Restitution of Distributors by a Fiduciary to Which the Recipient Was Not Entitled

George E. Palmer
RESTITUTION OF DISTRIBUTIONS BY A FIDUCIARY TO WHICH THE RECIPIENT WAS NOT ENTITLED

By George E. Palmer*

WHEN a fiduciary pays or distributes fiduciary funds or other property to the wrong person, or distributes more than his due to a person who has a valid claim, or distributes funds to a legatee or heir (used herein to include next of kin) when the funds are needed to pay debts, a complex of problems may arise.¹ May the fiduciary obtain restitution from the recipient of the benefit? Is restitution available to the person who should have received the funds? Is restitution in either case limited to payment by mistake, and if so does it make a difference whether the mistake was of fact or law? And finally, is the fiduciary personally liable to the one entitled to the funds?² This last issue should be irrelevant to the solution of the restitution problems, but by some authority, mostly English, it may become critical.

Some reference to early English decisions seems necessary, not so much because of the influence of the decisions on case-law in this country as because of the influence on discussion in American texts and other writing.

I.

Restitution from an Actual or Supposed Heir, Legatee or Beneficiary

Restitution may be sought from an actual or supposed heir, legatee or beneficiary for a variety of reasons. The distribution may have been made in the belief that the recipient was an heir when in fact he was not. In such a case the property should have gone to the true heirs and restitution may be sought either by them or by the personal representative. Similar mistakes can occur in distribution under a will or a trust. Again, a legatee may have been paid

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¹ The problems are discussed in Warren, Problems in Probate and Administration, 32 Harv. L. Rev. 315, 329-48 (1919).
² In general, the fiduciary will be liable for an improper distribution, unless it is pursuant to court order. The problem as it relates primarily to trusts is discussed in Schuyler, Payments Under Void Trusts, 65 Harv. L. Rev. 597 (1952); Schuyler, The Fiduciary Must Know the Law, 56 NW. U.L. Rev. 177 (1961).
in full, leaving insufficient assets to pay other legacies of the same class. In this instance restitution of only a portion of the distribution is in order, and again it may be sought either by the personal representative or by the underpaid legatees. Sometimes distribution is made to heirs and legatees which leaves insufficient assets in the estate to pay debts, with restitution sought either by an unpaid creditor or by the personal representative.

Suit by Unpaid Creditor

Some of the earliest English cases, decided in the 17th century, allowed restitution from an heir or legatee in favor of an unpaid creditor. For modern law perhaps the most significant aspect of these cases is that the order for refund was entered upon a showing of insufficiency of assets left to pay creditor's claims. No attempt was made to fit recovery into mistake doctrine, even though the decisions began during the period in which assumpsit came into use to recover money paid by mistake—mistake of performance, as it might be called today. It was enough for the Chancellor in 1682 to say that "the common justice of this court will compel a legatee to refund." Restitution at suit of the creditor was granted where the executor's distribution was not the product in mistake, and where the executor himself would not be entitled to restitution because he paid with notice of the debt. This was decided in the 17th century and confirmed nearly 200 years later in Jervis v. Wolferstan, where a contingent liability of the estate materialized after the executor had made distribution to residuary legatees and restitution from the legatees was granted in favor of the creditor.

The claim of an unpaid creditor, as well as the claim of an unpaid or underpaid distributee or legatee, can be based on the view that he has an equitable interest in the assets and that the


5 G. PALMER, MISTAKE AND UNJUST ENRICHMENT 21-32 (1962).


8 L.R. 18 Eq. 18 (1874). The liability of the estate arose out of calls against shareholders of an insurance company which became insolvent after distribution of the estate. The action against the legatees, based upon the decedent's liability as a shareholder, was brought by one who was also liable on the call but was entitled to be indemnified out of the decedent's estate.
defendant legatee or distributee took subject to this equitable interest. An executor or administrator takes legal title to the decedent's personal property, but like a trustee he holds this title for the benefit of others, in this case the creditors, heirs and legatees as their interests may appear.°

In American law the procedure for filing and allowing claims against a decedent's estate reduces the likelihood that legatees or distributees will be paid before creditors.10 When this does occur it seems likely that, except in Pennsylvania, restitution will be given in favor of an unpaid creditor who has properly presented his claim, unless the distribution was the result of a mistake of law on the part of the personal representative and the court is misled into believing that this somehow prevents restitution in favor of the person ultimately entitled to the assets.11 The English cases granting restitution to a creditor, without regard to the personal representative's right to restitution, should demonstrate that the creditor's claim is not grounded on mistake, hence the fact that there was mistake of law should be regarded as legally irrelevant.

Suit by Unpaid or Underpaid Legatee or Beneficiary

Where one legatee sought restitution from another because the latter had been paid in full before discovery that there were insufficient assets to pay all legacies of that class, the 17th century English cases treated this as analogous to a creditor's claim. As with the creditor, the unpaid or underpaid legatee was entitled to compel a refund "where the assets become deficient."12 Subsequently, however, there were occasional statements to the effect that recovery would be denied if the deficiency of assets was the result of a wasting of assets by the executor after payment of the defendant's

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10 The English decisions were under a practice substantially different from that commonly followed today in this country. As described by Eldon in Gillespie v. Alexander, 3 Russ. 130, 33 Eng. Rep. 525 (Ch. 1827), there apparently was no time limit on the filing of claims. In an account of debts a decree could be entered for payment of those proved and this protected the personal representative in making distribution. But a creditor could later prove his claim, which meant that if the assets had been distributed the claim could be satisfied only through obtaining restitution from the legatees or distributees. In that case the court said the creditor could compel restitution, and that the burden of doing so was on him rather than the personal representative. Accord, Harrison v. Kirk, [1904] A.C. 1 (P.C.); cf. N.Y. Sup. Ct. Proc. § 1802 (McKinney 1967).

11 Creditors' claims may be affected by legislation. Thus, in Massachusetts a creditor may recover from heirs or legatees when the circumstances were such that his claim could not have been presented within the normal period. Mass. Gen. Laws Ann. ch. 197, §§ 26, 29 (1958). Pennsylvania decisions are discussed in text accompanying notes 41-44 infra.

legacy. The reason for this limitation, as stated in a 1718 case,\textsuperscript{13} has little relevance in present American law: the legatee who had collected in full, the court said, was entitled to "retain the advantage of his legal diligence, which the other legatees neglected by not bringing their suit in time, before the wasting by the executor."\textsuperscript{14} Administration of decedents' estates in this country will usually prevent the occurrence of the problem, but when it does arise this will rarely be an acceptable reason for refusing restitution. The receipt of distribution by one legatee before another of the same class will seldom be properly attributed to "legal diligence." There are situations in which the unpaid legatee will be denied relief, but this is where the assets later wasted have been set aside as a trust fund for his benefit.

The exclusion of a case in which the executor had wasted assets did not extend to other situations in which there was a depreciation in the value of the estate after payment of the defendant's legacy. From the earliest cases it was assumed that a bill by the unpaid or underpaid legatee would lie where the deficiency in assets was caused by events occurring after the payment.\textsuperscript{15} When suit was by an unpaid creditor, courts likewise granted recovery from a legatee for a deficiency of assets caused by events occurring after the payment; nor was there any suggestion in the creditors' cases that the result would be otherwise if the deficiency was produced by wrongful acts of the executor. The executor would be accountable to the estate in such circumstances, but if he were insolvent the only effective remedy of the creditor or unpaid legatee might be restitution from the defendant legatee.

Two developments occurred in connection with actions by one legatee against another which, if accepted, placed serious limits on the availability of the restitutionary remedy. The first development appeared at least as early as 1751, in Orr v. Kaines,\textsuperscript{16} when the court held that an unpaid legatee's action was solely against the executor if the executor was solvent, as he was in that case—only if he were insolvent, the court said, could the claimant proceed against the overpaid legatee.\textsuperscript{17} Moreover, the court said that the executor

\textsuperscript{13} Anonymous, 1 P. Wms. 495, 24 Eng. Rep. 487 (Ch. 1718).
\textsuperscript{15} Case cited note 12 supra. See also, 8 C. Viner, A General Abridgment of Law and Equity 423 (1752): "So if one gets a decree for his legacy and is paid, and afterwards a deficiency happens, he shall refund."
\textsuperscript{16} 2 Ves. Sen. 194, 28 Eng. Rep. 125 (Ch.).
\textsuperscript{17} The decision was perhaps foreshadowed in Hodges v. Waddington, 2 Vent. 360, 86 Eng. Rep. 485 (K.B. 1884), where a creditor was granted restitution from a legatee with the reporter's note that "the principal case went upon the insolvency of the executor."
would not be entitled to a refund since he had paid "voluntarily," with the result that ultimate liability fell on the executor rather than the legatee who received a benefit to which he was not entitled.

The overpayment in Orr v. Kaines arose out of a deficiency of assets and for a long period thereafter it appeared that the decision might be limited to such a situation. There were decisions involving trusts, both inter vivos and testamentary, in which one beneficiary was allowed restitution from another who had been overpaid due to a mistake as to the extent of his interest, with no suggestion that the trustee was insolvent or otherwise unable to account. In present English law, however, under the decision in In re Diplock, the true beneficiary apparently can recover from the recipient of a benefit to which he is not entitled only if and to the extent that he is unable to obtain satisfaction from the fiduciary. Since the fiduciary's right to restitution is severely limited in English law, the result will commonly be to place the ultimate loss from a mistaken distribution on the fiduciary. But the situation is worse than this: as will be seen hereinafter, the English courts have, within limits left undefined, consciously chosen to throw the ultimate burden on the fiduciary in the Diplock situation, rather than on the recipient of the unjustified benefit. No corresponding doctrine developed in connection with creditor's actions against legatees or heirs. In English law there is both a remarkable failure to do justice and a remarkable failure to see the problem whole.

A second development occurred in 1876, in Rogers v. Ingham, where the plaintiff legatees claimed that a share of the estate that should have gone to them was distributed by the executor to the defendant under an erroneous construction of the will. The court denied relief, without passing on the question of construction, on the ground that restitution would not be given for mistake of law. If the decision were to be read broadly, as denying recovery by the true beneficiary because of the nature of the fiduciary's mistake, it would be in conflict with earlier decisions in which restitution was awarded on similar facts without discussing the nature of the mistake, as well as the cases giving restitution to a creditor where the distribution was not caused by mistake. In fact, the court in Rogers

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20 L.R. 3 Ch. D. 351 (C.A. 1876).

21 In Dibbs v. Goren, 11 Beav. 483, 50 Eng. Rep. 904 (Rolls Ct. 1849), where restitution from an overpaid beneficiary was awarded, the payment had been made "under an erroneous view of the effect of the will," but the court did not discuss the question whether the mistake was one of law or fact.
v. Ingham treated the plaintiff beneficiary as though he were the mistaken payor. The beneficiary had consented to the distribution and the case was the same, one judge said, "as if the cestui que trust had received the money from the trustee, and had herself paid it to that person." It is dubious reasoning, but nonetheless the reasoning seems to limit the decision to restitution sought by one who must base his claim on mistake of law. The refusal to give restitution to a payor for mistake of law began in England in 1802, and this seems to be the first case in which the doctrine was applied to mistaken distribution by a fiduciary. The limitation of the doctrine to cases in which restitution was in substance sought by the payor was later confirmed in In re Diplock, where executors and trustees had mistakenly paid over £200,000 in estate funds to a number of charities under an attempted testamentary trust which was invalid because of indefiniteness of beneficiaries. The mistake was clearly one of law but the Court of Appeal held that the next of kin were entitled to restitution from the charities in equity. Although the court refused to allow recovery in quasi-contract, this can be explained by the severe and irrational restrictions placed on that remedy in modern English law, restrictions which have no counterpart in this country. One might perhaps conclude from the Ingham case that restitution at suit of the fiduciary would be denied where his distribution was produced by mistake of law, but more recent English cases have cast doubt on this conclusion. The matter will be examined hereinafter.

On the whole the complicated limitations on restitution to the true beneficiary which have been introduced into English law have not appeared in our cases. The English view that the action lies only if recovery cannot be had from the fiduciary is implicitly rejected in decisions granting restitution from the recipient of the benefit without regard to the solvency or liability of the fiduciary. This is true of cases in which distribution was made, through mistake of law or fact, to one who was not an heir, legatee, or beneficiary, as well as cases in which an overpayment was made to one who was a beneficiary. Restitution has been granted in all of these situations, nor has it been refused because the mistake was one of law. In a Connecticut case an heir believed to have predeceased the intestate was in fact alive, and the court said he had an action to recover his share from the other heirs to whom distribution had been made. In a Missouri case the court ordered a refund in favor of one group of heirs against

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22 3 Ch. D. at 355.
24 Gray v. Goddard, 90 Conn. 561, 569, 98 A. 126, 129 (1916). The actual decision was that the action of the omitted heirs against the administrator was barred by the statute of limitations.
another group, following distribution of the estate in the mistaken belief that the heirs took per stirpes rather than per capita—clearly a mistake of law.\(^25\) In a Michigan case the true heirs were awarded restitution of a distribution made to an adopted child in the mistaken belief that he was an heir. The fact of adoption was known, but the law was not. The court squarely rejected the view that restitution should be denied because the mistake was one of law.\(^26\) In a New York case in which a trustee by mistake of law had distributed to beneficiaries funds to which they were not entitled, the beneficiaries who were entitled obtained restitution.\(^27\)

When one legatee has been paid in full and another legatee seeks restitution because of an insufficiency of assets, there are statements in a few American cases that repeat the doctrine found in English law concerning a wasting of assets by the executor. Thus an early New York case says:

There is a distinction, running through the cases, between an original deficiency of assets and where the assets were sufficient, but had been wasted by the executor. In the former case, a legatee who has been paid more than his proportion under the deficiency must refund; but in the latter case, he is not obliged to do so, for he has received no more than what was due to him, and the other legatees must look to the executor. The legatee who has been paid shall retain the advantage of his legal diligence.\(^28\)

That case, and other cases as well, which purport to rest on this general principle found in English decisions, can be more satisfactorily explained on a different ground than that of rewarding a legatee who has won a race of diligence. The will contained money bequests to the plaintiffs, to be paid at ages which they had not attained when the will took effect. The executors retained sufficient funds to pay the bequests and distributed the balance to the residuary legatees. Thereafter the executors “wasted” the assets held for the plaintiffs. It was properly held that their only action was against the executors as trustees. A trust fund had been set aside for their benefit and thereafter their only rights were with respect to that fund.\(^29\)

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\(^{25}\) Aull v. St. Louis Trust Co., 149 Mo. 1, 50 S.W. 289 (1899).
\(^{26}\) Moritz v. Horsman, 305 Mich. 627, 9 N.W.2d 868 (1943).
\(^{28}\) Lupton v. Lupton, 2 Johns. Ch. 614, 626-27 (N.Y. Ch. 1817). The substance of the statement is repeated in Buffalo Trust Co. v. Leonard, 154 N.Y. 141, 47 N.E. 966 (1897), but restitution was nonetheless awarded in favor of money legatees who had not been paid, against the residuary legatees to whom the estate had been distributed. The assets were sufficient to pay the plaintiffs when distribution was made to the residuary legatees, but subsequently became insufficient because of misappropriation by and insolvency of the executors.
\(^{29}\) This also explains Mills v. Smith, 141 N.Y. 256, 36 N.E. 178 (1894), as well as Walcott v. Hall, 2 Bro. C.C. 306, 29 Eng. Rep. 167 (Ch. 1788). In the
As the cases already cited suggest, restitution to the true beneficiary has not been denied in this country because the distribution was produced by mistake of law. The true beneficiary of a trust, the true legatee, and the true next of kin have an equitable interest in the assets in question and are entitled to recover from the recipient on that ground alone, regardless of the circumstances that led to the recipient's acquisition of assets to which he was not entitled. As said in a New York case in which one beneficiary recovered from another:

The beneficiaries whose rights were defeated committed no mistake either of law or of fact. They are not asking to be relieved from their own act or deed, performed with knowledge of the facts, though under mistake as to the law, but from the acts performed by another. It would seem clear, upon principle at least, that the rule against the recovery of money paid under mistake of law should not apply to payments made by a trustee, or other fiduciary, of funds, the equitable ownership of which was in third persons.30

Suit by the Fiduciary

When distribution to a legatee or next of kin left insufficient assets to pay creditors' claims the early English cases were prepared to grant restitution at suit of the personal representative in some circumstances, but with some uncertainty as to what those circumstances were. In the earliest case found, Nelthrop v. Hill, decided in 1669, there is a dictum stating that an executor may force a refund from a legatee when debts of the estate are later discovered with insufficient assets to pay them.31 Later in the same century it was held in Noel v. Robinson that the distribution was not recoverable if "voluntary" and that it was voluntary unless the personal representative was "compelled" to pay.32 The facts of the case differed from Nelthrop, however, in that the deficiency of assets arose after the distribution, due to the insolvency of two persons indebted to the estate. The statement that the executor's distribution was "voluntary" is matched in the present law of restitution when relief is denied to a "volunteer." Commonly, this means that the court is unable to find any recognized ground for holding that the retention of a

New York case, on facts analogous to those in Lupton v. Lupton, 2 Johns Ch. 614 (N.Y. Ch. 1817), the court said: "The question ... concerned the trust fund and when that is found to have been set apart and held by the executors out of the estate, it is no concern of [plaintiff's] how the distribution was made of the rest of the estate to the residuary legatees. He is remitted to his remedy against the executor or trustee, and for any breach of duty or of his trust on his part he is without any claim against the distributees of this estate." 141 N.Y. at 264, 36 N.E. at 180.

benefit is unjust. The search for a ground was beginning in these 17th century cases. In the *Nelthorp* case the facts made it a case of payment by mistake, in the mistaken belief, that is, that the assets were then sufficient to pay both debts and legacies, whereas in *Noel v. Robinson* there was no operative mistake at the time of distribution to the legatee. Distribution under compulsion, however, was conceived to provide a separate ground for restitution of the payment, as would be true also today.

In the following century Viner cited a case thought to be opposed to *Noel v. Robinson*, justifying recovery by the executor of a “voluntary” payment on the ground that he “stands in the place of the creditor.”\(^3\) Although this is the preferable view, it remains uncertain that present English law would grant restitution to the executor on the facts of *Noel*.\(^4\) The claim for restitution to a personal representative is even more uncertain in English law when a legatee has been overpaid at the expense of other legatees. A 17th century case denied recovery on the ground that the distribution was voluntary rather than by compulsion,\(^5\) and this position seems to have been adhered to in later cases.\(^6\) Both problems are intimately related to the question as to who should bear the ultimate burden of an improper distribution, and will be discussed again in that connection. If it is held, as it should be, that primary liability rests on the recipient of the benefit, the personal representative who has made a distribution which at the time seemed proper should be able to recover on behalf of an unpaid creditor or legatee, or be subrogated to the rights of a creditor or legatee whom he has paid.

In this country restitution has been regularly granted to a personal representative who made distribution to legatees or next of kin in the mistaken belief that the assets remaining were sufficient to pay the claims of creditors. In some instances the mistake consisted of ignorance of a debt of the estate,\(^7\) in others the fiduciary was mistaken as to the value of the assets.\(^8\) Restitution has likewise been granted where the distribution resulted in a deficiency of assets to pay other heirs or legatees,\(^9\) as well as where the personal repre-

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\(^7\) Clifton v. Clifton, 54 Fla. 535, 45 So. 458 (1907) (restitution from heir); Cutright v. Stanford, 81 Ill. 240 (1876) (restitution from heirs); Walker v. Hill, 17 Mass. 380, 385 (1821) (dictum).

\(^8\) Buchanan v. Fue, 31 Md. 35, 6 Gill. 112 (1847) (restitution from legatees).

\(^9\) Culbreath v. Culbreath, 7 Ga. 64 (1849) (restitution from overpaid
sentative distributed estate funds to the wrong person, for example, to one mistakenly believed to be an heir.\textsuperscript{40}

The principal dissent from these views is in Pennsylvania which has refused restitution to the personal representative, whether the distribution resulted in an insufficiency of assets to pay creditors,\textsuperscript{41} or other legatees.\textsuperscript{42} These decisions are associated with the refusal of the Pennsylvania courts to grant restitution at suit of the creditor or the underpaid legatee or heir.\textsuperscript{43} The basic position is that the overpaid legatee or heir may retain a benefit to which he was not initially entitled, simply because he received it. The decisions stem principally from Montgomery's Appeal,\textsuperscript{44} where the court justified the denial of restitution as follows: "It would be a great hardship upon distributees, to whom an administrator has voluntarily made payments on account of their shares, if they may be called upon for repayment after the lapse of years. They may have spent it, or increased their style of living in entire good faith, and in ignorance of any over-payment."\textsuperscript{45} This type of hardship may occur whenever restitution of a mistaken payment is sought, but the possibility of such hardship has not caused most courts to refuse relief. Instead, inquiry is made in the particular case to determine whether, because of change of position on the faith of the payment, it would be inequitable to order restitution in whole or in part. It seems unlikely that the Pennsylvania court will extend this protection to the recipient of a mistaken distribution who was not in fact an heir, legatee or beneficiary,\textsuperscript{46} even though the reason given in Montgomery's Appeal could be said to extend to such a case.

\textbf{Mistake of Law}

In some of the American cases granting restitution to a personal representative the mistake was one of law, but this was not thought

\begin{itemize}
  \item Old Colony Trust Co. v. Wood, 321 Mass. 519, 74 N.E.2d 1 (1947).
  \item Montgomery's Appeal, 92 Pa. 202 (1879).
  \item Fitzgerald's Estate, 266 Pa. 321, 109 A. 635 (1920); Ferguson v. Yard, 164 Pa. 586, 30 A. 517 (1894).
  \item 92 Pa. 202 (1879). The Pennsylvania cases are discussed in Farage, \textit{Restitution in Pennsylvania of Overpayments Made by Executors or Administrators to Distributees}, 12 PA. B. Ass'n Q. 30 (1940).
  \item 92 Pa. at 206.
  \item Union Trust Co. v. Gilpin, 235 Pa. 524, 84 A. 448 (1912).
\end{itemize}
sufficient to prevent recovery. There are, however, some decisions denying restitution for this reason, and this general position, unfortunately, was adopted by the Restatement of Restitution.

Before discussing the specific problem it may be useful to make a short excursion into the general topic of restitution for mistake of law. The discussion is confined to mistake in performance, where the recipient has received a benefit through a mistaken payment or other transfer for which he has neither given nor agreed to give anything in exchange.

In early English law, courts relieved against mistake without regard to whether it was of fact or law, but in 1802, in Bilbie v. Lumley, Lord Ellenborough committed a "monstrous mistake of law" in denying restitution of a money payment not owed on the ground that the payor knew the facts and was in error only as to the applicable law. The distinction has been condemned almost universally by writers and very commonly by judges, as in Lord Wright's

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47 Northrop v. Graves, 19 Conn. 548 (1849) (executor); Mansfield v. Lynch, 59 Conn. 320, 22 A. 313 (1890); Culbreath v. Culbreath, 7 Ga. 64 (1849) (administrator); Roach v. Underwood, 192 Tenn. 378, 241 S.W.2d 498 (1950) (administrator).

48 Harding v. Hewes, 87 N.H. 488, 179 A. 343 (1935) (administrator); In re Welton's Estate, 141 Misc. 674, 253 N.Y.S. 128 (1931) (administrator); Phillips v. McConica, 59 Ohio St. 1, 51 N.E. 445 (1898); Scott v. Ford, 45 Ore. 531, 178 P. 742 (1904), rehearing denied 45 Ore. 550, 80 P. 399 (1905), aff'd on subsequent appeal, 52 Ore. 288, 97 P. 99 (1908) (executor). Other cases, most relatively old, are cited in Annot., 147 A.L.R. 121 (1943).

49 RESTATEMENT OF RESTITUTION § 45 (1937) (especially Illustration No. 1). The position of the Restatement is described more fully in note 73 infra.


51 2 East. 469, 102 Eng. Rep. 448 (K.B. 1802). The case was probably rightly decided, though for the wrong reason. The rule announced was accepted and applied in Brisbane v. Dacres, 5 Taunt. 143, 128 Eng. Rep. 641 (C.P. 1813).


53 W. KEENER, QUASI-CONTRACTS 85-87 (1893); F. WOODWARD, QUASI CONTRACT §§ 35-42 (1913); J. DAWSON, UNJUST ENRICHMENT 130-31 (1951); W. MARKBY, ELEMENTS OF LAW §§ 263-71 (4th ed. 1889); S. WILLISTON, CONTRACTS § 1581 (rev. ed. 1937); A. CORBIN, CONTRACTS §§ 616-17 (1960); RESTATEMENT OF RESTITUTION § 43, at 179-91 (1937); Foulke, Mistake in the Formation and Performance of a Contract, 11 COLUM. L. REV. 299, 320 (1911); Patterson, Improvements in the Law of Restitution, 40 CORNELL L.Q. 667, 676 (1955). Patterson's statement that the denial of relief for mistake of law is limited to law as opposed to equity cannot be accepted with respect to American law, although it may be the tendency of English decisions. In re Diplock, [1948]
observation that it "originated in a hasty and ill-considered utterance of Lord Ellenborough";\(^5\) nonetheless it has had and continues to have great influence on the course of decision.

The reason given by Lord Ellenborough for denying restitution of money paid by mistake of law was that "[e]very man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried."\(^5\) As more commonly expressed, "everyone is presumed to know the law." If this is to be regarded as one of those presumptions resting on probable fact, it is manifestly without foundation.\(^5\) As an English court said in an early case in which relief was given for mistake of law, "it seems hard, a young woman should suffer for her ignorance of the law" when the rule of law was one on which the judges were "till very lately" in disagreement.\(^5\) But Ellenborough was stating a rule of law, not a presumption grounded in fact, and the proper inquiry is whether it is supported by reasons of policy strong enough to justify retention of a payment to which the recipient was not entitled, when the payment was made in the mistaken belief that he was. There are no reasons of policy sufficient to justify this result.

It is true that ignorance of law does not usually enable a person to escape the application of that law to his acts. This is thought to be necessary to the maintenance of the public order or to the enforcement of rules having a regulatory function. No useful presumption is involved; instead a decision has been made that the rule of law in question is one of general application, binding on all who come within its terms. In general, one does not escape criminal responsibility or tort liability, or liability for breach of contract, by pleading ignorance of the law,\(^5\) nor does he escape the application of the


\(^{54}\) R. Wright, Preface to Legal Essays and Addresses xix (1939). He uses this as an instance in which "the dead hand of the past fastens on the living present."


\(^{56}\) "The idea that equity has no relief from mistakes of law had its origin in the almost humorous and wholly suppositious presumption that all know the law—a proposition contrary to both law and sense." Peterson v. First Nat'l Bank, 162 Minn. 369, 375, 203 N.W. 53, 55 (1925).


\(^{58}\) "Ignorance of law, of either the civil or the moral code, should not excuse a rational being from the prescribed responsibility for a voluntary violation of it; because, so far as civil and moral conduct may be concerned, it is the duty of every intelligent citizen and moral agent to know the law and his own obligations, and no government, moral or political, could prevail or be upheld, if a plea of voluntary ignorance would excuse an infraction of its prescribed rules of conduct . . . .

"But the same reasoning does not apply to contracts, or to private
statute of limitations because he mistakenly thought the period was longer than the one in fact prescribed. But this last example serves to bring out the irrelevancy of a mistake of law analysis, for the result would be the same were the mistake one of fact, for example, the date of occurrence of the event that gave rise to the cause of action. In all of these instances the party is seeking to escape the application of a rule of law. In the restitution cases with which we are now concerned he is not—on the contrary he makes the rule of law a part of his case and seeks restitution of the performance because he was mistaken as to that rule. Policies applied to mistake of law in the first situation have no bearing on the solution of the second. Rather than trying to escape the consequences of a rule of law the plaintiff seeks to escape consequences that would not have occurred had the law been known and observed. In a very general sense it can be said that he seeks to bring the situation into conformity with the rule of law, by asserting rights based upon it.

The rule refusing restitution for mistake of law is ill-adviced, yet it must be recognized that it is commonly followed as to mistakes in performance, particularly when the performance is a money payment. Even so, the rule should not be applied to mistaken distribution by a fiduciary for reasons best seen by considering the case rights . . . . [I]f one, ignorant of a plain principle of law, shall, without any other motive or consideration than an erroneous opinion respecting his legal rights and obligations, release a right, pay money, or undertake to do any act, what principle of law, or dictate of justice or policy, would require him to be bound, as with a Gordian Knot, which nothing but the sword could loose?

"Why should he be punished in such a case, for such ignorance? or why should the other party be enriched or benefited, without any equivalent or merit of any kind or to any extent whatsoever?" Underwood v. Brockman, 34 Ky. 209, 214 (1836) (italics deleted). Keener argues for the same distinction in W. Keener, Quasi-Contracts 91 (1893).

Similarly, a trustee does not normally escape liability for breach of trust by pleading ignorance of the law proscribing the act in question, although the lack of bad faith may have a bearing on the extent of liability. The issue was presented in Mosser v. Darrow, 341 U.S. 267 (1951).


In this instance a person seeks to use mistake in order to escape the consequences of a rule of law, the statute of limitations. The restitution problem arises when he relies upon that rule as a basis of relief. Thus, if one pays an obligation in the mistaken belief that it is enforceable when in fact action is barred by the statute of limitations, restitution will be denied but this is not because the mistake may have been one of law. The result would be the same were the mistake wholly factual. The reason for refusing restitution lies in the judicial attitude toward statutes of limitation: even though enforcement of the obligation is barred the obligation is not wholly discharged and retention of a mistaken payment is not unjust. Barr v. Payne, 298 Mich. 85, 298 N.W. 460 (1941); Clifton Mfg. Co. v. United States, 76 F.2d 577 (4th Cir. 1935), cert. denied, 296 U.S. 622 (1935).

61 Restatement of Restitution, Reporters' Notes at 35-50 (1937); J. Dawson & G. Palmer, Cases on Restitution 808-12 (1958).
in which restitution is sought by the true beneficiary. As we have seen, in the American decisions it makes no difference to the beneficiary’s action whether the fiduciary’s mistake was of fact or law. In truth it makes no difference whether there was mistake at all. If a fiduciary transfers funds to $D$ knowing that they are held for the benefit of $B$, the latter can obtain restitution on the strength of his equitable title which is not cut off unless $D$ is a bona fide purchaser. Such transfers usually occur because of mistake but mistake is not an essential element of $B$’s claim, hence the fact that the mistake was one of law is irrelevant.

When the fiduciary seeks restitution on behalf of the beneficiary, the rights between the beneficiary and the defendant are really in issue and the fact that the mistake, if there was one, was of law should not bar restitution. This was recognized by the Massachusetts court in Old Colony Trust Co. v. Wood, where a trustee turned the principal of a trust over to an adopted daughter of the life tenant in the belief that she was the person meant by the language of the trust under which principal was to go to the life tenant’s heirs. The court held that an adopted child was not an “heir” within the meaning of the trust instrument; conceded for purposes of decision that the trustee’s mistake might be analyzed as one of law; but held nonetheless that he could obtain restitution for the benefit of the true beneficiaries. The trust property was impressed with the trust in the hands of the defendant and the trustee “had standing to bring the petition in behalf of the interests of those entitled.”

This conclusion is taken for granted, I believe, in the administration of trusts. There are countless cases in which a trustee makes a mistake of law as to the relative rights of the income and principal beneficiaries, resulting in the distribution of trust receipts to the wrong beneficiary. Almost as a matter of course the beneficiary who received funds or property to which he was not entitled will be ordered to make restitution to the trust, for the benefit of the rightful beneficiary. The nature of the relief given tends to be concealed by the manner in which the issue is raised, typically in a proceeding

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63 A. Scott, Trusts § 254.2 (3d ed. 1967).

64 321 Mass. 519, 74 N.E.2d 141 (1947).

65 Id. at 527, 74 N.E.2d at 146.

66 An example is In re Stern’s Trust, 87 N.Y.S.2d 128, 131 (Sup. Ct. 1949), where the order read: “the trustee and life beneficiaries are directed to restore to principal the amount of accrued interest which was paid over as income . . . .”
to approve the trustee's accounts. When the order takes the form of disallowing the trustee's payment and ordering the beneficiary to restore the amount to which he is not entitled, this is in substance the same as a judgment in favor of the trustee in an action against a beneficiary to recover a payment made by mistake of law. When for some reason the issue arises in an independent action by the trustee against the beneficiary the result should be the same. Nor should it matter whether or not the trustee has made good to the beneficiary entitled to the distribution. If he has not, his suit is on behalf of that beneficiary, whereas if he has he is subrogated to the rights of the beneficiary. The basic policy decision is that as between the fiduciary and the recipient of the benefit the ultimate responsibility for making the true beneficiary whole is on the recipient. Subrogation goes by analogy to numerous other instances in which a person who discharges an obligation on which he is only secondarily liable is subrogated to the creditor's rights against the one primarily liable.

Nonetheless, there are decisions denying restitution to a fiduciary because his mistake was one of law, all of them involving mistaken

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67 In re Underhill, 117 N.Y. 471, 22 N.E. 1120 (1889), where the executor overpaid a legatee, it was held in his final accounting, first, that he was entitled to credit only for the amount due the legatee but, second, that he could not obtain an order for restitution in the accounting proceeding. The overpayment was a matter "between him and such legatee" and he could obtain restitution only in an independent action. In a trust accounting, where overpayment has been to an income beneficiary, the matter is commonly worked out by deducting the amount of the overpayment from future installments of income. In re Schell's Estate, 82 N.Y.S.2d 240 (Sur. Ct. 1943).

68 In re Lawyers Title & Guar. Co., 270 App. Div. 294, 58 N.Y.S.2d 857 (1945) (dictum); A. SCOTT, TRUSTS § 254 (3d ed. 1967). English cases are to the same effect. In re Ainsworth, [1915] 2 Ch. 96; In re Musgrave, [1916] 2 Ch. 417. In the Musgrave case the court considered the mistake of law argument and held it inapplicable; it was proper to "adjust the right between the cestui que trust and the trustee who has overpaid though an honest and, so to speak, permissible mistake of construction . . ." [1916] 2 Ch. at 425.

69 Subrogation was used as early as 1718 in allowing an executor to recover from a legatee where the remaining assets proved to be insufficient to pay debts. Davis v. Davis, 22 Eng. Rep. 466 (Ch. 1718), described in 8 C. Viner, supra note 15, at 423. In Old Colony Trust Co. v. Wood, 321 Mass. 519, 74 N.E.2d 141 (1947); where the mistake was one of law, the court was of the opinion that the mistaken trustee could recover either on his own behalf or on behalf of the beneficiaries.

In Hood v. Clapham, 19 Beav. 90, 94, 52 Eng. Rep. 282, 284 (Rolls Ct. 1854), a trustee overpaid one beneficiary at the expense of another and was held liable to the latter in the amount of the overpayment. But in the same proceeding it was decreed that the trustee recover the overpayment from the recipient. As counsel for the trustee said in argument, he "ought to be indemnified out of the estates of the tenants for life, who have received the benefit . . . ." Although the nature of the mistake was not discussed it may have been a mistake of law. The solution is just, but difficult to square with In re Diplock, [1948] Ch. 465 (C.A.), aff'd sub nom. Ministry of Health v. Simpson, [1951] A.C. 251 (H.L.).
distribution by the personal representative of a decedent's estate.\(^7\)
An executor or administrator who holds legal title to the decedent's property does so in order to perform different functions from those of a trustee, but he holds his title nonetheless for the benefit of the distributees or legatees and his right to recover a mistaken transfer on their behalf should be the same as the right of the trustee of an express trust. Similarly, if he has satisfied his liability to the distributees or legatees he is entitled to be subrogated to their rights against the recipient.\(^7\)
The denial of relief in these cases seems to result primarily from inadequate analysis, as in the one-sentence opinion of the New Hampshire court denying restitution to an administrator who overpaid next of kin in the mistaken belief that they took per stirpes instead of per capita. The law is well settled, the court said, "that money voluntarily paid under a mistake of law cannot be recovered."\(^7\)
The statement ignores the factors that set this mistaken payment apart from the generality of cases involving mistake of law.

Ordinarily the personal representative or other fiduciary who mistakenly overpays a beneficiary, or pays a person who has no right, will be personally liable to the true beneficiary. Where he is denied restitution because his mistake was one of law, this has the undesirable consequence of giving the true beneficiary the option of throwing the ultimate liability on either the fiduciary or the recipient of the mistaken payment. He can choose the recipient by proceeding directly against him, in which case mistake of law is no defense. Or he can choose the fiduciary by holding him accountable in the first instance, which leaves the fiduciary without recourse against the recipient. It is not wise to give the beneficiary this choice when ultimate liability should in all justice be borne by the person who received assets to which he had no claim.

The Question of Ultimate Liability

The assertion that ultimate liability will be placed on the recipient of the benefit where suit is by the true beneficiary is fully supported in American law, except for Pennsylvania. In England, on the other hand, there are cases holding that the true beneficiary must look in

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\(^7\) Cases are cited in note 48 supra.

\(^7\) Restitution for mistake of law was granted to an administrator in such a situation in Culbreath v. Culbreath, 7 Ga. 64 (1849), where an heir who was entitled to take by representation was omitted from the distribution. In most of the cases on the point, the facts do not disclose whether or not the personal representative had satisfied his liability to the estate.

\(^7\) Harding v. Hewes, 87 N.H. 488, 179 A. 343 (1935). The situation was similarly regarded as one calling for application of the general rule against restitution for mistake of law in Scott v. Ford, 45 Ore. 531, 78 P. 742 (1905), rehearing denied, 45 Ore. 550, 80 P. 899 (1905).
the first instance to the fiduciary—restitution from the one who received the benefit is allowed only if and to the extent that the plaintiff is unable to obtain satisfaction from the fiduciary. This is not an instance in which final liability may fall on the fiduciary because of piecemeal decision, as has occurred in this country with respect to mistake of law. If a court will grant restitution at suit of the true beneficiary, but deny it at suit of the fiduciary (and this apparently is what might happen if it followed the Restatement rules on mistake of law), the consequence may be to impose the ultimate burden on the fiduciary without having considered the justice of such a result. In the English decisions, however, the courts have sometimes purported to consider that question, and having done so have come to the extraordinary conclusion that ultimate liability should fall on the fiduciary.

In Hilliard v. Fulford, the executor, without court order, distributed the residuary estate to five legatees but in the present proceeding it was held that a sixth person was entitled to an equal share. The bequest was a class gift and evidently the executors were mistaken as to when the class closed, although this issue was not discussed in the reported decision. The executors had paid the share of the sixth legatee out of their own funds, and with respect to their right to refund from the overpaid legatees Jessel had this

73 The position of the Restatement is difficult to describe accurately. The general position taken in section 45 is that restitution will be denied where the mistake is solely one of law. Illustration No. 1 is as follows: "A is the administrator of B's estate. As such, erroneously interpreting the law of descent, he pays money to C as next of kin. C shares the mistake. A is not entitled to restitution from C." In comment c to section 45, however, it is pointed out that if a third person has legal or equitable ownership of the assets transferred he is entitled to restitution from the transferee even though the mistake is one of law. Finally it is observed that the fiduciary may be able to maintain the action on behalf of this third person. If this person has only equitable title as beneficiary of a trust, the Restatement of Trusts takes the position that the trustee may recover on his behalf. RESTATEMENT (SECOND) of TRUSTS § 294, comment c (1959).

To return to Illustration No. 1, supra: If the estate was personal property, the administrator received legal title in most states, but he holds this title for the benefit of the next of kin. If the next of kin were D he would have equitable title to the same extent as the beneficiary of an express trust. He would be able to obtain restitution under comment c even though the mistake was one of law (a topic elaborated in section 126 of the Restatement of Restitution), and the administrator likewise would be able to sue on his behalf. If the conclusion asserted in Illustration No. 1 is not in conflict with comment c it is to say the least misleading. Presumably the illustration would apply where the administrator had satisfied his liability to D and then sued C. This is not always the case however, which means that the position taken in the illustration is too broad. In addition, it is argued in the present text that restitution should be granted to the administrator in this case as well.

to say: "Of course you cannot make these other residuary legatees pay back anything... Therefore the difference... will in substance have to be made good by the executors who wrongly distributed the estate: they who have made the error will have to pay for it. Upon these grounds I think justice will [be] done."\textsuperscript{75}

The same curious sense of justice was expressed in \textit{In re Diplock},\textsuperscript{76} where executors and trustees, without prior adjudication of the validity of the trust, mistakenly paid out over £200,000 in estate funds to a number of charities under an attempted testamentary trust which was invalid because of indefiniteness of beneficiaries. In a suit by the next of kin to obtain restitution from the charities the court of appeal said: "Since the original wrong payment was attributable to the blunder of the personal representatives, the right of the unpaid beneficiary is in the first instance against the wrongdoer, executor or administrator: and the beneficiary's direct claim in equity against those overpaid or wrongly paid should be limited to the amount which he cannot recover from the party responsible."\textsuperscript{77} This is an indefensible position. The only "wrong" of which the executors were guilty was the distribution of estate funds in the mistaken belief that the trust was valid. The funds belonged in equity to the next of kin and they could hold the executors personally accountable. But there was no wrong to the charities; they merely benefited from the executor's mistake. It is a perversion of justice to conclude that as between the executors and the charities the former should bear the ultimate liability—imposition of full liability on the executors would burden them with a £200,000 loss, whereas it would merely take from the charities an unjustified gain.\textsuperscript{78} A personal representative or trustee can usually protect himself against personal liability by obtaining an appropriate court decree before distribution, but his failure to do so is not a valid reason for placing the ultimate liability on him.

Both of these English decisions apparently involved mistake of law, but in neither case did the court rest its opinion on that factor, nor is there anything in the reasoning to suggest that it is more "wrongful" to mistake the law than the facts. Although the scope of the doctrine remains uncertain,\textsuperscript{79} that is not cause for serious

\textsuperscript{75} L.R. 4 Ch. D. at 394.  
\textsuperscript{77} Id. at 503.  
\textsuperscript{78} Any equity in favor of the charities would depend upon change of position in reliance on the mistaken additions to their wealth. This aspect of the case is discussed in G.K. Scott, \textit{Restitution From an Innocent Transferee who is not a Purchaser for Value}, 62 Harv. L. Rev. 1002 (1949).  
\textsuperscript{79} It is difficult if not impossible to reconcile all of the English decisions.
concern as to American law since the doctrine is not likely to be followed here.³⁸ It is true that it has been repeated in some American writings,³⁹ but in the decisions as a whole it has been implicitly rejected. It is rejected in the cases granting restitution at suit of the true beneficiary without regard to the liability of the fiduciary.⁴⁰ Similarly, the cases granting restitution to the fiduciary without considering his personal liability, or after he has discharged his personal liability, must go on the premise that the ultimate burden should fall on the recipient of the mistaken distribution.

II.

Restitution from Actual or Supposed Creditors

If through mistake a personal representative pays a debt not owed, for example a debt that had actually been paid during the lifetime of the decedent, he will doubtless be awarded restitution.⁴³ A more troublesome case arises when the debt paid by the personal representative is valid but has not been properly filed in the decedent’s estate so as to entitle the creditor to payment. The issue is close and the few cases on the point are in disagreement. Normally, one who mistakenly pays a debt which is not enforceable, because barred by the statute of limitations or for some similar reason, will be denied restitution since it is not inequitable for the recipient to retain the payment.⁴⁴ This is an expression of the judicial attitude toward the statute of limitations and similar defenses, in a


The doctrine was never extended to distributions which were at the expense of creditors of an estate.³⁸ In Bomgardner v. Blatt, 35 Pa. Super. 361, 366 (1908), the executor was denied recovery of an overpayment made to a legatee through mistake of fact. The court assumed that the executor was personally accountable to the estate and observed that he “must bear the loss occasioned by his own mistake.” The decision reflects the unusual development of Pennsylvania law. See text accompanying notes 41-44 supra.

³⁸ In Bomgardner v. Blatt, 35 Pa. Super. 361, 366 (1908), the executor was denied recovery of an overpayment made to a legatee through mistake of fact. The court assumed that the executor was personally accountable to the estate and observed that he “must bear the loss occasioned by his own mistake.” The decision reflects the unusual development of Pennsylvania law. See text accompanying notes 41-44 supra.

³⁹ An example is Joseph Warren’s inelegant statement that the “beneficiary must first exhaust the personal representative.” Warren, Problems in Probate and Administration, 32 HARV. L. REV. 315, 337 (1919).


⁴¹ Restitution was granted in such circumstances in Pooley v. Ray, 1 P. Wms. 354, 24 Eng. Rep. 423 (Ch. 1717), at suit, however, of the heirs instead of the personal representative. The case would be too clear for argument if the creditor knew he was being paid a second time, but even though he did not there is little doubt that a refund will be ordered. In the Pooley case the creditor was dead and his executor received payment in the honest belief that the debt was outstanding.

⁴² RESTATEMENT OF RESTITUTION § 61 (1937); note 60 supra.
case that merely involves weighing the equities between the debtor and creditor. In the present instance however, the personal representative will probably have to bear the loss unless he is able to obtain restitution, which makes the equities more nearly equal. Nonetheless, he must establish that the creditor's retention of the payment is unjust and it seems that this is not the case.85

Most actions by a personal representative against a creditor of a decedent's estate occur because the representative paid a debt in the belief that the estate was solvent when in fact it was not. Nearly all authority in this country awards restitution to the executor or administrator to the extent of the overpayment.86 It has been suggested that relief should be denied if the mistake was one of law,87 but this was rejected by the Connecticut court in Mansfield v. Lynch88 in granting restitution where the mistake was clearly one of law. Relief is available both where the personal representative has satisfied his liability to the other creditors89 and where he has not.90

85 Restitution was denied in Graham McNeil Co. v. Scarborough, 135 Miss. 59, 99 So. 502 (1924); Adams v. Smith, 19 Nev. 259, 9 P. 337, rehearing denied, 19 Nev. 278, 10 P. 353 (1889). In the Mississippi case the administrator's credit for the payment was disallowed on final accounting, which meant that the loss fell on him personally. In each case the administrator's mistake was one of law and the courts gave this as a reason for refusing relief. In addition, however, the Nevada court thought that the payment was not recoverable because the debt was "legally exigible." In Miner v. Raymond, 113 Mich. 28, 71 N.W. 501 (1897), restitution was granted without suggesting mistake or any other ground.


English decisions on the point are not useful because of differences in the practices with respect to payment of claims against an insolvent estate. See Walker v. Hill, 17 Mass. at 383-85. Nonetheless, the early case of Pooley v. Ray, 1 P. Wms. 358, 24 Eng. Rep. 423 (Ch. 1717), supports restitution to the personal representative when the facts are analogous to those occurring in the American cases.

88 59 Conn. 320, 22 A. 313 (1890).
90 Mansfield v. Lynch, 59 Conn. 320, 22 A. 313 (1890); Morris v. Porter, 87 Me. 510, 33 A. 15 (1895); Chestertown Bank v. Perkins, 154 Md. 456, 140 A. 834 (1927). In some of the cases decreeing restitution in favor of the executor or administrator the report does not disclose whether or not he had discharged his liability to the creditors—the fact was evidently considered irrelevant. E.g., Woodruff v. H.B. Claffin Co., 198 N.Y. 470, 91 N.E. 1103 (1910). Joseph Warren's statement that the personal representative's "right should exist only when he has been obliged to make the creditor whole" (a statement made in discussing suits against legatees or distributees) is unsupported in the cases and lacking in merit. Warren, Problems in Probate and Administration, 32 Harv. L. Rev. 315, 335 (1919).
Restitution to the personal representative was denied in early cases from Kentucky, Pennsylvania and Virginia, for reasons that are not persuasive. The principal reason given was that the defendant had an "honest debt" and was entitled to retain money paid in discharge of that debt. Although there has been an attempt in recent times to support this reasoning, surely the court in *Mansfield v. Lynch* provided a sufficient answer in concluding that the defendant's only right was "to receive her pro rata share," so that the excess constituted an unjust enrichment. The Kentucky court emphasized the negligence of the administrator in paying the debt without sufficient examination of the assets and liabilities. But there are numerous cases in which a mistaken payment of money not due has been held recoverable despite the negligence of the payor, and there is no reason for different treatment of a payor who is an executor or administrator. The rule in Kentucky has been changed by a statute authorizing restitution of an overpayment made to a creditor "under a mistake as to the solvency of the estate."

The solution of these problems may be affected today by statutes dealing with the payment of a decedent's debts. This is true, for example, in Massachusetts, where restitution was granted in *Walker v. Hill*, in an action by a personal representative against an overpaid creditor, in perhaps the earliest decision of the issue in this country. By Massachusetts statute a personal representative may pay debts of the estate after 6 months from the approval of his bond, without incurring any liability to creditors of whose claims he has no notice, provided that at the time of payment the representative had no notice "of demands against the estate of the deceased sufficient to warrant him to represent such estate to be insolvent." If this leaves assets of the estate insufficient to pay claims thereafter demanded, the latter creditors are entitled only to share in the remaining estate, and "the creditors of the deceased who have been previously paid shall not be liable to repay any part of the amount received by

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91 Lawson's Adm'rs v. Hansborough, 49 Ky. 147 (1849).
93 Findlay v. Trigg's Adm'r, 83 Va. 539, 3 S.E. 142 (1887).
94 This reason was used in the Pennsylvania case (note 92 supra) and accepted in the Virginia case (note 93 supra).
95 Farage, 12 Pa. B. Ass'n Q. 30, 32 (1940).
96 59 Conn. 320, 22 A. 313 (1890).
98 Ky. Rev. Stat., § 396.140 (1962). The statute also provides for recovery of mistaken distributions to a legatee or distributee.
99 17 Mass. 380 (1821).
This means that if the statutory procedure is followed the "overpaid" creditor is entitled to retain the payment and the personal representative is protected against personal liability. The limited application of the statute, however, is illustrated by the fact that it would not cover the situation presented in Walker v. Hill, where the mistake as to the solvency of the estate occurred, not because there were unknown claims but because of an excessive valuation of some of the assets in the estate.

III.

Conclusion

When distribution of a decedent's estate to heirs or legatees leaves insufficient funds to pay creditors of the decedent, it is reasonably clear that the unpaid creditors will be granted restitution from the recipient of the payment. English authority was to this effect from an early time and it is to be expected that courts in this country will follow the same course. If relief is sought in the first instance by the personal representative, restitution by the heir or legatee is nearly always ordered in this country if the payment was induced by mistake of fact. Where the mistake was one of law there is apt to be a difference of opinion, but it seems highly preferable to grant relief in this situation as well. In truth, restitution should not necessarily turn on the presence of mistake, whether of fact or law. No doubt a personal representative would be refused relief if he distributed estate funds to an heir or legatee knowing that they had no right to the funds, but if the distribution seemed proper at the time, in view of the facts as they then were or appeared to be, the personal representative should be entitled to restitution.

When a distribution to actual or supposed heirs, legatees or beneficiaries of a trust is at the expense of other heirs, legatees or beneficiaries, the claim to restitution is generally recognized in the American cases when sought by those entitled to the assets. This is true where the recipient was overpaid because of mistake or a deficiency of assets. It is true also where the recipient was entitled to no share, not being an heir, legatee or beneficiary, as was supposed at the time of distribution. There is enough American authority granting restitution where the mistake was one of law to justify the conclusion that this is not a serious obstacle to recovery by the true beneficiary. If the action is by the personal representative, restitution will be awarded under most of our decisions if the mistake was one of fact, but if it was a mistake of law there is a sharp division of opinion. Even though the mistake of law doctrine is accepted generally so as

to deny restitution of money paid which was not owed, it should not
be applied to the action by the fiduciary. Nonetheless, account must
be taken of the fact that the doctrine has been applied in a significant
number of cases.

When a decedent's estate is insolvent and the personal representa-
tive mistakenly overpays a creditor, he is entitled to restitution of
the overpayment by nearly all American authority if the mistake was
one of fact, but with some uncertainty where the mistake was one of
law. There seems, however, to be less inclination to draw the law-fact
distinction in this situation than there is when restitution is sought
from an overpaid heir or legatee. If the fiduciary has not compensated
the underpaid creditors, they should be able to obtain restitution on
their own behalf.

In all of the situations in which restitution is generally awarded
to a fiduciary, this should be done without regard to whether the
fiduciary has or has not compensated the creditors or beneficiaries
who were entitled to the funds, and the cases as a whole support
this conclusion.

In this paper no attempt has been made to discuss one important
issue, that is, res judicata. It is a troublesome problem in connection
with distribution of a decedent's estate pursuant to order of the pro-
bate court. If such an order was entered after notices given as re-
quired by statute, it is clear that the personal representative is
protected in making distribution pursuant to the order, but the
effect of the order as a final adjudication of beneficial interests is a
separate question. Local statutes must be consulted, but under con-
ventional analysis one would expect a final decree of distribution to be
regarded as a final adjudication which will bar restitution from one
beneficiary in favor of another, unless the order is either modified or
subject to collateral attack. There are decisions to this effect.

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102 The effect of a final decree of distribution is discussed in Simes, *The Administration of a Decedent's Estate as a Proceeding in Rem*, in *Model Probate Code* 489, 498 (1946). One of the troublesome problems that may arise is whether a probate court has jurisdiction to construe a will, as may be necessary in order to decree final distribution.

103 In *Aull v. St. Louis Trust Co.*, 149 Mo. 1, 50 S.W. 289 (1899), distribution was made pursuant to a court order which was later determined to be erroneous and modified at the same term of court. In a separate action, a group of heirs who had been overpaid was ordered to make restitution to the heirs who had been underpaid.

104 *Dow v. Scully*, 376 Mich. 84, 135 N.W.2d 360 (1965); *Michie v. Grainger*, 149 Mo. App. 301, 129 S.W. 983 (1910). In another Michigan case it was held that judicial approval of a testamentary trustee's annual account showing distribution of assets to certain persons was no bar to the claim of the decedent's widow to a share in the assets under the terms of the will. The question of will construction was not involved in the approval of the account and "has never been adjudicated." *In re Wagar's Estate*, 295 Mich. 463, 295 N.W. 227 (1940).
but there are also decisions that grant restitution of a distribution made pursuant to court order without discussing the effect of the order,\footnote{Gray v. Goddard, 90 Conn. 561, 98 A. 126 (1916) (dictum); Roach v. Underwood, 192 Tenn. 378, 241 S.W. 498 (1950). In Moritz v. Wayne Circuit Judge, 291 Mich. 190, 289 N.W. 126 (1943), the estate of an intestate had been distributed, pursuant to order of the probate court, to the supposed heirs, including three daughters and an adopted son of a deceased brother. The adopted son was not in fact an heir under the Michigan law then in force. Nearly a year later one of the daughters sought mandamus to compel the lower court to grant leave to take an appeal, but the supreme court refused to issue the mandate, partly on the ground that to readjust "the final distribution of the residue would entail ... great hardship on the administrator and the surety on his bond who have long been discharged." But the court explicitly stated that its decision was "without prejudice to any rights petitioner may have to bring an action at law or in equity ... to recover moneys paid through mistake of law" to the adopted son. In a subsequent action restitution was granted. Moritz v. Horsman, 305 Mich. 627, 9 N.W.2d 868 (1943).} as well as decisions ordering restitution without disclosing whether or not the distribution was pursuant to court order.\footnote{Culbreath v. Culbreath, 7 Ga. 64 (1849).}