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Relief for Mistake of Law

of aviation and radio communication is assured.[63] So too, myriad transactions which concededly exert a direct effect on interstate commerce. But the decision stands as a warning signal that the integrity of state lines will be zealously guarded lest "the federal authority . . . embrace practically all the activities of the people and the authority of the State over its domestic concerns . . . exist only by sufferance of the federal government."[64]

RELIEF FOR MISTAKE OF LAW.—Firmly embedded in the fields of quasi-contracts[1] and equity[2] is the principle that relief will be afforded against the consequences of a material mistake of fact. That the rule denying relief where the mistake is of law remains in sharp contradistinction is clearly indicated by several recent decisions.[3]

In the realm of the law of crimes and torts there exists a conclusive presumption that every man knows the law. Hardly anyone would question its necessity for the adequate administration of justice.[4] The application of this conclusive presumption to cases where the object sought is the prevention of unjust gain by another is directly attributable to the decision of Lord Ellenborough in the famous case of *Bilbie v. Lumley*.[5] In that case quasi-contractual recovery of money paid upon an insurance policy, with full knowledge of the facts, but under the mistaken belief that the facts constituted no legal defense, was denied upon the express ground that the mistake was of law. This conclusion was reached in direct contravention of several earlier decisions,

63. Powell, *Would the Supreme Court Block a Planned Economy* (Aug. 1935) 12 FORTUNE 48, suggests that goods within the Original Package Doctrine may likewise be excepted from the scope of the Schechter decision.

64. A.L.A. Schechter Poultry Corp. v. United States, 55 Sup. Ct. 837, 850 (1935).

1. 3 WILLISTON, CONTRACTS (1920) § 1574; WOODWARD, QUASI-CONTRACTS (1913) § 11. Of course, the mere existence of a mistake of fact is not sufficient for relief. The retention of the benefit conferred by reason of the mistake must be inequitable.

2. 2 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 852.

3. Standard Oil Co. of Ky. v. Gramling, 160 So. 725 (Ala. App. 1935); Jordan v. Johns, 79 S. W. (2d) 798 (Tenn. 1935); State v. Perlstein, 79 S. W. (2d) 143 (Tex. Civ. App. 1935); Alderson v. Gauley Fuel Co., 178 S. E. 626 (W. Va. 1935); see New York City Employees' Retirement System v. Eliot, 267 N. Y. 193, 200, 196 N. E. 23, 25 (1935).

4. A conclusive presumption of knowledge of the law is unquestionably necessary in criminal law and torts. The result of allowing a plea of mistake of law in these fields can well be imagined. Naturally, no one's rights would be safe were the plea of mistake of law allowed.

5. 2 East 469, 102 Eng. Reprints 448 (K. B. 1802). It is submitted that recovery here could have been denied upon the ground that the plaintiff owed at least a moral obligation, thus rendering retention by the defendant not against conscience.

An explanation for Lord Ellenborough's decision possibly may be found in the fact that he received his early training in criminal trials. See 2 WILLISTON, CONTRACTS § 1581.

both at law[6] and in equity,[7] in which relief for mistake of law had been allowed. In a later decision,[8] Lord Ellenborough evidently recanted, for he held ineffectual in law a deed which had been cancelled under a mistake, and declared the result to be the same regardless of whether the mistake was considered of fact or of law. Nevertheless the principle of *Bilbie v. Lumley* was adopted by the courts of England,[9] and several American jurisdictions accepted it without questioning its fundamental soundness.[10] The courts of two states[11] arrived at the conclusion that no reasonable ground for the distinction existed, and accordingly placed relief for mistake of law and fact upon the same basis. However, the rule denying relief for mistake of law attained sufficient currency to endow it with strongly persuasive force in the eyes of courts deferential to precedent, and it was only a question of time until the rule became generally embodied in American jurisprudence.

Quasi-Contractual Relief

Perhaps the most frequently encountered situation in which the rule is applied is that of voluntary payment of money under mistake. It is well settled that if the mistake be of fact and retention is inequitable, recovery may be had in quasi-contract.[12] Equally well settled is the rule that money paid under mistake of law cannot be recovered, regardless of the fact that the

6. Hewer v. Bartholomew, Cro. Eliz. 614, 78 Eng. Reprints 855 (Q. B. 1597) (recovery of money paid under mistake of law in action of account); Bonnel v. Foulke, 2 Sid. 4, 82 Eng. Reprints 1224 (U. B. 1657) (general assumpsit); Bize v. Dickason, 1 Term Rep. 285, 99 Eng. Reprints 1097 (K. B. 1786) (general assumpsit).

7. Turner v. Turner, 2 Chan. Rep. 154, 21 Eng. Reprints 644 (1679) (reinstatement of mortgage released under mistake of law); Lansdowne v. Lansdowne, 2 Jac. & W. 205, 37 Eng. Reprints 605 (Ch. 1730) (cancellation of partition agreement entered into under mistake of law).

8. Perrott v. Perrott, 14 East 423, 104 Eng. Reprints 665 (K. B. 1811). *Accord: Re* Saxon Life Assur. Soc., 2 J. & H. 408, 70 Eng. Reprints 1117 (Ch. 1862).

9. Stevens v. Lynch, 12 East 38, 104 Eng. Reprints 16 (K. B. 1810); Brisbane v. Dacres, 2 Taunt. 142, 128 Eng. Reprints 641 (C. P. 1813); *cf.* Hammond v. Brewer, 2 Keny 33, 96 Eng. Reprints 1097 (K. B. 1824).

10. Jones v. Watkins, 1 Stew. 81 (Ala. 1827) (quasi-contract); Larkins v. Biddle, 21 Ala. 252 (1852) (reformation); Norton v. Marden, 15 Me. 45 (1838) (quasi-contract); Shotwell v. Murray, 1 Johns. Ch. 512 (N. Y. 1815) (injunction); Dupree v. Thompson, 4 Barb. 279 (N. Y. 1848) (rescission); Arthur v. Arthur, 10 Barb. 9 (N. Y. 1850) (reformation); Filgo v. Penny, 6 N. C. 182 (1812) (quasi-contract).

11. In Northrop's Ex'r v. Graves, 19 Conn. 547 (1849), money paid to the defendant under the belief that he was legally entitled thereto under a will was recovered in an action of assumpsit. The court expressly denied the existence of any reason why relief should be granted for mistake of fact but denied for mistake of law.

Kentucky also refused to apply this distinction. Ray v. Bank of Kentucky, 3 B. Monroe 510 (Ky. 1843); see Underwood v. Brockman, 34 Ky. 309, 317 (Ch. 1836).

12. Baltimore & S. R. Co. v. Faunce, 6 Gill 68 (Md. 1847); see Note (1924) 31 A. L. R. 384; 3 WILLISTON, CONTRACTS § 1574; Comment (1923) 23 COL. L. REV. 283; Comment (1927) 12 CORN. L. Q. 394.

refusal to relieve may work injustice.[13] Two jurisdictions have unqualifiedly refused to discriminate between mistakes of law and those of fact,[14] while two others draw the elusive distinction between mistake and ignorance of law, and grant relief for *mistake,* but deny it when the payment was due to *ignorance.*[15] In several other states legislative attempts have been made to

13. Campbell v. Rainey, 127 Cal. App. 747, 16 P. (2d) 310 (1932) (payment of stock assessment under mutual mistake as to validity of statute requiring payment); Alton v. First Nat. Bank, 157 Mass. 341, 32 N. E. 228, 18 L. R. A. 144 (1892) (mistaken belief in liability on note); Thorkildsen v. Carpenter, 120 Mich. 419, 79 N. W. 636 (1899) (mistake as to vendor's title to land); Belloff v. Dime Sav. Bank, 118 App. Div. 20, 103 N. Y. Supp. 273 (2d. Dep't 1907), *aff'd,* 191 N. Y. 551, 85 N. E. 1106 (1908) (mistake as to legal effect of a deed); Payne v. Witherbee, Sherman & Co., 200 N. Y. 572, 93 N. E. 1106 (1911) (payment under erroneous construction of contract); Hadley v. Farmers' Nat. Bank of Oklahoma City, 125 Okla. 250, 257 Pac. 1101 (1927) (payment of note under mutual mistake of payor's liability); see Note (1928) 53 A. L. R. 949; Comment (1922) 22 COL. L. REV. 166; Comment (1931) 30 MICH. L. REV. 437.

14. The courts of both Connecticut and Kentucky have consistently held that payments made under mistake of law can be recovered. Northrop's Ex'r v. Graves, 19 Conn. 547 (1849) and Ray v. Bank of Kentucky, 3 B. Monroe 510 (Ky. 1834), being the leading authorities. An administrator's payment of a claim under the belief that the estate was solvent because of the invalidity of other claims was held recoverable in Mansfield v. Lynch, 59 Conn. 321, 22 Atl. 313 (1890). A reiteration of this rule is found in Gilpatric v. City of Hartford, 98 Conn. 471, 120 Atl. 317 (1923) (incorrect apportionment of tax due to mistake of law by state treasurer). But *cf.* Monroe Nat. Bank v. Catlin, 82 Conn. 227, 73 Atl. 3 (1909) (payment under mistake of law not recoverable because not against conscience to retain); Rockwell v. New Departure Mfg. Co., 102 Conn. 255, 128 Atl. 302 (1923) (application of doctrine of "practical construction" of contract precluded recovery of money paid under an erroneous, although permissible, construction).

The Kentucky decisions reinforce the doctrine of Ray v. Bank of Kentucky, *supra.* Scott v. Board of Trustees of Town of New Castle, 132 Ky. 616, 116 S. W. 788, 21 L. R. A. (N.S.) 112 (1909) (recovery of license fee paid under mistake as to validity of ordinance); Supreme Council Catholic Knights of America v. Fenwick, 169 Ky. 269, 183 S. W. 906 (1916) (payment of insurance premiums under belief that they were legally imposed); but *cf.* Underwood v. Brockman, 34 Ky. 309 (Ch. 1836) ("mistake of law" regarded as compromise, hence no recovery); Hall's Ex'r v. Farmer's Bank of Ky., 23 Ky. Law 1450, 65 S. W. 365 (1901) (payment with knowledge of doubtful state of law held to be compromise).

An example of the fact that to allow relief for mistake of law is necessary for complete justice is the case of Polites v. Barlin, 149 Ky. 376, 149 S. W. 828, 41 L. R. A. (N.S.) 1217 (1912), in which an infant bootblack was permitted to recover tips he had received and paid to his employer under the mistaken belief that the latter was entitled to them. *Accord:* Zappas v. Roumeliote, 156 Iowa 709, 137 N. W. 935 (1912) ("mistake of law" not mentioned). *Contra:* Gloyd v. Hotel La Salle, 221 Ill. App. 104 (1921).

15. Culbreath v. Culbreath, 7 Ga. 64 (1849); Hutton v. Edgerton, 6 S. C. 485 (1875). In the Culbreath Case the court said (p. 70): "*Ignorance* implies passiveness, *mistake* implies action. *Ignorance* does not pretend to knowledge, but *mistake* assumes to know. *Ignorance* may be the result of laches, which is criminal; *mistake* argues diligence, which is commendable. Mere *ignorance* is no *mistake,* but a *mistake* always involves *ignorance,*

eliminate the distinction.[16] The results, however, have not been very satisfactory, because of the stringent and narrow judicial interpretations the statutes have received.[17]

The situations in which money is paid under a mistake of law are as diverse as the facts of human relationships. When compared with analogous cases where money paid under mistake of fact is recoverable, the injustice of the rule is luminously demonstrated. Few instances are necessary to show this. The person who makes a payment in pursuance of a statutory duty has no right to recover his payment in the event that the statute is later held to be void;[18] payments made under a mistaken belief that the payor

yet not that alone." (Italics in original). But see Champlin v. Laytin, 18 Wend. 407, 415 (N. Y. 1837); *cf.* Whitehurst v. Mason, 140 Ga. 148, 78 S. E. 938 (1913) (no recovery for mistake of law because not against conscience to retain). The distinction between ignorance and mistake of law has been given legislative approval. GA. CODE ANN. (Michie, 1926) § 4575.

16. CAL. CIV. CODE (Deering, 1931) §§ 1576, 1578; GA. CODE ANN. (Michie, 1926) §§ 4574, 4575, 4578, 4579 (applies only to equitable relief); MONT. REV. CODE (Choate, 1921) § 7486; N. D. COMP. LAWS ANN. (1913) § 5855; OKLA. STAT. (Harlow, 1932) § 9423; S. D. COMP. LAWS (1929) § 822.

With the exception of the Georgia statute, the others are identical. The California statute, *supra* reads: "§ 1576. Mistake may be either of fact or of law. § 1578. Mistake of law constitutes a mistake . . . 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 were aware at the time of contracting, but which they do (*sic*) not rectify." (Italics in original).

The Georgia statute *supra* permits equitable relief for "an honest mistake of law . . . when such mistake operates as a gross injustice to one, and gives an unconscientious (*sic*) advantage to the other. . . ."

17. The statutes were not even mentioned in some cases denying recovery of money paid under mistake of law. Evans v. Hughes County, 3 S. D. 244, 52 N. W. 1062 (1892); Hadley v. Farmers' Nat. Bank of Oklahoma, 125 Okla. 250, 257 Pac. 1101 (1927). Considering the application of the statutes as extending only to the equitable remedies of reformation and rescission, some courts have denied quasi-contractual recovery of money paid under mistake of law. Wingertner v. City and County of San Francisco, 134 Cal. 547, 66 Pac. 730 (1901); City of Petaluma v. Hickey, 90 Cal. App. 616, 266 Pac. 613 (1928); Jacobson v. Mohall Tel. Co., 34 N. D. 213, 157 N. W. 1033, L. R. A. 1916F 532 (1916); Chrysler Light & Power Co. v. City of Belfield, 58 N. D. 33, 224 N. W. 871 (1929); *cf.* Bottego v. Carroll, 31 Mont. 122, 77 Pac. 430 (1904) (recovery in equity denied because of slight variance between pleading and proof). *Contra:* Gregory v. Clabrough's Ex'rs, 129 Cal. 475, 62 Pac. 72 (1900) (quasi-contractual recovery allowed under CAL. CIV. CODE [Deering, 1931] § 1578).

18. Campbell v. Rainey, 127 Cal. App. 747, 16 P. (2d) 310 (1932) (assessment on shares of banking stock required by statute); Gillett v. Moore, 74 Colo. 484, 223 Pac. 21 (1924) (stock assessment not unconstitutional, but otherwise invalid); State v. Perlstein, 79 S. W. (2d) 143 (Tex. Civ. App. 1935) (purchase of land from state under unconstitutional statute); but *cf.* Young v. Hoagland, 292 Pac. 189 (Cal. App. 1930) (payment of stock assessment under void statute is involuntary because failure to pay would cause

is liable on a negotiable instrument are not recoverable;[19] benefits conferred under a misconstruction of the terms of a contract cannot be retrieved;[20] and an administrator or executor of an estate, who is personally liable for his errors, is not allowed to recover payments made in the administration of the estate under mistake of law.[21] Further enumeration of fact-situations would illustrate in bold relief the wide divergence in the law of quasi-contracts between redress for mistakes of law and those of fact, and the unsoundness of the discrimination when viewed in the light of common justice.

In the majority of decisions denying the plaintiff the right to regain a payment because he had erred as to his legal liability, a diametrically opposite result would have been attained had the error been of fact. On the other hand, in a not inconsiderable number of cases wherein recovery was denied upon the express ground that the mistake was of law, the courts could readily have disregarded the error of law and denied relief upon other grounds, generally applicable to payments resulting from mistakes of fact.[22] Perhaps in some

loss of credit rating); Conway v. Towne of Grand Chute, 162 Wis. 172, 155 N. W. 953 (1916) (payment to city for improvements under unconstitutional statute recoverable on theory of a gift upon a condition).

It is well settled that voluntary payments of taxes under mistake of law are not recoverable. See Note (1927) 48 A. L. R. 1381, 1382. This rule is of course sound, as public funds should be protected in every manner possible. If a person is willing to pay a tax without questioning its validity, he should bear the loss. However, if the voluntary payment was not of a tax, but a license fee, it is recoverable. Scott v. Board of Trustees of Town of New Castle, 132 Ky. 616, 116 S. W. 788, 21 L. R. A. (N.S.) 112 (1909). *Contra:* Hebron v. City of New York, 78 Misc. 653, 138 N. Y. Supp. 1010 (Sup. Ct. 1913).

19. E. H. Tallor Jr. & Sons v. First Nat. Bank, 212 Fed. 898 (C. C. A. 6th, 1914); Alton v. First Nat. Bank, 157 Mass. 341, 32 N. E. 228, 18 L. R. A. 144 (1892); American Surety Co. v. Steen, 86 Okla. 252, 208 Pac. 212 (1922); Hadley v. Farmers' Nat. Bank of Oklahoma, 125 Okla. 250, 257 Pac. 1101 (1927); *cf.* Monroe Nat. Bank v. Catlin, 82 Conn. 227, 73 Atl. 3 (1909). *Contra:* Kentucky Title Sav. Bank & Trust Co. v. Langan, 144 Ky. 46, 137 S. W. 846 (1911).

20. United States v. Skinner & Eddy Corp., 28 F. (2d) 373 (W. D. Wash. 1928); Traweek v. Hagler, 99 Ala. 664, 75 So. 152 (1927); Heath v. Allbrook, 123 Iowa 559, 98 N. W. 619 (1904); Payne v. Witherbee, Sherman & Co., 200 N. Y. 572, 93 N. E. 954 (1911); Alderson v. Gauley Fuel Co., 178 S. E. 626 (W. Va. 1935); see Royal Italian Government v. National Brass & Copper Tube Co., 294 Fed. 23, 27 (C. C. A. 2d, 1923), *cert. denied,* 264 U. S. 587 (1924).

21. Graham McNeil Co. v. Scarborough, 135 Miss. 59, 99 So. 502 (1924) (payment of claim by administrator); Matter of Welton, 141 Misc. 674, 253 N. Y. Supp. 128 (Surr. Ct. 1931) (payment by administrator to one believed to be a distributee); Scott v. Ford, 52 Ore. 288, 97 Pac. 99 (1908) (payment of lapsed legacy). *Contra:* Northrop's Ex'rs v. Graves, 19 Conn. 547 (1849); Culbreath v. Culbreath, 7 Ga. 64 (1849).

22. For example, not against conscience to retain: Stafford Sav. Bank v. Church, 69 N. H. 582, 44 Atl. 105 (1899) (payment of deceased wife's bank account to husband); the payor might have been under a moral obligation to the payee: Jacobson v. Mohall Tel. Co., 34 N. D. 213, 157 N. W. 1033 (1916) (plaintiff's neglect of duty caused payee's loss, although he had no legal liability); a change of position by the payee: Nelson v.

cases of this class, the courts realize that to permit recovery would be unjust to the defendant. However, regardless of their hidden motives, they apply the rule of mistake of law to reach an entirely just result. On the other hand, many courts go no further than to determine whether in a given case the mistake is of law. If it is, they deny relief even where no other reason for such action exists, and refuse to consider the equities of the particular case.

That courts have doubted the soundness of the rule denying recovery of payments upon the ground of mistake of law is illustrated, at least tacitly, by the exceptions which they have created. Recourse is had to a principle of the law of evidence[23] to permit recovery of payments resulting from a mistake of the law of a jurisdiction other than that wherein the payor resides.[24] Accordingly, a mistake of foreign law is regarded as a mistake of fact and relief is granted upon that basis. This exception may be the result of a realization by the courts that it is unreasonable to require a person to know the law of jurisdictions other than that of his residence.[25] A second exception, which allows the recovery of money paid to officers of the court,[26]

Swenson, 46 R. I. 26, 124 Atl. 468 (1924) (payment of bank deposit to executor, who administered it); plaintiff might have received a benefit from the payment: Lincoln v. Kuskokwim Fishing and Trans. Co., 118 Wash. 137, 203 Pac. 62 (1921) (payment of freight in excess of legal rate, yet charge was fair); the payment might have been tainted with illegality: Houlehan v. Inhabitants of Kennebec County, 108 Me. 397, 81 Atl. 449 (1911) (payment of "fine" in lieu of jail sentence without prosecutor's consent); or the payment was in reality a compromise: Erkens v. Nicolin, 39 Minn. 461, 40 N. W. 567 (1888) (money paid for quitclaim of disputed strip of land).

23. Foreign law, of which the court will not take judicial notice, must be pleaded and proved as a fact. Hanna v. Lichtenhein, 225 N. Y. 579, 122 N. E. 625 (1919).

24. Haven v. Foster, 26 Mass. 111 (1829) (release in Massachusetts of interest in estate under mistake of New York law); Bank of Chillicothe v. Dodge, 8 Barb. 233 (N. Y. 1850) (mistake of New York law made in Ohio by Ohio resident). Even when a non-resident while within a foreign state mistakes its law, the error is treated as one of fact. Patterson v. Bloomer, 35 Conn. 57 (1868); Vinal v. Continental Const. & Imp. Co., 53 Hun 247, 6 N. Y. Supp. 595 (1889).

25. The denial of relief for mistake of law is grounded upon the presumption that every man is cognizant of the law, a principle borrowed from the criminal law. Since a resident of one state is conclusively presumed to know the criminal law of any other state in which he may be, it would seem only logical to require him to know its civil law as well. The courts, however, have seen fit to require knowledge merely of the law of the state of one's domicile. This limitation seems to admit, at least inferentially, that the rule compelling parties to proceed upon questions of domestic law at their own peril is open to question, for the difference between knowledge of domestic and foreign law basically is one of degree, not of kind. See (1931) 30 MICH. L. REV. 301.

26. Carpenter v. Southworth, 165 Fed. 428 (C. C. A. 2d, 1908) (payment to trustee in bankruptcy); Sando v. Smith, 237 Ill. App. 570 (1925). An attorney is an officer of the court within the comprehension of this exception, and payments to him under mistake of law are recoverable. Moulton v. Bennett, 18 Wend. 586 (N. Y. 1836). *Cf.* Harris v. Board of Ed. of Webster, 3 Mo. App. 570 (1877), where recovery was allowed from a public officer.

rests upon the theory that it is against good conscience to permit such functionaries to retain payments to which they are not legally entitled. Another exception, that payments out of public funds resulting from mistake of law can be recovered,[27] is based upon the desire to protect such funds,[28] and upon the further ground that by making a payment under a mistake of law the public officer exceeds his authority. Consequently, his act does not bind his principal, the public body.[29] Since his authority is set forth in the statutes, all persons dealing with him are expected to familiarize themselves with his actual authority.[30] A final exception, borrowed from equity jurisprudence,[31] allows redress where the mistake relates to legal title, either as an exception to the rule,[32] or upon the ground that legal title necessarily involves facts.[33]

Without a doubt these exceptions indicate a judicial desire to limit the comprehensiveness of the general rule precluding recovery of money paid under mistake of law. However, the sphere of their application is of necessity confined to the comparatively small number of fact situations they embrace. The greater number of cases of voluntary payment under mistake of law remain unaffected.[34]

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27. Wisconsin Cent. R. Co. v. United States, 164 U. S. 190 (1896); City of Demopolis v. Marengo County, 195 Ala. 214, 70 So. 275 (1915); Independent School Dist. No. 6 v. Mittry, 39 Idaho 282, 226 Pac. 1076 (1924); New York City Employees' Retirement System v. Eliot, 267 N. Y. 193, 196 N. E. 23 (1935). *Contra:* City of Petaluma v. Hickey, 90 Cal. App. 616, 266 Pac. 613 (1927); Territory v. Newhal, 15 N. M. 141, 103 Pac. 982 (1909); Flynn v. Hurd, 118 N. Y. 19, 22 N. E. 1109 (1889).

The exception is confined to payments made in a governmental capacity, and payments made under mistake of law in a proprietary capacity are not recoverable. Chrysler Light & Power Co. v. City of Belfield, 58 N. D. 33, 224 N. W. 871 (1929) (payment for street lighting).

28. Wisconsin Cent. R. Co. v. United States, 164 U. S. 190 (1896). The public policy that demands protection of public funds is clearly a sufficient reason for permitting recovery.

29. The agency theory is the one most frequently advanced to support this exception. See note 27, *supra*. However, it would seem that the mistake of the agent should be imputed to the principal. *Cf.* Payne v. Witherbee, Sherman & Co., 200 N. Y. 572, 93 N. E. 954 (1911) (mistake of law by corporate agent imputed to principal). The public policy argument would seem to be the better ground, but the result is sound, regardless of the reasoning employed to attain it.

30. It is submitted that this ground for the exception is incorrect. The extent of the officer's power is usually not directly involved, although it is true that he exceeds it by making a payment under mistake of law. The question is rather of the liability of the public body represented by the officer.

31. See note 44, *infra;* Comment (1932) 30 MICH. L. REV. 437.

32. Gaffney v. Stowers, 73 W. Va. 420, 80 S. E. 501 (1913).

33. Picotte v. Mills, 200 Mo. App. 127, 203 S. W. 825 (1918); Goff v. Gott, 5 Sneed 562 (Tenn. 1858). *Contra:* Birkhauser v. Schmitt, 45 Wis. 316 (1878); Scott v. Slaughter, 35 Tex. Civ. App. 524, 80 S. W. 643 (1904).

34. *E.g.*, payments on notes, in the administration of estates, payments under misconstruction of contracts. See notes 19, 20, 21, *supra*.

Equitable Relief

The jurisdiction of courts of equity to relieve against the consequences of mistakes of fact is universally recognized.[35] However, in regard to relief for a pure mistake of law, both courts and commentators deny that relief will be granted, either affirmatively or defensively.[36] Despite these expressions, some decisions intentionally contravene the rule[37] while others recognize it but grant relief for mistake of law where it is accompanied by fraud, misrepresentation, excessive hardship or overreaching.[38]

Reformation on the ground of a pure mistake of law is allowed in the majority of jurisdictions where a written instrument fails to effectuate the true agreement of the parties because of a mutual misapprehension of the legal effect of the words used in reducing the agreement to writing.[39] On the other hand, reformation is denied when the mistake relates not to the legal effect of the words employed, but to the legal effect of an instrument chosen by the parties to accomplish a previously determined result.[40] The reason generally

35. 2 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 852.

36. See Lyon v. Richmond, 2 Johns. Ch. 51, 60 (N. Y. 1816); Haviland v. Willetts, 141 N. Y. 35, 50, 35 N. E. 958, 960 (1894); 2 POMEROY, *op. cit. supra* note 35.

37. A release executed under a mutual mistake of law was rescinded in Reggio v. Warren, 207 Mass. 525, 93 N. E. 805 (1911). This was a pure mistake of law. Connecticut, of course, relieves against a pure mistake of law. Bronson v. Leibold, 87 Conn. 293, 87 Atl. 979 (1913) (cancellation of deed). Kentucky is in accord with Connecticut. Louisville Banking Co. v. Asher, 112 Ky. 138, 65 S. W. 133 (1901).

However, many cases have denied equitable relief upon the express ground that the mistake was of law. Pittsburgh & L. A. Iron Co. v. Lake Superior Iron Co., 118 Mich. 109, 76 N. W. 395 (1898); Jacobs v. Morange, 47 N. Y. 57 (1871); Shields v. Hitchman, 251 Pa. 455, 96 Atl. 1039 (1916); Campbell v. Newman, 50 Okla. 121, 151 Pac. 602 (1915).

38. This basis for equitable relief against mistake of law is well established. Jordan v. Stevens, 51 Me. 78 (1863) (disparity of parties); Tompkins v. Hollister, 60 Mich. 470, 27 N. W. 651 (1886) (fraudulent concealment); Sullivan v. Jennings, 44 N. J. Eq. 11 (Ch. 1888) (hardship); Berry v. American Cent. Ins. Co., 132 N. Y. 49, 30 N. E. 254 (1892) (superior knowledge and misrepresentation); Haviland v. Willetts, 141 N. Y. 35, 35 N. E. 958 (1894) (studious concealment); Tolley v. Poteet, 62 W. Va. 231, 57 S. E. 811 (1907) (defendant attempting to take advantage of plaintiff's mistake).

39. Park Bros. & Co., Ltd. v. The Blodgett & Clapp Co., 64 Conn. 28, 29 Atl. 133 (1894); Godwin v. De Conturbia, 115 Md. 488, 80 Atl. 1016 (1911); Pitcher v. Hennessy, 48 N. Y. 415 (1872); Bacot v. Fessenden, 139 App. Div. 647, 124 N. Y. Supp. 370 (1st Dep't 1910); see (1931) 7 WIS. L. REV. 45.

In this type of case the parties are under no misapprehension as to the legal consequences of the agreement they intended to make, but which was not in fact made because of a mistake of law in the expression of the agreement. In some jurisdictions, however, reformation is denied if the parties had agreed upon the particular words to be used and were mistaken as to their legal significance. Atherton v. Roche, 192 Ill. 251, 61 N. E. 357 (1901); Corning v. Grohe, 65 Iowa 328, 21 N. W. 662 (1884); Andrus v. Blazzard, 23 Utah 233, 63 Pac. 888 (1901); *cf.* GA. CODE ANN. (Michie, 1926) § 4578.

40. Hunt v. Rousmanier's Adm'r, 26 U. S. 1 (1828) is the leading case on this point. The parties had desired to provide security for a loan from *H* to *R*. They originally had intended to execute a mortgage upon a ship, but finally decided upon a power of attorney,

assigned for the denial of reformation in this situation is that to allow it would be to force the parties into an agreement they never contemplated. However, if the result the parties intended has been clearly shown, there seems to be no reason why a court of equity should not carry out their intention.[41]

Another ground upon which equitable relief is granted is that of mistake in regard to the private rights of one party, as distinguished from a mistake of general law.[42] Originally enunciated by Lord Westbury,[43] the distinction finds its most frequent application in cases involving mistakes of legal title and ownership.[44] The basis for relieving against mistakes involving private rights is that they frequently involve questions of fact. Its logical basis is questionable because in many instances matters of legal title do not depend upon facts, while in others they involve matters of general law.[45] However, by employing this distinction courts of equity are enabled to relieve against mistakes of law while at the same time professing adherence to the general rule denying such relief. Nevertheless, as in the law of quasi-contract,

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which was executed. The power of attorney did not survive the death of *R*, and *H* sought to have it reformed into a mortgage. Reformation was denied upon the ground of mistake of law. *Accord:* Taylor v. Buttrick, 165 Mass. 547, 43 N. E. 507 (1896); Mitchell v. Holman, 30 Ore. 280, 47 Pac. 616 (1897).

41. It has been suggested that whether or not equity should grant reformation to effectuate the general intention of the parties is a question of degree, *i.e.*, how far the instrument will have to be changed in order to give effect to the parties' general intention, where their intention is not defeated, but merely impaired. See 3 WILLISTON, CONTRACTS § 1587.

42. General law consists of legal rules equally applicable to all persons, for example, the law of descent and distribution, or the law governing the formation of contracts.

43. See Cooper v. Phibbs, L. R. 2 H. L. 149, 170 (1867) *per* Westbury, L. J. "It is said *ignorantia juris haûd excusat;* but in that maxim the word *'jus'* is used in the sense of denoting general law,—the ordinary law of the country. But when the word *'jus'* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of a matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights . . . that agreement is liable to be set aside. . . ."

44. Stoeckle v. Rosenheim, 10 Del. Ch. 195, 87 Atl. 1006 (1913) (injunction against foreclosure sale because third mortgagee did not know of his right to be subrogated to first mortgage); Lewis v. Mote, 140 Iowa 698, 119 N. W. 152 (1909) (cancellation of deed); Houston v. Northern Pac. Ry. Co., 109 Minn. 273, 123 N. W. 922 (1909) (rescission of contract to purchase land already owned by buyer), *rev'd on other grounds,* 231 U. S. 181 (1913); Burton v. Haden, 108 Va. 51, 60 S. E. 736 (1908) (cancellation of quitclaim transferring entire fee where grantor thought she had only one-third interest); see Note (1925) 39 A. L. R. 194, 195. *Contra:* Campbell v. Newman, 50 Okla. 121, 151 Pac. 602 (1915) (no cancellation of deed transferring fee, where grantor believed he had only life estate).

45. Very often the question of legal title may depend upon the general law of wills or intestacy. In such case a mistake of title will not be of fact. It will, however, be relieved against as a mistake of private rights, regardless of the misapprehension of general law. Thus the theoretical denial of relief for mistake of general law does not conform to actual practice.

equitable relief for mistake of law is by no means upon an equal footing with relief for mistake of fact.

Conclusion

The chief reason advanced by the courts for denying relief for mistake of law, when any reason is given, is that to allow such relief would result in insecurity in contractual relations and lead to a variety of other undesirable results. The prophesied evils have not been perceived in those jurisdictions where relief is permitted. That the discrimination between mistake of law and fact is unsound is apparent from the exceptions which the courts have created to mitigate the consequences of the application of the general rule, their frequent expressions of its undesirability, and the legislative attempts to eliminate it. However, the courts find themselves in the grip of *stare decisis,* with the result that they have construed remedial statutes in a manner so narrow as to defeat the legislative purpose. The distinction between mistake of law and fact, an historical accident in the law, should have no place in modern jurisprudence.[46] Since the courts can eliminate the distinction only by engrafting exceptions, its abrogation is a duty for the legislatures. Carefully drawn statutes could without a doubt achieve this result.

PERSONAL TORT ACTIONS BETWEEN HUSBAND AND WIFE.—A recent case,[1] refusing on the ground of public policy to enforce a right of action for personal injuries sustained by a husband through the negligence of his wife even though that right was enforceable in the state where it was acquired,[2] brings to the fore the prominent part played by varying ideas of public policy in extending the legal rights of married parties and exemplifies the difficulties arising in the conflict of laws on such actions.

At common law, because of the legal unity of the spouses, neither could maintain an action against the other.[3] General dissatisfaction with the appli-

46. *Cf.* Comment (1931) 45 HARV. L. REV. 336

1. Poling v. Poling, 179 S. E. 604 (W. Va. 1935).

2. The automobile accident giving rise to the cause of action occurred in Alabama, where tort actions between husband and wife are maintainable. Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917) (wilful injury); Penton v. Penton, 223 Ala. 282, 135 So. 481 (1931) (negligent injury); Bennett v. Bennett, 224 Ala. 335, 140 So. 378 (1932) (negligent injury).

3. MADDEN, PERSONS AND DOMESTIC RELATIONS (1931) 220. The unity of the spouses was often disregarded in criminal actions and in suits in chancery, however. One spouse was held incapable of committing the crimes of larceny, burglary, or arson against the other because of the legal unity of person, but murder and criminal assault by one spouse against the other were held possible despite this unity. MADDEN, *op. cit. supra* at 227. In suits regarding her equitable estate a married woman could sue in the chancery court as a *femme sole* even under the common law. Jacques v. Methodist Episcopal Church, 17 Johns. 549 (N. Y. 1820).