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ALTON *v.* FIRST NATIONAL BANK.[1] SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER 22, 1892.

Plaintiff endorsed certain papers supposing them negotiable notes, afterwards the principal fled and the plaintiff was called upon for payment. After paying a portion of the notes plaintiff was advised that they were not negotiable and refused further payment. A suit by the bank to recover the remaining amount was decided in his favor. He then brought this action to recover the amouut paid to the bank. Held, the mistake under which the payment was made would not warrant a recovery, it being a matter equally open to the inquiry of both parties.

[1] Reported in 32 N. E. Rep. 228; 157 Mass. 341.

MONEY PAID BY MISTAKE OF LAW.

The subject of mistake of law is involved in confusion and the decisions of the courts give little hope of the speedy adoption of a general rule or a decisive victory for either of the views that have moulded the decisions of judges and chancellors. The question is one that lies so close to the border-land of morals that it is more than difficult to decide whether the victim of circumstances shall be assisted and relieved or allowed to suffer for his stupidity. It was argued before Lord Mansfield that all the laws of the country are presumed clear, evident and certain. But the Chief Justice replied, "as to the certainty of the law it would be very hard upon the profession if the law was so certain that everybody knew it. The misfortune is that it is so uncertain that it costs much money to know what it is even to the last resort:" Jones *v.* Randall, Cowp. 37. Whatever may have been the

view formerly there can be no doubt that at present the granting of relief in cases of mistake of law rests in the discretion of the court, a discretion that must be exercised with the greatest care, but the existence of which it is now too late to deny: Griswold *v.* Hazard, 141 U. S. 260.

While this may be true in equity, it is, nevertheless, almost unanimously laid down by text-writers that money paid by mistake of law cannot be recovered back, and the statement is made without qualification. Indeed, the payment of money by mistake of law is usually regarded as the last, impregnable stronghold of the maxim, *ignorantia juris non excusat.*

The subject was complicated at an early date through the conflicting propositions of the Roman law. In the Code it is stated that where a person ignorant of the law pays money which is not due, the right to repetition ceases, for repetition is only allowed in those cases where what is not due is paid in consequence of an error of fact: Dig. xx, tit. 29; Code Lib. 1, tit. 18, l. 10; Inst. Lib. III, tit. XXVII, §§ 6 and 7. Upon the texts a hotly contested battle has been fought by the commentators; Cujas, Donnellus, Voet, Heinneicus, Pothier and Savigny contend that no action lies, while the contrary is maintained by Vinnius, Huber, Ulric and D'Aguesseau. Voet Lib. 12, tit. 6; Savigny System, 8, 3; Evans' Pothier on Obligations, Appendix 320; Vinnius Inst. Lib. 3, tit. XXVIII 6; Domat Lib. 1, tit. 18, § 1. The former writers rely upon the words of the Code and the positive laws of the Emperors Diocletian and Maximian, while the latter contend that the right of action can only be excluded by exceptions founded upon equity upon the opposite side. In the words of Vinnius "the mere circumstances of my having mistaken the law does not alone give you a just reason for retaining what was not in any manner due to you, and in this case, *melius est favere repetitioni quam adventio lucro.*" The Civil Code of France adopted the views of Vinnius and D'Aguesseau: Code Napoleon, Art. 1377, 1356, 2052; and was followed in Louisiana, Tanner *v.* Robert, 5 Martin, N. S., 260. In Scotland the Court of Sessions held the same opinion until the decision of Wilson *v.* Sinclair, in the House

of Lords of the United Kingdom, 4 Wils. & Shaw, 398. In Spain the rule was explicitly laid down that what is paid through ignorance of law cannot be recovered back: Institutes of Civil Law of Spain. Also Manuel Lib. 2, tit. 11, ch. 2. And the want of unanimity is further displayed in the Codes of Austria and Prussia: Burge on Conflict of Laws, Vol. 3, p. 729.

In the English common law courts the question was further complicated by the forms of action and the rules of pleading. In Farmer *v.* Arundel, 2 Wm. Bl. 824, Grey, C. J., said, that assumpsit would lie where money was paid by one man to another on mistake, either of fact or law. In Bize *v.* Dickinson, the question was fairly before the court; the debtor of a bankrupt, in ignorance of his right, paid the debt without taking advantage of a set-off to which he was entitled. In an action for money had and received Lord Mansfield gave judgment for the plaintiff, saying, "Where money is paid under a mistake of law, which there was no ground to claim in conscience, the party may recover it back in this kind of action: 1 Term Rep. 285; Lowry *v.* Bourdieu, Dougl. 468; Ancher *v.* Bank, Dougl. 637.

Bilbie *v.* Lumley, 2 East. 469, however, ignored the previous tendency of the courts. On argument for a new trial Lord Ellenborough inquired of counsel whether he could state any case where money had been recovered back when paid by mistake of law. If counsel had been prepared with the cases of Lord Mansfield's time, the result might have been different. As it was, counsel gave no answer, and the Chief Justice said that "every 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." This decision has had the widest influence both in England and America: Brisbane *v.* Dacres, 5 Taunt. 144; Stevens *v.* Lynch, 12 East. 37. Not only in the law courts, but in the court of chancery as well: Goodman *v.* Sayers, 2 Jacob & W. 249; Currie *v.* Gould, 2 Mad. Ch. 163; Bramston *v.* Robins, 4 Bingh. 11; Ry. Co. *v.* Cripps, 5 Hare, 90, *c. f.*; Livesey *v.* Livesey, 3 Russ. 287.

These cases, however, have lost their importance since the decision in Rogers *v.* Ingham, L. R., 3 Ch. D. 351, said to be the modern leading case upon this subject, Brett's Modern Leading Cases in Equity, p. 65. An executor was advised that a legatee was not entitled to certain interest, which had been paid to her. The legatee also took the opinion of her counsel which was the same, and the estate was divided accordingly. Two years later the legatee commenced this action submitting a new construction of the will and claiming repayment. It was held that such an action could not be maintained. Relief, said Lord Justice James, had never been given in the case of a simple money demand without intervening equities, Lord Justice Mellish adding, that he had no doubt that the court had power to relieve against mistakes of law, if there was any equitable ground which made it under the particular facts inequitable that the party who received the money should retain it. In Daniel *v.* Sinclair, 6 Appeal Cases, 180, the suit was to redeem a mortgage. The respondent on the erroneous supposition that compound interest was authorized, had consented that the accounts should be so kept, and had ratified them in writing. On appeal before the Judicial Committee of the Privy Council the overcharge was disallowed, Lord Monkswell remarking, that the line between mistakes of law and fact had not been so sharply drawn in equity as in law. Powell *v.* Hulkes, 33 Ch. D. 552.

Whatever may be the rule between ordinary adverse litigants the court finds no difficulty in giving relief where money has been paid to an officer of the court by mistake of law. The principle was applied in *ex parte* James, L. R., 9 Ch. 609, where a trustee in bankruptcy was ordered to repay money.

"The rule," said Lord Esher, "is not confined to the Court of Bankruptcy. If money by mistake of law has come into the hands of an officer of the Court of Common Law, the court would order him to repay it so soon as the mistake was discovered." The court would direct its officer to do that which any high-minded man would do: *Ex parte* Simmonds, 16 Q. B. D. 308. So also in Chancery, where trust money in

the hands of a trustee which had been paid to the trustee in liquidation by mistake of law, was ordered to be refunded: Dixon *v.* Brown, 32 Ch. D. 597; *In re* Opera Limited, 2 Ch. (1891) 154; see Morrow *v.* Surber, 97 Mo. 155.

In the United States the rule is not uniform, although the prevailing opinion supports the strict rule in Bilbie *v.* Lumley (*supra*). One of the earliest reported cases is Levy *v.* The Bank of the United States, decided in Pennsylvania and reported in 1 Binney, 27. In an action by a depositor to charge the bank with the amount of a forged cheque which he claimed should have been credited to his account, it was set up in defense that he had waived his right, having said, "if it is a forgery it is no deposit." "If he had said this deliberately," remarked Shippen, C. J., "knowing his right, it might have been obligatory on him, but it was the expression of an opinion of what he was willing to allow, and being under a mistake of his right, he is not bound by it." Very similar were the rulings in May *v.* Coffin, 4 Mass. 341, and Warder *v.* Tucker, 7 Mass. 452; Cabot *v.* Haskins, 3 Pick. 91. In the former the court said "we are all satisfied that what the defendant said of paying money from the payment of which he was discharged by law ought not to bind him." These cases, it will be noted, were not actions to recover back money paid, but upon promises to pay, made under a mistake of law, and are similar in the facts and circumstances to the case of Stevens *v.* Lynch (*supra*). The last decision in this line is Churchill *v.* Bradley, 58 Vt. 403. The defendant was surety on a note paid by the principal with a worthless bank note, and believing himself still liable signed a new note. It was held that his ignorance was no defence: Haigh *v.* Brooks, 10 Ad. & E. 309.

The decisions in Pennsylvania have not followed the line indicated by Levy *v.* The Bank (*supra*); Colwell *v.* Peden, 3 Watts. 327; Espy *v.* Allison, 9 Watts. 462. The question was thoroughly discussed in Ege *v.* Koontz, 3 Pa. 109. The action was *debt* to recover money paid voluntarily to the defendant who had claimed it as a debt due his assignor in bankruptcy. It was decided that there could be no recovery. "One person is not allowed," said Sar-

geant, J., "gratuitiously to alter the position of another and affect his rights and liabilities by voluntarily assuming to understand his own legal duty and paying a claim on the footing of such an assumption, and then drawing it into question upon the allegation of mistake of his duty:" Keener *v.* Bank, 2 Pa. 237; Boas *v.* Updegrove, 5 Pa. 516; Savings Institution *v.* Linder, 74 Pa. 371. In Union Ins. Co. *v.* City of Allegheny, 101 Pa. 250, an action of assumpsit was brought to recover the amount of certain taxes paid under protest, the lien of which had been discharged by a judicial sale. It was held that the money had been paid without compulsion and could not be recovered back. But the decision was by a bare majority of the court; Sharswood, C. J., Trunkey and Gordon, JJ., dissenting. Certainly the case was one of great hardship, for part of the land was actually levied on and advertised for sale before the plaintiff paid the tax. A similar conclusion was reached in Lamborn *v.* The Commissioners, 97 U. S. 185, where the lands were actually sold and a trustee relying on the validity of the tax paid a sum sufficient to redeem them. In the Massachusetts case of The Glass Co. *v.* City of Boston, 4 Met. 181, payments to a tax collector were held compulsory and not voluntary and could be recovered back in an action for money had and received, the reason for the rule arising from the authority placed in the hands of the collector to levy directly upon the property of every individual whose name is on the tax list in default of payment of taxes. See Magee *v.* Salem, 149 Mass. 238.

In Gould *v.* McFall, 118 Pa. 455, the question of the payment of money came before the court on a rule to show cause why a writ of restitution should not issue. After judgment and execution defendant voluntarily paid the debt and costs a few days before a sale advertised. Subsequently the judgment was set aside. It was held that the writ of restitution should not be awarded as the writ is *ex gratia*, resting in the exercise of a sound discretion and that justice did not call for it in this case.

The United States courts have been particularly active in

enforcing the strict rule both in law and equity. The case that has been most frequently referred to in this connection is Bank of U. S. *v.* Daniels, 12 Pet. 320. The endorsers of a note protested for non-payment took it up, giving their own note for the amount with ten per cent. penalty. This penalty was afterwards discovered not to be due by them and application was made for an injunction to stay proceedings on the damages. The injunction was discharged, Catron, J., saying, "vexed as this question formerly was, and delicate as it now is from the confusion in which numerous and conflicting decisions have involved it, no discussion of cases can be gone into without hazarding the introduction of exceptions that will be likely to sap the direct principle we intend to apply. Indeed the remedial power claimed by courts of chancery to relieve against mistakes of law is a doctrine grounded rather upon exceptions than upon established rules. To this course of adjudication we are unwilling to yield." See also Elliott *v.* Swartwout, 10 Pet. 137; Railway *v.* Soutter, 13 Wall. 517; Allen *v.* Galloway, 30 Fed. 466.

Still earlier the courts of New York were confronted with the question. In Mowatt *v.* Wright, 1 Wend. 355, although the mistake might almost have been called a mistake of fact, the court carefully reviewed the early English decisions and confirmed the rule that the money could not be recovered back. The parties were, however, in this case, bound by a compromise entered into in good faith.

Similar decision have been made in other States, which need not be set out at length: Gilliam *v.* Alford, 69 Tex. 267; Galveston *v.* Graham, 49 Tex. 303; Campbell *v.* Clark, 44 Mo. App. 249; Smith *v.* McDougal, 2 Cal. 586; Connecticut M. Ins. Co. *v.* Stewardson, 95 Ind. 588.

Beard *v.* Beard, 25 W. Va. 486, speaks both for West Virginia and the parent State: "It is now too well settled in Virginia and this State that where one voluntarily pays money to another with full knowledge of the facts, but under a mistake of law he cannot recover it:" Shriver *v.* Garrison, 30 W. Va. 456; Harner *v.* Price, 17 W. Va. 523; Hugh *v.* Loan Ass'n, 19 W. Va. 792. In Erkens *v.* Nicolin,

39 Minn. 461, where a party under ignorance of the rule of law that distances must yield to natural boundaries called for in a deed, paid money for a quit claim deed of property, which under this rule belonged to him, he could not recover back the purchase money so paid. "More mischief," said the court, "will always result from attempting to mould the law to what seems natural justice in a particular case than from a steady adherence to general principles." In the recent case of Alton *v.* The Bank, 157 Mass. 341, the plaintiff, an endorser, sought to recover the amount he had paid upon certain instruments, which both parties had erroneously supposed negotiable. It was held that, whether the mistake was one of fact or law, the plaintiff could not recover, it being a matter equally open for the inquiry and judgment of both parties, and the defendant had a right to assume that the plaintiff relied wholly on his own means of information. (*Cf.* Bank *v.* Alton, *infra.*)

While the rule is thus strongly laid down in the States mentioned above, the contrary is just as strongly maintained in other jurisdictions. In Lawrence *v.* Baubein, 2 Bailey's Law (S. C.), 623, mistake of law was set up as a defence in an action on a bond, and the question was gone into at great length both by counsel and court. The court, however, found a distinction between ignorance of law and mistake of law, and concluded that contracts founded upon a mistake of law ought not to be enforced. The distinction taken between ignorance and mistake has been severely criticised: Schlesinger *v.* U. S., 1 Ct. of Cl. 25; *cf.* Champlin *v.* Latyn, 18 Wend. 407. And is now practically abandoned in South Carolina: Cunningham *v.* Cunningham, 20 S. C. 317; Keit *v.* Andrews, 4 Rich. Eq. 349.

In Kentucky it has been laid down that, whenever by a clear and palpable mistake of law or fact essentially bearing upon and affecting the contract, money has been paid without cause or considerations, which in honor or conscience was not due and payable and which in honor or good conscience ought not to be retained, it could and ought to be recovered

back: Ray *v.* The Bank, 3 B. Mon. 510; Gratz *v.* Redd, 4 B. Mon. 190.

In Culbreath *v.* Culbreath, 7 Ga. 64, an administrator brought an action of assumpsit to recover money paid to defendant as part of distributive share of an estate, the payment having been made in ignorance of the law regulating the distribution of estates. The court below entered a nonsuit, but this was reversed above. After stating that the weight of the authorities was with them, the court continued, "If the authorities *were* balanced we would feel justified in kicking the beam and ruling according to that naked and changeless equity which forbids that one man should retain the money of his neighbor for which he paid nothing, an equity which is natural, which savages understand, which cultivated reason approves, and which Christianity not only sanctions, but in a thousand forms has ordained."

This remarkable opinion has been quoted with approval in in the recent case of Mansfield *v.* Lynch, 59 Conn. 320, where it was held that an administrator, *d. b. n.*, could recover from the creditors of an estate the excess which they had been paid on their claims, over what they would have been entitled to had all the valid claims been allowed when presented to the original administrator. The court relied upon Northrop *v.* Graves, 19 Conn. 548, where it was said "we mean distinctly to assert that when money is paid by one under a mistake of his right and his duty, and which he was under no 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 the mistake be one of law or fact, and this, we insist, may be done both upon the principles of Christian morals and the common law." These decisions involved a repudiation of Bulkley *v.* Steward, 1 Day, 133; see also Rogers *v.* Weaver, 5 Ham. (Ohio) 536; Beatty *v.* Dufief, 11 La. Ann. 74. It is not disputed that a mistake of the law of another State will be treated as a mistake of fact: Haven *v.* Foster, 9 Pick. 112; Bank *v.* Dody, 8 Barb. 233; Morgan *v.* Bell, 3 Wash. 154.

In First Nat. Bank *v.* Alton, 22 Atl. (Conn.) 1010, the court