

University of Leeds

From the Selected Works of Duncan Sheehan

2008

The Origins of the Mistake of Law Bar in English Law

Duncan Sheehan, *University of East Anglia*



Available at: https://works.bepress.com/duncan_sheehan/18/



The University of East Anglia
Norwich Law School Working Papers Series
<http://lawwp.webapp1.uea.ac.uk/wp/index.php/workingpapers>

NLSWP 08/01 (published March 19, 2008)

The Origins of the Mistake of Law Bar in English Law

by

Duncan Sheehan*

Abstract:

This paper examines the origins of the mistake of law bar in English law. It notes that it came about as a result of confusion, evident initially in *Bilbie v Lumley* and developed later between different concepts of voluntary payments and the idea of inexcusable mistake. There were other pressures – philosophers such as Austin thought the bar essential for the administration of justice. Influential commentary writers, such as Joseph Story believed it essential, and this won over judges such as Lord Brougham, who solidified the bar in Scots law. By the 1840s the view was that mistake of law barred recovery and the removal of the excusability requirement in mistake of fact cases could not alter that.

Keywords:

Mistake of Law, Restitution, Legal History

Contact Details

Dr Duncan Sheehan, Norwich Law School, University of East Anglia, NR4 7TJ

ISSN

1754-5218

* Senior Lecturer in Law, University of East Anglia

This paper establishes how the rule came into existence that recovery of money paid was barred, if the claimant had made a mistake of law. This rule was removed in the law of restitution in 1998 by *Kleinwort Benson v Lincoln City Council* after a long campaign arguing that it made no sense,¹ and subsequently removed in contract as well. We refer to this as the mistake of law bar. We see what concerns led to the rule, and suggest that one element may have been confusion between three distinct issues; barring recovery of payments by inexcusable mistake, barring recovery of voluntary payments, and barring recovery of payments by mistake of law. It was not true that early lawyers had no idea what they were doing. They thought there were good reasons for the bar – and there may yet be cases where it has to be treated differently to mistakes of fact.

Firstly, we see what the eighteenth century position was. There was dissent. Some lawyers believed that mistakes of law did not attract relief. Some believed they did. Secondly, we examine the different senses of voluntary payment and how the uncertainty in the late eighteenth and early nineteenth centuries as to what counted as a voluntary payment contributed to confusion as to whether there was a mistake of law bar. We also seek to explain what Lord Ellenborough meant in *Bilbie v Lumley*,² the case said to introduce the bar.³ The claimant insurer had paid an insurance claim, not realising that he was not obliged to do so, because the defendant insured had failed to disclose information relevant to his decision whether or not to insure. The information had, however, come into his possession before he paid out. The mistake alleged was that the claimant had not known the non-disclosure entitled him to rescind. Lord Ellenborough asked counsel, Mr Wood, if he knew of any cases where a voluntary payment made by mistake of law with full knowledge of the facts had been recovered. When counsel did not reply, Lord Ellenborough said that every man must be taken to be cognisant of the law, and barred relief.⁴ Thirdly, we see the other pressures that influenced courts in the introduction of the bar.

(1) The Eighteenth Century

Lord Wright thought that during the eighteenth century relief was available for mistake of law.⁵ Keener also thought that that was the case.⁶ However, Goff and Jones suggest that the situation was not so clear cut.⁷ Goff and Jones are correct to sound a note of caution. Amongst other things, the system of unjust factors, or reasons for restitution, was not well developed in the eighteenth century. It may be that restitution was available where the defendant had no reason to retain the assets.

¹ [1999] 2 AC 349 (HL)

² (1802) 2 East 469, 102 ER 448

³ Law Commission *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments* (Law Comm no 227 1994) para 2.3; Goff and Jones *The Law of Restitution* (5th edn Sweet & Maxwell London 1998) 213-214 (the current 7th edn has no commentary on the matter); RM Jackson *The History of Quasi-Contract in English Law* (CUP Cambridge 1936) 59-61, recognising also a dictum in *Lowry v Bourdieu* (1780) 2 Dougl 468, 99 ER 299 and AS Burrows *The Law of Restitution* (2nd edn Butterworths London 2002) 148.

⁴ (1802) 2 East 469, 472, 102 ER 448, 449-450.

⁵ Lord Wright of Durley *Legal Essays and Addresses* (CUP Cambridge 1939) Preface xix

⁶ WA Keener *A Treatise on the Law of Quasi-Contract* (Baker Voorhis & Co New York 1893) 85-86.

⁷ Goff and Jones (n 2) 214 n 5

In 1793 Fonblanque suggested that relief could not be obtained in equity against a mistake of law.⁸ However, Sir William Evans argued in 1802 and again in 1806 that the authorities justified a rule that money paid as a result of a mistake of law could be recovered. There was clearly therefore a debate going on at the turn of the nineteenth century. We firstly examine Sir William Evans' argument in favour of allowing relief, and secondly see that there are other cases, which can be said to support the provision of relief. In the last section we examine the eighteenth century writers and cases suggesting that mistake of law did not attract relief.

(A) *Sir William Evans' Argument*

Sir William Evans said,⁹ 'The opinion of the old interpreters is, that if no natural obligation intervenes, even what is paid under a mistake in law, may be recovered back, in which opinion I concur.' One of the cases he cited for this proposition is *Farmer v Arundel*,¹⁰ a case from 1772. The claimant paid the defendant, believing that under the poor laws he was obliged to repay to the defendant sums that the latter had spent on the upkeep of a third party pauper. It turned out that as a matter of law he was not obliged to reimburse the defendant. He sought to recover the money. The defendant had not been obliged to make the payments, and had saved the claimant expense, because the claimant was obliged to provide necessities for the pauper. The claimant therefore had a moral duty to reimburse the defendant. The court held that, money paid by mistake could be recovered, whether that was by mistake of law or fact; however, because this money was due in honour it could not be recovered.¹¹ The idea of money "due in honour" has translated into natural obligations in modern law,¹² which bar recovery of money paid by mistake of law, and Evans recognised their existence at the turn of the nineteenth century.

Evans thought that the decision that recovery was barred, because of the duty in honour to pay, rendered obiter the judgment that payments under mistake of law were prima facie recoverable.¹³ However, had the court not decided that money paid under mistake of law was prima facie recoverable it would not have needed to make the further decision that on the facts the money was not recoverable. The decision that a payment by mistake of law was recoverable was therefore an integral part of the court's reasoning, and part of the ratio decidendi.

A second case on which Evans relied was *Bize v Dickason*,¹⁴ in 1786. The claimant was an insurance broker, who had engaged the bankrupt third party as underwriter. On his bankruptcy the underwriter owed £662 to the claimant as a result of various insurance losses. The claimant owed a greater sum to the bankrupt in underwriting premiums. He paid these premiums to the defendant, the bankrupt's trustee in bankruptcy, without deducting the £662, mistakenly believing he was not

⁸ J Fonblanque *A Treatise on Equity* (1793) Vol I 108

⁹ Sir William Evans 'An Essay on the Action of Money Had and Received' (1802) PBH Birks, FD Rose and LD Smith (edd) [1998] RLR 1, 5.

¹⁰ (1772) 2 Black W 824, 96 ER 485

¹¹ (1772) 2 Black W 824, 825-826, 96 ER 485, 486

¹² D Sheehan 'Natural Obligations in English Law' [2004] LMCLQ 172

¹³ Evans (n 9) 8

¹⁴ (1786) 1 TR 285, 99 ER 1097

entitled to do so. He was. On discovering his mistake, he sought to recover this sum. Lord Mansfield said that if the claimant paid what in equity he ought to pay he could not recover.¹⁵ However, he could recover if he made a payment by mistake where the recipient had no claim in conscience to retain it. Lord Mansfield therefore allowed recovery, as the defendant had no claim to retain the £662. Evans claimed that on the facts this could only mean that the mistake of law, as to whether the money could be deducted, allowed recovery.¹⁶

In *Brisbane v Dacres*¹⁷ Gibbs J did not accept *Bize v Dickason* as authority that money paid under a mistake of law could be recovered back.¹⁸ He argued that Lord Mansfield could not have meant that money paid under mistake of law was recoverable. Given that relief was permitted, this seems unlikely. The decision is certainly inconsistent with only mistake of fact attracting relief. Gibbs J's reasoning was that Lord Mansfield had been on the court in *Lowry v Bourdieu*,¹⁹ six years before *Bize v Dickason*, where Buller J had decided that money paid under a mistake of law could not be recovered.²⁰ Similarly Buller J, who was on the court in *Bize v Dickason*, would not have allowed the matter to pass unquestioned had the question of the recovery of money paid by mistake of law been raised. Stadden commented that this was a weak argument, based on surmise as to the reason for a judge's silence.²¹

Evans insisted that *Lowry v Bourdieu* was no authority for the proposition that money could not be recovered where the payor had made a mistake of law.²² The claimant had lent money to a third party, Lawson, and bought an insurance policy from the defendant on Lawson's ship, which was carrying cargo to be sold to satisfy the debt. The voyage was a success and the vessel came into port safely. The insured claimant sought to recover the premium on the policy on the grounds that he had had no insurable interest in the ship, and that he had paid the money under a mistake of law as to the validity of the policy. The policy was in fact illegal. Evans claimed that the question whether money paid by mistake of law could be recovered, and the question in *Lowry v Bourdieu* whether a sum of money could be recovered, when it was clear that the advantage bargained for could not have been obtained, were distinct.²³ Lord Mansfield rested his decision in *Lowry v Bourdieu* on questions of illegality, which were not present in *Bize v Dickason*.²⁴ Although it is not as clear, Ashhurst J probably rested his on the same issue.²⁵ There appears to be no doubt that Buller J said that there would be no restitution for mistake of law, at least where the

¹⁵ (1786) 1 TR 285, 285-286, 99 ER 1097, 1098

¹⁶ Sir William Evans (tr) RJ Pothier *A Treatise on the Law of Obligations or Contracts* (1806) Vol II 389.

¹⁷ (1813) 5 Taunt 143, 128 ER 641.

¹⁸ (1813) 5 Taunt 143, 153-154, 128 ER 641, 645-646.

¹⁹ (1780) 2 Dougl 468, 99 ER 299

²⁰ (1780) 2 Dougl 468, 471, 99 ER 299, 300

²¹ CM Stadden 'Error of Law' (1907) 7 Columbia L Rev 476, 506

²² Pothier (n 16) 393

²³ Ibid 393

²⁴ Ibid 394; (1780) 2 Dougl 468, 470, 99 ER 299, 300

²⁵ (1780) 2 Dougl 468, 471, 99 ER 299-300; Pothier (n 16) 394

contract of insurance was fully executed.²⁶ Evans observed that the question was how much attention should be paid to Buller J's reference to *ignorantia juris non excusat*. Evans argued that the maxim was inappropriate in the context, and inconsistent with Buller J's proposition that the money would have been recoverable had the contract been executory.²⁷ This need not be the case – it may be that Buller J thought mistakes of law as to illegality ought not attract relief, which would amount to carving out an exception to the general rule. At the same time his references to executory contracts can be seen as very early development of locus poenitentiae, the rule that claimants can repent and claim their money back before the illegal purpose is in fact attempted.

Evans relied on another case that he himself admitted to be weak.²⁸ That was *Ancher v Bank of England*,²⁹ decided in 1781. Ancher drew a bill of exchange on the bank in favour of Dahl who indorsed it to Moestue. Moestue restrained its negotiability, so it could not be validly passed to a third party indorsee. It was later negotiated on a forged indorsement to the fraudster, who obtained payment. The forgery was then discovered, and Ancher, whose agent had arranged for payment, sought to recover from the defendant bank and succeeded. Ashurst J rested his judgment on the mistake that the money due on the bill was due to the fraudster.³⁰ Evans argued that there was no mistake of fact because the restraint on indorsement was clear on the face of the bill, or if there were a mistake, it was due to negligence so gross as to deny any right to relief. There were no circumstances of fraud, or any other grounds, on which the action could have proceeded. The mistake for which the claimant recovered must therefore have been one of law.³¹ A caveat should, however, be entered. It was not the whole court who proceeded on the basis of mistake. The other judges in the majority examined the effect of the restraint on the bill's negotiability. The bank could not, having paid the fraudster, have maintained an action against the claimant, Ancher, for the recovery of the payment of the bill because it was non-negotiable, and therefore Ancher could himself recover.³² The decision fits with Kremer's argument that recovery could be had in the eighteenth century simply because no consideration was given.³³ Indeed the decision fits rather better with such an interpretation than that mistake had any role to play.

There is a parallel in Scots law. Evans-Jones has demonstrated that Roman law had not made a definite choice between two rival traditions. Scots law imported the controversy and only finally made a decision in the late eighteenth and early nineteenth centuries.³⁴ The first view was that the pursuer be mistaken before he could

²⁶ (1780) 2 Dougl 468, 471, 99 ER 299, 300-301.

²⁷ Pothier (n 16) 395

²⁸ Evans (n 9) 7

²⁹ (1781) 2 Dougl 637, 99 ER 404

³⁰ (1781) 2 Dougl 637, 640, 99 ER 404, 405

³¹ Pothier (n 16) 387-388.

³² (1781) 2 Dougl 637, 639-641, 99 ER 404, 405

³³ B Kremer 'Recovering Money Paid under Void Contracts: 'Absence of Consideration' and Failure of Consideration' (2001) 17 JCL 37, 42-52.

³⁴ R Evans-Jones 'From "Undue Transfer" to "Retention without a Legal Basis"' in R Evans-Jones (ed) *The Civil Law Tradition in Scotland* (Stair Society Edinburgh 1995) 213, 228; *Carrick v Carse* 1778 Mor 2931; Viscount Stair *The Institutions of the Law of Scotland* (2nd edn 1693) DM Walker (ed) (Stair

obtain relief. The second tradition was that relief was available where the money paid was proven not to be due. There was no requirement of mistake. Relief was only barred where the payor knew that the payment was not due. Other English cases are explicitly framed in terms of mistake though. This and Evans' discussion of *Lowry v Bourdieu*, arguing that mistake of law was different from recovery of money paid where there is no possibility of obtaining the bargained-for consideration suggests at the very least a move towards mistake claims rather than claims that the money was not due was under way in the late eighteenth century. Such a move made a mistake of law bar possible.

Finally, Evans argued that the action of money had and received was founded on reasons of equity and moral rectitude, and that any exception must be based on the same principles.³⁵ To bar relief where the mistake was one of law, rather than one of fact, was not justifiable on grounds of equity.

(B) Other Cases Supporting Relief for Mistake of Law

We examine the two most frequently cited, although there are others.³⁶ *Lansdowne v Lansdowne*³⁷ was decided in 1730. There were three Lansdowne brothers originally, and the middle brother died. The two survivors agreed to divide his lands between them. They did so on the mistaken advice that land could not ascend, so the younger brother was the heir rather than the elder. After the death of the younger brother, his lands devolved to his son. The surviving brother, the eldest, sued in the court of Chancery for recovery of the land from his nephew and the cancellation of the agreement. He claimed that he had been mistaken in believing that the youngest brother was entitled to the land as heir. The Lord Chancellor, Lord King, held that the bond and indentures were made by mistake of law, and that they should be given up to be cancelled.³⁸ *Bingham v Bingham*³⁹ was decided in 1748. The claimant bought an estate from the defendant. On discovering that the estate was his all along, he sued in the court of Chancery for the return of the money paid. It was held that equity relieved against bargains made under a misconception of rights, including a mistaken belief as to ownership of a given piece of property.

Both of these cases involved a mistake of law. However, in both cases the mistake could be characterised as a mistake as to private rights. Mistakes as to private rights were later squeezed into an exception to the mistake of law bar.⁴⁰ For this reason the cases were no doubt seen in the later nineteenth century as being weak authority against the bar.

Society Edinburgh 1981) 1.7.9; Lord Kames *Principles of Equity* (1760) 91-92; J Erskine *An Institute of the Law of Scotland* (1773) 3.3.54

³⁵ Evans (n 9) 5

³⁶ *Hewer v Bartholomew* (1598) Cro Eliz 614, 78 ER 855; *Bonnel v Foulke* (1657) 2 Sid 4, 82 ER 1224; *Tompkins v Burnet* (1693) Salk 22, 91 ER 21 and *AG v Perry* (1733) 2 Comyns 481, 92 ER 1169. Equity cases allowing relief include *Pusey v Desbouverie* (1734) 3 P Wms 315, 24 ER 1081 and *Willan v Willan* (1809) 16 Ves Jun 72, 33 ER 911.

³⁷ (1730) 2 Jac&W 205, 37 ER 605 (1730) Mos 364, 25 ER 441

³⁸ (1730) 2 Jac&W 205, 206, 37 ER 605, 606 (1730) Mos 364, 365, 25 ER 441

³⁹ (1748) 1 Ves Sen 126, 27 ER 934 (1748) Belts Supplement 79, 28 ER 462

⁴⁰ *Cooper v Phibbs* (1867) LR 2 HL 149.

(C) Cases and Writing against the Provision of Relief for Mistake of Law

In 1793 Fonblanque maintained that where the claimant had made a mistake of law he ought not to receive relief. He argued, 'As to ignorance of law, it may be laid down as a general proposition, that it shall not affect agreements, nor excuse from the legal consequences of particular acts, even in courts of equity.'⁴¹

He relied for this proposition on the maxim *ignorantia juris non excusat*, and the case of *Harman v Camm*.⁴² That case was authority for the following proposition. If two men were bound to another by a joint obligation, and the creditor released one debtor, believing that he had not released the other, he released both parties. The mistake of law had no effect. Fonblanque⁴³ commented that there was only one case where the contrary was asserted and that was *Lansdowne v Lansdowne*, where the Lord Chancellor argued that the use of the maxim *ignorantia juris non excusat* outside the criminal context was illegitimate.⁴⁴ It may be that Fonblanque would explain *Bingham v Bingham* as being a mistake as to facts, and indeed possibly *Lansdowne v Lansdowne* as well, although he does regard that one dictum in the case to be against him. Fonblanque's explanation of *Harman v Camm* - that it can be explained as being a case of relief being denied because the mistake was one of law - assumes that it is possible to release one party to a joint obligation, but not the other. This would seem unlikely - the nature of a joint liability is that both parties are together taken as one party. On this basis the release is either of both parties or neither. The mistake of law has no effect. It does not make possible the impossible. Fonblanque was relying on a case, authority for no proposition of use to him.

Other than *Lowry v Bourdieu*, *Munt v Stokes*,⁴⁵ in 1792, is the only eighteenth century case where there was a reasonably explicit suggestion that mistake of law did not allow relief.⁴⁶ The testator had borrowed money on a type of loan contract illegal in England. The executors had repaid the loan, and sought to recover the money on the basis of their mistaken view of their liability to pay. Lord Kenyon said that the parties were bound to know the law.⁴⁷ He appears to have thought the claimants were not mistaken, but his allusion to the maxim *ignorantia juris non excusat* suggests that it would not have mattered if they had been mistaken as to the law. Evans was, however, unimpressed by the authority of this case as to the mistake of law bar.⁴⁸ He said that the dictum was no more than an incidental remark, and any inference from the general knowledge of the law we are presumed to possess would be inconsistent with the principles he (Evans) had set out earlier.⁴⁹ This is unconvincing, but it is

⁴¹ Fonblanque (n 8) Vol I 108

⁴² Viner's Abridgment Vol 4 387 pl 3 (2nd edn 1791); Fonblanque (n 7) 108 Vol I and J Story *Commentaries on Equity Jurisprudence: as administered in England and America* (2nd edn 1839) s 111 n 4, citing *Wibdey v Cooper Company* (1713) 3 P Wms 128, 24 ER 997 n1 and *Atwood v Lamprey* (1719) 3 P Wms 128, 24 ER 997 n1.

⁴³ Fonblanque (n 7) Vol I 108

⁴⁴ (1730) Mos 364, 365, 25 ER 441, 441

⁴⁵ (1792) 4 TR 561, 100 ER 1176

⁴⁶ Goff and Jones (n 2) 214 n 5

⁴⁷ (1792) 4 TR 561, 564, 100 ER 1176, 1178

⁴⁸ Evans (n 9) 24

⁴⁹ Ibid 5-8

noticeable that both *Lowry v Bourdieu* and *Munt v Stokes* involve questions of illegality. There may well have been a question whether mistakes as to illegality ought to be treated differently. The second point is that Lord Kenyon barred relief because the parties were bound in honour, which barred otherwise good mistake claims. This is a curious reason. It is hard to see how one could be bound in honour to do something that was illegal, but even leaving this to one side obligations binding in honour have emerged in modern English law as natural obligations, which as we have seen already bar recovery of payments made in mistake of law – this is because the payment was in fact due, albeit unenforceable.

(2) The Early Nineteenth Century: Separate Ideas Confused

In judgments from the early nineteenth century there is a connection, or juxtaposition, between voluntary payments and mistake of law. The first instance seems to be in *Bilbie v Lumley*. Lord Ellenborough asked counsel ‘whether he could state any case where if a party paid money to another voluntarily with a full knowledge of the facts of the case he could recover it back again on account of his ignorance of law.’⁵⁰ Treatise writers also juxtaposed the ideas of voluntary payment and mistake of law. Selwyn, for instance, stated that where a party paid money to another voluntarily, with full knowledge, or full means of knowledge, he could not recover on account of his ignorance of law.⁵¹ This is important. The exposition of the law in terms of the irrecoverability of voluntary payments made by mistake of law causes us to consider what ‘voluntary payment’ actually meant and whether recovery was at least initially denied because the payment was voluntary, rather than because of the mistake of law.

The first section is devoted to showing that there were several different senses of voluntary payment, which together could swallow up relief for mistake of law. The second shows that there was an excusability requirement in English law at the beginning of the nineteenth century, which may have been confused with the voluntary payments idea. The third section seeks to explain *Bilbie v Lumley*. We see that it was the voluntary nature of the payment that barred relief.

(A) Voluntary Payments

‘Voluntary payment’ naturally means a payment the payor wants to make. At law, however, its meaning rapidly became unstable. The eighteenth century cases show a number of different meanings. The confusion remains today.⁵² This section aims to straighten out some of the different meanings that the phrase bore, and suggests ways in which the confusion might have contributed to the introduction of the mistake of law bar.

⁵⁰ (1802) 2 East 469, 470, 102 ER 448, 449; *Brisbane v Dacres* (1813) 5 Taunt 143, 128 ER 641 and *Wilson v Ray* (1839) 10 Ad&E 82, 113 ER 32

⁵¹ W Selwyn *An Abridgment of the Law of Nisi Prius* (1808) Vol I 71 and subsequent editions; PB Leigh *An Abridgment of the Law of Nisi Prius* (1838) Vol I 54-56 and F Edwards and SB Harrison *A Practical Abridgment of the Law of Nisi Prius with the General Principles of Law Applicable to the Civil Relations of Persons and the Subject Matter of Legal Contention* (1838) Vol I 226.

⁵² PBH Birks *An Introduction to the Law of Restitution* (Revised edn Clarendon Press Oxford 1989) 164.

(i) Non-Compelled Payments

The New South Wales Law Reform Commission suggested that in *Bilbie v Lumley* ‘voluntary’ meant uncoerced.⁵³ Lord Ellenborough said nothing that obviously contradicts that. He asked if Mr Wood knew of any cases where money paid voluntarily under a mistake of law had ever been recovered. An uncoerced, voluntary, payment in mistake of law would be barred, but not a coerced payment. Lord Ellenborough considered *Chatfield v Paxton* to be a case against his assertions about mistake of law.⁵⁴ The claimants drew a bill of exchange on a third party drawee, which the defendants obtained and attempted to claim payment from the drawees. The drawee became insolvent and the defendants sent it back to the drawer, protested for non-payment. The defendants then drew a bill on the claimants as drawees to discharge the claimants’ supposed debt to them. The claimants accepted liability to discharge the bill. Before they finally became liable to pay, however, it became clear that the facts were such that they had not needed to take on such liability. Nonetheless they paid, and attempted to recover, from the defendants, the money they had paid. Relief was allowed, but the claimant had protested when paying. This might be explained as a coerced payment, as protest is at least evidence of coercion;⁵⁵ however, Lord Ellenborough treats it as a voluntary payments case.⁵⁶ This may be because coercion by legal process is not coercion that the legal process can take any account of. The decision therefore poses difficulties for Lord Ellenborough since he argued voluntary payments by mistake of law did not attract relief – and one had attracted relief here. They are, as we will see, reconcilable. In *Chatfield v Paxton* the mistake the claimants made may have been excusable, justifying relief – while that in *Bilbie v Lumley* was inexcusable, thus denying relief.

Nonetheless there is some warrant for accepting that ‘voluntary’ meant uncoerced. In *Irving v Wilson*⁵⁷ the claimant sent hams from Scotland to Carlisle. He obtained a permit for this, but the wagons became separated. Customs officers seized the first set of wagons, the permit being with the second set, and refused to release them until the fee for the licence were paid. The claimant made the second payment. Ashhurst J said that it was not a voluntary payment because when the defendants stopped the goods the claimant was in their power.⁵⁸ He said ‘It was a payment by coercion’.⁵⁹ The contrast between a payment by coercion and a voluntary payment implied that any payment that was not coerced was voluntary. The case looks more like a case of duress of goods, such as *Astley v Reynolds*,⁶⁰ at least to modern eyes. The claimant pawned a plate to the defendant for £20 and the latter sought £10 in interest, not allowing the claimant to take the plate until he had paid. After he had paid, the claimant brought an action to recover £10, and succeeded. He insisted that

⁵³ New South Wales Law Reform Commission *Restitution of Benefits Conferred under Mistake of Law* (LRC 53 1987) para 3.27 n 46

⁵⁴ (1798) 2 East 471 n, 102 ER 449; suggestions consistent with absence of basis make this a difficult case, indeed so difficult it was not at first considered worth reporting.

⁵⁵ (1798) 2 East 471 n, 102 ER 449 (Ashhurst J)

⁵⁶ (1802) 2 East 469, 470-471, 102 ER 448, 449

⁵⁷ (1791) 4 TR 485, 100 ER 1132

⁵⁸ (1791) 4 TR 485, 486, 100 ER 1132, 1133

⁵⁹ (1791) 4 TR 485, 487, 100 ER 1132, 1133

⁶⁰ (1731) 2 Str 915, 93 ER 939.

where there was extortion the payment was involuntary.⁶¹ This again shows the contrast that was drawn between coerced involuntary payments and uncoerced voluntary payments. This is important because it could have led lawyers to an erroneous conclusion. If mistake of law cases involving coerced non-voluntary payments attracted relief, and mistake of law cases involving voluntary payments did not, it would have been easy to come to the conclusion that the voluntariness of the payment was crucial. If there were a sense of 'voluntary' in which it meant uncoerced, it would have been easy to conclude, erroneously, that the coercion, rather than the mistake, allowed restitution.

(ii) Payments under Pressure of Legal Process

The sense of voluntary payment under discussion here is that the payment is voluntary where compelled only by due process. This is interesting because this is coercion of which the law can take no notice.⁶² If a voluntary payment were merely an uncoerced payment, voluntary payments could be taken to include payments pressured by legal process. Thus enlarged it could cover almost all cases of relief for mistake of law.

In *Knibbs v Hall*⁶³ the claimant was indebted to the defendant for rent. He insisted that the latter accept a lower rent than he was demanding, which the latter refused to do. The defendant distrained for the balance of the rent he claimed was outstanding, after the claimant's payment of the lesser sum. After the claimant paid the balance, he argued that he could prove he had only been obliged to pay the lower rent. He claimed to set off the overpayments in future payments of rent. The court held that where a party threatened with distress for rent had a defence at that time, but paid, he could not recover the money, because his payment was voluntary.⁶⁴ In *Brown v M'Kinally*⁶⁵ the claimant and defendant entered an agreement, by which the defendant agreed to sell old iron at £9 per ton. The iron was mixed with bushel iron of inferior quality and sold at the same rate. The claimant paid the price under pressure of being sued, but he reserved a right to sue himself. He later exercised this right. Lord Kenyon argued, 'Money paid by mistake was recoverable in assumpsit but here it was paid voluntarily and could not be recovered'.⁶⁶ Previously he had said that he could not give relief, because the claimant relied on an argument available to him when he made the payment.⁶⁷ There appears to have been a connection made between the two. Selwyn discussed these cases in a footnote to the discussion of *Bilbie v Lumley*.⁶⁸ This proves juxtaposition only, but is suggestive of a perceived link between the ideas. Leigh⁶⁹ and Edwards and Harrison⁷⁰ also seem to have run the

⁶¹ (1731) 2 Str 915, 916, 93 ER 939.

⁶² *Marriott v Hampton* (1797) 7 TR 269, 101 ER 969.

⁶³ (1794) 1 Esp 84, 170 ER 287.

⁶⁴ (1794) 1 Esp 84, 84, 170 ER 287, 287.

⁶⁵ (1795) 1 Esp 279, 170 ER 356.

⁶⁶ (1795) 1 Esp 279, 279-280, 170 ER 356, 357.

⁶⁷ (1795) 1 Esp 279, 279, 170 ER 356, 357.

⁶⁸ See for example Selwyn (n 51) 71-72 citing primarily *Knibbs v Hall*; W Selwyn *An Abridgment of the Law of Nisi Prius* (4th edn 1817) 80-81 citing also *Cartwright v Rowley* (1799) 2 Esp 723, 170 ER 509 and *Kist v Atkinson* (1809) 2 Camp 63, 170 ER 1082 and W Selwyn *An Abridgment of the Law of Nisi Prius* (9th edn 1838) 83-84, citing also *Gower v Popkin* (1817) 2 Stark 85, 171 ER 581.

⁶⁹ Leigh (n 51) 64-65.

question of barring relief in this case together with barring relief for voluntary payments in knowledge of all the facts.

In many cases where the payor had made a mistake of law, the mistake would be that he had no defence to the legal claim, or demand, originally made against him. If so, and a payment were voluntary where it was made pursuant to a demand, a bar to recovery of voluntary payments could cover almost all cases of mistake of law – this is particularly clear when we see the impact of settlement.

(iii) Settlement

Goff and Jones argue that *Bilbie v Lumley* can be seen as being a case of voluntary payment in the following sense.⁷¹ If a payment is made in mistake of law, with full knowledge of the relevant facts, in response to a demand, it may be characterised as voluntary if the party has taken the risk that he may be mistaken.⁷² Alternatively we may say that the payment was made in settlement of the demand. There seems again nothing that obviously contradicts the proposition that Lord Ellenborough meant a voluntary payment to be one paid in response to a demand. The facts were that the payment was made in response to a demand. *Brisbane v Dacres* merely followed *Bilbie v Lumley* by holding that type of payment to be voluntary.⁷³ A captain paid over a proportion of freight received for the carriage of publicly owned bullion to his admiral, believing it due under an old custom. However, it later turned out that it was not due. He could not recover from the admiral's widow. Gibbs J made the point that there are many doubtful questions of law and, when they arise, the defendant has an option to litigate them.⁷⁴ He said

We must take this payment to have been made under a demand of right, and I think that where a man demands money of another as a matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum, he never can recover back the sum he has so voluntarily paid.⁷⁵

Later he referred to *Chatfield v Paxton* as supporting this proposition.⁷⁶ *Chatfield* is consistent with the position, it is true, but does not seem to require it. Gibbs J was concerned with the question of finality of dispute settlement. He said that by paying the claimant closes the transaction. *Brisbane v Dacres* may therefore be no authority for the proposition that payments made in mistake of law were irrecoverable; rather it may be authority for the proposition that voluntary payments in settlement of a demand were irrecoverable. This runs into the objection that there was no actual demand by the admiral, but Gibbs J said that it must be taken as if there were.⁷⁷ Heath J said that a payment in the knowledge that a demand was going to be

⁷⁰ Edwards and Harrison (n 51) 226-227.

⁷¹ Goff and Jones (n 2) 214-215.

⁷² Ibid 55

⁷³ Law Commission (n 3) para 2.4

⁷⁴ (1813) 5 Taunt 143, 152, 128 ER 641, 645.

⁷⁵ (1813) 5 Taunt 143, 152, 128 ER 641, 645.

⁷⁶ (1813) 5 Taunt 143, 155-156, 128 ER 641, 646.

⁷⁷ (1813) 5 Taunt 143, 152, 128 ER 641, 645.

made had to be treated the same as a payment made subsequently to a demand.⁷⁸ The notion of a made-up (or constructive) demand obviously must be treated with caution – it could become an easy device for enlarging the bar.

A requirement of the cause of action, although it seems not to have been made explicit until *Kelly v Solari*,⁷⁹ was that the mistake had to be as to liability. The insurer in that case had paid out on a life insurance policy to Mrs Solari, after she had made a claim, believing the policy to be valid, whereas in fact it had lapsed. The insurer recovered because his mistake was as to his liability to pay. If a demand were made and a belief existed that the payor was liable, relief would be barred – once that is extended to cases not involving an actual demand – almost all cases are covered. The assumption we make is that if we do not pay what we owe, we will be asked to do so. If this were recognised, it must have contributed to the growing belief that relief was unavailable for mistake of law.

(iv) A Preliminary Conclusion

There were several senses in which voluntary payments were understood. The most important seem to have been that the payment was not coerced, that it was pressured by legal process, and that the payment was made in settlement, or submission to an honest claim. These different senses of voluntary payment could easily swallow the availability of relief for mistake of law. To say therefore that relief was not available for voluntary payment under mistake of law was tantamount to refusing it altogether for mistake of law. The only obvious case where a mistake of law might be present, and yet relief was given would be a coerced payment by mistake of law; however, in such cases it is easy to see relief as being given for the coercion.

(B) Excusable Mistakes

We must distinguish voluntary payments from payments by inexcusable mistake. In modern South African law relief will not be given if the mistake is slack or inexcusable.⁸⁰ South African lawyers do not, however, make a connection with voluntary payments. We firstly show that there was an excusability requirement in early nineteenth century English law. We show in the second subsection that confusion may have developed between the concept of payment by inexcusable mistake and the concept of voluntary payment.

(i) The Requirement

In the early nineteenth century a view was held that a mistake, to be relieved, had to be one such that the claimant did not have the ready means of discovering its falsehood. In essence this is a requirement that the mistake be excusable. One example of an inexcusable mistake is a mistake that the claimant ought not to have made because of the ease in discovering that it was in fact untrue. In Scotland

⁷⁸ (1813) 5 Taunt 143, 160, 128 ER 641, 648.

⁷⁹ (1841) 9 M&W 54, 152 ER 24

⁸⁰ *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* (1992) (4) SA 202 (A) 223-224 (Hefer JA)

inexcusable mistake was described in these terms, as having the full or easy means of knowledge available.⁸¹

In *Martin v Morgan*⁸² the defendants presented a post-dated cheque, knowing it to be post-dated, and knowing that the drawer of it was insolvent. The claimants paid the cheque, expecting to be put in funds shortly afterwards. They claimed the money back on discovering the drawer's insolvency. They lost because they ought to have known of the insolvency. Dallas CJ held, 'The rule of law is, that where money is paid with full knowledge, or with full means of knowledge of the circumstances attending the demand, the party paying is not entitled to recover back such payment.'⁸³

(ii) Excusability and Voluntariness

In *Bilbie v Lumley* counsel contended 'that the money having been paid with full knowledge or full means of knowledge could not be recovered.'⁸⁴ This, as we have seen, is the language of excusability. It is hard to see how this made the payment voluntary. *Bilbie v Lumley* can therefore be seen as an example of inexcusable error. The insurer ought to have known that they could have rescinded the contract for non-disclosure. However, *Bilbie v Lumley* was a case expressly concerned with voluntary payments. Lord Ellenborough made this clear by asking whether Mr Wood knew of any cases of voluntary payments in mistake of law where the money was recovered.⁸⁵ The head note makes no mention of this, saying that 'money paid by one with full knowledge (or the means of such knowledge in his hands) of all the circumstances cannot be recovered back again on account of such payments having been made under an ignorance of law'.⁸⁶ The reporter appears not to have thought that Lord Ellenborough's reference to voluntary payments was crucial, or maybe he thought that the head note summarised accurately the judgment, including the reference to voluntariness.

This suggests confusion between payments by inexcusable mistake and voluntary payments. There is further evidence for this. Comyn for example argued, "Upon the subject of *voluntary payments*, the rule of law is, that where money is paid with full knowledge, or with full means of knowledge of the circumstances attending the demand, the party is not entitled to recover back such payment, though made

⁸¹ *Young v Campbell* (1854) 14 D 63; *Stirling v Earl of Lauderdale Kames Collection Dictionary Vol VIII 1733-1734 Document 874 Petition of Stirling and Youle v Cochrane* (1868) 6 M 427. This requirement has now been formally removed by *Morgan Guaranty Trust Corporation of New York v Lothian RC* 1995 SLT 299 (IH).

⁸² (1819) 1 Brod&B 289, 129 ER 734

⁸³ (1819) 1 Brod&B 289, 291, 129 ER 734, 734-735; *Bilbie v Lumley* (1802) 2 East 469, 102 ER 448; *Milnes v Duncan* (1827) 6 B&C 671, 108 ER 598; *Wilson and M'Lellan v Sinclair* (1830) 4 W&S 398, 409; Pothier (n 16) 387-388 and Leigh (n 52) 55, citing *Milnes v Duncan*

⁸⁴ (1802) 2 East 469, 470, 102 ER 448, 448

⁸⁵ (1802) 2 East 469, 470, 102 ER 448, 449

⁸⁶ (1802) 2 East 469, 469, 102 ER 448, 448

without sufficient consideration.”⁸⁷ He referred to *Bilbie v Lumley* as authority for this proposition. He made no distinction between mistakes of fact and of law. It was no more than a statement of the principle in *Martin v Morgan*.

Chatfield v Paxton provides further evidence of confusion between the two concepts. The claimant did not know the full facts at the time that he accepted liability to pay the sum due on the bill of exchange. Ashhurst J suggested on the motion for a new trial that because the claimant had protested, the claimant’s payment was not voluntary. This would suggest that he felt it was a case of coercion. However, he also said that where the payment was made ‘not with full knowledge but only under a blind suspicion of the case’ it ought to be recovered. This appears to suggest that, at least sometimes, where the claimant was mistaken and did not investigate the facts fully he could recover. Grose J was equivocal, arguing that he was not completely satisfied the claimant did not have sufficient knowledge of the facts to render it a voluntary payment; nonetheless he acquiesced in the judgment. It may be that the party did not have the means of knowledge to fall foul of the excusability rule. Lawrence J made comments to much the same effect. He used language better suited to describing the excusability of the mistake and then argued that the maxim *volenti non fit injuria* could not be used. The use of this maxim looks strange to modern eyes where it is normally deployed in tort cases, but it reflects a sense in which the payment was the claimant’s fault. It appears that the case can either be seen as a case where the mistake was not quite inexcusable enough, or the level of knowledge available to the claimants was not enough, to render the payment voluntary. The two concepts had simply become intertwined.

In *Kelly v Solari* the excusability requirement was dropped, and the cause of action defined without reference to the requirement. Parke B said,

Where money is paid to another under the influence of a mistake, that is, upon the supposition that a particular fact is true, which would entitle the other to the money, but which fact is untrue and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back and it is against conscience to retain it.⁸⁸

Parke B made it clear though that where the claimant deliberately chose not to investigate he would be held to have acted voluntarily.⁸⁹ It may be that Comyn and members of the court in *Chatfield v Paxton* thought that where the party had the full means of knowledge in his hands his not availing himself of those means rendered the payment voluntary – ie all failures to inquire further are deliberate. Perhaps further they concluded these cases were examples of settlement. This cannot be right; the negligence of the payor may have been that he did not realise that the means were available to him. The distinction between payments under inexcusable mistake and payments after deliberately choosing not to investigate had not, however, previously

⁸⁷ S Comyn *The Law of Contracts and Promises upon Various Subjects with Particular Persons as Settled in the Action of Assumpsit* (2nd edn 1824) 338. See also Comyn in argument in *Milnes v Duncan* (1827) 6 B&C 671, 676, 108 ER 598, 600.

⁸⁸ (1841) 9 M&W 54, 58, 152 ER 24, 26.

⁸⁹ (1841) 9 M&W 54, 59, 152 ER 24, 26

been considered in the cases. It is not implausible that Comyn and the judges in *Chatfield v Paxton* did not see it. Because there was an excusability requirement, there was no need to distinguish between payments by inexcusable mistake and payments after a deliberate decision not to investigate. If an inexcusable mistake did not ground relief, a fortiori the case of paying and deliberately not investigating could not. Once the shift away from a requirement of excusability had occurred, the distinction was noticed and deliberate risk-taking introduced as a separate bar.

This enlarged the ambit of voluntary payments yet further and further squeezed the range of cases in which relief could be obtained for mistake of law. However, the bar to recovery of payments under inexcusable mistake had another important effect. Lord Brougham LC said that the law was available to all and therefore it was not unreasonable to assume that everyone knew it.⁹⁰ This fits the sense of excusability just discussed – means of knowledge of the law are available, but was patently false. In *Montriou v Jefferys* Abbott CJ commented that it would be ludicrous to think that everybody, even attorneys, actually knew the law.⁹¹ The attorney in question had billed his client wrongly, as a result of his mistake of law, and was allowed to recover the additional sums due. Austin argued that the maxim must not be understood as implying that mistakes of law as a class were inexcusable, but that recovery must be barred for very practical reasons.⁹² Nonetheless Story supported the Lord Chancellor. He argued that where we have the means available to us to discover our legal rights we are assumed to know them.⁹³ He may have seen a connection between the maxim *ignorantia juris non excusat* and excusability of the mistake. He argued

The ground of this distinction between ignorance of law and ignorance of fact seems to be, that, as every man of reasonable understanding is presumed to know the law, and to act upon the rights which it confers or supports, when he knows all the facts, it is culpable negligence in him to do an act, or to make a contract, and then to set up his ignorance of law as a defence...but no person can be presumed to be acquainted with all matters of fact; neither is it possible, by any degree of diligence, to acquire that knowledge; and therefore, an ignorance of facts does not import culpable negligence.⁹⁴

The implication is that mistakes of law are inexcusable, as a class, but mistakes of fact are not; presumably with diligence it is possible to acquire knowledge of all the law relating to the instant case. This gives us an interesting parallel with later developments in Scotland and South Africa where it appears mistakes of law

⁹⁰ *Dixon v Monkland Canal Company* (1831) 5 W&S 445, 452.

⁹¹ (1825) 2 Car&P 113, 116, 172 ER 51, 53

⁹² R Campbell (ed) J Austin *Lectures on Jurisprudence* (3rd edn John Murray London 1869) Vol I 499. The lectures were actually given 1828-1832, although not published in their first edition until 1861. They may have had an impact though with students attending the lectures (and in the end there were only a few – see *Oxford Dictionary of National Biography* (<http://www.oxforddnb.com>) entry John Austin) going on into practice. John Stuart Mill was a student.

⁹³ Story (n 42) s 111.

⁹⁴ *Ibid* s 140

were routinely assumed to be inexcusable.⁹⁵ Those developments were based at least in part on Roman law and Roman-Dutch law debates which in part revolved around whether mistakes of law were ever excusable. *Stirling v Earl of Lauderdale* in Scotland referred for instance, to several Roman, and Roman-Dutch sources including passages of Perezius,⁹⁶ Donellus,⁹⁷ Cujacius,⁹⁸ and one of Duarenus.⁹⁹ The Earl in argument referred to passages in the Digest by Papinian,¹⁰⁰ and a passage where Vinnius claimed there were no passages in the Pandects justifying a distinction between mistakes of law and fact.¹⁰¹ These were debates of which English authors were aware. Austin for example referred to the Digest¹⁰² in his lectures on the subject, and Evans was well aware of the Roman texts as well. Indeed the view of mistakes of law as being inexcusable continued anachronistically after any requirement of the excusability of the mistake had been removed.¹⁰³

We might conclude that the inexcusability of the mistake was a factor in the introduction of the bar. If mistakes of law were routinely thought inexcusable, and payments under inexcusable mistake voluntary, it would have been easy to conclude that payments under mistake of law were necessarily voluntary, and therefore irrecoverable.

(iii) The Removal of the Excusability Requirement

The requirement ceased to be applied in England in the middle of the century. In *Kelly v Solari Parke* B held that it did not matter that the insurer had been negligent, because, unless he had paid intending that the payee have the money in any case, he would be able to recover.¹⁰⁴ This bar where the payor intended the payee to have the money in any case is a bar in cases of conscious risk-taking or settlement. McKendrick appears not to have noticed this shift from the excusability requirement. He¹⁰⁵ argues that if *Bilbie v Lumley* was a case of the defence of submission to an

⁹⁵ Scottish Law Commission *Recovery of Benefits Conferred under Error of Law* (Scot Law Comm DP no 95 1993) Vol 1 para 2.78; DP Visser 'Unjustified Enrichment' in DP Visser and R Zimmermann (edd) *Southern Cross: Common Law and Civil Law in South Africa* (Clarendon Press Oxford 1996) 523, 529-532.

⁹⁶ Perezius *Commentaries on Nine Books of the Codex* 14, discussing C 4.5.

⁹⁷ Donellus *Commentaries on Civil Law* ch 21. These last two are only identified in the pleadings from the Scottish Record Office quoted by the Scottish Law Commission (n 30 above) Vol 2 Part 1 Appendix A 19-22.

⁹⁸ Cujacius *Observations* book 5 observation 39.

⁹⁹ It is likely that the reference was to Duarenus *Commentaries on the Digest* discussing D 12.6, cited in favour of the bar by Vinnius *Select Questions* book 1 ch 47. This reference by Vinnius was later translated Pothier (n 16) 438.

¹⁰⁰ D 22.6.7, D 22.6.8

¹⁰¹ Vinnius *Select Questions* book 1 ch 47; Pothier (n 16) 442.

¹⁰² D 22.6.2

¹⁰³ WE Grigsby (ed) J Story *Commentaries on Equity Jurisprudence* (1st English edn Stevens & Haynes London 1884) s 140.

¹⁰⁴ (1841) 9 M&W 54, 59, 152 ER 24, 26

¹⁰⁵ E McKendrick 'Mistake of Law-Time for a Change' in WJ Swadling (ed) *The Limits of Restitutionary Claims: A Comparative Analysis* (UKNCCL London 1997) 212, 239.

honest claim, as Goff and Jones suggest,¹⁰⁶ and *Kelly v Solari* was not, the defence operated differently in cases of mistake of law and mistake of fact. The defence of submission to an honest claim operates, and operated, where the defendant honestly claimed the money, and the claimant paid him in order to close the transaction.¹⁰⁷ McKendrick suggests that the inconsistency means the early mistake of law cases cannot be explained in terms of submission to an honest claim.¹⁰⁸ If they could, *Kelly v Solari* should be seen as wrongly decided, as it too was a submission case. The only distinction was the nature of the mistake as one of law in *Bilbie v Lumley*.

McKendrick is right that there is a similarity, and apparent inconsistency in the two cases. However, *Kelly v Solari* would have been decided differently had it been decided in 1802. This becomes clear once it is realised that both *Kelly v Solari* and *Bilbie v Lumley* are inexcusable mistake cases. Kelly had the means of discovering that the money was not due to Mrs Solari. The insurers had actually written on the policy that it had been cancelled – only if it were a more explicit submission would the insurer’s claim fail. It was not a payment in final settlement of a dispute. Earlier in the century they would have been unable to recover the money, because their mistake of fact was inexcusable, just as it appears that the insurer in *Bilbie v Lumley* made an inexcusable mistake, having the means of full knowledge in his hands. That would have barred relief and the question of a settlement of a dispute would not have come up.

(C) Decisions of Lord Ellenborough Supporting Relief for Mistake of Law

The thesis of this paper so far is that after *Bilbie v Lumley* a number of different ideas were confused: payments by mistake of law, payments by inexcusable mistake and voluntary payments. *Bilbie v Lumley* itself did not give us the rule, nor properly understood was it intended to do so. This section seeks to explain two decisions of Lord Ellenborough in which he grants relief for mistake of law. It seeks to demonstrate that these can be explained consistently with the explanation of *Bilbie v Lumley* as a voluntary payments case. Certainly *Bilbie v Lumley* cannot, as Birks accepted, be seen as a serious intellectual commitment to the mistake of law bar.¹⁰⁹ Lord Ellenborough’s invocation of *ignorantia juris non excusat* seems not to have been fully thought through. This section first sets out these two later cases. In the second subsection we attempt to explain the distinction between them and *Bilbie v Lumley*.

(i) Herbert v Champion and Perrott v Perrott

In *Herbert v Champion*¹¹⁰ the facts were indistinguishable from those of *Bilbie v Lumley* except that the payment had not been made; the underwriter had only promised to pay. He was allowed to rescind the promise. In *Perrott v Perrott*¹¹¹ the

¹⁰⁶ Goff and Jones (n 3) 214

¹⁰⁷ S Arrowsmith ‘Mistake and the Role of the “Submission to an Honest Claim”’ in AS Burrows (ed) *Essays on the Law of Restitution* (Clarendon Press Oxford 1991) 17, 17.

¹⁰⁸ McKendrick (n 104) 239

¹⁰⁹ PBH Birks ‘Mistakes of Law’ [2000] CLP 205, 211.

¹¹⁰ (1807) 1 Camp 133, 170 ER 903

¹¹¹ (1811) 14 East 423, 104 ER 665

defendant gave a penal bond as security for her payment of £1000, after Territ's death, to such person as the latter appointed, either by deed or by will. Territ made a deed appointing the claimant to receive the money, but later cut her name and seal off that deed, because she had made a will purporting to appoint other relatives of hers to receive the money. The litigation occurred after Territ's death and centred on the entitlement to the money. The defendant pleaded that there had been no appointment at all, because the will was ineffective, and the deed had been cancelled. The claimant had no entitlement. The claimant argued that Territ had made a mistake in believing the will a valid appointment, and that the cancellation of the deed was therefore to be disregarded. Lord Ellenborough held that mistake, whether a mistake of fact, or of law, was enough to annul the cancellation.¹¹² The claimant was entitled to the money. Lord Ellenborough relied on the case of *Onions v Tyrer*¹¹³ as authority for this proposition. In that case the deviser had made a will devising his land to trustees for certain uses, but had then made another will revoking the first, and appointing new trustees. This second will was void. The question for the court was whether the void second will operated as a revocation of the first. If so, the deceased's heir at law was entitled to the land; if not, the original trustees remained entitled. The Lord Chancellor, Lord Harcourt, said the second will did not revoke the first. He would also have been prepared to give relief by way of reinstating the first will, if the second had been effective, on the grounds of the deviser's mistake of law as to the validity of the second will.¹¹⁴

(ii) The Cases Explained

There are three possible explanations for the seeming inconsistency between Lord Ellenborough's refusal of relief for mistake of law in *Bilbie v Lumley* and grant of it in these cases. Only the third seems ultimately satisfying.

The first explanation is that Lord Ellenborough saw a distinction between the cancellation of deeds and of wills and promises, and payment of money. In some circumstances this is nonsensical. Evans had already stated that if a payment made under a mistake of law were recoverable, a promise made under the same mistake of law could not be enforceable.¹¹⁵ The result would otherwise be absurd. This must be right, and there is no reason to ascribe a different view to Lord Ellenborough. The explanation demonstrates too little. It cannot be said that because Lord Ellenborough allowed relief in *Herbert v Champion* and *Perrott v Perrott* where there had been no payment he did not believe that payments by mistake of law could not be recovered. There is no logical reason why if promises to pay made under mistake of law are not binding that payments under mistake of law should be reversible. Lord Ellenborough himself explained *Herbert v Champion* this way, distinguishing it from *Bilbie v Lumley*. A payment would have bound the underwriter, but the promise would only do so where there was consideration and a binding contractual compromise.¹¹⁶

¹¹² (1811) 14 East 423, 439-440, 104 ER 665, 671

¹¹³ (1716) 1 P Wms 343, 24 ER 418

¹¹⁴ (1716) 1 P Wms 343, 345-346, 24 ER 418, 419

¹¹⁵ Pothier (n 16) 395-396.

¹¹⁶ (1807) 1 Camp 133, 136-137, 170 ER 903, 904

The second possible explanation is that Lord Ellenborough had changed his mind. This may be because he read two pieces by Sir William Evans, one of which appeared just prior to *Bilbie v Lumley*. That piece, ‘An Essay on the Action of Money Had and Received’ would have been available to him immediately, as it had been dedicated to him. This explanation is, however, unsatisfactory because it assumes that Lord Ellenborough was ignorant, and the counsel Mr Wood was ignorant, of the cases that supported recovery for mistake of law, of which there were several.

The third explanation is that Lord Ellenborough believed that mistakes of law could attract relief, but that they would not do so in cases of voluntary payment. This is consistent with, but slightly different to, the first. Crucially he did not, as is often but erroneously believed, ask Mr Wood whether he knew of any cases in which mistake of law grounded recovery. He asked whether he knew of any cases of voluntary payment where it had done so, and where the party involved had known of all the facts.¹¹⁷ The question therefore is whether the word voluntary is in fact surplusage; did Lord Ellenborough mean payments by mistake of law other than voluntary payments to be irrecoverable? It appears that he probably did not.

We do not need to show that the concept of voluntary payments had a narrow and certain definition in 1802. It did not. We merely need to show that Lord Ellenborough had a particular meaning in mind. His reference to Lord Kenyon’s judgment in *Chatfield v Paxton* might be support for the position that he was concerned with submission to honest claims.¹¹⁸ Certainly Evans seems to have thought so.¹¹⁹ Lord Kenyon though said the action was maintainable as the claimant had not paid with fair knowledge of his case, which rather looks to the excusability of the mistake. As we have seen the case revolved around the extent of the claimant’s knowledge, the excusability of the mistake, and whether his knowledge was enough to make it a voluntary payment.¹²⁰ It appears that it was the excusability of the mistake that Lord Ellenborough had in mind, although he probably misinterpreted Lord Kenyon’s judgment as referring to fair knowledge of the law.

It is an interesting question why the idea of voluntary payment did not attach itself to mistake of fact cases in the same way. However, it seems clear that relief for mistake of fact was barred in those cases where payments were classed as voluntary, such as compulsion of legal process.¹²¹ There had never been a dispute as to the recoverability of payments by mistake of fact, and payments by mistake of fact would be less greatly affected by the bar to recovery of voluntary payments and payments by inexcusable mistake. Arguments were, however, current in the late eighteenth and early nineteenth centuries that payments under mistake of law ought not be recoverable, because the mistake was of law. If so, allusions to voluntary payments by mistake of law could be seen initially as a negative affirmation that mistake of law could ground relief in some cases.

¹¹⁷ (1802) 2 East 469, 470, 102 ER 448, 449.

¹¹⁸ (1802) 2 East 469, 470-471, 102 ER 448, 449

¹¹⁹ Pothier (n 16) 390-391; Evans (n 9) 8

¹²⁰ See pp 34-35.

¹²¹ W Selwyn *An Abridgment of the Law of Nisi Prius* (2nd edn 1810) 92; W Selwyn *An Abridgment of the Law of Nisi Prius* (4th edn 1817) 79 and W Selwyn *An Abridgment of the Law of Nisi Prius* (9th edn 1838) 82-83

(D) A Preliminary Conclusion

It appears that in *Bilbie v Lumley* Lord Ellenborough barred relief to the insurer because his payment was voluntary. It is unlikely that he intended to bar relief for all mistakes of law, since he gave such relief in later decisions. However, the instability of the meaning of voluntary payment eventually led to almost every instance of relief for mistake of law being swallowed by a bar to recovery of voluntary payments. This was not helped by the confusion between voluntariness and excusability. If all mistakes of law were inexcusable, and payments under inexcusable mistake voluntary, the requirement, for irrecoverability, of voluntariness may well have dissolved as superfluous. This would be true irrespective of the fact that the requirement may have served to emphasise the initial prima facie right to recover.

(3) Other Pressures

That influential writers thought there were good reasons to bar relief where the mistake was one of law must have contributed to the move towards the bar. The confusion between barring recovery of voluntary payments, barring recovery of payments under inexcusable mistake, and barring recovery of money paid under mistake of law could not otherwise have produced the mistake of law bar. Birks was probably right to refuse to ascribe responsibility for the bar to Pothier,¹²² but he did not ascribe it widely enough.

(A) Benthamite Thinkers

Austin argued that if ignorance of the law were admitted as a ground of recovery the courts would have to decide whether the party was really mistaken.¹²³ The maxim *ignorantia juris non excusat* was to be understood as meaning that mistake of law could not for administrative reasons be allowed to count, not because it could not morally be excused.¹²⁴ A legal system simply could not be run on the basis that the law applied only so far as it was known. This was a conclusion Austin only reached reluctantly, as it was a large exception to his theory of moral responsibility, that responsibility required knowledge of all relevant points. Lord Brougham LC accepted the argument of administrative necessity.¹²⁵ They were both in Bentham's intellectual circle.¹²⁶ It is likely they were aware of each others' views, although there is little explicitly on the question in Bentham's own writings. In *Dixon v Monkland Canal Company*¹²⁷ the pursuers attempted to recover fees paid to the canal company, mistakenly believed to be due, but which had been overcharged under the statute governing the canal. Lord Brougham LC suggested that the inquiry into whether the pursuers had been mistaken as to the law was impossible, and commented that

¹²² Birks (n 108) 212

¹²³ Austin (n 91) 498

¹²⁴ Ibid 498-499

¹²⁵ *Dixon v Monkland Canal Company* (1831) 5 W&S 445, 450.

¹²⁶ GT Garrett *Lord Brougham* (Methuen & Co London 1905) 49; WL Morison *John Austin* (Edward Arnold London 1982) 38-49, especially 39; Oxford Dictionary of National Biography (<http://www.oxforddnb.com>) entry Lord Brougham

¹²⁷ (1831) 5 W&S 445

everyone would claim to have been mistaken, saying ‘I am a very stupid sort of a man’ and that he had misunderstood the law.¹²⁸ He argued

Are we in each particular instance to measure and gauge the knowledge of the law which an individual has? and having got at that knowledge are we to gauge his capacity to make the law apply to facts? because you must consider each person, under this doctrine as you would a lawyer, and you must consider how far he has that which was said to be the talent of a lawyer....Now these absurdities are so gross that it forces the admission that there must be some qualification, but I have not been able to ascertain what that is.¹²⁹

This was in fact a Scots decision, but it is unlikely that the Lord Chancellor’s, an English judge, view there did not affect English cases and judges. Nonetheless we cannot argue the bar was firmly in place in the 1830s. The voluntariness requirement had not yet dissolved.

(B) Story

Birks suggested that Benthamite thinkers lay behind the mistake of law bar, citing Austin in particular.¹³⁰ He did not claim that Austin could himself have triggered the hard line in favour of the bar, not least because the bar was in place well before first publication of Austin’s lectures, but it is the Benthamites to whom we ought to look for its origin. However, Story was another fervent supporter of the bar in the 1830s and one whose arguments and influence have been overlooked in the hardening of the rule. He followed in the footsteps of others, who do not seem to have been as directly influential.¹³¹ He used much the same arguments as Lord Brougham LC and Austin, but seems to have come to them independently. He did not cite *Dixon v Monkland Canal Company* and is unlikely to have been aware of the details of Austin’s lectures, published as they were only after his own death in 1845.

Story argued that it was a well known maxim that ignorance of the law would not furnish an excuse for any person either for a breach, or an omission, of duty and that that was equally true of equity. The same principle applied to agreements entered into in good faith but under a mistake of law. They were in general valid.¹³² The maxim *ignorantia juris non excusat* was regularly invoked,¹³³ and Story invoked it in the context of the equity jurisdiction.¹³⁴ Story claimed that the reason why equity acknowledged the maxim was to be found in the speech of Lord Ellenborough in *Bilbie v Lumley* where he said that otherwise there is no telling to what extent the

¹²⁸ Ibid 449

¹²⁹ Ibid 449-450

¹³⁰ Birks (n 108) 213-214.

¹³¹ G Jeremy A *Treatise on the Equity Jurisdiction of the High Court of Chancery* (1828) 366; H Maddock A *Treatise on the Principles and Practice of the High Court of Chancery* (1815) 60-63.

¹³² Story (n 42) s 113.

¹³³ *Lowry v Bourdieu* (1780) Dougl 467, 99 ER 299; *Munt v Stokes* (1792) 4 TR 561, 100 ER 1176; *Bilbie v Lumley* (1802) 2 East 469, 102 ER 448 and *Dixon v Monkland Canal Company* (1831) 5 W&S 445

¹³⁴ Story (n 42) s 111.

excuse would be taken.¹³⁵ This is the same argument that Lord Brougham LC advanced.¹³⁶ Story did depart from the Austinian line in claiming that a mistake of law was *prima facie* inexcusable.¹³⁷ There may also be traces of that view in *Dixon v Monkland Canal Company*.¹³⁸

He dealt with many of the cases that appear to support the grant of relief where the mistake is one of law. He distinguished some, as involving another known factor;¹³⁹ he declared that some might be wrong;¹⁴⁰ he argued in some cases that there was some factor of which we are unaware.¹⁴¹ He argued that every case where relief seemed to have been granted for mistake of law was a case where there was some other factor in play.¹⁴² He claimed that, where there is a plain and established doctrine on the subject understood by the community at large, a mistake of law could be evidence of other factors, such as undue imposition, which would justify relief.¹⁴³ In short the distinction between mistakes of fact and law was founded on sound principle and wisdom and only departed from rarely.¹⁴⁴

His influence was considerable. The first English edition, by Grigsby, was published in 1884.¹⁴⁵ Indeed the very fact that Grigsby wished to use the name is testimony to the impact that Story had had both in the USA and England. Grigsby commented in his preface that Story had initially concentrated on English cases, but that over time, as more US cases were cited, a dedicated English edition had come to be needed. All the US cases had therefore been removed from the new edition. Nonetheless in places it is difficult to see the difference between the English and American editions. Grigsby used the maxim *ignorantia juris non excusat* in the same way, as in earlier American editions.¹⁴⁶ Indeed he practically left it word for word identical, although by 1884 the bar was well entrenched.

Story's influence can be seen in the citations that other equity treatises make of his work. *Snell's Principles of Equity* has become one of the leading equity

¹³⁵ (1802) 2 East 469, 102 ER 448, 449

¹³⁶ *Dixon v Monkland Canal Company* (1831) 5 W&S 445, 449.

¹³⁷ Story (n 42) s 140.

¹³⁸ (1831) 5 W&S 445, 452

¹³⁹ He distinguished *Pusey v Desbouverie* (1734) 3 P Wms 315, 24 ER 1081 on the ground that it was a mistake of fact case as well, Story (n 42) ss 117-118. *Willan v Willan* (1809) 16 Ves Jun 72, 33 ER 911 he appears to distinguish as being a case of surprise, although it is unclear precisely what surprise means, Story (n 42) s 120.

¹⁴⁰ He claimed Story (n 42) s 125 that *Lansdowne v Lansdowne* (1730) 2 Jac&W 205, 37 ER 605 (1730) Mos 364, 25 ER 441 was difficult to sustain on principle and in authority.

¹⁴¹ He claimed Story (n 42) s 124 that there must have been such a factor involved in *Bingham v Bingham* (1748) 1 Ves Sen 126, 27 ER 934 (1748) Belt's Supplement 79, 28 ER 462. This is an undeniably weak argument.

¹⁴² Story (n 42) s 116.

¹⁴³ *Ibid* s 128

¹⁴⁴ *Ibid* s 137

¹⁴⁵ WE Grigsby (ed) J Story *Commentaries on Equity Jurisprudence* (1st English edn Stevens & Haynes London 1884).

¹⁴⁶ *Ibid* s 111

treatises in England, and it rapidly gained that accolade. Snell commented that it was a well known maxim that ignorance of the law was no excuse for a breach of duty, and that that applied as much in equity as in the criminal context. An agreement entered into in good faith though in mistake of law was therefore to be held valid and obligatory. He cited Story for this proposition and no cases.¹⁴⁷ Broom argued that ignorance of law did not affect agreements, for which he too cited Story.¹⁴⁸

(4) The Dropping of the Requirement of Voluntariness

Kelly v Solari appears to have been the watershed case, after which it became accepted in the courts that the rule barring relief was a general rule applying to mistakes of law. Parke B formulated his famous test for recovery in terms of mistakes of fact, not mistakes generally.¹⁴⁹ It may have become generally recognised that the requirement of voluntariness had become superfluous. There were, however, still some diehards who refused to accept the dropping of the requirement of voluntariness,¹⁵⁰ even into the twentieth century.¹⁵¹ Payment by mistake of law has even in recent times been equated with a voluntary payment.¹⁵²

There were cases earlier in the century in which the requirement of voluntariness was dropped. In *Milnes v Duncan*¹⁵³ in 1827 the defendant received a bill of exchange drawn in Ireland; the proper stamp duty had been paid and it was a perfectly valid bill. The defendant was in England and presented the bill a month late for payment. Payment was refused and the defendant applied to the claimant, who had indorsed the bill to him to pay off a debt he owed the defendant. The claimant refused to pay, because the bill was presented late, thus discharging him of liability. The defendant argued that the bill was void because the proper stamp duty had not been paid, and that he would have to explore other means of recovering the debt owing to him. The defendant mistakenly believed that it was an English bill on which a higher rate of stamp duty was payable. The claimant's agent agreed with this mistaken belief, and the claimant paid. On discovering that the bill was valid after all and need not have been paid, the claimant sought to recover the money. Bayley J held that if a party pays money under a mistake of law he could not recover it back.¹⁵⁴

¹⁴⁷ EHT Snell *Principles of Equity* (Stevens & Haynes London 1868) 345

¹⁴⁸ H Broom *A Selection of Legal Maxims* (5th edn William Maxwell & Son London 1870) 262-263. He cited *Directors of Midland Great Western Rly v Johnson* (1858) 6 HLC 798, 10 ER 1509 as an illustration of the principle.

¹⁴⁹ (1841) 9 M&W 54, 58, 152 ER 24, 26

¹⁵⁰ Selwyn (n 52) 88

¹⁵¹ *Werrin v The Commonwealth* (1937) 59 CLR 150 (HCA); *Sawyer and Vincent v Window Brace Ltd* [1943] KB 32; *York Air Conditioning and Refrigeration (Asia) Pty Ltd v The Commonwealth* (1950) 80 CLR 11 (HCA); *South Australian Cold Stores Ltd v Electricity Trust of South Australia* (1957) 98 CLR 65 (HCA) and *J&S Holdings Pty Ltd v NRMA Insurance Ltd* (1982) 41 ALR 539 (HCA).

¹⁵² *Woolwich Equitable BS v IRC (No 2)* [1993] AC 70 (HL) 165 (Lord Goff); Birks (n 51) 164;

¹⁵³ (1827) 6 B&C 671, 108 ER 598

¹⁵⁴ (1827) 6 B&C 671, 677, 108 ER 598, 600

In *Wilson v Ray*,¹⁵⁵ some 12 years later, however, the claimant agreed with his creditors that they would accept lesser sums in full settlement of their debts. The defendant refused to subscribe to this agreement unless paid in full. The claimant gave a bill of exchange for the difference between the full debt and the proportion accepted under the agreement. He subsequently paid the difference and attempted to recover this payment, on the ground that he had mistakenly believed such agreements to pay the difference valid. Lord Denman CJ decided that the payment was a voluntary payment in full knowledge of the facts and therefore could not be recovered.¹⁵⁶ This shows that the courts were still unwilling to abandon the voluntary payments formulation wholesale. Treatise writers were also unwilling to abandon it, even those who cited *Milnes v Duncan*.¹⁵⁷ This may be simply a case of legal conservatism, but the courts were noticeably happier to drop the formula after *Kelly v Solari*.

That mistakes of law could not ground recovery was practically unquestioned after *Rogers v Ingham*.¹⁵⁸ An executor, acting on the advice of counsel as to the construction of a will, proposed to divide in certain proportions a fund between two legatees. One of the legatees obtained the opinion of counsel, which was that this was allowable. The fund was divided. The legatee then filed suit, on discovering that the will had been wrongly construed. He sought repayment from the other legatee. James LJ said that no case had been cited where a party with knowledge of the facts had recovered for mistake of law.¹⁵⁹ In fact before its abolition there were hundreds of cases, which affirmed the existence of the bar.¹⁶⁰

(5) Conclusion

We have seen that the rule barring recovery for payments made in mistake of law was at least in part due to confusion between barring recovery of voluntary payments, barring recovery of payments made under an inexcusable mistake and barring recovery of payments made under mistake of law. This confusion comes about because of the multiple differing meanings that voluntary payments had and the capacity of some to swallow recovery for mistake of law. Lord Ellenborough's comments in *Bilbie v Lumley* are often said to be the foundation of the rule. In fact he only seems to have meant to bar recovery of what he called voluntary payments. Over the next half century any idea that not all payments by mistake of law could be classified as voluntary payments was lost under pressure from confusion as to what a voluntary payment might be, and from pressure from writers and increasingly judges – such as Lord Brougham – intellectually committed to the bar for a variety of reasons, not least the perceived inability of a justice system to operate without such a bar in place. From the middle of the nineteenth century the bar remained firmly in place, and so far as the law underwent further development, it did so by introducing exceptions to the rule until finally abolished in England in 1998, and subsequently removed in the contractual as well as the restitutionary context.

¹⁵⁵ (1839) 10 Ad&E 82, 113 ER 32

¹⁵⁶ (1839) 10 Ad&E 82, 89, 113 ER 32, 35

¹⁵⁷ Leigh (n 51) 54-56 cited *Milnes v Duncan*. Edwards and Harrison (n 51) 226, however, did not.

¹⁵⁸ (1876) 3 Ch D 351 (CA)

¹⁵⁹ *Ibid* 355

¹⁶⁰ A Lexis search elicited over 250 cases, where the existence of the bar was asserted, stretching back only to 1914