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## RESTITUTION FOR MONEY PAID UNDER MISTAKE OF LAW

Restitution<sup>1</sup> has been defined as the grouping together of the common law quasi-contract and the corresponding right to equitable relief to prevent unjust enrichment.<sup>2</sup> This concept is embodied in the *Restatement of Restitution* section 1: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." As a general rule, in order to establish the right to restitution, the plaintiff must show that the defendant has received a benefit from the plaintiff, and that the retention of the benefit by the defendant is unjust.<sup>3</sup>

If A has made a payment by mistake to B, one of the factors involved in determining if A may recover the payment is whether the mistake was one of fact or of law. If the mistake was one of fact, as a general rule the payment may be recovered.<sup>4</sup> If the mistake was one of law, as a general rule the payment may not be recovered.<sup>5</sup> The purpose of this paper is to examine this distinction as it has been applied in California; to determine if it is valid in light of underlying policy factors; and, if the distinction proves unsound, to suggest remedial legislation. At the outset it is necessary to be aware of the following:

It must always be borne in mind, in cases denying restitution of money paid on the stated ground that it was paid by mistake of law and not of fact, that the circumstances may have been such that restitution would have been denied even though the money had been paid by mistake of fact instead of mistake of law. When a court is convinced that restitution should not be decreed, in the pressure of work it is likely to seize on the first plausible rule that comes handy; and the reader surely well knows how handy the "mistake of law" rule has become.<sup>6</sup>

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<sup>1</sup> Background material is available in the following sources: *RESTATEMENT OF RESTITUTION* §§ 1-2, 6-55 (1937) [hereinafter cited as *RESTATEMENT*]; *AMERICAN LAW INSTITUTE, CALIFORNIA ANNOTATIONS TO THE RESTATEMENT OF RESTITUTION* (1940); 3 A. CORBIN, *CONTRACTS* § 617 (rev. ed. 1960); R. GOFF & G. JONES, *THE LAW OF RESTITUTION* 61-139 (1966); W. KEENER, *QUASI-CONTRACT*, 26-158 (1893); 5 S. WILLISTON, *CONTRACTS* §§ 1580-93 (rev. ed. 1937); F. WOODWARD, *QUASI-CONTRACT* §§ 10-44 (1913) [hereinafter cited as *WOODWARD*]; 70 C.J.S. *Payment* §§ 156-57 (1951); 38 CAL. JUR. 2d *Payment* §§ 59-69 (1957); Annot., 53 A.L.R. 949 (1928) (right to recover money voluntarily paid with full knowledge of facts but under a misapprehension as to legal rights and obligations); Annot., 63 A.L.R. 1346 (1929) (recovery back of public money paid by mistake); Annot., 87 A.L.R. 649 (1933) (good faith in receiving payment under mistake of fact as affecting its recovery); 40 A.L.R.2d 997 (1955) (what constitutes change of position by payee so as to preclude recovery of payment made under mistake).

<sup>2</sup> Thurston, *Recent Developments in Restitution: 1940-1947*, 45 MICH. L. REV. 935 (1947).

<sup>3</sup> WOODWARD § 7.

<sup>4</sup> E.g., 70 C.J.S. *Payment* § 157, at 367 (1951).

<sup>5</sup> E.g., *id.* § 156, at 362-63.

<sup>6</sup> 3 A. CORBIN, *CONTRACTS* § 617 at 756 (rev. ed. 1960).

## Origin of the Rule

The origin of the distinction between mistakes of fact and law as applied to money payments is found in the 1802 English case of *Bilbie v. Lumley*.<sup>7</sup> Lord Ellenborough stated that "every man must be taken to be cognizant of the law."<sup>8</sup> Woodward saw this as a misapplication of the criminal law principle *ignorantia juris non excusat*,<sup>9</sup> and concluded that the distinction was unsound:

The maxim has no proper application . . . to the case of one who has done no wrong and who seeks not to inflict a loss upon another . . . .

. . . .  
 . . . But the courts in England and America have long conceded that money paid under mistake of fact, in circumstances which make its retention inequitable, may be recovered; and there appears to be no reason to fear that the excuse of ignorance of the law would prove a greater temptation to the unscrupulous or a more effective weapon of injustice.<sup>10</sup>

The *Restatement of Restitution* states the general rule: "Except as otherwise stated in §§ 46-55, a person who, induced thereto solely by mistake of law, has conferred a benefit upon another to satisfy in whole or in part an honest claim of another to the performance given, is not entitled to restitution."<sup>11</sup>

## Applicable California Cases and Statutes

The operation of the rule in California will be examined first by reference to the mistake of fact statute and cases, second by examination of the modification worked by the mistake of law statute, and finally by reference to the mistake of law cases. It is necessary to deal with the statutes and cases in this manner as the mistake of fact cases state most clearly the mistake of law rule.<sup>12</sup>

## Effect of Civil Code Section 1577

California Civil Code section 1577 provides:

Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in:

1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or,
2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.

<sup>7</sup> 102 Eng. Rep. 448 (K.B.).

<sup>8</sup> *Id.* at 449.

<sup>9</sup> Ignorance of the law is no excuse.

<sup>10</sup> WOODWARD § 36, at 57-58.

<sup>11</sup> RESTATEMENT § 45. The sections cited as exceptions indicate the extent to which the rule has been judicially modified: § 46, satisfaction of non-existent obligation, when restitution granted; § 47, payment upon a void agreement; § 48, failure of purpose; § 49, gratuitous transactions; § 50, mistake as to size of grantor's interest; § 51, mistake as to the legal effect of grant; § 52, purchase of nonexistent interest; § 53, services and improvements; § 54, performance of another's duty or discharge of lien against his property; § 55, benefit obtained by fraud or mistake.

<sup>12</sup> See, e.g., *Aebli v. Board of Education*, 62 Cal. App. 2d 706, 145 P.2d 601 (1944).

The effect of this section is to render an underlying contract voidable and subject to rescission under section 1689 of the Civil Code. Adjudication of rescission includes the possibility of restitution: "The aggrieved party shall be awarded complete relief, including restitution of benefits, if any, conferred by him as a result of the transaction . . . ."<sup>13</sup>

*Aebli v. Board of Education*<sup>14</sup> involved overpayments made to school teachers. The city of San Francisco had adopted a salary schedule, the amount of the salary being determined by the number of years of service. The mistaken overpayments were discovered after an audit, and the board of education began to deduct from the salaries of the teachers the overpayments which were not barred by the statute of limitations. The teachers then brought this action to challenge the reductions and to recover those deductions that had already been made.

The court affirmed the right of the board of education to recover the overpayments: "The legal doctrine upon which the board based its action in charging back the overpayments, and now justifies that action is that of mistake. The law recognizes and deals with two kinds of mistake, —that of law and that of fact. As a general rule mistake of law is of no legal consequence, just as ignorance of the law is no excuse."<sup>15</sup> California has thus perpetuated the error of *Bilbie v. Lumley*. The court went on to discuss mistake of fact: "Mistake of fact, however, as a general rule furnishes a good ground for relief. Moreover, the mistake need not be mutual, or known to or shared by the party receiving the money. Money paid under mistake of fact may be recovered back however negligent the person making the payment may have been unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund."<sup>16</sup>

The court declined to state whether the mistake was one of law or of fact, rather it was said to be a close question.<sup>17</sup> The court placed its decision on a qualification of the mistake of law rule, namely that money paid out by mistake of the government or any agency of the government, whether the mistake be one of law or fact, may be recovered. The justification given for the exception was that the money paid was public money, it was held in trust, and the payor was unauthorized to make overpayments. While the case reaches the correct result, it does so without an express statement of the underlying basis for the decision, namely unjust enrichment. That this is the basis is partially seen in the statement that the payment may be recovered however negligent the person making the payment may have been.<sup>18</sup>

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<sup>13</sup> CAL. CIV. CODE § 1692.

<sup>14</sup> 62 Cal. App. 2d 706, 145 P.2d 601 (1944).

<sup>15</sup> *Id.* at 724, 145 P.2d at 610.

<sup>16</sup> *Id.* at 724-25, 145 P.2d at 610.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 725, 145 P.2d at 610; RESTATEMENT § 1; WOODWARD § 7; *see, e.g.,* Fox v. Monahan, 8 Cal. App. 707, 709, 97 P. 765 (1908): "The action for money had and received will lie wherever it appears that the defendant has received money which in equity and good conscience he should pay to the plaintiff."

*American Oil Service, Inc. v. Hope Oil Co.*<sup>19</sup> was an action in which a buyer and seller sought declaratory relief to determine their rights. Involved were overpayments made on the part of the buyer resulting from oversights of the buyer's bookkeeper. The defendant maintained that there could be no recovery as this was a mistake of law, and not of fact, but that if it was a mistake of fact, he had changed his position so that it would be inequitable for a recovery to be allowed. The court defined mistake of law in the following manner: "A mistake of law occurs where a person is truly acquainted with the existence or nonexistence of facts, but is ignorant of, or comes to an erroneous conclusion as to their legal effect . . . . A payment made by reason of a wrong construction of the terms of a contract is made under a mistake of law."<sup>20</sup>

The court allowed recovery, holding that the mistake was one of fact, the error being an oversight, and that there was no change of position sufficient to make the recovery inequitable.<sup>21</sup>

### *Effect of Civil Code Section 1578*

Before considering the mistake of law cases it is necessary to consider the effect of section 1578 of the Civil Code, and to consider the role that the volunteer policy plays in the right to restitution.

California Civil Code section 1578 provides:

Mistake of law constitutes a mistake, within the meaning of this article, only when it arises from:

1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or,
2. A misapprehension of the law by one party, of which the others are aware at the time of the contracting, but which they do not rectify.

The mistake found in subsection 2 contains an element of fraud which affords an obvious ground of relief.<sup>22</sup> The mistake discussed in the first clause is the type with which this note is concerned. The effect of this section is similar to that of section 1577.<sup>23</sup> The underlying contract is made voidable and subject to rescission.<sup>24</sup> Adjudication of rescission includes the possibility of restitution.<sup>25</sup> The modification which the statute makes is that it allows rescission and restitution where the mistake of law was *mutual*; its weakness is that it confines relief to such a case.

*Gregory v. Clabrough's Executor*<sup>26</sup> is cited by Professor Corbin as a case which applies section 1578.<sup>27</sup> The proceeds of a crop grown on mortgaged land were mistakenly paid by the mortgagor to the mortgagee on the advice of the mortgagor's attorney. The mistake was made in the interpretation of the mortgage which purported to cover

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<sup>19</sup> 233 Cal. App. 2d 822, 44 Cal. Rptr. 60 (1965).

<sup>20</sup> *Id.* at 830, 44 Cal. Rptr. at 65.

<sup>21</sup> *Id.* at 831, 44 Cal. Rptr. at 66.

<sup>22</sup> WOODWARD § 39, at 62.

<sup>23</sup> See text accompanying note 13 *supra*.

<sup>24</sup> CAL. CIV. CODE § 1689.

<sup>25</sup> CAL. CIV. CODE § 1692.

<sup>26</sup> 129 Cal. 475, 62 P. 72 (1900).

<sup>27</sup> See, e.g., 3 A. CORBIN, CONTRACTS § 617, at 755 n.52 (rev. ed. 1960).

all rents, issues and profits. The court found that the mistake arose from a mutual misapprehension of the law, and stated that in such a case it would imply a promise to repay the money.<sup>28</sup> It should be noted that this case did not involve a unilateral mistake of law. In other words, where the mistake is mutual, and therefore within the scope of section 1578, the right to restitution is present, just as it would have been had the mistake been one of fact.<sup>29</sup>

It is clear that in both cases, where the mistake was one of fact, or where the mistake of law was mutual, the basis for recovery is unjust enrichment:<sup>30</sup> "[I]t is just for one who has benefited by the mistake of another to return what he has received, except where he is entitled to the benefit of his bargain or where there are other circumstances which would make restitution inequitable . . ."<sup>31</sup> Nevertheless, the effect of section 1578 is that it confines relief to those cases where there was a mutual mistake of law.

### *Mistake of Law*

In the mistake of law cases it is often difficult to determine the exact basis on which the court rests its decision. This is due in part to the volunteer policy which is embodied in the *Restatement of Restitution* section 2: "A person who officiously confers a benefit upon another is not entitled to restitution therefor." This section amounts to a qualification of section 1: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." When read together the two sections indicate that the enrichment principle provides for restitution only when the enrichment is unjust, and that the volunteer policy is a factor of consequence in determining if the enrichment is unjust.<sup>32</sup> It is submitted that one of the factors used to determine if the payment was voluntary, and hence not recoverable, is whether the mistake was one of law or of fact.<sup>33</sup>

The joint operation of the volunteer policy and the mistake of law policy is illustrated in the case of *Myers v. City of Calipatria*.<sup>34</sup> Myers had been serving the city as its elected clerk. He was later appointed city attorney; the same instrument which appointed him provided that the city should be at no expense for any deputy clerks so long as Myers was city attorney. Nevertheless he paid out of his own money the salaries of certain deputies. In this action the plaintiff alleged that he had paid the money for the use and benefit of the city.

The court denied recovery, finding that the payments were voluntary; and that even if the order, which stated that the city was to

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<sup>28</sup> 129 Cal. at 478, 62 P. at 73.

<sup>29</sup> See CAL. CIV. CODE § 1577, and text accompanying note 13 *supra*.

<sup>30</sup> Note 18 *supra*.

<sup>31</sup> RESTATEMENT, at 179.

<sup>32</sup> See Wade, *Restitution for Benefits Conferred without Request*, 19 VAND. L. REV. 1183, 1183-84 (1966).

<sup>33</sup> See *Bucknall v. Story*, 46 Cal. 589 (1873); *Draper v. Grant*, 91 Cal. App. 2d 566, 205 P.2d 399 (1949); *Myers v. City of Calipatria*, 140 Cal. App. 295, 35 P.2d 377 (1934); *Thresher v. Lopez*, 52 Cal. App. 219, 198 P. 419 (1921).

<sup>34</sup> 140 Cal. App. 295, 35 P.2d 377 (1934).

be at no expense for clerks, were void, that of itself would not constitute a ground of relief. The court quoted<sup>35</sup> at length from an earlier California case, *Brumagim v. Tillinghast*:<sup>36</sup> "It is the compulsion or coercion under which the party is supposed to act which gives him the right to relief. If he voluntarily pay an illegal demand, knowing it to be illegal, he is of course entitled to no consideration; and if he voluntarily pay such demand in ignorance or misapprehension of the law respecting its validity, he is in no better position, for it is against the highest policy to permit transactions to be opened upon grounds of this character."<sup>37</sup>

A second example of the interrelation of the two policies is found in the case of *Bucknall v. Story*.<sup>38</sup> It was an action to recover a sum of money paid under protest for an assessment made on the plaintiff's property. The assessment was void in that it was made to a person who had no interest in the land. In order to prevent the threatened judicial sale of his land, the plaintiff paid the assessment. The court held that where one makes a payment under a misapprehension of the law the payment is deemed voluntary, and cannot be recovered back. The plaintiff was held to the knowledge that the assessment was void, and that any threatened sale would have been ineffective to give a purchaser even a color of title.<sup>39</sup> This was the misapprehension of law which rendered the plaintiff's payment voluntary and not recoverable.

The net effect of the volunteer policy and the mistake of law policy operating in conjunction is the denial of restitution. It is not readily apparent if *Myers* or *Bucknall* could have been decided on the basis of the volunteer policy alone. It is submitted that in this area the two policies coalesce, with the result that if a person has made a unilateral mistake of law, it is easy to characterize him as a volunteer, and thus have an additional reason to deny recovery.<sup>40</sup>

There is but one California case which rests squarely on the rule of money paid under mistake of law. *Christy v. Sullivan*<sup>41</sup> was decided after the enactment of Civil Code section 1578, but does not refer to the statute. While the report of the case is very brief, it appears that the plaintiff had purchased county warrants which did not constitute a valid charge on the county treasury. The authority of the treasurer to issue notes was limited to a certain dollar amount which had been exceeded. The court disposed of the case with a brief statement that the maxim *ignorantia legis non excusat* applied.<sup>42</sup>

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<sup>35</sup> *Id.* at 299, 35 P.2d at 379.

<sup>36</sup> 18 Cal. 265 (1861).

<sup>37</sup> *Id.* at 271.

<sup>38</sup> 46 Cal. 589 (1873).

<sup>39</sup> *Id.* at 599.

<sup>40</sup> "[W]here money is paid with full knowledge of the facts and circumstances on which it is demanded, or with the means of such knowledge, it cannot be recovered back on the ground that the party supposed he was not bound in law to pay it, when in truth he was not. 'He shall not be permitted' said the court, 'to allege his ignorance of the law, and it shall be considered a voluntary payment.'" *Brumagim v. Tillinghast*, 18 Cal. 265, 271 (1861); see, e.g., cases cited note 33 *supra*.

<sup>41</sup> 50 Cal. 337 (1875).

<sup>42</sup> *Id.* at 339.

### Critique of the State of the Law

The impression that one is left with as to restitution for money paid under mistake of law is that California, while paying lip service to the rule in cases which allow recovery either on the ground that the mistake was one of fact,<sup>43</sup> or that the mistake was made by a government agency,<sup>44</sup> in reality has the rule in form and not in substance. *Christy v. Sullivan*<sup>45</sup> alone can be said to rest on mistake of law, but it is a weak case for supporting the rule in that it makes no mention of Civil Code section 1578, and in that its brevity makes analysis difficult. *Myers v. City of Calipatria*<sup>46</sup> and *Bucknall v. Story*<sup>47</sup> most likely could have been justified on the basis of the volunteer policy alone.

The underlying basis for restitution in the mistake of fact cases is unjust enrichment.<sup>48</sup> It is submitted that the enrichment is no less unjust when the mistake is one of law. The cases which follow illustrate two positions concerning relief for a payment made under mistake of law.

*Payne v. Witherbee Sherman & Co.*,<sup>49</sup> a New York case, was an action to recover the balance due for electrical power furnished by the plaintiff power company to the defendant. The defendant, having discovered that overpayments had been made for a 3-year period, counterclaimed for the excess paid. The trial court dismissed the plaintiff's action, and awarded judgment on the counterclaim, finding that the money had been paid under mistake. The New York Court of Appeals reversed, stating that the trial court's finding that the overpayment was made by mistake was insufficient to allow a recovery as payment made under mistake of law could not be recovered.<sup>50</sup>

In contrast to *Payne*, Connecticut has, by judicial decision, allowed recovery for payments made under mistake of law. The rationale for allowing such recovery is expressed in the recent case of *Ficken v. Edward's, Inc.*<sup>51</sup> The defendant, a subcontractor, was unable to obtain payment from an insolvent contractor, and sought payment from the owner of the building. The owner made the payments in the mistaken belief that the subcontractor had the right to a mechanic's lien, when in fact no such right attached as the owner had paid the contractor in full. The court allowed the owner to recover the payments, and found its reason in the language of an earlier Connecticut case, *Northrop's Executor v. Graves*:<sup>52</sup> "When money is paid by one, under mistake of his rights and his duty, and which he was under no

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<sup>43</sup> See, e.g., *American Oil Serv., Inc. v. Hope Oil Co.*, 233 Cal. App. 2d 822, 44 Cal. Rptr. 60 (1965), discussed in text accompanying notes 19-21 *supra*.

<sup>44</sup> See, e.g., *Aebli v. Board of Education*, 62 Cal. App. 2d 706, 145 P.2d 601 (1944), discussed in text accompanying notes 14-18 *supra*.

<sup>45</sup> 50 Cal. 337 (1875).

<sup>46</sup> 140 Cal. App. 295, 35 P.2d 377 (1934).

<sup>47</sup> 46 Cal. 589 (1873).

<sup>48</sup> Note 18 *supra*.

<sup>49</sup> 200 N.Y. 572, 93 N.E. 954 (1911).

<sup>50</sup> *Id.* at 576, 93 N.E. at 956.

<sup>51</sup> 23 Conn. Supp. 378, 183 A.2d 924 (1962).

<sup>52</sup> 19 Conn. 548 (1848).

legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back in an action of *indebitatus assumpsit*, whether such mistake be one of law or fact. . . . The mind no more assents to the payment made under a mistake of law, than if made under a mistake of the facts; in both alike the mind is influenced by false motives."<sup>53</sup>

### Statutory Relief

The present rule in California would not allow a recovery to be had in a case similar to *Ficken* unless the court were to find that the mistake was mutual. It is submitted that the result should not turn on whether the mistake was mutual or unilateral, rather that the true basis for a recovery lies in the principle of unjust enrichment, and the enrichment is no less unjust where the mistake is one of law.

It is therefore recommended that the California statute which deals with mistake of law be changed so as to allow recovery for mistake of law. The experience of New York should prove helpful in this regard, as New York has enacted a statute dealing with relief against mistake of law on the recommendation of the New York Law Revision Commission.<sup>54</sup> In essence, their recommendation was that the arbitrary rule which distinguished between mistake of fact and law be abrogated since it was found to be without sound basis. This would allow the courts the freedom to develop a general rule as to mistake, and would avoid the unjust enrichment which is so apparent in the *Payne v. Witherbee Sherman & Co.*<sup>55</sup> case. The statute which they recommended was enacted in 1942,<sup>56</sup> and now reads:

When relief against a mistake is sought in an action or by way of counterclaim, relief shall not be denied because the mistake was one of law rather than one of fact.<sup>57</sup>

It is respectfully recommended that a statute similar to the above be enacted in California. Given that the underlying basis for restitution is unjust enrichment, the only manner in which relief for mistake can be consistently applied lies in such a statute.

*Browning E. Marean\**

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<sup>53</sup> *Id.* at 554.

<sup>54</sup> 1942 N.Y. LAW REVISION COMM'N, REPORTS 27-67.

<sup>55</sup> 200 N.Y. 572, 93 N.E. 954 (1911).

<sup>56</sup> Ch. 558, § 112-f [1942] N.Y. Laws 1369.

<sup>57</sup> N.Y. CIV. PRAC. LAW § 3005 (McKinney 1963).

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