THE BANK'S RIGHT TO RECOVER ON CHEQUES PAID BY MISTAKE

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On a Saturday A buys a motor-car from B. He gives B a cheque in payment and drives off in the car. He is soon dissatisfied with the car. Before banking hours on Monday morning, he instructs his bank not to pay the cheque. B, unaware that the cheque has been stopped, presents it to a teller as soon as the bank is open for business. The teller, who has not been informed of A's instructions, pays B cash for the cheque. When the error is discovered, the bank notifies B, who refuses to refund the money. In *Commonwealth Trading Bank v. Reno Auto Sales Pty Ltd*,[1] Gillard J. decided that in such circumstances the bank is unable to recover the money from B.[2]

It is proposed in this article to review generally the law relating to the recovery of a payment made by a drawee bank on a cheque, where the payment would not have been made if the person making the payment had not been mistaken. Examples[3] of such mistake come readily to mind. The person paying may think that the customer's account is sufficiently in credit to meet the cheque, when it is not. Similarly, he may overlook the fact that the customer has closed his

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1 [1967] V.R. 790. An unreserved judgment.

2 On the actual facts of the case before him, Gillard J. held that the drawer of the cheque had not effectively countermanded payment. However, His Honour went on to consider the law on the assumption that payment had been stopped. Only the decision on the latter point falls within the scope of this article. Yet the writer, with all respect, would not want it to be thought that he finds the decision that there was no countermand acceptable. Neither of the authorities relied on by the learned Judge supports his reasoning fully. *Curtice v. London, City and Midland Bank Ltd* [1908] 1 K.B. 293 (C.A.) was concerned with whether the customer had effectively communicated his countermand to the bank and with whether an unauthenticated communication is sufficient. In the present case the customer's wife spoke by telephone to an employee of the bank. No doubt was expressed as to the genuineness of the communication. If there had been a doubt, it could have been allayed by telephoning the customer. His Honour thought that there might be a duty to communicate with someone higher in status than the telephonist, but he did not rest his decision on this. The telephonist was apparently authorized by the bank to receive instructions to stop payment, since she testified that she would have filled in the appropriate forms if she had not foolishly believed that the cheque would not be presented until at least the following day. *Westminster Bank Ltd v. Hilton* (1926) 136 L.T. 315 (H.L.) was decided on the ground that where a principal gives ambiguous instructions to an agent, the principal cannot complain if the agent reasonably interprets the instructions in a way contrary to the principal's true intention. With respect, it is difficult to see what construction the bank in the present case could reasonably have put on the instructions other than not to pay the cheque, either at all or until the customer himself called at the bank.

The writer readily admits that in setting out the facts in the text, he has used emotive language designed to evoke the reader's sympathy for A, rather than for B, in their dealings concerning the car. His Honour's language has the reverse effect. Thus he speaks of A having 'repented of his bargain', where I have said that he was 'dissatisfied with the car'.

3 The list which follows does not purport to be exhaustive.

account. He may think that the drawer's signature is that of a customer, whereas it is a forgery. He may not know that an indorsement has been forged. He may by mistake pay more than the amount appearing on the face of the cheque; or he may pay that amount when it has been fraudulently increased above the amount for which the cheque was drawn. He may be mistaken as to the identity of the person he pays. He may not notice that the cheque is post-dated or 'stale'. In some of the instances mentioned, the bank would be entitled to debit its customer's account with the amount paid; in others, it would not be. Whether or not it may debit its customer, it may prefer to seek recovery of the amount paid (or overpaid) from the person to whom payment was made, who will be called 'the recipient'.[4]

If the recipient knew of the bank's mistake at the time when he received the money, he would undoubtedly be obliged to repay the bank. In many such cases, the recipient's conduct would amount to fraud, whether he deliberately induced the mistake by a positive false representation or by the concealment of relevant facts. In such circumstances, the bank might sue him for damages for deceit or waive the tort and sue for money had and received.[5] Thus in *Holt v. Ely*[6] the plaintiff, who, though a solicitor, was acting in effect as the banker of the drawer of certain bills, was held entitled to recover from the defendant who had represented that he held such a bill.[7] An example of fraudulent concealment is, perhaps, *Martin v. Morgan*,[8] where the defendants, contrary to a statute, took a post-dated cheque drawn on the plaintiffs. When they presented the cheque, the defendants knew that the drawer was insolvent, whereas the plaintiffs, while aware that they held no funds on his behalf, expected to receive money from the drawer. In holding the plaintiffs entitled to recover the payment they had made, some members of the Court relied on the illegality attendant on the drawing of the post-dated cheque, but all agreed that the plaintiffs were entitled to succeed because of the lack of equality between the parties as to knowledge of the drawer's insolvency.

It is possible that the recipient, though aware of the true facts, is nevertheless innocent of fraud. He would still be obliged to restore the money. There is ample authority permitting recovery by the drawer of a cheque whose agent, to the knowledge of the recipient,

[4] 'The recipient' has been chosen in preference to 'the payee' to avoid confusion between the designated payee on a cheque or other bill of exchange and the person who actually receives payment. If the bill has not been negotiated, the recipient will be the payee, except in cases of mistaken identity.

[5] See Goff & Jones, *The Law of Restitution* (1966), pp. 70-71.

[6] (1853) 1 El. & Bl. 795, 118 E.R. 634.

[7] The Court rejected the argument of Bramwell for the defendant that the drawer alone could sue. Similar arguments were rejected in *Banque Belge pour L'Etranger v. Hambrouck* [1921] 1 K.B. 321 (C.A.) and *Colonial Bank v. Exchange Bank of Yarmouth, Novia Scotia* (1885) 11 App. Cas. 84 (J.C.).

[8] (1819) 1 Brod. & B. 289, 129 E.R. 734.

has abused his authority in signing on the drawer's behalf.[9] It is more difficult to find authority permitting the drawee to recover. In *Kendal v. Wood*[10] the Exchequer Chamber allowed the acceptor of a bill drawn in respect of a partnership debt to recover the payment when the defendants had previously received money out of partnership funds, but had credited that money to a partner's personal account. However, Blackburn J., among others, rested his judgment to some extent on the lack of voluntariness in the plaintiff's acceptance and payment of the bill in order to save the credit of his father, the drawer. Although *Natal Bank Ltd v. Roorda*[11] was a case where the recipient knew that payment of the cheque had been stopped, no point was made of this in the judgment. Despite this lack of direct authority,[12] it is implicit, if not always explicit, in most of the decisions discussed in the rest of this article that, where recovery has been denied, the denial is dependent on the absence of knowledge on the part of the recipient. Where recovery has been permitted in the absence of knowledge, it will be allowed *a fortiori* where the recipient knew of the payor's mistake. In the rest of this article it will be assumed that the recipient was ignorant of the payor's mistake. To use the terminology of Dr Cheshire and Mr Fifoot,[13] we shall be concerned with common and mutual mistakes, but not unilateral ones.

In order to recover a payment it has made, the bank will base its claim on the action for money had and received to the use of the plaintiff on the ground of mistake. We shall consider first the authorities which relate generally to this action as they bear on the bank's right to recovery; then we shall look at the authorities directly relevant to some of the particular situations in which a bank might be mistaken.

[9] *John v. Dodwell & Co.* [1918] A.C. 563 (J.C.) and *Reckitt v. Barnett, Pembroke & Slater Ltd* [1929] A.C. 176 (H.L.) are two examples. An analogous case, not concerned with a cheque, is *Taylor v. Smith* (1926) 38 C.L.R. 48.

[10] (1871) L.R. 6 Ex. 243. Cf., also, the cases in note 7, supra.

[11] 1903 T.H. 298, discussed below.

[12] So far as general principles are concerned, cases such as *Larner v. L.C.C.* [1949] 2 K.B. 683 (C.A.) may be regarded as turning on the recipient's knowledge. In *R. E. Jones Ltd v. Waring & Gillow Ltd* [1926] A.C. 670 (H.L.), 696, Lord Sumner said that in *Kelly v. Solari* (1841) 9 M. & W. 54 the recipient probably knew, or at least ought to have known, of the mistake. His Lordship's dictum supports the view here put forward that recovery will be permitted where the recipient had the necessary knowledge, but in so far as it makes knowledge or imputed knowledge a requirement of recovery in every case, it is not borne out by the facts of *Kelly v. Solari* and numerous cases which have followed it. In the passage from Parke B.'s judgment in *Kelly v. Solari* quoted below, the learned Baron contemplated recovery 'in those cases in which the party receiving may have been ignorant of the mistake'.

[13] *The Law of Contract* (6th ed., 1964), p. 188; (Australian ed. 1966), p. 307. The purpose of their classification is mainly to throw light on the effect of mistake on the *formation* of a contract. We shall mostly be concerned with the effect of mistake on *performance* of a contractual or other obligation. The classification is nonetheless a convenient one.

GENERAL PRINCIPLES

Any discussion of the action for the recovery of money paid by mistake must almost necessarily commence with the well known passage in the judgment of Parke B. in *Kelly v. Solari*,[14] which reads:

> 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 payor that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake.

This passage has often been approved and applied.[15] There are three alleged requirements of the cause of action which are sometimes thought to be derived from the passage—particularly from the clause in italics—but which, it is hoped now to demonstrate, need not necessarily be present for the plaintiff to succeed.

(a) *Mistake as to the Payor's Liability*

It is frequently said that unless, on the facts as supposed, he would have been liable to the recipient, i.e. that he would have been under a legally enforceable obligation, the payor may not recover the payment after he has discovered his mistake. Thus in the *Commonwealth Trading Bank* case[16] Gillard J. held that since the drawee of a cheque is not liable to the holder—there being no acceptance—the plaintiff bank would not have been liable to the recipient even if the cheque had not been countermanded; accordingly, the bank could not recover when the true facts emerged.[17] It is not often noticed that the significant words in Parke B.'s judgment from which this implication is drawn do not appear in the report of the same passage in the *Law*

[14] (1841) 9 M. & W. 54, 58, 152 E.R. 24, 26 (italics added). The other members of the Court of Exchequer who delivered judgments were Lord Abinger C.B. and Rolfe B., each of whom gave his own reasons for the decision in favour of the plaintiff ordering a new trial in place of a nonsuit. Gurney B. concurred. Parke B.'s judgment is the one most frequently cited.

[15] In *R. E. Jones Ltd v. Waring & Gillow Ltd* [1926] A.C. 670 (H.L.), 689, Lord Shaw said that no attack on *Kelly v. Solari* had ever been successful. See, too, *Imperial Bank of Canada v. Bank of Hamilton* [1903] A.C. 49 (J.C.), 56. The quotation from Parke B.'s judgment is usually regarded as embodying the principle of the decision.

[16] Supra, n. 1.

[17] As authority for this proposition the learned Judge cited a sentence from the joint judgment of the High Court in *South Australian Cold Stores Ltd v. Electricity Trust of South Australia* (1957) 98 C.L.R. 65, 75 (Dixon C.J., McTiernan, Williams, Webb and Taylor JJ.) which, out of context, may seem to emphasise the part of Parke B.'s judgment italicized in the text. However, the very next sentence of the High Court's judgment acknowledges that '[a]ccording to the decision of Pilcher J. in *Turvey v. Dentons 1923 Ltd.* ([1953] 1 Q.B. 218) it is too restrictive to say that the fact would if true have entitled the payee to the money'. Even if the High Court was not here approving Pilcher J., the point was at least left open.

Journal,[18] which is as follows:

> If a party makes a payment on the supposition that a fact is true, which afterwards proves to be untrue, he may recover back money that has been so paid . . .;[19] for if money is paid under a mistake, and it is unconscientious in the receiver to keep it, it may be recovered back. In some cases, indeed, it may be necessary to give notice before the action is brought as, for instance, where the party receiving the money may fairly think himself entitled to retain it.

On the facts of *Kelly v. Solari* it seems at least doubtful whether the directors of the insurance company would have been obliged to pay the recipient at the time when they did, since a discount was deducted 'in consideration of the payment being made three months earlier than by the rules of the office it was payable'.[20] Furthermore, there are cases of the highest authority in which recovery has been permitted despite the absence of any legal obligation on the facts as supposed. Two instances will suffice.[21]

In *Kerrison v. Glyn, Mills, Currie & Co.*[22] the plaintiff had an interest in a Mexican company. He arranged for New York bankers to honour bills drawn on them by the Mexican company on the basis that he would reimburse the bankers through their London agents, the defendants, up to £500. This sum was to be by way of a 'standing' (or 'revolving')[23] credit. In practice, instead of allowing the Mexican company credit up to £500 and then seeking reimbursement from the plaintiff before allowing further credit, the bankers would inform the plaintiff when the £500 was nearly exhausted and he would pay a further £500 in advance. In response to such information on one occasion, the plaintiff paid the defendants the £500 in dispute. Unknown to the plaintiff and the defendants, the bankers had on the previous day assigned all their assets for the benefit of their creditors. The plaintiff sought to recover the £500 on the ground that at the date of payment he was mistaken in thinking that the bankers were a living commercial entity, able to perform their side of the contract.

18 11 L.J. (N.S.) Ex. 10, 13.

19 The omitted words deal with an argument based on laches and 'means of knowledge' available to the plaintiff.

20 9 M. & W. 54. (The word 'made' appears before 'payable' in 11 L.J. (N.S.) Ex. 10, 11.) If it is contended that in effect a new contract was entered into between the directors and the recipient, so that the directors were liable to make the payment when they did, a decision permitting recovery must necessarily have involved setting aside the contract for mistake, something not discussed in the judgments. It would be surprising to find mistake having this effect in a case at law, despite cases such as *Gompertz v. Bartlett* (1833) 2 El. & Bl. 849, 118 E.R. 985, and *Gurney v. Womersley* (1854) 4 El. & Bl. 133, 119 E.R. 51, which are explicable on the basis of the warranty given by a transferor by delivery of a bill, today set out in the *Bills of Exchange Act*, 1909–58 (Commonwealth), section 63 (3).

21 See also Kitto J. (dissenting) in *Porter v. Latec Finance (Qld) Pty Ltd* (1964) 111 C.L.R. 177, 190.

22 (1911) 17 Com. Cas. 41 (H.L.).

23 The word used depended on the side of the Atlantic on which the speaker found himself.

The defendants, who were owed £40,000 by the bankers, were anxious to retain the £500. The Court of Appeal[24] held that as a result of the practice of the parties, the original contract had been varied so as to make the plaintiff liable to pay each £500 in advance. This particular payment had thus been made pursuant to a binding obligation, which was not vitiated by mistake, whether the facts were as supposed or as true. On this view there was no right of recovery.[25] This decision was reversed by the House of Lords,[26] who restored the judgment at first instance of Hamilton J.[27] (as he then was). It was held that the course of practice had not varied the original contract. At the time when the plaintiff paid he was *not* liable to pay on the facts as supposed, nor, *a fortiori*, on the true facts. Obviously, he had not intended to make a gift or to pay in all events, since he paid 'in a voluntary anticipation of what might very shortly have become his actual legal liability'.[28] The plaintiff was thus permitted to recover although he was not legally bound to pay on the supposition that the relevant fact was true.

In *Imperial Bank of Canada v. Bank of Hamilton*[29] the plaintiff bank successfully recovered an excess payment made to a holder in due course on a marked cheque that had been fraudulently increased from $5 to $500 after the bank had marked it. While in the United States 'certification' of a cheque by the bank is equivalent to acceptance,[30] making the bank liable on the cheque, this is not so in English law and the Privy Council did not treat it as such by Canadian law.[31] Although the bank, as mere drawee, would not have been liable to the holder if the facts had been as supposed, recovery of the amount overpaid was not debarred.

Kelly v. Solari itself makes it clear that the payor may not recover where he intended that the recipient should have the money irrespective of the mistake. Thus the case was sent down for a new trial so that a jury could determine whether the directors had paid with knowledge that the policy had lapsed, or not caring whether it had lapsed or not, for instance, in order to preserve the reputation of the insurance company. If this were so, they could not subsequently change their mind and reclaim the money. A payor's belief that he was liable to the recipient is good evidence that he did not intend the recipient to have the money in other circumstances, but it is obviously not conclusive evidence of that. Nor is it the only evidence

24 (1910) 15 Com. Cas. 241 (C.A.).

25 Cf. *Steam Saw Mills Co. Ltd v. Baring Bros & Co. Ltd* [1922] 1 Ch. 244 (C.A.). Contrast *British American Continental Bank v. British Bank for Foreign Trade* [1926] 1 K.B. 328 (C.A.).

26 (1911) 17 Com. Cas. 41 (H.L.). 27 (1910) 15 Com. Cas. 1.

28 Ibid., 14.

29 [1903] A.C. 49 (J.C.). Lord Lindley delivered the advice of the Board.

30 Uniform Commercial Code, section 3-411. Formerly, Uniform Negotiable Instruments Law, section 187.

31 [1903] A.C. 49, 54.

from which his intention may be deduced. A belief that he was liable to a third party to make the payment to the recipient should be equally good evidence. A bank is liable to its customer if it wrongfully dishonours his cheque; that is enough to show that it does not intend the recipient to have the money whether or not the cheque is valid.[32]

(b) *Mistake as to the Recipient's Entitlement*

There is an ambiguity in the words 'which would entitle the other to the money' when more than two parties are involved in the transaction. As long as only two parties are concerned, if the recipient is entitled to the money, then the payor is liable to him.[33] A mistake as to the recipient's entitlement is at the same time a mistake as to the payor's liability. This is reflected in the reports of Bramwell B.'s judgment in *Aiken v. Short* in *Hurlstone and Norman*[34] and the *Law Journal*[35] respectively. In the former it appears as though the learned Baron was looking at the case solely from the plaintiff's point of view:

> In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person liable to pay the money. . . .

According to the *Law Journal* His Lordship was apparently considering the matter of the plaintiff's belief as it referred to the defendant:

> It seems to me that the right to recover money paid under a mistake of fact must have reference to a belief of the existence of a fact which, if true, would have given the person receiving a right against the person paying the money. . . .[36]

When we introduce more than two parties to the transaction, it becomes possible for the recipient to be 'entitled' to the money without the payor being liable to him: he may have a claim against a third party. Here, a mistake as to the recipient's entitlement does not carry with it a mistake as to the payor's liability. It might, perhaps, be thought that Parke B. used the words attributed to him by Meeson and Welsby (if he used them at all) in this sense, so that recovery

[32] Cf. *Leedon v. Skinner* [1923] V.L.R. 401, where it was held that even if on the facts as supposed by the payor he could not have been compelled by law to pay, his *belief* in his liability was sufficient. See, also, *Royal Bank v. The King* [1931] 2 D.L.R. 685, 689, where a legal, equitable or moral obligation was regarded as sufficient; and Samek (1965) 39 *Australian Law Journal* 116, 125 (Conclusion 5).

[33] Leaving out of account such things as limitation-barred debts.

[34] (1856) 1 H. & N. 210, 215, 156 E.R. 1180, 1182.

[35] 25 L.J. (N.S.) Ex. 321, 324.

[36] In the *Law Journal* there also appears a qualification not found in *Hurlstone and Norman,* since the former report continues: 'I do not know whether that is a sufficiently comprehensive principle, but it is one which has existed throughout in my mind.' Winfield, 'Mistake of Law' (1943) 59 *Law Quarterly Review* 327, 335-8, discusses the 'chequered history' of Bramwell B.'s dictum, which seems to be cited more often in the *Law Journal* version. In *Gasson v. Cole* (1910) 26 T.L.R. 468 Channell J. said that the dictum had never been acted on so as to disallow a claim; but see *Morton & Son v. Smith* (1912) 18 Arg. L.R. 322, where a number of reasons were given for disallowing the claim, the only supportable one being the change of position of the recipient.

would be allowed only when there was a mistake as to the recipient's entitlement, i.e. where the payor believed that the recipient was entitled to the money, but that was not so. Some support for this view would come from Parke B.'s reference to it being unconscientious for the defendant to retain the money.[37] When the money is not due to him at all, it is obviously unconscientious for the recipient to retain it; when the money is in fact owing, even if not by the payor, it is not necessarily so. Nevertheless, this view is not open on the authorities. Again, only the highest authorities will be used as illustrations. Had it been correct that the recipient could retain money to which he was truly entitled, it would have been relevant in *Imperial Bank of Canada v. Bank of Hamilton*[38] to investigate the recipient's entitlement to the money as against persons other than the plaintiff bank, yet this was not done. As a holder of the bill the defendant bank would have had a right of action on the cheque for the full apparent value against the plaintiff bank's customer, who made the alteration.[39] Despite this 'entitlement', the Privy Council held that the money had to be repaid.

In *Colonial Bank v. Exchange Bank of Yarmouth, Nova Scotia*,[40] the plaintiff bank wrongly followed instructions, which had originated from one R., to pay a particular bank. It mistakenly paid the defendant bank, where R. happened to have an account, which was overdrawn. The defendant sought to retain the money in reduction of the overdraft. It was held that the plaintiff could recover the money.[41] When making payment the plaintiff could not have thought that it was liable to the defendant, but it must have thought that the defendant was entitled to the money. There was thus no mistake as to its own liability to the defendant, nor as to the defendant's entitlement to the money, since the defendant did have a claim against R. Its only mistake was as to R.'s instructions. This case shows that mistake as to the recipient's 'entitlement'—in whichever of the two suggested senses the word is used—is not a necessary condition for the recovery of money paid in such circumstances.

Although it is unnecessary to set out in detail the facts of the well-known case of *R. E. Jones Ltd v. Waring & Gillow Ltd*[42], attention should be drawn to certain features. The mistake here was

37 *Kelly v. Solari*, supra.

38 [1903] A.C. 49 (J.C.).

39 Cf. *Bills of Exchange Act*, 1909–58 (C'th), section 69(1).

40 (1885) 11 App. Cas. 84 (J.C.).

41 In *Commonwealth Trading Bank v. Reno Auto Sales* [1967] V.R. 790, 796, Gillard J. cited this decision in such a way as to appear that he regarded it as depending on the defendant's knowledge that it was not entitled to the money. This explanation is, with respect, unacceptable. There is nothing in the advice of the Board to indicate that the defendant bank did not believe that it was entitled to the money when it received it. Their Lordships said only that it was against conscience for the defendant to retain the money once it learned of the mistake.

42 [1926] A.C. 670 (H.L.).

clearly mutual, not common.[43] The plaintiffs believed that they were paying pursuant to an obligation to 'International Motors', whom the rogue Bodenham claimed to represent. Though deceived into believing that the defendants were financing 'International Motors' and would receive payment on behalf of that firm, the plaintiffs can hardly be said to have believed that they had entered into a contract with the defendants. The defendants on the other hand, received the payment in the belief that it was made to discharge in part Bodenham's obligations to them under the hire-purchase agreements in order to obtain the release of the repossessed goods. The plaintiffs mistakenly believed that they were liable to pay (but this supposed liability was to someone other than the defendants); the defendants correctly believed that they were entitled to the money (though not from the plaintiffs). All five members of the House of Lords held that the plaintiffs had made out a cause of action for money had and received.[44] To transpose this to the case of a bank paying on a cheque: the bank believes that it is liable to its customer to make the payment, even though it knows that it is not liable to the holder; the holder believes that he is entitled to payment on the cheque in discharge of the liability of the drawer. If the bank is mistaken in its belief, so that it is not liable to its customer, *Jones v. Waring & Gillow* indicates that it may recover the payment, notwithstanding the recipient's belief and even though the recipient's belief is justified.

As a matter of policy, too, it is suggested that the recipient's entitlement as against a third party should be disregarded. There may be—and usually there will be in the case of a drawer stopping a cheque—a dispute between the recipient and the third party as to the recipient's right to the money. Such dispute ought to be adjudicated on in an action between the recipient and the third party; not incidentally in the course of an action by the payor, who is not a party to the dispute.[45]

(c) *Mistake as between the Payor and the Recipient*

In *Halsbury* it is said: 'The mistake must be a mistake between the party paying and the party receiving the money. If the fact about which the mistake exists has nothing to do with the payee, the rule does not apply.'[46] It was presumably to give effect to this rule that Gillard J. in the *Commonwealth Trading Bank* case[47] said: '. . . since

[43] On the meaning of these terms, see Cheshire and Fifoot, loc. cit.

[44] Viscount Cave L.C. and Lord Atkinson dissented from the final result of the case, since they held that the plaintiffs were estopped by their representations from recovering.

[45] This argument on policy is put forward solely in relation to the submission that the entitlement of the recipient is an irrelevant consideration in determining whether the plaintiff may make out a cause of action. Other arguments will be adduced as to whether the law *should* permit recovery in each of the particular situations considered below.

[46] *Halsbury* (3rd ed.), Vol. 26, p. 923. Footnotes omitted.

[47] [1967] V.R. 790, 798.

the alleged mistake of fact here did not affect the legal character of the relationship between the plaintiff and the defendant, there being in law no privity between them, such mistake would not found the action for money had and received.'

There are two alternative answers to this: either there is no such requirement as that stated by *Halsbury,* or, if there is, Gillard J. was wrong in holding that it is not satisfied in circumstances such as he was considering. It is difficult to see how there can be such a requirement in cases of mutual mistake. In such situations it seems that the payor's mistake alone is relevant, though this be a mistake with which the recipient has nothing to do. Any privity between the plaintiffs and the defendants in *R. E. Jones Ltd v. Waring & Gillow Ltd*[48] arose only because the plaintiffs effected payment by cheque; it cannot seriously be contended that, all other things being equal, the plaintiffs would have failed if they had paid cash. A further illustration may be taken from another decision of the House of Lords, *Kleinwort, Sons & Co. v. Dunlop Rubber Co.*[49] A rubber merchant having supplied the plaintiffs with goods, assigned his right to payment to certain financiers.[50] By mistake the plaintiffs paid the defendants, who had financed the merchant in other transactions. The jury found, *inter alia,* that the defendants received the money in the belief that they were being paid in their own right. It was held that the plaintiffs were entitled to recover the payment.

This last case—and *Colonial Bank v. Exchange Bank of Yarmouth, Nova Scotia*[51]—could possibly be explained as being concerned with error of identity, to which special rules may apply.[52] However, this explanation would not do for cases such as *T. Place & Sons Ltd v. Turner,*[53] a decision of Devlin J. (as he then was) which affords a neat illustration. The plaintiffs were induced by their manager to draw cheques in favour of the defendant, a bookmaker, on the representation that the defendant was a merchant who had supplied the plaintiffs with timber. The manager used the cheques to pay his own gambling debts, representing to the defendant that the cheques had been drawn in respect of bonuses due to himself. It was held that even though the

[48] [1926] A.C. 670 (H.L.).

[49] (1907) 23 T.L.R. 696, 97 L.T. 263 (H.L.). Cf. *Colonial Bank v. Exchange Bank of Yarmouth, Nova Scotia* (1885) 11 App. Cas. 84 (J.C.), discussed supra.

[50] There was held to be a valid equitable assignment, so as to render the present plaintiffs liable to the financiers, in *Brandt's Sons & Co. v. Dunlop Rubber Co.* [1905] A.C. 454 (H.L.).

[51] (1885) 11 App. Cas. 84 (J.C.).

[52] In *Porter v. Latec Finance (Qld) Pty Ltd* (1964) 111 C.L.R. 177, 187, Barwick C.J. was clearly troubled by the view that if the requirements discussed in the text were insisted on, a 'voluntary' payment to the wrong person would be irrecoverable. His solution was to substitute a general test of whether the mistake was 'fundamental' to the transaction. This test was no doubt suggested to His Honour by *Norwich Union Fire Insurance Society Ltd v. Wm H. Price Ltd* [1934] A.C. 455 (J.C.) and *Morgan v. Ashcroft* [1938] 1 K.B. 49 (C.A.).

[53] *The Times,* 7th Feb., 1951.

defendant was in good faith, the plaintiffs were entitled to recover.

The alleged requirement must, therefore, apply, if it applies at all, to cases of common mistake, i.e. where the plaintiff and the defendant share the same mistaken belief. Stated in this way it might at first sight appear that the requirement will always be satisfied, since a common mistake is necessarily one 'between' the payor and the recipient. However, it may be necessary here to heed the warning of Barwick C.J. in *Porter v. Latec Finance (Qld) Pty Ltd*[54] that the transaction and the relationship of the mistake to it must be properly identified and that the mistake must be fundamental in this regard.

This may lead to some difference of opinion, as it did in the *Porter* case. One Lionel Herbert Gill induced first the appellant and then the respondent to believe that he was Herbert Henry Gill, the owner of a certain mortgaged property, and that he was thus able to discharge an existing mortgage and to grant a new one if money were lent to him. The appellant advanced money to him, part of which was paid to the original mortgagee in purported discharge of the mortgage debt. Later the respondent advanced money to him, part of which was paid to the appellant in order to secure the discharge of the mortgage which L. H. Gill had purported to grant in the name of H. H. Gill. The Chief Justice held that there was no operative mistake so as to enable the respondent to recover the money paid to the appellant. Taylor and Owen JJ. took a view of the facts of the stated case which made it unnecessary for them to decide this. Kitto and Windeyer JJ., in their dissenting judgments, held that there was an operative mistake. The reasoning of Windeyer J. is particularly apposite:[55]

> As the argument was presented it seemed that it was the mistake as to the identity of Lionel Herbert Gill arising from his fraudulent representation of himself as Herbert Henry Gill. But to recover in an action for money had and received the plaintiff must establish a mistake operative as between himself, the payer, and the defendant, the payee: cf. *Weld-Blundell v. Synott.*[56] And the peculiarity of the present case, distinguishing it from some others that were referred to, is that, as between the parties, it is not a case of unilateral mistake as to the party to a supposed contract: it is a case of a common and fundamental mistake as to the existence of a subject-matter. The mistake arose because the appellant and the respondent had each earlier been mistaken as to the identity of Lionel Herbert Gill. But now the operative mistake as between them was their common belief that the appellant was a creditor of Herbert Henry Gill in an amount of £1,592 2s. 10d., secured by a valid legal mortgage. In reality the appellant was a creditor of Herbert Henry Gill for some lesser sum secured by an equitable charge. The respondent can succeed in its action for money had and received if, using words used by *Dixon* and *Fullagar* JJ. in *McRae* v. *Commonwealth Disposals Commission*,[57] it is "a case in which the parties can

54 (1964) 111 C.L.R. 177, 187.
55 Ibid., 204.
56 [1940] 2 K.B. 107.
57 (1951) 84 C.L.R. 377.

be seen to have proceeded on the basis of a common assumption of fact so as to justify the conclusion that the correctness of the assumption was intended by both parties to be a condition precedent to the creation of contractual obligations".[58] In my view it is such a case.

In *Commonwealth of Australia v. Kerr*[59] it was also accepted that the mistake must be between the payor and the recipient, but again it was held that the requirement was satisfied on facts very closely analogous to the case of a bank paying on a cheque that has been stopped. Here a soldier, before being posted overseas, signed an 'allotment', directing the Commonwealth to pay part of his allowance to the defendant, who was then his fiancée. While he was oversees, he married another woman, cancelled the allotment in favour of the defendant and made a new allotment in favour of his wife. The Commonwealth, having overlooked the cancellation, continued to pay the defendant. When the soldier died, they informed the defendant that they would pay her a gratuity for two months, which they did. When it was discovered that the original allotment had been cancelled, the Commonwealth sought to recover the payments made between the date of cancellation and the date of death of the soldier, as well as the gratuity. Rejecting various defences put forward, the Full Court of the Supreme Court of South Australia upheld the Commonwealth's claims. Although the allotment and its cancellation both emanated from the soldier, the mistake was held to be between the Commonwealth and the defendant.

When a cheque is paid, both the bank and the recipient proceed on the common assumption that the bank has a mandate from its customer to make the payment. The existence of this mandate is surely fundamental.[60] Thus if the mandate has been revoked—because the cheque has been stopped—or if it never existed—as where the cus-

58 Ibid. 409.

59 [1919] S.A.S.R. 201 (F.C.).

60 It may be that when one is concerned with mistaken performance—as opposed to the mistaken creation of contractual relations—it is not necessary in order to recall the performance to show that the mistake attained the greater degree of importance connoted by the word 'fundamental' in cases of contractual mistake. The test of fundamentality seems to have originated with Lord Wright in delivering the advice of the Board in *Norwich Union Fire Insurance Society Ltd v. Wm H. Price Ltd* [1934] A.C. 455 (J.C.), an appeal from N.S.W. which, in so far as it related to a payment under an insurance policy in the mistaken belief that an event insured against had happened, would appear to be a case of mistaken performance. However, the plaintiffs required the defendants to sign a notice of abandonment in consideration of the payment and the Privy Council was concerned with the validity of this agreement. It was held that the mistake was sufficiently fundamental to vitiate the agreement. For the view that a mistaken performance may be set aside more readily than mistaken contracts, see Palmer, *Mistake and Unjust Enrichment* (1962), p. 25, who says: 'The policies supporting enforcement of contract work against rescission for mistake in basic assumptions, whereas they tend to work in favour of . . . restitution of a mistaken performance. The difference shows up in considering whether the mistake needs to be substantial. For rescission it must be basic enough to overcome the pressures favouring finality of contract, but there is no such limitation on relief for . . . mistake in performance.'

tomer's signature has been forged—the requirement that the mistake be between the payor and the recipient presents no obstacle to recovery. A different result might well be reached, however, when the mistake is as to something extraneous to the mandate, such as a belief that the customer's account is sufficiently in credit to meet the cheque.

The authority cited by Windeyer J. in the passage quoted above in connection with the proposition that the mistake must be between the payor and the recipient, *Weld-Blundell v. Synott*,[61] is also cited by *Halsbury* in a footnote to the first sentence of the quotation that commences this section. However, it provides a slender foundation on which to build such a magnificent edifice.[62] Asquith J. there explained the proposition as meaning no more than that the payor must suppose himself to be under a legal obligation to pay. He held that if the amount which the payor must pay the recipient depends on the calculation of an amount owing between the payor and a third party, a mistake in the latter calculation is to be treated also as a mistake between the payor and the recipient so as to satisfy the alleged rule. Thus a mistake between the bank and its customer does not necessarily prevent the same mistake being treated as one between the bank and the recipient.

Conclusions

The basic requirements of the action for the recovery of money paid under a mistake are: (1) that the payor should have been under a mistake of fact;[63] (2) that if not for this mistake, he would not have made the payment;[64] and (3) that he did not make the payment pursuant to a contract which is not itself vitiated by reason of the mistake.[65] These three necessary conditions are not in themselves

61 [1940] 2 K.B. 107.

62 A case which more directly supports the proposition is *Toohey's Ltd v. Sydney Municipal Council* (1936) 12 L.G.R. 52.

63 The question of whether recovery may be had for a payment under a mistake of law would not normally arise in the circumstances considered in this article. On the troublesome distinction between law and fact in this area and for the authorities on mistake of law, see Goff and Jones, op. cit., pp. 79 ff.; Stoljar, *The Law of Quasi-Contract* (1964), pp. 43 ff.; Winfield, 'Mistake of Law' (1943) 59 *Law Quarterly Review* 327.

64 E.g., per Scrutton L.J. in *Holt v. Markham* [1923] 1 K.B. 504 (C.A.). This requirement excludes cases where the payor pays intentionally 'without reference to the truth or falsehood of the fact, . . . meaning to waive all enquiry into it, and that the person receiving shall have the money at all events' (per Parke B. in *Kelly v. Solari*, 9 M. & W. 54, 59).

65 It is often said that the payment must not be 'voluntary'. This may mean no more than that the payor must not intend the recipient to have the money in all events (see the previous note). However, the payment is sometimes said to be 'voluntary' in order to defeat recovery of a payment made to secure the release of a proprietary interest thought to exist in favour of the recipient in property in which the payor has acquired an interest, as in *Aiken v. Short* (1856) 1 H. & N. 210, 156 E.R. 1180; *Porter v. Latec Finance (Qld) Pty Ltd* (1964) 111 C.L.R. 177—on one view of the facts; *Harris v. Loyd* (1839) 5 M. & W. 432, 151 E.R. 183; *Krebs v. World Finance Co. Ltd* (1958) 14 D.L.R. (2d.) 405. It is submitted that what is meant here is that the payor was free to enter the contract by which he

sufficient to impose liability on the recipient. In addition there ought to be some sound reason why the recipient should be compelled to restore the money to the payor. Reasons for and against allowing recovery vary greatly according to the circumstances—as will be illustrated when discussing particular instances of mistake by banks—and are seldom articulated by judges. Judges may, perhaps, use the notion that the mistake is 'fundamental' (rather than 'too remote') as a shorthand statement of the conclusion that the reasons for allowing recovery outweigh those for refusing it. To require that a mistake be 'fundamental' in any other sense is to introduce a factor which is too subjective to be of much assistance.

It has been shown that it is not essential in order to allow recovery that under the facts as supposed the payor would have been liable to make the payment, nor that he should have been mistaken in his belief that the payor was entitled to the money. In cases of mutual mistake, the mistake need not have been one between the payor and the recipient; in cases of common mistake, if there be such a requirement, it may be satisfied more easily than was recognized by Gillard J. in the *Commonwealth Trading Bank* case. Thus in this case the three main essentials were present and none of the alleged barriers to recovery was insurmountable. There remain to be considered the reasons of policy for and against allowing the action. This will be done after a discussion of the authorities dealing with the same subject-matter. Before turning to those authorities, however, it is necessary for the sake of completeness to look at the law relating to the defences to an action for money paid under a mistake of fact.

Defences

Despite an early dictum that an omission to avail himself of the means of knowledge would preclude the payor from recovering,[66] it has long been established that mere failure to discover the mistake—as opposed to actual suspicion and wilful avoidance of the avenues of enquiry—does not bar the payor's action for recovery, no matter how negligent the payor may have been.[67] Negligence may assist in establishing an estoppel against the payor, since, where it is the payor's

proposed to secure the release, or not, as he chose. Having chosen to make the bargain, he will not be permitted to resile from it because it has turned out less advantageous than he expected. The same principle leads the law to uphold the validity of a compromise (as in *Maskell v. Horner* [1915] 3 K.B. 106 (C.A.)). If the payment was made pursuant to a contract, it cannot be recovered unless the contract is first set aside (see Goff and Jones, op. cit., pp. 21-22), which it will not be in these circumstances. It does not matter whether the contract was unilateral—so that the payor was not bound to pay—or synallagmatic (for the distinction between these types of contract, see Diplock L.J. in *United Dominions Trust (Commercial) Ltd v. Eagle Aircraft Services Ltd* [1968] 1 W.L.R. 74 (C.A.), 82-3).

66 *Milnes v. Duncan* (1827) 6 B. & C. 671, 677, 108 E.R. 598, 600, per Bayley J.

67 *Kelly v. Solari, supra; Townsend v. Crowdy* (1860) 8 C.B. (N.S.) 477, 141 E.R. 1251; *R. E. Jones Ltd v. Waring & Gillow Ltd* [1926] A.C. 670 (H.L.); *Anglo-Scottish Beet Sugar Corporation v. Spalding U.D.C.* [1937] 2 K.B. 607.

duty to inform the recipient of the amount due to him, the negligent payment of an incorrect amount will be irrecoverable.[68] It may be that where such a duty exists, even if he exercised all reasonable care, the payor would be estopped from denying that the amount paid was due; in other words that these are cases of estoppel by representation, not by negligence. However, a bank owes no such duty to the holder of a cheque and would not be estopped by its payment.[69] Where there is no duty of this type, it becomes almost impossible to establish an estoppel by negligence. If on the facts of *R. E. Jones Ltd v. Waring & Gillow Ltd*[70] the payor was not estopped, as three members of the House of Lords held, it is difficult to imagine circumstances where he would be. Possibly there is scope for the extension of the duty concept in this area along the lines of *Hedley Byrne Ltd v. Heller & Partners Ltd*.[71] Of course, an express representation by a bank, for instance, that the signature on a cheque was that of a customer, might subsequently preclude it from contending that it was a forgery, if the representee is induced to act on the representation.[72]

Sometimes stated as merely a requirement of the defence of estoppel is change of position to the detriment of the recipient. It may be, however, that such change of position is itself a substantive defence.[73] Although widely recognized as such in America,[74] its application in English law seems to have been almost[75] exclusively confined to agents who have paid the money over to their principals before notice of the claim.[76] Thus, in *Standish v. Ross*,[77] Parke B., delivering the judg-

[68] *Skyring v. Greenwood* (1825) 4 B. & C. 281, 107 E.R. 1064; *Holt v. Markham* [1923] 1 K.B. 504 (C.A.).

[69] Cf. *Deutsche Bank (London Agency) v. Beriro & Co.* (1895) 1 Com. Cas. 255 (C.A.), where the decision of Mathew J. (73 L.T. 669, 1 Com. Cas. 123) was upheld only on his alternative ratio (change of position to the prejudice of the recipient). Lindley L.J. expressly doubted the first ratio that the bank was in breach of duty in wrongly informing the defendant that a bill had been collected.

[70] [1926] A.C. 670 (H.L.).

[71] [1964] A.C. 465 (H.L.).

[72] Cf. *Leach v. Buchanan* (1802) 4 Esp. 226, 170 E.R. 700. Contrast *Kernan v. London Discount & Mortgage Bank Ltd* (1878) 4 V.L.R. (L.) 279, where there was no evidence of the representee acting on the representation.

[73] Alternatively, the payment itself may be regarded as an implied representation, satisfying that requirement of estoppel.

[74] E.g., Annotation 40 A.L.R. 2d 997 (1951).

[75] *Deutsche Bank (London Agency) v. Beriro & Co.* (1895) 1 Com. Cas. 255 (C.A.) perhaps goes a little further, but not much.

[76] E.g., *Gowers v. Lloyds and National Provincial Foreign Bank Ltd* [1938] 1 All E.R. 766 (C.A.). In *Continental Caoutchouc & Gutta Percha Co. v. Kleinwort Sons & Co.* (1904) 9 Com. Cas. 240, 90 L.T. 474 (C.A.) Collins M.R. adopted the argument of Scrutton K.C. (as he then was) that if money is received as principal it must be restored, notwithstanding that it has been paid away; whereas if it has been received as agent, it need not be if it has been paid over to the principal. Where it was received as agent and not actually paid to the principal, but credited to the principal's account and set off against a debt owed by the principal to the agent, this might be treated as payment and be a good defence to the original payor's action for money had and received. However, if the account between the principal and the agent had not been settled so that it was open to the agent to reverse the credit and retain control of the money, then the agent's defence would fail: cf. *Buller v. Harrison* (1777) 2 Cowp. 565, 98 E.R. 1243, with *Holland v. Russell* (1863) 30 L.J. (N.S.) Q.B. 308; 4 B. & S. 14, 122 E.R. 365 (Ex. Ch.). It

ment of the Court, held that it was no defence that the recipient 'had applied the money in the meantime to some purchase he would otherwise not have made and so could not be placed *in statu quo*'.[78] Yet, there is force in the dictum of Mansfield C.J. in relation to an action which failed for other reasons:[79]

> . . . it would be most contrary to *aequum et bonum,* if he were obliged to pay it back. For see how it is! If the sum be large it probably alters the habits of his life, he increases his expenses, he has spent it over and over again; perhaps he cannot repay it at all, or not without great distress.

Even Lord Sumner admitted that it was hard for the defendant to suffer for the mistake of another, 'but such is the law'.[80] His Lordship's suggested solution of a short limitation period for such actions might meet Mansfield C.J.'s objections; it does not assist where the action is 'very promptly begun',[81] but the recipient has already released security which he cannot recover or has suffered similar detriment. Since in most cases concerning banks the mistake is likely to be discovered quickly, the shortest limitation period will not help most recipients.

A defence analogous to change of position has received some recognition in the area with which we are concerned. In *Cocks v. Masterman*[82] the plaintiffs were the bankers of the drawee on a bill of exchange, whose signature as acceptor had been forged. The forgery was discovered on the day after the plaintiffs had paid the bill. Notice was immediately given to the defendants, the recipients, and also to the indorsers of the bill. It was held that the defendants were entitled to know on the day when the bill was payable whether it was dishonoured or not and notice of the claim given on the next day was too late. This distinguished the case from *Wilkinson v. Johnson,*[83] where the bankers of a supposed indorser paid a dishonoured bill for the honour of their customer, but on the same day, having discovered that his signature had been forged, informed the recipients. Probably, *Cocks v. Masterman* went too far, since the recipients suffered no real detriment, being entitled to give the necessary notices of dishonour on the day after the bill had been dishonoured.[84] The Court said that the

was presumably for this last reason that the bank's defence failed in *Bavins Jnr & Sims v. London & S.W. Bank Ltd* [1900] 1 Q.B. 270 (C.A.) and *Admiralty Commissioners v. National Provincial & Union Bank of England Ltd* (1922) 127 L.T. 452. In *Dominion Bank v. Union Bank of Canada* (1908) 40 Can. S.C.R. 366, it was held that the recipient bank had taken the cheque as principal.

77 (1849) 3 Ex. 527, 154 E.R. 954.

78 Ibid. See, further, *Transvaal & Delagoa Bay Investment Co. Ltd v. Atkinson* [1944] 1 All E.R. 579; *Commonwealth of Australia v. Kerr* [1919] S.A.S.R. 201 (F.C.).

79 *Brisbane v. Dacres* (1813) 5 Taunt. 142, 162, 128 E.R. 641, 649.

80 In *R. E. Jones Ltd v. Waring & Gillow Ltd* [1926] A.C. 670 (H.L.), 695-6.

81 As it had been in the case before Lord Sumner.

82 (1829) 9 B. & C. 902, 109 E.R. 335.

83 (1823) 3 B. & C. 428, 107 E.R. 792.

84 Cf. *Bills of Exchange Act,* 1909–58 (C'th), section 54(b). See, also, section 55(1), which excuses delay in giving notice where the delay is not the fault of the holder.

detriment lay in the loss of the privilege of giving notice of dishonour on the same day; a somewhat nebulous detriment in the absence of evidence that this led to financial loss through the insolvency or departure of a party to the bill. This was recognized in *Imperial Bank of Canada v. Bank of Hamilton*,[85] where it was said that, assuming *Cocks v. Masterman* to be right,[85a] the rule would not be extended. Although it held that no detriment to the defendant had been proved in the case before it, the Privy Council seems to admit that if notice had not been given within a reasonable time and loss had been suffered by the recipient as a result, the plaintiff's claim would have failed.[85b]

It is not clear whether the Privy Council considered that two requirements must be satisfied for a successful defence, viz. (1) the plaintiff must have delayed unreasonably in giving notice; (2) the defendant must have suffered loss in consequence. If both are essential, then provided the payor gives reasonable notice, detriment incurred by the recipient between receipt of the money and receipt of the notice will not avail him. This may be harsh on the recipient. It is suggested that change of position to the recipient's detriment before notice should in all cases be a good defence; and that the reasonableness or otherwise of the notice should be irrelevant. It will still be in the payor's interest to give notice promptly, since change of position after notice should not avail the recipient. 'Notice' should be construed broadly, so that information that the payment was mistaken should prevent the recipient relying on a later change of position, whatever the source of the information. Constructive notice, on the other hand, should have no greater role here than it has in commercial law generally. Just as it does not bar the payor's cause of action that he had the means of discovering the mistake, so it should not bar the recipient's defence of change of position that he ought to have realized that the payment was mistaken.[86] A wilful avoidance of enquiry would obviously be equated with actual knowledge.

SOME PARTICULAR INSTANCES

It is now proposed to examine the case law directly relevant to some of the particular types of mistake which might be made by a bank in paying a cheque. The opportunity will be taken to draw attention to the American law in each instance.

85 [1903] A.C. 49 (J.C.).

85a The correctness of *Cocks v. Masterman* was accepted, *obiter*, by some members of the Court in *Morison v. London, County & Westminster Bank Ltd* [1914] 3 K.B. 356 (C.A.).

85b See Idington J. (dissenting) in *Dominion Bank v. Union Bank of Canada* (1908) 40 Can. S.C.R. 366, 374-375.

86 Negligence on the part of the recipient bank in the case cited in the previous note influenced some members of the Supreme Court of Canada to decide in favour of the payor.

(a) *Countermanded Cheques*

Commonwealth Trading Bank v. Reno Auto Sales Pty Ltd appears to be the first reported decision of a superior court in the English-speaking world outside the United States which has considered an action by a bank to recover payment from a recipient who did not know that the cheque had been stopped. In *Natal Bank Ltd v. Roorda*[87] the drawer of a cheque had given notice to the payee at the same time that he instructed the bank to stop payment. The payee, on the advice of his solicitor, nonetheless presented the cheque to the bank, in order to sue on the cheque after its dishonour. By mistake, the bank paid the cheque. In holding that the principles of Roman-Dutch law were similar to those laid down in *Kelly v. Solari*,[88] and that the bank was entitled to recover, Smith J. placed no special significance on the recipient's knowledge that the cheque had been stopped.

Two inferior courts have faced the problem: one permitted recovery, the other denied it. In *Bank of N.S.W. v. Deri*,[89] Clegg D.C.J., in giving judgment for the bank, identified the mistake as common to the bank and the recipient. In *Royal Bank of Canada v. Boyce*,[90] Costello Co. C.J. held that the mistake was one with which the recipient had nothing to do.[91] There is also an *obiter dictum* in the Irish Court of Appeal favouring recovery. *Reade v. Royal Bank of Ireland*[92] was an action in which a customer succeeded in establishing against the bank that he had validly stopped payment. O'Connor L.J. remarked[93] that 'as at present advised' he would be disposed to think that the bank would have an action for money had and received against the recipient.

Of closely analogous cases *Commonwealth of Australia v. Kerr*,[94] where, as has been seen,[95] the revocation of an authority to pay was overlooked by the payor, undoubtedly supports the bank's right to recovery. *Barclays Bank Ltd v. Malcolm & Co.*[96] is against. Here a bank in Warsaw instructed the plaintiff bank by telegram to pay £2000 to the defendants, which the plaintiffs did. Later the plaintiffs received a letter from the Warsaw bank confirming the telegram, but the plaintiffs, regarding it as a new instruction, paid a further £2000. It was admitted that more than £4000 was owing to the defendants. Subsequently, the plaintiffs did receive further instructions to pay—this time £1000—but this sum was not paid. After discovery of the mistake, the plaintiffs agreed to credit the defendants with £1000,

87 1903 T.H. 298.
88 (1841) 9 M. & W. 54, 152 E.R. 24.
89 (1963) 80 W.N. (N.S.W.) 1499, noted (1966) 5 M.U.L.R. 377.
90 (1966) 57 D.L.R. (2d.) 683.
91 He relied on *Dominion Bank v. Jacobs* [1951] 3 D.L.R. 233, where the bank mistook the drawer's signature for that of a customer. Le Bel J. there refused the bank's claim, citing the passage in *Halsbury* (supra) which requires the mistake to be between the payor and the recipient.
92 [1922] 2 Ir. (K.B.) 22 (C.A.).
93 Ibid. 27.
94 [1919] S.A.S.R. 201 (F.C.).
95 Supra.
96 (1925) 133 L.T. 512, 41 T.L.R. 518.

seeking to recover £1000 of the £2000 paid by mistake. In denying recovery, Roche J. upheld two of three alternative arguments for the defendants. Only the first concerns us here.[97] This was that the mistake was not such as to entitle the plaintiffs to recovery. With regard to this the learned Judge saw it as not within his function as a judge of first instance that he 'should examine all the cases dealing with money paid on a mistake of fact or should reformulate the principles applicable to such cases'.[98] In the circumstances the case cannot be regarded as of great authority.

More formidable is the authority of *Pollard v. Bank of England*.[99] Here a bill was payable at the acceptor's banker. It was presented by the defendants, along with other negotiable instruments payable by the banker, who gave a cheque to the defendants for an amount which included the value of the bill. The defendants then credited the account of the plaintiff, from whom they had received the bill. Before the defendants finally closed for business on that day, the acceptor's banker discovered that he had insufficient funds 'and the further fact was also for the first time ascertained, that, at the same time, [the acceptor] had stopped payment'. The banker immediately notified the defendants, who agreed to take back the bill and to credit the banker with the amount, reserving all their rights. It was held that the plaintiff was entitled to retain the credit given to him. The true analysis of this case shows that the mistake was as to the insufficiency of the acceptor's funds with his banker. As will be seen[100] this is not a mistake against which the Court will (or should) grant relief. The authority relied on by the Court was *Chambers v. Miller*,[1] a case of insufficient funds. Although the phrase 'stopped payment' is ambiguous, the context seems to indicate that it was used in the sense 'ceased to pay his debts',[2] not 'countermanded his authority to pay'. It must be conceded that the reasoning of the Court lends no support to the view that in a case of countermanded authority the result would have been different; on the other hand, it is certainly not conclusively against the view.

In the United States, all states except Louisiana have now adopted the Uniform Commercial Code,[3] which explicitly deals with the problem. By section 4-407 the bank is subrogated to the rights of the recipient against the drawer, or those of the drawer against the recipient, so as 'to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment'. This

97 The other defence upheld was that the plaintiffs could not adopt the payment in part (as to £1000) and seek to set it aside in part. Yet this is what the plaintiff bank did in *Imperial Bank of Canada v. Bank of Hamilton* [1903] A.C. 49 (J.C.).

98 41 T.L.R. 518, 519.

99 (1871) L.R. 6 Q.B. 623.

100 Infra.

1 (1862) 13 C.B. (N.S.) 125, discussed below.

2 The Shorter O.E.D., s.v. 'stop', defines the phrase 'to stop payment' as 'to declare oneself unable to meet one's financial obligations'.

3 Hereinafter referred to as the 'U.C.C.'.

would seem to place the bank in the difficult position of having to decide for itself before instituting action where the merits of the dispute between its customer and the recipient lie. If the customer wrongfully stopped payment of the cheque or if the recipient was a holder in due course, the bank would be subrogated to the recipient's rights against the customer; if the customer was justified in stopping the cheque and the recipient was not a holder in due course, the bank would be subrogated to the rights of the customer against the recipient. In order to determine who is the correct person to sue, the bank must discover whether its customer was right or wrong, and, if he was right, whether the recipient was a holder in due course or not. The solution may be to sue both in the alternative, which might lead to unnecessary complications and difficulty with regard to costs.

Before the enactment of the U.C.C. in each state, case law in the United States appears to have been divided on the point. In 1925 an Annotation[4] to *National Loan and Exchange Bank of Columbia v. Lachovitz*[5] stated that, although authority was scant, this was the only decision permitting recovery, while *National Bank of New Jersey v. Berrall*[6] and other cases had denied the bank's right to recover. Subsequently, in *Turetsky v. Morris Plan Industrial Bank of New York,*[7] it was held without an opinion that a bank was entitled to a refund. On the other hand, in *First National Bank of Chicago v. Molesky*[8] the Illinois Appeal Court held that the bank could not recover in the absence of evidence that the recipient knew that he was not entitled to payment.[9] This last case was distinguished in *National Boulevard Bank of Chicago v. Schwartz,*[10] where, after he had deposited the cheque in his own bank for collection, but before it had been presented by that bank for payment, the recipient received notice that the cheque had been stopped; this was held to defeat his right to retain the money. The Court recognized in this case that the substance of the dispute was between the drawer and the recipient and it held that the burden of the lawsuit should not be shifted to an innocent party, the bank.

In two cases in 1963 the bank's right to recover was upheld. In *Capital National Bank in Austin v. Wootton*[11] the recipient knew that the cheque had been stopped, but mistakenly believed that the order to stop payment had been rescinded. The Texas Court of Civil Appeals held that, although it was negligent in paying, the bank could recover. *Wright v. Trust Co. of Georgia*[12] was an action against a bank on a cheque it had issued in exchange for a customer's cheque which it

4 39 A.L.R. 1239.
5 128 S.E. 10, 39 A.L.R. 1237 (1925).
6 70 N.J.L. 757, 58A. 189 (1904).
7 22 N.Y.S. 2d. 514 (1936).
8 146 N.E. 2d. 707 (1957).
9 For a case which turned on knowledge, see *Smith & McCracken Inc. v. Chatham Phoenix National Bank and Trust Co.,* 239 App. Div. 318, 267 N.Y.S. 153 (1933).
10 175 F. Supp. 74 (1959).
11 369 S.W. 2d. 475 (1963).
12 108 Ga. App. 783, 134 S.E. 2d. 457 (1963).

had by mistake certified after payment had been stopped. The Georgia Court of Appeal held that the bank was not liable on its own cheque, which was given without consideration, since if it had paid on the customer's cheque it would have been able to recover the money. At first sight the decision of the New York Court of Appeals in *Rosenbaum v. First National City Bank of New York*[13] is to the contrary on apparently similar facts. This was a 'per curiam' decision, giving no reasons other than that 'the weight of authority' favoured the view that the bank could not recover. In the report of the case in the Appellate Division,[14] whose judgment was affirmed by the Court of Appeals, there appears a significant fact not mentioned in the report of the proceedings before the higher court: the bank, when permitting the customer to stop payment of the cheque, had taken an indemnity from him, the validity of which was upheld. The bank, therefore, had no real interest in the matter—there being no suggestion that the customer was unable to pay—and the Court refused to allow the bank to fight its customer's battles for him.

By section 33 of the *Restatement of the Law: Restitution* (1937)[15] '[t]he holder of a cheque . . . , who having paid value in good faith therefor, receives payment from the drawee without reason to know that the drawee is mistaken, is under no duty of restitution to him although the drawee pays because of a mistaken belief . . . that he is . . . under a duty to pay'. This qualifies the rule laid down that there may be no recovery in so far as the recipient has constructive notice of the mistake.

De lege ferenda it would seem to be best to allow the bank a general right of recovery, subject to the defence of change of position. If the law refuses to allow the bank to recover, it compels the bank to bear a loss and permits someone without merits to receive a windfall. The real dispute is between the customer and the recipient: either the customer owes the money to the recipient or he does not. If he does not, then clearly the recipient has made an unmeritorious gain at the expense of the bank. If the customer does owe the money, then *he* has made an unmeritorious gain at the expense of the bank, because—in the absence of subrogation as under the U.C.C.—he will not have to pay the bank and will not be pressed by his creditor for payment.[16] On the other hand, if the law allows the bank to recover against re-delivery of the cheque to the recipient, unless the latter has changed his position to his detriment, the recipient, *ex hypothesi*, is no worse off than he would have been if the payment had not been made,

13 227 N.Y.S. 2d. 670 (1962). 14 213 N.Y.S. 2d. 513 (1961).

15 Hereinafter referred to as the *'Restatement'*.

16 The debt may not be discharged (*Simpson v. Eggington* (1855) 10 Ex. 845, 156 E.R. 683), but this need cause no alarm to the customer so long as the creditor is content. If the creditor were to sue on the undischarged debt, the customer could ratify the payment. In so doing, he would render himself liable to the bank. This course of events is most unlikely.

nor is the customer in any better position. The recipient would still have the advantages of an action on the cheque against the drawer. Although this may seem to lead to circuity of actions, that is preferable to a short cut that leads to injustice.

(b) *Insufficient Funds*

Different considerations arise where the bank pays a cheque in the mistaken belief that the customer's account is in credit or that a limited overdraft has not been exceeded. The bank will in such circumstances be entitled to recover from its customer, since it will have performed a valid mandate. There will also not usually be any dispute that the money was owing by the customer to the recipient. It may thus seem to be fair to require the bank, rather than the recipient, to bear the burden of an action against the customer and the risk of the latter's insolvency. The authorities all support this view.

In *Chambers v. Miller*[17] the point arose incidentally in the course of an action for trespass to the person. The plaintiff, having presented a cheque to the defendant bankers, was counting the money he had been given when a clerk discovered that the drawer's account was overdrawn and seized the plaintiff in an effort to get the money back. Byles J. recognized that even if the defendants were entitled to recover the money, the forcible seizure of the plaintiff was not justified. However, all the judges considered, and answered in the negative, the question whether the bank was entitled to recover the money. Erle C.J. said[18] that 'as between the parties here, there was no manner of mistake', which is perhaps best explained by Williams J. when he observed[19] that the teller thought that it was a genuine cheque and there was no mistake in that. The state of the customer's account was a remote consideration.[20] Byles J. was of the opinion that there was no mistake because the banker had full notice,[21] but his main ratio decidendi depends on an awareness of commercial practice: it 'would create a great sensation in the City of London, if it were to be held . . . that, after a cheque has been regularly handed over the banker's counter and the money received for it . . . the banker might treat the cheque as unpaid . . . because he has subsequently . . . ascertained that the state of the customer's account was unfavourable'.[22]

As has been seen,[23] *Chambers v. Miller*[24] was followed in *Pollard*

17 (1862) 13 C.B. (N.S.) 125, 143 E.R. 50, 32 L.J. (N.S.) C.P. 30.
18 Ibid., 134 (C.B.), 53 (E.R.). 19 32 L.J. (N.S.) C.P. 30, 33.
20 In the *Law Journal*, loc. cit., Williams J. is reported to have said also that it was a mistake with which the recipient had 'nothing to do'.
21 This reasoning is inconsistent with *Kelly v. Solari* itself, since the insurers there had as full notice as the bankers here. Similarly, Keating J. in the course of argument drew an untenable distinction between the present case and *Kelly v. Solari* on the basis that here there was laches and that there was none.
22 (1862) 13 C.B. (N.S.) 125, 136, 143 E.R. 50, 54.
23 Supra. 24 Supra.

v. Bank of England.[25] *Woodland v. Fear,*[26] where a bank was allowed to recover a payment made at a branch other than the one on which the cheque was drawn when the cheque was later dishonoured for lack of funds, is of little authority after the aspersions on it in *Prince v. Oriental Banking Corporation.*[27]

In the United States, too, the rule 'almost uniformly adopted . . . is that no recovery may be had against the payee'.[28] There are only occasional exceptions.[29] Where the payee happens to have his account at the same bank as the drawer, it is likewise held that the bank may not reverse a credit to the payee's account on discovery of the drawer's lack of funds. *Chambers v. Miller* also had the support of J. B. Ames;[30] while the *Restatement*[31] adopted the same solution where the recipient 'paid value in good faith' for the cheque. Similarly, the U.C.C.[32] lays down that 'payment . . . is final in favour of a holder in due course[33] or a person who has in good faith changed his position in reliance on the payment'. Since under the Code a payee may be a holder in due course[34] (which is not the law in England[35]), in most commercial transactions recovery will be barred, but questionable exceptions remain. A Comment points out that '[i]f no value has been given for the instrument the holder loses nothing by the recovery of the payment . . . and if he has given only an executory promise or credit he is not compelled to perform it after the . . . reason for recovery is discovered'.[36] This is by no means self-evident, particularly in the case of an 'executory promise or credit'. Where the customer is solvent, the bank has an adequate remedy against him; where the customer is bankrupt, the laws of bankruptcy are surely adequate to adjust the rights of the parties in respect of payments made without consideration or for an illegal consideration. If the customer has disappeared, or for some other reason the bank is unable to recover from him, there may be something to be said for allowing it to recover from a recipient who gave no value; but not necessarily from one who, though relieved from performing an executory contract, may have lost an expected profit. In practice the problem is likely to be rare.

The Comment[37] also says that '[i]f he has taken the instrument in

[25] (1871) L.R. 6 Q.B. 623. [26] (1857) 7 El. & Bl. 519, 119 E.R. 1339.
[27] (1878) 3 App. Cas. 325 (J.C.).
[28] Annotation, 114 A.L.R. 382, 385-8 (1937). To the cases listed may be added *First National Bank of Portland v. Noble,* 179 Or. 26, 168 P. 2d. 354, 169 A.L.R. (1946), and *Central Bank & Trust Co. v. General Finance Corporation,* 29 F. 2d. 126 (1961).
[29] A comparatively recent one is *Manufacturers Trust Co. v. Diamond,* 17 Misc. 2d. 909, 186 N.Y.S. 2d. 917 (1959).
[30] (1891) 4 *Harvard Law Review* 297, 305.
[31] Section 33. [32] Section 3-418.
[33] This includes a transferee from a holder in due course: section 3-201.
[34] Section 3-302 (2).
[35] *R. E. Jones Ltd v. Waring & Gillow Ltd* [1926] A.C. 670 (H.L.).
[36] Section 3-418, comment 3. [37] Ibid.

bad faith or with notice he has no equities as against the drawee'. We have seen that in *Martin v. Morgan*[38] the bankers were held entitled to recover in circumstances in which the recipient could be described as 'in bad faith or with notice'. However, in *Central Bank & Trust Co. v. General Finance Corporation*[39] the U.S. Court of Appeals (Fifth Circuit) rejected an argument that the bank was entitled to recover because, in the peculiar circumstances of the case, the recipient had superior knowledge as to the financial position of the customer, the recipient having stopped payment of its own cheque in favour of the customer which had already been deposited to the customer's account but had not yet been presented for payment. It was held that in the absence of 'fraud, misrepresentation or overreaching', the recipient was not liable to repay the bank.

(c) *Forged*[40] *Signature of Drawer*

In *Price v. Neal*,[41] a man (who was subsequently hanged for the forgery) had forged the drawer's signature to two bills. In one instance, the drawee paid on presentation of the bill; in the other, he accepted and later paid the bill. On discovery of the forgery, he sought to recover the amounts paid from the recipient, an innocent indorsee for value. Lord Mansfield held that he could not recover on either bill. He gave a number of reasons, the main one being that all the fault lay on the side of the drawee and none on the side of the recipient. Although Lord Mansfield did not distinguish between the two bills, only the decision in relation to the accepted bill is expressly confirmed by the *Bills of Exchange Act*,[42] which provides as follows:

> The acceptor of a bill, by accepting it . . . is precluded from denying to a holder in due course . . . the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill . . .

Since a bank will rarely, if ever, accept a cheque,[43] it is the decision with regard to the other bill that concerns us. In the light of later cases[44] negligence on the part of the payor is not a criterion for refusing relief in an action for money had and received. Moreover, mere failure to recognize a signature does not necessarily connote fault.[45] Nor is innocence on the part of the recipient ordinarily a defence to an action for money had and received.

38 (1819) 1 Brod. & B. 289, 129 E.R. 734. 39 29 F. 2d. 126 (1961).

40 Throughout this article 'forged' includes 'unauthorized'.

41 (1762) 3 Burr. 1354, 97 E.R. 871. 42 1909–58 (C'th), section 59(b)(i).

43 *Bank of Baroda Ltd v. Punjab National Bank* [1944] A.C. 176 (J.C.); *Smith v. Commercial Banking Co. of Sydney* (1910) 11 C.L.R. 667, 683. In the United States, both under the Uniform Negotiable Instruments Law (section 187) and the U.C.C. (section 3-411), the certification ('marking') of a cheque by the bank is equivalent to acceptance.

44 Supra, n. 67.

45 This point was taken by Chambre J., dissenting, in *Smith v. Mercer* (1815) 6 Taunt. 76, 128 E.R. 961, and Mathew J. in *London & River Plate Bank Ltd v. The Bank of Liverpool Ltd* [1896] 1 Q.B. 7.

Price v. Neal[46] was followed in *Smith v. Mercer*.[47] Here the drawee's signature was forged on the acceptance of the bill, but the drawee's bankers paid the holders in due course. Dallas and Heath JJ. held that it is a banker's duty to know the signature of his customer and failure to recognize it is negligence. The dissenting judgment of Chambre J., who observed that a forgery might be so skilfully done as to negative negligence, is surely preferable on this point.[48] Gibbs C.J. decided the case on the narrow ground that the defendants lost the opportunity of giving notice of dishonour to the drawer and prior indorser[49]—i.e. he upheld the defence of change of position—but he did not dissent from the broader reasoning of Dallas and Heath JJ. Chambre J., in his dissent, relied on *Bruce v. Bruce*,[50] which is meagrely reported, but appears to be a case where the acceptor was permitted to recover an overpayment as a result of a fraudulent alteration. Gibbs C.J., in the course of argument, stated the facts of *Bruce v. Bruce* more fully than in the report and cast doubt on the decision. The other members of the majority were content to distinguish it. Yet *Bruce v. Bruce* was relied on in *Wilkinson v. Johnson*[51] where the facts were held to be closer to that case than to *Price v. Neal*. Here the bill bore the forged signatures of a drawer, acceptor and indorser. It was paid by the bankers of the purported indorser, who were held entitled to recover when the forgery was discovered on the same day and the recipients were immediately informed. This last case was distinguished in *Cocks v. Masterman*,[52] which was again a case of the drawee's bankers paying on a forged acceptance. But the distinction made was that the recipients were not informed until the next day and so lost the 'privilege' of giving notice of dishonour on the first day. This goes to the defence of change of position, which has already been discussed;[53] it does not preclude recovery where notice is given timeously.

In *Hart v. Frontino and Bolivia South American Gold Mining Co. Ltd*,[54] a case concerned with the forgery of a share transfer form, Bramwell B. made the following remark:[55]

> This is no novelty; as against a bona fide holder for value a banker paying a forged cheque, or a drawee paying a forged bill, cannot afterwards recover back the money, nor can an acceptor deny the drawer's signature.

[46] Supra, n. 41. [47] (1815) 6 Taunt. 76, 128 E.R. 961.
[48] See, too, *London & River Plate Bank Ltd v. The Bank of Liverpool Ltd* [1896] 1 Q.B. 7.
[49] Dallas J. gave as a subsidiary reason for his decision that the defendants may have suffered prejudice. He held that the onus lay on the plaintiffs to prove that this was not so!
[50] (1814) 5 Taunt. 495 n., 128 E.R. 782.
[51] (1824) 3 B. & C. 428, 107 E.R. 792.
[52] (1829) 9 B. & C. 902, 109 E.R. 335.
[53] Supra, where the stringency of the decision is doubted.
[54] (1870) L.R. 5 Exch. 111. [55] Ibid., 115.

In a similar case a few years later[56] Lindley J. (as he then was) uttered a similar *obiter dictum*[57] adding, however, that the bank would be compelled to pay the cheque 'twice over', which would be more appropriate where the bank paid a genuine cheque to the wrong person. These *dicta* were not cited when Lord Lindley delivered the advice of the Board in *Imperial Bank of Canada v. Bank of Hamilton*[58] but were referred to with approval by Vaughan Williams L.J. in another case concerned with a forged transfer form.[59]

In Ceylon there is authority in which the bank was actually held entitled to recover when it paid on a forged cheque: *The Imperial Bank of India v. Abeysinghe*.[60] As is observed by Paget,[61] the defence of change of position should have been available on the facts of the case.

There are conflicting Canadian decisions on the point. In *Dominion Bank v. Jacobs*[62] a cheque was drawn by a man who had no account with the drawee bank. Mistaking the signature for that of one of its own customers, the bank paid the payee of the cheque. Le Bel J. held that the bank could not recover, because the mistake was not one between the payor and the recipient. However, recovery was permitted on the more complicated facts of *Royal Bank v. The King*.[63] A taxgatherer both for the Province and a municipality paid money that he had collected on behalf of the latter into the former's bank account. Although he had no authority to draw cheques on that account, the bank permitted him to draw a cheque in order to transmit money which he owed the Province to the provincial headquarters. After the taxgatherer's death in insolvent circumstances, the bank was compelled to refund the money to the municipality. It then brought action against the Province and was held entitled to recover the amount it had paid on the cheque.

'The doctrine of *Price v. Neal*', as it was called in the title of an article by J. B. Ames,[64] has had much influence in the United States.[65] Ames himself supported the decision on the ground that where the equities are equal, the loss should lie where it falls and the legal title to the money should prevail. He thought that the equities were

[56] *Simm v. Anglo-American Telegraph Co.* (1879) 5 Q.B.D. 188. The judgments on appeal to the Court of Appeal, reported immediately after, do not mention the matter, though Bramwell L.J. presided.

[57] Ibid., 196.

[58] [1903] A.C. 49 (J.C.).

[59] *Sheffield Corporation v. Barclay* [1903] 2 K.B. 580 (C.A.).

[60] (1927) 29-30 Ceylon N.L.R. 257, cited in *Paget's Law of Banking* (7th ed., 1966), pp. 367-8.

[61] Loc. cit.

[62] [1951] 3 D.L.R. 233 (Ontario H.C.). See, also, *Bank of Montreal v. The King*, 38 Can. S.C.R. 258, which was explained in *Dominion Bank v. Union Bank of Canada*, 40 Can. S.C.R. 366, as turning on the defence of change of position.

[63] [1931] 2 D.L.R. 685 (Manitoba K.B.).

[64] (1891) *4 Harvard Law Review* 297.

[65] See, e.g., Lockwood, 'Current Status of *Price v. Neal* in New York,' (1962) 13 *Syracuse Law Review* 426.

not equal where the recipient received the cheque as a gift or made no enquiries as to the person from whom he received it. In these situations the bank would be entitled to recover. On this reasoning Ames also supported *Chambers v. Miller*.[66] He would also have refused relief to a bank which had paid an increased amount on a fraudulently altered cheque to a holder for value in good faith. The latter application of his reasoning is inconsistent with *Imperial Bank of Canada v. Bank of Hamilton*,[67] while many other cases where recovery has been allowed for money paid under a mistake of fact cannot be reconciled with his general principle. After all, the remedy is in law, not equity, despite Lord Mansfield's invocation of *ex aequo et bono* in *Moses v. Macferlan*.[68] The most widely recognized reason given in the American cases which have followed *Price v. Neal* has been commercial expediency, not logic.[69] Although cases applying the doctrine are legion, there is an undercurrent of authority allowing banks to recover, unless the recipient has changed his position to his detriment.[70]

In the United States certification (or 'marking') of a cheque is common and by statute is equivalent to acceptance.[71] Furthermore, the payee of a cheque may be a holder in due course.[72] Thus many of the cases allowing recovery are explicable on the basis of that aspect of *Price v. Neal* which was confirmed by the *Bills of Exchange Act*.[73] Some of the cases treat payment as equivalent to, or greater than, acceptance, so as to estop the drawee from denying the validity of the drawer's signature to a holder in due course.[74] The *Restatement*[75] adopted the following rule:

> The holder of a bill of exchange . . . who has received payment thereof . . . from a drawee on a bill on which the drawer's name was forged, is not thereby under a duty of restitution if he paid value and received payment without reason to know that the signature was forged.

Under the U.C.C.[76] a holder in due course (who may be the payee) or any person who has in good faith changed his position in reliance on the payment cannot be made to repay except where he *actually*[77]

66 (1862) 13 C.B. (N.S.) 125, 143 E.R. 50, discussed supra.
67 [1903] A.C. 49 (J.C.), discussed supra. See also infra.
68 (1760) 2 Burr. 1005, 97 E.R. 676.
69 Annotation, 12 A.L.R. 1089 (1917).
70 See the following Annotations: 10 L.R.A. (N.S.) 49 (1906), 12 A.L.R. 1089 (1917), 71 A.L.R. 337 (1929), 121 A.L.R. 1056 (1937).
71 See supra, n. 43.
72 There was a 'long continued conflict' on this (U.C.C. Section 3-302, Comment 2) which has been settled by the U.C.C. in favour of the view stated in the text.
73 Supra, n. 42.
74 See, e.g., the cases cited in the Annotation 71 A.L.R. 337 (1929); Ames, (1900) 14 *Harvard Law Review* 241, 243.
75 Section 30.
76 Sections 3-417 and 3-418.
77 In *White v. First National Bank*, 22 App. Div. 2d. 973, 254 N.Y.S. 2d. 651 (1964), it was recognized that before the enactment of the U.C.C., the bank could recover if the recipient was in bad faith or *negligent*. The negligence exception is abandoned by the U.C.C. section 3-418, Comment 4.

knows—presumably at the time of presentment—that the drawer's signature is forged.[78] If he does know, then he is in breach of an implied warranty under section 3-417(1)(b).

In principle there is no distinction between payment on a forged cheque and on one which has been stopped. However, there will be no dispute to be resolved between the recipient and the bank's customer. The recipient will usually have given value for the cheque to a rogue. This means that the loss will have to be borne by one of two innocent parties, the bank or the recipient. Should the bank be made to bear the risk of a forgery rather than the recipient who was willing to take a cheque without verifying the drawer's signature? Banks do encourage the use of cheques; they are also in a favourable position to distribute the loss among all users of cheques. On the other hand, since millions of cheques pass through the banks each day, the opportunity for detecting a forgery is perhaps smaller than when the cheque is handed to the recipient. If the bank does detect the forgery before paying, the loss will fall on the recipient anyway. If it does not and pays, there is obviously much to be said for letting the loss lie where it falls, so that the bank should be unable to recover. Yet, this situation resembles most closely that discussed under (e) below (fraudulent increase in the amount), where, as we shall see, both authority and desideratum point to allowing recovery. Consistency demands that recovery be permitted here, too.

(d) *Forged Indorsements*

The overwhelming majority[79] of cheques in use in Australia today are paid into the account of the payee or direct to him personally. Negotiation of cheques is rare. Of those negotiated many will be drawn payable to bearer[80] and, since no indorsement is necessary, no problem can arise with regard to a forged indorsement. In the occasional case where an indorsement on an order cheque has been forged, the bank will usually be amply protected under the *Bills of Exchange Act* if it acted in good faith in the ordinary course of business (where the cheque was not crossed)[81] or in good faith and without negligence (where the cheque was crossed).[82]

78 In *Citizens Bank, Booneville, Arkansas v. The National Bank of Commerce, Tulsa, Oklahoma*, 334 F. 2d. 251 (1965), the U.C.C. was held not to have changed the rule that the doctrine of *Price v. Neal* operates only in favour of a holder in due course, which the defendant was held to be on the facts.

79 The Committee appointed to review the *Bills of Exchange Act*, 1909–58 (C'th), received an estimate that of more than 300 million cheques drawn in Australia each year, 77 per cent. are deposited to the credit of the accounts of the payees named in the cheques (*Report* (1964), section 27).

80 This will include cases where the payee is fictitious or non-existing (*Bills of Exchange Act*, section 12(3)), as will usually be the situation where both drawer's and indorser's signatures are forged. This situation is to be treated as falling under (c) in the text: see O'Malley, 'The Code and Double Forgeries' (1967) *Syracuse Law Review* 36.

81 Section 65. 82 Section 86.

If the bank nevertheless wishes to recover the money from the recipient, *London and River Plate Bank Ltd v. The Bank of Liverpool Ltd*[83] presents an obstacle. This was an action by the acceptor of a bill to recover a payment made to a 'holder' under a forged indorsement which failed. However, Mathew J.'s reasoning depended on an extension of the defence associated with *Cocks v. Masterman.*[84] In *Imperial Bank of Canada v. Bank of Hamilton*[85] the Privy Council was prepared to 'assume' that the rule was as stringent as put forward in these cases, but was not prepared to extend it. The result is that if it discovers the forgery immediately and gives notice to the recipient on the same day, the bank may certainly recover. It is arguable that it may recover if it gives notice at any time before the recipient has suffered prejudice such as losing the right to give notice of dishonour.[86]

In Canada a statute[87] confers on the bank the right to recover from the recipient if notice is given within a reasonable time after it discovers the forgery to persons who indorsed subsequently to the forgery.

Ames, who, as we have seen, would have denied a right of recovery in the two previous situations, was prepared to allow recovery in these circumstances, since the recipient would not have any legal title to the cheque and would in any event be liable to the true owner in conversion.[88] According to Palmer,[89] in the United States an acceptor is regularly held entitled to recover where he has paid on a forged indorsement. However, in *National Bank of Commerce v. First National Bank of Coweta,*[90] it was held that negligence on the part of the bank precluded it from setting up the forgery. The combined effect of sections 35 and 37 of the *Restatement* would allow the bank to recover, unless the recipient had already satisfied the true owner or the drawer's signature was also forged. By reason of a warranty given to the payor that he has good title, the recipient would today be liable to the bank under the U.C.C.[91]

[83] [1896] 1 Q.B. 7. Also, in *Leal & Co. v. Williams,* 1906 T.S. 554, 559, Innes C.J. suggested that if it was protected as against the true owner, the bank could not recover from the recipient.

[84] (1829) 9 B. & C. 902, 109 E.R. 335. See, supra.

[85] [1903] A.C. 49 (J.C.).

[86] The *Bills of Exchange Act,* section 55(1), ensures that in most cases this right will not be lost.

[87] Set out and discussed in Falconbridge, *Banking and Bills of Exchange* (6th ed., 1956), pp. 558 ff. In *Dominion Bank v. Union Bank of Canada* (1908) 40 Can. S.C.R. 366, the bank was held entitled to recover, without reference to any statutory provision where *inter alia* the rogue had changed the name of the payee and indorsed in the fictitious name.

[88] (1891) 4 *Harvard Law Review* 297.

[89] *Mistake and Unjust Enrichment,* p. 28, citing *Canal Bank v. Bank of Albany,* 1 Hill (N.Y.) 287 (1941), and Britton, *Bills and Notes* (1943), section 139.

[90] 51 Okla. 787, 152 P. 596, L.R.A. 1916E 537 (1915).

[91] Section 3-417 (1)(a). On 'double forgeries', see the Comment by O'Malley, supra, n. 80.

(e) *Mistake as to Amount*

Imperial Bank of Canada v. Bank of Hamilton,[92] as has been seen, decided that a bank may recover, even from a holder in due course, the amount by which a cheque had been fraudulently increased after it had been marked by the bank. Since the decision did not depend on treating certification as equivalent to acceptance, it seems that the decision should apply also to an unmarked cheque which has been increased contrary to the drawer's intention. It is true that if the drawer was negligent in his manner of drawing the cheque, the bank might still be able to debit his account with the full amount,[93] yet although in the *Imperial Bank* case the forgery was committed by the drawer himself, no point was made that the bank ought to look to him for its remedy.

If the bank may recover where the amount has been altered, it ought to be allowed to recover where it simply makes an overpayment as a result of misreading the cheque. In most cases the recipient will then be aware of the mistake, but even if he were not, recovery would be allowed in accordance with general principles.[94] Thus in *President, etc. of the Shire of Rutherglen v. Kelly*[95] the drawer of a cheque was allowed to recover from the payee who, without noticing that it was for £100 more than the amount due, had negotiated it for the lower sum. In the absence of evidence that he was unable to recover the excess from the indorsee, the payee was held not to have suffered prejudice so as to give him a defence.

Where the matter is not complicated by certification,[96] which in the United States is deemed to be equivalent to acceptance,[97] the American courts have held that the bank may recover if it acted in good faith and without negligence.[98] *Kansas Bankers Surety Co. v. Ford County State Bank*[99] is an isolated decision in which a bank was held unable to recover from a holder in due course. The reasoning was that since an acceptor under the Uniform Negotiable Instruments Law[99(a)] undertakes to pay in accordance with the tenor of his acceptance, and since payment is stronger than acceptance, the bank may not recover the payment. There are dicta to the effect that the bank

92 [1903] A.C. 49 (J.C.).

93 *London Joint Stock Bank v. Macmillan & Arthur* [1918] A.C. 777 (H.L.). *Colonial Bank of Australasia v. Marshall* [1906] A.C. 559 (J.C.) must be regarded as wrongly decided, even if technically binding in Australia.

94 Cf. *Weld-Blundell v. Synott* [1940] 2 K.B. 107; *Anglo-Scottish Beet Sugar Corporation Ltd v. Spalding U.D.C.* [1937] 2 K.B. 607; *Turvey v. Dentons (1923) Ltd* [1953] 1 Q.B. 218.

95 (1878) 4 V.L.R. (L.) 119.

96 The cases on certified cheques which have been altered—either before or after certification—are gathered in an Annotation, 22 A.L.R. 1157 (1921). See, further, Breckenridge & Llewellyn (1921) 31 *Yale Law Journal* 522, and note, ibid. 548.

97 Supra, n. 43. 98 Annotation, 75 A.L.R. 2d. 611 (1959).

99 184 Kan. 529, 338 P. 2d. 309, 75 A.L.R. 2d. 600 (1959).

99(a) Section 62(1). Cf *Bills of Exchange Act*, 1909–58 (C'th), section 59(a).

would have succeeded if it could have shown that the recipient was negligent.

It may be doubted whether payment should be treated as equivalent to or greater than acceptance. Furthermore, if liability is to be determined according to the provisions of the *Bills of Exchange Act,* then the relevant section is that dealing with alteration of a bill.[1] Can an acceptor or a drawee who pays be said to have 'assented to the alteration' when he accepts or pays in ignorance of the alteration? In *Langton v. Lazarus*[2] the acceptor pleaded to an action by the holder that the bill had been altered. A demurrer was upheld on the ground that the plea did not state that the bill had been altered *after* acceptance. This implies that the acceptor would be liable if the alteration was *before* acceptance. But the editor of *Chalmers*[3] must think that this is not necessarily so under the Act, for he gives the following illustration:

> A genuine bill fraudulently altered in amount from £10 to £100 is *subsequently*[4] accepted and paid. Four months afterwards the acceptor discovers the fraud and gives immediate notice to the holder he paid. He can (probably) recover the money.

The rule adopted by the *Restatement*[5] imposes a duty to restore the excess amount of an unaccepted bill even on a holder who has paid value 'if the drawee was in the exercise of care in making payment in the belief that the instrument had not been altered'. Under the U.C.C.[6] a person obtaining payment of a cheque warrants to a person who pays in good faith that the instrument has not been materially altered.[7] Liability thus depends on breach of this warranty.

From the point of view of what is the most desirable rule, we must note that where the amount is fraudulently increased, as in the case where the drawer's signature is forged, one of two innocent parties will have to bear the loss if the rogue cannot be traced. Here the bank will have the opportunity of shifting the loss back to its customer if he was negligent in the manner of drawing the cheque. There is no reason to suppose that the customer will be better able to bear the loss than the recipient and it is possible that the recipient may have been equally negligent in taking the cheque without full enquiry. The customer's breach of duty to the bank may well be held not to constitute a breach of duty to the ultimate recipient, so that he will not be estopped from recovering the excess from the recipient.[8] It would

1 Section 69. 2 (1839) 5 M. & W. 629, 151 E.R. 266.
3 *Bills of Exchange,* 13th ed. (1964), p. 208. 4 My italics.
5 Section 31(b). 6 Section 3-417(1)(c).
7 The exceptions in section 3-417(1)(c)(iii) and (iv), relating to payment after acceptance, need not concern us.
8 Under the *Bills of Exchange Act,* 1909–58 (C'th), section 69, if the alteration is not apparent and the recipient is a holder in due course, the drawer is liable, on the instrument as originally drawn. Thus, where payment has been made in these

be absurd to make the recipient bear the loss where the drawer has been negligent vis-á-vis the bank, but not where the drawer has exercised all reasonable care. To achieve consistency the bank should be permitted to recover from the recipient in all cases where he has not changed his position to his detriment. In other words, the decision in *Imperial Bank of Canada v. Bank of Hamilton*[9] should be held to apply to all cheques, marked and unmarked.

(f) *Mistake as to the Recipient*

In most cases where the bank pays the wrong person (not as the result of a forged indorsement),[10] the recipient will be aware of the mistake and will be liable to make restitution. Although there appear to be no cases concerning cheques, the principles of *Colonial Bank v. Exchange Bank of Yarmouth, Nova Scotia*[11] and *Kleinwort, Sons & Co. v. Dunlop Rubber Co.*[12] clearly allow the payor to recover where he is mistaken as to the identity of the recipient, even where the latter is innocent. Likewise, the *Restatement* has no special rule for bills in this regard, but the matter falls under the general wording of section 22, which allows recovery 'unless the [recipient] is protected as a contracting party or as a bona fide purchaser'. Under the U.C.C. the warranty of good title,[13] which protects the bank in the case of a forged indorsement, will also serve here.

(g) *Others*

The case law yields no direct answers to other problems which may arise. Material alterations of a cheque, other than a change in the amount, should undoubtedly[14] be dealt with in the same way as an alteration in the sum payable. Other situations will similarly have to be decided in accordance with the analogies they present to the situations discussed. Enough has been said to show that the main reason given in the *Commonwealth Trading Bank*[15] case, viz. that a bank

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circumstances, only the *excess* would be recoverable. If these conditions are not satisfied, the bill is avoided under section 69 and the drawer would presumably be able to recover the full payment.

9 [1903] A.C. 49 (J.C.).

10 As to forged indorsements, see supra. The present discussion would be relevant where the 'indorsement' is a mere receipt: see *National Bank v. Paterson*, 1909 T.S. 322, approved in *Smith v. Commercial Banking Co. of Sydney* (1910) 11 C.L.R. 667.

11 (1885) 11 App. Cas. 84 (J.C.).

12 (1907) 23 T.L.R. 696, 97 L.T. 263 (H.L.). See, too, *Continental Caoutchouc & Gutta Percha Co. v. Kleinwort Sons & Co.* (1904) 90 L.T. 474 (C.A.), *Steam Saw Mills Co. Ltd v. Baring Bros & Co. Ltd* [1922] 1 Ch. 244 (C.A.) (where it was recognized that if the 'identity' of the Russian Government had changed, the plaintiffs would have been entitled to recover the money), *Kerrison v. Glyn, Mills, Currie & Co.* (1911) 17 Com. Cas. 41 (H.L.) (where the insolvency of the New York bankers was said to have changed their identity from that of a living commercial entity), *Morgan v. Ashcroft* [1938] 1 K.B. 49 (C.A.), 66-7, 74.

13 Section 3-417(1)(a).

14 Cf. *Dominion Bank v. Union Bank of Canada* (1908) 40 Can. S.C.R. 366.

15 [1967] V.R. 790.

is precluded from recovery because it is not under a legal obligation to the holder of the cheque to pay him, is not a good one in law, and that in every case consideration should be given to the effect of either allowing or refusing relief on all persons concerned, whether or not they are parties to the action.