Perhaps, the main importance of *Re Lysaght*[10] lies in its extension of the court's notion of impracticability. In previous cases judges have not insisted that it must be absolutely impossible to carry out the trust before it will fail for impracticability. In cases such as *In Re Dominion Students' Hall Trust*[11] judges have urged that a wide significance should be given to the notions of impracticability. In that case it is easy to see that the clause of racial discrimination would make the trust difficult to execute since it is virtually contrary to the aim of the trust, namely, the promotion of inter-Commonwealth relationships. Unlike the above case, the gift in *Re Lysaght*[12] is not so clearly impracticable. It had become impracticable to carry out the trust because the trustees claimed that the gift was 'alien to the spirit of the college's work.' In effect, the Royal College of Surgeons was saying that it did not like the gift with the religious conditions included and would not accept the trust so long as the conditions remained. Buckley J. has clearly extended the notions of impracticability by holding that the trustees dislike for such a gift in these circumstances was sufficient to make the trust impracticable.

As a result of *Re Lysaght*[13] it will be interesting to note in the future whether universities, hospitals and other such institutions which have already accepted charitable gifts, subject to discriminatory conditions, will seek to have such restrictions removed by arguing that the spirit of the institution has changed so that it has become impracticable to carry out the trust.

JAN BOXALL

BANK OF NEW SOUTH WALES v. DERI[1]

Quasi-contract—Money had and received under a mistake of fact—Payment of stopped cheque—Whether money recoverable by Bank.

A case of some interest to both banks and customers with regard to payment, by mistake, of stopped cheques was decided in N.S.W. District Court in 1964 by Clegg D.C.J. In *Bank of N.S.W. v. Deri*[2] the plaintiff bank sued to recover £400 paid to the defendant Deri[3] on a cheque drawn by a Mrs Irene Wieder—a customer of the plaintiff bank. Mrs Wieder entered negotiations for the purchase of a business from Mr and Mrs Deri. In the course of these negotiations Mrs Wieder handed the defendant (son of Mr and Mrs Deri) a cheque payable to 'cash' for the above amount. The negotiations, not having been concluded, Mrs Wieder called at the bank's office and, learning that the cheque had not yet been

10 [1965] 3 W.L.R. 391.
11 [1947] Ch. 183.
12 [1965] 3 W.L.R. 391.
13 *Ibid.*

1 (1963) 80 W.N. (N.S.W.) 1499. District Court, N.S.W.; Clegg D.C.J.
2 *Ibid.*
3 There was some doubt at the trial as to who actually cashed the cheque, Clegg D.C.J. was, however, satisfied that the defendant, Stephen Deri, had in fact been the person who presented it. *Ibid.* p. 1500.

cashed, stopped payment on it.[4] Four days later, the cheque was presented for payment. The teller handed over the money.

There is no doubt that there was negligence[5] on the plaintiff's part on two occasions: first, the ledger keeper's failure to stamp the words 'stop cheque' onto Mrs Wieder's ledger sheet and, secondly, when the teller looked up the ledger sheet, there were insufficient funds to meet the cheque whereupon the teller placed the cheque and the ledger sheet on the sub-manager's table, the latter negligently authorizing payment.

There was no assertion of fraud and it appeared that the defendant presented the cheque without knowing it to have been stopped.[6]

Clegg D.C.J. held that under these circumstances the money was recoverable as money had and received under a mistake of fact.

In deciding the case, Clegg D.C.J. held that the facts of the case brought it squarely within the operation of the principle in *Kelly v. Solari*.[7]

In the case of *Kelly v. Solari*[8] the deceased husband of the defendant had taken a life insurance policy with the insurance company for whom the plaintiff worked. Before his death the defendant's husband had forgotten to pay his premium. Upon his death, the defendant (who was his executrix) proved the will and applied for payment—getting a cheque in due course. The directors who drew the cheque had overlooked the fact that on the policy, the word 'lapsed' had been written.[9] On appeal, the Court of Exchequer Chamber reversed a judgment for the defendant, holding that regardless of the plaintiff's negligence, he was entitled to recover:

> I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it.[10]

And moreover,

> . . . if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact.[11]

4 The usual procedure when payment of a cheque is stopped is: the customer is required to sign an order requesting payment to be stopped, the order is then presented to the manager or accountant for perusal, and to each teller who peruses and initials it; it then goes to the ledger keeper who enters particulars of the cheque on the customer's ledger sheet and affixes a rubber stamp with the words 'stop cheque' onto the ledger sheet. In this case, the ledger keeper had omitted to affix the stamp required. *Ibid.* 1499-1500.

5 *Ibid.* 1504. 6 *Ibid.* 1503.

7 (1841) 9 M. & W. 54; 152 E.R. 24. *Bank of N.S.W. v. Deri* (1963) 80 W.N. (N.S.W.) 1499, 1503. 8 (1841) 9 M. & W. 54; 152 E.R. 24.

9 *Ibid.* 10 *Ibid.* Per Parke B. 152 E.R. 24, 26.

11 *Loc. cit.* These propositions have repeatedly been sanctified by subsequent decisions as being of the highest authority. In *R. E. Jones Ltd. v. Waring & Gillow Ltd.* [1926] A.C. 670, 689 Per Lord Shaw of Dunfirmline: 'I am not aware that in the whole course of the decisions . . . an assault upon *Solari's case* has ever been successful, and since its date in 1841 it has . . . remained of paramount authority as part of the law of England'.

It will be seen that this is not so much a principle guarding against 'unjust enrichment' such a principle is subsumed in the entire case—but rather, that the payer will not be unjustly deprived; after all, the defendant may in fact be entitled to money, but may get it from a party no longer under an obligation to pay, in which case, such money would probably be recoverable, since *Kelly v. Solari*[12] places the emphasis on the *payer's* mistake.

The other case which Clegg D.C.J. considered in detail, was that of *Chambers v. Miller.*[13] In this case the plaintiff presented a cheque to the cashier (one of the defendants), who placed the money on the counter. The plaintiff collected it. Upon checking the drawer's account, the defendant found it to be considerably overdrawn and demanded the money back. The plaintiff, who returned the money after having been detained, sued for assault and false imprisonment. It was held that as the property in the money had duly been passed to the plaintiff, the defendant had no lawful excuse for trying to get it back by detaining the plaintiff. Adverting to the question of mistake, the Court held that there had been no mistake.[14] It is necessary to add, however, that the mistake to which the judges referred related more to questions of consent to the passing of property for the purpose of the law relating to criminally obtaining property; so that the same type of mistake would not necessarily apply to a case where the plaintiff concedes that he had in fact passed property, but asserts that he was mistaken in thinking he was obliged to do so. From this it would seem that Clegg D.C.J. was perfectly correct in saying that *Chambers v. Miller*[15] has been used by some text book writers to support propositions which are not justified by the decision,[16] and that it is in fact no bar to recovery in an action for money had and received under a mistake of fact.

There is thus a vital distinction to be made between passing property intentionally so that the payee cannot be forced to return it, as in *Chambers v. Miller*[17] and passing property intentionally, but doing so because of a mistake of fact which induces the payer to believe that he is under an obligation to pay—as in *Kelly v. Solari.*[18] It is thererefore interesting to speculate on whether the defendant in *Chambers v. Miller*[19] would have recovered the money in an action for money had and received under a mistake of fact, rather than by trying to recover it by force. On principle it would seem that he would have succeeded in such an action. It was therefore not necessary for Clegg D.C.J. to distinguish *Miller's case* on the hair-splitting point that there the mistake had been as to an overdrawn account rather than a 'stopped cheque'[20]—all that was necessary to say was

12 (1841) 9 M. & W. 54; 152 E.R. 24.
13 (1862) 13 C.B.N.S. 125; 143 E.R. 50.
14 *Ibid.* Erle C.J., p. 53; Williams J., p. 54; Byles J., p. 54; Keating J., p. 55.
15 *Ibid.*
16 *Bank of N.S.W. v. Deri* (1963) 80 W.N. (N.S.W.) 1499, 1503.
17 (1862) 13 C.B.N.S. 125; 143 E.R. 50.
18 (1841) 9 M. & W. 54; 152 E.R. 24.
19 (1862) 13 C.B.N.S. 125; 143 E.R. 50.
20 *Bank of N.S.W. v. Deri* (1963) 80 W.N. (N.S.W.) 1499, 1503.

that *Miller's case* simply did not relate to an action for recovery of money paid under a mistake of fact.

On the question of negligence Clegg D.C.J. again applied the principle of *Kelly v. Solari*[21] holding that the plaintiff's negligence did not alter the fact of the defendant's non-entitlement to get money from the bank,[22] with the proviso that the plaintiff could not recover where 'the position [of the defendant] . . . as a man of business, must have been altered before notice of the mistake was brought to his attention.'[23] In the present case, however, there had been no such defence.[24]

Another point of interest which arose in connection with the bank's mistake related to the nature of the mistake involved. As the plaintiff sued for recovery of money paid under a 'mutual mistake of fact',[25] argued the defendant, the bank could not recover because there had in fact been only a 'unilateral' mistake on the part of the plaintiff—the defendant never having adverted to the validity of the cheque.[26] Clegg D.C.J. held that in fact there had been a common mistake of fact.[27] But in holding that nothing turned on this,[28] Clegg D.C.J. again underlined the fact that the essence of the action is whether the payer paid under the impression that he was obliged to do so—this would certainly apply to all three types of mistake and especially where the payer's mistake is unilateral since there, it would certainly be unconscionable for the payee to retain the money.

The decision in *Bank of N.S.W. v. Deri*[29] would thus seem to be quite sound.

Complications will arise, though, in a more complex situation involving our cheque clearance system. For example, the case in which drawer and

21 (1841) 9 M. & W. 54; 152 E.R. 24, 26.

22 *Bank of N.S.W. v. Deri* (1963) 80 W.N. (N.S.W.) 1499, 1503.

23 *Ibid.* p. 1503.

24 *Ibid.* p. 1504. The position with regard to the defence of altered situation is explored in detail by S. J. Stoljar, *The Law of Quasi-Contract* (*1964 Law Book Co. Ltd*). The limits of such a defence are necessarily vague and 'the case here rests on the whole relationship created by the payment under mistake'. *Ibid.* 33. It is clear that such 'prejudice' as is incurred must be something more than merely the recrediting of money paid. The relevant considerations will include: the interval elapsing between payment and notification of mistake—*London and River Plate Bank Ltd. v. The Bank of Liverpool Ltd.* [1896] 1 Q.B. 7, 11; the extent to which the defendant has committed himself in lieu of payment—*Brisbane v. Dacres* (1813) 5 Taunt. 143, 162; and whether or not the defendant still has money with which to repay.

In the present case, the interval between payment and notification of the mistake was one day only. *Bank of N.S.W. v. Deri* (1963) 80 W.N. (N.S.W.) 1499, 1500.

25 *Bank of N.S.W. v. Deri* (1963) 80 W.N. (N.S.W.) 1499, 1500.

26 *Ibid.* 1500.

27 For distinction between the three classes of mistake, Cheshire & Fifoot, *The Law of Contract* (Aust. Ed., 1966) p. 307. A *common* mistake is one where both parties make the same error. With a *mutual* mistake, the parties misunderstand each other and are 'at cross-purposes'. In the case of a *unilateral* mistake, only one party makes the mistake—the other knows, or must be taken to know of this mistake. Thus in an action for money had and received under a mistake of fact, it is clearly seen that the exact classification of the mistake is irrelevant since in all three instances, the payer is in fact paying under a misapprehension of his obligation to pay.

28 *Bank of N.S.W. v. Deri* (1963) 80 W.N. (N.S.W.) 1499, 1501.

29 *Ibid.*

payee are customers at two different banks. Is the paying bank to sue the collecting bank or the payee? Quite clearly, there is no mistake as between the payee and the paying bank. On the other hand, the collecting bank was acting merely as agent for collection on behalf of the payee. Again, is there in fact a mistake? The basis on which cheque clearance operates, and the enormous number of cheques cleared each day would certainly give rise to the implication that there was no mistake—neither the banks having adverted to the question in the first place.

On the question of there being a mistake as between the clearing banks, some authority may be derived from the reaction of the High Court in *Porter v. Latex Finance (Qld.) Pty. Ltd.*[30] against the formulation of a 'mistake' in relation to an action which is induced by it—in cases such as *Aiken v. Short.*[31] Thus Barwick C.J. pronounced.

> It is preferable in my opinion to test the matter by determining whether the mistake is fundamental to the transaction, properly identifying the transaction and the relationship of the mistake to it.[32]

Clearly, the fact that a cheque had been stopped is 'fundamental' to the notion of its being a valid subsisting authority to pay. In the final analysis, however, 'the question in issue is always whether a mistake *should* be treated as fundamental and in deciding this question the court will usually have to seek a balance between competing policy considerations, such as . . . the need to safeguard the security of transactions and the desirability of preventing unjust enrichment.'[33]

Lest it be thought that the odds are too much against an innocent recipient of money (on a cheque which had been stopped), who may after all have a legitimate claim to receive money, it must be pointed out that this legitimate claim is after all against the drawer of the cheque, and that, as the bank credits the drawer's account without valid authority, it stands to lose with no remedy; whereas the payee may proceed against the drawer to recover money legally payable to him.

R. RICHTER

30 (1964) 38 A.L.J.R. 184; [1965] A.L.R. 3.
31 (1856) 1 H. & N. 210; 156 E.R. 1180.
32 *Porter v. Latec Finance (Qld.) Pty. Ltd.* (1964) 38 A.L.J.R. 184, 187; [1965] A.L.R. 3, 8.
33 R. A. Samek, 'Money Paid Under a Mistake of Fact and Mistake in Contract' (1965) 39, Australian Law Journal 116, 124.