THE BASIS OF RESTITUTION

For a very long time, the unsettled nature of the law in this field has given rise to controversy as to the basis of liability in quasi-contract. Two schools of thought exist. The so-called orthodox view is that the extent of liability in quasi-contract depends on its corresponding extent of liability in contract. In *Sinclair* v. *Brougham,* Lord Sumner said[1] of the action for money had and received: " All now rest, and long have rested, upon a notional or imputed promise to repay." The other view is that liability is based on the theory of unjust enrichment. The earliest exponent of this view was Lord Mansfield. In *Moses* v. *Macferlan,* he said: [2] "The action for money had and received lies for money paid by mistake; or upon a consideration which happens to fail; or for money got from imposition, (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." In the course of time, this view has been the object of many disparaging remarks;[3] nevertheless it has its supporters, among others, in Lord Wright,[4] Cotton L.J.,[5] Winfield,[6] and Friedmann.[7] In the United States, the second is the orthodox view, perhaps the only view.

To litigants, what is important is not whether the first or the second theory is correct, but whether different consequences flow from the acceptance of one or the other. If the practical results are the same whichever view one takes, then the whole controversy is a lot of puff. Indeed, the controversy is largely academic, for, in the majority of cases, the result is the same on either basis. For example, neither theory could support a depositor in an action to recover money lent to a building company carrying on an *ultra vires* banking business.[8]

But it is the odd case which brings out the real difference between the two theories and the artificiality of the first. As Cotton L.J. pointed in *Re Rhodes,*[5] to support an action for the recovery of sums expended on the necessaries of a lunatic on the basis of implied contract is "erroneous and unfortunate," as a lunatic, *ex hypothesi,* is incapable of contracting. That the second theory is in the ascendency is reflected in the recent decision of the Privy Council in *Kiriri Cotton Co. Ltd.* v. *Dewani.*[9] The facts of this case are simple. The plaintiff (respondent) came to live at Kampala in Uganda and for that purpose rented a flat from the defendant (appellant), the owner, paying a premium of 10,000 shillings. This was illegal because it was in contravention of the Rent Restriction Ordinance, 1949, of Uganda. The mistake arose because the lawyers who drew up the lease failed to appreciate the

1. [1914] A.C. 398, 453. Other adherents to this view are Cozens Hardy M.R. in *Baylis* v. *Bishop of London* [1913] 1 Ch. 127, 133; Scrutton L.J. in *Holt* v. *Markham* [1923] 1 K.B. 504, 513; Lord Greene in *Morgan* v. *Ashcroft* [1938] 1 K.B. 49. 62; Mr. Landon, 53 L.Q.R. 302; and Sir William Holdsworth, Essays in Law and History, 238.

2. (1760) 2 Burr. 1005, 1012; see also *Smith* v. *Bromley* (1760) 2 Doug. 696.

3. See note 1.

4. *Fribosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32, 62-64; *Brooks' Wharf* v. *Goodman Brothers* [1937] 1 K.B. 534, 545.

5. *Re Rhodes* [1890] 44 Ch. D. 94, 105.

6. 53 L.Q.R. 447; 54 L.Q.R. 529; 64 L.Q.R. 46; and in *Province of the Law of Tort.*

7. 53 L.Q.R. 449; *Legal Theory.*

8. *Sinclair* v. *Brougham* [1914] A.C. 398.

9. [1960] 2 W.L.R. 127; [1960] I All E.R. 177. The Board consisted on Lord Denning, Lord Jenkins and the Rt. Hon. Mr. L. M. D. de Silva.

importance of the definition of 'premises.'[10] The plaintiff claimed the return of the premium. The High Court of Uganda gave judgment for the plaintiff. The Court of Appeal of East Africa affirmed the decision. The defendant company appealed to Her Majesty in Council, no doubt encouraged by a previous conflicting decision of the same Court of Appeal. The Privy Council dismissed the appeal.

Their Lordships were presented with two issues: (1) In the absence of a statutory provision enabling a premium to be recovered, is the plaintiff deprived of the common law remedy for money had and received? (2) If not, are the parties *in pari delicto,* so that the plaintiff is not entitled to recover the premium?

As to the first issue, the appellant (defendant) relied on the case of *R.* v. *Godinho*[11] in which the Court of Appeal for East Africa decided that without the statutory right of recovery, the giver of the illegal premium was left in the position of one who, although he himself had committed no substantive offence, had aided and abetted the commission of an offence by another. In those circumstances he could not go into a civil court with clean hands, and the principle stated by Lord Ellenborough in *Langton* v. *Hughes*[12] applied: "What is done in contravention of an Act of Parliament cannot be made the subject of an action." Their Lordships had two answers to this contention. First, they had no difficulty in impeaching the validity of this reasoning. They pointed out that the observation of Lord Ellenborough was made in a case where a party was seeking the aid of the court in order positively to enforce an illegal contract and should be confined to cases of that description. Secondly, they pointed out that the exclusion of a statutory remedy did not, in such cases, exclude the remedy by money had and received. That was sufficiently evident from the cases such as those arising under the statutes against usury, lotteries and gaming in which there was no remedy given by the statute but it was nevertheless held that an action lay for money had and received. In cases such as the present, where a party was seeking to recover money paid or properly transferred under the illegal transaction, the general principle applicable was stated by Littledale J. in *Hastelow* v. *Jackson:*[13] "If two parties enter into an illegal contract and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards."

It was clear that in the present case the illegal transaction was fully executed and carried out. This left their Lordships with the second issue. The appellant argued that the parties were *in pari delicto.* The payment was made voluntarily under a mistake of law. Both parties were supposed to know the law but both equally mistook it and were thus *in pari delicto.*[14] This argument was rejected for two reasons. First, nobody is presumed to know the law. "The true proposition is that no man can excuse himself from doing his duty by saying that he did not know the law."[15] Secondly, it is also not correct to say that money paid under a mistake of law can never be recovered back. "The true proposition is that money paid under

10. According to s.2 of the Ordinance, 'premises' means any building or part of a building let for business, trade or professional purpose or for the public service. The proviso relating to the charging of a premium on the grant for a long lease of premises could not apply to the fiat in question — because by the very terms of the sub-lease it was let for residence only. *Cf.* Federation of Malaya Control of Rent Ord., 1956, s.4(2) and Singapore Control of Rent Ord., 1947, s.4, both of which make provision for the recovery of premiums illegally paid.

11. (1950) 17 E.A.C.A. 132.

12. (1813) 1 M. & S. 593, 596: 105 E.R. 222, 223.

13. (1828) 8 B. & C. 221, 226; 108 E.R. 1026, 1028.

14. In support counsel cited: *Harse* v. *Pearl Life Assurance* [1904] 1 K.B. 568; *William Whiteley Ltd.* v. *The King* (1909) 26 T.L.R. 19; *Evanson* v. *Crooks* (1911) 28 T.L.R. 123; *Sharp Brothers & Knight* v. *Chant* [1917] 1 K.B. 771, 776.

15. [1960] 2 W.L.R. 127, 133. See *Rogers* v. *Ingham* (1876) 3 Ch. D. 351, 355 James L.J.

a mistake of law, by itself and without more, cannot be recovered back."[16] If an additional element exists which throws the responsibility on the defendant, then the parties are not *in pari delicto* and the money may be recovered back. Without being exhaustive, their Lordships gave two instances: the first, where the duty of observing the law is placed on the shoulders of one rather than the other,[17] and the second, where the responsibility for the mistake lies more on the one than the other.[18] In the present case the Uganda Rent Restriction Ordinance was intended to protect tenants from being exploited by landlords in days of housing shortage. The duty of observing the law was placed on the shoulders of the landlord for the protection of the tenant. If the law was broken the landlord must take the primary responsibility. The parties were therefore not *in pari delicto* and the tenant was entitled to recover the premium by the common law.

It is important to note that their Lordships based their decision entirely on the principles enunciated by Lord Mansfield in his efforts to treat quasi-contract as essentially an equitable institution. Their unqualified approval of his stand was clearly expressed in the following passage:

" These propositions are in full accord with the principles laid down by Lord Mansfield relating to the action for money had and received. Their Lordships have in mind particularly his judgment in *Smith* v. *Bromley*[19], in notis, which he delivered when he sat at Guildhall in April, 1760: and his celebrated judgment three or four weeks later, on May 19, 1760, in Moses v. *Macferlan*[20] when he sat in banco. Their Lordships were referred to some cases 30 or 40 years ago when disparaging remarks were made about the action for money had and received: but their Lordships venture to suggest that these were made under a misunderstanding of its origin. It is not an action on contract or imputed contract. If it were, none such could be imputed here, as their Lordships readily agree. It is simply an action for restitution of money which the defendant has received but which the laws says he ought to return to the plaintiff. This was explained by Lord Wright in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*[21] All the particular heads of money had and received, such as money paid under a mistake of fact, paid under a consideration that has wholly failed, money paid by one who is not *in pari delicto* with the defendant, are only instances where the law says the money ought to be returned." [22]

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16. *Browning* v. *Morris* (1778) 2 Cowp. 790, 792; 98 E.R. 1364: ". . .where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon the other; there, the parties are not in *pari delicto;* and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract."
17. See note 16.
18. *Harse* v. *Pearl Life Assurance Co.* [1904] 1 K.B. 558, 564.
19. (1760) 2 Doug. 696.
20. (1760) 2 Burr. 1005.
21. [1943] A.C. 32, 62-64.
22. [1960] 2 W.L.R. 127, 133