Scottish Law Commission

DISCUSSION PAPER NO. 95

RECOVERY OF BENEFITS CONFERRED UNDER ERROR OF LAW

Volume 2
(BACKGROUND RESEARCH PAPERS)

SEPTEMBER 1993

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ON

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NOTE ON ABBREVIATIONS

The same abbreviations are used as are set out in the Table at pp viii to xii of volume 1.

PART I

ERROR OF LAW AND THE CONDICTIO INDEBITI: THE DEVELOPMENT OF THE LAW

1.1 Preliminary. In this Part we describe the development of the Scots law on the error of law rule and the condictio indebiti, the main doctrine or remedy in which that rule is applied, so far as that development is not treated in Part II of volume 1. In the Institutional period, the development of the law was much influenced by continental civilian writers among whom the topic provoked much controversy.[1]

1.2 In that period, however, both the Institutional writers[2] and the courts[3] concurred in holding that repetition lay for payments made under error of law and there was impressive unanimity on this conclusion.

(1) The civilian background

1.3 In Roman law it was a requirement of the condictio indebiti that the pursuer had made his payment in the erroneous belief that it was due. It has been said that the requirement of error is "the single most disputed area of the Roman law of unjustified enrichment".[4] It appears that the distinction between error of fact and error of law was recognised by the classical Roman jurists in one limited context[5] and transformed by the compilers of the Corpus Juris into a general rule. This general rule was that ignorance of the law precluded recovery, while ignorance of fact did not.[6] Zimmermann observes that this

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[1]See paras 1.3 to 1.6.

[2]See paras 1.7 to 1.14.

[3]See paras 1.15 to 1.20.

[4]Zimmermann Law of Obligations p 849.

[5]Ibid, p 850, fn 111; Zweigert/Kotz/Weir Comparative Law vol 2, p 262.

[6]Zimmermann, op cit, pp 850, 851; see D.22.6.9 pr (Paul): "Regula est iuris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere". (It is a rule of law that mistake of law prejudices, mistake of fact

distinction "was based on the assumption that an error of fact was typically excusable, whereas an error of law was not".[1]

1.4 While this was the general rule, there were footholds in the texts for a contrary view, notably two texts of Papinian stating that, while an error of law does not give an advantage to those wishing to acquire, it does not prejudice those who sue for what is theirs,[2] and that it does not prejudice anyone seeking to avoid a threatened loss.[3]

1.5 The error of law/fact dichotomy was hotly debated by continental civilians after the Reception. There were apparently two main lines of argument.[4] On one view, if the pursuer owed a natural obligation of payment but wrongly assumed that he owed a legal obligation, his error of law precluded recovery. But if he was not under either a natural or legal obligation, error of law did not

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does not) (Mommsen-Krueger-Watson trans); C.1.18.10 (Diocletian and Maximian) "Cum quis ius ignorans indebitam pecuniam persolverit, cessat repetitio, per ignorantiam enim facti tantum repetitionem indebiti soluti competere tibi notum est". (If anyone ignorant of the law has paid money which was not due, he cannot recover it; for it is known to you that repetition is permitted only in cases where what is not due is paid as a result of an error of fact.)

[1]Op cit, p 851.

[2]Zimmermann op cit p 868, fn 204, citing D.22.6.7: "Iuris ignorantia non prodest adquirere volentibus, suum vero petentibus non nocet". (Mistake of law does not benefit those who wish to acquire, but does not prejudice those who sue for their own.) (Mommsen-Krueger-Watson trans) cited Baron Hume Lectures vol III p 174; Stirling of Northwoodside v Earl of Lauderdale (1733), see Appendix A.

[3]D.22.6.8. (Papinian) "ceterum omnibus iuris error in damnis amittendae rei suae non nocet". (But mistake of law does not prejudice anyone in regard to the loss of his own property) (Mommsen-Krueger-Watson trans) cited Bankton Institute I, 8, 24; Stirling of Northwoodside v Earl of Lauderdale (1733), see Appendix A.

[4]Zimmermann op cit pp 868-871.

preclude recovery.[1] This was the view taken by the Roman-Dutch jurist Vinnius[2] (the main authority cited in the first Scots case, Stirling of Northwoodside v Earl of Lauderdale[3]) who gave three main reasons. First, that the condictio indebiti is introduced ex aequo et bono and therefore can only be opposed by defences founding upon equity on the opposite side. There was no equity in a defender retaining a debt which was not even naturally due, founding on Pomponius' enrichment principle.[4] Second, the technical argument that in D.12.6 the right of repetition under the condictio indebiti is never applied solely to error of fact, or denied to error of law, but is referred generally to error. The right of repetition is not prevented by the nature of the error but only by the knowledge of the person making the payment.[5] Third, Vinnius was chiefly influenced by Papinian's view that ignorance of law does not harm anyone in respect to losing what is due to him.[6] If we deny that this applies to the condictio indebiti, Vinnius argued, we must necessarily accept that an error of law does subject a man to the loss of what belongs to him.

1.6 The opposing major line of argument was that error of law precluded recovery whether the debt was due under a legal obligation, or a natural obligation, or both.[7] It has been said that this was the dominant civilian view until the great modern codifications.[8] Papinian's view in D.22.6.7 was explained away on the technical argument that

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[1]Ibid pp 868, 869.

[2](1733) Mor 2930; see Appendix A, Answers for the Earl of Lauderdale to the representations of William Stirling of Northwoodside 1733.

[3]Select Questions, (Evans trans) p 437 ff: "I subscribe to the opinion of the old interpreters, that repetition should be allowed even of what is paid by error of law, provided there is not any natural obligation" (at p 440).

[4]D.12.6.14.

[5]Select Questions (Evans trans) op cit, p 442.

[6]Ibid p 443: see para 1.4 above.

[7] Zimmermann op cit p 869.

[8]Zweigert/Kotz/Weir Comparative Law vol 2 p 262.

since the pursuer in a condictio indebiti had already lost ownership, he was not seeking to recover his own property, only something he had already lost (albeit it was owed to him under a quasi-contractual obligation) and therefore Papinian's sententia did not apply. This was the view taken by Voet,[1] but had previously been dismissed by Vinnius as a quibble.[2]

1.7 There was apparently a third line of argument adopted by civilian jurists, especially German Pandectists in the nineteenth century, namely that the main distinction was between surmountable (and therefore inexcusable) error on the one hand and on the other hand invincible (and

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[1]Commentary on the Pandects 12.6.7. (Gane's trans): "In vain too is it brought up that ignorance of the law does not prejudice those who are claiming what is their own. D.22.6.7. The question here is not one of claiming one's own property, since ... he who pays has ceased to be an owner and is reclaiming in a condictio indebiti not what is his, but what is owed to him in a quasi-contract" cited Carrick v Carse (1778) Mor 2931 (defender's pleading); and see Bankton Institute I, 8, 24.

[2]Select Questions (Evans trans) at p 443: "Neither do I see how any answer can be given to this argument without a cavil: for certainly the answer which is given in support of the modern opinion, viz. that the person making the claim does not contend de re AMITTENDA, but de re AMISSA, is nothing more; for if a man, by paying through a mistake of law what is not due from him, so loses his property as to have no recovery, then his mistake has the effect of injuring him in damno amittendae rei suae. And the question relates not to the time of instituting the action, but to that of making the payment, and Papinian denies that a person mistaking the law thereby loses his property, that is, so that he can never recover it. And it is almost (tantum non,) ridiculous to say, that a person would derive a gain from his error of law, merely by recovering his own property back again, for that having been transferred to another, it would be a new acquisition. As if a man did not suffer any loss in the deprivation of his property, (quasi damno non afficiatur, qui dominium rei suae amittit,) or the reparation of a loss was to be regarded as a gain. Nothing can be said to be a gain, except after deducting the loss; and the action in question is only for recovering the amount of the loss that has been sustained."

therefore excusable) error.[1] Error of law was merely an example or possible example of inexcusable error, and not an absolute bar to recovery.[2] There is a hint of a requirement of inexcusability in the defender's pleadings in Carrick v Carse but probably confined to error of fact.[3] The requirement in modern Scots law that the error must be excusable for a condictio indebiti to lie does not seem to derive, at least directly, from civilian sources but rather from the dicta of Lord Brougham LC in Wilson and McLellan v Sinclair,[4] following, or purporting to follow, English law.[5]

(2) Initial rejection in Scots law of the error of law rule

(a) The Institutional writers

1.8 Turning to Scots law, of the early Institutional writers Craig does not consider the condictio indebiti. Stair remarked:

> "Restitution extendeth to indebite solutum, when any party through error delivereth or payeth that which he supposeth due, or belongeth to another; if thereafter it appear that it was not due to that other, he who receiveth it is obliged to restore, and yet not by paction or contract."[6]

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[1] Zimmermann op cit pp 869, 870.

[2] Idem.

[3] (1778) Mor 2931 at p 2932 "repetition of money paid from alleged ignorance of law in every case, or of fact, when gross and inexcusable, cannot be required ...". The antecedent of "gross and inexcusable" seems to be "ignorance of fact" and contrasts with "ignorance of law, in every case".

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

[5] See para 2.33 below.

[6] Stair Institutions I, 7, 9.

This passage is apt in its terms to cover error of law.[1] Stair does not, however, expressly refer to the rule of non-recovery for error of law.[2]

1.9 Mackenzie is the only Institutional writer to affirm that rule unequivocally. In his Institutions, he states that since the obligation of repetition enforced by the condictio indebiti:

> "arises from the Payer's ignorance, therefore if he knew what he payed was due, he will not get Repetition, but what he payed will be look'd upon as a Donation, but it must be ignorantia facti, for ignorantia juris availeth no Man; ..."[3] (emphasis in original).

Elchies states that in the condictio indebiti, "our law follows the Roman law, and admits of the same exceptions that it doth",[4] but he does not consider the question of recovery for error of law.

1.10 Bankton unequivocally accepted that a condictio indebiti, as indeed a condictio sine causa, lay to recover money paid or a thing transferred under error of law. He first defines the condictio indebiti as arising "where one, thro' error, delivers or makes payment of what was not, but which he believed to be due" and gives an example of an error of fact.[5] He then considers at some length the question, "Is such repayment competent, where payment was

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[1]And so was relied on by the pursuer in Stirling of Northwoodside v Earl of Lauderdale (1733) Mor 2930; see Appendix A.

[2]In Glasgow v Corporation v Lord Advocate 1959 SC 203, Lord President Clyde (at p 232) relied on this omission as "not without significance".

[3]Mackenzie Institutions III, 1, paragraph sidenoted "Condictio indebiti". This passage was not cited in subsequent cases.

[4]Elchies, Annotations p 39.

[5]Bankton Institute I, 8, 23 viz where an heir pays a bond, of which he afterwards finds a discharge to his predecessor, Bankton states that the heir must have restitution of the last payment.

unduly made by error of law, as well as error of fact?" in the following terms:[1]

> "Error is either of fact, or of law; of fact, as in the preceeding example, and in all cases where one is ignorant of a fact that would have saved him from the payment; of law, when the party is ignorant of what the law prescribes, and believes the money or thing belonged in law to the receiver, when it did not; the rule is, 'That undue payment or delivery, made thro' error of fact or law, must be restored, where there is no just cause to support it'.
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> "That error in fact founds restitution, was never doubted; and then, as to error in law, it seems equally plain, as the above rule is qualified; for example, one holding lands feu or blench, thro' ignorance of the law, imagined that the casuality of marriage was due, in such kind of holding, and so paid the avail or value of it to the superior; or a debtor who is heir to the creditor in reality, thro' error in the rules of succession, believes another to be his heir, and so pays the debt to him. Were it not unreasonable, in either of these cases, or the like, to refuse the payer restitution, more than if the payment had been made thro' error in fact? Wherefore restitution is always granted where payment is purely erroneous, and without any just cause to support it.[2]
>
> "Hence the parallel rule is, 'That ignorance of the law cannot hurt one that is only insisting to be free of a real damage; Nemini juris error in damnis amittendae rei suae nocet'.[3] And indeed restitution would be competent on the other title, viz condictione sine causa; for the thing or sum unduly delivered would be with the receiver in the same manner without any consideration, whether the payment or delivery happened thro' ignorance of the law, or of the fact."

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[1]Bankton Institute I, 8, 24.

[2] The reference given is "Hume (condictio indebiti) 26 July 1733 Stirling" which appears to be a reference to Stirling v Earl of Lauderdale (1733) Mor 2930.

[3]Citing D.22.6.8.

1.11 Erskine's treatment was shorter but equally unequivocal in allowing a condictio indebiti for error of law:[1]

> "If he who made the payment knew at the time that no debt was due, the action is not competent; for he who deliberately gives what he knows is not due is presumed to intend a present; so that to found this action the sum must be paid through mistake or ignorance. Civilians are not agreed whether it takes place where one pays the indebitum through a mistake in law; because by a known maxim, Ignorantia juris neminem excusat; but the Court of Session has justly sustained action even where the payment had proceed upon an error of law; because the action being grounded on equity, the payer ought in equity to have redress from whatever mistake the indebitum was paid."

Kames, Principles of Equity considers aspects of the condictio indebiti[2] but not the rule of non-recovery for error of law.[3]

1.12 Baron Hume, after stating that generally the payment must be made under an erroneous notion of a debt or obligation, remarked:[4]

> "As to the nature or description of the error in other respects, - it seems not to be of any moment (though commentators have much disputed about it) whether the error be in point of law, or in point of fact. Though it be an error in point of law, and not in fact, still the pursuer of this sort of action, is certans de damno vitando;[5] and he is thus under the protection of that equitable text (as it appears to be,) of the Roman law, which says: 'Juris ignorantia

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[1]Erskine Institute III, 3, 54.

[2]Eg Kames Principles of Equity (5th edn, 1825) p 125.

[3]On the other hand, in the context of recompense, Kames accepts (ibid pp 98, 99) that the claim of a person striving to avoid loss (certans de damno evitando) has a remedy, but not one who is striving to acquire a benefit. Cf para 1.6 above.

[4]Baron Hume Lectures vol III p 174.

[5]Ie "striving to avoid a loss" (Trayner Latin Maxims and Phrases (4th edn) p 75).

non prodest adquirere volentibus, suum vero petentibus non nocet'.[1] It is too, rather (so it appears to me), to be held, that the person's ignorance, whether of the law or the fact, is to be presumed in his favour, until proof be made of circumstances to the contrary."

1.13 In 1832, Professor More, in the Notes to Stair's Institutions, wrote:

> "Although some nice and subtle distinctions formerly prevailed as to claims for repetition of payments which had been made by mistake, the rule seems now to be established, that a person is entitled to be restored against any payment he has voluntarily made, in ignorance of any valid defence against the claim. It makes no difference whether the ignorance be with regard to the facts or the legal effect of them."[2] (emphasis added)

1.14 Bell, in the last personal edition of his Principles published in 1839, is the first Institutional writer to take account of English authority and is more equivocal. In discussing the condictio indebiti, he remarked:[3]

> "If the payment have been made under an unavoidable error in fact, restitution may be demanded.[4] But, if the error be in law, although sufficient to relieve from an obligation, it is more doubtful whether it affords a good ground of restitution.[5] In several

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[1]See D.22.6.7 quoted at para 1.3 above, last footnote.

[2]Stair Institutions (5th edn; 1832); Notes p xlix. In his Lectures (1864) vol 1, pp 306 to 309, however, Professor More stated that the older Scots law had been overturned by the dicta of the House of Lords in the Sinclair and Dixon cases, though some doubt was thrown on this by Dickson v Halbert (1854) 16 D 586.

[3]Bell Principles (4th edn; 1839) s 534.

[4]Citing Erskine Institute III, 3, 54.

[5]In a footnote he remarks: "See the controversy amoung the civilians on the distinction between error in law and fact. Voet, lib 12 tit 6 s 7. Pothier, Tr de Cond In-deb No 160. Vinnius, Quest Sel lib 1 c 47. Huber, lib 2 tit 6 s 1. It is settled in France by the rule which we have adopted; Code Civile, s 1377. In England the controversy

cases the Court of Session held error in law to ground restitution;[1] but this doctrine is much shaken by a late case in the House of Lords."[2]

It is interesting that in a footnote, under reference to the French Code Civile, article 1377, he states that the controversy among the civilians on error of law "is settled by the rule we have adopted".

(b) Case-law in the Institutional period

1.15 In the first case, Stirling of Northwoodside v Earl of Lauderdale[3] in 1733, the report consists only of ten words : "Condictio indebiti sustained to one who had paid errore juris". The authority of this case has been brushed aside because of the brevity of the report and the fact that "the circumstances are quite unknown. It is not possible to tell what the nature of the error of law was".[4] Recent research[5] has discovered the unreported pleadings. The process was a petition by the Earl of Lauderdale for suspension of diligence by Stirling of Northwoodside enforcing a sum due to him by Lauderdale under a bond. Lauderdale sought to set off a payment made to Stirling under error of law against the sum for which Stirling was doing diligence. Lauderdale had granted a bond of 1,000 marks a year, payable half yearly at Whitsunday and Martinmas, for the liferent use of his uncle's wife who, after she was widowed, assigned the liferent to Stirling in 1717. The liferentrix died shortly after Martinmas 1726 and therefore in law the liferent

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came to a solemn discussion in Brisbane v Davies (sic) (1813) 5 Taunt 143, and was settled against the right to restitution on mistake in law."

[1]Citing Stirling v Earl of Lauderdale (1733) Mor 2930; Carrick v Carse (1778) Mor 2931, Hailes 783; Keith v Grant (1792) Mor 2933.

[2]Citing Wilson and McLellan v Sinclair (1830) 4 W and S 398.

[3](1733) Mor 2930.

[4]Glasgow Corporation v Lord Advocate 1959 SC 203 at p 231, 232 per Lord President Clyde.

[5]D R Macdonald "Mistaken Payments [1989] Juridical Review 49 at p 58. For extracts from the pleadings, see Appendix A.

ceased. The Earl of Lauderdale, however, in the knowledge of the death of the liferentrix, paid a half-year's instalment of 500 marks at the following Whitsunday 1727. Lauderdale owed another sum to Stirling under another bond which was the basis of Stirling's diligence and in the suspension proceedings, Lauderdale sought to set off the 500 marks overpaid against that other sum. Stirling pleaded that the payment at Whitsunday 1727 was made under error of law. Lauderdale relied on Grotius, Vinnius and Stair and on "the most solid grounds of equity and justice". His argument was upheld. The legal arguments on each side are set out in Appendix A. As we have seen the case was regarded as authoritative on the general rule of recovery of error of law by Bankton, Erskine, Baron Hume, and (subject to the doubts introduced by the House of Lords) Bell.

1.16 In the next case, Carrick v Carse[1] in 1778, a cautioner paid the principal sum to the creditor after the lapse of the period of the septennial prescription and the next day he demanded repayment. He admitted that he knew the law at the time when he made the payment but alleged that he was ignorant of the fact that the seven years had elapsed. The pursuer argued that "When there is no obligation in equity to pay, it makes no difference whether the mistake arises from ignorance of law or fact, of whatever species". He relied on Bankton,[2] Stirling v Earl of Lauderdale,[3] several texts from the Digest[4] and the Select Questions of Vinnius mentioned above.[5] The pursuer emphasised the distinction drawn by Vinnius between error where the payer is making profit or gain (lucro faciendo) and where he is only avoiding a loss (damno evitando): "In the former case, the civil law did not restore him against errors in law, or gross errors in fact, such as error facti proprii. But, in the latter, every species of error

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[1](1778) Mor 2931, Hailes 783.

[2]Institute I, 8, 27.

[3](1733) Mor 2930.

[4]"De usu et usurp. 27" (not traced); D.18.1.15.2; D.22.6.2,3,4 and 7.

[5]Bk 1, c 47; see paras 1.5 and 1.6 above.

was excusable".[1] The Lord Ordinary observed:[2]

> "It makes no difference whether the payment was made from error of law or of fact; it is sufficient that it proceeded from mistake; and, when payment is made sine causa, it will be presumed to have proceeded from error, and not donation, unless the contrary can be proved. The payment is made sine causa; for, after the lapse of seven years, there was no obligation, natural or civil, on the cautioner."

On reclaiming, the Court adhered. Lord Braxfield remarked:[3]

> "On the first hearing, I recollected the case in the civil law, where the distinction is made between a payment made errore juris et errore facti; and observing that Carrick had had the bond in his hands when presented by Carse, I supposed that he had paid errore juris, and I therefore thought that there was no condictio indebiti. On farther deliberation, and on the principles expressed by Lord Gardenston,[4] I changed my opinion. I can see neither equity nor justice in taking a sum of money out of Mr Carrick's pocket, through whatever sort of ignorance it was paid. A donation is never presumed; and, besides, Mr Carrick showed that he intended no donation, for, immediately on discovery of his error, he re-demanded the money. The subtilties of the civil law have not been received among us, and I observe a case in 1733, Stirling v Earl of Lauderdale, where condictio indebiti was allowed when one paid errore juris."

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[1]Mor 2932; see para 1.6 above, last footnote.

[2]Mor 2931 at 2933.

[3] Hailes 783, 784.

[4]Lord Gardenston said (Hailes 783): "In this case I cannot believe that Carrick would have paid had he known that he was not bound to pay. There was neither a civil nor a natural obligation on him to pay. In applying the principles of the civil law, I am afraid that we depart from the sense of the civil law. It would be strange in any law, if a man, by paying inadvertently, without being bound, should not have repetition. A man bound as a cautioner for seven years, is not bound in conscience after seven years".

In later cases, this authority was regarded as obiter so far as error of law is concerned since the defender admitted that he knew the law but his error was one of fact.

1.17 Bell[1] cited Keith v Grant[2] (along with Stirling and Carrick) as one of a trilogy of cases in which the Court of Session had held error of law to ground restitution, and Gloag remarked that in that case a rule of recovery for error of law seems to have been assumed,[3] though it is not cited by Baron Hume in his full citation of the case law on the rule as to error of law.[4] The error concerned payment of money on the mistaken view that the granter of a heritable bond had been infeft when in fact he was uninfeft and the bond was null. It does not appear from the report whether the error was one of fact or law, though Carrick v Carse was cited in argument.

1.18 Baron Hume[5] refers to an unreported case Oliver (Bennet's Trustees) v Scott[6] decided in 1798 which related to an action of repetition of teinds paid by a heritor prior to a decision of the Court of Session changing the interpretation of the law. The action of repetition was unsuccessful because the teinds had been paid under a compromise to avoid litigation. Significantly for present purposes, however, Hume points out that the action was based on the ground that the payment was made ex errore juris.

1.19 Baron Hume also cites the unreported case of Rose Innes (or Rose) v Gordon[7] of 1802 to support a rule allowing repetition of payments made under error of law.

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[1]Principles (4th edn, 1839) s 534, fn (c).

[2](1792) Mor 2933.

[3]Gloag Contract (2nd edn) p 62, fn 3.

[4]Baron Hume Lectures vol III, p 174.

[5]Idem.

[6](unreported) Bell, Illustrations vol 1, p 328; Hume Session Papers vol lxxx, No 5; cited in note to Erskine Institute (5th edn) p 544.

[7]13 January 1862 (unreported) Hume Session Papers vol lxxiii No 51; Signet Library, Old Session Papers, vol 421, No 55a.

This concerned the payment of £50 which the defender said he had made to the pursuer in satisfaction of an annuity which had not commenced at the date of the payments; that they were indebitae solutiones which he was entitled to recover, or rather to deduct from future payments. The pleadings in the Signet Library however do not disclose whether the error was one of law.

1.20 If greater significance on first impression is the case of Meiklejohn v Erskine[1] in 1815 which is cited by Baron Hume as a successful action of repetition of statutory duties on malt paid by error of law.[2] This case however was not cited to the courts in the line of subsequent cases in which the non-recovery rule for error of law was established in Scots law. The status of the case is in some doubt and it can only be understood in the light of the unpublished pleadings. We consider the case in Appendix B. We show there that the case contains an unreversed interlocutor by a Lord Ordinary holding sums paid under error of law to be recoverable, though the interlocutor was superseded by an extra-judicial compromise. We conclude that the case, so far as it goes, supports the view that at that time payments made under error of law were recoverable.

(c) Summary

1.21 At the end of the Institutional period, therefore, Scots law, following one strand of authority deriving from 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[3] and founded on equity.[4] The view of Vinnius was accepted that error of law cannot prejudice one who is seeking to avoid loss by recovering his own.[5] There is also support in the passages from

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[1]31 January 1815 FC.

[2]Baron Hume Lectures vol III, p 175.

[3]Bankton Institute I, 8, 24 (see para 1.10 above).

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

[5] Bankton Institute I, 8, 24 (para 1.10 above); Baron Hume's Lectures vol III p 174 (see para 1.12 above).

Vinnius cited in Scots cases[1] that the refusal of repetition clashed with Pomponius' enrichment principle and it is significant that in Carrick v Carse[2] the Lord Ordinary based his decision on the ground that payment under error of law is recoverable if made sine causa, in other words that the defender's enrichment was unjustified.

(3) The initial reception in Scots law of the error of law rule

1.22 In Scots law, 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[3] and Dixon v Monkland Canal Co.[4] These cases are discussed in volume 1, paragraphs 2.15 to 2.21.

(4) The period between 1831 and 1959

1.23 There followed a period in which the law was uncertain because of the obiter nature of Lord Brougham's observations and their inconsistency with the pre-existing law. This period lasted till 1959 when Glasgow Corporation v Lord Advocate[5] was decided.

1.24 The dicta in Wilson and McLellan and in Dixon were considered by the First Division at length in Dickson v Halbert.[6] The opinions were obiter: this was a case, not of repetition, but of reduction of a discharge of legal rights. The discharge was sine causa to the extent that the pursuer was ignorant of the true extent of these rights. In the Outer House[7] and, on appeal,[8] in the Inner

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[1]See para 1.4 above.

[2](1778) Mor 2932 at 2933.

[3](1830) 4 W & S 398.

[4](1831) 5 W & S 445.

[5]1959 SC 203.

[6](1854) 16 D 586 following Ross v Mackenzie (1842) 5 D 151 (OH).

[7](1854) 16 D 586 at pp 588-593.

House, Lord Robertson (dissenting) refused reduction, on the ground that (i) there was no distinction in principle between a condictio indebiti and reduction of a discharge, and (ii) Lord Brougham's dicta were "an authoritative declaration of the law of Scotland". The majority of the Inner House, however, distinguished a discharge (holding error of law to be a ground for reduction) from a condictio indebiti; the opinions expressed considerable doubt as to whether the error of law rule was part of Scots law.[1] Lord Ivory remarked:[2]

> "I cannot look upon these decisions in the House of Lords as absolutely fixing any principle. Looking to our institutional writers, looking to our old authorities, meagre though they be, and looking to the successive series of dicta and authority until these cases arose, there is every reason to believe that the law of Scotland did not go along with the dicta in the House of Lords, but was rather opposed to them; and therefore, if we were in a proper case of condictio indebiti, there is a great deal yet open in dealing with it. Great respect is to be given to what passed in the House of Lords, so far as matter of express decision; but in so far as not matter of express decision, I am inclined to hold that, in a proper question of condictio indebiti, it is still open for us to consider the whole question. I am all the more disposed to take this view of it, that when I look abroad to the general views of eminent jurists on this point, and see the diversity of opinion which has existed in their minds as to the extent to which the doctrine is to be carried, seeing the great names on either side of the question, I am not disposed to throw up at once our old doctrine as to redress, and adopt, in the abstract, the views of the House of Lords."

1.25 A feature of this case is that a distinction, identical or similar to that made by the civilians when debating the sententia of Papinian[3] was applied by Lord

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[8]Ibid at pp 597-599.

[1]Ibid at p 595 per Lord President McNeill; at p 596 per Lord Ivory; at p 599 per Lord Rutherfurd.

[2]Ibid at p 596.

[3]See paras 1.5 and 1.6 above.

Rutherfurd[1] to justify a distinction between reduction of a discharge granted on an underpayment and a condictio indebiti for recovery of an overpayment. The former was characterised as "de damnis amittendae rei"[2] and therefore an action of reduction of a discharge lay for error of law, whereas the latter was treated as "de damnis rei jam amissae, sed jure domini in alium jam translatae"[3] and therefore no condictio indebiti lay.[4] Lord Robertson, however, saw no difference in principle[5] and his view has much to commend it. It is difficult, therefore, to resist the conclusion that the Court's refusal to extend the

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[1] Ibid at p 599.

[2] Ie concerning "damages" arising from a thing under threat of being lost.

[3] Ie concerning "damages arising from a thing already lost, but concerning the right of the owner already transferred to another". (The references to the civil law were not given, though Pothier was referred to at p 600.)

[4] Ibid at p 599 per Lord Rutherfurd: "A person who has not received the full amount of his right, and who is only demanding what is unquestionably his own, and which he never meant to relinquish, is in a more favourable position than a party who has voluntarily parted with his property or his money by paying or performing an obligation, but in excess of whatever due". Lord President McNeill adopted a different distinction (at p 595): a payment concludes a transaction (a condictio indebiti case) whereas receipt of a payment only discharges the claim so far as the money goes. This is difficult to understand. Lord Ivory at (at p 597) adopted yet another distinction: in a condictio indebiti the payer intends the recipient to have the money but not in the case of discharge. But why? In Manclark v Thomson's Trs 1958 SC 147 at p 162 the First Division reserved its opinion as to the circumstances in which an error of law, as distinct from error of fact, will ground a reduction.

[5] Ibid at p 599: "the over payment is as much sine causa as the under payment; and if in the one case there is no restitution on broad and general grounds of equity, I can see no reason for giving a remedy equally without basis in the other". See also at p 589: "If the party who got too little can demand the balance by an action of reduction on his part, it would seem strange that, had the transaction been the other way, the party who had paid too much would have no remedy".

error of law rule to reductions of discharges was based on a dislike of the rule itself rather than on any valid distinction between a condictio indebiti for overpayments and an action of reduction for underpayments. It cannot be said that the views of civilian jurists influenced the subsequent development of the Scots law on error of law since Scots law had by then passed out of the orbit of the civilian "common law" of Europe.

1.26 In Young v Campbell,[1] the principle that error as to the general law bars repetition was said in the Outer House to be "settled ... by repeated judgements of the House of Lords";[2] but this was a case of payment made under threat of legal proceedings, and according to the Inner House no question of error arose. Bremner v Taylor[3] is the only case where the principle was applied, but was an Outer House decision (involving statutory liability for poor relief). In Baird's Trs v Baird & Co[4] Lord Ormidale[5] accepted the dictum of Lord Westbury LC[6] that in the maxim ignorantia juris haud excusat, "ius is used in the sense of denoting general law - the ordinary law of the country".

1.27 In three other cases the question was whether - supposing the payer had a right to deduct income tax from the payment - he could recover the deductible sum if he paid the gross sum by mistake. In Agnew v Ferguson[7] it was said that the taxpayer had a right at common law to recover overpayments; the case perhaps deserved greater weight than it received from Lord Wheatley in Glasgow Corporation.[8] In Oswald v Kirkcaldy Magistrates[9] and

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[1](1851) 14 D 63.

[2]Ibid at p 64 per Lord Rutherfurd.

[3](1866) 3 S L Rep 24 (OH) at p 26 per Lord Ormidale.

[4](1877) 4 R 1005.

[5]Ibid at p 1011.

[6]Cooper v Phibbs (1867) LR 2 HL 149 at p 170.

[7](1903) 5 F 879.

[8] 1959 SC 203 at p 218.

[9]1919 SC 147.

Rowan's Trs v Rowan[1] it was held that tax was not deductible, so that no question of repayment could arise; but in both cases (even supposing deductibility) there were special reasons for refusing repetition; in Oswald because payment had been made for ten years, while in Rowan it was said (arguably wrongly) that trustees came within a special rule that they cannot recover overpayments arising from error in construing documents.

1.28 In Lanarkshire Steel Co v Caledonian Rly Co[2] there is an obiter dictum by Lord President Kinross[3] which could conceivably be construed as favouring repetition for error of law,[4] but his Lordship is more likely to have been referring to an action of repetition based on improper compulsion in exacting excessive railway charges rather than a true condictio indebiti.

APPENDIX A

EXTRACTS FROM THE PLEADINGS IN STIRLING OF NORTHWOODSIDE v EARL OF LAUDERDALE (1733) Mor 2930 IN THE SCOTTISH RECORD OFFICE
Reference: SRO 228/5/2/92

Answers for the Earl of Lauderdale to the representations of William Stirling of Northwoodside, 1733.

"The Earl being Debtor to Northside in the Ballance of an Heret[able] Bond offered a Suspension upon this Ground. That Northside having Right by Assignation to a thousand Merks a Yearly Joynture due by the Earl to the deceased Lady Keir. Northside had arrested the annuity to the term

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[1]1940 SC 30.

[2](1903) 6 F 47 (court has jurisdiction at common law in respect of overpayments of statutory railway charges only if the rates were unauthorised by statute and therefore illegal).

[3]At p 57: "If the question was one of the legality, and not of the reasonableness, I should have thought that there was much force in the view that any rate which is illegal could be recovered by action at law".

[4]See R Evans-Jones "Full Circle?" (1992) 37 JLSS 92 at p 94.

of Whitsunday after her Death to which by no Law he had Right. The legall terms of Joyntures being Whitsunday and Mars. And the Liferentrix having survived Martinmas but a short time She or Northside her assigney were only Intituled to the Joynture due at Martinmas preceeding her Death -. Both parties agree in the facts. But Northside insisted that the terms on which Joyntures are payable being clear in the Law and in the Obligation Constituting this Annuity, The Earl ought to have known that if he paid a terms Joynture after the liferentrix her Death He was not intituled to a Repetition Because Ignorantia Juris Neminem Excusat-

Northside further insisted that the Earl did known the Law in this Case And notwithstanding Sciens et prudens he paid the Money and therefore had not the least Claim to a Repetition or to Compensate the remains of the Heretable Bond due by his Lordship to Northside And for proving Northsides Allegations He exhibited a Condescendence of facts to be answered by the Earl from which he pretended to prove the Earl's Knowledge of the Law in this point Which being answered by the Earl your Lordship was pleased upon the 23d February last to find that the said Answers do not prove the Allegations made for Northside And therefore sustained Compensation.

Against this Interloqr. Northside has presented a Representation wherein he repeats the Arguments formerly insisted upon before your Lordship and prays that you may alter your Former Judgment Which the Earl is now to Answer.

And in the first place Northside Contends that a person who thro' ignorance of the Law pays what is not due is not Intituled to a [Page 2] Repetition and for supporting this proposition he Cites Authorities from the Civill Law or rather Commentators upon it who he [alleges] are of his side of the question and pretends there are no Lawiers of Note against him.

It is admitted for the Earl that this has been a Contraversy in the Civill Law founded upon the Subtilties and nice Distinctions made use of by the Commentators in Explaining the different texts upon which they build their opinions. But the Earl does affirm that both the Authorities of that law and the Commentators of the Greatest Name are Clearly on his Side.

Arnoldus Vinnius expressly handles this question Select quest. Lib.1 Ch. 47. And with great assurance determines it for the Earl upon two Laws of the pandects vizt. L.

Juris Ignorantia 7ff De juris et facti Ignor. - Juris Ignorantiam, non nocere suum petentibus - And L 8 De Jur. et fact. Ign. - Nemini in Damnis Ammittendae rei suae ignorantiam Juris nocere - And in his famous Commentar upon the Institutes Establishes this Doctrine upon clear Authorities and affirms that it has been the Constant opinion of all the old Lawiers and answers the Objections.

Grocius appears also for this Decision. In his Book Manuduct. ad Jurisprud. Holl. Libr.3 Cap.30 num.19 - And many others might be cited to the same purpose, And when the Contrary opinions are examined It will be found that the Condictio indebiti has alwise been admitted in the Civill Law Except when the money paid was due by a natural obligation, and when they mention the Rule Ignorantia Juris neminem Excusat, It will be found to be applied to Crimes and not to this present question.

And indeed if we consider this matter according to the principles of 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.

My Lord Stair is also clearly of this opinion 63d page of his Institutes where he does not touch that Distinction betwixt Ignorantia Juris et facti."

Extract from Petition for William Stirling of Northwoodside, 11 June 1733.

"I beg leave to lay the whole cause once more before your Lordship. And in the first place I must again submitt to your Lordship's Judgement the general point how far a person who thro ignorance of the Law pays what is not due is founded in a repetition.

As this is a question upon which we have no Statute of our own the Authority of the Roman Law will have great weight in the decision and that seems both from its rules and the particular cases determined by it, to give it against the Suspender Ignorantia juris neminem excusat; ignorantia juris omnibus nocet; scire et scire debere aequiparantur and the law gives a good reason why an error juris et facti have so different effects: jus says the Lawyer finitum et potest esse et debet facti autem Interpretatio plerumique prudentissimos fallit. It is for these reasons

that the Lawyers of the greatest names have given it as their opinion that there is no repetition of what is paid errore juris Peres, [Perezius] in Cod.: de cond: indeb: § 14 Donellus C.I. commentariorum Cap. 21. Mastertius tract: var. who cites Cujac: Duarenus etc and indeed few Lawyers of note are upon the other side of the Question."

APPENDIX B

MEIKLEJOHN v ERSKINE 31 JANUARY 1815 FC

1. This case involved the now obsolete "quasi-servitude" of thirlage under which a person bound (or "astricted") by thirlage to grind his grain for malt at a certain mill was required to give, for the grinding, a proportion (called 'multures') to the owner or tenant of the mill (the multurer). A tax or duty upon malt, payable to the Government, was introduced by 6 Anne c. 11 and was augmented by a series of subsequent Acts. To prevent fraud against the revenue, this tax had been directed [by statute] to be levied from the maltster or maker of the malt (ie where thirlage was involved, the person bound by the thirlage) at the time the grain was lying in the steep. By this arrangement, the maltster had always paid the tax upon the quantity of grain he delivered to the owner or tenant of the mill as multure. In Magistrates of Forfar v Potter,[1] however, this common understanding of the law was changed and it was held that the astricted maltsters were entitled to draw back from the multurer the duties on the quantities of grain or malt which they delivered to the multurer in the name of multure.

2. Following this case, Meiklejohn, a brewer who was thirled to a mill in Alloa owned by Erskine and tenanted by Thomson, made a formal intimation of the Magistrates of Forfar decision to Thomson.[2] It is clear that multures given by Thomson thereafter without abatement for malt duties were so given under protest and not under error of law. Thereafter Meiklejohn (and others) brought an action of declarator against Thomson to the effect that he was entitled to a draw-back or deduction from the quantity of

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[1]May 17, 1808 FC; Mor sv "Thirlage", App'x No 3.

[2]This fact does not emerge from the report in the Faculty Collection, but is disclosed in Hume Session Papers, vol cxxi, No 53 Petition of Erskine of Mar, p 3; Answers for Meiklejohn, p 3.

malt delivered as multure equivalent to the tax on the multure for the time being in force. It seems that there was also a conclusion for "repetition" of sums equal to the amounts of duties on multures already paid.

3. In an interlocutor of 12 November 1813, the Lord Ordinary granted the declarator and found the defender, Thomson, "liable in repetition of a sum equal to the amount of the duties payable to Government on all malt brought by the pursuers, and grinded at the defender's mill, since 19 January 1809",[1] being the date of the formal intimation by Meiklejohn to Thomson. This interlocutor presumably proceeded on the basis that the multures given without abatement after that date were so given under protest and reserving Meiklejohn's right to claim a draw-back. As already mentioned, they were not given under error of law. Prior to that interlocutor, Meiklejohn (and others) had raised a supplementary action of declarator against the owner of the mill, Erskine, containing similar conclusions to the action against Thomson, and the two actions were conjoined in the process. The interlocutor of 12 November 1813 also granted declarator against Erskine but the grant of the interlocutor for repetition quoted above was, however, directed only against Thomson.

4. On 1 March 1814, the Lord Ordinary pronounced another interlocutor, in the action against Thomson, in which he found "the defender liable in a sum equal to the amount of the duties payable to Government on all malt brought by the pursuers, and grinded at the defender's mill, from Martinmas 1804 to January 1809", and ordained a state thereof to be given in.[2]

5. It is this interlocutor which seems to justify Baron Hume's statement that "to the amount of these malt duties, there had been thus an overpayment, ex errore juris, of which repetition was found due".

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[1]See the Faculty Collection report, at p 187.

[2]See the Faculty Collection report, at p 187. The interlocutor of 1 March 1814 does not make it clear that the reference therein to "the defender" was a reference to Thomson (and not Erskine) but this is made clear in the Session Papers cited above. The Session Papers also make it clear that Martinmas 1804 was selected because it was the date of commencement of Thomson's lease.

6. The published report of the case states that "the defender" reclaimed and that the Second Division adhered. In the arguments on the reclaiming motion it was said that there was no claim of repetition against Erskine and the action was entirely prospective (ie declaratory), but this remark does not seem to have been applicable to or to have affected the interlocutor requiring repetition of 1 March 1814 against Thomson. It appears however from the unreported pleadings in the Hume Collection that on 2 June 1814 an extra-judicial settlement or compromise was made in the action between Meiklejohn and Thomson.[1]

7. It is this fact which may well explain why the Meiklejohn case has not been regarded as authoritative. The interlocutor of 1 March 1814 finding "repetition" due of an amount equivalent to the multures delivered ex errore juris was not final and was superseded by an extra-judicial compromise. Moreover, that interlocutor was not considered by the Second Division or at least was not adhered to by them. Even if it had been final, as a decision in the Outer House, it would not have been binding on the First Division when they finally approved the rule of non-recovery for error of law in Glasgow Corporation v Lord Advocate.[2] On the other hand, it is an unreversed interlocutor of a Lord Ordinary and, so far as it goes, it supports the view that in the Institutional period, repetition of sums paid under error of law was indeed competent in Scots law.

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[1]Hume Session Papers, vol cxxi, No 53, Answers for Meiklejohn, pp 6 and 8.

[2]1959 SC 203.

PART II
PAYMENTS AND TRANSFERS MADE UNDER ERROR OF FACT AS TO LEGAL LIABILITY (CONDICTIO INDEBITI)

A. Purpose and scope of condictio indebiti

2.1 In Roman law, the condictio indebiti became the most important of the forms of remedy for redressing unjustified enrichment[1]. It was the only such form dealt with in the Institutes of Gaius[2] and of Justinian[3]. It was a remedy in personam by which a person who had paid money or delivered a thing which was not due (indebitum) could obtain repetition (re-payment) of the money or restitution of the thing if he had made the payment or transfer in the erroneous belief that it was legally due. Referring to legal systems within the civilian tradition, Zimmermann remarks that, over the centuries, the condictio indebiti "has become one of the cornerstones of our modern law of unjustified enrichment".[4] It is a mark of the isolation of Scots law from that tradition that in a recent case, the Second Division held that it was not necessary for repetition under the condictio indebiti that the recipient be enriched.[5]

2.2 Definitions of the condictio indebiti. In the Institutional writers, we find the following definitions or descriptions of the condictio indebiti as a doctrine of Scots law.

Stair Institutions I, 7, 9:

> "Restitution extendeth to indebite solutum, when any person through error delivereth or payeth that which he supposeth due, or belongeth to another; if

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[1]See Zimmermann Law of Obligations p 848; D Liebs "The History of the Roman Condictio up to Justinian" in The Legal Mind, Essays for Tony Honore (1986) (edd N MacCormick and P Birks) 163.

[2]Gaius Institutes III, 91.

[3]Justinian Institutes III, 27, 6 and 7. The other condictiones are treated in the Digest and Codex.

[4]Zimmermann Law of Obligations pp 834, 835.

[5]Royal Bank of Scotland plc v Watt 1991 SLT 138; see para 2.95 ff.

thereafter it appear that it was not due to that other, he who receiveth it is obliged to restore, and yet not by paction or contract".

Bankton Institute I, 8, 23:

"Where one, thro' error, delivers or makes payment of what was not due, but which he believed to be due, he has re-payment, termed in the Civil Law Condictio indebiti;..."

Erskine Institute III, 3, 54:

"Indebiti solutio, or the payment to one of a debt not truly due to him, is in effect a pro-mutuum, or quasi mutuum, by which he who made the payment is entitled to an action against the receiver for payment, called by the Romans condictio indebiti; which arises, not from any explicit consent or agreement of parties, but solely from equity. The action does not lie in the following cases .... 2 dly, If he who made the payment knew at the time that no debt was due, the action is not competent; for he who deliberately gives what he knows is not due is presumed to intend a present; so that to found this action the sum must be paid through mistake or ignorance ..."

Baron Hume Lectures vol III, p. 172:

"We find a further illustration of this maxim [ie. Quod nemo debet locupletari ex aliena jactura], in the condictio indebiti (as 'tis called) - that action which lies for recovery of money that has been unduly paid, - paid under the erroneous belief of a debt being due to the party, who receives the money".

Bell Principles, s. 531:

"Whatever has been delivered or paid on an erroneous conception of duty or obligation may be recovered on the ground of equity; provided the person receiving it has no reason, on natural right, implied donation, or compromise, to rely on the acquisition as his own. The action by which in the Roman law this was effected was called Condictio Indebiti, and the term has been adopted by us. It was an action founded,

not on convention, but quasi ex contractu; a sort of pro-mutuum or quasi mutuum."

It will be seen that Erskine and Bell refer to an undue payment as a quasi-loan ("pro-mutuum" or "quasi mutuum") and this analogy is drawn by some civilians.[1] Generally however it is accepted in Scots law that the obligation to repay is obediential and not derived from even implied contract.[2] The analogy of loan has therefore not been influential in Scots law except in the context of the rules on the liability of a recipient to pay interest on the principal sum paid to him in error.[3]

2.3 Restitution as well as repetition? There is a certain ambiguity, if not indeed confusion, in the Scottish sources on the question whether under Scots law the condictio indebiti extends to the restitution of property (or moveable property) other than money, or whether it is properly confined to the repetition of money. The definitions or descriptions of the condictio indebiti in the Scots Institutional writers are generally apt to cover restitution of things other than money[4]. This

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[1]Notably French civilians such as Cuiacius and Pothier: see Zimmermann Law of Obligations pp 837, n 28; 899, 900.

[2]eg Stair Institutions I, 7, 1. cf I, 7, 9: "the same natural obligation which mutuum or loan hath by voluntary engagement".

[3]See Bankton Institute I, 8, 29 and Duncan, Galloway and Co Ltd v Duncan, Falconer and Co 1913 SC 265 at p 270; discussed at paras 2.126 and 2.132 below respectively.

[4]Stair Institutions I, 7, 9: "delivereth or payeth"; Bankton Institute I, 8, 23: "delivers or makes payment". Bell in his Principles does not deal with the condictio indebiti by name under the head of "Restitution" (ss 526 to 530), but only under "Repetition", (ss 531 to 537). On the other hand, his description of the condictio indebiti in s. 531 ("Whatever has been delivered or paid...") is apt to cover restitution of moveables other than money, and at s 537 Bell deals with "restitution... not of money, but of a thing delivered and received unduly". Compare however Erskine Institute III, 3, 54 "the payment to one of a debt not truly due to him"; Baron Hume Lectures vol III, p 172: "that action which lies for recovery of money that has been unduly paid".

usage is also followed by some modern authors.[1] On the other hand, there are statements by modern authors[2] and dicta by judges[3] suggesting that, at least as a matter of usage in our law, the condictio indebiti is confined to the repetition of money. Professor McBryde observes that "a similar rule probably applies to delivery of goods in error [as to sums paid in error], although the reported case law has been concerned with money payments".[4] It should be noted that where coins or bank notes can be identified in the hands of the payee, the payer may bring an action of restitution concluding for delivery[5] rather than an action of repetition. Such an action of restitution appears to be proprietary rather than personal in character.

2.4 Professor Birks has referred to inconsistencies in Institutional and modern writings in drawing the line between repetition of money paid under error and restitution of moveables delivered under error.[6] In his Principles, Bell for example states, under the heading "Restitution", at s. 530: "One who by mistake has received anything (as from a carrier) is liable in restitution;...". Under the heading "Repetition", Bell states at s. 531: "Whatever has been delivered or paid on an erroneous conception of duty or obligation may be

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[1]See eg D M Walker The Law of Contracts (2nd edn; 1985) p. 584: "If property has been delivered or money paid...".

[2]Gloag Contract (2nd edn; 1929) p 60: "the condictio indebiti, a term which is still commonly used in Scotland to denote an action having for its object the recovery of money paid under the mistaken belief that it was due".

[3]See eg Bell v Thomson (1867) 6 M 64 at p 70 per Lord Neaves: "The ...condictio indebiti...is what Stair calls an obediential obligation. Restitution is another of these obligations and it resembles condictio indebiti".

[4]W W McBryde, The Law of Contract (1987) p 204, citing Stair Institutions I, 7, 9; and Bell Principles s 531.

[5]Henry v Morrison (1881) 8 R 692 at p 693 per Lord President Inglis; at p 694 per Lord Deas.

[6]P Birks "Six Questions" [1985] Juridical Review 227.

recovered on the ground of equity". Birks remarks:

> "The underlying cause of these tensions is a conceptual distinction between the principles of the Roman vindicatio, in which the pursuer's contention was that something in the defender's possession was his, and the condictio, in which the pursuer's contention was that the defender ought to make over to him something (whether goods or money). In the condictio "make over" (dare) definitively supposed the pursuer not yet owner. That is, the defender was to "make over" the subject-matter in such a way as to constitute the pursuer owner.[1] The system adopted by Stair brought the condictio and the vindicatio, or perhaps more accurately the condictio and the Roman action preliminary to the vindicatio, namely the actio ad exhibendum, into close juxtaposition.[2] This has profound implications for the relationship between the law of property and the law of obligations and also for the proper limits of the law of unjust enrichment/restitution. However, it requires a separate study. For the moment it must be enough to say, somewhat evasively, that, though we perceive the distinction between restitution in the narrowest sense and repetition as turning on the difference between goods and money, it may have been intended to turn on the distinction between cases in which no property had passed to the defender (the vindicatio principle) and cases in which the property had passed (the condictio principle). Since property in money is rarely retained and, even when it is, easily ceases to be exigible for want of identifiability, money is in practice drawn under the latter principle, so that, in practice, the conceptual distinction produces results similar to the mechanical division by subject-matter".[3]

We argue below that the action for restitution of corporeal moveables delivered in error plays in Scots law a dual role, coming in place of both the rei vindicatio and the condictio indebiti of Roman law.[4] Where it comes

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[1]Citing Gaius Institutes 4. 3-5.

[2]Citing Stair Institutions I, 7, 2; I, 7, 9; I, 7, 14.

[3][1985] Juridical Review 227 at pp 236, 237.

[4]See paras 2.106 to 2.122 below.

in place of the rei vindicatio, ie where the pursuer is the true proprietor, it takes the form of a simple action of delivery. Where it comes in place of the Roman condictio indebiti, ie where the defender is proprietor but without legal justification (sine causa), the action should in principle conclude for re-conveyance of the moveables to the pursuer as well as delivery. But as the re-conveyance is effected by delivery, the distinction may be overlooked in practice. It will be seen that the content of the obligation differs according as the defender is owner or merely possessor. It is clear that if the defender is merely possessor, not an owner, it is from the standpoint of Roman law a solecism to describe the action as a condictio indebiti, but there is Institutional authority for the usage in Scots law.[1]

2.5 Services excluded. In Roman law the condictio indebiti did not apply to a factum (or performance of services other than a conveyance of property)[2]. In Scots law, the label is not applied to recompense for the performance of services.

2.6 Overlap with other categories. As a matter of terminology, actions have been characterised as a condictio indebiti in circumstances where, under Roman law, the true remedy may have been the condictio ob turpem causam[3]. An action of recompense for expenses incurred for another has been described as an action of repetition of those expenses[4]. The distinction between the condictio indebiti and the condictio causa data causa non secuta can cause difficulty. The condictio indebiti lies where a debt is erroneously thought to exist already; the condictio causa data causa non secuta lies where a payment is made on the basis that some future condition will be satisfied, which may be a counter-prestation under an executory contract, or some future event as in the case of

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[1]Stair Institutions I, 7, 9; Bankton Institute I, 8, 23; Bell Principles s 531.

[2]See eg W de Vos, "Unjustified Enrichment in South Africa" [1960] Juridical Review 125 at p 131.

[3]See eg Arrol v Montgomery (1826) 4 S 499 at p 502 per Lord Pitmilly.

[4]Robertson v Scott (1886) 13 R 1127 (rubric).

a gift in contemplation of the donee's marriage[1]. In Came v City of Glasgow Friendly Society[2] a woman paid premiums under an insurance policy but the policy was held to be void owing to the absence of consensus in idem. It was held that she was entitled to repayment of the premiums. Lord Anderson observed[3] that the basis of recovery was the principle of causa data causa non secuta apparently on the view that the woman did not get the policy of assurance which she desired to obtain. It is thought however that the applicable principle was the condictio indebiti since the payments were made under the erroneous impression that they were already due under a contract which in fact was void.[4] Again in Haggarty v Scottish TGWU[5], payments of trade union dues were made to a trade union by a putative member in the belief that he was indeed a member when in fact his membership was ultra vires the trade union's rules. It was held[6] that the true basis of recovery was the condictio indebiti since the money was paid under error as to the pursuer's purported membership, and not the condictio causa data causa non secuta. An action of repetition to recover a payment conditional on repayment on a certain event which in fact occurs is not a condictio indebiti.[7]

2.7 Is error a universal requirement of the condictio indebiti? In Roman law, it seems that error was an

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[1]See Stair Institutions I,7,7; Bankton Institute I,8,21; Erskine Institute III,1,10. .

[2]1933 SC 69.

[3]Ibid at p 78.

[4]See also Davis v Salvation Army Assurance Society Ltd (1914) 30 Sh Ct Reps 6 where however the form of condictio was not discussed.

[5]1955 SC 109.

[6]Ibid at pp 113, 114. Here the condictio causa data causa non secuta was said to be applicable to money paid under a contractual obligation where there has been a subsequent failure of consideration: idem. That however is not the only case where that type of condictio lies.

[7]Pattisson v McVicar (1886) 13 R 550 at p 567; British Railways Board v Glasgow Corporation 1976 SC 224 at p 240.

essential requirement of the condictio indebiti[1]. In Scots law, the weight of authority is to the effect that error is an essential requirement of the condictio indebiti[2]. On the other hand, it has been said[3] that the "condictio indebiti... lies where money has been paid subject to a condition which is not satisfied[4] or pending decision of a matter in dispute[5]. The commonest cases are, however, cases of payments made in error". Again though Gloag has been cited for the proposition that error is essential,[6] Gloag elsewhere relies on Agnew v. Ferguson[7]

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[1]See D.12.6; C.4.5; Zimmermann Law of Obligations pp 849, 850; Gaius III, 91; D.12.6.1.1; D.12.6.26.3. There is a theory that in classical Roman law, error was presumed if the pursuer proved an indebitum solutum, but Justinian "elevated error to a core requirement of the plaintiff's claim": Zimmermann p 850.

[2]See eg Sutherland v Mackay (1830) 8 S 316 per Lord Glenlee: "if it is not admitted that there was any error in fact at all, there is no room for a condictio indebiti"; Henderson & Co Ltd v Turnbull & Co 1909 S C 510 at p 517 per Lord Low: "the person claiming repayment can only recover if he proves that the payment was made in ignorance or error"; Costin v Hume 1914 SC 134 at p 138 per Lord Dundas; British Oxygen Co v SSEB 1958 S C 53 at p 79 per Lord Patrick: "The claim does not fit well into the condictio indebiti in respect that money was not paid under the mistaken belief that it was due" (affd 1959 S C (HL) 17); G M Scott (Willowbank Cooperage) Ltd v York Trailer Co 1969 SLT 87 (OH) at p 88 per Lord President Clyde: "The essential element necessary before the doctrine can be invoked is that there should be a payment made in error..."; (revd on another point 1970 SLT 15); Reid v Shaw Stewart (1890) 6 Sh Ct Reps 296 at 299; Miller v Campbell 1991 GWD 26-1477; see also the definitions by Stair, Bankton, Baron Hume and Bell quoted at para. 2.2 above.

[3]Walker Contracts (2nd edn; 1985) p 584.

[4]Citing Semple v Wilson (1889) 16 R 790.

[5]Citing Glasgow Gas-Light Co v Glasgow Barony Board (1886) 6 M 406; British Railways Board v Glasgow Corporation 1976 S C 224.

[6]See Gloag Contract (2nd edn) p 60.

[7]Agnew v Ferguson (1903) 5 F 879.

for the proposition that "the rule of condictio indebiti might be expressed - payments which are not due may be recovered, if made in the belief that they are due, or with a reasonable expectation of repayment".[1] In Arrol v Montgomery[2] a creditor obtained bills from a bankrupt as the price of agreeing to a voluntary composition with creditors. The payment was illegal as a secret preference. The creditor was held liable in repetition and Lord Pitmilly remarked that "a condictio indebiti is the proper legal remedy."[3] There is no doubt that these quotations identify good grounds of repetition, but it does not follow that every remedy or doctrine for the recovery of an indebitum made under error should be regarded as actionable under the condictio indebiti. While usage has not been uniform, by far the most common usage is to treat error as essential in a condictio indebiti: that usage is followed in this Discussion Paper.

2.8 Is every action of repetition of an undue payment made in error a condictio indebiti? Professor Birks has observed that:

> "The danger of using the civilian category [ie of condictio indebiti] with its definitional limitation to liability mistakes is that it is easy to assume that non-liability mistakes have no place in the scheme at all, whereas the particular mistake may be remediable under another head, either the condictio sine causa (for no consideration at all) or condictio causa data causa non secuta (for failure of consideration)".[4]

That warning is well justified. The difficulty is to identify the classes of action of repetition of money paid in error which are actionable not by a condictio indebiti

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[1]Gloag Contract (2nd edn) p 63, fn 5, emphasis added.

[2](1826) 4 S 499.

[3]Ibid at p 502. The term "condictio indebiti" was not used by the other judges in that case, nor in other similar cases (cited in Gloag Contract p 562, fn 2). In Macfarlane v Nicoll (1864) 3 M 237, Lord Deas (at p 245) said that "concussion" (ie compulsion) was the applicable principle.

[4]Birks "Restitution: Scots Law" [1985] CLP 57 at p 69.

but by an innominate action of repetition. In general, where a debtor pays money to a putative creditor in error, the true creditor to whom the money should have been paid has no title to sue the putative creditor directly, except in special circumstances described in volume 1, paras 3.56 ff. In South African law, such an action has been described as a condictio sine causa[1]. In Scots law, it has been held that such an action is not a condictio indebiti apparently because that form of action can only be raised by the person who made the payment and not by the true creditor.[2] The action by the true creditor is in practice regarded as an innominate action of repetition rather than a condictio sine causa though retention sine causa (unjustified enrichment) is no doubt at the bottom of the recipient's liability.[3] Then again where a gift is made on an erroneous assumption that a future condition may be satisfied (eg a marriage between two parties who unknown to the donor are within the forbidden degrees), there may be an action of repetition either on the ground of causa data causa non secuta or an innominate act of repetition.[4]

2.9 Does the payer require to believe that the payment is a debt legally due to the recipient? The definitions by

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[1]See eg Govender v Standard Bank of South Africa Ltd 1984 (4) SA 392 (C) at p 400.

[2]See Countess of Cromertie v Lord Advocate (1871) 9 M 988 at p 992 per Lord President Inglis: "The true question at issue is between the heritor and the Crown. It is a condictio indebiti"; Earl of Cawdor v Lord Advocate (1878) 5 R 710 at p 714 per Lord Justice-Clerk Moncreiff "the defence of bona fide ... consumption is not excluded by reason that the claim resolves into one of condictio indebiti. [The true creditor's] claim is not of that nature. It is an action by a titular against an intromitter with the teinds .."; Fraser v Robertson 1989 GWD 5-194 (unreported, 16 January 1989) per Sheriff Craik: "the pursuers founded on the condictio indebiti. But an action based on the condictio is only open to the payer himself..."

[3]Cf Patten & Patten v Royal Bank of Scotland (1853) 15 D 617 at p 619 per Lord Cuninghame: "in error, as in their hands sine causa".

[4]Birks "Restitution: Scots Law" [1985] CLP 57 at p 69.

the Institutional writers[1], seem to make it a prerequisite of a condictio indebiti that the payer must erroneously believe that the payment is made to satisfy a debt due by him (or possibly by someone else) to the payee. Doubt however is thrown on this requirement by cases involving actions by banks of repetition of money paid when honouring a cheque in error.[2] The error may relate to the bank's mandate from its customer to pay his cheques or to its own liability to pay.[3] An error as to its mandate may take various forms.[4] For example, (i) the bank may pay a countermanded cheque overlooking its customer's countermand.[5] (ii) The bank may pay the cheque overlooking the fact that it holds insufficient funds in the customer's account or that an overdraft limit has been exceeded[6]. (iii) The bank may neglect to identify the fact that the signature of the drawer, its customer, has been forged.[7] (iv) The bank may be unaware that an indorsement of the payee's signature on an order cheque

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[1]See para 2.2 above.

[2]Eg Credit Lyonnais v George Stevenson & Co Ltd (1901) 9 SLT 93 (OH); Alexander Beith Ltd v Allan 1961 SLT (Notes) 80 (OH); Royal Bank of Scotland v Watt 1991 SLT 138; Bank of New York v North British Steel Group Ltd 1992 SLT 613 (OH); Bank of Scotland v Grimm-Foxen [1992] GWD 37-2171 (Sh Ct).

[3]Ellinger Modern Banking Law (1987) p 334.

[4]See as to Anglo-American law, H Luntz "The Bank's Right to Recover on Cheques paid by Mistake" (1968) 6 Melbourne Univ Law Rev 308; Ellinger Modern Banking Law (1987) pp 334-337.

[5]Recovery is allowed in English law (Barclays Bank Ltd v W J Simms Son and Cooke (Southern) Ltd [1980] 1 QB 677) and in South African law (Govender v Standard Bank of South Africa 1984 (4) SA 392 (C)).

[6]For the uncertainty in English law, see Luntz, op cit at pp 329-331; Ellinger op cit pp 336-337; Friedmann and Cohen "Payment of Another's Debt" para 60.

[7]Price v Neal (1762) 3 Burr 1354; National Westminster Bank Ltd v Barclays Bank International Ltd [1975] QB 654; Imperial Bank of India v Abeyesinghe (1927) 29 NLR (Ceylon) 257.

has been forged.[1] (v) The bank's mandate may be vitiated by a forged alteration of a material part of the cheque such as an increase in the amount[2] or a change in the identity of the payee[3]. (vi) The bank may pay the cheque to the wrong person under an error as to the identity of the recipient.[4]

2.10 It is commonly accepted in Scotland that where a bank honours a cheque in error, the banker's remedy against the payee is a condictio indebiti whether the error is due to a forged alteration of the amount or of the payer's name,[5] or an error as to the identity of the payee,[6] or presumably any other type of error. There are two difficulties about this categorisation which have led South African courts to conclude that the bank's remedy is not a condictio indebiti but a condictio sine causa specialis. First, the bank knows that it is not indebted to the recipient, and makes no error as its own indebtedness to him. As Rose-Innes J held in the Govender

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[1]Alexander Beith Ltd v Allan 1961 SLT (Notes) 80 (OH). Cf in England London and River Plate Bank Ltd v Bank of Liverpool Ltd [1896] 1 QB 7.

[2]Royal Bank of Scotland plc v Watt 1991 SLT 138; cf in English law, Imperial Bank of Canada v Bank of Hamilton [1903] AC 49 (PC).

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

[4]Cf Credit Lyonnais v George Stevenson & Co Ltd (1901) 9 SLT 93 (OH); Bank of New York v North British Steel Group Ltd 1992 SLT 613 (OH); Bank of Scotland v Grimm-Foxen [1992] GWD 37-2171 (Sh Ct).

[5]Royal Bank of Scotland plc v Watt 1991 SLT 138 at pp 143, 146, 149.

[6]Credit Lyonnais v George Stevenson Ltd (1901) 9 SLT 93 (OH); Bank of New York v North British Steel Group Ltd 1992 SLT 613 (OH); Bank of Scotland v Grimm-Foxen [1992] GWD 37-2171 (Sh Ct). See also Wallace and McNeil Banking Law (10th edn; 1991) p 137; cf Evans-Jones "Identifying the Enriched" 1992 SLT (News) 25.

case[1]:

> "A condictio indebiti lies to recover a payment made in the mistaken belief that there was a debt owing and to be paid, but a bank paying a cheque owes no debt to the payee and knows that it is not indebted to the payee. A bank is not indebted or liable to the payee on the cheque nor on the transaction underlying the cheque. The indebtedness on a cheque, or on the underlying cause of a cheque, is that of the drawer, not the bank upon whom the cheque is drawn ... A bank, accordingly, when paying a cheque does not make payment in the belief that there is a debt owing by it to the payee."

The same point had been made earlier by Professor Malan:

> "The condictio indebiti is the claim by which the solvens claims restitution of an undue payment from the accipiens. It has been shown that payment by a bank constitutes a performance by the bank to the drawer and simultaneously performance by the drawer to the payee. It is seldom, if ever, the bank's own performance to the payee. A drawee bank paying a cheque functions as a neutral functionary for its client. It performs in respect of the bank/customer agreement. The fact that the cheque is forged does not alter the nature of its payment and transforms it into a performance vis-a-vis the payee. The mistake of the bank, if it may be put in this way, is inter alios partes. Its payment is an undue performance to its customer. The latter may be enriched thereby but would in such a case normally not be. The condictio indebiti would seem to be excluded."[2]

The second point is that the bank's payment may not be made to discharge any liability of its customer, and the bank commonly makes no assumption and therefore no error

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[1]Govender v Standard Bank of South Africa Ltd 1984 (4) SA 392 (C) at p 398 (payment under countermanded cheque).

[2]F R Malan "The Rule in Price v Neal" (1978) 11 CILSA 276 at p 287 (footnotes omitted). See also F R Malan "Price v Neal Revisited" [1992] Acta Juridica 131 at pp 142, 143.

as to its customer's liability. As Rose-Innes J stated:[1]

> "Not all cheques are drawn or given in payment of any debt at all, as where the drawer draws a cheque to transfer his funds for convenience from his banking account to that of his partner or his wife, or sends an unsolicited cheque to a charity, or pays by cheque an amount which he knows he does not owe but does not care to dispute, or pays a friend's debt by cheque to avoid his being summonsed, or his friend's fine to avoid his arrest. None of these causes for payment by cheque are any concern of the bank upon whom the cheque is drawn. A bank need make no inquiry, and usually does not, whether in paying a cheque it is discharging any debt at all, and certainly knows that it is not discharging its own debt to the payee. It is thus no answer to suggest that a bank in paying a cheque is under the impression that it is paying a debt which is owing by another on whose behalf it is discharging the debt. In more cases than not in practice a bank neither knows nor is concerned to know nor gives any thought to whether or not there is a debt owing by the drawer to the payee of a cheque."

In the result, South African law treats the bank's action as a condictio sine causa (specialis), an evolving doctrine of uncertain scope which applies to a claim for the recovery of money which has come into the defender's hands for no justifiable cause.[2] In Scots law, though there are many references to performance sine causa or retention sine causa, in the sources,[3] it is common practice to refer simply to an (innominate) action of repetition in cases where the nominate condictiones (indebiti, causa data causa non secuta, and less certainly ob turpem vel iniustam causam) are regarded as inapplicable. One might therefore expect the bank's action in Scotland to be an innominate action of repetition equivalent to a condictio sine causa (specialis). However, account must be taken of the special statutory rule that where the banker has sufficient funds, the cheque operates as an assignment

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[1]In the Govender case 1984 (4) SA 392 (C) at pp 398, 399.

[2]Govender v Standard Bank of South Africa Ltd 1984 (4) SA 392 (C) at p 400; Malan (1978) 11 CILSA 276 at p 287; [1992] Acta Juridica 131 at pp 142, 143.

[3]See vol 1, para 3.6.

from the time of presentation.[1] The effect of this statutory assignment may be to impose on the bank an obligation of payment to the holder and the error may be construed as relating to that obligation, not the obligation to pay the customer's mandate. This would presumably make the condictio indebiti the appropriate remedy. The matter requires fuller investigation than is possible here. Another open question is whether the pursuer in a condictio indebiti must erroneously believe that the debt was legally due by him, with the effect that if he erroneously believes that the debt was legally due by a third party, his remedy is an innominate action of repetition. The definitions of the Institutional writers[2] do not confine the condictio indebiti to errors as to the payer's own liability.

2.11 Misappropriation by creditor's agent or nominee of money paid to him for the creditor. Where money is paid to the agent or nominee of a creditor for transmission to the creditor, and the agent or nominee misappropriates the money, there is authority that the creditor's remedy against the agent or nominee is treated as an action of repetition.[3] Where A pays money to B for the benefit of and delivery to C, and B declines to deliver it but fraudulently misappropriates it, it was held in Costin v Hume[4] that, while C has a title to sue B for payment, the form of action is not a condictio indebiti. Lord Dundas observed:

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[1]Bills of Exchange Act 1882, s 53(2) amended by the Law Reform (Miscellaneous Provisions)(Scotalnd) Act 1985, s 11(a). On countermand, the banker is treated as having no funds available for payment; 1882 Act, s 75A as amended by 1985 Act, s 11(b).

[2]See para 2.2 above.

[3]See eg 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 per Lord Justice-Clerk Ross: "Once the money had been credited to the defender's account, if he had ... sought to retain the money, Pratt would have had to seek repayment of the money under the principle of repetition or recompense." See also Extruded Welding Wire (Sales) Ltd v McLachlan and Brown 1986 SLT 314 (OH).

[4]1914 SC 134. The headnote states that the money was sent to B in error, but this does not clearly appear from the report.

> "I cannot see that condictio indebiti arises here at all. It is not a case where the donor is endeavouring to get repayment of money which he had paid under error. It is a case of the pursuer seeking, not repayment, but payment from the defender who, she says, has got money belonging to her in his hands."[1]

On this analysis, the creditor's action is not an action of repetition at all (and therefore not a condictio indebiti) but an ordinary action of payment. This characterisation is intelligible but conflicts with other authority cited above designating actions for recovery of misappropriated funds as an (innominate) action of repetition. It is not disputed however that the creditor's action is not a condictio indebiti.

Summary of (provisional) conclusions on scope

2.12 It may be convenient to summarise our (provisional) findings as to the scope of the condictio indebiti.

(1) A condictio indebiti is generally defined by the Institutional writers as an action for the recovery of money or property unduly paid under an erroneous belief that it is due to the recipient. (para 2.2).

(2) The action enforces an obediential obligation of repetition or restitution (para 2.2).

(3) Though there is little authority, the better view is that the condictio indebiti applies to the restitution of property as well as the repetition of money (para 2.3).

(4) It does not apply to the performance of services (a factum) (para 2.5)

(5) There is uncertainty about the boundaries of the condictio indebiti and whether it overlaps with other condictiones (para 2.6).

(6) While usage has not been uniform the most common usage is to treat error (as to legal liability) as an essential requirement of a condictio indebiti (para 2.8).

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[1] Ibid at p 138.

(7) Not every action of repetition or restitution based on error is a condictio indebiti. Where the error is that of a third party and not of the pursuer claiming repayment, the form of action is not a condictio indebiti. An error not relating to legal liability (but eg as to some future condition attached to a gift) is not a condictio indebiti (para 2.9).

(8) While it is generally thought that the payer must believe that the erroneous payment is a debt legally due to the recipient, cases involving repetition by banks who have honoured cheques in error in which the form of action was treated as a condictio indebiti cast doubt on this requirement. It may be that such actions should be treated as innominate actions of repetition except where the Bills of Exchange Act 1882, s 53(2), imposes an obligation on the banker to honour the cheque (para 2.10).

(9) An action by a creditor to recover money from his agent or nominee who has misappropriated money paid to him is not a condictio indebiti. It has been characterised as an action of repetition but there is also authority that it is simply an action for payment (para 2.11).

B. The requirements of the condictio indebiti

Preliminary: summary of requirements

2.13 The requirements of the condictio indebiti in modern Scots law may be expounded in various ways and it cannot be said that any particular mode of exposition has won general acceptance. The main requirements of the condictio indebiti may be summarised as follows:

(1) there was a payment of money or transfer of property;

(2) the payment or transfer was not legally due;

(3) the payment or transfer was made under error (normally of fact) that the payment or transfer was due;

(4) the defence that it would be inequitable for the court to order repayment or retransfer does not lie;

(5) no other defence precludes recovery;

(6) the pursuer has a title to sue; and

(7) the defender was the person to whom the money was paid or the thing was transferred.

There are two further possible requirements the existence or nature of which are controversial and uncertain, namely:

(a) that the defender must have been enriched by the payment or transfer at the time when it was made[1]; and

(b) that the defender's enrichment was at the pursuer's expense[2].

(1) Payment or transfer

2.14 In Roman law, the condictiones sine causa in general, and the condictio indebiti in particular, required that the defender's enrichment arose out of a payment of money

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[1]See paras 2.93 ff below.

[2]See paras 2.192 ff below.

or transfer of property (solutio or datio) to him by the pursuer.[1] The same requirement has been inherited by Scots law at least to this extent that the label "condictio indebiti" is not applied to recompense for services rendered by the defender to the pursuer. The authorities on the condictio indebiti as applied to restitution of moveables are meagre and the question of what amounts to a transfer of moveable goods for the purposes of the condictio indebiti is uncertain since the Scots cases on that condictio generally relate to payment of money rather than restitution of moveables.[2]

(2) The sum paid or thing delivered must have been not due (indebitum)

2.15 It is a requirement of the condictio indebiti in Scots law that the sum paid or thing delivered must not have been due.[3] Wessels, professedly following Pothier, isolates various cases where payments have been treated as indebiti solutiones.[4] Similar cases are found in the Scots sources.

(a) Obligation discovered, after payment or transfer, to be null or extinguished

2.16 A payment is treated as not due (indebitum) where a claim was thought to exist which after payment is found to be null or non-existent or to have been extinguished.[5] A useful distinction has been made by an American commentator between:

> "restitution of value that depends on the avoidance of some legal arrangement and restitution that does not require avoidance of any transaction except the transfer itself."[6]

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[1]See A M Honore "Condictio and Payment" [1958] Acta Juridica 135.

[2]We consider this matter at para 2.106 ff below.

[3]See the Institutional definitions in para. 2.2 above.

[4]Wessels Contract (2nd edn; 1951) vol 2, para 3642.

[5]Idem.

[6]Palmer Restitution, vol 2, para 11.2, p 483.

In cases where a contract under which a payment is made is void, it will normally be necessary (in practice, though not in theory) to reduce the contract. Unlike contracts which are merely voidable, restitutio in integrum is not formally required though the court may require the pursuer to restore benefits.[1] Repetition of payments under void contracts is discussed in Section J at paragraph 2.204 below. The second category of case does not involve the dismantling of a void transaction and is sometimes called "performance error".[2] Examples are overpayments or double payments or payments to the wrong person.[3] Similar to performance error are cases where money is paid under an obligation which has been terminated eg by the negative prescription[4] or by a new contractual arrangement[5]. The money may be recovered by a condictio indebiti. In Roman law it lay also where the payer was ignorant of the fact that his obligation had been extinguished by compensation or set-off.[6]

(b) Where the payer or transferor can plead a "peremptory" or "perpetual" defence to the payee's or transferee's claim

2.17 Wessels remarks[7]:

> "There is a solutio indebiti if the solvens can show that the apparent debt ought not to be admitted by a court of law either as a debt or as a natural obligation, and that he did not know of the flaw when

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[1]See para 2.68 below.

[2]McBryde Contract p 204.

[3]See para 2.20 below.

[4]Carrick v Carse (1778) Mor 2931; Hailes 783. See para 2.17 below.

[5]Inverness County Council v Macdonald 1949 SLT (Sh Ct) 79.

[6]D.16.2.10.1.

[7]Wessels Contract, vol 2, para 3644. See also Zimmermann Law of Obligations p 848: "the condictio indebiti could also be brought if performance had been made in discharge of a debt which was valid at civil law but defeasible, ex jure praetorio, by an exceptio perpetua".

he paid it (citing Pothier Condictio Indebiti, s. 144). The Roman jurists expressed this by saying that if the solvens can plead a peremptory exception to the claim the payment is an indebiti solutio (D.12.6.26.3)".

There are sources supporting the same rule in Scots law. Thus in Carrick v Carse,[1], Lord Covington remarked[2]:

> "If a debt is paid which is not due, or against which there lies an exceptio perpetua, there is condictio indebiti, supposing the person paying to be ignorant of the debt not being due or of the exceptio perpetua".

And Lord Braxfield said[3]:

> "The civil law puts the case of one having a perpetual exception; if that exception is in favorem accipientis, the condictio indebiti takes place".

Bankton deals directly with this ground of repetition; he states[4]:

> "If the debt is excluded by a perpetual exception, introduced in favour of the debtor, which cuts off the ground of debt, as if it was extorted or obtained by fraud,[5] payment by one who knew not the circumstances, as by an heir or executor, must be restored; because in reality the debt is not due, which can be excluded by such exception".

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[1](1778) Mor 2931; Hailes 783.

[2]Hailes 783. An "exceptio perpetua" is a peremptory, as distinct from a dilatory, defence. "Dilatory defences are those which have the effect of absolving the defender without cutting off the pursuer's right to bring a new action... Peremptory defences, on the other hand, are positive allegations which enter into the merits of the cause itself, and have the effect either of taking away the ground of action, or of extinguishing its effects": Bell Dictionary (7th edn) sv "defences".

[3]Hailes 783, 784.

[4]Bankton Institute I, 8, 26.

[5]Citing D.12.4.7; D.12.6.40; D.12.6.43.

Thus if an executor pays the amount due under a bond granted by the deceased acting under force and fear, and the executor did not know of that defect of consent, he can recover the amount paid.[1]

2.18 It appears that Roman law distinguished between a perpetual (or peremptory) defence introduced in favour of the debtor and such a defence introduced out of hostility to the creditor (in odio creditoris).[2] In the former case, the payer could recover money paid to satisfy a debt if he could have relied on a defence to an action for that debt (eg a defence founded on fraud, force and fear, the benefit of the senatus consultum Velleianum[3], or causa data causa non secuta). In the latter case, he could not recover: for example, a son-in-power who borrowed money contrary to the senatus consultum Macedonianum and repaid after becoming pater familias, could not recover[4]. The latter was said to be introduced out of hostility to creditors or usurers.[5] Bankton seems to accept a similar distinction, observing[6]:

> "But if the exception does not truly cut off the ground of debt, but is only a legal privilege whereby the debtor may defend himself against it, the debt, if paid, will not be refunded; for the party is presumed to have observed bonam fidem, by voluntarily submitting to the debt, though not legally binding: this was the case of money lent to children in family, without consent of their father, by the civil law; action was denied to the creditor, in odium of him; but, if payment notwithstanding voluntarily ensued, it could not be re-demanded."

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[1]Cf Wessels, para 3644; citing Voet, Commentaries on the Pandects 12.6.1.2 and 4.

[2]D.12.6.40; Wessels Contract (2nd edn) vol 2 para 3645; citing Voet 12.6.4.

[3]Under which women were prohibited from incurring liability for the benefit of others eg as cautioners: see Zimmermann Law of Obligations p 145 ff.

[4]D.12.6.40.

[5]Voet 12.6.4 cited by Wessels, supra.

[6]Bankton Institute I, 8, 27.

Bankton is thus apparently drawing a contrast between a perpetual or peremptory defence available to the payer that the obligation is null, non-existent or extinguished (in which case the condictio indebiti lies), and a defence that the obligation is unenforceable by action but still due and resting owing in other respects (a 'natural' obligation in the original Roman sense) ie. a privilege of unenforceability.

2.19 Bankton gives three other examples. First "the case of bonds or other securities granted for money lost at game, or lent knowingly in order to gaming, by the British statute.[1] The law denies action upon such securities, but cannot hinder voluntary payment". So, in Bankton's view, if the borrower, under the erroneous impression that the bond is enforceable, repays the money due under the bond, a condictio indebiti does not lie. The result is very similar to the rule relating to illegal contracts under which, if the payer is in pari delicto, and can only establish a right to repayment by relying on the illegal contract or its illegality or unenforceability, he cannot recover: the loss lies where it falls.[2] Second, if a person of limited capacity borrows money without the requisite legal authority, and repays it after becoming of full capacity, he or she cannot claim repayment under the condictio indebiti.[3] Third, "by the civil law, no action lay upon a nude paction; but, if it was repeated or homologated, an action was competent,[4] and much more, if

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[1]Citing 9 Anne c.13. Apparently this is a mistaken reference to the Gaming Act 1710 (9 Anne c. 19) subsequently held not to apply to Scotland; see McBryde Contract paras 25.17 and 25.25; Rayner v Kent 1922 SLT 331.

[2]See McBryde Contract, Chapter 25; para 2.220 below.

[3]Bankton Institute I, 8, 27: "the like will hold in bonds for borrowed money granted by a married woman; she is not liable to pay it, nor is the husband, unless it turned to his account: but, if such money shall be paid by the wife out of the proceed of the same, or out of her own effects, after dissolution of the marriage, there is no restitution", citing D.12.6.13 (stating inter alia that where a pupil child receives a loan without his tutor's authority and is thereby enriched, he cannot recover any payments which he makes after attaining minority).

[4]Citing D.13.5 (De pecunia constituta) 1 pr.

it was fulfilled, restitution should be denied".[1] So if money is due by a party under a contract which is defective in form, the other party performs his part of the contract, and the first party pays the sum due under the contract under the erroneous impression that the other party can enforce the contract by action, the first party cannot recover. Another example given by Bankton[2] is payment under a bond which is void for not observing the solemnities of the Subscription of Deeds Act 1681: "for the debt is naturally due...".

(c) Payment or transfer of more than is due, and double payments

2.20 A very typical case of the condictio indebiti arises when a person pays by error a greater amount than is owed. Examples include overpayment of a tradesman's account[3]; payment of railway charges at a higher rate than contracted for[4]; over-payment of marriage-contract provisions[5]; payment by the pursuers' employee to a contractor for extra work in the erroneous belief that the work had been authorised by the pursuers[6]; payment of the price of heritable subjects erroneously thought to be included in the contract of sale[7]; payment of interest on the balance of a debt when only interest on arrears was due[8]; payment of a sum without deducting a rebate to

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[1]Bankton Institute I, 8, 27.

[2]Institute I, 8, 28.

[3]Balfour v Smith and Logan (1877) 4 R 454.

[4]Dalmellington Iron Co v Glasgow S W Rly Co (1889) 16 R 523; Caledonian Ry Co v Young (1897) 13 Sh Ct Reps 7; cf Dixons v Monkland Canal Co (1831) 5 W and S 445 affg 8 S.826 (excess canal charges).

[5]Cf Fowler v Mackenzie (1874) 11 SL Rep 485 (HL).

[6]Peter Walker & Sons (Edinburgh)Ltd v Leith Glazing Co Ltd 1980 SLT (Sh Ct) 104.

[7]Duncan, Galloway and Co Ltd v Duncan Falconer and Co 1913 S C 265.

[8]Baird Trs v Baird and Co (1877) 4 R 1005.

which the payer was entitled by contract[1]; payment of too large a dividend from the bankrupt estate of one co-obligant where the trustee was ignorant of the fact that the creditor drew more than 20 shillings in the pound over-all in ranking on the estates of both co-obligants[2]; and payment by an auctioneer to the seller's nominee of more than the true balance of the proceeds of sale.[3] In general, it is immaterial whether the error of fact arose from error in calculation[4] or clerical error[5], or an omission to deduct the amount over-paid.

2.21 An action of restitution will lie where in error a larger quantity of goods is delivered than is in fact due. In Pride v St Anne's Bleaching Co[6] a bleaching company delivered to one of their customers by mistake a larger quantity of yarns than they had received from him for bleaching. The Court pronounced decree against him to restore the excess quantity of yarns, or pay their value, to the company. It has been persuasively argued that restitution was here a condictio indebiti rather than a proprietary vindicatio[7].

2.22 Cases of double payment can occur as where an executor pays a debt to a creditor of the deceased and the creditor had already been paid his full debt by the deceased;[8] or where a feuar paid his neighbour half of the cost of erecting a gable wall when the sum had already been paid by his feudal superior[9]; or where a person pays

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[1]British Hydro-Carbon Chemicals and British Transport Commission Petitioners 1961 SLT 280.

[2]Patten and Patten v Royal Bank of Scotland (1853) 15 D 617.

[3]Wallet v Ramsay (1904) 12 SLT 111.

[4]Brown v Graham (1848) 10 D 867; (1849) 11 D 1330; Forbes' Trs v Edinburgh and Glasgow Union Canal Co (1834) 12 S 365.

[5]Wallet v Ramsey (1904) 12 SLT 111.

[6](1838) 16 S 1376.

[7]Stewart, Restitution para 7.6; see para 2.115.

[8]Moore's Executors v McDermid (1913) 1 SLT 278.

[9]Robertson v Scott (1886) 13 R 1127.

a debt forgetting that he himself has already paid part of the sum to account.[1] A condictio indebiti lies in accordance (it is said) with the brocard "ius non patitur idem bis solvi" (the law does not suffer the same debt to be paid twice).[2]

(d) Payment or transfer where suspensive condition not met

2.23 Scots law seems broadly to follow the Roman law on repayment of future or contingent debts.[3] If the debt is contingent, - dependent on the occurrence of an uncertain future event, ie one which may or may not occur, such as the attainment of an age or the fulfilment of a specified condition -, the debt is not due until the event occurs. Accordingly a payment made before that event occurs is indebitum solutum and can be recovered, unless the event occurs, and therefore the debt becomes truly due, after the payment and before the action is commenced, or perhaps disposed of[4]. So a mutual insurance society, which paid a widow's annuity on the mistaken assumption that her husband was dead, could recover the amount paid[5]. Likewise an insurance company, which paid the sum assured to the holder of a life assurance policy in the mistaken belief that the person whose life was insured had died, was held entitled to recover that sum on re-delivering the policy which still subsisted in force.[6]

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[1]Allied (Times) Theatres Ltd v Anderson 1958 SLT (Sh Ct) 29.

[2]Stair Institutions I, 7, 9, cited Moore's Executors v McDermid (1913) 1 SLT 278 at p 279.

[3]Bankton Institute I, 8, 25, following D.12.6.17 and 18.

[4]Bankton Institute I, 8, 25: "The thing must be paid not only unduly, but likewise remain still not due, at the time of suing restitution. For example a conditional debt is paid pending the condition, and if, before action is intented, the condition exists, restitution will be denied, because the debt becomes truly due;...".

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

[6]North British and Mercantile Insurance Co v Stewart (1871) 9 M 534.

2.24 On the other hand, where payment is due to be made on a certain date in the future or on the happening of an event which must occur, but in fact is made prematurely, "there is no re-payment, for the debt is due tho' the termof payment is not come;..."[1]. Wessels remarks:

> "A payment made before it is due certainly benefits the recipiens and is to the detriment of the solvens, but in such a case the law does not consider the recipiens to be enriched to the detriment of the solvens because the enrichment is not wrongful (cum iniuria)".[2]

Perhaps a better term than "wrongful" is "unjustified".

(e) Payment by a person other than the true debtor

2.25 One category of case which has caused great difficulty in Scots law arises where a debt is due to a creditor and the debt is paid by a person who is not the debtor. Some of the difficulties are discussed in an article by Dr R Evans-Jones.[3] We revert to this topic below.[4]

(f) Payment or transfer to person other than the true creditor

2.26 In Roman law, a payment was characterised as indebitum not only where the debt was not due at all, but also where a debt was due to one person but was paid to another.[5] Clearly payment made in error to any but the true creditor does not discharge the debt,[6] except in

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[1]Bankton Institute I, 8, 25; see D.12.6.10 (Paul): "A debtor whose debt falls due on a given day is still sufficiently a debtor not to be able to recover a payment made before that day" (Mommsen-Krueger-Watson trans).

[2]Wessels Contract (2nd edn) vol 2 para 3662: he continues "Doubt has been cast upon the correctness of the decision of Paul (Pothier, Cond Indeb s 152)".

[3]"Identifying the Enriched" 1992 SLT (News) 25.

[4]See paras. 2.157 ff.

[5]D.12.6.65.9; C.4.5.8.

[6]Kames Principles of Equity (5th edn; 1825) pp 347, 348.

special cases eg where the defence of bona fide payment applies[1]. As a general rule, in Scots law, a condictio indebiti will lie to recover the debt. Thus where a heritor paid surplus teinds to the Crown erroneously believing the Crown to be titular when the true titular was a third party, he was held entitled to recover the payments.[2] Where a bank, making an error as to the recipient's identity, remitted to a firm named "George Stevenson and Co Ltd" a sum which was truly due to a different firm named "D M Stevenson and Co", the bank was held entitled to repayment[3]. In Armour v. Glasgow Royal Infirmary[4] testamentary trustees paid an alleged legacy out of the estate of a deceased to an infirmary. The heirs on intestacy brought an action in which it was declared that the legacy was void, that it was paid in error and fell into intestacy, and that the infirmary should repay the alleged legacy to the trustees.

2.27 In an old case relating to corporeal moveables, Findlay v. Monro[5], the pursuer sent an ox to be delivered to a person and it was instead delivered to the defender in error. The defender killed and salted the ox, "looking on it as God's gift, or some friend's who had forgot to write with it". Since the defender could no longer make restitution of the live ox, it was held that he was bound to recompense the pursuer for its value.

2.28 The payment (or transfer) must however be made in error, and for this purpose a misprediction that the true

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[1]Encyclopaedia of the Laws of Scotland vol 2 (1927) paras 685 to 694.

[2]Countess of Cromertie v Lord Advocate (1871) 9 M 988; Gwydyr v Lord Advocate (1894) 2 SLT 280.

[3]Credit Lyonnais v George Stevenson and Co Ltd (1901) 9 SLT 93 (OH); see also Tainsh v Rollo (1824) 3 S 47; Bank of New York v North British Steel Group Ltd 1992 SLT 613 (OH).

[4]1909 SC 916. In this case there was a specialty in that the action was at the instance of the heirs on intestacy who were impoverished by the payment rather than by the trustees who made the payment.

[5](1698) Mor 1767.

creditor would not demand the money is not treated as an error but rather as the assumption of a risk.[1]

(g) Miscellaneous cases

2.29 The foregoing categories are not necessarily exhaustive, and other types of error may occur giving rise to a condictio indebiti[2]. For example in Roman law a transfer was characterised as indebitum where a person transferred a thing erroneously thinking it was due when in reality it was some other thing that was due.[3] Another example given by Wessels[4] is that "if two things are promised in the alternative by a single debtor, and he, in error, pays both at the same time, he can demand back whichever he pleases because the choice lay with him and he does not exercise it by paying both.[5] If, however, he pays one thing and then later in error pays the other, he can only recover the one last delivered because the payment of the first extinguished the debt".[6] It is not however clear how far the Scottish courts would nowadays refer to Roman authority to dispose of new cases which may arise.

(4) Error of fact

2.30 Sometimes the error of fact requirement is stated in terms of the absence of knowledge, or constructive knowledge, that the debt was not due, and sometimes in terms of the existence of excusable error or ignorance. It might be thought that the differences are purely semantic, and that the requirement is the same whichever

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[1]McIvor v Roy 1970 SLT (Sh Ct) 58.

[2]See eg Wessels, Contract (2nd edn) vol 2, paras 3664 to 3669.

[3]D.12.6.19.3 in which Pomponius states: "I think I owe either Stichus or Pamphilus when I actually owe Stichus. I hand over Pamphilus. I can recover under the head of payments not due (indebitum solutum). I am not deemed to have offered a substituted performance of my debt"; Wessels Contract (2nd edn) vol 2, para 3664.

[4]Ibid para 3665.

[5]Citing C.4.5.10.

[6]Citing Cujacius, Commentary on D., vol 10 and D.12.6.32 and C.4.5.10.

formulation is used. The distinction may be relevant where the pursuer paid under a doubt as to whether the payment was due. It may be easier to characterise a doubt as lack of knowledge rather than as an error. We have not traced Scottish authority on the treatment of doubts.[1] It is thought however that the weight of authority favours excusable error (rather than absence of knowledge) as the primary requirement.[2] The onus of proof of error is on the pursuer. He must aver and prove what the error was.[3]

2.31 Knowledge, or constructive knowledge, that payment not due. Where at the time of payment the payer knows, or ought to know, that the payment was not due, he cannot recover the payment. Sometimes (following English law) it is said the rule against repetition by a person who pays in the knowledge that the payment is not due depends "on the principle that such a payment imports a waiver of all objections, and an admission that the debt is justly due".[4] Sometimes (following Roman law authority) payment in such circumstances is construed as a gift.[5] Since on the authorities, excusable error is the test, knowledge is relevant because it negatives error.

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[1]See however Balfour v Smith and Logan (1877) 4 R 454 where the pursuer's initial doubts were stilled by the defender's false assurances.

[2]See para 2.35 below.

[3]See eg Miller v Campbell 1991 GWD 26-1473 (Extra Div.).

[4]Dalmellington Iron Co Ltd v Glasgow and SW Rly Co (1889) 16 R 523 at p 534 per Lord Rutherfurd Clark; applied Moore's Exors v McDermid (1913) 1 SLT 278; Inverness C C v Macdonald 1949 SLT (Sh Ct) 79. See also Balfour Melville v Duncan (1903) 5 F 1079 at p 1085 per Lord Kinnear: "If ... he did so [pay] in full knowledge of his legal rights and of the facts bearing on his liability I see no ground in law on which he should be entitled to recover", applied McIvor v Roy 1970 SLT (Sh Ct) 58.

[5]Bankton Institute I, 8, 31: "Where one knowingly pays, or delivers what is not due, he is understood to gift it, by the rule of law, [quoting D.50.17.53]; and consequently the same is not to be refunded"; Erskine Institute III, 3, 54; "he who deliberately gives what he knows is not due is presumed to intend a present"; Bell Principles ss 531 and 534.

2.32 It is established that not merely actual knowledge but also constructive knowledge, viz that the payer should have known that the debt is not due, will preclude recovery. In the Dalmellington case, Lord Rutherfurd Clark remarked:

> "It may be sufficient if the knowledge should have been present to [the payer's] mind, on the ground that he cannot be allowed to say that he did not know what he ought to have known. But unless it was present, or should have been present, it would, I think, be unjust to apply the rule...".[1]

This important qualification has been accepted as good law in subsequent cases[2] and is consistent with the requirement that the error must be excusable for repetition to lie.

2.33 Error must be "excusable". As a means of reconciling the antinomies in the Corpus Juris Civilis, the civilians distinguished between ignorantia vincibilis (ie surmountable and hence unreasonable or inexcusable error) and ignorantia invincibilis or excusable error.[3] The requirement of excusable error is not found in the Institutional writers until Bell's Principles[4] where it was probably taken from Wilson and McLellan v Sinclair[5]. In at least two early Scots cases, inexcusable error was argued as a defence[6] but does not seem to have taken root

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[1]Dalmellington Iron Co Ltd v Glasgow and SW Rly Co (1889) 16 R 523 at p 534.

[2]Eg Moore's Exors v McDermid (1913) 1 SLT 278 at p 279; and at p 280 per Lord Ormidale: "If the knowledge of the true position was not present to their minds in fact or should not necessarily have been present, and if the defender had no right to take the payment, the pursuers have a relevant case" (emphasis added); Inverness C C v Macdonald 1949 SLT (Sh Ct) 79 at p 80.

[3]Zimmermann Law of Obligations p 870.

[4](4th edn; 1839) s 534.

[5](1830) 4 W and S 398 at p 409.

[6]Duke of Argyle v Lord Halcraig's Representatives (1723) Mor 2929, defender's argument; Carrick v Carse (1778) Hailes 783 per Lord Justice-Clerk. See Macdonald "Mistaken Payments" [1989] Juridical Review 49 at pp 62,

at that time. A requirement of "excusable" or "avoidable" error was introduced in Scots law largely as a result of the obiter dicta of Lord Chancellor Brougham in Wilson and McLellan v. Sinclair[1]:

> "But, my Lords, there is one circumstance which would be fatal altogether to such an action. If the party who has paid the money is under an unavoidable mistake, if the mistake is no fault of his, then he may have it back again; but, if he has himself to blame - if he himself paid the money, ignorant of the fact, and had the means of knowledge of the fact within his power - and did not use those means, he shall in vain attempt, by means of proceeding at law, to have that repaid to him. That has been decided in our Courts repeatedly. It is a rule founded in the strict principles of ordinary and universal justice, which will never allow a man to take advantage of his own wrong, - or, what is the same thing, of his own gross negligence. The ground of action being ignorance, it must be unavoidable ignorance, -it must not be ignorance through his own fault, of having shut out the light by wilfully closing his eyes. That is the principle which runs through the whole of our law. I have stated this principle because it applies to the Scottish law as well as to the English, and it must apply to the administration of justice under every system of jurisprudence. I do not find it alleged at the bar, that it is not the law; but the fact is attempted to be denied, and denied with no success, in my opinion".

The reference to "our Courts" was a reference to the English courts.

2.34 It appears that the requirement of "excusable" or "avoidable" error, if indeed it existed in English law in 1830, has been rejected and is not now part of English law. Thus in Kelly v Solari,[2] an insurance company were held entitled to recover money erroneously thought to be due under a life insurance policy, and forgetting that the policy had lapsed through non-payment of premiums. Parke B said that recovery was possible "however careless the

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

[2](1841) 9 M & W 54, approved Jones (RE) Ltd v Waring and Gillow Ltd [1926] AC 670 (HL).

party paying may have been, in omitting to use due diligence to inquire into the fact".[1] The rule in English law now is that "a person paying money under a mistake of fact is not prevented from recovering it merely because he has been negligent in failing to discover the true facts"[2].

2.35 There is, however, a long line of dicta and decisions establishing beyond doubt that in Scots law, the error must be excusable for repetition or restitution to lie. For example in Youle v. Cochrane Lord Ardmillan said[3]:

> "an error in fact arising from mere ignorance is not enough to sustain a plea of condictio indebiti, - the ignorance must be excusable... that is, whether [the payer] had within his reach the means of knowing that of which he was ignorant".

However mere possession of the means of knowledge does not necessarily render the error inexcusable.[4] In Balfour v Smith and Logan Lord President Inglis put the requirement slightly differently[5]:

> "It is quite true that a party, having made a payment in error, must, before he can recover, shew that the error was not induced by his own fault, but was due to adverse circumstances, or to the proceedings of the other party".

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[1]Ibid at p 59.

[2]Chitty on Contracts (26th edn) para 2048, citing Weld-Blundell v Synott [1940] 2 KB 107; Turvey v Dentons (1923) Ltd [1953] 1 QB 218, 224; Chase Manhattan Bank NA v Israel-British Bank (London) Ltd [1981] Ch 105.

[3](1868) 6 M 427 at p 433.

[4]See the Dalmellington and Duncan Galloway cases described at para 2.38 below.

[5](1877) 4 R 454 at pp 458, 459, applied in Duncan Galloway & Co Ltd v Duncan, Falconer & Co 1913 SC 265 at p 272.

In Agnew v Ferguson, Lord Moncreiff said that the pursuer could only recover payment[1]:

> "on the conditions under which condictio indebiti is recognised in our law; that is, he must shew that the payment was made according to the usual course of dealing, or under excusable error or misunderstanding".

In Glasgow Corporation v Lord Advocate[2], Lord President Clyde, having affirmed the principle that the condictio indebiti is an equitable doctrine, observed:

> "Moreover, if equity lies at the root of the doctrine of the condictio, the original mistake in paying must be excusable,...".[3]

2.36 In the Bank of New York v. North British Steel Group[4] the pursuer bank alleged that they received instructions from a company A to transfer a sum of money to a particular bank to account of a company B but in error they remitted the money to that bank to account of the defenders. The defenders alleged that company A owed them a lesser liquid sum and repaid the difference. The pursuers raised a condictio indebiti action to recover the sum retained by the defenders on the ground that the payment was due to an error as to the correct identity of the payee. The pursuers did not explain why they made a payment in error nor aver facts from which it could be concluded that any error was excusable. The defenders alleged that payment to them by the pursuers was a normal source of payments to them by company A and did not admit the instructions received by the pursuer from A nor the fact that the payment was in error. In these circumstances, the Lord Ordinary refused to grant summary decree holding that the pursuer must show that the error was excusable as a matter of relevancy and that it may

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[1](1903) 5 F 879 at p 885, applied in Glasgow Corporation v Lord Advocate (see next footnote) and Inverness C C v Macdonald 1949 SLT (Sh Ct) 79 at p 80.

[2]1959 S C 203 at p 233.

[3]Ibid at p 233 applied in Taylor v Wilson's Trs 1975 SC 146 at p 156 per Lord Justice-Clerk Wheatley and at p 158 per Lord Cameron.

[4]1992 SLT 613 (OH).

well be that the court would require to hear evidence before it could decide whether the error was excusable.

2.37 Must the error be "basic"? In McIvor v. Roy[1], the sheriff said that "In order to found the condictio indebiti, the error relied on must be a basic one", and cited in support the following dictum of Lord Wright in an appeal to the Privy Council from Australia[2]:

> "It is essential that the mistake relied on should be of such a nature that it can be properly described as a mistake in respect of the underlying assumption of the contract or transaction or as being fundamental or basic".

This test has, however, been criticised by standard English textbooks,[3] as too narrow and as importing into restitution the test for rescinding or setting aside a contract for mistake. Instead it is argued that "in principle, any mistake of fact which causes the payer to pay the money should be sufficient to permit recovery".[4] The test that the error must be basic has not been received in Scots law. The sheriff's remarks in McIvor v Roy were obiter because he held that there was in fact no error at all, but a misprediction, on the part of the pursuer.

2.38 Examples of excusable error. In the Dalmellington Iron Co[5] case, a railway company contracted with an iron company not to carry traffic for any other party at a lower rate than charged to the iron company and to place the iron company on the same footing as the most favoured traders on the railway line. The pursuers were held entitled to repetition of excess charges although their manager had information which would have enabled him at the time to discover his mistake, because this information was not present to his mind at the time of payment, and

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[1]1970 SLT (Sh Ct) 58.

[2]Norwich Union Fire Insurance Society v William H Price Ltd [1934] AC 455 at p 463.

[3]Goff and Jones Restitution pp 88, 89; Birks Introduction p 156 et seq.

[4]Goff and Jones, Restitution p 89.

[5]Dalmellington Iron Co v Glasgow and SW Rly Co (1889) 16 R 523.

was not of such a character that it ought to have been present. In Duncan, Galloway, & Co Ltd v. Duncan, Falconer & Co[1], the sellers of property made non-fraudulent representations to the purchasers inducing them to believe erroneously that certain buildings were included in a sale of the tenancy of a quarry when they were not. Their error was held excusable. It was observed that if the pursuers had taken legal advice and studied the law, they might have discovered their error but that did not suffice. They might well have thought that there was some collateral agreement in which the landlord recognised the tenant's rights to the buildings. Other cases are noted below, especially cases in which the pursuer's error was wholly or partly induced by the representations or other conduct of the recipient of the payment.[2]

2.39 Examples of inexcusable error. In Youle v Cochrane[3], a consignee of a ship's cargo paid the shipmaster (representing the shipowners) the full freight, on delivery at the port of discharge, in ignorance of the fact that when the ship began its voyage the shipper had, under a separate agreement with the charterer, already paid one-third of the freight to the charterer. The shipper brought an action of repetition against the ship-owners founding on the consignee's error in over-payment. The main ground of decision was that the shipowners got only their due, but a subsidiary ground was that the consignee's error was inexcusable. The consignee should have discovered the prior payment of one-third of the freight either from the charterer's receipt for the one-third endorsed on the bill of lading or from enquiries as to the amount of freight payable which would have identified the separate agreement with its stipulation as to payment of one-third to the charterer. So the "consignee, if really in ignorance, was in a position to have ascertained the facts with a very little trouble".[4]

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[1]1913 SC 265.

[2]See para 2.53.

[3](1868) 6 M 427.

[4]Ibid at p 432 per Lord President Inglis. See also at p 433 per Lord Ardmillan: "We are accordingly left to gather from the circumstances of the case, whether the ignorance of this consignee was excusable or not, - that is, whether he had within his reach the means of knowing that of which he was ignorant. Looking to the bill of

The case is unusual in that the pursuer founded, not on his own error or ignorance, but on that of the consignee. In Taylor v Wilson's Trs[1] the liquidator of a company, when calculating the amount of money available for distribution, made provision for liability to income tax on deposit receipt interest received by the company after it ceased trading whereas he should have provided for liability to corporation tax. He further failed to provide for short-fall tax payable after the company ceased trading. In these circumstances he miscalculated the sums due to the ordinary shareholders and over-paid them. The Second Division held inter alia that the liquidator's successor could not recover the payments because the mistake was an error of law, and that in any event, if the error fell to be regarded as one of fact, it was inexcusable.[2] He had not for example taken the "elementary precaution" of obtaining from the Inland Revenue a clearance certificate before making the distribution. Sometimes the courts refer to "negligence" on the part of the payer. In Bell v Thomson[3], rates assessments were for four years levied by and paid to burgh police commissioners in respect of property erroneously believed to be within the burgh. The payer was refused decree for repetition of the undue rates which he had paid. It was held that in returning this property as a subject in the burgh he was guilty of negligence, and this made any error on the part of the recipient excusable.[4]

2.40 The error need not be shared by the payee. There is no requirement that the payee's error must also be shared by the payee.[5] The restriction in Roman law of the condictio indebiti to unilateral error stemmed from the fact that the condictio [ex causa] furtiva was available

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lading, with the receipt on the margin, I think there can be very little doubt on that point".

[1]1975 SC 146.

[2]1975 SC at p 156 per Lord Justice-Clerk Wheatley; at p 159, 160 per Lord Cameron.

[3](1867) 6 M 64.

[4]Ibid at p 67 per Lord Justice-Clerk Patton.

[5]Cf Dawson v Stirton (1863) 2 M 196 at p 202 (pursuer's argument) referring to the condictio furtiva D.13.1.

in Roman law to deal with cases where the payee knew that the payment was not due.[1] The condictio furtiva has not been received in Scots law.[2] Generally speaking, where the payee knew that the payment was not due, there is an even stronger case for repetition than where he does not have that knowledge.

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[1]See Thomas Textbook of Roman Law (1976) p 327 who states that the recipient must accept in good faith, and (at fn.64) that a mala fide recipient would have been guilty of furtum and in terms of D.13.1.18 liable under the condictio furtiva. See also Zimmermann Law of Obligations pp 839 to 841.

[2]Cf Bankton Institute I, 8, 33 who states that a person who knowingly receives what is not due, from a person who pays in error, is not liable for theft in contrast to the Roman law position.

C. Defences

Preliminary: the classification of defences

2.41 The main defence to the condictio indebiti is that it would be inequitable for the court to grant decree of repetition or restitution in the particular circumstances of the case. This defence requires the court, in the exercise of its discretion, to "balance" or "adjust" the equities of the case having regard to all relevant circumstances. We consider this defence first.[1] Within this balancing test, however, some factors tending to negate liability are of such importance as to require separate consideration, eg the fact that the recipient of a payment has changed his position in reliance on the payment,[2] or the defence that rates or taxes are not recoverable if there has been a change in the composition of the general body of rates or tax payers.[3]

2.42 Then there are separate and independent absolute defences properly so called, such as negative prescription. If facts constituting a defence of this kind are proved, the pursuer necessarily fails. If, however, a factor tending to negate liability is not itself an independent, absolute defence but simply a factor within the general defence that decree of repetition would be inequitable, then if that factor is proved, the pursuer does not necessarily fail since that factor may be outweighed by other factors favouring repetition or restitution. It is not always easy to distinguish between independent defences and discretionary "factors" tending to negate liability.

2.43 The following pleas are either independent defences or discretionary factors tending to negate liability:

(1) balance of equities precluding recovery;

(2) personal bar;

(3) change of position;

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[1]See paras 2.44 to 2.60.

[2]See paras 2.63 to 2.65.

[3]See para 2.66.

(4) change in composition of rates or tax payers;

(5) bona fide consumption;

(6) restoration by pursuer of benefits received from defender;

(7) payment due under "natural" obligation;

(8) compromise;

(9) pursuer's waiver of objections to payment;

(10) illegality or unenforceability;

(11) reference to oath;

(12) decree or document requiring reduction;

(13) negative prescription of obligation to pay;

(14) set off (compensation).

(1) Balance of equities precluding recovery

2.44 Relevance of equity to the condictio indebiti. There is a long line of authority, both Institutional[1] and judicial[2], affirming the principle that the remedy of the

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[1]See eg Stair Institutions I, 7, 9 "natural obligation"; Bankton Institute I, 8, 1 "the obligation to restore other men's goods...is most natural, and one of the principal foundations of justice"; Erskine Institute III, 3, 54: "the action being grounded in equity, the payer ought in equity to have redress from whatever mistake the indebitum was paid"; Baron Hume Lectures vol III, p 172: "a pure equitable remedy": Bell Principles s 531; "Whatever has been delivered or paid on an erroneous conception of duty or obligation may be recovered on the ground of equity".

[2]See eg the dicta cited at para 2.1.90 below: see also eg Dickson v Halbert (1854) 16 D 586 at p 591 per Lord Robertson: "The whole doctrine on this subject rested on equity, and nothing else"; Bell v Thomson (1867) 6 M 64 at p 67 per Lord Justice-Clerk Patton: "rested upon considerations of equity. It is a remedy ex aequo et bono introductum"; North British Insurance Co v Stewart (1871) 9 M 534 at p 537 per Lord Ormidale: "The

condictio indebiti is equitable in its origin and character. It will be seen, however, that the concept of equity is relevant to the condictio indebiti in at least three different ways which it is necessary to distinguish.

2.45 Equity or natural law as the source of obediential obligations. First, there are many authorities ascribing the source of the doctrine of the condictio indebiti to equity or natural law.[1] In the same way, the wider obligations of restitution and repetition (which comprehend the condictio indebiti) and recompense were characterised by Stair and later authorities as obediential or natural obligations.[2] Stripped of the pre-Enlightenment ideas of Natural Law encrusting the concept of an obediential or natural obligation,[3] the most important legal effect of this use of the notion of equity is to provide a theoretical foundation for rejecting the doctrine of implied contract as the basis of the so-called 'quasi-contractual' obligations of restitution, repetition and recompense.[4] Instead, these obligations may be recognised as having for their object the redress of unjustified enrichment, a notion firmly

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insurance company's claim is rested solely in equity"; Pattisson v McVicar (1886) 13 R 550 at p 560; Henderson & Co Ltd v Turnbull & Co 1909 SC 510 at p 517 per Lord Low: "a purely equitable remedy"; Glasgow Corporation v Lord Advocate 1959 SC 203 at pp 232, 233 per Lord President Clyde; Unigate Food Ltd v Scottish Milk Marketing Board 1972 SLT 137 at p 139 per Lord Stott: "an equitable remedy depending on a wide variety of considerations".

[1]Stair Institutions I, 7, 9: "the same natural obligation which mutuum or loan hath by voluntary engagement".

[2]Stair Institutions I,3; I,7; I,8; Bankton Institute I,4,34; I,8 and I,9; Erskine Institute III,1,2; III,1,10 and 11; cf III,3.51.

[3]See A H Campbell The Structure of Stair's Institutions (1954); D N MacCormick "Stair as Analytical Jurist" in D M Walker (ed) Stair Tercentenary Studies (1981) (Stair Society, vol 33) pp 187 ff.

[4]See eg P Birks and G McLeod "The Implied Contract Theory of Quasi-Contract: Civilian Opinion Current in the Century before Blackstone" (1986) 6 OJLS 46 at pp 56-58.

rooted in equity both historically and in modern theory and doctrine.[1]

2.46 Equity as the source of specific rules. Second, the sources appeal sometimes to equity as the justification for specific rules imposing legal requirements of the relevancy or competence of the condictio indebiti. So in Glasgow Corporation v Lord Advocate[2], Lord President Clyde invoked the concept of equity to justify the specific rule that the condictio indebiti does not lie in cases of error in law in interpreting a public general statute[3], and also the rule that that condictio is not competent unless the original error of the payer is excusable.[4] Again in Bell v Thomson[5], Lord Justice-Clerk Patton affirmed that the condictio indebiti is "rested upon considerations of equity" and deduced from that fact the specific rule that "a debt paid, which was not due in law, cannot be recovered if made where there were moral or natural considerations for the payment".[6] In this second role, equity is not itself directly applied by the judges to determine particular cases, but rather is invoked as, in the relevant sense, a 'legislative' principle underlying specific rules. Once such a rule is accepted in the law, it is then applied whatever the other equitable considerations may be.

2.47 Equity as a defence. In the foregoing usages, equity is invoked as the source or justification of legal rules on obediental obligations, and specific rules of the common law on the condictio indebiti. In these usages, equity is not directly applicable; it is merely an underlying justification for doctrines or rules. In the condictio indebiti, however, the concept of equity also forms a defence which is directly applicable to the factual circumstances of a given case.

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[1]See paras 2.101 ff.

[2]1959 S C 203.

[3]Ibid at pp 232, 233.

[4]Ibid at p 233.

[5](1867) 6 M 64.

[6]Ibid at p 67. See also Bell Principles s 532: "As restitution is grounded on equity, it has no place if the transference or payment have proceeded on a natural obligation; for that is binding in equity, as a bar,...".

2.48 The judicial test of balancing the equities. This defence involves a weighing or balancing test in which the Court, after having regard to the relevant circumstances averred by the parties, must refuse decree of repetition if it would be inequitable to grant it. Thus in Bell v Thomson, Lord Cowan remarked[1]:

> "The remedy afforded by the condictio indebiti is essentially equitable in its origin and character, and personal as regards the party against whom or whose representative it is directed. Such an action may be excluded when considerations exist on the other side outweighing the equity on which the claim is made".

In Henderson and Co Ltd v. Turnbull & Co, Lord Ardwall observed[2]:

> "Now, the condictio indebiti is an equitable remedy, and will not be granted by the Court unless it clearly appears that it would be inequitable for the party to whom a payment has been made to retain the sums alleged to have been paid under error".

In Balfour-Melville v Duncan, Lord Kinnear said[3]:

> "To recover overpayments under [a condictio indebiti] it is necessary that the pursuer should show that they were made in error or ignorance, and in such circumstances as will entitle him to be relieved against his own mistake".

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[1](1867) 6 M 64 at p 69, applied Peter Walker & Sons (Edinburgh) Ltd v Leith Glazing Co Ltd 1980 SLT (Sh Ct) 104 at p 105.

[2]1909 S C 510 at p 521.

[3](1903) 41 S L Rep 149 at p 152.

In Credit Lyonnais v George Stevenson & Co Ltd, Lord Kyllachy stated[1]:

> "I do not, however, myself consider that the present is anything else than an ordinary condictio indebiti, of which the rules are well established in our law. The money in question was paid in error under a mistake of fact. It was therefore reclaimable, unless (the pursuers' remedy being equitable) there was an equitable defence to repetition".

In Haggarty v Scottish TGWU, Lord Sorn, giving the leading opinion, said[2]:

> "The condictio indebiti is an equitable remedy and the position with regard to it is, I consider, correctly stated in Gloag on Contract (2nd edn) at p 61: 'Repayment of money paid by mistake has always been regarded as an equitable claim, not to be sustained unless it appears that retention of the money would be inequitable'".

In the same case, Lord Sorn referred to "an adjustment of the equities".[3] The principle that the condictio indebiti is an equitable remedy has apparently been taken so far as to displace or exclude the theory that the condictio is designed to redress unjustified enrichment, which on one view is the very basis of the action. Thus in Royal Bank of Scotland plc v Watt, Lord Justice-Clerk Ross remarked[4]:

> "The present case is one where money was paid in error, and in such a situation the equitable remedy of repetition is available. The emphasis is not upon the extent to which the party receiving the payment

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[1](1901) 9 SLT 93 (OH) at p 95, approved by the Second Division in Royal Bank of Scotland plc v Watt 1991 SLT 138 at pp 143, 146 and 149. See also National Bank of Scotland v Lord Advocate (1892) 30 S L Rep 579 (OH) at p 582 per Lord Wellwood: "Condictio indebiti is an equitable plea, and I think that in every case the whole circumstances must be considered".

[2]1955 SC 109 at p 114; followed in Royal Bank of Scotland plc v Watt 1991 SLT 138 at pp 143 and 146.

[3]Idem.

[4]1991 SLT 138 at p 143.

has been enriched, but upon whether that person has any good and equitable reason to refrain from repaying the money to the person who paid it under a mistake".

In the same case, Lord Mayfield remarked[1]:

"In my opinion when all the equities are considered the balance favours the pursuers".

We revert to this aspect below.[2]

2.49 Factors in the balancing test. There have been few authoritative attempts to state the factors to be weighed in balancing the equities. One such attempt however was made by Lord Stott (Ordinary) in Unigate Foods Ltd v Scottish Milk Marketing Board[3], where he remarked (obiter):

"Where money has been paid in error, the right to repayment depends on the nature of the error. Broadly speaking, all money paid under a mistake in fact can be recovered. It is equally well settled that, when a mistake has been made in construing a public general statute, payments made in consequence of that mistake are not recoverable.[4] Between those extremes the Scottish courts have treated the condictio indebiti as an equitable remedy depending on a wide variety of considerations: whether the error was in construing a private contract affecting no one but the parties[5]; whether the party called on to repay was the same that had benefited from the payment[6]; whether the recipient was a mere

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[1]1991 SLT 138 at p 147.

[2]See para 2.93.

[3] 1975 SC (HL) 75 at p 79.

[4]Citing Glasgow Corporation v Lord Advocate 1959 SC 203.

[5]Citing British Hydrocarbon Chemicals and British Transport Commission Petrs 1961 SLT 280.

[6]Citing Bell v Thomson (1867) 6 M 64.

intermediary and had paid the money away[1]; what was the status of the recipient and the knowledge to be imputed to him[2]; which of the parties was responsible for the mistake[3] whether the error had been induced by the recipient's conduct[4]".

The factors referred to will vary from case to case and being questions of fact, cannot be defined beforehand by legal rules.

2.50 Excusable nature of error and balancing the equities. From the foregoing authorities, it seems that in the modern law, increased emphasis is laid upon the equitable character of the condictio indebiti and it is for consideration whether the question whether the error was excusable is subsumed within the broader question of whether it would be equitable for the recipient to retain the money paid. Sometimes the two questions are dealt with together. Thus for example in Baird's Trs v. Baird & Co[5], (where the pursuer paid interest on the balance of the price of machinery and plant instead of interest on unpaid instalments which alone was due under the contract), Lord Ormidale said:

> "The ignorance or mistake, is indeed, all the more excusable on the part of the defenders in the present case, and their right to be restored against it is all the more equitable, in respect that it was in some degree induced by the conduct of the pursuers in sending them a statement of debt made up on what must now be held, so far as the interest in question is concerned, an erroneous footing".[6]

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[1]Citing Gloag on Contract, 2nd edition, p 61, Continental Caoutchouc Co v Kleinwort, (1904) 9 Com Cas 240.

[2]Citing Dalmellington Iron Co v Glasgow and South Western Railway Co (1889) 16 R 523.

[3]Citing Hunter's Trustees v Hunter (1894) 21 R 949.

[4]Citing Baird's Trustees v Baird & Co (1877) 4 R 1005.

[5](1877) 4 R 1005.

[6]Ibid at p 1012.

On this view, the more inexcusable is the error of the payer, the more equitable it is that he should have repetition or restitution.

2.51 However the two tests do not exactly correspond. It is possible that payments may be made under an excusable error and nevertheless recovery may be denied. In Hunter's Trs v. Hunter[1], for example, trustees made overpayments to a beneficiary on an excusable error of construction of a trust deed "the view they took being one for which much may be forcibly urged".[2] It was held however that the trustees could not recover the overpayments, either because the beneficiary was entitled to assume that she was paid only what she was entitled to and should not be called upon to repay the amount[3] or on the basis of bona fide consumption.[4] In short, it seems that if the error was not excusable the pursuer will fail,[5] but if the error was excusable he will not necessarily succeed for repetition or restitution may for other reasons be inequitable.

2.52 It does not seem that the courts have developed the balancing test to the point where they simply evaluate the conduct of the payer and recipient, and grant decree in favour of the party who is less to blame for the error. It has been suggested that Scots law is close to this "relative fault" approach, but has not adopted it in its pure form.[6] The pursuer must first establish excusable error, and if he does so a prima facie case for repetition

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[1](1894) 21 R 949.

[2]Ibid at p 953 per Lord Justice-Clerk Macdonald; at p 955 per Lord Trayner: "I cannot say that the trustees were in any way to blame...".

[3]Ibid at p 953 per Lord Justice-Clerk Macdonald.

[4]Ibid at p 953 per Lord Young.

[5]See eg Youle v Cochrane (1868) 6 M 427; Taylor v Wilson's Trs 1975 SC 146.

[6]MacDonald, "Mistaken Payments" [1989] Juridical Review 49 at p 64: "There is apparently no reported case where negligence in payment was by itself sufficient to bar restitution. To that extent Scots law does not have a pure 'relative fault' approach; it starts from the standpoint that restitution is granted unless proved unjust".

or restitution is made out.[1] It is only thereafter that the court adjusts or balances the equities to ascertain whether repetition would be inequitable. This appears from the dictum of Lord Kyllachy in the Credit Lyonnais[2] case quoted above[3] recently approved by the Second Division.[4] After determining that the error was excusable, Lord Kyllachy held that the money was therefore reclaimable unless there was an "equitable defence" to repetition[5].

2.53 Responsibility for error; payee's contribution to payer's error. It is a factor favouring repetition that the payer's error was wholly or partly induced by the payee's representations or other conduct. In the Monkland Canal Co case[6], Lord Brougham L C thought that the payer should recover where he had 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 a good conscience for him to retain it". The reference to "good conscience" seems to derive from English Chancery practice in Equity.

2.54 Fraud however is not necessary. In the Duncan, Galloway case[7], it was a factor strongly favouring repetition of an over-payment of the price of the tenancy of a quarry that the purchasers' erroneous belief that

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[1]See eg Taylor v Wilson's Trs 1975 SC 146 at p 157 per Lord Cameron: "Where an over-payment has been made through excusable error in fact the condictio indebiti is as a general rule applicable and money so paid is recoverable". (emphasis added).

[2]Credit Lyonnais v George Stevenson & Co Ltd (1901) 9 SLT 93 (OH) at p 95.

[3]See para 2.48.

[4]Royal Bank of Scotland plc v Watt 1991 SLT 138, at pp 143, 146 and 149.

[5](1901) 9 SLT 93 at p 95.

[6]Dixon v Monkland Canal Co (1831) 5 W & S 445 at p 447; applied Balfour v Smith and Logan (1877) 4 R 454 at p 461.

[7]Duncan, Galloway & Co Ltd v Duncan Falconer & Co 1913 S C 265.

certain buildings belonged to the sellers had been induced by the seller's non-fraudulent misrepresentations. In another case[1], where sub-contractors submitted to the principal contractor an account for work done which included extra work not authorised by the sub-contract, but the terms of the account implied that the extra work was so authorised, it was held that the account was to some extent misleading and had contributed to the principal contractor's mistaken payment.

2.55 Where the payee shows that he is relying on the payer's assurances that the sum is due, a false assurance will clearly favour repetition. In Balfour v. Smith and Logan[2], at the time of payment, the payer was in doubt whether the sum claimed was due, did not have his account books accessible for checking, was expressly assured by the recipient that the sum was indeed due, and paid on that footing. It was held that he was entitled to recover.

2.56 But even the submission of a wrong account will by itself often make the error excusable. In the same case, Lord Shand observed:

> "If a tradesman, by sending in his account after payment, and thus by plain implication representing it to be still due, should obtain payment twice, it is surely too plain for argument that he could not be heard to maintain that he was entitled to keep the money because if his customer had examined his vouchers he would have found the first receipt, and so avoided the mistake".[3]

2.57 Conversely, where the undue payment is "volunteered" without a prior demand by the putative creditor, there is a stronger case against repetition. In National Bank of Scotland v. Lord Advocate[4], which was a condictio indebiti for repayment of the stamp duty on a statutory licence which the pursuer bank erroneously thought was required in respect of one of its branches, the Lord Ordinary

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[1]Peter Walker & Sons (Edinburgh) Ltd v Leith Glazing Co Ltd 1980 SLT (Sh Ct) 104.

[2]Balfour v Smith and Logan (1877) 4 R 454.

[3]Ibid at pp 461, 462.

[4](1892) 30 SL Rep 579.

distinguished the Balfour[1] and Dalmellington[2] cases on the ground that in these cases[3]:

> "the payment was not volunteered by the supposed debtor, but was made in response to a demand by the supposed creditor, who thus innocently or otherwise helped to induce the supposed debtor to waive inquiry. The present case, however, is less favourable to the party who paid in error. The bank was not called upon to take out a licence for the Springburn branch. They had to make up their mind year by year what licences they required, and to apply to the Board of Inland Revenue for them. The Board were not put upon their inquiry in the matter, and granted the licence asked as a matter of course on payment of the duty. It may thus well be held that the bank, who admittedly had the means of knowledge, and could at once have discovered the mistake if those officials who took out the licences had made any inquiry, waived all inquiry".

2.58 The court where necessary will examine business correspondence to ascertain who was mainly to blame for an erroneous payment as in the Credit Lyonnais case[4] where after such an examination, the recipient company were held primarily to blame. They were "at least culpably negligent" in failing to read an important letter from the pursuer; while not fraudulent they had good reason to know that the money was not theirs; by writing to the payer requesting remittance they in effect represented that the money was theirs; in short their error and not the pursuer's was the true proximate cause of the payment.

2.59 Other factors. It may be a factor favouring refusal of repetition that the payer has delayed unduly in claiming repayment[5]. Where the payer got advantages from

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[1]Balfour v Smith and Logan (1877) 4 R 454.

[2]Dalmellington Iron Co v Glasgow and SW Ry Co (1889) 16 R 523.

[3](1892) 30 SL Rep 579 at pp 582, 583 (obiter).

[4]Credit Lyonnais v George Stevenson & Co Ltd (1901) 9 SLT 93 (OH).

[5]Bell v Thomson (1867) 6 M 64 at p 67 per Lord Justice-Clerk Patton: "Had the objection been taken when it should have been, the rate might have been corrected by

the recipient in return for his money, as where he paid trade union contributions and enjoyed the advantages of union membership though his membership was ultra vires the union's rules, that was held to be a possible relevant factor in adjusting the equities as were the costs incurred by the union on his account.[1] It is probable that repetition is not barred where the error related to past instalments of a continuing transaction not yet completed in which the sums over-paid could be set off against future instalments.[2]

2.60 Need for proof. In many cases, the courts are reluctant to determine whether repetition or restitution would be equitable (or retention of the money inequitable) without proof, or proof before answer. In Haggarty v. Scottish TGWU[3], where the defender exacted and the pursuer paid contributions to a trade union which were ultra vires, the defenders alleged that the pursuer had enjoyed all the advantages of a member. The Court held that the sheriff should not have repelled the defences without a proof and should have heard evidence in order to put himself in a position to judge whether retention of the money by the defenders would be inequitable.[4] Similarly a proof may often be necessary to determine whether the payer's error was excusable.[5]

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levying the amount from the parties truly liable"; Oswald v Kirkcaldy Magistrates 1919 SC 147 at p 152 per Lord President Strathclyde.

[1]Haggarty v Scottish TGWU 1955 SC 109 at p 114 per Lord Sorn.

[2]Cf British Hydro-Carbon Chemicals Ltd and BTC 1961 SLT 280; Baird's Trs v Baird & Co (1877) 4 R 1005.

[3]1955 SC 109.

[4]Idem.

[5]Inverness County Council v Macdonald 1949 SLT (Sh Ct) 79 at p 80 per Sheriff substitute Allan G Walker: "I cannot say, without enquiry, whether or not the present payments were made under excusable error or misunderstanding"; Bank of New York v North British Steel Group Ltd 1992 SLT 613 (OH).

(2) Personal bar

2.61 There is no doubt that a plea of personal bar may be a defence to a condictio indebiti.[1] In Johnston v Johnston[2] payments were made by a trust, of which the pursuer was a trustee, in error to the pursuer's mother. The pursuer had a right to the money but his action for repetition of certain payments was held to be excluded by personal bar since in his capacity as trustee he had concurred in the making of those payments. There do not seem, however, to be many reported Scots cases of repetition or restitution in which the plea of personal bar has been upheld.[3] The main test applicable is the classic definition in Gatty v Maclaine[4]: "Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted on such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed". Mere lapse of time before demanding repayment does not suffice.[5] In a repetition case, it has been held "essential to a successful plea of personal bar... that the representation made by the one party, whether the representation was by speaking or acting, or by failing to speak or act, should have been acted upon by the other

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[1]See Dixon v Monkland Canal Co (1831) 5 W and S 445 (acquiescence).

[2](1875) 2 R 986.

[3]See Porteous v Cordiners of Glasgow (1830) 8 S 908 (pursuer not barred by personal exception from demanding repetition of a sum of money paid as entry money to a Corporation, by having sanctioned the exaction of the same sum from others, while in a state of ignorance); Bremner v Taylor (1866) 3 SL Rep 24 (plea of mora held not applicable in the circumstances to exclude a claim for repetition); Renwick's Exix v Muir (1886) 2 Sh Ct Reps 380 (plea of personal bar by acquiescence rejected in action for repetition); Allied (Times) Theatres Ltd v Anderson 1958 SLT (Sh Ct) 29 (same).

[4]1921 SC (HL) 1 at p 7 per Lord Birkenhead L C; applied Allied Times (Theatres) Ltd v Anderson 1958 SLT (Sh Ct) 29.

[5]Cf Fowler v Mackenzie (1874) 11 S L Rep 485 (HL) at p 486 per Lord Selborne.

party, or that the other party's position should have been altered in consequence of it, to his prejudice".[1]

2.62 To that extent personal bar resembles the "equitable defence" of change of position[2] in repetition or restitution actions, but in personal bar there must be a "representation" by words or conduct whereas in the "equitable defence" of change of position, there is no formal requirement of such a representation. Furthermore, personal bar may possibly have the effect that the money paid is wholly irrecoverable whereas, if "change of position" is established, part of the money paid may be recoverable ie to the extent that it has not been "consumed" in extra expenditure incurred in reliance on the payment.

(3) Change of position

2.63 There are several principles or doctrines designed to relieve a recipient of money or property from the obligation of repetition or restitution in circumstances where he has so altered his position in the belief that he is the owner as to make implement of the obligation inequitable. These consist of or include (1) personal bar;[3] (2) the defence of bona fide perception and consumption whose scope is problematic;[4] and (3) the rule under which bona fide possessors of property who dispose of it in good faith are liable only quantum lucratus.[5]

2.64 The same circumstance however may lead the court to refuse decree on the ground that it would be inequitable to ordain restitution or repetition. There are older cases in which a debtor, who had already paid a debt to the original creditor, paid the same debt again in error to an assignee and failed in his action of repetition against

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[1] Allied (Times) Theatres Ltd v Anderson 1958 SLT (Sh Ct) 29 at p 30 per Sheriff substitute Allan G Walker.

[2] See para 2.64.

[3] See para 2.61 above.

[4] See paras 2.67 and 2.144 ff below.

[5] See para 2.139 below.

the assignee where the cedent had become bankrupt.[1] The explanation given by Kames is that the assignee's position had changed because the cedent's bankruptcy had made the assignee's right of recourse against the cedent worthless.[2] Bell gives this approach his own Institutional authority. After rejecting the suum recepit defence as he understood it to be in Roman law, Bell states:

> "though perhaps in equity - where, in consequence of such negligent proceeding by him who pays, the creditor has been led into some expenditure which may bear hard on him if obliged to refund; or where, in consideration of the payment, he has foregone some advantage, or given up a security, or liberated his debtor - he ought to be entitled to retain what he has got".[3]

The same approach was approved obiter in Wallet v Ramsay,[4] namely that if the recipient assignee had, on the faith of the payment by the debtor, discharged the cedent (who had already received the debt), repetition might not have been due. In Bell v Thomson[5] the fact that the recipient had immediately disbursed the rates unduly received was a relevant factor, though the primary ground was that the ratepayers at the date of the action differed from those benefiting from the over-paid rates and so were not enriched.

2.65 The main modern authority on a general "equitable defence" of change of position is Credit Lyonnais v George Stevenson and Co Ltd[6] (which involved a mistaken payment under error of identity) in which Lord Kyllachy remarked

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[1] Duke of Argyle v Lord Halcraig's Representatives (1723) Mor 2929; Ker v Rutherford (1684) Mor 2928. See paras 2.183 to 2.185 below.

[2] Principles of Equity. (5th edn; 1825) pp 124, 125; also pp 125, 126, explaining Earl of Mar v Earl of Callander (1681) Mor 2927 on the same ground.

[3] Bell Principles s 536. Bell here misunderstands the import of the suum recepit defence; see paras 2.173 ff.

[4] (1904) 12 SLT 111, see paras 2.181 and 2.190 below.

[5] (1867) 6 M 64.

[6] (1901) 9 SLT 93.

that the money being granted under (excusable) error:

> "was therefore reclaimable, unless (the pursuers' remedy being equitable) there was an equitable defence to repetition. In my opinion the defenders, in order to establish such a defence, would require to show (1) that they had reasonable grounds for believing that the money was theirs; and (2) that having that reasonable belief, they acted upon it so as to alter their position in such manner as to make repetition unjust".[1]

This approach was approved by the Second Division in Watt v Royal Bank of Scotland plc,[2] in which however the defence of change of position was not upheld. The defender's non-fraudulent but very foolish behaviour (in facilitating a fraud by cashing a forged cheque and handing the proceeds over to a stranger who then disappeared) was held to be outweighed by the equity of allowing repetition in favour of the bank which had credited the sum to his account. It has been held in the sheriff court that where a sum paid in error was spent in the normal course on the payment of household bills, the defence of "change of position" did not arise.[3]

(4) Change in composition of rates or tax payers

2.66 In two cases last century it was held that where undue rates or taxes were paid in error and before a condictio indebiti was raised, there has been a change in the composition of the rates or tax payers, the payment is irrecoverable.[4] The rule has not been applied outside the context of public authority defenders[5].

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[1]Ibid at p 95. See also Bank of Scotland v Grimm-Foxen [1992] GWD 37-2171.

[2]1991 SLT 138. See para 2.95 below.

[3]Bank of Scotland v Grimm-Foxen [1992] GWD 37-2171.

[4]Bell v Thomson (1867) 6 M 64; National Bank of Scotland v Lord Advocate (1892) 30 S L Rep 579 (OH) at p 583 (obiter).

[5]Purvis Industries Ltd v J & W Henderson (1959) 75 Sh Ct Reps 143.

(5) Bona fide consumption

2.67 We discuss the defence of bona fide consumption at paragraphs 2.145 ff below. Suffice it to note here that the plea of bona fide consumption may possibly be a defence to an action for repetition of a principal sum paid under error of fact, and not merely for payment of interest on that sum.

(6) Restoration by pursuer of benefits received from defender

2.68 Restitutio in integrum is not a prerequisite of recovery under the condictio indebiti, eg where a payment is made under a void contract.[1] The doctrine is confined to voidable contracts. Nevertheless, the court, in the exercise of its equitable discretion to refuse repetition, may require the payer-pursuer to restore benefits received from the defender-payee, as a condition of obtaining decree of repetition. So an insurance company paid the proceeds of a life assurance policy on the erroneous assumption that the insured was dead.[2] On discovering that the insured was alive, the company sued for repetition but refused to revive the policy. The policy holder had acted in good faith in claiming the proceeds of the policy. The Court held that the policy was a subsisting policy which the company was bound to restore to the policy holder on receiving from him repayment of the sum paid and interest. "The insurance company's claim is rested solely in equity, but they who ask equity must be prepared to give it."[3] Similarly deductions may be made from the sum recoverable by the pursuer in respect of benefits given to the pursuer by the defender.[4]

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[1]See eg General Property Investment Co v Matheson's Trs (1888) 16 R 282: para 2.213 below.

[2]North British and Mercantile Insurance Co v Stewart (1871) 9 M 534.

[3]Ibid at p 537 per Lord Ormidale (Ordinary).

[4]Haggarty v Scottish TGWU 1955 SC 109 at pp 114, 115 per Lord Sorn.

(7) Payment due under "natural obligation"

2.69 The concept of "natural" (as distinct from "legal") obligation is relevant to the condictio indebiti in two ways.

> (1) If the payer makes the payment erroneously thinking that he is under a legal obligation to pay, the payment is irrecoverable if it was due under a "natural obligation".
>
> (2) If the payer makes an error of fact as to whether he is under a "natural obligation" (eg a moral duty), the payment is irrecoverable by the condictio indebiti or possibly by any other action or ground of repetition.

It may be that we shall consider the second of these categories in a future Discussion Paper in the context of gifts made in error. The first category, - the plea of "natural obligation" as a defence to a condictio indebiti, - is what concerns us here.

2.70 There is Institutional[1] and judicial[2] authority for the proposition that an action for restitution or repetition does not lie if the transfer or payment implemented a so-called "natural obligation". Erskine states that:

> "Though positive law could not have forced the payment of a sum due by an obligation merely natural, yet being once paid, it cannot be again recovered by him who made the payment; for as the action for repayment is introduced merely from equity, it cannot be admitted where the sum paid was due in equity".[3]

Bell is to a like effect:

> "As restitution is grounded on equity, it has no place if the transference or payment have proceeded

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[1]Mackenzie Institutions III, 1, 15; Erskine Institute III, 3, 54; Baron Hume Lectures vol III, p 172; Bell Principles s 532.

[2]See eg Bell v Thomson (1867) 6 M 64 at p 67 per Lord Justice-Clerk Patton; Clark v Clark (1869) 7 M 335 at p 337 per Lord Benholme (obiter).

[3]Erskine Institute III, 3, 54, citing D.12.6.66.

on a natural obligation; for that is binding in equity, as a bar, although it would not have grounded a demand at law".[1]

Baron Hume explains the rule by reference to the concepts of indebitum and enrichment:

> "To make way for [the condictio indebiti], it seems to be necessary, that the payment have been absolutely and utterly indebitum, not due to that party, by any even natural bond of obligation; for, if there be such a bond, - in that case, the party, receiving payment, is not locupletior; and this, which is a pure equitable remedy, cannot be pleaded against him".[2]

2.71 In Bell v. Thomson[3] Lord Justice-Clerk Patton adopted the same reasoning as Erskine and Bell:

> "The condictio indebiti... is controlled as to the extent to which it is carried by the same equity to which it owes its origin. A debt paid, which was not due in law, cannot be recovered if made where there were moral or natural considerations for the payment".[4]

In Clark v Clark[5] a bankrupt obtained a discharge of his debts on payment of a composition to his creditors and after his discharge granted a bill of exchange to his brother, one of those creditors, for the unpaid balance of the debt due to him. A note of suspension was brought by the acceptor of the bill on the ground that the bill was granted without consideration. It was held that the bill could not be treated as gratuitous because it was granted in fulfilment of a moral obligation to pay the debt in

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[1]Bell Principles s 532.

[2]Baron Hume Lectures Vol III, p 172.

[3](1867) 6 M 64.

[4]Ibid at p 67.

[5](1869) 7 M 335.

full. Lord Benholme remarked[1]:

> "I think an analogy may be discovered in our law with regard to condictio indebiti. When a debt, morally due, but not legally exigible, has been paid, or a defence against such a claim not adverted to, the debtor will thereafter in vain seek to recover the money so paid, by condictio indebiti, because the payment was not absolutely without cause, being truly made in performance of a moral obligation".

There are obiter dicta in other cases to the effect that there is a moral obligation on a bankrupt, notwithstanding his discharge, to pay his debts in full if he has it in his power.[2] In these cases recovery was refused apparently not because the defence of "natural obligation" was upheld but because the bankrupt granted a bill or made a payment voluntarily after his discharge. In these cases there was no error that the payment was due and as Lord Glenlee remarked, if there was no error as to legal liability, there was no room for the defence of natural obligation[3].

2.72 "Natural obligations" in Roman law. There is little doubt that the concept of a natural obligation was borrowed by Scots law from Roman law. Roman usage was notoriously loose, and the concept of "obligatio naturalis" never attained the status of a clearly defined technical term. Professor Zimmermann identifies four different senses of the term[4]. First, originally the term was applied to debts and obligations which were not enforceable by the creditor by court action and execution and which were therefore not legal obligations in the full sense of the term, but which had some of the secondary effects of obligations.[5] Such were obligations incurred by persons of limited capacity such as children or women in power or slaves who could not normally be parties to a court action. One of these secondary effects was that

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[1]Ibid at p 337 (obiter).

[2]See Sutherland v Mackay (1830) 8 S 313 at p 316 per Lord Cringletie; Grimshaw v Malcolm (1842) 4 D 1360; cf Roy v Scoular (1831) 9 S 766.

[3]Sutherland v Mackay (1830) 8 S 313 at p 316.

[4]Zimmermann Law of Obligations pp 7-10.

[5]Ibid p 7.

payment by a person of limited capacity of a "natural" debt due by him could not be recovered[1]; "the receiver had not been enriched without legal ground because what was owed was, after all, a debitum (even though the claim was not enforceable)".[2] It seems that an obligatio naturalis had other effects.[3] Second, the term was extended by the Romans to cover other cases of debts in respect of which a claim could be made but the debtor could raise a defence to bar the claim[4]. These included cases where in breach of the senatus consultum Macedonianum, (enacted in AD 46 as the result of the actings of a usurer called Macedo) a person loaned money to a son in power. The senatus consultum provided that no action was to be given to the lender against the filius familias even though his pater familias had since died. The praetor granted an exceptio or defence to the claim. There was, however, a "naturalis obligatio on the borrower, of no importance against him so long as he was still a filiusfamilias, but such that if he repaid the loan after he was sui iuris he could not recover it as an indebitum"[5]. They included cases where obligations were incurred by a pupil without the authority of his tutor,[6] and obligations extinguished by litis contestatio.[7] Third, later Roman jurists extended the concept to "merely moral or ethical and, in this sense, 'natural' duties".[8] These included cases in which a freedman rendered services to his patron which were not in fact legally owed,[9] or where someone having received a gift comes thereby under a "natural" obligation to make a return-

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[1]See D.46.1.16.4; D.44.7.10.

[2]Zimmermann, op cit, p 7.

[3]It could be novated, D.46.2.1, pr and 1; used to set off a claim by the debtor, D.16.2.6; and could support a pledge or caution to secure its performance, Gaius III, 119: all cited by Zimmermann, pp 7, 8.

[4]Zimmermann, Law of Obligations pp 8, 9.

[5]Buckland Manual of Roman Private Law (1928) p 274.

[6]D.12.6.13.1.

[7]D.46.1.8.3.

[8]Zimmermann, Law of Obligations p 9.

[9]D.12.6.26.12.

gift.[1] Fourth, Zimmermann[2] points out that the jurist Paul used the term "natural obligations" in a totally different sense, namely to denote obligations enforceable by action which were not peculiar to the Roman civil law, (ius civile) in the strict sense but were based on natural reason (naturalis ratio) and as such were part of the law of nations (ius gentium) common to all peoples.[3]

2.73 Variety of meanings of "natural obligation" in Scots law. Having regard to the foregoing historical background, it is not surprising that in the Scots sources, a wide variety of meanings is ascribed to the concept of "natural obligation" in Scots law. Gloag identified three meanings:

> "(1) moral duties, such as benevolence or charity, or duties to God;
>
> (2) obligations derived, or assumed to be derived, as a matter of legal history, from the tie of relationship, such as the reciprocal obligation of aliment between parent and child;
>
> (3) obligations actually undertaken but, from some defect of form, or want of contractual capacity, not enforceable against the obligant".[4]

To these may be added for completeness:

> (4) the famous category of so-called "obediential" obligations which are legal obligations finding their source in the dictates of natural law rather than contract, and which include inter alia the obligations of reparation arising from delict, and of restitution, repetition and recompense[5], as well as the obligation of aliment identified by Gloag.

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[1]D.5.3 (De hereditatis petitione) 25.11.

[2]Op cit pp 9, 10.

[3]Citing D.50.17.84.1; D.45.1.126.2.

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

[5]See Stair Institutions I, 3, 4; I, 7 to I, 9; Stair Tercentenary Studies (ed D M Walker) (1981) (Stair Society vol 33) pp 157, 161, 188, 195: para 2.45 above.

We are not however here concerned with the second and fourth categories, both of which are strictly legal obligations enforceable by Court action and diligence unlike the first and third categories.

2.74 Valid obligations unenforceable by action, but otherwise effective. Among earlier Scots jurists Bankton and Baron Hume include in this category cases of debts which are valid and subsisting but not enforceable by action. There is an overlap between the category of obligations subject to a privilege of unenforceability and natural obligations. As we have seen[1], Bankton[2] contrasts obligations to which there is a perpetual (peremptory) defence and obligations in which action for "the debt paid was only barred by a legal privilege". The examples he gives relate to payments by persons of limited capacity; payments under obligations prohibited by statute, such as loans for gaming prohibited under the Gaming Act 1710; payments under bare contracts and under obligations defective in point of form[3]. Baron Hume states:

> "Thus, a minor repaying borrowed money, or a married woman paying her bill, - or any other person paying his irregular and improbative bond, - has no claim of restitution, though by custom or statute he was furnished with an exception against payment, if he had used it at the proper time".[4]

2.75 Prescription and limitation of actions. Under the Scots law of prescription, negative prescription operates to extinguish the prescribed obligation.[5] It is clear therefore that if a principal debtor pays a debt which has prescribed, he has no right to repetition founding on his error, unless it can be said that he has a "natural" obligation to pay.

2.76 The only reported decision on this matter related to the special case of the septennial prescription of

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[1]See para 2.18 above.

[2]Institute I, 8, 26 and 27.

[3]Idem.

[4]Baron Hume Lectures vol III, p 172.

[5]Prescription and Limitation (Scotland) Act 1973, ss 6 to 8A.

cautionary obligations under the Cautioners Act 1695,[1], now repealed. In Carrick v. Carse[2], after the expiry of the seven years prescriptive period, a cautioner paid the principal sum to the creditor and on the next day demanded repayment as he had paid it by error being ignorant of the fact that the seven years had elapsed. The defender pleaded that the debt was due under a natural obligation. The Court held, however, that after the lapse of seven years there was no legal or even natural obligation[3] on the cautioner and ordered repetition. Baron Hume draws a distinction between such a case and a principal debtor seeking repetition of money loaned to him under a bond defective in form.

> "It would have been quite another question with the principal debtor, though he had paid his improbative bond. For, having got the money, though on an irregular writing, he was naturally, and in justice, bound to pay. But as to the cautioner, who got no part of the money, there was no natural obligation to pay; and the civil obligation imposed on him by the bond was extinguished vi iuris, - by the lapse of the limited term of law".[4]

If Baron Hume's reasoning is correct, then where the obligation to repay a loan prescribes through non-payment of interest, and the principal debtor pays in error after the lapse of the prescriptive period, it would follow that he has a 'natural' obligation to repay since he got the money and that the analogy of the cautioner, who got no part of the money, is inapt. But the law is not free from doubt.[5]

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[1]1695 c 7. This was an extinctive prescription: Stocks v McLagan (1890) 17 R 1122.

[2](1778) Mor 2931; Hailes 783.

[3]Mor 2933 (observations of the judges); Hailes 783 per Lord Gardenston.

[4]Baron Hume Lectures vol III, p 173.

[5]In Dixon v Monkland Canal Co (1831) 5 W and S 445 at p 449, Lord Brougham observed (obiter) that the "natural duty" to pay a time-barred debt differed from the "natural duty of a man to provide for his child" in that the former was not legally enforceable. These dicta do not address the present question of whether a prescribed debt, if paid, is recoverable on the ground of error of fact.

2.77 The issue raises questions of statutory interpretation, and in particular whether to treat a payment as 'naturally due' and therefore irrecoverable after the obligation to pay has been extinguished by the operation of the provisions of the 1973 Act, sections 6, 7, 8 or 8A, would be inconsistent with the Parliamentary intention underlying those provisions, bearing in mind that United Kingdom Acts are more strictly construed than Acts of the Scottish Parliament. It is thought that a debt paid after its extinction by the negative prescription is not recoverable.

2.78 In contrast to prescription, limitation of actions does not in Scots law extinguish an obligation but "merely denies certain rights of action after a certain lapse of time".[1] It appears therefore that debts paid after the lapse of a statutory limitation period[2] under an erroneous belief that the creditor could sue for payment would not found a condictio indebiti.

(8) Compromises ("transactions")

2.79 There is a very well established rule, inherited from Roman law,[3] that where an alleged debt is paid (or thing transferred) in pursuance of a compromise (or "transaction" as it was called in the older authorities[4]), no condictio indebiti lies for repetition although it could subsequently be shown that the alleged debt was not due.[5] To qualify as a compromise, an agreement must (1)

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[1]Macdonald v North of Scotland Bank 1942 SC 369 per Lord Justice-Clerk Cooper; Bell Principles ss 586, 605.

[2]eg Prescription and Limitation (Scotland) Act 1973 Part II (damages for personal injury or death); Consumer Protection Act 1987 ss 22B, 22C.

[3]D.12.6.65.1.

[4]See Evenoon Ltd v Jackel & Co Ltd 1982 SLT 83 at p 88 and see next footnote.

[5]Stair Institutions I, 7, 9; I, 17, 2; Bankton Institute I, 8, 33; Erskine Institute III, 3, 54; Baron Hume Lectures vol III, p 174; Bell Principles, ss 531, 535; More Notes to Stair's Institutions, Note F, para. 6; cf Kames Principles of Equity (5th edn; 1825) p 182; Gloag Contract (2nd edn) p 456; Johnstone v McKenzie (1824) 3 S 321; Stewart v Stewart (1836) 15 S 112; affd (1839) 1 McL and Rob 401; Kippen v Kippen's Tr (1874) 1

be concerned with matters doubtful or debateable which have arisen between the parties; (2) be entered into for the deliberate avoidance of the hazard of litigation; and (3) give effect to a mutual surrender (quittance or abatement) of rights.[1] There must be give and take on both sides; an agreement which is all give on the one side and all take on the other, is not a compromise.[2]

2.80 Erskine observed:

> "Some writers state another exception [to the condictio indebiti], that this condiction hath no room in transactions, though it should appear that the sum paid in consequence of the transaction was not one either in law or in equity; but this exception is improper; for where a sum is paid in consequence of a transaction the sum paid is truly due, the debtor having bound himself to pay it at finishing the transaction, for avoiding the expense or uncertainty of a law suit; so that though there had been no obligation of debt, either civil or even natural, anterior to the transaction, the transaction itself forms an obligation, and so creates a debt [D.12.6.65.1]"[3].

In other words a compromise is not so much an exception to the rule on recovery of undue payments but rather replaces

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R 1171; Mackintosh v Rose (1889) 26 SL Rep 450; Manclark v Thomson's Trs 1958 SC 147 at pp 162; 167, 168.

[1]Evenoon Ltd v Jackel & Co Ltd 1982 SLT 83 at p 86 per Lord President Emslie. For a case in which the requirements of a compromise were held not to exist, see Brown v Graham (1848) 10 D 867; (1849) 11 D 1330.

[2]Hunter v Bradford Property Trust Ltd 1970 SLT 173 (HL) (where a party refused to carry out his legal obligation unless the other party makes a concession, and the other party did so, held that was not a compromise).

[3]Erskine Institute III, 3, 54. See also Bell Principles s 535 "an independent obligation"; Gloag Contract (2nd edn) p 456: "But cases of this class are not properly cases of error. The consideration given on each side is the avoidance of the trouble and expense likely to be involved in deciding the point in dispute, and, with regard to that consideration, there is no error".

the former rights of the parties by new rights, thereby superseding that rule.

2.81 The authorities concur in holding that a transaction or compromise is very difficult to challenge successfully. Stair referred to "the common interest, that transactions should firmly and inviolably be observed, which, both by the Roman law and our customs, hath been held as sacred, and necessary for men's quiet and peace".[1] Lord Justice-Clerk Boyle remarked: "Our law writers hold that an agreement or transaction regarding doubtful rights is the most difficult of any to upset".[2] It appears that a compromise cannot be set aside without an allegation of fraudulent misrepresentation or fraudulent concealment, or something equivalent.[3]

2.82 The question whether the Crown may set aside a compromise relating to tax or duties will be considered in the forthcoming Discussion Paper mentioned in volume 1, paragraph 1.6.

(9) Pursuer's waiver of objections to payment

2.83 We have seen that money paid by a person in the knowledge that the payment is not due is irrecoverable "on the principle that such a payment imports a waiver of all objections, and an admission that the debt is justly due".[4] It could be said therefore that it is a defence that the payer expressly or impliedly waived all objections to the payment. The onus is on the payer

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[1]Stair Institutions I, 17, 2.

[2]Stewart v Stewart (1836) 15 S 112 at p 115; affd (1839) 1 McL and Rob 401. See also Dickson v Halbert (1854) 16 D 586 at p 600 per Lord Rutherfurd: "transaction... of all agreements, is one that the courts will be most reluctant to set aside in respect of error or inequality".

[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; Kirkpatrick v Thomson (1903) 19 Sh Ct Rep 100 at p 102; Bell Principles S 535; cf Johnston v Johnston (1857) 19 D 706; Dempsters v Raes (1873) 11 M 843.

[4]Dalmellington Iron Co v Glasgow and S W Railway Co (1889) 16 R 523 at p 524; cited at para 2.31 above.

however to prove that he neither knew nor ought to have known that the money was due.

(10) Illegality or unenforceability on grounds of public policy

2.84 We refer in Part III of this volume to the doctrine of ob turpem vel iniustam causam as an affirmative ground of recovery.[1] The doctrine is moreover a defence to an action to enforce a contract which is illegal or unenforceable in the sense of contrary to public policy,[2] and also a defence inter alia to an action of restitution or repetition based on error.

2.85 Where a person makes a payment to fulfil a purported obligation which is contrary to public policy and therefore illegal or unenforceable, in the erroneous belief that the payment is due, the payment is nonetheless irrecoverable. In an action of repetition or restitution in respect of a payment or transfer contrary to public policy, the rule is in pari delicto potior est conditio defendentis.[3] In a recent sheriff court case,[4] the defender while playing roulette in the defender's gaming casino won £5,150 on a turn of the wheel but was given chips to the value of £7,150 in error by the croupier. After further wins and losses he encashed the remaining chips and left the casino. It was held that the over-payment by the casino on encashment of the chips was so linked to the gaming session as to be part of it and therefore was irrecoverable as a sponsio ludicra, and that the condictio indebiti was unavailable.

2.86 There is English authority for the proposition that, as an exception to the defence of illegality, a party who enters into a contract under an error of fact as to its legality may be entitled to recover money paid or property transferred under the contract. In Oom v Bruce[5] a party who insured goods in Russia for their Russian owner in excusable ignorance of the fact that Russia had declared

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[1]See para 3.6 ff below..

[2]McBryde Contract Ch 25, p 573 ff.

[3]See para 2.220 below.

[4]County Property and Developments Co v Harper 1989 SCLR 597.

[5](1810) 12 East 225.

war on Britain and the contract was therefore illegal, was held entitled to recover the premium from the British insurer. If the mistake had been of law, the premium would not have been recoverable.

(11) Payment after reference to oath

2.87 In addition to "transactions" in the sense of compromises, Stair refers to another form of "transaction" which he terms "judicial by Litiscontestation",[1] in contrast to an extra-judicial transaction or compromise. By "litiscontestation", however, Stair meant a reference to oath.[2] An oath is conclusive of the reference and if it afterwards appears that a debt admitted by oath was not due, nevertheless a payment thereunder cannot be recovered by condictio indebiti[3]. Litiscontestation has since 1672 been constituted by lodging defences[4], and is now a misnomer in relation to reference to oath. This exception to the condictio indebiti will disappear if, as we have recommended, the procedure of reference to oath is abolished.[5]

(12) Payment under decree or other document requiring reduction or rectification

2.88 Money paid under a court decree can generally not be recovered by condictio indebiti, even if the decree is based on a wrong judgment, unless the decree is first reduced.[6]

> "As long as the judgment stands unreversed, it is a warrant for that which was done under it, - as long as it stands unreversed, it is impossible to say that

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[1]Stair Institutions I, 7, 9.

[2]Idem.

[3]Idem; Bankton Institute I, 8, 33.

[4]Act 1672 c 40, s 19; Maclaren Court of Session Practice p 403. Previously the Court's warrant for proving allegations was called an "act of litiscontestation": Bell's Dictionary (7th edn) p 667.

[5]See our Report on Requirements of Writing (1988) Scot Law Com No 112, Recommendation 11 (para 3.19).

[6]Wilson and McLellan v Sinclair (1830) 4 W and S 398.

the party, however wrong in paying the money - however much he paid the money under mistake, and in his own wrong, - has a right to recover it back, standing the judgment;...".[1]

It has been said that the grounds of reducing a court decree however are limited and error in law, or error in fact though produced by perjury , will generally not suffice: there must be error caused by fraud, or deceit, or corruption practised on the judge or jury.[2] While this may be true as a general rule, it is not invariable. In Brown v Graham[3], the Court had approved an accountant's report in an action of accounting and pronounced decree in foro. It subsequently transpired that there was an error calculi in the report. The Court sustained an action of reduction of the decree and ordained repetition of the sums paid thereunder, reserving to the payee the right to propone objections to the report that he might have made in the action now reduced.

2.89 It might be thought that where a discharge has been granted proceeding on an underpayment, then the amount of the true debt underpaid and wrongly discharged cannot be recovered until the discharge is reduced.[4] The rule, if it is one, may not be invariable, however, because in Armour v. Glasgow Royal Infirmary it was held that while certain discharges granted by the pursuers precluded them from holding the defender trustees personally liable, they did not prevent the pursuers from demanding repetition (to the trustees) of a payment made to a third party in error.[5] In the Unigate Foods Limited case[6] discussed elsewhere, reduction of a statutory certificate was granted as a preliminary to an action of repetition of overcharges attributable to an error in the certificate.

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[1]Ibid at p 407 per Lord Brougham L C.

[2]Bell Principles (10th edn) s 535; citing Begg v Begg (1889) 16 R 550.

[3](1848) 10 D 867; (1849) 11 D 1330.

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

[5]1909 S C 916 at p 920 per Lord Skerrington.

[6]Unigate Foods Limited v Scottish Milk Marketing Board 1975 SC (HL) 75.

2.90 Several cases relate to overpayment of rates. The tenant of a pier claimed that he had been assessed and paid rates on the erroneous assumption that the whole pier was situated in the defender's area, whereas in fact part of it was situated within an adjacent local authority area, and claimed repetition of the overpayment. It was held that the error, if any, lay in the entry in the valuation roll, and that until the pursuer got the entry rectified, an action of repayment was incompetent.[1] If however the pier had been wholly outwith the defender's burgh area, the burgh assessor would have had no right to enter it on his roll at all, and it was observed that a condictio indebiti would have been competent.[2] In Wood v Willox Ltd,[3] it was held that where a ratepayer had paid the poor rates upon a demand regularly made upon him qua occupier, his name appearing on the assessment list and valuation roll after all the proper and regular procedures, it is too late for him to offer, by means of an action of repetition, to litigate the question with the rating authority as to whether these rates were legally due, the ratepayer having claimed that he had occupied the property for only three-quarters of the year. In a condictio indebiti for overpayment of rates, however, the defence of failure to exhaust statutory remedies may be available.[4]

(13) Extinction of obligation of repetition or restitution by negative prescription

2.91 In the context of the defence of "natural obligation", we have already referred to the negative prescription of the payer's obligation to pay the debt.[5] The negative prescription of the payee's obligation to repay the erroneous payment is also a defence. The

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[1]McAlister v Cove and Kilcreggan Commissioners (1894) 10 Sh Ct Reps 123.

[2]Ibid at p 124; referring to Bell v Thomson (1867) 6 M 64 at p 66.

[3](1917) 33 Sh Ct Reps 132.

[4]Cf British Railways Board v Glasgow Corporation 1976 SC 224.

[5]See para 2.75.

prescriptive period is five years.[1] The prescriptive period begins to run from the date when the obligation of repetition became enforceable.[2] This is presumably the date when the payment is made.[3] The commencement of the prescriptive period may however be postponed by fraud, or by error induced by words or conduct of the debtor or his agent.[4]

(14) Set-off (compensation)

2.92 A claim for repetition of a sum paid in error may be met by a plea of set-off or compensation.[5] As a general rule, only liquid claims can be set off. In the Henderson & Co Ltd case, Lord Ardwall observed (obiter) that the pursuer's claim for repayment of overpaid freight "cannot be regarded as properly a liquid claim, because it is a condictio indebiti, which is a purely equitable remedy ...".[6] Nevertheless, the Court allowed set-off in that case so that if a condictio indebiti is correctly characterised as an illiquid claim, that character does not preclude set-off.

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[1] Prescription and Limitation (Scotland) Act 1973, s 6; Sch 1, para 1(b).

[2] 1973 Act, s 6(3).

[3] There seems to be no case construing the Act in relation to obligations of repetition: but the proposition in the text appears consistent with the First Division's decision in N V Devos Gebroeder v Sunderland Sportswear Ltd 1990 SC 291 (obligation to make recompense arises when the defender first becomes lucratus).

[4] 1973 Act, s 6(4).

[5] Henderson & Co Ltd v Turnbull & Co 1909 SC 510 (pursuer's claim for repetition of overpayment in error of freight; defenders held entitled to set off a claim for dead freight).

[6] Ibid at p 517.

D. The relevance of the recipient's enrichment in repetition of money

2.93 Preliminary. One of the most difficult topics in this domain is the question whether there is a requirement that the defender be enriched by the payment or transfer. It is convenient to distinguish cases where the condictio indebiti takes the form of an action for repetition of money from cases where it takes the form of restitution of property other than money. We consider the latter in Section E below.

2.94 In a condictio indebiti for repetition of money, once it is established that the defender received money not due and paid under excusable error by the pursuer, the pursuer has a prima facie right of repetition, which may be rebutted if the court, in the exercise of its discretionary power to refuse decree of repetition on a balance of the equities, decides that it would be inequitable to grant such a decree. The defender need not be enriched at the time of the action, but the question of his enrichment at that time is a factor to which the court will have regard in deciding whether decree of repetition would be equitable. There is a view that the foundation of the right of repetition is equity, and that any link with unjustified enrichment is at best indirect.

2.95 This was affirmed by the recent case of Royal Bank of Scotland plc v Watt[1]. The defender was persuaded by a stranger, who claimed to be an English car-dealer needing money in Scotland to buy cars here, to enter into an arrangement whereby the stranger credited the defender's account with £18,631; and thereafter the defender was to withdraw the money and pay it to the stranger. The sum was duly credited and the following day the defender withdrew £18,000 of the money, and handed it over to the stranger, who then disappeared. It later transpired that the cheque had been drawn by an Edinburgh firm of solicitors for £631 to the order of someone else and had been skilfully and fraudulently altered so that it bore to be payable in the sum of £18,631 to the order of the defender. The cheque had been presented for collection at the London branch of the defender's bank and sent by bank giro credit transfer to the defender's account in an Edinburgh branch. The drawee bank had accepted the cheque in good faith and credited the defender's account. The bank sued the defender for repetition. The Lord Ordinary granted decree

[1] 1991 SLT 138.

for £631 only since at the time of the action the defender was not enriched by the £18,000.

2.96 Reversing the Lord Ordinary's decision, the Second Division held that the Lord Ordinary had confused recompense, in which the defender is liable only if enriched, with repetition of money, which was the remedy sought by the pursuer. They further held that it was not necessary for repetition that the recipient be lucratus, although since repetition was an equitable remedy, the court was entitled to take account of whether the recipient was lucratus in deciding how to exercise its discretion. In this case, the defender had been lucratus when the money was credited to his account. The court further held that the Lord Ordinary had erred in considering the defender's enrichment to the exclusion of all factors. The equitable considerations favoured the pursuer bank since in the circumstances the suspicions of an ordinary reasonable man would have been aroused, and the defender had acted foolishly in facilitating the stranger's fraudulent acquisition of the money. Decree for the full £18,631 was granted. If the basis of the condictio indebiti were unjustified enrichment, it would be inadmissible that the defender should suffer loss by reason of the decree of repetition. In the Watt case, the defender did indeed suffer loss amounting to £18,000.

2.97 Enrichment at the time of the action for repetition a factor not a requirement. It might have been possible for the court in Watt to formulate a general rule that in the normal case the defender must be enriched at the date of the action subject to an exception at the discretion of the court based on equitable considerations. The court held, however, that the defender's enrichment at the date of the action is simply one of the factors favouring liability which the court will weigh in the balance. Thus Lord Justice-Clerk Ross observed[1]:

> "The emphasis is not upon the extent to which the party receiving the payment has been enriched, but upon whether that person has any good and equitable reason to refrain from repaying the money to the person who paid it under mistake. Is it inequitable that he should return the money paid in error?".

[1]1991 SLT 138 at p 143.

Lord Mayfield remarked[1]:

> "None of the authorities...supports the view... that in order to succeed in the claim of repetition the pursuer must establish that the defender was lucratus. That in my view is the essential difference between the remedy of repetition and recompense. In the latter remedy gain is vital[2]... In my view benefit may be a factor in a claim of repetition but ... it is not an essential element where equitable considerations prevail".

After reviewing Institutional authorities on restitution and recompense[3], Lord McCluskey said:

> "In all these texts, the idea of an undeserved benefit which it would be unjust to allow the recipient to retain is seen to be an essential feature in claims based upon recompense. But the need to establish that the recipient has been lucratus, that he has derived some material benefit, though it is undoubtedly an equitable consideration, is not an essential element in all cases where equitable considerations underlie the remedy allowed by the law. In particular, there is no reason in principle that I can detect why the extent of the recipient's benefit should necessarily delimit the right of the true owner to recover what he has paid or handed over under a mistake of fact. It is even less apparent that the true owner has to show that the payee or recipient still enjoys the benefit at the time when the claim is brought to court."(emphasis in original).

Earlier in the Outer House case of Alexander Beith Ltd v Allan,[4] on somewhat similar facts, the defender was induced by a rogue to cash a fraudulently endorsed cheque and pay it to the rogue. The defender contended that he had throughout acted in good faith as agent or

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[1]Ibid at p 146.

[2]Quoting Bell Principles s 538.

[3]Stair Institutions I, 7, 9 (condictio indebiti); I, 8, 6 (recompense); Erskine Institute III, 1, 10 and 11; Bell Principles s 531 et seq (repetition), s 538 et seq (recompense).

[4]1961 SLT (Notes) 80.

intermediary for the rogue and so was not enriched by the transaction. While accepting that the defender acted in good faith Lord Walker nevertheless rejected the defence observing:

> "If, as I think, the defender received the cash as a principal, it is not material what he afterwards did with the money. He had received the proceeds of a cheque to which he had neither right nor title and, in my opinion, he held the proceeds for behoof of the true owners who in this instance were the pursuers as the drawers."[1]

This case, which was not referred to in Watt, seems to reject the relevance of enrichment, or unjustified enrichment, even as a factor to be weighed in the balance, and to that extent was wrongly decided.

2.98 Normally when a recipient has spent or disposed of money received, and is therefore no longer enriched at the date of the action, that is a factor weighing against liability. Generally that is because the defender disposed of the money in the reasonable belief that he is not bound to restore it to the true owner. In the Watt case, however, the circumstances were such that they should have aroused suspicion in the defender's mind that the person to whom the defender gave the money was not the true owner. Lord Justice-Clerk Ross remarked that the test was whether the defender "had acted reasonably in the circumstances".[2] Lord Mayfield said: "The suspicions of a reasonable man would have been aroused".[3] Lord McCluskey did not expressly use the language of the reasonable man perhaps because, as he remarked, the defender had "behaved like a fool from start to finish"[4], so that a less stringent test of reasonableness did not have to be considered. The foregoing dicta suggest that the test of reasonableness will be invoked, and that the more stringent test of the defender's gross negligence equivalent to bad faith applicable to the conduct of the

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[1] Idem (emphasis added).

[2] 1991 SLT 138 at p 144.

[3] Ibid at p 146.

[4] Ibid at p 149.

possessor of another's corporeal moveables,[1] is not applicable.

2.99 While absence of enrichment at the time of the action is not without more an absolute defence as the Watt case shows, the authorities on the recipient's change of position[2] suggest that normally it will be a factor tending to negate liability. This is because the court is careful to protect the security of receipts, and will give effect to the defender's reasonable (albeit erroneous) assumption that the money paid was his. The result in the Watt case is entirely consistent with these authorities because they establish merely an "equitable", and not an absolute, defence of absence of enrichment at the time of the action.

2.100 Is enrichment at the time of payment a legal requirement or merely a factor? The reasoning in the Watt case is sufficiently wide to support the proposition that the recipient defender need not be enriched by the payment at the time of the payment. All the judges affirmed that enrichment (benefit or lucrum) was essential to recompense but not to restitution or repetition generally, and in particular not to the condictio indebiti[3]. So far as enrichment at the time of payment is concerned, however, the reasoning of the Second Division judges is strictly obiter because they all held that in any event the recipient defender was enriched at the time of payment.[4]

Criticism of the theory that the condictio indebiti is not based on unjustified enrichment

2.101 A number of criticisms may be made of the decision in the Watt case insofar as it rejects the view that the defender need not be enriched by his receipt of the payment.

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[1]Contrast Faulds v Townsend (1861) 23 D 437 (recipient's killing and boiling of stolen horse) at p 439 per Lord Ardmillan: "in mala fide or by dole, or by such fault as is equivalent to dole".

[2]See para 2.63 ff.

[3]1991 SLT at p 143 per Lord Justice-Clerk Ross; at p 146 per Lord Mayfield; at pp 148, 149 per Lord McCluskey.

[4]1991 SLT 138 at p 144 per Lord Justice-Clerk Ross who observed that "the point is a narrow one"; at pp 146, 147 per Lord Mayfield; at p 149 per Lord McCluskey.

2.102 First, as Dr R Evans-Jones observes:[1]

> "in definitions of repetition and recompense the requirement of enrichment is only stated expressly for the latter. The court therefore draws the conclusion that it is not an absolute requirement in the former. This difference does not support the conclusion drawn from it. In circumstances for which a remedy of recompense is appropriate, the presence of enrichment cannot be presumed, whereas in repetition the presence of enrichment is, in virtually all cases, so clear as not to require specification at the level of a definition."

Thus money is itself both the medium of exchange and the measure of value, and the receipt of money which is not due in most cases necessarily enriches the recipient as it did in the Watt case. In the South African Govender case, Rose-Innes J observed[2]:

> "The fact of the payment of money is itself prima facie proof of enrichment, but not conclusive proof. In assessing whether defendent has been enriched by the payment, account must be taken of any performance rendered by defendant which was juridically connected with his receipt of the money."

On the other hand, recompense is a conglomerate remedy available in a wide variety of circumstances and in very many, if not all, it is essential at the level of a definition to state that the recipient be enriched, eg where the claim of recompense relates to the provision of services. In repetition, but not recompense, specification of benefit is otiose but it should not follow that the action is not based on the principle of unjustified enrichment.

2.103 Second, there are Scots authorities which support the view that unjustified enrichment is indeed the basis of the condictiones or actions of repetition or restitution. (1) Such was the view of Baron Hume who

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[1]"Identifying the Enriched" 1992 SLT (News) 25 at p 25.

[2]Govender v Standard Bank of South Africa Ltd 1984 (4) A 392 (C), at p 404. See also in English law, Goff and Jones Restitution p 17: "The mere receipt of money is ... a benefit to the recipient"; Birks Introduction (1985) p 167.

regarded the condictio indebiti as an illustration of the maxim: "Quod nemo debet locupletari aliena jactura"[1] and of Lord Kames.[2] (2) In Bell v Thomson[3], Lord Justice-Clerk Patton recognised that the condictio indebiti is an equitable doctrine, "ex aequo et bono introductum"[4] and remarked:

> "Pothier, after laying down the fundamental principle on which the action rests, deduces from it two results, - one that the action is personal; and the second, that it holds good only to the amount of the benefit actually received by the party against whom it is maintained".[5] (emphasis added).

The main ground of his decision was that:

> "Applying this principle, there is no case here made for repetition. The ratepayers against whom the action is brought have not, directly or indirectly, touched one farthing of the fund which it is sought to recover from them".[6] (emphasis added)

In other words, the defenders had never been enriched by the payments. Lord Benholme regarded it as a ground of refusing repetition that there was no averment that the current ratepayers were lucrati by the overpayments in previous years.[7] Lord Neaves drew a parallel between

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[1]"That nobody ought to be enriched out of another's loss" (deriving from Pomponius' famous statements of principle in D.12.6.14, and D.50.17.206); see Baron Hume Lectures, vol III, p 172; and p 173 fn 44: "It is requisite to this action that the person who has to repeat be locupletior, and that he will not be in any respect damaged by the restitution as in the case of a bond paid twice".

[2]Kames Principles of Equity (5th edn, 1825) p 89 ff and esp at pp 93, 94.

[3](1867) 6 M 64.

[4]This phrase derives from D.12.6.66 (Papinian) as to which, see Zimmermann Law of Obligations pp 852, 853.

[5](1867) 6 M 64 at p 67.

[6]Idem.

[7](1867) 6 M 64 at p 70.

restitution in its narrowest sense and the condictio indebiti of money[1]:

> "The nature of the remedy of condictio indebiti is well understood in the law of Scotland. It is founded, not on contract, but on equity. It is what Stair calls an obediential obligation. Restitution is another of these obligations, and it resembles condictio indebiti. Now, restitution implies nothing more than an obligation to restore, binding on the person who has received a thing, and who has it to restore. If a person has in bona fide got a thing, and in bona fide given it to another, he cannot be called upon to restore it; and if he is not lucratus by these transactions, there is not even room for asking an equivalent. In like manner, condictio indebiti must be urged against the receiver himself, or his general representatives". (emphasis added).

This analogy suggests that in the condictio indebiti, the defender must be, or have been, enriched. (3) A case on overpayments made under a contractual obligation of relief also supports a requirement of enrichment at the date of the action. In Crawford v. Boyle[2], the tenant of a farm was bound by his lease to pay the minister's stipend (for which the landlord as heritor was primarily liable). Shortly before the tenant's entry, the stipend for the farm had been fixed by an interim scheme of locality at a certain sum, which the tenant paid to the minister throughout the currency of the lease. It was later discovered that, through error, too great a proportion of the stipend due by the heritors had been allocated on the farm. This had the effect that other tenants of the landlord, and other heritors, had made under-payments. The landlord recovered the under-payments due by the other heritors in an accounting with them which he remitted to the tenant. The tenant sued the landlord for repetition of the balance of his overpayments. The landlord's main defence was that he was not lucratus by these overpayments, the only persons lucrati being the under-paying tenants whom the tenant was bound to call as defenders. The First Division rejected the defence that the landlord was not lucratus. His remedy was to sue the under-paying tenants whom the pursuer had no title to sue. It might be possible to distinguish this case (although described in the report as an action of repetition) as one

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[1] Idem.

[2] (1849) 11 D 714.

of recompense for discharge of another's liabilities in error, but such a distinction is technical and not based on any principle. The payments were made to the minister on behalf of the landlord and equivalent to payments to the landlord for onward transmission to the minister. (4) In cases dealing with repayment of interest on a sum paid in error where the defence of bona fide consumption does not apply, there is authority that the basis of the claim is the equitable principle of restitution and that the recipient should not be required to pay back more interest than has actually accrued, or an estimate thereof, it being inadmissible that the recipient should be subjected to loss.[1] This is consistent with the theory that the object of the equitable restitutionary claim is to redress the recipient's unjustified enrichment, not to cause him loss without fault. (5) In the analogous case of an action of repetition by the creditor of a deceased for repetition of the executor's erroneous over-payment to a beneficiary, Lord Justice-Clerk Hope held that the ground of repetition was that the recipient "would be lucratus at the expense of the creditors if allowed to retain the sum...".[2] (6) Where a debtor makes a payment to a putative creditor in error, the unpaid true creditor has a title to sue the payee putative creditor where the debtor has a defence of bona fide payment against the true creditor's claim.[3] As we indicated in volume 1, paragraph 3.64, the basis of the unpaid true creditor's right to sue the paid putative creditor in an innominate action of repetition is explained by Kames as resting on unjustified enrichment.[4] This seems right in principle. Indeed, it seems impossible to expiscate the rights and obligations of parties in many three-way payment situations involving actions of repetition unless one can identify who was unjustifiably enriched and who suffered the correlative loss. (7) In the Cantiere San Rocco case[5], Lord Shaw said, with reference to the condictio causa data causa non secuta that the principle of preventing unjust enrichment

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[1]Countess of Cromertie v Lord Advocate (1871) 9 M 988 at p 991 per Lord Gifford, quoted at para 2.128 below.

[2]Wyllie v Black's Tr (1853) 16 D 180 at p 188.

[3]Stair Institutions IV,40,33; Stewart's Trs v Evans (1871) 9 M 810 at p 813.

[4]Kames Principles of Equity (5th edn) p 349.

[5]Cantiere San Rocco v Clyde Shipbuilding and Engineering Co 1923 SC (HL) 105 at p 117.

underlies as a reason the doctrine of restitution. It does not appear that any of these authorities were cited to the court in the Watt case, although they all support the view that the condictio indebiti is based on unjustified enrichment.

2.104 Implications for the general principle underlying restitution, repetition and recompense. There are statements in modern text-books that the redress of unjustified enrichment is the basis of the obligations of restitution, repetition and recompense,[1] and this has been implicitly recognised by statute.[2] In the Watt case, Lord Justice-Clerk Ross observed that "no doubt, as Professor Walker says..., the basis of all these kinds of obligation is the avoidance of undue enrichment",[3] but his actual decision does not seem consistent with that concession. If even enrichment at the time of payment is not a requirement of the condictio indebiti, it is difficult to see how the principle of unjustified enrichment can form the basis of that condictio. If enrichment ceases to be the basis of the condictio indebiti, Scots law would be even more isolated from legal systems in the civilian tradition, which treat the condictio indebiti as one of the cornerstones of the law on unjustified enrichment,[4] and also out of step with trends in Anglo-American legal systems which also treat the action for money had and received as a cornerstone of that law.[5] These include the

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[1]eg D M Walker Principles of Scottish Private Law (1st edn, 1970) p 988; Walker Contracts (2nd edn, 1985) p 583; T B Smith Short Commentary on the Law of Scotland (1962) p 623.

[2]Prescription and Limitation (Scotland) ACt 1973, Sch 1, para 1(b).

[3]Royal Bank of Scotland plc v Watt 1991 SLT 138 at p 143.

[4]See Zimmermann Law of Obligations pp 834, 835; Zweigert/Kotz/Weir Comparative Law (2nd edn) vol 2, pp 232 to 234; 238 to 240; Dawson Unjust Enrichment pp 43 to 54; 130 ff. See also as to South African law, Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue 1992 (4) SA 202 (A).

[5]See Goff and Jones Restitution p 17; P Birks Introduction p 146 ff; American Law Institute Restatement of the Law of Restitution (1937) ss 15 ff; Maddaugh and McCamus Restitution (1990) p 13 ff [Canada].

law of England and Wales,[1] Canada,[2] and Australia.[3] The Watt[4] case makes it even more difficult than ever for the courts to evolve a common denominator of general principle that would underlie the law of restitution, repetition and recompense.

2.105 In this connection it is pertinent to point to an emerging cross-border difference in approach. In Scotland, as the Watt case shows, enrichment is treated as an essential requirement of a claim of recompense for services but it is not treated as an essential requirement of a condictio indebiti or action of repetition of money. In England, 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 sacrifice".[5] On the other

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[1] Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 (HL) at p 61 per Lord Wright; Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548 (HL); Woolwich Equitable Building Society v IRC [1993] 1 AC 70 (HL) at pp 196, 197 per Lord Browne-Wilkinson; P Birks "The English Recognition of Unjust Enrichment" [1991] LMCLQ 473.

[2] Rural Municipality of Storthoaks v Mobil Oil Canada Ltd (1976) 55 DLR (3d) 1 (Supreme Court of Canada); cf Deglman v Guaranty Trust of Canada and Constantineau [1954] 3 DLR 785.

[3] Pavey and Matthews Pty Ltd v Paul (1987) 162 CLR 221 at pp 256-257 per Deane J; Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation (1988) 62 ALJR 292; David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 109 ALR 57.

[4] 1991 SLT 138.

[5] See eg S Stoljar "Unjust Enrichment and Unjust Sacrifice" (1987) 50 MLR 603; G Muir "Unjust Sacrifice and the Officious Intervener" in Finn (ed) Essays on Restitution (1990) p 297 ff; Beatson "Benefit, Reliance and the Structure of Unjust Enrichment" [1987] CLP 71; A S Burrows "Free Acceptance and the Law of Restitution" (1988) 104 LQR 576; G Mead "Free Acceptance: Some Further Considerations" (1989) 105 LQR 460; M Garner "The Role of Subjective Benefit in the Law of Unjust Enrichment" (1990) 10 OJLS 42; P Birks "In Defence of Free Acceptance" in A S Burrows (ed) Essays on the Law of Restitution (1991) p 105 ff.

hand, an action of repayment of money is now universally treated in England as based on unjustified enrichment.

E. Restitution of property: the co-existence of the condictio indebiti with proprietary rights and remedies

(1) Preliminary

2.106 Different approaches of Scots and English law to specific restitution of moveables. In civil law systems, including for this purpose Scots law,[1] quasi-contractual obligations include the obligation to make restitution of specific property.[2] In Scots law, the condictio indebiti applies in principle to the restitution of moveable property transferred in error[3] as well as repetition of money. In English law, by contrast, the quasi-contractual action for money had and received is, as its name implies, confined to repayment of money. Specific restitution of moveables is obtained by the appropriate remedies in tort, eg conversion and at one time detinue, which has been abolished by statute and replaced by the tort of conversion.[4] As Professor Englard explains[5]:

> "In traditional COMMON LAW, quasi-contractual actions are strictly limited to claims formulated in terms of money. Specific restitution of property falls under the headings of various other forms of actions not necessarily based upon the idea of unjust enrichment.

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[1] See paras 2.3 and 2.21 above.

[2] See Englard,"Restitution of Benefits", paras 55 and 56.

[3] See Pride v St Anne's Bleaching Co (1838) 16 S 1376; Caledonian Railway Co v Harrison and Co (1879) 7 R 151. In these cases however the label "condictio indebiti" was not used.

[4] Torts (Interference with Goods) Act 1977, s 2; Goff and Jones, pp 63, 64. Under the English law doctrine of "waiver of tort", it is competent for a plaintiff to elect to sue for recovery of money under a quasi-contractual action. Furthermore, the traditional common law remedies in tort are supplemented by rules of Equity giving particular remedies, including the imputation of a constructive trust which gives rise to an obligation of specific restitution. See Englard, para 56.

[5] "Restitution of Benefits", para 55.

include, in principle, restitution in specie, and for that reason they may compete with general proprietary actions. This possibility of plurality of actions has created difficult problems of co-ordination in a number of systems".

2.107 Problems of co-ordination in Scots law. These difficulties of co-ordination arise also in Scots law, at least in theory. In practice the difficulties are avoided by subsuming the following doctrinally different causes of action under the undifferentiated concept of restitution and under the undifferentiated form of action of delivery, namely (a) actions to recover ownership of moveables and actions to recover natural possession of moveables and (b) actions based on the right of a lawful possessor to vindicate and recover possession and actions based on the condictio indebiti. In this Section, we make a tentative and provisional discussion of the relevant doctrinal issues which impinge on the co-ordination of the condictio indebiti with other petitory claims for restitution.

(1) Difficulties emerge in Scots law from the co-existence of quasi-contractual claims founded on the personal obligation of restitution with proprietary claims. The reason is that hidden in the undifferentiated Scots concept of restitution lies the important distinction between on the one hand specific restitution of ownership of moveables where ownership has been transferred (the role of the condictio indebiti in Roman law) and, on the other hand, vindication of the transferor's title to ownership where physical possession but not ownership has been transferred (the role of the rei vindicatio in Roman law) coupled with specific restitution of physical possession of those moveables. The latter is a remedy to recover possession which in principle is ancillary to vindication of title. Furthermore, a stable analysis of restitutionary obligations and actions or remedies may be difficult to achieve unless and until the controversial question is settled whether Scots law recognises an abstract or causal theory of the transfer of ownership of moveable property.

(2) The classification of remedies in the modern law, in particular the distinction between petitory and possessory remedies, is still based on a classification-frame or taxonomy laid down by the Institutional writers which did not even then face up to the problems of co-ordination. The present system of classification by conclusion

(remedy) was fixed by Stair,[1] Bankton[2] and Erskine,[3] and is accepted by the main modern authorities on Court of Session practice, Mackay,[4] Maclaren[5] and Maxwell.[6] The main relevant categories are:

(a) actions of declarator and actions of reduction;

(b) petitory actions, in which "some demand is made upon the defender, in consequence either of a right of property or credit in the pursuer";[7] and

(c) possessory actions in which "an absolute right is not contended for, but possession is claimed to be attained, retained or recovered".[8]

The Institutional writers all subsumed actions of restitution, including the condictio indebiti, and quasi-contractual actions generally, under petitory actions[9]. So far as moveables are concerned, it seems that the only possessory remedy within the strict meaning of this traditional classification is spuilzie.[10] In all other actions to recover possession, the pursuer must show some right in the property so that the action is technically

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[1]Institutions IV, 3, 47; IV, 21, 1; IV, 26, 1.

[2]Institute IV, 24, 20.

[3]Institute IV, 1, 47.

[4]Practice vol 1 pp 357-361.

[5]Practice pp 637-640.

[6]Practice pp 353-4.

[7]Erskine Institute IV, 1, 47, quoted by Maclaren, p 639.

[8]Maclaren, p 639. There are other categories not here relevant.

[9]Stair Institutions IV,21,4; Bankton Institute IV,24,28; Erskine Institute IV,1 47.

[10]K G C Reid Stair Memorial Encyclopaedia vol 18 (forthcoming) para 140. In spuilzie where property has been seized vitiously by the defender from the pursuer, bare possession suffices to raise a title to sue.

petitory rather than possessory. In fact,the distinction between petitory and possessory actions is criticised and not adopted by Mr K G C Reid in his pioneering analysis of "possession" due to be published in the Stair Memorial Encyclopaedia title on "Property".[1] Instead a distinction is drawn by him between "those remedies [for recovering possession] in which some right is required of the pursuer and those remedies for which bare possession is sufficient".[2] Since by its definition, spuilzie depends on D's vitious dispossession of P and not P's mistaken transfer to D, it cannot overlap with the condictio indebiti. It is very odd that actions of delivery or restitution to recover possession cannot be called possessory remedies in the strict sense, but that is a consequence of the old and still extant classification of actions.

(3) In principle a distinction may be made between:

(a) an action of restitution for recovery of ownership of property mistakenly transferred by P to D ie an action for a reconveyance (a condictio indebiti in the strict Roman sense);

(b) an action of restitution for recovery of natural possession where P (as either custodier or possessor) mistakenly transferred natural possession not ownership to D (which may possibly be termed a condictio indebiti in Scots law); and

(c) an action for recovery of natural possession by a possessor having a real right of possession.

These distinctions of principle are obscured by the fact that in all three cases, the form of action is a petitory action of delivery or restitution.

2.108 To simplify the discussion, we deal only with a condictio indebiti for recovery of corporeal moveables, but similar problems arise in relation to (a) a claim for restitution based on compulsion (actionable under the condictio ob turpem causam) and perhaps other personal restitutionary claims, and (b) claims relating to restitution of incorporeal moveables.

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[1]Ibid para 139.

[2]Idem.

(2) Condictio indebiti as remedy for recovering (i) ownership and (ii) natural possession

2.109 Condictio indebiti where ownership of moveables transferred. The following propositions in this and the next paragraph may help to illustrate the theoretical distinctions between a condictio indebiti for recovery of ownership and a condictio indebiti for recovery of natural possession.

(a) Where a transfer of corporeal moveables to the defender is made by the pursuer in the erroneous belief that the transfer is legally due, and the transfer has the effect of vesting ownership of the moveables in the defender, the defender comes (at least prima facie) under a personal obligation to restore ownership of the moveables to the pursuer.

(b) In such a case, the defender is unjustifiably enriched in the strict sense that he has become owner of the moveables. His obligation of restitution is an obligation to reverse the enrichment by transferring ownership of the moveable back to the pursuer. This was the true role of a condictio indebiti in Roman law.

(c) It is for consideration how far the defences available in a condictio indebiti for repetition of money outlined in Section D above do or should apply in a condictio indebiti for restitution of ownership of a corporeal moveable, in particular the equitable defence of change of position, which has developed solely in the context of repetition of money.

(d) Bell states certain rules as to the obligation to restore the thing itself and its accessions which are applicable to "restitution ... of a thing delivered and received unduly".[1] This seems to be a reference to restitution by a person to whom ownership of the moveable has been transferred (the condictio indebiti in Roman law) though the matter is not free from doubt. It is for consideration whether or how far these rules are supplemented by, and can be co-ordinated with, the rules on the right of an owner (lawful possessor) of corporeal moveables

[1]Bell Principles s 537.

to restitution of the moveables from a bona fide possessor without title, including the defence of bona fide consumption. This matter is considered below.[1]

(e) Since the defender's obligation is enforceable by a condictio indebiti in the classic Roman sense, in principle the decree should ordain the defender to transfer ownership back to the pursuer. This might be done by a decree ordaining delivery. Delivery by the defender in implement of the decree has, or should have, by law the effect of restoring ownership even if the defender does not have the requisite intention or animus transferendi. No authority on this has been traced.

(f) If the defender does not obtemper the decree by effecting delivery, the delivery should be enforceable by proceedings under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, section 1, in the normal way. If in such proceedings the court orders an officer of court to take possession of the moveables in question and deliver them to the pursuer, such delivery should by law have the effect of restoring ownership to the pursuer. But no provision is made to that effect.

2.110 Restitution where possession but not ownership of moveables transferred. In Scots law, however, the undifferentiated concept of restitution of moveables is applied to cases where in a transaction vitiated by error the owner of the moveables has transferred physical possession but not ownership to the defender. Here a different set of propositions seem applicable.

(a) Where a transfer of corporeal moveables to the defender is made by the pursuer in the erroneous belief that the transfer is legally due, but (unlike the case postulated in paragraph 2.109) the transfer does not have the effect of vesting ownership of the moveables in the defender, it seems that the defender comes (at least prima facie) under a personal obligation to deliver physical possession of the moveables back to the pursuer as the true owner.

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[1]See para 2.145.

(b) The question whether the original transfer does indeed have the effect of operating as a conveyance of ownership depends at least in part on whether Scots law recognises a "causal" or "abstract" theory of the transfer of ownership. As we note below, whether Scots law recognises a causal or abstract theory is uncertain and controversial.[1]

(c) Where a transfer does not have the effect of conveying ownership, it is doubtful whether it can be said that the defender is enriched, because ex hypothesi he is not owner of the moveables. At best he is a bona fide possessor for a period (normally until decree), and it is by no means clear that mere possession can properly be said to enrich him.

(d) In such a case, a condictio indebiti did not lie in Roman law. Since the transfer did not divest the pursuer of ownership, the pursuer's principal remedy in Roman law was a rei vindicatio, an action to vindicate his right of ownership.

(e) In Scots law, while there are references to a rei vindicatio in the sources, it seems the better view that the Roman remedy as such has not been received in Scots law.[2] There is no doubt, however, that Scots law has, and always has had, an equivalent remedy or remedies, notably a declarator of ownership or a reduction of the defender's pretended title of ownership as well as an action of restitution to vindicate possession.

(f) In such an action, there is in principle no room for the defences (such as change of position) available to the defender in a condictio indebiti. Subject to one possible exception, the only defences will be those available to an owner or lawful possessor recovering from a bona fide (or mala fide) possessor without title, such as bona fide consumption. The possible exception is that it is unclear whether the special rules stated by Bell referred to in

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[1]See para 2.121.

[2]See para 2.118.

paragraph 109(d) above apply to a transfer operating as a conveyance of ownership.

(g) While Scots law has in principle actions of declarator or reduction to vindicate the right of ownership, broadly equivalent to the Roman rei vindicatio, some Institutional writers argued that the action of restitution comes in place of the rei vindicatio. This seems strange. The obligation to restore by delivery of these moveables is logically merely ancillary to the action of declarator or reduction vindicating the right of ownership.[1]

(3) Comparison of requirements of condictio indebiti and of the lawful possessor's vindicatory remedy for recovery of moveable property

2.111 In order to illustrate the problems of co-ordination, it is necessary to compare the requirements of the condictio indebiti with those of a the lawful possessor's remedy remedy to vindicate and recover possession of property. For simplicity, we confine the discussion to moveable property.

2.112 Requirements of condictio indebiti. As we have seen[2], the main requirements of the condictio indebiti so far as relating to restitution of property are as follows:

(1) there was a transfer of property;

(2) the transfer was not legally due;

(3) the transfer was made under error (normally of fact);

(4) the defence that it would be inequitable for the court to order retransfer does not lie;

(5) no other defence precludes recovery;

(6) the pursuer has a title to sue (normally he must be the person who made the transfer); and

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[1]See para 2.119 below.

[2]See para 2.13 above.

(7) the defender was the person to whom the thing was transferred.[1]

2.113 Requirements of vindicatory action for recovery of possession of moveables. The requirements of a vindicatory remedy for recovery of possession of moveables are discussed by Mr K G C Reid in the Title on "Property" in a forthcoming volume of the Stair Memorial Encyclopaedia[2] on which this paragraph is based. The requirements are as follows.

(1) Title to sue depends on real right of possession. The pursuer must have a real right to possession (jus possidendi) which he can vindicate against all challengers.[3] "But while the right to possession is a real right it is not an autonomous right. It cannot exist on its own but only as part of some other and more general right, such as the right of ownership".[4] This more general real right may be ownership or some other real right (such as the pledgee's right under pledge) conferring entitlement to possession[5]. Possession must be distinguished from a licence to possession. A licence to possession is a personal right enforceable against the licensor but not against third parties.[6] Normally the licensor alone will hold the real right to natural possession, and accordingly he, not the licensee, has a title to sue for recovery of natural possession.[7] Possession must also be distinguished from detention or custody. Possession of a thing implies an intention to exercise control for the possessor's own benefit. Detention and control of a thing may however be exercised by a custodier (or detentor)

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[1]In addition there are two further possible requirements which are controversial and uncertain, namely: (a) that the defender must have been enriched by the transfer at the time when it was made; and (b) that the defender's enrichment was at the pursuer's expense.

[2]Volume 18.

[3]Reid op cit para 127.

[4]Idem.

[5]Ibid para 158, citing Stair Institutions IV,3,45.

[6]Ibid para 128.

[7]Idem.

exclusively on behalf of another[1] who is then treated as having civil possession.[2] It is the civil possessor,not the custodier, who has a title to sue a possessory remedy.

(2) Rebuttal of presumption that possession implies ownership. There is a presumption that natural possession of corporeal moveables is lawful[3] and a related presumption (of varying strength) that the natural possessor (as distinct from the custodier) of corporeal moveable property is the owner[4].The pursuer must rebut these presumptions.

(3) Proof of right of possession. The extent to which the pursuer must prove his right or title of possession depends on the defender's pleadings.[5] If the defender avers that his right of possession is a subordinate title (eg as hirer or pledgee) flowing from the pursuer as his author,the pursuer need not prove his right because the validity of the defender's subordinate title presupposes the validity of the pursuer's title.[6] If the defender pleads that he holds on a title not derived from the pursuer or challenges the pursuer's right of possession without averring his own title,the pursuer must prove his own right of possession. This lays on the pursuer the double burden of proving (a) that he had a right of possession (flowing from a real right such as ownership or pledge) by proving his own earlier natural possession and (b) that that his earlier right subsists and is a better right to possession than that of the defender.[7]

2.114 Comparison It will be seen that the requirements for the two types of claim are quite different even though the

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[1]Invariably pursuant to some pre-existing legal relationship,eg employer-employee.

[2]Ibid paras 121 and 125.

[3]Ibid para 129.

[4]Ibid para 130.

[5]Ibid para 150.

[6]Idem. The issue then becomes whether the subordinate title still subsists:idem.

[7]Ibid para 150.If the property has passed through several hands, he must prove that his right is higher than that of each of the intermediate possessors:idem.

form of action is in both cases an action for delivery. There is a measure of overlap. Where a person having a real right of possession (eg an owner or pledgee) mistakenly hands over goods to the wrong person or delivers too great a quantity he may choose either form of remedy. In other circumstances, only one form of remedy be available. For example, where the mistaken transferor has no real right of possession, eg he is only a custodier or licensee holding on behalf of the civil possessor, a condictio indebiti is the only remedy available to the custodier.

2.115 Case-law Excluding transfers of moveables under void contracts, we have traced only two cases of actions for restitution of corporeal moveables following a mistaken delivery. In Pride v St Anne's Bleaching Co[1] the pursuer bleaching company by mistake delivered to the defender (Pride),one of their customers, 250 spindles of yarn more than had been sent to them by the manufacturer on the defender's account to be boiled and cleaned. The defender and other customers (including one McIntyre) carried on a course of dealing with the pursuers under which each customer had a parcel of yarns in the pursuers' hands to be boiled and cleaned. These yarns were made by the same maker and were of the same quality and appearance. The pursuers' records showed that at the time when the over-delivery of 250 spindles was made to the defender, a short delivery of 250 spindles was made to McIntyre. The bleaching company brought a sheriff court action concluding for (specific) restitution by the defender of the 250 spindles or payment of their value, which the sheriff granted. On advocation, it was held in the Outer and Inner House that, as the defender refused to return the spindles, he was liable for the price. No opinions are reported. It is for consideration whether the action should be characterised as a vindicatory action for recovery of possession or a condictio indebiti or perhaps simply an innominate action for restitution. Stewart on Restitution argues that the action was a condictio indebiti rather than a vindicatory action for recovery of possession.[2] His argument is that all the yarns were indistinguishable in appearance; that none of the yarns belonged to the pursuers;and that the "lost" (ie McIntyre's) yarn was immixed with the defenders' yarn and at least after delivery arguably became the defender's property by commixtion. In short the pursuers were never

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[1](1838) 16 S 1376.

[2]Para 7.6.

owners but, even if they had been, ownership was lost by commixtion. In the light, however,of Mr Reid's (as yet unpublished) analysis of title to sue a vindicatory action to recover possession, title to sue such an action depended not on the pursuers' ownership but rather on whether they had a real right of possession. If as seems likely (but the question was not discussed) the pursuers were merely detentors or custodiers of McIntyre's yarns by virtue of their contract with him,and civil possession was vested in McIntyre, then the latter would have had title to sue a vindicatory action, at least if the yarns had been identifiable. It does seem probable that ,as Stewart observes, ownership of the extra spindles of yarn delivered to the defender (which was probably McIntyre's yarn) had passed to the defender by commixtion in which case a vindicatory action for possession would not have lain. In these circumstances, it seems likely that a condictio indebiti for specific restitution, which failing restitution of value, did indeed lie.There was delivery under error of an indebitum and unjustified retention. On the question whether a condictio indebiti lies to recover natural possession as distinct from ownership, the case is neutral. But it does seem right on grounds of principle and policy that, if McIntyre's yarns had been identifiable in the defender's hands, the bleaching company who made the mistake should have had a title to sue to correct their mistake.

2.116 In Caledonian Rly Co v John Harrison and Co[1], A [Carruthers and Co] sold goods to B [Banks and Stewart] who sold them to C [John Harrison and Co] the defenders. A forwarded the goods to a railway station to remain at his own order. The railway company, by mistake, without a delivery order from A, delivered them to C on B's order. A demanded the value of the goods from the railway company (by way of damages for delivering the goods to C contrary to A's instructions). B became bankrupt. C had not paid B the price of the goods. The railway company paid A the price of the goods. The report does not make clear whether this payment was by way of purchase or by way of damages. If it had been by way of purchase, the railway company would have had a personal right to ownership of the goods which would become a real right on their obtaining delivery from C. The railway company would then have had a title as lawful possessor to vindicate their right of possession. The railway company then raised an action against C for redelivery of the goods or for the price and cost of carriage. Their main plea-in-law was that the

[1](1879) 4 R 151.

pursuers, having delivered the goods to the defenders in error,were entitled to have it returned. The pursuers' reliance on their erroneous delivery as the basis of their claim seems to bring the action within the doctrine of the condictio indebiti in its application to moveables. The defenders C averred (i) that they had suffered serious loss as the result of B's non-fulfilment of their contract because C had sold the goods to X and had been compelled to go into the market to implement their contract with X;and (ii) that since C had counterclaims against B, C would lose their right of set-off if they paid the price to anyone else. They pleaded inter alia no title to sue and no privity of contract. The Second Division held that the pursuer railway company was entitled to restitution from C, or to restitution of the value including the cost of carriage, unless C could show that he had suffered, or would suffer,loss arising from the mistake. Any such loss could be set off as a deduction. The Court further held that C could not show any direct loss already suffered nor any probable or contingent loss in the future. The fact that C had had to go into the market to get other goods was due to B's breach of contract with C, not to the railway company's mistaken delivery. C were not entitled to retain another's goods for which they had not paid a farthing. The report does not refer to the condictio indebiti but the case does seem to have been an example of such a condictio.

(4) The condictio indebiti, declarator of ownership and the rejection of the rei vindicatio

2.117 The classification of actions. The question whether the condictio indebiti should lie only where ownership of moveable property is transferred, as in Roman or German law, or whether it should lie also where mere physical possession is transferred, is bound up with the Scottish system of classifying ordinary actions by reference to the conclusions of the action, in which the pursuer states the remedy he seeks.

2.118 Real and personal actions: rejection of the rei vindicatio. The distinction between real and personal actions has been borrowed from Roman law but has not been applied in Scots law as an exhaustive classification and is now of little importance.[1] It is in the context of this distinction that Stair denies that Scots law has received

[1]Stair Institutions IV, 3, 35; IV, 3, 45; Bankton Institute IV, 4, 2; Erskine Institute IV, 1, 10; cf Mackay Practice pp 367, 368; Maxwell Practice p 353.

the rei vindicatio of Roman law.[1] Stair confined the category of real actions to poinding of the ground, because in such actions "there is nothing decerned against persons personally, but only not to impede the poinding of the ground".[2] Subject to an inconsistency noted below, Bankton agrees saying that real actions "are directed against the thing, and have no personal conclusion upon the defender", and gives the examples of adjudication and poinding of the ground.[3] Stair remarked:

> "we make not use of the name or nature of Vindication, whereby the proprietor pursues the possessor ... to suffer the proprietor to take possession of his own ... the conclusion for delivery doth not properly arise from vindication, which concludes no such obligement on the haver, but only to be passive, and not to hinder the proprietor to take possession of his own ...".[4]

He contrasts this passivity with the active nature of the obligation of restitution:[5]

> "there is a real obligation upon possessors, not having a title sufficient to defend their possession, to restore or re-deliver, not only to the proprietor, but to the lawful possessor".

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[1] Institutions IV, 3, 45.

[2] Idem. Compare however ibid IV, 23, 1 in which poinding of the ground is defined as a petitory action, which seems to presuppose a personal conclusion: see ibid IV, 3, 47; IV, 21, 1.

[3] Institute IV, 4, 2.

[4] Institutions IV, 3, 45. Stair continued: "wherein the Romans were so precise, that none could vindicate but he who proved his right of property; and it was not sufficient to recover his possession, till the Praetor gave action to him that pretended that he had acquired by usucapion, though the time was not complete: but they did not own any personal obligation upon the haver".

[5] Idem.

Bankton states:[1]

> "an action for the delivery of moveables is either a Personal Action, or a Real, as it is founded on the defender's obligation, or on the pursuer's right of property; but the defender is decreed to deliver the thing, tho' the pursuer's claim be founded in his right of property in the same".

Bankton here recognises the dual proprietory and petitory functions of the action of delivery, though the petitory character of the conclusion is inconsistent with the requirement (accepted by Stair and Bankton) that a real action has no personal conclusions.

2.119 Action and obligation of restitution coming in place of the rei vindicatio. As Dr Carey Miller has shown,[2] the concept of the rei vindicatio has often been used by the courts, sometimes interchangeably with "restitution". He argues that "the right of vindication is given effect to through the obligation of restitution".[3] Bell refers to a summary action of restitution available to a proprietor "grounded on the jus in re. It comes in place of the rei vindicatio of the Roman law".[4] It has been said that "Restitution was the personal remedy by which the owner asserted his real right".[5] It is, however, important to avoid two errors. First, it should not be thought that the action (and obligation) of restitution is the only successor of the Roman rei vindicatio. The owner of property may wish to vindicate his title to moveables by declarator without demanding delivery, as where he claims ownership but concedes to the possessor a limited title of possession. We revert to this in the next paragraph. Second, one unfortunate consequence of treating restitution as the Scots successor of the Roman rei vindicatio is that it has encouraged the erroneous

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[1]Institute IV, 4, 2.

[2]Carey Miller Corporeal Moveables pp 175-179.

[3]Ibid p 175, citing Erskine Institute III, 1, 10: "whatever comes into our power or possession which belongs to another, without an intention in the owner of making a present of it, ought to be restored to him".

[4]Bell Principles s 1320.

[5]D R Macdonald "Restitution and Property Law" 1988 SLT (News) 81 at p 81.

tendency to assume that restitution is available only to an owner. Thus our Consultative Memorandum No 31 suggested that "the ius ad rem (obligation) is only available to a claimant who has a ius in re".[1] And it has been observed that "there can be no claim to restitution where ownership has passed".[2] The better view, however, is that a claim to a reconveyance (ie re-transfer of ownership) of a thing transferred under a void causa is also a right to restitution, the particular form of remedy for restitution being the condictio indebiti.

2.120 Modern definition of "real action": declarator of ownership coming in place of rei vindicatio. Stair regarded a real action as vindicating a property right without imposing a personal obligation of restoring ownership.[3] Elsewhere he recognises declarators of ownership,[4] yet he treats them as being neither real nor personal[5] and does not expressly consider them to be the successor of the rei vindicatio of Roman law. It is a feature of an action of declarator of ownership in Scots law that (in accordance with the general rule relating to declarators) it is res judicata only as between parties to the action. It may be that Stair took the view that the rei vindicatio of the Roman law was not subject to this limitation and for that reason he did not regard an action of declarator of ownership as being a rei vindicatio in the strict sense. Bankton as we have seen used "real action" in Stair's sense, but also in a new and different sense as an action founded on the right of property.[6] Erskine[7] and modern commentators[8] define real actions as

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[1]Corporeal Moveables: Remedies (1976) p 4, fn 3.

[2]Carey Miller Corporeal Moveables p 181.

[3]Institutions IV, 3, 45.

[4]Ibid IV, 3, 47; IV, 4, 1.

[5]Ibid IV, 3, 45.

[6]Bankton Institute IV, 4, 2: see para 2.113 above.

[7]Erskine Institute IV, 1, 10.

[8]See Mackay p 367; Maclaren p 645. But Maxwell p 353 is in slightly different terms: "A real action (actio in rem) is an action to determine the right of property in a subject, ... A personal action (actio in personam) is an action to enforce a personal obligation".

actions grounded on a real right or jus in re and personal actions as actions founded on a personal right (obligation) or jus ad rem. Mackay, expressly disagreeing with Stair, suggested that "it would perhaps be more proper to consider declarators as real actions; for until reduced, the right declared to belong to the pursuer must be recognised by the Court".[1] It seems to us in any event clear that an action of declarator of ownership, which is and always has been competent where the owner's title requires vindication,[2] performs in Scots law a role akin to the rei vindicatio of Roman law, whether or not such an action of declarator is classified as a real action.

2.121 Abstract and causal theories of transfer of ownership. Scots law draws a distinction between the underlying basis or reason for a transfer of ownership, - usually the antecedent contract (eg sale, gift or exchange) - and the formal act of transferring ownership, normally effected by delivery or traditio in the case of corporeal moveables. Under the causal theory, where the antecedent contract is invalid, the conveyance implementing the contract is also invalid. Under the abstract theory, where the contract is invalid, the conveyance will nevertheless be valid if the intention of both parties was to transfer ownership. This question was reviewed in our Consultative Memorandum No 25,[3] where it was observed that the abstract theory had not been formally accepted in Scots law but that certain decisions could be construed as recognising it implicitly. This issue has proved controversial[4] and as yet no consensus has been reached. If Scots law does not recognise a purely causal theory of transfer of ownership, then there will sometimes be cases in which the underlying contract is invalid, but the conveyance is valid, and accordingly

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[1]Mackay p 367, fn (e), commenting on Stair Institutions IV, 3, 45.

[2]Walker Civil Remedies (1974) p 125 ff. An action of reduction may be necessary where the agreement to transfer is embodied in a writ, but an action of reduction is not competent where there is no writ: MacLean v MacLean 1976 SLT 86 at p 91 per Lord Cameron.

[3]Consultative Memorandum No 25 on Corporeal Moveables: Passing of Risk and of Ownership (1976) paras 12 to 17.

[4]See eg W W McBryde The Law of Contract in Scotland (1987), paras 26-31 to 26-37; Carey Miller Corporeal Moveables pp 106-114.

a condictio indebiti in the classic sense, ie an action of restitution for recovery of ownership, based on error will lie[1]. In such cases, since there is no iusta causa traditionis the transferee is enriched without justification, sine causa, and has an obligation to convey the property back to the transferor. Generally speaking, the question whether a transfer of moveables has vested ownership in the transferee only becomes important where a competition of property rights arises between the transferor and singular successors or creditors of the transferee. In a condictio indebiti, such questions normally do not arise because in that condictio the pursuer seeks to enforce a personal obligation of specific restitution or, if the moveables have been disposed of, a substitute personal obligation of recompense.

(5) Summary of conclusions

2.122 The foregoing tentative survey illustrates the difficulty of co-ordinating the rights and remedies for specific restitution of goods transferred under error. First Scots law subsumes the following doctrinally different causes of action under the undifferentiated concept of restitution and under the undifferentiated form of action of delivery, namely (a) actions to recover ownership of moveables and actions to recover natural possession of moveables and (b) actions based on the right of a lawful possessor to vindicate and recover possession and actions based on the condictio indebiti. Second, the requirements of actions based on the right of a lawful possessor to vindicate and recover possession and actions based on the condictio indebiti are different. Third, although the case law is scanty, at least two cases suggest that a condictio indebiti, or an action of that nature, lies at the instance of a transferor to recover goods erroneously transferred to the defender. Fourth, there is doubt whether Scots law acknowledges an abstract or a causal theory of the transfer of ownership, and therefore there must sometimes be doubt whether the object of an action of specific restitution is the reconveyance of ownership or simply the recovery of possession. This doubt makes a stable analysis of remedies difficult. The doubt is concealed by the use of the action of delivery (normally in the sheriff court) to cover both the recovery of ownership, and the recovery of natural possession, of a thing transferred in error.

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[1]See D R Macdonald "Restitution in Property Law" 1988 SLT (News) 81 at pp 81, 82.

Similarly the authorities on the obligation of restitution in specie do not distinguish between recovery of ownership or recovery of possession.

Fifth, while it is true that the action of delivery and the obligation of restitution are invoked as proprietary remedies by an owner who has transferred possession of moveables under error, it is not true that the action of delivery is the only successor of the Roman rei vindicatio. An action of declarator of ownership also comes in place of the rei vindicatio since, where the sole object of the action is to vindicate title, an action of specific restitution or delivery is inappropriate.

F. The measure and extent of recovery

(1) Preliminary

2.123 Measures of recovery. Professor Birks has argued that in restitution (in the widest sense), there are only two measures of recovery "value received" and "value surviving":

> "the normal measure is 'value received', ie what the recipient obtained, without regard to whether he still has it or anything representing it; the exceptional measure is 'value surviving', ie what the recipient still holds of, or representing, the value he received."[1]

The second measure "what he has left" will normally be less than "what he received". All proprietary claims are in the second measure, but personal claims may be either in the first or second measure.[2] It is thought that the normal measure of recovery in recompense under Scots law is "value surviving", a notion taken to be implicit in the quantum lucratus measure in recompense.[3] We are here concerned primarily with repetition of money and restitution of moveables in which the measure of recovery is primarily "value received", though in the case of a sub-sale by a bona fide possessor, his liability is quantum lucratus, eg the profit on the sub-sale, which could be seen as a form of "value surviving".

2.124 "Value received" and defences. Whether or not this analysis wins recognition in Scots law, it is helpful in explaining the relation of defences such as "change of position" or "bona fide consumption" to the primary measure of recovery. In particular the fact that the law allows an equitable defence of "change of position" does not mean that the measure of recovery is "value

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[1]Peter Birks "Restitution: Scots Law" (1985) 38 CLP 57 at p 65. See also ibid pp 75-78; and as to English law Birks, Introduction pp 75 ff.

[2](1985) 38 CLP 57 at p 76.

[3]In Royal Bank of Scotland plc v Watt 1991 SLT 138, it was assumed that in an action for recompense quantum lucratus, the tempus inspiciendum for assessing enrichment was the time of the action.

surviving". Professor Birks explains this very clearly by reference to the following example:[1]

> "A given jurisdiction might allow a defence of charitable donation: you would not have to repay a mistaken payment if, and so far as, you had given the money to charity. Suppose then that in that jurisdiction P mistakenly paid D £1000, and D then donated £500 to a charity. P claims his £1000, and D relies on what happened afterwards, his payment to the charity.
>
> Here P's claim is still based on the measure 'value received', albeit subject to reduction by virtue of the specific defence available to D. When D successfully raises his defence of charitable donation, P's claim will be cut down to £500. The important point is that it is not cut down simply because D no longer has the money which he received. He may well no longer have the other £500 either, but he has to repay that whether he has it or not. The reason that P's claim is reduced is simply that his prima facie right to recover the full value received by D here encounters a specific defence maintainable by D, not just that he spent it but that he spent it in a particular way."

(2) The condictio indebiti for repetition of money

(a) The amount of the sum received

2.125 In Scots law, in a condictio indebiti for repetition of money the measure of recovery is "value received", though this is subject to equitable defences including change of position. This is clear from Lord Kyllachy's dictum in the Credit Lyonnais case:[2]

> "The money in question was paid in error under a mistake of fact. It was therefore reclaimable, unless (the pursuers' remedy being equitable) there was an equitable defence to repetition."

In Royal Bank of Scotland plc v Watt,[3] for example, the pursuers recovered from the defender the full amount of

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[1] Ibid p 76.

[2] (1901) 9 SLT 93 at p 95.

[3] 1991 SLT 138.

£18,631 paid by the pursuers to the defender even though the defender had later paid £18,000 out of that sum to a third party who had disappeared. The defender failed to show that his change of position by reason of his payment of £18,000 to the third party made it inequitable for the court to order repayment of the full amount.

(b) Interest on the amount of the sum received

2.126 The Institutional period. In the Institutional period, the law on whether interest on an undue payment was recoverable was in process of development. In an anonymous case in 1677,[1] the Court of Session held that annualrents (interest) on money paid in error could be condicted, following Roman law[2], apparently on the ground that they were a fruit and accession of the principal sum, and so should follow it. Again in 1710, it was held that, where a party assigned a bond bearing an annualrent and containing a larger principal sum than was due to the assignee, the assignee was liable to pay back the undue part of the sum together with the annualrent from the time he uplifted it.[3] Bankton[4] thought that interest on sums unduly received was not recoverable (on the analogy of a loan not bearing interest) but that if the sum bore interest at the time of payment, then the annualrent had to be paid over along with the principal. Erskine took the same view that interest had to be paid over along with the principal in the case of "one who receives money belonging to another, which formerly carried interest" on the ground that "the whole intermediate interest... as an accessory is to be held as part of the sum itself".[5] In Garthland's Trs v. McDowall[6], it was held that interest was due on loans by legal implication though there was no stipulation for interest, so that the analogy relied on by Bankton of a loan no longer supported a rule that interest was not recoverable where the sum did not formerly bear interest. Accordingly Bell stated that by implied contract, interest is due where one has levied moneys belonging to another

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[1](1677) 3 B S 155, headed "Anent Indebiti Solutio".

[2]D.12.6.15 pr.

[3]Irving v Gordon (1710) Mor 553.

[4]Institute I, 8, 29.

[5]Institute III, 3, 79.

[6]26 May 1820 FC.

which bore interest in the hands of the former debtor[1], and later remarked that "The doctrine is gradually extending, so as to recognise a claim of interest in all cases of loan and debt in which one enjoys the use of money belonging to another"[2]. This proposition, however, while true of loan, does not apply to all debts in the modern law.[3]

2.127 The modern law. In the modern law, it is established that interest is payable on sums paid in error, but there is some doubt as to the rules governing the time from which interest is payable and as to the rate of interest payable. The main question is whether the time from which interest runs on a payment made in error is (1) on the principle of restitution or on the analogy of interest on loans, the date when the erroneous payment was received, or (2) under the more general rule, the date when the erroneous payment was first "wrongfully withheld" which generally means the date when the payer made a formal or judicial demand for repayment.[4] It has, however, to be borne in mind that where the payee relies on the defence of bona fide percepta et consumpta,[5] the date when bona fides ceases is the critical date.

2.128 The principle of restitution. Few of the cases on this matter are entirely satisfactory. The principles were canvassed in the Countess of Cromertie v Lord Advocate[6]. For many years surplus teinds were paid by a heritor to the Crown, since all interested parties had believed that the Crown was titular of the teinds. It was eventually discovered that the teinds were due not to the Crown, but to a private person as patron of the parish. The patron and the heritor sued for declarator that the patron was titular and the heritor at least, or possibly

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[1]Bell Commentaries vol 1, p 692 (citing inter alia Irving v Gordon (1710) Mor 553).

[2]Ibid p 693 (citing Garthland's Trs v McDowall 26 May 1920 FC).

[3]As to the antinomies in the existing law, see J Murray "Interest on Debt" 1991 SLT (News) 305.

[4]See para 2.134 below.

[5]See para 2.145 below.

[6](1871) 9 M 988.

both the heritor and patron, sued for repetition to the heritor of the sums erroneously paid to the Crown and interest thereon. The Crown did not advance a plea of bona fide percepta et consumpta, in accordance with its practice. The Lord Ordinary (Gifford) held that interest was recoverable from the date of payment on the principle of restitution and awarded interest at 3% as an estimate of the interest actually earned by the Crown. He remarked[1]:

> "The Lord Ordinary thinks that the true principle applicable to the present case is the equitable principle of restitution. Laying aside the plea of bona fide perception and consumption as inapplicable to the case, or as waived by the Crown, then the rule is, that he who has become possessed of the property of another, however innocently, is bound to restore it, or hand it over to the true owner cum omni casu, that is, with all profit and advantage which has accresced or accrued to it in his hands. If it be a moveable subject, which has increased in value by change of market, by age, or otherwise, the true owner is entitled to the benefit of such increase. So if the subject, without expense or labour on the part of the bona fide possessor, has produced fruits or increment, such fruits, as an accessory to the subject itself, must be restored along with it. Of course in all these cases there might be the plea of bona fide consumption; but if once that is out of the way, the obligation of restitution applies equally to the fruits as to the subject itself.
>
> On the other hand, it is plain that the Crown, as bona fide uplifter of the teinds in question, ought not to be subjected to any loss or detriment whatever on account of the innocent mistake which has occurred. The Crown cannot be asked to pay back more interest than has actually accrued upon the money in its hands. To exact from the Crown interest which it has not actually received, would be to subject the Crown, without fault, to a loss. This is inadmissible. The Crown, by abstaining from pleading bona fide perception and consumption, has virtually, and it may be generously, stated that it desires no gain; but no ground can be suggested why it should be subjected in loss".

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[1]Ibid at p 991.

In other words, interest on money follows the same rule as natural fruits and accessions.

2.129 The First Division, however, held that the Crown was not liable for interest accrued prior to the heritor's formal demand for repetition.[1] Lord President Inglis (Lord Ardmillan concurring) characterised the action for repetition as a condictio indebiti, stating that the true question at issue was between the heritor and the Crown.[2] Nevertheless he held that the patron's extreme negligence in not knowing that she was the true titular absolved the Crown from paying interest accrued prior to a formal demand. This negligence was relevant because if the heritor was to receive payment, it must be for paying the sum to the true titular; he could not be allowed to pocket the interest because he paid to the wrong creditor.[3] It should be noted that the Lord President did not criticise Lord Gifford's reliance on the principle of restitution, but seems rather to have held it inapplicable on the facts. Lord Kinloch agreed with the Lord President that the true titular was by her own fault not entitled to demand interest before the date of the formal demand,[4] but he also criticised Lord Gifford's reliance on the principle of restitution as applied to interest. He remarked[5]:

> "If this principle be sound, I think it simply amounts to establishing a charge of interest in every case whatever in which money owing to another remains unpaid, for in every case it may be equally assumed that gain was made by its retention. I can draw no sound distinction between the case of money of another's, drawn and kept by mistake, and money owing to another on an ordinary debt, not paid when due. The latter rather appears to me to be the more fitting case of the two for the exaction of interest. The assumption of gain being made by a holder of money in every case whatever is a somewhat violent one, and often very contrary to the fact. I perceive

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[1]In a dissenting opinion, Lord Deas (at pp 993, 994) agreed with Lord Gifford.

[2](1871) 9 M 988 at p 992.

[3]Ibid at p 993.

[4]Ibid at p 994, 995.

[5]Ibid at p 994.

no ground for considering it necessarily presumable that on each of these yearly receipts 3 per cent per annum was made by or on behalf of the Crown. It seems to me just as likely that they were spent or employed without creating any pecuniary profit".

2.130 In the result, the Countess of Cromertie case provides some support for the proposition that the recovery of interest paid in error is based on the principle of restitution and that, in the absence of a defence of bona fide percepta et consumpta, interest is due from the date when the erroneous payment was received, but that negligence on the part of the payer, or the person regarded as ultimately impoverished (such as the person to whom the payment should have been made) will bar the payment of interest until the date when repetition of the principal sum is demanded. There is, however, support in Lord Kinloch's opinion for the view that the ordinary rules of payment of interest, which are now based on the test of wrongful withholding, applies in a condictio indebiti.

2.131 The scantily reported Outer House case of Gwydyr v Lord Advocate[1] supports Lord Gifford's view that payment of interest is based on restitution. The pursuers sued the Crown for repetition of surplus teinds, paid to the Crown in error, together with the interest thereon. The Crown admitted liability to repay the principal sum, paid in error, but refused to pay interest. In holding that the pursuer was entitled to interest at the rate of 3%, Lord Kyllachy observed[2]:

> "I am of opinion that interest is due where money paid in error is recovered under a condictio indebiti. The principle of that remedy is restitution, and I think there cannot be restitution unless interest is paid".

The actual result in the Countess of Cromertie case was distinguished on the ground that the question there was whether the true creditor, who had neglected to claim her debt, could after the lapse of years recover it with interest.

2.132 The analogy of loan. The fact that, in the normal case of a condictio indebiti the critical date is the date

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[1](1894) 2 SLT 280.

[2]Idem.

of payment rather than the date of a formal demand for repayment receives support from Duncan, Galloway and Co Ltd v Duncan, Falconer and Co[1]. The tenants of a quarry sold their interest in the lease and inter alia some buildings which they erroneously believed belonged to them, or for which they were entitled to receive value or allowances at the termination of their occupancy, and represented this to the purchasers. In fact some of the buildings belonged to the landlord. In an action for repetition by way of condictio indebiti for the part of the price paid for these buildings, it was held that the purchasers were entitled to repetition of that part of the price with interest at 3 per cent from the date of payment. The Lord Ordinary (Hunter) referred to the general rule "that interest, in the absence of express stipulation, is due upon money lent"[2] and remarked that "This rule would appear equally to apply where money is paid in error, and the use thereof has been enjoyed by one not otherwise entitled thereto".[3] On reclaiming, the rate of interest allowed was described as "moderate"[4] and Lord Guthrie observed that if the Lord Ordinary had given 5% instead of 3%, he would have agreed.

2.133 The seller may have a defence to a claim for interest on the excess of the price paid to him in error where the purchaser takes possession of a greater extent of subjects belonging to the seller than is due to the purchaser under the contract of sale. Thus in the Duncan, Galloway and Co Ltd case[5], the defender sellers contended that the pursuers had had possession of the subjects which they erroneously thought they were purchasing, and that their use of the subjects should be set against the interest claimed. This contention was rejected on the ground that the possession of the purchasers was traced to the landlords and not to the defender sellers. Lord Hunter (Ordinary) said (obiter) however that if possession had been due to the seller defenders (rather than the

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[1]1913 SC 265.

[2]Blair's Trs v Payne (1884) 12 R 104 at pp 109, 110 per Lord Fraser.

[3]1913 SC 265 at p 270.

[4]1913 SC 265 at p 273 per Lord Salvesen.

[5]1913 SC 265.

landlords), he would have given effect to the defenders' plea.[1]

2.134 "Wrongful withholding": date of formal demand? There is Outer House authority holding that interest on excess estate duty paid in error ran only from the time when the payer, having discovered his error, made a formal demand for repayment.[2] This is consistent with the general rule that interest only runs from the date when the principal sum is "wrongfully withheld".[3]

2.135 The date of payment. The weight of authority however favours the date of payment though the basis for this is not clear. In the Duncan, Galloway case, the right of the mistaken payer to interest from the date of payment was upheld on the analogy of interest on loans, whereas in the Countess of Cromertie and Gwydyr cases, it was said to depend on the principle of restitution. Dicta in subsequent cases do not seem to have changed the position.[4] It does seem therefore that interest runs from the date of payment unless there is negligent delay in demanding repayment, when it will run from the date of the demand. In a case not concerned with a condictio indebiti, it was observed that the Duncan, Galloway case depended

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[1]Ibid at p 270, approved at p 273 per Lord Salvesen.

[2]Sprot's Trs v Lord Advocate (1903) 10 SLT 452 (OH).

[3]Carmichael v Caledonian Railway Co (1870) 8 M (HL) 119 at p 131 per Lord Westbury; Blair's Trs v Payne (1884) 12 R 104 at p 110 per Lord Fraser.

[4]In Magistrates of Stonehaven v Kincardineshire County Council 1939 SC 760, Lord President Normand said (at p 771): "Counsel also raised a question about interest, and it was conceded that bank interest would not be recoverable under the principle of unjust enrichment". The Court did not however decide the question in the absence of averments relating to interest. See also the reference to the Countess of Cromertie and Duncan, Galloway cases in Trans Barwil Agencies (UK) Ltd v John S Braid & Co (No. 2) 1990 SLT 182 at p 185 (OH) per Lord McCluskey: this case involved money received by an agent from a third party and withheld from the principal in error, and not to a condictio indebiti where the principal has paid money to the agent in error.

"upon its own circumstances",[1] but there is no reason to doubt that the decision applies to a condictio indebiti.

(3) Restitution of specific property and its fruits and accessions.

2.136 Preliminary. The authorities on the measure and extent of restitution normally presuppose that the pursuer in an action of restitution of moveables is the owner or lawful possessor and that the defender is merely the natural possessor. These authorities are therefore applicable in principle to the case of a transfer of the moveables under error where, under the causal theory, ownership does not pass and where, therefore, the recipient is merely a possessor, (normally a bona fide possessor). The action is strictly proprietary or possessory, and not an action for the redress of unjustified enrichment, unless it can be said that possession is an enrichment.

2.137 It may be that the main rules on the measure and extent of the defender's liability could be applied, with some modifications, to the case where a transfer under error has the effect of conveying ownership, if Scots law were to recognise the abstract theory of transfer of ownership, of corporeal moveables. Some modification of theory would be necessary. Thus, if ownership of a cow in calf were transferred but under a void causa, the right of the transferee to the calf would flow from his ownership of the cow, and not from the doctrine of the bona fide possessor's right to acquire the fruits of the thing possessed. Then again if the transferee were to sell the cow, his liability to the transferor could be determined according to the rules applying to the bona fide possessor's liability in recompense and the mala fide possessor's liability in restitution. It has to be recognised, however, that the doubt at the heart of our property law concerning the recognition of the abstract or causal theory of the transfer of ownership precludes a stable analysis of the measure and extent of recovery in restitution of specific moveables.

(a) The thing itself or its value

2.138 The principal obligation in restitution of property other than money unduly received is to restore the thing

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[1] Raymond Harrison and Co's Tr v North West Securities 1989 SLT 718 at p 724 per Lord Clyde.

itself. Bell states the general rule thus:

> "If restitution be demandable, not of money, but of a thing delivered and received unduly, the thing must be restored in the same condition in which it was received, barring accidents".[1]

No case is cited by Bell, and no subsequent reported case has been traced, as to this proposition so that the law is undeveloped. In some cases recompense or "restitution" of the full value is due as a substitute remedy. Thus (1) according to Bell if the thing has perished by the receiver's fault, the value must be restored[2], and (2) if the thing has perished without the receiver's fault and he received it in bad faith, the value must be restored.[3] It is not clear what is meant by "fault" nor how proposition (1) is to be reconciled with the defence of bona fide possession. (3) Bell also states that if the receiver sells the thing in bona fide, he must pay over the price to the true owner.[4] All the foregoing rules were stated by Bell as applicable to restitution of "things delivered and received unduly". This seems to be or include a condictio indebiti of moveables other than money. Two cases bearing on this matter are discussed elsewhere.[5]

2.139 Other general rules relating to restitution by owners or lawful possessors from natural possessors are also relevant and are presumably applicable in a condictio indebiti for specific restitution. These are as follows. (1) The obligation of restitution in specie owed by a natural possessor to the owner or lawful possessor only applies where the natural possessor retains natural possession.[6] (2) Where the natural possessor parts with

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[1]Bell Principles s 537; cf Bankton Institute I, 8, 29 "restitution of the thing unduly received".

[2]Idem.

[3]Idem.

[4]Idem.

[5] Pride v St Anne's Bleaching Co (1838) 16 S 1876; Caledonian Railway Co v Harrison and Co (1879) 7 R 151 (see paras 2.115 and 2.116 above).

[6]Carey Miller, Corporeal Moveables pp 182, 183; citing Scot v Low (1704) Mor 9123; Faulds v Townsend (1861) 23 D 437 at p 439; Gorebridge Co-operative Society Ltd v

the property in bad faith or through gross negligence, the owner has a right to claim the value of the thing, a species of compensation or reparation called (following Stair[1]) a right of restitution.[2] It is not clear whether the lawful possessor has the same right as the owner. (3) Where the natural possessor has in good faith and without negligence made specific restitution impossible by parting with possession, he is not liable in restitution for the full value to the owner but only in recompense quantum lucratus[3] (normally his profit on re-sale). (4) Where however specific restitution is impossible because the moveable has been consumed or destroyed without negligence or bad faith on the natural possessor's part, or where specificatio has taken place, it has been held that the possessor is liable in restitution for the full value, and not simply in recompense quantum lucratus.[4] This however is inconsistent with other (albeit obiter) authority[5] and has been criticised[6] as inconsistent with the rule applying where the natural possessor parts with possession. (5) Where a mala fide possessor and a fortiori a bona fide possessor, disposes of the property of

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Turnbull 1952 SLT (Sh Ct) 91.

[1]Stair Institutions I, 7, 2.

[2]Carey Miller ibid pp 185-187; citing Stair Institutions I, 7, 2; Erskine Institute III, 1, 10; Baron Hume Lectures vol III, p 234; Scot v Low (1704) Mor 9123; Faulds v Townsend (1861) 23 D 437 at p 439.

[3]Stair Institutions I, 7, 11; Bankton Institute I, 8, 10; Erskine Institute III, 1, 10; Bell Principles s 527; Baron Hume Lectures vol III, p 234; Scot v Low (1704) Mor 9123; Walker v Spence and Carfrae (1765) Mor 12802; Faulds v Townsend (1861) 23 D 437 at p 439 per Lord Ardmillan; International Banking Corporation v Ferguson Shaw and Sons 1910 SC 182 at p 193 per Lord Ardwall; Jarvis v Manson 1953 SLT (Sh Ct) 93; North West Securities Ltd v Barrhead Coachworks Ltd 1976 SC 68 (OH) esp at p 71 per Lord McDonald.

[4]Oliver and Boyd v Marr Typefounding Co (1901) 9 SLT 170; International Banking Corporation v Ferguson Shaw & Sons 1910 SC 182; Ferguson v Forrest (1639) Mor 4145.

[5]Faulds v Townsend (1861) 23 D 437 at p 439.

[6]See our Consultative Memorandum No 31 on Corporeal Moveables: Remedies (1976), para 13.

another, the proceeds of sale in his hands are not impressed with a constructive trust in favour of the true owner.[1]

2.140 Is change of position a defence? There are few reported cases on the delivery of goods under "performance error". In Caledonian Railway Co v Harrison and Co,[2] A sold goods to B who sold them to C. A forwarded the goods to a railway station to remain at his own order. The railway company, by mistake, without a delivery order from A, delivered them to C on B's order. The railway company, having paid A as the true owners the price of the goods, raised an action against C for redelivery or for the price and cost of carriage. The Second Division held that the railway company were entitled to restitution from C, or to the value including the cost of carriage, unless C could show that they would suffer prejudice through the mistake.[3] In the circumstances, C could not qualify any loss and was held liable for the value and cost of carriage. This case seems to assume the existence of a type of defence of change of position: a defender innocent of any mistake cannot be made to suffer by restitution.

(b) Obligation to restore fruits and accessions

2.141 The Institutional writers concur in stating that the possessor of a thing must restore its fruits and accessions, subject to certain limitations.[4] In corporeal moveables, this would for example include the offspring of animals and honey from bees. In Roman law, the fruits had only to be restored "less expenses" (deductis impensis)[5], presumably meaning production costs, and it seems likely that Scots law has received that rule. One limitation

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[1]Raymond Harrison and Co's Tr v North West Securities Ltd 1989 SLT 718.

[2](1879) 7 R 151.

[3]Ibid at pp 154, 155 per Lord Justice-Clerk Moncreiff: "The only question is, whether specific restoration is now impossible. In other words, has any damage been suffered by [C]? For if there has, they, as the parties innocent of the mistake, cannot be made to suffer".

[4]Stair Institutions I, 7, 10 to 12; II, 1, 23 and 24; IV, 30, 7; Bankton Institute I, 8, 12 to 20; Erskine Institute II, 1, 25 and 26.

[5]D.12.6.65.5.

stated by Stair is that "industrial and artificial profits, in so far as they arise from the haver's industry and not from the thing, fall not under restitution, if once separate therefrom".[1] It seems the better view however that the obligation applies to industrial and civil fruits,[2] subject to the defence of bona fide percepta et consumpta referred to below.

2.142 Must possessor be enriched by the fruits at the time of restitution or recompense? Another limitation stated by Stair is that the obligation to restore the fruits and accessions or to recompense the true owner if the fruits are consumed, only applies where the possessor is still enriched by them.[3] Apparently enrichment means enrichment at the time when the question arises, probably when his bona fides ceases. Enrichment includes not only an addition to his assets but also the discharge of liabilities and even a gift if he would have made the gift whether he had the fruits or not.[4] "But if he have increased his spending bona fide because of his having, he is free".[5]

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[1]Stair Institutions I, 7, 10.

[2]Gordon Scottish Land Law p 415 fn 19; Erskine Institute II, 1, 26; see also editor's note.

[3]Stair Institutions I, 7, 11: "And as to the fruits of that which is another's, the obligation of restitution takes only place against the haver, where they are extant; and therefore, where they are neglected, or being reaped have perished, yea where they are consumed by the haver's making use of them, the obligation of restitution takes no place, though the obligation of recompense hath place in so far only as, by such fruits the haver conceiving them to be his own, is gainer, and in better condition than if he had not had them; but if he have increased his spending bona fide because of his having, he is free, l.25.s dum re sua 11 de Pet haered [D.5. 3. 25. 11]. Under his profiting comes his paying of his debt, or even his beneficence, where it appears he would have gifted, whether such a thing had come to his hand or not, for in either case he is locupletior, and must recompense". See also I, 7, 12.

[4]Idem.

[5]Idem.

2.143 This passage from Stair is not easy to understand. He seems to be considering the case of a bona fide possessor. But such a possessor can rely on the defence of bona fide perception and consumption. Where that defence applies, the possessor is free of liability for the fruits whether or not he has been enriched by them.[1]

2.144 Bankton, in a passage not altogether easy to construe,[2] states that under the civil law, in the condictio indebiti, the possessor was liable for the bygone fruits so far he was thereby enriched. He distinguishes between bona fide possessors who received a thing not due to them, who were liable for the bygone fruits so far as thereby enriched, and other bona fide possessors who were not liable for the fruits received in good faith. He then apparently rejects this special enrichment rule allegedly applicable in the condictio indebiti because "indolence or prodigality would be indulged, and industry or frugality discouraged, which is unreasonable". It seems therefore that a defender in a condictio indebiti for restitution of specific property is in the same position as other bona fide possessors.

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[1]Indeed Stair Institutions I, 7, 12 states as a reason for the defence that it relieved bona fide possessors "of their great vexation in clearing, whether they be enriched thereby [ie by the fruits] or not".

[2]Bankton Institute I, 8, 29: "The action is only granted for restitution of the thing unduly received; and as to the intermediate fruits of subjects affording them, so far only as the possessor was thereby enriched [citing D.12.6.3; D.12.6.15]: in this case the bona fide possessor differs from other bona fide possessors, those not being liable at all for the fruits that are bona fide received, as above, without distinction, whether they have turned to their account or not: whereas a bona fide receiver of what was not due is liable, by the civil law, to account for the fruits In quantum locupletior factus est, so far as he thereby profited. But this distinction will not hold with us; for the foresaid maxim would secure the possessor upon any title, sufficient to found bonam fidem, or a belief that the subject is his own, without inquiring, whether he had thereby profited or not; and, if it were otherwise, indolence or prodigality would be indulged, and industry or frugality discouraged, which is unreasonable".

(4) The defence of bona fide perception and consumption

2.145 Writing in 1832, Professor More observed that "the chief defence against restitution, is founded on the plea of bona fide consumption",[1] but in this century the defence has not been frequently relied on, and in 1918[2] Lord Salvesen remarked that there "are very few cases in recent years where the defence of bona fide consumption has been sustained". There was apparently no equivalent doctrine in English law, a fact regretted by Lord Selborne in the House of Lords[3]. The defence was borrowed from Roman law[4] and is expressed in the maxim: "Bona fide possessor facit fructus perceptos et consumptos suos".[5] The maxim however "understates the right of the bona fide possessor in Scots law"[6]. In Scots law the bona fide possessor is entitled to all fruits gathered (percepta) during his bona fides even if the fruits have not been consumed,[7] and indeed it has been suggested that fruits separated but not gathered also belong to the bona fide possessor.[8] The doctrine was said by Erskine to be based partly on the hardship of subjecting a bona fide possessor to a claim for restitution of fruits and partly

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[1]More, Notes to Stair's Institutions (5th edn) Note F, para 7.

[2]Morrison v School Board of St Andrews 1918 SC 51 at p 61.

[3]Lord Advocate v Drysdale (1874) 1 R (HL) 27 at p 35; see also Aberdeen Rly Co v Blaikie (1833) 1 MacQ 461 at p 479 per Lord Brougham. English law may change as a result of Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548.

[4]Stair Institutions I, 7, 12; II, 1, 22 and 23.

[5]A possessor in good faith makes the fruits gathered and consumed his own.

[6]Gordon, Scottish Land Law p 415.

[7]Erskine Institute II, 1, 25; Ferguson v Lord Advocate (1906) 14 SLT 52 at p 53 per Lord Ardwall.

[8]Gordon Scottish Land Law p 415.

on the neglect of the true owner in looking after his property. He remarked[1]:

> "This doctrine has been introduced, that the minds of men who bestow their pains and money on what they believe their own, and who afterwards enjoy the profits thereof, may be secured from the continual apprehensions under which they might labour, if the event of a doubtful right should lay them under a necessity of accounting for what they had thus possessed bona fide. And, indeed, the loss ought in that case to fall on the owner, who had all the while neglected to look after his property, rather than on the possessor, who, if he had not considered the subject as his own, would probably have lived more sparingly, and who, by restoring the intermediate fruits, might, without the least blame imputable to him, be at once reduced to indigence".

Though always characterised as a defence, the plea of bona fide perception and consumption is a defence of a special type since "the rule is not that the possessor is bound to restore and that the right to retain is an exception, but that he is entitled to retain the fruits, and the burden of proving fraudulent or mala fide occupancy lies on a claimant".[2]

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[1]Erskine Institute II, 1, 25; see also Stair Institutions I, 7, 12: "Which doth much secure and quiet men's enjoyments, that they may freely use and enjoy that which bona fide they have, and to shun the hazard of their ruin by answering for the bygone fruits, or their great vexation in clearing, whether they be enriched thereby or not,..." and at II,1,23 "so it is in hatred of the negligence of the other party not pursuing his right".

[2]T M Taylor "Bona et Mala Fides", Encyclopaedia of the Laws of Scotland vol 2 (1927) para 676, citing Agnew v Earl of Stair (1826) 4 S 604 per Lord Glenlee. See also Lord Advocate v Drysdale (1874) 1 R (HL) 27 at p 35 per Lord Selborne: "a presumption of good faith, so as to throw the onus probandi, generally speaking, on those who repel it".

(a) Does the defence of bona fide perception and consumption apply to the interest on a sum of money unduly paid?

2.146 Erskine was emphatic that the defence of bona fide consumption applies to the interest of sums of money. He remarked[1]:

> "All fruits, whether natural, ie, which spring up sponte, or industrial, are thus acquired perceptione by the bona fide possessor; for it is not so much the possessor's cultura or industry which entitles him to gather them for his own, as his bona fides, which extends equally to all kinds of fruits; L.48, de adq. rer. domin. [D.41.1.48]. Even as to civil fruits, ie, the rents or profits arising from subjects which produce no proper or natural fruits, it is universally allowed, that the rents of houses, which are, beyond all doubt, fructus civiles, are in the same case with the rents of land. But it has been said by some lawyers that this doctrine is not to be received with regard to the interest of money; and that, consequently, where one hath bona fide received the interest of a bond as his own for a tract of years together, he must, upon the true creditor's proving his property in the bond, restore to him not only the principal sum, but that intermediate interest. No reason, however, hath been assigned for this specialty, which may not be as justly applied to houses, or other subjects which produce no natural fruits; neither does any authority occur that can be brought in support of this opinion, either from the Roman law or our own practice. On the contrary, whatever is in fructu becomes, by the Roman law, the absolute property of the bona fide possessor (d.L.48) [D.41.1.48] , and usurae are justly said vicem fructuum obtinere; in L.34, de usur. [D.22.1.34]; from whence it is consequent that a bona fide possessor is as strongly entitled to retain interest as natural fruits".

2.147 There are however cases which seem to undermine Erskine's views regarding the application of the defence to interest on money. In Haldane v Ogilvy[2] the Second Division held that a plea of bona fide perception and consumption of teinds was not a relevant defence by a

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[1]Erskine Institute II, 1, 26.

[2](1871) 10 M 62.

heritor having a heritable right to teinds against the claim of a stipendiary minister for arrears of stipend. It was observed that the plea was relevant if stated by a heritor against a titular. Lord Benholme, in the leading opinion, drew a distinction between a claim for the fruits of the heritable estate (such as the claim of a titular for teinds) and the claims of a mere creditor who sues for the recovery of a sum of money (such as the claim of a stipendiary minister for arrears of stipend).

> "Against a proper titular, who is the legal proprietor of the heritable, and in general feudal, estate of teinds, the defence of bona fide perception - the perception of those fruits which are the subject of his right and the object of his claim - is directly and peculiarly applicable. Against the stipendiary on the other hand, who, under his modification and locality, has no other than a claim for an annual payment of money, the defence has no application".[1]

He relied on two older cases in which, in an action by a stipendiary minister against heritors for arrears of stipend, a defence of bona fide perception was rejected.[2] In one of these, Oliphant v Smyth, it was observed on the Bench that "the condictio indebiti, as the present action really is, admits no claim for annualrents, as bona fide percepta, repetition of interest not being less due than of the principal".[3] It is difficult to see why the action should have been characterised as a condictio indebiti since it was for arrears of stipend. The report also states that "in a reclaiming petition, it was endeavoured to show, by the following authorities from the civil law,

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[1]Ibid at p 69 per Lord Benholme. The other judges concurred.

[2]Beg v Rig (1751) Mor 1719; Oliphant v Smyth (1790) Mor 1721.

[3](1790) Mor 1721 at p 1722. Erskine's editor at II, 1, 26 fn 16 remarked of this case that "this judgment seems, however, to have proceeded, not on any general denial of the doctrine in the text, but on a sort of speciality, viz that the particular action before the Court - as being a condictio indebiti - 'admitted no claim for annualrent, bona fide percepta'". This may be doubted.

and from the law of Scotland,[1] that a bona fide possessor is not bound to restore the interest of money indebite solutum, any more than the fruits of other subjects". The Court refused the petition without answers.

2.148 It should be noted that in Haldane v. Ogilvy, the Court awarded the pursuer interest at 5 per cent on the arrears of stipend and that they made no distinction between the arrears of stipend (the principal sum or corpus) and interest on the arrears (the fruits of the corpus). The defence was held inapplicable both to the interest and the principal sums of stipend.

2.149 It does not appear that Haldane v. Ogilvy has been commented on and its implications may have been overlooked. For example, in the Outer House case of Ferguson v. Lord Advocate[2], Lord Ardwall observed[3] that it appeared from Erskine Institute II, 1, 25 and 26 "that interest on money follows the same rule as fruits of the soil", but Haldane v Ogilvy was not cited. In the Ferguson case, the defence of bona fide percepta was applied to the dividends of shares, and Lord Ardwall viewed the case as "a question of liability to account for interest on these bonds".[4] The defence has been upheld in cases relating to income from rights of a heritable character such as feu-duties[5], rents[6] and teinds[7], but also to income from moveable trust funds[8], and it has been observed (obiter) that the doctrine is not necessarily

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[1]These included Erskine Institute II, 1, 26.

[2](1906) 14 SLT 52.

[3]Ibid at p 54.

[4]Idem.

[5]Leslie v Earl of Moray (1827) 5 S 284.

[6]Duke of Roxburghe v Wauchope (1825) 1 W & S 41; Menzies v Menzies (1863) 1 M 1025; Morrison v School Board of St Andrews 1918 SC 51.

[7]Scott v Heritors of Ancrum (1795) Mor 15,700, Bell Fol Cas 152; Lord Advocate v Drysdale (1874) 1 R (HL) 27; cf Earl of Cawdor v Lord Advocate (1878) 5 R 710.

[8]Hunter's Trs v Hunter (1894) 21 R 949 per Lord Young; Ferguson v Lord Advocate (1906) 14 SLT 52; and see Rowan's Trs v Rowan 1940 SC 30, at pp 39 and 48.

limited to cases of heritable right, there being no reason for not applying it where there are competing titles to moveable rights such as shares in limited liability companies or mortgages on a ship.[1]

2.150 The exclusion of the defence from a condictio indebiti for the recovery of interest on money therefore creates some curious anomalies. It is difficult to resist the logic of Erskine's principle that bona fides extends equally to all kinds of fruits, including interest on money. On the other hand, the defence seems to overlap with the equitable defence of change of position which could be applied to interest on sums recoverable by a condictio indebiti.

(b) Whether defence applicable only to the fruits of a subject, and not to the subject itself

2.151 The problem stated. In Hunter's Trs v. Hunter[2] a testator left his widow an annuity of £300 in addition to an annuity of £300 to which she was entitled by marriage-contract, but there was a provision that any annuity she might receive from the Bombay Civil Fund should be imputed to the account of the two annuities. The amount of the annuity from that Fund was for a time £300 but was later increased. The trustees however continued to pay the widow £300 per annum. When the error was discovered, the trustees brought a condictio indebiti to recover the overpayment. Lord Young held that the case fell "within the equitable rule or principle of property received and consumed in good faith".[3] Subsequently in Darling's Trs v. Darling's Trs[4], the donee of a power of appointment exercised the power by appointing a liferent to her niece but the exercise of the power was held to be bad, so that part of the sums paid to the niece by way of liferent were payable to another person. The First Division held that the doctrine of bona fide percepta et consumpta applies only to the fruits of a subject and not to the subject itself and therefore did not apply to payments of a

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[1]Morrison v School Board of St Andrews 1918 SC 51 at p 61 per Lord Salvesen.

[2](1894) 21 R 949.

[3]Ibid at p 953. Lord Justice-Clerk Macdonald and Lord Trayner based their opinions on the view that repayment would be inequitable.

[4]1909 SC 445.

liferent where the liferent itself is the subject. Lord President Dunedin (giving the leading opinion[1]) observed[2]:

> "An attempt was made to argue that [the liferentrix] should not be made to repay upon the doctrine of bona fide percepta et consumpta, and a certain case was quoted to us - Hunter's Trustees v Hunter[3]. That case was decided upon its own terms and conditions. I most respectfully say I am not to be held to agree with what it is said was there laid down as a general principle. I thought it was long ago settled and indeed is clear law, that the doctrine of bona fide percepta et consumpta, is a doctrine which deals with fruits. It deals only with the case where the subject is given to a wrong person in bona fides, which subject can be restored as a whole, and then the doctrine deals with the fruits while they were in the wrong hands, and by that doctrine such fruits are not bound to be repaid. It has no application whatsoever to wrong payments, not of fruits, but of the subject itself. The liferent here paid was not a fruit, it was the thing itself. And accordingly I cannot imagine that this doctrine has any application whatsoever to a case of this class. Nor indeed is there here any equitable basis for it, for of course she will take more under her share of the capital than she would have taken under the liferent, and there is no reason she should have both".

2.152 Conflict of authority. This decision has not been construed as finally settling the matter, and has evoked mixed reactions. It was approved by Lord Salvesen in the St Andrew's School Board case,[4] but in Rowan's Trs v Rowan[5], the case of Hunter's Trs was followed (on the ground that the overpayments had been made in error as to the widow's legal rights in construing the documents) and

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[1]Lord McLaren expressly concurring (at p 451) and Lord Pearson giving a general concurrence.

[2]1909 SC at p 451.

[3](1894) 21 R 949; see above.

[4]Morrison v School Board of St Andrews 1918 SC 51 at p 64 (dissenting).

[5]1940 SC 30 (overpayments made by trustees to beneficiary through an error in construing the trust deed).

two of the judges reserved their opinion as to whether Lord President Dunedin's criticism of Lord Young's judgment was correct in law.[1] Lord Moncrieff remarked:

> "I think it would be unfortunate if an equitable plea, such as bona fide perception, should be found to depend, not on the substance of the matter, but on the preferences of conveyancers or on the state of the title".

He referred with apparent approval to Lord Shand's criticisms of the "artificial limitations of this equitable plea" in the Huntly's Trs case.[2] There Lord Shand criticised two of the elements or alleged elements, of the plea, eviction and two competing titles. He observed that the plea does not depend on the eviction of the bona fide possessor from the subjects: "Eviction occurs, and gives occasion to state the plea of bona fides, but is not of the essence of that plea". He also observed that the plea arises not merely where there are two competing titles but where there are adverse interests under the same title. These views have been much disputed and the law is unsettled.[3]

2.153 Among academic writers, Professor Wilson comments that Lord President Dunedin's view "does seem more consistent with principle. Indeed, it is difficult to reconcile the rule as to overpayments with the principle".[4] On the other hand, Professor Gordon remarks that:

> "although [Lord President Dunedin's] statement of the law places what seems a logical restriction on the application of the doctrine, it may be that the decision was influenced by the fact that, if repetition ha[d] been refused, the liferentrix would have enjoyed both liferent and capital which would have meant an inequitable application of a doctrine founded in equity. It is difficult to see that the

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[1] Ibid at p 39 per Lord President Normand; at p 48 per Lord Moncrieff.

[2] Huntly's Trs v Hallyburton's Trs (1880) 8 R 50 at pp 65, 66.

[3] Gordon Scottish Land Law para 14-51.

[4] Wilson and Duncan Trusts, Trustees and Executors (1975) p 376.

> position is essentially different from the case of a bona fide possessor of teinds, for example, and the reason for the rule which protects the bona fide possessor - that an innocent possessor should not be at the risk of having to account for fruits which he may well have disposed of[1] - is equally applicable to the recipient of income, although he may not possess any stock or corpus".[2]

The comparison with teinds seems to be well taken. In Haldane v Ogilvy[3], Lord Benholme characterised the titular's right to teinds as being "the perception of those fruits which are the subject of his right and the object of his claim" and said that the defence of bona fide perception was "directly and peculiarly applicable". Though his judgment rejects the application of the defence to money payments, such as were in issue in Hunter's Trs, Darling's Trs and Rowan's Trs, his reasoning supports the application of the defence to fruits which are themselves the subject of a right, rather than the fruits of such a subject. Earlier Professor More applied the doctrine to the subject, and not merely its fruits.[4]

2.154 Summary. To sum up, the law is uncertain and unsatisfactory. An extension of the defence to the subject itself seems inconsistent with the apparent requirement that it arises only on eviction from the subjects, and not entirely logical. On the other hand, the equitable objectives underlying the defence seem, as the critics state, equally applicable to the consumption of the subject itself and, if there were no other equitable defence, its restriction to fruits would appear artificial and unsatisfactory. The defence of bona fide consumption, however, in its application to the principal sum of money (the subject itself) overlaps with the general requirement in the condictio indebiti that

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[1]Citing Stair Institutions II, 1, 23; Erskine Institute II, 1, 25.

[2]Gordon op cit pp 415, 416.

[3](1871) 10 M 62.

[4]Notes to Stair's Institutions, Note F, para 7: "This defence [of bona fide consumption] rests on the equitable principle of not requiring a person who bona fide believes the property to be his own, and who has spent or consumed the article, or its fruits or profits, to account for these to the true proprietor".(emphasis added)

repetition of money must not be inequitable to the defender,[1] and in particular with the "equitable defence" of change of position in reliance on the payment.[2] In view of this overlap, it may be doubted whether the defence of bona fide consumption is necessary in cases where the equitable defence of change of position applies. That defence does apply in a condictio indebiti for repetition of money, though we have only traced one case in which a similar defence has been recognised in a condictio indebiti for restitution of specific moveables other than money.[3]

(5) The bona fide possessor's claim for improvements on relinquishing possession[4]

2.155 Before making restitution to the lawful possessor or owner, a bona fide possessor without title may claim recompense for improvements which he has made to the property while he possessed it in good faith.[5] The measure of recompense is the extent to which the person claiming restitution has been enriched by the improvements. Bankton states that there is deducted all fruits received by the bona fide possessor except insofar as attributable to the improvements.[6] To secure his claim, the bona fide possessor has a right of retention or lien while the property remains in his possession,[7] at least in a question with the lawful possessor or owner. It has been observed[8] that recompense for improvements is not confined to cases of unlawful possession but applies inter alia in

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[1]See para 2.44.

[2]See para 2.63.

[3]Caledonian Railway Co v Harrison and Co (1879) 7 R 151; see para 2.140 above.

[4]This paragraph is based on as yet unpublished material by Mr K G C Reid to whom we are grateful.

[5]Stair Institutions I, 8, 6; Bankton Institute I, 8, 15; Erskine Institute III, 1, 11; Bell Principles p 538; Baron Hume Lectures vol III p 171.

[6]Bankton Institute I, 8, 15.

[7]Bankton Institute II, 9, 68; Binning v Brotherstones (1676) Mor 13401; Barbour v Halliday (1840) 2 D 1279.

[8]By Mr K G C Reid.

a case of possession on a subsisting but voidable title which has subsequently been avoided.[1]

(6) Summary of rules on the measure and extent of recovery

2.156 The main rules on the measure and extent of recovery may be summarised as follows.

(i) In a condictio indebiti for repetition of money, the measure of recovery is the amount of the sum received subject to the equitable defence of change of position. (Para 2.125)

(ii) Interest is recoverable, either on the principle of restitution or by analogy of loan, from the date of payment unless there is negligent delay in demanding repayment, in which case interest runs from the date of the demand. (Paras 2.126 to 2.135)

(iii) The rules on the measure of restitution of specific property apply to the case of a defender having no lawful title of possession. It is not clear whether or how far they apply to a defender possessing on a subsisting but voidable title. (Paras 2.136 and 2.137)

(iv) The primary obligation is to restore the thing itself in the same condition in which it was received barring accidents. There are specific rules stating when the thing must be restored or its value or recompense quantum lucratus paid in lieu. These rules are not well developed and some have been criticised as internally inconsistent. (Paras 2.138 and 2.139)

(v) There are few cases on restitution of specific moveables transferred or delivered under error, but there is authority that a recipient who is innocent of the error has a defence if he would suffer prejudice by restitution. This defence resembles the equitable defence of change of position. (Para 2.140)

(vi) In principle, the possessor must restore fruits and accessions as well as the thing itself. Though there is authority that the defender must be enriched by the bygone fruits, the defence of bona fide perception and consumption will generally make this requirement irrelevant. A defender in a condictio indebiti for restitution of specific property is in the same position

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[1] Trade Development Bank v Warriner and Mason (Scotland) Ltd 1980 SC 74.

as other bona fide possessors and need not restore fruits which he has gathered or consumed. (Paras 2.142 to 2.144)

(vii) The defence of bona fide consumption is based on the need to relieve the possessor from hardship and on the neglect of the true owner in looking after his property. The burden of proving mala fide possession lies on the pursuer. (Para 2.145)

(viii) There is a conflict of authority on whether the defence of bona fide consumption applies to interest on a sum of money unduly paid. In principle good faith should apply to all kinds of fruits, including interest on money, but the defence would then overlap with the equitable defence of change of position. (Paras 2.146 to 2.150)

(ix) There is also a conflict of authority on whether the defence of bona fide consumption applies to the fruits of a subject, and not to the subject itself (eg a principal sum as distinct from interest). If the defence were to apply to the principal sum, it would overlap with the equitable defence of change of position. (Paras 2.151 to 2.154).

(x) A bona fide possessor relinquishing possession has a claim for recompense for improvements, subject to deduction of the fruits except insofar as attributable to the improvements. (Para 2.155)

G. Payment of another's debt in error

Preliminary

2.157 In this Section, we consider some of the complex problems which arise when a third party pays another's debt in error. There are broadly two types of case. First, where the third party erroneously believes that he is paying his own debt to the creditor. Thus he makes an error as to the identity of the debtor.[1] Second, where the third party is aware that he is not under an obligation to pay the creditor but makes an error as to some other relevant fact, such as his own indebtedness to the debtor.[2] In such cases, where the recipient of the erroneous payment is prejudiced in pursuing his remedies against the true debtor by a change in circumstances (eg the true debtor's insolvency), he may rely on the equitable defence of change of position.[3] Before considering the principles and rules on these matters, however, something should be said concerning the preliminary question of the power of a third party to discharge another's debt. The Scots law on that matter is not satisfactory; there is no modern analysis of the topic; and yet the power of an unauthorised third party to discharge another's debt affects the question whether a condictio indebiti will lie. We briefly consider this matter first.[4]

(1) Power of third party to discharge another's debt

2.158 If a payment extinguishes a debt, no condictio indebiti will lie. Therefore, where payment of a debt is made by a third party, the question whether the payment will extinguish the debt is an essential prelude to the question whether the condictio indebiti will lie. Of the English law, it has been observed that:

> "the problems which arise in the law of restitution where one person pays another's debt cannot be solved in the absence of a stable analysis of the effects of

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[1] See paras 2.163-2.167.

[2] See paras 2.168-2.182.

[3] See paras 2.183-2.190.

[4] See paras 2.158-2.162.

such a payment on the relationship between the creditor and the debtor".[1]

While Scots law is different, this comment equally applies to Scots law. The preliminary question of when an unauthorised third party may extinguish another's debt is however fraught with difficulty in Scots law. The relevant rules belong to the law on extinction of obligations which lie outside the scope of this Discussion Paper and cannot be fully analysed here.

2.159 There is in Scots law a conflict of authority on this question. Bankton[2] and Bell,[3] citing Justinian's Institutes,[4] state that an unauthorised third party can by payment of another's debt extinguish that debt whether the debtor knows of it or not or even against his will at least in some circumstances. The most authoritative statement is that of Bell:[5]

> "(1) Payment, to the effect of extinguishing the obligation, may be made not only by the debtor himself, but by anyone acting for the debtor: or

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[1]P Birks and J Beatson "Unrequested Payment of Another's Debt" (1976) 92 LQR 188; reprinted J Beatson The Use and Abuse of Unjust Enrichment (1991) pp 177 ff. On English law, see also D Friedmann "Payment of another's debt" (1983) 99 LQR 534; Goff and Jones Restitution pp 317; 529-531; P Birks Introduction pp 189-193. For a comparative survey, see Friedmann and Cohen "Payment of Another's Debt" International Encyclopaedia of Comparative Law vol 10, chapter 10 (1991).

[2]Institute I, 24, 2: "payment may be made for one that is ignorant of it, or even against his will, because he cannot hinder the creditor to take his payment where he can get it".

[3]Principles s 557.

[4]III, 29, pr: "Every obligation is determined by the performance of what is owed, or if some one with the consent of the creditor performs something else in its place. It makes no difference who performs, whether the debtor himself, or another on his behalf; for the debtor is released from his obligation if another person performs, whether the debtor knows of it or not, and even against his will". (R W Lee's trans)

[5]Principles s 557.

even by a stranger, where the debt is pecuniary, and due, and demanded[1]; or where any penal effect may arise from delay; or where the creditor has no interest in demanding performance by the proper debtor."[2]

This approach was adopted by Lord Anderson in Reid v Lord Ruthven,[3] but in that case the basis of the third party's power was said to be negotiorum gestio which is a special doctrine with its own rules.

2.160 On the other hand, Lord Kames[4] and Baron Hume[5] state that an unauthorised third party's payment of another's debt does not extinguish the debt until it is ratified by the debtor. The fuller analysis is given by Lord Kames, and on several points Baron Hume concurs. Their analysis is as follows.

(1) Where a third party pays a debt and takes a discharge in the debtor's name, the debtor can rely on the payment as a defence to an action by the creditor. The creditor cannot in conscience demand a second payment from him.[6]

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[1]Citing Justinian's Institutes III, 30, pr (sic); the correct reference is Institute III, 29. pr.

[2]Bell continues: "(2) The debtor cannot prevent any stranger from paying and demanding an assignation if the creditor chooses to grant it. (3) But the creditor cannot be compelled to grant an assignation, unless the debtor shall consent, and the granting of the assignation shall not interfere with any other interest of the creditor himself".

[3](1918) 55 S L Rep 616 at p 618.

[4]Principles of Equity (5th edn) pp 330, 331.

[5]Lectures vol III, pp 16, 17.

[6]Kames, supra, p 330 (citing D.2.14.17.4; D.2.4.25.2 and 26; D.23.4.26.4).

(2) Such a payment, however, does not extinguish the debt until it is ratified by the debtor.[1]

(3) Until ratification by the debtor, the third party and the creditor can cancel their transaction by mutual consent.[2]

(4) Until ratification the debtor can himself pay and compel a discharge from the creditor.[3]

(5) If the debtor relies on the third party's payment by way of a defence, this is a deemed ratification extinguishing the debt.[4]

(6) On the debtor's ratification of the third party's payment, the third party acquires a right to recompense from him.[5]

Remarkably neither Kames nor Hume cite Scottish authority.

2.161 Another complication is that a variety of different doctrines may govern the third party payer's right to recover from the debtor whose debt he has paid. Apart from rights of relief among co-obligants or cautioners, these consist of or include (1) negotiorum gestio; (2) recompense; (3) the benefit of cession of actions (beneficium cedendarum actionum); (4) possibly subrogation, a conglomerate category of English law which has been gaining ground in Scots law recently;[6] and (5) condictio indebiti. Negotiorum gestio may give a third

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[1]Idem; Baron Hume Lectures vol III, p 16, expressly disagreeing with Bankton Institute I, 24, 2 (quoted above). (The actual reference is to Bankton I, 8,31, which appears incorrect.)

[2]Kames, supra p 330; Baron Hume Lectures, supra.

[3]Kames, supra pp 330, 331; Baron Hume Lectures, vol III, pp 16, 17.

[4] Kames, supra, p 331.

[5]Idem.

[6]Cf Esso Petroleum Co Ltd v Hall, Russell & Co Ltd 1988 SLT 874 (HL) affg 1988 SLT 33 (subrogation in cases of indemnity payments, which are not treated as discharging the true debtor's debt). The English doctrine of subrogation extends beyond indemnity payments.

party (the gestor) a power to pay a debt on behalf of the dominus negotii but if the debt is not due by the dominus, it is thought that no action lies against the debtor in negotiorum gestio. An action in recompense may be based on error, but no case has been traced of an action in recompense by a third party against a putative creditor or debtor whose purported debt was paid by the third party in error. The extent of the reception of the English doctrine of subrogation is obscure and it cuts a curious figure in this domain.

2.162 This Section is confined to the availability of the condictio indebiti at the instance of the third party payer against the actual or putative creditor or debtor.

(2) Third party payer erroneously believes he is paying his own debt; error as to identity of debtor

2.163 Where a person makes a payment in his own name and in the erroneous belief that he is indebted to the recipient in the amount paid, he is entitled to repetition. Despite a contrary dictum by Stair[1] discussed below,[2] this rule applies even if another person is liable for the amount paid so that in a sense the creditor obtained no more than his due. Thus Elchies remarks:

> "if a man, believing himself to be debtor, when not he but another is debtor, pays the money, he will have repetition. Thus, if one believing himself to be heir to a person, pay, as heir, while another is heir, then he will have repetition off the creditor, though that creditor got payment of no more than was due to him, and that because the other person payed it, as if he himself had been debtor, which he was not."[3]

2.164 Kames makes the availability of the condictio indebiti depend on whether the payment has discharged the

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[1] Institutions I, 7, 9.

[2] See para 2.174 below.

[3] Elchies Annotations p 40, citing D.12.6.19.1; D.12.6.65.9.

debt. He remarks[1]:

> "We proceed to the case where a debt really subsisting is paid by a man who erroneously understands himself to be the debtor. This case has divided the Roman writers. To the person who thus pays erroneously, Pomponius gives a condictio indebiti[2]. Paulus is of the same opinion.[3] Yet this same Paulus, in another treatise, refuses action[4]. The solution of this question seems not to be difficult. Were it the effect of the erroneous payment to extinguish the debt, a condictio could not be sustained against the creditor: a man who does no more but receive payment of a just debt, cannot be bound to repeat. But the following reasons evince, that a debt is not extinguished by erroneous payment. First, There is nothing that can hinder the creditor, upon discovery of the mistake, to restore the money, and to hold by the true debtor. Second, The true debtor, notwithstanding the erroneous payment, is entitled to force a discharge from the creditor, upon offering him payment; which he could not do were the debt already extinguished. Hence it follows, that the creditor holds the putative debtor's money sine justa causa; and, consequently, that a condictio indebiti against him is well founded".

2.165 Elchies also gives the example of a debtor in a bond who pays the debt; the creditor assigns the bond; and the debtor then pays the assignee in ignorance of the fact that he has already paid the cedent. The debtor is entitled to repetition from the assignee. As Elchies explains, the debtor did not pay in the cedent's name, to extinguish the cedent's obligation to the assignee, but in his own name to extinguish the debt which he erroneously thought was now due to the assignee.[5] This case is very

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[1]Kames Principles of Equity (5th edn; 1825) pp. 199, 200 (footnotes in original).

[2]D.12.6.19.3.

[3]D.12.6.65.9.

[4]D.12.6.44.

[5]Elchies Annotations pp 40, 41. Since the debt has already been paid before the assignation, the assignation was worthless: McBryde Contract p 391.

similar in its facts to Earl of Mar v Earl of Callander[1] discussed below[2] but the crucial difference is that in the Earl of Mar case, it seems that the Court construed the assignation as operating as a delegation (of performance) by the cedent, so that the debtor paid in the cedent's name.

2.166 The same result follows where the transfer of the debt by the original creditor is not a voluntary assignation but an involuntary transfer by diligence such as arrestment or confirmation as executor-creditor. In Ramsay v Robertson,[3] A was a debtor to B under a bond. B was a debtor to C. A paid B. After B's death C, as B's executor-creditor, confirmed the bond, and A paid the sum in the bond to C in error. A was held entitled to repetition from C, though C got no more than was due to him by B's estate, because A paid C in his own (A's) name and not in the name of B's estate. In such cases, since the debt due to B was extinguished before the assignation or diligence in C's favour, and was therefore not transferred to C, A can recover from C.

2.167 A similar type of error as to the debtor's identity occurs where the payer mistakenly believes that the debtor is X and pays in his own name in order to discharge X's liability. There is no direct Scots authority but Dr R Evans-Jones states that the payer is entitled to repetition from the recipient.[4] This seems right in principle because, as Friedmann and Cohen remark, the case is analogous to that in which the payer believes himself to be the debtor.[5]

(3) Third party payer aware that he is not the recipient's debtor

2.168 In the foregoing cases the payer erroneously believed that he was paying his own debt or made an analogous error as to the debtor's identity. We now turn to cases of payment of another's debt where the payer's error related not to his own liability to the payee, but

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[1](1681) Mor 2927.

[2]Para 2.178.

[3](1673) Mor 2924, cited by Elchies Annotations p 41.

[4]1992 SLT (News) 25 at p 26.

[5]"Payment of Another's Debt", p 54, fn 366.

to his own relationship with the debtor, or the debtor's relation to the payee/creditor.

2.169 Terminology:meaning of "assignation", "novation", and "delegation". Some of the difficulties in this branch of law stem from a failure to distinguish between the different meanings and effects of the assignation,novation and delegation of a debt.These terms denote three main types of legal transaction whereby the components of an obligation to pay a debt may be changed.

(1) An assignation of a debt effects a change of creditor substituting a new creditor (the assignee) for the original creditor (the cedent or assignor) while the nature and incidents of the obligation and the identity of the debtor remain unchanged.[1]

(2) A novation of a debt,in its distinctive,narrow sense, effects the extinction of one obligation by the substitution of another but the identities of the creditor and the debtor remain the same.[2]

(3) A delegation of a debt in its primary and distinctive sense effects a change of debtor, substituting a new debtor (who was at one time known as an "expromissor"[3]) for the previous debtor (who is thereby liberated from the obligation) but the identity of the creditor and the nature and characteristics of the obligation remain the same.[4]

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[1]See Gloag Contract (2d edn) chapters 24 and 25;McBryde Contract chapter 17;Bell Dictionary (7th edn) s v "assignation";Baron Hume Lectures vol III chapter 9.

[2]Bell Dictionary (7th edn) s v "novation" ; Stair Institutions I,18,8;Bankton Institute I,24,37; Erskine Institute III,4,22; Baron Hume Lectures vol III pp 60-62; Bell Principles s 576;McBryde Contract paras 23.22 - 23.26;Wilson Debt (2d edn) para 14.1.

[3]Stair Institutions I,18,8; Bankton Institute I,24,38; Erskine Institute III,4,22; Bell Dictionary (7th edn) s v "expromissor".

[4]Stair Institutions I,18,8; Bankton Institute I,24,38; Erskine Institute III,4,22; Bell Principles s 577;Bell Dictionary (7th edn) s v "delegation";Gloag Contract (2d edn) p 258; McBryde Contract para 23.22; Wilson Debt (2d edn) para 14.2.

"Novation" is sometimes used in a wider sense to include delegation.[1]

2.170 Delegation of debt and delegation of performance Somewhat confusingly, "delegation" is also used in a different sense to mean "delegation of performance" to a third party. In delegation in this sense, the third party is not substituted as debtor and the original debtor is not liberated from the obligation. Rather the original debtor remains liable but authorises the third party to perform the obligation in his (the original debtor's) name.[2] Sometimes the expression "novatory delegation" is adopted and this might be used to denote a delegation of debt. Unfortunately it is sometimes not clear whether "novatory delegation" refers to one or both types of delegation.[3] The difference between delegation of debt and delegation of performance can be illustrated by the standard type-case where A owes B £100 and B owes C £100. If A with C's consent delegates B to pay C and the delegation is a "delegation of debt", then A becomes C's debtor and B is liberated from the obligation. When A pays C, he pays in his own name as C's debtor. If it turns out that B never owed C or owed less than A paid, in principle it is A and not B who has a right to repetition. On the other hand,if by way of "delegation of performance", B delegates A to pay C in B's name as B's delegate (ie performance-delegate), then if A pays C with C's consent,A's single physical payment to C operates in law as two performances,namely a discharge of A's debt to B and of B's debt to C. If it subsequently transpires that B did not in fact owe C or owed C less than A paid, it is B and not A who has a right of repetition against C. We revert to this principle below.[4]

2.171 Can an assignation operate as a delegation of debt or performance? To make confusion worse confounded, in legal history, "delegation" had a third meaning:it

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[1]eg Erskine Institute III,4,22:; Gloag Contract (2d edn) p 258;McBryde Contract para 23.22; W J Harte Construction Ltd v Scottish Homes 1992 S L T 948 at p 951.

[2]Gloag Contract (2d edn) p 418;McBryde Contract para 17.50.

[3]See Honore "Condictio and Payment" [1958] Acta Juridica 135 at pp 138,139 where this ambiguity occurs.

[4]See para 2.172.

sometimes referred to a device[1] which was used to get round the difficulty that in Roman law an obligation could not be assigned. In Roman law, there were two such devices or indirect forms of transmission, namely (a) procuratory in rem suam and (b) a special type of delegation effecting a change of creditor[2]. Traces of the former are found in Scots law[3]. Erskine remarked:

> "It would seem that by our ancient law, all obligations were intransmissible, from a notion that no creditor could compel his debtor, contrary to the precise terms of his obligation, to become debtor to another, where the obligation did not expressly bear "to assignees". And it was perhaps upon this ground that, by the old style of assignations, which is sometimes continued to this day, the assignee was made mandatory and procurator in rem suam; which mandate empowered him to sue for, recover and discharge the obligation as the creditor himself could have done;but our later customs have considered assignations not barely as mandates, but as conveyances, by which the property of the subject assigned is, without any such clause, fully vested in the assignee;..."[4]

This shows that the assignee could be regarded as procurator for the cedent but, so far as we are aware, there is no authority that an assignation has or had the effect that the debtor (as distinct from the assignee) in the debt assigned becomes the procurator or delegate of the cedent. Under the second device, known as delegatio obligandi, the old creditor authorised the debtor to incur a new debt (in the same terms as the old debt) to a third

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[1]Stair Institutions III,1,3 called the device "an indirect manner of transmission".

[2]Zimmmermann Law of Obligations pp 60 - 62.

[3]Stair Institutions III,1,3; Erskine Institute III,5,2; Baron Hume Lectures vol III, pp 1,2; Bell Principles s 1459; W Ross Lectures on Conveyancing (2nd edn; 1822) pp 178 ff.

[4]Erskine Institute III,5,2. He continues: "and the general rule is, that whoever is in right of any subject, though it should not bear to assignees, may at pleasure convey it to another, except where he is barred either by the nature of the subject or by immemorial custom.".

party (the would-be assignee), and this liberated the old debtor from the old debt by a species of novation.[1] Thus this special type of delegation did effect a change of creditor. We have not found any trace of this device in Scots law[2], except possibly in a difficult passage in Stair[3]. We do not think, moreover, that there is a rule in the modern law that an assignation of a debt can operate as a delegation of debt or delegation of performance. Apart possibly from the doubtful passage in Stair just cited and the important and controversial case of Earl of Mar v Earl of Callendar[4], discussed below[5] we can find no authority suggesting that in the Institutional period the law was any different.[6] This historical excursus may

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[1]Zimmermann Law of Obligations p 60.

[2]Ross Lectures on Conveyancing (2d edn,1822) p 180 notes that the French "found that the Roman creditors very often substituted others in their place, by delegation. The French admitted the practice of delegation, upon the condition that it was done by writing; and, at the same time, in order to avoid the necessity of procuring the debtor's consent,they also introduced a direct conveyance of the debt or right by one man to another,which was termed un transport". While Ross suggests that the French "act of transport" was engrafted on the Scots assignation, he does not suggest that the device of delegation was introduced in Scots law. That would have been unnecessary.

[3]See Stair Institutions III,1,3. After describing the "indirect transmission" by way of procuratory in rem suam, Stair observes: "The like is done amongst merchants, by orders,whereby their debtors are ordered to pay such a person their debt, which indeed is a mandate; but if it be to his own behoof,it is properly an assignation". He added (idem):"Assignations are more frequent with us than anywhere; there is scarce mention thereof in the civil law".

[4](1681) Mor 2927.

[5]See para 2.178.

[6]Cf Evans-Jones "Identifying the Enriched" 1992 SLT (News) 25 at p 27: "Assignation may or may not operate as a novation (Stair I. xviii. 8). In circumstances where it does not novate, notwithstanding the assignation, A is still indebted to B and B is still indebted to C." The citation of Stair does not seem to support the proposition that an assignation can operate as a delegation.

suggest, however, that the Roman device of using a type of delegation to effect a change of creditor (viz in effect an assignation) misled the Court in the Earl of Mar case into accepting the converse proposition that an assignation could be treated as, or as equivalent to, a delegation in the circumstances of that case.

2.172 "Condictio" and delegation. In Roman law the condictiones required a "direct" payment or transfer from the pursuer to the defender. There had to be a transaction (negotium) between those parties. A direct payment included delegation in three-party situations.[1] For example, A owes £100 to B and B owes £100 to C. A physical payment of £100 from A to C as B's delegate operated in law as two payments extinguishing A's debt to B and B's debt to C. If A did not truly owe the debt to B, he had a condictio indebiti against B; and if B did not truly owe the debt to C, he had a condictio indebiti against C. If A did not owe the debt to B, and B did not owe the debt to C, A had a condictio against C, because there was no reason to characterise the single physical payment as two legal payments, from A to B and B to C. But if A did not truly owe the debt to B, he had no condictio indebiti against C. The purpose of the physical payment A to C had been achieved by discharging B's debt to C. A's remedy is against B.

2.173 Reception of delegation theory in Scots law. In a recent article,[2] Dr R Evans-Jones has in effect argued that these rules have been generally received in Scots law.[3] The Roman law was originally misunderstood or misrepresented by Stair,[4] who was corrected by Elchies[5]

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[1]See Honore "Condictio and Payment" [1958] Acta Juridica 135 at pp 138, 139; Nicholas "Unjustified Enrichment in the Civil Law and Louisiana Law" (1962) 36 Tulane Law Review 605 at p 611 ff; cf Friedmann and Cohen "Payment of Another's Debt" para 50.

[2]"Identifying the Enriched" 1992 SLT (News) 25 esp at pp 27-29.

[3]Dr Evans-Jones ibid at p 27 expresses doubts whether, in a case where there is no debt A-B and no debt A-C, A can sue C.

[4]Institutions I, 7, 9.

[5]Annotations pp 39-41.

and Bankton.[1] The Roman law on delegation in the condictio indebiti was applied in Earl of Mar v Earl of Callander,[2] but in that case the court seems to have assumed that a delegation can take the form of an assignation, which normally has completely different effects from a delegation. Accordingly Gloag doubted the correctness of that case.[3]

2.174 Stair stated the defence known as suum recepit ("he has received his own") in the following terms:[4]

> "There is this exception against indebiti solutum, that it cannot be repeated, when the creditor gets that which is due to him, though not due by that party who paid the same".

Stair cites in support a text by Paul[5]:

> "Repetitio nulla est ab eo qui suum recepit, tametsi ab alio quam vero debitore solutum est". ("No recovery is possible against a man who has received his own property, even from a person other than a true debtor": Mommsen-Krueger-Watson trans),

and also a text from the Codex[6]. Erskine surmised that the defence of "suum recepit":

> "seems to have been also grounded on the rule, Ignorantia juris neminem excusat, which our law has rejected in the condictio indebiti; and indeed the applying of it to this question is hardly reconcilable to the obvious rules of equity".[7]

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[1]Institute I, 8, 32.

[2](1681) Mor 2927. See also Duke of Argyle v Lord Halcraig's Representatives (1723) Mor 2929.

[3]Contract (2d edn) p 65.

[4]Institutions I, 7, 9.

[5]D.12.6.44.

[6]C.4.5.2. In this text, Severus and Antoninus state that if a man is delegated to pay money that he does not owe to the creditor of the delegator, he has a condictio against the delegator.

[7]Erskine Institute III, 3, 54.

Bell stated that the Roman suum recepit rule "is not the law with us"[1]. He must have had in mind the rule as stated by Stair. Bell did not elucidate the true role of that defence.

2.175 In summary, it is thought that (as Dr Evans-Jones argues) the true role of the suum recepit defence is to apply in cases where the third party pays in the name of the true debtor. This view is consonant with Roman law[2] and is supported by Elchies[3], Bankton[4], and Baron Hume[5].

2.176 Institutional authorities restricting the "suum recepit" defence to its true role. Elchies sought to correct Stair's elliptical statement of the "suum recepit" defence[6]. He stated that Stair's proposition:

> "only holds when the money is paid in name of him who was really debtor; or, which is the same, when it is paid by novation or delegation..."[7].

He gives, as an example of novation or delegation the case where the debtor of a creditor draws a bill of exchange on a person he erroneously thought owed himself to pay a sum to the creditor, and the drawee accepts the bill.

> "In that case the acceptor would not have repetition against the creditor in the bill, because he [the creditor] got no more than what was owing him, and the acceptor payed in name of the drawer, which he might have done whether he had been owing the drawer or not; according to [D.12.6.44 and C.4.5.2].[8]"

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[1]Bell Principles, s 536.

[2]cf Honore "Condictio and Payment" [1958] Acta Juridica 135 at pp 138, 139.

[3]Annotations pp 39, 40.

[4]Institute I, 8, 32.

[5]Lectures vol III, pp 16, 17.

[6]Elchies, Annotations pp 39, 40, citing D.12.6.44; C.4.5.2.

[7]Ibid p 39.

[8]Ibid p 40.

Since Elchies postulates that the acceptor of the bill paid in the drawer's name, his reference to "novation or delegation" must be construed as a reference to delegation of performance.

2.177 Bankton makes the same qualification to Stair as does Elchies[1]. He first accepts the rule laid down by Stair:

> "It is a certain rule, That he who gets payment of a just debt, tho' not from the true debtor, is not liable to restore. Repetitio nulla est ab eo qui suum recepit, licet ab alio quam vero debitore solutum est[2]. [D.12.6.44]".

Then comes the qualification:

> "The meaning is, that where one pays another person's debt, by delegation, believing that he was debtor to the delegator, as to which he afterwards finds he was in a mistake, the creditor who received payment is not concerned, but the payer has only action against the debtor for whom he paid [citing D.12.6.19.1, and Duke of Argyle v Halcraig's Representatives (1723) Mor 2929].

Like Elchies, Bankton here seems to use "delegation" to mean delegation of performance, since he refers to the payer making the payment for the delegator. Though Baron Hume does not cite authority, his statement of the law is consistent with that of Elchies and Bankton:

> "The Condictio Indebiti does not apply where the creditor only gets what is due to him, though the party who pays truly owed nothing; if that party paid not in his own name but in that of him who was truly debtor" (emphasis added).[3]

It is thought that these authorities limit Stair's elliptical statement of the suum recepit defence to cases where the payment by the person who was not the true debtor was made in the true debtor's name.

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[1]Bankton Institute I, 8, 32.

[2]See para 2.171 above.

[3]Baron Hume Lectures, vol III, p 17.

2.178 The case law. The leading case is Earl of Mar v Earl of Callander.[1] A owed B 6,000 merks under a bond, and B owed C 6,000 merks. A's chamberlain paid B 1,000 merks. This was overlooked when B assigned the bond for 6,000 merks to C in satisfaction of B's debt to C. A paid C 6,000 merks, discovered the erroneous overpayment, and sued C for 1,000 merks which had been twice paid, once to B and once in error to C. The Court refused A's claim on the express but elliptical ground that C had received no more from A than what was due to him from B.[2] The fuller explanation (as given by Dr R Evans-Jones)[3] is that as under Roman law the physical payment A to C operated as two legal payments: from A to B and from B to C. The payment from B to C was effective to discharge B's debt to C, and therefore no condictio indebiti lay against C. It was the debt A to B which was not owed. The purpose of this payment (discharge of the debt) was not achieved. Therefore A had a remedy against B.[4]

2.179 In the Duke of Argyle v. Lord Halcraig's Representatives[5], an heir A paid a debt to an assignee C of the debt in ignorance of the fact that his predecessor had paid the debt already to the cedent B. The Court held that the condictio indebiti did not lie at A's instance against C. In this case, however, there were two specialties insofar as B had become bankrupt after the second payment (and therefore C's right of recourse against him was prejudiced), and A's predecessor had granted a bond of corroboration to C.

2.180 Acceptance of delegation theory despite confusion of assignation with delegation. In the Earl of Mar case and possibly the Duke of Argyle case, it appears that the Court treated the payment by A to the assignee C as a payment in the name of B (the cedent) as B's delegate. This is only possible in the modern law if an assignation by B to C of A's debt to B can operate as a delegation by B to A to pay B's debt to C in B's name. As indicated in paragraph 2.171 above however an assignation effects a change in creditor not a delegation of the debt (a change

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[1](1681) Mor 2927.

[2]Ibid at p 2928.

[3]1992 SLT (News) 25 at p 27.

[4]Idem.

[5](1723) Mor 2929.

of debtor) or a delegation of performance. An intimated assignation does not confer on an assignee a higher right than the cedent had. If the debtor has paid the cedent, the cedent has no enforceable debt which he can transfer to the assignee.[1] It is noteworthy that Elchies, in his full and clear analysis of this branch of law, does not cite the Earl of Mar case. Instead, he gives a hypothetical case in which the facts appear identical to the Earl of Mar case and states that the debtor in the assigned debt can recover from the assignee because he does not pay in the assignor's name but in his own name.[2] This seems correct in principle. Nevertheless, where there is a true delegation of performance as distinct from an assignation, there is no reason to doubt that the law is as laid down in the Earl of Mar and Duke of Argyle cases. It is significant that Bankton characterised the latter case as one of delegation.[3] It is also significant that Elchies, though he rejects tacitly the authority of the Earl of Mar case, does accept the delegation theory of the condictio as part of Scots law.[4]

2.181 Modern authorities. Gloag doubts whether the Mar and Argyle cases were correctly decided remarking that "the grounds of judgment were not explained" and that "it does not seem obvious why an assignee should be in a better position than the cedent".[5] From the standpoint of the modern law, it is thought that Gloag is correct. His

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[1]McBryde Contract p 391.

[2]Elchies Annotations pp 40, 41: "Thus, likeways, if Caius, being debtor to Seius, in payment thereof assigns him to a bond of Titius, which Titius had payed before, but afterwards Titius, ignorantia facti, payes the bond, he can repeat the money from Seius, although he got no more than what was oweing him by Caius, because Titius did not pay in Caius's name, to extinguish his obligation to Seius, but paid in his own name to extinguish his own debt, which he thought he owed Caius, and was now in Seius's person." If one substitutes the Laird of Gloret for Caius, the Earl of Callendar for Seius, and the Earl of Mar for Titius, one sees that the facts are the same as in the Earl of Mar case.

[3]Bankton Institute I,8,32.

[4]Elchies Annotations pp 39-41.

[5]Gloag Contract (2nd edn) p 65.

reliance on the modern case of Wallet v Ramsay[1] may not however be correct. That case seems further to confuse the law. In that case, an auctioneer A sold stock for a tenant B and sent him £250 to account of the proceeds of sale. B had previously agreed to apply the proceeds of sale in satisfaction of a debt due to his landlord C. B authorised A to pay to C the proceeds of sale. There was no assignation. A paid £145 to C and then discovered that by an error the true balance due to B (ie the actual proceeds of sale) was £100 less. Lord Low granted A decree of repayment against C holding that C was "in no better position than an assignee", and that A could recover an erroneous payment from C in the same way as from B. This case, however, does seem to have involved not an assignation but an authorisation by B to A to pay B's debt to C in B's name. As Dr Evans-Jones points out,[2] the debt B-C existed and was discharged by A's payment to C. It was A's debt to B which was overpaid. The condictio indebiti at A's instance should lie only against B who was unjustifiably enriched at A's expense.

2.182 Error by third party as to his indebtedness to debtor. Elchies considers that there will be repetition where an error is made by a third party payer of another's debt, not as to the identity of the debtor, but as to the payer's indebtedness to the debtor. He states:

> "if one, believing himself a debtor to a person, pay, in his own name, a debt due by that person to another, then he will have repetition."[3]

This, however, may be a proper case for the defence of suum recepit, and Elchies' proposition is not free from doubt.

(4) Defence of change of position in cases of erroneous payment of another's debt or assignation cases

2.183 Where a mistaken payment is received by a creditor, he may change his position by failing to sue the true debtor within the prescriptive period or by surrendering his rights against the true debtor. His prospects of

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[1](1904) 12 SLT 111.

[2]1992 SLT (News) 25 at p 28.

[3]Elchies Annotations p 40.

recovery from the true debtor may be diminished or lost by the subsequent bankruptcy of the true debtor.[1]

2.184 The earliest Institutional authority on the defence of change of position in a case of a payment of another's debt by a person erroneously thinking himself to be the debtor, is a passage in Kames Principles of Equity:[2]

> "Upon receiving payment bona fide from the putative debtor, the creditor thinks no more of a debt he considers to be extinguished; and, therefore, if the real debtor become insolvent after the payment, the inconsiderateness of the putative debtor will subject him to the loss; which may instruct him to be more circumspect in time coming."

This view is supported by Bell[3] and More.[4]

2.185 Most of the cases on the defence of change of position in three-party situations in Scots law concern not cases of payment of another's debt, but payments made by the debtor to an assignee overlooking the fact that payment of that debt had already been made to the cedent. In such cases, the payer pays not the cedent's debt but his own debt twice over, once to the cedent and once to the assignee. In such cases, when the first payment is discovered, the assignee has a right of recourse against the cedent because the assignation was worthless since the debt had already been paid. If however the cedent has in the meantime become bankrupt, the assignee's right of recourse against the cedent has itself become worthless. There is authority of long standing in Scots law that in such cases, the assignee may rely on the cedent's

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[1]See Friedmann and Cohen "Payment of Another's Debt" paras 67 ff.

[2](5th edn; 1825) p 200.

[3]Principles s 536: quoted at para 2.64 above.

[4]More, Notes to Stair's Institutions, Note F, para 5, pxlix: "But all such claims, being founded on equity, will be barred, where, by any negligence, or misconduct, or delay, on the part of the individual by whom the mistake has been committed, any injury would arise to the other party...". He cites Ker v Rutherford (1684) Mor 2928 and Duke of Argyle v Halcraig (1723) Mor 2929, and on this ground doubts whether Rigg v Paterson (1788) Mor 2102 was correctly decided.

bankruptcy in putting forward what in effect is a defence of change of position. We revert to these cases at paragraph 2.188 below.

2.186 In cases of "delegation" of performance there is not the same room for the payee's defence of change of position relying on the bankruptcy of a person against whom the payee has a right of recourse, because such "delegation" cases do not give rise to rights of recourse as between the "delegator", the "delegate" and the payee. Thus where it is thought that A owes B and B owes C, and B authorises A to pay C, but it turns out that A does not owe B, A may sue B in a condictio indebiti. But B has no right of recourse against C: his debt to C existed and was discharged by A's payment. Similarly if B did not owe C, B may sue C in a condictio indebiti but C has no right of recourse against A. A's debt to B existed and was discharged by A's payment to C. However, if after the payment by A to C, B (where the error is in the relation A-B) or C (where the error is in the relation B-C) has changed his position, eg by increasing his expenditure in reliance on the erroneous payment, he may have a defence of change of position on the ordinary principles discussed above.

2.187 We have postponed discussion of the defence of change of position in assignation cases (ie where the debtor pays the cedent and then the assignee) to the present section because of their close relationship to cases of payment of another's debt: some of the cases could be construed as involving an assignation but were, or may have been, decided as involving "delegation" of performance.

2.188 A defence of change of position was apparently upheld in the old case of Ker v Rutherford[1]. A owed B and B owed C. A's debt to B was assigned by B to D who intimated the assignation to A. C obtained decree against B and arrested A's debt to B in A's hands after the intimation of the assignation. The arrestment therefore attached nothing in A's hands. A, nevertheless, paid C on a decree of furthcoming. A was then decerned to pay D the debt due to B which had been assigned to D. A then sought repayment from the arresting creditor C. C pleaded suum recepit and also that if the arrestee A had produced the assignation in C's action of furthcoming, "the arrester [C] would have secured himself against the other estate of

[1](1684) Mor 2928.

the common debtor [A] who is now become bankrupt". The Court upheld the defence.

2.189 Kames[1] treated Earl of Mar v Earl of Callander[2] and Duke of Argyle v Lord Halcraig's Representatives[3] as involving assignation rather than "delegation". In the latter case, as we have seen, an heir A erroneously paid a debt to the assignee C after A's ancestor had paid the debt to the cedent B. B had become insolvent in the meantime and Kames states that that fact was the ground upon which the Court refused A's condictio indebiti against C.[4] He remarks:[5]

> "A strong circumstance for the assignee is, that the payment he received from the heir bona fide, was to him invincible evidence that he could have no claim against the cedent. He was led into that mistake by the heir's remissness or rather rashness in paying without examining his father's writings. They are equally certantes de damno vitando; and yet the heir's claim at common law must be sustained, if there be nothing in equity to balance it. The balance in equity is, that the loss ought to rest on the heir, by whose remissness it was occasioned, and not on the assignee, who had it not in his power to prevent it. But as the assignee's loss is only the price he paid to the cedent, his equitable defence against the heir can go no further."

Of the Earl of Mar case, Kames suggests that "probably the cedent had become insolvent after the erroneous payment" and explains the case on the basis of the defence of change of position.[6]

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[1]Kames Principles of Equity (5th edn) pp 124-126.

[2](1681) Mor 2927.

[3](1723) Mor 2929.

[4]Principles of Equity (5th edn) pp 124, 125.

[5]Idem.

[6]Ibid p 126.

2.190 Finally, in Wallet v Ramsay,[1] as we have seen,[2] B authorised his debtor A to pay B's creditor C, and A in error paid more to C than was due to B. The case seems to have involved "delegation" (in sense 2 above) but was treated by Lord Low as akin to an assignation by B to C of A's debt. In allowing an action by A against C, Lord Low remarked (obiter) that if C had granted a discharge to B, or had been prejudiced from recovering the debt from B, "it might have made a difference".[3] In a case or delegation of performance, C would have had no right of recourse against B as explained in paragraph 2.186 above. Nevertheless, the case proceeding as it did on an assignation theory, supports a defence of change of position.

(5) Summary

2.191 In summary, the present state of the law is as follows.

Error as to identity of debtor

(1) If A pays in his own name a debt to C erroneously believing himself to be C's debtor, but in fact B is C's debtor, A has a condictio indebiti against C. (Paras 2.163 and 2.164)

(2) On the same principle, if A owes B, B assigns the debt to C, and A pays C forgetful that before the assignation he had already paid B, A has a condictio indebiti against C. The same result follows if the purported transfer of the extinguished debt is by diligence by C against B. (Paras 2.165 and 2.166)

(3) If A in his own name pays C a debt due by B thinking that X rather than B is the true debtor, in principle A is entitled to repetition. (Para 2.167)

Payer aware he is not recipient's debtor

(4) If A owes B and B owes C, and A on B's instructions pays C, A may sue B if the debt A-B did not exist. B may sue C if the debt B-C did not exist. A may sue C only if the debts A-B and B-C did not exist. These

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[1](1904) 12 SLT 111.

[2]See para 2.181.

[3](1904) 12 SLT 111 at p 112.

rules are not however free from doubt. (Paras 2.168 to 2.181)

(5) There is some authority suggesting that if A erroneously believing himself to be B's debtor pays B's creditor C in his own (A's name) to discharge B's debt to C, he has an action of repetition. This is questionable. (Para 2.182)

Equitable defence of change of position

(6) The equitable defence of change of position is available to C where, by reason of A's erroneous payment to him, C's rights of recourse against the true debtor (B) have been prejudiced by the negative prescription of B's debt, or by B's insolvency, or C's surrender of his rights against B, or by other change in circumstances. (Paras 2.183 to 2.190)

H. Title to sue

2.192 Must the pursuer have suffered loss? Normally the person who makes the erroneous payment does so as the principal obligant rather than as an agent, and is also the person truly impoverished by it. There is no doubt that such a person has a title to sue a condictio indebiti. In a case involving only two parties, however, it is by no means clear whther the pursuer must have suffered loss in order to have a title to sue a condictio indebiti. There are cases where the fact that the pursuer did not suffer loss is a relevant factor in determining whether, or to what extent, repetition should be ordered by the court. For example in Bell v Thomson[1], the pursuer was wrongly assessed to rates by the defender burgh and he thereby escaped liability to rates in the neighbouring county. This was held to be a factor tending to negate liability[2]. Then again, the quantum of recovery may be reduced by setting off the value of benefits which the pursuer received from the defender.[3] It is thought that only the payer (or his principal) has a title to sue a condictio indebiti[4] and that he need not prove that he personally suffered loss by reason of the payment. This conclusion is not free from doubt, however, and is not easy to reconcile with the principles underlying third-party cases where the identification of the enriched and the impoverished parties seems a necessary prelude to expiscating their rights.

2.193 Principals and agents. There is little doubt that where an agent makes a payment in error, the agent's principal has a title to sue a condictio indebiti[5]. In McIvor v Roy[6], the question was raised, but not decided, whether an agent, who acting on behalf of a disclosed

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[1](1867) 6 M 64.

[2]Ibid at p 70 per Lord Neaves.

[3]Haggarty v Scottish TGWU 1955 SC 109.

[4]Fraser v Robertson 1989 GWD 5-194.

[5]Dawson v Stirton (1863) 2 M 196 at p 204 per Lord Benholme.

[6]1970 SLT (Sh Ct) 58. (The pursuer was the branch manager of an industrial assurance company and perhaps therefore an employee but the issue of title to sue was considered as if he were an agent).

principal mistakenly makes a payment which was not due, had a title to sue a condictio indebiti for its recovery. Reference was made there to the rule of English law under which such an agent does have a title to sue for recovery of a mistaken payment.[1] Gloag points out that as "the obligation to repay is not contractual but obediential or implied by law, the rules as to title to sue on contract have no application".[2] For this proposition, Gloag relied on Dawson v Stirton[3]. In that case, the trustee for an outgoing tenant's creditors sold his way-going crop to the landlord who sold it on to the incoming tenant. The incoming tenant, on behalf of the landlord, paid to the outgoing tenant's trustees £100 to account of the sum due by the landlord. Later in ignorance of the payment to account, the landlord paid the whole price of the crop to the outgoing tenant's trustees. The incoming tenant without the landlord's concurrence sued the survivor of the outgoing tenant's trustees for repetition of the £100. It was held that the surviving trustee was not personally liable for the alleged over-payment.

2.194 The sheriff observed (obiter) in McIvor v Roy[4] that the Dawson case does not vouch Gloag's proposition but rather treats the question of title to sue as doubtful. The head-note to the case states: "Opinions that the incoming tenant had a title to sue the outgoing tenant for the alleged over-payment" but this is misleading. Lord Justice-Clerk Inglis entertained doubts not so much as to the pursuer's title but rather as to the form of action.[5] Lord Cowan did not deal with the point.[6] Lord Benholme thought there was title to sue:

> "The question of title has cost me some trouble as a general point. But the result of my opinion is, that there would be a title to recover money paid, as alleged here, if the defence was not made out otherwise, because if a party has paid a sum, and

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[1]Colonial Bank v Exchange Bank of Yarmouth, Nova Scotia (1885) 11 App Cas 84.

[2]Gloag Contract (2nd edn) p 65.

[3](1863) 2 M 196.

[4]1970 SLT (Sh Ct) 58 at p 59.

[5]See (1863) 2 M 196 at p 203.

[6]Ibid at pp 203, 204.

afterwards, through another, makes to the recipient of the first sum an additional payment in excess of the sum due, I rather think there is condictio indebiti in him".[1]

This however seems to concede a title to sue to the principal and misses the crucial point that in Dawson the action for repetition was not raised by the principal debtor who made the first payment but by his agent who made the second payment, the issue being whether the agent, not the principal, had a title to sue. Lord Neaves concurring thought the point "attended with difficulty" but based his judgment on another ground.[2] Despite the unsatisfactory precedent of the Dawson case, the sheriff in McIvor v Roy expressed the view (obiter) that if it had been necessary to decide the issue, he would have found that the agent had a title to sue.[3] This result does not seem to be consistent with the rule that where payment is made to the known agent of a known principal, only the principal can be sued,[4] nor with the fact that in recompense a mandatory has no title to sue separately from the mandator, lest defences available against the mandator cannot be raised against the mandatory.[5]

2.195 Whether impoverished third party has a title to sue. Gloag affirmed that an "action for the recovery of money paid by mistake may be at the instance of the party who is the ultimate loser, though he may not be the party who made the payment".[6] No case however is cited for this proposition, and there is contrary text-book authority.[7] Where the debtor pays the wrong person, it may be doubted whether it can be said that the true creditor thereby

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[1]Ibid at p 204.

[2]Ibid at p 205.

[3]1970 SLT (Sh Ct) 58 at p 59.

[4]Royal Bank of Scotland plc v Watt 1991 SLT 138 at p 149: see para 2.200 below.

[5]Johnston v Marquis of Annandale (1726) Mor 9281.

[6]Gloag Contract (2nd edn) p 65.

[7]Walker Civil Remedies p 289: "In general only the payer, and not anyone claiming to be the proper payee, can claim repetition".

suffers loss. As we mentioned in volume 1, paragraph 3.57, notwithstanding the payment the debtor remains liable to the true creditor in exactly the same amount.

2.196 In volume 1, paragraphs 3.56 to 3.64 we reviewed the rules on actions of repetition at the instance of the unpaid true creditor redressing his debtor's erroneous payment to the wrongly paid putative creditor. As we note there, such an action is an innominate action of repetition (equivalent to a condictio sine causa in the ius commune) rather than a condictio indebiti. In general such an innominate action is competent only in exceptional cases and subject to certain limitations and safeguards whose primary object seems to be the avoidance of double jeopardy.

I. Defenders

2.197 Recipient as proper defender. The general rule is that the person to whom the money was paid or the thing transferred is the proper defender in a condictio indebiti.[1] In Bell v Thomson[2] Lord Cowan said that in the case of a payment made under error of fact "condictio indebiti will in the general case lie against the party who has received the money, and is sine causa retaining it"[3] and that the remedy was "personal as regards the party against whom or whose representatives it is directed"[4]. Lord Neaves said that "condictio indebiti must be urged against the receiver himself, or his general representatives".[5]

2.198 Performance-delegate's action against delegator. There is an apparent exception to this general rule which has already been noted. Where a debtor delegates his putative debtor to pay in the delegator's name a debt due by the delegator to his (the delegator's) creditor, and the putative debtor makes the payment but does not in fact owe a debt to the delegator, the putative debtor has an action (presumably a condictio indebiti) against the delegator even though the delegator is not the actual recipient of the payment.[6] This however is reconcilable with the general rule on the ground that the payment to the delegator's creditor was made in the delegator's name and by his authority and so is equivalent to a payment to the delegator, who for this purpose is treated as the true recipient. Clearly it is the delegator, not the delegator's creditor, who is unjustifiably enriched by the payment, and this seems a preferable basis for the

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[1]Stair Institutions I, 7, 9: "he who receiveth it is obliged to restore"; Erskine Institute III, 3, 54: "he who made the payment is entitled to an action against the receiver for payment".

[2](1867) 6 M 64.

[3]Ibid at p 68.

[4]Ibid at p 69; see also at p 67 per Lord Justice-Clerk Patton who refers to Pothier as authority for this rule.

[5]Ibid at p 70.

[6]See paras 2.168 ff.

exception than a fiction that it is the delegator who actually received the money.

2.199 Principal and agent. As regards Roman law, Modestinus is quoted in the Digest as saying: "A condictio can be brought to recover money against those only to whom the money has been in some form or other paid, not against those [as such] who are benefited by the payment".[1] According to Wessels[2], in Roman-Dutch law the condictio indebiti "is brought against the person to whom in law the money is considered to have been paid, or against his executor[3]. Hence, if money is paid indebite to an agent, the action lies against the principal and not against the agent, for it is the principal and not the agent who is enriched"[4]. In other words, the primary rule is that the receiver is sued but as between the receiving agent and his principal, the principal's enrichment is the underlying principle.

2.200 In Scots law, in the Watt case, Lord McCluskey accepted (obiter) that it was the (disclosed) principal, not the receiving agent, who is the proper defender but rejected the principal's enrichment as the underlying principle[5]:

> "It is easy to see, of course, that where the person who receives money paid under a mistake of fact receives it as the known agent of a known principal, that is to say as "a mere intermediary", he is under no obligation to refund that money: cf Continental Caoutchouc Co v. Kleinwort[6]. But in such a case the true position, in my opinion, is that the money has been paid not to the agent but to the principal and it is, therefore, to the principal that the payer must look for that money to be refunded. It is not because the principal is lucratus that he

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[1]D.12.6.49 (Monro's trans)

[2]Contract vol 2, para 3697.

[3]Citing Voet Commentary on Pandects 12.6.11.

[4]Citing D.12.6.49; D.50.17.180; Voet Commentary on Pandects 12.6.11.

[5]Royal Bank of Scotland plc v Watt 1991 SLT 138 at p 149.

[6](1904) 90 LT 474; 20 TLR 403.

must repay; it is because he has been paid that which he was not due to receive. Equally, it is not because he is not lucratus that the agent would not be obliged to repay, but because it was not he, but his principal, who was the true recipient of it".

This is consonant with the reasoning in the Watt case that enrichment even at the time of payment is not a requirement of liability but only a factor to be weighed in the balance when adjusting the equities.

2.201 Sum paid in error transferred by recipient to third party. In a case where a sum is paid in error and the original recipient transfers the sum received to a third party, there is some doubt whether the payer can sue a condictio indebiti against the third party, or whether he must found on some other ground of repetition. This question was discussed in the York Trailer Co case[1] but the reported judgment on relevancy was somewhat inconclusive on the matter. The pursuer company placed an order for the purchase of a York trailer with the representative of the York Trailer Company. He informed them that a garage company had such a trailer for sale and requested the company to give him a cheque for the price payable to the garage company. The cheque was handed to the representative who fraudulently handed it to the garage company as his own property. The garage company credited the proceeds of the cheque to the representative's loan account with them. Subsequently the pursuer company cancelled the order as the trailer was unsuitable. They sued (as allegedly responsible for the acts of their representative) the York Trailer Company, and also the garage company for recovery of the sum. The action against the garage company was for restitution on the ground that they had no right to retain the money. The action against the garage company was dismissed in the Outer House on the ground that the doctrine of condictio indebiti did not apply since the payment was made to the garage company not in consequence of the pursuer's error but in consequence of the fraud of the original recipient. On reclaiming the pursuers by amendment averred that they had made the payment to the garage company "in the mistaken belief that it had been arranged that they would receive in exchange a trailer supplied by the [the garage

[1] G M Scott (Willowbank Cooperage) Ltd v York Trailer Co 1970 SLT 15 revg 1969 SLT 87.

company]". Lord Justice-Clerk Grant held[1] that if the pursuer's averment was established the Court might be able to hold that the pursuer company parted with the cheque in the mistaken belief that they were paying the price of a trailer which they thought they were under an obligation to purchase when in fact there was no such obligation. The averment was that payment was made to the garage company, which predicates a direct payment through a mere intermediary rather than a transfer by the original recipient to a third party. It is thought therefore that this case does not support a theory that a condictio indebiti lies against a person to whom an undue payment has been transferred by the original recipient.

2.202 Indirect enrichment. The circumstances in which a person may recover from a second recipient to whom the first recipient (who was paid in error) has paid the money, or who has taken the money from the first recipient,[2] are governed by principles and rules on the redress of indirect enrichment which require a special study.[3] Normally the ground of action is recompense.

2.203 Moveable property transferred in error and thereafter transferred by recipient to a third party. Whether an owner of goods who transfers them to another in error can recover them from a third party to whom the original recipient has conveyed, or purported to convey, ownership, will depend in part on the question whether ownership was vested in the original recipient by the original transfer (which in turn depends on whether Scots law recognises a causal or abstract theory of the transfer of ownership); on the operation of the rule nemo dat quod non habet; and on the rules protecting bona fide purchasers for value, and the disputed question whether

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[1]1970 SLT 15 at p 19: (Lord Wheatley and Lord Milligan concurring); Lord Walker dissented inter alia on the ground that the added averment did not amount to an averment of a mistaken belief that a debt was due when in fact it was not.

[2]See Extruded Welding Wire (Sales) Ltd v McLachlan and Brown 1986 SLT 314.

[3]See volume 1, paras 3.118 to 3.123 for a short survey.

error operates as a vitium reale[1]. The original transferor's remedy of restitution against the third party owner or possessor is not treated in the sources as a condictio indebiti.

[1]See our Consultative Memorandum No 27 on Corporeal Moveables; Protection of the Onerous Bona Fide Acquirer of Another's Property (1976), especially at para 19, where it is argued that error does not so operate but that the law is not free from doubt.

J. Obligations discovered after payment or transfer to be null or non-existent

2.204 As stated above,[1] it is a general rule that a condictio indebiti will lie where an obligation is thought to exist which, after payment or transfer, is found to be null or non-existent. While this is true as a general proposition, there are some exceptions or difficulties peculiar to different categories of case.

2.205 The main categories appear to consist of payments or transfers made under contracts or obligations which are:

(1) non-existent though failure to reach agreement (dissensus or misunderstanding);

(2) void for force and fear (extortion);

(3) void for initial impossibility;

(4) void for incapacity (including ultra vires);

(5) void for want of authority;

(6) affected by informality;

(7) illegal on grounds of public policy (pacta illicita);

(8) subject to a suspensive condition; or

(9) void for uncertainty;

(1) Obligations non-existent through dissensus (misunderstanding)

2.206 A condictio indebiti lies to recover a payment made under error as to the existence of an obligation under an ostensible contract which never came into existence because of dissensus or misunderstanding. In such cases no contract is formed because the offer does not meet the acceptance.[2] So where a lady thought she had entered into a contract of insurance with a society in which she was

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[1]See para 2.16.

[2]See eg Morrisson v Robertson 1908 SC 332; Mathieson Gee (Ayrshire) Ltd v Quigley 1952 SC (HL) 38: Thomson "Error Revised" 1992 SLT (News) 215.

the beneficiary whereas the society thought someone else was, it was held that no contract had been concluded, and she was entitled to recover the premiums.[1]

2.207 Some difficulties arise in cases of purported contracts of sale which are never formed because of dissensus. Though few authorities say so, the putative seller's remedy would in principle seem to be a condictio indebiti for specific restitution. There is obiter authority that:

> "In the usual case, the price to be paid is one of the essential matters on which agreement is necessary before either party is bound. If they have not agreed upon the actual sum or on a method of deciding that sum, there is not the consensus in idem requisite before a contract can be completed."[2]

A line of authority seems to establish, however, that at common law if matters are not entire, eg goods have been supplied, the law will infer an obligation to pay a reasonable price or the market price.[3] The origin of this rule may be old English authority mediated to Scots law by Bell.[4]

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[1]Came v City of Glasgow Friendly Society 1933 SC 69; see also Davis v Salvation Army Assurance Society Ltd (1914) 30 Sh Ct Reps 6.

[2]R & J Dempster v Motherwell Bridge and Engineering Co 1964 SC 308 at p 332 per Lord Guthrie: McBryde Contract (1987) para 3.39: "if a price is not agreed, nor is a method of fixing it agreed, there is no sale."

[3]Wilson v Marquis of Breadalbane (1859) 21 D 957 (purported sale of cattle; disagreement as to price; contract apparently non-existent though dissensus; cattle delivered; putative purchaser held bound to pay market price); Stuart & Co v Kennedy (1883) 13 R 221; (coping stones sold by the foot, one party intending "lineal" feet and the other "superficial" feet; putative purchaser held bound to pay market price); Lennox v Rennie 1951 SLT (Notes) 78; Glynwed Distribution Ltd v S. Koronka & Co 1977 SC 1.

[4]See G J Bell Inquiries into the Contract of Sale of Goods and Merchandise (1844) pp 19, 20, cited by the pursuer in Wilson v Marquis of Breadalbane supra at p 963. Bell cites Acebal v Levy (1834) 10 Bing 376 at p 382; Hoadly v McLaine (1834) 10 Bing 482; Bell Illustrations

2.208 The basis has been said to be not agreement but the fact that something had followed on the supposed contract which could not be undone.[1] The party receiving the benefit was bound to make restitution of value to the other at the market rate. In such a case specific restitution would not lie, and it seems that restitution of value rather than recompense lies.[2] Under the Sale of Goods Act 1979,[3] where the price is not fixed by or under the contract or by the course of dealings between the parties, the buyer must pay a reasonable price.[4] Absence of agreement as to the price nevertheless may provide good evidence that no contract has yet been concluded,[5] and in such a case the common law may be relevant to exclude specific restitution and provide instead restitution of value in lieu.

2.209 Error not precluding formation of contract. The test for ascertaining consensus in idem is objective.[6]

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vol 1, p 95; and Blackstone Commentaries, Book II, chap 30, p 433 (edn not stated). Bell ibid p 20 also cites Leslie v Millers (1714) Mor 14197, Bell Illustrations vol 1, p 95 for the proposition that "In Scotland, also, it has been held, that, where nothing has been said as to the price in a sale concusively settled between the parties, merchants are presumed to contract according to the current prices of the country".

[1]R Brown Sale of Goods (2d edn, 1911) p 39, citing Stuart & Co v Kennedy (1885) 13 R 221 at p 223 per Lord President Inglis; see also Gloag Contract (2d edn) p 450; Carey Miller Corporeal Moveables pp 110, 111.

[2]See however Stair Institutions I,8,2: "And generally the delivery of any thing is not presumed to be a donation, but for recompense or loan. And so the delivery of victual to an ordinary buyer or seller of victual was found to infer the ordinary price, though no agreement or price was proven, unless the receiver instruct another cause of the delivery", citing Hume v Jamieson (1667) Mor 11508.

[3]S 8(1) and (2).

[4]S 8(1) and (2).

[5]Atiyah Sale of Goods (7th ed; 1985) p 27.

[6]Macleod v Kerr 1965 SC 253; Brooker-Simpson Ltd v Duncan Logan (Builders) Ltd 1969 SLT 304.

Where there is objective consensus in idem, the contract exists. It may be rescinded or reduced or otherwise avoided on the ground of error induced by misrepresentation[1] or of a common error in substantials,[2] or in some cases of uninduced unilateral error, as where such an error is substantial and is known to the other party.[3] In these cases, the payer's or transferor's remedy is not a condictio indebiti because when the payment or transfer was made the contract was voidable and not void and the payment or transfer was therefore due. In some cases, this is not entirely clear. In Hamilton v Western Bank of Scotland,[4] a small piece of land with buildings thereon was purchased under a common error that the whole property belonged to the seller. In fact, the buildings to a considerable extent were built on a neighbouring feu. The contract of sale was reduced on the ground of essential error as to the identity of the subject and the purchaser was held entitled to repayment of the price. The judgments do not make clear whether the sale was void ab initio, or merely voidable, but since restitutio in integrum was possible, the question did not arise.

(2) Obligations void through force and fear (extortion)

2.210 The Scots authorities are ambivalent as to whether a contract induced by force and fear is void or merely voidable.[5] Although the "overborne will" theory has been much criticised,[6] it still represents the law at least in

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[1]Stewart v Kennedy (1890) 17 R (HL) 25; Menzies v Menzies (1893) 20 R (HL) 108; Ritchie v Glass 1936 SLT 591.

[2]Anderson v Lambie 1954 SC (HL) 43 revg. 1953 SC 94.

[3]Steuart's Trs v Hart (1875) 3 R 192.

[4](1861) 23 D 1033.

[5]See McBryde, Contract, paras 12.11, 12.13. The authorities were reviewed in our Consultative Memorandum No 42 on Defective Consent and Consequential Matters (1978), paras 3.104 to 3.119; see also ibid Part II.

[6]Eg Atiyah, "Economic Duress and the 'Overborne Will'" (1982) 98 LQR 197; E McKendrick "Economic Duress - A Reply" 1985 SLT (News) 277.

some cases.[1] It has been suggested that the answer may vary according to the nature or degree of the extortionate compulsion:[2]

> "There is something to be said for distinguishing two situations. If a person is physically forced to sign a contract, there is no consent and the act is a nullity. On the other hand, if consent is obtained through fear there is still consent and, as in other cases where the method of obtaining consent is tainted,[3] the contract should be voidable."

If a bond is void through force and fear, payment under the bond in the erroneous belief that it is due should in principle be recoverable under a condictio indebiti . Such cases are likely to be rare. If the payment itself is also exacted by force and fear, then it is recoverable on the ground of compulsion which is separate from the condictio indebiti.[4] If the payment is made under a bond void for force and fear, the payment is made sine causa and it may be unnecessary to establish error on the part of the payer.

(3) Obligations void through initial impossibility of performance

2.211 Where the parties have contracted to do something which, at the time of the formation of the contract, is known by reasonable men to be physically or legally impossible, the contract is void.[5] The reason, it is said, is that "no serious consent can be supposed",[6] or

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[1]Hislop v Dickson Motors (Forres) Ltd 1978 SLT (Notes) 73.

[2]McBryde Contract para 12.12.

[3]Fraud, facility and circumvention, undue influence (author's footnote).

[4]See Part III below.

[5]Stair Institutions I, 10, 13; Erskine Institute III, 3, 84; "Legal impossibility" would include for example a purported contract to purchase something which is extra commercium which Gloag p 338 treats under original impossibility of performance and McBryde para 8-04 treats under general limitations on capacity.

[6]Gloag Contract (2d edn) p 337.

that "the intention cannot have been serious".[1] This is consistent with the approach of most civil law systems[2] under which initial impossibility of performance is a ground of nullity without the need (as in English law) to prove mistake or a related doctrine.[3] Accordingly a payment made under a purported obligation void through initial impossibility of performance of the counter-obligation in respect of which the payment was made, and in the erroneous belief that the contract was valid, is recoverable by a condictio indebiti.

(4) Obligations void for incapacity (including ultra vires)

2.212 It seems that Scots law treats payments made by persons of limited legal capacity under contracts void for want of capacity as recoverable. By incapacity we mean not only the incapacity of a natural person through non-age (namely persons under the age of 16 years[4]) or mental disability,[5] but also the incapacity of trustees or corporate bodies acting ultra vires.[6]

2.213 In the leading case of Matheson's Trs,[7] for example, a company purchased its own shares by an ultra vires contract. After the company went into liquidation, it was held that the sale was reducible as void ab initio and that the seller's representatives were liable in repayment of the price with interest from the date of

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[1]Union Totalisator Co Ltd v Scott 1951 SLT (Notes) 5 per Lord Sorn.

[2]See D 50.17.185.

[3]Englard "Restitution of Benefits" para 165. McBryde Contract para 15.02 however observes that initial impossibility of performance raises issues of error. This may be doubted.

[4]See now Age of Legal Capacity (Scotland) Act 1991, s 1.

[5]Gall v Bird (1855) 17 D 1027; John Loudon and Co v Elder's Curator Bonis 1923 SLT 226 (OH).

[6]See McBryde Contract p 151 ff.

[7]General Property Investment Co v Matheson's Trs (1888) 16 R 282.

citation.[1] The question whether the ground of action was a condictio indebiti or whether error on the part of the company had to be established was not discussed.[2] It may be that the case is an example of an innominate action of repetition (equivalent to a condictio sine causa).

2.214 A payment made to a person of limited capacity under a purported obligation void through incapacity or ultra vires may possibly be characterised as a payment under error of fact and thus recoverable under the condictio indebiti. Thus in Haggarty v Scottish TGWU,[3] a condictio indebiti was held competent where payments of trade union dues were made to a trade union by a putative member when in fact his membership was ultra vires the trade union's rules.

2.215 In the Haggarty case, however, the question was not considered whether the true basis of liability was recompense. The measure of recovery in the condictio indebiti is the amount received assessed at the date of receipt (plus interest) subject to equitable diminution in respect of a change of position. The measure of recovery in recompense is quantum lucratus at the date of the action ("value surviving"). Here the conglomerate category of recompense is the successor of the Roman "actio in quantum locupletior factus est". The limitation of the measure of recovery to quantum lucratus ("value surviving") as distinct from "value received" is designed to protect young and mentally disabled persons from suffering loss where the amount received has been squandered instead of being applied for their benefit (in rem versum).

2.216 Despite the Haggarty case, the weight of authority favours recompense as the basis of liability to redress the unjustified enrichment of the person of limited capacity. Thus Gloag states: "While no contract can be inferred with a party who has no power to contract the supply of money, goods, or services to him will raise an

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[1]Ibid at pp 286 and 294.

[2]The main questions were whether the sale was void or voidable; whether it could be homologated; and whether the shareholders whose names were restored to the register were liable for calls and entitled to dividends, on which last point opinion was reserved.

[3]1955 SC 109.

obligation to pay so far as he is enriched".[1] There is authority for this proposition in cases relating to payments in the form of advances or loans made to a person whose incapacity or limited capacity stems from non-age,[2] or from mental disability,[3] to a trustee who has no power to bind the trust estate,[4] and to a local authority receiving a loan which is ultra vires its borrowing powers and known to be ultra vires by the lender.[5] As mentioned above, the rules derive from Roman law,[6] and differ from the English rules.[7]

(5) Obligation void through want of authority.

2.217 Where a third party is induced by a putative agent to enter into a purported contract with the putative principal, the contract is void because of the putative agent's want of authority to bind the putative principal. In such a case, it is established that the third party has an action of damages for breach of warranty of authority against the putative agent.[8] The third party also has an action of recompense (or actio de in rem verso) against

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[1]Gloag Contract (2nd edn) p 329; see also McBryde Contract p 623.

[2]Stair Institutions I, 6, 33 (citing Gordon v Earl of Galloway (1629) Mor 8941) and I, 8, 6 (citing D.13.6.3; D.26.8.5); Bankton Institute I, 9, 41; Erskine Institute I,8,33; Scott's Tr v Scott (1887) 14 R 1043, McBryde Contract p 134.

[3]Bankton Institute I, 9, 41; Gloag Contract (2nd edn) p 93, citing D.44.7.46.

[4]Ralston v McIntyre's Factor (1882) 10 R 72 at p 76 per Lord Rutherfurd Clark; McMillan v Armstrong (1848) 11 D 191; Heriot's Trs v Fyffe (1836) 14 S 670.

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

[6]See W de Vos "Unjustified Enrichment in South Africa" [1960] Juridical Review 125 at p 132.

[7]Sinclair v Brougham [1914] AC 398 at pp 434 ff per Lord Dunedin, citing D.13.6.1 and 3; D.26.8.5; Pothier Traite des Obligations ss 114, 115.

[8]Anderson v Croall & Sons Ltd (1903) 6 F 153; Irving v Burns 1915 SC 260.

the principal to the extent that the principal has been enriched by the payment.[1] No direct authority has yet been traced on whether the third party can elect to raise a condictio indebiti against the putative agent, but it is thought that in principle he does have that choice. It appears that the third party would be entitled to repayment of the money from the putative agent under English law.[2] If, however, he does have that choice, and if the subsidiary remedy doctrine applies to recompense against the putative principal, he should sue the putative agent first.

(6) Obligations affected by informality.

2.218 The validity of an obligation may depend on its constitution in a writing which complies with the formal requirements of the authentication statutes (known as obligationes litteris, eg obligations relating to heritable property including leases for more than one year, contracts of service for more than one year, and contracts of apprenticeship)[3] or with formal requirements imposed by a specific enactment.[4] In the case of an obligatio litteris, money may be paid by the debtor in the erroneous belief that he is bound by the obligation when in fact either the writing is formally defective or the agreement is merely verbal. In such a case, the creditor's right to resile from the contract may be lost by personal

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[1] Arnot v Stevenson (1698) Mor 6017 cited by Gloag Contract (2nd edn) p 153; Bruce v Stanhope (1669) Mor 13403; Hawthorn v Urquhart (1726) Mor 13407; Inches v Elder (1793) Hume 322; Commercial Bank of Scotland v Biggar 1958 SLT (Notes) 46; Baron Hume Lectures vol II, pp 169, 170; Kames Principles of Equity (5th edn) pp 96, 97. Note that pace Gloag (idem) British Linen Co v Alexander (1853) 15 D. 277 did not concern an unauthorised agent but a joint adventurer and it is not clear that what was done was unauthorised. On the question whether a condictio indebiti would lie against the putative principal, see G M Scott (Willowbank Cooperage) Ltd v York Trailer Co 1970 SLT 15 revg 1969 SLT 87.

[2] Cf Goff and Jones Restitution p 375.

[3] See Report on Requirements of Writing Scot Law Com No 112 (1988) paras 2.2 to 2.7.

[4] See ibid, para 7.2 ff.

bar in the form of rei interventus or homologation.[1] This is probably the normal result where such an agreement is acted upon, but in some cases the payer seeking to affirm the contract may fail to do so. Gloag gives the example of a case where, on a verbal contract of sale of land, the purchaser has paid part of the price but has failed to instruct the agreement by competent evidence and therefore is precluded from relying on his payment as rei interventus.[2] Gloag states that the purchaser will have an action for repetition of his payment[3] citing an old case concerning repetition of an earnest (arra)[4] and obiter dicta in Paterson v Paterson.[5] There Lord McLaren observed that "in general if a contract fails through some informality the rule is that the consideration - money - must be returned".[6] Gloag and Henderson state that on the same principle a payment in advance of a term's rent on a lease void for informality is recoverable on the ground of repetition.[7]

2.219 Where the contract is of a type where its validity does not depend on writing (eg a consensual contract such as sale or a real contract such as loan) but the parties choose to embody the contract in writing, and the writing is of a type covered by the authentication statutes, there is authority that the writing must comply with formalities

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[1]Ie where the creditor seeking to withdraw has sat back and allowed the debtor to act on the faith of the agreement as if it were complete (rei interventus) or has himself acted on the faith of the agreement in such a way as to indicate that he regards himself as bound by it (homologation).

[2]Gloag Contract (2nd edn) p 176.

[3]Idem.

[4]Lawson v Auchinleck (1699) Mor 8402.

[5](1897) 25 R 144 at p 191 per Lord McLaren: "If it were possible to figure a case of money being paid in such circumstances as would not amount to rei interventus, beyond all question the purchaser would get back his money.".

[6]Ibid at p 190. See also Oliphant v Lord Monorgan (1628) Mor 8400.

[7]Introduction (9th edn; 1987) para 7.8.

of execution required by these statutes.[1] If the writing is invalidated by a formal defect, there is some doubt whether it is permissible to use the writing as evidence of the underlying obligation.[2] The typical example is a bond for repayment of a loan. Baron Hume states that where a borrower has repaid a loan due under an irregular and improbative bond, he has no condictio indebiti for repetition:[3] "For having got the money, though on an irregular writing, he was naturally, and in justice, bound to pay.".[4] Where the invalidity in the bond is discovered while the loan is still in the borrower's hands, there are two possibilities. First, where the underlying contract of loan survives and is proved, repayment will be due to the lender by virtue of the contract. Second, and alternatively, where the underlying loan contract does not survive or is not proved, the lender will have a quasi-contractual action of repetition,[5] presumably a condictio indebiti founding on an error of fact as to the existence of the contract of loan.

(7) Obligations affected by illegality.

2.220 Obligations which are illegal or unenforceable are considered by Professor Gloag under the head of "Pacta Illicita"[6] and by Professor McBryde under the head of "Public Policy".[7] While there is an absolute rule that an illegal contract is unenforceable by an action under the contract, there are circumstances in which an action for

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[1]Scot Law Com No 112, paras 2.4, 4.36; Walker and Walker Evidence p 91.

[2]Scot Law Com No 112, paras 2.5 and 4.36; Paterson v Paterson (1897) 25 R 144 at pp 174, 181, 187.

[3]Lectures vol III, pp 172, 173.

[4]Ibid p 173. See also Bankton Institute I, 8, 28: "where the obligation labours under a legal nullity, but there truly interveened a debt, as in bonds void for not observing the solemnities of the act 1681, there is no restitution..." but his meaning is not clear.

[5]Paterson v Paterson (1897) 25 R 144 at p 190 per Lord McLaren; see previous paragraph.

[6]Contract (2nd edn) Chapter 33, p 549 ff.

[7]Contract, Chapter 25, p 573 ff.

repetition may be available to redress unjustified enrichment arising from performance of the contract, eg where the payer was innocent, but the recipient was guilty, of turpitude and the maxim in pari delicto potior est conditio defendentis does not apply so as to preclude repetition.

2.221 As we note below[1] at one time, repetition was founded on the condictio ob turpem vel iniustam causam, but in the late eighteenth century, the doctrine of that condictio came to be regarded as a defence. The exact status of the condictio is now in doubt. The law is now generally presented as a principle of non-recovery (ie a defence to an action of repetition, restitution or recompense) subject to defined exceptions in which recovery is allowed. As mentioned below this has left a gap in the law in some areas, (eg payments under compulsion) where the condictio ob turpem causam should arguably be a ground of recovery.

2.222 There are several justifications for the doctrine of non-recovery of payments under illegal obligations.[2] Some of these may be questionable but others have sufficient force to show that the present doctrine cannot be replaced by a general rule allowing recovery. First, in some cases to allow recovery of benefits transferred under an illegal contract would have the same effect as enforcing the contract. Thus if money is loaned in terms of an illegal contract, the lender cannot sue in repetition or recompense because the effect would be the same as if he sued for recovery of the loan under the contract.[3] The same can be said of an action of count, reckoning and payment by a partner or joint adventurer in respect of the profits or losses of an illegal partnership or joint adventure,[4] or by a principal against an agent in

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[1]See Part III in this volume.

[2]See Wade "Benefits obtained under illegal transactions - reasons for and against allowing restitution" (1946) 25 Texas Law Review 31 at pp 32-52.

[3]See eg M v S and Others 1934 SLT (Sh Ct) 43; Harry Smith Ltd v Connor (1944) 60 Sh Ct Rep 5; Colin Campbell v Pirie 1967 SLT (Sh Ct) 49.

[4]Stewart v Gibson (1840) 1 Rob 260 affg (1828) 6 S 733; Fraser v Hill (1852) 14 D 335, 1 Stuart 274; AB v CD (1912) 1 SLT 44.

respect of money collected in an illegal undertaking[1] and of an action for restitution of a pledge given for an illegal purpose.[2] Second, an important reason for refusing repetition is that the pursuer is unworthy to obtain redress; in other words a "clean hands" doctrine.[3] This is consistent with the requirement borrowed from Roman law by the Scots Institutional writers that the pursuer must not be implicated in the turpitude.[4] The courts will not assist a party in breach of a statute.[5] This focuses on the pursuer's moral condition. Third, another reason focuses on the nature of the act rather than the pursuer's moral condition: there are "acts of which the Courts cannot take cognisance except to visit them with penalties".[6] Fourth, the argument that the courts should not waste their time on such actions is generally invoked in relation to betting and gaming contracts which are unenforceable as sponsiones ludicrae.[7] Fifth, it is said that the rule precluding recovery deters or discourages illegal transactions.[8]

2.223 Some of these justifications are questionable but it clearly appears that the solution does not lie in a wide absolute rule of recovery, which may be no better than a rule allowing the loss to lie where it falls. In some cases, moreover, forfeiture by the State may be the

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[1]Campbell v Scotland (1778) Mor 9530.

[2]See Taylor v Chester (1869) L R 4 QB 309, and cf Nisbet's Creditors Tr v Robertson (1791) Mor 9554, Bell's Octavo Cases 349.

[3]Wade, op cit at p 39: "Nemo auditur propriam turpitudinen allegans".

[4]Stair Institutions I, 7, 8; Bankton Institute I, 8, 22; Bell Principles s 35.

[5]Jamieson v Watt's Tr 1950 SC 265 at p 271 per Lord Justice-Clerk Thomson.

[6]Ibid at p 280 per Lord Patrick.

[7]See, however, the criticism of this reason in Kelly v Murphy 1940 SC 96 at p 118 per Lord Wark.

[8]Bruce v Grant (1839) 1 D 583 at p 588 per Lord Jeffrey.

best solution.[1] Furthermore, it is likely that any reform of quasi-contractual remedies in this area should be accompanied by reform of the relevant branch of the law of contract.[2]

(8) Obligations subject to a suspensive condition

2.224 Where the coming into force of a contract is postponed by a suspensive condition; a payment is made in terms of the contract; but the suspensive condition is never purified, the payment is recoverable. If the payment was made in the erroneous belief that the money is already due, the remedy will be a condictio indebiti. Otherwise the remedy may be a condictio causa data causa non secuta or innominate action of repetition. Sometimes it is difficult to distinguish a contract subject to a suspensive condition (ie not yet in force) and a contract subject to a resolutive condition (ie providing that the contract will cease to be binding on an uncertain event).[3] In Brown v Nielson[4] the owner of a parcel of ground agreed to constitute a servitude non aedificandi over it on condition of all the feuars paying a certain consideration. Some feuars refused to accede to the contract and pay their share. The owner was held bound to repay the consideration paid by the acceding feuars. While the term "at an end" used in the report of the case seems to indicate a resolutive condition, it may be that the condition was suspensive.

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[1]See Scottish Law Commission Consultative Memorandum No 25 on Corporeal Moveables: Passing of Risk and of Ownership (1976) para 56; T B Smith Property Problems in Sale (1978) p 104: "it seems less objectionable that property which has been the subject of illegal dealing should be applied to the public good through acquisition by the State than that a rogue should enjoy the fruits of his obliquity". Cf Stair Institutions I, 7, 8; Blair v Gib (1738) Mor 664.

[2]See J Beatson "Should there be Legislative Development of the Law of Restitution" in Burrows (ed) Essays on the Law of Restitution (1991) 279, at p 301.

[3]Gloag Contract (2d ed) p 272. McBryde Contract p 42 states that "there is a difference between a condition suspensive of a contract and a contract subject to a suspensive condition".

[4](1825) 4 S 271.

(9) Obligations void from uncertainty

2.225 The general rule is that:

> "In order to create a contractual obligation an agreement must be reasonably definite. Vague general understandings cannot be enforced".[1]

Such agreement is said to be "void from uncertainty"[2]. The word "void" in this context has been criticised, as being "best reserved for those situations in which consent is invalid or not recognised by the law."[3] However, the phrase is commonly used where the uncertainty cannot be cured by extrinsic evidence or the subsequent actings of the parties and is thus unenforceable or void beyond redemption.[4] Uncertainty rendering an agreement void may arise where the words are too vague in meaning; or the agreement is incurably incomplete; or parts of the agreement are contradictory.[5] It seems that the courts are "less inclined to hold a contract void from uncertainty when part of the contract has been carried out."[6]

2.226 No Scots case has been traced of repetition or restitution of benefits conferred under a contract or obligation which is void from uncertainty, but in principle it would appear that such remedies are available. In English law it appears that restitutionary remedies lie at least if there has been a total failure of consideration.[7] Goff and Jones treat cases of failure to agree on an essential term, eg the price in a contract of sale of goods, along with cases of unresolved ambiguity.[8]

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[1]Gloag Contract (2d edn) p 11.

[2]Idem.

[3]McBryde Contract para 4.18.

[4]Idem.

[5]Ibid para 4.23.

[6]Ibid para 4.33 citing F & G Sykes (Wessex) Ltd v Fine Fare Ltd (1967) 1 Lloyd's Rep 53 at pp 57, 58 per Lord Denning.

[7]Goff and Jones, (3d edn) p 380 ff.

[8]Ibid p 384. See para 2.208 above.

PART III

RECOVERY OF PAYMENTS MADE UNDER IMPROPER COMPULSION

(1) Preliminary

3.1 The Scots law on compulsion as a ground of repetition or restitution stems from a variety of sources, Roman, English and indigenous. The private law rules have tended to develop in separate strands and in this Part we attempt to draw these strands together.

3.2 The rules are to be found in:

(1) some Scots authorities based on the Roman condictiones, of particular relevance being the condictio ob turpem vel iniustam causam, (perhaps) the condictio sine causa and somewhat oddly (because no error is involved) the condictio indebiti;

(2) the Scots rules (originally derived from Roman law) on "force and fear" or "extortion" as a ground of reduction of an obligation to pay or perform, which rules have in some cases been applied in actions of repetition;[1] and

(3) the analogy of the English common law rules on restitution based on compulsion, ie the English action for money had and received.

3.3 Historical accidents impeding development of compulsion as a ground of repetition. The development of the Scots law on compulsion as a ground of repetition has been impeded by two accidents of legal history. The first is attributable to Stair. As Professor Birks has remarked:[2]

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[1]Force and fear, or compulsion, is also relevant in actions relating to the vitious dispossession of corporeal property, such as the old possessory action of spuilzie of moveables or land, but these do not seem to have influenced the rules on repetition of money, and are unimportant in modern law.

[2]Birks "Restitution: Scots Law" [1985] CLP 57 at p 70; Birks "Six Questions" [1985] Juridical Review 227 at pp 245-247.

> "the distribution of the Scots material [on compulsion] . . . has not recovered from Stair's decision, which runs back to the separate treatment of metus in Roman law, that in dealing with restitution he would remit "force and fear" to his section on wrongs: "As for these things which are attained by force and fear, they have their original from delinquence, and come not under this consideration."[1]"

Thus the natural place to find authorities on repetition for compulsion is, as Birks remarks,[2] in the modern descendant of the condictio ob turpem causam. In fact, it is precisely in that context that authorities are indeed found in Scots law as we note below.[3] Moreover, the undeveloped nature of the condictio ob turpem causam has meant that authorities on "force and fear", as a ground of reduction of obligations, have been applied in actions of repetition of money exacted by compulsion.[4]

3.4 The second historical accident impeding development has been the tendency in expositions of the modern law to regard the doctrine of ob turpem vel iniustam causam only as a defence to an action to enforce an illegal contract, overlooking its other original role as the basis of the condictio ob turpem vel iniustam causam, ie a substantive cause of action as distinct from a mere defence.

(2) The condictiones and compulsion

3.5 The Scots law of repetition and restitution was much influenced in its formative period by the Roman condictiones. The principal nominate condictiones consisted of the condictio indebiti; condictio causa data causa non secuta; condictio ob turpem vel iniustam causam; and condictio sine causa (specialis). The first two were partially received though the extent of Roman influence is debateable, and in the case of the condictio indebiti, Roman sources are rarely if ever cited in modern practice. The last two are of particular importance where the ground of recovery is extortion of money.

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[1]Citing Stair Institutions I, 7, 8; cf ibid I, 7, 1.

[2]Idem. See also Zimmermann Law of Obligations (1990) p 845.

[3]See para 3.6

[4]See para 3.36.

3.6 The condictio ob turpem vel iniustam causam. There is no space here to recount the history of the partial reception in Scots law of the condictio ob turpem vel iniustam causam. Suffice it to say here that the older Institutional writers, Stair, Bankton, Erskine and Kames treated the condictio as received at least in part.[1]

3.7 The Institutional writers, following the Digest,[2] laid down a tripartite classification of the cases covered by the condictio depending on the incidence of turpitude. First, where both parties were guilty of turpitude, the payment (or property transferred) could not be recovered.[3] The most common version of this rule nowadays is "in pari delicto potior est conditio defendentis". Second, where only the payer (or transferor) was guilty of turpitude, recovery was refused. Third, this leaves only the case where the turpitude taints only the recipient of the payment (or property) and not the payer. In this case the condictio does lie. This tripartite classification of cases is very clearly set out in Bankton[4]:

> "If things are given for an unlawful cause, distinction must be made as to the several cases; for where the unlawfulness was in the giver, and not

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[1]Stair Institutions I, 7, 8 (approved (obiter) in Cantiere San Rocco v Clyde Shipbuilding and Engineering Co Ltd 1923 SC (HL) 105 at p 122 per Lord Shaw of Dunfermline); Bankton Institute I, 8, 22; Erskine Institute III, 1, 10; Kames Principles of Equity (5th edn; 1825) p 53.

[2]D.12.5; cf C.4.7 and C.4.9; see generally Grodecki "In pari delicto potior est conditio defendentis" (1955) 71 LQR 254; Sabbath "Denial of Restitution in Unlawful Transactions - A Study in Comparative Law" (1959) 8 ICLQ 486, 489; Zimmermann Law of Obligations (1990) pp 844-847; 863-866.

[3]Stair Institutions I.7.8: "But in things received ex turpi causa, if both parties be in culpa, potior est conditio possidentis"; Bankton Institute I, 8, 22: "In pari casu potior est conditio possidentis"; Bell Principles s 35 "... melior est conditio possidentis vel defendentis". See also Baron Hume's Lectures vol II, p 31: "in all...cases of mutual turpis causa, the cause of the possessor prevails".

[4]Institute I, 8, 22.

in the receiver, in such case the thing is not to be restored, even though the fact for which it was given was not performed; but, if the unlawfulness was in the party receiver, and not in the giver, then the thing must be restored, even tho' the cause of the giving was performed; if the turpitude was both in the party giver and receiver, then he that is in possession has the advantage, by the rule, that In pari casu potior est conditio possidentis; so that the bond given on such consideration is void; but if the payment is made, it is not to be repaid".

3.8 In the late eighteenth century, however, there occurred a change in the way in which the condictio ob turpem vel iniustam causam was perceived. Baron Hume did not treat of it in his account of quasi-contractual obligations[1], and gives but a brief reference to mutual turpis causa barring recovery of money paid under illegal contracts in his discussion of particular contracts.[2] Bell in his Principles and his editors dealt with the maxim in pari delicto potior est conditio defendentis in the context of pacta illicita[3] and not in the context of quasi-contractual remedies.[4] Morison's Dictionary[5] and later case digests have followed the same course. An important disadvantage of this change in classification is that it can encourage the erroneous tendency to believe that in our law the only role of the doctrine of turpis vel iniusta causa is (or was) to provide a defence to actions enforcing an obligation vitiated by illegality or (in the case of sponsio ludicra) unenforceability. That approach takes no acount of the fact that the condictio ob turpem vel iniustam causam in the Institutional period also had an important role in providing and regulating not merely a defence of the kind just described but also a substantive cause of action, namely a ground for redressing unjustified enrichment arising from among other things unlawful or unwarrantable forms of compulsion, as it was in Roman law.

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[1]Baron Hume's Lectures vol III, chap XV, pp 165-185.

[2]Ibid vol II, p 31 (sale); vol III, p 395 (insurance).

[3]Bell Principles s 35.

[4]Ibid ss 526-539.

[5]Mor s v "Pactum Illicitum" pp 9451-9584.

3.9 The effect is to leave in modern expositions of the law of repetition, a vacuum which is made even larger by the fact that, notwithstanding a few scattered references in the Scots sources to the condictio sine causa[1], that form of condictio has not been received in any developed and useful form in Scots law. Of modern secondary works, only an Encyclopaedia article by Mr John Cowan QC on "Repetition" clearly recognises the survival of the condictio ob turpem causam[2], but even he does not mention the condictio sine causa (specialis).

3.10 In South Africa, which recognises the condictio ob turpem vel iniustam causam, Roman law is supplemented by recourse to English law. The South African judge and jurist Wessels, for example, remarked that many cases which are decided in English law upon duress or undue pressure may be decided in South African law by applying the principles of the condictio sine causa and the condictio ob turpem causam[3]. He continues[4]:

> "according to English law, money paid to recover goods from a carrier who refuses to give them up except on payment of an exorbitant sum, can be recovered as money extorted by duress of goods (Ashmole v. Wainwright, 1842, 2 QB 837, at p 846: 11 LJQB 79: 114 ER 325)".

Then he submits that South African law[5]:

> "will allow a repetition of the money on the ground that it was paid sine causa to a person who retained it contra aequum et bonum. If a carrier has been paid the freight agreed upon, he is legally bound to give up the goods. If he extorts more than the charges agreed upon, he obtains the extorted money ob turpem causam, and as the payer is not in turpe causa but the receiver is, the former can get his money

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[1]eg Watson v Shankland (1871) 10 M 142 at p 152 per Lord President Inglis; Bankton Institute I, 8, 24.

[2]Encyclopaedia of the Laws of Scotland vol 12 (1931) para 1183.

[3]Wessels Contract vol 2, para 3767.

[4]Idem.

[5]Ibid, para 3768.

back as money paid sine causa (arg. D.12.5.2.1: 12.5.9.pr.1)"[1].

3.11 A similar approach is adopted in Scots law by Mr John Cowan in the Encyclopaedia article referred to above. He states that "money which has been extorted by unfair means can be recovered, although paid with full knowledge that no debt is due",[2] the remedy being a condictio ob turpem causam. As an example he gives the case of "money paid in order... to recover goods from a carrier, who refused to give them up except on payment of an exorbitant charge"[3] and, like Wessels, cites (inter alia) Ashmole v Wainwright[4] for this proposition.

3.12 In the leading Scots case of British Oxygen Co v SSEB,[5] discussed more fully below,[6] (an action for repetition of an excess sum paid to a public utility for performance of a duty which it was bound to perform for less than it exacted) the opportunity occurred to invoke the condictio ob turpem causam, but (perhaps understandably in view of the state of Scots legal literature) it was not referred to by either counsel or judge. It was observed that the condictio indebiti was not applicable,[7] but the particular category of restitutionary liability applicable to the case was not made clear. It could be argued that in the British Oxygen Co case, the defender electricity board obtained the overcharge ob turpem vel iniustam causam and as the pursuer company was not at fault (in pari delicto or in turpitudine) but the defender board was, the pursuer could recover his money. There are older Scots cases based on the condictio ob turpem causam which support this

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[1]See para 3.20 below for an explanation of these Digest citations.

[2]Encyclopaedia of the Laws of Scotland, vol 12 (1931) para 1183.

[3]Idem.

[4](1842) 2 QB 837.

[5]1959 SC (HL) 17 affg 1958 SC 53.

[6]See paras 3.30 to 3.34.

[7]1958 SC 53 at p 79 per Lord Patrick.

approach,[1] which were not cited in the British Oxygen Co case.

3.13 Forms of compulsion. Compulsion may take the form of actual or threatened harm to the person of the payer, or to his property, or of threats to withhold the provision of goods, services or other benefits which the person exercising the compulsion is bound by law to provide. We now turn to consider these three forms of compulsion. These forms of compulsion are mentioned for ease of exposition and are not hard and fast categories which necessarily exhaust the whole field of repetition on the ground of compulsion. For example there are cases where creditors of a bankrupt have obtained bills from him as a secret preference and been held liable in repetition on the ground of extortion or concussion[2]. It is not at all clear which (if any) of the three above-mentioned categories of compulsion applied in those cases.

(a) Acts affecting the person

3.14 In Scots law, where a person has been forced to enter into a contract by some form of improper compulsion, and to make a payment thereunder, he may recover. In Roman law such a person could bring a condictio ob turpem vel iniustam causam. Thus in the Digest title on that condictio, Pomponius states (at D.12.5.7): "It is agreed that money exacted under a stipulation itself extorted by force is recoverable" (Mommsen-Krueger-Watson edn. trans.).[3] Wessels[4] remarks that "It is doubtful whether, in such a case, the giver can be said to be in delicto at all. His mind never voluntarily agreed to the commission of a delict. At any rate, he cannot be said to be in pari delicto". This rule has been received in Scots law though in an early case, the remedy was referred to as a

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[1]See para 3.20 below.

[2]Riddell v Christie (1821) 1 S 151; Arroll v Montgomery (1826) 4 S 499; Macfarlane v Nicoll (1864) 3 M 237.

[3]D.12.5.7: "Ex ea stipulatione, quae per vim extorta esset, si exacta esset pecunia, repetitionem esse constat".

[4]Wessels Contract vol 1, p 216, para 667.

condictio indebiti. Thus in Jack v. Fiddes[1] the pursuer was forced to grant a bond to the defender and to pay the sum due under the bond to free himself from prison where he had been imprisoned for debt by diligence under a decree by a court of Cromwellian Army officers acting during the Interregnum without proper jurisdiction. A condictio was sustained for repayment of the sum paid under the bond.[2] In principle, the form of condictio is a condictio ob turpem vel iniustam causam.[3] This ground of recovery was of more importance when civil imprisonment for debt was recognised by Scots law, and applied where unwarranted threats of such imprisonment were used to extort money unlawfully.[4]

(b) Acts affecting property

3.15 In principle, the improper compulsion may take the form of actual or threatened unlawful harm to the property of the person unlawfully compelled to pay or the unlawful taking or detention of such property. Some forms of pressure on debtors, or alleged debtors, are legitimate. Thus a threat to sue for a debt, which often carries with it an implied threat of diligence on the dependence and in execution, is not an improper form of pressure even

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[1]Jack v Fiddes (1661) Mor 2923; distinguished in Macintyre v Murray & Muir (1915) 36 Sh Ct Reps 49 at pp 54, 55.

[2]In the defender's unsuccessful pleadings, this condictio was described as a condictio indebiti, probably because he wished to rely on the defence that the money was due under a natural obligation. The law applicable is more reliably found in the pursuer's successful pleadings which clearly alleged compulsion; made it clear that the assignee defender was also guilty of turpitude; and did not mention error on the pursuer's part or the condictio indebiti.

[3]D.12.5.7.

[4]Cf Darven v Logan (1861) 1 Guthrie 85 (unlawful diligence by creditor after sequestration of bankrupt who paid under fear of civil imprisonment for debt). In this case, the sheriff held that repetition was due under the Bankruptcy (Scotland) Act 1856, s 111, but that gave the right of recovery of illegal preferences to the trustee whereas in this case the action was at the instance of the bankrupt after his discharge.

if the debt is ultimately found not to be due.[1] This rule no doubt stems from the fact that the ordinary courts of law are the machinery provided by the State for resolving legal disputes. Threats by central or local government to use diligence under summary warrants against property for the recovery of arrears of taxes, rates or community charge may, however, be in a different position. Such warrants are granted by the sheriff as an administrative act without a hearing on an ex parte application and certificate of arrears by the official collector.[2] The public authority creditor in such cases warrants the truth of the certificate and acts at its peril, being strictly liable in damages if the diligence turns out to be wrongful.[3] It might be thought that in principle an action of repetition of payments exacted under the threat of wrongful summary warrant diligence would also lie.

3.16 This possibility was discussed but not resolved in British Railways Board v Glasgow Corporation[4] where a dispute arose as to whether certain premises of a nationalised industry were liable to be rated, and payment of the rates was made under protest and reservation of rights. An action of repetition was refused on the ground that the pursuers had failed to exhaust their statutory remedies of appeal to the rating authority against the demand note for rates. The court made some obiter remarks on the common law grounds of recovery which would have applied if the statutory remedies had been exhausted. The pursuers had contended that once demand notes in terms of the rates assessments had been issued, they were enforceable by summary warrant and the pursuers therefore had no alternative but to pay. In the Outer House, Lord McDonald remarked:

> "There is authority for the proposition that payments made under statutory compulsion may be recovered if it transpires that there was indeed no valid

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[1]Gloag Contract p 63; approved British Railways Board v Glasgow Corporation 1976 SC 224 at p 232.

[2]Local Government (Scotland) Act 1947, s 247; Taxes Management Act 1970, s 63; Car Tax Act 1983, Sch 1, para 3(3); Value Added Tax Act 1983, Sch 7, para 6(5), all as read with Debtors (Scotland) Act 1987, Sch 5; Abolition of Domestic Rates Etc (Scotland) Act 1987, Sch 2, para 7.

[3]Grant v Magistrates of Airdrie 1939 SC 738.

[4]1976 SC 224.

statutory warrant to justify them[1].... In my opinion, the present case falls within that category".[2]

On reclaiming two of the judges expressed obiter qualified disagreement with the Lord Ordinary's remarks on the common law grounds of recovery,[3] but it is not altogether clear whether they intended to disapprove the dicta quoted above or were referring to other aspects of those remarks.

3.17 It seems to us that the British Oxygen Co case cited by Lord McDonald does indeed vouch his dictum. If as the British Oxygen Co case holds, improper compulsion grounding a right to repetition can take the form of the tacit threat of the wrongful withholding by a public utility of services of which it has a monopoly, then a fortiori it can also take the form of the tacit threat by a public authority of wrongful diligence under summary warrant, and that it can be said of the latter case as of the former that the payer had no alternative to making the payment. In the analogous branch of law on the grounds of reduction of contracts and deeds vitiated by force and fear or extortion (which has been applied in actions of repetition[4]), there is good authority that the actual or threatened use of irregular diligence[5], or the unlawful seizure of goods[6], or more generally any illegal or unwarrantable act[7], is such a ground.[8]

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[1]Citing British Oxygen Co v SSEB 1959 SC (HL) 17 affg 1958 SC 53.

[2]1976 SC 224 at p 232.

[3]Ibid at p 240, 241 per Lord Justice-Clerk Wheatley; at pp 243, 244 per Lord Kissen.

[4]See para 3.37 below.

[5]McIntosh v Chalmers (1883) 11 R 8.

[6]Wiseman v Logie (1700) Mor 16,505.

[7]McIntosh v Chalmers (1883) 11 R 8; Education Authority of Dumfriesshire v Wright 1926 SLT 217.

[8]See para 3.41 below.

3.18 Unlawful acts affecting property include the act of withholding another person's property in order to induce him to make a payment which he is not obliged to make. This means of pressure is considered in the next Section along with the withholding of other types of benefit.

(c) Withholding of benefits (property, services, facilities, licences etc)

3.19 The Law Commission's Consultation Paper[1] refers to a number of English cases[2], and one Scots decision of the House of Lords, British Oxygen Co v SSEB[3], which can be read as supporting a proposition that all payments unlawfully demanded for the performance of a public duty are recoverable. As already mentioned, these English cases form the basis for the Court of Appeal's affirmation of a general right to restitution in the Woolwich case[4]. In our view and the Law Commission's view, however, the British Oxygen Co case was based on improper compulsion rather than a general restitutionary right, as we explain at paragraphs 3.30 to 3.34 below[5]. This is confirmed by the decision of the House of Lords in the Woolwich case in which Lords Keith, Goff and Jauncey all treated the case as based on improper compulsion.[6]

3.20 Roman law and older Scots authorities based thereon. In Roman law where a payment was made to encourage the performance of a duty which the payee was in any event legally bound to perform, the payer could recover the money by a condictio ob turpem vel iniustam causam.[7] If

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[1]Law Com CP No 120, para 3.10.

[2] Campbell v Hall (1774) 1 Cowp 204; Dew v Parsons (1819) 2 B & Ald 562; Steele v Williams (1853) 22 L J Exch 225; Hooper v Exeter Corporation (1887) 57 LJQB 457.

[3]1959 SC (HL) 17 affg 1958 SC 53.

[4]Woolwich Equitable Building Society v IRC [1993] 1 AC 70 (HL affg CA) revg [1989] 1 WLR 137.

[5]See Law Com C P No 120, para 3.10, fn 25, head (c).

[6][1993] AC 70 (HL) at pp 159, 160; 165; 187, 188

[7]See eg Zimmerman, Law of Obligations (1990), p 845: "If the performance had been such that its acceptance offended the traditional standards of honest and moral

for example the pursuer had deposited a thing with the defender and the defender had refused to give it back without payment of money which the pursuer then paid, the pursuer had a condictio to recover the money.[1] Where the pursuer had lent the defender clothes for use and had paid the defender a price to get them back, the pursuer could recover the price by a condictio.[2] Where the owner of stolen property was compelled to pay the thief money in order to get the stolen property back, the owner could recover the payment.[3]

3.21 In Scots law, this principle was applied in two old cases. In Rossie v Her Curators[4] the curator of a woman refused to deliver up writs belonging to her till he got a bond from her for payment of a certain sum. In a

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behaviour (datio ob turpem causam), the condictio ob turpem causam was applicable. It lay, for instance, against a person who had accepted money . . . in order to do what he was obliged to do in any event (" . . . si tibi dedero, ut rem mihi reddas depositam apud te") [citing D.12.5.2.1]. . . . Extraordinary practices of this kind could, of course, not be condoned, and thus the transfer of the money could hardly be sanctioned by the legal system.".

[1]D.12.5.2 (Ulpian): "Similarly, in the case where I pay to make you give me back something deposited with you, a document, for instance" (Mommsen-Krueger-Watson edn trans) "Item si tibi dedero, ut rem mihi reddas depositam apud te vel ut instrumentum mihi redderes". In Roman law and in Scots law, a depositary was bound to act gratuitously: see Erskine Institute III, 1, 26 citing D.16.3.1.8; and see Central Motors (Glasgow) Ltd v Cessnock Garage and Motor Co 1925 SC 796 at pp 800, 801.

[2]D.12.5.9: (Paul) "If I lend you clothes for use and then pay you a price to get them back, the reply has been given that I will be right to sue by condictio. Though the giving was for a purpose and the purpose has materialised, it was nevertheless wrongful" (Mommsen-Krueger-Watson edn trans). "Si vestimenta utenda tibi commodavero, deinde pretium, ut reciperem, dedissem, condictione me recte acturum responsum est: quamvis enim propter rem datum sit et causa secuta sit, tamen turpiter datum est".

[3]C.4.7.7 (Diocletian and Maximian).

[4](1624) Mor 9456.

suspension, the Court of Session held that as the bond was given in order to get back instruments deposited with the curator, which was "no just cause" and "a shameful cause", the reasons for 'suspension were relevant. It seems clear that the decision was based on D.12.5.2 cited in the previous paragraph[1]. In Mushet v Dog[2] a tutor-at-law granted a factory to the pupil child's mother in return for a bond for a considerable sum. In a suspension, the Court held that the bond had been granted ob turpem causam, because although a tutor might make a factor, it was not lawful to do so "for such a lucrative cause to himself". In both these cases, the person taking the bond, being in a fiduciary position, was bound to act gratuitously.

3.22 Both of these cases concerned proceedings for suspension, presumably of diligence on the bond. If the procedings had been an action of repetition, then strictly speaking the proper remedy might have been a condictio indebiti since the bond could have been treated as an obligation void ab initio. However, if instead of granting a bond for payment of money, the pursuer had simply paid money, the relevant condictio would have been a condictio ob turpem causam on the authority of D.12.5.2. If as Rossie v Her Curators shows, D.12.5.2 can be applied in proceedings for suspension, then a fortiori it must apply in a condictio ob turpem causam which is the very remedy dealt with in D.12.5.2.

3.23 Although these two cases are collated in Morison's Dictionary under the head of Pactum Illicitum, which in modern law is regarded as a different plea from extortion[3], Kames treated them as based on extortion. He remarked:

> "To take money for doing what I am bound to do without it, must be extortion: I hold the money sine justa causa, and ought, in conscience, to restore it. Thus it is extortion for a tutor to take a sum from his pupil's mother for granting a factory to her.[4]

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[1]It was said that the bond was "given ob instrumenta deposita reddenda", paraphrasing the words of D.12.5.2.

[2](1639) Mor 9456.

[3]Hislop v Dickson Motors (Forres) Ltd 1978 SLT (Notes) 73 at p 75 per Lord Maxwell.

[4]Citing Mushet v Dog (1639) Mor 9456.

> And it was found extortion in a man to take a bond from one whose curator he had been, before he would deliver up the family-writings".[1]

3.24 These cases relate to extortionate exactions made under threat of withholding the performance of duties owed for nothing or for less than is exacted. The compulsion lies in the fact that unless the payment is made, the person owing the duty will not perform it.

3.25 These Roman texts and older Scots authorities relate to duties under private law rather than public law. Before the Woolwich case it was in effect held in Glasgow Corporation v. Lord Advocate[2] that public authorities are in the same position with respect to repetition as private citizens, and in cases not governed by the Woolwich case, it would seem to follow that the same principles of repetition apply to payments made to public authorities to encourage their performance of public duties which they are bound to perform for nothing, or for less than has been paid. Apart from the fact that there is high authority that a common law doctrine cannot not be abrogated by desuetude[3], both Roman law[4] and Kames Principles of Equity[5] have been applied in modern cases to develop the law on unjustified enrichment, and cannot safely be ignored in the present context. It is at least arguable therefore that the ob turpem causam doctrine should have been invoked in the British Oxygen case[6].

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[1]Principles of Equity (5th edn) p 53, citing Nicolson Practicks (written circa 1620 x 1630) MS Advocates Library, s v "turpis causa"; Rossie v Her Curators (1624) Mor 9456. Contrast Blair v Gib (1738) Mor 664 (reduction of arbiter's award for demanding fee, the payment being forfeited to the court for charitable uses).

[2]1959 SC 203.

[3]McKendrick v Sinclair 1972 SC (HL) 25 at pp 53, 54 per Lord Reid; at p 69 per Lord Kilbrandon.

[4]See eg Cantiere San Rocco v Clyde Shipbuilding and Engineering Co Ltd 1923 SC (HL) 105; Magistrates of Stonehaven v Kincardineshire County Council 1939 SC 760.

[5]See Varney (Scotland) Ltd v Lanark Town Council 1974 SC 245, at pp 250, 255, 260.

[6]British Oxygen Co v SSEB 1959 SC (HL) 17 affg 1958 SC 53.

3.26 Ultra vires demands by public boards with statutory monopolies. That case[1] recognised a right of repetition where a body having a statutory monopoly makes an ultra vires demand and the pursuer pays more than he is bound by law to pay because he has no reasonable alternative. The monopoly ensures that the person paying cannot obtain the services he wants or needs from any other source.

3.27 The development of this branch of law begins with the twin rules derived from English law that a common carrier is bound to carry goods on being paid a reasonable compensation, and that where a customer, in order to induce the common carrier to perform his duty pays under protest a larger hire than is reasonable, the customer can recover the surplus beyond what the carrier was bound to receive as being money extorted from him.[2] A common carrier, however, was not bound at common law to charge like prices for like services, but such a duty was imposed by the so-called "equality clauses" enacted by railway acts last century[3], which made it illegal for a railway company to charge one customer more than they charged another in similar circumstances[4]. Important English cases held that a customer who proved breach of an equality clause could recover any overcharge, ie the difference

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[1]Idem.

[2]Great Western Railway Co v Sutton (1868) L R 4 HL 226 at p 237 per Blackburn J; Lancashire and Yorkshire Railway Co v Gidlow (1875) L R 7 HL 517 at p 527 per Lord Chelmsford; British Oxygen Co v SSEB 1958 SC 53 at p 80 per Lord Patrick; Encyclopaedia of the Laws of Scotland vol 3 (1927) s v "Carriage by Land" p 9, para 25. A customer had a right to recover money paid to a railway company which there was not a lawful title to demand, as where he paid to the company charges in excess of the maximum charges authorised by statute. Lancashire and Yorkshire Railway Co v Gidlow (1875) L R 7 HL 517. See dictum at p 527 per Lord Chelmsford applied in the British Oxygen Co case, 1958 SC 53 at p 80 per Lord Patrick.

[3]Railways Clauses Consolidation (Scotland) Act 1845, s 83; Railway Clauses Consolidation Act 1845, s 90 (England and Wales).

[4]A similar principle of equality of treatment applied in Scots law in relation to burgh customs duties: Stewart v Isat (1775) Mor 1993; Magistrates of Inverness v D Cameron & Co (1903) 5F 977 at p 987.

between what he did pay and the lower amount which, under the equality clause, he should have paid[1].

3.28 In the leading English House of Lords case of Great Western Railway Co v Sutton[2], one of the consulted judges, Willes J, observed:

> "when a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion or concussion in respect of which he is entitled to recover the excess by condictio indebiti, or action for money had and received".[3]

This dictum is to some extent misleading because the condictio indebiti was not in Roman law, and is not in Scots law, the exact equivalent of the English action for money had and received (which covers several different grounds eg error, duress, failure of consideration and illegality[4]) but as Lord Patrick observed in the British Oxygen Co case[5], is limited to payments under error in Scots law. Where money was paid under compulsion in order to encourage performance of a legal duty, the Roman form of action was the condictio ob turpem vel iniustam causam, and arguably that is the correct Scottish ground of action[6].

3.29 Since "equality clauses" only applied where the journeys were precisely the same, they were found to be an inadequate protection and accordingly the Railway and

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[1]Eg Parker v Great Western Railway Co (1844) 7 Man & G 253; Great Western Railway Co v Sutton (1868) LR 4 HL 226; Lancashire and Yorkshire Railway Co v Gidlow (1875) LR 7 HL 517; Evershed v London and North-Western Railway Co (1878) 3 App Cas 1029 (HL).

[2](1868) LR 4 HL 226.

[3]Ibid at p 249; cited with approval in British Oxygen Co v SSEB 1959 SC (HL) 17 at p 48 per Lord Merriman.

[4]See Moses v Macferlan (1760) 2 Burr 1005 at p 1012 per Lord Mansfield C J, cited in the Woolwich case [1991] 3 WLR 790 at p 797.

[5]1958 SC 53 at p 79 quoted at para 3.31 below.

[6]See paras 3.6 to 3.12 above.

Canal Traffic Act 1854 was passed which by section 2 prohibited any undue or unreasonable preference or advantage. The 1854 Act section 3 provided an alternative form of remedy for a customer and section 6 prohibited him from proceeding by way of action. There were cases deciding that it was not competent for a customer to sue for the recovery of overcharges.[1] The Court of Session and the House of Lords however have held that these are to be construed as decided under the special terms of sections 3 and 6 of the 1854 Act and did not bar a common law action for repetition of payments which fell to be treated as overcharges in terms of undue preference clauses in other legislation which has no equivalent to section 6[2]. To promote competition with road transport businesses, these statutory provisions have been repealed[3].

3.30 The principle developed in the English railway acts cases was applied in British Oxygen Co v. South of Scotland Electricity Board[4], the leading Scottish case on recovery of overcharges exacted by monopoly public utility suppliers. The pursuers were supplied with electricity at high voltage by the defenders. It cost more to supply electricity at low voltage than at high voltage and in fact the pursuers were charged less for their supply than low voltage consumers under tariffs fixed by the defenders. However in a decision on relevancy, a proof before answer was allowed on the question whether in fixing tariffs which did not differentiate fairly between high and low voltage consumers, the defenders were

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[1]Eg Murray v Glasgow and South-Western Railway Co (1883) 11 R 205; Phipps v London and North-Western Railway Co [1892] 2 QB 229. In two Scots cases, repetition was refused because, failing an application under the relevant railway act, it could not be said that there was any illegality: Dalmellington Iron Co v Glasgow and South-Western Railway Co (1889) 16 R 523; Lanarkshire Steel Co v Caledonian Railway Co (1903) 6 F 47.

[2]British Oxygen Co v SSEB 1959 SC (HL) 17 at p 39, 40 per Lord Kilmuir LC; at p 49 per Lord Merriman; at p 51 per Lord Reid; 1958 SC 53 at p 71, 72 per Lord Justice-Clerk Thomson.

[3]Transport Charges etc (Miscellaneous Provisions) Act 1954, s 14; Sch 2, Pt II.

[4]1959 SC (HL) 17 affg 1958 SC 53, reported sub nom British Oxygen Co v South West Scotland Electricity Board.

exercising "undue discrimination" (within the meaning of the relevant statute[1]) against high voltage consumers. Both the Second Division and the House of Lords held that an action at common law to recover any overcharges breaching the undue discrimination provisions was competent.

3.31 In the Second Division, Lord Patrick remarked[2]:

> "The claim does not fit well into the condictio indebiti, in respect that money was not paid under the mistaken belief that it was due. We are, however, in a very special tract of country. This is not a case where a private trader charges an unconscionable sum for goods supplied to a private customer. There the customer is free to take the goods at the price or go elsewhere for the goods or do without them. In such a case, if he takes the goods, he must pay the contract price. This is a case where statute has conferred on a public body a monopoly of the right of supplying a commodity, an uninterrupted supply of which is essential to the industry of the country. The supply is to be charged for by tariffs fixed by the Area Boards and there is to be no undue discrimination between customers. Tariffs when fixed are to be published, but there is no provision for the publication of proposed tariffs and the hearing of objections to proposed tariffs by a body with powers to refuse sanction to charges found not to be warranted by the statute. If a customer alleges that in a published tariff he is unduly discriminated against, the circumstances compel him to continue to take a supply of electricity. Where, as here, the Area Board continue to maintain that there is no undue discrimination in the tariff, he has no reasonable alternative but to pay for his supply at the rates fixed in the tariff. He could seek an interdict against the Board charging the rates objected to, but might not obtain a final interdict for years, and might well be refused an interim interdict on the ground that the balance of convenience dictated the refusal.... He has no reasonable alternative but to take the supply which is essential to him, pay for it at the rates objected

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[1]Electricity Act 1947, s 37 (8); Hydro-Electric Development (Scotland) Act 1943, s 10(1), proviso (i); see now Electricity Act 1989, s 18(4).

[2]1958 SC 53 at p 79.

to, and hope to recover from the Board any payments in excess of those warranted by the statute. In such special circumstances I should have thought that principle demanded that excess charges, demanded by and paid to the Board, and ultimately held to be unwarranted, should be recoverable by action at law". (emphasis added).

3.32 Lord Justice-Clerk Thomson observed[1]:

"In my view, it is contrary to elementary principle to say that, despite their having been charged more than they should have been charged, the pursuers cannot get the difference back. Once the pursuers' case is held relevant, the position is that they have wrongfully and without statutory warrant been charged too much. This surely on principle entitles them to get back what they would not have had to pay, had the statute been obeyed".

This could be construed as supporting a general restitutionary principle. It is a wider ground than that referred to by Lord Patrick, which was confined to the special circumstances of compulsion by monopoly suppliers. Later, however, the Lord Justice-Clerk cited observations of Lord Chelmsford in the Sutton case[2], and commented that they[3]:

"affirm also that a party who has paid the extra in circumstances which give him no reasonable alternative but to pay is not to be barred from recovering that extra. Looking to the relative position of the parties, I cannot see that the pursuers have had any practical option in the matter". (emphasis added).

It probably follows that the Lord Justice-Clerk based his opinion on compulsion, since he held that the pursuers had

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[1]Ibid at p 70.

[2]Great Western Railway Co v Sutton (1868) L R 4 HL 226 at p 263 which refer to "the principle of several decided cases, in which it has been held that money which a party has been wrongfully compelled to pay under circumstances in which he was unable to resist the imposition, may be recovered back in an action for money had and received"; cited 1958 SC 53 at p 72.

[3]1958 SC 53 at p 72.

no practical option but to pay. Lord Mackintosh, while dissenting on the question of discrimination, concurred on the right of repetition, stating that if there had been undue discrimination[1]:

> "then the position is that [the pursuers] will have been charged more than was warranted by the statute and were so charged in circumstances which gave them no reasonable alternative but to pay what was demanded. They could not go elsewhere than to the defenders for their supply and they could not risk having their supply cut off by declining to pay the defenders' charges for it. In such circumstances I think that on principle the pursuers must be allowed to recover...". (emphasis added).

He relied on English railway cases as authority[2]. Lord Blades concurred with the Lord Justice-Clerk[3].

3.33 The House of Lords affirming the decision of the Second Division, also relied on principle and on the authority of the English railway cases affirming the right to recover overcharges[4]. Lord Kilmuir L C remarked[5]:

> "The respondents [pursuers] were charged more than is warranted by the statute. Then, it is clear that, until a Court so declares, the respondents have no alternative but to continue to pay the charges demanded of them. In principle, the appellants should not be permitted to retain payments for which they have no warrant to charge. The respondents, may, therefore, recover whatever sum they may be able to prove was in excess of such a charge as would have avoided undue discrimination against them". (emphasis added).

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[1]1958 SC 53 at pp 91, 92.

[2]Great Western Railway Co v Sutton (1868) LR 4 HL 226; Evershed v London and North Western Railway Co (1877) 3 QBD 134 at p 144 per Bramwell L J; Denaby Main Colliery Co v Manchester Sheffield and Lincolnshire Railway Co (1885) 11 App Cas 97 at p 112 per Lord Halsbury.

[3]1958 SC 53 at p 95.

[4]1959 SC (HL) 17.

[5]Ibid at p 38.

Lord Tucker concurred both with the decision to dismiss the appeals and the reasons for it stated by the Lord Chancellor.[1] Lord Merriman approved the dictum of Willes J quoted at para 3.28 above and thus apparently based his opinion on compulsion[2]. Lord Reid said that there was nothing in law to prevent recovery; that the only reason advanced for the contrary view was that overcharges by railway companies were said to be irrecoverable if due to the company giving an undue preference to another company; and on construing the railway acts and cases thereon, rejected this contrary view[3]. Unfortunately, Lord Reid did not state what was the nature and source of the common law rule requiring recovery, but rather was concerned to show that that rule was not disapplied by the railway cases mentioned at para 3.29 above. Lord Keith of Avonholm reserved his opinion on the right of recovery of overcharges[4].

3.34 Thus all the judgments in the Inner House[5] and the speeches of a majority of the House of Lords[6] relied on a rule based on improper compulsion, and this view of the case is confirmed by the speeches of Lords Keith, Goff and Jauncey in the Woolwich case.[7] Like the Inner House,

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[1]Ibid at p 57.

[2]Ibid at p 48. That dictum is slightly ambiguous because it does not expressly state that the payer must have had no reasonable alternative to payment; it merely states that if he pays an undue payment or overcharge, there is a "compulsion or concussion". However the dictum seems to assume tacitly that the payer (of freight) had no reasonable alternative. Otherwise there could have been no true compulsion or concussion. In the Woolwich case, Lord Jauncey explained that the dictum presupposed that compulsion had induced the payment. The dictum is normally regarded as referring to compulsion: see Goff and Jones Restitution p 221.

[3]Ibid at pp 50, 51.

[4]Ibid at p 62.

[5]If we include that of Lord Justice-Clerk Thomson, supra.

[6]If we include that of Lord Merriman, supra.

[7]See [1992] 3 WLR 366 (HL) at pp 379-380; 384; 405-406.

however, the House of Lords in the British Oxygen Co case did not analyse the way in which the Scots law on repetition of money paid under improper compulsion has developed, nor place "improper compulsion" within an analytic framework comprehending the various grounds of repetition, perhaps because in the absence of an adequate modern text-book, counsel were understandably unable to present to the court materials on which such an analysis could be based. The result was that reliance was placed on English case-law based on a particular classificatory framework which differs from the taxonomy of the Roman condictiones followed in older Scots cases and Institutional authority which were overlooked by the court[1]. This is a recipe for confusion because inter alia it leaves unclear what are the formal sources of Scots law in this domain. In particular, it leaves unclear whether the requirements of the condictio ob turpem vel iniustam causam have to be satisfied in a case based on improper compulsion.

3.35 The British Oxygen Co case was invoked in Unigate Foods Ltd v Scottish Milk Marketing Board[2] which we shall discuss in the Discussion Paper mentioned in volume 1, paragraph 1.8.

(3) The doctrine of "force and fear" or "extortion" as a ground of repetition

3.36 Preliminary The doctrine of "force and fear" or "extortion"[3] (or "concussion"[4]) is generally treated in

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[1]It may be that both the Roman and English classification frameworks based on forms of process peculiar to Roman law and English law should in Scots law be replaced by a classification based on the factors which make retention of the payment unjustified or "sine causa".

[2]1975 SC (HL) 75.

[3]"Extortion" is the term used by Bankton Institute I, 10, 50 and has been approved in modern cases: Priestnell v Hutcheson (1857) 19 D.495 at p 499 per Lord Deas; Hislop v Dickson Motors (Forres) Ltd 1978 SLT (Notes) 73 at p 74 per Lord Maxwell.

[4]This term apparently derives from D.47.13 where it meant extortion by threats and had reference to public law. It is found in older Scots private law cases, eg Gray v Earl of Lauderdale (1685) Mor 16,497 at 16,498; Earl of Lauderdale v Earl of Aberdeen (1685) Harcarse 154;

modern Scottish text-books as a ground of reduction of a voluntary obligation, or a deed such as a conveyance or discharge of a debt[1]. The law was reviewed by this Commission in a Consultative Memorandum in 1978[2]. In origin it derives from the Roman actio quod metus causa, an action which was partly penal and partly restitutionary in the sense that the person suffering loss by reason of force and fear had a restitutio in integrum. Whether force and fear renders an obligation or deed void or merely voidable, is still an open question in Scots law[3]. If the latter, restitutio in integrum is the proper remedy; if the former, the victim of the force and fear need not offer restitutio in integrum.

3.37 "Force and fear" applied in actions of repetition. There are, however, cases, both early[4] and modern[5], showing that the doctrine of force and fear may be invoked as a ground of repetition of money exacted by extortion. In those cases, the courts have applied the same principles as apply in the reduction of voluntary obligations in relation to both of the main elements in the doctrine, namely, (1) the standard of firmness or constancy to be expected of the victim of extortion in withstanding the extortioner's pressure to comply with his demand, and (2) the nature and extent of the methods of compulsion employed by the extortioner in imposing that pressure.

Alexander v Hamilton (1694) 4 BS 186, and more recently Macfarlane v Nicoll (1864) 3 M 237 at p 244 per Lord Deas. It does not seem that the term has acquired any definite technical meaning or is much used in modern practice.

[1]See Gloag Contract (2nd edn; 1929) pp 488 - 492; McBryde Contract (1987) pp 250-258; Walker Contracts (2nd edn; 1986) paras 15.7 to 15.12.

[2]Consultative Memorandum No 42 on Defective Consent and Consequential Matters, paras 2.2 to 2.12; paras 3.104 to 3.111.

[3]McBryde Contract paras 12.11 to 12.13.

[4]Love v Downie (1586) Mor 16,480; Alexander v Hamilton (1694) 4 B S 186.

[5]Wolfson v Edelman 1952 SLT (Sh Ct) 97; Hislop v Dickson Motors (Forres) Ltd 1978 SLT (Notes) 73.

3.38 "Reverential fear" and public authorities. Stair refers to the concept of "reverential fear" (metus reverentialis)[1] which had reference to the situation where the extortioner was in a position of authority over the victim of the extortion[2], but Erskine said that reduction was not competent in cases of reverential fear arising from the authority of (among others) magistrates[3]. There is no sign in the modern law of a concept of "reverential fear" applying where the extortioner is a public authority.

3.39 Actions against public authorities. In Scots law, the doctrine of force and fear was upheld in actions of reduction of deeds exacted by the Crown or public officials, especially in early times when it was much needed. In an early case,[4] King James V had harried the Earl of Morton until he agreed to resign his lands to Douglas of Lochleven who made them over to the King. After the King's death, in an action against Lochleven and Queen Mary and her tutor, the Court of Session reduced the Earl's resignation of his Earldom "because on the Earl's refusal, the King had ordered him to prison". Hope cites this case for the proposition that "dispositions maid to the King for just fear ar null et datur restitutio".[5] In Gray v Earl of Lauderdale[6], described as "an action of

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[1]Institutions I, 9, 8.

[2]See Scholtens "Undue Influence" [1960] Acta Juridica 276.

[3]Institute IV, 1, 26.

[4]Earl of Morton v Lochleven (1543) Mor 16, 479; also reported sub nom Earl of Morton v The Queen and her tutor, Balfour Practicks (Stair Society edn) vol 1 p 183; and sub nom Earl of Morton v The Queen Hope Major Practicks (Stair Society edn) vol 2, p 208. For similar cases, see Lord Yester v The Queen, Hope Major Practicks vol 2 p 36; p 60, cited by Fountainhall, Mor 16,500; Laird of Dundas v Laird of Craigiehall (1553) Balfour Practicks vol 1, p 183. For the background of the Earl of Morton case, see G Donaldson Scotland James V - James VII (1965) p 53.

[5]Major Practicks vol 2, pp 207, 208.

[6](1685) Mor 16497.

concussion", the defender[1] was alleged to have oppressed the creditors of Dundee's estate and forced them to transact and convey their rights to him in 1673 when he was an extraordinary Lord of Session "and had much power". Various grounds of force and fear were alleged.[2] Foutainhall's report states that though little was proved, yet "to discourage great men from oppressing when in power, [the Lords] reduced the transaction".[3] In Rutherford v Murray,[4] on the other hand, a threat of imprisonment under a warrant of the Parliamentary Committee for regulating the Poll Tax against a sub-collector of that tax was held not to be extortionate so as to render his bond for payment of collected monies reducible.

3.40 In the modern law, there have been few cases in which extortion has been alleged against public authorities. In one such case, Education Authority of Dumfriesshire v Wright[5], a school master signed a letter addressed to his education authority employers undertaking to resign office on attaining the age of 60. He averred that the undertaking was void on the ground of force and fear since it had been signed in response to a threat by the education authority to dismiss him, which induced the fear that he would thereby lose not only his employment, but his pension and reputation. It was held that the intimation by the education authority of an intention to dismiss him was not an illegal or unwarrantable act. The fact that the pursuer was an employee of the education authority and therefore in a relatively vulnerable position does not seem to have been given any weight.

3.41 Extortion by threats. Most of the cases on force and fear deal with extortion by threats. In the Hislop case, Lord Maxwell said that the characteristic of a threat is the expression or implication of the extortioner's intention to do something unless the victim gives way to

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[1]The Earl of Lauderdale was the leading minister of King Charles II's administration in Scotland and a member of the "Cabal".

[2]See Mor 16,501, 16,502.

[3]Mor 16,502.

[4](1698) Mor 16,502.

[5]1926 SLT 217 (OH).

his demand.[1] A payment made to buy off a threatened act will be recoverable on the ground of extortion if the act is in itself illegal or unwarrantable.[2] In some cases, a payment made to buy off a threatened act may even be recoverable on that ground where the act is in itself lawful, but this will not apply if the money is in fact due and the act is done for the purpose of private recovery of the money (eg the raising of an action or the doing of diligence) or the public prosecution of a criminal act giving rise to the debt (eg. reporting the crime to the police).[3] On the other hand, if the threatened act, though itself lawful, relates to a different matter, such as the enforcement of a separate and independent obligation, the act may amount to extortion.[4] In our Consultative Memorandum No. 42, the case law was summarised as follows[5]:

> "Apart from threats of violence and of use of diligence to extort more than the amount due, it has been held a relevant ground of reduction that the pursuer was threatened with loss of employment.[6] Moreover, it has been held from an early date that if a party's goods are seized unwarrantably, an obligation granted to secure their release is reducible.[7] However, on the whole the Scots law on force and fear has not been developed by modern case law and the authorities are redolent of a bygone age. In particular there has been no real development of what is known to American lawyers as "economic duress" or - an aspect developed also on the

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[1]Hislop v Dickson Motors (Forres) Ltd 1978 SLT (Notes) 73 (OH) at p 74.

[2]McIntosh v Chalmers (1883) 11 R.8; Education Authority of Dumfriesshire v Wright 1926 SLT 217.

[3]Hislop v Dickson Motors (Forres) Ltd 1978 SLT (Notes) 73 (OH) at p 75.

[4]Nisbet v Stewart (1708) Mor 16, 512; Arratt v Wilson (1718) Robertson's Appeals 234; Fraser v Black 13 December 1810 FC; McIntosh v Chalmers (1883) 11 R 8.

[5]Para 3.111.

[6]Gow v Henry (1899) 2 F 48.

[7]Citing Gloag Contract (2nd edn) pp 489, 490.

Continent - threats related to property rather than to the person".[1]

(4) Implied threats

3.42 Where extortionate pressure takes the form of threats, it is important to establish whether the threats have to be made by the person applying the pressure expressly or whether it is enough that the threat can be implied from the extortionate nature of the transaction or from the whole circumstances of the case. Thus the Law Commission comment that in English law:

> "it may be difficult to decide whether there is duress where the authority does not explicitly make a threat. Often sanctions which the plaintiff may expect to be applied if no payment is made may be provided in the statute for non-payment, for example a licence may be refused or goods seized. The mere existence of these sanctions is not necessarily sufficient to establish a threat but the courts have differed in their willingness to imply a threat in such circumstances".[2]

The Commission contrast Twyford v Manchester Corporation[3] and Woolwich Equitable Building Society v IRC[4] on the one hand with Mason v New South Wales[5] on the other. The

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[1]As to economic duress, see now McBryde Contract paras 12.03 to 12.10; A Thompson "Economic Duress" 1985 SLT (News) 85; E McKendrick "Economic Duress - A Reply" 1985 SLT (News) 277.

[2]Law Com CP No 120, para 3.6.

[3][1946] Ch 236 (stonemasons sued for repayment of admission fee to cemetery; held no implied threat to exclude them for non-payment).

[4][1991] 3 WLR 790 (fact that interest would be repayable on tax withheld, and adverse publicity attendant on action by Inland Revenue for recovery of tax, if challenge of vires failed, did not amount to duress).

[5](1959) 102 CLR 108 (High Court of Australia) (plaintiffs paid fee for licence to carry goods under ultra vires schemes; fact that State might have seized plaintiff's vehicles if they had operated without a licence held to be duress).

question arises whether the Scots courts would find an implied improper threat to exist in similar circumstances.

3.43 In the strand of authority relating to the recovery of payments made to encourage the performance of a duty which the payee was bound to perform for nothing, or for less than was exacted[1], there seems to have been little if any explicit discussion of the question whether in order to qualify as extortionate, the payee's threat to withhold benefits (eg a railway carrier's refusal to carry a customer's goods; an electricity board cutting off supply; or a milk marketing board refusing to supply milk) has to be expressed or may be tacit and implied from the circumstances. In the leading British Oxygen Co case[2], however, the emphasis in the judgments was on the fact that the defender board's monopoly by itself was a circumstance which left the pursuer company with no reasonable alternative but to pay. This appears for example from the judgments of Lord Patrick[3], Lord Mackintosh[4] and Lord Kilmuir LC[5], quoted above, and indeed Lord Justice-Clerk Thomson at one point seems to have recognised that it was enough that the pursuers had "wrongfully and without statutory warrant been charged too much"[6]. The same is true of the dictum of Willes J in the Sutton case approved by Lord Merriman in the British Oxygen Co case[7], and of the obiter dictum of Lord President Emslie in the Unigate Foods Ltd case[8], neither of which required express threats.

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[1]See paras 3.19 to 3.35 above.

[2]British Oxygen Co v SSEB 1959 SC (HL) 17 affg 1958 SC 53.

[3]See para 3.31 above.

[4]See para 3.32 above.

[5]See para 3.33 above.

[6]See para 3.32 above.

[7]See para 3.33 above.

[8]See para 3.33 above.

3.44 In the British Railways Board case[1], the pursuers seeking repetition of undue rates submitted that once demand notes for rates were issued, they were enforceable by summary warrant and the pursuers therefore had no reasonable alternative but to pay. No mention was made of an express threat by the rating authority to use summary warrant diligence and the threat, if it existed, was tacit and implied from the circumstances. As we have seen[2], in response to this submission Lord McDonald (obiter) accepted that if the statutory summary warrant was not valid, there would have been improper "statutory compulsion" and that on the basis of the British Oxygen Co case, the payments would have been recoverable. This dictum however was not expressly approved, and may have been disapproved, by the Second Division on reclaiming[3], and its status even as an obiter dictum is in doubt. Many central government taxes are enforceable by diligence under summary warrant, but the reported cases on central government taxes have related to payments made in error, and the issue of "statutory compulsion" has not been judicially considered in that context.

3.45 In the strand of authority[4] based on force and fear or extortion as a ground principally of reduction but applied also to repetition[5], the threats seem generally to have been expressed. In the Hislop case, however, on the basis of English authority[6], Lord Maxwell observed (obiter) that "no doubt there may be cases where the extortionate nature of the transaction is implied rather than expressed in plain terms"[7].

3.46 There is thus good authority in Scots law that tacit threats implied from the circumstances can qualify as

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[1]British Railways Board v Glasgow Corporation 1976 SC 224.

[2]See para 3.16 above: 1976 SC 224 at p 232.

[3]See para 3.16 above.

[4]See paras 3.36 to 3.41 above.

[5]See para 3.37 above.

[6]Mutual Finance Ltd v John Wetton and Sons Ltd [1937] 2 KB 389.

[7]Hislop v Dickson Motors (Forres) Ltd 1978 SLT (Notes) 73 (OH) at p 75.

extortionate, but as in England, it is not at all clear what are the circumstances from which the courts will imply a threat.