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## Quasi-Contract—Change of Position by Receipt of Money in Satisfaction of a Præexisting Obligation

IT is commonly stated that a payment made under mistake of fact cannot be recovered from the recipient who has thereafter in good faith changed his position.<sup>1</sup> The basis of the rule is said to be found in the governing and fundamental principle of quasi-contracts:

"To say that a plaintiff can recover money paid by mistake notwithstanding the recovery will throw a loss upon the defendant, . . . is to lose sight of the grounds upon which a recovery is allowed—namely, that the defendant has money which in conscience he cannot keep. It seems difficult to establish in a case where the defendant cannot be said to be more responsible for the mistake made by the plaintiff than is the plaintiff himself, that he should in conscience return to the plaintiff money paid under mistake, where the result of such repayment is to throw a loss upon the defendant which he would not have suffered, had not the payment been made. The principle that forbids the defendant enriching himself at the expense of the plaintiff should clearly forbid the plaintiff indemnifying himself against loss at the expense of an innocent and blameless defendant."<sup>2</sup>

### I. QUALIFICATIONS TO RULE OF CHANGE OF POSITION

Before undertaking a study of the problems indicated by the title, let us consider possible exceptions or qualifications to a general rule of change of position. While there is more or less distinct recognition in the cases for allowing recovery where the defendant can be regarded as in some way solely to blame or at least more to blame than the plaintiff for the mistake, the point has been adequately treated elsewhere and it is not proposed to deal with it here.<sup>3</sup>

<sup>1</sup> To be sure some cases deny this, e.g., *Kingston Bank v. Eltinge* (1869) 40 N. Y. 391, 100 Am. Dec. 516; *Durant v. Ecclesiastical Comm'rs* (1880) 6 Q. B. D. 234. See KEENER, *QUASI-CONTRACTS* (1893) 66; WOODWARD, *QUASI-CONTRACTS* (1913) §25; Cohen, *Change of Position in Quasi-Contracts* (1932) 45 HARV. L. REV. 1333; Costigan, *Change of Position as a Defense* (1907) 20 HARV. L. REV. 205, 216.

<sup>2</sup> KEENER, *op. cit. supra* note 1, at 67.

<sup>3</sup> *Ibid.* 71-72; WOODWARD, *loc. cit. supra* note 1; Cohen, *op. cit. supra* note 1, at 1356; Costigan, *op. cit. supra* note 1, at 205, 212.

Must the plaintiff have foreseen or have been in a situation where he might reasonably have anticipated the change of position? If it were not for one line of decisions, one would have little hesitation in giving a negative answer. The underlying principle of quasi-contract would make this immaterial and, in the cases denying recovery, no reference is made to such a qualification, and in many of them it is impossible to see how the plaintiff could have reasonably contemplated the particular, or any, change of position. Nor in the cases permitting recovery, with the possible exception of the undisclosed principal decisions, is any stress laid upon this fact.<sup>4</sup> However, where the payment is made to a known agent, it is, of course, true that the plaintiff expects a change of position, namely payment over to the principal. The authorities awarding recovery where an agent of an undisclosed principal has made the payment over, may be thought to rest upon the necessity of such contemplation.<sup>5</sup> But the undisclosed principal cases have been subjected to severe criticism.<sup>6</sup> The possible flaw in the leading case of *Newall v. Tomlinson*<sup>7</sup> is that the rule of payment

<sup>4</sup> *Ibid.* 212 n.: "Where it is not in consequence of the payment, change of position is immaterial . . . It is only by showing that but for the mistake he would not have changed his position, that the defendant can get any equity. Causation is necessary to make his change of position part of the same transaction as the plaintiff's mistaken payment, but that causation need not impute any blame to the plaintiff."

<sup>5</sup> In *Newall v. Tomlinson* (1871) L. R. 6 C. P. 405, 408, Bovill, C. J., said: "In no sense could they [defendants] be said to have received this money for the purpose of handing it over to Messrs. Dixon & Co." In *Continental Caoutchouc & Gutta Percha Co. v. Kleinwort, Sons, & Co.* (1904) 90 L. T. 474, Collins, M. R., remarked: "It is clear law that *prima facie* the person to whom money has been paid under a mistake of fact is liable to refund it, even though he may have paid it away to third parties in ignorance of the mistake. He has had the benefit of the windfall and must restore it to the true owner. On the other hand, it is equally true that an intermediary who has received money for the purpose of handing it over to a third party, and has handed it over, is no longer accountable to the sender. In such case he is a mere conduit-pipe, and has not had the benefit of the windfall."

<sup>6</sup> KEENER, *op. cit. supra* note 1, at 62; WOODWARD, *op. cit. supra* note 1, §27. The American Law Institute Restatement of Agency, §564, adopts under protest the rule of recovery simply out of deference to authority; see explanatory note to this section where in addition Professor Costigan's theory of a warranty by the agent that he is a principal is criticized.

<sup>7</sup> *Supra* note 5. The particular case might have been put solely, as it was in part, on the ground that the mistake was due to the carelessness of the defendant rather than to any fault on the part of the plaintiff.

Mr. Cohen, *op. cit. supra* note 1, at 1347, would explain the disclosed agency cases as resting not upon change of position but upon "elementary principles of agency which relieve a disclosed agent of liability when his authorized functions are performed." In his judgment the undisclosed agency cases largely prove this and are probably based on the analogy of the liability of the undisclosed agent on contracts made for the principal. He adds (note 46): "If the defendant is known to be an agent, and it is provided that he is to turn over to a third person money

over by the known agent is treated as a peculiar doctrine of agency instead of a mere instance of a wider principle of change of position. Granting that in certain fields of law, notably the tort field of negligence, actual causation alone is insufficient to impose legal consequences, it by no means follows in this particular branch of law, based on the theory of unjust retention of the money, that the plaintiff must have expected or as a reasonably prudent individual should have appreciated the possibility of the consequences.

Must the change of position be "irrevocable"? Mr. Woodward<sup>8</sup> strongly urges an affirmative answer and it must be admitted that certain cases support his contention. Thus, in *Phetteplace v. Bucklin*<sup>9</sup> a surety on an executor's bond was permitted recovery where, after the malversation and insolvency of his principal, he had paid a lapsed legacy to the defendant, the executor of a predeceased legatee, and the defendant in turn had paid over the money to those entitled to the estate of the legatee. The court thought that the defendant must show that reasonable efforts had been taken to recover the money and had proved unavailing. While it was suggested that a simple request might have been sufficient to insure a return, we are not told definitely that a declined request would have exonerated the defendant. What would be reasonable efforts? Would the defendant be required to sue the distributees, some of whom lived in distant countries, or show their insolvency? Would the plaintiff's action be premature while the de-

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paid him by the plaintiff, he is not liable to repay money paid under mistake after he pays it to his principal, because he was not expected to be liable, and not because he made an unproved ["unproved," apparently because Mr. Cohen believes change of position must be "irrevocable" in the sense indicated *infra*] change of position." The answer is that when payment is made under mistake, liability is never rested upon expectation or intention, whereas when the undisclosed agent enters into a true contract his liability is based upon the justifiable expectation of the third person.

<sup>8</sup> *Op. cit. supra* note 1, §26. Cohen, *op. cit. supra* note 1, at 1346, is of the same opinion.

<sup>9</sup> (1893) 18 R. I. 297, 27 Atl. 211. The decision, however, is not rested entirely on this ground. While the surety was ignorant of the predecease of the legatee, it was not proved that the defendant was ignorant. The court thought that the burden was on the defendant to show his ignorance and that in the absence of such ignorance at the time of receipt or before the payment over, he must refund. The court also seemed to deny altogether the doctrine of change of position unless there was additional laches upon the discovery of the truth in failing to demand repayment, followed by subsequent change of position. It is interesting to note that while the defendant might have been aware of the predecease he might have been ignorant of the law as to lapsed legacies in which case there would have been a mistake of fact by the plaintiff and one of law by the defendant. If there is merit in the rule denying recovery when the plaintiff is under a mistake of law as distinguished from one of fact, it would seem that the plaintiff should recover where the defendant's change of position was due to such mistake of law.

fendant's suits were pending? Would the defendant have to bear the expenses of such suits?<sup>10</sup> If the view be taken, as it occasionally has been in analogous cases,<sup>11</sup> that the defendant has not sufficiently changed his position if these distributees are solvent, what are the consequences? The present solvency of these persons is no guaranty of their solvency by the time judgments can be obtained. Furthermore, even in case of insolvency the change of position may not be *wholly* irrevocable since it does not follow that the defendant could not get something from the insolvent distributees. The way is open to cast all expenses upon the plaintiff and to resolve all doubts of the irrevocable character of the change of position, without unduly prejudicing the plaintiff, by forcing the plaintiff to sue these distributees.

In a New York case<sup>12</sup> the plaintiff, owner of lot 28 subjected to a paving assessment, received notice of the assessment on lot 27. Supposing the notice to refer to his lot, he paid the city, whose officer apparently thought him to be the owner. Recovery was permitted for the reason that there was nothing to show that the position of the defendant had been changed and that it could not upon refunding enforce the lien against lot 27. But why could not justice be done the plaintiff by subrogating him to the lien? By that method the plaintiff would be protected as much as he should be, assuming there be merit in the rule of change of position, while risks of depreciation in value of the property, due to ordinary causes or destruction of improvements, or of loss of lien owing to a sale to a purchaser buying on the strength of the recorded payment, are shifted to the plaintiff. In still another New York decision<sup>13</sup> a debtor overpaid his creditor's assignee for security and subsequently the assignee released the assignor's surety upon receiving from him the balance due from the assignor. To the argument that the assignor was now insolvent, the court countered with the answer that the assignee could still recover

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<sup>10</sup> The later Rhode Island case of *Hatton v. Howard Braiding Co.* (1925) 47 R. I. 47, 59, 129 Atl. 805, 810, comes pretty close to overruling *Phetteplace v. Bucklin* on the point. The only distinguishing feature is that the facts showed that a simple request would probably have been unavailing. The court said: "Provided the legatee is solvent, what must an executor do under such circumstances? Must he bear the expenses of an unsuccessful suit against the legatee before it can be said that the executor's position has been unalterably changed for the worse? We think not."

<sup>11</sup> See *First National Bank v. Behon* (1891) 91 Ky. 560, 16 S. W. 368, *infra* note 55.

<sup>12</sup> *Mayer v. New York* (1875) 63 N. Y. 455.

<sup>13</sup> *Lawrence v. American National Bank* (1873) 54 N. Y. 432, *infra* note 72. See also *Grand Lodge v. Towne* (1917) 136 Minn. 72, 161 N. W. 403, L. R. A. 1917E 344, *infra* page 337. *Bank of New York v. Thos. W. Simmons Co.* (1921) 117 Misc. 103, 190 N. Y. Supp. 602.

from the surety since the release was given under mistake. Besides the objections made above, it may be added that the surety might conceivably have a defense in that his own position had been changed in consequence of the defendant's release.<sup>14</sup> In fact, since the possible defenses of a surety are numerous and since a determination in this action that the defendant may look to the surety would not be conclusive in the later action against the latter, it would seem fairer to subrogate the plaintiff to any remedy against the surety.

The courts, however, do not always require an "irrevocable" change of position in the sense just indicated. In the case of payment over by the known agent to his principal we hear nothing of the necessity of the impossibility of the agent's collecting from the principal. To meet the argument to be drawn from such decisions, Mr. Woodward<sup>15</sup> replies:

"A better reason for denying relief against the agent would seem to be that since a payment to an agent is in legal contemplation a payment to his principal, it is the principal and not the agent who benefits by the mistake. And if this be true, the agent certainly does no wrong in putting his principal into the possession of the money even after the receipt of notice that a claim for restitution, equitable in its nature, has been made."<sup>16</sup>

There are two difficulties with this argument. In the first place, Mr. Woodward is driven to contend, contrary to the decisions, that the agent should not be liable where he pays over after notice of the mistake. In the second place, while payment to an unauthorized agent of what is actually due is legally a payment to the principal, so far as the debtor is concerned, it may be doubted whether, at least when the principal has not participated in the mistake nor ratified the payment in some way, such a payment is legally a payment to the principal. Can it be true in such a case, if the agent does not pay the money over but appropriates it to his own use, the principal would be liable? Clearly the principal is in no way enriched.<sup>17</sup> Also where the defendant in good faith has taken from

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<sup>14</sup> See Ann. Cas. 1914B 57, on the problem of estoppel in favor of a surety who has been told by the creditor that the debt has been paid, when for some reason the payment or settlement with the principal debtor has proved unavailing.

<sup>15</sup> *Op. cit. supra* note 1, §27.

<sup>16</sup> While *Phetteplace v. Bucklin*, *supra* note 9, on which Mr. Woodward places much reliance, was not a case of payment to an agent, yet the defendant was an executor who was doubtless expected by the plaintiff to pay over the money to creditors or distributees of the legatee's estate. So far as payment over was concerned, the situation should be governed by the same rule. See *Beam v. Copeland* (1890) 54 Ark. 70, 14 S. W. 1094.

<sup>17</sup> *Cf. Fay v. Slaughter* (1902) 194 Ill. 157, 62 N. E. 592, 56 L. R. A. 564; *Credit Alliance Corp. v. Sheridan Theatre Co.* (1923) 121 Misc. 656, 202 N. Y. Supp. 217. In the former the defendant's agent with authority to draw checks on a bank and to indorse checks for deposit forged the defendant's name to an assignment of a stock certificate belonging to the latter and transferred it to the plaintiffs, innocent purchasers. In payment the agent received checks to the defendant's

his debtor in payment money stolen from the plaintiff, recovery is denied without reference to the ability of the defendant to collect again from the thief.<sup>18</sup> Likewise in the *Price v. Neal* problem, *infra* page 346, no importance seems attached to the question whether or not the defendant could collect from other parties such as prior indorsers on their warranties of genuineness or from the forger himself. And in other cases of money paid to the defendant under mistake recovery has been denied on the ground of change of position which may not be "irrevocable."<sup>19</sup> Nor is it without significance to our present problem that where the legal title to ordinary property, which is subject to an equity, passes to a *bona fide* purchaser, the authorities afford no recognition to the idea that he can be forced to surrender if it appears that he can recover from his transferor what he gave or its value. The holder of the equity is left to pursue the transferor. Furthermore the transferee is left undisturbed in possession of the property even where it is more valuable than the consideration given.

It is submitted that such cases as *Grier v. Huston*<sup>20</sup> are not inconsistent with the position here taken. A debtor by mistake overpaid an administrator who made a distribution among creditors and legatees. It was held that the administrator was liable if, when he discovered the mistake, there were sufficient assets remaining to reimburse himself. In the first place, it would be difficult to show that the very money or its proceeds were paid over, since the funds are usually mingled. In the second place, if this could be established, yet the situation is one where no appreciable risk is imposed upon the defendant. If the very money had gone to creditors of the estate, the plaintiff

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order which he indorsed with the defendant's name, depositing them with the bank where they were credited to the defendant's account. The agent subsequently drew upon this account and appropriated the proceeds. It was held the defendant was not liable though the money, so to speak, passed through his account, since he got no benefit from it. While Woodward, *op. cit. supra* note 1, §76, disapproves of the result, it would have had the support of Keener, *op. cit. supra* note 1, at 333-334, as it has the note writers' in (1920) 20 COL. L. REV. 602 and (1924) 33 YALE L. J. 664.

<sup>18</sup> See *infra* page 318.

<sup>19</sup> See, e.g., *Whitehurst v. Mason* (1913) 140 Ga. 148, 78 S. E. 938, *infra* note 71 (payment to an assignee for security under a void assignment, despite the fact that there was a solvent surety for the assignor who was also solvent so far as appears); *Winslow v. Anderson* (1917) 78 N. H. 478, 102 Atl. 310; *Espy v. Allison* (Pa. 1840) 9 Watts 462; *Boas v. Updegrove* (1847) 5 Pa. 516. In *Jefferson County v. McGrath's Ex'r.* (1925) 205 Ky. 484, 266 S. W. 29, a county which had by mistake given a warrant to a contractor for more than was owing was denied recovery from an assignee for value who had collected the full amount. While it appeared that the contractor had become insolvent after the payment, the opinion is rested largely on the point that the defendant was not unjustly enriched since he received only what he paid for the warrant. Mr. Woodward (1925) 20 ILL. L. REV. 88, thinks the result would be indefensible in the absence of the contractor's insolvency.

would doubtless be unable to recover from them. Hence, unless he could sue the administrator, the plaintiff would be remediless until the legatees had been paid the balance of the assets. The situation is comparable to one in which the agent merely credits his principal on his books. The credit may be cancelled with little if any danger to the agent. There is an analogous problem in the law of negotiable instruments where a bank discounting paper merely credits the price to the seller and up to the time of notice of defenses the seller's balance has continuously been in excess of the amount of the discount. Here it is usually held that the bank is not a holder in due course since it has parted with nothing.<sup>21</sup>

## II. STOLEN AND EMBEZZLED MONEY

As a preliminary to a discussion of the main problem, we may consider another line of authorities whose bearing is believed to be significant.

It is an elementary principle of law that money possesses a negotiable character differentiating it from ordinary property. Thus even a thief of money may confer an indefeasible title upon one who in good faith gives "value" therefor. Nor in the case of money is value restricted to a new consideration presently passing; one who takes money in payment of or even as security for a preëxisting debt is regarded as a taker for value.<sup>22</sup>

It is important to bear in mind the reasons for such conclusions. With regard to the person who gives a new consideration in return, the answer has seemed obvious to the courts. In the first place it is most impracticable for the taker to investigate the true title of money; here the common saying that money has no earmarks is of significance.<sup>23</sup> In the second place, and of greater importance, the con-

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<sup>20</sup> (Pa. 1822) 8 S. & R. 402.

<sup>21</sup> *Mann v. Second National Bank of Springfield* (1883) 30 Kan. 412; *Union National Bank v. Winsor* (1907) 101 Minn. 470, 112 N. W. 999, 11 Ann. Cas. 204. See BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* (4th ed. 1926) 386; COSTIGAN, *CASES ON TRUSTS* (1925) 123; Bolles, *When is a Bank the Bona Fide Owner of a Check Left for Deposit or Collection?* (1908) 56 U. OF PA. L. REV. 375; (1924) 33 YALE L. J. 628.

<sup>22</sup> *Gannon v. Butler* (1861) 48 Me. 344 (plaintiff gave husband \$100 to be paid to her children; he paid it to defendant on his own debt); *Spaulding v. Kendrick* (1898) 172 Mass. 71, 51 N. E. 453 (given as security for antecedent debt).

<sup>23</sup> Of course the "no-earmark" idea does not prevent the owner recovering against the original wrongdoer or one who can show no particular equity in his favor. Wallace, J., in *Holly v. Domestic & Foreign Missionary Soc.* (C. C. A. 2d, 1899) 92 Fed. 745, 747: "The old notion that money cannot be thus followed because it has no earmarks has been exploded; though in many cases where it has been mingled with other moneys of the wrongdoer, or has been converted into

venience of business and the ordinary affairs of life imperatively demand the existence of a medium of exchange freely transferable, whose antecedents need not be investigated. Consequently the one who, for example, exchanges goods for money is protected since he has changed his position in reliance upon the apparent ownership of the money; he has delivered the goods.

What of the grocer who takes money from the thief in payment of the latter's indebtedness for groceries previously furnished? Is there any change of position here? Certainly it is not so clear. One may urge—and this argument is frequently successful in the case of one who takes the legal title to land or ordinary personal property which is subject to an equity—that there is no change of position since upon recovery of the money the payment of the debt is cancelled and the creditor is just where he was at the start.<sup>24</sup> However, this argument has not prevailed in the case of money.<sup>25</sup> The creditor upon payment considers the transaction closed and hence is naturally induced to forego other measures of collection; he is lulled into a sense of security. While as a matter of fact it is impossible in many cases to conclude with assurance that he would and could have otherwise collected, and in some cases it may be possible to say rather definitely that he could not, yet in perhaps most cases this is wholly a matter of conjecture. Because of the difficulty of ascertaining what he would or could have done, if the payment had not been made, the law has decreed that convenience requires a workable, if sometimes arbitrary,

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other property, the practical difficulty of identifying it and following it is insuperable." In the case itself an agent to whom a check was made payable for a particular purpose deposited it to his own credit and drew against the same in favor of a legatee whom the agent, as executor of an estate, had been ordered to pay. The principal was denied recovery from the legatee.

<sup>24</sup> Even in the case of a transfer of the legal title of ordinary property subject to an equity to one who in good faith gives a present consideration, it might be argued that the owner of the equity should be entitled to recover upon restoring the value that the purchaser has given. The cases, however, afford no recognition to such an argument.

<sup>25</sup> WILLISTON, *SALES* (2d ed. 1924) §620, contends that taking in payment of a precedent debt should be regarded in all cases as value. While admitting that where property is taken as security for a precedent debt, the creditor gives no "value," yet the author suggests that his subsequent conduct is almost sure to be affected by the possession of the security, since, while forbearance is not stipulated for, the effect is almost inevitably to cause the creditor to forbear or diminish efforts to obtain satisfaction from other sources.

"Any attempt to prove that taking in payment of an antecedent debt is value by deductive logic fails, as the debt is not discharged unless the taking is for value, and the taking is for value only if the debt is discharged. Some other and extrinsic considerations, as those of business convenience, have led to the adoption and codification of this rule that taking in payment of an antecedent debt has the effect which we denote 'value'." (1924) 33 *YALE L. J.* 633.



rule.<sup>26</sup> Thus, so far as the cases reveal, if the former owner should demand back his money from the creditor two minutes after the latter had taken it, his demand could be successfully resisted.<sup>27</sup> The same argument was responsible for those cases at common law holding that one who takes negotiable paper in payment of or as security for a pre-existing debt is a holder in due course, a rule not always followed but now embodied in the Uniform Negotiable Instruments Law. It is noteworthy that the framers of the other uniform commercial acts have adopted a similar definition of value, apparently in accordance with what they regard modern commercial convenience to require. Also, as is well known, the same argument has proved convincing to many courts in the analogous problem of the purchaser of ordinary property subject to an equity. But whether or not policy requires the same rule in the latter case is not a part of our present inquiry. The significant point is that the doctrine of purchaser for value, whether at law or in equity, rests upon and is merely a branch of a more general doctrine of change of position.<sup>28</sup> That this is so is evidenced by those

<sup>26</sup> Weston, *Money Stolen by a Trustee from One Trust and Used for Another* (1912) 25 HARV. L. REV. 602, 615, in explaining the reason for regarding taking in payment of a past debt as value says: "It is easily discovered in the fact that as a practical matter the owner of the equitable title can seldom if ever have his remedy instantly applied, and unless it be instantly applied the court feels no certainty that it can put the defendant back in the same position that he was in before he received the property in satisfaction of his debt. He may very likely have failed to have pursued his debtor as he would otherwise have pursued him. The debtor's ability to pay may have become impaired. And a court of equity is not at all willing to run the risk of doing an injury to an innocent person for the benefit of a plaintiff whose trustee has been guilty of a breach of trust. The defendant's change of position, which may or may not be susceptible of proof but yet takes place in almost every case, constitutes a substantial equity and justifies the rule."

In answer to the argument that one who takes in payment of an antecedent debt has not altered his position the court in *Long v. McAvoy* (1925) 133 WASH. 472, 477, 233 PAC. 930, 932, said: "It seems to us that these reasons are more plausible than sound. It is not true that if the property be taken from him he is put in the same position he was before, and it is not true that he may not thereby be caused to suffer. He is changed from the position of one who has been paid to one who holds what may be a doubtful account. Between the time he received his payment and the time he is made to return it, his position, and particularly that of his debtor, may have greatly changed. It is ordinarily impossible to put him in the same position he occupied before."

<sup>27</sup> Cf. *Chambers v. Miller* (1862) 13 C. B. (N.S.) 125.

<sup>28</sup> Ballantine, *Purchase for Value and Estoppel* (1922) 6 MINN. L. REV. 87. But see Costigan, *The Theory of Chancery in Protecting against the Cestui Que Trust One Who Purchases from a Trustee for Value and Without Notice* (1924) 12 CALIF. L. REV. 356, 363. Mr. Ballantine's theory will not account for the denial of protection to one who pays the price in reliance on the apparently complete ownership of a trustee but has not secured the legal title, a result he considers unsound. Mr. Costigan's theory is that "the legal title, other things being equal, must carry the day, since it is logically the business of chancery to let the loss stay where it has fallen unless the chancellor can find some superior merit, i.e., 'equity,'

cases holding that a donee in good faith of ordinary property subject to an equity, who in turn conveys away the property while still in ignorance, is at most bound to refund to the owner of the equity what he has received in exchange or, if he has received nothing, bound to pay nothing.<sup>29</sup> Likewise when a husband puts stolen money into the bank account of his innocent wife who draws upon the same to pay her husband's debts, she is not liable to the previous owner of the money.<sup>30</sup> In both these situations there has been such a change of position as to make it unjust to allow recovery and yet it requires imagination to consider the donee or the wife as a purchaser.

Nor is this rule with regard to money confined to a case where the identical money has been handed over to the creditor. Thus, when a person deposits a check payable to him and received by him for a forged mortgage and later draws on his bank account in payment of a debt to the defendant, the defrauded mortgagee cannot recover.<sup>31</sup> Likewise, where one entrusted with an indorsed stock certificate improperly borrowed upon it as collateral, receiving a check payable to himself which he deposited in a bank under an arrangement whereby

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in the particular contender who starts as loser which entitles him to cast the loss upon the other." The difficulty with this theory is that it fails to consider the cases at law such as the purchaser from a thief of money or negotiable instruments, the English purchaser in market overt, and the purchaser of goods from a seller in possession as against a prior purchaser. See 1 WILLISTON, CONTRACTS (1920) §466a, that the protection of the latter at law is probably based upon the same reason that led equity to protect the purchaser from prior equitable claims.

While admitting the defense of purchase for value in actions to recover money paid under mistake, Mr. Cohen, *op. cit. supra* note 1, at 1342, states: "Although the defense of purchase for value may be nothing more than an instance of change of position grown doctrinaire, the differences in the approach to each defense today are too great to permit of argument that the defenses have important features in common. The rules of purchase for value do not conform to natural law prejudices; instead, the significant theory is that they are subsumed under a highly formal doctrine." In what respect the approaches differ we are not told.

<sup>29</sup> *Mast & Co. v. Henry* (1884) 65 Iowa 193, 21 N. W. 559; *Bonesteel v. Bonesteel* (1872) 30 Wis. 516; *Robes v. Bent* (1599) Moore 552.

See also *Spooner v. Holmes* (1869) 102 Mass. 503, and *Pratt v. Higginson* (1918) 230 Mass. 256, 119 N. E. 661, 1 A. L. R. 714, holding the innocent agent of a thief of negotiable paper, selling the same and remitting the proceeds to the thief, not to be a converter. *Contra: Kimball v. Billings* (1867) 55 Me. 147, 92 Am. Dec. 581. See Note (1919) 28 YALE L. J. 175.

<sup>30</sup> *Seagle v. Barreto* (1920) 190 App. Div. 549, 179 N. Y. Supp. 856; Note (1920) 20 COL. L. REV. 602.

<sup>31</sup> *Stephens v. Board of Education* (1879) 79 N. Y. 183. *Contra: First National Bank v. Badger Lumber Co.* (1893) 54 Mo. App. 327, (1895) 60 Mo. App. 255, which must be deemed overruled by *Case v. Hammond Packing Co.* (1904) 105 Mo. App. 168, 70 S. W. 732; *Evans v. Garlock* (N. Y. 1885) 37 Hun. 588. See also *Holley v. Domestic & Foreign Missionary Soc.*, *supra* note 23.

the bank credited the proceeds against his indebtedness.<sup>32</sup> Where the receiver of a bank misappropriated \$5000 and sent it in the form of a draft as security to one who was his surety on his bond as a testamentary trustee for a much greater liability, recovery was refused against the surety who had collected the draft.<sup>33</sup> When an agent of the plaintiff collected money due to the latter and then lent it as his own to the defendant to whom the agent was indebted, it was decided that the defendant could not be deprived of his set-off against the agent by the intervention of the plaintiff's claim.<sup>34</sup> Without stretching the imagination unduly, we may say of the latter case, that the defendant's liability for the loan is of the nature of security for the agent's indebtedness. As a practical matter, certainly the existence of a claim against a debtor will influence a creditor in borrowing from that debtor in the expectation of set-off, whereas, if the loan comes first, the borrower will be the more ready to extend credit to the lender upon some other transaction. In the latter case the borrower is in the position of one who advances a new consideration; in the former, of one who takes as security for a precedent debt. The case falls within the reason of the rule that when sued by an undisclosed principal the third person may employ set-offs against the agent acquired before knowledge of the relation of principal and agent.<sup>35</sup> Lastly, it should be noted that even if an agent wrongfully uses his principal's money to pay the defendant not his own debt, nor one for which he was liable in any way, but the debt of a third person, the plaintiff cannot recover.<sup>36</sup>

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<sup>32</sup> *Hatch v. Fourth National Bank of New York* (1895) 147 N. Y. 184, 41 N. E. 403; *Carlisle v. Norris* (1915) 215 N. Y. 400, 109 N. E. 564, Ann. Cas. 1917A 429 (check made payable to creditor at direction of lender).

<sup>33</sup> *Spaulding v. Kendrick*, *supra* note 22.

<sup>34</sup> *Lime Rock Bank v. Plimpton* (Mass. 1835) 17 Pick. 159, 28 Am. Dec. 286.

<sup>35</sup> 2 *MECHEM, AGENCY* (2d ed. 1914) §§ 2077-2079. An interesting situation is presented by *Thacher v. Pray* (1873) 113 Mass. 291, where without authority A sold the plaintiff's horse to the defendant receiving in payment a check which he indorsed to the plaintiff in payment of a debt. It was held the plaintiff could recover the horse since the receipt and collection of the check was in satisfaction of A's debt and did not amount to a ratification of the sale of the horse.

<sup>36</sup> *Leavitt v. Leighton* (1914) 219 Mass. 132, 106 N. E. 634. It would seem that the underlying principle of the money cases is disregarded in such cases as *Andrews v. Northwestern National Bank* (1908) 107 Minn. 196, 117 N. W. 621, 25 L. R. A. (N.S.) 996 and *Bayley v. Hamburg* (1919) 106 Wash. 177, 179 Pac. 88. In the first case a principal sent his agent for delivery to a creditor of the former a check payable to the creditor. Forging the creditor's name to an indorsement, the agent deposited the check to his own bank account and drew against the same to pay his own indebtedness to the principal. In an action by the latter against his bank which had paid the check with the forged indorsement, the court in substance held that the defendant could debit its depositor since the proceeds of the check had come back to the drawer and consequently he had suffered no damage by its payment.

The remedy of the principal would seem to be against the agent or the person whose debt was so paid.

The authorities then compel the conclusion that where *A* steals, embezzles, or procures by fraud or mistake, money from the plaintiff, using the same to pay his debt or that of a third person to the defendant, who takes in good faith, the latter is not liable. Is the same principle involved, are the same considerations present and applicable, when the plaintiff transfers the money directly to the defendant, but the transfer is due to some mistake on the plaintiff's part affecting his relation to a third person, or to some fraud perpetrated by the latter, the defendant being innocent and accepting the money in payment of the obligation of the third person or some other individual? Some of the cases, to be considered in detail subsequently,<sup>37</sup> expressly put their conclusion on the basis that the situation is exactly the same, so far as legal principles are concerned, as if the third person obtained the money directly from the plaintiff and then paid it over to the defendant who was unaware of the source or the circumstances attending its acquisition. Likewise, does the same principle govern where the mistake is of the sort that would not lead to the payment to a third person and a subsequent payment over by him to the defendant, as where there is no fraud perpetrated by the third person nor a mistake common to the payer and a third person, but nevertheless there is a payment made by the plaintiff on his supposed obligation to the defendant, who takes the same consciously or unconsciously as a satisfaction of the third person's debt to him?

In the situations just described the defendant may well be treated as a "purchaser for value." Upon payment, he considers the transaction closed; he is naturally induced to forego other measures for collection from the person legally liable and, consequently, if forced to refund, he may find himself worse off than if the payment had not been made. Using the expression, for lack of a better, to include not only a positive act of commission, but also inaction caused by the payment,<sup>38</sup> there has been a change of position. While, as previously indicated in the discussion of stolen or embezzled funds, one cannot always be positive that the defendant is actually prejudiced by being

<sup>37</sup> *Whitehurst v. Mason*, *supra* note 19; *Merchants' Ins. Co. v. Abbott* (1881) 130 Mass. 397; *Walker v. Conant* (1888) 69 Mich. 321, 13 Am. St. Rep. 391; *Southwick v. First National Bank of Memphis* (1881) 84 N. Y. 420; *New York Title & Mortgage Co. v. Title Guarantee & Trust Co.* (1923) 206 App. Div. 490, 201 N. Y. Supp. 529; *Gaffner v. American Finance Co.* (1922) 120 Wash. 76, 206 Pac. 916, 28 A. L. R. 624.

<sup>38</sup> See *Fegan v. Great Northern Ry.* (1889) 9 N. D. 30, 81 N. W. 39, *infra* note 53; *Atlantic Coast Line R. R. v. Schirmer* (1912) 87 S. C. 309, 69 S. E. 439, *infra* note 52.

forced to surrender, yet, if in the former situation convenience requires a somewhat arbitrary rule in conformity with what probably is the usual case, no reason is apparent why the same rule is not required here as well. It is believed that many courts instinctively, if not consciously, have appreciated the essential identity of the two situations. Those which have not have possibly failed to analyze the problem adequately, in consequence of which failure a particular jurisdiction will at different times take contradictory positions without any realization of the inconsistency. In all our legal thinking there is too great a tendency to pigeon-hole categories according to their superficial resemblances and ignore essential identities.

The same simple problem assumes such protean forms, frequently masking the underlying question, that the writer craves indulgence in indicating in perhaps wearisome detail the facts of the various cases. It is perhaps unnecessary to add that in all the cases to be considered, unless the contrary be indicated, the defendant is "innocent," that is, at the time of payment he has no knowledge of the mistake, fraud or other element that would justify a recovery in the absence of such good faith.

Proceeding now to an examination of the authorities, we may note that it is somewhat difficult to classify them and that some will fall as well in one class as another. First of the agency cases.

### III. AGENCY PROBLEMS

It is well-settled doctrine that "an agent acting for a known principal and duly authorized, to whom money has, by mistake or other similar cause, been voluntarily paid for the use of his principal, is not liable to the person so paying it where, before notice of such mistake,<sup>39</sup> he has paid it over to his principal, even though the principal had no legal right to receive it. In such event, the person so paying it must look to the principal."<sup>40</sup> Nor is the protection of the agent confined

<sup>39</sup> Payment over is no defense if the agent is aware of the mistake at the time he receives the money. *Metcalf & Syler v. Denson* (1874) 63 Tenn. 565.

<sup>40</sup> 1 *MECHEM, AGENCY* (2d ed. 1914) §1432.

*Koontz v. Central National Bank* (1873) 51 Mo. 275, is perhaps *contra*. The defendant bank, receiving for collection a draft upon a debtor, by mistake presented it to the plaintiff, who paid thinking it was drawn upon her and that she was indebted to the drawer to whom the money was paid over by the defendant. *WOODWARD, op. cit. supra* note 1, §25, defends the decision on the basis that the mistake was due solely or chiefly to the negligence of the defendant. Query. While perhaps the plaintiff may have been less negligent than the defendant in supposing the draft to have been drawn upon her, since she may have relied upon the bank's act of presentment, yet she doubtless would not have paid except for another mistake, that is, that she was indebted to the drawer, a mistake to which the bank was in no way privy. It is hence difficult to charge the bank with greater negligence. *KEENER, op. cit. supra* note 1, at 72, thinks the plaintiff was equally negligent in paying without inspecting the draft. Assuming the foregoing contention

to the case of a direct payment over to the principal but is extended to other instances of change of position as when in reliance on the payment the agent extends new credit to his principal or at the direction of the principal expends the money in his principal's behalf.<sup>41</sup> What is to our immediate interest, protection is given the agent when, properly as between the principal and himself, the money is retained in payment of his principal's prior indebtedness or credited against it.<sup>42</sup> In this case the courts treat the problem exactly as if the agent had paid over to the principal who thereupon paid his debt to the agent. Certainly business convenience would not tolerate such circuitry. Yet it is to be noted that the agent ultimately takes the money in satisfaction of a preëxisting debt and, so far as is revealed in the opinions, it is immaterial that the payer is ignorant that the money will be so applied.<sup>43</sup>

The same considerations apply equally in favor of one who, while technically not an agent, occupies a similar position. Thus, if the payment is made to an executor or administrator, who distributes the money to creditors, legatees and next of kin, the money cannot be reclaimed from such representative.<sup>44</sup> Similarly where the plaintiff

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to be sound, what would the result have been if the plaintiff had sued the drawer? The drawer took the money in good faith in payment of the real drawee's debt and hence under the principle of many of the cases cited herein recovery should be denied, although usually when the money has been paid over to the principal, the latter is liable. The remedy of the plaintiff would then be against the insolvent drawee.

<sup>41</sup> Winslow v. Anderson, *supra* note 19; Buller v. Harrison (1777) 2 Cowp. 565; Holland v. Russell (1861) 1 B. & S. 424, *aff'd*, (1863) 4 B. & S. 14.

<sup>42</sup> Bradley Lumber Co. v. Bradley County Bank (C. C. A. 8th, 1913) 206 Fed. 41; Winslow v. Anderson, *supra* note 19; La Farge v. Kneeland (N. Y. 1827) 7 Cow. 455; Mowatt v. McLellan (N. Y. 1828) 1 Wend. 173; Langley v. Warner (1850) 3 N. Y. 327; Cullen v. Donahue (1923) 45 R. I. 237, 121 Atl. 392; Holland v. Russell, *supra* note 41.

<sup>43</sup> The cases laying down the opposite rule where the payment has been turned over to an undisclosed principal have already been alluded to. KEENER, *op. cit. supra* note 1, at 62; 2 MECHAM, *op. cit. supra* note 35, §1429; WOODWARD, *op. cit. supra* note 1, §27. *Contra*: Hibbs v. Beall (1914) 41 App. D. C. 592; Hauenstein v. Ruh (1905) 73 N. J. L. 98, 62 Atl. 184 (agency disclosed but the principal undisclosed). The following cases are also *contra*, although the undisclosed agency point is not noticed. Continental National Bank v. Tradesman's National Bank (1903) 173 N. Y. 272, 65 N. E. 1108; Hibbs v. First National Bank of Alexandria (1922) 133 Va. 94, 112 S. E. 669, 25 A. L. R. 120. For the facts of the latter case, see *infra* page 335. Compare Crocker-Woolworth Bank v. Nevada Bank (1903) 139 Cal. 564, 73 Pac. 456, a good part of the reasoning of which is *contra* to the usually accepted rule.

<sup>44</sup> Lindley v. United States (C. C. A. 9th, 1932) 59 F. (2d) 336; Grier v. Huston, *supra* note 20; Hatton v. Howard Braiding Co., *supra* note 10; see Pool v. Harrison (1850) 18 Ala. 514; Jones v. Subera (1910) 25 S. D. 223, 126 N. W. 253. In Beam v. Copeland (1890) 54 Ark. 70, 14 S. W. 1094, the share of a distributee of an estate erroneously supposed to be dead was paid by order of court

paid a sheriff who paid over to an execution creditor.<sup>45</sup> When a mortgagor of wheat sold it to the plaintiff who made an excessive payment to the mortgagee, who kept part in payment of the mortgage debt and paid the balance to the mortgagor and to the mortgagor's creditors whose claims he had guaranteed, recovery from the mortgagee was denied.<sup>46</sup> While as to the mortgage debt there was an additional change of position in the release of the lien, as to the debts on which the defendant was a surety the defendant really used the money to satisfy the mortgagor's precedent obligation to exonerate the defendant as surety, and thus the case is similar to that of an agent crediting the payment against his principal's indebtedness. However, it is difficult to support *Moors v. Bird*.<sup>47</sup> A banker financing importations had the goods shipped under bill of lading to himself and upon arrival transferred possession to the importer under trust receipts whereby the proceeds of the sale were to be applied to indebtedness arising out of the financing. Due to the fraud of the importer, the purchaser paid to the banker more than was owing on the price. The court held the purchaser to be entitled to recover the excess from the banker, although the latter had settled accounts with the importer, paying to him all over the sums advanced. The court seemed to think the situation distinguishable from the earlier Massachusetts case of *Abbott v. Merchants' Ins. Co.*<sup>48</sup> on the ground that the transaction constituted a sale from the banker to the purchaser and hence that payment to the banker was in legal effect payment to him and not to the importer made at the request of importer to the banker. In the first place, it is difficult to see how there was any sale from the banker to the purchaser; rather there was an assignment of the obligation of the purchaser to the banker, who kept control over the goods by means of the bills of

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to the administrator of his next of kin. Recovery was denied against the administrator who had expended the money in paying the debts of the next of kin.

Phetteplace v. Bucklin, commented upon *supra* page 313; *King v. Stewart* (1892) 66 L. T. 339 (money paid to a trustee who distributed among the *cestuis*); *Baylis v. Bishop of London* [1913] 1 Ch. 127, ignore the essential identity. If payment is made to an executor or a known trustee, the payer expects the payment over and is, consequently, hardly in a position to complain. If the situation is to be treated differently from that of payment to a known agent it must be rested on the highly technical reason that there is no direct relation between the payer and the legatee or *cestui*.

<sup>45</sup> *Harris v. Loyd* (1839) 5 M. & W. 432. The facts of this case are given *infra* note 65.

<sup>46</sup> *Hullett v. Cadick Milling Co.* (1929) 90 Ind. App. 271, 168 N. E. 610.

<sup>47</sup> (1906) 190 Mass. 400, 77 N. E. 643. In *Houston & T. C. R. R. v. Hughes* (1911) 63 Tex. Civ. App. 514, 133 S. W. 731, a railroad recovered overpayments to a building contractor who had paid over to a subcontractor in reliance upon mistaken estimates of the work made by the plaintiff.

<sup>48</sup> *Supra* note 37.

lading and trust receipts. If in the *Abbott* case the insurance company had paid to the assignee a greater sum than was owing on the secured debt and the assignee had turned over the balance to the assignor, it is inconceivable, judging from the language of the opinion, that the court would have ordered the assignee to refund this balance.<sup>49</sup> If by any possibility it can be said that there was a sale by the bank, then the bank should have been treated as a sort of agent for the importer and, since the importer's connection with the transaction was known to the purchaser, the case does not involve an undisclosed principal.

#### IV. MISCELLANEOUS PROBLEMS

We may now proceed to a miscellaneous group of cases in which the payment was made because of a supposed obligation of the plaintiff to the defendant, whereas in truth the payment operates as a satisfaction of the debt of a third person. When an officer in enforcing execution by mistake seized and sold the property of a third person whom he was later compelled to reimburse, he was refused recovery of the proceeds he had paid the execution creditor and which the latter took in payment of his judgment debtor's obligation.<sup>50</sup> A similar result has been reached where a surety, mistaken as to his liability on a bond, has paid the obligee a sum actually due the defendant from the principal obligor.<sup>51</sup> Where a railway company, mistakenly supposing that it had lost goods in transit, paid the consignor their value,

<sup>49</sup> Recovery was denied in this situation in *Bessler Movable Stairway Co. v. Bank of Leakesville* (1926) 140 Miss. 537, 106 So. 445.

<sup>50</sup> *Bissell v. Edwards* (Conn. 1811) 5 Day 94. In *Krumbhaar v. Yewdall* (1893) 153 Pa. 476, 26 Atl. 219, a sheriff in possession of a fund paid a creditor of a judgment debtor in ignorance of a prior lien which the sheriff was later obliged to pay. The sheriff was denied recovery since the amount paid was owed by the judgment debtor.

<sup>51</sup> *Ferguson v. Hirsch* (1876) 54 Ind. 337 (the case itself, however, seems to go on the ground that the plaintiff either labored under no mistake or that it was one of law; *Ash v. McLellan* (1905) 101 Me. 17, 62 Atl. 598 (A surety on the bond of a debtor to take the poor debtor's oath paid in ignorance of the fact that the condition of the bond had been satisfied. The decision was not, however, put upon this ground but partly on the questionable basis that the plaintiff refrained from ascertaining the fact from an ulterior motive.)).

The following cases are distinguishable: *Ray & Thornton v. Bank of Kentucky* (1843) 42 Ky. (3 B. Mon.) 510 (the plaintiff was ignorant while the defendant was aware of the facts although ignorant of the law discharging indorsers upon failure to present the draft promptly to the acceptor); *Talbot v. National Bank of the Commonwealth* (1880) 129 Mass. 67 (where the indorser of a note was awarded judgment for the recovery of a payment for the reason that he had mistakenly supposed proper presentment had been made to the maker, the defendant or at least the notary who acted for him was aware of the facts, even if ignorant of the law); *Mills v. The Alderbury Union* (1849) 3 Ex. 590 (while the surety was ignorant, the defendants were doubtless aware of the facts negating the surety's liability.).



whereas in fact the consignee had received them and consequently was liable for the price, recovery was denied.<sup>52</sup> A station agent, who paid the railway for a default of a subagent, mistakenly supposing that the default had occurred *after* the station agent became such, was refused relief.<sup>53</sup> Similarly a justice of the peace, who accepted a judgment debtor's check payable to himself in payment of the judgment, satisfied the judgment of record and paid the successful party, was denied recovery from the judgment creditor upon the dishonor of the check. The court considered it immaterial whether the judgment debtor had money in the bank between the time when it was made and the time of presentment.<sup>54</sup> It is to be remarked, however, that there was no mistake as to an existing fact unless the plaintiff erroneously supposed that at the time of delivery of the check there were sufficient funds. If there were, then the plaintiff was knowingly taking a chance of collection.

On the other hand, situations seeming on principle to call for the same result have been decided in favor of the plaintiff. Thus in the case of a bank which, because of its correspondent's failure to notify it of dishonor, paid the drawer upon the mistaken belief that the latter's draft on his debtor had been paid.<sup>55</sup> Likewise where a father paid

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<sup>52</sup> *Atlantic Coast Line R. R. v. Schirmer*, *supra* note 38. The decision, however, is rested on the ground that the railway was guilty of laches in failing to demand repayment promptly on acquiring knowledge of the facts since in the meantime the consignee who had previously made prompt payments had disappeared.

<sup>53</sup> *Fegan v. Great Northern Ry.*, *supra* note 38. The decision, however, is put on the basis that due to a time limitation in the bond of the plaintiff's predecessor the remedy against the surety was gone.

<sup>54</sup> *Garretson v. Joseph* (1893) 100 Ala. 279, 13 So. 948. A similar state of facts resulted in a like decision in *Pepperday v. Citizens' National Bank* (1898) 183 Pa. 519, 38 Atl. 1030 (3 judges dissenting). In *Duncan v. Berlin* (1867) 28 N. Y. Sup. Ct. (5 Robt.) 457, after a judgment in an attachment suit in favor of the present defendants, the plaintiff by mistake overpaid on demand to the sheriff his debt to the judgment defendant. The officer in turn paid over to the present defendants. Judgment for the defendants was based on the ground that, while the judgment debtor was insolvent at all times concerned, the judgment creditors, had it not been for the payment, could have secured payment out of other property of the judgment debtor. This decision, however, was reversed in *Duncan v. Berlin* (1871) 46 N. Y. 685, without reported opinion; the head note indicates that the reversal went on the ground that the defendants would be no worse off by refunding. In *Barclay & Co. Ltd. v. Malcolm & Co.* (1925) 133 L. T. 512, where the plaintiff bank mistakenly supposed it had been directed by a debtor to pay two separate sums of £2000 each, instead of one, to the defendant, the creditor, recovery of the second sum was denied, the second payment leaving the debtor still indebted.

<sup>55</sup> *First National Bank v. Behon*, *supra* note 11 (the basis of the decision was that recovery would merely put the defendant back *in statu quo*, and it was conceded that the result would have been different had the drawee become insolvent subsequent to the payment to the defendant); *De Nayer v. State National*

the supposed liability of his son to the defendant, when, as a matter of fact, it was a third person who was liable.<sup>56</sup> In *Bank of Toronto v. Hamilton*<sup>57</sup> the plaintiff bank received \$2000 from A for payment to the defendant but due to an error in transmission its subagency paid \$3000; upon receipt the defendant shipped cattle sold to A upon his agreement to do so upon the payment of \$2827.00. After voluntarily surrendering \$173.00 to the plaintiff, the defendant was forced to pay \$827.00. It is to be noted that besides the satisfaction of a past debt that there was an additional change of position in the shipment of the cattle. The case is rested on the doctrine laid down in *Durrant v. Ecclesiastical Comm'rs*<sup>58</sup> that a change of position is immaterial.

#### V. PAYMENT OF SUPPOSED LIENS

Another group of cases involves the intentional payment of the debt of a third person, constituting a supposed lien. The simplest factual situation is presented by *Boas v. Updegrove*<sup>59</sup> where the plaintiff paid off a judgment obtained against his grantor after the plaintiff had purchased the land, supposing it to be a lien. Recovery was denied for the reason that the defendant could conscientiously retain the payment of the just debt even though neither the plaintiff nor his property was liable for it.<sup>60</sup> Where the good-faith buyer of an automobile from a thief as a part of the purchase agreement paid off a

Bank (1879) 8 Neb. 104; *Union National Bank v. Sixth National Bank* (1871) 43 N. Y. 452. In *Appleton Bank v. McGilvray* (Mass. 1855) 4 Gray 518, a bank clerk, thinking a note deposited for collection had been collected, paid the holder. Recovery was permitted on the ground that there had been no change of position since when the note fell due the maker had no funds and would not have paid it, and shortly thereafter made an assignment in insolvency without having paid any debts in the meanwhile. This, then, is a case where it was possible to establish with almost complete certainty that the defendant was not prejudicially affected by the payment, and it may be that under the Massachusetts insolvency law, if the maker had paid, the money could have been recovered by the assignee in insolvency as a preferential payment.

<sup>56</sup> *Lowe v. Wells Fargo & Co. Express* (1908) 78 Kan. 105, 96 Pac. 74. Some reliance seems to be placed on the fact that while it was hopeless to get anything out of the real defaulter, yet the defendant could collect from the latter's surety, i.e., that the change of position was not "irrevocable."

<sup>57</sup> (1896) 28 Ont. Rep. 51.

<sup>58</sup> *Supra* note 1.

<sup>59</sup> (1847) 5 Pa. 516.

<sup>60</sup> *Accord*: *Espy v. Allison*, *supra* note 19 (mortgage supposed by plaintiff to cover his land); *Richey v. Clark* (1895) 11 Utah 467, 40 Pac. 717 (mortgage supposed by plaintiff to include his land. He paid part of the mortgage debt for a release of his land. There was present the additional element that in a subsequent foreclosure suit of the mortgagor's property, credit was given for the plaintiff's payment and the rights between the mortgagor and mortgagee were fixed by the decree. A dissent went on the ground that the defendant discovered the mistake before the foreclosure and while the mortgagor was, so far as appears, solvent. Under these circumstances it may well be that the defendant should have notified the plaintiff and joined him as a party to the foreclosure suit so as to allow him

mortgage previously executed by the defendant, he was denied recovery since there was no mistake as to the indebtedness, although the mortgage was invalid as against the true owner who subsequently recovered the machine.<sup>61</sup> The court considered the case to be the same in principle as if the plaintiff had paid the whole price to the thief who in turn paid the defendant. It is to be noted that the mortgage was a valid encumbrance against the title the plaintiff was buying, however invalid it may have been against the real owner. It would be extraordinary and most unsettling to completed transactions if the owner of an interest in property or a junior encumbrancer of the same could recover payment of a lien upon discovery of the invalidity of his interest. To be classed with this case is *Sears v. Leland*,<sup>62</sup> where an attaching creditor of one who had possession of goods under a conditional sale upon which nothing had been paid discharged a mortgage executed by the purchaser. It would seem clear that one acquiring an interest that may or may not prove valuable should not be able to throw the loss of his speculation upon the defendant whose valid claim is discharged. Yet if the defendant had not had any claim against the purchaser, justice would demand recovery. In *New York Title & Mortgage Co. v. Title Guarantee & Trust Co.*<sup>63</sup> recovery was denied one lending money on a supposed first mortgage to a borrower, who had forged a satisfaction of a prior mortgage, from the defendant to whom part of the loan was paid directly by the lender for the release of another mortgage which would otherwise have taken precedence over the plaintiff's mortgage but was junior to the mortgage apparently discharged. While the defendant perhaps profited by the fraud of the borrower, since the subsequent foreclosure of the first mortgage exhausted the property, the court considered the case governed by

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subrogation to the mortgage and to the debt, though subordinate to the defendant. If it appeared that the plaintiff sustained injury through this failure, the loss should be thrown upon the defendant.). *Contra*: *Mayer v. New York*, *supra* note 12. The case goes on the ground that the change of position was not irrevocable since, so far as appears, the defendant upon refunding could enforce the lien. It will be noted that in *Boas v. Updegrove* and *Espy v. Allison*, *supra*, no importance was attached to this possibility.

<sup>61</sup> *Gaffner v. American Finance Co.*, *supra* note 37. (See adverse comment in (1923) 7 MINN. L. REV. 171 on the ground that the plaintiff's purpose was not primarily to wipe out the debt but to relieve the property of the lien.). *Accord*: *Belloff v. Dine Savings Bank* (1907) 118 App. Div. 20, 103 N. Y. Supp. 273, *aff'd*, 191 N. Y. 551, 85 N. E. 1106 (put partly on the basis that the mistake was one of law); *Aiken v. Short* (1856) 1 H. & N. 210. See also *Wilson v. Barker* (1862) 50 Me. 447. Compare the situation where the drawee pays a draft accompanied by forged bills of lading, *infra* page 351.

<sup>62</sup> (1887) 145 Mass. 277, 14 N. E. 111.

<sup>63</sup> *Supra* note 37.

*Carlisle v. Norris*<sup>64</sup> in which an agent by a wrongful pledge of his principal's stock secured a check payable to the agent's creditor.<sup>65</sup>

#### VI. PURCHASERS AT EXECUTION SALES

Closely related to the preceding situation is the case of the purchaser at an execution or similar sale who labors under mistake as to the debtor's title. Here it is generally held that he cannot recover the price from the execution creditor merely because of the lack of title.<sup>66</sup> These decisions may be rested, as some explicitly are,<sup>67</sup> on the ground of change of position since the creditor takes in satisfaction of the debt. While certain opinions may talk about *caveat emptor* as if the

<sup>64</sup> (1915) 215 N. Y. 400, 109 N. E. 564.

<sup>65</sup> In *Harris v. Loyd*, *supra* note 45, the plaintiffs, assignees of a deed for creditors, paid off to the defendant, a sheriff, a prior execution upon the debtor's goods, unaware of an act of bankruptcy committed before the execution was levied. The defendant paid over the money to the execution creditor without, so far as appears, knowledge of the act of bankruptcy on the part of either the defendant or the creditor. We may safely hazard the guess that the plaintiffs either had to reimburse the assignee in bankruptcy for the property of the bankrupt used to pay the sheriff or, having advanced their own funds to pay, were refused reimbursement from the assignee in bankruptcy who took over the goods. In denying recovery against the sheriff the court went on two grounds: (1) that the plaintiff merely made a bad bargain; and (2) that at the time it was the duty of the sheriff to pay over to the creditor (but compare *Standish v. Ross* (1849) 3 Ex. 527) since the latter's lien was then good and only subject to the possibility of subsequent bankruptcy, in other words, that there had been a change of position. If the plaintiffs had sued the creditor, it would seem that the answer would depend on whether the execution lien, if not paid off, would have been good against the assignees in bankruptcy. If the answer is in the affirmative, the plaintiffs should not recover but should themselves have been entitled to be subrogated to the lien as against the assignees in bankruptcy. On the other hand if the lien would have been stricken down, the creditor would have received a voidable preference and should repay the plaintiffs, unless by reason of the payment the creditor had failed within the proper time to present his claim against the bankrupt's estate, in which event the recovery should be limited to the excess of the payment over the proper dividend. A complete explanation of the situation would require careful study of the then English bankruptcy law and possibly a knowledge of more facts than are revealed by the report.

<sup>66</sup> See the cases collected in the annotations to *Dresser v. Kronberg* (1912) 36 L. R. A. (N.S.) 1218, Ann. Cas. 1913B 544. The annotated case itself, 108 Me. 423, 81 Atl. 487, reaches a contrary result because it sees no distinction between recovering from the debtor and recovering from the creditor.

<sup>67</sup> See particularly the concurring opinion of Wilson, C. J., in *England v. Clark* (1843) 5 Ill. 487, 494: "but if years after a plaintiff has recovered his debt, through the agency of the law, he can be made to refund, because of some neglect or mistake on the part of its officers, he can never know when he is safe, or at the end of the law. Admitting that by a bill in chancery, or by application to the court, he can set aside the execution and obtain a new one against the debtor, would it not be a positive injustice to drive him to this expense, force him to refund the money which he had probably parted with, and incur the risk of the continued solvency of his debtor, when no fault can be imputed to him?" See also *McGhee v. Ellis* (1823) 14 Ky. (4 Litt.) 244.

purchaser fully assumed the risk, yet this is not entirely true since it is also held that the purchaser may recover from the judgment debtor to the extent to which his debt has been satisfied.<sup>68</sup> In the case of ordinary sales of personal property the purchaser will get only the title of the seller and in this sense *caveat emptor* applies, and yet he may be able to recover from the seller on theories of warranty or failure of consideration. It is usually said that such persons as pledgees and mortgagees selling under a power do not warrant title and cannot be compelled to refund. It is suggested that the real reason is that they take the proceeds in satisfaction of a debtor's obligation. As to any excess paid over to the debtor they are in the position of agents. But if there should actually be no debt as well as no title in the pledgor or mortgagor, would they not be compelled to refund the amount they have retained for the non-existent debt?<sup>69</sup>

#### VII. PAYMENTS TO ASSIGNEES

Next in order is a group of cases involving payment to assignees of contractual obligations. Where a plaintiff has paid an assignee, knowing that the payment will operate as a discharge of an obligation of the assignor to the assignee, under the mistaken belief that his contract with the assignor obligates him to make such a payment, a number of authorities deny recovery. In *Merchants' Ins. Co. v. Abbott*<sup>70</sup> an insurance company paid a fire loss to the defendant to whom the policy had been assigned after loss as security for a debt of the insured. Subsequently it was discovered that the insured had wilfully caused the loss. The court thought the situation should be treated exactly as if the company had paid the insured who had used the money to pay off his debt to the defendant, emphasizing the point that the defendant took the money honestly and for value.<sup>71</sup>

<sup>68</sup> See the cases cited in *Dresser v. Kronberg*, *supra* note 66.

<sup>69</sup> *McGoren v. Avery* (1877) 37 Mich. 120; *Henderson v. Overton* (1830) 10 Tenn. 394. In both cases the purchaser was allowed to recover from the execution "creditor"; in the first there was no judgment and in the second a void judgment to support the sale.

<sup>70</sup> (1831) 130 Mass. 397. The situation closely resembles that of payment by a drawee of a check under the mistaken supposition that there are sufficient funds. See note 124 *infra*.

<sup>71</sup> *Accord*: *Fidelity Mutual Life Ins. Co. v. Clark* (1906) 203 U. S. 64 (fraud of assignor); *Whitehurst v. Mason*, *supra* note 19 (The administrator of an insured assigned a life policy on the deceased to *J* who in turn assigned to *W* as collateral for the purchase price of land bought of *W*. The insurer paid to *W* part of the amount due on the policy. Denying the company recovery from *W*, although the first assignment was void and consequently the second, since there had been no order of court authorizing the sale, the court went on the ground that the situation was the same as if the company had paid *J* who in turn paid *W*. It is noteworthy that *W* had a solvent indorser on the obligation of *J* and it does not

However, there is some authority *contra*.<sup>72</sup> Bearing a strong resemblance to the assignment cases is a recent New Hampshire decision.<sup>73</sup> A purchaser of goods was refused recovery for an excessive payment, made under mistake as to the amount due, against the defendant to whom payment was made at the direction of the seller. The defendant used the money, apparently with the authority of the seller, to pay off debts of the seller on some of which the defendant was surety. As to the debts on which the defendant was not liable, the case is simply one of payment over by an agent to his principal or in his principal's

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even appear that *J* was insolvent); *Behring v. Somerville* (1889) 63 N. J. L. 568, 44 Atl. 641 (A mortgagor in ignorance of the mortgagee's first assignment for security, despite recordation which under a statute was constructive notice to the mortgagor and subsequent assignees, paid a likewise ignorant second assignee for security who obtained the original note and mortgage from the mortgagee. While it was said that the second assignee had good title to the note and mortgage subject to the first and could properly surrender his claim upon payment, and was not bound to ascertain whether there was any prior claim nor to inform the mortgagor, it would seem that this argument overlooks the point apparent from the facts that the assignee must have realized that the mortgagor was acting under the impression, which he shared, that there was only one assignment. Clearly if the second assignee had known the truth and realized the plaintiff's mistake, he could not have retained the money. As it was, he took the payment in good faith in satisfaction of the assignor's indebtedness. The case seems to go largely on the ground that the second assignee lost his hold on the note and mortgage as security for his claim and cannot be held to repay except upon being restored to his former position. This argument overlooks the quite possible fact that the first assignment might well have exhausted the security.); *Youmans v. Edgerton* (1883) 91 N. Y. 403 (failure of consideration).

<sup>72</sup> *Lawrence v. American National Bank* (1873) 54 N. Y. 432 (*P*, who had an account with the plaintiff, assigned it as security to the defendant; making a mistake as to the amount due, the plaintiff overpaid the defendant who later released *P*'s surety upon the debt upon payment of the balance. While the insolvency of *P* was urged as a reason for denying recovery, the court answered that the defendant could recover from the surety since the release was given under mistake. Thus the decision seems to go on the basis that the change of position was not irrevocable.); *American Bonding Co. v. State Savings Bank* (1913) 47 Mont. 332, 133 Pac. 367, 46 L. R. A. (N.S.) 557 (The deputy of a clerk of court issued false and fictitious juror's certificates which were bought by the defendant bank in good faith and paid by the county. The surety on the clerk's bond paid a judgment for the money so paid on the certificates. It was conceded, for the purpose of argument at least, that the bank would be bound to refund to the county. Subrogation was, however, denied the surety.). One cannot be sure that *Deisch v. Wooten-Agee Co.* (1910) 95 Ark. 279, 129 S. W. 819, is *contra* to the *Abbott* case. A purchaser of a tenant's crop making an error as to the amount due on the purchase overpaid the tenant's landlord who credited the tenant with the amount paid. It was held that the purchaser could recover the excess from the landlord since the credit could be corrected. But it does not appear that the tenant was indebted to the landlord for more than the correct purchase price. If he was not, clearly there was no change of position on the part of the defendant and the case resembles the situation where payment was made to an agent who merely credits the principal on his books.

<sup>73</sup> *Winslow v. Anderson*, *supra* note 19.

behalf. As to the other debts the defendant was really a creditor of the seller who as principal was bound to exonerate his surety. It is significant that, so far as appears, the plaintiff did not realize the seller's purpose in having the payment made to the defendant.

*Franklin Bank v. Raymond*<sup>74</sup> presents an interesting assignment problem. The maker of a note paid an assignee, who had purchased the same, the full amount without deducting a set-off against the payee under the erroneous impression that the note had been indorsed so as to preclude set-off. While the judgment goes on other grounds,<sup>75</sup> it would seem that, since the payee as a seller would have been liable on his warranty in case the set-off had been used,<sup>76</sup> in effect the maker was, perhaps unwittingly, satisfying the existing obligation of the payee to the assignee. Mr. Woodward<sup>77</sup> is inclined to criticize the case apart from the first reason assigned by the court and regards *Bize v. Dickason*<sup>78</sup> as *contra*. However, there is a significant difference between the two cases. In the latter the plaintiff, a debtor of a bankrupt, paid the assignees in bankruptcy the full amount of his debt without deducting a set-off against the bankrupt. Recovery for the amount of the set-off was allowed. By failing to use the set-off the plaintiff was in effect paying to the defendants the amount of the indebtedness of the bankrupt to himself, or looking at it from a different aspect, was overpaying more than his net indebtedness to the defendants. But the bankrupt was not indebted nor in any way obligated to his assignees since not being a seller he made no warranties. Hence it cannot be said that the defendants took the overpayment in satisfaction of the obligation of anyone to themselves. There is, consequently, not present the element of change of position, assuming, as was true in the particular case, that the assignees had not before notice distributed the money among the creditors of the bankrupt estate.

The significance of *Jefferson County v. McGrath's Ex'r*.<sup>79</sup> is that apparently it is not material that the plaintiff is unaware of the obligation of the assignor which he is satisfying.<sup>80</sup> A county, which by

<sup>74</sup> (N. Y. 1829) 3 Wend. 69.

<sup>75</sup> (1) That the failure to indorse was inadvertent and consequently the maker was morally bound not to use the set-off, and (2) that there was a debt due from the maker to the assignee for the full amount with a mere *privilege* of set-off. Query as to the latter.

<sup>76</sup> 1 WILLISTON, CONTRACTS (1920) §445; RESTATEMENT OF CONTRACTS (Am. L. Inst. 1928) §175.

<sup>77</sup> *Op. cit. supra* note 1, §22; see KEENER, *op. cit. supra* note 1, at 50.

<sup>78</sup> (1786) 1 T. R. 285.

<sup>79</sup> *Supra* note 19.

<sup>80</sup> While the plaintiff, had it known that the assignment was for value, would have realized that the assignee would be liable on his warranty if payment in full were not made, yet it must have supposed there to have been no breach of warranty—a mistake in which the defendant participated as well.

mistake had given a contractor a warrant for more than was owing, failed to recover the excess from an assignee who had collected the face amount. The point was stressed that the defendant was not unjustly enriched as he received only what he had paid for the warrant. Since the contractor would have been liable on his warranty for the excess if the correct amount only had been paid, in effect, unknown to both parties, the county was satisfying—as to the excess—the obligation of the contractor. Nor on theory should it make any difference that the parties were unaware that a third person's obligation was being satisfied; upon the payment the defendant naturally concludes that the transaction is settled and is deterred from taking steps to collect from that third person.<sup>81</sup>

#### VIII. UNWITTING SATISFACTION OF ANOTHER'S OBLIGATION

The case last cited leads naturally to other situations where the plaintiff unwittingly pays the obligation of a third party to the defendant. The first to be considered are those in which the defendant takes the payment in intentional satisfaction of the third party's obligation. Typical is *Southwick v. First National Bank of Memphis*.<sup>82</sup> Here a drawer drew a draft on the plaintiff payable to himself and deposited it with the defendant bank under an agreement whereby the proceeds were to be credited on the indebtedness of the drawer. On presentment the plaintiff paid, supposing that the proceeds were to be used for an entirely different purpose as had been agreed upon between the plaintiff and the drawer. It was held that the plaintiff could not recover from the defendant which knew nothing of this agreement. It is especially noteworthy here that the court said that the defendant could not have held the plaintiff upon an acceptance by the latter, since at that time in New York an existing indebtedness was not value in the case of negotiable paper.<sup>83</sup> In substance then, in this case the plaintiff paid the debt of a third person while thinking he was doing something else. The court considered the situation exactly as if the drawer had obtained money from the drawee for a different purpose and had then used it to pay his own debt to the defendant.<sup>84</sup>

<sup>81</sup> In *Atlantic Coast Line R. R. v. Schirmer*, *supra* note 38, both plaintiff and defendant supposed that the plaintiff was paying his own obligation to the defendant and were unaware of the obligation of the third party since the supposed obligation of the plaintiff depended upon the absence of obligation of the third person. But see *contra*: *Lowe v. Wells Fargo & Co. Express*, *supra* note 56.

<sup>82</sup> (1881) 84 N. Y. 420.

<sup>83</sup> Cf. *Fort Dearborn National Bank v. Carter, Rice & Co.* (1890) 152 Mass. 34, 25 N. E. 27, holding that the drawee would be liable on his acceptance.

<sup>84</sup> It is to be noted that in this case there was not a mutual mistake in the sense that both parties were mistaken as to the same thing. The plaintiff's mistake lay in its ignorance of the agreement between the drawer and the defendant;



In a recent Virginia case<sup>85</sup> the following facts were presented. Under an arrangement whereby *D* was to have half the proceeds of a sale of *S*'s stock in payment of *S*'s debt, *D* delivered the certificate to a bank which directed brokers to sell the same. Due to a mistake on the part of the brokers, they sold stock in a corporation bearing a somewhat similar name and paid the bank which credited *D* for the full amount. Thereupon *D* paid half the amount to *S*. It was held that the brokers could not recover from the bank,<sup>86</sup> nor from *D*. As

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while the defendant's mistake lay in his ignorance of the agreement between the drawer and the plaintiff.

The Southwick decision, *supra* note 82, was regarded as controlling in *Ball v. Shepard* (1911) 202 N. Y. 247, 95 N. E. 719. Here *V* bought bonds of the defendant at 90, telling the defendant to bill and deliver them to the plaintiff at 98. Upon delivery the plaintiff paid under an agreement with *V* who had falsely represented that he had sold the bonds to *S* whose check would be forthcoming. It had been the practice for the plaintiff to clear such transactions for *V*. Immediately thereafter the defendant paid \$8 per 100 to *V*. The plaintiff tendered back the bonds and demanded his money. It is to be noted that the plaintiff supposed he was paying the obligation of *S* to *V*, and in part at least the obligation of *V* to the defendant. In fact the defendant received \$90 per 100 in satisfaction of *V*'s obligation to the defendant and as to \$8 per 100 the defendant acted as agent for *V* and later paid over to his principal. As to both the \$90 and the \$8 the case is stronger than the Southwick case for the defendant, who did more than take the money in satisfaction of a precedent debt since he surrendered the bonds and paid the \$8 to *V*. Yet as the bonds were tendered back, the defendant would have been able by acceptance of them to restore himself in part to his original position. It is significant, however, that this was not regarded as material. Under these two cases we may ask what is left of the earlier New York rule with regard to change of position as laid down in *Kingston Bank v. Eltinge*, *supra* note 1, where a sheriff having an earlier execution in favor of the defendant and a later one in favor of the plaintiff sold the personal property of the judgment debtor and with the consent of the plaintiff paid the proceeds to the defendant, although unbeknown to the parties the defendant's execution had expired by lapse of time. It was held that the plaintiff could recover although by reason of the payment the defendant had lost his judgment lien against the debtor's land. But in the same case on a later appeal, (1876) 66 N. Y. 625, the plaintiff lost for the reason that he had realized from the debtor's land, upon which the defendant's judgment had been a prior lien, at least as much as the defendant received by execution on the personalty. It would seem that the case was virtually one of set-off or, as Mr. Woodward puts it (*op. cit. supra* note 1, §24), the plaintiff reaped an equivalent from the same mistake. In its opinion in *Ball v. Shepard*, the court endeavors to distinguish *Hathaway v. Delaware County* (1906) 185 N. Y. 368, 78 N. E. 153, 13 L. R. A. (n.s.) 273, on the ground that the plaintiff intended to pay the defendant for the bonds, whereas in the *Hathaway* case the plaintiff intended to lend to the county and not to discharge the obligation of the defaulting treasurer, *i.e.*, that there was no mistake in the *Ball* case as between plaintiff and defendant. But even if it be assumed that this distinction is sound, how is the Southwick case to be distinguished from the *Hathaway* case?

<sup>85</sup> *Hibbs v. First National Bank of Alexandria*, *supra* note 43.

<sup>86</sup> The reason assigned was that upon crediting *D* the bank became an unconditional debtor to *D* and could not change its relationship. Query. But if *D* was not liable, then the bank should not be.

to *D*, the payment over to *S* of one-half should be a defense, though it is to be noted that the brokers knew neither *S* nor *D* in the transaction, since *D* was really the agent of *S*. As to the other half, *D* took the bank credit in satisfaction of *S*'s debt. Thus the brokers, without knowing that they were doing so, indirectly paid off the debt of *S* to *D*. An interesting point is that, while it does not appear that *D* had drawn against his bank credit, the situation is treated, and it is thought rightly, the same as if he had.

Two English decisions must be considered *contra*. A purchaser of two parcels of goods, directed by the seller to pay for one parcel to the defendant and for the other to *X*, by mistake paid for both parcels to the defendant. The seller had assigned his claims for payment to the defendant and *X*, who had held shipping documents and who had released the goods upon receiving the assignments. The defendant received the payment in good faith, having been falsely told by the seller of other sales to the purchaser, and having released other goods on that understanding, consequently supposing that part of the payment was for these other goods. The purchaser was allowed to recover for the excess despite the fact that the defendant took it in payment of the indebtedness of the seller and despite the later insolvency of the seller. While the court admitted that a payee cannot recover from an agent who credits the payment against the principal's indebtedness, it somehow thought that the same principle did not apply here.<sup>87</sup> With one possible exception, similar facts were presented in *Kleinwort, Sons, & Co. v. Dunlop Rubber Co.*<sup>88</sup> In this latter case the jury specifically found that the payee, even if the overpayment had not been made, would have continued to make advances to the seller. This point is stressed by the court as showing that there was no change of position. However, it is submitted that it is almost impossible to say what a person would have done if conditions had been different. In the case of stolen or fraudulently obtained money received in payment of the debt of the possessor, it is frequently possible to conjecture that the payee would or could have done nothing to recover the debt if the payment had not been made. Yet this argument has apparently proved futile in such cases.

A variant of the problems just discussed occurs where the intentions of both parties are directed to satisfaction of a supposed but nonexistent debt of a third person while in fact the payment results, assuming it can be retained, in the discharge to the payee of the obligation of

<sup>87</sup> *Continental Caoutchouc & G. P. Co. v. Kleinwort, Sons, & Co.* (1904) 90 L. T. 474.

<sup>88</sup> (1907) 97 L. T. 263.

a fourth person. *Walker v. Conant*<sup>89</sup> is typical. A person falsely purporting to be an agent procured money from the defendant upon the forged note and mortgage of his principal. He later obtained a second loan from the plaintiff upon another forged mortgage of the same property and out of the money advanced arranged for the plaintiff to pay off the supposed first mortgage to the defendant. In denying recovery, the court considered that the situation was the same as if the plaintiff had paid cash to the swindler, who in turn paid the defendant. "The money is honestly her [the defendant's] due, and she has an equitable right to demand and receive it of Edgar [the swindler]." While the court bolsters up its opinion by the dubious argument that, as a result, the defendant parted with her securities, which apparently had been destroyed, and thus her situation had been changed without possibility of restoration,<sup>90</sup> this argument may be thought unnecessary. The payment of the supposed mortgage would naturally lead the defendant to believe the transaction closed and defers the disclosure of the original fraud. So far as change of position is concerned, she is in the same position as the creditor who takes stolen money from his debtor. It is difficult to see why it is material that she knew the money was coming from the plaintiff.<sup>91</sup> However, other cases are opposed to the above result. Thus, under similar facts in *Grand Lodge A. O. U. W. v. Towne*,<sup>92</sup> the court said:

"But here we have the payment of a mortgage that never existed, which strikes us as nothing more or less than a payment made by the plaintiff

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<sup>89</sup> *Supra* note 37. Cohen, *op. cit. supra* note 1, at 1342, disagrees apparently with this and other cases of "unconscious purchase for value." In his opinion seemingly it is necessary that the defendant must intend to discharge his actual claim in order to be a purchaser for value of the money. This would appear to be due to his attributing to the expression "purchase for value" a literal significance and his denial (see *supra* note 28) that the doctrine now rests upon change of position. If that denial is unsound, the use of a term, in general use because it describes the more frequent situation, should not blind us to the underlying theory.

<sup>90</sup> This argument was properly refuted by the dissent of Sherwood, C. J., who pointed out that the securities were worthless and that the forgery could be established without them in an action against the forger.

<sup>91</sup> *Russell v. Richard* (1912) 6 Ala. App. 73, 60 So. 411, *Ex parte Richard* (1913) 180 Ala. 580, 61 So. 819, reaches a similar conclusion. The factual differences are that the swindler impersonated the owner and gave a check for the new loan to the swindler's attorney with directions to pay off the defendant's supposed first mortgage out of the proceeds. While the defendant did not know from whom the money came he knew it came from someone who was advancing on another mortgage. Without entirely disapproving, the court purported to differentiate *Walker v. Conant*, *supra* note 89, on the ground that here the plaintiff paid the swindler who in turn through his agent paid the defendant. It may be questionable whether such a slight difference should justify different results. Doubtless in both cases the means taken were to avoid the possibility of neglect to pay off the first mortgage.

<sup>92</sup> (1917) 136 Minn. 72, 161 N. W. 403, L. R. A. 1917E 344.

to a third person on the strength of false representations of O'Donnell [the forger]<sup>93</sup> that such person was entitled to it. The situation is not as if plaintiff had intrusted O'Donnell with the money, and authorized him to pay Towne. This it expressly declined to do."

The court added that there was no change of position since the defendant gave up a worthless note and mortgage and it was entirely too speculative whether the defendant would have been able to discover the fraud and recover from the forger before he absconded.<sup>94</sup>

There is another line of cases where the defendant did not knowingly accept the money in satisfaction of an existing obligation, being unaware of its existence. In a New York case, through fraud *T* secured a credit with the plaintiff bank. He had previously forged and collected a check on the defendant bank for \$2400.00. Later he drew a check on the plaintiff to the order of the estate whose name he had forged and deposited this with the defendant bank to the credit of the estate. The defendant collected. At the time, neither the defendant nor the executors knew of the previous forgery and apparently were not cognizant until demand was made. Recovery was denied.<sup>95</sup> In answer to the objection that the money was not received nor accepted by the defendant bank in payment of the obligation caused by the forgery, Gray, J., remarked:

"Taylor was a debtor by reason of his forgeries, . . . , and it is of no conceivable importance, in my opinion, that the existence of the fact of indebtedness should be unknown at the time when he sought to make reparation by repaying the moneys feloniously taken. Having made the payment, he could not reclaim it, and no interest in the moneys remained in him. It satisfied the claim which the bank undoubtedly possessed against him, and discovery or knowledge of such claim was not necessary to its existence."<sup>96</sup>

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<sup>93</sup> Compare the doctrine of suretyship law that a surety has no defense in the fact that he was induced to enter upon the suretyship by the fraud of the principal to which the obligee was not privy. ARANT, *HANDBOOK OF THE LAW OF SURETYSHIP AND GUARANTY* (1931) 80.

<sup>94</sup> *Strauss v. Hensey* (1896) 9 App. D. C. 541 reaches the same conclusion on facts similar except that the swindler impersonated the true owner instead of pretending to be the agent.

<sup>95</sup> *Nassau Bank v. National Bank of Newburgh* (1899) 159 N. Y. 456, 54 N. E. 66.

<sup>96</sup> *Ibid.* at 460, 54 N. E. at 67. The court also quoted with approval the language of Mr. Justice Cullen in the Appellate Division: "Where one person defrauds another so skilfully that the party defrauded is ignorant of his loss, and restitution is made so adroitly that it does not disclose the original offence, does any different rule obtain from a case where one confesses his fault and openly makes restitution? We apprehend that there can be no distinction between the two cases." *Ibid.* at 461, 54 N. E. at 67.

See also *Title Guarantee & Trust Co. v. Haven* (1909) 196 N. Y. 487, 89 N. E. 1082, (1915) 214 N. Y. 468, 108 N. E. 819. A forger of a check on the plaintiff bank gave the same to the city to discharge street assessment liens on the defendants' land. The check was paid. It is consistent with the statement of facts that the defendants did not even know of the assessments, having secured title

Likewise, where the plaintiff lent money to one who purported to act as agent for the defendant but was without authority to borrow and the agent used the same to pay off his principal's debts, he has been denied recovery where the agent at the time of payment of the debts was in default to his principal for a sum at least as large as the money so used, but the principal was unaware at the time both of the loan and the agent's prior embezzlement or default.<sup>97</sup> If, as admitted in the Illinois decision cited in the previous note,<sup>98</sup> in the absence of the agent's default, the plaintiff can recover on the ground that his money has been used to confer a benefit upon the defendant, the situation is comparable to the problem previously discussed. Unwittingly the defendant has received payment of his debts in satisfaction of the agent's liability. It would seem immaterial that the agent's motive was to cover up his defalcation rather than to procure a benefit for the principal. It may be that the agent's payment of

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under a will after the assessments became liens. They apparently did not know of the payment until after they had sold and received the purchase price from a buyer. It was held that the plaintiff was entitled to be subrogated to the city's lien as against the proceeds of the sale *only* if the payment by the forger was gratuitous and not in discharge of an obligation of himself or the depositor, whose name was forged, to pay off the liens. See note (1913) 26 HARV. L. REV. 634.

<sup>97</sup> Merchants' National Bank v. Nichols & Shepherd Co. (1906) 223 Ill. 41, 79 N. E. 38; Railroad National Bank v. City of Lowell (1872) 109 Mass. 214; Agawam National Bank v. South Hadley (1880) 128 Mass. 503; Craft v. South Boston R. Co. (1889) 150 Mass. 207, 22 N. E. 920; Arey v. Hall (1888) 81 Me. 17; First National Bank v. City of New Castle (1909) 224 Pa. 285, 73 Atl. 331. Henry v. Wilkes (1868) 37 N. Y. 562, denying recovery, is slightly different in its facts since there the unauthorized agent used the money to pay off a mortgage on the defendant's land, being under contract with the defendant to satisfy the same. See Shipman v. Bank of the State of New York (1891) 126 N. Y. 318, 27 N. E. 371. Here the plaintiff gave his agent for delivery to X a check payable to the latter. By forgery of X's name the agent collected. Later the agent paid X the amount of the check but there was no evidence that the payment was made with the particular money received from the collection. In an action against the bank it was held that the latter could not defend on the ground of the agent's payment since the agent had also committed other frauds on the plaintiff causing him losses in excess of the amount of this particular check.

*Contra:* Reid v. Rigby & Co. [1894] 2 Q. B. 40; Bannatyne v. MacIver [1906] 1 K. B. 103. In commenting upon the last named case, Weston, *op. cit. supra* note 26, at 621, makes what is submitted to be an untenable distinction between the case there presented and where the agent steals money from a third person and uses it to pay his principal's debts unbeknown to the latter. He contends that where the agent purports to borrow for his principal, there is an "equitable estoppel," making it unjust for the defendant to deny the agent's authority to the extent to which as agent he has actually used the money in the principal's behalf. Clearly there is no estoppel in the sense of misleading conduct on the part of the principal. Perhaps his theory is ratification. See *infra* page 340.

<sup>98</sup> First National Bank v. Oberne (1886) 121 Ill. 25, 7 N. E. 85, lays down the principle.

the debts has postponed the moment of discovery, hence impairing the opportunity for collecting from the agent, if not making possible further speculations.

In these agency cases the argument for the plaintiff may be that the retention of the benefits received through the agent's unauthorized act amounts to a ratification, at least to the extent of the benefit received.<sup>99</sup> Such an argument is believed unsound. While usually retention of benefits from the agent's unauthorized act after knowledge of the facts works a ratification, this principle is not without qualification. When the borrowing agent pays over the money to the principal who takes it as the agent's money in intentional satisfaction of the agent's debt, he does not take it as the proceeds of the unauthorized act and consequently it is almost universally held that the principal is not liable.<sup>100</sup> Ratification by retention of benefits without other indication of a willingness to be bound by the agent's unauthorized act is a rule of law imposed involuntarily upon the defendant and consequently is not and should not be applied unless justice calls for it. When the principal is in a situation where he cannot surrender the benefits of the agent's act without putting himself in a worse position, the usual rule of ratification by retention does not apply.<sup>101</sup> The profit derived by the defendant in these cases is counterbalanced by his change of position.

A similar situation is presented when a trustee of two trusts, in default by reason of embezzlement from the first, takes money belonging to the second and uses it to pay debts incurred by him as trustee of the first. This problem, coupled with the additional fact that the trustee had settled his accounts with the first trust long before the truth was discovered, was presented in the widely criticized decision of *Newell v. Hadley*,<sup>102</sup> in which the beneficiaries of the second trust were permitted

<sup>99</sup> See *First National Bank v. Badger Lumber Co.*, *supra* note 31.

<sup>100</sup> 1 MECHEM, AGENCY (2d ed. 1914) §437. In *Wycoff v. Davis* (1905) 127 Iowa 399, 101 N. W. 349, the agent obtained money to pay his debt to the principal by wrongfully disposing of the latter's property as his own. It was held the principal could reclaim his property without restoring the money. *Accord*: *Thatcher v. Pray*, *supra* note 35.

<sup>101</sup> See 1 MECHEM, *op. cit. supra* note 100, §§ 435, 436 for other instances where ratification is not worked by a retention of benefits.

<sup>102</sup> (1910) 206 Mass. 335, 92 N. E. 507. The case is severely criticized by Baker, *The Application of Money Wrongfully Procured, by a Defaulting Agent or Trustee, to the Payment of the Debts of the Principal's Business or the Trust Estate* (1911) 59 UOF PA. L. REV. 225; Jacob, *A Problem in Trusts: Newell v. Hadley* (1930) 25 ILL. L. REV. 19; Weston, *loc. cit. supra* note 26. The point is advanced by Messrs. Baker and Jacob that the debts were not the debts of the beneficiaries and that the creditors of the first trust could reach the trust estate only through the trustee's right of indemnity or exoneration, which is affected by the state of accounts between the trustee and the beneficiaries. But see Stone, *A*

recovery against the beneficiaries of the first.<sup>103</sup>

Bearing a close resemblance to the cases previously discussed is the problem presented by a few cases typified by an English decision.<sup>104</sup> The manager of the defendant bank, having access to its securities, abstracted certain negotiable securities which he passed to the plaintiff, a holder in good faith for value. To avoid detection at an approaching audit, the manager by fraud secured some of them back from the plaintiff and placed them among the defendant's securities where they were exhibited to the auditors as if they had always been in the custody of the defendant. Since the manager did not return all those abstracted, discovery of the fraud followed. However, it does not appear how soon the defendant learned that the returned securities had been withdrawn. The court refused to allow recovery, on the ground that the defendant was a purchaser in good faith for value, having taken the securities in satisfaction of the then unknown obligation of the manager to restore them or their value. A contrary conclusion, however, has been reached in certain American cases.<sup>105</sup> While it may be admitted that the bare return of the securities to their former place should not revest ownership in the original owner,

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*Theory of Liability of Trust Estates for the Contracts and Torts of the Trustee* (1922) 22 COL. L. REV. 527, 529. Under this theory the problem is not the same as in the agency cases. *Newell v. Hadley* is defended in Note (1927) 25 MICH. L. REV. 436.

<sup>103</sup> See also *Whiting v. Hudson Trust Co.* (1923) 234 N. Y. 394, 138 N. E. 33. This case may be thought distinguishable. But see Note (1923) 21 MICH. L. REV. 919.

<sup>104</sup> *London & County Banking Co. v. London & River Plate Bank* (1888) 21 Q. B. D. 535. Cf. *Nash v. De Freville* [1900] 2 Q. B. 72.

<sup>105</sup> *Voss v. Chamberlain* (1908) 139 Iowa 569, 117 N. W. 269, (1909) 19 L. R. A. (N.S.) 106 (Possibly there is a significant difference here in that the original owner, the defendant, never saw the negotiable notes after they were replaced in a wallet containing the private papers of the defendant, which was in custody of the embezzler, until after the embezzler had gone into bankruptcy—under these circumstances there is no chance for a change of position.); *Brown v. Southwestern Farm Mortgage Co.* (1922) 112 Kan. 192, 210 Pac. 658 (It might be mentioned that here the securities were replaced by the defaulting officer of the defendant about six months before he absconded; so far as appears, other officers of the defendant may have observed them there beforehand and at least it does affirmatively appear that after the defaulter absconded the bank examiner found them sometime before the plaintiff made known her claim; in other words, the surreptitious return may well have prevented the defendant from discovering the theft for an appreciable period; see Note (1923) 36 HARV. L. REV. 858. While approving *Newell v. Hadley*, *supra* note 102, the note writer in (1923) 21 MICH. L. REV. 919 apparently agrees also with the *London & County Banking Co.* case, *supra* note 104. See also *Childs & Co. v. Harris Trust & Savings Bank* (C. C. A. 9th, 1928) 7 F. (2d) 633, commented upon in (1928) 27 MICH. L. REV. 205.

yet it may be urged that if there are additional facts showing a possible change of position, the original owner should succeed.<sup>106</sup> It cannot be insisted too strongly that the doctrine of purchaser for value is merely one instance of a wider doctrine of change of position. While the language of the *London & County Banking Co.* decision that the defendant was a *purchaser* of the bonds in satisfaction of the unknown claim does sound far-fetched,<sup>107</sup> yet the decision need not rest upon such conception.<sup>108</sup>

On the same general principle of change of position, if commercial paper is indorsed generally and deposited for collection in a bank, which in turn sends it on to a correspondent collecting bank, then if sued by the depositor, the correspondent may set off the indebtedness of the depositary bank, even if that indebtedness existed before the paper was taken, provided that the correspondent was without knowledge of the depositor's ownership when it took the paper.<sup>109</sup> This is but an instance of the rule that, when sued by an undisclosed principal, the third person may use set-offs against the agent acquired before notice of the relation of principal and agent.<sup>110</sup>

Likewise, even in those jurisdictions where a prior assignee of a non-negotiable chose in action will normally prevail over the second who purchased for value in ignorance of the prior but who gave the

<sup>106</sup> See Note (1923) 36 HARV. L. REV. 858.

<sup>107</sup> "If some one steals my boots, and afterwards replaces them, one might perhaps, but not, I think, without some strain on the imagination, conceive that I impliedly release my right to complain of the theft, in return for the returned boots, though I did not know that they had been stolen." Collins, L. J., in *Nash v. De Freville*, *supra* note 104, at 88.

<sup>108</sup> There are a number of other similar cases where the result is made to depend on the doctrine of imputing the knowledge of the agent to the principal. Thus in *Atlantic Cotton Mills v. Indian Orchard Mills* (1888) 147 Mass. 268, 17 N. E. 496, where the common treasurer of two corporations, in order to make good his default to one, had drawn checks upon the other, payable to the order of the first, by which the money was drawn and used, no other officer of either knowing the facts, the corporation using the money was held to be affected by the treasurer's knowledge. *Metropolitan Trust Co. v. Federal Trust Co.* (1919) 232 Mass. 363, 122 N. E. 413, probably goes on this ground, as in part do *Newell v. Hadley*, *supra* note 102; *Brown v. Southwestern Farm Mortgage Co.*, and *Childs & Co. v. Harris Trust & Savings Bank*, both *supra* note 105. As is well known, there is considerable dispute whether the doctrine of imputation of knowledge applies in such a case. The problem, however, is too large to be discussed here. For an examination of it in connection with *Newell v. Hadley*, *supra* note 102, see *Baker, op. cit. supra* note 102, at 225, 227.

<sup>109</sup> *Bank of Metropolis v. New England Bank* (1843) 42 U. S. (1 How.) 234, (1848) 47 U. S. (6 How.) 212; *Garrison v. Union Trust Co.* (1905) 139 Mich. 392, 102 N. W. 978, 111 Am. St. Rep. 407. But see the somewhat questionable distinction in *Wilson & Co. v. Smith* (1845) 44 U. S. (3 How.) 762; 2 MORSE, BANKS AND BANKING (6th ed. 1928) §§ 591-602.

<sup>110</sup> 2 MECHEM, AGENCY (2d ed. 1914) §2077. See *supra* page 321.



first notice to the obligor, the second may retain as against the first a payment procured without notice of the prior assignment.<sup>111</sup> In such a case the second assignee actually takes the money in satisfaction of the assignor's obligation as a warrantor, instead of the supposed obligation of the obligor to himself. Since the obligor is discharged of all liability when he pays in ignorance of the first assignment, the first assignee is left with a remedy against the assignor only. The peculiarity of the result is that the first assignee has neither paid the second nor is he, according to these jurisdictions, sufficiently blameworthy in making possible the second assignment as to preclude himself when the competition arises before payment by the obligor. But the second assignee has obtained the money or whatever else of value the obligor gave in satisfaction, and he received it, however unwittingly, in satisfaction of the assignor's obligation.

#### IX. COMMERCIAL PAPER

We may now turn our attention to problems arising in connection with negotiable paper, treated separately here merely because they are usually segregated.

As is well known, there has been a lively controversy since the adoption of the Uniform Negotiable Instruments Law on the question whether the payee of negotiable paper can be a holder in due course. While it has been frequently said that before the act he might be,<sup>112</sup> the decisions under the act are in conflict.<sup>113</sup> If the payee can enforce the paper, it goes without saying that a payment cannot be recovered. On the other hand, if he cannot enforce the paper, it by no means follows that a payment can be reclaimed. Yet in those cases where the payee is being sued, the solution apparently is thought by the courts to be dependent upon whether he could affirmatively enforce the paper.<sup>114</sup> To take as typical the leading case of *Boston Steel & Iron Co. v. Steuer*,<sup>115</sup> where a wife put into the hands of her husband

<sup>111</sup> *Rabinowitz v. People's National Bank* (1920) 235 Mass. 102, 126 N. E. 289; 1 WILLISTON, CONTRACTS (1920) §435; Ames, *The Doctrine of Price v. Neal* (1891) 4 HARV. L. REV. 297, 309; RESTATEMENT OF CONTRACTS (Am. L. Inst. 1928) §173.

<sup>112</sup> Feezer, *May the Payee of a Negotiable Instrument be a Holder in Due Course?* (1925) 9 MINN. L. REV. 101, 104. But see Note (1924) 32 A. L. R. 289, 294.

<sup>113</sup> Feezer, *op. cit. supra* note 112, at 105; Moore, *The Right of the Remitter of a Bill or Note* (1920) 20 COL. L. REV. 749; Hamilton, *Holder in Due Course* (1912) 24 JUR. REV. 41; BRANNAN, NEGOTIABLE INSTRUMENTS LAW (4th ed. 1926) 119, 361. The cases are collected in Notes (1921) 15 A. L. R. 437; (1922) 21 *ibid.* 1365, (1923) 26 *ibid.* 769, (1924) 32 *ibid.* 289, (1930) 68 *ibid.* 962.

<sup>114</sup> One exception to this conception appears in the dissenting opinion of Cave, L. C., in *Jones v. Waring & Gillow* [1926] A. C. 670, (1930) 68 A. L. R. 944.

<sup>115</sup> (1903) 183 Mass. 140, 66 N. E. 646.

a check payable to her creditor in order to make a payment on her debt but instead the husband delivered it to the payee as a payment on his, the court denied recovery or an application upon her debt for the reason that the payee was a holder in due course and could have affirmatively enforced the check against her for her husband's debt. On the other hand, the decisions giving relief go upon the ground that the defendant cannot be a holder in due course.<sup>116</sup> Assuming that the payee cannot be such a holder, what is the explanation for allowing recovery of the completed payment in those cases where the payee has in good faith taken and collected, either for the debt of, or for a new consideration passing to, the intermediary possessor? In *Hathaway v. Delaware County*<sup>117</sup> the Negotiable Instruments Law was not cited nor was there any discussion whether the defendant was a holder in due course. The facts were that a defaulting county ex-treasurer forged a note of the county which he sold to the plaintiffs, who in return gave a check payable to the county. This check the defaulter gave to the county in payment of his defalcation. In deciding for the plaintiffs, the court said:

"The check was drawn by the plaintiffs to the order of the defendant. It imported on its face that the money represented by it was the property of the plaintiffs and that they, not Woodruff, were paying it to the defendant . . . Woodruff had no apparent title to the check. He was merely the agent of the plaintiffs for the purpose of delivering it to the defendant."<sup>118</sup>

The trouble with this theory is that the intermediary in the above

<sup>116</sup> *Jones v. Waring & Gillow*, *supra* note 114 (A check was taken in satisfaction of the debt of the possessor by the payee who thereupon redelivered property sold upon a conditional sale that had been repossessed upon failure to pay. It should be noted, however, that in his dissent Cave, L. C., while thinking that the payee could not be a holder in due course, yet considered that the plaintiff could not recover because of a change of position on the part of the defendants, or, as he puts it, "estoppel"); *Bowles Co. v. Clark* (1910) 59 Wash. 336, 109 Pac. 812 (Negotiable Instruments Law not mentioned). *St. Charles Savings Bank v. Edwards* (1912) 243 Mo. 553, 147 S. W. 978 (Negotiable Instruments Law not cited) is distinguishable inasmuch as the plaintiff's name was signed by its cashier as such and the check was given to the defendant in payment of the cashier's debt to the defendant. See *infra* page 345.

<sup>117</sup> (1906) 185 N. Y. 368, 78 N. E. 153, 13 L. R. A. (N.S.) 273, *supra* note 84.

<sup>118</sup> See BRANNAN, NEGOTIABLE INSTRUMENTS LAW (4th ed. 1926) 120 n.: "This case was really decided upon the theory that the payee was put upon inquiry of the rights of the drawer. It is submitted that it was wrong upon its facts . . . The case is disapproved in 23 Banking Law Journal 595." A similar line of reasoning appears in *Bowles Co. v. Clark*, *supra* note 116, and *Sims v. United States Trust Co.* (1886) 103 N. Y. 472, 9 N. E. 605 (before the adoption of the Negotiable Instruments Law). *Quarles v. Hall* (1903) 100 Mo. App. 523, 74 S. W. 883, is probably distinguishable since the check bore on its face notice of the purpose for which it was given.

cited cases did not purport to the payee to be acting as agent,<sup>119</sup> but rather as one who was owner of the check. The question is then whether it is so uncommon for one to purchase a check payable to a third person, that the third person should be put upon inquiry, should be regarded as having constructive notice, if the fact be such, that he was only an agent whose authority must be inquired into.<sup>120</sup> But if this be so, then some of the cases denying the possibility of the payee being a holder in due course and therefore unable to enforce the paper, might be placed on the ground that he does not take in good faith, rather than that he is not one to whom the paper has been "negotiated" within the meaning of section 52 of the Negotiable Instruments Law. It must, however, be admitted that this explanation will not suffice in those cases where the intermediary was not an agent but had procured the paper through fraud or other improper means or where there was a failure of consideration between the maker and the intermediary. If the difficulty of notice be surmounted, then the cases allowing recovery of the payment must be conceded to deny the application of the doctrine of *bona fide* purchaser of the money collected.

Before departing from this sub-topic, reference should be made to a somewhat similar but distinguishable line of cases. *Newburyport v. Fidelity Ins. Co.*<sup>121</sup> will serve as an example. A city treasurer drew a check payable to the defendant in the name of the city, signed by himself as treasurer, and gave it to the defendant in payment of premiums on his own policy. It was held that the city was entitled to recover on the ground that the defendant had notice that the treasurer was using the city's funds to pay his individual debt and consequently was guilty of bad faith.<sup>122</sup>

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<sup>119</sup> In *Bristol Knife Co. v. First National Bank* (1874) 41 Conn. 421, a check was indorsed by the payee to the defendant bank and sent with a deposit slip by a messenger who presented the check without the deposit slip, stating that the payee did not wish to deposit it but to have it cashed. In deciding for the payee against the bank the court said that the question was solely one of agency. Here, however, the messenger professed to be an agent for the payee. There was a dissent on the ground that the messenger had apparent authority to cash the check.

<sup>120</sup> See Feezer, *op. cit. supra* note 112, at 102, 103, where the author differs from Professor Moore in the latter's view, *loc. cit. supra* note 113, that only the payee of "truly remittable paper," such as bank drafts, should be protected as a holder in due course. Mr. Feezer would extend the protection to payees of ordinary checks.

<sup>121</sup> (1908) 197 Mass. 596, 84 N. E. 111.

<sup>122</sup> *St. Charles Savings Bank v. Edwards*, *supra* note 116, is explainable on this ground. See also *Wolfe v. State* (1885) 79 Ala. 201. But see *Goshen National Bank v. State* (1894) 141 N. Y. 379, 36 N. E. 316. A bank cashier drew a cashier's draft on the funds of the bank in another bank and gave it to the state in payment of his personal obligation to the state as a tax collector. It was held that the bank could not recover from the state for the reason that the state took the money in payment of a debt. The case certainly seems a much stronger one for the plaintiff

The *Price v. Neal*<sup>123</sup> problem next confronts us. Since that case was decided in 1762, it has been held with almost complete unanimity that a purchaser for value in good faith of negotiable paper may retain payment received from the drawee or maker, despite the forgery of the signature of drawer or maker.<sup>124</sup> The soundness of the doctrine has been much mooted.<sup>125</sup> While criticising Ames' theory of equal equities, Keener,<sup>126</sup> but without elaboration, points out that the result may be supported on the ground that since the defendant "having certain rights receives from the plaintiff money in extinguishment thereof, he is in a position to say that he surrendered value for the money received, and should not therefore be required to return the money so paid."<sup>127</sup>

than *Hathaway v. Delaware County*, *supra* note 117. If correct, it must go on the ground that the cashier had authority to draw on the bank's funds to pay his own debts when the state of his deposit justified and that this was an extrinsic fact peculiarly within his own knowledge. See (1920) 20 COL. L. REV. 492.

<sup>123</sup> (1762) 3 Burr. 1354. It is to be noted that this is another case of "unconscious purchaser for value" in that the minds of both parties are directed to the payment of the non-existent obligation of the drawer.

<sup>124</sup> Usually, likewise, recovery is denied where the drawee pays under a mistake as to the state of the drawer's account. *WOODWARD, op. cit. supra* note 1, §182; *BRANNAN, op. cit. supra* note 21, at 573. Here the bank is paying off an actual obligation of the drawer, something that it consciously intends to do, and in this respect the case differs from that of the forged drawing where the supposed obligation of the drawer does not exist and the obligation actually paid is that of the indorser or forger. Hence the case resembles payment by an obligor to the obligee's assignee for security. Otherwise there appears to be little difference between the two cases except that in the haste of banking transactions it may be more onerous to verify the state of the drawer's account than the genuineness of his signature.

<sup>125</sup> *KEENER, op. cit. supra* note 1, at 154; *WOODWARD, op. cit. supra* note 1, §80 *et seq.*; *Aigler, The Doctrine of Price v. Neal* (1926) 24 MICH. L. REV. 809; *Ames, loc. cit. supra* note 111; *Costigan, op. cit. supra* note 1, at 208; *Wigmore, A Summary of Quasi-Contracts* (1891) 25 AMER. L. REV. 695, 706. It has even been held that under certain circumstances a payment made to the payee upon a forged drawing may not be recovered. *Bergstrom v. Ritz-Carlton R. & H. Co.* (1916) 171 App. Div. 776, 157 N. Y. Supp. 959. The swindler here presented the check to payee, stating that the apparent drawer, who was known to payee, wished to cash the same. The court seemed to regard the payee as a holder in due course, although it is not apparent how the payee of a forged check can be such. *National Bank of North America v. Bangs* (1871) 106 Mass. 441, was distinguished on the ground that there the payee was negligent and his presentation for payment induced the payment, while here the drawee was in no way deceived by the presentation for payment, since the drawee, the husband of the drawer, pronounced the check genuine upon his cashier expressing some doubt. While the payee may have been negligent, the drawee was equally so. It is not, however, proposed here to discuss the numerous cases making an exception to *Price v. Neal* on the ground that the defendant was negligent in taking the paper.

<sup>126</sup> *Op. cit. supra* note 1, at 156.

<sup>127</sup> He regards the problem as governed by the principle of *Merchants' Ins. Co. v. Abbott, supra* note 70, and *Southwick v. National Bank, supra* note 82.

See Note (1913) 26 HARV. L. REV. 634: "The holder buys the instrument itself only for reasons of commercial convenience. The real thing bargained for is payment by the drawee. If, instead of an order for money, he had bought an

Where there are prior indorsers who are liable on their indorsements, his meaning probably is that the money is received in satisfaction of their ordinary obligations as well as that of the supposed drawer or maker.<sup>128</sup> His meaning would also include satisfaction of the obligations of the indorsers as warrantors of the genuineness of the paper. And even if there were no prior indorsers the one who perpetrated the fraud would be liable to the defendant for any loss incurred.<sup>129</sup> Hence figuratively the defendant takes the money in satisfaction of the unknown obligation of this person, or, to put it more accurately, there is a possible change of position in that the defendant, thinking the transaction closed, will be lulled into a sense of security and take no steps against the swindler.<sup>130</sup> On this theory *Price v. Neal*, instead of being anomalous, is in accord with many of the other quasi-contract cases already discussed.

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order for a conveyance of Blackacre, the substance of the transaction would be obvious. The fact that the property right is obtained directly and not through the wrongdoer should make no difference in considering the merits of the parties. If the wrongdoer stole the money from the drawee, he would have no more right to it equitably than the forged order gave him, and the drawee would be no more responsible for his possession of the money than for his drawing of the order. Yet if he paid the money in due course, the person who received it would admittedly be entitled to keep it. Now, if the wrongdoer accomplishes his purpose by means of a forged order instead of a trespass, is not the innocent purchaser who receives payment in the same position equitably? The device of an order simply expands the transaction and makes it triangular. It affords no reason for changing the substantive rights of the parties."

<sup>128</sup> Mr. Woodward, *op. cit. supra* note 1, §85, says: "Another suggested reason for denying relief is that, in consequence of the drawee's payment of the bill, the holder loses the right of recourse against prior indorsers which the dishonor of the bill would have given him. That is, as a result of the drawee's mistake the holder's position is so altered that to permit a recovery from him would be to cause him a loss which but for the drawee's mistake he would not have suffered." The meaning would seem to be that there is an irretrievable loss of remedy against the indorsers. The difficulty with the argument is that while the indorsers could not be held upon their ordinary obligation to pay upon dishonor and notice, yet if the defendant were properly forced to refund, he could still come back upon the indorsers upon their warranties of the genuineness of the instrument and would not be barred by the failure to give notice of dishonor..

<sup>129</sup> Following the quotation in the preceding note, Mr. Woodward adds: "This theory may provide an adequate reason for denying recovery where it appears that there *were* prior indorsers and that recourse against them is lost. But as an explanation of the general rule it encounters a number of cases in which a recovery is denied even though there were no prior indorsers, and it overlooks the fact that an acceptance alone, which, of course, does not release indorsers, precludes the drawee from setting up the forgery of the drawer's signature." As to the last suggestion it may be answered that the acceptance naturally leads the holder to believe the instrument genuine and to desist from taking steps immediately to hold the indorsers upon the warranty of genuineness.

<sup>130</sup> This idea is expressed by Story, J., in *Bank of United States v. Bank of Georgia* (1825) 23 U. S. (10 Wheat.) 333, at 356, as follows: "We think this doctrine founded on public policy and convenience; and that actual loss is not

However, it is asserted that the recognition of this principle would forbid relief in certain cases where the decisions uniformly permit it.<sup>131</sup> Thus, where the instrument is genuine but the defendant's title comes through a forged indorsement, recovery is allowed. To explain and reconcile this result with *Price v. Neal*, Ames<sup>132</sup> expounded a theory which seems to meet with little, if any, recognition in the decisions. It is as follows: The defendant is legally a converter of the bill, however innocent he may be, from the one whose indorsement is forged and consequently when he receives payment, he becomes a constructive trustee of the money for that person as money received by means of the latter's property. If the defendant is compelled to pay the money, the title to the paper passes to him but, if he should seek to collect again from the acceptor or maker, he would be met by the defense that the bill or note had already been paid him. On the other hand if the true owner should proceed against maker or acceptor, the prior payment to the defendant holder would be no bar, and the maker or acceptor upon payment would be entitled to the paper and subrogated to the owner's right to enforce the constructive trust against the holder, thereby making himself whole. Consequently whatever course the true owner elects to pursue, the loss ultimately falls upon the holder. While admitting the anomaly of permitting the maker or acceptor to proceed directly against the holder without first paying the true owner, the result is defended on the practical ground that it puts the loss where it should ultimately lie on the principle of subrogation.

Is Dean Ames' explanation entirely satisfactory?<sup>133</sup> While it may be admitted that the real owner has this choice of remedy, yet if he

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necessary to be proved, for potential loss may exist, and the law will always presume a possible loss, in cases of this nature." See also *Johnston v. Commercial Bank* (1885) 27 W. Va. 343.

See Note (1923) 36 HARV. L. REV. 858, 860, to the effect that the real basis of *Price v. Neal* is that the drawee's failure to discover the forgery prevents the holder from seeking immediate recourse against the forger; that the short period usually elapsing between the purchase of the bill and presentment makes it more likely that immediate recourse would be of some value while a subsequent revival of the claim would be of nebulous value. Instead of requiring proof of an actual change of position, a hard and fast rule that satisfies the requirements of mercantile certainty makes the time of payment or acceptance the time of fixing the rights of drawee and holder. It is added that the drawee's greater opportunity for familiarizing himself with the drawer's signature makes it more expedient to place the risk on him, whereas in the case of a forged indorsement the drawee is in no better position to protect himself than the holder.

<sup>131</sup> KEENER, *op. cit. supra* note 1, at 157.

<sup>132</sup> Ames, *op. cit. supra* note 111, at 307. Possibly the opinion in *United States v. Chase National Bank* (1920) 252 U. S. 485 lends some support to Ames' view.

<sup>133</sup> KEENER, *op. cit. supra* note 1, at 157, criticizes it on the ground that in certain peculiar and extraordinary situations subrogation could not possibly be available.

recovers from the maker or acceptor, is it true that the latter would be entitled on principles of subrogation to the true owner's alternative remedy against the paid holder? Subrogation is a doctrine of equity, designed to put the ultimate responsibility or loss where equitably it should be. Frequently where there are two persons liable to a third, it is difficult to determine which of the two upon payment is entitled to subrogation against the other. Subrogation is denied wherever it is unjust to allow it.<sup>134</sup> Thus subrogation to property interests is refused when the defendant is a purchaser for value in good faith of the legal title.<sup>135</sup> Without elaboration of the point, we wish merely to suggest that subrogation may not be permitted, if the maker's or acceptor's payment has led to a change of position on the holder's part and that Dean Ames' theory of subrogation in such a situation is at least questionable.<sup>136</sup> On the other hand if the true owner has chosen to recover from the holder, does it follow, without begging the question in issue, that the maker or acceptor could, when sued, set up the prior payment as a defense? Although payment was made to the holder, he was not then the owner of the paper; he became owner by operation of law when he satisfied the judgment of the original owner. Should he not *then* succeed to the remedy of that owner against the maker or acceptor? To support Ames' view, it would appear necessary to resort to the doctrine of relation. Relation, however, is a fiction, properly and usually applied only when justice demands. We are then remitted to the same question where the payment to the holder has led to the change of position. A more serious difficulty presents itself when the drawee paid

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<sup>134</sup> Ladd, J., in *Baker v. American Surety Co.* (1916) 181 Iowa 634, 639, 159 N. W. 1044, 1046: "Wherever the doctrine [of subrogation] is made use of, it is always for the promotion of justice and the prevention of inequitable results. It will never be enforced, when doing so would be inequitable, or where it would work injustice to those having equal equities. . . . It necessarily follows that the equities of one seeking subrogation must be greater than those of him against whom subrogation is sought. . . . As remarked in *Acer v. Hotchkiss*, 97 N. Y. 395: 'The doctrine of subrogation is a device to promote justice. We shall never handle it unwisely if that purpose controls the effort, and the resultant equity is steadily kept in view.'"

<sup>135</sup> *Richards v. Griffith* (1891) 92 Cal. 493, 28 Pac. 484.

<sup>136</sup> See *National Surety Co. v. Arosin* (C. C. A. 8th, 1912) 198 Fed. 605, but see on former appeal *National Surety Co. v. State Savings Bank* (C. C. A. 8th, 1907) 156 Fed. 21, (1908) 14 L. R. A. (N. S.) 155, (1909) 13 Ann. Cas. 421; *Baker v. American Surety Co.*, *supra* note 134, (even if the surety of the plaintiff's treasurer was liable to the plaintiff for checks forged in the name of the plaintiff, the surety was not entitled to subrogation to the remedy of the plaintiff against the bank paying the checks); *Stewart v. Commonwealth* (1898) 104 Ky. 489, 47 S. W. 332; *Northern Trust Co. v. Consolidated Elevator Co.* (1919) 142 Minn. 132, 171 N. W. 265; *American Bonding Co. v. State Savings Bank*, *supra* note 72; (1933) 21 CALIF. L. REV. 176.

without a prior acceptance. Dean Ames apparently did not specifically address himself to that point although many of the cases are of that sort. However, in numerous decisions the true owner of the bill or check has been awarded recovery against the drawee bank which paid the check to one holding through a forged indorsement, on the theory that payment amounts to an acceptance or that the drawee bank converted the paper, or in an action for money had and received.<sup>137</sup> Whatever the theory or its correctness, if it is admitted that the true owner has such a remedy, it would follow, assuming the above premise to be sound, that the once-paid holder succeeds to the right of the true owner against the drawee in such cases as well. If Dean Ames' explanation of the above situation is incorrect, the forged indorsement cases deny the doctrine of change of position by taking in satisfaction of a pre-existing obligation.

The next group of negotiable paper cases is where the note or bill has been altered, as for example by raising the amount. Here again the authorities, at least before the adoption of the Negotiable Instruments Law, permit recovery by the drawee.<sup>138</sup> Dean Ames thought, and it is believed rightly, that these cases are inconsistent with *Price v. Neal*, and stated that continental European law is *contra*. The subrogation theory is obviously inapplicable, since the owners prior to the alteration have no claim to recover the instrument or its proceeds. Yet when it is the drawer or maker who pays the altered instrument, he cannot recover.<sup>139</sup> He is certainly in as good a position to know whether the instrument has been altered as the drawee is to know the signature of the drawer.<sup>140</sup>

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<sup>137</sup> BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* (4th ed. 1926) 907. See Aigler, *Rights of Holder of Bill of Exchange Against the Drawee* (1925) 38 HARV. L. REV. 857, 877.

<sup>138</sup> It is not proposed here to deal with the question of the effect of §62 of the Negotiable Instruments Law. See BRANNAN, *ibid.* 555, 567; Greeley, *The Effect of Acceptance of an Altered Bill* (1933) 27 ILL. L. REV. 519. According to some cases, at least, (others are *contra*) the act changes the former law as to the effect upon the liability of the drawee of a certification or acceptance made after the alteration. See (1931) 19 CALIF. L. REV. 210; the case reviewed was affirmed in *Wells Fargo Bank & Union Trust Co. v. Bank of Italy* (1931) 214 Cal. 156, 4 P. (2d) 781. Whether this section of the Negotiable Instruments Law applies to a payment alone as distinguished from an acceptance, query.

<sup>139</sup> *Bank of United States v. Bank of Georgia*, *supra* note 130; *United States v. National Exchange Bank* (C. C. A. 4th, 1924) 1 F. (2d) 888; 2 DANIEL, *NEGOTIABLE INSTRUMENTS* (6th ed. 1913) §1688; (1925) 11 VA. L. REV. 316.

<sup>140</sup> It is respectfully submitted that Professor Costigan's theory (*op. cit. supra* note 1, at 204, 208) that upon presentation the holder impliedly warrants to the drawee that indorsements are genuine and that there has been no alteration is not supportable. It is believed that a warranty when "conclusively" implied is not conclusively implied as a fact by the court. Such a warranty is created by law only



The next class is where the drawee accepts or pays drafts accompanied by forged bills of lading. In the absence of special circumstances the drawee is both liable on his acceptance and is denied recovery if he has paid without prior acceptance.<sup>141</sup> It is impossible to put the result on the basis that the drawee can be reasonably expected to know the signature of a distant freight agent. It has been said:

"The only sound explanation, apart from Dean Ames', [*i.e.*, the equal equities theory] is that a *bona fide* purchaser of a genuine bill of exchange should not be affected by extrinsic transactions between the drawer and drawee, even though they involve fraud or failure of consideration. It is just as if the drawee had accepted or paid the draft under a mistake about the financial standing of the drawer or the value of collateral copper stock."<sup>142</sup>

Again, however, it may be said that the paid holder should be protected because he has taken payment in satisfaction of a precedent obligation.

#### X. PAYMENT TO CREDITORS BY REPRESENTATIVES OF INSOLVENT ESTATES

We now would turn attention to a line of authorities that a first glance may seem inconsistent with the general thesis of this paper. A typical instance is presented when an administrator or executor, mistakenly believing the estate to be solvent, pays off a creditor in full. It may be thought that the representative should not recover since the creditor, unaware of the insolvency, takes the payment in satisfaction of his claim and a few cases so hold.<sup>143</sup> Such a conclusion comes from a too superficial analysis since the truth is that on the death of the debtor, personal liability is gone and there is only a claim against the assets of the estate for the proper proportion of the original debt. Hence when

when justice demands. The holder who presents the bill for payment is not a seller. See Ames, *op. cit. supra* note 111, at 297, 301. Once the law is settled that the money can be recovered, it may be proper to state the warranty as a conclusion. It is not, however, a reason. Except for the fact that the drawee is normally in a position to know the signature of the drawer, there is as much reason for implying a warranty of the genuineness of the drawer's signature. Space forbids a full consideration of implied warranties.

<sup>141</sup> WOODWARD, *op. cit. supra* note 1, §91; BRANNAN, *op. cit. supra* note 137, 574; Note (1919) 32 HARV. L. REV. 560.

<sup>142</sup> *Ibid.* at 562.

<sup>143</sup> Carson v. McFarland (Pa. 1828) 2 Rawle 118, 119: "The defendant has no money to which in honesty and conscience he is not entitled as against the estate of the deceased. The hardship on the plaintiff may be great. The hardship on the defendant if called on to refund would not be small; and the confusion, inconvenience and general uncertainty which would follow from a decision that an honest creditor who had gotten an honest debt was liable to be sued and compelled to repay would be so great, would make the settlement of an estate so uncertain and so interminable, that we think the plaintiff ought not to recover." Beardsley v. Marsteller (1889) 120 Ind. 319, 22 N. E. 315; Findlay v. Trigg (1887) 83 Va. 539, 3 S. E. 142.

the administrator pays more than that proportion he is paying an amount for which there is no longer any personal or property liability. Consequently those cases allowing a recovery of the excess are believed to be correct.<sup>144</sup> The result of denying a recovery is to throw the loss either on the administrator and his sureties or on the other innocent creditors in case the latter are unable to collect from the administrator or his sureties. Inasmuch as the overpaid creditor by hypothesis had no claim against anyone or any property for the excess, it is impossible in the ordinary situation to say that he has sustained any change of position. However, a case may arise where there is a change of position; thus where a note was paid in full and no demand was made upon the holder until after the lapse of time barring actions against the indorsers, recovery was denied.<sup>145</sup> Here there is a clear case of change of position. And even if a remedy against the surety is not barred by limitation, yet the creditor received payment in satisfaction of the surety's obligation as well as that of the principal and hence it is believed that the risk of collecting from the surety should be thrown upon the payer—let the latter be subrogated to any remedy against the surety that the creditor would have had in case he had received only the proper proportionate payment. In the case of the insolvent estate of a deceased person the surety, at least where he is the sole surety, would upon repayment of the excess have no claim against anyone, hence he cannot be injured by any reliance upon a belief that his obligation has been paid by the insolvent estate.<sup>146</sup>

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<sup>144</sup> *Mansfield v. Lynch* (1890) 59 Conn. 320, 22 Atl. 313; *Woodruff v. Claflin Co.* (1910) 198 N. Y. 470, 91 N. E. 1103, 28 L. R. A. (N. S.) 440, 19 Ann. Cas. 791. The cases are collected in *Notes* (1911) 19 Ann. Cas. 794 and (1910) 28 L. R. A. (N. S.) 440. See also *Johnson v. Dodd* (1931) 238 Ky. 194, 37 S. W. (2d) 26, 77 A. L. R. 975, as to the remedy of the other creditors in case the executor or administrator refuses to sue.

*Guild v. Baldridge* (1852) 32 Tenn. 294, probably is dependent on the same principle. After the death of *A*, insolvent, the plaintiff who had previously paid for goods bought of *A*, paid defendant, a creditor of *A*, the price of the goods, believing that he had not paid *A*. It was held that there could be a recovery unless the defendant in consequence of the payment had waived or lost some other remedy. If, as seems probable, *A* had left no property at all or there had been a completed administration of his estate before the payment, the result is sound.

<sup>145</sup> *German Security Bank v. Columbia Finance & Trust Co.* (1905) 27 Ky. Law Rep. 581, 85 S. W. 761.

<sup>146</sup> Nor is *Standish v. Ross* (1849) 3 Ex. 527, *contra* to the principle of change of position. A sheriff sold property to the judgment creditor who credited the price on the judgment. Before the sale, the judgment debtor had committed an act of bankruptcy of which the creditor had knowledge. The sheriff, who had been compelled to pay the value of the goods to the assignees in bankruptcy (query whether he should have been held liable; see *Harris v. Loyd*, *supra* note 45) was awarded recovery from the judgment creditor. Since apparently the court considered the effect of the bankruptcy was to invalidate retroactively the act of the

## XI. COLLATERAL MISTAKE

Inasmuch as Mr. Woodward, whose excellent treatise has received appropriate appreciation, explains some of the cases previously reviewed herein, on a basis other than that taken by the present writer, the latter feels impelled to express the reasons for his dissent. Mr. Woodward remarks:<sup>147</sup>

"It is sometimes said that money paid or other benefits conferred under a mistake of fact cannot be recovered if the mistake is as to a *collateral* or *extrinsic* fact. The words 'collateral' and 'extrinsic' as here used, however, are too indefinite. What is generally meant—and this seems a more illuminating statement of the rule—is that unless the fact mistaken by the bestower of the benefit is one essential to the existence or enforceability of his legal right, there is no obligation on the recipient to make restitution."

"The effect of this limitation is to prevent a recovery by one who confers a benefit under the inducement of a mistake of fact which affects merely the *policy* of his act. And the reason for denying relief in such cases is that by the common understanding of mankind one must accept the responsibility of determining in advance whether or not a proposed transaction is to his advantage . . . . The other party to the transaction, it is true, may profit by his error of judgment or his ignorance, but in the absence of fraudulent representation or concealment, the profit is not an illegitimate one, and there is no obligation to make restitution."

While the above statement may be correct as applied to certain situations<sup>148</sup> it is thought too sweeping to be of universal application. In support of his thesis Mr. Woodward cites *Harris v. Loyd*<sup>149</sup> and *Aiken v. Short*<sup>150</sup> as to which he says in another place:<sup>151</sup>

"Upon principle there is a distinction between a mistake as to legal relations with a third person which affects merely the policy of conferring the benefit, and a mistake as to such legal relations which affects either the *duty* of conferring the benefit or a *right* to be acquired by conferring it. In *Harris v. Loyd* . . . where the plaintiff's mistake was as to his rights under a deed of trust from a third person, he was led by his mistake to believe that it would be to his interest to pay money to the defendant for the release of certain goods from execution, but he was not led to believe that he was under a legal duty to release the goods from the defendant's execution or that he would acquire a legal right by so doing. The same is true of *Aiken v. Short* . . . where the plaintiff's mistake as to his rights under a mortgage given to him by a third person induced him, as a matter of policy only, to pay a claim of the defendant."

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sheriff and the sale, the execution creditor would have been bound to surrender the goods and the effect of a recovery by the sheriff is merely to take away a preference the creditor has received. Furthermore, it was apparently the duty of the sheriff at the time to sell, since it was conjectural whether bankruptcy proceedings would ever be instituted.

<sup>147</sup> *Op. cit. supra* note 1, §18.

<sup>148</sup> Thus to *Buffalo v. O'Malley* (1884) 61 Wis. 255, 20 N. W. 913, 50 Am. Rep. 137, cited by Mr. Woodward. See *infra* page 355 for facts.

<sup>149</sup> *Supra* note 45.

<sup>150</sup> (1856) 1 H. & N. 210.

<sup>151</sup> *Op. cit. supra* note 1, at 29.

In both of the cases cited, however, it is not true that the plaintiff supposed that he would not acquire "a legal right" or more properly perhaps an immunity. Unquestionably, in both cases the plaintiff supposed that he was the owner of, or had a valid junior lien upon, the property which he was seeking to free from an encumbrance. Furthermore, in *Aiken v. Short* the plaintiff had contracted with the supposed owner to pay off the senior lien and in consequence he labored under a mistake as to his legal obligation to a third person to pay the defendant, for, while the senior encumbrancer might have no cause of action for a breach—certainly not in England under the doctrine denying any cause of action to a third party beneficiary—he would have been liable to the supposed owner, however small the measure of damages might be, had the facts been as he thought. Hence it is believed that both cases, despite certain language therein referring to "collateral mistake," are more properly explained on the ground that the defendant took the money in satisfaction of a valid claim against the third person. Mr. Woodward's reasoning apparently<sup>152</sup> leads him to disagree with *Chambers v. Miller*<sup>153</sup> and *Merchants' Ins. Co. v. Abbott*<sup>154</sup> inasmuch as in these cases the plaintiff labored under a mistake as to his obligation to a third person rather than a mistake of policy.

This "policy" argument may be tested by the case of *Lowe v. Wells Fargo & Co. Express*.<sup>155</sup> A father, thinking his son responsible for the loss of a package belonging to the defendant paid the latter, not because he believed himself to be liable but merely to protect his son's name. Recovery was allowed. While the case may be criticized on the score that a fourth person was liable for the embezzlement of the package, yet it would clearly seem to be a case of "policy." If there had been no liability on the part of anyone, as for example where the package was later discovered in the defendant's possession, doubtless no one would hesitate to say that the defendant should refund, and yet the character of the mistake would be unchanged. Likewise in *Aiken v. Short* if there had been no obligation by anyone to the defendant, justice would certainly demand a return of the money.

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<sup>152</sup> Of these two cases Mr. Woodward declares (*ibid.*): "The money is paid in misreliance upon a supposed legal duty, and not merely under a mistake as to policy, and it is submitted that in the absence of special circumstances justifying the retention of the benefit, the payor is equitably entitled to restitution." Nowhere in his work does the author explain what, if any, were such special circumstances in the Abbott case. The Chambers decision, he declares, §182, must rest on a policy of maintaining confidence in the security of negotiable paper.

<sup>153</sup> (1862) 13 C. B. (N. S.) 125. Payment by drawee of a check in ignorance of the fact that the drawer's account was overdrawn.

<sup>154</sup> *Supra* note 70.

<sup>155</sup> *Supra* note 56.

The truth would seem to be that the question is whether the error is one "vitally affecting the fact or facts on the basis of which" the parties acted.<sup>156</sup> Did both parties act on the assumption that a certain vital state of facts existed? An affirmative answer may be posited in *Aiken v. Short*, *Harris v. Loyd*, and *Lowe v. Wells Fargo & Co. Express*. The situation is quite different in *Buffalo v. O'Malley*<sup>157</sup> where a carrier contracted to carry bark at a certain rate per cord and the shipper's mistake, which, so far as appears, was not even participated in by the carrier nor known to him, was his ignorance that in the selling market at the point of destination a different mode of measurement was employed for cords of bark of the character of the plaintiff's. As a matter of fact in that case it would seem that the shipper was liable on the contract since the mistake was a unilateral one not known to the carrier; if this is correct, of course, the shipper can not recover.

#### CONCLUSION

In the problem under discussion there is some obligation of a third person to the defendant and, if the payment may be retained, it has been satisfied in whole or in part. If the payment may be recovered, then the defendant still has the obligation of the third person; whereas if it cannot, then the plaintiff has his remedy against the third person on the principle of subrogation to the defendant's claim or on the quasi-contractual theory that his payment has benefited the third person. On the assumption that the third person could always be made to pay ultimately, the proper solution of the problem would be of little practical importance. As unfortunately the assumption is far from the truth, the solution is highly important to the plaintiff and the defendant and we are confronted with that always difficult question that arises when as between two innocent parties one must bear the loss or at least the risk of collection from the third person. While it may well be that here as in many other places the law could have more fairly adopted some plan of contribution,<sup>158</sup> yet, this possibility out of the way, the answer must depend on what result will best serve the needs of business and society in general. Upsetting the *status quo* is always

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<sup>156</sup> See 3 WILLISTON, CONTRACTS (1920) §§ 1544, 1569, 1570.

<sup>157</sup> *Supra* note 148.

<sup>158</sup> "For there is nothing sacred, there is nothing immanent, there is not even great utility, in this whole-hog-or-none approach which is typical of law. In this notion that the purported bona fide purchaser must be left with the whole pie or else lose it all; that he who is contributorily negligent is barred from all recovery; that if the offer for the unilateral contract is revoked before a full performance the contract must be either all good or be all bad. Surely we have in this white-black division an ancient echo, the ghost-voice of premedieval centuries, of a procedure too crude to be far trusted." LLEWELLYN, *THE BRAMBLE BUSH* (1930) 148.

hazardous unless there is assurance that some good will come of it; otherwise there is little point in shifting the loss from one innocent person to another equally innocent. Every plaintiff must convince the court—and here we are not concerned with matters of pleading and burden of proof—that in view of all the facts there is warrant for judicial intervention. Truly, *potior est conditio defendentis*. Admitting the soundness of the change of position principle in quasi-contracts, there are at least three possible solutions of the present problem; the first is that the very receipt is to be regarded as sufficient change, the second is that it never is, while the third, requiring an investigation in each case whether the defendant will be worse off upon refunding than he would have been had the payment not been made, throws us into the field of speculation and conjecture. Still another alternative, for which the cases afford no warrant and which would doubtless require legislation, would make, as a condition of relief, notice or demand within a short period after the payment, a period so short as to reduce to a minimum the possibility of change of position. Hard and fast rules possess the merit of certainty and facility of application. The law is not unused to them, as witness, among many that might be cited, the rule requiring presentment and prompt notice of dishonor in the law of negotiable paper; while this is based on the consideration that failure to take such steps may be prejudicial to the indorser, no inquiry is permitted whether it actually was so in the particular case. The formula, *bona fide* purchaser for value, may seem conceptualistic, but why be frightened at a mere short-hand term, used properly to express a result based on considerations of policy and not as a reason for reaching that result? Nor should we be blinded by the literal meaning of such an expression that we fail to appreciate the underlying considerations and hence hesitate to bring the defendant within its protection. What difference should it make that literally we cannot conceive of the defendant being the “purchaser” of the money when he takes it with the intent to satisfy a non-existent obligation? Unless there enter into the particular situation other considerations calling for a different result, why not consider satisfaction of an antecedent obligation “value” in all cases of money? The suggestion that the defendant receives a windfall or profits through the wrong of the third person begs the question since it assumes that he is better off than he would have been had the payment not been made.

*Stephen I. Langmaid.*