Scottish Law Commission

DISCUSSION PAPER NO. 100

RECOVERY OF ULTRA VIRES PUBLIC AUTHORITY RECEIPTS AND DISBURSEMENTS

FEBRUARY 1996

This Discussion Paper is published for comment and criticism and does not represent the final views of the Scottish Law Commission

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Notes

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

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SCOTTISH LAW COMMISSION

DISCUSSION PAPER No 100

ON

RECOVERY OF *ULTRA VIRES* PUBLIC AUTHORITY RECEIPTS AND DISBURSEMENTS

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ABBREVIATIONS

Beatson, "Restitution of Taxes"
J Beatson, "Restitution of Taxes, Levies and Other Imposts: Defining the Extent of the *Woolwich* Principle" (1993) 109 LQR 401.

Birks, *Introduction*
Peter Birks *An Introduction to the Law of Restitution* (Oxford 1985, paperback edn revised, 1989).

Birks, "Restitution from the Executive"
Peter Birks, "Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights" in P Finn (ed), *Essays on Restitution* (1990) 164.

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 Scot Law Com DP No 99.

Cornish, "Colour of Office"
W R Cornish, "'Colour of Office': Restitutionary Redress Against Public Authority" (1987) 14 *Journal of Malaysian and Comparative Law* 41.

du Plessis and Wicke, "*Woolwich Equitable* v *I.R.C.*"
J E du Plessis and H Wicke, "*Woolwich Equitable* v *I.R.C.* and the Condictio Indebiti in Scots Law" 1993 SLT (News) 303.

Evans-Jones, "Reflections on the Condictio Indebiti"
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"
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.

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.

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

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

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

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

LRCBC 48
Law Reform Commission of British Columbia, Report No 48 on *The Recovery of Unauthorized Disbursements of Public Funds*, LRC 48 (1980).

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

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

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

Scot Law Com DP No 99
Scottish Law Commission, Discussion Paper No 99 on *Judicial Abolition of the Error of Law Rule and its Aftermath* (1995).

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

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

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

Zweigert/Kötz/Weir *Comparative Law*
K Zweigert and H Kötz *Introduction to Comparative Law*, translated from the German by T Weir (Oxford, 2d edn, 1987).

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

PART I
INTRODUCTION

Aims of Discussion Paper

1.1 This Discussion Paper[1] has several aims. The first is to explain the common law of Scotland relating to the recovery of *ultra vires* public authority receipts[2].

1.2 The second is to seek views on our provisional decision not to recommend the introduction by statute of a rule providing for the automatic recovery of *ultra vires* public authority receipts (which would be equivalent to the important new rule of English law laid down by the House of Lords in *Woolwich Equitable Building Society* v *IRC*[3], - "the *Woolwich* rule").[4]

1.3 The third aim is to seek views on proposals to amend the statutory provisions for the recovery of the principal central and local government taxes and charges in order to harmonise them with the *Woolwich* rule.[5] Most of these proposals relate to United Kingdom or Great Britain enactments and were recommended by the Law Commission in their Report on *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts*

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[1]This Discussion Paper is issued under Item 2 of our *First Programme of Law Reform* (1965) Scot Law Com No 1, the reform of the law of obligations.

[2]See Part II.

[3][1993] AC 70 (HL affg CA), revg. [1989] 1 WLR 137.

[4]See Part III.

[5]See Part IV.

and Payments[6]. The proposals relating to the refund of overpaid non-domestic rates relate only to Scotland. In both cases, Scottish interests have yet to be consulted.

1.4 Finally we seek views on whether any change should be made on the rule relating to the recovery of *ultra vires* payments out of the Consolidated Fund.[7]

The background to this Paper

1.5 In July 1991, the Law Commission for England and Wales, acting under a reference by the Lord Chancellor, published their Consultation Paper on *Restitution of Payments Made Under Mistake of Law* (Law Com CP No 120).

1.6 **Abolition of the error of law rule.** Part II of Law Com CP No 120 contained provisional proposals for abolition of the rule of English law preventing the recovery of payments made under error of law. These proposals were matched by a similar proposal relating to Scots law in our Discussion Paper on *Recovery of Benefits Conferred Under Error of Law* published in September 1993 (Scot Law Com DP No 95). Thereafter Scots law and English law have diverged. In November 1994, the Law Commission published their Report on *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments* (Law Com No 227), Section B (Parts II - V) of which recommended the abolition by statute of the mistake of law rule in England and Wales. In December 1994, a

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[6](1994) Law Com No 227.

[7]See Part V.

recommendation to that effect was rendered unnecessary by the judgment in *Morgan Guaranty Trust Company of New York* v *Lothian Regional Council*[8]. In that case, an Inner House Bench of Five Judges of the Court of Session in effect abolished the error of law rule in Scots law, and restored the old law as it had existed in the Institutional period. In our Discussion Paper No 99, we consider 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 of the law subsequently changed by judicial decision.

1.7 **Recovery of *ultra vires* public authority receipts.** Part III of Law Com CP No 120 addressed the question whether a citizen, who makes a payment to a public authority in response to an *ultra vires* demand for tax or similar levy, should be entitled to repayment even though neither of the traditional "private law" grounds of mistake and compulsion had been satisfied.

1.8 Under English law as it stood before *Woolwich Equitable Building Society* v *IRC*[9], generally speaking a citizen who made an undue payment of a tax or other impost to a public authority was legally entitled to repayment only if he could rely on a specific "private law" ground of recovery such as mistake of fact or duress, or

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[8]1995 SLT 299, 1995 SCLR 225 (Court of Five Judges) reversing Lord Ordinary 1995 SLT 299 at pp 301-308; 1994 SCLR 213 (OH).

[9][1993] AC 70 (HL affg CA), revg. [1989] 1 WLR 137.

under a specific enactment requiring refund, or under a contractual condition for repayment accepted by the payee authority. These private law grounds were supplemented by the possibility that in cases where the authority had a statutory discretionary power to refund which it refused to exercise in the citizen's favour, the refusal might be quashed in judicial review proceedings.[10]

1.9 In May 1991, the Court of Appeal, in *Woolwich Equitable Building Society* v *IRC*[11], by a two-one majority, held that the citizen had, under "what is now called public law"[12], an automatic right of recovery irrespective of mistake or duress.

1.10 On its publication in July 1991, Law Com CP No 120 gave the Court of Appeal's judgment a warm welcome subject to some criticisms of detail. Law Com CP No 120 argued that the citizen should indeed have a general restitutionary right to recover undue payments made in breach of public law. It also sought views on provisional proposals as to what if any defences and limitation periods were necessary to safeguard public authorities, and as to the harmonisation of specific enactments of recovery of the main central and local government taxes with the new *Woolwich* rule.

1.11 On 20 July 1992, the House of Lords, by a three-two majority upholding the Court of

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[10] *R* v *Tower Hamlets L B C , ex parte Chetnik Developments* [1988] AC 858.

[11] [1993] AC 70 (HL affg CA).

[12] *Ibid* at p 79C per Glidewell LJ.

Appeal's judgment but on different grounds[13], "reformulated the law" and affirmed that a citizen who makes an undue payment of tax to a public authority pursuant to an unlawful demand by the authority has a prima facie right to its restitution.

1.12 The immediate background to Law Com No 120 and to the House of Lords' extensive exercise in judicial legislation was a series of academic articles in the "common law" world arguing in favour of a *prima facie* automatic right of recovery.[14] Particularly influential in both the Court of Appeal and the House of Lords were articles by Professors Birks[15] and Cornish[16] which were the source of arguments presented to the courts and whose contributions, as well as those of the authors of Law Com No 120 (Professor Sue Arrowsmith and Professor Jack Beatson, the Law Commissioner), were expressly acknowledged by Lord Goff.[17] Some of these articles had founded on a series of older English cases which could be

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[13][1993] AC 70 (HL affg CA) Lord Goff of Chieveley, Lord Browne-Wilkinson and Lord Slynn of Hadley; Lord Keith of Kinkel and Lord Jauncey of Tullichettle dissenting.

[14]Thirteen articles and books, published between 1959 and 1991, are referred to by Birks in [1992] *Public Law* 580 at p 591 fn 75.

[15]Peter Birks, "Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights" in P Finn (ed), *Essays on Restitution* (1990) 164.

[16]W R Cornish, "'Colour of Office': Restitutionary Redress Against Public Authority" (1987) 14 *Journal of Malaysian and Comparative Law* 41.

[17][1993] AC 70 at pp 163, 164; 166.

construed as upholding a constitutional right to recovery[18]. The House of Lords however held that a series of English cases since 1888 decided up to the level of the Court of Appeal[19], including cases followed in *Glasgow Corporation* v *Lord Advocate*[20], had required the establishment of the ordinary private law grounds of recovery and that English law required to be changed.

1.13 The two Scottish Law Lords (dissenting) said that reform should be left to Parliament.[21] Although this approach has been criticised, we respectfully think it has much to commend it. It remains to be seen whether Scots lawyers, who have just got rid of the public/private dichotomy in judicial review,[22] would welcome its reappearance,or something like it, which would seem to be the result of treating the *Woolwich* decision as authoritative in Scots law.

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[18]See *Newdigate* v *Davy* (1694) 1 Ld Raym 742; *Campbell* v *Hall* (1774) 1 Cowp 204, 20 State Trials 239; *Morgan* v *Palmer* (1824) 2 B & C 729; *Steele* v *Williams* (1853) 8 Ex. 625; *Hooper* v *Exeter Corporation* (1887) 56 L J Q B 457.

[19]*Slater* v *Burnley Corporation* (1888) 59 LT 636; *William Whitely Ltd* v *The King* (1909) 101 LT 741; *Brocklebank Ltd* v *The King* [1924] 1 KB 647; [1925] 1 KB 52 (CA); *National Pari-Mutuel Association Ltd* v *The King* (1930) 47 TLR 110 (CA); *Twyford* v *Manchester Corporation* [1946] Ch 236; *Sebel Products Ltd* v *Customs and Excise Commissioners* [1949] Ch 409.

[20]1959 SC 203; see para 2.5, fn 14 below.

[21][1993] AC 70 at p 161, per Lord Keith; at pp 193, 194; 196, per Lord Jauncey.

[22]*West* v *Secretary of State for Scotland* 1992 S L T 636 (1st Div).

1.14 ***Morgan Guaranty* and the *Woolwich* rule.** In *Morgan Guaranty*, Lord President Hope said that the Inner House's decision in that case achieved the same result as the decision in *Woolwich* but "by reference to the principles of Scots law".[23] For reasons given in Discussion Paper No 99[24], however, we think that the Court's decision in *Morgan Guaranty* does not by itself introduce in Scots law 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. As we point out in Discussion Paper No 99[25], there are nevertheless dicta in *Morgan Guaranty* from which such a ground might be developed. Thus 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.[26] 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.

1.15 In Part II of this Paper we set out the main common law rules governing repetition of *ultra vires* public authority receipts.

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[23]1995 SLT 299 at p 315L.

[24]See Scot Law Com DP No 99 on *Judicial Abolition of the Error of Law Rule and its Aftermath* (1995) paras 4.41 - 4.47.

[25]See Scot Law Com DP No 99, para 4.47.

[26]1995 SLT at p 316B per Lord President Hope; at p 322D per Lord Cullen.

Cross-border uniformity

1.16 It seems clear that in the domain of a citizen's rights to recover taxes and other public sector levies, it is essential that there should be substantial cross-border uniformity lest tax-payers in one part of the United Kingdom have lesser rights than tax-payers in another part. We have throughout discussed the proper approach to reform with the Law Commission[27] and have reached agreement with them on the broad outlines and many details of the legislation recommended in the short term. We wish to express our gratitude to the Law Commission for their assistance.

Legislation in the short term as agreed with Law Commission: amendment of existing statutory provisions

The approaches to reform

1.17 The Law Commission's Report on *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments*[28] identifies three different approaches to reform - namely, common law development[29], statutory codification[30], and rationalisation of specific statutory provisions[31] against the rather different background of the English common law.

1.18 **The common law development approach.** The Law Commission state that they do not believe that

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[27]See eg Law Com No 227, paras 1.12 and 1.13.

[28](1994) Law Com No 227.

[29]Law Com No 227, paras 8.8 - 8.12.

[30]Law Com No 227, paras 8.13 - 8.19.

[31]Law Com No 227, paras 8.20 - 8.22.

leaving the further development of the *Woolwich* rule entirely to the courts is desirable[32] and that they recommend the adoption by statute of safeguards against the unrestricted operation of the *Woolwich* right[33]. This requires some explanation, however, because in fact the Commission do not recommend any changes to the law applied in claims at common law under the *Woolwich* rule. All their recommendations for legislation, including their recommendations for safeguards (defences or limitation periods), relate to claims to recovery of taxes under specific enactments.[34] So far as we can see, Law Com No 227 leaves the further development of claims at common law under the *Woolwich* rule entirely to the courts.

1.19 In Scotland, the common law is different and there is uncertainty as to the precise nature and extent of the principle or rule equivalent to the English *Woolwich* rule. We argue in Part III that the development of this rule should be left to the courts unless a general codification of Scots enrichment law were to be enacted.

1.20 **The statutory codification of *Woolwich* rule approach.** In Law Com CP No 120, the Law Commission provisionally proposed that:

> "in the case of payments made to a public authority, existing statutory rights of recovery should be rationalised, there should be a general right to recover which should ... subject to special defences..., in addition extend to all payments made pursuant to a

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[32]Law Com No 227, paras 8.12.

[33]Law Com No 227, para 8.11.

[34]Law Com No 227, Section C, *passim*.

> demand made in breach of public law (including those in breach of EC law)..., whether made under statutory or common law powers or levied in excess of statutory authority... and to all other payments made but not otherwise due because of a breach of public law".[35]

We found ourselves unable to agree with this provisional proposal, and much of our work in the intervening period has been expended in trying to devise what in our opinion would be a better approach to reform.

1.21 In the Report - Law Com No 227 - which followed on Law Com CP No 120, however, the Law Commission do not recommend a wide-ranging statutory right of the type just described.[36] For one thing, since Law Com CP No 120 was published, the *Woolwich* case has introduced such a right at common law and ,in the Law Commission's view, legislation enshrining the right in statute is unnecessary. Far from clarifying the common law, it might give scope for increased litigation. Moreover there is a risk that such a general, wide-ranging, statutory right would clash with the existing statutory framework for the collection of most central and local government revenue. The Law Commission believe that the scope of the *Woolwich* principle extends beyond these charges to all charges levied in excess of statutory authority but recommend that these should be left to common law development.

1.22 We welcome this decision of the Law Commission. In Part III of this Discussion Paper

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[35]Law Com CP No 120, para. 5.2(c).

[36]Law Com No 227, paras 8.13 - 8.19.

we set out in detail the arguments which have led us to reject legislation enshrining the *Woolwich* rule in statute and introducing it in Scotland. These arguments differ from those which influenced the Law Commission and require to be separately stated.

1.23 **Specific statutory provisions approach (rationalising enactments on refund of overpaid taxes)**. In their Report[37], the Law Commission recommend a series of specific amendments and replacements of the existing statutory provisions for the recovery of the principal central and local government taxes and charges with the aim of reconciling these with the *Woolwich* principle.

1.24 Again we welcome these recommendations by the Law Commission. In Part IV below, we provisionally propose the same approach for Scots law. This is the more necessary since the enactments mainly concern central government taxes, or cross-border provisions on council tax, which should be the same on both sides of the border. Only the legislation on non-domestic rates and water rates differs from its English counterpart.

Recovery of *ultra vires* public authority disbursements

1.25 In Part V we seek views on the reform of the law on the recovery of *ultra vires* public authority disbursements.[38]

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[37]Law Com No 227, Section C Parts VI - XV.

[38]This topic is dealt with by the Law Commission in Law Com No 227, Section D (Part XVII).

Legislation in the longer term: general review of the Scots law on unjustified enrichment

1.26 Any regime for the recovery of undue payments must balance two conflicting policies, namely, protecting the security of receipts against redressing the recipient's unjustified enrichment. The traditional common law regime emphasises the policy of protecting the security of receipts. It assumes that undue payments should be retained by the recipients unless a specific ground of recovery can be established, normally error or improper compulsion, and even then receipts are protected by defences such as change of position at least in error cases. The *Woolwich* case reverses this policy in the limited class of public authority levies by providing for *prima facie* automatic recovery of undue payments. The policy of security of receipts is downgraded and treated as of mere secondary importance to be promoted only by as yet undefined defences.

1.27 If the *Woolwich* rule were held to apply in Scotland, especially if it were held to apply extensively (eg to all payments made in excess of statutory authority), there would be two radically different restitutionary regimes for undue payments in Scots law. The *Woolwich* rule would provide for a *prima facie* right of recovery of payments of taxes and other levies made to public authorities pursuant to unlawful demands. The other regime would apply to all other cases of "undue payments" and allow for recovery only where the payer establishes one of the traditional common law grounds of repayment, such as error or improper compulsion.

1.28 This duality, in our opinion, would be likely to give rise to considerable uncertainty in defining the scope of the types of public authority recipient, or the types of public authority debt, to which the public law regime of *prima facie* automatic recovery would apply. As we seek to show in Part III below the public/private dichotomy, in our view, is likely to create serious anomalies. These are best avoided if a satisfactory alternative approach to reform can be devised in the longer term.

1.29 One option in the long-term would be to replace the existing grounds of repetition or restitution by a broader ground, or broader grounds, of recovery of the type recently suggested by commentators[39] and referred to in Scot Law Com DP No 99[40]. This option would make a separate rule for refund of *ultra vires* public authority receipts unnecessary and thereby avoid the need to introduce the public/private dichotomy into the law of repetition.

1.30 Our research in the domain of unjustified enrichment has revealed much that is wrong with the present law. At the instigation of the Lord

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[39]See eg R Evans-Jones, "Some Reflections on the Condictio Indebiti in a Mixed Legal System" (1994) 111 SALJ 759; id, "Retention without a Legal Basis"; E M Clive, *Draft Rules on Unjustified Enrichment and Commentary (Paper for Seminar on 22 October 1994)* published as an appendix to Scot Law Com DP No 99; N R Whitty, "Some Trends and Issues in Scots Enrichment Law" 1994 JR 127; R Zimmermann, "Unjustified Enrichment: The Modern Civilian Approach" (1995) 15 OJLS 403.

[40]See Scot Law Com DP No 99, paras 4.51 - 4.55.

Advocate, a one-day seminar on unjustified enrichment was held at the Parliament House, Edinburgh, on October 23, 1993 under the auspices of Strathclyde University Law School and this Commission[41]. We believe that the seminar was successful in stimulating interest in this long neglected area of law and on the way in which it should develop. A main question here is whether the law of unjustified enrichment should be comprehensively codified by statute or left to be developed by the courts assisted by writers with piecemeal reforms being effected by *ad hoc* statutes to remove perceived injustices.

1.31 Some of the problems are structural and go to the root of the common law[42]. To assess the feasibilty of codification, one of our Commissioners, Dr Eric Clive, drafted and circulated a tentative first draft of a code and commentary to a few interested persons in December 1993. The response was mixed but generally favourable. In March 1994, commenting on Scot Law Com D P No 95, the Faculty of Advocates remarked on the uncertain state of the law revealed by the Paper, doubted the ability of the courts to rationalise it and concluded: "The modernisation of

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[41]Four papers were given, three of which have been published in revised form: R Evans-Jones, "Some Reflections on the Condictio Indebiti in a Mixed Legal system" (1994) 111 SALJ 759; H L MacQueen, "Unjustified Enrichment and Breach of Contract" 1994 JR 137, and K G C Reid, "Unjustified Enrichment and Property Law" 1994 JR 167. The other paper was: N R Whitty, "The Taxonomy of Unjustified Enrichment in Scots Law" (unpublished).

[42]eg the division of the law into repetition, restitution and recompense; and the extent of the reception of the *condictiones*.

the law is a matter for Parliament. The Faculty would accordingly favour a statutory formulation of the law of restitution". Further, in April 1994, the Law Reform Committee of the Law Society of Scotland stated that the law required further work and reform and that the rules and commentary should be taken to the stage of consultation. To take the matter further, Edinburgh University Law Faculty and this Commission held a one-day seminar on October 22, 1994, at which four papers were given by distinguished academic lawyers[43] on codification of the law of unjustified enrichment in Scots law and other legal systems. This did not reveal strong support for a binding statutory code. On 1 December 1994, a Court of Five Judges handed down their decision in the *Morgan Guaranty* case[44], a striking exercise in judicial activism which may be thought by some to lessen the need for codification, and certainly carried its own warning against codification.[45] On the other hand, it is difficult to see how the structural defects in the

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[43]Professor Reinhard Zimmermann, University of Regensburg, "Unjustified Enrichment: the Modern Civilian Approach, apropos the Reform of Scots Enrichment Law" now published in (1995) 15 OJLS 403; Professor Daniel P Visser, University of Cape Town, "The Proposals for a Statutory General Enrichment Action in South 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*, which is appended to Scot Law Com DP No 99.

[44]*Morgan Guaranty Trust Company of New York* v *Lothian Regional Council* 1995 SLT 299.

[45]In 1995 SLT 299 at p 320F,G Lord Clyde remarked: "Where the matter is essentially one of equity there may well be more harm than advantage in detailed codification".

present law can be cured otherwise than by a comprehensive statute.

Summary of argument

1.32 The argument in this paper, as read with Scot law Com DP No 99, can be summarised as follows.

(1) The *Woolwich* rule has not, or not yet, been received in Scotland.

(2) The *Morgan Guaranty* case[46] overruled that part of the decision in the *Glasgow Corporation* case[47] which denied repetition of sums paid under error of law but did not overrule that part of the decision in *Glasgow Corporation* which denied that overpaid taxes were recoverable purely on constitutional grounds. It is therefore incorrect to say that the *Morgan Guaranty* case achieved the same result as the *Woolwich* case but by reference to the principles of Scots law[48].

(3) The *Woolwich* case has undermined the authority of that part of the *Glasgow Corporation* case which denied that overpaid taxes were recoverable purely on constitutional grounds. However it is not clear what rule or doctrine is the Scottish equivalent of the *Woolwich* rule.

(4) The Scots law on repetition from public authorities as it stood before the *Woolwich* case is

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[46]*Morgan Guaranty Trust Company of New York* v *Lothian Regional Council* 1995 SLT 299.

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

[48]The dictum to that effect in *Morgan Guaranty Trust Company of New York* v *Lothian Regional Council* 1995 SLT 299 at p 315L was *per incuriam*: see our Discussion Paper No 99, para 4.46.

described in Part II below. It is unsatisfactory for the reasons given in that Part.

(5) We do not think that the *Woolwich* rule should be introduced into Scots law by statute. In Part III below, we explain the reasons why we consider that the introduction of a new ground of repetition limited to public sector debts or public sector bodies (however defined) would not provide the best path to reform. At one level, the reform does not go far enough and it would not be satisfactory to introduce the public/private dichotomy into Scots enrichment law.

(6) At a deeper level, our research has led us to doubt whether development by way of the ever increasing recognition and extension of specific grounds of recovery is the hall-mark of a mature system of restitution of undue payments and transfers or of unjustified enrichment generally. We think that broader grounds of recovery should be developed which, according to some commentators[49], represent the natural development of our civilian common law.

(7) We agree with the Law Commission[50] that the statutory provisions for the recovery of the principal central and local government taxes and charges should be amended in order to harmonise them with the *Woolwich* rule, even though the precise Scottish equivalent to that rule is still uncertain. Such amendments are necessary whatever particular form (eg broad grounds or narrow specific grounds) the reform of the general private law rules take. Accepting with minor modifications the Law Commission's valuable recommendations in

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[49]See para 1.29, footnote 39 above.

[50]Law Com No 227, Section C.

Law Com No 227, we consider the necessary amendments in Part IV.

(8) While the *Auckland Harbour Board* rule[51] - whose status in Scots law is unclear - is in some respects defective, we do not think that it should be reformed by legislation separate from a general codification of the Scots law on unjustified enrichment. In this respect we make the same proposal as the Law Commission[52] though for different reasons. In the event however that consultees favour legislative reform, views are invited on specific reforms in Part V below.

Acknowledgements

1.33 We gratefully acknowledge the help and advice of Professor Jack Beatson, formerly a Commissioner of the Law Commission, Mr Liam Flynn of the Law Commission, Mr Stuart Foubister of the Office of the Solicitor to the Secretary of State for Scotland, and Mr Iain Matheson of Fife Regional Council. We also wish to thank the Law Commission and HMSO for permission to publish extracts from Law Com No 227 in Appendix B.

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[51]*Auckland Harbour Board v The King* [1924] AC 318 (PC) under which *ultra vires* disbursements by central government from the Consolidated Fund, and possibly other *ultra vires* disbursements by public authorities from other public funds, are always recoverable.

[52]Law Com No 227, Section D.

PART II

THE SCOTS LAW BEFORE THE *WOOLWICH* CASE

2.1 The decision of the House of Lords, as well as that of the Court of Appeal, in *Woolwich Equitable Building Society* v *IRC*[1] proceeded on an analysis of the pre-existing law of England. The only Scots authorities cited, namely the *Glasgow Corporation* and *British Oxygen Company* cases[2], had been decided largely on the basis of English authority. What however was the Scots law prior to the *Woolwich* case?

(1) Grounds of repetition

(a) The constitutional principle of automatic recovery

2.2 **The constitutional principle against taxation without Parliamentary authority.** Where a citizen in Scotland pays the Crown undue tax in response to an *ultra vires* demand, and the Crown refuses repayment, there is technically no breach of the letter of the provisions of the Claim of Right 1689 concerning taxation[3], since those provisions merely prevent the Crown from granting revenue-raising powers to third parties without

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[1][1993] AC 70 (HL affg CA), revg [1989] 1 WLR 137.

[2]*Glasgow Corporation* v *Lord Advocate* 1959 SC 203;*British Oxygen Co* v *South of Scotland Electricity Board* 1959 SC (HL) 17; affg 1958 SC 53.

[3]"The Declaration of the Estates of the Kingdom of Scotland containing the Claim of Right and the offer of the Croune to the King and Queen of England"; APS 1689, c 28. This enacts:"the giveing gifts or grants for raiseing of money without the Consent of Parliament or Convention of Estates is Contrary to law".

Parliamentary consent[4]. Those provisions therefore do not in terms apply to a case where the demand is made, and the payment is retained, by or on behalf of the Crown itself.

2.3 Though the Bill of Rights 1689 was not among the pre-Union English Acts applied by the Treaty of Union to Scotland, there is of course no doubt that the principle of no taxation by the Crown or others without Parliamentary consent, enshrined in the Bill of Rights[5] (and relied on in the *Woolwich* case[6]), applies in Scots law as in

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[4]The reason for the difference between the taxation provisions of the Claim of Right and of the Bill of Rights probably lies in the different relations between the Crown and the two legislatures in the seventeenth century. The Crown in Scotland was expected to live off its own revenues but "extraordinary taxation", agreed by the Scottish Parliament, had become regular. See G Donaldson *Scotland: James V to James VII* (1965) p 302; D Stevenson *The Scottish Revolution: 1637-44* (1973) p 42. It seems likely that the abuse struck at by the Scottish provision was the King's alienation to the subject of the power to raise revenues, eg the gift for 16 years by Charles I to the Marquis of Hamilton of the impost on wines, the largest single source of Crown revenues. See D Stevenson "The King's Scottish Revenues and the Covenanters, 1625-1641" (1974) 17 *Historical Journal* 17 at pp 21, 22. Such grants were thought to make resort to extraordinary Parliamentary taxation necessary.

[5]1 W & M, c. 36, Article 4 provides: "That levying money for or to the use of the Crowne by pretence of prerogative without grant of Parlyament for longer time or in other manner than the same is or shall be granted is illegal."

[6][1993] AC 70 (HL) at p 172 per Lord Goff; (CA) at p 97 per Glidewell LJ.

other parts of the United Kingdom[7], and may be implicit in the Claim of Right if it is construed liberally and in its historical context.

2.4 **Scots precursors of the *Woolwich* case.** The *Woolwich* case has few precursors in Scots law. There are two older Scots cases which could be explained as based on the constitutional principle of no taxation without Parliamentary consent, and an implied right of repetition derived therefrom. In neither was the opinion of the judges reported.[8] It would have been possible to construe the *Magistrates of Dunbar* case[9] as based on fundamental constitutional principles, and in particular on an automatic constitutional right to repayment of unauthorised taxes unwarrantably exacted[10]. The

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[7]See eg *Boog* v *Magistrates of Burntisland* (1775) Mor 1991; *Glasgow Corporation* v *Lord Advocate* 1959 S C 203.

[8]*Murray* v *Thomson* (1826) 5 S 183 (repetition ordered of over-charges of sheriff-clerks' fees not sanctioned by the relevant act of sederunt); *Magistrates of Dunbar* v *Kelly* (1829) 8 S 128 (repetition of customs dues on exports of fish levied by burgh ulta vires purportedly under statute; defence of *bona fide* consumption repelled). Distinguished in *Bell* v *Thomson* (1867) 6 M 64 at p 69 where Lord Cowan at p 69 wrongly assumed that the magistrates retained the money. Applied in *Unigate Foods Ltd* v *Scottish Milk Marketing Board* 1975 S C (HL) 75 at p 90 per Lord President Emslie (obiter).

[9](1829) 8 S 128.

[10]The Session Papers disclose that no direct reference was made to broad constitutional principle or the Claim of Right or Bill of Rights. However the sheriff (8 S at p 129) cited *Boog* v *Magistrates of Burntisland* (1775) Mor 1991 in which constitutional principle was relied on and in which *Campbell* v *Hall* (1774) 1 Cowp 204; 20 State Trials 239 was cited, though the case did not involve

constitutional potential of the case was not fully realised and developed perhaps because the grounds of judgment were not reported. With one or two very doubtful exceptions, none of the reported modern Scots cases decided before *Glasgow Corporation* v. *Lord Advocate*[11] on claims for repayment of central government taxes which we have traced lend any support to the existence of a general automatic common law right to repayment.[12] In *Glasgow Corporation* v *Lord Advocate*[13] the First Division held that a taxpayer does not have an automatic right based on Article 4 of the Bill of Rights to recover from the Crown undue tax paid in error.

2.5 **The *Woolwich* case.** This decision, however, based as it was largely on English authority[14], is undermined by the decision of the House of Lords in the recent English case of

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repetition.

[11]1959 SC 203.

[12]*Galletly's Trs* v *Lord Advocate* (1880) 8 R 74; *Lord Advocate* v *Marquis of Ailsa* (1881) 9 R 40; *Russell* v *North of Scotland Bank* (1891) 18R 543. *National Bank of Scotland* v *Lord Advocate* (1892) 30 SL Rep 579; *Alston's Trs* v *Lord Advocate* (1895) 33 SL Rep 278; *Watherston's Trs* v *Lord Advocate* (1901) 3 F 429; *Sprot's Trs* v *Lord Advocate* (1903) 10 SLT 452. Perhaps the only case which could be construed as favouring such a right is *Lord Advocate* v *Marquis of Ailsa* but that related to recovery by set-off.

[13]1959 SC 203.

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

Woolwich Equitable Building Society v *IRC*[15]. That decision affirmed that money paid by a citizen to a public authority by way of taxes or other levies pursuant to an *ultra vires* demand by the authority is *prima facie* recoverable by the citizen as of right.

(b) Specific "private law" grounds of repetition

2.6 **Error: the *condictio indebiti*.** As a general rule, the rules on repetition of sums paid in error under the *condictio indebiti* apply to payments to public bodies as they apply to payments to private individuals. In particular payments made under error are not recoverable. In fact important cases in which the rule precluding recovery of payments made under error of law was accepted[16], as well as the *Morgan Guaranty* case which abolished that rule[17], involved payments to central or local government. The *condictio indebiti* is also the proper common law form of action for the recovery from a local authority of rates paid in error,[18] or for the recovery from a public utility of undue charges purportedly levied under statute and paid

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[15][1993] AC 70 (HL affg CA), revg [1989] 1 WLR 137.

[16]*Bremner* v *Taylor* (1866) 3 S L Rep 24 (OH); *Oswald* v *Magistrates of Kirkcaldy* 1919 SC 147 at p 152 per Lord President Strathclyde; *Glasgow Corporation* v *Lord Advocate* 1959 SC 203.

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

[18]*Bell* v *Thomson* (1867) 6 M 64; see also *McAlister* v *Cove and Kilcreggan Police Commissioners* (1894) 10 Sh Ct Reps 123.

in error[19]. The old requirement of the Scots *condictio indebiti* that the error of fact must be excusable[20] applied equally where the recipient was a public authority[21] but that requirement was abrogated by the *Morgan Guaranty* case in which the defender was itself a public authority.[22]

2.7 **Payment to officers of the court.** Before the *Woolwich* case, the error of law rule applied in Scotland (unlike England) in relation to payments made to officers of the court as it applied in relation to payments to other persons.[23]

2.8 **Improper compulsion.** Where a public authority, by an improper form of compulsion,

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[19]*Dixon* v *Monkland Canal Co* (1831) 5 W & S 445, affg (1830) 8 S 826.

[20]*Wilson and McLellan* v *Sinclair* (1830) 4 W and S 398 at p 409; *Youle* v *Cochrane* (1868) 6 M 427 at p 433; *Balfour* v *Smith & Logan* (1877) 4 R 454 at pp 458, 459; *Agnew* v *Ferguson* (1903) 5 F 879 at p 885; *Duncan Galloway & Co Ltd* v *Duncan, Falconer & Co* 1913 SC 265 at p 271; *Inverness CC* v *Macdonald* 1949 SLT (Sh Ct) 79 at p 80; *Taylor* v *Wilson's Trs* 1975 SC 146 at pp 156, 158; *Bank of New York* v *North British Steel Group Ltd* 1992 SLT 613 (OH); see Scot Law Com DP No 95, vol 2, para 2.33 ff. The requirement was not found in English law. See *Kelly* v *Solari* (1841) 9 M & W 54.

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

[22]1995 SLT 299: see Scot Law Com DP No 99, paras 2.51 - 2.55.

[23]Cf authorities denying any higher duty on officers of the court: *Clyde Marine Insurance Co* v *Renwick & Co* 1924 S C 113 (which expressly rejects the English law); N M L Walker, *Judicial Factors* (1974) p 91; Thoms, *Judicial Factors* (2d edn;1881) pp 99,100. See Scot Law Com DP No 95, vol 1, paras 2.61 to 2.64.

exacts from a person money which is not due, the payment may be recovered. The compulsion may take the form of acts affecting the person (rare since the virtual abolition of civil imprisonment for debt), acts affecting property, or the withholding of goods, services, facilities, licences or other benefits which the public authority is bound by a legal duty to provide for nothing or for less than is paid. The legal basis of this right of repetition was discussed by us in Scot Law Com DP No 95.[24] That treatment has been criticised[25] and the definition and classification of the specific ground or grounds of recovery in compulsion cases is controversial being affected by the wider controversy surrounding the definition and classification of the grounds of repetition and restitution.[26]

2.9 It is important to stress that, in cases where the improper compulsion takes the form of withholding the performance of a legal duty, the duty may arise under common law[27] or statute[28], private law or public law.[29] Scots law has not

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[24]vol 2, Part III.

[25]Evans-Jones and McKenzie, "Condictio ob Turpem " 1994 J R 60; R Evans-Jones, "Retention without a Legal Basis" pp 243-247.

[26]See Scot Law Com DP No 99, paras 4.20 - 4.23.

[27]*Rossie* v *Her Curators* (1624) Mor 9456; *Mushet* v *Dog* (1639) Mor 9456.

[28]*British Oxygen Co* v *South of Scotland Electricity Board* 1959 SC (HL) 17; affg 1958 SC 53.

[29]As to public law, see *British Railways Board* v *Glasgow Corporation* 1976 SC 224 at p 232 per Lord McDonald (Ordinary).

received the English doctrine of extortion *colore officii*[30] (ie by public or quasi-public officers)[31] nor for the purpose of repetition does it treat public law or statutory duties differently from private law or common law duties.[32]

2.10 Tacit threats implied from the circumstances can qualify as extortionate. In the strand of authority relating to payments made to procure the performance of a duty owed for nothing or for less than was exacted, the matter was not explicitly discussed but the emphasis in the judgments in the *British Oxygen Co*[33] and *Unigate Foods Ltd*[34] cases was that the defender payee's monopoly, by itself without an explicit threat of cutting off supply, left the pursuer company with no reasonable alternative but to pay.[35] In the case of "force and fear", it has been recognised *obiter* that extortion may be implied from the

[30]In the *Woolwich* case [1993] AC 70(HL), Lord Keith made observations (at p 160) suggesting that *British Oxygen Co* v *SSEB* 1959 SC (HL) 17 proceeded on the same basis as the *colore officii* cases. Presumably he meant that the payments were elicited by some form of improper pressure.

[31]Goff and Jones *Law of Restitution* (4th edn; 1993) pp 245-250.

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

[33]1959 SC (HL) 17; 1958 SC 53.

[34]1975 SC (HL) 75.

[35]See Scot Law Com No 95, vol 2, para 3.42: see also the comments on the *British Railway Board* case, *ibid* para 3.44.

circumstances rather than expressed in plain terms.[36] As in England, however, it is not at all clear what are the circumstances from which the courts will imply a threat.

(c) Recovery through set-off

2.11 Before the *Morgan Guaranty* case, there may have been an anomalous difference in Scots law between the grounds of the remedy of direct repetition of payments in response to unlawful demands and the grounds of the remedy of giving credit for such a payment in adjusting accounts. In one case duty paid apparently in error of law was recoverable by set-off in circumstances where, because of the (now abolished) error of law rule, repetition would not have lain.[37]

(2) Defences to actions of repetition prior to the *Woolwich* rule

(a) *Bona fide* consumption

2.12 **Error cases.** It seems the better view that the defence of *bona fide* consumption, though available *against* the Crown[38], is not available *to* the Crown in an action for repetition based on error of fact (*condictio indebiti*) at least in a case where the payment is of State revenues of

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[36]*Hislop* v *Dickson Motors (Forres) Ltd* 1978 SLT (Notes) 73 (OH) at p 75 per Lord Maxwell; see Scot Law Com DP No 95, vol 2, para 3.45.

[37]In *Lord Advocate* v *Marquis of Ailsa* (1881) 9 R 40, it was held that where a person paid succession-duty on woodlands which was not due, he was entitled, in an accounting under statute for the duty payable on sales of timber in the future, to credit for the previous undue payments.

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

relatively small amount[39]. In *Earl of Cawdor* v *Lord Advocate*[40], teinds (a type of pecuniary real burden on land payable to a "titular") were paid by a heritor to the Crown under the erroneous belief that the Crown was titular whereas in fact they were payable to another person. The heritor and the true titular brought an action for repetition (repayment) to the heritor of the undue payments. The Crown's defence of *bona fide* consumption failed because the Crown had no colourable title on which to based *bona fides*. Three of the four judges doubted (obiter) whether the plea was ever available to the Crown. In the Outer House, Lord Young remarked that[41]:

> "the Crown revenues under the charge of the [Commissioners of] Woods and Forests although in a sense patrimonial estate of the Crown, are in truth during the present reign as they have been in former reigns, simply, and that by statute, part of the public revenues, so that the plea is here in fact urged on behalf of the nation against a private citizen. Now, I venture to doubt whether the doctrine on which the plea rests, and which is in its character a benignant doctrine, having for its object the avoidance of private and individual hardship (though it may consistently extend to companies and associations), is available to the nation or to Crown officers acting for the nation. It was urged on behalf of the Crown that the doctrine has been enforced in favour of individuals against the Crown, but that is obviously consistent with its character and policy".

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[39] *Earl of Cawdor* v *Lord Advocate* (1878) 5 R 710 at p 712 per Lord Young(obiter);at pp 714, 715 per Lord Justice-Clerk Moncreiff (obiter). Lord Gifford concurred(at p 718). Only Lord Ormidale (at pp 716,717) seemed to think that the defence was available to the Crown, though he reserved his opinion.

[40](1878) 5 R 710.

[41](1878) 5 R 710 at p 712 (*obiter*).

2.13 On reclaiming, Lord Justice-Clerk Moncreiff observed[42]:

> "It is maintained, in support of the [plea of *bona fide* consumption] that as these teinds now form part of the ordinary revenue of the country the equitable considerations on which the plea is founded cannot apply, seeing that the deficiency created by repayment of what was unduly levied can always be supplied from other public sources. To the extent of regretting that the Crown officials should have departed from the well-established practice of not seeking to retain what they find they levied unjustly I have entire sympathy with the plea. I think the duty of all revenue officials in such cases is that of prompt and immediate restitution, and I cannot understand why the Crown has not in this instance followed that course. The plea has also some solid foundation on which to rest. For the Crown is in this matter simply trustee for the taxpayers, and it is in their interest solely that this plea can be stated. Now, the additional amount levied on the individual taxpayer which would result from the repayment of this unjust exaction is so inappreciable as not to be worthy of the cognisance of a Court of justice, and the equity, it may be said, with truth, turns the opposite scale.
>
> "But I feel unwilling, unless it is necessary here, to define the extent to which as matter of right the Crown can plead equities of this kind which are competent to ordinary litigants".

As a result of this case, it seems that the Crown did not thereafter plead *bona fide* consumption in actions against it for recovery of teinds[43]. It should be noted that the sums involved were regarded as "inappreciable" and it may be that the

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[42]*Ibid* at pp 714, 715 (*obiter*). Lord Gifford concurred (at p 717). Only Lord Ormidale (at pp 716, 717) seemed to think that the defence was available to the Crown, though he reserved his opinion.

[43]See *Gwydyr* v *Lord Advocate* (1894) 2 SLT 280 (OH).

plea does arise where the amounts are so large as to cause disruption to the Crown's finances.

2.14 This is a rare, perhaps unique, example in Scots law of more stringent rules of repetition applying in claims against the Crown than apply in claims against private citizens. The *obiter dicta* in *Earl of Cawdor* v *Lord Advocate*[44] have not influenced the law outside actions for the recovery of teinds, which are now virtually unknown in modern practice.[45] The dicta were not cited in the *Glasgow Corporation* case.[46] Yet in the circumstances of the *Earl of Cawdor* case, teinds were treated as part of the ordinary revenue of the state.

2.15 The considerations that the Crown as representing the nation is in a special position and should not take advantage of pleas competent to ordinary citizens; that Crown officials should not depart from "the well-established practice of not seeking to retain what they levied unjustly";[47] that "the duty of all revenue officials in such cases is that of prompt and immediate restitution";[48] and that equity demands repayment,

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[44](1878) 5 R 710.

[45]Moreover the question whether the defence of *bona fide* consumption lies in respect of a principal sum of money is controversial: see Scot Law Com DP No 95, vol 2, paras 2.151 - 2.154.

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

[47](1875) 5 R 710 at p 714 per Lord Justice-Clerk Moncreiff.

[48]*Idem*.

were accepted in *Woolwich*. The argument that only small overpayments are recoverable should be irrelevant because it supports "the imperative that, if governments are to exceed their taxing powers, this should be done on the grandest scale".[49]

2.16 **Improper compulsion.** In *Magistrates of Dunbar* v. *Kelly*[50] (an action of repetition of *ultra vires* customs duties paid on goods exported from a royal burgh), it was held that the defence of *bona fide* consumption was not available to the royal burgh where the burgh had erroneously stated in a published custom-roll that the duty was warranted by an Act of Parliament. The underlying principle is not self-evident. It is obvious that the statement by the royal burgh contributed to the payers' erroneous belief that the duty was payable under the statute in question and no doubt it thereby rendered the payers' error excusable. It is not, however, clear why the statement should have deprived the royal burgh of the defence of *bona fide* consumption.

2.17 In the *Unigate Foods Ltd* case[51], which related to overcharges wrongfully exacted by the monopolistic statutory board from the pursuers who had no alternative but to pay, Lord President Emslie relied (*obiter*, it is thought) on the *Magistrates of Dunbar* case for the proposition that

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[49]Cornish, "Colour of Office" (1987) 14 J Mal & Comp Law 41 at p 52.

[50](1829) 8 S 128. See para 2.4 above.

[51]*Unigate Foods Ltd* v *Scottish Milk Marketing Board* 1975 SC (HL) 75.

the defence of *bona fide* consumption provided no answer to a demand for repayment.[52]

2.18 **Conclusion.** From these authorities, it seems the better view that the defence of *bona fide* consumption is not available to the Crown in some cases of error involving small amounts nor where payment is made in response to an *ultra vires* demand and under an improper form of compulsion, but the matter is not free from doubt.

(b) Equitable defences in *condictio indebiti* for error: change in composition of tax or rate payers

2.19 Before the *Woolwich* case, equitable defences generally were in principle applicable in actions for repetition of sums paid in error based on the *condictio indebiti* against central and local government, (apart from the defence of *bona fide* consumption).

2.20 **Error.** In stark contrast to the *Earl of Cawdor* case[53] the leading case of *Bell* v *Thomson*[54]

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[52]*Ibid* at p 90.

[53](1878) 5 R 710: see paras 2.12 - 2.15 above.

[54] In *Bell* v *Thomson* (1867) 6 M 64 the primary ground for refusing repetition of rates paid in error was that the ratepayers at the date of action differed from those benefiting from the over-paid rates and so were not enriched. This was applied (*obiter*) in the Outer House in a case relating to central government taxes. In *National Bank of Scotland* v *Lord Advocate* (1892) 30 S L Rep 579 a bank inadvertently took out a licence in respect of a branch for which no licence was needed and paid stamp duty on the licence to the Inland Revenue. Its action for repetition of the duty was held barred by a statutory provision requiring application for relief to be made within 6 months. The Lord Ordinary further held (*obiter*) at p 583

shows an uncompromisingly hostile approach to recovery. In that case it was held that a change in the composition of tax or rate payers, between the date of a mistaken payment of tax or rates and the date of the action for its repetition (*condictio indebiti*) raised after the year of collection, was a defence to that action, at any rate where the taxes or rates were expended in the year of collection so that the tax or rate payers in the next year were not *lucrati*. This defence, which treats central government or a local authority as a kind of collecting agent for taxpayers or ratepayers, is regarded as an equitable defence[55], and was so regarded in the *Unigate Foods Co* case[56].

2.21 It appears that this defence may only apply, or have applied, to actions against local authorities or government departments. An attempt to extend it to recovery from a private company was rejected in the sheriff court.[57] It is notable that the defence was not raised by the Crown in the *Glasgow Corporation*[58] case. Its status has been doubted in the sheriff court.[59] Muirhead argued

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that the bank "must be held to have known that the duty so paid would in ordinary course be used year by year for public purposes" and therefore that the case fell within the decision in *Bell* v *Thomson*.

[55]*Bell* v *Thomson* (1867) 6 M 64, passim.

[56]*Unigate Foods Ltd* v *Scottish Milk Marketing Board* 1975 SC (HL) 75.

[57]*Purvis Industries Ltd* v *J & W Henderson* (1959) 75 Sh Ct Rep 143.

[58]1959 SC 203.

[59]*McAlister* v *Cove and Kilcreggan Police Commissioners* (1894) 10 Sh Ct Reps 123 at p 125 per Sheriff Lees.

that the decision in *Bell* v *Thomson* was based on the ground that the Police Commissioners were not a body corporate, and that as the town councils of police and royal burghs were corporate bodies, the decision did not apply to them.[60] In the *Unigate Foods Co* case, Lord President Emslie said that there was "a real difficulty" in treating the defender milk marketing board "which is a statutory corporation with an anomalous and complex character, as if it were merely a collecting agent for producers".[61] Even before the *Woolwich* case was decided, therefore, it was not clear in what circumstances the court would treat a public authority as a mere "collecting agent" for the general body of its "principals" with the effect that fluctuations, however small, in the composition of that body relieved the authority of liability in repetition.

2.22 The special defence upheld in *Bell* v *Thomson*[62] is inconsistent with the rationale underlying the *Woolwich* rule. The defence probably flows from a mid-nineteenth century benevolent judicial attitude towards local authorities (many of them new creatures of statute) which, in that period, often had slender financial resources and wide and novel functions (eg in public health) which were of enormous social importance. That attitude is no longer justified in modern conditions, if it ever was.

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[60] J Muirhead, *Municipal and Police Government in Burghs in Scotland* (2d edn; 1905) p 618.

[61] *Unigate Foods Ltd* v *Scottish Milk Marketing Board* 1975 SC (HL) 75 at pp 89, 90.

[62] (1867) 6 M 64.

2.23 **Compulsion.** We have referred above[63] to *obiter dicta* in the *Unigate Foods* case[64] stating that there was "real difficulty" in treating the defender statutory board as a mere collecting agent for the milk producers[65] under the doctrine of *Bell* v *Thomson*[66], and that in an action based on improper compulsion, the defence of *bona fide* consumption is not available[67].

2.24 In *Unigate Foods Ltd* v *Scottish Milk Marketing Board*[68], the defender was a statutory body having a statutory monopoly of the right to market milk in its area, and the duty to determine the price at which milk to be manufactured into butter may be sold. The Board published memoranda determining that the price should be certified by its auditors and reached by applying a formula specified in the memoranda. Through an error in interpreting the formula, the auditor's certificate specified a price in excess of what should have been charged under the formula. The pursuers sought declarator of the true import of the formula, reduction of the certificate, decree of specific implement ordering the issue of new certificates, and an accounting.

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[63]See para 2.21 above.

[64]*Unigate Foods Ltd* v *Scottish Milk Marketing Board* 1975 SC (HL) 75.

[65]*Ibid* at pp 89, 90.

[66](1867) 6 M 64.

[67]*Ibid* at p 90.

[68]1975 SC (HL) 75.

2.25 The Lord Ordinary inter alia held the action of accounting incompetent and this was acquiesced in by the pursuers on reclaiming to the First Division. The question then arose whether the other conclusions were incompetent as having no practical result which in turn raised the issue whether decree of repayment would be competent in a subsequent action. The pursuers (respondents) contended that the action, being based on the *condictio indebiti*, was an equitable remedy, and to order repetition would be inequitable (because the milk producers benefited by the overpayment were not the same as those who would have to repay[69]). In rejecting this contention, Lord President Emslie observed[70]:

> "The pursuers were undoubtedly required to pay the prices demanded in accordance with the terms of the auditors' certificates. They did not therefore pay under any 'mistake' in fact or law. If the true position is that the pursuers have simply been charged too much, wrongfully and without statutory warrant by a statutory corporation, and had no alternative but to pay, no equitable considerations would be allowed to defeat their claim for repayment".[71]

This dictum may be relied on for the proposition that in an action to recover payments or overcharges made to encourage the performance of a legal duty which the defender is bound to provide for nothing, or for less than is charged, in

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[69]Cf *Bell v Thomson* (1867) 6 M 64.

[70]*Ibid* at p 90. This seems to have been *obiter* since the Lord President (*idem*) noted that at that stage the court did not have to decide more than that it has not been shown that decree of declarator, reduction and specific implement can have no practical result.

[71]Citing *British Oxygen Co v SSEB* 1959 SC (HL) 17 affg 1958 SC 53.

circumstances where the pursuer had no alternative but to pay, the equitable discretionary power to refuse repetition exercisable by the court in a *condictio indebiti* based on error is not available.[72]

(c) Compromises and the Crown

2.26 In a number of Scots cases last century relating to legacy duties, it was held that the Crown is not barred, by accepting a particular sum as settlement of duty, from claiming an additional amount later.[73] In *Lord Advocate* v *Miller's Trs*, Lord Fraser, in what he described as "a very hard case" based the rule on "the privilege of the Crown not to be bound by the omissions, neglect and

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[72]In the House of Lords, the judgment of the First Division was upheld and the speeches focused on the technical question whether the remedies of declarator, reduction and specific implement were necessary as a preliminary to a later action of repetition. It seems to have been assumed that such an action would be competent and successful. Lord Salmon for example remarked: "A declarator would ... have the important practical effect of finally establishing Unigate's right to repayment by the Board of the amount which the Board has certainly overcharged, leaving only the amount of the overcharge to be assessed": 1975 SC (HL) 75 at p 105.

[73]See *Lord Advocate* v *Meiklam* (1860) 22 D 1427; *Lord Advocate* v *Pringle* (1878) 5 R 912; *Lord Advocate* v *Miller's Trs* (1884) 11 R 1046; *Lord Advocate* v *Duke of Hamilton* (1891) 29 S L Rep 213 at p 218 per Lord Wellwood and at pp 221, 222 per Lord President Robertson: "No bargain or transaction is alleged, for nothing was paid or given up by the defender, and the right of the Crown is not taken away by its officers, even after consultation among themselves, departing from a demand from duty, and telling the persons concerned that they did so"; *Alston's Trs* v *Lord Advocate* (1895) 33 S L Rep 278.

blunders of their officers".[74] In *Alston's Trs* v. *Lord Advocate*,[75] Lord Moncreiff remarked (*obiter*):

> "In the general case there is no transaction [ie compromise]. The Inland Revenue accepts the duty but grants no discharge. But it has not, so far as I know, been decided that the Crown can be barred in no case by a deliberate transaction entered into in the full knowledge of the circumstances, and in the absence of neglect or omission on the part of its officers. Had the Crown not been one of the parties, I should have had no hesitation in holding that on the correspondence there was a concluded transaction. But it is settled law that the Crown is not barred by the neglect or omission of its officers, and it is difficult to define the limits of this exemption".

These dicta have never been judicially disapproved. It seems that the doctrine that the Crown is not barred by its officers' negligence stems at least in part from an Act of the Scottish Parliament (which has never been repealed),[76] and it has been recognised in other contexts.[77] While Gloag[78] relied on the *Miller's Trs* case for the proposition that the Crown can set aside a compromise accepting a sum as payment of duty, it is not thought that any of the Scots cases cited involved a compromise in the strict sense of an agreement involving

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[74](1884) 11 R 1046 at p 1053.

[75](1895) 33 S L Rep 278 at p 281.

[76]Crown Proceedings Act 1600 (c 14).

[77]See Erskine *Institute* I, 2,27; *Eyers* v *Hunter* (1711) Mor 7596; *Somerville* v *Lord Advocate* (1893) 20 R 1050 at p 1061 per Lord Trayner; *Mackay* v *Board of Admiralty* (1925) 13 SLCR 48.

[78]*Contract* (2nd edn) p 456, fn 2.

inter alia mutual surrender of rights on both sides[79]. The broad dictum of Lord Fraser has been criticised as not supported by the circumstances of the case.[80]

2.27 The Revenue now have statutory powers to compromise claims under section 54 of the Taxes Management Act 1970. In cases not falling under such statutory powers, moreover, account has to be taken of the modern development of administrative law and recent English cases holding that the Revenue are guilty of "unfairness" amounting to abuse of power if their conduct would, in the case of an authority other than the Crown, entitle the payer to a remedy of injunction (interdict) or damages based on breach of contract or estoppel (personal bar) by representation.[81] In one of these cases, Bingham L J referred to "the valuable, developing doctrine of legitimate expectation" and observed:

> "If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or estopped from so acting a public

[79]See Scot Law Com DP No 95, vol 2, para 2.79.

[80]A W Bradley in: *The Laws of Scotland; Stair Memorial Encyclopaedia* vol 1 (1987) para 296, fn 4.

[81]*R* v *IRC ex parte Preston* [1985] AC 835 (HL); see also *R* v *IRC, Ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL).

authority should generally be in no better position".[82]

The concept of "legitimate expectation" has been recognised in some contexts in Scots cases[83]. Given that in judicial review in Scotland the law is the same as in England so far as unfairness amounting to abuse of power is concerned,[84] and having regard to the modern tendency to assimilate the English and Scots rules on Crown prerogatives, and the long-standing cross-border assimilation of the rules on tax matters, it seems likely that the nineteenth century Scots authorities are no longer a safe guide to modern Scots law.

(d) Defence of non-exhaustion of statutory remedies

2.28 Two types of statutory procedure may found a defence of failure to exhaust statutory remedies[85], namely:

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[82] *R* v *IRC ex parte MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 at p 1569.

[83] See eg *Strathkelvin D C* v *Secretary of State for the Environment* 1987 GWD 9-258, noted C Himsworth (1987) 21 SPLP 49; *Thomson Petitioner* 1989 SLT 343; *Clyde Cablevision Ltd* v *Cable Authority* 1990 SCLR 28; *Castelow* v *Stirling D C* 1992 GWD 19 - 1139; *Pirie* v *City of Aberdeen D C* 1993 SLT 1155 at p 1157; *Pollock* v *Secretary of State for Scotland* 1993 SLT 1173 at p 1179; *Naik* v *University of Stirling* 1994 SLT 449; *Butt* v *Secretary of State for the Home Department* 1994 GWD 15-960.

[84] *West* v *Secretary of State for Scotland* 1992 SLT 636 at p 651.

[85] See C T Reid, "Failure to Exhaust Statutory Remedies" 1984 JR 185; A W Bradley in *The Laws of Scotland, Stair Memorial Encyclopaedia* vol 1 (1987) sv "Administrative Law", paras 304, 305.

(1) assessment and appeal procedures for finally fixing liability, eg by formal assessment by an official and statutory appeal to a tribunal or authority and often further appeal to the ordinary courts; and

(2) special statutory provisions on repayment of overpayments.

The Law Commission reviewed provisions of the latter type in Law Com CP No 120[86] and provisions of the first type in Law Com No 227, on which we comment below. The latter are part of the same statutory codes as the former, and are designed to remove injustices created by a mistaken official assessment or determination of liability.

2.29 Sometimes the statutory appeal procedures for determining liability (or a related matter such as valuation) expressly provide for refund of tax or duties already paid pending the statutory appeal[87]. The second type of statutory provisions on repayment of overpayments apply at a later stage where after liability has been fixed, the tax is being collected.

2.30 The defence of failure to exhaust statutory remedies can arise either in a common law

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[86]Paras 3.20 - 3.37.

[87]See eg Taxes Management Act 1970, s 55(9)(b)(repayment of undue tax on determination by Commissioners); s 56(9)(refund of tax following decision by Court of Session); Car Tax Act 1983, s 3(4) (refund of undue car tax deposited pending referee's decision on wholesale value of car); Value Added Tax Act 1994, s 84(8) (refund of undue VAT paid or deposited pending appeal to VAT Tribunal).

action for an ordinary remedy such as repetition or in proceedings for judicial review.

2.31 Specialised statutory remedies must be pursued under their own procedure rather than the procedure prescribed for judicial review under RCS 1994, Chapter 58.[88] At present, it seems that the same principles apply to the defence whether the non-statutory proceeding is a common law action (eg of repetition) or an application for judicial review.

2.32 The Scottish courts have understandably declined to define exhaustively the exceptions to the defence of non-exhaustion of statutory remedies but those exceptions do or may include, for example, cases where the pursuer has been prevented from appealing to a statutory body through a procedural irregularity (such as failure to notify a decision)[89]; possibly where the statutory appellate body would be judge in their own cause[90], though this exception has been disapproved or at least not followed[91]; where the statutory remedy is procedurally available but in the circumstances

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[88]See RCS, 58.3(2) derived from RC 260B(3) construed in *Simpson v IRC* 1992 SLT 1069 (OH) per Lord Coulsfield.

[89]*Sharp v Latheron Parochial Board* (1883) 10 R 1163 per Lord Kinnear approved *Moss' Empires Ltd v Assessor of Glasgow* 1917 SC (HL) 1 at p 11 per Lord Shaw.

[90]*Hope v Corporation of Edinburgh* (1897) 5 SLT 195 (OH) cited with approval *Tarmac Econowaste Ltd v Assessor for Lothian Region* 1991 SLT 77 (OH) at p 79 per Lord Clyde.

[91]*British Railways Board v Glasgow Corporation* 1976 SC 224 at pp 229, 239, 243.

provides an inadequate method of resolving the issue[92]; and in some cases of fraud or *ultra vires*.[93]

2.33 In some cases the defence has been held available in an application for judicial review where in the alternative statutory proceedings a remedy is competent against *ultra vires* acts[94], but in other cases where the *ultra vires* decision disclosed a miscarriage of justice, that was held to be an exceptional circumstance eliding the defence.[95] In the *Tarmac Econowaste* case Lord Clyde remarked:

> "Given the recognition that an inadequacy in the statutory alternative may be a sufficient reason for recourse to be had to a judicial review, this is an area of law which may well be open to development in the interests of the provision of an effective procedure for redressing wrongs."[96]

In summary, Scots law starts from the principle that non-exhaustion of statutory remedies bars

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[92]*City Cabs (Edinburgh) Ltd v City of Edinburgh DC* 1988 SLT 184 (OH).

[93]*British Railways Board v Glasgow Corporation* 1976 SC 224 at p 239 per Lord Justice-Clerk Wheatley (*obiter*).

[94]*Tarmac Econowaste Ltd v Assessor for Lothian Region* 1991 SLT 77 (OH) at p 79; cf *Bellway Ltd v Strathclyde RC* 1979 SC 92 at p 97; *Simpson v IRC* 1992 SLT 1069(OH) (alleged procedural irregularity could be corrected in the alternative statutory procedure and was closely connected to the substantive question in that procedure).

[95]*Bain v Hugh L S McConnell Ltd* 1991 SLT 691 at p 695 per Lord Justice-Clerk Ross; *Accountant in Bankruptcy v Allens of Gillock Ltd* 1991 SLT 765 (OH) at pp 768, 769 per Lord Cowie.

[96]1991 SLT 77 (OH) at p 79.

judicial review but admits exceptions which are beginning to multiply.

2.34 It is disappointing to record that older Scots authority on this defence, revealing the baneful influence of *Bell* v *Thomson*[97], showed a remarkably harsh attitude to taxpayers and an extraordinary tendency to protect the Revenue by ignoring or bending ordinary canons of statutory interpretation. In two Scots cases last century, judicial obiter dicta suggested that the mere existence of express provisions in revenue statutes for repayment of tax went far to show that, in the absence of express provision in the instant case, a person paying undue tax in error had no redress.[98] These dicta,with their enormous potential for working injustice, were never followed. They were for example not cited in the *Glasgow Corporation* case.[99]

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[97](1867) 6 M 64.

[98]*National Bank of Scotland* v *Lord Advocate* (1892) 30 S L Rep 579 at p 583 "I think the fact that ... express provision is made for repayment in certain cases goes far to show that where duties are chargeable which are to be applied to public purposes, and no provision is made for repayment in case of payment in error, a person who pays in error has no redress unless the Commissioners ex gratia think fit to remit the whole or part of the duty";cited in *Alston's Trs* v *Lord Advocate* (1895) 33 S L Rep 278 at p 281: "But the fact that in the Revenue Statutes, whether relating to probate or inventory duty or income tax, power to return duty overpaid is generally conferred in express terms and under conditions, seems to indicate that the common law as to payments made in error is inapplicable". The first case followed *Bell* v *Thomson* (1867) 6 M 64.

[99]1959 SC 203.

(3) Contractual right to repetition of payments demanded unlawfully

2.35 If payment is made and accepted subject to an express condition for repayment on a certain event (eg pending the outcome of a litigation between the parties, or of a test case between other parties), the payee cannot reject the condition if it is purified and retain the money paid[100]. If the payee does not find the condition acceptable, he must return the payment. If the payee accepts the payment and the condition, then on the purification of the condition, the payer acquires a right to repayment based on contract.[101] A payment will be protected by an agreement for repayment even if the payment is made in the course of an action against the payer for payment, eg if the agreement includes a term that the action should be sisted pending a final decision in a test case between other parties as to the lawfulness of the claim.[102] These rules apply in relation to payments to public bodies as they apply in relation to payments to ordinary individuals.[103]

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[100]*British Railways Board* v *Glasgow Corporation* 1976 SC 224 at p 233 per Lord McDonald; at pp 240, 241 per Lord Justice-Clerk Wheatley (*obiter*); *Semple* v *Wilson* (1889) 16 R 790.

[101]*McIvor* v *Roy* 1970 SLT (Sh Ct) 58 at p 60 per Sheriff Wilkinson.

[102]eg *Haddon's Exix* v *Scottish Milk Marketing Board* 1938 SC 168.

[103]See eg *Glasgow Gas-Light Co* v *Barony Parish of Glasgow* (1868) 6 M 406 (rates); *Sprot's Trs* v *Lord Advocate* (1903) 10 SLT 452 (OH) (estate duty);*Haddon's Exix* v *Scottish Milk Marketing Board* 1938 SC 168 (illegal levies on milk producers); *British Railways Board* v *Glasgow Corporation* 1976 SC 224 (rates).

2.36 Gloag drew a distinction between payments "under protest" and payments under "a definite reservation", the former being ineffective, and the latter effective, as a basis of repetition in his view.[104] This distinction seems of doubtful validity and could well mislead. A definite reservation does not always preserve recourse, even where the payee accepts the money. In the *Woolwich* case, for example, the building society plaintiff made the payments under cover of letters expressly stating that they were made without prejudice to any right to recover them which might arise as a result of legal proceedings challenging the *vires* of the regulations. In holding that no implied agreement for re-payment could be inferred, Lord Keith observed that in accepting the payments, the Revenue were doing no more than agreeing that they would not be treated as prejudicing any such right.[105] If there was no such right, the reservation did not create it. It would have been different if the reservation had stated that the money was offered on condition that it would be repaid if ultimately found, in the pending litigation, not to be due. In short, the reservation must be apt in its terms to create a

[104]Gloag, *Contract* (2nd edn) p 63: "If a man knows or believes that a particular claim is unfounded but pays in preference to fighting the question in the law courts, a mere protest will not entitle him to recover if the correctness of his view is afterwards established, but a definite reservation will preserve recourse": cited in *British Railways Board* v *Glasgow Corporation* 1976 SC 224 at pp 232, 233.

[105][1993] AC 70 (HL) at p 150. Lord Jauncey (at p 178) concurred with Lord Keith. Lord Goff (at p 170) "appreciated the force of [Lord Keith's] reasoning" but found it unnecessary to reach a conclusion on the point.

right to repayment and be expressly or impliedly accepted by the payee. Where there is a right to recovery, a reservation is not necessarily futile. It may form part of the evidence showing that the payment was not made waiving all objections, or "to close the transaction" in the English phrase.[106]

2.37 Lord Keith's *obiter* dicta are consonant with Scottish authority. In the *Glasgow Tramway and Omnibus Co* case,[107] the Court of Session held that a statutory right of relief was saved by a reservation in spite of the fact that certain payments had been made over a period of time. That case was distinguishable from the *Woolwich* case because the right which was reserved was upheld by the court. In the *Lanarkshire Steel Co* case,[108] there was not only a reservation of right but in addition an express stipulation that in certain events the money should be repaid. These two cases therefore do not justify Gloag's proposition that a definite reservation preserves recourse.

2.38 In summary, where a payment is made and accepted subject to an express reservation of rights imposing a condition for repayment on a certain event, the payee cannot reject the condition if it is purified and retain the money

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[106]*Maskell* v *Horner* [1915] 3 KB 106 at p 120 per Lord Reading CJ, approved in the *Woolwich* case by Lord Goff (*supra* at p 166) and cited by Gloag *Contract* (2nd edn) p 63.

[107]*Glasgow Tramway and Omnibus Co* v *Glasgow Corporation* (1897) 24 R 628.

[108]*Lanarkshire Steel Co* v *Caledonian Railway Co* (1903) 6 F 47.

paid. But a reservation of a non-existent right to repayment is ineffective to create such a right.

(4) Interest on payments recovered

2.39 The rules on interest apply at common law to debts due by public bodies as they apply to debts due by other persons.[109]

2.40 Interest runs on sums paid in error and while there is a conflict of authority on whether it runs from the date of the erroneous payment or from the date when repayment of the principal sum is demanded and wrongfully withheld, the weight of authority favours the first of these dates.[110]

2.41 Interest runs on sums paid under improper compulsion from the date of payment.[111]

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[109]See *Glasgow Gas-Light Co* v *Barony Parish of Glasgow* (1868) 6 M 406 at p 414 per Lord President Inglis.

[110]*Duncan, Galloway & Co Ltd* v *Duncan Falconer & Co* 1913 SC 265 (based on analogy of loan); *Gwydyr* v *Lord Advocate* (1894) 2 SLT 280 (OH) (based on principle of restitution); and see *Countess of Cromertie* v *Lord Advocate* (1871) 9 M 988, at p 991 per Lord Gifford; at pp 993, 994 per Lord Deas; cf at p 994 per Lord Kinloch. In *Sprot's Trs* v *Lord Advocate* (1903) 10 SLT 452 (OH) it was held (on the principle of wrongful withholding) that interest on excess estate duty paid in error ran only from the time when the payer, having discovered his error, made a formal demand for repayment. But this is inconsistent with the *Duncan, Galloway* case.

[111]If interest is due from the date of payment on sums paid in error, *a fortiori* it must be due from that date on sums paid under improper compulsion. Moreover, money paid under improper compulsion would *ex hypothesi* be wrongfully withheld from the date of payment and therefore interest would be due on the principle of "wrongful withholding". No direct authority has been traced.

2.42 Under the *Woolwich* case, interest runs on undue taxes and levies unlawfully demanded by a public authority from the date of payment.

2.43 Where the payer knows or believes that the demand is *ultra vires* or unlawful and pays under express and effective reservation accepted by the payee, the court will imply an obligation to pay interest in the contractual agreement by virtue of which the sum is repayable. This rule applies where the reservation leaves to implication the payment of both principal and interest.[112] Even where the reservation makes an express stipulation for repayment of the principal sum only and makes no mention of interest, the Court will imply an obligation to pay interest, and the maxim *expressio unius* will not be invoked so as to preclude the implication of that obligation[113]. The court will

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The matter was raised but not decided in *Alexander* v *Hamilton* (1694) 4 BS 186 (repetition of sum paid under "force and fear"). In *Glasgow Gas-Light Co* v *Barony Parish of Glasgow* (1868) 6 M 406, the money was paid under the threat of diligence which, by reason of a subsequent test case, would have been held wrongful, but the decision proceeded on the interpretation of an agreement as to repayment of the sum paid.

[112]As where payment is made "under reservation of all rights and pleas, and pending a final decision" in a test case as to the legality of the demand for payment:*Haddon's Exix* v *Scottish Milk Marketing Board* 1938 SC 168.

[113]*Glasgow Gas-Light Co* v *Barony Parish of Glasgow* (1868) 6 M 406; *Haddon's Exix* v *Scottish Milk Marketing Board* 1938 SC 168 at p 173.In the leading *Glasgow Gas-Light Co* case, Lord President Inglis remarked (at p 414): "A party receiving payment of money, reserving the question of his title to receive it, is surely bound to repay it with interest.... There can be no clearer case of interest being due than that ... the fact that the

not imply an obligation to pay interest if the contrary intention appears in the agreement, but it must be an intention on the part of both parties.[114] A defence of change of position will only arise if there is an express or implied special term in the agreement admitting the defence.[115]

(5) The impact of the *Woolwich* case in Scots law

2.44 **Uncertainty regarding the ground of repetition equivalent to the *Woolwich* rule.** In Scot Law Com DP No 99[116], we make the following points. (1) The *Woolwich* case undermined that part of the decision in *Glasgow Corporation* which had held (following English cases[117]) that a taxpayer

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party is a public board makes not the slightest difference". English law is different: see the *Woolwich* case [1989] 1 WLR 137 (Nolan J) holding that as the agreement (which he wrongly held to exist) for repayment of capital was silent as to repayment of interest, Woolwich's claim must be refused.

[114]1938 SC 168 at p 174.

[115]In the *Glasgow Gas-Light Co* case (1868) 6 M 406 at p 415, Lord Deas remarked (*obiter*) that interest might not run "in the case of a parochial board if they shew that they had to pay away the money to the poor...". However, the availability of such a defence depends not on the common law but on the express or implied terms of the agreement; and the mere fact that the payee has spent the money *after* receiving it cannot influence the court in the construction of the agreement entered into *before* he received it: *Haddon's Exix* v *Scottish Milk Marketing Board* 1938 SC 168 at p 173 per Lord President Normand.

[116]See paras 4.41-4.47.

[117]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*

does not have an automatic right, based on the Bill of Rights, to recover from the Crown undue tax paid in error.[118] (2) The decision in *Morgan Guaranty* however neither introduced the *Woolwich* ground in Scots law nor recognised a new ground covering cases of the *Woolwich* type, ie payments to public authorities pursuant to *ultra vires* demands.[119] (3) Nevertheless in *Morgan Guaranty* there are dicta recognising that such cases should indeed be actionable in Scots law and also dicta paving the way for the court to evolve a ground of repetition covering such cases. (4) The uncertainty and controversy surrounding the taxonomy of the grounds of repetition and associated *condictiones* makes it unclear what will be the scope and form of such a ground and whether it will be subsumed under a *condictio indebiti* (broadly defined) or *condictio sine causa*.

2.45 ***Woolwich* case exposes serious defects in Scots law.** The *Woolwich* case was decided upon an analysis of the English authorities, and of only two Scots cases both based largely on English law.[120] There is no doubt however that the *Woolwich* case has also exposed serious defects in the Scots law. Under the Scots law as applied before the

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Dairies (1921) 37 TLR 884 was not in point.

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

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

[120]*British Oxygen Co* v *SSEB* 1959 SC (HL) 17; *Glasgow Corporation* v *Lord Advocate* 1959 SC 203.

Morgan Guaranty case, *Woolwich* would not have recovered its money.[121]

2.46 Before the *Woolwich* case, it was more difficult for citizens to recover taxes or other levies from a public authority under Scots law than under English law. First, a payment under error is recoverable only if the error is excusable. This rule, introduced by the House of Lords on the basis that the same rule applied in England,[122] does not now apply in England if it ever did.[123] Second, the wide judicial discretion to refuse payment on equitable grounds is another hurdle. This equitable discretion has been useful in providing the basis of a defence of change of position.[124] But a wide discretion can dissolve the common law or rather prevent its development. Third, the old defence in *Bell* v *Thomson*,[125] which has been questioned but never overruled, would preclude repetition in all or most cases where a tax or rate payer sues for repetition in the year after the year of the undue payment.[126] Fourth, there is no doctrine of *colore officii* in Scots law. Fifth, there is no special

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[121]It is true that Scots law, unlike English law, does imply an agreement to pay interest in an agreement to repay principal (see para 2.44 above), but in the *Woolwich* case it was eventually held that there was no agreement to repay the principal: [1993] 1 AC 70 at p 150.

[122]*Wilson and McLellan* v *Sinclair* (1830) 4 W and S 398 at p 409; see Scot Law Com Discussion Paper No 95, vol 2, para 2.33.

[123]*Kelly* v *Solari* (1841) 9 M and W 54.

[124]Scot Law Com DP No 95, vol 2, para 2.63.

[125](1867) 6 M 64.

[126]See paras 2.20 - 2.22 above.

rule requiring a higher standard of honesty of officers of the court and public officials.[127]

2.47 It is only in the context of the judicial dicta in the *Earl of Cawdor*[128] case stating (obiter) that the defence of *bona fide* consumption is available against, but not to, the Crown in revenue cases, that the the special position of the Crown has been recognised so as to allow the citizen to recover. The reasons of principle underlying these dicta are broadly consonant with the principles underlying the *Woolwich* decision. But the case has been neglected and the question whether *bona fide* consumption is properly applicable to money payments is controversial and technically has served to marginalise the case.

2.48 With some exceptions, before the *Woolwich* case, the approach of Scots law was that the same principles of repetition apply to public sector as to private sector bodies and debts. The absence of any doctrine of *colore officii*, and of any special rule requiring a higher standard of honesty of public officials in repetition, means that allowing recovery in cases of undue payments to public authorities in response to *ultra vires* demands would effect a bigger change in Scots law than in English law.

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[127]See para 2.7 above.

[128]*Earl of Cawdor* v *Lord Advocate* (1878) 5 R 710: see paras 2.12 - 2.15.

PART III

THE CASE AGAINST INTRODUCING THE *WOOLWICH* PRINCIPLE INTO SCOTS LAW BY STATUTE

Introductory

3.1 We believe that, as a matter of principle and policy, there is a virtually unanswerable case for giving the citizen a remedy on the *Woolwich* facts. We respectfully suggest therefore that, to that extent, the decision of the House of Lords in the *Woolwich* case is to be welcomed. The difficulty we have however lies in accepting that the introduction of a new ground of repetition limited to public sector debts or bodies (however defined) provides the best path to reform. In our view this depends on whether the limitations on the *Woolwich* principle are justifiable. Does a rule so limited go far enough? We beg leave to doubt whether it does.

3.2 Before the decision of the House of Lords in the *Woolwich* case, the Law Commission provisionally proposed the introduction by statute of a general right to recover (subject to special defences) undue payments made to a public authority pursuant to a demand made in breach of public law or EC law and all other payments made but not otherwise due because of a breach of public law.[1] In the *Woolwich* case, this approach was approved by Lord Goff who considered that Parliament should accept the *Woolwich* rule and then make any necessary consequential amendments of the common law as well as amending the statutory enactments on recovery. He did not trust the machinery of law

[1] Law Com CP No 120, para 5.2(c).

reform to introduce the principle itself.[2] He then observed:

> "if the principle is to be recognised, this is an almost ideal moment for that recognition to take place. This is because the Law Commission's Consultation Paper is now under active consideration, calling for a fundamental review of the law on this subject, including a fresh look at the various, often inconsistent, statutory regimes under which overpaid taxes and duties either may or must be repaid. The consultation may acquire a greater urgency and sense of purpose if set against the background of a recognised right of recovery at common law. But in addition there is an immediate opportunity for the authorities concerned to reformulate, in collaboration with the Law Commission, the appropriate limits to recovery, on a coherent system of principles suitable for modern society, in terms which can (if it is thought right to do so) embrace the unusual circumstances of the present case. In this way, legislative bounds can be set to the common law principle,..."[3]

In their Report on this topic, however, the Law Commission depart from the original wide-ranging proposal in Law Com CP No 120 and instead recommend a much more limited reform, namely, rationalising the existing statutory provisions for the recovery of the principal central and local government taxes and charges.[4]

3.3 We respectfully agree with this decision of the Law Commission and in Part IV we seek views

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[2][1993] AC 70 (HL) at p 176: "I fear that, however compelling the principle of justice may be, it would never be sufficient to persuade a government to propose its legislative recognition by Parliament: caution, otherwise known as the Treasury, would never allow this to happen".

[3]*Ibid* at pp 176 - 177.

[4]Law Com No 227, especially at paras 8.7 - 8.22.

on these more limited reforms. Before doing so, it seems right that we should state in some detail our reasons for not proposing statutory development of the *Woolwich* principle since these differ from the Law Commission's reasons.

3.4 The Law Commission understandably accept the present position under which the English law develops by widening the existing specific grounds of restitution ("unjust factors") of undue payments[5] and adding new grounds (such as that recognised in the *Woolwich* case itself). They also accept the *Woolwich* rule as fitting in with that approach.

3.5 Part of our reluctance to accept the *Woolwich* rule stems from a suspicion that to accept the *Woolwich* rule may only make sense if the approach to defining the grounds of repetition is the same as,or similar to, the "unjust factors" approach in English law. In Scot Law Com DP No 95, we argued that the Scots law of repetition seemed to be committed to a similar approach[6]. That is disputed[7], and it is not clear how the common law

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[5]eg by adding economic duress to the existing recognised forms of duress grounding restitution.

[6]See Scot Law Com DP No 95, vol 2, Parts II and III.

[7]There is a view that the *condictio indebiti*, properly understood, is wide enough to cover all undue payments and transfers made without legal cause, not merely those made in error: see R Evans-Jones, "Reflections on the Condictio Indebiti" (1994) 111 SALJ 759; Evans-Jones, "Retention without a Legal Basis" passim; du Plessis and Wicke, "*Woolwich Equitable* v *I.R.C.*" 1993 SLT (News) 303. See Scot Law Com No 99, paras 4.22,4.33.

will develop. On the one hand, the *Morgan Guaranty* case suggests that that may still represent the law[8]. On the other hand, dicta in the same case[9] may provide the means of developing a broader and more liberal ground or grounds of repetition of undue payments.[10] The Scottish criticism of the "unjust factors approach", other English developments[11], and examples drawn from comparative law[12], call that whole approach in question.

Scope and Arrangement of Part III

3.6 In this Part, we consider the following matters.

A. What is the scope of the *Woolwich* rule (eg to what types of bodies or debts does it apply)?

B. Do the reasons of principle and policy underlying the *Woolwich* rule justify a new ground

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[8]1995 SLT 299 discussed in Scot Law Com DP No 99, paras 4.20 - 4.27.

[9]1995 SLT 299 at p 316B per Lord President Hope; at p 322D per Lord Cullen.

[10]See Scot Law Com DP No 99, paras 4.48- 4.56.

[11]eg the recognition in English law of "absence of consideration" as a ground of recovery: *Westdeutsche Landesbank Girozentrale* v *Islington L B C* [1994] 1 WLR 938 affg. (1993) 91 L G R 323; and the criticisms in A. Burrows , "Restitution of payments made under swap transactions" [1993] NLJ 480; P Birks, "No Consideration: Restitution After Void Contracts" (1993) 23 Western Australia L Rev 195. See also Evans-Jones and Hellwege, "Swaps" (1995) 1 Scottish Law and Practice Quarterly 1 at pp 9 -14.

[12]Zimmermann, "Unjustified Enrichment" (1995) 15 OJLS 403, quoted in Scot Law Com DP No 99, para 4.53.

limited to public sector bodies or debts (however defined)?

We argue that these reasons do not justify a rule so limited.

We conclude therefore that, as a matter of policy, the scope of application of the *Woolwich* principle should not be defined by statute. Indeed we think that there may be good reasons for rejecting the *Woolwich* principle and trying a completely different approach to the recovery of undue payments. We revert to this at paragraph 3.121 below.

3.7 **Uncertainty of distinction between "public law" and "private law".** The uncertainty surrounding the definition and classification of the grounds of repetition in Scots law are matched by uncertainty, both in Scots and English law, surrounding the distinction between the concept of public law (invoked in the *Woolwich* rule) and private law. A similar difficulty arises in the context of delictual obligations in relation to which Professor Blackie has observed:

> "As Scots law does not have any clear division between public and private law, and as it lacks any separate system of courts for dealing with public law questions, it is not surprising that it is difficult to find any clear exposition of what is comprehended by the notion of a public body, public authority or, indeed, public official".[13]

3.8 There are a number of distinctions, some very controversial, creating cross-cutting

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[13]John W G Blackie, "Scots Law: General Principles or Diverse Rules" in: J Bell and A W Bradley (eds), *Governmental Liability: A Comparative Study* (1991) 45 at p 46.

categories which in turn give rise to many variables and imponderables which are likely to affect the scope of the *Woolwich* rule. These consist of or include: (1) the distinction between public law and private law and its derivative distinctions between public and private bodies or between public and private rights or between public and private acts; (2) the distinction between *ultra vires* in public law and in private law; (3) the distinction between governmental and non-governmental functions (powers and duties); (4) the distinction between statutory authority and common law authority; and (5) the distinction between acts challengeable only by judicial review proceedings and acts challengeable by ordinary action. It would lengthen this Paper unduly to explore these.

3.9 In both Scots and English law, the distinction between public law and private law, and derivative distinctions applying the public/private dichotomy, do not now necessarily demarcate the procedural and jurisdictional boundary between judicial review and ordinary action.[14] The test for the availability of judicial review remains uncertain in both legal systems. In particular the novel requirement, introduced in Scots law by the *West* case, of a tripartite relationship does not

[14]As to English law, see *Roy* v *Kensington & Chelsea and Westminster F P C* [1992] 1 AC 624 (HL) (holding that procedure by ordinary action is competent in some cases involving public as well as private rights); as to Scots law see *West* v *Secretary of State for Scotland* 1992 SLT 636.

seem consistent with other authority and has been cogently criticised[15] and judicially doubted[16].

3.10 The *Woolwich* case stands at the place where two rapidly developing branches of law meet, namely the English private law doctrine of restitution and what is now known as public law. The question is whether the types of payees or debts to which the *Woolwich* rule is to apply have special "public" characteristics which are so significant that a special public law rule of automatic recovery should apply to them when it does not apply to ordinary citizens or ordinary debts. The onus should be on the proponents of change to identify these bodies and their special characteristics. In an important article[17], Professor Beatson has sought to discharge this onus. Having regard to the difficulties of definition which the public/private dichotomy presents in the modern state and the risk of sterile and unrewarding litigation about the scope of any rule limited by that dichotomy, the onus is a heavy one.

3.11 An alternative approach is for the law to move in the area of repetition to a conception of civil obligation which can apply equally well to

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[15] W Finnie, "Triangles as Touchstones of Review" 1993 SLT (News) 51; C M G Himsworth, "Further West? More Geometry of Judicial Review" 1995 SLT (News) 127.

[16] *Naik* v *University of Stirling* 1994 SLT 449(OH) per Lord MacLean; see also *Joobeen v University of Stirling* 1995 SLT 120 (OH) per Lord Prosser.

[17] Beatson, "Restitution of Taxes" (1993) 109 LQR 401.

public sector and private sector payees and debts[18] except where there are specific enactments regulating recovery such as are discussed in Part IV.

A. THE SCOPE OF THE *WOOLWICH* PRINCIPLE AT COMMON LAW

3.12 In delimiting the scope of the *Woolwich* principle, the following questions arise.

(1) Does the *Woolwich* principle apply to all payments made pursuant to an *ultra vires* demand by a public authority or only to some of those demands?

(2) To what types of payees, and to what types of debts, does the principle apply?

(3) Does the *Woolwich* principle apply only where the payment is made in response to a demand?

(4) Does a claim for repayment based on the *Woolwich* principle require to be made by way of an application to the Court of Session for judicial review?

(1) Is the reason why a demand is *ultra vires* relevant?

3.13 The *Woolwich* case left unclear the scope of the principle which it introduced. Lord Goff held:[19]

> "that money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an *ultra vires* demand by the authority is prima facie recoverable by the citizen as of right."

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[18] See the quotation from Professor Cornish's article at para 3.99 below, last fn.

[19] [1993] AC 70 (HL) at p 177.

Lord Browne-Wilkinson defined the issue as being whether there should be a right of recovery where tax is paid under protest in response to an *ultra vires* demand,[20] but agreed that the law should be established in the sense which Lord Goff proposed.[21] Lord Slynn said that nothing prevented the House "from laying down that money paid by way of tax following an *ultra vires* demand by the revenue is recoverable".[22] Strictly the *ratio decidendi* does not go beyond Lord Slynn's formulation. In the incremental development of the law, however, the wider formulation of Lord Goff is likely to be influential.

3.14 The Law Commission point out that Lord Goff's formulation of the *Woolwich* rule illustrates three criteria (a) demands which are for (b) tax and are (c) made under *ultra vires* subordinate legislation.[23] So the *Woolwich* rule clearly applies to payment of tax made pursuant to a demand which is *ultra vires* because of the invalidity of an enactment purportedly imposing the charge to tax. This was the precise case to which the *Woolwich* decision related. The enactment will normally be subordinate legislation but could be primary legislation invalid under Community law.

3.15 Lord Goff and Lord Slynn reserved their opinion on whether the principle applies to payments of tax made pursuant to a demand that is

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[20]*Ibid* at p 196.

[21]*Ibid* at p 198.

[22]*Ibid* at p 201.

[23]Law Com No 227, para 6.36.

ultra vires because of the misconstruction of primary or subordinate legislation[24].

3.16 Some English commentators however argue that in principle the reason why the demand is *ultra vires* is irrelevant. Professor Burrows remarks:

> "The key question is whether or not the demand for payment, even if based on a valid regulation, is *ultra vires*. If the demand is intra vires, even though based on a mistake, it is authorised by Parliament and does not constitute an unjust factor. The scope of the doctrine of *ultra vires* is a controversial issue of public law but it appears that all, or nearly all, mistakes of law are regarded as going to jurisdiction.[25] Mistakes of fact may be more problematic but again one would expect that serious mistakes of fact (eg demanding tax from the wrong person) would render the demand *ultra vires*".[26]

Professor Beatson observes that:

> "the *Woolwich* principle clearly applies to taxes and duties levied by governmental bodies which are *ultra vires* because of the invalidity of the relevant subordinate legislation. It almost certainly applies where the *ultra vires* nature of the levy stems from an error of law or an abuse of discretion. The position of levies vitiated by procedural

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[24][1993] AC 70 at p 177 per Lord Goff; at p 205 per Lord Slynn. The dissenting judges Lord Keith (at p 161) and Lord Jauncey (at p 196) considered that the distinction was irrelevant.

[25]Citing Craig *Administrative Law* (2d edn) pp 262,263.

[26]Burrows, *Law of Restitution* p 353.

> unfairness is less clear but, in principle should not differ."[27]

The Law Commission are to a like effect.[28]

(2) Types of payees and types of debts

3.17 There are important ambiguities in the concepts of "tax or other levy" and "public authority". It is not clear whether all the types of "levies" or "authorities" concerned in the cases discussed in the *Woolwich* case fall under the *Woolwich* principle.

3.18 In the Court of Appeal the scope of the *Woolwich* principle was limited to organs of central and local government. Glidewell L J referred to:

> "cases in which the defendant is an instrument or officer of central or local government, exercising a power to require payment of a tax, customs duty, licence fee or other similar impost".[29]

He held that such cases fell within "the sphere of what is now called public law" and their main distinguishing feature was that in such cases "there is no question of the defendant having given, offered, or purported to give any consideration for the payment by the plaintiff."[30]

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[27]"Restitution of Taxes" (1993) 109 LQR 401 at p 417.

[28]Law Com No 227, para 6.39.

[29][1993] AC 70 at p 79.

[30]*Idem*. Butler-Sloss L J (*ibid* at p 138) agreed that:"a distinction should be drawn between public and private law. In the category of public law someone with actual or ostensible authority to require payment in respect of tax, duty, licence fee or other payment on behalf of central or local government makes the demand for payment by a private individual or company or other

3.19 The House of Lords did not elucidate the matter. Lord Goff referred to "taxes or other levies"[31]; Lord Browne Wilkinson to "tax" and to "impost"[32]; and Lord Slynn to "tax"[33]. The cases cited were examined by the House to see whether a remedy based on improper compulsion lay. Holding that a case of compulsion could not be made out, the House of Lords laid down a new principle which, in Lord Goff's formulation, applies to a tax or other levy. But it does not inevitably follow that all types of levy discussed in the cases cited in the speeches fall under the *Woolwich* principle.

3.20 It is convenient to discuss separately (a) the English and Commonwealth cases on extortion by colour of office (*colore officii*) and (b) the cases on payments made to encourage the performance of a legal duty owed for nothing or for less than was exacted ("the withholding-performance cases").

3.21 **Extortion** ***colore officii*** **(by colour of office).** Under the English common law doctrine of *colore officii*, money paid to a person in a public or quasi-public position to obtain the performance by him of a duty which he is bound to perform for nothing, or for less than the sum demanded by him,

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organisation. In respect of such a demand no question of consideration arises".

[31] [1993] AC at p 177.

[32] *Ibid* at pp 196G; 197E; 198G.

[33] *Ibid* at pp 199C; 201D; 204F.

is recoverable to the extent that he is not entitled to it.[34]

3.22 English cases cited by Lord Keith in the *Woolwich* case as examples of extortion *colore officii* include cases where an attorney was held entitled to set off an excess charge demanded by a sheriff for the issue of a warrant;[35] recovery from a local authority of an excess charge demanded for renewal of a publican's licence;[36] recovery of an unlawful charge for making extracts from a parish register;[37] recovery from a local authority of harbour dues for landing limestone used for lime-burning purportedly demanded under a private Act which in fact contained an exemption for limestone landed for lime-burning;[38] recovery from the Crown of sums unlawfully demanded by the Shipping

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[34][1993] AC 70 (HL) at pp 164, 165 per Lord Goff. The most frequently cited short description is as follows:"Extortion by colour of office occurs when a public officer demands and is paid money he is not entitled to, or more than he is entitled to, for the performance of his public duty. Examples of such exactions are overtolls paid to the keepers of toll bridges and turnpikes, excessive fees demanded by sheriffs, pound-keepers, etc. The parties were not on an equal footing; and generally the payer paid the sum demanded in ignorance that it was not due.". See *Mason* v *New South Wales* (1959) 102 CLR 108 at p 140 per Windeyer J, cited with approval in the *Woolwich* case *ibid* at pp 155, 164 and 165, 201.

[35]*Dew* v *Parsons* (1819) 2 B & Ald 562 ("capable of being rationalised" as an exaction *colore officii*).

[36]*Morgan* v *Palmer* (1824) 2 B & C 729.

[37]*Steele* v *Williams* (1853) 8 Ex 625.

[38]*Hooper* v *Exeter Corporation* (1887) 56 LJQB 457.

Controller as a condition of licensing the sale of a ship.[39]

3.23 Arguing for a wide interpretation, Professor Beatson remarks that while the House recognised that the *colore officii* cases "had previously been explained as turning on duress or compulsion, it is important to note that what their Lordships were doing was to reinterpret the principles lying behind the authorities".[40] He argues that if the *colore officii* and withholding-performance cases "are to remain cases of compulsion, the new principle would not in fact be a reformulation but a new discovery".[41] While it is true that Lord Browne-Wilkinson held that the English *colore officii* cases should be treated as merely examples of the *Woolwich* principle,[42] that does not seem part of the *ratio decidendi*. There is also some equivocal support in Lord Goff's speech for the view that the *colore officii* doctrine is supplanted throughout its field of application, and

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[39]*Brocklebank Ltd* v *The King* [1924] 1 KB 647; [1925] 1 KB 52.

[40]"Restitution of Taxes" (1993) 109 LQR 401 at p 406. See [1993] AC 70 at p 168C,D (per Lord Goff), "reformulate the law" in accordance with "the principle of justice" stated in dicta in certain *colore officii* cases; p 171F (per Lord Goff), "reformulate the law"; p 196G (per Lord Browne-Wilkinson): "reinterpret the principles lying behind the authorities so as to give a right of recovery".

[41](1993) 109 LQR 401 at p 408. See also Law Com No 227, para 6.40.

[42][1993] AC 70 at p 198.

not merely supplemented, by the *Woolwich* principle[43]; his statement (quoted at paragraph 3.56 below) concerning its limited immediate practical impact suggests that that was not his meaning.

3.24 It is arguable that the references to reinterpretation and reformulation are neutral as to scope, perhaps deliberately neutral so as to leave the exceedingly difficult questions of scope to the incremental development of the common law. It may be significant that the House of Lords did not disagree with or disapprove of the Court of Appeal's restriction of the principle[44] to central and local government payees, which is still a tenable boundary. The majority did not in terms declare the abrogation of the *colore officii* doctrine and its replacement by the new doctrine. Lord Slynn for example said that although:

> "the facts do not fit easily into the existing category of duress or of claims *colore officii*, they shade into them. There is a common element of pressure which by analogy can be said to justify a claim for repayment"[45].

To argue by analogy from the existing doctrine of *colore officii* is not the same thing as declaring its abrogation and replacement by a new doctrine. It is however consistent with the creation of a new principle supplementing, and partially overlapping

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[43][1993] AC at p 173: "logic appears to demand that the right of recovery should require neither mistake or compulsion, and that the simple fact that the tax was exacted unlawfully should prima facie be enough to require its replacement" cited by Beatson (1993) 109 LQR 401 at p 408.

[44]See para 3.18 above.

[45][1993] AC 70 at p 204.

with, rather than supplanting the existing doctrine.

3.25 In short while the better view may be that the *Woolwich* rule has supplanted the *colore officii* doctrine throughout its whole area of operation, that conclusion is not free from doubt.

Extortion by withholding performance of a duty under private or public law.

3.26 In relation to extortion by withholding performance of a duty under private or public law, the key case is the *British Oxygen Co* case[46], a Scottish case in which English authority was followed and older pertinent Scottish authority was overlooked. There are at least two possible broad interpretations of this case.

3.27 **Private law ground of improper compulsion.** The first theory is that the *British Oxygen Co* case was based on improper compulsion, the extortion of a higher tariff than was legally due by a tacit threat to withhold the supply of electricity, in circumstances, where by reason of the defender board's monopoly of supply, the pursuer had no reasonable alternative but to pay now and recover the payment later. We have argued elsewhere[47] that in Scots law, the *British Oxygen Co* case is one of a series of cases which vouch the proposition that a payment made to encourage the performance of a legal duty owed for nothing or for less than is exacted is recoverable under the

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[46]*British Oxygen Co* v *SSEB* 1959 SC (HL) 17; affg 1958 SC 53.

[47]Scot Law Com DP No 95, Part III.

doctrine of repetition *ob turpem causam*, at least where the payee wrongfully withheld performance of the duty and the payer had no reasonable alternative but to pay.[48] It is important to stress that the duty may arise under common law[49] or statute[50], private law or public law[51]. On this view, Scots law does not (or at least before the *Woolwich* case did not) treat public law or statutory duties differently from private law or common law duties.[52] Nor should it. A payment made to induce the performance of *any* legal duty, public or private, common law or statutory, can be extortionate in Scots law and the real world.

3.28 It is thought that the majority of the judges both in the Second Division and the House of Lords (Viscount Kilmuir LC[53], Lord Tucker concurring[54] and Lord Merriman[55]) in the *British*

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[48]*Rossie* v *Her Curators* (1624) Mor 9456; *Mushet* v *Dog* (1639) Mor 9456; Kames *Principles of Equity* (5th edn; 1825) p 53; *British Oxygen Co* v *South of Scotland Electricity Board* 1959 SC (HL) 17 affg 1958 SC 53; *Unigate Foods Ltd* v *Scottish Milk Marketing Board* 1975 SC (HL) 75.

[49]*Rossie* v *Her Curators* (1624) Mor 9456; *Mushet* v *Dog* (1639) Mor 9456.

[50]*British Oxygen Co* v *SSEB* 1959 SC (HL) 17; affg 1958 SC 53.

[51]As to public law, see *British Railways Board* v *Glasgow Corporation* 1976 SC 224 at p 232 per Lord McDonald (Ordinary).

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

[53]1959 SC (HL) 17 at p 38.

[54]*Ibid* at p 57.

[55]*Ibid* at p 48.

Oxygen Co case based their decision on a private law doctrine of improper compulsion.[56] In the *Woolwich* case, Lord Goff referred to the case along with the *Sutton* case[57] as based on a form of compulsion in his description of the existing law[58] and did not rely on it in reformulating the law. Lord Keith said that the *British Oxygen* case proceeded on the same basis as the *colore officii* cases (ie compulsion).[59] Lord Jauncey construed the case as based on compulsion having regard to inter alia the reliance on the *Sutton* case[60]. The other Lords of Appeal did not mention it. As Professor Burrows notes[61], the *Sutton* case belongs indisputably to private law. Differing from the above interpretation, Dr Evans-Jones characterises the *British Oxygen* case as involving a *condictio indebiti*[62], but that is a doctrine of private law.

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[56]Lord Reid's speech (*ibid* pp 50,51) was concerned to reject the argument that a common law right to repetition was disapplied by certain English railway cases. He did not state what was the nature and source of the common law right of recovery. Lord Keith (*ibid*) p 62 reserved his opinion. For a fuller discussion of this case, see Scot Law Com DP No 95, vol 2, paras 3.30 - 3.34.

[57]*Great Western Railway Co* v *Sutton* (1869) LR 4 HL 226.

[58][1993] AC 70 at p 165.

[59]*Ibid* at p 160.

[60]*Ibid* at p 188.

[61]*Law of Restitution* (1993) p 354.

[62]Evans-Jones, "Retention without a Legal Basis" pp 239,240;Evans-Jones, "Reflections on the Condictio Indebiti" (1994) 111 SALJ 759 at p 765. On this theory the *British Oxygen Co* case was an example of a general *condictio indebiti* in which the fact of improper compulsion negatives the bar to recovery stemming from the pursuer's knowledge

3.29 It might be thought that the law was satisfactorily settled by the private law interpretation in *Woolwich* of the *British Oxygen Co* case. Nobody has pointed to any practical defect in it. The pursuer, having by virtue of the defender's monopoly no reasonable alternative but to pay, gets any excess statutory charges back. All the difficulties attendant upon judicial review or upon the public/private dichotomy are avoided by a clear, simple and principled private law rule. The Law Commission however believe that the future scope of the *Woolwich* principle may be much wider than its strict ratio suggests; that it may be construed so as to encompass charges levied by statutory monopolies and privatised utilities in excess of statutory authority; but that the practical importance of extending the *Woolwich* principle outside the field of taxation would be marginal because of the *British Oxygen Co* case.[63]

3.30 **The public law test of *ultra vires* for the purpose of judicial review.** In Professor Burrows's view, the question whether charges by nationalised corporations in excess of statutory authority fall within the *Woolwich* principle:

> "ought to turn on general principles of public law and is not a direct matter for the law of restitution. In other words,...the key is the doctrine of ultra vires. If and in so far as the payment demand falls within that doctrine

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that the payment was not due. But Lord Patrick held (1958 SC 53 at p 79) that, absent error, the claim was difficult to classify as a *condictio indebiti*.

[63]Law Com No 227, paras 6.42-6.45; 8.22.

and is hence susceptible to judicial review ..., the *Woolwich* principle applies: otherwise not."[64]

In his view the same rule applies to sums extorted *colore officii* and indeed to all payments recoverable under the *Woolwich* rule.

3.31 **The public law test of *ultra vires* applying outwith judicial review.** Professor Beatson agrees in principle with Professor Burrows that the test, or rather one of the tests, of the scope of the *Woolwich* rule is, or should be, the public law test of *ultra vires* but does not agree that the particular form of that test is the test of jurisdiction in proceedings for judicial review[65]. Professor Beatson also points to several contexts in which a similar distinction to that which emerges from the *Woolwich* case are applied by the English courts. These consist of or include the tort of misfeasance in a public office; exemplary damages for unconstitutional arbitrary or oppressive conduct by public officials; the tort liability of bodies exercising statutory powers; the inability of public authorities to fetter their discretion by contract or statements; and public interest immunity[66]. As he indicates, similar rules are applied in Scots law at any rate in some of these contexts.[67] No doubt in some others, English

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[64]Burrows, *Law of Restitution* p 354.

[65](1993) 109 LQR 401 at p 414.

[66]*Ibid* at pp 413,414, text keyed to fns 61 to 68.

[67]See *ibid* fns 61 and 66. For a review of the relevance of public law concepts in the Scots law of delict, see John W G Blackie, "Scots Law: General Principles or Diverse Rules" in J Bell and

cases might be followed. As he also indicates elsewhere, the "analogy of the tort of misfeasance in a public office is instructive since, although, as in the general restitutionary claim, proceedings can only be brought against a public authority in respect of invalid acts, there is no suggestion that such proceedings must be brought under Order 53", ie by way of judicial review.[68]

3.32 The Law Commission argue that the *Woolwich* right is not limited to payments of tax or to Governmental or quasi-Governmental exactions: the "crucial element is that the payment is collected by any person or body which is operating outside its statutory authority, that is, it is acting *ultra vires*".[69] Professor Beatson has forcefully argued in favour of this view. He rejects the notion that the basis of the *Woolwich* rule is a general principle of "transactional inequality" which, as he points out, is not recognised as a ground of restitution in English or Scots law. There are instead protections only in specified cases of inequality. Professor Beatson observes[70]:

> "The *Woolwich* rule however recognises the particular force of power created or exercised by the state. If one has to describe it in terms of inequality, it is simply a further situation in which the law protects against a particular form of inequality. Here, what justifies the intervention of the law is the fact that the inequality has been created by

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A W Bradley (eds), *Governmental Liability: A Comparative Study* (1991) 45.

[68](1993) 109 LQR 1 at p 5.

[69]Law Com No 227, para 6.42.

[70](1993) 109 LQR 401 at pp 411 - 413.

the legislature or other public grant of power which is, however, inherently limited. The protection is against the unlawful exercise or purported exercise of that power. It may be asked why this particular form of power merits this form of protection. It is at this stage that the constitutional principles adverted to by Lord Goff and which form the basis of much of the academic commentary[71] come into their own. These give primacy to the principle of legality and the need to ensure adherence to the jurisdictional limits of the power of the state and its emanations rather than to a broad notion of inequality. It might be argued that the constitutional principles do not apply to non-governmental bodies such as harbour and ferry boards. But this is not necessarily so. Such bodies are given their powers by the state and may be subject to public law principles. If so, it is clearly arguable that they should also be subject to the prohibition on unlawful charges.[72]

"A focus on a broad notion of inequality gives, in my view, insufficient emphasis to the fact that the House of Lords was concerned with situations in which limitations are inherent in the power conferred by statute to make specified types of charges (taxes,levies and other imposts such as dues and tolls). If it is necessary to discuss these situations in terms of inequality, what marks them out and provides the policy justification for the special rule is the fact that it is the state and not the market that has given the payee extraordinary power. It is not, for instance, the fact that the payee happens to own the only cemetery in town or operate the only taxi service, which is important.It is the fact that the state has given him a monopoly and has limited his monopoly powers (or not removed inherent limits on them). So, where a limited statutory power to charge or raise money is given, in principle it should not matter whether it is given to government, a

[71]Cornish (1987) 1 J Mal & Comp Law 41; Birks in Finn (ed) *Essays on Restitution* (1990) at pp 161 et seq. See also Law Com CP No 120, paras 3.14,3.54.

[72]Citing Mitchell *Constitutional Law* (2d edn;1968) pp 213,216,230.

> public body or a private (or privatised) industry which is subject to public law legislation. The limit is inherent in the sense that but for the power - with its limitations - there would be no authority at all to charge.
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> "That this lies at the bottom of the *Woolwich* principle is supported by the fact that Lord Browne-Wilkinson's wider principle only extended to situations in which the citizen is "in practice, unable to resist the payment save at the risk of breaking the law or exposing himself to penalties or other disadvantages,"[73] from Lord Slynn's citation of Kitto J in *Mason* v *New South Wales*[74] that what created the compulsion was "the terms of the Act itself" and from the general reliance on the *colore officii* cases as reformulated. This approach is also supported by the fact that any other would have to confront very difficult problems of definition, whether distinguishing governmental from non-governmental powers (although some non-governmental powers give rise to issues of public law), or payments for goods or services (as in the *South of Scotland Electricity Board* case) from those in respect of taxes, duties and licences".

The learned author states that nobody would have difficulty in deciding whether the principle applies to a given set of facts[75].

3.33 We ourselves respectfully doubt whether, consistently with its rationale, the *Woolwich* rule can be extended to all charges levied in excess of statutory authority. First, statute is merely a source of law. In a system based on specific grounds of recovery constituting reasons for redressing an enrichment (*anglicé* "unjust

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[73] [1993] AC 70 at p 198C.

[74] (1959) 102 CLR 108 at p 129 (in *Woolwich* at p 202H).

[75] (1993) 109 LQR 401 at p 412.

factors"), the fact that the source of a power to charge is statutory should in principle not be treated as a ground of repetition. Many statutory powers are conferred on statutory bodies expressly or impliedly not because such powers are special governmental or public powers but simply because such bodies, being purely creatures of statute, do not possess even the ordinary powers of ordinary citizens unless the powers have been conferred expressly or impliedly by statute.

3.34 Second, we find it difficult to accept that Lord Browne-Wilkinson or Lord Slynn in the dicta cited had in mind cases of the licensed taxi-cab type or similar small businesses (who in Scotland require to be licensed under the Civic Government (Scotland) Act 1982). It seems to us unrealistic to treat them for the purpose of the *Woolwich* rule as "emanations of the State"[76]. Their real legal and economic position is completely different from the paradigm case of the Inland Revenue which influenced the House of Lords in the *Woolwich case*. This suggests to us that the test of an express or implied statutory power to charge lacks credibility. These Civic Government Act cases properly test the principle and so cannot be dismissed as extreme cases. Many other examples could be given.

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[76]Part II of the Act provides for the licensing not only of taxi and private hire car services, but also metal dealers; boat hire; street trading; operating a private market; use of premises as a place of public entertainment; late hours catering; window cleaning; and other activities designated by statutory instrument. Part III and Schedule 2 provide for the licensing of sex-shops.

3.35 Third, we believe that without violating principle it is not possible to delimit the new rule by reference only to the exercise of rights or functions (powers and duties) conferred or regulated by statute since a very large and increasing number of statutes, too numerous to specify, confer or regulate purely private law rights and functions. A charge levied by a trade union may be in excess of its statutory powers, but no one has yet suggested that the rule of automatic recovery should apply simply because it contravenes Parliament's intention in conferring or regulating the powers of the trade union. Overpayments of aliment or statutory rent also contravene Parliament's intention. In fact, the invocation of Parliamentary intention obscures rather than clarifies the scope of the *Woolwich* rule.

3.36 Fourth, our preference for a unitary law of repetition does not depend on the continued acceptance of Dicey's discredited second meaning of the rule of law.[77] It depends rather on the need to ensure that where particular classes of payees or debts are to be subjected to a special rule of repetition belonging to, or at least rooted in, public law, the payees or debts within those classes must possess special characteristics which justify the imposition of that special rule.[78] In

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[77]Cf Beatson, "Restitution of Taxes" (1993) 109 LQR 401 at p 413 commenting on A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn; 1961) pp 193 et seq.

[78]Mitchell, *Constitutional Law* (2d edn;1968) pp 58 - 62 argued that the special position of government and some public authorities requires on the one hand that they possess extraordinary powers and immunities not available to ordinary citizens

our view, a criterion of scope based on the mere fact that a power to charge is statutory does not identify those characteristics satisfactorily and is therefore unduly undiscriminating and formalistic.

3.37 Fifth, critics of the *Woolwich* principle may accept that any other approach to the delimitation of the *Woolwich* principle "would have to confront very difficult problems of definition"; that these are relevant considerations in trying to ascertain the existing boundaries of the *Woolwich* principle; and that a definition by reference to statutory charging powers is the best that can be devised. But if the best approach to definition is (as we contend) itself highly unsatisfactory, that would seem to indicate that there is something fundamentally wrong with the *Woolwich* principle.

(3) The need for a demand?

3.38 Although the speeches in the *Woolwich* case refer to payments made pursuant to an *ultra vires* demand,[79] English commentators argue that the requirement of a demand is inappropriate. Thus the Law Commission point out that "the move to self-assessment for income tax would mean that if a

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and on the other hand that they are subjected to greater liabilities and higher standards than ordinary citizens to guard against abuse of power. He rejected (*ibid* p 62) Dicey's second branch of the rule of law except "as an indication that governmental bodies should be subject to law. Often that subjection may be facilitated by a recognition of their special characteristics, where those are significant".

[79] [1993] AC 70 (HL) at p 177 (Lord Goff) and p 205 (Lord Slynn): also at pp 161 and 196 by the dissenting law lords.

demand were to be held essential, the scope of the right would be significantly narrowed."[80] In principle the foundation policy of "legality" or "no taxation without Parliamentary consent" should apply as much where money is paid by way of tax without a demand as where there is a demand.[81] As Professor Burrows explains: "The expression "*ultra vires* demands" can therefore be taken to be shorthand for demands or reasonably anticipated demands that are, or will be, *ultra vires*."[82]

(4) The need for judicial review?

3.39 **English law.** In the *Woolwich* case, proceedings for judicial review annulling the *ultra vires* regulations were followed by an ordinary action for repayment of the interest on the tax overpaid. The House of Lords did not say whether judicial review proceedings were a necessary prelude to an ordinary action for repayment but there is an indication in the dissenting judgment in the Court of Appeal that at least one tax-payer, but probably only one, would require to bring judicial review proceedings to establish that the

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[80]Law Com No 227, para 6.37. The Finance Act 1994, Part IV, Chapter IV (ss 200 - 218) (Changes for facilitating self-assessment under Schedule D) applying to new businesses set up after 5 April 1994 and in all other cases from 1996-1997 onwards.

[81]See Law Com CP No 120, paras 3.90 ,3.91; Law Com No 227, para 6.37; Burrows, *Law of Restitution* pp 356,357; Beatson "Restitution of Taxes" (1993) 109 LQR 401 at pp 405,406.

[82]Burrows, *Law of Restitution* (1993) p 356. He continues (*ibid* pp 356,357): "The stress on 'reasonable anticipation' is designed to exclude the person who pays where there is no prospect of the tax being demanded. It would seem that he should have to rely on the ground of mistake if he is to recover".

demand was indeed *ultra vires*[83]. Professor Burrows argues that only one petition for judicial review would be necessary and that other tax payers could found on that decision in their subsequent ordinary actions.[84] Professor Beatson questions whether even one judicial review application would be necessary[85] founding particularly on the undernoted case[86]. He does not found on Lord Slynn's dictum that "if a claim lies for money had and received, judicial review adds nothing"[87] because,as he says, "that was made in the context of the Revenue's suggestion that the proper procedure following their refusal to repay *after* the regulations had been judicially reviewed was by *another* application for judicial review"[88].

3.40 **Scots law.** The questions arise whether in Scotland (a) the *ultra vires* demand or receipt would have to be challenged by judicial review and (b) the new test of tripartite relationship would require to be satisfied. The question whether judicial review is necessary raises different policy considerations than under English law because (a) repetition could be claimed in judicial

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[83][1993] AC 70 at p 120D per Ralph Gibson LJ.

[84]Burrows, *Law of Restitution* (1993) p 355.

[85]J Beatson, "Public Law, Restitution and the Role of the House of Lords" (1993) 109 LQR 1 at pp 4,5.

[86]*Roy* v *Kensington & Chelsea and Westminster F P C* [1992] 1 AC 624.

[87][1993] AC 70 at p 200E,F.

[88](1993) 109 LQR 1 at pp 4,5 (emphasis in original).

review proceedings[89] so that two sets of proceedings would not be necessary and (b) there is no special time limit akin to the three-month limit under English law.

3.41 **Is judicial review necessary in Scots law?** It is not easy to give an answer to the first question. The law is still developing. It is not entirely clear that in a case where an ordinary common law action is available, judicial review is excluded, or *vice versa*. The case of *Watt* v *Strathclyde Regional Council*[90] suggests that there may be an overlap between a process of judicial review (for the reduction of a decision by an education authority to refuse to give effect to a settlement relating to absence cover for teachers, as required by statute) and an action of damages for breach of contract resulting from the decision. It was observed that the ordinary contractual remedies were available in relation to breaches of contract resulting from the decision not to give effect to the settlement, and the decision itself was amenable to judicial review. This might suggest that a decision not to refund might be amenable to judicial review (especially if it affects a large number of cases[91]) while the resulting failure to refund might be actionable by an action of repetition based on the *Woolwich* principle, or an error in payment.

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[89]RCS 1994, Chapter 58 (formerly RC 260B).

[90]1992 SLT 324, explained in *West* v *Secretary of State for Scotland* 1992 SLT 636 at p 649.

[91]That is not however essential to judicial review; see the *West* case 1992 SLT 636 at p 650.

3.42 **The requirement of a tripartite relationship.** One possible barrier to judicial review of a common law or statutory discretionary power to repay sums unlawfully demanded and received lies in the requirement, first articulated in the recent leading case of *West* v *Secretary of State for Scotland*,[92] that cases appropriate for judicial review involve a "tripartite relationship". It is somewhat difficult to see how the exercise by a public authority of a power to repay sums unlawfully demanded and received can fall within the description of a tripartite relationship. In such cases, normally only two parties are involved, namely the public authority recipient and the private citizen payer. There is Inner House authority prior to the *West* case that a discretionary decision to make a payment may be reviewed by the Court of Session in the exercise of its supervisory jurisdiction[93], though it has been said that discretionary payments are not an area of executive discretion which in practice the Court will review closely.[94] As indicated above, the universality of the requirement of tripartite relationship has been cogently criticised[95] and doubted in the Outer House.[96]

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[92]1992 SLT 636.

[93]Eg *Campbell* v *Glasgow Police Commissioners* (1895) 22 R 621; *Nimmo's Trs* 1941 SC 58.

[94]A W Bradley, *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 1 (1987), para 234.

[95]See para 3.9, fns 15 and 16 above.

[96]*Naik* v *University of Stirling* 1994 SLT 449 (OH) at p 451L-452A per Lord MacLean: "I confess that I have very considerable difficulty in understanding that in every case in which application is made to the supervisory jurisdiction

3.43 We provisionally conclude that any requirement of a tripartite relationship would not preclude judicial review of the exercise by a public authority of a common law or statutory power to refund money demanded by the authority unlawfully.

3.44 **The *Chetnik* and *Woolwich* cases and competency of judicial review.** In the English case of *R* v. *Tower Hamlets LBC, ex parte Chetnik Developments Ltd*[97], the House of Lords quashed a rating authority's discretionary decision not to refund rates made in the exercise of an express statutory discretionary power conferred on it by the General Rates Act 1967, section 9(1) (which has no exact counterpart in Scotland[98]). Giving the leading opinion, Lord Bridge held that the purpose of section 9(1) was to enable rating authorities to redress the injustice arising where ratepayers paid undue rates; that Parliament must have intended rating authorities to act in the same high principled way which (under English law[99]) is expected by the court of its own officers and not to retain rates paid under a mistake of law or upon an erroneous valuation unless there were special

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of the Court of Session there must exist such a tripartite relationship. This seems to me to impose an inflexible and over formal restraint upon the Court's jurisdiction".

[97][1988] AC 858.

[98]Cf Local Government (Financial Provisions) (Scotland) Act 1963, s 20(1), (which imposes a duty to repay rates paid by reason of an error in fact).

[99]See Scot Law Com DP No 95,paras 2.61 to 2.64.

circumstances justifying retention[100]. Moreover he held that the authority could not take into account the financial circumstances of the ratepayer and the general body of ratepayers, or the fact that the authority had expended its rate income, or that a proportion of the amounts paid had been received on behalf of other "precepting" authorities.

3.45 In a concurring opinion (which did not itself receive concurrence), Lord Goff held that section 9 effectively created a statutory remedy of restitution and that local authorities should have regard to the general principles of the law of restitution in exercising their discretion. Since the *Woolwich* case, these principles now require automatic repayment of sums unlawfully demanded by a public authority so that there would be no room for the exercise of a discretion. The *Chetnik* decision however presupposed that the grounds of recovery were error and compulsion.

3.46 In the *Woolwich* case, the Court of Appeal regarded these general principles as applying to the review of any discretionary power to repay, exercisable under a specific statute or at common law.[101] In the House of Lords, however, a difference of opinion emerged. Lord Keith observed that it would have been open to Woolwich to claim repayment in proceedings for judicial review of the Revenue's common law discretionary power to make refunds, and that there would appear to be no reason why such proceedings would not have been

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[100][1988] AC 858 at p 877.

[101]*Woolwich Building Society* v *IRC* [1993] AC 70 (CA) at pp 88, 91, 97; and p 140.

successful.[102] While this observation assumed that Woolwich had no common law remedy, it supports judicial review of a common law discretionary power of repayment. On the other hand, Lord Goff held that the principles affirmed in the *Chetnik* case did not apply to a common law discretionary power to refund.[103]

3.47 While the test of competency of applications for judicial review is not the same in Scots law as in English law,[104] the *Chetnik* case does provide persuasive authority that a *statutory* power to refund would be amenable to judicial review under our law. The *Woolwich* case gives conflicting signals as to whether a *common law* discretion to refund tax is so amenable, but it is difficult to see why not.

B. DO THE REASONS UNDERLYING *WOOLWICH* PRINCIPLE JUSTIFY A NEW GROUND LIMITED TO PUBLIC SECTOR BODIES OR DEBTS?

(1) Difficulties of correlating scope with policy justifications

3.48 Paradoxically it is something of an embarrassment for the law reformer that a more than usually large number of legal and policy justifications of the *Woolwich* principle have been advanced. At least nine justifications were mentioned by the House of Lords in the *Woolwich* case and a further eight justifications have been advanced by others including some by Professors Birks and Cornish whose contributions were

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[102][1993] AC 70 (HL) at p 153.

[103]*Ibid* at pp 170-171.

[104]*West* v *Secretary of State for Scotland* 1992 SLT 636 at pp 648 to 650.

commended by Lord Goff in the *Woolwich* case. We examine all seventeen justifications in this section.[105]

3.49 A statutory restatement of the *Woolwich* principle would be peculiarly difficult for the following reasons.

(1) Whereas there is a more than usually large number of policy justifications for the *Woolwich* principle, there is as yet no agreement among commentators on which are the important ones at least for the purposes of determining scope. These difficulties of scope are of fundamental importance.

(2) It is difficult, if not indeed impossible, to consider policy justifications for the *Woolwich* principle adequately unless one first knows the scope of the bodies to whom, or the debts to which, the principle is to apply.

(3) The questions of scope are peculiarly difficult because of the sheer size of the spectrum of (recipient) bodies and of debts to which the *Woolwich* principle could be made to apply and the very fine, arbitrary and debatable nature of the gradations within that spectrum.

(4) There is not, or not yet, in existence a fully researched typology of recipients and debts to which the *Woolwich* principle might apply and the framing of such a typology is likely to be a huge

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[105]See paras 3.50 - 3.110; for a summary see paras 3.111 - 3.116.

task which could absorb scarce law reform resources for a very considerable time.

(2) The justifications for the *Woolwich* rule

3.50 **Justifications in the *Woolwich* case.** In the speeches of the majority in the House of Lords in the *Woolwich* case, at least nine justifications for the *Woolwich* principle may be discerned:

(i) "the simple call of justice";
(ii) the Bill of Rights;
(iii) intrinsically coercive powers of the State;
(iv) the public law principle of legality;
(v) penalising the good payer;
(vi) the example of European Community Law;
(vii) different rule applying to recovery by public authorities;
(viii) want of consideration; and
(ix) the unjust enrichment principle.

3.51 **Other justifications.** Apart from the foregoing, other justifications for the *Woolwich* principle have been identified by commentators and courts. These consist of or include the following:

(x) increasing public confidence in the fairness of government;
(xi) higher standards of fairness expected of public authorities;
(xii) superior ability of governmental bodies to make refunds;
(xiii) inadequacy of improper compulsion as a ground of repetition;
(xiv) inadequacy of *condictio indebiti*;
(xv) discrimination against poorer and less well-educated citizens;

(xvi) discouragement of *ultra vires* demands; and

(xvii) encouragement of prompt payment of public law debts.

3.52 We do not think that these considerations or any of them do justify the introduction of a principle of automatic recovery limited in some way to public sector payees or public sector debts.

(i) "The simple call of justice"

3.53 In the *Woolwich* case the majority held that as a matter of common justice the Revenue's position was unsustainable, especially since the Revenue had the benefit of a massive interest-free loan as the fruit of its unlawful action.[106]

> "Take any tax or duty paid by the citizen pursuant to an unlawful demand. Common justice seems to require that tax to be repaid, unless special circumstances or some principle of policy require otherwise; *prima facie* the taxpayer should be entitled to repayment as of right."[107]

Lord Goff approved the following dictum in a Canadian case:

> "If it is appropriate for the courts to adopt some kind of policy in order to protect Government against itself (and I cannot say that the idea particularly appeals to me), it should be one that distributes the loss fairly across the public. The loss should not fall on the totally innocent taxpayer whose only fault is that it paid what the legislature improperly said was due."[108]

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[106][1993] AC 70 at p 171 per Lord Goff.

[107]*Ibid* at p 172.

[108]*Air Canada* v *British Columbia* (1989) 59 DLR (4th) 161 at p 169 per Wilson J (dissenting) approved [1993] AC 70 (HL) at p 176; see also at p 203 per Lord Slynn.

3.54 While we respectfully agree that the Revenue's case was unsustainable as a matter of common justice, justice may also require that undue payments should be recoverable in the case of some private sector debts not covered by the existing grounds of recovery. This justification by itself does not assist in delimiting the boundaries of the *Woolwich* principle or support a special rule for public sector payees or debts.

(ii) The Bill of Rights

3.55 In the Court of Appeal[109] and influential academic writings,[110] reliance was placed on the constitutional principle of no taxation without Parliamentary consent enshrined in Article 4 of the Bill of Rights 1689. This argument had been rejected in the *Glasgow Corporation* case,[111] and in the *Woolwich* case, Lord Keith remarked that Article 4 had no relevance since it was concerned with the denial of the right of the executive to levy taxes without the consent of Parliament.[112] Lord Goff however observed:

> "the retention by the state of taxes unlawfully exacted is *particularly* obnoxious, because it is one of the fundamental principles of our law - enshrined in a famous constitutional document, the Bill of Rights 1688 - that taxes should not be levied without the authority of Parliament; and full effect

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[109][1993] AC 70 (CA) at p 79 and 97 per Glidewell LJ;

[110]Birks, "Restitution from the Executive" at p 181; Cornish "Colour of Office" (1987) 14 J of Mal and Comp Law 41 at pp 49 - 51.

[111]*Glasgow Corporation* v *Lord Advocate* 1959 SC 203 at p 230 per Lord President Clyde; at p 242 per Lord Sorn.

[112][1993] AC 70 (HL) at pp 161, 162.

> can only be given to that principle if the return of taxes exacted under an unlawful demand can be enforced as a matter of right."[113] (emphasis added)

The word "particularly" may possibly suggest that the *Woolwich* principle applies beyond taxes properly so called to other types of levy by public authorities. In any event, it should be noted that English and Commonwealth case law has extended the principle of Article 4 of the Bill of Rights beyond the exaction of taxes to other forms of exaction, eg *ultra vires* charges for licences.[114]

> "No one denies the general constitutional principle that no moneys can be exacted by Government without legislative authority and without such authority no moneys can be demanded or raised by Government as a condition of exercising a power or discretion to the exercise of which the subject is entitled or giving effect to a right with which he is invested by law."[115]

3.56 To attribute to Lord Goff the view that the *Woolwich* rule extends beyond repayment of taxes and similar levies to repayment of a wide variety of statutory charges imposed *ultra vires* by a wide range of fringe bodies and even individuals such as operators of taxi services, is entirely inconsistent with another important passage in Lord Goff's speech. Counsel for the revenue (Mr Glick)

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[113] *Ibid* at p 172. See also *ibid* at p 196 per Lord Jauncey (dissenting) stating that there was in theory a good deal to be said for the submission of Professor Birks concerning the Bill of Rights ground, citing Birks *Introduction* p 295.

[114] *Attorney-General* v *Wilts United Dairies Ltd* (1921) 37 TLR 884 (CA); affd (1922) 38 TLR 781 (HL); *Brocklebank Ltd* v *The King* [1924] 1 KB 647.

[115] *Cam and Sons Proprietary Ltd* v *Ramsay* (1960) 104 CLR 247 at p 258 per Dixon CJ.

submitted that the vast majority of tax cases will be covered by statutory provisions[116]. Conceding this Lord Goff remarked:

> "turning Mr Glick's argument against him, the immediate practical impact of the recognition of the principle will be limited, for (unlike the present case) most cases will continue for the time being to be regulated by the various statutory regimes now in force".[117]

3.57 We respectfully agree with those commentators who deny that article 4 of the Bill of Rights is by itself a sufficient justification for an automatic right of recovery. Thus it has been observed:

> "...there is no reason to think that 'taxation' in the Bill of Rights was intended to include every money demand made by the Crown. In any event it is not clear that the high constitutional principle [of 'no taxation without Parliament'] adds any force beyond simply saying that the public authority's demand for payment was *ultra vires* and the precise policy reason justifying restitution is therefore left unargued".[118]

3.58 In constitutional history, the main importance of article 4 of the Bill of Rights was and is that it has allowed Parliament to control supply and thereby, at least in the last resort, to

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[116] [1993] AC 70 at p 170.

[117] [1993] AC 70 at p 176G.

[118] A Burrows, "Public Authorities, Ultra Vires and Restitution", in Burrows (ed) *Essays on the Law of Restitution* (1991) at pp 61, 62. See also W R Cornish "Colour of Office" (1987) 14 J of Mal and Comp Law 41 at p 50: "a rule requiring the return of moneys paid is likely to be a matter of inference from the fundamental proposition [in the Bill of Rights] and it requires its own justification". See also *ibid* at p 51 (quoted below).

control the executive. It is therefore fundamentally important at the level of the relationship between Parliament and the executive. After three centuries, the *Woolwich* case has given the Bill of Rights a new special importance at the level of the relationship between the individual citizen and the executive by extending its scope from the prohibition of the levy of unauthorised taxes to an affirmation of the right of recovery by the ordinary citizen of unauthorised taxes and levies already paid. It seems to us clear that this extension requires a further justification beyond the bald invocation of the Bill of Rights[119], especially (but not only) in relation to levies, such as licence fees, which are not taxes properly so called.

3.59 There is much to be said for Lord Keith's view[120] that article 4 of the Bill of Rights is concerned with control of supply, not repetition or restitution. We do not think that that article gives clear guidance on the scope of the *Woolwich* principle.

(iii) Intrinsically coercive powers of the State

3.60 A third reason was:

> "when the revenue makes a demand for tax, that demand is implicitly backed by the coercive powers of the state and may well entail (as in the present case) unpleasant economic and

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[119]It is fair to say that no court or commentator whom we have cited has relied solely on the Bill of Rights.

[120][1993] AC 70 at pp 161,162.

social consequences if the taxpayer does not pay."[121]

In that case, the coercive powers included "a power to charge interest which is penal in its effect".[122] Moreover, the plaintiffs "being a reputable society which alone among building societies is challenging the unlawfulness of the demand, it understandably fears damage to its reputation if it does not pay".[123]

3.61 Several authorities refer to summary remedies (such as distress in England or summary warrant diligence in Scotland) available to the State without decree obtained in a court action by the State and when therefore the citizen has no

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[121] [1993] AC 70 (HL) at p 172 per Lord Goff.

[122] *Ibid* at p 171 per Lord Goff. See also [1989] 1 WLR 137 at p 142 per Nolan J: "Woolwich was not, of course, to know at the time of the payments that it would succeed in the judicial review proceedings. Had Woolwich failed in those proceedings, it would have faced a bill for interest, which would not have been deductible for tax purposes, in an amount far exceeding the net return which Woolwich could have obtained from investing the money withheld."

[123] [1993] AC 70 at p 171 per Lord Goff. See also [1989] 1 WLR 137 at p 142 per Nolan J: "First and foremost, the requirements of the Regulations as amplified in communications from the revenue amounted on their face to lawful demands from the Crown. Woolwich would have expected any refusal of payment to lead to collection proceedings which would have been gravely embarrassing for Woolwich, the more so as it would have been the only building society refusing to pay. Any publicity suggesting that Woolwich might be in difficulty in meeting its financial obligations, or that alone amongst building societies it was pursuing a policy of confrontation with the revenue, might have damaging effects far outweighing Woolwich's prospects of success on the issue of principle."

opportunity to state a defence. The majority approved a dictum by Holmes J that:

> "when, as is common the State has a more summary remedy, such as distress, and the party indicates by protest that he is yielding to what he cannot prevent, courts sometimes perhaps have been a little too slow to recognize the implied duress under which payment is made."[124]

But the majority also found that such implied duress existed where the State was not threatening to use a summary remedy, following the statement by Holmes J that:

> "even if the State is driven to an action, if at the same time the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional, rights, by defence in the suit, justice may require that he should be at liberty to avoid these disadvantages by paying promptly and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms."[125]

Lord Browne-Wilkinson remarked:

> "the colore officii cases are merely examples of a wider principle, viz. that where the parties are on an unequal footing so that money is paid by way of tax or other impost in pursuance of a demand by some public officer, these moneys are recoverable since the citizen is, in practice, unable to resist the payment save at the risk of breaking the law or exposing himself to penalties or other disadvantages."[126]

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[124]*Atchison, Topeka and Santa Fe Railway Co* v *O'Connor* (1912) 223 US 280 at p 285.

[125]*Ibid* at p 286, approved [1993] AC 70 (HL) at pp 172, 173; 198; 203.

[126][1993] AC 70 (HL) at p 198. See also at p 204 per Lord Slynn: "Although as I see it the facts do not fit easily into the existing category of duress or of claims colore officii, they shade into them. There is a common element of pressure which by analogy can be said to justify a claim for repayment."

The coercive powers include a power to charge penal interest and to use summary warrant diligence, and the unpleasant consequences of non-payment included the risk of damage to reputation.

3.62 This justification was strongly founded on by the majority of the House of Lords in the *Woolwich* case. But that case concerned a dispute between the Inland Revenue and an apparently vulnerable building society, a paradigm case for applying the *Woolwich* rule. As Lord Browne-Wilkinson remarked:

> "The inequalities of the parties' respective positions is manifest even in the case of a major financial institution like Woolwich."[127]

We find it difficult to see how this consideration can justify the wide formulation that money paid by a citizen to a public authority in form of a levy pursuant to an *ultra vires* demand is *prima facie* recoverable as of right. That is a formal rule which could apply in cases where the parties' respective positions may not be unequal, and indeed where the alleged debtor may be more powerful than the public authority.

3.63 Public authorities generally do not possess either the power to charge penal interest, nor the power to enforce their debts by summary warrant diligence which is confined to certain central and local government fiscal debts.

3.64 It is quite true that delay in paying a tax pending litigation can be damaging to the alleged debtor's reputation, but that proposition

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[127] [1993] AC 70 (HL) at p 198.

seems just as true of civil debts generally as of taxes and rates, and other public levies (eg TV licence fees). We are not aware of any evidence that delay in paying tax pending litigation is any more (or less) damaging to a person's social or commercial reputation than delay in paying commercial, consumer, alimentary or other civil debts.[128] Nobody likes to be a defender in a debt action, not only because of the potentially damaging effect of diligence on the dependence but also because the man in the street can sometimes not discriminate between defending an action and being held liable in an action.[129] In the absence of reliable, empirical research, public perceptions of the morality of resisting payment of different types of claim (eg public levies and other forms of debt) and therefore the different impacts on reputation of delay in payment pending litigation, are something of a mystery and yield no guidance on scope whatsoever.

3.65 Furthermore, it is not clear that demands by (say) such levy-making "authorities" as a trust port, a road bridge board, a university (for fees), a compulsory liquidator (as distinct from a voluntary liquidator), or a solicitor (as distinct from an accountant) are inherently more coercive than demands by very large commercial or financial

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[128]No such evidence is referred to in the Report of the Departmental Committee on *Enforcement Powers of the Revenue Departments* (1983) Cmnd 8822: Chairman, the Rt Hon Lord Keith of Kinkel, PC.

[129]*Dick and Parker* v *Langloan Iron and Chemical Co Ltd* (1905) 21 Sh Ct Reps 139 at p 140 per Sheriff Fyfe: "to the mind of the commercial man in the street, I fear an action in court infers resistance to a just claim".

institutions who have deeper pockets, and greater ability to sustain lengthy litigation, than the bodies or persons just mentioned. In short what is true of the coercive nature of demands by the Inland Revenue may not be true of demands by other far less powerful public authorities or public officers.

3.66 While the inequality of the respective positions of the parties in the *Woolwich* case justifies the actual decision on the facts of that case, it does not point to a rule bounded by reference to the public/private dichotomy and affords virtually no practical guidance on the scope of such a rule so bounded. If anything, it points to a test based on inequality applying to the private as well as the public sector.

(iv) The public law principle of legality

3.67 In his formative article, Professor Birks argued that an automatic right to restitution from the executive of *ultra vires* levies is justified by the high constitutional principle of the rule of law or the principle of legality, "which alone allows the individual to have confidence in those who hold political power"[130].

3.68 Then there is the presumption that administrative acts are valid. Professor Sir William Wade remarks[131]:

> "It hardly seems reasonable to tell the citizen, on the one hand, that administrative

[130]Birks, "Restitution from the Executive" at p 168.

[131]H W R Wade *Administrative Law* (6th edn, 1988) p 793.

> acts must be presumed valid until a court holds otherwise and, on the other hand, that if he acts on this presumption he may have to submit to unlawful taxation".

This argument extends beyond taxation to all *ultra vires* "public law" acts imposing levies and charges.

3.69 The focus of Professor Birks's argument was directed to restitution from the inherently powerful organs of the state. Only in this way can one explain his otherwise irreconcilable argument that "transactional inequality" may yet be found to be the basis of the new rule[132] and his reference to "political power" in the passage quoted at paragraph 3.67 above.

3.70 Professor Cornish's influential article suggested a new rule applying to "a government department, local authority or any other organ purporting to exercise public authority"[133]. His argument is in many places consistent with a wide interpretation of the new rule:

> "The innermost struggle for the soul of democratic government lies in the conflict between sectional interest and the general good; in the tension between the pursuit of party objectives and the maintenance of government for the benefit of the whole society. In order to ensure that the victory does not go as of course to the first, there are only two real checks, the ballot box and the requirement of legality. The power of the electorate, for all that it remains weighty, is a blunt and an occasional instrument. The requirement that governmental action remain within the scope of legal authority is also

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[132] Birks, "Restitution from the Executive" at p 204.

[133] W R Cornish, "Colour of Office" (1987) 14 J of Mal and Comp Law 41 at p 42.

> only an occasional weapon, but it is by nature precise. The more the political condition of a country becomes polarised, the greater undoubtedly is the need to keep the weapon of legality well sharpened. Among its various cutting edges the one concerned to require that taxes, rates and charges be extracted only under legal authority remains as important as it has been since the English struggles of the seventeenth century."[134]

However his main argument quoted below[135] that governmental bodies are special because, unlike private demanders, "they do not regularly face encounters with insolvency"[136] assumes that commercial organisations should fall outside the scope of what is now the *Woolwich* rule. Moreover, Professor Cornish may have seen a public sector rule of automatic recovery as merely a staging-post towards something better.[137]

3.71 Professor Beatson[138] argues that the principle of legality "lies at the bottom of the *Woolwich* principle"[139]. But he gives to the concept a very important shift of emphasis only uncertainly foreshadowed in the pre-*Woolwich* literature and not

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[134]*Ibid* at p 51.

[135]See para 3.92.

[136](1987) 14 J of Mal and Comp Law 41 at p 51.

[137]See his remarks at p 57:"the distinction between the public and the private is a complex and sometimes awkward one... In the end, having belatedly discovered that ... the common law does indeed have an administrative law, it may be that we shall move on towards concepts of civil obligation that affect public and private institutions and individuals indifferently".

[138](1993) 109 LQR 401 especially at pp 411 - 413 quoted at para 3.32 above.

[139]*Ibid* at p 412.

at all in the *Woolwich* case itself. In his view, the constitutional principles adverted to by Lord Goff[140] which form the basis of much of the academic commentary (eg the articles by Professors Birks and Cornish[141]):

> "give primacy to the principle of legality and the need to ensure adherence to the jurisdictional limits of the power of the state and its emanations rather than to a broad notion of inequality. It might be argued that the constitutional principles do not apply to non-governmental bodies such as harbour and ferry boards. But this is not necessarily so. Such bodies are given their powers by the state and may be subject to public law principles. If so, it is clearly arguable that they should also be subject to the prohibition on unlawful charges.[142]"

3.72 Professor Cornish remarked:

> "I do not myself see that the requirement to repay should be axiomatic in either direction, in favour of government or against it. The case must be argued."[143]

As we have seen, the case for extending the *Woolwich* rule beyond *ultra vires* central government taxes was not argued in the *Woolwich* case itself and is now being argued by commentators against the background of inadequate knowledge of the types of bodies and debts who would be affected by a wide interpretation of the principle of legality.

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[140]Quoted at para 3.55 above.

[141]Birks, "Restitution from the Executive"; Cornish, "Colour of Office" (1987) 14 J of Mal and Comp Law 41.

[142]Citing Mitchell, *Constitutional Law* (2d edn; 1968) pp 213,216,230.

[143](1987) 14 J of Mal and Comp Law 41 at p 51.

(v) Penalising the good payer

3.73 Since a threat is necessary to establish improper compulsion, a payer who does not challenge a claim from a public authority, thinking to act like a good citizen, will not be able to recover on that ground. As Lord Goff remarked:

> "In any event, it seems strange to penalise the good citizen, whose natural instinct is to trust the revenue and pay taxes when they are demanded of him".[144]

This argument was anticipated by commentators. Birks remarks:

> "Since the attitude of many people, even of those who would not be supine in the face of private claims, is that official claims are too complex and relentless to be worth challenging, there is a danger that restitution will never be available to those whose mentality and means make access to legal advice difficult. This contradicts prevailing standards of public morality".[145]

A Canadian commentator observes[146]:

> "A rule which penalises citizens who are inclined to assume that public authorities act within the law does not accord with common sense".

3.74 We are not persuaded that this argument justifies a rule of recovery confined to only public sector debts. It is quite true that citizens are inclined to assume that public authorities act within the law. But citizens are

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[144] [1993] AC 70 (HL) at p 172.

[145] P Birks, "Restitution from Public Authorities" (1980) 33 Current Legal Problems 191 at p 197.

[146] J D McCamus, "Restitutionary Recovery of Moneys Paid to a Public Authority under a Mistake of Law: Ignorantia Juris in the Supreme Court of Canada" (1983) 17 University of British Columbia Law Review 233 at p 247.

also inclined to assume that large prestigious commercial organisations act "within the law". They even assume normally that tradesmen's and shopkeepers' accounts rendered are "within the law". There is not the sharp dividing line between public officials and others which this argument presupposes. This justification affords little or no guidance on scope.

(vi) The example of European Community law

3.75 Lord Goff referred to the *San Giorgio* case[147] establishing that a person paying charges levied by a Member State contrary to the rules of Community law is automatically entitled to repayment[148] and observed:

> "at a time when Community law is becoming increasingly important, it would be strange if the right of the citizen to recover overpaid charges were to be more restricted under domestic law than it is under European law".[149]

The same point has been made by others.[150]

3.76 It does not however follow that the new rule should be confined to public sector debts and authorities. The argument only goes so far as to hold that the new rule should not be less extensive than the EC rule.

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[147] *Amministrazione delle Finanze dello Stato* v *San Giorgio S p A* (Case 199/82) [1985] 2 CMLR 658.

[148] *Ibid* at p 688.

[149] [1993] AC 70 (HL) at p 177.

[150] Cf Law Com CP No 120, para 3.60; Birks, "Restitution from the Executive" pp 187, 188.

3.77 If an attempt were made to define scope of the *Woolwich* rule by statute, two difficulties would arise from the standpoint of European law. The first is that, unless the statutory definitions were to dovetail with those of Community law, the two systems of law would have to be treated separately. The second difficulty is that even if an initial measure of harmonisation could be achieved, the European institutions and Court would still be able to develop the scope of the public sphere independently of the UK Parliament and courts.

(vii) Different rule applying to recovery by public authorities

3.78 In the *Woolwich* case, Lord Goff referred to the fact that under the *Auckland Harbour Board* rule[151], the Crown was entitled as of right to recover money paid by Crown servants to the citizen out of the Consolidated Fund.[152] He observed that the "comparison with the position of the citizen, on the law as it stands at present, is most unattractive".[153]

3.79 One answer to this criticism might have lain in abrogating the *Auckland Harbour Board* rule. But this legislative solution was rejected in Law Com No 227, Section D, and is also provisionally rejected in Part V below.

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[151] *Auckland Harbour Board* v *The King* [1924] A C 318.

[152] [1993] AC 70 at p 177B. See Cornish, (1987) 14 J of Mal and Comp Law 41 at p 51.

[153] [1993] AC 70 at p 177B.

3.80 Apart from that, this criticism does not seem to us to justify the introduction of a special rule of repetition limited to public authority recipients or public law debts. The anomaly could as easily be removed by introducing a rule of recovery for all payments made without legal ground.

(viii) Want of consideration

3.81 In *Campbell* v *Hall*[154] (the "Magna Carta of the colonies") the plaintiff recovered from the Crown duty which he had paid on sugar exported from the colony of Grenada. It was there held that the Crown could not impose taxation without the consent of Parliament or the colony's Assembly. Lord Mansfield observed:

> "The action is an action for money had and received; and it is brought upon this ground; namely that the money was paid to the defendant without any consideration; the duty, for which, and in respect of which he received it, not having been imposed by lawful or sufficient authority to warrant the same."[155]

This ground was not examined in that case because the Crown did not oppose recovery if the tax was invalid. Founding on this case and later authorities,[156] Lord Browne-Wilkinson in the *Woolwich* case observed:

> "money paid on the footing that there is a legal demand is paid for a reason that does not exist if that demand is a nullity. There is in my view a close analogy to the right to recover money paid under a contract the

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[154](1774) 1 Cowp 204.

[155]*Ibid* at p 205.

[156]*Dew* v *Parsons* (1819) 1 B & Ald 562; *Steele* v *Williams* (1853) 8 Ex 625 per Martin B; *Queens of the River Steamship Co* v *Conservators of the River Thames* (1899) 15 TLR 474 per Phillimore J.

> consideration for which has wholly failed."[157]

3.82 Against the background of the English system basing liability on proof of an "unjust factor",the concept of "want of consideration" has been justly criticised. Professor Burrows remarks:[158]

> "Want of consideration, as opposed to failure of consideration, is not a recognised unjust factor and it is unclear what is meant by it. If the idea is that there should be restitution where nothing is given in return for a payment, all gifts would be recoverable. If on the other hand, all it means is that there is no good reason to keep the payment, it is circular and begs the question of whether there is an unjust factor, ..."

Professor Birks says that the concept of "want of consideration" is equivalent to the civilian "*sine causa*" and simply interposes an additional layer of abstraction, which does not explain why there is "no consideration".[159]

3.83 It is in any event difficult to see how the concept of want of consideration or the analogy of money paid for a consideration which fails can justify a special rule for public authorities.

(ix) The unjust enrichment principle

3.84 In the *Woolwich* case Lord Browne-Wilkinson observed that though there is as yet in English law no general rule of recovery from a defendant unjustly enriched at the plaintiff's expense, "the concept of unjust enrichment lies at

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[157][1993] AC 70 at p 197.

[158]Burrows, *Law of Restitution* p 351.

[159]Birks [1992] *Public Law* 580 at pp 587, 588.

the heart of all the individual instances in which the law does give a right of recovery".[160] He remarked:

> "In the present case, the concept of unjust enrichment suggests that the plaintiffs should have a remedy ... If the revenue is right, it will be enriched by the interest on money to which it had no right ... In my judgment, this is the paradigm of a case of unjust enrichment."[161]

His actual decision was based on the analogy of cases relating to want of consideration and to *colore officii*.

3.85 The principle of unjustified enrichment does not support only a special rule nor assist in delimiting the scope of such a rule.

(x) Increasing public confidence in the fairness of government

3.86 We referred at paragraph 3.67 above to Professor Birks's argument that the principle of legality ,which underlies the new rule, "alone allows the individual to have confidence in those who hold political power"[162]. The Law Commission refer to the argument "that recovery is likely to increase public confidence in the fairness of government".[163]

3.87 This suggests that the special rule should apply to central and local government bodies. It is unduly straining the argument to

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[160] *Ibid* at p 197.

[161] *Idem*.

[162] Birks, "Restitution from the Executive" at p 168.

[163] Law Com CP No 120, para 3.56.

extend the rule to bodies and individuals who have a remote connection with government such as those exercising statutory powers.

(xi) Higher standards of fairness expected of public authorities.

3.88 It is said that public authorities are in a special position and should be expected to behave with higher standards of fairness and equity towards others than should private individuals.[164] If that is right, then should the justification apply to the commercial and non-governmental activities of a public authority, at any rate where there is an inequality of bargaining power, resources, or otherwise as between them? In fact the advocates for reform do not press their claims thus far. Thus, Professor Birks states[165]:

> "There are contexts in which a public body may act in a purely private capacity, as for example if it lets out commercial property or buys supplies. The stricter restitutionary doctrine should not apply to such cases. So an authority claiming rent should not be caught by a theoretical possibility of distress, but only by fear of actual use of that remedy[166]. It is only another way of putting this point to say that the error underlying the demand must be jurisdictional, the demand therefore *ultra vires*. Otherwise an authority would be an insurer of all its interpretations of the law".

[164]See eg Law Com CP No 120, para 3.54.

[165]"Restitution from Public Authorities" (1980) 33 CLP 190 at p 205.

[166]Citing *Air India* v *The Commonwealth* [1971] 1 NSWLR 449.

He concedes that the line between a public authority acting in a public capacity and a private capacity may be difficult to draw[167].

3.89 The origins of this approach lie in the special standard expected in England of officers of the court[168]. But this arguably leads to unjustifiable distinctions. There seems no good reason why a liquidator in a compulsory winding up, who is an officer of the court in England, should observe higher standards of conduct than a liquidator in a voluntary winding up, who is not such an officer[169]. The Law Reform Commission of British Columbia observed that:[170]

> "it is difficult to see why the standards of 'fairness' and 'honesty' imposed on [officers of the court] should not be applied universally. Should the common law sanction less than the highest standards of honesty and fairness in any defendant?"

In so far as this questions the existence of double standards for public officials and others in the law of repetition, we respectfully agree with it.

3.90 In our view, there is much to be said for the Scottish approach which refuses to draw such a

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[167]"Restitution from the Executive" p 195, fn 163.

[168]See Scot Law Com DP No 95, vol 1, paras 2.61 to 2.64.

[169]*Re Hill's Waterfall Estate Co.* [1896] 1 Ch 947 at p 954; *Clyde Marine Insurance Co* v *Renwick & Co* 1924 SC 113 at p 127 per Lord President Clyde; *Taylor* v *Wilson's Trs* 1975 SC 146 at p 151 per Lord Fraser.

[170]LRCBC 51, p 54.

distinction[171], (except in the limited context of the defence of *bona fide* consumption[172]). A judicial factor for example is an officer of the court but we doubt whether the standard to be expected of say a *curator bonis* administering a minor's estate should be any higher than the standard expected of a testamentary guardian who is not an officer of the court. In a Canadian case[173] the principle of higher standards of honesty was applied to a solicitor which seems to us to create all sorts of anomalies akin to the unwarranted distinction between compulsory and voluntary liquidators. Why solicitors and not accountants? These anomalies are best avoided.

3.91 It may be that the special standard in the English cases on officers of the court is best explained as a device to get round the unfortunate consequences of the error of law rule, and arguably therefore should not survive the abolition of that rule. Application of the standard to *ultra vires* acts by others raises very difficult questions of scope.

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[171]See para 2.7 above and references cited there. See eg *Clyde Marine Insurance Co* v *Renwick & Co* 1924 SC 113 at p 127 per Lord Skerrington: "there is every reason why the Court should refrain from converting a debt of honour into an ordinary debt at the expense of persons who, if they were consulted, might reply that they were legally unable or personally unwilling to exhibit so much generosity".

[172]*Earl of Cawdor* v *Lord Advocate* (1878) 5 R 710; *Lord Advocate* v *Drysdale* (1874) 1 R (HL) 27 affg (1872) 10 M 499: see paras 2.12 ff. above.

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

(xii) Superior ability of governmental bodies to make refunds

3.92 Another argument is that governmental bodies rarely go insolvent and are generally able to refund *ultra vires* levies even if it means raising taxation for that purpose. Thus Professor Cornish observes[174]:

> "Once moneys have been paid on demand to a governmental body, that body certainly has some interest in treating the question of legality as settled. After all, the issue at stake may concern a tax of huge amount contributing a substantial proportion to an adopted budget. Nonetheless I would submit that these bodies do not deserve the protection that is currently given to the private demander, because they do not regularly face encounters with insolvency, the stalking horse of the market-place. Their decisions are governed not so much by commercial risk-taking as by political interest and electoral popularity. If they make unauthorised exactions and have to repay, they may suffer political embarrassment; but they enjoy, or can seek the support of others who enjoy, the power to raise revenue by other means, or even the power to make retrospective statutory exceptions (where that is constitutional). I would argue that the balance of these competing needs is indeed in favour of a rule of automatic recovery from public authority".

This is no doubt true of central government with its wide tax base and *de facto* control of supply through Parliament, but it is not, or not necessarily, true of all the fringe bodies and corporations and small businesses operated by individuals to which some commentators would apply the *Woolwich* rule. One suspects that for example a major commercial or financial institution could buy some types of public or semi-public authority

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[174] W R Cornish, "Colour of Office" (1987) 14 J of Mal and Comp Law 41 at pp 51, 52.

and scarcely notice the difference in its balance sheet.

(xiii) Inadequacy of improper compulsion as a ground of repetition

3.93 It is true that uncertainty can arise in English law as to whether there is duress where a public authority does not make an explicit threat to withhold performance of a public duty.[175] The same uncertainty arises in Scots law.[176] But the uncertainty in these cases is as nothing compared to the uncertainty and risk of conflicting decisions which would be introduced by the uncertain boundaries of the proposed new rule.

3.94 There may well in any event be a similar problem where a private person, as a means of extortion, tacitly threatens to withhold performance of a private law obligation which he owes for nothing or for less than is exacted[177] and the English common carrier cases where the carrier refuses to carry goods except for a larger hire than reasonable or refuses to give up goods except on payment of an exorbitant charge.[178] On the Scots private law cases, there could be a question whether the threat of withholding has to be explicit. This would suggest that the problem is not confined to public bodies or public law duties.

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[175] Law Com CP No 120, para 3.6.

[176] See Scot Law Com DP No 95, vol 2, paras 3.42 - 3.46.

[177] See Scot Law Com DP No 95, vol 2, Part III.

[178] *Ashmole* v. *Wainwright* (1842) 2 QB 837.

3.95 Then there is the argument that the "improper compulsion" ground can lead to the anomaly that the greater the illegality, the less likely it is that repetition will be allowed.[179] Where a statutory licensing scheme is valid, and the licensing authority unlawfully exacts an overcharge in return for issuing a licence, the licensee can recover the overcharge on the ground that the payment was made to encourage the performance of a public duty - the issue of the licence - incumbent on the licensing authority, the improper compulsion being the threat, express or implicit, of withholding a valid licence. But if the statutory scheme is itself *ultra vires* and invalid, the licensing authority has no duty or power to issue a valid licence, and technically the payment is not therefore made to encourage the performance of a public duty. Further, the withholding of a licence under an invalid scheme is not improper compulsion because the applicant for the licence is not entitled to it, in any event, by reason of the scheme's invalidity.

3.96 It is thought that this anomaly, if it is thought to exist in English and Scots law, could be reformed easily by specific legislation. Where a statutory licensing scheme is itself *ultra vires* and invalid, and an *ultra vires* charge for a licence is made under it, the argument is that there is no recovery because (a) there is no public duty and the payment is therefore technically not

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[179]Birks, Restitution from Public Authorities" (1980) 33 CLP 191 at pp 196, 197; Birks, "Restitution from the Executive" at p 193. These anomalies arose in *Mason* v *New South Wales* (1959) 102 CLR 108, and *Bell Bros (Pty) Ltd* v *Serpentine-Jarrahdale Shire* (1969-70) 121 CLR 137.

made to encourage the performance of a (public) duty owed for nothing or for less than is exacted and (b) the withholding of the licence is technically not improper compulsion because the applicant for the licence is not entitled to it in any event. To remove this absurdity, it could be provided that where an *ultra vires* charge is made under purported subordinate legislation, statutory scheme or other subordinate instrument, which is itself *ultra vires* and null, the payer should have the same right of recovery on the ground of improper compulsion as he would possess if (i) the instrument were *intra vires* and *valid* but (ii) the charge were (or rather continued to be) *ultra vires* and *invalid*. One might have thought that the courts could develop such a rule unaided, but legislative reform would not be difficult.

(xiv) Inadequacy of *condictio indebiti*

3.97 The main inadequacies in the *condictio indebiti* are the error of law rule and the excusability requirement both of which have been abolished.[180] The main inadequacy of the action for money had and received is the error of law rule which the Law Commission have recommended should be abolished.[181]

3.98 As regards the other defects or possible defects, the aim should be to introduce reforms which do not expressly depend on the private/public dichotomy or a similar test.

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[180] *Morgan Guaranty Trust Co of New York v Lothian Regional Council* 1995 SLT 299.

[181] Law Com No 277.

(xv) Discrimination against poorer and less well-advised citizens

3.99 The Law Commission observe[182]:

> "The current position has also been said to favour those with greater resources and better access to legal advice, and those who are more prone to dispute their liabilities,...".

One example of this already referred to is the undesirable effects of "improper compulsion" as a ground of recovery[183]. Another example is the somewhat discriminatory effect in practice of the rule under which a payment made under an express and positive reservation of rights to claim repayment on a certain event (eg litigation between the parties or a test case) accepted by the payee will protect the payer. Poorer and less well-advised citizens, who believe that a demand is not due, are more likely to fail to make a proper reservation.

3.100 It is true that "improper compulsion" as a ground of recovery favours those with greater resources and better access to legal advice and those who are more prone to dispute their liabilities. It is also true that those with few resources acting without legal advice are less likely to make a proper reservation of rights to claim repayment. Both these arguments however are true whether the debt is owed to a public authority or to a private person.

3.101 It is said that where the payee is the government this contradicts prevailing standards of

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[182]Law Com CP No 120, para 3.56.

[183]See paras 3.93 - 3.96 above.

public morality.[184] That argument does not support the application of the *Woolwich* rule to a large number of unknown fringe bodies who are not easily distinguishable from other bodies, or whose "public law" claims are not easily distinguishable from "private law" claims.

3.102 It is an unfortunate fact of life that many rules of law do (in the sense used here) "discriminate" against those who do not dispute purported liabilities or who do not have access to legal advice at the relevant time. The rules on the incapacity of minors and mentally disabled; consumer credit and consumer protection; unfair contract terms; facility and circumvention and so on exist to protect some of the disadvantaged.

3.103 The question is whether the problem is confined to the category of payments to "public authorities" or "public law debts". As we have seen, Professor Birks at one time argued that "transactional inequality ... may turn out to be the very basis on which claims to recover payments made in response to *ultra vires* governmental demands should be rested".[185] This suggestion is not easy to reconcile with Professor Birks' emphasis on the Bill of Rights or restitution from the executive. It seems to us that the two positions are inconsistent. The "transactional inequality" suggestion points to additional grounds

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[184]See P Birks, "Restitution from Public Authorities" (1980) 33 CLP 191 at p 197.

[185]Birks, "Restitution from the Executive" p 176.

of recovery not limited to public authority recipients or public law debts.

(xvi) Discouragement of demands *ultra vires* under public law

3.104 The Law Commission refer to the argument that a rule permitting recovery gives to an authority an incentive to avoid making any *ultra vires* demands[186]. So Birks argues:

> "One would need a remarkably sanguine outlook on human character and motivation to believe that under [a rule against restitution] those responsible for drafting or administering measures imposing taxes and other levies could hope to be as scrupulous in their insistence on the principle of legality as they would be if they knew that unlawful impositions had to be given back... the only rule calculated to engender bureaucratic vigilance is automatic restitution of money demanded unlawfully"[187].

It may be true that a rule permitting the citizen to recover gives the public authority an incentive to avoid making *ultra vires* demands but it is possible to exaggerate the deterrent effect of legal rules. Professor Birks says that "the only rule calculated to engender bureaucratic vigilance is automatic restitution of money unlawfully demanded". One wonders whether this supposed psychological insight corresponds to reality. We suspect that few public officials will knowingly make *ultra vires* demands. If they are responsible for such a demand, their reputation within the civil service or other organisation may be as little or as much prejudiced where the consequences are governed by a rule permitting automatic recovery as by a rule requiring error.

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[186]Law Com CP No 120, para 3.54.

[187]"Restitution from the Executive" at p 203.

It is moreover questionable how far public officials making demands for payment do in practice have regard to the legal consequences if the demand should turn out to be *ultra vires*. The rules of law governing repetition are rules applying when something has gone wrong and while these are ever present to the mind of legal academic commentators, they are far less likely to be present to the mind of a public official, whose main concern is to get the law or facts or calculations right often without thinking about the precise legal consequences if he gets those matters wrong.

3.105 If the rule were that the money recoverable by the citizen had to be found out of the public official's pocket, the public official who knows the rule would almost certainly be motivated to greater vigilance. But it is not so clear that if the organisation for which the official works has to find the money, that will have a significant effect on bureaucratic vigilance.

3.106 It is thought that while there is something in this argument it does not have great weight and certainly not sufficient either alone or with other valid arguments to justify the difficulties which the *Woolwich* rule will cause. In any event, if it is true that a rule of automatic recovery would encourage greater vigilance among public authority creditors, then it should also be true that it will encourage greater vigilance among private creditors. Why should citizens be protected in the one almost indefinable class of case, but not the other?

(xvii) Encouragement of prompt payment of public law debts

3.107 Another reason suggested in favour of an automatic rule of recovery is the public interest in encouraging the prompt payment of taxes and charges[188]. In the *Sebel Products Ltd* case[189], Vaisey J said that the mistake of law defence should be used with great discretion *inter alia*:

> "because the taxpayer, who is too often tempted to evade his liability and to keep in his own pocket money which he ought to have paid to the revenue, will find too ready an excuse in the plea that the revenue authorities will, if they can, keep in their coffers, if they can get it there, money which the taxpayer was under no obligation to pay to them, and they had no right to demand"[190].

This justification is unusual in favouring the public authority making the demand.

3.108 The proposition that an automatic rule of recovery will encourage the prompt payment of taxes and public charges may be true in some cases, but it is somewhat speculative. The extension of repetition to cover payments under error of law will cover most of the cases not covered by the existing law. It is thought that those cases which are left will mainly involve those alleged debtors who are poorly advised who know that the payment is not due, or entertain doubts whether it is due, but fail to make a proper reservation. It is doubtful whether such persons will have sufficient knowledge of the law on repetition to be able to reason that if they pay the money, they will not be able to get

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[188]Law Com CP No 120, para 3.54.

[189]*Sebel Products Ltd* v *Commissioners of Customs and Excise* [1949] Ch 409.

[190]*Ibid* at p 413.

it back. If they do have a sufficiently sophisticated knowledge of the law to be able to reason thus far, the chances are that they will also have sufficient knowledge and ability to reason that they should secure the payee's agreement to a condition for repayment before parting with the money.

3.109 In any event, if it be true that a rule of automatic recovery encourages prompt payment of public law debts, then it should also encourage prompt payment of private law debts. It is not clear why the former should be favoured by this argument but not the latter.

3.110 It is submitted that this argument (which is unusual in favouring public authority recipients rather than citizen payers) does not justify a rule of automatic recovery limited to public sector payees and debts.

Conclusions

3.111 To sum up, in principle the scope of the *Woolwich* rule should be governed by the justifications of legal principle or legal policy which the rule is designed to promote. This however is exceedingly difficult to accomplish. At least nine justifications were mentioned in the *Woolwich* case itself[191] and at least eight other justifications have been identified in other cases and the influential academic commentaries[192]. These

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[191]See heads (i) - (ix), paras 3.53 - 3.85 above.

[192]See heads (x) - (xvii), paras 3.86 to 3.110 above.

various justifications assume, but do not demonstrate, that a satisfactorily clear boundary can be drawn by reference to public sector bodies and debts (however defined). While the justifications generally identify the need to extend the existing grounds of recovery, they otherwise point to different criteria of scope. This point may be illustrated by grouping the justifications in four categories.

3.112 First, many of the justifications could be invoked (with or without a slight modification in language) as a reason for introducing a rule of automatic recovery applying to private sector payees and debts as well as to public sector payees and debts. Such justifications include the "simple call of justice"[193]; penalising the good payer[194]; the example of EC law[195]; want of consideration[196]; the unjust enrichment principle[197]; inadequacy of improper compulsion as a ground of repetition[198]; inadequacy of the *condictio indebiti*[199]; discrimination against poorer and less well advised citizens[200];

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[193]See paras 3.53,3.54 above.

[194]See paras 3.73,3.74 above.

[195]See paras 3.75 - 3.77 above.

[196]See paras 3.81 - 3.83 above.

[197]See paras 3.84,3.85 above.

[198]See paras 3.93 - 3.96 above.

[199]See paras 3.97,3.98 above.

[200]See paras 3.99 - 3.103 above.

discouragement of unlawful demands[201]; and encouragement of prompt payment of debts[202]. In our provisional view, these justifications do not support an extension of the *Woolwich* principle limited only to public sector payees or debts.

3.113 Second, there are other justifications which apply well enough to the Crown but which seem inapt or unconvincing when applied to other fringe bodies and individuals. These include the Bill of Rights, article 4[203]; the intrinsically coercive powers of the State[204]; a different rule applying to recovery by public authorities of sums paid out of the Consolidated Fund[205]; increasing public confidence in the fairness of government[206]; higher standards of fairness expected of public authorities[207]; and the superior ability of governmental bodies to make refunds of undue payments.[208]

3.114 Third, there are some justifications which would lose their force as a reason for the *Woolwich* rule if other more appropriate or less contentious legislation were enacted. These include possibly a different rule applying to recovery by

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[201]See paras 3.104 - 3.106 above.

[202]See paras 3.107 - 3.110 above.

[203]See paras 3.55 - 3. 59 above.

[204]See paras 3.60 - 3.66 above.

[205]See paras 3.78 - 3.80 above.

[206]See paras 3.86, 3.87 above.

[207]See paras 3.88 - 3.91 above.

[208]See para 3.92 above.

public authorities of sums paid out of the Consolidated Fund[209]; and some aspects of improper compulsion as a ground of repetition[210] and of the *condictio indebiti*.[211]

3.115 Fourth, the only remaining justification advanced for applying the *Woolwich* principle beyond central and local government levies while limiting it to public sector debts (however defined) is the public law principle of legality.[212] The *Woolwich* case involved a well nigh paradigm case for an exceptional ground of recovery, - a demand by the Inland Revenue, a powerful department of state, for undue tax paid under protest. All the justifications apply well enough to central (and possibly local) government payees and fiscal debts. It seems clear, however, that the more the nature of the payee or of the type of debt differs from that paradigm case, the less justification there is for subsuming that type of payee or debt under the *Woolwich* principle.

3.116 To apply the *Woolwich* principle to fringe bodies and individuals merely on the ground that their demand infringes the principle of legality, or that their sole power to charge is statutory, seems to us to fall between two stools. On the one hand, this approach does not satisfy those justifications which apply equally well to private sector debts because it excludes those debts. On

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[209]See paras 3.78 - 3.80.

[210]See paras 3.93 - 3.96 above.

[211]See paras 3.97,3.98.

[212]See paras 3.67 - 3.72 above.

the other hand, this approach fails to recognise that the other justifications, which apply well enough to the Crown, are often inapt or unconvincing when applied to other fringe bodies and individuals. In other words this approach would enact a formalistic test of scope which has no necessary relevance to practical reality.

C. THE PUBLIC/PRIVATE DICHOTOMY: TWO CAUTIONARY TALES

3.117 Although the distinction between public and private rights or law was recognised in the Treaty of Union, Article 18, and by the Institutional writers[213], defining the distinction has proved exceedingly difficult. Further, where the courts have been called upon to use the distinction in practice, extreme difficulty has often been experienced.

3.118 **The precedent of the Public Authorities Protection Act 1893.** The operation of this Act illustrates some of the possible difficulties. It provided for a short six-month (latterly one year in England) limitation period for proceedings:

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[213]Stair *Institutions* I,1,23: "Public rights are those which concern the state of the commonwealth; Private rights are the rights of persons and particular incorporations"; Bankton *Institute* I,1,54,55; Erskine *Institute* I,1,29:"Positive law may be divided into public and private. The public law is that which hath more immediately in view the public weal, and the preservation and good order of society; as laws concerning the constitution of the state, the administration of the government, the police of the country, public revenues , trade and manufactures, the punishment of crimes etc. Private is that which is chiefly intended for ascertaining the civil rights of individuals".

> "against any person for any act done in pursuance, or execution, or intended execution, of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty or authority..."[214].

By judicial interpretation, the Act was confined to public authority defenders[215]. In recommending the repeal of the Act, the Tucker Committee[216] observed:

> "It is also a matter of great difficulty to decide whether any particular act is within the protection afforded and a fine distinction has to be drawn between acts done in pursuance of duties and acts done in pursuance of incidental powers. Again, such persons as Service drivers, or persons employed by the Metropolitan Water Board are protected, whereas the employees of private pier and harbour companies and private coach companies are not, and it is difficult for an injured person to appreciate why, if he is injured by an employee of one body, he has six years to bring his action, whereas, if injured by the employee of another, the action must be brought within one year".

Later the Committee remarked:

> "The Act gives protection only if the authority is acting in pursuance or execution, or intended execution, of any Act of Parliament, or of any public duty or authority. Whereas in the case of a defendant who enjoys no special protection a plaintiff

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[214]1893 Act, s 1 (repealed by the Law Reform (Limitation of Actions) Act 1954. For an unsuccessful attempt to apply the Act to a *condictio indebiti* in respect of over-payments of feu-duty, see *Magistrates of Edinburgh* v *Heriot's Trust* (1900) 7 SLT 371.

[215]For Scottish decisions construing the Act, see *Encyclopaedia of the Laws of Scotland* vol 1 (1926) paras 239 to 242; *Marshall* v *Scottish Milk Marketing Board* 1956 SC (HL) 37.

[216]Report of the Committee on *Limitation of Actions* (1949) Cmd 7740, (chairman: the Rt Hon Lord Justice Tucker), para 8.

> need only consider who is responsible for the injury which he has suffered, in a case which may be within the Public Authorities Protection Act the plaintiff must also ascertain not only whether the public body qualifies for the protection of the Act, but also whether the injury or damage was caused to him in the course of the performance of a public duty and not merely as an incident thereof. In the latter case, the Act will generally be found not to apply, but this is a difficult question which has been the subject of many conflicting decisions"[217].

It seems to us likely that similar problems would be experienced if the *Woolwich* rule were to be extensively applied with boundaries limited by reference to the public/private dichotomy. Although this Act was in force from 1893 to 1954, and thus antedated the evolution of public law in the post-*Ridge* v *Baldwin*[218] era, that evolution does not deprive the experience of the 1893 Act of its value as a warning to us of the difficulties of using the public/private dichotomy as a criterion delimiting the scope of legal rules.

3.119 **Judicial review.** On the contrary that evolution provides a similar warning because similar difficulties with the public/private dichotomy have surfaced in the context of judicial review. These are illustrated by remarks of Lord Prosser[219]:

> "I can see no reason for defining the type of interest which gives access to the supervisory jurisdiction in terms of public interest, or a public situation, or public rights or public

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[217]*Ibid*, para 11.

[218][1964] AC 40 (HL).

[219]Lord Prosser, "The Supervisory Jurisdiction: Public and Private Law" (Law Society of Scotland, PQLE Papers, 18 June 1990) 67 at pp 71, 72.

law. I can see no historic or other reason for denying judicial review to anyone in Scotland on the basis that there is some lack of "public" right. Indeed coming to the present day, with an inheritance of public and *quasi* public bodies, and privatisation under which previously public bodies are replaced by private, or at least less public, institutions, it would surely be foolish to adopt a public/private test for access to the courts or to particular procedures unless one was driven to this by some entrenched and overriding principle. Does principle really draw a line between the GPO and Telecom? or between a public electricity board and a private electricity company? or between public and private railway or tramway companies? or between the disciplinary procedures of the state, public boards or indeed private companies? and indeed, if some situations can be best described and dealt with in terms of the law of contract, and others cannot, and others raise an uncertainty, does principle really demand that we have separate avenues of procedure depending on these distinctions?"

3.120 We do not think that the unfortunate experience of the public/private dichotomy in judicial review can be dismissed as irrelevant to the present issue upon the ground that judicial review relates to a procedural matter and the present issue relates to the different issue of the definition of a ground of repetition (*anglicé* an "unjust factor").[220] It may readily be conceded that the issues of procedure and substantive law are not the same. The new *Woolwich* ground, or at least many of the justifications advanced for it, are nevertheless rooted in public law and nothing else. In our view, there is no reason to suppose

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[220]See Beatson, "Restitution of Taxes" (1993) 109 LQR 401 at p 414: "the procedural complexities of Order 53 are not, in my view, relevant to the present argument, since, what is being talked about is a right of recovery enforceable by an action for money had and received."

that the concept of "public law" would not lead to difficulties similar to those which it raised in the context of judicial review.

D. POSSIBLE RADICAL ALTERNATIVE TO THE *WOOLWICH* PRINCIPLE: A NEW STRUCTURE FOR OBLIGATIONS REDRESSING UNJUSTIFIED ENRICHMENT?

3.121 In the *Woolwich* case, to fill a gap which the House of Lords had identified in English law and which it considered it could not fill by expanding existing grounds, the House reversed the traditional development in a particular category of loosely defined cases. This was a self-conscious decision. In outlining possible objections to a prima facie right of recovery arising from an undue payment of tax, Lord Goff said that the first objection:

> "is to be found in the structure of our law of restitution as it developed during the 19th and early 20th centuries. That law might have developed so as to recognise a condictio indebiti - an action for the recovery of money on the ground that it was not due. But it did not do so. Instead,...there developed common law actions for the recovery of money paid under a mistake of fact, and under certain forms of compulsion. What is now being sought is in a sense a reversal of that development in a particular type of case;..." [221]

The last words are important since they, together with other dicta[222], show that, in Lord Goff's view, English law is still committed to development by way of the recognition, expansion and refinement of specific grounds and has not affirmed

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[221] [1993] AC 70 at p 172C,D.

[222] *Ibid* at p 165C per Lord Goff: "I would not think it right, especially bearing in mind the concept of economic duress, to regard the categories of compulsion for present purposes as closed".

a general principle of recovery of payments made without cause. Professor Burrows identifies ten grounds of restitution in cases of payment or transfer under English law and stresses that the categories are not closed.[223] The result is a very complicated branch of law which required the recognition of an entirely new ground of recovery to solve a simple case like *Woolwich*.

3.122 What of the Scots law? Although there are views that the Scottish *condictio indebiti* is general in character[224], in our view the present Scottish version of that form of *condictio* is limited to payments and transfers in error. Other grounds, however, are recognised in other *condictiones*, in innominate actions of restitution and repetition and in actions of recompense.

3.123 There is, however, a very important question whether development by way of the ever increasing recognition and extension of specific grounds of recovery is the hall-mark of a mature system of restitution of undue payments and transfers or of unjustified enrichment generally. Here the civilian, continental experience, or at least part of that experience, enduring over two thousand years may suggest otherwise. As is well

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[223]Burrows, *The Law of Restitution* (1993) pp 21 and 56; chapters 3 to 12: "mistake, ignorance, duress, exploitation, legal compulsion, necessity, failure of consideration, illegality, incapacity, ultra vires demands by public authorities". An eleventh "unjust factor" identified by Burrows (chapter 13) is "retention of the plaintiff's property without his consent" but this seems to cover what in Scots law would be a vindicatory remedy.

[224]See para 3.5, fn 7.

known, in German law the BGB of 1900 for example starts from a completely different standpoint. The basic principle, which is enacted in the first sentence of section 812 of the BGB, is that a person who, through an act performed by another, or in any other way, obtains something at the latter's expense without any legal ground, is bound to return it to him. The next ten sections develop this fundamental principle. Of course the law is also complex and the literature on the topic is very extensive indeed. Nevertheless this type of approach seems to us worth examining as part of a general review of the law of unjustified enrichment. Another approach was outlined by Dr E M Clive at the seminar held on 22 October 1994[225].

E. PROVISIONAL PROPOSAL

3.124 **(1) The *Woolwich* rule (under which a citizen who makes an undue payment of tax or other levy to a public authority pursuant to an *ultra vires* demand has a prima facie right to repayment) should not be introduced by statute into Scots law.**

(2) We question whether development by way of the ever increasing recognition and extension of specific grounds of recovery is the hall-mark of a mature system of restitution of undue payments and transfers or of unjustified enrichment generally.

[225]See Clive, *Seminar Paper, 22 October 1994*, copy published as an appendix to Scot Law Com DP No 99.

(3) We suggest that a new type of approach based on broader and more liberal grounds of recovery should be examined as part of a general review of the law of unjustified enrichment.

(Proposition 1)

PART IV

AMENDMENT OF THE STATUTORY PROVISIONS FOR REFUND OF OVERPAID TAX

A. INTRODUCTORY

4.1 The purpose of this Part is to present to consultees in summary form the recommendations made by the Law Commission in Parts IX to XV of their Report on *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments* (1994) Law Com No 227, which we generally support. These Parts contain recommendations to incorporate the *Woolwich* rule to the fullest extent possible into the statutory provisions dealing with recovery of overpaid central and local government taxes while at the same time establishing limitations or defences to its exercise.[1] When we have received the responses from consultees, we shall then be in a position to recommend to Government any amendments required from a Scottish standpoint.

1. The Law Commission's recommendations

4.2 In Law Com No 227, the Law Commission consider the following types of tax or levy: -

A. Taxes administered by the Inland Revenue (Income Tax; Inheritance Tax; Stamp Duties);

B. Indirect Taxes (Value Added Tax; Charges governed by European Law; Excise Duties and Car Tax; Insurance Premium Tax);

C. National Insurance Contributions;

D. Local Authority Council Tax.

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[1]Law Com No 227, para 8.20.

To these we would add:

E. Local Authority Non-domestic Rates and Water Rates due under statutes applying only in Scotland.

2. Adaptations of the Law Commission's scheme for Scotland

4.3 In general the only type of tax discussed in this Part which differs in its machinery of collection and refund from English law is non-domestic rates.[2]

3. Abbreviations

4.4 In this Part the following abbreviations are used:-

"ADRE(S)A" = Abolition of Domestic Rates Etc (Scotland) Act 1987;
"FA" = Finance Act;
"ICTA 1988" = Income and Corporation Taxes Act 1988;
"IHTA" 1984" = Inheritance Tax Act 1984;
"IT (Employments) Regs 1993" = Income Tax (Employments) Regulations 1993 (SI 1993/744);
"LGE(S)A 1994" = Local Government etc (Scotland) Act 1994;
"LGFA 1992" = Local Government Finance Act 1992;
"LG(FP)(S)A 1963" = Local Government (Financial Provisions) (Scotland) Act 1963;
"LG(S)A" = Local Government (Scotland) Act;
"SA 1891" = Stamp Act 1891;
"SDMA 1891" = Stamp Duty Management Act 1891;
"SSC&BA 1992" = Social Security Contributions and Benefits Act 1992;
"TMA 1970" = Taxes Management Act 1970;
"VATA 1994" = Value Added Tax Act 1994.

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[2] Some provisions of the Local Government Finance Act 1992 and subordinate legislation thereunder on the recovery of council tax and water charges make or reflect cross-border differences.

B. TAXES ADMINISTERED BY THE INLAND REVENUE

1. Income Tax, Corporation Tax, Capital Gains Tax and Petroleum Revenue Tax

(1) Existing machinery of assessment, collection and refund of overpayments

4.5 Law Com No 227 describes the machinery of assessment, collection and refund of overpayments.[3] There are two methods of collection: direct assessment and PAYE.

4.6 **Returns.**[4] The direct assessment method begins with the production of a return by the taxpayer or a trustee or guardian.

4.7 **Assessments.**[5] On the basis of the information in the return, the Revenue makes an assessment of the taxpayer's liability under each Schedule. In an exceptional case, liability may arise under statute without an assessment: eg tax due from a company in respect of interest or annual payments.[6] As a general rule, assessments must be made within 6 years of the end of the year of assessment.

4.8 **Appeals against assessments.**[7] The notice of assessment served on the taxpayer states the time-limits on an appeal against the assessment. Appeals are competent whenever assessments are

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[3]Paras 9.6 - 9.23.

[4]Law Com No 227, para 9.7

[5]Law Com No 227, para 9.9.

[6]ICTA 1988, Sch.16, para 4.

[7]Law Com No 227, para 9.12.

made.[8] Where the Revenue succeed on appeal or no appeal is taken in time, the assessment becomes final and conclusive, subject to the taxpayer's right to claim repayment under TMA 1970, section 33 of tax overpaid under "error or mistake".[9]

4.9 A statutory appeal does not postpone liability to pay the tax unless, under TMA 1970, section 55, the Commissioners postpone recovery by the Revenue.[10] On the determination of an appeal, any tax overpaid must be repaid.[11] Repayment supplement may be payable on undue taxes paid to the Revenue[12] (in lieu of interest), and in a statutory appeal the Court of Session may award interest on tax repaid.[13]

4.10 Within 30 days of the making of an assessment, an appeal lies to (i) the General Commissioners from assessments under Schedule A, B, D or E unless the appellant opts for the Special Commissioners[14] (but probably not Schedule C); and

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[8]TMA 1970,s.31.

[9]Law Com No 227, para 9.11, p 91, fn.17, points out that "it is not entirely clear whether an appeal is available against an assessment under Schedule C should one be made"; see Whiteman, *Income Tax* (3d ed, 1988), para 30.03.

[10]See also *ibid* s 56(9) (pending appeal to Court of Session, tax must be paid in accordance with determination of Commissioners).

[11]*Ibid* s 55(9)(b) (repayment of undue tax on determination by Commissioners); s 56(9) (refund of tax following decision by Court of Session).

[12]ICTA 1988, ss 824-826.

[13]TMA 1970, s 56(9).

[14]TMA 1970, s 31(4).

(ii) the Special Commissioners from assessments under ICTA 1988, section 349 (tax charged on annuities and other payments subject to Schedule D, Case III)).[15] In Schedule C assessments, the Law Commission state that "the taxpayer's remedy is to bring action against the Board under some provision enabling repayment, or to proceed at common law".[16] An appeal lies to the General or Special Commissioners against all "assessments" to income tax and "decisions" on claims.[17] Generally the appeal procedure (as well as the procedure for recovery under TMA 1970, section 33) presupposes and requires a valid assessment.[18] In the *Woolwich* case there was no assessment and for that reason Woolwich was neither enabled nor required to appeal

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[15]ICTA 1988, s. 350. Liability to this tax can arise without an assessment:ICTA 1988, schedule 16, para 4.

[16]Law Com No 227, para 9.12. Whiteman, *Income Tax* para 30.03 states that no appeal is provided from an assessment under Schedule C which is made on the Bank of England or paying or collecting agent. Law Com No 227 para 9.11, p 91, fn 17 points out that it is not entirely clear whether an appeal is available against an assessment under Schedule C should one be made.

[17]TMA 1970, s31.

[18]In the *Woolwich* case it was argued that under the Income Tax (Building Societies) Regulations 1986, reg 7, unpaid composite rate tax could have been the subject of an assessment on Woolwich under the Finance Act 1972, Sch 20, para 4(2) or(3). Having held that such an assessment would have been null because the regulations were null, Lord Goff observed ([1993] AC 70 at p 169 E,F):"I do not see how there could have been an appeal [viz under Finance Act 1972, Sch 20, para 10(3)] against such an assessment pursuant to paragraph 10(3) of schedule 20; because such an appeal presupposes an assessment which, apart from the impugned error, would otherwise have been valid".

(or to claim under TMA 1970, section 33), but had to seek its remedy at common law.[19]

4.11 **Reopening of Assessments.**[20] The Revenue may raise additional assessments eg under TMA 1970, section 29(3) and (4) on discovery either of the failure to assess income or of the insufficiency of an assessment. This power is exercisable even where the taxpayer has furnished correct information and the Revenue alone were responsible for the mistake: *Cenlon Finance Co* v *Ellwood*[21]. Under this provision however the Revenue cannot re-open the subject matter either of a previous appeal against assessment or of a statutory compromise.[22] The Revenue does not re-open an assessment where all matters were originally before the Inspector and the original view was tenable[23].

4.12 The Law Commission state that in English law, the Revenue "is bound by the ordinary law of contract where it reaches compromises and settlements with taxpayers in the usual way".[24] As indicated above, we think Scots law is now the same.[25] But an agreement (unless it is a compromise

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[19][1993] AC 70 at pp 169H,170A per Lord Goff.

[20]Law Com No 227, paras 9.13, 9.14.

[21](1962) 40 TC 176; see also *Parkin* v *Cattell* (1971) 48 TC 462.

[22]Law Com No 227, para 9.13, citing *Scorer v Olin Energy Systems Ltd* (1985) 58 TC 592 and [1985] STC 218.

[23]Law Com No 227, para 9.14.

[24]*Ibid*, para 9.14, and see fn 28.

[25]See paras 2.26,2.27 above.

under TMA 1970, section 54) will not preclude an additional assessment. Nevertheless the doctrine of legitimate expectation, borrowed by Scots law from English law[26], might, as the Law Commmission state:

> "afford a taxpayer protection against an additional assessment, in circumstances where a binding contract had been made, but was subject to reopening under the *Cenlon* principle, or where a binding contract would but for the fact that the Inland Revenue is a public body have been made"[27].

4.13 **Relationship between statutory recovery rights and rights of appeal.**[28] At present taxpayers have a short time (30 days) within which to appeal against an assessment though the limit is not strictly enforced. They can apply for refund of overpayments under TMA 1970, section 33 without first appealing against an assessment but only on narrow grounds(eg error in a return).

4.14 TMA 1970, section 33 provides:

> "**33.**-(1) If any person who has paid tax charged under an assessment alleges that the assessment was excessive by reason of some error or mistake in a return, he may by notice in writing at any time not later than six years after the end of the year of assessment ...(or, if the assessment is to corporation tax, the end of the accounting period) in which the assessment was made, make a claim to the Board for relief.
>
> (2) On receiving the claim the Board shall inquire into the matter and shall, subject to the provisions of this section, give by way of repayment such relief in respect of the error or mistake as is reasonable and just:..."

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[26] *Idem.*

[27] Law Com No 227, para 9.14.

[28] Law Com No 227, paras 9.15 - 9.17.

There follows a proviso (quoted at paragraph 4.33 below) precluding recovery of payments made in accordance with general practice.

(2) The Law Commission's recommendations

(a) The right of recovery

4.15 The Law Commission recommend that in place of the narrow provisions of TMA 1970, section 33, a right should be conferred on all taxpayers charged to tax, whether under an assessment or otherwise, to recover tax paid but not due without the need to prove error.[29] We respectfully agree with this recommendation for the reasons given by the Law Commission[30] which may be shortly summarised.

4.16 The right of recovery under TMA 1970, section 33, is significantly narrower than (1) the English rights of recovery at common law under the *Woolwich* rule or as proposed to be amended by the statutory abrogation of the error of law rule, and (2) the Scottish common law right of recovery as amended by the abrogation in the *Morgan Guaranty* case of the error of law rule and the affirmation (obiter) in the same case of the principle of recovery of undue transfers made without donation[31]. These existing and proposed changes in Scots law and English law in effect render the narrow provisions of TMA 1970, section 33, illogical and out-of-date. In particular, section 33 only applies to error of fact, not error of law,

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[29]*Ibid*, recommendation (11), para 9.25.

[30]See especially *ibid* paras 9.15 to 9.24.

[31]1995 SLT 299, discussed in Scot Law Com DP No 99 at paras 4.41 et seq.

in a return. It does not apply where there is no return or no assessment. In some cases no assessment is necessary for tax to become chargeable[32], as occurred in the case of the composite rate tax litigated in the *Woolwich* case where it was held that section 33 could not have been invoked[33]. Moreover, "assessment " is no longer defined and its meaning is uncertain. The section does not apply if payment has been made in accordance with a "general practice"[34]. Recovery rights are especially important in cases where no statutory right to appeal against an assessment exists (eg income tax under Schedule C) and recovery under TMA 1970, section 33[35] is the only remedy[36], or where appeal is not automatic but requires the taxpayer to act[37].

4.17 The Law Commission recognise that the reforms must carefully balance the interests of the Revenue and the public purse against the interests of the taxpayer. A taxpayer's claim for repayment may be brought up to six years after the end of the taxation year in question, creating administrative inconvenience and possibly a right to interest from

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[32]Law Com No 227, para 9.9 gives the example of the charge to income tax under ICTA 1988, s 348 and refers to ICTA 1988, Sch. 16, para 4(1)(a).

[33][1993] AC 70, at pp 168,169 per Lord Goff.

[34]See para 4.33 below.

[35]Or other recovery right, eg ICTA 1988, Sch.3, para 6F, inserted by Finance (No 2) Act 1992, Sch.11, paras 2(1),(2) and 6.

[36]Law Com No 227, paras 9.11 and 9.21.

[37]eg PAYE where the taxpayer must call for an assessment before he can appeal.

the Crown.[38] Further the time limits on appeals would be rendered nugatory if taxpayers unreasonably failed to exercise their right of appeal and sought recovery later under the amended TMA 1970, section 33. The solution lies in an enactment introducing a statutory defence of failure to exhaust statutory rights of appeal which would be carefully drafted to strike a balance between the interests of the Revenue in maintaining the principle of the finality of assessments and the interests of the taxpayer,who may only discover his error after the expiry of the appeal days.[39] As the Commission point out, since the Revenue can raise further assessments on discovery of errors, it is only fair that taxpayers should be entitled to claim refunds in similar circumstances.[40] But the defence would be tightly circumscribed.

4.18 The Law Commission's overall aim is that a claim under the amended TMA 1970, section 33 should be only a second line of defence, the first being an appeal against assessment.[41] We respectfully agree with this approach. It is consistent with the Scots common law doctrine of non-exhaustion of statutory remedies which has for long founded a defence to common law actions (eg of repetition) as well as applications to the supervisory jurisdiction for judicial review[42].

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[38]Law Com No 227, para 9.17.

[39]*Ibid*, paras 9.19 ,9.20.

[40]*Idem*.

[41]See *ibid* paras 9.16, 9.17.

[42]See paras 2.28 - 2.34 above.

4.19 To sum up:

In the case of Income Tax, Corporation Tax, Capital Gains Tax and Petroleum Revenue Tax, we support recommendation 11 of Law Com No 227 proposing that:

(a) the Taxes Management Act 1970, section 33 should be replaced by a provision introducing a right on the part of all taxpayers charged to tax, whether under an assessment or otherwise, to recover tax paid but not due irrespective of the presence or absence of any mistake on the part of the taxpayer; and

(b) the right to repayment should be exercised by application in writing to the Board of Inland Revenue in the first instance with an appeal to the Special Commissioners and with a further appeal on a point of law to the Court of Session.

(Proposition 2)

(b) A unitary ground (undue payment) or two separate grounds (error and *ultra vires*)

4.20 Recommendation 11 of Law Com No 227 proposes a single ground of recovery ("tax paid but not due") rather than two separate grounds (ie error and *ultra vires* demand). Thus the recommended draft new clause 33(1) of TMA 1970 provides:

> "Where a person has paid an amount by way of tax which was not tax due from him, the Board shall (subject to this section and section 33AA below) be liable to repay the amount to him".[43]

[43] Law Com No 227, Appendix B (Draft Tax Clauses) p 202.

4.21 We support this approach for the following reasons. First, it seems right that as a general rule taxes paid (without donation) which are not due should be recoverable subject to appropriate defences.

4.22 Second, there may be a case where the demand is technically not *ultra vires* in the public law sense (eg a demand by the Revenue based on a mistake on their part not amounting to an excess of "jurisdiction") and the taxpayer pays without error (eg under pressure of the demand and to avoid commercial embarrassment as in the *Woolwich* case). The argument for a prima facie right of recovery seems to us to be no less strong in that case than in cases of error or *ultra vires*. In our view, in the domain of repetition, the technicalities of the public law concept of *ultra vires* are best avoided.

4.23 Third, if the aim is to give full effect to article 4 of the Bill of Rights 1689, then undue payments of Inland Revenue taxes made without donation should be prima facie recoverable whether they fall within or outside the highly technical boundary set by the public law doctrine of *ultra vires*.

4.24 Fourth, there is a precedent for a single unitary ground in VATA 1994, section 80(1)[44] which provides:

> "Where a person has (whether before or after the commencement of this Act) paid an amount to the Commissioners by way of VAT which was not VAT due to them, they shall be liable to repay the amount to him".

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[44]Consolidating the FA 1989, s 24.

4.25 The Law Commission do recommend a defence of "payment in accordance with a settled view of the law" which is available only in "error claims"[45]. This seems to be the only defence in which the distinction between "error claims" and "*ultra vires* claims" is preserved.[46]

(c) Defences and other safeguards against disruption of public finances

4.26 We agree with the Law Commission[47] that defences are necessary to prevent undue disruption of public finances - a policy supported by dicta in the *Woolwich* case[48].

4.27 The Law Commission recommend a number of defences to the new right of recovery and other safeguards for public authority payees designed to protect public finances. These relate to payments of undue taxes whether the payment was made under error (of fact or law) or pursuant to an *ultra vires* demand. These two sources of undue payment often overlap. In most cases of payment of tax pursuant to an *ultra vires* demand, the taxpayer

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[45]ie "a claim made on the ground that the amount in question was paid in accordance with an erroneous view of the law" ; see Law Com No 227, Appendix B , TMA 1970, new clause 33AA(6) (page 204) introduced by recommendations 12 - 14.

[46]See para 4.30 below.

[47]Law Com No 227, paras 10.4 - 10.8.

[48][1993] AC 70 at p 101 B-E per Glidewell LJ; at p 177 B-E per Lord Goff.

pays under error as to his liability. We agree that for simplicity one set of defences is desirable.[49]

4.28 The possible defences and other safeguards are considered below under the heads in the following list (in which an asterisk denotes a defence recommended by the Law Commission):-

*(i) Defence of change in "settled view" of the law;

(ii) Exception to "settled view defence": recovery by payer-challengers;

(iii) Judicial power of prospective overruling;

*(iv) Defences of compromise and (in England) "submission to an honest claim";

(v) Short time limits (negative prescription, or limitation of actions);

*(vi) Defence of non-exhaustion of statutory remedies;

*(vii) Defence of unjust enrichment of tax-payer;

(viii) Defence of change of position;

(ix) Defence of disruption to public finances; and

(x) Personal bar.

4.29 **Overview of Law Commission's recommendations on defences and safeguards.** The Law Commission accept (i), (iv), (vi) and (vii) in their scheme for revising the enactments on refund of overpaid income tax and other direct taxes administered by the Inland Revenue. The Law Commission accept only (vii) in their scheme for

[49]Law Com No 227, para 10.2 states that "different defences are possible only if clear distinctions can be made between the two categories".

refund of overpaid VAT and indirect taxes administered by the Customs and Excise. The existing legislation on refund of overpaid national insurance contributions and council tax do not provide for any of the foregoing defences or safeguards[50] and the Law Commission recommend no change. There seems to be limited scope for harmonisation of defences.

(i) Defence of change in "settled view" of the law (replacing "general practice" defence)[51]

4.30 **Error/mistake claims.** In Law Com No 227, Section B (on the abolition of the mistake of law bar to recovery), the Law Commission 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".[52]

Applying the same principle to the defences to a statutory claim for recovery of unpaid tax, the Law Commission recommend that a payment to the Revenue made on the basis of a settled view of the law changed by later judicial decisions should not be treated as undue and recoverable[53].

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[50]The legislation on national insurance contributions has a *de minimis* threshold on claims for refund of overpaid contributions.

[51]Law Com No 227, paras 10.10 - 10.30.

[52]Law Com No 227, recommendation 5 (para 5.13).

[53]Law Com No 227, recommendation 12 (para 10.20) which states: "overpayments of tax should not be regarded as paid under a mistake of law on the part of the taxpayer (and consequently not due and recoverable on that ground) merely because the

4.31 **Repeal of "general practice" defence.** The proviso to TMA 1970, section 33(2) provides:

> "no relief shall be given under this section in respect of an error or mistake as to the basis on which the liability of the claimant ought to have been computed where the return was in fact made on the basis of or in accordance with the practice generally prevailing at the time when the return was made".

The Law Commission recommend that this "general practice" defence should be repealed for a variety of reasons[54], one being that the "change in the settled view of the law" defence would afford the Revenue much the same protection but in a more principled way.[55]

4.32 ***Ultra vires* claims.** The Law Commission point out that an error as to the *vires* of an administrative act or legislation is an error of law. Accordingly if the "change in the settled view of the law" defence were to apply in claims for

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taxpayer paid in accordance with a settled view of the law that the payment was due, and later judicial decisions have departed from that view".

[54]Law Com No 227, paras 10.10 - 10.20. In summary these reasons are: (1) inconsistency with the *Taxpayer's Charter* (Inland Revenue Leaflet IR 120 "You and the Inland Revenue") in terms of which the taxpayer may expect to pay only tax legally due; (2) VATA 1994, s 80 and FA 1989, s 29 do not have this proviso; (3) the defence is wider than common law defences; (4) unsatisfactory nature of machinery for determining "general practice" - only well-advised taxpayers can dispute the Revenue's view ;(5) the defence was let in by MPs in 1923 only as a temporary experiment; (6) the *Woolwich* decision affords an opportunity to review the defence; and (7) the diversity of sources of existing Revenue practice makes it difficult for non-specialists to keep abreast of it.

[55]Law Com No 227, para 10.19.

refund of payments made pursuant to *ultra vires* demands for income tax, the *Woolwich* right would be negated.[56] To avoid this result, the Law Commission recommend that a payment resulting from the invalidity of subordinate legislation purportedly creating the charge to tax would be recoverable.[57]

4.33 **Analogy of Scots common law claims.** In Scot Law Com D P No 99[58] we refer to the view of the Sheriffs Association 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". We suggest there that the case for a bar, with or without exceptions, is not sufficiently strong to justify its introduction by statute.[59] But we reserved to the present Paper 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.

4.34 There are two opposing views on whether a payment made on the faith of a settled view of

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[56]Law Com No 227, para 10.23.

[57]*Ibid*, Recommendation 14 (para 10.30) which states: "the change in a settled view of the law bar to recovery (Recommendation 12) should not apply to claims for the recovery of sums paid to the Revenue as a result of the invalidity of subordinate legislation which created or was fundamental to the collection of the charge to tax".

[58]Para 3.49.

[59]Scot Law Com DP No 99, paras 3.50, 3.51.

the law later changed by judicial decision is made in error.[60] The case for the bar should not be perilled on the disputed theory that such a payment was not in error. It depends not on principle or equity but rather on the policy against opening the floodgates.

4.35 Since the matter is one of policy, there can be different answers for specific taxes. Parliament has already recognised that public finances should be protected against opening floodgates by enacting the "general practice" defence in TMA 1970, section 33(2), which resembles the "settled view of the law defence" in its effect. In these circumstances it would seem unrealistic to propose a radically different solution.

4.36 **We agree with the Law Commission's recommendations that:**

(1) overpayments of tax should not be regarded as paid under a mistake of law on the part of the taxpayer (and consequently recoverable) merely because the taxpayer paid in accordance with a settled view of the law that the payment was due, and later judicial decisions have departed from that view (Law Com No 227, recommendation 12 (para 10.20)); and

(2) as a consequential, the "prevailing practice" defence in the proviso to TMA 1970, section 33(2) should be repealed

[60]Scot Law Com DP No 99, paras 3.19 - 3.30.

(Law Com No 227, recommendation 12 (para 10.20)).

(Proposition 3)

(ii) Exception to "settled view of law" defence: recovery by payer-challengers[61]

4.37 This option provides an exception to the "change in the settled view of the law" defence. In other words, as a general rule, payments made before such a change effected by a judicial decision holding a tax invalid would not be recoverable. But an exception would be made in favour of persons paying an invalid levy of tax who had commenced proceedings for repayment before the judicial change in the law. They would be entitled to recover the payment.[62]

4.38 Recovery by payer-challengers was provisionally proposed in Scot Law Com DP No 95[63] but was rejected by the Law Commission's Report[64]. We canvassed the issue again in Scot Law Com DP No 99 when considering possible legislation consequential on the abrogation by the *Morgan Guaranty* case of the error of law rule in private

[61]Law Com No 227, paras 11.26 - 11.30.

[62] It is similar in its effect to a judicial power of prospective overruling (which we examine at para 4.39 below) but the result is achieved automatically by operation of the statute restricting recovery rather than by a judicial declarator that the law is changed only prospectively. For that reason it is not open to the same constitutional objections as judicial prospective overruling.

[63]vol 1, para 2.124, and Proposition 3(4) (para 2.125).

[64]Law Com No 227, recommendation 13 (para 10.21).

law obligations of repetition.[65] We quote there Professor D M Walker's remark: "No doubt past transactions cannot be opened but surely the man who makes the challenge should not be barred".[66] We do not think that exceptions to the bar would be wrong in principle: the matter is mainly one of policy.

4.39 Somewhat reluctantly, we suggest that there should be no exceptions to the bar for three reasons. First, we think that the Convention of Scottish Local Authorities and the Society of Directors of Administration in Scotland 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.[67]

4.40 Second, we are influenced by Lord Coulsfield's argument 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.[68]

4.41 Third, the Revenue's "general practice" defence in TMA 1970, section 33(2), has no similar exception.

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[65]1995 SLT 299. See Scot Law Com DP No 99, Proposition 3.1(4) (para 3.51).

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

[67]Scot Law Com DP No 99, paras 3.45,3.46.

[68]Scot Law Com DP No 99, para 3.40.

4.42 **We concur in the Law Commission's recommendation that persons paying a levy of tax who had claimed repayment from the Revenue before a judicial change in a settled view of the law holding the levy invalid should not, on that ground alone, be entitled to recover the payment.[69]**
(Proposition 4)

(iii) Judicial power of prospective overruling[70]

4.43 The conferment on courts of an express statutory jurisdiction to overrule a precedent in a way having effect only in the instant case and future cases was provisionally rejected in Discussion Paper No 95[71]. One reason for this conclusion is that in areas of United Kingdom jurisprudence, cross-border overruling is technically not competent and there are constitutional objections to English courts overruling Scottish precedents.

4.44 **We agree with the Law Commission's recommendation[72] that a judicial power of prospective overruling of decisions should not be applied in an attempt to prevent disruption to public finances caused by claims for the recovery**

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[69]Cf Law Com No 227, recommendation 13 (para 10.21).

[70]Law Com No 227, paras 11.7; 11.23 - 11.25.

[71]Vol 1, paras 2.113 - 2.115. See also Lord Mackay of Clashfern, "Can Judges Change the Law?" (1987) 73 Proceedings of the British Academy 285 arguing (at pp 303 - 308) that prospective overruling should not be adopted by British courts.

[72]Law Com No 227, recommendation 26 (para 11.25).

of payments made under *ultra vires* subordinate legislation.
(Proposition 5)

(iv) Defences of compromise and (in England) "submission to an honest claim"

4.45 **The Law Commission's recommendations.** The Law Commission consider the defences of compromise and "submission to an honest claim" in the context of claims for refund of undue tax paid as a result of a mistake[73] and as a result of an *ultra vires* demand[74]. Their recommendation in each case is the same namely that:

> "it should be a defence to an action for recovery of an overpayment of tax paid as a result of a mistake[75] that a claim for the tax in question was contractually compromised[76], or that payment was in response to litigation commenced by the Inland Revenue against the taxpayer concerned. However, it should not be a defence that the payment was made in response to a mere threat to litigate, unless that payment would also qualify as a contractual compromise".[77]

The recommendation's reference to a defence in an action is to be construed as, or as including, a reference to a defence to a statutory claim under the revised section 33 of TMA 1970. So in the draft clauses in Appendix B to Law Com No 227, clause A

[73]Law Com No 227, paras 10.31 - 10.34, recommendation 15, Clause A, s 33AA(4).

[74]Law Com No 227, para 10.35, recommendation 16, Clause A, s 33AA (4).

[75]Or as a result of an *ultra vires* charging instrument: recommendation 16 (para 10.35).

[76]Whether under TMA 1970, s 54, or in accordance with standard contractual principles.

[77]Recommendations 15 (para 10.34) and 16 (para 10.35).

inserts a new clause 33AA in TMA 1970, subsection (4) of which provides:

> "(4) It shall be a defence to any claim that the amount in question was paid-
>
> (a) in pursuance of an agreement between the claimant and the Commissioners settling proceedings relating to the payment of that amount; or
>
> (b) in consequence of proceedings enforcing the payment of that amount being brought by the Commissioners."[78]

This clause reproduces a rule of the English common law that a compromise of, or submission to, legal proceedings cannot normally be reopened.[79] As we show in more detail in Appendix A below, the English common law principle of finality of litigation and finality of payments differs significantly from the corresponding branch of Scots law.

4.46 **Analysis by stage of recovery process.** The Law Commission[80] distinguish three types of case according to the stage in the debt recovery process at which payment is made, namely: (a) pursuant to a simple demand by the payee; (b) pursuant to a demand coupled with the payee's threat of legal proceedings; and (c) after commencement of legal proceedings. They also refer to compromises (which can occur at any stage). In Appendix A, we compare the Scots and English laws

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[78] Law Com No 227, p 204.

[79] Law Com No 227, p 205, Explanatory Note to new clause 33AA(4) of TMA 1970.

[80] Law Com No 227, paras 2.25 - 2.38.

on the recovery of erroneous payments made at each of these three stages.[81]

4.47 **Cross-border differences in law on finality of litigation.** Broadly speaking in English law mistaken payments of an undue debt are recoverable if made at stage (a) but are, however, irrecoverable if made at stage (b) or stage (c) or if made at any stage under a compromise. Scots law is the same with respect to compromises. Moreover in Scots law mistaken payments of an undue debt are recoverable (as in English law) if made at stage (a) ie in response to a bare demand.

4.48 In contrast to the English law, however, in Scots law mistaken undue payments are recoverable if made at stage (b) (ie after the payee's threat to litigate). In this case, the Law Commission recommend that a payment of undue tax should be recoverable if made at or after the payee's threat to litigate.[82] We respectfully agree with this recommendation which reflects the Scots law.

4.49 Again in contrast to the English law, in Scots law mistaken undue payments are recoverable if made at stage (c), (ie after the commencement of the payee's action of payment) provided the action is not disposed of by a decree *in foro*. The Scottish doctrine of *res judicata* presupposes a decree *in foro*, which generally cannot be granted

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[81]Appendix A, paras 22 - 32.

[82]Recommendations 15 (para 10.34) and 16 (para 10.35).

until after defences are lodged[83], so that payment made in response to an action disposed of by decree in absence or decree of dismissal is in principle recoverable.

4.50 **Our provisional proposals.** We agree with the Law Commission's recommendations that recovery should be barred in the case of a compromise and should not be barred by the mere fact that payment was made in response to a bare demand for payment. This reflects the common law in Scotland and in England. The Law Commission remark:

> "In the context of public authorities with their superior power to impose pressure on the subject and also the apparent legality of their demands to the subject, we suggested in our Consultation Paper that the defence of submission should not continue to apply. This would mean that only agreements qualifying as contractual compromises (or, possibly, voluntary payments) would constitute defences to claims for repayment. However, if a taxpayer pays, after proceedings have in fact been commenced against him, it seems contrary to the principle of finality of litigation to permit that payment to be reopened".[84]

It will be seen that the Law Commission depart from English law in proposing that payments made in response to a threat to litigate should be recoverable. We agree with this part of their recommendations which seems to us right in principle and is also consonant with the common law of Scotland.

4.51 In the last sentence of the quoted passage however the Law Commission recommend

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[83]The main exception is decree by the defender's consent before defences are lodged.

[84]Law Com No 227, para 10.31.

applying the English common law principle of finality of litigation to payments made after the commencement by the Revenue of proceedings against the taxpayer for payment of the undue tax. In our view, however, this particular English common law rule is not a principle of general jurisprudence but a peculiarity of the English common law. As indicated above the Scottish common law principle of finality of litigation or *res judicata* is more generous than is English law to the recovery by a putative debtor of an undue payment which he has erroneously made after the commencement against him by the payee of an action for payment. In general only a decree *in foro* or compromise will bar such recovery. The principle of finality of litigation has to be balanced against the principle of giving every citizen his due - in this case recovery of undue tax overpaid in response to the Revenue's unfounded litigation in which the court has not pronounced on the merits and no defences have been lodged.

4.52 It is not for us to suggest the extension to England of the Scottish solution which depends on technical concepts of court procedure and remedies (such as a decree *in foro*) which may have no exact English counterpart. If the Scots solution cannot be adopted in England, we suggest that this is one small corner of Revenue law where a cross-border difference should be permitted reflecting the different background common law rules.

4.53 **Modification of recommendation as respects prior court action in Scotland.** We therefore venture to suggest a modification of the Law Commission's recommendation applicable where

the earlier legal proceedings prompting the mistaken payment of undue tax was an action by the Revenue against the taxpayer in a Scottish court. We suggest that it should be a defence to a statutory claim under TMA 1970, section 33, that the payment had been made in response to an action before a Scottish court brought by the Inland Revenue against the taxpayer concerned only if the decree in the action would be *res judicata* in a subsequent action raised by the taxpayer in Scotland for recovery of the payment. In general the effect of this provision would be that there would be a statutory defence to a claim for refund of tax erroneously paid in response to a Scottish common law action only if that action had been disposed of by a decree in foro of payment.

4.54 Our provisional proposals are as follows:

(1) We agree with the Law Commission that

(a) it should be a defence to a statutory claim for recovery of an overpayment of tax that a claim for the tax in question was contractually compromised; but

(b) it should not be a defence to such a claim that the payment was made in response to a mere threat to litigate, unless that payment would also qualify as a contractual compromise.

(2) It should not be a defence to such a claim that the payment had been made in response to an earlier action before a Scottish court brought by the Inland Revenue against the taxpayer concerned unless decree in the earlier action would

be *res judicata* in a subsequent action raised by a taxpayer in a Scottish court for recovery of the payment.

(Proposition 6)

(v) Short time limits (negative prescription, or limitation of actions)

4.55 The special statutory provisions on refund of taxes, rates and social security contributions impose a variety of time-limits on the making of a claim for a refund eg 6 years (VAT)[85] or 3 months (import duties)[86] after the date of payment; or 6 years after the end of the relevant year of assessment to taxes (income tax, capital gains tax, petroleum revenue tax)[87] or of accounting (corporation tax)[88], or assessment to rates[89], or the year in which the relevant social security contribution was made[90]; or 21 days after the date of assessment (stamp duty)[91]. The period of 6 years in the special provisions on central government taxes was probably selected for consistency with the general English law of

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[85]Value Added Tax Act 1994, s 80(4) and (5) consolidating Finance Act 1989, s 24(4) and (5).

[86]Customs and Excise Management Act 1979, s 127.

[87]Taxes Management Act 1970, s 33(1).

[88]*Idem*.

[89]Local Government (Scotland) Act 1973, s 20(1); Local Government (Scotland) Act 1975, s 9A (1).

[90]Social Security (Contributions) Regulations 1979, reg 32(5) (SI 1979/591).

[91]Stamp Act 1891, s 13(1) (application for stated case for appeal to Court of Session).

limitation, but it should be noted that the commencement date of the period under those special provisions is not in all cases the same as under that general law.

4.56 In Scotland, where action must be taken at common law the period of the short negative prescription of five years applies[92]. Prescription begins to run from the date when the obligation of repetition became enforceable[93], being presumably the date when the payment was made[94]. Where by reason of (i) fraud, or (ii) error induced by words or conduct of the debtor or any person acting on his behalf, the creditor is induced to refrain from making a relevant claim for a period, the running of prescription is postponed till the end of that period, at any rate for so long as the debtor could not with reasonable diligence have discovered the fraud or error[95]. In English law, the normal limitation period is six years[96].

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[92]Prescription and Limitation (Scotland) Act 1973, section 6 (1) and (2) and Schedule 1, para 1(b).

[93]1973 Act, s 6(3).

[94]There seems to be no case construing the Act in relation to actions of repetition; but the proposition in the text appears consistent with the First Division's decision in *N V Devos Gebroeder* v *Sunderland Sportswear Ltd* 1990 SLT 473 (obligation to make recompense arises when the defender first becomes *lucratus*).

[95]1973 Act, s 6(4).

[96]Law Com No 227 para 10.36. Limitation Act 1980,ss 2 and 5. The commencement of the period is postponed by fraud, mistake or concealment: Limitation Act 1980, s 32.

4.57 We respectfully agree with the Law Commission's rejection of short time limits[97]. First, the Law Commission argued that the other defences which they recommended would adequately safeguard the public purse.[98] Second, short time-limits tend to favour those with access to legal advice rather than the small taxpayer and businessman who is most in need of refund of overpaid tax. This type of safeguard was not favoured by the Inland Revenue representatives who indicated that such limits would cause particular problems in connection with the change to self-assessment of tax.

4.58 The Law Commission recommended a limitation period of six years from the date of payment. We think that the period must be the same in Scotland, even though it does not cohere with the five-year prescriptive period of Scots law, since Scottish taxpayers cannot be at a disadvantage compared with English taxpayers.

4.59 (1) **Short time limits on claims for repayment of overpaid tax should not be introduced to safeguard public finances.**

(2) **In a claim based on error, time should not begin to run against the taxpayer until he discovers the error or could**

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[97]Law Com No 227, paras 10.36 - 10.41.

[98]Law Com No 227, para 10.40, referring to non-exhaustion of statutory rights of appeal; change in a settled view of the law; compromise and "submission to an honest claim"; and unjust enrichment of the tax-payer.

with reasonable diligence have discovered it.

(Proposition 7)

(vi) Non-exhaustion of statutory remedies[99]

4.60 We referred above to the common law defence of failure to exhaust statutory remedies which has been firmly established in Scots law since the beginning of the 19th century.[100] This defence qualifies actions at common law (eg of repetition) and applications for judicial review and the underlying policy to prevent these proceedings from undermining statutory procedures applies here.

4.61 Officials of the Inland Revenue repeatedly emphasised to the Law Commission the overriding importance of preserving the finality of the assessment procedure.[101] The practical need for a defence of non-exhaustion is readily apparent. It enables questions of liability to be determined finally at the stage of a formal assessment (or determination) as to liability, subject only to any special statutory avenue of appeal which itself is final. The finality of the assessment or appeal enables collection of the tax, rates or other levy to proceed free from being impeded or disrupted by litigation about liability. If recovery is by ordinary action and diligence, a defence of non-liability cannot be raised in the action if it could have been raised at the assessment stage.

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[99]Law Com No 227, paras 10.42, 10.43.

[100]See C T Reid, "Failure to Exhaust Statutory Remedies" 1984 JR 185.

[101]Law Com No 227, para 10.43.

4.62 Further, summary warrant diligence may be used for recovery of tax arrears[102] reasonably free from the fear that the issue of liability for the arrears will be contested in a suspension of the diligence. Summary warrant diligence is used at the risk of the collecting authority and liability in delict for its wrongful use is strict.[103]

4.63 In the draft clauses annexed to Law Com No 227, statutory defences of *res judicata* and non-exhaustion are defined as follows[104]:-

> "(2) It shall be a defence to a claim made on any ground that the ground was considered on an appeal by the claimant against an assessment relating to the amount in question.
>
> (3) It shall be a defence, in the case of a claim made on a ground that has not been put forward by the claimant on an appeal against an assessment relating to the amount in question, that the ground was or by the exercise of due diligence should have been known to the claimant -
>
> > (a) if no such appeal has taken place, before the end of the period in which he was entitled (under section 31 above) to bring an appeal, or
> >
> > (b) if such an appeal has taken place, before the hearing of the appeal".

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[102]See as to taxes, Taxes Management Act 1970, s 63; Car Tax Act 1983, Sch 1, para 3(2); Value Added Tax Act 1994, Sch 11, para 5(5); as to rates, Local Government (Scotland) Act 1947, s 247; as to council tax and council water charge, Local Government Finance Act 1992, Sch 8, para 2(2); Finance Act 1994, Sch 7,para 7(8). See *Civil Judicial Statistics, Scotland* (1993) Annual Tables, Table 8. (Note that one summary warrant may cover a large number of defaulters).

[103]*Grant* v *Magistrates of Airdrie* 1939 SC 738.

[104]Law Com No 227, Appendix B, Draft Tax Clauses, Clause A, (new s 33AA in TMA 1970) p 202.

4.64 A defence of non-exhaustion of statutory appeal procedures should be available to the Revenue against a statutory claim for refund of overpaid tax.
(Proposition 8)

(vii) Unjust enrichment of tax-payer or "passing on"[105]

4.65 In section 80 of the Value Added Tax Act 1994[106], which provides for repayment of overpaid VAT, subsection (3) enacts that it is a defence to any claim under the section that repayment "would unjustly enrich" the claimant. This defence was designed to preclude recovery when the payee has "passed on" the amount of the tax, for example to purchasers of his goods or services.

4.66 As Lord President Hope pointed out in the *McMaster Stores* case[107], the common law principles of unjustified enrichment are not in point when construing the statutory expression "unjustly enrich".[108] He observed that the Court[109]:

> "should try to avoid a construction of the statute which might produce inequalities of taxation between Scotland and England so that so far as possible it may have a uniform

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[105]Law Com No 227, paras 10.44 - 10.48.

[106]Formerly section 24 of the Finance Act 1989.

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

[108]*Ibid*, Transcript p 14.

[109]*Idem*.

> effect in both countries...[110] The common law of unjustified enrichment is not the same as its equivalent in England, nor are the remedies. For this reason also it is preferable to confine our attention solely to the terms of the statute".

4.67 The Law Commission recommend that it should be a defence to claims for the repayment of taxes overpaid as a result of mistake, or as a result of an ultra vires charging instrument, that repayment would unjustly enrich the claimant.[111] Such a defence would arise:

> "where the burden of a charge has effectively been 'passed on' to other parties by the charge payer through an increase in the price of goods or services to take account of the higher cost to the payer arising from the payment of the charge. This may occur where a charge is levied which relates directly to specific goods or services such as V.A.T. or import or export charges levied on particular items, in which case the whole amount of the charge may be directly added to the price of the goods or services. It might also occur in the context of overpaid corporation tax where it could be argued that the price of a firm's product had been increased to reflect the tax paid. A defence of 'passing on' could in theory be raised in any action for restitution where the diminishing of the payer's assets in conferring the relevant benefit might have been offset to some degree by a compensating adjustment to the price of his product".[112]

A defence of "passing on" is one form of a defence that the payer would be "unjustly enriched" by repayment.

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[110]Citing *Income Tax Commissioners v Gibbs* [1942] AC 402 at p 419 per Lord Macmillan.

[111]Law Com No 227, recommendations 20 (para 10.46) and 21 (para 10.48).

[112]Law Com CP No 120, para 3.81.

4.68 **Scots law.** In Scots law, in a *condictio indebiti*, the fact that the payer had "passed on" the burden of the undue payment might conceivably be a factor to which the court would pay regard in balancing the equities for and against repetition, but we have not traced any case in which that approach has been adopted or argued. Since equitable defences can probably not be relied on in an action of repetition based on improper compulsion, "passing on" would not be a defence in such an action.

Comparative law

4.69 **Commonwealth and American common law.** In the United States, one justification for the error of law rule, "at least in areas of taxes bearing on the conduct of a business, is that the taxpayer is only nominally the real payer and that he will have passed it on to his customers as a cost of his product or service".[113] In Canada, the issue provoked conflicting *obiter dicta* in the *Air Canada* case [114]. La Forest J (on the basis of American authority to the effect that the courts should not shift the tax authority's enrichment to the taxpayer[115]) remarked:

> "The law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss. Its function is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or

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[113]Pannam, "The Recovery of Unconstitutional Taxes in Australia and the United States" (1964) 42 Texas L R 777 at p 792; Palmer *The Law of Restitution* (1986 Supplement) p 255.

[114]*Air Canada* v *British Columbia* (1989) 59 DLR (4th) 161.

[115]Palmer, *supra*.

> would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain the province made at the airlines' expense. If the airlines have not shown that they bore the burden of the tax, then they have not made out their claim. What the province received is relevant only in so far as it was received at the airlines' expense".[116]

Wilson J rejected this approach holding that where payments were made pursuant to an unconstitutional statute, there is no legitimate basis on which they can be retained.[117]

4.70 In Australia the defence has been rejected in at least two cases[118]. In the *Woolwich* case, Lord Goff reserved his opinion and suggested that the defence's availability may depend on the nature of the tax or other levy.[119]

4.71 **European Community law.** Under European Community law, the national law of a member State may provide for a defence of passing on in an action for repayment of a tax, charge or duty levied in breach of Community law[120]. In the *San*

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[116](1989) 59 DLR (4th) 161 at pp 193, 194 Lamer and L'Heureux-Dubé JJ concurring.

[117]*Ibid* at pp 169, 170 (dissenting in part).

[118]*Mason v New South Wales* (1959) 102 CLR 108; *Commissioner of State Revenue v Royal Insurance Australia Ltd* (1995) 69 ALJR 51, noted J Beatson, "Restitution of Overpaid Tax, Discretion and Passing-on" (1995) 111 LQR 375.

[119]*Woolwich Equitable Building Society v IRC* [1970] AC 70 at pp 177,178.

[120]Case 68/79 *Hans Just I/S* v *Danish Ministry for Fiscal Affairs* [1981] 2 CMLR 714.

Giorgio case[121], however, it was held that any requirement of proof which makes it excessively difficult to secure the repayment of charges levied contrary to Community law (eg a restriction to documentary evidence, or a presumption of passing on which the claimant for repayment must rebut) is incompatible with Community law. In that case the Advocate General took the view that "extinction of the right to repayment as a result of the passing on of charges is permissible only marginally and almost never in those cases where the price is determined by market forces".[122] The facts in the *Hans Just* case were special. There the authorities imposed an *ultra vires* tax on the purchase of grain by a miller and increased the price of bread sold by the miller by an amount equal to the tax. There passing on was allowed but the price was fixed by public authorities, not market forces, and clearly provided for passing on the loss to buyers. Where the price is determined by market forces, "the passing on of charges is apparent, and may therefore be presumed by the legislature, only where two conditions are satisfied, namely that supply is elastic and demand is rigid"[123]. In the normal case, where these two conditions were not satisfied, proof of "passing on" would be very difficult because of the numerous and complex

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[121]Case 199/82 *Amministrazione della Finanze dello Stato* v *San Giorgio Sp A* [1985] 2 CMLR 658.

[122]*Ibid* at p 677.

[123]*Idem*. The Commission thought the only product for which both these conditions are fulfilled is salt: *ibid* at p 672. See on this matter B Rudden and W Bishop "Gritz and Quellmehl: Pass It On" (1981) 6 European Law Review 243.

economic variables affecting the passing on of charges[124].

4.72 **European legal systems.** It is relevant to note that, in the *San Giorgio* case (1982), the Advocate-General observed that, "with the exception of Denmark, passing on is alien to the legal experience of the member States",[125] and that in Danish law a defence of "passing on" had been permitted only within strict limits.[126]

Assessment of the defence.

4.73 Several objections may be made to a defence of "passing on". First, "it would be difficult to determine the precise extent to which the charge has in fact been passed on".[127]

4.74 Second, "the increase in price may have lead to a decrease in demand so as to negate any 'windfall' element"[128]. This may occur in the usual

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[124]See Rudden and Bishop, *op cit*.

[125][1985] 2 CMLR 658 at p 679 per Advocate-General Mancini: viz Belgium, France, Germany, Italy, Netherlands, United Kingdom: *ibid* at pp 678, 679.

[126]Cf Burrows *The Law of Restitution* (1993) p 476 stating that passing on "has a well-established pedigree as a public authority's defence in civil law systems". The *San Giorgio* and *St Just* cases cited by the learned author,however, do not support that proposition.

[127]Law Com CP No 120, para 3.84.

[128]*Idem*. See also Burrows, "Public authorities, Ultra Vires and Restitution" in Burrows (ed) *Essays on the Law of Restitution* (1991) 39 at p 59: "to pass on one's loss does not necessarily mean that one recoups that loss. For example, the charging of higher prices ought in theory to reduce the number

case where demand is elastic and prices are fixed by the market.

4.75 Third, the possibility of such a defence would provide an incentive to the payer to raise an action immediately and if possible to absorb the costs until the action is disposed of. This may perhaps be an advantage or neutral rather than a disadvantage of the proposal. However if the loss is passed on, it may not be possible for the court to assess the longer term effect on sales of the increase in prices, since these effects may not be felt till after the time of action, depending on market conditions. This would be unjust to the payer especially if there is a very short limitation period.

4.76 Fourth, a defence that repayment "would unjustly enrich" the claimant for repayment would cover passing back as well as passing on the loss down the distribution chain. By "passing back" is meant shifting the burden to those who provide the payer "with the factors of production: the suppliers of new material, the owners of property [or] equipment rented, or their employees",[129] in other words by reducing the costs of production. This increases the complexity of the defence.

4.77 Fifth, the defence is unlikely to secure justice to all the various interests involved: "it is very difficult, as a matter of abstract justice,

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of customers".

[129]Cf Rudden and Bishop, *op cit*, p 251: "any argument addressed to passing on which applies to forward shifting applies equally to backward shifting" (*idem*).

to deny the buyer an action"[130]. Yet, nobody suggests that the buyers ultimately impoverished by "passing on" should have a title to sue. The choice lies between unjust enrichment of the public authority or the payer.

4.78 Sixth, the defence of "passing on" seems to be recognised by European Union law only in limited circumstances and is generally rejected by other member States. Other things being equal, it seems desirable to preserve this harmony between European legal systems.

4.79 Seventh, the defence is likely to be uncertain in its operation. For example, to illustrate the utility of the defence in "minimising recovery in unmeritorious circumstances", the Law Commission remarked:

> "if a taxpayer company went into liquidation owing substantial amounts to the Inland Revenue, it would seem to us to be unjust if an absolute entitlement to a refund based on an earlier mistake could be maintained by the liquidator, who then proceeded to apply the sum recovered to other debts."[131]

On the other hand, when precisely that set of facts arose in the *McMaster Stores* case, the First Division held that there was no "unjust enrichment" within the section.[132]

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[130]*Ibid*, p 254.

[131]Law Com No 227, para 10.45.

[132]*Commissioners of Customs and Excise v McMaster Stores (Scotland) Ltd (in receivership)* (1st Div) (unreported, 26 May 1995) 1995 GWD 23-1281, approving *Landec Ltd* MAN/90/1018.

4.80 In the *McMaster Stores* case, the Lord President said that there could be "no injustice ... as regards the Commissioners, as the sum sought to be recovered from them was paid over to them in error when it was not due".[133] That factor must be irrelevant because otherwise it would preclude the defence in all cases.

4.81 Since apparently the defence works well in VAT and excise duty cases, we do not propose its abolition there. On the other hand, but for the Law Commission's support for the defence, we would have been inclined to reject it as a general defence, having regard to the factors mentioned above. We have not reached any concluded view.

4.82 **Should it be a defence to a statutory claim for recovery of overpaid taxes that recovery would "unjustly enrich" the taxpayer? (Proposition 9)**

(viii) A defence of serious disruption to public finances[134]

4.83 The Law Commission rejected a defence of "serious disruption to public finances" on the grounds (a) of its inherent imprecision; (b) that it lacked support on consultation; (c) of the invidious and unprecedented nature of a judicial power to deny justice on grounds of expediency.

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[133] *Commissioners of Customs and Excise v McMaster Stores (Scotland) Ltd (in receivership)* (1st Div) (unreported, 26 May 1995) 1995 GWD 23-1281, Transcipt, p 18.

[134] Law Com No 227, paras 11.6;11.23 et seq.

4.84 **We agree with the Law Commission's recommendation[135] that the problem of disruption to public finances should not be dealt with by the introduction of a defence permitting denial of recovery where such disruption would result. (Proposition 10)**

(ix) Equitable defences (change of position and *bona fide* consumption)[136]

4.85 In Law Com No 227, the Law Commission discuss whether a defence of change of position would be an appropriate solution to the problem of disruption of public finances caused by claims for recovery of undue taxes paid under mistake of law or pursuant to an ultra vires demand.

The Scots law on equitable defences

4.86 Under the classic modern formulation of the equitable defence of change of position in Scots law, the defenders:

> "require to show (1) that they had reasonable grounds for believing that the money was theirs; and (2) that having that reasonable belief, they acted upon it so as to alter their position in such manner as to make repetition unjust".[137]

The *Morgan Guaranty* case shows, in consonance with older cases[138], that the defence of change of position can apply to a *condictio indebiti* or

[135]Law Com No 227, recommendation 22 (para 11.6).

[136]Law Com No 227, paras 11.10 - 11.17.

[137]*Crédit Lyonnais v George Stevenson and Co Ltd* (1901) 9 SLT 93 (OH) at p 95 per Lord Kyllachy, approved in *Watt v Royal Bank of Scotland plc* 1991 SC 48 at pp 57,61,64.

[138]See paras 2.19 - 2.25 above.

action of repetition against a public authority defender, if it is made out on the facts.[139] In that case Lord President Hope, in rejecting a contention that equity favoured protection of public finances rather than repayment, observed:

> "I do not see why a local authority which has received money as a result of a transaction which it had no power to enter into should be held entitled to retain it simply in order to protect public finances. Public finances are sufficiently protected by ensuring that the local authority does not enter into transactions which are outwith its powers. It is not necessary for their protection that they should be enriched by the retention of sums paid to them which were not due."[140]

4.87 As we saw in Part II, the *Earl of Cawdor* case provides authority that the defence of *bona fide* consumption is not available to the Crown in an action of repetition based on error of fact (*condictio indebiti*), at least in a case where the payment is of a relatively small amount[141]. This authority is not easy to reconcile with *Bell v Thomson* which upheld a type of defence of "change of position" in actions for recovery of undue taxes and rates even of small amounts. This defence treats the governmental body as a mere collecting agent for the general body of tax or rate payers. It denies recovery where there has been a change in the composition of tax or rate payers, between the date of a mistaken payment of tax or rates and the date of the action for its repetition raised

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

[140]1995 SLT 299 at p 316I,J.

[141]See paras 2.12ff; *Earl of Cawdor* v *Lord Advocate* (1878) 5 R 710.

after the year of collection, at any rate where the taxes or rates were expended in the year of collection so that the tax or rate payers in the next year were not *lucrati*.[142]

4.88 On the other hand, we also saw in Part II that there is authority that probably neither the defence of *bona fide* consumption[143] nor the equitable defence of change of position[144] are available to a public body in defence to an action for repetition based on improper compulsion.[145]

4.89 We think that the latter analogy should be followed in the context of a statutory right of recovery.

Defence of "change of position" in Common Law systems

4.90 In English law, the defence of change of position has been defined as follows:

> "the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full. I wish to stress however that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any

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[142]See paras 2.16 ff; *Bell* v *Thomson* (1867) 6 M 64; applied (*obiter*) in *National Bank of Scotland* v *Lord Advocate* (1892) 30 S L Rep 579 (OH).

[143]See paras 2.16, 2.17.

[144]See para 2.16.

[145]*Unigate Foods Ltd* v *Scottish Milk Marketing Board* 1975 SC (HL) 75 at p 90: see para 2.25.

event have been incurred by him in the ordinary course of things."[146]

Law Com No 227 points out that the principles governing the defence and its availability to public authority defendants are unclear.[147]

4.91 We note that most commentators have adversely criticised the defence in the context of claims against public authorities[148]. The main arguments against acceptance of a defence of change of position in *Woolwich* actions appear to be as follows.

4.92 First, a judicial power to absolve a public authority from liability on the ground of disruption of public finances "seems to contain the imperative that, if governments are to exceed their taxing powers, this should be done on the grandest scale".[149] There is here an implied criticism of the dicta in the *Earl of Cawdor* case[150] that the defence of *bona fide* consumption is not available to the Crown where the amounts wrongly paid are of

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[146]*Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at p 580 per Lord Goff.

[147]Para 11.17. *Westdeutsche Landesbank Girozentrale v Islington LBC* (1993) 91 LGR 323, at pp 387-397 per Hobhouse J; affd [1994] 1 WLR 938 (CA) shows that the defence may be available to public authority defendants.

[148]See Birks "Restitution from the Executive" *op cit*, pp 200, 201; Burrows *op cit* at pp 57, 58; Collins *op cit* at pp 436, 437; Cornish, *op cit* at p 52. Cf McCamus *op cit* at p 273.

[149]Cornish, *op cit* at p 52.

[150]*Earl of Cawdor* v *Lord Advocate* (1878) 5 R 710 at pp 714, 715 per Lord Justice-Clerk Moncreiff; see para 2.13 above.

a relatively small amount. This criticism is difficult to refute.

4.93 Second, if the defence is not available, the public authority will redistribute the burden of repayment by subsequent lawful taxation or by other means. As the Law Commission remark:

> "The defence is not directed at the particular problems of public authorities and where it applies the defence automatically shifts the net loss from "future" generations of tax or charge payers to those who suffered from the illegal levy. It does not appear to us that this is an appropriate result".[151]

Support for this view is to be found in the dissenting judgment of Wilson J in the *Air Canada* case[152].

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[151]Law Com CP No 120, para 3.78.

[152]*Air Canada* v *British Columbia* (1989) 59 DLR (4th) 161 at p 169:"If it is appropriate for the courts to adopt some kind of policy in order to protect government against itself (and I cannot say that the idea particularly appeals to me), it should be one which distributes the loss fairly across the public. The loss should not fall on the totally innocent taxpayer whose only fault is that it paid what the legislature improperly said was due. I find it quite ironic to describe such a person as 'asserting a right to disrupt the government by demanding a refund' or 'creating fiscal chaos' or 'requiring a new generation to pay for the expenditures of the old'. By refusing to adopt such a policy the courts are not 'visiting the sins of the fathers on the children'. The 'sin' in this case (if it can be so described) is that of government and only government and government has means available to it to protect against the consequences of it. It should not, in my opinion, be done by the courts and certainly not at the expense of individual taxpayers".

4.94 Third, as the Law Commission observe[153], no such defence is provided in any of the statutory provisions conferring a right to recovery of charges not due.

4.95 Fourth, there is force in the Law Commission's provisional conclusion that "the complexity of the factual determinations which [the defence] would involve in this context also suggest that it should not be adopted"[154].

4.96 Fifth, a defence of change of position can take various forms, but none so far identified seems altogether satisfactory. At least three approaches have been identified.

4.97 *Primo*, the public authority must show that it has changed its position by undertaking items of expenditure other than those it would in any event have undertaken.[155] This is not easy because the "spending plans of revenue raising public authorities, and particularly those of the Crown, are generally decided in principle several years in advance of the taxation year to which they relate".[156]

4.98 *Secundo*, the defence might take the wide form of treating the public authority receiving undue tax as a mere collecting agent so that a later generation of tax or rate payers were treated

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[153]Law Com CP No 120, para 3.78.

[154]Law Com CP No 120, para 3.78.

[155]Law Com No 227 para 11.12.

[156]Law Com No 227, para 11.12.

as never having received the money, as in *Bell* v *Thomson* [157]. In such a case the defence would be made out if the public authority had spent the money in the year of receipt and not carried forward a surplus to the year in which the claim for repetition was made. Such a defence would deprive the *Woolwich* rule of all content, except possibly and perhaps illogically in those cases where proceedings for repayment were brought in the same fiscal year as that in which the undue payment was made.[158]

4.99 In the Republic of Ireland, an approach very similar to that in *Bell v Thomson* was adopted by the Supreme Court in *Murphy v Attorney-General*[159], which was a taxpayer's action for repayment of unconstitutional taxes. The majority upheld the defence on the ground that in every tax year the State had collected the money in good faith, and had "justifiably altered its position by spending the taxes thus collected and by arranging its fiscal and taxation policies and programmes accordingly"[160]. Restitution would be inequitable because at the end of each financial year the State's accounts are closed. To order restitution would be equivalent to ordering one set of taxpayers to make restitution to another.

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[157] *Bell* v *Thomson* (1867) 6 M 64; *National Bank of Scotland* v *Lord Advocate* (1892) 30 S L Rep 579.

[158] Or possibly where it was proved that a surplus was carried forward from the year of payment to the year of commencement of the action of repetition.

[159] *Murphy* v *Attorney General* [1982] 1 Irish Reports 241 at pp 319, 320.

[160] [1982] IR 241 at pp 319,320.

4.100 The approach adopted in the *Bell* and *Murphy* cases would in effect amount to the imposition of a short time limit of one year,[161] a solution which we have rejected elsewhere.[162]

4.101 *Tertio*, if the defence of "change of position" were to take the very different limited form recently adopted by the Supreme Court of Canada[163], then it would not be enough that the public authority had simply spent the money, unless there was some fault on the payer's part and none on the part of the payee. There would have to be proof that special projects had been undertaken, or special financial commitments made, as a direct result of the receipt of the undue payments. The result would be that the defence would "be virtually impossible to establish",[164] at least in many cases. The Law Commission remark that the division of the departments of state into "spending" and "revenue raising" departments would make it extremely difficult to match any specific item of expenditure to the overpayment of tax received.[165]

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[161]This point is made in Law Com No 227, para 11.17.

[162]Proposition 4.6 (para 4.59).

[163]*Rural Municipality of Storthoaks* v *Mobil Oil Canada Ltd* (1975) 55 DLR (3rd) 1 at pp 12 to 14 per Martland J; *Hydro-Electric Commission of Nepean* v *Ontario Hydro* (1982) 132 DLR (3rd) 193 at pp 212 to 215 per Dickson J (dissenting).

[164]Birks, "Restitution from the Executive", *op cit* at p 201.

[165]Law Com No 227, para 11.16.

4.102 In conclusion we think that there are two distinct issues. The first is whether change of position should be a defence to a statutory claim for refund of overpaid tax[166]. We agree with the Law Commission's recommendation[167] that it should not.

4.103 The second - which relates to the defences available against a general common law claim for repetition rather than the defences to statutory claims for refund - is whether the rule in *Bell* v *Thomson*[168] should be abrogated by statute. That rule is inconsistent with modern policy notions on recovery of undue tax payments as affirmed in the *Woolwich* case and (obiter) in *Morgan Guaranty*.

4.104 **(1) The statutory scheme should neither provide for a defence of change of position nor confer on a court or tribunal the same equitable discretionary power to refuse refund of tax as the Scottish courts possess to refuse decree of repetition in a *condictio indebiti*.**

(2) The rule in *Bell* v *Thomson*[169] (under which a public authority receiving undue taxes or rates is treated as a mere collecting agent

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[166]Law Com CP No 120, paras 3.77, 3.78.

[167]Law Com No 227, recommendation 25, (para 11.17).

[168](1867) 6 M 64.

[169](1867) 6 M 64.

so that a later generation of tax or rate payers are treated as never having received the money, and therefore as not enriched thereby) should be abrogated by statute in claims under the general law of repetition.

(Proposition 11)

(x) Personal bar[170]

4.105 In our Discussion Paper No 95[171], we described the Scots law on personal bar as a defence to a *condictio indebiti*. In most reported *condictio indebiti* cases in which the plea has been raised, it has not been upheld. A plea of personal bar differs from "change of position" in requiring an express or implied representation on the faith of which the recipient's position is altered to his prejudice.[172] The Scots law of personal bar resembles the English law on estoppel but there are differences.[173]

4.106 Nevertheless **with reference to the Law Commission's recommendation**[174] **that the proposed legislation should not deal with the doctrine of estoppel, we suggest that it should also not deal**

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[170]Law Com No 227, para 11.32.

[171]vol 2, paras 2.61, 2.62.

[172]*Ibid; Allied Times Theatres Ltd v Anderson* 1958 SLT (Sh Ct) 29 at p 30.

[173]eg Scots law has rejected the English doctrine of "issue estoppel": *Clink v Speyside Distillery Co Ltd* 1995 GWD 21-1192 (OH).

[174]Law Com No 227, recommendation 29 (para 11.32).

with the Scots law on personal bar insofar as it applies (if at all) to the refund of overpaid tax. (Proposition 12)

(c) PAYE[175]

4.107 Under the PAYE system, income tax is collected by the direct deduction of the income tax at source by an employer paying income assessable under Schedule E[176] who then pays it to the Revenue. The system is regulated by statutory instrument.[177]

4.108 Assessments are unnecessary for collection of tax under Schedule E[178] but taxpayers have certain rights to call for an assessment[179], to appeal to the General or Special Commissioners against it[180] and to seek repayment on grounds of error or mistake under TMA 1970, section 33.

4.109 The Law Commission saw no difficulty in extending their recommendations on refund of overpaid income tax to tax paid under PAYE. In particular the defences would be identical.[181] They explained that the defence of non-exhaustion of

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[175]See Law Com No 227, paras 12.1 - 12.7.

[176]ICTA 1988, s 203(1).

[177]Income Tax (Employments) Regulations 1993 (S I 1993/744).

[178]ICTA 1988, s 203(1).

[179]ICTA 1988, s 205(3) and Income Tax (Employments) Regulations 1993 reg 99(1).

[180]Income Tax (Employments) Regulations 1993 reg 100 (1),(2); TMA 1970, s 31 and Part V.

[181]Law Com No 227, para 12.7.

statutory rights of appeal should not apply to appeals against notices of coding, since these limited forms of appeal may not comprehensively determine the taxpayer's liability to income tax.[182]

4.110 In accordance with the Law Commission's recommendation[183], we suggest that:

The enactments proposed above to replace the Taxes Management Act 1970, section 33, should apply to tax paid by PAYE.
(Proposition 13)

(d) The self-assessment system[184]

4.111 The Finance Act 1994[185] makes provision enabling the introduction of a system of self-assessment of liability to direct taxes as from the taxation year 1996-1997.[186] Under the present law, the taxpayer is responsible for providing information to the Revenue. The Revenue is responsible for calculating the tax due and creating a legal debt (the assessment). The new self-assessment system transfers the responsibility for creating the correct legal charge to the taxpayer. A tax return will contain all the

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[182] *Idem.*

[183] Law Com No 227, recommendation 30, (para 12.7).

[184] Law Com No 227, paras 12.8 - 12.17.

[185] Part IV, Chapter III (ss 178 - 199) Schedule 19; Chapter IV.

[186] Our brief remarks outlining the system are based on Inland Revenue, *Self Assessment: the legal framework. A guide for Inland Revenue Officers and Tax Practitioners* SAT 2 (1995).

information needed to calculate the taxpayer's total taxable income from all sources and chargeable gains for the period of charge. Then the tax will be calculated either by the taxpayer (self-assessment) or the Revenue. There will be fixed filing dates for completed returns.[187] The taxpayer will be entitled to correct errors by amending the self-assessment within 12 months of the filing date.[188]

4.112 The taxpayer will be entitled to make a claim for error or mistake relief within 5 years of the annual filing date for the year concerned.[189] The general requirements of the claim and the "general practice" defence remain unaltered.[190] The taxpayer will have also a right of appeal against amendments by the Revenue of self-assessments as well as against assessments which are not self-assessed.[191] So there will presumably continue to be a need for a defence of failure to exhaust statutory remedies.

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[187]The annual filing date for a return of income for the year ended 5 April 1998 will be 31 January 1999. The charge to tax will be created by the submission of a completed self-assessment or, in Revenue calculation cases, by the issue of the notice of the tax payable.

[188]TMA 1970, s 9 as substituted and amended by FA 1994, s 179 and FA 1995, ss 104(4) and 115(2).

[189]TMA 1970, s 33(1),(2) and (2A) as amended or inserted by FA 1994, Sch 19, para 8; s 33 as inserted by FA 1994, Sch 19, para 9. The period of 5 years after the filing date contrasts with the current limit of 6 years after the end of the year of assessment.

[190]*Idem.*

[191]TMA 1970 s 31 as amended by 1994, Sch 19, para 7.

4.113 In accordance with the Law Commission's recommendation[192], we suggest that:

The reforms proposed above to the recovery provisions in relation to income tax should extend to income tax paid under the self-assessment system.
(Proposition 14)

2. Inheritance Tax[193]

4.114 Inheritance tax under IHTA 1984 is imposed on "chargeable transfers". Special statutory provisions regulate the determination by the Revenue of the amount due[194] and appeals to the Special Commissioners or the Court of Session against notices of determination.[195]

4.115 The Law Commission point out[196] that the right to recovery of overpaid inheritance tax[197] is subject only to a time limit of six years[198] and a defence of "payment on a view of the law generally received or adopted in practice"[199]. The Law Commission consider that the latter defence should be replaced by a defence of a change in a settled

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[192]Law Com No 227, recommendation 31, (para 12.17).

[193]See Law Com No 227, paras 13.1 - 13.11.

[194]IHTA 1984, s 216 as amended; s 221(5).

[195]IHTA 1984, ss 222 - 225; General and Special Commissioners (Amendment of Enactments) Regulations 1994 (SI 1994/1813); RCS, rule 41.24(1)(b).

[196]Law Com No 227, para 13.11.

[197]IHTA 1984, s 241(1).

[198]*Idem.*

[199]IHTA 1984, s 255.

view of the law for mistake claims.[200] The Law Commission also recommend that the defences to recovery of overpaid inheritance tax should be the same as those recommended for income tax, which would mean introducing the following further defences, namely, non-exhaustion of statutory remedies, unjust enrichment of the payer and submission to an honest claim or compromise. The Commission remark[201]:

> "At first sight, it may seem anomalous for us to recommend a recovery provision for inheritance tax which seems narrower than the existing statutory recovery provisions. However, we consider that the additional defences which we propose take little away from the taxpayer, and in fact represent fair limitations on a taxpayer's right to recover overpaid funds, whether through mistake or as a result of an ultra vires levy. We further consider that these additional defences must be balanced against the proposed removal of the rather broad formulation of the adopted practice defence in IHTA, section 255, when considering whether the taxpayer's overall position against the Inland Revenue is improved as a result of our proposals."

While we hesitate to concur with recommendations which cut down a taxpayer's rights under existing law, we can see no very good reason for enacting different rules for inheritance tax.

4.116 We therefore agree with the Law Commission[202] that:

> **the scheme developed in relation to income tax should apply to inheritance tax.**
>
> **(Proposition 15)**

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[200]Law Com No 227, para 13.11.

[201]*Idem*.

[202]*Idem*, recommendation 32.

3. Stamp Duty[203]

4.117 Stamp duty, which is charged on certain classes of documents, is administered by the Commissioners of Inland Revenue[204] who adjudicate on whether documents are chargeable to stamp duty and on the amount of duty. Appeals lie to the Court of Session[205] and thence to the House of Lords. There is no system of appeal tribunals.

4.118 As the Law Commission explain[206] ,the Stamp Acts inter alia permit the refund of duty paid on an instrument which is either void[207] or unfit by reason of error for the purpose originally intended[208], provided that it has not been relied on in court proceedings and the application is made within two years.[209] Refund is also permitted in cases of the inadvertent stamping of a non-liable instrument or stamping with a greater duty than required by law, subject to a two year limitation

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[203]Law Com No 227, paras 13.12 - 13.23.

[204]SDMA 1891; Inland Revenue Regulation Act 1890.

[205]Stamp Act 1891,s 13 and RCS, rule 41.23 (1)(a); Stamp Duty Reserve Tax Regulations 1986 (SI 1986/1711), reg 10(1) substituted by the General and Special Commissioners (Amendment of Enactments) Regulations 1994 (SI 1994/1813) and RCS, rule 41.24 (1)(c).

[206]Law Com No 227, paras 13.17 - 13.20 summarised at para 13.21 on which this para is based.

[207]SDMA 1891, s9(7)(a).

[208]SDMA 1891, s9(7)(b).

[209]Revenue Act 1898, s 13.

period.[210] There are various other rights to refund of overpaid stamp duty eg for failed instruments.[211]

4.119 We invite views on the Law Commission's recommendation[212] (with which we concur) that:

the scheme developed in relation to income tax should apply to stamp duty.
(Proposition 16)

C. EUROPEAN COMMUNITY LAW AND INDIRECT TAXES ADMINISTERED BY HM CUSTOMS AND EXCISE[213]

1. European Community Law

4.120 European Community law requires the repayment of levies exacted in breach of its provisions. This applies to indirect taxes such as VAT derived from Community law. The Law Commission identify two situations affected by EC law.

4.121 The first is where levies are collected on behalf of the EC by the national government or are set directly by the EC throughout the Community. If the levying provision either is invalid as in breach of EC law or does not authorise the payment levied, the payment is

[210]SDMA 1891, s 10.

[211]Law Com No 227 refers to various difficulties in making precise recommendations for legislation but concludes that in principle the recovery provisions for stamp duty should mirror those for direct taxes.

[212]Law Com No 227, recommendation 33, para 13.23.

[213]Law Com No 227 Part XIV pp 155 - 164.

recoverable under EC law[214] by proceedings in the national courts. We agree with the Law Commission that for these reasons no recommendation is needed.[215]

4.122 The second situation arises where taxes or charges levied by the UK Government or Parliament are invalid because they infringe EC law.[216] The Law Commission identify two problems in taxation law as a result of the supremacy of EC law. First, where a national tax is invalid for infringing EC law, EC law requires national law to afford the charge-payer a restitutionary remedy[217] which is not "impossible, impractical or extremely difficult" to exercise.[218] The Law Commission explain that they do not make recommendations on this situation for the following reasons.[219] (a) The provisions on recovery of indirect taxes[220] already provide such a remedy. (b) As regards direct taxes, the Law Commission observe that the vast majority of claims to recover overpayments

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[214]Council Regulation 1430/1979, art 2; Community Customs Code 2913/92 EEC arts 236-241.

[215]Law Com No 227, para 14.2.

[216]*R v Secretary of State for Transport, ex parte Factortame (No 2)* [1990] 2 AC 85; [1991] 1 AC 603.

[217]*Hans Just I/S v Danish Ministry for Fiscal Affairs* [1980] ECR 501.

[218]Case 199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595.

[219]Law Com No 227, paras 14.3,14.4.

[220]Which contain defences limited to those permitted by EC law.

have no EC implications.[221] In the case of the defence of "the payer's unjust enrichment" EC law is uncertain but the Crown should have the defence at least in the many cases with no EC implications. The defences of non-exhaustion of statutory remedies and "submission" or compromise do not breach EC law.

4.123 Second, the EEC Treaty by Article 12 prohibits customs duties on intra-Community trade and by Article 95 prohibits discrimination by the imposition directly or indirectly of internal taxes on the products of other Member States in excess of that imposed directly or indirectly on similar domestic products, or indirectly protecting other products. Under EC law, such levies are recoverable subject to an "unjust enrichment of the payer" defence.

4.124 The Law Commission point out[222] that of the principal indirect taxes, only VAT can be recovered in national law under a recovery right which is as wide as EC law prescribes[223]. Their recommendation on excise duties will repair this defect.[224]

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[221]Law com No 227, para 14.4.

[222]Law Com No 227, para 14.5.

[223]VATA 1994, s 80.

[224]Law Com No 227, paras 14.20 - 14.23.

2. Value Added Tax[225]

4.125 VAT is administered by the Commissioners of Customs and Excise[226] through a network of local valuation offices. Law Com No 227 gives a valuable description of the systems of collection of VAT[227] and of recovery rights.[228]

The system of collection of VAT

4.126 **General.** Under the VAT system, a taxable person must account for and pay to the Customs and Excise the difference between his input tax (VAT on supplies to him) and output tax (VAT on supplies by him) if higher. If his input tax exceeds his output tax, he can claim the excess. Regulations require the tax to be paid by reference to prescribed accounting periods normally of 3 months.[229] Where a taxable person duly makes returns at the proper time, normally no formal assessment is needed because he pays the tax when making the return.[230] The Commissioners may however make estimated assessments if the taxable person fails to make returns, or to keep proper records, or makes incorrect or incomplete returns or incorrectly

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[225]Law Com No 227, paras 14.6 - 14.9.

[226]VATA 1994 Sch 11, para 1(1).

[227]Paras 14.8 - 14.13.

[228]Paras 14.14 - 14.19.

[229]Value Added Tax Act 1983, s 14(1) and Sch 7, para 2; Value Added Tax (General) Regulations 1985 (SI 1985/886) Part VII, regs 58 and 60.

[230]Pinson, *Revenue Law* (16th edn; 1985) para 35-18.

claims a purported excess of input over output tax.[231]

4.127 **Difference from Inland Revenue collection system.** In contrast to Inland Revenue taxes such as income tax, the administration of VAT is not a phased system consisting of a formal assessment stage finally and conclusively fixing liability subject to appeals followed by a collection stage. Rather there are self-assessed returns not declared by statute to be final and the making of the returns and collection are rolled up into one continuous phase involving quarterly accounting and payment.

4.128 **Appeal procedures.** An appeal lies to a VAT and Duties Tribunal[232] against a decision of the Commissioners in respect of a long list of matters[233], such as registration or deregistration, the tax payable, refunds and assessments. The normal time limit for the appeal is 30 days from the date of the Commissioners' decision[234]. An appeal from a VAT and Duties Tribunal on a point of law lies to the Court of Session[235] and thereafter

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[231]Value Added Tax Act 1983, Sch 7, para 4.

[232]The Value Added Tax Tribunals were renamed "VAT and Duties Tribunals" by the Finance Act 1994, s 7.

[233]*Ibid*, s 40(1)(a) to (n).

[234]Value Added Tax Tribunals Rules 1986 (SI 1986/590), rule 4.

[235]Tribunals and Inquiries Act 1971, s 13 as applied to VAT Tribunals by the Tribunals and Inquiries (VAT Tribunals) Order 1972 (SI 1972/1210).

to the House of Lords.[236] It is a condition of an appeal that the taxpayer has made returns and paid the VAT thereon,[237] or where the Commissioners have determined that VAT is payable, has paid or deposited the VAT, (except where hardship would be suffered).[238] Where on appeal amounts paid or deposited are found not due, they must be repaid with interest as determined by the VAT and Duties Tribunal.[239] In appeals to VAT and Duties Tribunals therefore, there is neither need nor room for the *Woolwich* rule.

4.129 We have not traced any case holding that a taxpayer's failure to invoke statutory VAT Tribunal appeal procedures precludes a common law action for repayment of overpaid VAT. As we note below[240], since 1989, there has been an almost unlimited statutory right to recover overpaid VAT[241], so the question is unlikely to be litigated.

4.130 **Formal rulings and appeals.** The Law Commission explain[242] that, as a matter of administrative practice, Local Valuation Offices will on request give formal rulings on liability.

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[236]Tribunals and Inquiries Act 1971, s 13(6)(c). The leave of the Court of Session or House of Lords is required.

[237]VATA 1994, s 84(2).

[238]*Ibid*, s 84(3).

[239]*Ibid*, s 84(4).

[240]Para 4.131.

[241]FA 1989, s 24; now VATA 1994, s 80.

[242]Law Com No 227, paras 14.9,14.10.

It may be possible to appeal against it to a VAT Tribunal. If a trader suffers detriment, there are three possible avenues of relief: (i) extra-statutory application to Commissioners[243]; (ii) judicial review; and (iii) complaint to the Parliamentary Commissioner.

4.131 **Recovery rights.** Section 80(1) of the Value Added Tax Act 1994 (formerly section 24(1) of the Finance Act 1989) provides that "[w]here a person has paid an amount to the [Customs and Excise] Commissioners by way of value added tax which was not tax due to them, they shall be liable to repay the amount to him"[244] on a claim being made for the purpose.[245] This provision gives a general right to recover a tax not due which does not depend on the circumstances of payment: it is irrelevant, for example, whether the payment was made under a mistake. No claim may be made more than six years after the date on which the payment was made[246]; except that where the payment is made by reason of mistake, a claim may be made at any time within six years from the time the claimant discovered the mistake, or could with reasonable

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[243] Parliamentary statement: Written Answer, *Hansard* (HC) 21 July 1978, vol 161, col 426: jurisdiction is limited to the items set out in VATA 1994, s 82 (appeal tribunals) and s 83 (appeals).

[244] The procedures are set out in SI 1989/2248, Reg 6.

[245] VATA 1994, s 80(2).

[246] *Ibid*, s 80(4).

diligence have discovered it.[247] An appeal lies to a VAT Tribunal[248].

4.132 The "unjust enrichment" defence under section 80(3) of the 1994 Act was discussed above.[249] The section specifically states that there is to be no liability to repay by virtue of the fact that it was not tax due except under the section.[250]

4.133 **Law Commission's recommendations.** The Law Commission recommend no change to the recovery rights under VATA 1994, section 80. First, UK national law has to conform to EC law which recognises only two limits on the right to recovery namely the defence of "unjust enrichment" and reasonable limitation periods. Second, the Commissioners of Customs and Excise are satisfied with the operation of VATA 1994, section 80, and they affirm that the defences recommended for direct Inland Revenue taxes are not needed.[251]

4.134 **We agree with the Law Commission's recommendation that the scheme for recovery of**

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[247] *Ibid*, s 80(5).

[248] VATA 1994, s 83(t).

[249] Paras 4.65 - 4.82.

[250] Section 80(7).

[251] viz change in the settled view of the law; non-exhaustion of statutory remedies; a bar against recovery by payer-challengers; *res judicata* and (in England) "submission to an honest claim": see paras 4.30 - 4.54 above.

overpaid VAT in the Value Added Tax Act 1994, section 80, should not be altered.
(Proposition 17)

3. Excise Duties[252]

4.135 Excise duties are charged on certain goods produced in the UK, certain imported foreign goods and some licences[253]. Apart from vehicle excise duty[254], excise duties are administered by the Commissioners of Customs and Excise[255].

4.136 The Law Commission's recommendation that overpaid excise duties should be subject to the same liberal recovery regime as overpaid VAT[256] has now been implemented.[257] We are not aware that any other reforms are required.[258]

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[252]Law Com No 227, paras 14.20 - 14.23.

[253]See eg Vehicles (Excise) Act 1971; Alcoholic Liquor Duties Act 1979; Hydrocarbon Oil Duties Act 1979; Matches and Mechanical Lighters Duties Act 1979; Tobacco Products Duty Act 1979; Betting and Gaming Duties Act 1981; Finance Act 1994 Pt. I, Chapter IV (Air Passenger Duty)(ss 28 - 44).

[254]Administered by the Department of Transport.

[255]Customs and Excise Management Act 1979.

[256]Law Com No 227, recommendation 35 (para 14.23).

[257]Customs and Excise Management Act 1979, s 137A, inserted by Finance Act 1995, s 20.

[258]The European Community Customs Code, article 243, requires Member States to provide appeal procedures for customs and excise duties: Regulation of the Council of the European Communities dated 12th October 1992 (EEC) No 2913/92. Implementing the Code, the Finance Act 1994, Pt.I, Chapter II (Appeals and Penalties) introduced a general system of appeals to VAT and Duties Tribunals against decisions of the

4.137 **Having regard to the Finance Act 1995, section 20 (which implements the Law Commission's recommendation[259] that overpaid excise duty should be recoverable in the same circumstances as overpaid VAT), we are not aware that further legislation is required as to the recovery of overpaid excise duty.**
(Proposition 18)

4. Insurance Premium Tax[260]

4.138 The existing provisions regulating the statutory right of recovery[261] of the new insurance premium tax[262] are the same as those for VAT. We respectfully agree with the Law Commission's view that the latter are a model for indirect taxes. Therefore **we concur in the Law Commission's recommendation[263] that the existing provision for recovery of insurance premium tax should not be amended.**
(Proposition 19)

Commissioners on matters relating to liability for customs and excise duties. There seems however to be no pressure from any quarter to introduce a defence of non-exhaustion of statutory appeal rights in proceedings for refund of overpaid excise duties.

[259] Law Com No 227, recommendation 35 (para 14.23).

[260] Law Com No 227, para 14.24.

[261] Finance Act 1994, Sch 7, para 8.

[262] FA 1994, Pt III. This new tax is not an excise duty.

[263] Law Com No 227, recommendation 36 (para 14.24).

5. Car Tax

4.139 Car tax is charged on the wholesale value of chargeable vehicles under the Car Tax Act 1983 where the vehicle was made or registered in the United Kingdom by a person registered under the Act or made or registered in, or imported into, the United Kingdom by any other person.[264] The tax becomes due by a registered person when it is appropriated to his use; or in a sale or return when it ceases to be his property; or when it is sent out from his premises.[265] Recovery of car tax resembles VAT insofar as registered persons normally pay the tax when making quarterly returns to the Customs and Excise.[266]

4.140 The Commissioners may determine the wholesale value of a vehicle[267] and a taxpayer dissatisfied with the determination may require it to be referred for arbitration to a referee, whose decision is by statute final and conclusive.[268] No reference may be made unless the taxpayer deposits with the Commissioners the amount of the tax due on the basis of their determination. If the tax chargeable as a result of the referee's decision is less than the amount deposited, it is repayable

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[264]Car Tax Act 1983 s1(1) and (2). Section 5(1) determines the person by whom car tax is payable, eg maker, importer, registered person, or keeper of vehicle.

[265]*Ibid* s 5(2). See as to car tax on importation s 5(4). Car tax payable by unregistered persons is due on registration: s 5(6).

[266]Car Tax Regulations 1985 (SI 1985/1737) regs 8 and 9.

[267]Car Tax Act 1983 s 3(1) and (2).

[268]*Ibid* s 3(3).

with interest[269]. The Commissioners may make estimated assessments in defined circumstances. The assessment is challengeable by ordinary action rather than statutory appeal.[270]

4.141 Section 29 of the Finance Act 1989 governs the recovery of overpaid car tax as well as overpaid excise duty.

4.142 We provisionally propose that **overpaid car tax should be recoverable in the same circumstances as overpaid VAT.**
(Proposition 20)

D. SOCIAL SECURITY CONTRIBUTIONS

4.143 There is a provision in the Social Security (Contributions) Regulations 1979[271] which gives a right to the recovery of National Insurance Contributions paid in error.[272] This provision applies whether the mistake is one of fact or law.[273] The application must be made within 6 years from the end of the year in which the contribution was paid[274]. No provision is made as to interest.

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[269] *Ibid*, s 3(4).The referee fixes the rate of interest.

[270] *Ibid*, Sch 1 para 2(1) and (5).

[271] SI 1979/591 as amended.

[272] *Ibid*, reg 32; and see also reg 34 on voluntary contributions where recovery is not stated to depend on the existence of any error.

[273] *Morecombe v Secretary of State*, "The Times", December 12 1987.

[274] SI 1979/591, reg 32(5).

4.144 **We concur with the Law Commission's recommendation[275] that the existing scheme for the recovery of social security contributions paid in error should be unaltered except for the inclusion, by the amendment of the Contribution Regulations, of payments made under *ultra vires* secondary legislation.**
(Proposition 21)

E. COUNCIL TAX[276]

4.145 The Local Government Finance Act 1992[277] replaced the community charge[278] (which was a flat-rate, capitation tax) with the council tax[279]. In the council tax, the main unit of charge is the taxpayer's dwelling.[280] Since the basis of valuation of the dwelling is its capital value[281], council tax differs very significantly from

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[275]Law Com No 227, recommendation 37 (para 15.12).

[276]Law Com No 227, paras 15.13 - 15.26 describe the council tax system as it operates in England and Wales.

[277]Part II (ss 70 - 99) applies to Scotland.

[278]Which had been introduced by the Abolition of Domestic Rates Etc (Scotland) Act 1987.

[279]LGFA 1992, s 70 as amended by LGE(S)A 1994, Sch 13, para 176.

[280]LGFA 1992, s 72; as amended by SI 1992/1334; SI 1992/2955; SI 1993/526.

[281]ie the amount the dwelling might reasonably have been expected to realise if sold on the open market by a willing seller with vacant possession and in reasonable repair: LGFA 1992, s 86; Council Tax (Valuation of Dwellings) (Scotland) Regulations 1992 (SI 1992/1329).

rates[282] whose basis of valuation is the rent under a hypothetical tenancy[283]. Council tax is mainly a type of property tax but has also a personal element.[284] It is payable in respect of "chargeable dwellings"[285], which are entered on a "valuation list" that is kept by the local assessor but is separate and distinct from the valuation roll[286].

Valuation list alterations and appeals

4.146 An interested person may serve on the local assessor a proposal for alteration of the valuation list in relation to a particular

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[282]The system of rates, which is now confined to non-domestic property, is considered in Section F below.

[283]Valuation and Rating (Scotland) Act 1956, s 6(8); *Armour on Valuation and Rating* (5th edn) para 17-11.

[284]In the council tax system, chargeable dwellings are divided into eight valuation bands, which determine the proportion of council tax due:LGFA 1992, s 74. Dwellings in the lowest band, A (values not exceeding £27,000) attract the lowest proportion of council tax (6); those in the highest band, H (values exceeding £212,000) attract the highest proportion (18), the intervening bands being graded. There is however a personal element. The standard charge in each band assumes that any dwelling will be occupied by two residents. Accordingly LGFA 1992, s 79 provides for discounts where there is only one resident or the residents are exempt.

[285]LGFA 1992, s 72.

[286]The "valuation list" is kept by the local assessor for the purpose of the council tax: LGFA 1992, s 84 (compilation and maintenance of valuation lists), as amended by the LGE(S)A 1994, Sch 13, para 176(6). See also LGFA 1992, s 73(1) excluding dwellings from the valuation roll.

dwelling.[287] The grounds for altering a dwelling's valuation band are restricted.[288] One ground arises where an appeal decision (by a valuation appeal committee, the Court of Session or the House of Lords) provides reasonable ground to contend that the valuation band is wrong.[289] An appeal lies to the local valuation appeal committee against a local assessor's decision on alteration of the list.[290]

Non-list appeals and further appeals

4.147 An appeal lies to a valuation appeal committee against a levying authority's decision that a dwelling is chargeable, or their decision on liability to council tax, or against a calculation by a levying authority.[291] In respect of both list appeals and non-list appeals to a valuation appeal

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[287]LGFA 1992, s 87; Council Tax (Alteration of Lists and Appeals) (Scotland) Regulations 1993, Part II (SI 1993/355).

[288]Council Tax (Alteration of Lists and Appeals) (Scotland) Regulations 1993, reg 4.

[289]*Ibid*, reg 5(2) and (6). The proposal must be made within 6 months after the appeal decision.

[290]LGFA 1992, s 87. As to the detailed mechanics of the appeal, see Council Tax (Alteration of Lists and Appeals) (Scotland) Regulations 1993, reg 15. Under reg 15(2), the appeal must be made within 6 months of the proposal for alteration. For appeals on related matters, see *ibid*, regs 8(2), 9(3), 10(2). For time limits on making proposals, see reg 5.

[291]LGFA 1992, s 81(1); Council Tax (Alteration of Lists and Appeals) (Scotland) Regulations 1993, Part III. The aggrieved person must first notify his grievance to the levying authority: LGFA 1992, s 81(4)-(6). The appeal is competent only if the levying authority reject the grievance or fail to answer within two months: *ibid*, s 81(7).

committee, a further appeal lies to the Inner House of the Court of Session on a point of law.[292]

Statutory provision on refund of overpaid council tax

4.148 Regulations[293] make provision for the adjustment (repayment or crediting of overpayments) of council tax where payment is by instalments[294] or lump sum.[295] A final adjustment is made as soon as practicable after the end of the financial year.[296] Any overpayment, to the extent that it exceeds the person's other outstanding liability, must be repaid to him if he so requires or, in any other case, credited against any subsequent liability of his to pay council tax.[297]

4.149 In England and Wales, a six-year time limit from the date the cause of action accrued is imposed by the general law on recovery under statutes.[298] In Scots law, there is a question

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[292]LGFA 1992, s 82(4); RCS 1994, rules 41.18-41.22 (Appeal to Inner House in Form 41.19).

[293]Council Tax (Administration and Enforcement) (Scotland) Regulations 1992 (SI 1992/1332). LGFA 1992, Sch 2, para 2 (5)(b) enables regulations to be made providing: "that any amount paid by the liable person in excess of his liability (whether the excess arises because an estimate turns out to be wrong or otherwise) must be repaid or credited against any subsequent liability".

[294]Reg 23 (payments: adjustments).

[295]Reg 24 (lump sum payments).

[296]Reg 27 (final adjustment of sums payable).

[297]Reg 27(4).

[298]Limitation Act 1980, s 9; Law Com No 227, para 15.25.

whether the 5-year or 20-year period of negative prescription applies. Since the short (5-year) period of negative prescription can apply to public law obligations[299], the council tax provisions may possibly be construed as creating an obligation of repetition, or other obligation of redress of unjustified enrichment, which both prescribe in 5 years.[300]

4.150 The Law Commission remarked:

> "The provisions for recovery of overpaid Council Tax are unlimited for recovery of payments made under a mistake of law. It seems unjustifiable to us to limit taxpayers' existing rights in any way by introducing further defences, and shorter limitation periods.... Parliament and the Department of the Environment acting under Parliamentary authority have ... recently seen fit to introduce a virtually unlimited recovery right, and we do not see that we should interfere with that decision retrospectively".[301]

We agree with these comments which are equally applicable to the very similar regulations made by the Secretary of State for Scotland[302]. The Law Commission[303] thought that the concept of

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[299]*Lord Advocate v Butt* 1991 SLT 248 (OH) at pp 252K-253A per Lord Prosser; reversed on another point, 1992 SC 140 (2d Div).

[300]Prescription and Limitation (Scotland) Act 1973, s 6, and Sch. 1, para 1(b). Where however the obligation to repay is imposed by "an order of a tribunal or authority exercising jurisdiction under any enactment", the period is 20 years: 1973 Act, Sch 1, para 2 (c).

[301]Law Com No 227, para 15.26.

[302]SI 1993/1332.

[303]Law Com No 227, recommendation 38 (para 15.26).

"overpayment" included *ultra vires* charges but recommended that it was desirable to clarify the law by amendment of the relevant Regulations[304]. We ourselves do not regard the doubt as strong enough to require such an amendment, but concede that if the amendment were to be made in England, it should be made in Scotland, lest different wording be differently construed.

4.151 **We concur with the Law Commission's general recommendation[305] that the existing scheme for the recovery of undue council tax should not be altered. We further agree with the Law Commission that overpayments demanded *ultra vires* should be recoverable but do not think it necessary to amend the regulations to achieve that result.**
(Proposition 22)

F. NON-DOMESTIC RATES

1. The existing law

(1) The statutory scheme for fixing liability to non-domestic rates

4.152 **Valuation and assessment rolls.** The system of valuation and rating[306] is based on a valuation roll and an assessment roll.[307] The

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[304]Council Tax (Administration and Enforcement) Regulations 1992 (SI 1992/613). The Scottish Regulations (SI 1993/1332) are in similar terms.

[305]Law Com No 227, recommendation 38 (para 15.26).

[306]See *Armour on Valuation and Rating* (5th edn) Chapter 1; *Stair Memorial Encyclopaedia* vol 14, sv "Local Government", paras 834 et seq.

[307]The valuation roll is primarily regulated by LG(S)A 1975, Part I. The assessment roll and the recovery and refund of rates are primarily regulated by provisions in LG(S)A 1947. Both of

valuation roll[308] shows the yearly rent or value of the rateable lands and heritages in each valuation area.[309] The assessment roll is made up and maintained by a rating authority on the basis of the valuation roll and contains the information required for collecting the rates levied by the authority.[310]

(a) Valuation roll

4.153 **The valuation roll and the limitation of rating to non-domestic subjects.** The Local Government (Scotland) Act 1975, section 7 provides that every rate levied by a rating authority[311] for any year shall be levied in respect of all lands and heritages within the area of the rating authority[312] according to their rateable value as appearing in the valuation roll in force at the beginning of that year.

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these Acts have been much amended by statutes reflecting the far-reaching changes in local authority finance and organisation.

[308]Made up and kept by the local assessor under the LG(S)A 1975, Part I. Section 1 provides for quinquennial revaluations. The roll is a "running roll" ie a roll made up for a revaluation year remains in force till the next quinquennial revaluation.

[309]As to the form and content of the roll, see Valuation Roll and Valuation Notice (Scotland) Order 1989 (SI 1989/2385); *Armour on Valuation for Rating* (5th edn) para 2-12.

[310]LG(S)A 1947, s 233(1) substituted by LG(S)A 1975, s 11.

[311]Which after 1st April 1996 will be the new unitary local authorities: see LG(S)A 1994, s 30.

[312]LG(S)A 1975, s 7B(3) inserted by LGFA 1992, s 110(2).

4.154 Under the 1975 Act as originally enacted, domestic dwellings were included among the subjects entered in the valuation roll, since their occupiers were assessed for rates. The Abolition of Domestic Rates Etc (Scotland) Act 1987 introduced the community charge and (as its name implies) abolished domestic rates.[313] It therefore provided for the exclusion of "domestic subjects" from the valuation roll with effect from the financial year 1989-1990.[314] The old system of rates was preserved but confined to non-domestic subjects.[315]

4.155 The 1987 Act was repealed by the Local Government Finance Act 1992, which replaced the community charge with the council tax[316]. We noted above that dwellings chargeable to council tax are entered into a "valuation list" distinct from the valuation roll[317]. The 1992 Act retained with modifications the system of non-domestic rates levied on non-domestic subjects.[318] It amended the

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[313]Section 1.

[314]Section 2. However section 5 provides for the continuation of the system of valuation for the limited purpose of construing references to rateable values in statutes and other documents.

[315]ADRE(S)A 1987, s 3.

[316]1992 Act, Part II.

[317]See para 4.145. LGFA 1992, s 73(1) provides that dwellings shall not be entered in the valuation roll in respect of the financial year 1993-94 or any subsequent financial year. Dwellings on the roll immediately before 1 April 1993 were deleted with effect from that date.

[318]LGFA 1992, s 110 inserting a new section 7A and a section 7B in the LG(S)A 1975.

1975 Act[319] so as to provide that rates are levied by rating authorities in respect of lands and heritages in their area in accordance with section 7 of that Act, or in certain cases in accordance with regulations.[320]

4.156 **Statutory applications and appeals concerning entries in valuation roll.** Statutory provisions lay down special procedures for dealing with complaints concerning entries in the valuation roll namely application to the assessor for redress[321]; appeal or complaint to the valuation appeal committee[322], or to the Lands Tribunal for Scotland[323], and a further appeal to the Lands Valuation Appeal Court[324], the jurisdiction of which is limited to questions of value.[325] Time limits are imposed on the period for making complaints or appeals.[326]

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[319]See section 7B inserted by LGFA 1992, s 110 (2) and amended by the LGE(S)A 1994, Sch 13, para 100(4).

[320]Made under the LGE(S)A 1994, s 153.

[321]LG(S)A 1975, s 3(2).

[322]LG(S)A 1975, ss 3(2) and (4); 4.

[323]Lands Tribunal Act 1949, s 1 (3A).

[324]Valuation of Lands (Scotland) Amendment Act 1879, s 7; LG(S)A 1966, s 23.

[325]See eg *British Linen Co v Assessor for Aberdeen* (1906) 8 F 508; *Assessor for Glasgow v Glasgow Corporation* 1929 SC 291; or questions necessary to determine value *Ferguson v Assessor for Inverness-shire* 1912 SC 768.

[326]See eg Valuation Timetable (Scotland) Order 1995, Schedule (SI 1995/164).

4.157 **Finality of valuation roll.** The conclusiveness of the valuation roll was much litigated between the 1850s and 1920s.[327] The cases affirm the principle, which forms the starting point of the modern law, that the valuation roll, when completed by the assessor and placed in the hands of the rating authority as the basis for levying assessments[328], is final and conclusive so far as matters of valuation are concerned.[329] Four main limits may be mentioned. (i) The finality principle only applies to matters of valuation. (ii) The assessor may make some alterations to the valuation roll while it is in force. (iii) Correction of an error is a ground of appeal at any time while the roll is in force. (iv) There is a statutory right to recover rates paid under error of fact.[330]

4.158 **Only matters of valuation.** The Valuation Acts are concerned only with valuation and do not conclusively fix liability to assessment[331]. They

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[327]See eg the *Faculty Digest 1868-1922*, vol 5, cols. 1103 -1107; *Moss' Empires Ltd v Assessor for Glasgow* 1917 SC (HL) 1; *Dante v Assessor for Ayr* 1922 SC 109; *Distillers Co v Fife C C* 1925 SC (HL) 15.

[328]LG(S)A 1975, s 1(4).

[329]*Armour on Valuation and Rating* (5th edn) para 2.26; Lands Valuation (Scotland) Act 1854, s 33; Local Government (Scotland) Act 1975, s 7(1): "every rate...shall be levied...according to the rateable value...**as appearing in the valuation roll** in force at the beginning of the year" (emphasis added).

[330]We consider (iv) at para 4.172 below.

[331]*University of Glasgow* (1870) 11 M 982; *Mclaren v Clyde Trustees* (1865) 4 M 58; 6 M (HL) 81; *Dante v Assessor for Ayr* 1922 SC 109 at pp

leave open questions as to deductions, exemptions and the proper unit for valuation in the valuation roll. Where an entry in the valuation roll is erroneous for a reason other than an error in valuation (eg because it duplicates one already there, or the wrong person is entered as owner or the subjects are not in the assessing area), the entry may be challenged in an appeal against the rates demand note[332] or in an action in the ordinary courts for a common law remedy[333]. An appeal to the valuation appeal committee is incompetent.[334]

4.159 **Alterations by assessor to valuation roll while in force.** Once the valuation roll has come into force, it can only be altered by the assessor in any of the nine cases specified in the Local Government (Scotland) Act 1975, section 2(1), paragraphs (a) to (h) or to give effect to any

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124,130; *Distillers Co v Fife C C* 1924 SC 499 at p 511; 1925 SC (HL) 15.

[332]LG(S)A 1947, s237: see para 4.166 below.

[333]Such as interdict (*Sharp v Latheron Parochial Board* (1883) 10 R 1163 and Lord Kinnear's opinion therein, reported in footnote in 1916 SC at p 371; *Distillers Co v Fife C C* 1924 SC 499; 1925 SC (HL) 15); or declarator (*Hope v Edinburgh Corporation* (1897) 5 SLT 195(OH); *Abercromby v Badenoch* (1909) 2 SLT 114(OH)); or reduction (*Moss' Empires v Assessor for Glasgow* 1917 SC (HL) 1; cf *Abercromby v Badenoch* (1909) 2 SLT 114(OH) per Lord Salvesen).

[334]*Distillers Co v Fife C C* 1925 (HL) 15 at p 19 per Lord Cave LC; p 21 per Lord Dunedin; *Greenock Corporation v Arbuckle Smith & Co* 1958 SC 615 at p 622 per Lord Patrick.

change in proprietorship, tenancy or occupancy.[335] The cases include inter alia alterations "to correct any error of measurement, survey or classification or any clerical or arithmetical error in any entry therein"[336]. Any alteration of the roll to make such a correction has effect only as from the date when the erroneous entry was made in the roll or the beginning of the year in which the correction was made, whichever is the later.[337] This however is expressed not to affect the statutory right of recovery of undue rates paid under error of fact[338] to which we revert below.

4.160 **Appeals for correction of error.** Correction of error is one of only two grounds upon which a proprietor, tenant or occupier of lands on the valuation roll may appeal at any time against the relevant entry.[339]

4.161 **Compromises or agreements.** The 1975 Act provides that where at any time before an appeal or complaint against an entry in the valuation roll is determined by a valuation appeal committee or the Lands Tribunal for Scotland, the parties reach agreement as to what should be done about the

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[335]Words added by Rating and Valuation (Amendment) (Scotland) Act 1984, Sch 2, para 13.

[336]LG(S)A 1975, s 2(1)(f).

[337]LG(S)A 1975, s 2(2)(d).

[338]LG(S)A 1975, s 2(2)(d) is expressed to be "subject to section 20 of the Local Government (Financial Provisions) (Scotland) Act 1963" (words inserted by Local Government (Miscellaneous Provisions) (Scotland) Act 1981, Sch 3, para 32).

[339]LG(S)A 1975, s 3(4).

entry, the assessor may alter the roll to give effect to the agreement.[340] Such an alteration is not appealable.[341]

(b) Assessment roll

4.162 **Finality of assessment roll.** Liability for rates is directly determined not by the valuation roll but by the assessment roll[342], which is made up by the rating authority[343] on the basis of the rateable value in the valuation roll.[344]
The main principles were summarised by Lord Salvesen[345]:

> "...(1st) that the Assessment-roll must be made up on the basis of the Valuation-roll, and must contain only the entries appearing in that Roll, so far as the lands and heritages are concerned and their respective values; (2nd) that the persons to be entered as liable for the rates are the persons appearing as owners and occupiers in the Valuation-roll, subject to any errors and possible omissions with regard to these which may have been discovered before the Assessment-roll was laid out for inspection, or that may be made in consequence of appeals taken at the time;

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[340]LG(S)A 1975, s 2(3). The agreement does not bind a person who subsequently becomes proprietor, tenant or occupier: *ibid*, s 3(2B).

[341]LG(S)A 1975, s 3(2).

[342]*Dante v Assessor for Ayr* 1922 SC 109; *Distillers Co v Fife County Council* 1925 SC (HL) 15 at p 19. The law on this matter goes back to the Poor Law (Scotland) Act 1845 , s 40, which provided that the assessment roll "shall be the rule for levying the assessment for the year or half-year then next ensuing".

[343]LG(S)A 1947, s 233(1) as substituted by LG(S)A 1975, s 11.

[344]LG(S)A 1975, s 7(1).

[345]*Lanarkshire C C v Miller* 1917 SC 35 at pp 43,44.

> (3rd) that the Assessment-roll, as finally made up, forms the rule for assessing the persons therein entered; (4th) that summary warrants may be issued for the recovery of the rates at the instance of the County Council against any person who, *ex facie* of the Roll, appears liable for them; or, if this is not thought expedient, that the rates may be recovered by action; (5th) that it is a condition of a valid warrant, or a successful action, that the name of the person against whom the warrant is taken out or action is brought must be on the Assessment-roll; (6th) that the warrant cannot be taken out, or actions successfully pursued, against persons who are not upon the Assessment-roll."

As the last two points indicate, the assessment roll is conclusive in the sense that a person is not liable for rates unless his name appears on the assessment roll.[346] It does not follow that "a person whose name appears on the [assessment roll] has, because it appears there, no remedy".[347] But such a person can generally challenge an entry in the assessment roll only through the statutory avenue of appeal and can invoke common law remedies only in very exceptional circumstances.[348]

4.163 There are two statutory qualifications to the conclusiveness of the assessment roll. (i) Within a year after the end of the year of assessment, the rating authority may amend the

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[346]*Bell v Thomson* (1867) 6 M 64 at p 70 per Lord Neaves (obiter): "An Assessment-roll has at least a certain degree of finality. If a man's name has been omitted in one year, posterior commissioners could not call on him in subsequent years for bygone assessments"; approved in *Lanarkshire C C v Miller* 1917 SC 35 at p 41 per Lord Dundas and p 44 per Lord Salvesen.

[347]*Commercial Bank of Scotland v Glasgow Corporation* 1925 SLT (Sh Ct) 142 at p 144.

[348]See paras 4.168 - 4.171 below.

assessment roll by striking out a person's name on an assessor's certificate or by correcting the amount of any value or rate which may have been inaccurately entered.[349] It is provided, however, that any such amendment does not vitiate the rate or render it less operative.[350] So presumably if a rates demand note has become final by expiry of the appeal days, the person concerned will remain liable for the current year's rates. (ii) There is a statutory right to recover rates paid under error of fact.[351]

4.164 **Demand note for rates.** Every rating authority has a duty "as soon as practicable" to issue demand notes, for payment of rates payable to the authority, to every person liable.[352] The demand note must contain certain information prescribed by statute.[353]

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[349]LG(S)A 1947, s 233(3) as substituted by LG(S)A 1975, s 11; formerly s 233(4) of the 1947 Act as originally enacted.

[350]*Idem.*

[351]See para 4.172 below.

[352]LG(S)A 1947, s 237(1).

[353]LG(S)A 1947, s 237(2)(a)-(e) and (g); (para (b) substituted by the Local Government (Financial Provisions etc) (Scotland) Act 1962, s 8 and amended by ADRE(S)A 1987, s 6; Sch 1, para 15). LG(S)A 1947, s 237(3) (substituted by LG(S)A 1973, Sch 9, para 9(b)) provides that the demand note must be in such form and contain such information as may be prescribed by regulations made by the Secretary of State under LG(S)A 1973, s 111 as amended by the LGFA 1992, Sch 13, para 39 and LGE(S)A 1994 Sch 14. No regulations have been made.

4.165 **Fixing the date of payment.** At one time the rating authority possessed an express power to fix the date on which rates were payable.[354] Now the power (or duty) rests impliedly on the duty to include in the statutory demand note information with respect to the date on which the rates are payable.[355]

4.166 **Statutory appeals against demand note for rates.** A person receiving a demand note may appeal to the rating authority within a period specified in the notice.[356] The appeal is on the ground that he is improperly charged[357], but does not lie to challenge the rateable value since, as already indicated, the valuation roll is fixed on that point at that stage.[358]

4.167 **Interest.** Where any amount has been paid in error[359] to a rating authority in respect of

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[354]LG(S)A 1947, s 231(1) provided that rates would be payable "on such date not earlier than the first day of November in the financial year to which the rates relate as the authority may determine". Section 231(2) dealt with payment by instalments. Both provisions were repealed by LG(S)A 1975, s 38(2), Sch 7.

[355]LG(S)A 1947, s 237(2)(c). As to payment of rates by instalments, see LG(S)A 1975, s 8.

[356]LG(S)A 1947, s 238 (1) and (2) as amended by the Rating and Valuation Amendment (Scotland) Act 1984, Sch 2, para 6.

[357]*Ibid*, s 238(1).

[358]*Magistrates of Glasgow v Hall* (1887) 14 R 319.

[359]Or in consequence of the entry on to the valuation roll of a valuation which is subsequently reduced.

rates and the rating authority repays the amount, the rating authority must also pay interest.[360] The Secretary of State has power to make regulations as to the circumstances in which interest is payable, the rate of interest and the date from which interest is to run.[361] Rates are payable while an appeal under the Valuation Acts is pending.[362] On the determination of the appeal, any overpayment must be repaid by the rating authority[363], with interest at the prescribed rate.[364]

(2) Defence of failure to exhaust statutory remedies.

4.168 Some of the leading cases on the doctrine of failure to exhaust statutory remedies[365] relate to valuation and rating[366]. As regards a challenge to an entry in the valuation roll, failure to initiate or insist in the statutory avenue of appeal against an assessor's acts amending the

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[360]LG(S)A 1975, s 9A(1) inserted by LGFA 1992, s 110(4).

[361]LG(S)A 1975, s 9A(2); see Non-Domestic Rating (Payment of Interest)(Scotland) Regulations 1992 (SI 1992/2184).

[362]LG(S)A 1975, s 9(1) substituted by LGFA 1988, Sch 12, para 12.

[363]LG(S)A 1975, s 9(2)(a).

[364]LG(S)A 1975, s 9A inserted by LGFA 1992, s 110(4).

[365]See paras 2.28 - 2.34.

[366]eg *Moss' Empires Ltd v Assessor for Glasgow* 1917 SC (HL) 1.

valuation roll will bar a common law remedy[367] including an application for judicial review.[368]

4.169 As regards a challenge against rating, it used to be thought [369] that any person whose name has been wrongly inserted in the assessment roll by the rating authority may dispute liability by defending an action by the rating authority for payment[370], or by raising an action of declarator that he is not liable[371]. This view was disapproved in the leading case of *British Railways Board* v *Glasgow Corporation*.[372]

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[367]*Dante v Assessor for Ayr* 1922 SC 109 (declarator that the pursuer is not a tenant or occupier in the sense of the Valuation Acts of particular lands and so is not liable to be rated or assessed in respect thereof held incompetent because of his failure to utilise the statutory right of appeal to the Valuation Committee against the entry of his name as tenant and occupier on the valuation roll).

[368]*Tarmac Econowaste Ltd* v *Assessor for Lothian Region* 1991 SLT 77(OH).

[369]See W Hutton, *The Local Government (Scotland) Act 1947* (1949) p 324; J Muirhead, *Municipal and Police Government in Burghs in Scotland* (3d edn) vol 2, p 728.

[370]*McTavish v Caledonian Ry Co* (1876) 3 R 412;or by suspending summary warrant diligence. See also *Greenock Corporation v Arbuckle Smith & Co Ltd* 1958 SC 615, and the remarks thereon in *British Railways Board v Glasgow Corporation* 1976 SC 224 at p 229 per Lord McDonald.

[371]*Edinburgh and Glasgow Ry Co v Meek* (1850) 12 D 153.

[372] 1976 SC 224.

4.170 In that case it was observed[373] that with two exceptions[374], the cases on which that view had rested were decided before the introduction in 1892 of statutory rights of appeal against rating demand notes in burghs.[375] One was a sheriff court case irreconcilable with the *Dante* case. The authority of the other, the Outer House case of *Hope*[376], had been undermined by two circumstances. First, it could be distinguished on the basis that, since the subjects were outwith the city boundary, the magistrates had *ex hypothesi* no jurisdiction and accordingly the pursuer had no statutory remedy to exhaust.[377] Second, the apparent ratio of the *Hope* case was that strictly speaking the so-called "appeal" against a demand note for rates was not truly an appeal because the appellate authority were to be judges in their own cause, which would be "contrary to the fundamental doctrines of justice".[378] It was held in the *British Railways*

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[373]1976 SC 224 at 243 per Lord Kissen; cf at p 239 per Lord Justice-Clerk Wheatley.

[374]Viz *Hope v Edinburgh Corporation* (1897) 5 SLT 195 (OH); *Cupar Town Council v Hitt* (1915) 31 Sh Ct Rep 266.

[375]The Burgh Police (Scotland) Act 1892, s 340 (repealed), the precursor of LG(S)A 1947, s 238: see *British Railways Board v Glasgow Corporation* 1976 SC 224 at p 234. It may be noted that LG(S)A 1889, s 62(2) and (3) (repealed) provided for appeals to county councils against rates demand notes in the counties.

[376]*Hope v Edinburgh Corporation* (1897) 5 SLT 195 (OH).

[377]See *British Railways Board v Glasgow Corporation* 1976 SC 224 at p 229 per Lord McDonald (Ordinary), approved at p 243 per Lord Kissen.

[378]*Hope v Edinburgh Corporation* (1897) 5 SLT 195 (OH) at p 195.

Board case however that this proposition cannot stand because the same could be said of all valuation appeals prior to the reorganisation of valuation appeal committees by the Valuation and Rating (Scotland) Act 1956.[379] Moreover, however axiomatic the proposition:

> "may appear as a general statement, when Parliament has enacted that there is to be a right of appeal and designates the body which will hear that appeal, no matter who or what the body is, then it is a statutory appeal".[380]

Accordingly it did not matter that the statutory avenue of appeal was to the rating authority which was also the authority which had made the allegedly *ultra vires* demand and received the payment.

4.171 In the *British Railways Board* case[381], the rate-payer pursuers argued that their failure to appeal to the rating authority against a demand note for rates, should not bar (1) an action of declarator that they were, as a nationalised industry, exempt under statute from liability for rates in respect of offices on "operational land", and (2) an action for repayment of rates paid under reservation. The Second Division held that assuming that the issue of liability turned on a question of rating rather than valuation, the pursuer's failure to appeal to the rating authority against the

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[379] *British Railways Board* v *Glasgow Corporation* 1976 SC 224 at p 229 per Lord McDonald (Ordinary), approved at p 243 per Lord Kissen.

[380] *British Railways Board* v *Glasgow Corporation* 1976 SC 224 at pp 238,239 per Lord Justice-Clerk Wheatley.

[381] *British Railways Board* v *Glasgow Corporation* 1976 SC 224.

demand note for rates barred the actions for declarator and repayment. The case stands for the proposition:

> "that recourse to common law proceedings in the Court of Session is not competent if the complainer has not availed himself of his statutory right of review , unless the failure was due to ignorance owing to some irregularity of procedure on the part of the assessor or rating authority, to the fact that resort to the statutory remedy would in the particular circumstances be otiose or to some other special reason".[382]

(3) General statutory right of recovery under LG(FP)(S)A 1963, section 20(1)

4.172 The Local Government (Financial Provisions) (Scotland) Act 1963, section 20(1) provides:

> "Where, *notwithstanding section 2(2)(d) of the Local Government (Scotland) Act 1975 or any entry in a valuation roll which is no longer in force*[383], it is shown to the satisfaction of a rating authority that any amount has been paid to them in respect of rates by reason of an error of fact, and the amount is not recoverable apart from this section, the authority shall repay the amount to the person from whom they received it or to any other person appearing to them to be entitled to that person's interest:
>
> Provided that no repayment under this subsection shall be made after the end of the sixth year after that in respect of which the amount was paid, unless application therefor was made before that time."

The provision will trump the 1975 Act, section 2(2)(d), in a conflict between them. This means that if an erroneous entry made in year 1 is not

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[382]1976 SC 224 at p 230.

[383]Italicised words inserted by Local Government (Miscellaneous Provisions) (Scotland) Act 1981, Sch 3, para 5. They complement the saving of the 1963 Act, s 20, inserted in LG(S)A 1975, s 2(2)(d) by the 1981 Act, Sch 3, para 32.

discovered till year 8, the ratepayer may recover under the 1963 Act, section 20, overpayments made in the last 6 years whereas the assessor under the 1975 Act, section 2(2)(d), can only correct the error with effect from the beginning of year 8.

4.173 **The aim of LG(FP)(S)A 1963, section 20(1).** Light is cast on the aim of the section by papers made available to us by the Scottish Office.[384] It was designed to fill the gap left by the fact that there is:

> "no general provision in the Local Government Acts for the repayment of rates overpaid over a period of years. Once the Valuation Roll has been closed and appeals against entries disposed of, it is not possible to re-open it; and as far as the Assessment Roll is concerned, that is, the roll from which the rates are levied, there is no power to remit rates except in the current and immediately succeeding financial year[385]."

The 6-year time-limit derived by analogy from the Income Tax Acts and the corresponding English rates provision, now repealed.[386]

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[384]viz Notes on Clauses on the Bill. Notes on Clauses are internal, unpublished papers prepared by civil servants to assist Ministers in piloting Bills through Parliament. In this case, the Note on clause (later section) 20 is uniquely valuable since *Hansard* is silent on its aim and provenance. It was not debated: cf *Parl Deb (HC), Scottish Standing Committee* (1962-63), vol IV, col 608. We are grateful to the Scottish Office for permission to quote from the Notes on Clauses.

[385]Citing LG(S)A 1947, s 233(4) as originally enacted; see now *ibid*, s 233(3) as substituted by LG(S)A 1975, s 11.

[386]Rating and Valuation Act 1961, s 17; consolidated as the General Rate Act 1967, s 9, repealed by the Local Government Finance Act 1988,s 117(1); s 149 and Sch 13. Section 120 of the 1988 Act amended the 1967 Act, s 9(2) by retrospectively introducing a "general practice" defence.

4.174 The section presents several difficulties as respects both the ground of claim and the availability of defences.

4.175 **The scope and meaning of "error" in LG(FP)(S)A 1963, section 20(1).** Section 20(1) makes it clear that the error must have caused the payment.[387] The most common form of error will be an erroneous assumption that rates are due to be paid by the payer when in fact they are not due, - a "liability error" as it is sometimes called. This in turn raises the fundamental question of when rates are due or not due (*indebitum*) for this purpose. Does "error" in s 20(1) refer only to an error of fact arising after the demand note has become final (eg inadvertent double payment)? Does it include not only such an error but also an error in the relevant entries in the valuation roll or assessment roll?

4.176 In principle, it might be thought that the first approach would be broadly correct because the *British Railways Board* case[388] establishes that after the appeal days, generally the law cannot look behind the rates demand note. Two factors may suggest however that the second approach was that intended.

4.177 First, the 1963 Act, section 20, allows recovery of the amount overpaid only if it "is not recoverable apart from this section", eg at common law. In a common law action for repetition of an

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[387]See the words "paid ... by reason of an error of fact".

[388]1976 SC 224.

overpayment caused by an error in the valuation roll or assessment roll, generally the amount will not be recoverable (because of the local authority's defence of failure to exhaust statutory remedies).

4.178 Second, from the Notes on Clauses, we understand that the section was intended to cover cases where (a) a person had paid someone else's rates, eg where a man paid his neighbour's rates as well as his own; or (b) the rate levied was not in accordance with the valuation roll; or (c) it emerged on a subsequent revaluation that a particular house had obviously been incorrectly valued by a considerable amount.[389] It does seem therefore that the intention was to give relief in respect of payments arising from errors in the valuation and assessment rolls in breach of the principle of the conclusiveness of those rolls and indeed because of a perceived need to derogate from that principle.

4.179 It is possible that section 20 may also have been intended to apply to an overpayment caused by an error of fact arising after the demand note has become final (eg inadvertent double payment) but such an overpayment would normally be recoverable apart from the section by common law action.

4.180 **Defences.** The 1963 Act, section 20(1) provides no defences other than the six-year limitation period. The requirement that the amount

[389]Apparently a case of the last type in Edinburgh had provided much of the impetus for LG(FP)(S)A 1963, s 20.

claimed be "not recoverable apart from the section" means that common law defences can be elided by recourse to the section. This is no doubt justifiable in some cases[390] but not in others eg if an attempt were made to use section 20(1) to evade a compromise. Some clarification appears desirable.

2. Proposals for reform

(1) Reform of ground of claim

4.181 Since the rating authority's duty to repay under section 20(1) of the 1963 Act arises only where the reason for the ratepayer's payment was an error of fact, it is clearly now out-of-date[391]. In accordance with our general policy, the ground of claiming a refund should be extended beyond "undue payments in error" to cover all undue payments.[392] The effect may not be great since it has been said of the valuation roll that "The vast majority of cases of error will probably, in

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[390]eg the type of defence raised in *Bell v Thomson* (1867) 6 M 64.

[391]Having regard (i) to the abolition of the old common law error of law rule by the *Morgan Guaranty* case 1995 SLT 299; and (ii) the obiter dicta in the same case stating that in principle money paid in the same circumstances as in the *Woolwich* case [1993] AC 70 (HL)(ie pursuant to an *ultra vires* demand) would be recoverable in Scots law though the precise ground of recovery is not clear.

[392]It is thought that for this purpose a payment which would not have been due if the valuation roll, assessment roll and demand note had been properly made up, should be treated as "undue" notwithstanding that it arises from an error in any of these documents. Whether such an undue payment should be recoverable would then depend on whether the defence of non-exhaustion of statutory remedies is to be available under the legislation.

practice, be found to be errors in relation to matters of fact".[393] However errors of law tend to be more widespread when they do occur.

4.182 **The ground of a statutory claim for a refund of overpaid rates under section 20(1) of the Local Government (Financial Provisions) (Scotland) Act 1963 (which applies only to undue payments made under error of fact) should be extended to cover all undue payments made by way of rates, whether made under error of fact or law, or under compulsion, or pursuant to an *ultra vires* demand or otherwise.**
(Proposition 23)

(2) Introduction of defences

4.183 The extension of the ground of claims under the 1963 Act, section 20(1) to errors of law would increase the importance of defences to such claims. Should the widening of the ground be matched by the introduction of appropriate defences?

(a) Negative prescription

4.184 A relatively short time-limit already exists and should be retained with or without modification. We suggest that claims for refund of overpaid rates should be subject to a short period of negative prescription. The six-year limitation period was introduced in 1963 long before the introduction of the five-year negative prescription in 1973. It is for consideration whether the period

[393] *Armour on Valuation for Rating* (5th edn) para 3-35.

should be five years as under private law or the period of six years proposed for income tax.[394]

4.185 **(1) Claims for refund of overpaid rates should be subject to a short period of negative prescription.**

(2) Views are invited on whether the prescriptive period should be five or six years.

(3) In a claim based on error, time should not begin to run against the ratepayer until he discovers the error or could with reasonable diligence have discovered it.

(Proposition 24)

(b) ***Res judicata*** **or compromise**

4.186 We suggest that the defences of *res judicata* and of compromise[395] should be expressly recognised, though we doubt whether, even under the present law, LG(FP)(S)A 1963, section 20(1) could be used to evade those defences. The considerations applicable to income tax mentioned above[396] seem to us to apply also to rates.

4.187 **(1) (a) It should be a defence to a statutory claim for recovery of an overpayment of rates that a claim for the rates in question had been contractually compromised; but**

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[394]See paras 4.55 - 4.59 above.

[395]See paras 4.45 - 4.54 above.

[396]*Idem.*

(b) it should not be a defence to such a claim that the payment was made in response to a mere threat to litigate, unless that payment would also qualify as a contractual compromise.

(2) It should not be a defence to such a claim that the payment had been made in response to an earlier action before a Scottish court brought by the rating authority against the ratepayer concerned unless decree in the earlier action would be *res judicata* in a subsequent action raised by the ratepayer in a Scottish court for recovery of the payment.

(Proposition 25)

(c) Unjust enrichment of claimant

4.188 We considered this defence fully above in the context of claims for overpaid income tax.[397] We indicated there[398] that, but for the Law Commission's support for the defence, we would have been inclined to reject it as a general defence to a claim for overpaid income tax. On balance we consider that, in the context of rates, the defence should not be available.

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[397]See paras 4.65 - 4.82 above.

[398]See para 4.81.

4.189 **In a statutory claim for refund of overpaid rates, a defence of unjust enrichment of the claimant should not be introduced.**
(Proposition 26)

(d) Payment in accordance with a settled view of the law

4.190 The extension of the statutory ground of refund of overpaid rates to include error of law cases raises sharply the question whether a defence of "payment in accordance with a settled view of the law"[399] is needed. Error of law may be unusual in rates cases but is more likely to have a widespread effect than error of fact. We seek views on this question.

4.191 **Should an overpayment of rates be recoverable where it was made by the ratepayer in accordance with a settled view of the law that the payment was due, and later judicial decisions have departed from that view?**
(Proposition 27)

(e) Non-exhaustion of statutory remedies

4.192 It is not for us to recommend changes to appeals against rating. We cannot however overlook the fact that a local authority entertaining an appeal against a rates demand note are judges in their own cause[400] and that this prima facie infringes elementary standards of natural justice. We proceed on the assumption that this matter will

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[399]Discussed at paras 4.30 - 4.36 above in the context of income tax.

[400]LG(S)A 1947, s 238.

be considered, and if need be reformed, by the competent authorities.

4.193 In the absence of a non-exhaustion defence, LG(FP)(S)A 1963, section 20(1) allows a claim for repayment of rates long after the time-limits have expired for exercising statutory rights of appeal and even after the expiry of the five-year period of the negative prescription of the obligation of repetition.[401] Under our proposals however error of fact would no longer be a requirement of recovery. So a ratepayer, who lay back and deliberately failed to use the statutory avenues of appeal, could recover an undue payment.

4.194 It is a little difficult to see what then would be the point of time-limits on appeals against valuation and rates notices. There would be a risk that the finality of the valuation and assessment rolls, and hence their accuracy and reliability, would be undermined. Moreover the principle of the conclusiveness of the valuation and assessment rolls allows the stage of fixing liability for rates to be clearly separated from the stage of their collection. The administrative and legal procedures for collection can safely proceed uncluttered by disputes as to liability.

4.195 **Summary warrant diligence.** The assessment roll is used in framing the certificate of arrears which forms the basis of the grant by the sheriff

[401]By virtue of the Prescription and Limitation (Scotland) Act 1973, s 12(1), the special six-year limitation would take precedence over the five-year negative prescription: see *Lord Advocate v Hepburn* 1990 SLT 530(OH) at p 532 per Lord Dervaird.

of summary warrants for diligence for the recovery of rates arrears.[402] Since such a warrant is granted at the risk of the local authority (*periculo petentis*) on an *ex parte* application, the authority is strictly liable for wrongful diligence if it should turn out that the certificate of arrears was inaccurate.[403]

4.196 One might have thought that the principle of the conclusiveness of the valuation and assessment rolls would be essential to the operation of the system of summary warrant diligence. Such a conclusion however is difficult to reconcile with the existence of summary warrants for recovering arrears of council tax[404] or VAT[405]. These warrants are also granted at the applicant's risk. Yet, as we have seen, this has not prevented the conferment on taxpayers of virtually unrestricted rights to the refund of overpaid council tax and VAT.

4.197 The system of administration of rates more nearly resembles the administration of income tax than the administration of VAT. The present

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[402]LG(S)A 1947, s 247, as amended by the Debtors (Scotland) Act 1987, Sch 4, para 1.

[403]*Grant v Magistrates of Airdrie* 1939 SC 738.

[404]LGFA 1992, s 97(5), Sch 8, para 2 (authorising summary warrant diligence for recovering council tax arrears) (as amended by the LGE(S)A 1994 Sch 13, para 176(18)); see also Council Tax (Administration and Enforcement) (Scotland) Regulations 1992, reg 30 (certificates with application for summary warrant) (SI 1992/1332).

[405]Value Added Tax Act 1994, s 58 and Sch 11, para 5(5)-(9).

administration of income tax, like that of rates, is a phased system consisting of a formal assessment stage finally and conclusively fixing liability, subject to appeals, followed by a collection stage. By contrast the administration of VAT provides for self-assessed returns not declared by statute to be final and the making of the returns and collection are rolled up into one continuous phase involving quarterly accounting and payment. It is for consideration whether this difference justifies introducing the non-exhaustion defence.

4.198 **Should a defence of non-exhaustion of statutory appeals against valuation or rating notices be available to a rating authority against a statutory claim for refund of overpaid rates? (Proposition 28)**

PART V

RECOVERY BY PUBLIC AUTHORITIES OF *ULTRA VIRES* DISBURSEMENTS

Preliminary

5.1 In this Part we consider the recovery by public authorities of *ultra vires* payments, which was also considered by the Law Commission in their Report and Consultation Paper[1].

A. THE EXISTING LAW

(1) Common law

5.2 **Scots cases.** There seem to be remarkably few reported cases of actions by "public authorities" for repetition of *ultra vires* or undue payments. Most of the cases relate to actions for repayment of parochial relief paid unduly to a pauper under the old poor law. There it was established that where relief was given for destitution, the poor law authority could generally not claim repetition from the pauper unless he had obtained the money by false pretences, as by concealing means sufficient for his support[2]. A speciality was that relief had to be given unconditionally. An agreement for repayment in the

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[1]Law Com No 227, Section D (Part XVII), "Claims by Public Bodies"; Law Com CP No 120, Part IV. See also Law Reform Commission of British Columbia, Report on *The Recovery of Unauthorized Disbursements of Public Funds*, LRC 48 (1980)(hereafter "LRCBC 48").

[2]*Henderson v Alexander* (1857) 29 Sc Jur 559; *Kilmartin Inspector of Poor v Macfarlane* (1885) 12 R 713; *Forfar Parish Council v Davidson* (1898) 1F 238; *Glasgow Parish Council v Rae* (1901) 17 Sh Ct Reps 117; *Prudential Assurance Co Ltd v Dalziel Parish Council* (1914) 24 Poor Law Magazine 203; *Rutherglen Parish v Tolmie* 1922 SLT (Sh Ct) 72.

future, eg if the pauper subsequently acquired means, could not be exacted or enforced[3]. This rule was perhaps an example of a species of "transactional inequality" but in this case operating to bar an action of repetition by the stronger party. It does not necessarily preclude agreements to repay in other cases of payments by a public authority where the recipient was not a pauper receiving parochial relief. If poor relief was obtained by the pauper under false pretences, a *condictio indebiti* lay[4].

5.3 In general, the Scottish courts have applied the ordinary common law rules on repetition to the recovery of *ultra vires* disbursements. In *Bremner v Taylor*[5], for example, an action by one poor law authority against another for recovery of an erroneous payment, recovery was denied on the ground that the error was one of law. Again in *Inverness County Council v Macdonald*[6], undue monthly payments were made in respect of a medical practice by a local authority which had overlooked the fact that the arrangement for the payments had been terminated. The sheriff treated the action as an ordinary *condictio indebiti* and applied the ordinary rules on error and on waiver of objections.

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[3]*Kilmartin Inspector of Poor v Macfarlane* (1885) 12 R 713; *Rutherglen Parish v Tolmie* 1922 SLT (Sh Ct) 72.

[4]*Rutherglen Parish v Tolmie* 1922 SLT (Sh Ct) 72 at p 73.

[5](1866) 3 S L Rep 24 (OH).

[6]1949 SLT (Sh Ct) 79.

5.4 One defence, that of *bona fide* consumption, is available to a private citizen defending an action by the Crown[7], though it is probably not available to the Crown in an action by a private citizen, at any rate where the amounts are small[8].

5.5 ***Ultra vires* payments out of the Consolidated Fund: the *Auckland Harbour Board* rule.** In the leading case of *Auckland Harbour Board v The King*[9], Viscount Haldane observed:

> "For it has been a principle of the British Constitution now for more than two centuries, a principle which their Lordships understand to have been inherited in the Constitution of New Zealand with the same stringency, that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself. The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorization or ratify an improper payment. Any payment out of the consolidated fund made without Parliamentary authority is simply illegal and ultra vires,

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[7]*Lord Advocate v Drysdale* (1872) 10 M 499, affd (1874) 1 R (HL) 27. This was not an action of repetition of a payment, but an action by the Crown for arrears of teinds in circumstances where the defender had consumed the rents out of which the teinds were payable.

[8]*Earl of Cawdor v Lord Advocate* (1878) 5 R 710. See paras 2.12, 2.18 above.

[9][1924] AC 318 (PC). The Crown paid under statute to the Harbour Board money in consideration of the Board granting a lease to a third party. The statute authorised the payment only if the lease was entered into. The Harbour Board was ready to grant the lease on the Crown's request but the Crown never made the request, resumed title to the land, and set off the money gainst other sums due by the Harbour Board to the Crown. The Harbour Board's action of repayment failed.

> and may be recovered by the Government if it can, as here, be traced"[10]

As a principle of the British Constitution, it must presumably apply in Scots law, unless possibly broadly the same result is achieved by reference to wider principles of Scots law. No Scots reported case referring to the principle has been found. This is scarcely surprising because in English law, according to the Law Commission, "there appear to have been only two reported cases on this topic in almost 400 years".[11]

5.6 The taxonomy of the Scots law of repetition is problematic being founded inter alia on a mixture of "forms of action" (the *condictiones*) and specific grounds of recovery which themselves are problematic; (eg error or compulsion).[12] On one approach, the *Auckland Harbour Board* rule could be subsumed within the *condictio sine causa*.[13] On another approach, if, as obiter dicta in the *Morgan Guaranty* case suggest, the principle underlying the *condictio indebiti* is that undue transfers made without

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[10] *Ibid* at pp 326-327 (delivering the judgment of the Board). By "traced" is probably meant ascertaining the recipient, not "tracing" in the sense of English Equity law: *Commonwealth of Australia v Burns* [1971] VR 525 at p 528 per Newton J.

[11] Law Com No 227, para 17.19. This is an apparent reference to *Doddington's Case* (1596) Cro. Eliz. 545: cited in argument in [1924] AC 318 (PC) at p 320. There have been a few Commonwealth cases cited below.

[12] See Scot Law Com DP No 99, paras 4.20 - 4.27.

[13] This is the approach adopted by *Gloag and Henderson, The Law of Scotland* (10th edn; 1995) para 29.7, notes 49 and 50 for the *Woolwich* rule.

donation are prima facie recoverable by repetition or restitution[14], the rule might be dispensed with depending on whether the ordinary defences in repetition should apply. The same result would follow if Dr Evans-Jones's theory as to the basis of the *condictio indebiti* were to be accepted, namely that undue transfers made to discharge an obligation without legal ground are prima facie recoverable.[15]

5.7 **Basis and scope of rule.** The basis and scope of the *Auckland Harbour Board* rule are not altogether clear. The rule does not prevent the Revenue from making an *ex gratia* payment of money paid to it in respect of an *ultra vires* claim to tax[16]. If the basis of the rule is the *ultra vires* nature of the levy, then it applies to disbursements where no error has been made. Lord Haldane appears to restrict the rule to payments out of the Consolidated Fund, but as the Law Commission observe such a limitation appears anomalous.[17] In their view, if the limitation is based on public policy, namely the protection of public funds, it probably ought to apply to all *ultra vires* disbursements made by central

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[14]*Morgan Guaranty Trust Co of New York v Lothian Regional Council* 1995 SLT 299 (Court of Five Judges) at p 316B per Lord President Hope.

[15]Evans-Jones, "Reflections on the Condictio Indebiti" (1994) 111 SALJ 759; Evans-Jones, "Retention without a Legal Basis" *passim*.

[16]*Woolwich Equitable Building Society v IRC* [1993] AC 70 at p 113 per Ralph Gibson L J.

[17]Law Com No 227, para 17.2.

government.[18] So it should apply to payments out of Departmental Budgets as it applies to payments out of the Consolidated Fund[19] but there is no authority that it does.[20] The Law Commission state that it would be unlikely in their view to apply to expenditure by local authorities, semi-state bodies and private utilities.[21]

5.8 **Defences.** Personal bar is sometimes available in administrative law where a representation has been given on behalf of a public authority to a private person who has relied on it to his detriment,[22] but there are limitations, eg it may not be relied on so as to enlarge a public authority's statutory powers or to override its statutory duties[23].

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[18]*Idem*.

[19]See Law Com No 227, para 17.11, n 24: "The limitation to payments out of the Consolidated Fund, as opposed to payments out of Departmental Budgets is probably anomalous. However, once a payment has been properly appropriated from the Consolidated Fund to the spending Department, the issue of the *vires* of the payment may become significantly more complex , as many areas of Departmental expenditure will be for the discretion of the relevant Minister, out of the funds provided by Parliament".

[20]LRCBC 48, p 7; Law Com No 227, para 17.11.

[21]Law Com No 227, para 17.11.

[22]A W Bradley, *The Laws of Scotland; Stair Memorial Encyclopaedia* vol 1 (1987) para 294.

[23]*Idem*, citing *Balfour v Sharp* (1833) 11 S 784 (tolls); *Fraserburgh Harbour Commissioners v Will* 1916 SC 107 (harbour dues); *Maritime Electric Co Ltd v General Dairies Ltd* [1937] AC 610 (PC).

5.9 In Australia, it has been held that the Crown's right of recovery is not barred by estoppel (or personal bar) on the grounds that Crown servants cannot authorise or ratify a payment made without Parliamentary authority, and thereby make lawful that which is unlawful[24]. The Law Commission[25] observe that "English law also recognises the limitations of estoppel in public law[26] although in certain situations a public body may be estopped by a representation made by it even where the representation is *ultra vires*[27]". They suggest that if "this approach were to be extended to *ultra vires* payments, a narrow defence of estoppel might be developed".

5.10 The defence of "change of position" recently recognised in English law[28] has not yet been considered in the context of *ultra vires* payments by public authorities. The Law Commission state that the defence will apply to this type of situation[29]. It is certainly true that the policy considerations involved are similar to those

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[24]*Commonwealth v Burns* [1971] V R 825 (Supreme Court of Victoria); *Attorney-General v Gray* [1977] 1 NSWLR 406 (CA).

[25]Law Com No 227, para 17.3.

[26]Citing Craig, *Administrative Law* (3d edn, 1994) Chapter 18.

[27]Citing *Western Fish Products Ltd v Penwith D C* [1981] 2 All ER 204; Craig *op cit* pp 474-6.

[28]*Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL).

[29]Law Com No 227, para 17.3.

concerning estoppel[30] or personal bar. On the other hand, in the terms in which Lord Haldane stated the *Auckland Harbour Board* rule the emphasis is not on restitution but on the *ultra vires* character of the disbursement. The implication is that the position of the recipient of the *ultra vires* disbursement is irrelevant[31], and it would follow that a change in his position is not a defence to an action for repetition of the disbursement.

5.11 The question whether the citizen may rely on compromise or "submission to an honest claim" has not been considered though the Law Commission state[32] that on principle such a defence applies.

5.12 The argument that the general restitutionary defences of the English common law apply raises questions as to the position under Scots law where, as we have seen, the equitable defence akin to change of position has taken a peculiar form in the converse case of claims for

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[30]*Idem*. This is not necessarily inconsistent with the statement in Maddaugh and McCamus, *The Law of Restitution* (1990) p 267 that "the formal reason" for excluding estoppel (viz that public servants cannot render lawful that which is unlawful) need not apply to the defence of change of position "which has as its exclusive object the protection of the defendant from harm resulting from detrimental reliance on the receipt of the payment". The "formal reason" is not necessarily the same as the true policy considerations.

[31]Law Reform Commission of British Columbia, LRC 48, p 6.

[32]Law Com No 227, para 17.3.

overpaid tax and rates[33] and the defence of "submission to an honest claim" is not recognised.[34]

(2) Statutory provisions on recovery

5.13 As the Law Commission remark[35], the recovery of welfare benefits, including social security benefit, child benefit, income support, family credit and certain payments from the Social Fund[36], is dealt with by the Social Security Administration Act 1992, section 71, and the relevant regulations.[37] By these provisions, overpayments by the Government (including those made under mistake of law) are only recoverable if caused by a claimant's misrepresentation or failure to disclose a material fact[38]. However, non-recoverable payments may be offset against other benefits payable[39]. This would include payments

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[33]See para 2.20 above, *Bell v Thomson* (1867) 6 M 64; *National Bank of Scotland v Lord Advocate* (1892) 30 S L Rep 579 (OH).

[34]See paras 4.47 - 4.49 above.

[35]Law Com No 227, para 17.4 on which this paragraph is largely based with the Law Commission's permission.

[36]Specified in Social Security Administration Act 1992, s 71(11).

[37]Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, on which see *R v Secretary of State for Social Security, Ex p Britnell* [1991] 1 WLR 198.

[38]Social Security Administration Act 1992, section 71(1); SI 1988/664, reg 5. *Plewa v Chief Adjudication Officer* [1995] 1 AC 249 (HL) overruling *Secretary of State for Social Security v Tunnicliffe*, [1991] 2 All ER 712.

[39]SI 1988/664, reg 5.

made as a result of mistake of law. Overpaid housing benefit is recoverable under section 75 of that Act[40] unless the payee could not reasonably have been expected to realise that it was an overpayment.[41]

(3) The Requirements of European Community Law[42]

(a) Payments Made Unlawfully under Community Provisions

5.14 A number of schemes concerned with agricultural products, administered by member states on behalf of the Community, provide for subsidies and grants to be paid from Community resources. Payments made under such schemes may infringe Community law, for instance in the case of a discriminatory subsidy, or payment of a subsidy may be based on an erroneous interpretation of Community legislation. Any action for recovery must be brought against the payee in national courts in accordance with national law and procedure[43].

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[40]As read with the Housing Benefit (General) Regulations 1987 (SI 1987/1971) regs 98 - 105. See A McIntosh, "Housing Benefit Overpayments" 1995 SCOLAG 67.

[41]SI 1987/1971, reg 99(2).

[42]Paras 5.12 to 5.15 below reproduce with editorial amendments Law Com No 227, paras 17.5 to 17.8 respectively (with the Law Commission's permission).

[43]Case 265/78 *H Ferwerda BV v Produktschaap voor Vee en Vlees* [1980] ECR 617; Case 54/81 *Firma Wilhelm Fromme v Bundesanstalt fur Landwirtschaftliche* [1982] ECR 1449; Cases 205-215/82 *Deutsche Milchkontor GmbH v Federal Republic of Germany* [1983] ECR 2633.

5.15 This basic principle is qualified by Community legislation and other rules of community law. Member States are under a general obligation to provide for the recovery of agricultural subsidies,[44] and the remedy must comply with the principle of effectiveness. In the absence of specific legislation it seems that the same requirement would arise from general principles of Community law to uphold the policies behind the community law restrictions.[45] However, substantial limitations on recovery are permissible and may indeed be required by community law to protect the recipient's legitimate expectations in the security of his receipt.[46] Thus, recovery may be limited by a short limitation period, by a defence of change of position or where there has been no "fault" on the part of the payee[47]. In this context any national remedy must also comply with the principle of non-discrimination; the remedy must be neither more nor less favourable than that which applies to comparable domestic claims[48].

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[44]Council Regulation 729/70 Article 8(1).

[45]In *Ferwerda*, it is clear that the court considered the same principles would apply where there was no relevant legislative provision.

[46]See the statement in Case 11/76 *Netherlands v Commission*, [1979] ECR 245, 278, suggesting that it may not be possible under *Community law* to recover sums paid in error, thus considerably reducing the impact of the regulation.

[47]See the cases cited above, para 4.11, last footnote.

[48]*H Ferwerda B V v Produktschap voor Vee en Vlees* [1980] ECR 617. *Deutsche Milchkontor v Germany* [1983] ECR 2633 concerned the permissibility of provisions which restricted the right of the administration to recover. *Firma Wilhelm Fromme v Bundesanstalt* [1982] ECR 1449

(b) Unlawful State Aids[49]

5.16 "State aids", that is, aid given by the authorities in member states from their own resources, may also raise restitutionary problems[50]. An aid payment without prior notification to the Commission or which is paid during the period of "review" by the Commission, or which, following such review, is found incompatible with European Community law, will be unlawful[51].

5.17 An action to recover an unlawful payment must be brought in national courts and will be determined according to national law and procedure,[52] but subject to the principles of effectiveness and non-discrimination. There may be no restrictions on recovery where the payee has not got a legitimate expectation that the payments are lawful and in several cases on state aids it has been held that there is no such expectation[53]. It

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concerned the stringency of the burden on the recipient - here the question of whether interest could be demanded from the recipient.

[49]See generally Wyatt and Dashwood, *European Community Law* (3d edn, 1993) Ch 17.

[50]For an explanation of the kind of payments falling within these provisions see Wyatt and Dashwood, *op cit*, pp 540,541.

[51]EC Treaty, Arts 92, 93; Case C-5/89 *Commission of the European Communities v Federal Republic of Germany*, The Times, 8 November 1990.

[52]Art 93. See Wyatt and Dashwood, *op cit*, pp 540,541.

[53]Case C-5/89, *Commission of the European Communities v Federal Republic of Germany*, The Times, 8 November 1990. The case concerned a state aid which was unlawful for failure to notify the Commission at all. No doubt the same principles would apply to aids which are unlawful for the

seems unlikely that an unlawful state aid will arise as a consequence of a mistake of law as opposed to a mistake of fact or a deliberate breach of Community rules.

B. DEFECTS IN THE EXISTING LAW

5.18 It seems to us that the *Auckland Harbour Board* rule is too absolute in allowing recovery in every case where an *ultra vires* payment is made out of the Consolidated Fund. As the Law Reform Commission of British Columbia remarked:

> "In a case involving the unauthorized expenditure of public funds, the issue is not merely whether public policy requires the expenditure to be treated as invalid, but whether it also requires the recipient of funds paid out illegally to refund them to the Crown whatever the merits of the case".[54]

5.19 **A fallacious dilemma.** The policy underlying the rule, namely the protection of the Consolidated Fund or (depending on the scope of the rule) public funds generally, from dissipation by *ultra vires* payments seems to bear a very close relationship to the discredited reasoning in the notorious House of Lords case in *Duncan v Findlater*[55]. That case overruled earlier Scots cases and was construed, at least in Scots law, as laying down a general rule that under statutes constituting corporations such as police commissioners and road trustees with powers to levy rates assessments or tolls, the rates or tolls were appropriated to statutory purposes and could not be

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other reasons mentioned above.

[54]LRCBC 48, p 11.

[55](1839) Maclean and Rob 911.

applied to pay damages caused by the negligence of the trustees or their employees. The underlying principle was stated by Lord Cottenham LC as follows[56]:

> "but why should the trust funds be so liable? If the thing done be within the powers of the statute, the party sustaining any damage from it cannot be entitled to compensation unless the statute itself provide it, and for this reason, that upon this supposition the act creating the damage would be lawful; if then the thing done be not within the powers of the statute, either from exceeding these powers or from the manner of doing it, why should the public funds bear the burden of indemnifying the guilty party?".

That dilemma was held to be fallacious and that ground of judgment unsound in English law in *Mersey Docks Trustees v Gibbs*[57] which was followed in Scotland in *Virtue v Alloa Police Commissioners*[58].

5.20 It seems to us that the *Auckland Harbour Board* case raises a similar fallacious dilemma. To treat the unauthorised payments as irrecoverable in some circumstances would not necessarily imply that the law would be treating them as lawful and *intra vires*: they may be unlawful and *ultra vires*, yet irrecoverable for sound reasons of policy. In other words, the fact that payments out of public funds are not expressly authorised by Parliament should not necessarily mean that the paying public authority must be entitled to recover them

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[56]*Ibid* at p 936.

[57](1866) LR 1 HL 93.

[58](1873) 1 R 285 at 303.

irrespective of the requirements of justice in the particular circumstances of individual cases.[59]

5.21 **Arguments for reform.** The Law Reform Commission of British Columbia[60] advance several arguments for reform of the *Auckland Harbour Board* rule, namely:

(1) The rule is not an effective means of enhancing legislative authority.

(2) There are more direct means of enhancing legislative control of public money.

(3) Parliament does not exercise specific control over the expenditure of funds.[61]

We respectfully agree that these are important arguments for reform. Another argument is the uncertainty surrounding the scope of the rule.

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[59]Just as *Duncan v Findlater* deduced from the doctrine of *ultra vires* an unjust absolute rule denying reparation, so the *Auckland Harbour Board* case (as subsequently construed) deduced from that doctrine an unjust absolute rule requiring repetition. The issue is not one of logic, but of policy, as the *Mersey Docks Trustees* and *Alloa Police Commissioners* cases show.

[60]LRCBC 48, p 12.

[61]Another argument (*ibid* p 13) was that to allow a defence to the recipient of funds would put him on an equal footing with the Crown. However, if proposals in Part III above were implemented, a citizen would have an automatic right to recover from the Crown an *ultra vires* receipt.

5.22 **Ineffective in enhancing legislative authority.** The Law Reform Commission of British Columbia remark[62]:

> "To the extent that the rule is designed to enhance the authority of Parliament, the usefulness of depriving the citizen of any defence may be doubted. The main justification for imposing liability on a citizen is that the money received was paid out by a public servant in excess of his authority. Yet the rule visits the consequences of the act upon the person who in many cases will be the victim, and not the perpetrator of the error. This was the case in *Commonwealth of Australia v Burns*[63] itself, where the defendant had been assured by the government's agents that she was entitled to the money".

We agree with these remarks.

5.23 **More direct methods of enhancing legislative control.** The Law Reform Commission of British Columbia argue that Parliament could assert more directly its control over public revenue, eg by enacting statutes rendering public servants liable to make good funds irregularly expended by them or imposing other sanctions on public servants making unauthorised disbursements[64]. An analogy may be the provisions of the Local Government (Scotland) Act 1973, ss 103[65] and 104 for repayment to a local authority of unlawful expenditure by the person responsible for incurring or authorising it. Whether or not other more direct methods of enhancing Parliament's control over disbursements

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[62]*Ibid*, p 12.

[63][1971] V R 565 (SC Victoria).

[64]LRCBC 48, p 12.

[65]As amended by the Local Government etc (Scotland) Act 1994, Sch 13, para 92(27).

were to be introduced, it does not seem that the *Auckland Harbour Board* rule is likely in practice to deter public servants from making unauthorised disbursements from public funds.

5.24 **Absence of specific Parliamentary control.** The Law Reform Commission of British Columbia argue:

> "While Parliament both votes money and approves estimates, it does not oversee the day-to-day administration of the funds. It is therefore difficult to see in every mistaken payment a challenge to the legislature's constitutional position. Only rarely, if ever, will such a challenge be made, and it is unlikely that the recipient of funds would be a party to the ensuing contest".[66]

We agree with this conclusion.

5.25 **Uncertain scope of *Auckland Harbour Board* rule.** We referred above[67] to the uncertain scope of the *Auckland Harbour Board* rule. It is arguable that if the rule is to continue with or without modification by statute, the scope of the rule should be clarified.

The Law Commission's recommendation against reform

5.26 These considerations suggest that the *Auckland Harbour Board* rule is in need of reform. It is necessary, however, to have regard to the Law Commission's recommendation against reform[68] especially since the same rule should apply throughout the United Kingdom.

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[66]LRCBC 48, p 12.

[67]Para 5.7.

[68]Law Com No 227, recommendation 40 (para 17.21).

5.27 In their Consultation Paper the Law Commission identified the following three options:[69]

(a) retention of the *Auckland Harbour Board* rule allowing recovery on the ground of the *ultra vires* nature of the payment, subject to defences of change of position "submission to an honest claim", compromise and estoppel (personal bar);

(b) application of the ordinary rules of private law reformed to allow recovery for error of law; or

(c) a new statutory rule allowing recovery only in very limited circumstances, eg where there is some kind of fault or misrepresentation on the part of the recipient.

As regards the first option, in their Consultation Paper the Law Commission seemed to consider that the defences of change of position and estoppel would have to be introduced by statute.[70] But in their Report, they took the view that, though there is no authority in that regard, the defences of change of position, "submission to an honest claim", and compromise, being general restitutionary defences, would and should apply any way at common law.[71]

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[69]Law Com CP No 120, paras 4.10 - 4.21.

[70]Law Com CP No 120, paras 4.3; 4.18 - 4.21.

[71]Law Com No 227, paras 17.3 and 17.20.

5.28 In their final Report the Law Commission recommended that the *Auckland Harbour Board* rule should not be altered[72] for the following reasons.

5.29 First, although most consultees who addressed the issue supported the second option (assimilation), the response on consultation was disappointing.[73] So it carried less weight.

5.30 Second, the practical area of application of the rule is quite limited because of the legislation on welfare benefits, the area where disputes are most likely to arise.[74] The Law Commission were "conscious of the relatively limited practical impact of reform".[75]

5.31 Third, the Law Commission were mindful of the potential of legislative reform to generate litigation: "the present rule, as is the nature of absolute rules, tends towards certainty and the avoidance of case law."[76]

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[72]Law Com No 227, recommendation 40 (para 17.21). The recommendation was made on the footing that the common law defences of change of position and submission or compromise would apply: para 17.21.

[73]None supported the third.

[74]Law Com No 227, para 17.17: perhaps only "payments of salaries, grants and awards ultra vires and payments under ultra vires contracts": *ibid*.

[75]Law Com No 227, para 17.19.

[76]Law Com No 227, para 17.19.

5.32 Fourth, the arguments of principle for reform did not appear to the Law Commission to hold sway to any great degree.[77]

C. WHETHER REFORM SHOULD PROCEED AND OPTIONS FOR REFORM

Should there be independent reform under Scots law?

5.33 In our view the present law is unsatisfactory. To the vagueness and uncertainty of the *Auckland Harbour Board* rule in England must be added the further uncertainty of how far the equivalent Scots rule corresponds, especially in relation to defences. We are not convinced that the apparently absolute nature of the *Auckland Harbour Board* rule leaves room for developing defences at common law. But, if there is room for such defences it seems unlikely, for example, that "submission to an honest claim" would or should ever be recognised as a defence to the Scottish version of the rule having regard to the different Scottish principles on finality of litigation.[78]

5.34 If there were to be a cross-border solution, reform would probably have to be statutory rather than by way of incremental judicial development because of the cross-border differences in the common law. Since however the Law Commission have rejected legislation, it would be unrealistic for us to recommend legislation which could not and should not amend the *Auckland Harbour Board* rule in Scotland only.

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[77] *Idem.*

[78] See paras 4.47 - 4.49 above.

Options for reform

5.35 We carefully considered the three options identified by the Law Commission[79] viz: (a) retention of the *Auckland Harbour Board* rule (on the assumption that appropriate defences are available)[80]; (b) abolition of the *Auckland Harbour Board* rule and application of the ordinary private law rules as reformed by abolition of the error of law rule[81]; and (c) replacement of the *Auckland Harbour Board* rule by a new statutory rule allowing recovery only in very limited circumstances.[82] The last received no support in England on consultation[83], and can be discarded.

5.36 Of the other two options, the second is in some ways preferable to the first. It would avoid difficult questions of scope and is consonant with such scanty Scottish authority as exists. We are not convinced that a separate rule is necessary or desirable to protect the Consolidated Fund. On the other hand, the present general law of repetition is in a state of transition and does not

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[79]Law Com No 227, para 17.9.

[80]This is the approach recommended by the Law Reform Commission of British Columbia: LRCBC 48, pp 14, 15.

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

[82]eg where there is some kind of fault on the part of the recipient: Law Com CP No 120, para 4.15. This rule would be very like the rules on recovery of welfare benefits, which are recoverable only where the payment was caused by the recipient's misrepresentation or failure to disclose a material fact. See para 5.13 above.

[83]Law Com No 227, para 17.10.

form a very secure basis for abolishing a rule of automatic recovery. Moreover as a matter of policy, the need for particular grounds of repetition like error is now being questioned in Scotland and the *Auckland Harbour Board* rule may accord with the direction in which the general law is moving.

5.37 We agree with the Law Reform Commission of British Columbia[84], the Law Reform Committee of South Australia[85], and the Law Commission[86] that a defence of "change of position" should be available. The need to protect public funds from unlawful dissipation should not override the interest of the payee who has changed his position in reliance on the payment.

5.38 It would however be unrealistic to recommend for Scotland alone clarification of the *Auckland Harbour Board* rule by enacting defences. It might be difficult to obtain cross-border agreement on uniform cross-border defences. We therefore favour no change in the law in the short term.

5.39 If however the general law of unjustified enrichment were to be codified, there might be no need for a separate rule for public authority disbursements like the *Auckland Harbour Board* rule since the new code might provide for the repayment

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[84]LRCBC 48, p 12.

[85]*Report Relating to the Irrecoverability of Benefits Obtained by Reason of Mistake of Law* (84th Report, 1984) pp 32, 33.

[86]Law Com No 227, para 17.20.

of sums paid to discharge an obligation without legal ground.

5.40 While the *Auckland Harbour Board* rule (under which *ultra vires* disbursements by central government from the Consolidated Fund, and possibly other *ultra vires* disbursements by public authorities from other public funds, are always recoverable) is in some respects defective, we do not think that it should be reformed by legislation separate from a general codification of the Scots law on unjustified enrichment.
(Proposition 29)

PART VI

SUMMARY OF PROVISIONAL PROPOSALS

PART III: THE CASE AGAINST INTRODUCING THE *WOOLWICH* PRINCIPLE INTO SCOTS LAW BY STATUTE

1. (1) The *Woolwich* rule (under which a citizen who makes an undue payment of tax or other levy to a public authority pursuant to an *ultra vires* demand has a prima facie right to repayment) should not be introduced by statute into Scots law.

   (2) We question whether development by way of the ever increasing recognition and extension of specific grounds of recovery is the hall-mark of a mature system of restitution of undue payments and transfers or of unjustified enrichment generally.

   (3) We suggest that a new type of approach based on broader and more liberal grounds of recovery should be examined as part of a general review of the law of unjustified enrichment.

(Paragraph 3.124)

PART IV: AMENDMENT OF THE STATUTORY PROVISIONS FOR REFUND OF OVERPAID TAX

TAXES ADMINISTERED BY THE INLAND REVENUE

1. **Income Tax, Corporation Tax, Capital Gains Tax and Petroleum Revenue Tax**

The right of recovery

2. In the case of Income Tax, Corporation Tax, Capital Gains Tax and Petroleum Revenue Tax,

we support recommendation 11 of Law Com No 227 proposing that:

(a) the Taxes Management Act 1970, section 33 should be replaced by a provision introducing a right on the part of all taxpayers charged to tax, whether under an assessment or otherwise, to recover tax paid but not due irrespective of the presence or absence of any mistake on the part of the taxpayer; and

(b) the right to repayment should be exercised by application in writing to the Board of Inland Revenue in the first instance with an appeal to the Special Commissioners and with a further appeal on a point of law to the Court of Session.

(Paragraph 4.19)

Defences

(i) Defence of change in "settled view" of the law (replacing "general practice" defence)

3. We agree with the Law Commission's recommendations that:

(1) overpayments of tax should not be regarded as paid under a mistake of law on the part of the taxpayer (and consequently recoverable) merely because the taxpayer paid in accordance with a settled view of the law that the payment was due, and later judicial decisions have departed from that view (Law Com No 227, recommendation 12 (para 10.20)); and

(2) as a consequential, the "prevailing practice" defence in the proviso to TMA 1970, section 33(2) should be repealed

(Law Com No 227, recommendation 12 (para 10.20)).

(Paragraph 4.36)

(ii) Exception to "settled view of law" defence: recovery by payer-challengers

4. We concur in the Law Commission's recommendation that persons paying a levy of tax who had claimed repayment from the Revenue before a judicial change in a settled view of the law holding the levy invalid should not, on that ground alone, be entitled to recover the payment.

(Paragraph 4.42)

(iii) Judicial power of prospective overruling

5. We agree with the Law Commission's recommendation that a judicial power of prospective overruling of decisions should not be applied in an attempt to prevent disruption to public finances caused by claims for the recovery of payments made under *ultra vires* subordinate legislation.

(Paragraph 4.44)

(iv) Defences of compromise and (in England) "submission to an honest claim"

6. (1) We agree with the Law Commission that
   - (a) it should be a defence to a statutory claim for recovery of an overpayment of tax that a claim for the tax in question was contractually compromised; but
   - (b) it should not be a defence to such a claim that the payment was made in response to a mere threat to litigate, unless that payment would

also qualify as a contractual compromise.

(2) It should not be a defence to such a claim that the payment had been made in response to an earlier action before a Scottish court brought by the Inland Revenue against the taxpayer concerned unless decree in the earlier action would be *res judicata* in a subsequent action raised by a taxpayer in a Scottish court for recovery of the payment.

(Paragraph 4.54)

(v) Short time limits (negative prescription, or limitation of actions)

7. (1) Short time limits on claims for repayment of overpaid tax should not be introduced to safeguard public finances.

(2) In a claim based on error, time should not begin to run against the taxpayer until he discovers the error or could with reasonable diligence have discovered it.

(Paragraph 4.59)

(vi) Non-exhaustion of statutory remedies

8. A defence of non-exhaustion of statutory appeal procedures should be available to the Revenue against a statutory claim for refund of overpaid tax.

(Paragraph 4.64)

(vii) Unjust enrichment of tax-payer or "passing on"

9. Should it be a defence to a statutory claim for recovery of overpaid taxes that recovery would "unjustly enrich" the taxpayer?

(Paragraph 4.82)

(viii) A defence of serious disruption to public finances

10. We agree with the Law Commission's recommendation that the problem of disruption to public finances should not be dealt with by the introduction of a defence permitting denial of recovery where such disruption would result.

(Paragraph 4.84)

(ix) Equitable defences (change of position and *bona fide* consumption)

11. (1) The statutory scheme should neither provide for a defence of change of position nor confer on a court or tribunal the same equitable discretionary power to refuse refund of tax as the Scottish courts possess to refuse decree of repetition in a *condictio indebiti*.

(2) The rule in *Bell* v *Thomson* (under which a public authority receiving undue taxes or rates is treated as a mere collecting agent so that a later generation of tax or rate payers are treated as never having received the money, and therefore as not enriched thereby) should be abrogated by statute in claims under the general law of repetition.

(Paragraph 4.104)

(x) Personal bar

12. With reference to the Law Commission's recommendation that the proposed legislation should not deal with the doctrine of estoppel, we suggest that it should also not deal with the Scots law on personal bar insofar as it applies (if at all) to the refund of overpaid tax.

(Paragraph 4.106)

(c) PAYE

13. The enactments proposed above to replace the Taxes Management Act 1970, section 33, should apply to tax paid by PAYE.

(Paragraph 4.110)

(d) The self-assessment system

14. The reforms proposed above to the recovery provisions in relation to income tax should extend to income tax paid under the self-assessment system.

(Paragraph 4.113)

2. Inheritance Tax

15. The scheme developed in relation to income tax should apply to inheritance tax.

(Paragraph 4.116)

3. Stamp Duty

16. The scheme developed in relation to income tax should apply to stamp duty.

(Paragraph 4.119)

EUROPEAN COMMUNITY LAW AND INDIRECT TAXES ADMINISTERED BY HM CUSTOMS AND EXCISE

Value Added Tax

17. We agree with the Law Commission's recommendation that the scheme for recovery of overpaid VAT in the Value Added Tax Act 1994, section 80, should not be altered.

(Paragraph 4.134)

Excise Duties

18. Having regard to the Finance Act 1995, section 20 (which implements the Law Commission's recommendation that overpaid excise duty should be recoverable in the same circumstances as overpaid VAT), we are not aware that further legislation is required as to the recovery of overpaid excise duty.

(Paragraph 4.137)

Insurance Premium Tax

19. We concur in the Law Commission's recommendation that the existing provision for recovery of insurance premium tax should not be amended.

(Paragraph 4.138)

Car Tax

20. Overpaid car tax should be recoverable in the same circumstances as overpaid VAT.

(Paragraph 4.142)

SOCIAL SECURITY CONTRIBUTIONS

21. We concur with the Law Commission's recommendation that the existing scheme for the recovery of social security contributions paid in error should be unaltered except for

the inclusion, by the amendment of the Contribution Regulations, of payments made under *ultra vires* secondary legislation.

(Paragraph 4.144)

COUNCIL TAX

22. We concur with the Law Commission's general recommendation that the existing scheme for the recovery of undue council tax should not be altered. We further agree with the Law Commission that overpayments demanded *ultra vires* should be recoverable but do not think it necessary to amend the regulations to achieve that result.

(Paragraph 4.151)

NON-DOMESTIC RATES

Ground of claim

23. The ground of a statutory claim for a refund of overpaid rates under section 20(1) of the Local Government (Financial Provisions) (Scotland) Act 1963 (which applies only to undue payments made under error of fact) should be extended to cover all undue payments made by way of rates, whether made under error of fact or law, or under compulsion, or pursuant to an *ultra vires* demand or otherwise.

(Paragraph 4.182)

Defences

Negative prescription

24. (1) Claims for refund of overpaid rates should be subject to a short period of negative prescription.

(2) Views are invited on whether the prescriptive period should be five or six years.

(3) In a claim based on error, time should not begin to run against the ratepayer until he discovers the error or could with reasonable diligence have discovered it.

(Paragraph 4.185)

***Res judicata* or compromise**

25. (1) (a) It should be a defence to a statutory claim for recovery of an overpayment of rates that a claim for the rates in question had been contractually compromised; but

(b) it should not be a defence to such a claim that the payment was made in response to a mere threat to litigate, unless that payment would also qualify as a contractual compromise.

(2) It should not be a defence to such a claim that the payment had been made in response to an earlier action before a Scottish court brought by the rating authority against the ratepayer concerned unless decree in the earlier action would be *res judicata* in a subsequent action raised by the ratepayer in a Scottish court for recovery of the payment.

(Paragraph 4.187)

Unjust enrichment of claimant

26. In a statutory claim for refund of overpaid rates, a defence of unjust enrichment of the claimant should not be introduced.

(Paragraph 4.189)

Payment in accordance with a settled view of the law

27. Should an overpayment of rates be recoverable where it was made by the ratepayer in accordance with a settled view of the law that the payment was due, and later judicial decisions have departed from that view?

(Paragraph 4.191)

Non-exhaustion of statutory remedies

28. Should a defence of non-exhaustion of statutory appeals against valuation or rating notices be available to a rating authority against a statutory claim for refund of overpaid rates?

(Paragraph 4.198)

PART V: RECOVERY BY PUBLIC AUTHORITIES OF *ULTRA VIRES* DISBURSEMENTS

29. While the *Auckland Harbour Board* rule (under which *ultra vires* disbursements by central government from the Consolidated Fund, and possibly other *ultra vires* disbursements by public authorities from other public funds, are always recoverable) is in some respects defective, we do not think that it should be reformed by legislation separate from a general codification of the Scots law on unjustified enrichment.

(Paragraph 5.40)

APPENDIX A

THE PRINCIPLE OF FINALITY OF LITIGATION

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THE PRINCIPLE OF FINALITY OF LITIGATION

(1) Preliminary

1. **The problem stated.** In discussing the mistake of law rule in Law Com No 227, the Law Commission describe the present English law on "submissions to honest claims" and compromises.[1] They then rely on that description in their revision of statutory claims by a taxpayer for refund of overpaid governmental taxes.[2] In that context, the Law Commission remark that:

> "if a taxpayer pays after proceedings have in fact been commenced against him, it seems contrary to the principle of finality of litigation to permit that payment to be reopened".[3]

This conclusion depends on what is meant by the "principle of finality of litigation" which can be given in different ways in different legal systems. Like all legal systems, Scots law recognises that principle which underlies such defences as compromise and *res judicata*. The terminology, requirements and practical results of the substantive rules, however, differ from the English law.

2. **Terminology.** As regards terminology (which is unsettled in England[4]), the English concept of "submission to an honest claim" has not been received in Scots law.[5] Even where the names of relevant doctrines are the same in each legal system, the substantive rules sometimes differ,

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[1]Law Com No 227, Section B, paras 2.25 to 2.38.

[2]Law Com No 227, Section C, paras 10.31 - 10.35.

[3]Law Com No 227, para 10.31

[4]Law Com No 227, para 2.28, states "there is no consensus as to terminology in this area of law: this common law concept has been variously described as compromise, submission to an honest claim, voluntary payment, payment to close the transaction, and contractual compromise".

[5]See para 18 below.

either radically as in the case of *res judicata*[6] or in emphasis as perhaps in the case of compromises[7]. The defence of waiver of objections to payment is similar (being derived in part from English law)[8] but it interacts with the requirement (not found in English law) that decree of repetition will not be granted if the grant would be inequitable.[9]

3. **Overview.** In this Appendix, we set out the Scots law on the principle of finality of litigation and in particular on (a) compromises; (b) the plea of *res judicata*; (c) the plea of new matters coming to notice (*res noviter veniens ad notitiam*); (d) the plea of "competent and omitted" defences; (e) the defence of waiver of objections to payment; (f) the requirement of excusability of error and the defence that repetition would be inequitable.[10] We then set out the corresponding rules of English law on compromises, "submission to an honest claim" and *res judicata*.[11] Finally we compare the Scots law and the English law.[12]

(2) The Scots law on finality of litigation

(a) Compromises

4. In Scots law, payment may be made either to discharge the original debt or in pursuance of a compromise.[13] A compromise has the effect of discharging the original disputed debt (if there was one) and of creating a new independent obligation which replaces the original debt.[14]

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[6]See paras 7 - 9 and 20 below.

[7]See paras 4 - 6 and 17 below.

[8]See paras 14 and 15 below.

[9]See para 16 below.

[10]See paras 4 - 16 below.

[11]See paras 17 - 20 below.

[12]See paras 21 *et seq*.

[13]Or "transaction" in the old terminology.

[14]Erskine, *Institute* III,3,54; Bell, *Principles* s. 535; Gloag, *Contract* (2d edn) p 456. For a fuller analysis, see Scot Law Com No 95, vol 2, paras 2.79 - 2.82.

It follows that where the original disputed debt is superseded by a compromise, no *condictio indebiti* lies for repetition on the ground that that original, disputed debt was in truth not due.[15] The theory that a compromise creates a new contractual debt separate from the original debt should not be taken too far where the original debt is tax. The amount due under such a compromise should be treated as due by way of tax (rather than as a new contractual debt) if it is to continue to attract the legislation on collection and enforcement of taxes eg on interest and enforcement of arrears by summary warrant diligence.

5. A compromise is very difficult to challenge successfully. It cannot be set aside except on the ground of fraudulent misrepresentation or fraudulent concealment, or something equivalent.[16]

6. In Scots law a compromise is strictly defined. To qualify as a compromise, an agreement must (1) be concerned with matters doubtful or debateable which have arisen between the parties; (2) be entered into for the deliberate avoidance of the hazard of litigation or diligence; and (3) give effect to a mutual surrender (quittance or abatement) of rights.[17] There must be give and take on both sides; an agreement which is all give on the one side and all take on the other, is not a compromise. Thus in *Hunter* v *Bradford Property Trust Ltd*[18], where a party refused to carry out his legal obligation unless the other party made a concession and the other party did so, the House of Lords held that that was not a compromise under Scots law.

(b) The plea of *res judicata*

7. In Scots law, a plea of *res judicata* is to the effect that the question in the action has

[15]See Scot Law Com No 95, vol 2, para 2.79, p 88 n 5.

[16]*Ibid*, para 2.81, p 90, n 3.

[17]*Ibid*, para 2.79 citing (at p 89 n 1) *Evenoon Ltd* v *Jackel & Co Ltd* 1982 SLT 83 at p 86 per Lord President Emslie.

[18]1970 SLT 173 (HL).

already been decided between the parties[19]. More fully:

> "when a matter has been the subject of judicial determination pronounced *in foro contentioso* by a competent tribunal, that determination excludes any subsequent action in regard to the same matter between the same parties or their authors, and on the same grounds."[20]

There are five requirements.[21] (1) There must be a prior decision by a competent court or tribunal. (2) The decree must be pronounced "*in foro contentioso*" without fraud or collusion, eg a decree of payment or of absolvitor (including such a decree proceeding on a compromise, consent, or joint minute[22]) or decree of absolvitor by default[23]. But a decree in absence[24], not being *in foro*, will not support the plea.[25] Neither will a decree of dismissal[26] whether based on

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[19]Or between other parties but binding the pursuer.

[20]I D Macphail, *Sheriff Court Practice* (1996) para 2-103.

[21]See *Stair Memorial Encyclopaedia* vol 17 (1989) s v "Procedure", para 1102; Macphail, *Sheriff Court Practice* paras. 2-103 to 2-108.

[22]Macphail, *Sheriff Court Practice* para 2-105, fn 27: it is unnecessary that the Court should have applied its mind to the case and given a considered judgment on it.

[23]*Forrest v Dunlop* (1875) 3 R 15.

[24]A decree in absence is granted where the defender fails to enter appearance in an action against him, despite the fact that the summons or initial writ served on him cited him to appear and certified that he would be liable if he failed.

[25]Macphail, *Sheriff Court Practice* para 2-105, fn 28.

[26]A decree of dismissal is granted where the defender has entered appearance in the action but the action has been disposed of on the basis of a preliminary plea (eg no title to sue; no jurisdiction; action incompetent in form) rather

irrelevancy or incompetency[27], or granted of consent.[28] As between the two court actions or proceedings, there must also be identity (3) of subject matter or object of the actions; (4) of grounds of action in law or in fact (*media concludendi*); and (5) of parties or parties' interests. The rationale is the State's interest in the finality of litigation and the hardship that a man should be vexed twice for the same cause[29]

8. At one time the principle clearly was that a pursuer could raise as many actions having the same object as he liked provided the *media concludendi* (grounds of claim) differed: even if the pursuer could have relied on all the *media concludendi* in his first action, the plea of "competent and omitted" did not bar him from relying on them in the second action[30], though there were and are some restraints against vexatious litigation.[31] In the

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than on the merits. The action as laid is dismissed but the pursuer may bring a new action on the same ground.

[27]*Russel* v *Gillespie* (1859) 3 Macq 757; 21 D (HL) 13 (irrelevancy); *Menzies* v *Menzies* (1893) 20 R (HL) 108 at pp 110,111(irrelevancy); *Duke of Sutherland* v *Reed* (1890) 18 R 252 (incompetency).

[28]eg *Margrie Holdings Ltd* v *City of Edinburgh D C* 1994 S L T 971. Where decree of dismissal is granted in circumstances where the appropriate decree would have been absolvitor the court will nevertheless apply the rule that a decree of dismissal is not *res judicata*: eg *Stewart* v *Greenock Harbour Trs* (1868) 6 M 954 (dismissal after defences lodged); *Cunningham* v *Skinner* (1902) 4 F 1124 (dismissal for default after pursuer failed to find caution for defences).

[29]*Lockyer* v *Ferryman* (1877) 4 R (HL) 32 at 42 per Lord Blackburn.

[30]*Macdonald* v *Macdonald* (1842) 1 Bell's App 819.

[31]Macphail, *Sheriff Court Practice* para 2-112, fn 61; eg by the court's exercise of its power to award expenses;see also Vexatious Actions (Scotland) Act 1898. As P R Beaumont, "Competent and Omitted" 1985 S L T (News) 345 points out (at p 349), Stair, *Institutions* IV,40,16 suggested that the rule might be altered by statute "to exclude

Boyd and Forrest case[32] however doubt was cast on that principle[33], or at least on its scope. On the basis of that case, it has been argued that:

> "if the object of the action ...is to get a sum of money then a failure in that action will preclude subsequent actions seeking the same sum of money even if the grounds of claim have altered. Therefore, in the context of simple petitory actions Scots law does not require identity of the object of the claim and identity of the grounds of the claim before res judicata will operate; only the former".[34]

This view is not (or not yet) taken in the standard textbooks, is not easy to reconcile with some cases,[35] and is not free from doubt. There is authority that the pursuer might be personally barred from relying on a new *medium concludendi* by a combination of opportunity to rely on it in the first action and excessive delay in raising the second.[36]

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pursuers from multiplying processes upon mediums competent and known [at] the time of the first process...".

[32]*Glasgow and South-Western Rly Co* v *Boyd and Forrest* 1918 S C (HL) 14.

[33]Ibid at p 30 per Lord Shaw of Dunfermline:"It would not be very creditable to any system of jurisprudence , and I am not prepared to admit that it is the law of Scotland".

[34]P R Beaumont, "Res Judicata and Estoppel in Civil Proceedings" 1985 S L T (News) 133 at p 134.

[35]In *Malcolm Muir Ltd* v *Jamieson* 1947 S C 314 which concerned two actions for payment of different sums under the same contract, Lord Mackay (at pp 321,322) rejected a plea of *res judicata* on the ground that though the subject matter was the same, the *media concludendi* were different. Lords Jamieson and Stevenson held that the claims were different. See also *Margrie Holdings Ltd* v *City of Edinburgh D C* 1994 S L T 971 (action of payment of grant wrongfully withheld; action of damages for extra cost of borrowing following wrongful withholding: *media concludendi* held different).

[36]*Lockyer* v *Ferryman* (1877) 4 R (HL) 32.

9. The reason why a decree of dismissal is not *res judicata* is that such a decree merely upholds the defender's plea as to the competency or relevancy of the pursuer's action. The fact that an action is found to be incompetent or irrelevant should not prevent the pursuer from raising an action which is competent and relevant.[37] The reason why a decree in absence is not *res judicata* is that:

> "where the defender does not appear, he cannot be said to have referred his cause to the decision of the Court in virtue of the contract implied in litiscontestation, which is the true ground upon which a decisive sentence becomes final".[38]

(c) The plea of "new matter coming to notice" ("*res noviter veniens ad notitiam*")

10. Where the foregoing five requirements of the plea of *res judicata* are established, the plea may nevertheless be overcome by a successful plea of *res noviter veniens ad notitiam*. This plea enables a party to found on new matters of fact supporting the conclusion or crave of his action, or new evidence supporting facts on which proof has already been led.[39] It may be pleaded in a second action brought to reduce the decree *in foro* which is alleged to be *res judicata*.[40] So where a person, who has paid a sum due under a decree *in foro* for payment, subsequently discovers a new fact (eg a previous payment) or new evidence (eg a written receipt or voucher) showing that in truth he was not liable, then unless there was a compromise, he may reduce the decree invoking *res noviter*.

11. The plea of *res noviter* however relates only to unknown matters of **fact** coming to the party's

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[37]*Duke of Sutherland* v *Reed* (1890) 18 R 252 at p 257 per Lord President Inglis.

[38]Erskine, *Institute* IV,3,6.

[39]Macphail, *Sheriff Court Practice* paras 2-109 to 2-110.

[40]There must be very specific averments explaining why the new facts or new evidence were not, and could not by due diligence be, founded on in the first action.

knowledge: a pure matter of **law** can never amount to *res noviter*[41]. Accordingly, if money was paid pursuant to a decree *in foro* for payment, the payer cannot rely on *res noviter*, to let in a reduction of the decree for payment and recovery of the payment, by alleging that the decree proceeded upon a view of the law which he has subsequently discovered to be erroneous.

(d) The plea of "competent and omitted" defences

12. The plea of "competent and omitted" prevents the unsuccessful defender in the first action from challenging the judgment in that action on the ground that he omitted to put forward a competent and good defence in that action.[42] The rationale is finality in litigation and prevention of abuse of judicial process.[43] The plea is available only against defenders on the theory that "the judgment in favour of the defender is not an absolute affirmation of his rights but is merely negative of the grounds put forward by the pursuer, and cannot extend beyond those grounds".[44]

13. It makes no difference if the competent and omitted defence was a legal argument whose omission

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[41]*Stewart* v *Gelot* (1871) 9 M 1057 (ignorance of law of foreign country in which payer resident at the time of payment); *Encyclopaedia of the Laws of Scotland* vol 12 (1931) para 1225.

[42]Macphail, *Sheriff Court Practice* paras 2-111 to 2-112; P R Beaumont, "Competent and Omitted" 1985 S L T (News) 345; Stair, *Institutions* IV,1,50 and 51. The plea was authorised by early legislation eg an Act of Sederunt of 1649 (against sustaining reasons of suspension which were competent and omitted in the first decree of suspension); Act 1471 c.41; Courts Act 1672, c.16.

[43]Stair, *Institutions* IV,1,50: "litigious parties might draw pleas to a great length, by forbearing to propone all that they might propone in law, or in fact, before sentence , and might again suspend upon new grounds, and so make as many processes and decreets as they could have defences; whereby the litigious would overthrow the innocent, and the rich, the poor,by wearing them out...".

[44]Macphail, *Sheriff Court Practice* para 2-112.

was attributable to the ignorance or error of law of defender's counsel.[45]

(e) Defence of waiver of objections to payment

14. In English law, an authority frequently cited to support the defence of "submission to an honest claim" is the statement of Parke B in *Kelly* v *Solari*[46] concerning repayment of money paid under a mistake of fact:

> "If indeed the money is intentionally paid without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to receive it; but if it is paid under the impression of the truth of a fact which is untrue, it may generally speaking be recovered back...".[47]

Insofar as *Kelly* v *Solari* held that negligence in making payment was not a requirement of restitution of money paid under error of fact[48], it was inconsistent with the old rule of Scots law that

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[45]Cf. Stair, *Institutions* IV, 1,50: "And as for alledgeances *in jure, ignorantia juris neminem excusat;* and if parties do not employ skilful advocates, it is their own fault and ought not to prejudge others",..."

[46](1841) 9 M & W 54 at p 59.

[47]S Arrowsmith, "Mistake and the Role of 'Submission to an Honest Claim'" in A Burrows (ed), *Essays on the Law of Restitution* (1991) 17 has examined the role of the concept of "submission to an honest claim" in the context of restitution for mistake under English law. She argues that it is irrelevant whether or not the payment is made in response to a legal claim and that it is preferable to refer to the doctrine of *Kelly* v. *Solari* as one of "waiver" of objections to payment rather than as one of "submission to an honest claim".

[48](1841) 9 M & W 54 at p 59 per Parke B.

the error must be excusable[49], but that rule has been abrogated by the *Morgan Guaranty* case.[50]

15. *Kelly* v *Solari* has been relied on in Scots law for the proposition that money paid waiving all inquiry into, or all objections to, the claim is not recoverable, and that aspect of the decision is consonant with Scots law.[51]

(f) Demand for payment inducing error as an equitable defence

16. Scots law has provided equitable defences (including "change of position") to repetition actions based on error for three centuries[52]. In English law, the defence of "change of position" was introduced by *Lipkin Gorman* v *Karpnale*[53] only in 1991.

(3) The English law on finality of litigation

17. **The English concept of compromise.** It is not clear to us whether compromises in English law are the same in their requirements, incidents and effects as in Scots law.[54] It seems that in English law, an element of concession or "consideration" on each side is required[55]. Scots law does not use the concept of "consideration"

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[49]Scot Law Com DP No 95, vol 2, paras 2.33 ff.

[50]1995 SLT 299.

[51]See *Balfour* v *Smith and Logan* (1877) 4 R 454 at p 462 per Lord Shand; *Dalmellington Iron Co Ltd* v *Glasgow and S W Rly Co* (1889) 16 R 523 at p 534 per Lord Rutherfurd Clark ("There is high authority for the proposition..." seems to be a reference to *Kelly* v *Solari*); *National Bank of Scotland* v *Lord Advocate* (1892) 30 SL Rep 579 at p 582; *Moore's Exors* v *McDermid* (1913) 1 SLT 278 at p 280 per Lord Ormidale; cf *Mactavish's J F* v *Michael's Trs* 1912 SC 425 at p 429 (Arg).

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

[53][1991] 2 AC 548 (HL).

[54]For the English law, see Law Com No 227, para 2.36.

[55]*Idem*.

here. We are uncertain whether in English law there is a theory that a compromise creates a new debt replacing the original debt (if any).

18. **The English doctrine of "submission to an honest claim".** Law Com No 227[56] analyses the English doctrine of "submission to an honest claim", quoting[57] the following classic statement of it:

> "[T]he principle of law is not that money paid under a judgment, but that money paid under the pressure of legal process cannot be recovered. The principle is based upon this, that when a person who has had an opportunity of defending an action if he chose, but has thought it proper to pay the money claimed by the action, the law will not allow him to try in a second action what he might have set up in the defence to the original action."[58]

It seems that "submission to an honest claim" has close links with the English doctrine of compromise. Apparently the two doctrines (which are both aimed at achieving finality of transactions) are not always clearly distinguished. As we have just seen, however, compromises in Scots law are distinct from payments in response to a demand by the payee.

19. The English doctrine of submission to an honest claim is not part of Scots law. If that phrase is taken to mean compliance with a non-fraudulent demand for payment, it certainly does not ground a defence in Scots law. Indeed submission to an honest claim, far from being a defence to an action for repetition, is not merely neutral or irrelevant but may be, and often is, a factor favouring liability in repetition. We revert to this below.[59]

20. **The English doctrine of *res judicata*.** It appears also that the English doctrine of "submission to an honest claim" is closely linked

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[56]Paras 2.25 - 2.38.

[57]At para 2.35.

[58]*Moore* v *Vestry of Fulham* [1895] 1 Q B 399 at pp 401,402 per Lord Halsbury.

[59]See para 23.

to their principle of *res judicata*.[60] Historically it seems that the former developed from the latter.[61] That principle is described by the Law Commission[62] as follows:

> "The principle of *res judicata* means that '[a] judicial decision is conclusive as between the parties'.[63] The principle also has a wider meaning - the process of the court cannot be abused[64]. This proposition has been judicially considered on several occasions, and has two rather disparate aspects. the classic statement of the law is in the judgment of Wigram VC in *Henderson* v *Henderson*:[65]
>
> > [t]he plea of res judicata applies, except in special cases, **not only to points of law upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time (emphasis added).**"

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[60]Law Com No 227 para 2.26; citing *Arnold* v *National Westminster Bank* [1989] Ch 63 at pp 69,70 per Sir Nicolas Browne-Wilkinson VC;see also at paras 8.27, 8.28.

[61]See Beatson, *The Use and Abuse of Unjust Enrichment* (1991) pp 100,101: the rule that money paid under process of law is irrecoverable "developed from the principle that a judgment is conclusive between the parties, which eventually included claims at all stages of an action. Eventually a bare threat of litigation was equated with the commencement of an action, and thus claims that later proved to be unfounded came within the principle" (footnotes omitted).

[62]Law Com No 227, para 8.27.

[63]Citing L Rutherford and S Bone, *Osborn's Concide Law Dictionary* (8th edn, 1993) p 229.

[64]Citing *Supreme Court Practice* (1993) Ord 18, r 19.

[65](1843) 3 Hare 100, at p 115.

(3) Comparison of the Scots and English principles on finality of litigation

21. **Analysis by stage of recovery process.** The Law Commission[66] distinguish three types of case according to the stage in the debt recovery process at which payment is made, namely: (a) pursuant to a simple demand by the payee; (b) pursuant to a demand coupled with the payee's threat of legal proceedings; and (c) after commencement of legal proceedings. They also refer to compromises (which can occur at any stage). It is necessary to compare the Scots and English laws on the recovery of erroneous payments made at each of these three stages.[67]

(a) Bare demand for undue payment

22. **English law.** At stage (a), where payment is made following a simple demand, it appears that the doctrine of submission to an honest claim does not apply. According to the Law Commission, - "Money paid in response to a mistaken demand can be recovered, as there is neither a compromise nor submission to an honest claim."[68] This reasoning gives the concept of "submission to an honest claim" a technical meaning in English law. In ordinary language, a non-fraudulent, albeit mistaken, demand for payment is an honest claim.

23. **Scots law.** Where payment is made in response to a demand by or on behalf of the payee, Scots law seems to be as favourable to recovery as is English law. Where the Scottish courts consider a defence that repetition of an undue payment made in error would be inequitable, it is a factor favouring repetition that the payer's error was wholly or

[66]Law Com No 227, paras 2.25 - 2.38.

[67]For a comparison of the Scots and English doctrines of *res judicata*, see P R Beaumont, "*Res judicata* and estoppel in civil proceedings" 1985 S L T (News) 133, 141, and "Competent and omitted" 1985 S L T (News) 345.

[68]Law Com No 227, para 2.37, citing *Bayliss* v *Bishop of London* [1913] 1 Ch 127.

partly induced by the payee's representations or other conduct.[69]

24. Where the pursuers had purchased the tenancy of a quarry and sought repetition of an over-payment of the price, it was a factor strongly favouring repetition that the purchasers' erroneous belief that certain buildings belonged to the sellers had been induced by the seller's non-fraudulent misrepresentations.[70] Where sub-contractors submitted to the principal contractor an account for work done which included extra work not authorised by the sub-contract, but the terms of the account implied that the extra work was so authorised, it was held that the account was to some extent misleading and had contributed to the principal contractor's mistaken payment.[71] Where the payee shows that he is relying on the payer's assurances that the sum is due, a false assurance will clearly favour repetition.[72] Even the submission of a wrong account will by itself often make the error excusable.[73]

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[69]In *Dixon* v *Monkland Canal Co* (1831) 5 W & S 445, Lord Brougham L C said (at p 447) that the payer should recover where he had been "induced to pay by any ignorance impressed upon him, as it were, by the person procuring it to be paid..."; applied in *Balfour* v *Smith and Logan* (1877) 4 R 454 at p 461.

[70]*Duncan, Galloway & Co Ltd* v *Duncan Falconer & Co* 1912 S C 265.

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

[72]*Balfour* v *Smith and Logan* (1877) 4 R 454. At the time of payment, the payer was in doubt whether the sum claimed was due, did not have his account books accessible for checking, was expressly assured by the recipient that the sum was indeed due, and paid on that footing. It was held that he was entitled to recover.

[73]*Ibid* at pp 461, 462 per Lord Shand:"If a tradesman, by sending in his account after payment, and thus by plain implication representing it to be still due, should obtain payment twice, it is surely too plain for argument that he could not be heard to maintain that he was entitled to keep the money because if his customer had examined his vouchers he would have found the first receipt, and

25. Conversely, where the undue payment is "volunteered" without a prior demand by the putative creditor, there is a stronger case against repetition.[74] The court where necessary will examine business correspondence to ascertain who was mainly to blame for an erroneous payment.[75]

26. To sum up, in the case of undue erroneous payments made pursuant to a bare demand by the payee before the commencement of an action for payment, Scots law reaches broadly the same result as the English law but by a different route. Unlike English law, the Scottish courts, in considering an equitable defence, may have to "balance" or "adjust" the equities. But the payer will normally overcome that hurdle because the fact that the payee contributed to the payer's error will help to render repetition equitable.

(b) Payment pursuant to a demand accompanied by a threat to litigate

27. **English law.** At stage (b), the doctrine of submission to an honest claim applies where there are no proceedings for recovery but the payee makes a claim accompanied by a threat to sue: recovery will be denied[76]. According to the Law

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so avoided the mistake".

[74]In *National Bank of Scotland* v. *Lord Advocate*(1892) 30 SL Rep 579 (*condictio indebiti* for repayment of the stamp duty on a statutory licence which the pursuer bank erroneously thought was required in respect of one of its branches) the Lord Ordinary distinguished the *Balfour* v *Smith and Logan* (1877) 4 R 454 and *Dalmellington Iron Co* v *Glasgow and SW Ry Co* (1889) 16 R 523 on the ground that in these cases "the payment was not volunteered by the supposed debtor, but was made in response to a demand by the supposed creditor, who thus innocently or otherwise helped to induce the supposed debtor to waive inquiry. The present case, however, is less favourable to the party who paid in error.)

[75]*Credit Lyonnais* v *George Stevenson & Co Ltd* (1901) 9 SLT 93 (OH) (recipient company were held primarily to blame: repetition granted).

[76]*David Securities Pty Ltd* v *Commonwealth Bank of Australia* (1992) 66 ALJR 768 at p 788 per Dawson J; *Moore* v *Vestry of Fulham* [1895] 1 Q B 399, cited

Commission, - "If the policy is that a cause should not be permitted to be tried twice, there is no difference in principle between a threat to litigate and a demand made after commencement of the proceedings."[77] For Scots lawyers, this reasoning is difficult to follow because ex hypothesi, there has been no prior court action but only a threat to litigate; there is an element of fiction in treating a bare threat to litigate as if it were a trial.

28. **Scots law.** In a system such as Scots law which recognises that the putative creditor's demand may contribute to the payer's error and generally treats that contribution as a factor favouring liability, in principle the same result should follow where the payee's demand is coupled with a threat to raise an action for recovery or to initiate diligence or sequestration in bankruptcy.[78] The threat to litigate will not diminish the putative creditor's contribution to the payer's error; if anything such a threat may reinforce the error. At all events, there is no reason in principle or authority to suppose that a threat to litigate accompanying a demand renders a payment pursuant to the demand irrecoverable. Such a threat certainly does not attract the Scots doctrines of compromise or *res judicata* to the payment. In this respect, the Scots law differs radically from the English law.

(c) Erroneous payment after commencement of payee's court action for payment but before lodging of defences (litiscontestation)

29. **English law.** It seems that the doctrine of submission to an honest claim applies after commencement of legal proceedings, one reason being that "the giving up of a suit, instituted to try a question respecting which the law is doubtful, is a good consideration to support a promise".[79] The

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in Law Com No 227, para 2.35.

[77]Law Com No 227, para 2.35.

[78]Of course such a threat is not improper compulsion for the purpose of an action of repetition based on compulsion: cf Gloag *Contract* (2d edn) pp 489,490.

[79]*Longridge* v *Dorville* (1821) 5 B & Ald 117 at p 123; quoted in Law Com No 227, para 2.35.

doctrine of consideration supporting promises is not part of Scots law. Apart from that, we are not entirely clear why promises should be regarded as relevant in English law. Payment of a putative debt does not imply a promise not to sue for its recovery if it should turn out that the payment was in fact undue.

30. **Scots law.** In Scots law, whether a payment after commencement of the payee's court action for payment is recoverable depends on the type of decree disposing of the action which in turn depends generally on the stage which the action has reached. In the case of an extra-judical settlement submitted to the court, it will depend on the type of decree which the parties ask the court to pronounce.

31. If payment is made after commencement of the action but before lodging of defences (litiscontestation), decree of dismissal or decree in absence will not bar an action of repetition by the payer-defender since such a decree is not *res judicata*. If payment is made after lodging of defences accompanied the resulting decree will be in *in foro* unless the parties submit an extra-judicial settlement to the court and seek a decree of dismissal.

32. If payment is made after commencement of the action but before lodging of defences (litiscontestation), then just as the putative creditor's demand, whether or not coupled with a threat to commence legal proceedings, may contribute to the payer's error in making an undue payment, so also the putative creditor's commencement of a court action may so contribute. If such commencement does so contribute, then in principle that is a factor favouring recovery by the payer. If such commencement does not so contribute, then it is merely neutral on the question of the payer's enforcement of his right to recover the undue payment: it does not bar such enforcement. In particular, the putative creditor's commencement of a court action certainly does not, by itself, attract the Scots doctrines of compromise or *res judicata* to the payment. In this respect also, the Scots law differs radically from the English law.

APPENDIX B

LAW COMMISSION'S DRAFT CLAUSES AMENDING TAXES MANAGEMENT ACT 1970 (taken from Law Com No 227, Appendix B)

Amendment of the Taxes Management Act 1970

Recovery of overpaid tax.

A. For section 33 of the Taxes Management Act 1970 there shall be substituted the following sections—

"Recovery of overpaid tax.

33.—(1) Where a person has paid an amount by way of tax which was not tax due from him, the Board shall (subject to this section and section 33AA below) be liable to repay the amount to him.

(2) The Board shall only be liable to repay an amount under this section on a claim in writing made to them for the purpose.

(3) No amount may be claimed under this section after the expiry of 6 years from the date on which it was paid, except where subsection (4) below applies.

(4) An amount paid by reason of a mistake may be claimed under this section at any time before the expiry of 6 years from the date on which the claimant discovered the mistake or could with reasonable diligence have discovered it.

(5) The Special Commissioners shall hear and determine any appeal brought from the decision of the Board on a claim under this section.

(6) Except as provided by this section or by or under any other enactment, the Board shall not be liable to repay an amount paid to them by way of tax by virtue of the fact that it was not due.

(7) References in this section to "tax" include references to interest on tax.

Defences to claims for repayment of overpaid tax.

33AA.—(1) The Board shall not be liable to repay an amount claimed under section 33 above if or to the extent that a defence under this section applies to the claim.

(2) It shall be a defence to a claim made on any ground that the ground was considered on an appeal by the claimant against an assessment relating to the amount in question.

(3) It shall be a defence, in the case of a claim made on a ground that has not been put forward by the claimant on an appeal against an assessment relating to the amount in question, that the ground was or by the exercise of due diligence should have been known to the claimant—

(a) if no such appeal has taken place, before the end of the period in which he was entitled (under section 31 above) to bring an appeal, or

(b) if such an appeal has taken place, before the hearing of the appeal.

(4) It shall be a defence to any claim that the amount in question was paid—

(a) in pursuance of an agreement between the claimant and the Commissioners settling proceedings relating to the payment of that amount; or 5

(b) in consequence of proceedings enforcing the payment of that amount being brought by the Commissioners.

(5) It shall be a defence to any claim that the repayment of the amount in question would unjustly enrich the claimant. 10

(6) In the case of a claim made on the ground that the amount in question was paid in accordance with an erroneous view of the law, it shall be a defence that— 15

(a) the view in accordance with which the amount was paid was a settled view of the law, and

(b) the amount was, on that settled view, tax due from the claimant,

notwithstanding that a subsequent decision of a court or tribunal departs from that settled view. 20

This subsection does not apply to a claim made on any ground depending on the invalidity of any subordinate legislation.

(7) A view of the law may be regarded for the purposes of subsection (6) above as settled notwithstanding that it was not held unanimously or had not been the subject of a decision by a court or tribunal." 25

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