Scottish Law Commission

DISCUSSION PAPER NO. 99

JUDICIAL ABOLITION OF THE ERROR OF LAW RULE AND ITS AFTERMATH

FEBRUARY 1996

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Notes

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SCOTTISH LAW COMMISSION

DISCUSSION PAPER No 99

ON

JUDICIAL ABOLITION OF THE ERROR OF LAW RULE AND ITS AFTERMATH

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ABBREVIATIONS

Clive, *Seminar Paper, 22 October 1994*
E M Clive, *Draft Rules on Unjustified Enrichment and Commentary (Paper for Seminar on 22 October 1994)*: published as an appendix to the present Discussion Paper.

Englard, "Restitution of Benefits"
Izhak Englard "Restitution of Benefits Conferred Without Obligation" (1991) Chapter 5 in Volume 10 *Restitution - Unjust Enrichment and Negotiorum Gestio* of *International Encyclopaedia of Comparative Law*

Evans-Jones and McKenzie, "Condictio ob Turpem"
R Evans-Jones and D McKenzie,"Towards a Profile of the Condictio ob Turpem vel Injustam Causam in Scots Law" 1994 J R 60.

Evans-Jones, "Retention without a Legal Basis"
R Evans-Jones, "From 'Undue Transfer' to 'Retention without a Legal Basis' (The *Condictio Indebiti* and *Condictio ob Turpem vel Iniustam Causam*)" in: R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (1995) 213.

Evans-Jones and Hellwege, "Swaps"
R Evans-Jones and P Hellwege, "Swaps, Error of Law and Unjustified Enrichment" (1995) 1 Scottish Law and Practice Quarterly 1.

Gloag and Henderson, The Law of Scotland
W A Wilson, A Forte et al (eds), *Gloag and Henderson, The Law of Scotland* (10th edn; 1995)

Goff and Jones
Lord Goff of Chieveley and G Jones, *The Law of Restitution* (4th edn; 1993).

Law Com No 227
Law Commission, *Report on Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments* (Law Com No 227) (1994).

Law Com CP No 120
Law Commission, Consultation Paper No 120 on *Restitution of Payments Made Under a Mistake of Law* (1991).

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

Macdonald, "Mistaken Payments"
D R Macdonald, "Mistaken Payments in Scots Law" 1989 J R 49.

MacQueen and Sellar, "Unjust Enrichment"
H L MacQueen and W David H Sellar, "Unjust Enrichment in Scots Law" in: E J H Schrage (ed), *Unjust Enrichment, The Comparative Legal History of the Law of Restitution* (1995) 289.

NSWLRC Report 53 (1987)
New South Wales Law Reform Commission, Report No 53 on *Restitution of Benefits Conferred Under Mistake of Law* (1987).

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

Scot Law Com DP No 95
Scottish Law Commission, Discussion Paper No 95 on *Recovery of Benefits Conferred Under Error of Law* (1993).

Whitty, "Trends and Issues"
N R Whitty, "Some Trends and Issues in Scots Enrichment Law" 1994 J R 127.

Whitty,"Ultra Vires Swaps"
N R Whitty,"Ultra Vires Swap Contracts and Unjustified Enrichment" 1994 SLT (News) 337.

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

Zimmermann, "Unjustified Enrichment"
R Zimmermann, "Unjustified Enrichment: The Modern Civilian Approach" (1995) 15 OJLS 403.

PART I
INTRODUCTION

1.1 In our Discussion Paper No 95 on *Recovery of Benefits Conferred Under Error of Law*, we sought views on provisional proposals that the rule precluding recovery of benefits conferred under error of law should be abrogated by statute.[1] This proposal has been superseded by the recent case of *Morgan Guaranty Trust Company of New York* v *Lothian Regional Council*[2] in which an Inner House Bench of Five Judges of the Court of Session in effect abolished that rule, and restored the old law as it had existed in the Institutional period. This case is of great importance not only for repetition on the ground of error but also for the future development of Scots enrichment law and we have carefully considered it. We explain the case fully in Part II.

1.2 In our Discussion Paper No 95, on the assumption that the error of law rule should be abolished by statute, we sought views on a consequential statutory provision specifically designed to safeguard payees from the risk that third-party payers would bring actions of repetition where the view of the law on which their

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[1]Scot Law Com DP No 95 (1993), vol 1, Proposition 1 (para 2.95). Both that and this paper are issued under Item 2 of our *First Programme of Law Reform*, the reform of the law of obligations.

[2]1995 SLT 299, 1995 SCLR 225 (Court of Five Judges) reversing Lord Ordinary 1995 SLT 299 at pp 301-308; 1994 SCLR 213 (OH) noted G T Laurie 1995 JR 244; N Andrews [1995] CLJ 246;G T Laurie (1995) 111 LQR 379. And see R Evans-Jones and P Hellwege, "Swaps, Error of Law and Unjustified Enrichment" (1995) 1 Scottish Law and Practice Quarterly 1.

payments were made is changed by a later judicial decision.[3] We have therefore thought it necessary to consult afresh on this which now becomes a question whether statute should supplement the court's abolition of the error of law rule by introducing a safeguard against reopening payment transactions which have been settled in accordance with a settled view or common understanding of the law subsequently changed by judicial decision. This is considered in Part III.

1.3 Within its strict ratio decidendi, the *Morgan Guaranty* case makes very important amendments of what had previously been thought to be the Scottish common law of repetition. Beyond that ratio, its effects may be even more far-reaching. We consider those possible effects in Part IV. We conclude there that although the *Morgan Guaranty* case made very considerable advances in the development of the Scots law on unjustified enrichment, it understandably left many questions unresolved, especially questions relating to the taxonomy of that branch of law.

1.4 In a seminar on 22 October 1994, several papers were presented by distinguished scholars on the codification, or possible codification, of the law of unjustified enrichment in Scotland and other countries.[4] We publish herewith Dr Clive's paper -

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[3]Paras 2.84 - 2.125.

[4]Professor Reinhard Zimmermann, University of Regensburg, "Unjustified Enrichment: the Modern Civilian Approach, apropos the Reform of Scots Enrichment Law" now published in (1995) 15 Oxford Journal of Legal Studies 403; Professor Daniel P Visser, University of Cape Town, "The Proposals for a Statutory General Enrichment Action in South

Draft Rules on Unjustified Enrichment and Commentary. These rules have been prepared to test the feasibility of a codification of Scots enrichment law. They represent Dr Clive's personal views and not necessarily those of the Scottish Law Commission.

1.5 At the seminar on 22 October 1994, there was little overt support from the floor for codification of Scots enrichment law and some opposition. In his seminar paper, Dr Clive argues that one of the main defects of the present law is its complicated and unsatisfactory structure and that only a new statutory framework could cure that.[5] As we indicate in Part IV below, the *Morgan Guaranty* case illustrates some of the difficulties in judicial development in this domain.

1.6 We have decided to prepare and issue in due course a discussion paper reviewing the whole of the Scots law of unjustified enrichment. This would contain a statement (or "restatement") of the existing law. We also intend to consult on whether codification is desirable and if so what approach should be adopted, eg that of Dr Clive[6] or the

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Africa"; Professor Peter Birks, University of Oxford, "Against Codification and Against Codification of Unjust Enrichment"; and Dr E M Clive, "Unjustified Enrichment - A Code for Scotland?" and *Draft Rules on Unjustified Enrichment and Commentary*.

[5]*Draft Rules on Unjustified Enrichment and Commentary* p 14.

[6]*Ibid, passim.*

approach of German law[7], or some other option. Even if no legislation were to result from the review, we hope that the discussion paper would assist courts, practitioners and writers in understanding and developing our law of unjustified enrichment.

1.7 The above-mentioned review is a medium term or longer term project and should not delay any reform arising out of Part III of the present Paper or the reforms proposed in Discussion Paper No 100 on *Recovery of Ultra Vires Public Authority Receipts and Disbursements* which is published at the same time as the present Paper.

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[7]See the König proposals for amending the BGB, a translation of which is set out in R Zimmermann, "Unjustified Enrichment: the Modern Civilian Approach" (1995) 15 OJLS 403 at pp 425 - 429.

PART II

ABOLITION OF ERROR OF LAW RULE

(1) The *Morgan Guaranty* case

2.1 ***Ultra vires* local authority interest rate swap agreements.** In the *Morgan Guaranty* case[8], the pursuer bank entered into an interest rate swap agreement with the defender regional council.[9] An interest rate swap agreement is:

> "an agreement between two parties by which each agrees to pay the other on a specified date or dates an amount calculated by reference to the interest which would have accrued over a given period on the same notional principal sum assuming different rates of interest are payable in each case."[10]

Such swap agreements between local authorities and banks were common in the 1980s until in *Hazell v Hammersmith and Fulham LBC*[11], the House of Lords

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[8]*Morgan Guaranty Trust Company of New York* v *Lothian Regional Council* 1995 SLT 299 (Court of Five Judges).

[9]As to the Scots law on enrichment claims arising from void swaps agreements, see W J Stewart, "Restitution: First Thoughts on Swaps in Scotland" 1992 SLT (News) 315; N R Whitty, "Ultra Vires Swap Contracts and Unjustified Enrichment" 1994 SLT (News) 337; R Evans-Jones and P Hellwege, "Swaps, Error of Law and Unjustified Enrichment" (1995) 1 Scottish Law and Practice Quarterly 1. As regards the English law, see A Burrows, "Restitution of payments made under swap transactions" 1993 N L J 480; P Birks, "No Consideration: Restitution After Void Contracts" (1993) 23 Western Australian L Rev 195; W J Swadling, "Restitution for No Consideration" [1994] RLR 73; Evans-Jones ed Hellwege, op cit at pp 9 - 14.

[10]See *Hazell v Hammersmith and Fulham LBC* [1990] 2 QB 697 at pp 739,740; followed in *Morgan Guaranty* 1995 SLT 299 at p 301G;308H.

[11][1992] 2 AC 1;[1990] 2 QB 697 (CA).

held that they were *ultra vires* the local authority under English local government legislation[12].

2.2 The Scottish legislation is similar[13]. *Hazell* was followed in *Morgan Guaranty* in the Outer House by Lord Penrose[14] whose decision was not reclaimed against.

2.3 **Recovery of money paid under *ultra vires* swap.** The question then arose whether the net loser on the swap can recover his excess payments from the net gainer. In England it was held in the *Westdeutsche* case[15] that a bank was entitled to recover money paid to a local authority under an *ultra vires* swap.

2.4 In Scotland, a similar claim by the bank was rejected by Lord Penrose in the Outer House but upheld on appeal by an Inner House Bench of Five Judges. Under the *ultra vires* agreement in *Morgan Guaranty*, the bank were liable for interest at variable rates on a notional sum of £10 million and the defender council were liable for interest at fixed rates on that sum[16]. Payments were made between the parties resulting in a net excess of

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[12]Local Government Act 1972, s 111(1) and (2).

[13]The provisions of the Local Government (Scotland) Act 1973 s 69(1) and (2) are identical to the English 1972 Act, s 111(1) and (2), though there are differences in the relevant schedules.

[14]1995 SLT 299 at pp 301-303.

[15]*Westdeutsche Landesbank Girozentrale v Islington L B C; Kleinwort Benson v Sandwell B C* (1993) 91 LGR 323, affd [1994] 1 WLR 938 (CA).

[16]1995 SLT 299 at p 301I.

payments by the bank to the council of £368,104.52. The bank concluded for payment of that amount[17]. Their first plea in law was:

> "The sum sued for having been paid by the pursuers to the defenders pursuant to an agreement void ab initio, the pursuers are entitled to payment thereof as concluded for".[18]

2.5 **Recompense and the *Stonehaven Magistrates* case.** In the Outer House, the pursuer contended that a remedy lay in recompense following *Magistrates of Stonehaven v Kincardineshire County Council*[19]. In that case, a county council had borrowed money under a purported contract of loan which was null because *ultra vires* the council's statutory borrowing powers. The First Division held that the council was under an obligation to recompense the "lender" by repaying the money "*in quantum locupletior*"[20] .

2.6 Lord Penrose distinguished the *Stonehaven Magistrates* case and rejected the claim of recompense primarily on the ground (found on appeal to be mistaken) that during the course of the contract period there was no performance of any obligation by either party but merely a calculation to be made determined wholly by the passage of time and the movement of interest rates in the money

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[17]*Ibid* at p 308K.

[18]*Ibid* at p 309D.

[19]1939 SC 760. For a detailed analysis of this case, see Whitty, 1994 SLT (News) 337 at pp 340,341.

[20]ie to the extent that they were richer.

market.[21] In his view, the termination of the arrangements in 1989 as a result of the *Hazell* litigation only limited the period over which the arrangements continued[22]. The learned judge concluded that notions of *quantum lucratus* or enrichment in the sense focused in *Stonehaven Magistrates* were inapplicable[23]. This approach was rejected by the First Division[24], Lord President Hope observing that:

> "the payments were made in implement of a supposed obligation under a contract which was discovered not to exist, and the recipients were enriched because the payment was of money to which they were not entitled. Leaving aside any equitable considerations which might suggest that the defenders should keep the money, I would regard this as a clear case for a remedy on the ground of unjustified enrichment".[25]

2.7 Lord Penrose's second ground for rejecting the bank's recompense claim was that:

> "parties proceeded upon an understanding of the local authority's capacity in law to conclude swap agreements. They were in error. Sums paid in faith of such a contract are, on authority, not recoverable".[26]

He relied on two leading First Division cases denying the competence of a *condictio indebiti* for

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[21]1995 SLT 299 at p 307E,F.

[22]*Idem*.

[23]*Ibid* at p 307G,H.

[24]1995 SLT 299 at p 310F-J per Lord President Hope;at p 318G-K per Lord Clyde.

[25]*Ibid* at p 310H,I.

[26]1995 SLT 299 at pp 307H-308D.

error of law namely *Glasgow Corporation v Lord Advocate*[27] and *Taylor v Wilson's Trs*[28].

2.8 This reasoning has been criticised[29] on the ground that the error of law rule does not provide a defence to a recompense claim based on a ground other than error.[30] Put another way, if the claim is not based on error, the fact that the error is not one of law is irrelevant. As we shall see, however, on appeal the error of law rule itself was swept away.

2.9 **Repetition (*condictio indebiti*) rather than recompense relied on in Inner House.** Whereas in the Outer House, the pursuers relied on recompense, in their grounds of appeal to the Inner House, they presented their case as being one for repetition under the *condictio indebiti*, their primary contention being that *Glasgow Corporation v Lord Advocate*[31] and *Taylor v Wilson's Trs*[32], insofar as they upheld the error of law rule, were wrongly decided. Their case in recompense based on *Stonehaven Magistrates* was argued only in the

[27]1959 SC 203.

[28]1975 SC 146.

[29]See Whitty, 1994 SLT (News) 337 at pp 342,343.

[30]viz a recompense claim for recovery of money paid to an incapax (eg a pupil child or a local authority acting *ultra vires*) under a contract void for incapacity.

[31]1959 SC 203.

[32]1975 SC 146.

alternative.[33] The Court considered repetition rather than recompense to be the appropriate remedy and the *condictio indebiti* to be the appropriate form of action or doctrine.[34] We revert to this aspect of the decision below.[35]

The ratio of the *Morgan Guaranty* case

2.10 Within its strict ratio, the decision of the Inner House in *Morgan Guaranty* has at least three important effects. First, it sweeps away the so-called error of law rule from the domain of obligations of repetition. Second, it abolishes the rule (or supposed rule) that in the case of the transfer of benefits under error, it is an essential requirement of recovery that the error was excusable. Third, it makes it clear that where in a *condictio indebiti* error on the part of the payer has been established, the onus lies on the payee to show that it would be equitable for the court to order repetition to the payer.

(2) "Abolition" of the error of law rule

(a) The reaffirmation of the law of the Institutional period

2.11 In the *Morgan Guaranty* case, the leading opinion was given by Lord President Hope.[36] In an

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[33]See 1995 SLT 299 at p 309E-G per Lord President Hope; at p 318G per Lord Clyde; at p 321A-C per Lord Cullen.

[34]1995 SLT 299 at p309H-J ;310B-E per Lord President Hope; at p318L-319F per Lord Clyde; at p 321D,E per Lord Cullen.

[35]See para 4.30 *et seq*.

[36]1995 SLT 299 at pp 308-317. Lord Mayfield (at p 317) and Lord Kirkwood (at p 322) gave a general concurrence. Lord Cullen (at p 321) expressly agreed with the Lord President's

outstanding judgment, his Lordship reviewed the authorities beginning with the ambiguous texts in the Roman law supporting either side of the argument and the division of opinion among the Roman-Dutch writers.[37] Despite these divisions of opinion, the Lord President was able to show conclusively that the Scots Institutional writers[38] and the case law of the Institutional period[39] supported the view that money paid under error of law was recoverable.

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conclusion and reasoning on the error of law rule. Lord Clyde's reasoning (at pp 317-320) was consonant with that of the Lord President on that point, differing only in detail or emphasis.

[37]1995 SLT at p 311.

[38]Lord President's opinion, 1995 SLT 299 at pp 311,312. Stair,*Institutions* I,7,9 drew no distinction between errors of law and errors of fact. The other Institutional authorities prior to Lord Brougham's dicta of 1830 and 1831 were solidly against the error of law rule: More's Note on Stair, loc. cit.; Bankton, *Institute* I,8,23 and 24; Erskine, *Institute* III,3,54; *Baron Hume's Lectures* vol. III, p 174. See also Bell, *Principles*, (10th edn; 1899) s. 534, fn (1), cited by the Lord President 1995 SLT at p 313. Only Mackenzie, *Institutions* III,1 (not cited in later cases) took the opposite view. However Bayne, *Notes for the Use of Students of the Municipal Law* (1731) - a commentary on Mackenzie's *Institutions* - observed (at p 119)" 'Tis hardly to be thought, in this matter, that this Distinction of the *ignorantia juris & facti* would take place in our Law, since the Civilians themselves are not agreed about it".

[39]*Stirling* v *Earl of Lauderdale* (1733) Mor 2930; *Carrick* v *Carse* (1778) Mor 2931, Hailes 783; *Keith* v *Grant* (1792) Mor 2933; *Meiklejohn* v *Erskine* 31 January 1815 F C.

2.12 The Court held that the matter was "already one of established law"[40] when Lord Brougham in two cases - *Wilson & McLellan* v *Sinclair*[41] and *Dixon* v *Monkland Canal Co*[42] - by obiter dicta, launched what Lord President Hope called "a powerful invective against the Scottish authorities"[43] based on the English law as laid down in *Bilbie* v *Lumley*[44] and what Lord Brougham took to be practical considerations. In 1959, these dicta were followed by the First Division in *Glasgow Corporation* v *Lord Advocate*[45] when they affirmed that the error of law rule was part of Scots law.

2.13 In *Morgan Guaranty*, the Lord President relied especially on the important and revealing unreported pleadings before the Inner House in 1733 in *Stirling* v *Earl of Lauderdale*[46] which research by pursuers' counsel had identified.[47] These

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[40]See 1995 SLT 299 at p 319J per Lord Clyde.

[41](1830) 4 W & S 398.

[42](1831) 5 W & S 445.

[43]1995 SLT 299 at p 312L.

[44](1802) 2 East 469.

[45]1959 SC 203.

[46](1733) Mor 2930.

[47]The printed pleadings in the Advocates Library are Kames Collection 1716-1740, vol 8, document No 874 (Petition of William Stirling of Northwoodside, dated July 16 1733); *ibid*, document No 875 (Answers for Charles, Earl of Lauderdale dated July 25 1733). These pleadings were probably relied on by Bankton: see his *Institute* I,8,24, at p 216, sidenote a, which contains the reference "Hume (condictio indebiti) 26. July 1733, Stirling". "Hume" or "Home" was the patronymic of

pleadings had not been placed before Lord Brougham in the *Wilson & McLellan*[48] or *Dixon*[49] cases nor before the First Division in *Glasgow Corporation* v *Lord Advocate*[50]. Because of the brevity of the report of *Stirling* in Morison's Dictionary (one sentence of ten words[51]), Lord Brougham in *Dixon's* case[52] and the First Division in *Glasgow Corporation*[53] had concluded that it could not be relied on for a rule of law. In *Morgan Guaranty*, however, the Lord President remarked that the pleadings showed what the issue was in *Stirling*, that the issue was subject to detailed argument under reference to authority,[54] and that the court had had before it all the arguments on either side

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Lord Kames. It should be noted that Mr D Ross Macdonald of Dundee University had earlier discovered the manuscript pleadings in the *Stirling* case in the Scottish Record Office: see D R Macdonald, "Mistaken Payments in Scots Law" 1989 J R 49 at p 58, footnote 49, citing S R O Adams Dal. S2/92 C S 228. Extracts (issued to us by the Scottish Record Office under reference SRO 228/5/2/92) of the pleadings in proceedings before the Lord Ordinary are set out in Scot Law Com DP No 95, vol 2, pp 19 - 22.

[48](1830) 4 W & S 398.

[49](1831) 5 W & S 445.

[50]1959 SC 203.

[51]"*Condictio indebiti* sustained to one who had paid *errore iuris*".

[52](1831) 5 W & S 445 at p 452: "Now this is certainly as meagre a case as I ever heard cited, and for aught I know, if the facts came to be looked into, it might not bear out this conclusion attempted to be drawn from it".

[53]1959 SC 203 at pp 231,232 per Lord President Clyde.

[54]1995 SLT 299 at p 313 I,J.

of the debate[55]. Further the decision "was regarded both in subsequent decisions and by the institutional writers and other commentators as having settled the point."[56] Lord Clyde remarked:

> "I can only conclude from the papers now made available that the court in 1733 took the deliberate and considered step of affirming that so far as the law of Scotland was concerned the *condictio indebiti* should be allowed whether the error was of fact or law. This early determination may be seen now as a far more solid authority than was earlier supposed and very different from the later English decision in *Bilbie* v *Lumley* [57] which proceeded without any assistance from counsel".[58]

2.14 The court held that in Scots law, the choice concerning the error of law rule had already been made in *Stirling* v *Earl of Lauderdale* in 1733 on logical and equitable grounds; that the error of law rule has no sound foundation in principle; that the dicta of Lord Brougham "can now be seen as not clarifying a point of doubt in the law but innovating upon existing authority" and as "a disruption to the natural development of the established law"[59]; and that the judgments affirming the rule in the *Glasgow Corporation*[60] and *Taylor*[61] cases should be overruled[62] as

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[55]*Ibid* at p 314L.

[56]*Ibid* at p 314L,315A per Lord President Hope.

[57](1802) 2 East 469.

[58]1995 SLT 299 at p 319G,H.

[59]*Idem* per Lord Clyde.

[60]*Glasgow Corporation* v *Lord Advocate* 1959 SC 203.

[61]*Taylor* v *Wilson's Trs* 1975 SC 146.

inconsistent with *Stirling* v *Earl of Lauderdale* and therefore wrongly decided.[63]

2.15 In considering legal policy, the court were influenced[64] by the criticisms of the rule in its country of origin, England[65], and by recent judicial decisions abrogating the error of law rule in Canada[66], Australia[67] and South Africa[68].

2.16 The decision in *Morgan Guaranty*, however, does not follow the modern approach of explicit judicial innovation, as for example was adopted by the House of Lords in the *Woolwich* case.[69] Rather

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[62]1995 SLT 299 at p 315 per Lord President Hope.

[63]*Ibid* at p 315I per Lord President Hope.

[64]See 1995 SLT 299 at pp 311 A - C; 315 E, F per Lord President Hope; *ibid* at p 321 K,L per Lord Cullen.

[65]The Lord President (1995 SLT 299 at p 313C) cited Lord Wright, *Legal Essays and Addresses* (1939) Preface p xix. For references to other criticisms by commentators and judges from the standpoint of English law, see Law Com No 227, para 3.1; Goff and Jones, *The Law of Restitution* (4th edn; 1993) pp 144-146.

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

[67]*David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1991-92) 175 CLR 353 (High Court of Australia).

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

[69]In *Woolwich Equitable Building Society v IRC* [1993] AC 70 (HL) the House of Lords did not declare the common law as it had been laid down in a line of English decisions before 1888 to be, and always to have been, English law. Rather it held that it was changing the law. See eg [1993] AC at

the judgment was declaratory in form and (it is thought) substance, since it "reaffirmed"[70] the common law of Scotland as it had existed in the formative, Institutional period of our law before the doubts introduced by Lord Brougham in 1830 and 1831. It has effect by way of declaratory renovation as distinct from innovation: it holds that the error of law rule is not, and since at least 1733 has not been, part of the common law of Scotland[71]. We revert in Part III below to the implications of this approach for the possible reopening of past transactions involving payments under error of law.

(b) The considerations of principle and legal policy underlying the decision

2.17 Although the court held that the law had been established by the *Stirling* case in 1733, it

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p 196G per Lord Browne-Wilkinson: "Your Lordships are all agreed that, as the law at present stands, tax paid under protest in reponse to an *ultra vires* demand is not recoverable at common law". For a criticism of this approach, see Birks [1992] Public Law 580 at p 587.

[70]See 1995 SLT at p315J per Lord President Hope:"Concern may be felt that **to reaffirm the decision** [scil. in *Stirling* v *Earl of Lauderdale*] that a payment not due may be recovered under the *condictio indebiti* irrespective of whether the mistake was one of fact or law may be too radical a departure **from what has been thought to be the law of Scotland for so many years**. I do not share that concern" (emphasis added). See also 1995 SLT 299 at p 321H per Lord Cullen referring to "the way in which the pronouncements of Lord Brougham ... have for so long affected the **apparent** state of the law of Scotland" (emphasis added). *Ibid* at p 320A per Lord Clyde: "it is now apparent that the matter was not technically open to decision as was taken to be the situation in 1959".

[71]*Idem*.

did not rely only on that fact but paid regard to considerations of principle and legal policy to justify its reaffirmation of that decision. These considerations may be summarised as follows, namely: - (i) that the error of law rule is based on expediency not equity; (ii) rejection of that argument that error of law is never excusable; (iii) rejection of an analogy with criminal cases; (iv) affirmation of the historic principle that error of law does not harm those reclaiming their own or seeking to avoid loss; (v) rejection of any "floodgates" argument (ie that abolition of error of law rule would let in the re-opening of a large number of settled payment transactions between other parties); (vi) rejection of the view that error of law not justiciable; (vii) that the fact/law distinction is irrelevant to error's primary role which is to exclude any intention of donation; and (viii) that the rule creates uncertainty and inconsistency.[72] We consider each of these considerations in that sequence.

(i) Error of law rule based on expediency not equity

2.18 In the *Glasgow Corporation* case[73], Lord President Clyde had stated that his main reason for holding that the *condictio indebiti* did not apply was that the doctrine was an equitable one. This

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[72]The main justifications for the error of law rule are set out in Lord President Clyde's opinion in the *Glasgow Corporation* case, in the earlier obiter dicta of Lord Brougham, or in both of these sources. For a full discussion, see Scot Law Com DP No 95, vol 1, paras 2.71 - 2. 83. These justifications were rejected by the court in *Morgan Guaranty*.

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

was rejected by the Court in *Morgan Guaranty* because, as Lord President Hope observed[74], in truth Lord President Clyde's "concern was not with the question what equity might demand as between the two parties to the transaction but as to the effect on parties to other transactions where the same error of law had been made".[75] That consideration was characterised by the court in *Morgan Guaranty* as one of public policy[76] or expediency rather than equity.[77] The Lord President said that the introduction into the structure of enrichment law, of a rule based on expediency distorts and disorganises the selection of the appropriate remedy.[78]

2.19 The court held that as between the parties the error of law rule was inequitable. For example the maxim "*Ignorantia iuris haud excusat*" should, if it is applied at all, be applied equally to the party who pays as to the party who receives, with the result that he who receives what he is not entitled to should be no more protected than he who

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[74]1995 SLT 299 at p 315B.

[75]1959 SC 203 at p 233 per Lord President Clyde: "There seems little equity in enabling B and C and D to secure an unexpected repayment merely because A has succeeded in upsetting the current interpretation of an Act of Parliament under which all of them paid away part of their funds."

[76]Cf *British Hydro-Carbon Chemicals Ltd and British Transport Commission* 1961 SLT 280 (OH) at p 282 per Lord Kilbrandon :"public considerations".

[77]1995 SLT at p 315D per Lord President Hope and at p 321I per Lord Cullen, both citing *Taylor* v *Wilson's Trs* 1975 SC 146 at p 157 per Lord Cameron.

[78]1995 SLT 299 at pp 309L - 310B.

pays.[79] Lord Cullen quoted with approval the following passage from the pleadings in *Stirling*:

> "The great rule of equity is, that *nemo debet locupletari cum alterius jactura*; which should plainly be transgressed were repetition denied in *jure erranti*. Nay I cannot see the opposer of the repetition can justify himself from iniquity. He pleads that every man is presumed to know the law: must not he then admit he knew it himself, and yet took what he knew was not due to him, from a person who, whatever be the presumption of the law, in reality was in a mistake?"[80]

His Lordship remarked that the unsoundness of the *ignorantia juris* maxim is especially obvious in a case like *Morgan Guaranty* in which the error is common to both parties.[81]

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[79]1995 SLT 299 at p 315D,E per Lord President Hope, citing *Dickson* v *Halbert* (1854) 16 D 586 at p 597 per Lord Ivory: "The whole doctrine rests on the maxim *ignorantia juris neminem excusat*. And are you to apply that to the one party, and not to the other? Surely it applies equally to the party who pays and to the party who receives." The Lord President (*ibid* p 315H) continued: "In a case which is concerned only with private rights the maxim [*ignorantia iuris*] ought to be applied, if at all, equally between the parties . Where the recipient is as ignorant of the law as the payer he should , in a case of unjustified enrichment, be in the same position as regards the consequence of his own ignorance as the payer is as regards his". See also R Evans-Jones, "Full Circle?" (1992) 37 JLSS 92 at p 93.

[80]1995 SLT 299 at p 322A. This passage is also interesting in that it bases the obligation of repetition on the enrichment principle: see para 4.2.

[81]*Ibid* at pp 321L, 322A. Of course where the payer is, and the payee is not, in error at the time of payment, there is an even stronger case for a *condictio indebiti*: see Scot Law Com DP No 95, vol 2, para 2.40.

2.20 Moreover "the absolute nature of the [error of law] rule leaves no room for considerations of equity between the parties"[82] and is thus inconsistent with the equitable character of the Scots version of the *condictio indebiti*. As Lord Cullen observed:

> "One might have thought that in the case of a remedy which should be based on an assessment of the equitable considerations in the particular case there is no room for a rule which in effect excludes a category of case regardless of the circumstances".[83]

In short the court clearly considered that the error of law rule was an indiscriminate and inequitable method of protecting a recipient's interest in the security of receipts.

(ii) Rejection of argument that error of law never excusable

2.21 In the *Glasgow Corporation* case, Lord President Clyde had affirmed that in the *condictio indebiti* the error must be excusable and, under the doctrine or maxim *ignorantia iuris haud excusat*, error of law is never excusable. He remarked:

> "Moreover, if equity lies at the root of the doctrine of the *condictio*, the original mistake in paying must be excusable ... It is relatively easy to establish that an error in fact is excusable, as there may be a host of reasons why the fact was unknown, all of which could be justifiable. But the same is not true of a question of law. For there the doctrine of *ignorantia iuris haud excusat* comes into play, and renders the ignorance devoid of that equitable quality which might

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[82]1995 SLT 299 at p 315H per Lord President Hope.

[83]1995 SLT 299 at p 321 I,J.

> otherwise have opened the door to the operation of the *condictio*."[84]

In *Morgan Guaranty*, the court disapproved the excusability rule but affirmed the defence that repetition must be refused if it would be inequitable. So if the court had stopped there, the *ignorantia iuris* maxim might still have been invoked to exclude that defence in all error of law cases.

2.22 The court however also disapproved of the maxim as an absolute rule in the context of the *condictio indebiti*. The Lord President said that the maxim was out of place in a case of unjustified enrichment because it did not apply to the recipient equally with the payer.[85] In addition to his dictum quoted above[86], Lord Cullen said that Lord President Clyde had misapplied the maxim:

> "this is not the use of the maxim in order to enforce the true law against a person but in order to compel him to live with the consequences of the application of bad law."[87]

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[84]1959 SC 203 at p 233. See also *ibid* at p 243 per Lord Sorn: "in Roman law the excusability of the error was material, and ... errors in law, or at least some of them, fell into the category of the inexcusable". On this see Scot Law Com DP No 95, vol 2, para 1.3 *et seq*.

[85]1995 SLT 299 at p 315H.

[86]See 1995 SLT 299 at p 321 I,J; quoted at para 2.20 above.

[87]1995 SLT 299 at p 321K. His Lordship continued: "As Dawson J. observed in *David Securities Pty Ltd* v *Commonwealth Bank of Australia* [1991-2] 175 C L R at p 402: 'The true principle is that ignorance of the law is no excuse, that is to say, a person cannot escape the consequences of breaking the law by pleading ignorance of it. A person seeking to recover money paid under a mistake of law is not seeking to escape from the

Lord Clyde said that "the argument that the error must be excusable and ignorance of the law will not excuse does not seem to me to be sound".[88] Their Lordships were careful to say however that inexcusability of error may be a relevant factor which the court may weigh in the balance when considering a defence that repetition would be inequitable.[89]

(iii) Analogy with criminal cases inapt

2.23 Both Lord Brougham and Lord President Clyde had relied on the analogy of the *ignorantia juris* rule in criminal cases.[90] In civil cases one may lose one's money but in criminal cases one may lose one's liberty (or as the law then stood) one's life.[91] All the more so, it was said, the *ignorantia juris* rule should apply in civil actions for repetition. Although there are other civil law contexts where the *ignorantia juris* maxim has been

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law, but to avail himself of it' ."

[88]1995 SLT 299 at p 320A.

[89]See para 2.54 below.

[90](1831) 5 W and S 445 at pp 451, 452 per Lord Brougham LC; 1959 SC 203 at p 233 per Lord President Clyde.

[91](1831) 5 W and S 445 at p 451. See also the dissenting judgment of Van den Heever JA in the South African case of *Willis Faber Enthoven (Pty) Ltd* v *Receiver of Revenue* 1992 4 SA 202 (A) at p 227: "The duty to take reasonable steps to discover the law is a real one .... I can think of no reason why the citizen should have a more onerous duty when his liberty is at stake than when it is merely his money that matters."

held applicable in Scots law,[92] and the maxim is undoubtedly applicable to civil wrongs (delicts) as well as criminal wrongs, repetition is different as Gloag remarked.[93]

2.24 In *Morgan Guaranty*, Lord President Hope cited with approval dicta in a Canadian case that the *ignorantia juris* maxim, "which [Dickson J] said was properly one of criminal and public law , had been wrongly imported into the law of contract(sic)".[94] He emphasised that the error of law rule is:

> "out of place in a discussion about private rights , where a party is not seeking to be excused from his ignorance but is seeking to show merely that his payment was a mistaken one and not to be taken as a gift: see Bankton, I,8,31".

Here the expression "private rights" clearly excludes criminal proceedings.

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[92]eg *Macfarlane* v *Nicoll* (1864) 3 M 237 at p 244 per Lord Deas: "Every man is presumed to know the law" (action of repetition of payments made by a bankrupt under compulsion in defraud of creditors); cf *Purves's Trs* v *Purves* (1895) 22 R 513 at pp 536 (per 5 judges): "Everyone is bound to know as much of the law as is necessary to regulate his conduct in the ordinary relations of life". See also the doctrines of *bona fide* payment and *bona fide* perception and consumption: Scot Law Com DP No 95 vol 1, paras 3.68 and 3.124 respectively.

[93]*Contract* (2nd edn) p 62, fn 4:"But surely the foundation of the *condictio indebiti* is that the defender has no justification for retaining money which was not due to him and, if so, the analogy of the criminal law is simply misleading."

[94]1995 SLT 299 at p 315E citing *Hydro Electric Commission of Nepean v Ontario Hydro* (1982) 1 SCR 347 at pp 360 361 per Dickson J.

(iv) Error of law does not harm those reclaiming their own or seeking to avoid loss

2.25 The *Morgan Guaranty* case saw an explicit reaffirmation by the Court of Session of Papinian's historic principle that error of law does not harm those reclaiming their own or striving to avoid loss. This principle is found in two seminal texts of Justinian's Digest[95], both of which were relied on by the successful pursuer in *Stirling* v *Earl of Lauderdale*[96].

2.26 Professor Zimmermann explains that in the *ius commune*, supporters of the error of law rule "made rather short shrift" of Papinian's text in D.22.6.7:

> "'Iuris ignorantia ... suum... petentibus non nocet' were the words used by Papinian; but since a person proceeding under a condictio indebiti... was not claiming what was owned by him but merely what was owed to him , this passage actually did not apply to the present type of situation".[97]

A similar fine distinction (characterised by Vinnius as a quibble[98]) was drawn to explain away D. 22.6.8 in which Papinian had stated that error of law does not prejudice anyone seeking to avoid

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[95]D.22.6.7; D.22.6.8.

[96](1733) Mor 2930. In the pleadings in the Kames Collection 1716 - 1740 (Advocates Library), vol 8, doc No 875 ;Answers for Earl of Lauderdale, dated 25 July 1733, pp 2,3.

[97]Zimmermann, *The Law of Obligations* p 869, citing Voet, *Commentarius ad Pandectas* Lib. XII, Tit. VI, VII.

[98]Vinnius, *Select Questions* (Evans trans.) p 443.

a threatened loss[99]. The quibble was that in a *condictio indebiti* the pursuer does not contend *de re amittenda* (to save his property from being lost) but *de re amissa* (to recover property already lost). In the *Stirling* case, the payer's (Lauderdale's) counsel met this argument head on. After quoting D. 22.6.8, he remarked:

> "And the Answer which the Petitioner's Commentators make to this, is what, with great Deference, cannot go down with any Reasonable Man; as if Papinian had not had in his Eye this *condictio indebiti*, by which the Pursuer is not endeavouring to save *rem amittendam*[100], but recovering *rem amissam*[101]. That may be a Language fit for Schools, where Men allow themselves to be intangled with Words; but can give no satisfaction to People who judge by the Rules of Reason."

2.27 One of Papinian's texts[102] was cited by Bankton[103] to support a proposition which was reaffirmed in *Morgan Guaranty* by Lord Cullen[104]:

> "a person seeking recovery is not seeking to obtain an advantage but to avoid a loss. *Bankton Inst.* I. viii. 24 states the rule: 'That ignorance of the law cannot hurt one that is only insisting to be free of a real damage' ".

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[99]D. 22.6.8: " *ceterum omnibus iuris error in damnis amittendae rei suae non nocet*".

[100]ie a thing requiring to be transferred.

[101]ie something already transferred.

[102]D. 22.6.8.

[103]Bankton, *Institute* I, 8, 24

[104]1995 SLT 299 at p 321L per Lord Cullen.

The other[105] was relied on by Baron Hume in a passage which entered the law of Scotland when it was approved by Lord Clyde in *Morgan Guaranty*:

> "the brocard *ignorantia legis* should not be used to prevent recovery of one's own property. Its significance relates to the unavailability of a line of defence rather than to the unavailability of a ground of action. The counter brocard can be found in *Hume's* lectures ...[106]: '*Juris ignorantia non prodest adquirere volentibus, suum vero petentibus non nocet*' [107]".[108]

(v) Rejection of "floodgates" argument (re-opening settled payment transactions between other parties)

2.28 Where the error inducing a payment is one of fact, it is not usually shared by third parties.[109] It is otherwise however where the error is one of law since many third parties may have made payments under the same error of law. In the *Glasgow Corporation* case, the court assumed that to allow one repayment would necessarily involve allowing all to be repaid, thereby opening the gates to a flood of claims reopening previously

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[105] D. 22.6.7.

[106] *Baron Hume's Lectures* vol. III, p 174.

[107] D. 22.6.7, Mommsen-Krüger-Watson edn trans: "Mistake of law does not benefit those who wish to acquire, but does not prejudice those who sue for their own".

[108] 1995 SLT 299 at p 320B.

[109] Though there are exceptions: see the English case of *Oom* v *Bruce* (1810) 12 East 225 (ignorance of outbreak of war between Russia and the United Kingdom).

settled transactions, a result from which they shrank.[110]

2.29 In our Discussion Paper No 95[111], we suggested that although the principal justification for the error of law rule is the "floodgates" argument, that argument does not require conclusively that that rule be retained. It is true that often an action of repetition is raised because a judicial decision has overturned a common misunderstanding as to the general law.[112] But quite frequently, the error of law is not widely shared[113] and in such cases there is no risk of letting in too much repetition by opening floodgates.[114] In our Discussion Paper No 95, we sought views on a statutory provision specifically designed to safeguard payees from that risk.[115]

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[110]1959 SC 203 at pp 232,233 per Lord President Clyde.

[111]Scot Law Com DP No 95, vol 1, para 2.83.

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

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

[114]See case-note by Professor D M Walker in 1959 J R 218, quoted at para 3.38 below.

[115]Paras 2.84 - 2.125.

2.30 In *Morgan Guaranty* the floodgates argument was rejected. The Lord President referred to the fact that it had much troubled the court in the *Glasgow Corporation* case[116]; observed that a typical case was where a demand for tax was later found by judicial decision to be unlawful; and noted that the *Woolwich* case[117] had given a remedy in English law.[118] As will appear later[119], however, there is room for doubt whether the *Woolwich* case by itself affords a good answer to the floodgates (or expediency) argument.

2.31 In *Morgan Guaranty*, Lord Clyde considered that the floodgates argument had less force now than in 1959. First, "[a]t a technical level the change in the law of prescription and limitation may well reduce the scale of the alleged dangers...".[120] Second, like Lord President Hope, Lord Clyde referred in this context to *Woolwich* which in his view afforded evidence of changed views of public policy:

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[116]1959 SC 203.

[117]*Woolwich Equitable Building Society v I R C* [1993] A C 70.

[118]1995 SLT 299 at p 315L.

[119]See para 3.7 below, last sentence, and footnote 204.

[120]1995 SLT 299 at p 320C,D per Lord Clyde. Before the Prescription and Limitation (Scotland) Act 1973 took effect, obligations to redress unjustified enrichment had been extinguished by the long negative prescription of 20 years (before 1924, 40 years). Section 6 of, and Sch.1, para 1 (b) to, the 1973 Act applied the new short negative prescription of 5 years to such obligations.

> "I do not believe that it can be so confidently affirmed today that the public interest in the finality of settlement transactions should outweigh the interest of private individuals in recovering money which on a proper understanding of the law they were never due to pay".[121]

Third, it is not obvious why error in the construction of a standard form contract which might affect very many individuals should enable repetition[122] while error in construing public legislation would not.[123]

(vi) Rejection of view that error of law not justiciable

2.32 In the *Dixon* case, Lord Brougham LC argued that if it makes no difference whether the error be one of law or fact, it would require the courts to open an enquiry in every case.[124] The payer (he said) would always allege that he would not have paid if he had known the law, even if he had obtained counsel's opinion (which he could say he did not understand). The courts (so the argument ran) would always be required to gauge the payer's knowledge of the law and his capacity to make the law apply to the facts of the case. These supposed requirements were characterised as "gross absurdities".[125] The court, he observed, has no

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[121] *Idem*.

[122] ie under the private rights exception to the error of law rule introduced in *Baird's Trustees* v *Baird and Co* (1877) 4 R 1005.

[123] 1995 SLT 299 at p 320E per Lord Clyde.

[124] (1831) 5 W and S 445 at p 449. See also *Bilbie* v *Lumley* (1802) 2 East 469 at p 472 per Lord Ellenborough CJ: "It would be urged in almost every case".

[125] (1831) 5 W and S 445 at p 450.

means of knowing whether a plea of ignorance of the law is made in good or bad faith: "you have no such hold over persons as you have where the only question is as to their ignorance of the fact".[126] There would thus be a grave risk that false claims would be upheld.

2.33 This justification of the error of law rule was not relied on by the court in the *Glasgow Corporation* case,[127] though the *Dixon* case was fully considered. It was cogently criticised by the Law Reform Commission of British Columbia.[128] Though referred to obliquely by Lord President Hope,[129] it was not expressly rebutted by the Court in *Morgan Guaranty* but clearly the court did not attach much (if any) weight to it. Their Lordships considered both that error of law could be proved in the pursuer's cause of action and that facts relevant to its excusability could be proved in considering the equity of repetition.[130]

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[126]*Ibid* at p 451.

[127]1959 SC 203.

[128]LRCBC 51, pp 58,59 rightly reject this argument as "unsatisfactory in that it confuses the right to plead a cause of action with the right to succeed. One could argue with equal plausibility that there should be no right to recover benefits conferred under duress, as it is equally possible to plead duress in every case."

[129]Lord President Hope referred to the fact that Lord Brougham's dicta in the *Dixon* case were inter alia supported by "practical considerations to avoid what he saw as an absurdity":1995 SLT 299 at p 313A.

[130]See para 2.56 below.

2.34 As regards the difficulty of the court ascertaining whether the payer knew the law or not, we said in our Discussion Paper No 95[131] that possibly the courts would require more substantial evidence to prove an error of law than an error of fact. This apparently occurs in continental legal systems which have rejected the error of law rule.[132]

(vii) Fact/law distinction irrelevant to error's role of excluding donation

2.35 Before the *Morgan Guaranty* case, it was established in Scots law that where at the time of payment the payer knows, or ought to know, that the payment was not due, he cannot recover the payment. The function of the error requirement in the *condictio indebiti* of Roman law was to show that the payer could not have intended donation.[133] The Institutional writers, following Roman law

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[131]Vol 1, para 2.74.

[132]Englard, "Restitution of Benefits" para 34. See also LRCBC 51, p 60: "In many cases there will be adequate evidence to corroborate the plaintiff. Where such evidence does not exist, the plaintiff's task of proving his mistake will not be an easy one. It is unlikely that judges and juries would not be alive to the possibility that a plaintiff might seek to recover his funds by dishonestly asserting an error of law.".

[133]Zimmermann, *Law of Obligations* p 851: "A man who gave something in the knowledge that he was not bound to do so did not deserve to be protected if he decided to reclaim this object, after all. He appeared more like someone who had executed a donation;[citing inter alia D. 50, 17, 53; D. 46, 2, 12] and a donation, as we know, could not be reclaimed either".

authority, asserted that knowing or deliberate payment of a sum not due is construed as a gift.[134]

2.36 In more recent case-law, it is sometimes said (following English law) that the rule against repetition by a person who knew, or should have known, that the payment was not due "depend on the principle that such a payment imports a waiver of all objections, and an admission that the debt is justly due".[135] But even English law assimilates "waiver" cases to gifts.[136]

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[134]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* s 533: "If the payment have been made with full knowledge of the person who makes it that he is under no debt or obligation to pay, it is held a donation and irrevocable". See also the reference to "implied donation" in s 531.

[135]*Dalmellington Iron Co Ltd* v *Glasgow and S W Rly Co* (1889) 16 R 523 at p 534 per Lord Rutherfurd Clark; applied in *Moore's Exors* v *McDermid* (1913) 1 SLT 278 and in *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 upon his liability I see no ground in law on which he should be entitled to recover", applied in *McIvor* v *Roy* 1970 SLT (Sh Ct) 58.

[136]*Maskell v Horner* [1915] 3 K B 106 at p 118 per Lord Reading CJ: "If a person with knowledge of the facts pays money, which he is in law not bound to pay,and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift, and the transaction cannot be reopened."

2.37 As we have seen, in *Morgan Guaranty* the Lord President said: "An averment that the payment was made through error is needed in order to show that this is not a case of donation."[137] Lord Cullen was of the same opinion observing that the Institutional writers had "clearly stated ... that the pursuer has to exclude an *animus donandi* and for that purpose requires to aver that he paid under error as to the payment being due".[138]

2.38 The significance of this approach is that it can be used to undermine the error of law rule, as clearly emerges from the unreported pleadings in the *Stirling* case[139]:

> "Observe the Reason why Repetition is refused *ei qui scienter solvit.*[140] We have it in the l. 53. *de reg jur.* [141] *Quia donasse intellegitur*[142]; which were no less absurd to say of one who paid *errore juris*, than if he had done it *errore facti.*" (footnotes added)

In other words, if one combines (a) the fact that the purpose of the error requirement in the *condictio indebiti* is to show that the person making the payment did not intend donation and (b)

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[137]1995 SLT 299 at p 316B. He continued:"It is appropriate to place the onus of demonstrating this point on the pursuer, as he is the party who can best explain why the payment was made although it was not due". See also at p 315E.

[138]1995 SLT 299 at p 322D.

[139]In the Kames Collection 1716 - 1740 (Advocates Library), vol 8, doc No 874; Answers for Earl of Lauderdale, dated 25 July 1733, p 2.

[140]ie "to one who paid knowingly".

[141]D.50.17.53.

[142]ie "because he is understood to have made a donation".

the fact that a person misled by an error of law into making a payment clearly does not intend donation, then it should follow that such a person should be entitled to recover the payment.

(viii) Uncertainty and inconsistency

2.39 In Scot Law Com DP No 95, we pointed out that the error of law rule is uncertain and inconsistent in its operation because of the number, variety and arbitrary nature of the exceptions to the rule; the uncertain extent to which English precedents on the exceptions will be followed; conflicting Scots decisions on some points; and the inherent difficulty of distinguishing between errors of fact and errors of law.[143] In the *Morgan Guaranty* case, these considerations were taken into account. Lord Cullen observed that:

> "recognition that the error of law rule has no place in the law of Scotland will put an end to the difficulty, if not impracticability, of distinguishing between an error of fact and an error of law in the construction of contracts and other writings".[144]

Lord Clyde referred to the fact that the error of law rule was a source of unease and concern after Lord Brougham's "disruption to the natural development of the established law"[145] and continued:

> "The unease can be seen in the tendency to avoid any absolute rule on error of law (for

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[143]Scot Law Com DP No 95, vol 1, paras 2.84 - 2.88. See also Law Com No 227, para 3.3; Law Com CP No 120, paras 2.25 and 2.26; LRCBC 51, pp 64-66.

[144]1995 SLT 299 at p 322B.

[145]*Ibid* at p 319K.

example in *Dickson* v *Halbert*[146]), in the drawing of a distinction between error in the construction of a private deed and error in relation to a general public statute (for example in *British Hydro-Carbon Chemicals Limited* v *British Transport Commission*[147]) and the reluctance of the court to apply the rule (for example in *Taylor* v *Wilson's Trs*[148])."[149]

Later Lord Clyde remarked :

> "Furthermore even if the [error of law] rule was justifiable on grounds of expediency I am not persuaded that it is altogether equitable. It was already seen in the case of *Taylor* as not being without exceptions. But it then becomes unclear precisely what the exceptions may be. For example it is not obvious to me why error in the construction of a standard form of contract which might affect many individuals should enable repetition, as presumably it may under the rule, whereas if the matter is one of public legislation the remedy will not be available".[150]

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[146](1854) 16 D 586.

[147]1961 SLT 280.

[148]1975 SC 146.

[149]1995 SLT 299 at p 319L per Lord Clyde. Superficially Lord Clyde's expression "tendency to avoid any absolute rule on error of law" might seem inconsistent with Lord President Hope's reference (at p 315H) to "the absolute nature of the [error of law] rule". However Lord Clyde's proposition is that the rule is not "absolute" because it does not apply in all transactions affected by error since in some (eg discharges) there is a prima facie right of recovery. The Lord President's proposition is that the rule is "absolute" in a different sense because, in the cases to which it applies, it bars a prima facie right of recovery and thus excludes a judicial balancing or adjustment of the equities.

[150]1995 SLT 299 at p 320D,E.

(2) Judicial abrogation of the excusability requirement; equity as a defence

(a) The law as understood before the *Morgan Guaranty* case

(i) Requirement that error must be "excusable".

2.40 Before the *Morgan Guaranty* case, there was an apparent requirement in the *condictio indebiti*, which the pursuer had to aver and prove as a matter of relevancy, that the error must be excusable. As a means of reconciling the antinomies in the *Corpus Juris Civilis*, the civilians had distinguished between *ignorantia vincibilis* (ie surmountable and hence unreasonable or inexcusable error) and *ignorantia invincibilis* or excusable error.[151] A requirement of "excusable" or "avoidable" error was introduced in Scots law not (at least not directly) from the civilians[152] but largely as a result of the obiter dicta of Lord Chancellor Brougham in *Wilson and McLellan* v *Sinclair*[153] purporting to follow English law. In fact English law rejected the requirement about a decade later in *Kelly* v *Solari*[154].

2.41 The requirement is not found in the Institutional writers until the later editions of

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[151]Zimmermann, *The Law of Obligations* p 870.

[152]In at least two early Scots cases, inexcusable error was argued as a defence *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 J R 49 at pp 62, 63) but does not seem to have taken root at that time.

[153](1830) 4 W and S 398 at p 409.

[154](1841) 9 M & W 54, approved *Jones (RE) Ltd* v *Waring and Gillow Ltd* [1926] AC 670 (HL).

Bell's *Principles*[155] where it was apparently taken from Lord Brougham's dicta[156]. Thereafter a series of dicta[157] and decisions[158] seemed to entrench the requirement of excusability in our law. For example in *Youle* v. *Cochrane*, Lord Ardmillan said[159]:

> "an error of 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".

Mere possession of the means of knowledge however did not necessarily render the error inexcusable.[160]

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[155](4th edn; 1839) s 535.

[156](1830) 4 W and S 398 at p 409.

[157]See eg *Youle* v. *Cochrane* (1868) 6 M 427 at p 433 per Lord Ardmillan; *Balfour* v *Smith and Logan* (1877) 4 R 454 at pp 458, 459,per Lord President Inglis, applied in *Duncan Galloway & Co Ltd* v *Duncan, Falconer & Co* 1912 SC 263 at p 272; *Agnew* v *Ferguson* (1903) 5 F 879 at p 885 per Lord Moncreiff, applied in *Glasgow Corporation* v *Lord Advocate* 1959 S C 203 and *Inverness C C* v *Macdonald* 1949 SLT (Sh Ct) 79 at p 80.

[158]eg *Glasgow Corporation* v *Lord Advocate* 1959 S C 203 at p 233 per Lord President Clyde, 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; *Bank of New York* v *North British Steel Group* 1992 SLT 613 (OH).

[159](1868) 6 M 427 at p 433.

[160] See *Dalmellington Iron Co v Glasgow and SW Ry Co* (1889) 6 R 523; *Duncan Galloway & Co Ltd v Duncan, Falconer & Co* 1913 SC 265.

(ii) Equity as a defence

2.42 As we have indicated elsewhere[161], a long line of authority, both Institutional and judicial, affirms the principle that the remedy of the *condictio indebiti* is equitable in its origin and character. The concept of equity, however, is relevant to the *condictio indebiti* in at least three different ways.

2.43 **Equity or natural law as the source of obediential obligations.** First, the source of the doctrine of the *condictio indebiti* is often ascribed to equity or natural law.[162] 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.[163]

2.44 **Equity as the source of specific rules.** Second, the sources sometimes appeal to equity as the justification for specific rules imposing legal requirements of the relevancy or competence of the *condictio indebiti*. An example noted above[164] is Lord President Clyde's invocation of the concept of

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[161] Scot Law Com DP No 95, vol 2, para 2.44.

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

[163] 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.

[164] See para 2. 18 above.

equity to justify the error of law rule[165] and the excusability requirement.[166] There are other examples[167]. 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. It was mainly because the error of law rule was inconsistent with this underlying principle that in *Morgan Guaranty*, the Court abrogated the rule.

2.45 **Judicial test of balancing the equities.** In the two 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.

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[165]*Glasgow Corporation v Lord Advocate* 1959 S C 203 at pp 232, 233.

[166]*Ibid* at p 233.

[167]eg in *Bell* v *Thomson* (1867) 6 M 64, Lord Justice-Clerk Patton (at p 67) 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". See also Bell *Principles* s 532: "As restitution is grounded on equity, it can have no place if the transference or payment have proceeded on a natural obligation; for that is binding in equity, as a bar;...".

2.46 In the *condictio indebiti*, however, the concept of equity is directly applicable to the factual circumstances of a given case. Indeed Scots law has provided equitable defences, including "change of position", to repetition actions based on error for three centuries[168]. In English law by contrast, the defence of "change of position" was introduced by *Lipkin Gorman* v *Karpnale*[169] only in 1991. The Scottish test is broader than "change of position" and involves a weighing or balancing process[170] 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. A classic formulation is that of Lord Cowan in *Bell* v *Thomson*[171]:

> "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 based".

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[168]See Scot Law Com DP No 95, vol 2, paras 2.44 - 2.60; 2.183 - 2.190.

[169][1991] 2 AC 548 (HL).

[170]The courts use the metaphor of "balancing" or "adjusting" the equities: eg *Haggarty* v *Scottish T G W U* 1955 SC 109 at p 114 per Lord Sorn: "an adjustment of the equities"; *Royal Bank of Scotland plc* v *Watt* 1991 SLT 138 at p 148 per Lord Mayfield: "In my opinion when all the equities are considered the balance favours the pursuers".

[171](1867) 6 M 64 at p 69, applied in *Peter Walker & Sons (Edinburgh) Ltd* v *Leith Glazing Co Ltd* 1980 SLT (Sh Ct) 104 at p 105.

2.47 Before the *Morgan Guaranty* case, the better view was that the fact that repetition would be inequitable was a defence in the sense that the onus was not on the pursuer and payer to prove circumstances inferring the equity of decree of repetition; rather it was for the defender and payee to prove circumstances inferring its inequity. In *Crédit Lyonnais* v *George Stevenson & Co Ltd*, for example, Lord Kyllachy stated[172]:

> "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 in fact. It was therefore reclaimable, unless (the pursuer's remedy being equitable) there was **an equitable defence** to repetition" (emphasis added).

There was however an element of doubt because the matter of onus of proof had not been expressly considered and determined by the court.

(iii) Relationship between excusability requirement and equity as a defence

2.48 Before the *Morgan Guaranty* case, there was clearly an overlap between the test that the error be excusable and the test whether it would be equitable for the recipient to retain the money paid. The more inexcusable was the error of the payer, the more equitable it was that he should have repetition or restitution and sometimes the

[172](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 143J, 146E and 149F. See also *National Bank of Scotland* v *Lord Advocate* (1982) 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".

two questions were dealt with together.[173] The two tests, however, did not exactly correspond. For one thing the better view was that the incidence of onus of proof differed as above-mentioned. Moreover, it was possible that payments might be made under an excusable error and nevertheless recovery might be denied.[174] In short, it seems that if the error was not excusable the pursuer would fail,[175] but if the error was excusable he would not necessarily succeed because under the broader test of balancing the equities, the court might hold that repetition or restitution might for other reasons, unrelated to the pursuer's conduct, be inequitable.

2.49 The law on these matters was unsatisfactory. First, the requirement that the error be excusable seemed to put an unfair extra obstacle in the path of pursuers. In practice, as was pointed out in a recent article, as a general rule mistakes of fact were treated as excusable.[176] Second, the excusability requirement was introduced

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[173]eg *Baird's Trs* v *Baird & Co*(1877) 4 R 1005 at p 1012 per Lord Ormidale.

[174]eg *Hunter* v *Hunter's Trs* (1894) 21 R 949 at p 953.

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

[176]J E du Plessis and H Wicke, "*Woolwich Equitable* v *IRC* and the Condictio Indebiti in Scots Law" 1993 SLT (News) 303 at p 304. The learned authors concede that excusability is relevant to error of law but state that they were unable to find a single case in which excusability was given any real significance in the context of errors of fact.

in 1831 on the view, found to be false in 1841[177], that it applied in English law. Third, in principle the excusability of the payer's error is one of the factors which the court weighs in the balance when considering whether repetition would be inequitable. It is difficult to see why that factor should have been segregated from the other factors and erected into a requirement of the relevancy of the pursuer's action. Fourth, there was no clear authority establishing beyond doubt that the test of balancing the equities was a defence rather than an essential ingredient of the pursuer's cause of action.

(b) The law as explained in the *Morgan Guaranty* case

2.50 In *Morgan Guaranty*, the defenders contended that it was for the pursuer to aver facts and circumstances (i) from which it could be inferred that the error was excusable, and (ii) which rendered it equitable that the remedy of repetition should be granted.[178]

(i) Abrogation of excusability requirement

2.51 As regards the first contention, the court clarified the law by holding that the pursuer did not require, as a matter of relevancy, to aver and prove that his error was excusable. The Lord President observed:

> "In my opinion the essentials of the *condictio indebiti* are that the sum which the pursuer paid was not due and that he made the payment in error. These matters must be the subject of averment by the pursuer to show that *prima facie* he is entitled to the remedy. It is the

[177] *Kelly v Solari* (1841) 9 M & W 54.

[178] 1995 SLT 299 at p 322C.

> fact that the sum was not due that provides the ground for repetition on the principle of unjustified enrichment. An averment that the payment was made through error is needed in order to show that this is not a case of donation. It is appropriate to place the onus of demonstrating this point on the pursuer, as he is the person who can best explain why the payment was made though it was not due".[179]

Lord Cullen also affirmed that "there is no rule of law to the effect that it is essential that the error should have been excusable" on the ground that it was an innovation introduced by Lord Brougham on the law laid down by the Institutional writers.[180] In describing the averments necessary to make out a *prima facie* claim, he remarked:

> "No doubt the pursuer has to aver that he made payment on the erroneous understanding that it was due; and for that purpose he has to set out averments as to the nature of that error, how it arose and how it accounted for his making the payments. The need for greater particularisation will depend on the extent to which these matters are peculiarly within his knowledge according to the circumstances of the particular case".[181]

Lord Clyde agreed that excusability is not an essential ingredient of the principle requiring repayment of money paid in the mistaken belief that it was due.[182]

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[179]1995 SLT 299 at p 316A,B.

[180]*Ibid* at p 322F.

[181]*Ibid* at p 322F,G.

[182]*Ibid* at p 320I. This decision was anticipated by a judgment to a like effect by Sheriff Principal Nicholson in *Bank of Scotland* v *Crawford* 1994 SCLR 913 (Sh Ct) where it was held that a bank which paid money on the faith of a cheque that was never honoured, on the erroneous assumption that the cheque had been cleared, did not require to aver that the payment had been made without fault on their part. The *Crawford* case was reported too late to be cited in *Morgan Guaranty*.

2.52 Both the Lord President[183] and Lord Cullen[184] deduced the error requirement from the need to negative an intention of donation. The relevance of this to excusability is that even an inexcusable error on the payer's part as to whether the payment was due will show that no gift was intended. Put another way, it is the mere fact of the error as to the payer's liability, not the excusable nature of the error, which shows absence of intent to donate. On this view, excusability is an unnecessary extra requirement.

2.53 Lord Clyde approached these issues slightly differently. He did not deduce the error ground of recovery from the need to negative an intention of donation nor did he advance an opinion as to the basis of error as a ground of claim. As regards the onus of proof, he hesitated:

> "to lay down any absolute rule on the specific requirements of pleading so far as excusability is concerned, because cases might occur where the circumstances in which the payment was made might require the pursuer to explain why it was equitable in such a context that he should be repaid."[185]

Nevertheless he did state that in his view "almost always the onus will technically lie on the defender".[186]

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[183]1995 SLT 299 at pp 315E and 316B.

[184]1995 SLT at p 322D. See para 2.37 above.

[185]1995 SLT 299 at p 320J.

[186]*Idem.*

2.54 The court held unanimously[187] that excusability of the payer's error would be one of the factors to be taken into account in deciding whether to order repayment.

2.55 In the South African version of the *condictio indebiti*, there is a requirement that the error be excusable in the sense that it was "neither slack nor studied". This requirement was affirmed by the South African Supreme Court when abrogating the error of law rule in the *Willis Faber* case: the Appellate Division held that the requirement should apply to error of law "so that the assimilation between the two kinds of error be complete".[188] Lord President Hope expressly refused to follow this precedent.[189]

(ii) Equity as a defence

2.56 The court rejected the defenders' contention that it was for the pursuer to aver facts and circumstances which rendered it equitable that the remedy of repetition should be granted.[190] This contention was unrealistic because the pertinent factors cannot be foreseen by the pursuer at the commencement of the action.[191] The

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[187]1995 SLT 299 at p 316F per Lord President Hope;at p 320I per Lord Clyde; and at p 322E per Lord Cullen.

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

[189]1995 SLT 299 at p 316E,F.

[190]*Ibid* at p 322C,F.

[191]As Lord Cullen observed (1995 SLT 299 at p 322F): "I do not consider that it is for the pursuer, if he is to make out a relevant case, to make averments in regard to all the factors which

incidence of onus of averments and proof was clearly resolved by Lord President Hope holding that:

> "once the pursuer has averred the necessary ingredients to show that *prima facie* he is entitled to the remedy,[192] it is for the defender to raise the issues which may lead to a decision that the remedy should be refused on grounds of equity".[193]

This approach is consonant with the opinions of Lord Cullen[194] and Lord Clyde[195].

(3) The defences of *bona fide* payment and *bona fide* perception and consumption

2.57 We have no doubt that the *Morgan Guaranty* case has swept away the error of law rule not only from the *condictio indebiti* but also from all other types of claim for the redress of unjustified enrichment where the rule formerly applied. In our Discussion Paper No 95 we sought views on provisional proposals for the abolition of the error of law rule in two contexts not necessarily involving enrichment claims, namely, the defence of *bona fide* payment[196] and the defence of *bona fide*

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may conceivably be relied upon on either side of the case. The resolution of an action of repetition depends upon the assessment of a number of factors, the scope of which cannot be predetermined."

[192]ie that the sum which the pursuer paid was not due and that he made the payment in error.

[193]1995 SLT 299 at p 316F.

[194]*Ibid* at p 332E - G.

[195]*Ibid* at p 320H - J, subject to his Lordship's reluctance (expressed at p 320I) to lay down an absolute rule.

[196]Scot Law Com DP No 95, vol 1, paras 3.68 - 3.73. Proposition 6 (para 3.73) proposed: "Where a debtor pays a debt to a putative creditor under

perception and consumption.[197] Unfortunately there is no reason to suppose that these proposals have been superseded by the *Morgan Guaranty* case. They were generally accepted on consultation and, unless we receive representations to the contrary, we intend to include the proposals in our report as firm recommendations.

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error of law or mixed fact and law, and the true creditor raises an action against the debtor for payment of that debt, the debtor should be entitled to found on a defence of *bona fide* payment in that action if he would have been so entitled had the error been wholly one of fact."

[197]Scot Law Com DP No 95, vol 1, paras 3.124 - 3.127. Proposition 10 (para 3.127) proposed: "Where a person possessing property is misled by an error of law or mixed fact and law into believing that he has a legal right thereto, he should be entitled to the fruits of that property under the doctrine of *bona fide* possession and consumption if he would have been so entitled had the error been wholly one of fact."

PART III

IS A CONSEQUENTIAL STATUTORY SAFEGUARD NEEDED AGAINST REOPENING SETTLED TRANSACTIONS?

(1) Main proposal in Discussion Paper No 95 superseded

3.1 The *Morgan Guaranty* case has the effect of superseding the main proposal in our Discussion Paper No 95, which was that the common law rule under which money paid under an error of law is *prima facie* not recoverable should be abolished by statute.[198] This proposal was generally welcomed by those who commented.[199] This reaction suggests that the decision in *Morgan Guaranty* is likely to be widely welcomed.

3.2 Two important consultees representing public bodies[200] however understandably deferred comment until they had had an opportunity to consider the present Discussion Paper.

3.3 In Scot Law Com No 95, views were sought on various methods of statutory reform.[201] On

[198]Scot Law Com No 95, vol 1, Proposition 1 (para 2.95).

[199]Including the Building Societies Association; the Court of Session Judges; the Committee of Scottish Clearing Bankers; the Faculty of Advocates; the Faculty of Law, University of Aberdeen; Professor W M Gordon; the Law Society of Scotland; the Royal Faculty of Procurators in Glasgow; Scottish Chambers of Commerce; the Sheriffs' Association; and the Association of Sheriffs Principal. Only one commentator expressed doubts.

[200]Convention of Scottish Local Authorities; Society of Directors of Administration in Scotland.

[201]Scot Law Com DP No 95, vol 1, para 2.96; for details see paras 2.97 to 2.107.

consultation, there was general agreement with our provisional conclusion that the best method would be statutory provision assimilating the grounds of recovery for error of law to the grounds of recovery for error of fact.[202] This is the approach recommended by Law Com No 227 and in South Australia.[203]

3.4 Of course, now that the *Morgan Guaranty* case has abrogated the error of law rule, these questions of statutory technique in abolition are superseded. As the Lord President said "[t]he effect of the decision will require to be worked out in subsequent cases".[204] The tenor of the opinions however is to the effect that the Institutional law applies under which there was one ground of repetition or restitution, - error - and the distinction between error of fact and error of law is irrelevant. It is satisfactory to note that this result accords well with the response on consultation favouring complete assimilation and with the Law Commission's recommendations for England and Wales.

(2) Change by judical decision in the "settled view" of the law

3.5 As mentioned above, in our Discussion Paper No 95, on the assumption that the error of

[202]In other words, where money is paid under error of law or mixed fact and law, the recipient should be under an obligation to restore it if he would have incurred that obligation had the error been wholly one of fact.

[203]Recommendation (3) (para 4.10) adhering to Law Com CP No 120, para 2.55; SALRC (1984) 84.

[204]1995 SLT 299 at p 315J.

law rule should be abolished by statute, we sought views on a consequential statutory provision specifically designed to safeguard payees from the risk that third-party payers would bring actions of repetition where the understanding of the law on which their payments were made was changed by a later judicial decision.[205] The idea was that such third parties would not recover unless they had commenced proceedings for recovery before the decision which changed the view of the law.

3.6 The response on consultation was generally in favour of the introduction of such a safeguard as a consequential to statutory abolition of the error of law rule. Nevertheless, it cannot be assumed that our consultees would necessarily adhere to that view in the new situation created by the decision in *Morgan Guaranty*. In that case, the court not only abrogated the error of law rule and held out the promise of incremental development of the common law, but also disapproved of the floodgates argument as a reason for retaining that rule.[206]

3.7 We have therefore thought it necessary to consult afresh on the question of safeguards controlling the floodgates. The question now is whether statute should supplement the court's abolition of the error of law rule by introducing a safeguard against reopening payment transactions which have been completed in accordance with a settled view or common understanding of the law

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[205]Vol 1, paras 2.84 - 2.125.

[206]1995 SLT 299 at pp 315L;320 C,D: see paras 2.30,2.31 above.

subsequently changed by judicial decision. In England, there is an analogy in the *Woolwich* case where the House of Lords left it to the Law Commission to suggest defences to a claim for refund of tax overpaid pursuant to an *ultra vires* demand in order to protect public finances from undue disruption.[207]

3.8 Another relevant factor is that in England and Wales, the Law Commission have recommended statutory safeguards against opening the floodgates to, first, private law actions of repayment brought by third parties where a judicial decision changes a settled view as to liability under private law[208] and, second, statutory claims by third parties where a decision of a court or tribunal changes a settled view as to tax liability.[209]

3.9 We briefly discuss the second of these recommendations in our Discussion Paper No 100.[210] There we provisionally propose that the same safeguard against opening floodgates should apply to statutory claims for refund of overpaid tax

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[207][1993] AC 70 at pp 176 - 177 per Lord Goff.

[208]Law Com No 227, paras 5.2 to 5.13; recommendation (5) para 5.13.

[209]Law Com No 227, paras 10.10 - 10.20, recommendation (12) (para 10.20). There is a not dissimilar statutory rule at present under which refund of overpaid tax is denied if it was paid in accordance with the generally prevailing practice when the return was made: Taxes Management Act 1970, s. 33(2),proviso.

[210]Scot Law Com DP No 100, paras 4.35 - 4.37; Proposition 4.3 (para 4.38).

discussed in that Paper[211] as apply to the common law claims for recovery of undue sums discussed in this Paper. Of course, it would not be appropriate to have cross-border differences on matters of tax liability. These questions are all interconnected. In *Morgan Guaranty*, the Inner House could not take account of the Law Commission's report[212] which was not published till after the hearing of the case.

(a) The "declaratory" and "change" theories

3.10 The Law Commission point out that where the law is changed by **legislation**, a payment made complying with the pre-existing law is irrecoverable because there was no error at the time it was made.[213] Where the law, or a general understanding of the law, is changed by a **judicial decision**, however, the position is unclear because of the clash of two competing theories.

3.11 **The declaratory theory.** On one theory, the judges do not "change" the law but merely "discover" and "declare" it. So where a payment is made before a judicial decision declaring the law to be different from the pre-existing interpretation thereof, and the payment was made on the faith of the pre-existing interpretation, then the payment is, on this "declaratory theory", mistaken and recoverable.

3.12 **The change theory.** On the other hand on consultation it was observed by the Court of

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[211] *Idem.*

[212] Law Com No 227.

[213] Law Com No 227, para 5.2; Law Com CP No 120, para 2.57.

Session judges that the traditional "declaratory" theory fails to accommodate the "common sense" truth that certain judicial decisions, for all practical purposes, do indeed change the law. In the Law Commission's view, it should not matter whether a change occurs through legislation or judicial decision: the payment should not be recoverable because in substance there has been no mistake.[214] They cited English cases suggesting that in such situations there is no mistake.[215] We have not traced comparable Scots cases. While the Law Commission did not expressly attack the declaratory theory, their argument seems to us to emphasise the change theory. They recommended:

> "that a restitutionary claim in respect of any payment,service or benefit that has been made, rendered or conferred under a mistake of law should not be permitted merely because it was done in accordance with a settled view of the law at the time, which was later departed from by a subsequent judicial decision".[216]

(b) Declaratory theory not mere fiction

3.13 In their Report, the Law Commission thought it "unlikely that the declaratory theory of the common law would lead the courts to permit recovery where there has been an obvious judicial

[214]Law Com No 227, para 5.3; Law Com CP No 120, para 2.58.

[215]*Henderson* v *Folkestone Waterworks Co* (1885) 1 T L R 329 at per Lord Coleridge: "at the time the money was paid... the law was in favour of the company"; applied in *Julian* v *Mayor of Auckland* [1927] NZLR 453; see also *Derrick* v *Williams* [1939] 2 All E R 559 at p 565.

[216]Law Com No 227, Recommendation (5) (para 5.13).

change in the law" but concluded that the matter could not be safely left to the common law.[217]

3.14 In Scot Law Com DP No 95[218] we agreed with the Law Commission's observation in their earlier Consultation Paper[219] that the declaratory theory is "a mere fiction and should not be allowed to affect substantive rights". On consultation, however, Lord Coulsfield remarked to us that the declaratory theory could not be dismissed as easily:in his view, "[i]t is, really, no theory, but a fundamental working assumption or basis for the legal system". It has also been maintained that the question whether there has been a "change" in the law may not, or not always, be justiciable[220]. We respectfully think that there is substance in these comments.

3.15 In our view, therefore, there is a real and substantial risk that the courts might hold that a decision changing the settled view of the law had merely declared the law thereby enabling previous payers, who had paid on the faith of the "old" view of the law, to recover on the ground of error of law.

(3) Consultation on bar to recovery

3.16 On consultation, the majority of consultees generally approved a bar to recovery. On

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[217]Law Com No 227, para 5.7.

[218]Vol 1, para 2.116.

[219]Law Com CP No 120, para 2.58.

[220]Comment made by Lord Prosser at the seminar on unjustified enrichment held at the Parliament House on 23 October 1993.

the other hand some commentators criticised the details of the proposals, some reserved their opinion and some opposed the idea of exceptions to the bar.

3.17 In fact, the proposals for a bar to recovery with exceptions proved to be the most controversial in Discussion Paper No 95. They require further consideration in the light of the Law Commission's Report No 227 and the *Morgan Guaranty* case.

(4) Three possible options

3.18 We have identified three possible options in the formulation of safeguards against too much repetition following on a judicial decision changing a settled view of the law. These are:

(i) to impose a statutory bar to recovery of all payments made before the decision without exceptions;

(ii) to impose such a statutory bar subject to exceptions;

(iii) to leave the development of safeguards to the courts.

We consider these options in that sequence.

(5) First possible option: statutory bar without exceptions

(a) Policy justifications for a bar to recovery

3.19 We think that there are two possible reasons for imposing a bar to recovery following on a judicial decision changing a common understanding or settled view of the law.

3.20 **The "no error" argument.** The first reason is that arguably where a payment is made

before a judicial decision changing the settled view of the law, the payment is not in substance made under error. In the absence of error, therefore, there is no specific ground of repetition (or, in the new English terminology, "unjust factor") to justify the redress of the enrichment. This may be called the "no error" argument. We did not mention this argument in Discussion Paper No 95, since we only identified it later in discussion with the Law Commission.

3.21 **The "floodgates" argument.** The second reason is that mentioned in Scot Law Com DP No 95, namely, that:

> "if the error of law rule were to be abolished by statute, a statutory safeguard would be needed to prevent settled transactions from being opened unfairly and repetition allowed of a wide circle of past payments whenever an existing commonly held understanding of the law was overturned by the courts".[221]

On reflection, in the light of the decision in *Morgan Guaranty* we think that the word "unfairly" is misleading. We accept Lord Coulsfield's criticism that "there is really no equitable way of restricting the ambit of recovery". We now think that the case for legislation restricting recovery is based on considerations of policy. In other words, a bar to repetition[222] may be needed to prevent abolition of the error of law rule from opening the floodgates to too many claims, thereby endangering the security of receipts. This may be

[221]Scot Law Com DP No 95, vol. 1, para 2.108.

[222]ie of payments made before a judicial change in a settled view of the law.

called the "floodgates" argument.[223] An analogy may be drawn with the law on negative prescription which is also a policy-led device for cutting off just claims for repetition with a view to attaining finality and protecting the security of receipts. We revert at paragraph 3.23 below to the different policy implications of the "no error" and "floodgates" arguments.

3.22 In Scot Law Com No 95, we said that the need not to re-open settled transactions is the principal justification of the error of law rule.[224] On consultation, this was generally accepted. Most consultees concluded from this, albeit in some cases with hesitation, that a statutory safeguard against this mischief would be required.

(b) Policy implications of the "no error" and "floodgates" arguments

3.23 It is important to distinguish between the "no error" and "floodgates" arguments because they affect, or may affect, the form which any statutory bar to recovery may take.

3.24 On the "no error" argument, nobody who paid a debt or purported debt in accordance with a

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[223]This is generally reckoned to be the main policy underlying the Judicature Act 1908, s 94A(2) (New Zealand): see LRCBC 51 (1981), p 72: "Section 94A(2) is aimed at closing the 'floodgates of litigation' which might be opened if every overruling of a case or change in jurisprudence gave rise to restitutionary claims"; NSWLRC Report 53 (1987), paras 5.20 and 5.21; New Zealand Law Commission, *Contract Statutes Review, Report No 25*, (1993) para 4.29.

[224]Scot Law Com No 95, vol 1, para 2.83.

settled view of the law subsequently changed by judicial decision should recover. This would apply even to the payer who challenged the settled view in a court action and persuaded the court to effect that change.

3.25 By contrast, on the "floodgates" argument, the scope of the bar would be determined by policy considerations, and there would be no logical impediment to the recovery by the payer-challenger and possibly by others eg those who paid in accordance with the overturned view of the law if they commenced proceedings before the decision effecting the change.

3.26 The Law Commission's case for introducing a bar seems based mainly on the "no error" argument.[225] Consistently with that argument, they do not recommend any exceptions to the bar eg an exception allowing the "payer-challenger" to recover. On the other hand, in our Discussion Paper, we relied on the "floodgates" argument.[226] There are at least two justifications for this approach.

3.27 First, it is not easy to reconcile the "no error" argument with the declaratory theory. To say that "where the court changes a settled view of the law there has been in substance no error" seems to us to presuppose, contrary to the declaratory theory, that the courts do change the law. How far

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[225]See Law Com No 227, paras 5.2 to 5.13 especially at para 5.3.

[226]Scot Law Com DP No 95,vol. 1, Proposition 3(2) (para 2.125).

the declaratory theory is correct or false is a difficult and controversial question which cannot be resolved in this project. It would be fallacious to say that the judges never change the law: as Lord Reid has observed, that is a fairy-tale[227]. It would be equally fallacious to say that the courts never declare the law. In between these two extremes, there are many gradations and many ways of describing what the courts do.[228] The issues are complex.

3.28 Second, as we see it, the bar inhibiting the effect of the declaratory theory is based on the policy of protecting security of receipts and in particular the policy of not opening up payments made on the faith of a common understanding or settled view of the law subsequently held by the courts to be erroneous. An important function of the law is to provide a stable background of rules on the basis of which citizens can settle payment and other transactions finally. The mistake of law rule promotes that function. We have always said that that role is the rule's principal justification but that the rule goes too far in denying recovery where a mistake of law is not

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[227]Lord Reid, "The Judge as Law-Maker" (1972-73) 12 JSPTL 22 at p 22. See also Lord Mackay of Clashfern, "Can Judges Change the Law?" (1987) 73 *Proceedings of the British Academy* 285.

[228]eg correcting previous mistaken judicial decisions, clarifying the law, resolving differences between contradictory lines of authority, filling gaps in the law and so on.

widely shared and where, therefore, allowing recovery for mistake of law would not open up a wide circle of payment transactions.[229]

3.29 In our view, the aim of the bar is finality of transactions, ie expediency rather than equity. It cannot be based on equity because a commonly held mistake of law is more likely to be excusable than a mistake of law by one person.[230] In other words it is policy-based like negative prescription.

3.30 If the bar to recovery should rest on the policy of not opening a wide circle of payment transactions, the challenger-payer may nevertheless recover. One case, that of the challenger, is not a wide circle; if only his case is let in, no floodgates are opened.

(c) Rejection of prospective over-ruling

3.31 In Scot Law Com DP No 95, we rejected the possibility that a safeguard against opening settled transactions might take the form of a statute enabling the court to declare that a judicial precedent is overruled only prospectively.[231] This was accepted by consultees. The Court of Session judges observed that the concept of prospective over-ruling raises broad issues of principle, and should not be introduced

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[229]Scot Law Com DP No 95, vol 1, para 2.83, p 67.

[230]See Scot Law Com No 95, vol, 1, para 2.81, quoting *Dixon* v *Monkland Canal Co* (1831) 5 W & S 445 at p 450.

[231] *Ibid*, Proposition 3(3) (para 2.125).

as a mere mechanism or protective adjunct in the present context.

(d) The formulation of the bar to recovery

3.32 In our Discussion Paper, we provisionally proposed that, by analogy with legislation in New Zealand and Western Australia[232], it should be provided that where there has been a change:

(a) in the law; or

(b) in the common understanding of the law,

effected by a judicial decision in civil proceedings, and a payment was previously made in accordance with the law, or the understanding of the law, before that change, the payment should not be recoverable by reason only of that change.[233]

(i) Safeguard unnecessary in "change" cases

3.33 The Court of Session judges pointed to the oddity of providing that a payment is not to be recoverable by reason of a "change" in the law. If it is indeed a change, the payment would *ex hypothesi* not be recoverable. We agree that any provision introducing the bar should not refer to a change in the law. If the courts do change the law, the reference is unnecessary; if they do not (because of the declaratory theory), it would be inappropriate for statute to state that they do.

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[232]Judicature Act 1908, s 94A(2), inserted by the Judicature Amendment Act 1958, s 2 (New Zealand); Law Reform (Property, Perpetuities and Succession) Act 1962, ss 23 (Western Australia) re-enacted in the Property Law Act 1969 (Western Australia) , s 124 (2).

[233]*Ibid*, vol 1, Proposition 3(4) (para 2.125). The decision referred to is the first decision which effects the change and not any later decision affirming or restoring that decision on appeal.

(ii) "Common understanding" or "settled view"

3.34 On this view, any provision introducing the bar should refer to a judicial decision changing the "common understanding" or "settled view" of the law in accordance with which the previous payments were made. Several commentators had misgivings about the concept of "common understanding". The Court of Session judges, for example, remarked that there may be a common understanding of the law which has been identified by legal advisers as a misunderstanding and argued that the concept of "common understanding" does not provide the appropriate criterion, departure from which may be taken as in some sense an error.

3.35 On consultation, doubts were expressed as to whether the foregoing proposal[234] resolves the problem in the best possible way. The Court of Session judges observed that "if judicial decisions are to be treated as effecting changes, that should not perhaps be taken as a datum, with statutory provision as to consequences: it may be that what is required is a specific provision that in defined circumstances, judicial decisions are to be regarded as effecting changes in the law, with the consequence (express or implied), that conformity with the pre-change law will involve no error."

3.36 In separate comments, Lord Coulsfield remarked:

> "At any given time, there are some areas of the law which can be regarded as reasonably fixed and others which cannot be so regarded, and the degree of uncertainty in the latter areas varies infinitely. How would the paper's proposed solution apply to a case in which 60%

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[234] *Idem.*

> of lawyers if consulted would have given an opinion one way and 40% the other? Or if the proportions were 70%/30%? If you are not careful, you may end up with a solution which makes the possibility of recovery depend on the quality of advice available to the person affected, either at the time of the transaction or the time when the possible error is noticed.... If some basis of this kind were to be taken, it seems to me that it would be better to say " a view of the law reasonably held at the time", but that would be not more than a minor improvement."

3.37 The Faculty of Advocates drew attention to certain practical difficulties. They observed that in practice, the payee would presumably have to establish that solicitors and counsel advising clients at the time of payment had had a common understanding. If the state of the law had been an open or controversial question then the defence would fail. The Faculty and another commentator remarked that "landmark" decisions changing the law[235] are commonly preceded, not by a common understanding which was controverted by the decision, but by a vigorous debate within the profession as to the true state of the law. In such cases, the defence would not be available. So probably the defence would be difficult to establish and apply only in a restricted number of cases.

3.38 The Unjustified Enrichment Working Party of the Law Society of Scotland agreed that a statutory bar to recovery was necessary but had reservations about the formulation of the proposal

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[235]The Faculty referred to *R H M Bakeries (Scotland) Ltd* v *Strathclyde Regional Council* 1985 SC (HL) 17; *Armour* v *Thyssen Edehlstahlwerke A G* 1990 SLT 891 (HL) as examples.

and observed that they would wish to examine any draft Bill closely in this respect.

(6) Second option: statutory bar subject to exceptions

(a) First possible exception: recovery by payer-challenger?

3.39 If the payer-challenger did not share the view of the law subsequently overturned by a judicial decision, or had doubts about his liability to pay, he should not make the payment. By making the payment in those circumstances, he waives objections to the payment and should not recover. If, however, the payer-challenger was misled into making the payment by the settled view of the law subsequently overturned by a judicial decision and only later realises that that view of the law was erroneous, it is arguable that he should be entitled to recover for two reasons. First, otherwise in cases where the settled but erroneous view of the law affected past payments but not future liabilities, the payer would have no incentive to make the challenge.[236] Second, it would seem very unjust if his success in challenging the settled view benefited others but did not benefit him. He should enjoy the fruits of his efforts and expense. As Professor D M Walker remarked: "No doubt past transactions cannot be opened but surely the man who makes the challenge should not be barred".[237] For these reasons, in

[236]Cf Pannam, "Recovery of Unconstitutional Taxes" (1964) 42 Texas Law Review 777 at pp 802,803 ,fn 97: cited in Scot Law Com No 95, vol 1, para 2.114.

[237]Case-note, 1959 J R 218.

Scot Law Com DP No 95, we provisionally proposed that the payer-challenger should recover.[238]

3.40 While few consultees dissented from this proposal, Lord Coulsfield argued that there is no equity in the distinction between those affected by the bar who cannot recover and those falling within the exceptions who can.

> "The person who challenges the mistake may simply be the person who has the funds to take a risk which others cannot afford to take, or the person who happens to consult a legal adviser who is prepared 'to have a go' as opposed to the adviser who may reasonably be regarded as more prudent".

He argued that if there were to be a remedy for error of law, the approach of the British Columbia Commission[239] was the correct one so that everyone affected by the error should recover if the error were excusable. His conclusion that there is no equitable way of restricting the ambit of recovery reinforced his doubts about abolition of the error of law rule itself.

3.41 Another factor is that it would sometimes be difficult in practice to confine the exception to the payer-challenger. Although Scottish court procedure does not as yet allow "class" or "multi-party" actions[240], parties acting in concert may

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[238]Scot Law Com DP No 95, vol 1, para 2.124 and Proposition 3(4) (para 2.125).

[239]LRCBC 51 p 72, quoted in Scot Law Com DP No 95, vol 1, para 2.111.

[240]See our Discussion Paper No 98 on *Multi-Party Actions: Court Proceedings and Funding* (1994); see also *Multi-Party Actions: Report by Working Party set up by Scottish Law Commission* (1994).

raise actions at the same time and seek to have their actions joined.

3.42 There is also the fact that, as we mentioned above[241] the Law Commission do not recommend any exception to the statutory bar allowing the payer-challenger to recover.[242] Indeed Professor Jack Beatson has argued that such an exception:

> "appears wrong in principle because there is, at the time of the payment, no mistake entitling the payer to relief either because the existing settled law requires payment or because a payer who believes the payment is not due but still pays is in fact not paying under a mistake. It also runs right against the principle favouring finality".[243]

While we see the force of this criticism, we remain of the view that to say that "the existing settled law requires payment" is not reconcilable with the declaratory theory of the common law.[244]

(b) Second possible exception: recovery by payers commencing proceedings before decision changing settled view of law

3.43 In Scot Law Com DP No 95, we also suggested that there should be a second exception allowing recovery by any other person who had made

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[241]See para 3.25.

[242]Law Com No 227, paras 5.2 - 5.13.

[243]J Beatson, "Mistakes of Law and Ultra Vires Public Authority Receipts: The Law Commission Report" [1995] RLR 280 at p 284, footnote 34.

[244]On the declaratory theory, it was not the law, but a mistaken (albeit settled) view of the law, which required payment. Put another way, on the declaratory theory, the law is and always different from that settled view and those who paid in conformity with that settled view nevertheless paid under mistake.

a payment under the same error and claimed repayment in an action commenced before the date of the judicial decision in the payer-challenger's action.[245] The *Blaizot* case[246], in which the European Court assumed a power of prospective overruling, affords a precedent for such a rule. If several sue and one is picked out as a test case, it would bear hard on the others to disallow recovery.

3.44 On the other hand, since the policy underlying the bar is finality in a wide circle of payment transactions, the bar would only work well if the exceptions did not apply to such a circle. Cases falling within the exceptions should not be so numerous as to render the bar ineffective.

3.45 On consultation, the Convention of Scottish Local Authorities (COSLA) and the Society of Directors of Administration in Scotland (SODAT), while reserving their final comments until our Discussion Paper No 100 is issued, made preliminary comments expressing the view that the exceptions to the bar to recovery proposed in Proposition 3(4) could be open to exploitation if not abuse.

3.46 Thus SODAT observed that where a test case was being taken it would be relatively easy for the person promoting the test case to advise persons in a similar position to start proceedings prior to the decision in the test case. They

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[245]Scot Law Com DP No 95, vol 1, para 2.124 and Proposition 3(4) (para 2.125).

[246]Case 24/86 *Blaizot v University of Liège* [1989] 1 CMLR 57, discussed in Scot Law Com DP No 95, vol 1, para 2.113.

referred to a case where the Police Federation and the Fire Fighters Union advised their members to lodge claims with industrial tribunals in advance of the decision of the European Court in the *Coloroll* case[247]. In the United Kingdom, it is estimated that 140,000 claims were lodged. Other cases of co-ordinated action include actions arising out of sudden disasters (eg Piper Alpha) or "creeping disasters" (eg Thalidomide deformities), or financial disasters arising from fraud (eg BCCL, the Mirror Pension Fund) or other fault (Lloyds of London). We think therefore that COSLA and SODAT are well founded in their reasonable apprehension that local authorities and other organisations with multiple debtors could be faced with co-ordinated action with the effect that the exceptions to the bar could be exploited or abused. These considerations fortified the Law Commission in their policy of not making any exceptions to the proposed statutory bar to recovery.

(c) Implications of making no exceptions to bar

3.47 If however the bar were to be enacted without the exceptions, the scope of the reform would be very narrow. The only payers who would be entitled to recover would be those whose error was not linked to a subsequent change in a settled view of the law. While such cases do occur[248], there are as many if not more cases in which an action of repetition is raised because a judicial decision

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[247] *Coloroll Pension Trustees Ltd* v *Russell* C 200/91.

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

has overturned the settled view of the law under which the payment was made.[249] Yet a payment based on a settled view of the law is more likely - perhaps far more likely - to be excusable than a payment under an error of law entertained by only one payer.[250] It would be unfortunate if the proposed legislation were to deny recovery in what are likely to be deserving cases and allow recovery in the less deserving cases. These considerations prompt the question whether the bar can be justified if even the payer-challenger cannot recover past payments.

(7) Third option: leave safeguards to be developed by the common law.

3.48 The third option would be to introduce no legislation and to leave any safeguards to be developed by the common law. We noted above Lord Coulsfield's comments that if error of law is abolished, all payers affected by such an error should recover.[251] Such an approach seems consistent with the court's reasoning in the *Morgan Guaranty* case, in which Lord President Hope disapproved the introduction into the structure of

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

[250]In saying this, we do not overlook the fact that the excusability requirement has been abolished. It is still relevant to the making of legislative policy.

[251]See para 3. 39, approving LRCBC 51, p 72.

enrichment law of a rule based on expediency,[252] explicitly rejected the floodgates argument as a reason for retaining the error of law rule and generally minimised the importance of that argument.[253] Moreover in other legal systems where the courts have recently abrogated the error of law rule[254], it does not seem to be suggested that supplementary legislation is necessary.

3.49 But even if it be assumed that a safeguard against opening floodgates is necessary, it does not follow that the safeguard should be introduced by legislation. Thus on consultation, the Sheriffs Association suggested that a statutory safeguard was unnecessary because "[t]he *condictio indebiti* would remain an equitable remedy and Courts would, no doubt, take an equitable approach in determining whether or not a transaction should be re-opened".

(8) Our provisional proposal

3.50 We have found this question to be exceptionally difficult. On balance we incline to the view that the case for a bar, with or without exceptions, is not sufficiently strong to justify the intervention of statute. Our consultation on Scot Law Com DP No 95 revealed that the introduction of such a bar would be likely to be controversial. Moreover the tenor of the judgments in the *Morgan Guaranty* case is against a bar. The

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[252] 1995 SLT 299 at pp 309L - 310B; see para 2.18 above.

[253] See paras 2. 28 - 2.31.

[254] ie Canada, Australia and South Africa: see para 2.15 above.

case advanced by public authorities favouring a bar might be sufficiently met if it were to be introduced not generally at common law but only as a defence to claims under statute for the refund of overpaid central and local government taxes and rates. That matter is discussed in Scot Law Com DP No 100.[255]

3.51 **(1) We propose that a statutory bar precluding the re-opening of settled payment transactions following a change in the settled view of the law effected by judicial decision should not be introduced.**

(2) This proposal is however without prejudice to the question whether such a bar should be a defence to claims under specific statutes for the refund of overpaid central and local government taxes and rates as discussed in Scot Law Com DP No 100, Part IV.

(Proposition 1)

3.52 We have referred above to payments of money but the same principles would apply *mutatis mutandis* to the transfer of property and conferment of benefits such as are discussed in Scot Law Com DP No 95, vol 1, Part III.

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[255]Part IV, paras 4.30 et seq.

PART IV

THE *MORGAN GUARANTY* CASE AND THE DEVELOPMENT OF SCOTS ENRICHMENT LAW

4.1 The *Morgan Guaranty* case is or may be important for the further development of the Scots law of unjustified enrichment in a number of ways which may conveniently discussed under the following heads:

(1) the acceptance of the general principle of unjustified enrichment as the element giving unity to the three Rs;

(2) the internal taxonomy of the three Rs;

(3) the classification of the specific grounds of repetition or restitution;

(4) the acceptance of error as a specific ground of repetition and restitution;

(5) the invalidity of a contract through incapacity or *ultra vires* as a ground of recompense; and

(6) the relationship between the recovery of benefits conferred under error of law (as upheld in the *Morgan Guaranty* case) and the recovery of benefits conferred pursuant to an *ultra vires* demand (as upheld in English law in the *Woolwich* case).

(1) Acceptance of general principle of unjustified enrichment

4.2 Before the *Morgan Guaranty* case, there had been a view that the foundation of the right of repetition was equity, and that any link with unjustified enrichment was at best indirect. This view had recently been adopted by the Second Division in *Royal Bank of Scotland plc* v *Watt*[256].

[256] 1991 SC 48.

In Scot Law Com DP No 95, we ventured to criticise that view drawing attention to contrary authorities which had been overlooked in the *Watt* case[257] and to academic criticism.

4.3 In the *Morgan Guaranty* case, the Court expressly based the three Rs on the enrichment principle. With respect to the *condictiones* and actions of repetition, restitution and recompense, Lord President Hope observed:

> "the important point is that these actions are all means to the same end, which is to redress an unjustified enrichment upon the broad equitable principle nemo debet locupletari aliena jactura" .

Lord Clyde referred to the formulation of the pursuers' case in terms of repetition and recompense and continued:

> "The two formulations are of course in some respects distinct, as was pointed out in *Royal Bank of Scotland* v *Watt*[258]. In recompense the emphasis is upon the enrichment, the loss and the absence of intention of donation. In repetition the emphasis is upon the payment of money in the mistaken belief that it was due. But the two formulations are closely related to each other and may well be treated as falling under the single descriptive heading of unjust enrichment. The grand rule here is that found in the familiar brocard nemo debet locupletari aliena jactura."[259]

Lord Cullen referred to "quasi-contractual" remedies as being remedies for unjust enrichment.[260]

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[257]Scot Law Com DP No 95, vol 2, paras 2.101 - 2.104.

[258]1991 SC 48.

[259]1995 SLT 299 at p 318C,D.

[260]*Ibid* at p 321 C,D.

4.4 The court was concerned to affirm that, as a general rule, the quasi-contractual remedies of repetition and restitution are based on the principle of unjustified enrichment, and thereby to correct the misleading contrary impression given by the *Watt* case.

4.5 We do not think that the court intended to affirm that the quasi-contractual remedy of restitution[261] always quadrates with unjustified enrichment: such a proposition goes too far.[262]

(2) Internal taxonomy of three Rs

4.6 In *Morgan Guaranty* the Court, following the trend of academic opinion[263] and echoing longstanding judicial criticism[264], recognised that the taxonomic structure of Scots enrichment law is not satisfactory. In the Outer House, counsel referred to "various ad hoc categories of

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[261]ie the quasi-contractual remedy of restitution as distinct from the proprietary remedy of restitution which is a type of *rei vindicatio*.

[262]eg in the case of restitution from the singular successor of a fraudster holding property on a title voidable for fraud, there appear to be two distinct grounds of the singular successor's obligation namely (a) that the singular successor acquired the property gratuitously; and (b) that he acquired it in bad faith. The first of these grounds is based on unjustified enrichment. The second ground however is not based on unjustified enrichment at all since onerosity is no defence: eg *McKay v Forsyth* (1758) Mor 4944. It is in fact based on the singular successor's participation in his author's fraud, ie fault. See N R Whitty, "Indirect Enrichment in Scots Law" 1994 J R 200 (Pt I); 239 (Pt II) at pp 256 - 258.

[263]See eg Scot Law Com DP No 95; 1994 J R 127.

[264]eg *Buchanan v Stewart* (1874) 2 R 78 at p 81 per Lord Neaves.

authority" and the absence of authoritative discussion of the friction between the cases[265]. Lord Penrose referred[266] to "inconsistencies and incompatibilities among the authorities which clearly were often based on partial citation of authority and which led to mutually incompatible results". In the Inner House, Lord Cullen remarked:

> "The taxonomy of the quasi-contractual remedies which are afforded by the law of Scotland is not in a wholly satisfactory state. In particular the scope of the remedies of repetition and recompense and the boundary between them [are] not altogether clear. It appears that the law has been developed in a somewhat piecemeal fashion ..."[267]

There are at least four different theories as to the basis of the *summa divisio* of the three Rs.

(a) The benefit-based theory

4.7 The first theory to be considered is that of Professor Birks which is to the effect that the tripartite classification of the main obligations redressing unjustified enrichment depends on the type of benefit received, ie (1) repetition (money); (2) restitution (property); and (3) recompense (services, or the product of services)[268]. In consonance with this benefit-based theory, there is authority[269] that repetition only, and not recompense, is available where (as in

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[265]1994 SLT 299 at p 305F,G.

[266]*Ibid* at p 308E.

[267]1995 SLT 299 at p 321C,D.

[268]1985 J R 227 at p 234; [1985] CLP 57 at pp 61-63.

[269]eg *Royal Bank of Scotland plc v Watt* 1991 SLT 138; *McIvor v Roy* 1970 SLT (Sh Ct) 58 at p 60.

Morgan Guaranty) the benefit received by the defender at the pursuer's expense is money .

4.8 The following guarded obiter dicta of the Lord President in *Morgan Guaranty* favour the benefit-based theory:

> "As a general rule it would appear that restitution is appropriate where the demand is for the return of corporeal property, repetition where the demand is for the repayment of money and recompense where the defender has been enriched at the pursuers' expense in the implement of a supposed obligation under a contract other than by the delivery of property or the payment of money. Recompense will be available, as a more broadly based remedy, in cases where the benefit was received by the defender in circumstances other than under a contract or a supposed contract.
>
> This brief summary ignores many problems, as Scots law still lacks a clear and coherent structure in this field...".[270]

4.9 **Criticism of benefit-based theory.** There are however considerable difficulties in accepting the benefit-based theory.[271] We readily concede that in repetition, the benefit received is invariably money and in restitution in its strict sense the benefit received is invariably property. But the benefit-based theory breaks down when one

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[270]1995 SLT 299 at p 309I,J.

[271]According to Evans-Jones, "Retention without a Legal Basis" p 215, it "seems universally to have been accepted, that the Scots law of unjustified enrichment is ordered according to the nature of the benefit received". In fact however the benefit-based theory has been criticised as inconsistent with authority in Scot Law Com DP No 95, vol 1, paras 3.10 and 3.11; by MacQueen and Sellar, "Unjust Enrichment" at p 296; by Whitty, "Trends and Issues" 1994 J R 127 at p 129 and "Ultra Vires Swaps" 1994 SLT (News) 337 at pp337,338

comes to recompense. In recompense,the benefit received covers services but it is not confined to services. Recompense governs some types of case where money or property is transferred to the defender eg aliment paid in cash,[272] or a benefit - goods or money - indirectly enriching the defender[273] or where money is misappropriated by the defender,[274] or - what could and perhaps should have been significant for the *Morgan Guaranty* case - money paid to an incapax under a contract void for want of capacity.[275]

(b) The quantum-based theory

4.10 In Scot Law Com DP No 95[276], we suggested that the traditional, tripartite taxonomy depends not on the type of benefit received but rather on the type of redress or remedy sought by the pursuer and in particular on the measure of recovery governing that redress: money plus interest (repetition)[277]; specific property with its fruits and accessions or the value of all of

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[272]See Scottish Law Commission Consultative Memorandum No 22 on *Aliment and Financial Provision* (1976) vol 2 para 2.79.

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

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

[275]*Stonehaven Magistrates* v *Kincardineshire County Council* 1939 SC 760.

[276]vol 1 , para 3.10.

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

these (restitution)[278]; and a sum representing the extent of the defender's enrichment or *quantum lucratus* (recompense).

4.11 On this theory, the tripartite taxonomy is not benefit-based but quantum-based[279]. In other words, as the very terms repetition, restitution and recompense imply[280], the taxonomy depends not primarily on what the defender received but rather on what he is bound by an obediental obligation to give back, or to give in lieu of what he received.

4.12 The quantum-based theory gains some support from the following obiter dicta of Lord Clyde in *Morgan Guaranty*:

> "The term repetition may apply where a payment of money has been made by one party to another in the mistaken belief that it was due in the performance of a legal obligation and the payer seeks to recover what he paid in error. Where the circumstances disclose that by the actings of one party performed without any intention of donation another party has benefited, **and the equitable remedy falls to be quantified in terms of a payment measured by the extent of the benefit gained by the other, the wider term of recompense becomes convenient.** But in an area of law where fine analysis or distinction between forms of action may well be dangerous and the overriding consideration is one of equity

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

[279]Or "remedy-based".

[280]In Scots law, the noun "repetition" (and its verb "to repeat") does not generally mean "to claim back" (though that is sometimes found) but rather "to pay back": see *Scottish National Dictionary* s v "repetition".

these labels should be recognised simply for what they are".[281] (emphasis added)

4.13 **Criticism of quantum-based theory.** A vitally important but as yet not fully researched question is, what is the relevant time for applying the measure of recovery? In repetition and restitution, the *tempus inspiciendum* is the time of receipt of the money or property but subject to equitable defences taking into account some post-receipt changes in value like change of position, or *bona fide* consumption (in Birks's terminology, "value received").[282]

4.14 Professor Birks has suggested that there are two measures -"value received" (at the time of the transfer) and "value surviving" (at the time of the claim)[283]. While this distinction provides very useful analytic tools, it does not fit incapacity cases in Scots law. Gloag[284] states that where money is paid to a minor incapax, recompense lies either (1) if "the money is still part of the minor's estate" (ie "value surviving") or (2) "has been expended in a manner profitable to him",i.e *in rem versum*.[285] The second leg of Gloag's test

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[281]1995 SLT 299 at p 316F,G.

[282]Scot Law Com DP No 95, vol 2, paras 2.123 - 2.156. In the *Watt* case 1991 SC 48, it was assumed that in recompense the *tempus inspiciendum* is the time of the claim ("value surviving").

[283](1985) 38 CLP 57 at p 65.

[284]*Contract* (2d edn) p. 85.

[285]An ambiguous phrase (cf *Henderson v Dawson* (1895) 22 R 895 at p 902 per Lord McLaren) now rarely used.

differs from both "value received" and "value surviving".

4.15 Writing in a personal capacity, Dr Clive has argued that:

> "[t]o be a useful basis of classification, [the quantum-based theory] would have to assume that 'enrichment' in the context of recompense meant some thing different from value received. In other words the basis of classification would have to be a distinction between value received (with a subdivision of a practical rather than a logical nature between money and other property) and value surviving. It is, however, by no means clear that the measure of recovery in recompense is always value surviving".[286]

Dr Clive suggests[287] that "value received" is the measure of recovery where aliment has been supplied by a person not under any obligation of aliment[288] and that it would be surprising if "value surviving" were the measure of recovery in recompense cases where the defender has made a profit out of the unauthorised use of another's property. On this view, the measure of recovery in recompense is not uniform but a patchwork.

(c) Recompense as a general enrichment action

4.16 It has been argued by Professor H L MacQueen and Mr W D H Sellar that recompense is a general enrichment action.[289] Expressly differing

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[286]Clive, *Seminar Paper, 22 October 1994* pp 16,17.

[287]*Idem*, p 17 n 11.

[288]Citing Stair, *Institutions* I,8,2.

[289]MacQueen and Sellar, "Unjust Enrichment" at pp 289, 295, 296, 305 and 321.

from Birks's benefit-based theory, the learned authors argue:

> "Restitution is certainly concerned with the recovery of goods, and its sub-head "repetition" with the recovery of money; but the scope of recompense is wider than services rendered. Thus a standard example of recompense concerns the obligation of a *bona fide* possessor of the goods of another to return any profit remaining in his hands after possession has been lost. We have seen also that Stair regarded the obligation of relief as falling within the scope of recompense. The obligation of recompense in Stair's second sense - that is, once *negotiorum gestio* has been excluded - is nothing other than a general action founded on unjustified enrichment".[290]

It is quite true that the width of the classic definitions of recompense (enrichment, loss, a causal connection, absence of donation) and some general observations of the Institutional writers, viewed in isolation from the authorities on restitution and repetition, are consistent with the existence of a general enrichment action.

4.17 **Criticism of "general enrichment action" theory.** This theory however has been criticised. First, it seems pointless for the law to lay down strict rules governing the scope of the nominate *condictiones* if an action based on recompense is available in any case falling under a wide general principle against unjustified enrichment.[291] Second, what is the relationship between the "residual" innominate actions of restitution and

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[290]MacQueen and Sellar, *ibid* at p 296.

[291]This point is made by Clive, *Seminar Paper, 22 October 1994* p 18.

repetition[292] and the residual action for recompense? It has been observed[293]:

> "In a system of specific grounds of recovery a general action's role is to fill gaps in those grounds. But some gaps in the grounds of repetition and restitution have been filled by a residual category of miscellaneous innominate actions of repetition and restitution[294]....It would be very odd if recompense formed yet another residual category".

Dr Clive, while agreeing that "it is not very satisfactory to have two residual categories" remarks: "Yet, as the result of unco-ordinated development, that is what we may well have."[295]

(d) No satisfactory basis; haphazard historical development?

4.18 For reasons such as these, Dr Clive concluded that "[t]here is probably no satisfactory basis for the tripartite division".[296] It would follow that the scope of recompense is determined by haphazard historical development as indeed Lord Cullen indicated in the *Morgan Guaranty* case.[297] So recompense applies to indirect enrichment cases because it is the historical successor of the *actio*

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[292]For the "residual" innominate actions of restitution and repetition, see Scot Law Com DP No 95, vol 1, para 3.8; *Gloag and Henderson, The Law of Scotland* (10th edn) para 29.7.

[293]Whitty, "Trends and Issues" 1994 J R 127 at p 131, n.37.

[294]Citing *ibid* p 30, nn 30 - 34. See also the width of Stair's descriptions of restitution: *Institutions* I, 7, 1 and 11.

[295]Clive, *Seminar Paper, 22 October 1994*, p 18, n 18.

[296]Clive, *Seminar Paper, 22 October 1994* p 17.

[297]See above.

de in rem verso of the *ius commune*[298] and to recovery from an incapax of money paid to him because it is the historical successor of the civilian *actio in quantum locupletior factus est*[299].

4.19 On this view, the Court can apply recompense in the *Morgan Guaranty* case without deciding whether the taxonomy is quantum-based or simply a haphazard patchwork produced by history, and can apply the two-pronged measure of recovery.[300] Only on the benefit-based theory would recompense not apply.

(3) The classification of the specific grounds of repetition or restitution

4.20 The main requirements of repetition of money paid by the pursuer (P) to the defender (D) are as follows.

(1) P must have paid money to D.

(2) Except possibly in certain compulsion cases[301], the payment must have been undue (*indebitum*).

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[298]See 1994 J R 200 at p 201 .

[299]As to non-age, see J A C Thomas, "Minors and Contract: A comparative study" 1972 Acta Juridica 151 (explaining the rescript of Antoninus Pius which is the ultimate foundation of the Scots law); Stair, *Institutions* I,6,33; I,8,6; Bankton, *Institutions* I,9,41; Erskine, *Institutions* I,1,11; *Scott's Tr v Scott* (1887) 14 R 1043; as to mental disability, see Bankton, *Institutions* I,9,41; Gloag, *Contract* (2d ed) p.93; as to juristic persons acting *ultra vires*, see *Sinclair v Brougham* [1914] AC 398 at p 434 per Lord Dunedin; *Stonehaven Magistrates v Kincardineshire C C* 1939 SC 760.

[300]Gloag, p 85 quoted above.

[301]See *Hislop v Dickson Motors (Forres) Ltd* 1978 SLT (Notes) 73 (OH).

(3) The orthodox view is that P must found on one or other of a number of specific grounds of repetition which, in the case of money paid for an existing cause (*causa praeterita*), include inter alia error or improper compulsion.
(4) There must be no equitable or other defence precluding decree of repetition.

4.21 The field of obligations of repetition and restitution may be classified according to the specific grounds of recovery and related forms of action, but the mode of classification, long neglected, is controversial. The following taxonomy or classification-frame is taken from the most recent edition of the standard work, Gloag and Henderson[302]:-

(a) *Condictio indebiti*[303] (claim for recovery of a payment which is not due): payments and transfers made by the pursuer under the erroneous belief that it was due to be paid under a legal obligation to the recipient.

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[302] *Gloag and Henderson, The Law of Scotland* (10th edn) paras 29.2 - 29.8 (repetition) and paras 29.10, 29.11 (restitution).This treatment is much fuller than in previous editions, reflecting recent research.

[303] *Gloag and Henderson, The Law of Scotland* (10th edn) paras 29.4,29.5 (repetition); 29.10 (restitution).

(b) *Condictio causa data, causa non secuta*[304] (claim for something given on a basis which has failed).[305]

(c) *Condictio ob turpem vel iniustam causam*[306] (claim on account of a base or unjust consideration).[307]

(d) *Condictio sine causa*[308] (claim for something retained without legal justification). This is the residual category of repetition and restitution equivalent to the *condictio sine causa specialis* of the *ius commune*.[309]

4.22 **The basis of the *condictio indebiti*.** In fact the foregoing classification is disputed. Critical is the scope and role of the *condictio*

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[304]*Gloag and Henderson, The Law of Scotland* (10th edn) paras 29.3 and 29.11, n 82.

[305]For conflicting views of the definition, scope and role of the *condictio causa data, causa non secuta* contrast (1) R Evans-Jones, "Unjust enrichment and the Third Reception of Roman Law in Scotland" (1993) 109 LQR 663; and R Evans-Jones, "The Dark Side of Connelly v Simpson" 1995 J R 90 with (2) H L MacQueen, "Unjustified Enrichment and Breach of Contract" 1994 J R 137.

[306]*Gloag and Henderson, The Law of Scotland* (10th edn) paras 29.6 and 29.11, n 83.

[307]It has been argued that this *condictio* no longer exists as a separate nominate form of action in modern Scots law but has been absorbed by the *condictio indebiti*. See R Evans-Jones and D McKenzie,"Towards a Profile of the *Condictio ob Turpem vel Injustam Causam* in Scots Law" 1994 J R 60; Evans-Jones, "Retention without a Legal Basis" pp 243 et seq.

[308]*Gloag and Henderson, The Law of Scotland* (10th edn) paras 29.7 and 29.11, n 84.

[309]*Idem;* Scot Law Com DP No 95, vol 1, para 3.8.

indebiti.[310] On the orthodox view, it covers only payments or transfers made in error as in category (a) above and the onus is on the payer or transferor to aver and prove affirmatively that he paid in error.

4.23 On the other hand Professor Robin Evans-Jones argues:

> "as its name suggests, the cause of action in the *condictio indebiti* is constituted by the fact that a transfer was undue (*indebitum*) subject to a defence, provable by the transferee, that the transferor knew that he was not obliged to make the transfer. Founding on this formulation the *condictio indebiti* is also given to recover an undue transfer made under compulsion...".[311]

Put another way, the *condictio indebiti* is not confined to error but "should be seen as the claim to recover all transfers (made to discharge a debt or duty) which were not due"[312]. It therefore comprehends not only (a), but also (c) and most cases of (d) above.[313] On this view a *condictio indebiti* lies without proof of the payer's error, though his knowledge that the debt was undue is a defence.

4.24 **The acceptance of error as a specific ground of repetition or restitution.** In our

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[310]See R Evans-Jones, "Some Reflections on the Condictio Indebiti in a Mixed Legal System" (1994) 111 SALJ 759; Evans-Jones, "Retention without a Legal Basis" pp 227,233.

[311]Evans-Jones, "Retention without a Legal Basis" p 227.

[312]Evans-Jones and McKenzie, "Condictio ob Turpem" 1994 J R 60 at p 75.

[313]See on this du Plessis and Wicke, 1993 SLT (News) 303.

Discussion Paper No 95 we argued that the weight of authority favours the orthodox view.[314] In the old law, when payment was made *sine causa,* error was presumed[315], but nowadays the payer-pursuer must aver and prove affirmatively that he paid in error and what the error was.[316]

4.25 In *Morgan Guaranty* the Inner House seemed also to favour the orthodox view. Lord President Hope observed:

> "In my opinion the essentials of the condictio indebiti are that the sum which the pursuer paid is not due and that he made the payment in error."[317]

Lord Clyde said that an ingredient of the *condictio indebiti* is that the payment should have been made in the mistaken belief that it was due.[318] Lord Cullen's remarks also appear to assume that error is necessary for a *condictio indebiti*.[319]

4.26 The Court regarded a *condictio indebiti* based on error as only one (albeit the most important in practice) of the forms of action or remedies for repetition and express mention was

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[314]See Scot Law Com. DP No. 95, vol 1, Pt II; vol 2, paras 2.7 and 2.30 - 2.40.

[315]*Carse v Carrick* (1778) Mor 2931 at p 2933.

[316]*Miller v Campbell* 1991 GWD 26-1477 (Extra Div).

[317]1995 SLT 299 at p 316A,B; see also at p 310B: "In my opinion the *condictio indebiti* is available for the recovery of money paid or property transferred under an obligation which is void but was erroneously thought to be valid".

[318]1995 SLT 299 at p 318B.

[319]1995 SLT 299 at p 321F.

also made of the *condictio causa data causa non secuta* and the *condictio sine causa*.[320]

4.27 **Payments in doubt.** The *Morgan Guaranty* case does not however settle the question whether or not a payment in doubt should be construed as made in error and recoverable. Du Plessis and Wicke[321] explain that on one view, paying in error means paying without knowing that the debt is undue. A payment in doubt whether the debt is due would be a payment in error because doubt excludes knowledge. On another view, paying in error implies a false opinion or belief that the payment is due. A payment in doubt whether the debt is due would lack the requisite opinion or belief and so would be irrecoverable by *condictio indebiti*.[322] The learned authors argue[323] that *Balfour v Smith & Logan*[324] shows that payments under doubt as to liability are treated as made under error. But in that case it does not seem that the payer was any longer in doubt as to his liability at the time of payment.[325]

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[320]1995 SLT 299 at p309 H,I per Lord President Hope; at p 321F per Lord Cullen.

[321]J E du Plessis and H Wicke, "*Woolwich Equitable v IRC* and the *Condictio Indebiti* in Scots Law" 1993 SLT (News) 303 at pp 304,305.

[322]*Idem*.

[323]1993 SLT 303 at p 305.

[324](1877) 4 R 454 .

[325]The payer was originally in doubt as to his liability, 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.

(4) The invalidity of a contract through incapacity or *ultra vires* as a ground of repetition or restitution.

4.28 The *condictio indebiti* lies to recover money paid or property transferred under void obligations erroneously thought to be valid.[326] Error as to the existence of the obligation has to be proved.[327]

4.29 **Claim of repetition or restitution BY an incapax (natural or juristic person).** Outside the *condictio indebiti*, the ground of the invalidity of an obligation may in some cases supply a policy reason for treating the enrichment as unjustified and redressible by repetition or restitution. For example, an enrichment claim **by** an incapax (natural or juristic person) for recovery of money or property is actionable by repetition or restitution.[328] Knowledge of incapacity or *ultra vires* does not bar recovery; error as to capacity or *vires* is not required.[329] It seems to follow that, in an enrichment claim **by** an incapax, the specific ground of recovery is simply the want of capacity or *vires* which renders the obligation void.

4.30 **Claim of repetition or restitution AGAINST an incapax.** *Haggarty v Scottish TGWU*[330]

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[326]Scot Law Com DP No 95, vol 2, paras 2.204 - 2.206.

[327]*Ibid* paras 2.33 - 2.36.

[328]*General Property Investment Co v Matheson's Trs* (1888) 16 R 282.

[329]*Idem*.

[330]1955 SC 109.

suggests that a *condictio indebiti* lies **against** an incapax for recovery of money or property paid or transferred in error if the incapax is a juristic person (or voluntary association such as a trade union) demanding the money *ultra vires*. This authority is difficult to reconcile with the *Stonehaven Magistrates* case considered below which suggests that recompense is the relevant obligation and remedy.

4.31 **Claim of recompense <u>AGAINST</u> an incapax.** As we indicated above,[331] whereas in the Inner House the pursuers relied primarily on repetition under the *condictio indebiti* with recompense as an alternative ground of appeal, in the Outer House, the pursuers had relied on recompense based on *Magistrates of Stonehaven v Kincardineshire County Council*.[332]

4.32 It is not altogether easy to understand the reasons why the Inner House rejected recompense and preferred repetition (*condictio indebiti*) as the appropriate remedy or doctrine.[333]

4.33 **Whether loan in *Stonehaven* paid under prior contractual obligation?** The first and most important was that *Magistrates of Stonehaven v*

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[331]See paras 2.05 - 2.08.

[332]1939 SC 760. See 1995 SLT 299 at p 309E-G per Lord President Hope; at p 318G per Lord Clyde; at p 321A-C per Lord Cullen.

[333]1995 SLT 299 at p309H-J ;310B-E per Lord President Hope; at p318L-319F per Lord Clyde; at p 321D,E per Lord Cullen.

Kincardineshire County Council[334] could be distinguished because, in Lord President Hope's words:

> "in that case the transaction was one of loan. The money was not paid by the lender to the local authority in implement of any obligation to pay it which was assumed to exist between them. Repetition under the condictio indebiti would not therefore have been appropriate, leaving aside altogether the problem which would have been created, if applied to this remedy, by the error of law rule". [335]

In similar vein, Lord Clyde remarked:

> "the *Stonehaven* case did not concern the recovery of money paid in satisfaction of a debt erroneously believed to have been due when it was not due but related to the recovery of money paid by way of loan in what was apparently a voluntary transaction. The claim was then not one for the repayment of an indebitum. So the solution was found inthe form of a claim for recompense".[336]

Concurring Lord Cullen said:

> "I do not consider that the remedy of recompense is appropriate in the present case. The critical point of distinction between it and the *Magistrates of Stonehaven* is that in the latter case the payments made by the lender, for the recovery of which it was envisaged that the remedy of recompense would have been available, were not made in implement of a prior contractual obligation. Hence it was not a claim for the recovery of an indebitum".[337]

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[334]See 1995 SLT 299 at p 309E-G per Lord President Hope; at p 318G per Lord Clyde; at p 321A-C per Lord Cullen.

[335]1995 SLT 299 at p 310D,E.

[336]1995 SLT 299 at p 319B. He observed that the *Morgan Guaranty* case did not fall to be categorised under the headfing of recompense.

[337]*Ibid* at p 321D,E.

4.34 The proposition that the lender's claim in *Stonehaven Magistrates* was not one for the repayment of an *indebitum* seems open to question. We doubt whether the court's assumption is warranted that in *Stonehaven Magistrates* the payment of the money by the lending bank to Kincardineshire County Council was not preceded by a contract to advance the money upon loan.

4.35 The contract of loan of money (*mutuum*) was classified among the real contracts in Roman law (ie did not come into effect before payment)[338], and an executory contract to advance money upon loan was not binding. In Scots law, while strictly speaking loan is still a real contract, an executory contract to advance money upon loan is competent and enforceable[339]. The reports of the *Stonehaven Magistrates* case do not state expressly whether the loan payment was preceded by a contract to advance money upon loan but it seems most unlikely that it was not. It would surely be most unusual for a bank to give a loan to a local authority without a prior agreement to do so.

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[338]Zimmermann, *The Law of Obligations* 163: "Roman law never merged mutuum, pactum de mutuo dando and interest stipulation into a single consensual contract to be transformed into a bonae fidei iudicium. A mere pactum de mutuo dando remained unenforceable...".

[339]Erskine, *Institute* III,1,17; *Baron Hume's Lectures* vol II p 125; *Stair Memorial Encyclopaedia* vol 13, sv "Loan", para 1708. It is possible that the contract is not enforceable against the lender by way of specific implement (Gloag, *Contract* 2d edn p 655) but it is enforceable against him by damages (cf Walker, *Civil Remedies* p 798).

4.36 **Whether recompense for recovery of money paid to an incapax rests on principle.** Second, *Stonehaven Magistrates* holds that in a recompense claim for recovery of money paid to an incapax (ie a local authority acting *ultra vires*) under a contract void for incapacity, the payer's knowledge of the payee's incapacity to make the contract does not bar recovery.[340] In *Morgan Guaranty* the fact that error of law was not a bar provided a tactical reason for the pursuer relying on recompense for recovery of money paid to an incapax, at least at the level of the Outer House which could not overrule the error of law rule. In Lord President Hope's view, this illustrated the way in which that rule has distorted the orderly development of our law of unjustified enrichment.[341]

4.37 There may be a historic reason of principle, and not merely a tactical reason, why a pursuer should be entitled to rely on recompense for recovery of money paid to an incapax. This turns on the measure of recovery applicable in recompense. Gloag[342] states that where money is paid to a minor incapax, recompense lies either (1) if "the money is still part of the minor's estate"

[340]In that case the third party lender could recover even though he "knew the statute law governing the County's power to borrow, and therefore he was aware that the transaction was *ultra vires*": 1939 SC 760 at 769 per Lord President Normand. In *Morgan Guaranty*, Lord Cullen said (1995 SLT 299 at p 321E) that the Court did not require to decide the question whether, in a case of the *Stonehaven* type, the lender's knowledge of the borrower's incapacity barred recompense.

[341]1995 SLT 299 at p 309.

[342]*Contract* (2d ed) p 85.

(ie "value surviving") or (2) "has been expended in a manner profitable to him", ie *in rem versum*. If it were otherwise and full recovery were allowed in an action of repetition, recovery from an incapax could in substance operate as an indirect means of enforcing the void transaction against him. It would for example be pointless for the law on personal incapacity to invalidate contracts of loan to minors if enrichment law were to allow the lender to recover the money in full by a claim in repetition.[343] Gloag's two-pronged test of *quantum lucratus* ensures that the doctrine of personal incapacity is not undermined.

4.38 We have argued elsewhere[344] that *quantum lucratus* is over-protective and arbitrary but it is a means of reconciling two fundamental doctrines namely, that of incapacity, which requires that the transactions of an incapax should not be enforced against him and that of redressing unjustified enrichment, which requires that the incapax should restore windfall benefits obtained under a contract void through incapacity .

4.39 **Absence of relevant authority?** Third, the Court said that they had not been referred to any case of recompense for recovery of money paid

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[343]This reasoning may seem inconsistent with *Colin Campbell Ltd v Pirie* 1967 SLT (Sh Ct) 49 at p 53 but illegality differs from incapacity and *ultra vires*.

[344]See our *Report on the Legal Capacity and Responsibility of Minors and Pupils*, Scot Law Com No 110 (1987), paras 3.34 - 3.36.

under a supposed obligation under a contract found to be void.[345]

4.40 As we mentioned above,[346] recompense is the historical successor of the civilian *actio in quantum locupletior factus est*. The authorities cover cases of recompense for recovery of money paid under a supposed obligation under a contract found to be void through incapacity. Indeed the classic example is a loan of money to a child incapax. The *Morgan Guaranty* case throws doubt on these cases. It has been suggested[347] that the classification of such cases under recompense derives from a peculiarity of Roman law and from the failure of Scots law to receive or develop a *condictio obligandi causa*.[348]

(5) The *condictio indebiti* and the *Woolwich* doctrine on recovery of benefits conferred pursuant to an *ultra vires* demand

4.41 In the *Morgan Guaranty* case, Lord President Hope said that the effect of the decision in that case:

> "will require to be worked out in subsequent cases, but in one important field it has already been anticipated, although on other grounds, by developments in English law. In

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[345]1995 SLT 299 at p 310E per Lord President Hope.

[346]See para 4.18 above. The development can be traced through the authorities noted at footnote 286.

[347]Evans-Jones, "Retention without a Legal Basis" p 235.

[348]See D.12.1.19.1. A claim to recover money paid or property transferred which failed to achieve its purpose of constituting an obligation.

the *Glasgow Corporation* case the court was obviously much troubled by the effect on other transactions if a change in the interpretation of an Act of Parliament were to enable a party to open up a transaction which had been settled and completed on the law as it was then understood. The typical example might be thought to be where an unlawful demand for the payment of a tax or some other duty made by a public authority has now been found by judicial decision to have been unlawful. In the *Woolwich* case it has now been held, for English law, that there is a prima facie right in such a case to recovery. By overruling the decision in *Glasgow Corporation v Lord Advocate* we will be achieving the same result by reference to the principles of Scots law. I regard that as satisfactory, because it would be inequitable that a remedy which is now available in England in this important field of transactions between the citizen and a public authority should be denied here on the ground that it was not permitted by our law. By removing the error of law rule we will be providing a remedy which will prima facie be available in these cases, but whether it will or will not be given will depend in each case on considerations of equity."[349]

4.42 Several comments may be made on this passage. First, it seems misleading to say that the decision in *Morgan Guaranty* has been anticipated on other grounds in English law by the decision in the *Woolwich* case[350]. The decision in *Morgan Guaranty* holds that the fact that an undue payment was made under an error of law as to the payer's liability does not bar a claim for repetition of the payment (a *condictio indebiti*) based on the specific ground that the undue payment was made in error. By contrast, the decision in the *Woolwich* case introduces a new specific ground

[349] 1995 SLT 299 at pp 315J-316A.

[350] *Woolwich Equitable Building Society v IRC* [1993] AC 70 (HL affg CA), revg [1989] 1 WLR 137.

of recovery in English law, namely that an undue payment of money made by a citizen to a public authority by way of tax or levy pursuant to an *ultra vires* demand is prima facie recoverable by the citizen as of right. This ground applies where the payment is not made in error or mistake as indeed was the case in *Woolwich*.[351]

4.43 Second, there were two grounds of decision in *Glasgow Corporation v Lord Advocate*.[352] One was the decision that a *condictio indebiti* does not lie where the payment was made under error of law.[353] It is this ground which was expressly overruled in *Morgan Guaranty*.

4.44 The other ground of decision in *Glasgow Corporation* was the decision (following English cases[354]) holding that a taxpayer does not have an automatic right, based on the constitutional principle of no taxation without Parliamentary authority enshrined in Article 4 of the Bill of Rights, to recover from the Crown undue tax paid in error.[355] We think that this ground of decision,

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[351]The plaintiff buiding society did not pay under any mistake; it had all along objected to making the payment on the ground that the regulations purportedly authorising the Inland Revenue's demand were *ultra vires*.

[352]1959 SC 203 at p 230 per Lord President Clyde.

[353]1959 SC 203 at pp 231 - 233.

[354]The Crown relied on *National Pari-Mutuel Association v The King* (1930) 47 TLR 110 (CA) and *William Whiteley Ltd v The King* (1909) 101 LT 741; and contended that *Attorney-General v Wilts United Dairies* (1921) 37 TLR 884 was not in point.

[355]See *ibid* at pp 230,231.

based largely on English authority, was undermined by the House of Lords' decision in the *Woolwich* case.

4.45 In *Morgan Guaranty*, Lord President Hope said that by overruling *Glasgow Corporation*, the Inner House "will be achieving the same result" [scil. as *Woolwich*] "by reference to the principles of Scots law".[356] This proposition is somewhat surprising since in *Morgan Guaranty* neither the problem of payments of *ultra vires* levies to public authorities nor the constitutional argument based on the Bill of Rights 1689, article 4, was addressed by counsel or judge. Later he said that by removing the error of law rule the Inner House will be providing a remedy which will prima facie be available in cases of undue payment of tax.[357]

4.46 As we understand it, however, the error of law rule was a defence which barred repetition only in cases where the ground of repetition was error. If that is right, then the Court's decision in *Morgan Guaranty* removing the error of law rule or defence will enable actions of repetition based on error to succeed. The decision does not by itself add a new ground of repetition equivalent to the *Woolwich* ground applying in cases in which (like *Woolwich* itself) the payment was not made in error.

4.47 There are however dicta in *Morgan Guaranty* which could have such a liberating effect as to enable the Court to evolve a specific ground

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[356]1995 SLT 299 at 315L.

[357]*Ibid* at p 315L,316A.

or grounds of repetition which would enable repetition to be granted in a case of the *Woolwich* type. As we have seen, in *Morgan Guaranty* the Court deduced the error requirement from the need in a repetition claim to negative an intention of donation on the part of the payer at the time of payment.[358] In developing Scots law incrementally, it would be open to the Court to recognise as a specific ground or grounds of recovery other sets of facts which negative an intention of donation, and these could include payment to a public authority made pursuant to an *ultra vires* demand.

(6) Development of law by recognition of new grounds of recovery

4.48 At first blush, the court's confirmation in *Morgan Guaranty* of the traditional view that error is a specific ground of recovery seems to commit Scots law to a system of narrowly defined specific grounds (eg error, compulsion, illegality, and the like). New grounds can be recognised and find a niche in the taxonomy as a sub-category of the residual *condictio sine causa*[359], which is the way in which the learned editors of a standard text-book have recently treated the new ground recognised by the *Woolwich* case.[360]

4.49 Allied to this are the questions of whether and how far it is right to rely on English

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[358]1995 SLT at pp 315E, 316B per Lord President Hope; at p 322D per Lord Cullen. See para 2.37 above.

[359]See para 4.21 above, head (d).

[360]*Gloag and Henderson, The Law of Scotland* (10th edn) para 29.7.

authority on "unjust factors", and indeed English authority generally, in developing the law. On this, views seem to differ.[361] On the one hand, in *Morgan Guaranty*, the Court paid regard to developments in Common Law systems[362]. On the other hand, the *Morgan Guaranty* case can be seen as an express and unambiguous affirmation of the autonomy of the Scots law of unjustified enrichment. Subsequently Lord President Hope has emphasised that the "common law of unjustified enrichment in Scotland is not the same as its equivalent in England, nor are the remedies."[363]

4.50 An extremely important question, highlighted by both the *Woolwich* and *Morgan Guaranty* cases, is "whether development by way of the ever-increasing recognition and extension of specific grounds of recovery is the hallmark of a

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[361]Contrast Evans-Jones, "Retention without a Legal Basis" with the continued citation of English cases in *Gloag and Henderson, The Law of Scotland* (10th edn) chapter 29 *passim*.

[362]See para 2.15 above. It has been suggested that the *Morgan Guaranty* case should be seen as resting not so much on *Stirling v Earl of Lauderdale* (1733) Mor 2930 but rather on "the modern developments in other jurisdictions... which simply suggests that *Stirling* was a convenient peg on which to hang the decision which the Five Judges wished to adopt...": see A Rodger,"The Use of the Civil Law in Scottish Courts", paper delivered in September 1995 to a Conference on the European Legal Tradition celebrating the Quincentenary of the foundation of the University of Aberdeen.

[363]*Commissioners of Customs and Excise v McMaster Stores (Scotland) Ltd (in receivership)* (1st Div, unreported 26 May 1995) 1995 GWD 23-1281; Transcript p 14.

mature system? Or is it merely the product of haphazard development?" [364]

4.51 From the standpoint of policy and legal principle, what has been called "the modern civilian approach", advocated by Professors Evans-Jones[365] and Zimmermann[366], may have much to recommend it.

4.52 This approach rests on broad grounds of repetition or restitution. Professor Evans-Jones for example has argued in favour of broad grounds of recovery of payments or transfers which (1) fail to achieve their purpose of discharging an obligation (*solvendi causa*), or creating an obligation (*obligandi causa*)[367], or making a gift

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[364]Whitty, "Trends and Issues" 1994 J R 127 at p 135.

[365]See especially Evans-Jones, "Retention without a Legal Basis", passim.

[366]Zimmermann, "Unjustified Enrichment" (1995) 15 OJLS 403.

[367]In other words, "to constitute credit" (*credendi causa*).Thus money paid by way of aliment is recoverable from the alimented person under the law of recompense: Scottish Law Commission, Consultative Memorandum No 22 on *Aliment and Financial Provision* (1976) vol 2, para 2.79. Money paid to an incapax is (or was until *Morgan Guaranty*) also recoverable under recompense. This classification has been criticised by Evans-Jones, "Retention without a Legal Basis" p 235 on the ground that money lent to an *incapax* should be recoverable by repetition under the modern equivalent of the *condictio obligandi causa*, which Scots law did not receive.

(*donandi causa*), as the case may be, or (2) are made in response to improper compulsion.[368]

4.53 A system of specific grounds is very like the English system of "unjust factors". At the seminar on 22 October 1994, Professor Zimmermann, in advising against the adoption by Scots law of that English system remarked[369]:

> "A particularly influential classification is the one proposed by Peter Birks[370] and, more recently, elaborated upon by Andrew Burrows.[371] They refer to enrichment 'by subtraction': the plaintiff has to connect himself to the defendant's enrichment by showing that the defendant's gain corresponds with a loss to himself. In addition, however, the plaintiff has to establish that the enrichment happened in circumstances rendering it 'unjust' in the eyes of the law. A full typology of 'unjust factors' is thus required in order to determine when restitution can be granted. These unjust factors include mistake, ignorance, duress, exploitation, legal compulsion, necessity, failure of consideration, illegality, incapacity, *ultra vires* demands by public authorities and the retention of the plaintiff's property without his consent.[372]
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> "It may well be that the compilation of this kind of list is a particular convenient way of organizing the casuistry of the English common law. In comparison with the modern civilian approach, and viewed against the background of the principle of unjust enrichment, it does

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[368]Evans-Jones, "Retention without a Legal Basis" p 235.

[369]Zimmermann, "Unjustified Enrichment" (1995) 15 OJLS 403 at pp 415,416.

[370]*An Introduction to the Law of Restitution* (1989, revised paperback edition).

[371]*The Law of Restitution* (1993) at 16 sqq.

[372]The list has been taken from the headings of chapters 3 to 13 in Andrew Burrows's book.

not, however, appear to be a scheme distinguished by its elegance. In the first place, it is not very tidy. In most cases we are dealing with a situation where a transfer has occurred. Ignorance, however, presents an exception.[373] Secondly, it is not comprehensive. New unjust factors may be recognized. The law remains uncertain. Thirdly, it requires courts and legal writers to analyse ten or even more specific grounds of restitution. Several of them (mistake, duress, exploitation) throw up formidable problems of delimitation. Fourthly, the fragmentation is quite unnecessary. Placing the focus on the single issue of 'transfer without legal ground' does not lead to runaway liability. The civil law systems provide the proof. And fifthly: insistence on specific unjust factors does not contribute to the internal economy of the legal system. For it leads to an unfortunate duplication of problems. Mistake, in certain circumstances, invalidates the contract. Mistake also provides the basis for a claim of restitution. What is the relationship between these two inquiries?[374] Why deal with one and the same issue in two different contexts? Why develop two different sets of rules in order to determine the sphere of operative mistakes? It is difficult to see why the law of unjustified enrichment should be saddled with the task of sorting out the fate of the contractual relationship between recipient and transferor.

"All in all, therefore, it is hardly conceivable that a legal system engaged with the task of rationally reorganizing its law of unjustified enrichment should take its lead from English jurisprudence. Scots law, the future direction of which we have come together to contemplate, has all the less reason to do so, since the Institutional writers have implanted in it the germ of the modern civilian enrichment-by-transfer claim:

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[373]On ignorance see Birks above n 78 at 140 sqq; Burrows above n 79 at 139 sqq; but see Goff and Jones above n 72 at 107 sq.

[374]Obviously, the baseline has to be (as in the civilian systems) that there can be no restitution if the contract is valid.

the *condictio indebiti*.[375] The same, incidentally, applies to modern Roman-Dutch law in South Africa.[376]"

4.54 The approach of Professors Zimmermann and Evans-Jones is a logical development of the *condictiones*. It lays down very broad grounds (eg failure to discharge an obligation) for showing why an enrichment of the defender at the pursuer's expense is unjustified ie why the enrichment should be redressed and repetition or restitution allowed.

4.55 An even more radical alternative has been suggested by Dr Eric M Clive, in his *Draft Rules on*

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[375] Cf Jacques du Plessis, Hartmut Wicke "*Woolwich Equitable v IRC* and the *Condictio Indebiti* in Scots Law" (1993) *Scots Law Times (News)* 303 sqq; Robin Evans-Jones, "From 'Undue Transfer' back to 'Retention Without a Legal Basis' (the *condictio indebiti* and *condictio ob turpem vel iniustam causam*)" in Robin Evans-Jones (ed), *The Civil Law Tradition in Scotland* (1995). The *condictio indebiti* does not, of course, apply where someone wishes to rescind a contract because of breach of contract on the part of the other party and consequently wants to recover what he has already handed over. According to English law, this is a case dealt with as part and parcel of the law of restitution. In Germany, contractual remedies are provided. For a comparative analysis, see Englard above n 24 at nn 132 sqq. As far as Scotland is concerned See Robin Evans-Jones, Johann Andreas Dieckmann, Robin Evans-Jones, "The Dark Side of *Conelly v Simpson*", 1995 *Juridical Review* 90ff.

[376] D P Visser, in D Hutchison (ed) *Wille's Principles of South African Law* (8th ed, 1991) at 630 sqq (636 sq); Wouter de Vos, *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (3rd ed, 1987) at 153 sqq. Most recently, cf D H van Zyl, "The General Enrichment Action is Alive and Well" (1992) *Acta Juridica* 115 sqq, On the general enrichment action that once existed in classical Roman-Dutch law see *Law of Obligations* above n 3 at 885 sqq; Visser above n 38 at 370 sqq.

Unjustified Enrichment and Commentary (Paper for Seminar on 22 October 1994) published as an appendix to the present Discussion Paper. Dr Clive's approach takes its inspiration, not from the *condictiones*, but from recompense. On this approach an enrichment of the defender at the pursuer's expense is unjustified only if the defender can rely on a specific legal ground for his enrichment. The emphasis is not on the impoverished pursuer establishing a specific ground of redress of the enrichment (an "unjustified if" approach) but on the enriched defender establishing a ground for its retention (an "unjustified unless" approach).

4.56 Thus although the *Morgan Guaranty* case made very considerable advances, there is a view that deep-rooted structural defects remain in our law on unjustified enrichment and that reform can probably only be eradicated by comprehensive legislation.

4.57 **Summary.** The *Morgan Guaranty* case is important for the further development of the Scots law of unjustified enrichment in the following ways.

4.58 (1) The court was concerned to affirm that, as a general rule, the remedies of repetition and restitution are based on the principle of unjustified enrichment[377].

(2) The court recognised that the taxonomic structure of Scots enrichment law (in particular the boundaries between repetition, restitution and

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[377]See paras 4.2 - 4.5.

recompense) is not satisfactory. It did not - and indeed could not within the bounds of a single case - clarify the basis of that taxonomy, as to which there are several theories[378].

(3) The judicial statements in *Morgan Guaranty* holding that error is an essential ingredient of a *condictio indebiti* confirm the orthodox view that the payer-pursuer must aver and prove affirmatively that he paid in error and what the error was. But a *condictio indebiti* based on error was recognised as only one (albeit the most important in practice) of the forms of action or remedies for repetition and express mention was made of the *condictio causa data causa non secuta* and the *condictio sine causa*.[379]

(4) The *Morgan Guaranty* case does not however settle the question whether or not a payment in doubt should be construed as made in error and recoverable.[380]

(5) We doubt whether the court in *Morgan Guaranty* were correct in law to distinguish the decision in the *Stonehaven Magistrates* case (which held that recompense lay for recovery of a loan paid to a local authority borrowing *ultra vires*) upon the ground that the lender's claim in *Stonehaven Magistrates* was not one for the repayment of an *indebitum*. There may be a historic reason of principle, and not merely a tactical reason, why a pursuer should be entitled to rely on recompense for recovery of money paid to an incapax. We have criticised that principle elsewhere as over-

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[378]See paras 4.6 - 4.19.

[379]See paras 4.20 - 4.26.

[380]See paras 4.28 - 4.29.

protective but it is a tenable principle nonetheless.[381]

(6) The decision in *Morgan Guaranty* does not by itself add a new ground of repetition equivalent to the *Woolwich* ground applying in cases in which (like *Woolwich* itself) the payment was not made in error. It therefore does not seem to achieve the same result as the *Woolwich* case. However dicta in the *Morgan Guaranty* case could have such a liberating effect as to enable the court, in developing Scots law incrementally, to recognise as a specific ground or grounds of repetition sets of facts which, like error, negative an intention of donation, and these sets of facts could include payment to a public authority made pursuant to an *ultra vires* demand.[382]

4.59 **Future action.** Although the decision in *Morgan Guaranty* made very significant advances in developing the Scots law of unjustified enrichment, it also shows how difficult it is for the courts to get rid of unsatisfactory features in the present law, especially deep-rooted structural faults. We have therefore decided to prepare a discussion paper reviewing the whole of the Scots law of unjustified enrichment. This would contain a "non-binding" statement (or "restatement") of the existing law. We also intend to consult on whether comprehensive statutory codification or further piecemeal statutory reforms are desirable. In the case of comprehensive statutory codification, the question would arise of what approach should be

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[381]See paras 4.30 - 4.42.

[382]See paras 4.43 - 4.48.

adopted, eg that of Dr Clive[383], or the approach of German law[384], or some other option. We would emphasise however that we are not committed to either comprehensive statutory codification or further piecemeal statutory reforms.

4.60 **Comments are invited on our proposal to publish a discussion paper setting out a "non-binding" statement (or "restatement") of the existing law on unjustified enrichment and seeking views on whether comprehensive statutory codification or further piecemeal statutory reforms are desirable. (Proposition 2)**

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[383]Clive, *Seminar Paper, 22 October 1994.*

[384]See the König proposals for amending the BGB set out in Zimmermann, "Unjustified Enrichment" (1995) 15 O J L S 403 at pp 425-429.

PART V

SUMMARY OF PROVISIONAL PROPOSALS

1. We seek views on the following propositions:
   (1) We propose that a statutory bar precluding the re-opening of settled payment transactions following a change in the settled view of the law effected by judicial decision should not be introduced.
   (2) This proposal is however without prejudice to the question whether such a bar should be a defence to claims under specific statutes for the refund of overpaid central and local government taxes and rates as discussed in Scot Law Com DP No 100, Part IV.

   (Paragraph 3.51)

2. Comments are invited on our proposal to publish a discussion paper setting out a "non-binding" statement (or "restatement") of the existing law on unjustified enrichment and seeking views on whether comprehensive statutory codification or further piecemeal statutory reforms are desirable.

   (Paragraph 4.60)

Electronically Printed by HMSO Scotland 2/96