Tracing the Modern Criticism of the Mistake of Law Bar

by

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Abstract: This paper traces the origins of the criticisms of the mistake of law bar. The actual criticisms are well known and well rehearsed. What is less discussed is who first criticised the bar and how their arguments affected others and drove the increasing and then dominant view in England that the mistake of law bar had to be abolished. The paper argues that the most immediate influences came after the mid twentieth century with the publication of the first edition of Goff and Jones and the New Zealand Judicature (Amendment) Act 1958. The paper traces the influences on the book and the legislation and how the opposition to the bar then snowballed.

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The old rule barring recovery of money paid over by mistake of law was not completely secure as a matter of precedent in the early nineteenth century. Separate ideas of voluntary payment, payment by mistake of law, and excusable mistake were confused. Although *Bilbie v Lumley* in 1802 in which a payment was made by the insurer to the insured party not realising that the contract was vitiable for non-disclosure is usually taken to be the source of the rule; in reality it only established that payments by inexcusable mistake of law were irrecoverable. Only after *Kelly v Solari* in 1841 which talked only of the availability of relief for payments by mistake of fact can the rule be said to have been totally secure. This may seem odd, but *Kelly v Solari* came at the end of a long series of cases and reflected a by-then unchallengable assumption that the only mistakes that counted were those of fact.

Once established, however, it went relatively unchallenged for over a century, with only a few critics, before a chorus of criticism emerged in the late twentieth century. That was accompanied by a surge in exceptions to the bar. These ranged from the private rights exception, to mistakes of foreign law, to fictionalised mistakes of fact. It is worth noting, however, that the bar in the contractual bargain context was never subject to the battering to which the bar in the context of money paid by mistake was. Prior to the abolition of the bar in restitution, and subsequently in contract, Cheshire and Fifoot made only passing reference to it in a footnote before referring the reader to the section on money paid by mistake. The reason for this may be that it was recognised that there were other interests at stake in the contractual context and that many mistake of law cases would be decided the same way were they mistake of fact cases. Many of the arguments advanced as to why the bar should be abolished in the context of mistaken payments also applied in the contractual bargain context, however. In this paper we trace the growth of this vehement criticism and suggest that there were two main fountainheads from which it sprang. What this paper does not do is restate and go over the very well rehearsed arguments themselves.

1 D Sheehan ‘The Origins of the Mistake of Law Bar in English Law’ NLSWP 08/01
2 (1802) 2 East 469; 102 ER 448
3 (1841) 9 M&W 54, 152 ER 24; see Sheehan (n 1) for an extended discussion of the nineteenth century “voluntary payments by mistake of law” cases alluded to here.
4 *Cooper v Phibbs* (1867) LR 2 HL 149
5 *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd (The Amazonia)* [1990] 1 Lloyds Rep 236 (CA)
6 *George Porky (Enterprises) Ltd v City of Regina* [1964] SCR 326 (1964) 44 DLR (2d) 179
7 *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349 (HL)
8 *Brennan v Bolt Burdon* [2004] EWCA Civ 1017, [2005] QB 303; on how mistake of law should now be treated in contract see D Sheehan ‘Vitiation of Contracts for Mistake and Misrepresentation of Law’ [2003] RLR 26
10 For this view see AL Corbin *Corbin on Contracts* (West Publishing St Paul Minnesota 1960) Vol 3 750.
(1) The Growth of the Criticism of the Mistake of Law Bar

There appear to be two main events that triggered much of the modern criticism around the world: the publication of the first major textbook on restitution and the passage of the New Zealand legislation removing the mistake of law bar, both of which brought the issue to a wider audience than had been conscious of the issue up until then. We first examine the influences and forces that acted to trigger the two main events of the period, before examining what effect those two single events had on the campaign for a change in the law to remove the bar. We then examine the effect that the Law Commission report had in England, before coming to a conclusion.

(A) Goff and Jones

Birks pointed out that Goff and Jones was a path-breaking book in England. Nobody could argue that it has not been of seminal importance, and we could simply argue that it started the wave of criticism around the Commonwealth. As Birks commented, its predecessors have had only mediate influence. However, that does not mean that we should not be aware of what they said, and more importantly how what they said influenced Goff and Jones. In 1966 Goff and Jones were still essentially alone in their assertion that the mistake of law bar should be removed, although it had already been removed in both New Zealand and Western Australia by statute, the latter in identical terms to the former. Neither piece of legislation seems to have been a great factor in the authors’ thinking; at least the book does not explicitly refer to either in the text, although the New Zealand legislation does appear in the footnotes.

Winfield was another possible influence. However, his influence appears at first sight to have been somewhat attenuated. He demonstrated conclusively that the difference between mistakes of law and of fact was mainly historical and that they were often difficult to distinguish. However, he did not condemn the rule wholesale. He contented himself with saying that the courts had had to steer a course between the general principle that a mistake of law did not ground relief and the fact that it would be possible to take the principle too far and fail to achieve justice. In the end Goff and Jones merely referred to him as showing that the two types of mistake are often indistinguishable. They argued that therefore a mistake of law should give relief in exactly the same cases as a mistake of fact. It is probable therefore that Winfield was at least of some influence in their belief that the bar had to go, but that Goff and Jones took a step further than Winfield was himself prepared to.

12 PBH Birks ‘The Law of Restitution at the End of an Epoch’ (1999) 28 U Western Australia L Rev 13, 16
13 Ibid 16
14 Judicature Act 1908 (NZ) s 94A; Law Reform (Property, Perpetuities and Succession) Act 1962 (WA) s 23(1) re-enacted by Property Law Act 1969 (WA), s 124(1).
15 Goff and Jones The Law of Restitution (Sweet & Maxwell London 1966) 82 n 24.
16 PH Winfield ‘Mistakes of Law’ (1943) 59 LQR 327
17 Goff and Jones (n 15) 80
There were at least two other important factors. The first and most obvious is that the authors believed that *Bilbie v Lumley* was no authority for the proposition that it was said to be. As we saw earlier, the insurer had paid out on an insurance policy, which could have rescinded because the insured had not disclosed as much information as he should have done. The insurer had not appreciated that as a matter of law he could rescind the contract. Lord Ellenborough asked counsel if he knew of any cases of a party recovering a payment made by mistake of law where he had made a voluntary payment in full knowledge of the facts. On receiving no affirmative answer, he barred relief and referred to the maxim *ignorantia juris non excusat*. Goff and Jones were correct in believing *Bilbie v Lumley* not to be authority for the mistake of law bar. Rather it was an inexcusable mistake case; the insurers should have been aware of their rights to rescind for non-disclosure. In the early nineteenth century carelessly mistaken payments were irrecoverable. This alternative explanation was not initially appreciated by twentieth century commentators on the mistake of law bar because its history was not examined closely enough. Indeed the bar was itself introduced without proper discussion of the arguments for or against. There was for instance no mention in either *Bilbie v Lumley* or in Goff and Jones of the sustained arguments against the mistake of law bar of Sir William Evans in the very early nineteenth century, or those of Fonblanque in favour of the bar in the eighteenth century. This brevity of reasoning in *Bilbie v Lumley* was itself a criticism levelled at the decision.

Birks argued, although rarely in print, that *Re Diplock* may have been an unexpressed factor at the back of Gareth Jones’ and Robert Goff’s minds as well, illustrating the gross injustice the rule could work. The executors of Diplock’s will had mistakenly made substantial payments to various charities, which then spent the money. The mistake that they had made was that the legacy under which the money was paid was valid. The next of kin subsequently objected and sought to recover the money. The court decided that the mistake was one of law. This did not matter; Lord Greene MR said the claim of the beneficiaries of the will was in no way derived from the claim in money had and received and that there were many and important differences between the claim in money had and received and the claim being made. He therefore concluded that there was no need for the claim in equity necessarily to be clothed with the attributes of the common law claim. Ultimately he decided that there was no reason why the claim ought to be defeated if the mistake were one of law; there was no authority either in logic or in the authorities for that proposition. Indeed he argued the next of kin had made no mistake at all, whatever the quality of the executors’ mistake. The only limitation to the legatees’ action was that they had to exhaust their remedies against the executors, who had no cause of action to recover.

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18 (1802) 2 East 469, 472, 102 ER 448, 449
19 Sheehan (n 1)
21 J Fonblanque *A Treatise on Equity* (1793) Vol I 108
22 [1948] Ch 465 (CA)
23 Ibid 480
24 Ibid 481
25 Ibid 502
26 Ibid 481
the money because their own mistake was one of law.\footnote{Ibid 503} The next of kin were therefore largely able to recover, but the executors were left in a position where they could not recover, but the next of kin had to exhaust their remedies against them before looking to the charities. One executor committed suicide because he was liable for significant sums without any possibility of recouping it.

In their first and second editions Goff and Jones discussed the case briefly in the chapter on mistake of law,\footnote{Goff and Jones (n 15) 87; Goff and Jones The Law of Restitution (2\textsuperscript{nd} edn Sweet & Maxwell London 1978) 99} and devoted an entire chapter to it later in the book.\footnote{Goff and Jones (n 15) 408-410; Goff and Jones The Law of Restitution (2\textsuperscript{nd} edn Sweet & Maxwell London 1978) 450-453} They said that to deny recovery where the trustee has wrongly paid money out by mistake of law could result in considerable hardship to the trustee.\footnote{Goff and Jones (n 15) 409; Goff and Jones The Law of Restitution (2\textsuperscript{nd} edn Sweet & Maxwell London 1978) 451} This may be an allusion to the suicide. Not everyone acknowledges the suicide. Whittaker comments that the case put another nail in the coffin of the mistake of law bar, without ever alluding to it.\footnote{SJ Whittaker ‘A Historical Perspective to the ‘Special Equitable Action’ in Re Diplock’ (1983) 4 J Legal History 3, 37} There was, however, no explicit move to remove the mistake of law rule in England as a result of Re Diplock, only to retrospectively reform a small part of the law of charitable trusts.\footnote{See Charitable Trusts (Validation) Act 1954. Maurice even suggests that the case may only have been a minor influence in promoting the Act. SG Maurice ‘Validation of Charitable Trusts’ (1954) 18 (NS) Conv 532, 533.} The Law Commission also does not appear to have considered the undoubted hardship caused by the decision in Re Diplock to be an important factor in arguments that the mistake of law bar should be removed. It was happy to list it as an apparent exception to the bar, which in truth, because the claimant next of kin had made no mistake of any description, it was not, and to accord it no more importance.\footnote{Law Comm (n 11) para 2.9}

One pressure on Goff and Jones, largely unremarked on by other commentators, was the US Restatement of Restitution.\footnote{Restatement of the Law of Restitution Quasi Contracts and Constructive Trusts (ALI St Paul Minnesota 1937)} Although Birks recognised that the book was in a sense its English offspring,\footnote{Birks (n 12) 15} the Restatement’s important effect on Goff and Jones’ rejection of the mistake of law bar is not often realised. In the second edition they commented that the Restatement recommended that there be no distinction and did so in the text.\footnote{Goff and Jones The Law of Restitution (2\textsuperscript{nd} edn Sweet & Maxwell London 1978) 91} The real importance of the Restatement can, however, be seen in the first edition, where the only reference in the footnote to their assertion that there should be no distinction between mistakes of law and those of fact is to section 44. Section 44 states

\begin{enumerate}
\item \footnote{Ibid 503}
\item \footnote{Goff and Jones (n 15) 87; Goff and Jones The Law of Restitution (2\textsuperscript{nd} edn Sweet & Maxwell London 1978) 99}
\item \footnote{Goff and Jones (n 15) 408-410; Goff and Jones The Law of Restitution (2\textsuperscript{nd} edn Sweet & Maxwell London 1978) 450-453}
\item \footnote{Goff and Jones (n 15) 409; Goff and Jones The Law of Restitution (2\textsuperscript{nd} edn Sweet & Maxwell London 1978) 451}
\item \footnote{SJ Whittaker ‘A Historical Perspective to the ‘Special Equitable Action’ in Re Diplock’ (1983) 4 J Legal History 3, 37}
\item \footnote{See Charitable Trusts (Validation) Act 1954. Maurice even suggests that the case may only have been a minor influence in promoting the Act. SG Maurice ‘Validation of Charitable Trusts’ (1954) 18 (NS) Conv 532, 533.}
\item \footnote{Law Comm (n 11) para 2.9}
\item \footnote{Restatement of the Law of Restitution Quasi Contracts and Constructive Trusts (ALI St Paul Minnesota 1937)}
\item \footnote{Birks (n 12) 15}
\item \footnote{Goff and Jones The Law of Restitution (2\textsuperscript{nd} edn Sweet & Maxwell London 1978) 91}
\end{enumerate}
A person who has paid money or otherwise conferred a benefit upon another induced thereto by a mistake of law is not entitled to restitution if he would not have been so entitled had the mistake been one of fact.

Section 44 does not itself in its terms remove the distinction between mistakes of law and fact; rather it seems to assume the absence of a distinction, since if there were a general bar there would be no need to talk of specific cases where payments by mistake of law were irrecoverable. Sections 46-55, however, enumerate a series of cases where mistakes of law can ground relief. Section 5 of the discussion draft of the Restatement Third more pithily rejects the distinction between mistakes of fact and those of law. It states

S 5(1) A transfer induced by invalidating mistake is subject to rescission at the instance of the transferor or a successor in interest.
S 5(2) An invalidating mistake is a misapprehension of fact or law…. 37

(B) The New Zealand and New York Legislation

The New Zealand legislation had a similar effect to the publication of Goff and Jones, in that the effect of the writings and legislation that prompted it was felt mediately via the legislation, and the form of the legislation was influential as a model. 38 However, it appears that the pressures that led to the New Zealand legislation were fewer in number and more pronounced in their impact than the somewhat variegated pressures and influences on Goff and Jones. Cameron points out that the New York legislation was treated as a prototype by the New Zealand law reform committee, which examined the question whether the mistake of law rule should be reformed. 39 Section 112f Civil Practice Act was enacted in New York in 1942. It was re-enacted in 1962 as section 3005 of the Civil Practice Law and Rules. It provides

When relief against a mistake is sought in an action or by way of proceeding, or by way of defense or counterclaim, relief shall not be denied merely because the mistake is one of law rather than fact. 40

Section 94A Judicature Act 1908 (NZ), as inserted by section 2 Judicature Amendment Act 1958, provides

S 94A(1) …Where relief in respect of any payment that has been made under mistake is sought in any court…and that relief could be granted if the mistake was wholly one of fact, that relief shall not be denied by reason only that the mistake is one of law…

Sutton points out that there are a number of differences between the New York and New Zealand statutes. 41 This makes the two statutes worthy of study in their own

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37 Restatement Third, Restitution and Unjust Enrichment (Discussion Draft) (ALI Philadelphia 2000)
38 Being eg re-enacted in the same form in Western Australia - Law Reform (Property, Perpetuities and Succession) Act 1962, s 23
40 Section 29(2) Finance Act 1989 (UK) is in the same form.
right, but still the New York legislation had an important impact and this can be seen in the similarities between the legislation. Both seek, for example, to remove the bar by saying that the fact of the mistake’s being of law should not be the sole reason for denying relief. The New Zealand committee intended that the approach of their legislation and the New York legislation be the same. In fact the approach to interpreting the New Zealand legislation has been much more robust than it was in New York. This probably reflects, as we see in the next section, a failure of the New York judiciary to fully embrace the New York State Law Revision Commission’s condemnation of the mistake of law bar. The commission commented for instance that the rule denying recovery had been condemned by many textbook writers and academics. They agreed with Williston, who argued that it was impossible to reconcile the case law with reference to a sound principle because there was no sound principle. The commission also referred to the Restatement, setting out a long extract in the appendix, and concluded that the mistake of law bar was arbitrary in its effects and ought to be abolished. It appears that the New York experience and therefore indirectly the Restatement were of seminal importance in provoking a reaction in New Zealand against the mistake of law bar in the mid twentieth century. That in turn as we see impacted to some extent on Goff and Jones, but more obviously on later Law Commissions in different jurisdictions.

(C) The Impact of These Factors

We can divide this section into two. The first assesses the impact of the New Zealand legislation and Goff and Jones. However, that in itself does not tell the full story of how the factors that influenced those two events impacted on the campaign for change. Assessing that will be the task of the second subsection.

(i) Goff and Jones and the New Zealand Legislation

One major development in the 1980s was the recognition by various law reform bodies that the mistake of law bar ought to be abolished, as well as an increasing number of academic articles criticising the bar. In the Commonwealth the rule was subjected to examination by law reform bodies in England, Scotland, South

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41 R Sutton ‘Mistake of Law-Lifting the Lid of Pandora’s Box’ in JF Northey (ed) The AG Davis Essays in Law (Butterworths London 1965) 218, 220.
43 New York State Law Revision Committee Reports Recommendation and Studies 1942 (Legislative Document no 65(B) 1942) 32.
45 NYSLRC (n 43) 35-41.
46 Ibid 5
Australia, \(^{49}\) New South Wales, \(^{50}\) Ontario and British Columbia, \(^{51}\) although the Ontario report merely refers us to the British Columbia report. \(^{52}\) This section attempts to show that much of the criticism and the impetus from law reform bodies around the world stemmed in the main from these two sources, Goff and Jones and the New Zealand legislation. Their importance and impact can easily be seen in the influence that they had over these various bodies and on academic articles, many of which added little to what Goff and Jones had said. \(^{53}\)

The British Columbia report for example followed the New Zealand Act exactly in its recommendation, \(^{54}\) commenting after a long discussion that it provided a generally workable model. \(^{55}\) The report did not go any further than Goff and Jones in its criticism of \textit{Bilbie v Lumley}; it merely asserted that the case was concerned with voluntary payments. \(^{56}\) The list of exceptions was almost exactly the same, albeit in a different order to Goff and Jones. \(^{57}\) The South Australian report also explained \textit{Bilbie v Lumley} as a case of voluntary payment, in the sense of a payment made in settlement after a demand. \(^{58}\) It commented that Goff and Jones had shown that the rule was not absolute, but subject to exceptions. \(^{59}\) Its list of exceptions was obviously based on Goff and Jones. \(^{60}\)

The New South Wales commission also accepted that \textit{Bilbie v Lumley} was a voluntary payments case just as had the South Australian committee. \(^{61}\) Their criticism of the bar seems to have been largely derived from the British Columbian report. They admitted in fact that they had drawn heavily on both the British Columbian and South Australian report, both of which, as we have seen, relied heavily on Goff and Jones. \(^{62}\) The influence of the New Zealand legislation can be seen in the fact that section 7 of

\begin{itemize}
  \item \textit{Error of Law and Public Authority Receipts and Disbursements} (Scot Law Comm Report no 169 1999).
  \item \textit{New South Wales Law Reform Commission Restitution of Benefits Conferred under Mistake of Law} (LRC 53 1987).
  \item \textit{259 An example of an article which repeats Goff and Jones’ criticisms and exceptions is C Needham ‘Mistaken Payments: A New Look at an Old Theme’ (1979) 12 U British Columbia L Rev 159, 170-177. A book that did so is AS Burrows \textit{The Law of Restitution} (Butterworths London 1993) 111-116.
  \item \textit{BCLRC} (n 51) 92
  \item Ibid 73
  \item Ibid 12
  \item Ibid 40-57
  \item \textit{SALRC} (n 49 above) 4-5.
  \item Ibid 3
  \item Ibid 8-18
  \item \textit{NSWLRC} (n 50) para 3.25; they expressly relied on Goff and Jones (3\textsuperscript{rd} edn Sweet & Maxwell London 1986) 36-38 to support this conclusion, para 3.25 n 42.
  \item Ibid para 4.1 n 2
\end{itemize}
the Restitution (Mistake of Law) Bill that they proposed was in the same form as section 94A Judicature Act 1908. The influence of Goff and Jones can be seen, amongst other things, in the fact that again the exceptions to the bar that they give are those found in Goff and Jones, albeit rearranged.\(^{63}\) In England the Law Commission gave a series of reasons why the mistake of law bar ought to be reformed, but they are again a condensed version of what had already been said.\(^{64}\) Certainly their list of exceptions seems to have been taken from Goff and Jones,\(^{65}\) although the proposed legislation is in a different form to that in New Zealand.\(^{66}\)

It does not seem therefore that many of the various Law Commissions around the world added much to what Goff and Jones had already said, and in the main their recommendations were that the legislature should enact a law in the same form as the New Zealand Act. It is true that the exceptions were approximately the same everywhere. However, the similarities in the arguments and in the expression of those arguments are nonetheless remarkable, suggesting considerable reliance on the work of Goff and Jones and an assumption that they – the various Law Commissions - were simply rehearsing what was already considered pretty trite, well known and well accepted criticisms. This became true to such an extent that it became easy to forget that there were in fact good reasons for the bar; the early nineteenth century judges had genuine and real concerns that needed to be addressed to do with floodgates, difficulties of proof of the mistake, and the much more slippery nature of a mistake of law, given that the law could change. Birks was therefore concerned not to condemn the bar wholesale.\(^{67}\)

The Scottish Law Commission is a notable exception to this rule of acceptance of Goff and Jones. It frequently cited its counterpart south of the border, but concentrated on domestic Scots authority in its discussion. That authority, as Scotland is a mixed system whose unjustified enrichment law draws heavily on the Roman tradition, is quite different, despite the heavy English influence on the development of the bar in Scotland, particularly the influence of Lord Brougham, then Lord Chancellor, in, for instance, *Dixon v Monkland Canal Company*\(^{68}\) where he was able to confirm Scots doubts about the availability of relief for mistake of law that had been current, but not dominant since the late eighteenth century.

(ii) The New York Experience

The New York legislation had an unhappy impact, partly because of the judiciary’s over-cautious interpretation, which failed to expunge the mistake of law bar completely from New York law. The British Columbia Law Reform Commission

\(^{63}\) Ibid para 3.17-3.24; Goff and Jones (n 61) 124-135

\(^{64}\) Law Comm (n 11) paras 3.1-3.4

\(^{65}\) Ibid paras 2.9-2.15; Goff and Jones *The Law of Restitution* (4th edn Sweet & Maxwell London 1993) 150-162

\(^{66}\) Law Comm (n 11) Appendix A 195-201

\(^{67}\) PBH Birks *An Introduction to the Law of Restitution* (Revised edn Clarendon Press Oxford 1989) 165-166. Lord Goff in *Kleinwort Benson v Lincoln City Council* said it would be unhistorical to criticise the lawyers of the early nineteenth century, when the bar was introduced to meet real fears [1999] 2 AC 349 (HL) 371.

\(^{68}\) (1831) 5 W&S 445
discussed the legislation and commented that the judiciary had not been bold in their interpretation of the legislation. The New York courts basically were not true to the spirit and purpose of the legislation. The British Columbians quoted the case of *Mercury Machine Importing v City of New York*. The company was claiming back overpaid taxes, paid under a mistake of law. The company lost. Van Voorhis J commented that the reform merely removed technical objections to allowing relief in mistake of law cases and was not intended to assimilate the rules to those regarding mistakes of fact. He also held that, because there were practical reasons, concerned with the protection of public finances, for holding that the payor must protest before illegal taxes it had paid could be recovered, relief would be refused.

There are currently in Commonwealth jurisdictions arguments that cases of restitution from the Executive should be treated differently from those between purely private parties. In favour of this Lord Goff suggested in *Kleinwort Benson v Lincoln City Council* for example that the risk of fiscal chaos might justify a defence that the taxes were paid on a settled understanding of the law, even though that settled understanding had now been proven wrong, and the defence was unavailable in cases involving private parties. LaForest J in *Air Canada v British Columbia* removed the mistake of law bar, but wished to bar restitution of ultra vires taxes for reasons of fiscal chaos. However, the critical problem with *Mercury Machine Importing* was that its result was part justified by an argument that the legislature never intended to assimilate the rules of mistake of fact and law; this meant that the law in private transactions could still be different in cases of mistake of fact and of law. The British Columbian commission argued that the mistake of law bar had not been effectively abolished. It remained in a kind of half-life. This criticism was echoed by other law reform bodies. The New York solution to the problems thrown up by the mistake of law bar therefore met with little favour. Despite this, however, Marean suggested its use as a model in California.

We have seen that the New York legislation had an important influence on the New Zealand legislation. The similarities are evident, but equally there are differences and these, perhaps along with a greater commitment in the judiciary to the sense of abolishing the rule, seem to have prevented similar difficulties bedevilling the New Zealand law, although it is interesting to note that section 2 Contractual Mistakes Act 1977 simply defines mistake as a “mistake of fact or law” in order to statutorily enshrine the abolition of the distinction in New Zealand contract law.

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69 BCLRC (n 51) 80
70 165 NYS (2d) 517, 144 NE (2d) 400 (Ct Appeals NY 1957)
71 165 NYS (2d) 517, 522, 144 NE (2d) 400, 404 (Ct Appeals NY 1957)
72 165 NYS (2d) 517, 521, 144 NE (2d) 400, 404 (Ct Appeals NY 1957)
74 (1989) 59 DLR (4th) 161, 197, but see now *Kingstreet Investments v New Brunswick Dept of Finance* [2007] SCC 1; [2007] 1 SCR 3
75 BCLRC (n 50) 80
76 See NSWLRC (n 48) paras 4.12-4.14; SALRC (n 49) 20-21 and Law Comm (n 11) para 4.3
77 B Marean ‘Restitution for Money Paid under Mistake of Law’ (1968) 19 Hastings LJ 1225, 1232
The Law Commission report originated in a reference in 1990 by the then Lord Chancellor, Lord MacKay. The Commission published the final report in 1994. The impact was considerable. The recommendations were accepted by first the Conservatives, \(^7\) and then the Labour Government, who intended to introduce the Law Commission’s draft bill in autumn 1998, but decided not to go ahead after the House of Lords’ decision. \(^7\) The report may also have brought home to lawyers who had not previously been aware of the problems with the bar that it was on the way out.

Those Law Commission proposals had an immediate impact on the debate, but a measurably less significant impact on the House of Lords than might be thought. The bar was removed in English law by the House in *Kleinwort Benson v Lincoln City Council*. That decision was one of the swaps cases; the local authority had entered into a swaps contract with the bank which later turned out to be ultra vires the city council. The contract was void. The bank which was the losing party on the contract sought to recover its money on the basis of a mistake of law as to the validity of the contract. Ultimately they succeeded. Every member of the House agreed the bar should be abolished. There was a disagreement, however, as to the precise nature of a mistake of law and when it could arise. \(^8\) Lord Lloyd, who was in fact in the minority, would have adopted the proposals of the commission in their entirety, as common law. \(^9\) However, Lord Hoffmann did not mention the commission report once in his judgment. When Lord Hope considered whether the bar should no longer be applied he too did not mention it. Lord Browne-Wilkinson did not consider the question explicitly of whether the bar ought to be removed, but assumed it should. Lord Goff’s judgment ranged widely over this question, but relied as much on the rejection of the mistake of law rule elsewhere in the common law world, as the Law Commission. \(^10\) He commented that the main criticisms were threefold and were set out by the commission, but he appears, and rightly so, to have believed that these criticisms were widely recognised prior to the report. \(^11\) Lord Goff suggested that the local authorities in not arguing for the retention of the bar were adopting a realistic stance. “In the light of prolonged criticism of the rule by scholars working in the field of restitution, and of recent decisions by courts in other major common law jurisdictions, the case for retention of the rule in its present form can no longer be sensibly advanced before your Lordships’ House.” \(^12\)

This suggests that the Law Commission’s impact on the majority law lords and in particular on Lord Goff, who gave the main majority speech, was limited, or mediated through its impact on other writers and courts. Certainly there is little evidence in the speeches that the Law Commission report was a *sine qua non* of the House of Lords’ removal of the bar from the law. Obviously the report gave some added impetus to the campaign for change, especially after its acceptance by the two governments, but it

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\(^7\) Announced in a written answer to a Parliamentary question 19 March 1997

\(^8\) Letter from the Lord Chancellor’s Department 15 November 1999

\(^9\) See Sheehan (n 73)

\(^10\) [1999] 2 AC 349 (HL) 392, 398

\(^11\) Ibid 372-374

\(^12\) Ibid 372

\(^13\) Ibid 368
seems at least arguable that without the report the House of Lords would still have acted as it did.

(2) Conclusion

Much of the modern criticism simply restated the criticisms, or some of them, which began to be made by Goff and Jones after 1966. Legislative proposals were often simply restatements of the New Zealand legislation. Neither of these two events simply happened. There had been voices in the wilderness in England before and voices, not quite in the wilderness, in the USA. It may be that Goff and Jones’ belief in the logical indefensibility of the bar arose from the US Restatement of Restitution, their recognition, derived from Winfield, that the two types of mistake are mostly indistinguishable and lastly from the plethora of exceptions. The exceptions cited subsequently were often almost exclusively those cited by Goff and Jones. This, as hinted earlier, proves correlation rather than causation. However, it is still noteworthy that Goff and Jones were the first to systematise the objections and exceptions to the rule, and reach a wide audience in doing so. Those who followed added very little.

The New Zealand legislation might never have happened had it not been for the New York legislation, which in turn drew heavily on the arguments of the reporters of the Restatement that the distinction between mistakes of fact and law ought to be abolished. It is unlikely given its legacy in its own jurisdiction that the New York experience was in the forefront of the mind of those campaigning for change subsequent to the New Zealand legislation. However, it was certainly viewed as an example of an option for reform, albeit one which was discussed, and rejected, by law reform bodies involved in the campaign for change. By the end of the twentieth century the rule’s abolition was certain. McCamus described its retention as embarrassing, and its removal can only be greeted with relief, although the manner in which it was done has attracted some disquiet.

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85 SALRC (n 49) 20-21; NSWLRC (n 48) paras 4.12-4.15; BCLRC (n 50) 80; Law Comm (n 11) para 4.3 and Scottish Law Commission Recovery of Benefits Conferred under Error of Law (Scot Law Comm DP no 95 1993) Vol 1 paras 2.98-2.99