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rather than subscription which the New York statute requires.<sup>16</sup> Yet Arizona, California and Virginia construe their statutes to forbid probate of a will on similar facts.<sup>17</sup> Clearly the will in the principal case could not be probated in New York, where all the requirements of the statute must be satisfied<sup>18</sup> and apply alike to all wills, with the single exception of nuncupative wills made by a soldier or sailor while in actual military or naval service or by a mariner while at sea.<sup>19</sup> Recent decisions in New York and elsewhere show a tendency toward a more liberal construction of the statute,<sup>20</sup> yet their liberality is, to say the least, conservative compared to the decision in the principal case.

## RECENT STATUTES

**CRIMINAL LAW—A NEW DEFINITION OF LARCENY.**—The New York Legislature, by an amendment to the Penal Law,<sup>1</sup> seeks to eliminate the procedural difficulties in prosecutions for larceny, which up until now have persisted because of the technical distinctions differentiating larceny, false pretenses and embezzlement.<sup>2</sup> The

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16. N. Y. DEC. EST. LAW (1938) § 21: "Every last will and testament . . . (1) shall be subscribed by the testator at the end of his will."

17. *In re Tyrrel's Estate*, 17 Ariz. 418, 153 Pac. 767 (1915); *In re Estate of Manchester*, 174 Cal. 417, 163 Pac. 358 (1917); *Warwick v. Warwick*, 86 Va. 596, 10 S. E. 843 (1890).

18. *Matter of Perrine*, 109 Misc. 459, 180 N. Y. Supp. 333 (1919). Herein the court denied probate to a holographic document, unattested, signed by the decedent and enclosed in a sealed envelope, on which, in addition to notation "Last Will and Testament of Isabelle Perrine", appeared the names of two witnesses. It was held that this document had not been executed as required by N. Y. DEC. EST. LAW (1938) § 21. In *Vogel v. Lehritter*, 139 N. Y. 223, 34 N. E. 914 (1893), a holographic document signed by deceased, attested on sealed envelope in which signed document was enclosed was held invalid. In *Matter of Kellem*, 52 N. Y. 517 (1873) the court pointed out that failure to comply with any one of these New York statutory requirements is absolutely fatal to the admission of the paper to probate.

19. As amended L. 1942, c. 668, N. Y. DEC. EST. LAW, § 16: "No nuncupative or unwritten or holographic will, bequeathing or devising personal or real estate, shall be valid, unless made by a soldier or a sailor while in actual military or naval service or by a mariner while at sea, and when made in the following manner: . . . (2) A holographic will when written entirely in the handwriting of the maker even though the same be unattested." *Sed quere*: Does the legislature intend no longer to require the signature of the testator to a holographic will made under these circumstances?

20. In *Matter of Eyett*, 124 Misc. 523, 209 N. Y. Supp. 251 (1925), where the testator's signature appeared only in attestation clause of a holographic will but below the dispositive parts, the court probated the will. *Matter of Field*, 204 N. Y. 448, 97 N. E. 881 (1912); *In re Morgan's Estate*, 200 Cal. 400, 253 Pac. 702 (1927); *Forrest v. Turner*, 146 Va. 734, 133 S. E. 69 (1926); *Graham v. Edwards*, 162 Ky. 771, 173 S. W. 127 (1915).

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1. N. Y. Laws 1942, c. 732, effective Sept. 1, 1942, repealing § 1290 of the Penal Law, substituting in its place a new section with the same numbering and adding a further § 1290-a.

2. The difficulty in distinguishing between larceny by trick and the statutory crime

text of the amendment is preceded by a "Declaration of Public Policy" which states that it is the intention of the legislature to abolish the distinctions between the various forms of theft as previously defined in section 1290 of the Penal Law.

Although the language defining larceny has been only slightly altered, the important change consists in the elimination of circumstances, as matter of defense, which have heretofore differentiated the various forms of the crime. Before the enactment of the Penal Code in 1881,<sup>3</sup> what was there defined as larceny constituted three separate crimes: larceny by trespass, in which there is an unlawful taking and asportation,<sup>4</sup> and larceny by trick and device, in which by such means the thief fraudulently obtains possession of the goods,<sup>5</sup> both forms of common law larceny;<sup>6</sup> false pretenses, in which the owner parts not only with possession but also with title in reliance upon a misrepresentation as to a past or existing fact;<sup>7</sup> and embezzlement in which a person rightfully in possession of a chattel forms the intent to convert it and does so.<sup>8</sup> The new section 1290 states that it will now be immaterial whether the taking be with or without the owner's consent, whether in the first instance possession, or title be obtained lawfully, or whether the owner intended to part with possession or title, or both, provided there is the intent to steal.<sup>9</sup> It will thus be seen that, while the new definition of larceny gives no extension to the scope of the crime of larceny, as it has formerly been defined in the Penal

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of false pretenses became apparent in the first case which recognized the former crime, *Rex v. Pear*, 1 Leach 212, 168 Eng. Rep. R. 208 (C. C. R. 1799), and this difficulty has continued. *People v. Noblett*, 244 N. Y. 355, 155 N. E. 670 (1927). Beale, *The Borderland of Larceny* (1892) 6 HARV. L. REV. 244; Note, *Larceny, Embezzlement and Obtaining Property by False Pretenses* (1920) 20 COL. L. REV. 318. Upon the nebulous distinction between custody and possession very often depended the determination whether the crime was larceny or embezzlement, see *Rex v. Bazeley*, 2 Leach 835, 168 Eng. Rep. R. 517 (1799); *People v. McDonald*, 43 N. Y. 61 (1870); *Regina v. Reed*, 6 Cox C. C. 284 (1854); *People v. Burr*, 41 How. Prac. 293 (N. Y. 1871); *In re Grin*, 112 Fed. 790 (C. C., N. D. Cal. 1901), *aff'd* 187 U. S. 181 (1902); or upon the exact point of time at which the intent to steal was formed, as in the case of a finder of lost property, see *Regina v. Thurborn*, 1 Den. 387, 169 Eng. Rep. R. 293 (1849); or upon the issue of breaking the bulk, see *Carrier's Case*, Year Book, 13 Edw. IV, 9, pl. 5 (1473); *Nichols v. People*, 17 N. Y. 114 (1858).

3. N. Y. Laws 1881, c. 676.

4. *Harrison v. People*, 50 N. Y. 518 (1872); *Hildebrand v. People*, 56 N. Y. 394 (1874).

5. *Smith v. People*, 53 N. Y. 111 (1873); *Loomis v. People*, 67 N. Y. 322 (1876); *People v. Miller*, 169 N. Y. 339, 62 N. E. 418 (1902).

6. The original form of larceny required a trespass until it was decided in *Rex v. Pear*, 1 Leach 212 (C. C. R. 1799) that fraud might take the place of force.

7. *People v. Noblett*, 244 N. Y. 355, 155 N. E. 670 (1927); *People v. Stiller*, 255 App. Div. 480, 7 N. Y. S. (2d) 865, *aff'd* 280 N. Y. 518, 19 N. E. (2d) 923 (1939).

8. *People v. Hennessey*, 15 Wend. 147 (N. Y. 1836); *People v. Meadows*, 199 N. Y. 1, 92 N. E. 128 (1910); *People v. Epstein*, 245 N. Y. 234, 157 N. E. 121 (1927).

9. It might have been better if the word "larceny", suggesting as it does the common law crime, had been entirely abandoned for the more inclusive word "theft". See *Pennsylvania Indemnity Fire Corp. v. Aldridge*, 117 F. (2d) 774 (App. D. C., 1941); *Van Vechten v. American Eagle Fire Ins. Co.*, 239 N. Y. 303, 146 N. E. 432 (1925); *People v. Stevenson*, 103 Cal. App. 82, 284 Pac. 487 (1930).

Law, it does in effect create a truly consolidated new crime, which is single, indivisible and comparatively simple to understand.<sup>10</sup>

The previous attempt of the legislature in 1881<sup>11</sup> to simplify the law by consolidating the three crimes into one called "larceny" failed because the courts did not interpret the statute as affecting any procedural reform. Prior to the 1942 amendment it was held that each form of the crime of larceny had to be prosecuted by a separate indictment or by a separate count of the indictment, *People v. Dumar*.<sup>12</sup> In that case the court pointed out that under Section 1290 there were four distinct and separate acts by which a person may commit larceny and that under the provisions of the Code of Criminal Procedure,<sup>13</sup> the indictment must charge not only the crime but also state the act constituting the crime. If the indictment contained separate counts containing all forms of the crime, the court might allow only one count to go to the jury,<sup>14</sup> and if more than one count were submitted to the jury, its verdict might be upset if the facts did not warrant conviction under one of the counts submitted.<sup>15</sup> For instance, where the act committed by the defendant constituted common larceny, but the court erroneously dismissed the indictment and permitted conviction under another indictment charging embezzlement, the conviction was reversed.<sup>16</sup> Similarly, if the indictment contains two counts, one for larceny by trick and the other for false pretenses (the crime actually committed) and the court dismisses the latter count and permits conviction under the former, the conviction must be reversed.<sup>17</sup> In both of these cases the defendant had clearly committed the statutory crime, but he went unpunished because he could not again be put in jeopardy of conviction. The New York courts have long recognized the need for remedial legislation.<sup>18</sup> At times in order to prevent a plain miscarriage of

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10. The old distinctions between larceny, embezzlement and false pretenses will continue to be important in civil litigation. See *Sweet & Co. v. Provident Loan Society*, 279 N. Y. 540, 18 N. E. (2d) 847 (1939).

11. See *supra* note 3.

12. 106 N. Y. 502, 13 N. E. 325 (1887).

13. CODE OF CRIMINAL PROCEDURE § 275. Even though under the new form of simplified indictment, provided for in N. Y. Laws 1929, c. 176, CODE OF CRIMINAL PROCEDURE §§ 295-a-295-k, the indictment need not specify the manner in which the crime charged was committed (C. C. P. §§ 295-b, 295-c and 295-f), the defendant would be entitled to a bill of particulars as to such matter. See *People v. Bogdanoff*, 254 N. Y. 16, 171 N. E. 890 (1930).

14. *People v. Noblett*, 244 N. Y. 355, 155 N. E. 670.

15. *People v. Cohen*, 148 App. Div. 205, 133 N. Y. Supp. 103 (1st Dep't 1911). See *People v. Lazar*, 271 N. Y. 27, 2 N. E. (2d) 32 (1936), where the court said, 271 N. Y. at 31, 2 N. E. (2d) at 33: "The case was submitted to the jury on two distinct theories, one of which was basically wrong. We cannot speculate as to which theory it adopted."

16. *Nichols v. People*, 17 N. Y. 114.

17. *People v. Noblett*, 244 N. Y. 355, 155 N. E. 670.

18. In *Nichols v. People*, 17 N. Y. 114, 120-121, Judge Pratt reluctantly concluded that "we must propound the law as we find it, . . ." Judge Lehman in *People v. Noblett*, 244 N. Y. 355, 359, 155 N. E. 670, 671, said: "Narrow technical distinctions by which a wrongdoer may escape the consequences of a crime hinder the administration of justice. The courts which administer the law fail to function properly when the penalty which the law has placed upon the commission of a crime may be evaded by the proven criminal

justice the courts have been forced to engage in subtle reasoning for the purpose of suiting the facts to the particular form of the crime charged.<sup>19</sup> The strong dissenting opinion of Judge Crane, delivered fifteen years ago, in *People v. Noblett*<sup>20</sup> has undoubtedly been instrumental in bringing about this long delayed revision of the law.<sup>21</sup>

The awkward problem presented to the prosecutor resulting from the narrow distinction between these crimes, has caused the enactment of legislation in England<sup>22</sup> and in many of the States.<sup>23</sup> However, in most instances the relief granted has been only partial, either due to shortcomings in the enactment itself or the conservative interpretation the statute has received from the courts.<sup>24</sup>

Massachusetts, in 1931, passed a statute which at least in one respect, may have served as a model for the New York legislation.<sup>25</sup> Under the Massachusetts law an indictment sufficiently charges the various forms of the crime, if it states that the defendant "did steal" the chattel.<sup>26</sup> The new section 1290-a of the Penal Law also provides that it will be sufficient if the indictment charges that the accused, with the required intent, "stole" the property and "is supported by proof of the commission by the accused of any one of the acts that constitute larceny as defined in this article."

The legislature may have inadvertently added a procedural requirement which was not intended. Previous to this statute it was sufficient if an indictment charged larceny by trick in the common law form, without setting forth the false pretense, if such were the trick or device used to fraudulently obtain possession of the property.<sup>27</sup> However, it was always necessary to allege in the indictment at least one of the misrepresentations, where the form of the crime was obtaining property by false

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through subtle reasoning based on obsolete theory."

19. *Loomis v. People*, 67 N. Y. 322 (1876); *People v. Miller*, 169 N. Y. 339, 62 N. E. 418; *People v. Stiller*, 255 App. Div. 480, 7 N. Y. S. (2d) 868, *aff'd* 280 N. Y. 518, 19 N. E. (2d) 923 (1939).

20. 244 N. Y. 355, 155 N. E. 670.

21. See Fuld, *The New Larceny Law*, 107 N. Y. L. J. (May 19, 1942), p. 2124, col. 1-3.

22. 7 & 8 Geo. IV c. 29, § 53 (1827) permits a conviction under a false pretenses indictment, even though the evidence shows larceny; 4 & 5 Geo. V, c. 58, § 39 (1914) provides for conviction of false pretenses, larceny or embezzlement even though the indictment is for larceny, embezzlement or larceny respectively; § 5 of the Criminal Appeal Act of 1907 (7 Edw. VII, c. 23) allows the Court of Criminal Appeal to substitute for the jury's verdict a verdict of another offense, if it appears to the court that the jury found facts warranting such a verdict.

23. ARK. STATS. (Pope, 1937) c. 42, § 3075; CAL. PENAL CODE (Deering, 1941) §§ 484, 951, 952; DEL. REV. CODE (1935) c. 150, § 5217, 37; ILL. REV. STATS. (1939) c. 38, § 253; KANS. GEN. STATS. (1935) § 21553; MINN. STATS. (Mason, 1927) c. 101, § 10358; MONT. REV. CODE (1935) c. 43, § 11368.

24. HALL & GLUECK, *CASES ON CRIMINAL LAW* (1940) 226-228; Note (1938) 22 MINN. L. REV. 211.

25. MASS. GEN. LAWS (1931) c. 266, § 30, defining larceny; *id.* c. 277, § 39 defining the words "larceny" and "stealing".

26. MASS. GEN. LAWS (1931) c. 277, § 79; *Commonwealth v. Kelley*, 184 Mass. 320, 68 N. E. 346 (1903).

27. *People v. Laurence*, 137 N. Y. 517, 33 N. E. 547 (1893).

pretenses.<sup>28</sup> The new amendment provides: "If, however, the theft was effected by means of any false or fraudulent representation or pretense, *evidence thereof may not be received at the trial unless the indictment or information alleges such means.*"<sup>29</sup> Does this mean that where the trick or device by which common law larceny is committed takes the form of a misrepresentation, it must be alleged in the indictment? It seems more plausible that the legislature was merely attempting to codify the old rule, and not attempting to increase the burden of the prosecution.

The new amendment, preceded as it is by the clear declaration of the legislative intent, should, if that intent is given effect by the courts, eliminate the needless and obsolete technicalities which have hampered the prosecution in this field of criminal law. It may well serve as model legislation for other states.

**MISTAKE OF LAW—DISTINCTION BETWEEN MISTAKE OF LAW AND MISTAKE OF FACT ABOLISHED.**—The history of mistake of law has completed a cycle, insofar as New York State is concerned, and the law now is substantially the same as it was prior to the 19th Century. Before 1802, no distinction had been made in civil cases between a mistake of fact and a mistake of law.<sup>1</sup> In that year, however, in the case of *Bilbie v. Lumley*,<sup>2</sup> Lord Ellenborough in refusing to grant restitution for a mistake of law said, "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."<sup>3</sup>

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28. *People v. Blanchard*, 90 N. Y. 314 (1882); *People v. Peckens*, 153 N. Y. 576, 588, 47 N. E. 883, 886 (1897). In false pretenses, as distinct from larceny by trick, the misrepresentation had to be of a particular kind, i.e., it had to refer to a past or existing fact. *People v. Miller*, 169 N. Y. 339, 62 N. E. 418 (1902); *People v. Sloane*, 254 App. Div. 780, *aff'd* 279 N. Y. 724, 17 N. E. (2d) 141 (1939). The difficulties this requirement has caused may be seen in a recent decision, *Brennan v. State*, 3 N. W. (2d) 217 (Neb. 1942).

29. N. Y. Laws 1942, c. 732, PENAL LAW § 1290-a. (Italics added.)

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1. *Hewer v. Bartholomew*, Cro. Eliz. 614, 78 Eng. Rep. R. 855 (1598); *Bonnel v. Foulke*, 2 Sid. 4, 82 Eng. Rep. R. 1224 (1657); *Turner v. Turner*, 2 Rep. Ch. 154, 21 Eng. Rep. R. 644 (1679); *Onions v. Tyrer*, 2 Vern. 741, 23 Eng. Rep. R. 1085 (1716). In *Lansdown v. Lansdown*, Mos. 364, 25 Eng. Rep. R. 441 (1730), the Lord Chancellor said at 365, 25 Eng. Rep. R. at 441: "That maxim of law, *Ignorantia juris non excusat*, was in regard to the public, that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases." *Bingham v. Bingham*, 1 Vesey, Sr., 126, 27 Eng. Rep. R. 934 (1748). In *Farmer v. Arundel*, 2 Black. W. 824, 96 Eng. Rep. R. 485 (1772), De Grey, C.J., said in a *dictum* at 825, 96 Eng. Rep. R. at 486: "When money is paid by one man to another, on a mistake either of fact or of law, or by deceit, this action will certainly lie." *Bize v. Dickason*, 1 T. R. 285, 99 Eng. Rep. R. 1097 (1786).

2. 2 East 469, 102 Eng. Rep. R. 448 (1802). Perhaps the reason for the decision was the ignorance of the counsel for the plaintiff. Lord Ellenborough asked counsel whether he could state any case where a recovery was had for money paid under a mistake of law. The lawyer did not answer and Lord Ellenborough continued with his decision. *Id.* at 470, 102 Eng. Rep. R. at 449. See also note 1 *supra*, and RESTATEMENT, RESTITUTION (1937), ch. 2, Topic 3, Introductory Note.

3. *Bilbie v. Lumley*, 2 East 469, 472, 102 Eng. Rep. R. 448, 449.

That doctrine has been generally accepted in both this country and in England, even though the distinction is illogical and the basis for the decision in the above case is without reason.<sup>4</sup> The distinction, with regard to New York, is merely of historic interest today. On April 29, 1942, the Legislature inserted into the Civil Practice Act a new section, § 112-f, which reads as follows: "§ 112-f. *Relief against mistake of law.* When relief against mistake is sought in an action or proceeding or by way of defense or counterclaim, relief shall not be denied merely because the mistake is one of law rather than one of fact."<sup>5</sup>

To dispel any doubt as to the aim and scope of the new section, the Law Revision Commission of the State of New York, in recommending the section to the Legislature for enactment, submitted the following statement: "Its purpose is to change the existing rule which denies relief merely because the mistake is one of law. Its purpose is not to grant relief in every case of mistake of law or to make the same rules applicable as in the case of mistake of fact. It does afford to the court, however, the power to act in appropriate cases involving a mistake of law."<sup>6</sup> Therefore this new section effectively overrules the principle of the *Bilbie* case in New York, and revives in this state the judicial power to grant relief in cases involving a mistake of law where the parties are equitably entitled to such relief.

The reasons which motivated this statutory enactment can best be appreciated by examining the modifications and limitations of the *Bilbie* decision in this country and particularly in New York. The remainder of this note will deal with the growth of the doctrine in the 140 years that have elapsed since the distinction between mistake of law and mistake of fact first arose. The many exceptions to the rule have been appended in a feeble attempt to obviate the harshness underlying it.

Although it was not until 1813 that the English courts recognized the *Bilbie* case as binding authority on them,<sup>7</sup> an American court in 1809 refused to grant relief for this type of mistake.<sup>8</sup> Chancellor Kent was an ardent advocate of the doctrine of refusing restitution in this country, proclaiming it to be a safe and wise policy.<sup>9</sup>

4. Seavey and Scott, *Notes, RESTATEMENT, RESTITUTION*, (1937) ch. 2, Topic 3, p. 35. Is not Seavey's language too broad when he states that the doctrine has been "almost universally adopted"? See notes 16-26 *infra*.

5. N. Y. Laws 1942, c. 558. This section is effective immediately.

6. Leg. Doc. (1942) No. 65 (B) p. 3.

7. *Brisbane v. Dacres*, 5 Taunt. 143, 128 Eng. Rep. R. 641 (1813). *Cf.* *Stevens v. Lynch*, 12 East. 38, 104 Eng. Rep. R. 16 (1810) where recovery was denied but no mention was made of *Bilbie v. Lumley*, 2 East. 469, 102 Eng. Rep. R. 448.

8. *Williams v. Hodgson*, 2 Har. & J. 474 (Md. 1809). Although *Bilbie v. Lumley* was not brought to its attention, the court at 482 said: "It is also established by the courts of law and equity, that ignorance of the law . . . cannot excuse or form a ground for relief in equity . . ."

9. Chancellor Kent in speaking about mistake of law in *Lyon v. Richmond*, 2 Johns. Ch. 51, 60 (N. Y. 1816) said: "The courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of the facts, though under a mistake of the law. Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind." In *Storrs v. Barker*, 6 Johns. Ch. 166, 170 (N. Y. 1822) he said: "It would seem, therefore, to be a wise principle of policy, that ignorance of the law, with knowledge of the fact, cannot generally be set up as a defence."

The jurists of that time expressed the fear that permission to set up a mistake of the law as a defense in particular instances would allow the defense to run riot throughout the entire field of the law. What these jurists apparently overlooked or were unimpressed with is that this defense when permitted by the discretion of the court would not overthrow all existing rules of law, but instead would allow the courts to grant relief in cases where justice demands that relief should be granted, without resorting to artificial formulae.<sup>10</sup>

Perhaps the most celebrated case in America on mistake of law is *Hunt v. Rousmaniere*.<sup>11</sup> In that case the plaintiff lent money to the defendant's intestate, taking back a letter of attorney with a power to sell, rather than a mortgage, under the mistaken view of the law that in case of death the power of attorney would bind the property equally as strongly as a mortgage. The court refused to grant any relief saying that the plaintiff had with deliberation made his choice and he must abide by the consequences of that decision.<sup>12</sup> And steadfastly through the years that followed this decision, the courts have denied relief for a pure and simple mistake of law.<sup>13</sup>

However, courts have realized that this doctrine is harsh and sometimes unjust, and ". . . judges are always glad to discover some special equity, aside from the mistake of law, which with the mistake may make their course more clear. Perhaps judges have sometimes been too ready to steer away from the dangers of the subject."<sup>14</sup> From these inequities arose the great field of exceptions to the rule. One broad basis of exceptions is that relief will be granted where there is a mistake of law on the one side plus inequitable conduct by the other party.<sup>15</sup> This inequitable

10. Connecticut and Kentucky have, by judicial decision, rejected the doctrine *in toto* and grant relief for mistake of law where the situation warrants it. The fear expressed by early jurists is controverted by the records of these two states. See *Northrop v. Graves*, 19 Conn. 547 (1849); *Gilpatric v. Hartford*, 98 Conn. 471, 120 Atl. 317 (1923); *Underwood v. Brockman*, 4 Dana 309, 29 Am. Dec. 407 (Ky. 1836); *Kentucky West Virginia Gas Co. v. Preece*, 260 Ky. 601, 86 S. W. (2d) 163 (1935).

11. 8 Wheat. 174 (U. S. 1823) and 1 Pet. 1 (U. S. 1828).

12. 1 Pet. 1, 14 (U. S. 1828). Story in commenting on this case says: "It is manifest that the whole controversy in this case turned upon the point whether a Court of Equity could grant relief where a security becomes ineffectual not by fraud or accident, or because it is not what the parties intended it to be, but because, conforming to that intention, the parties in executing it innocently mistook the law." 1 STORY, EQUITY JURISPRUDENCE (13 ed. 1886) 125. See also *ibid.* at § 114. When the case was up before the Supreme Court the first time, Chief Justice Marshall seemed to intimate that a court of equity could grant relief for a mistake of law. He said: "Although we do not find the naked principle, that relief may be granted on account of ignorance of law, asserted in the books, we find no case in which it has been decided, that a plain and acknowledged mistake in law is beyond the reach of equity." *Hunt v. Rousmaniere*, 8 Wheat. 174, 215 (U. S. 1823).

13. *Snell v. Insurance Co.*, 98 U. S. 85 (1878) *Bank of United States v. Daniel*, 12 Pet. 32 (U. S. 1838); *Weed v. Weed*, 94 N. Y. 243 (1883); *Treadwell v. Clark*, 124 App. Div. 260, 108 N. Y. Supp. 733 (1st Dep't 1908), *app. dismissed*, 192 N. Y. 531, 84 N. E. 1121 (1908); *Matter of Williams v. Gillespie*, 161 Misc. 156, 291 N. Y. Supp. 513 (Sup. Ct. 1936); *Matter of Welton*, 141 Misc. 674, 253 N. Y. Supp. 128 (Surr. Ct. 1931).

14. 1 STORY, EQUITY JURISPRUDENCE (13th ed. 1886) 112, n. (a).

15. 2 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 847, and cases cited therein.



conduct need not be willful or fraudulent, but may even be innocent.<sup>16</sup> Included in this broad category are benefits obtained through fraud,<sup>17</sup> or through a confidential relationship.<sup>18</sup> In the latter case it would clearly be inequitable to allow a person to retain any advantage gained through his peculiar relationship. Courts will, on the other hand, deny a recovery where payment was made to effect a compromise.<sup>19</sup> The theory of the denial is that the person making the compromise had deliberately made his choice.<sup>20</sup> Restitution will not be permitted where a party has in good faith used the money paid under a mistake of law and cannot now repay, or where he has otherwise altered his position in respect to the payment.<sup>21</sup> The fiction that everyone is presumed to know the law<sup>22</sup> is further restricted by interpreting it as meaning the law of one's own country and state, and thus we find cases allowing recovery for a mistake of foreign law, the courts treating the mistake as one of fact.<sup>23</sup>

Courts, particularly those in New York, usually allow a recovery where a govern-

16. *Ibid.*

17. *Haviland v. Willets*, 141 N. Y. 35, 35 N. E. 958 (1894); *Cooke v. Nathan*, 16 Barb. 342 (N. Y. 1853); see also *MacNamee v. Hermann*, 53 Fed. (2d) 549 (App. D. C., 1931); *Jekshewitz v. Groswald*, 265 Mass. 413, 164 N. E. 609 (1929); *RESTATEMENT, RESTITUTION* (1937) § 55.

18. *Pimpinello v. Swift & Co.*, 253 N. Y. 159, 170 N. E. 530 (1930); *Tompkins v. Hollister*, 60 Mich. 470, 27 N. W. 651 (1886); *Engelbrecht v. Engelbrecht*, 323 Ill. 208, 153 N. E. 827 (1926); *Jensen v. Snow*, 131 Me. 415, 163 Atl. 784 (1933); *Colby v. Life Indemnity & Inv. Co.*, 57 Minn. 510, 59 N. W. 539 (1894).

19. *Clarke v. Dutcher*, 9 Cow. 674 (N. Y. 1824); *Mowatt v. Wright*, 1 Wend. 355 (N. Y. 1828); *Sears v. Grand Lodge*, 163 N. Y. 374, 57 N. E. 618 (1900); *Butson v. Misc.*, 81 Or. 607, 160 Pac. 530 (1916); *Dalpine v. Lume*, 145 Mo. App. 549, 122 S. W. 776 (1909). Many times courts call payments made in a compromise voluntary payments. See *M & T Trust Co. v. City of Buffalo*, 266 N. Y. 319, 194 N. E. 841 (1935) where recovery was denied on an invalid tax assessment, the court holding that the payment was voluntary as a matter of fact.

20. The person usually has the choice of effecting a compromise or of litigating the dispute. If he chooses to settle, the courts will not reopen the matter when the person discovers that, as a matter of law, he would have been successful in court. Compromises are favored by courts and they will uphold them wherever possible. 2 *POMEROY, EQUITY JURISPRUDENCE* (4th ed. 1918) § 850; *New York Life Ins. Co. v. Chittenden*, 134 Iowa 613, 112 N. W. 96 (1907).

21. *Haviland v. Willets*, 141 N. Y. 35, 35 N. E. 958; *Holt v. Markham*, [1923] 1 K. B. 504 (1922). Recovery was denied in this case for two reasons: first, because there was a mistake of law, and second, because the bonus which the defendant had received, to which he was not entitled, had been invested in a company which had failed. See also *Ball v. Shepard*, 202 N. Y. 247, 254, 95 N. E. 719, 721 (1911).

22. With regard to this maxim it is interesting to note the acrid comment of Abbott, C.J. (afterwards Lord Tenterden) in *Montriou v. Jefferys*, 2 C. & P. 113, 116, 172 Eng. Rep. R. 51, 53 (1825): ". . . God forbid that it should be imagined that an attorney, or a counsel, or even a judge is bound to know all the law. . .".

23. *Bank of Chillicothe v. Dodge*, 8 Barb. 233 (N. Y. 1850); *Vinal v. Continental Construction Co.*, 53 Hun 247 (3d Dep't N. Y. 1889); *Merchants' Bank v. Spalding*, 12 Barb. 302 (N. Y. 1851); *Nicholson v. Nicholson*, 83 Kan. 233, 109 Pac. 1086 (1910); see also *Orth v. Kaesche*, 165 App. Div. 513, 150 N. Y. Supp. 957 (1st Dep't 1914).

mental body or official is suing for money paid under a mistake of law.<sup>24</sup> The reason for this exception to the rule is that the money involved is usually taxpayers' money and to deny a recovery would work a hardship on the people generally.<sup>25</sup> Recovery is not often permitted when an individual sues a governmental body;<sup>26</sup> cases permitting a recovery do so on the basis that the payment, frequently of taxes invalidly assessed, was made under duress and therefore cannot be considered a voluntary payment.<sup>27</sup>

The distinction between a mistake of law and one of fact is illusory and sometimes great difficulty is incurred in determining in which field the mistake lies.<sup>28</sup> An interesting case in this respect is *Champlin v. Laytin* in which one judge based his decision on the ground that the mistake was one of fact, and another judge permits recovery, in a concurring opinion, on the basis of a mistake of law.<sup>29</sup>

24. *Village of Fort Edward v. Fish*, 156 N. Y. 363, 50 N. E. 973 (1898); *People v. Sutherland*, 207 N. Y. 22, 100 N. E. 440 (1912); *New York City Employees' Retirement System v. Eliot*, 267 N. Y. 193, 196 N. E. 23 (1935); *New York Telephone Company v. Board of Education of the City of Elmira*, 270 N. Y. 111, 200 N. E. 663 (1936). The above cases all permitted a recovery where the governmental body sued the individual. The following cases involved one governmental body suing another: *County of Erie v. Town of Tonawanda*, 95 Misc. 663, 159 N. Y. Supp. 714 (1916), *aff'd*, 176 App. Div. 942, 159 N. Y. Supp. 714 (4th Dep't 1917) (recovery permitted); *Flynn v. Hurd*, 118 N. Y. 19, 22 N. E. 1109 (1889) (recovery denied). Money paid to a court officer invalidly appointed was recovered in *Matter of Voluntary Dissolution of the Home Provident Safety Fund Association of New York*, 129 N. Y. 288, 29 N. E. 323 (1891).

25. *Village of Fort Edward v. Smith*, 156 N. Y. 363, 375, 50 N. E. 973, 976 (1898): "It is a matter of grave public concern to protect municipal corporations from the unauthorized and illegal acts of their agents in wasting the funds of the taxpayers. . . . once let it go forth as the settled law of the state that an illegal contract can become the basis of a lawful compromise . . . and a new door will be opened to municipal spoliation. . . . Sound public policy will not permit the courts to countenance this. . . ."

26. *N. Y. & Harlem R.R. Co. v. Marsh*, 12 N. Y. 308 (1855); *Redmond v. Mayor, etc.*, 125 N. Y. 632, 26 N. E. 727 (1891); *M & T Trust Co. v. City of Buffalo*, 266 N. Y. 319, 194 N. E. 841 (1935).

27. *Adrico Realty Corp. v. City of New York*, 250 N. Y. 29, 164 N. E. 732 (1928); *Moss Estate, Inc. v. Town of Ossining*, 268 N. Y. 114, 196 N. E. 762 (1935); see also *Staten Island Hygeia Ice & Cold Storage Co. v. United States*, 85 F. (2d) 68 (C. C. A. 2d, 1936) (misrepresentation by tax collector).

28. *Champlin v. Laytin*, 18 Wend. 407 (N. Y. 1837); *Smith v. Hellman Motor Corporation*, 122 Misc. 422, 204 N. Y. Supp. 229 (N. Y. City Ct. 1924); *Woodruff v. Claffin Co.*, 198 N. Y. 470, 91 N. E. 1103 (1910). In this case recovery could have been allowed because of the fiduciary relationship of the administrator to the creditors as a whole. *E. R. Squibb & Sons v. Chemical Foundation, Inc.*, 93 F. (2d) 475 (C. C. A. 2d, 1937); *Pitcher v. The Turin Plank Road Company*, 10 Barb. 436 (1851).

29. 18 Wend. 407 (N. Y. 1837). The majority opinion allows recovery based on a mistake of fact. Bronson, J., at 412 says: "Courts of equity may grant relief against acts done and contracts executed under a mistake, or in ignorance of material facts; but it is otherwise, I think, where a party wishes to avoid his act or deed, on the ground that he was ignorant of the law. All men are presumed to know the law. . . ." In a concurring opinion, Senator Paige allowed recovery under a mistake of law. He aptly