Chapter III
DEFECTIVE TRANSFERS

A. MISTAKE

3.1.1 Introduction

The dictionary meaning of ‘mistake’ seems to encompass the wider view, including ‘an error or blunder in action, opinion or judgment’, ‘a misconception or misunderstanding’ and also ‘to choose badly or incorrectly.’ A person who transfers wealth to another because he is laboring under a mistake can argue that the other has been unjustly enriched at his expense. The rationale for recovery is that the transferor’s apparent intention to benefit the other was defective because he was not apprised of all the material facts. He would not have made the transfer had he been aware of the true state of affairs. According to Birks, mistake belongs within non-voluntary transfer, as an example of vitiated intention.1

There have been attempts to assimilate the mistake with the ground of recovery termed failure of consideration.2 In the majority of cases supposed contractual liability is the motive for payment, and when it transpires that there is no such liability the consideration for the payment wholly fails. Moreover it may be stated that the basic principle for the recovery of mistaken payments is the failure of the purpose for which the payment is made. This is to be judged by an objective assessment of the purposefulness or intentionality of the payment.

These arguments are, however, flawed, resulting in oversimplification. Sometimes recovery will be possible on either ground, especially where there is partial performance of void contracts. However, though they may overlap, often they do not. It is central to Birks’s scheme that mistake involves vitiation

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of intention, whereas failure of consideration involves qualification of
intention. A misprediction is not a qualifying mistake. If I pay money to a
charity hoping that my good works will receive recognition, I cannot recover
when my uncommunicated intentions are frustrated. However, if I specify the
terms of my payment, perhaps my name on a new hospital wing, and those are
accepted by the recipient, there is a conditional (and potentially reversible)
transaction. Birks insightfully observes: ‘The typical claim for failure of
considerations …a misprediction with the element of risk-taking eliminated by
the recipient's having accepted the basis of the transfer and hence its
conditionality.’

Cases concerning mistaken payments of money constitute a significant concern
of the law of restitution. Instances of recovery in cases of non-monetary
benefits are more rare, and difficulties in satisfying the tests for enrichment
require their separate treatment. A number of issues need to separated out.
First, it is necessary to consider the arguments about the existence of a distinct
cause of action in unjust enrichment termed ‘ignorance’. Secondly, it is
necessary to distinguish the wholly distinct regime where the mistaken transfer
takes place pursuant to an apparently binding contract or similar dispositive act,
thirdly, for two centuries English law drew a significant distinction between
mistakes of fact and mistakes of law. The former rendered a payment
recoverable; the latter did not. That bifurcation has now been rejected in a
landmark House of Lords case. However, mistakes of law still demonstrate
some peculiar difficulties of their own. Lastly, given the liberality of the regime
of recovery in respect of extra-contractual transfers, attention is necessarily
shifted to the work of defences such as good faith purchase and change of
position which protect security of receipt, and mitigate what might otherwise
be a peril to the stability of transactions.

3. Supra note 1 at p.235.
3.1.2 Mistake and Ignorance

Is recovery on the ground of mistake confined to situations where the transferor actively considered the factual and legal matrix surrounding the proposed transfer but reached the wrong conclusion, or does it extend to situations where no thought is given to the issue? Consider through two slightly different hypothetical examples. First, a clerk feeds incorrect information into a computer upon which basis payments are made. Secondly, a computer responsible for effecting payments is programmed correctly, but because of a malfunction makes incorrect distributions, of which its operators are blithely unaware.

Birks characterizes mistake as limited to situations where some responsible human agent commits an error of deliberation in some active reasoning process. He therefore suggests that recovery on the ground of mistake should be supplemented by a cause of action which he terms ‘ignorance’, where the transferor is unaware that wealth is hemorrhaging from his assets. Mistake is an example of vitiated voluntary intent. In contrast, ignorance of the transfer evidences the absence of any transmissive consent. Birks accordingly argues that recovery on the ground of ignorance is a fortiori recovery based on mistake.

However, the need for a distinct category of ignorance has been doubted and the prevailing judicial view appears to be that mistake as recognized in the case law encompasses the wider commonsense view covering both instances of ignorance and of mistake. In the leading House of Lords case on mistaken payments, Kleinwort Benson Ltd v. Lincoln City Council, Lord Hope of Craighead, citing David Securities, insisted: ‘the concept of mistake includes cases of sheer ignorance as well as positive but incorrect belief.’

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4 Supra Note 1 at pp. 140-146.
6 (1999) 2 AC 349.
3.1.3 Fact and Law

3.1.3.1 Origins of the Distinction

Until 1998 the law governing the recoverability of mistaken payments was dominated by the distinction between mistakes of fact, which prima facie grounded recovery, and mistakes of law, which did not. The line between the two was difficult to draw, proved malleable in practice and was finally abrogated by the House of Lords in the landmark case of *Kleinwort Benson Ltd v Lincoln City Council*.7 The plaintiff bank and the defendant local authority entered into an interest rate swap agreement. Subsequently, in another case it was decided that such contracts were *ultra vires* and beyond the capacity of local authorities, and accordingly void. The transaction was fully performed. The bank sought restitution of the net sums paid under the transaction on the basis of a mistake, and sought to rely on Section 32(l)(c) of the Limitation Act, 1980. Langley J held that he was bound by Court of Appeal authority to hold the mistake was one of law and accordingly irrecoverable. A leap-frog appeal was allowed to the House of Lords under section. 12 of the Administration of Justice Act, 1969. The House of Lords held that the plaintiff could recover, although the mistake was one of law, abrogating the common law mistake of law bar. It made no difference that the transaction was fully performed, as opposed to partially performed. Accordingly the bank could rely on Section 32(1)(c) of the Limitation Act, 1980. Time began to run once the bank discovered its mistake, which was not until the decision of the courts holding that such transactions were *ultra vires* and void.

There is now a unitary law of mistaken payments which can be shortly stated: a mistake which causes a transferor to make a payment is prima facie recoverable. The consequence is that much of the attention has switched to defences. However, before turning to the modern law the reasons for abrogating the traditional distinction between facts or law should be briefly

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7 Ibid.
examined. Evidence of the arbitrariness of the distinction is often sought by contrasting the decisions in the two leading early nineteenth-century authorities. In *Kelly v Solari*, an insurer paid out on a life policy overlooking the fact the policy had lapsed by reason of non-payment of a premium. The insurer was held entitled to restitution on the basis of mistake of fact. And in *Compare Bilbie v Lumley*, where an insurer met a claim on a marine policy, apparently unaware that the policy was voidable for the non-disclosure of a material letter relating to the time of the sailing of the vessel. The letter was in fact disclosed before the payment was made. The insurer claimed to recover the money on the express basis of mistake of law, namely that he was not aware at the time of payment that he had a complete defence of non-disclosure. The claim was summarily rejected.

The policy reasons for the old mistake of law bar were eloquently set out by Gibbs CJ in *Brisbane v Dacres*. They are three-fold. First, floodgate fears that such a claim would be urged in every case, secondly, the principle of finality which applies where the party has the choice to litigate the question or to submit to the demand. Accordingly any payment made in such circumstances operates to close the transaction between the parties. Thirdly, the interest in security of receipts, and in particular a desire to protect defendants who have changed their position upon the faith of a payment.

These are powerful arguments. However, they were ultimately rejected by the Law Commission and the House of Lords on the grounds of principle. First, the principle of unjust enrichment requires that where payment was made as a result of the payer's mistake, the money should be prima facie recoverable unless there were special circumstances to justify retention. Secondly, the distinction between fact and law was ‘capricious’. Thirdly, this led to the development of numerous exceptions and qualifications which undermined the

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8 (1841) 9M & W 54, 152 ER 24.  
9 (1802) 2 East 469, 102 ER 448.  
generality of the non-recovery rule. As a result of the difficulty of stating the law and the heterogeneous exceptions, the area of law was ripe for judicial manipulation to achieve practical justice, which had resulted in uncertainty and unpredictability for the application of the rule.\textsuperscript{11} The distinction between fact and law had been rejected in other jurisdictions\textsuperscript{12} and its rejection in English law was long overdue. However, the facts and decision of the majority in the \textit{Kleinwort Benson}\textsuperscript{13} case create particular difficulties concerning what constitutes a mistake of law.

3.1.3.2 The Former Exceptions to the Mistake of Law Rule

It is necessary briefly to review the former exceptions to the mistake of law rule. The abrogation of the rule may not be as significant in practice as some had anticipated, because of the large number of exceptions where recovery was allowed, before Kleinwort Benson.\textsuperscript{14}

First, it did not apply to payments made to or made by an officer of the court, such as a liquidator or a trustee in bankruptcy.\textsuperscript{15} Secondly, it did not apply to claims made by the beneficiaries after payments had been made by personal representatives or trustees under a mistake of law.\textsuperscript{16} Thirdly, mistakes of foreign law were treated as mistakes of fact.\textsuperscript{17} Fourthly, the mistake of law rule was never stringently applied in.\textsuperscript{18} Fifthly, the courts were reluctant to categories mistakes as being ones of law. In \textit{Cooper v Phibbs},\textsuperscript{19} where the plaintiff mistakenly bought property which he already owned, the House of Lords granted restitution. They distinguished the general law and private rights of ownership. The latter were categorized as matters of fact. Sixthly, the mistake of law rule did not operate as a bar to recovery, but simply did not

\begin{itemize}
\item \textsuperscript{11} \textit{Kleinwort Benson Ltd v Lincoln City Council} (1999) 2 AC 349
\item \textsuperscript{12} \textit{Air Canada v British Colombia} (1989) 59 DLR (4th) 161
\item \textsuperscript{13} Supra note 6 at p. 349.
\item \textsuperscript{14} Ibid.
\item \textsuperscript{15} \textit{Expane James} (1874) LR 9 Ch at p. 609.
\item \textsuperscript{16} \textit{Re Diplock} (1948) Ch 465; (1951) AC 251.
\item \textsuperscript{17} \textit{Lazard Brothers & Co. v Midland Bank} Ltd (1933) AC 239.
\item \textsuperscript{18} \textit{Equity Cooper v Phibbs} (1867) LR 2 HL 149.
\item \textsuperscript{19} (1867) LR 2 HL 149.
\end{itemize}
ground recovery. Accordingly, if a separate unjust factor could be established such as duress, recovery would follow despite the mistake of law.\textsuperscript{20} Seventhly, public authorities were not entitled to take advantage of the mistake of rule of law when exercising a statutory discretion to award restitution.\textsuperscript{21} Eighthly, the mistake of rule law did not apply where there was an unequal relationship between the parties, such that the plaintiff was not in pari delicto.\textsuperscript{22} ‘These exceptions and qualifications are heterogeneous and in truth betray an anxiety to escape from the confines of a rule perceived to be capable of injustice.’

It seems safe to say that all these exceptions to the former rule of irrevocability now constitute examples of the new general principle of recoverability. There is however one case, namely the Re Diplock claim.\textsuperscript{23} In such a case the mistake of law is not that of the claimants, but of the executors. It remains unclear, in the wake of Kleinwort Benson,\textsuperscript{24} whether the traditional restrictions upon the Diplock action still persist. The restitutionary claim of the unpaid beneficiary is limited by a requirement that the next of kin's remedies must have been exhausted against the executors.\textsuperscript{25}

\subsection{3.1.4 The Ground for Restitution}

Leaving aside particular difficulties thrown up by the Kleinwort Benson decision, the law governing mistaken payments, whether of fact or law, can be concisely stated. The court concerned with payments not made pursuant to an apparently binding contractual arrangement. Where the case that a payment is made which is expressly or impliedly governed by an apparently binding contract, but that contract was entered into as a result of a mistake, the principles differ. This is in accordance with the contractual or transactional matrix question and the associated principle of the primacy of contract. As Robert Goff J observed in \textit{Barclays Bank Ltd v W. J. Simms, Son & Cooke}

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  \item \textsuperscript{20} \textit{Maskell v Horner} (1915) 3 KB 106.
  \item \textsuperscript{21} \textit{R v Tower Hamlets London Borough Council ex parte Chetnik Developments Ltd} (1988) AC 858.
  \item \textsuperscript{22} \textit{Kiriri Cotton Co. Ltd v Dewani} (1960) AC 192).
  \item \textsuperscript{23} (1948) Ch. 465, 503-504.
  \item \textsuperscript{24} Supra Note 6. At p. 349.
  \item \textsuperscript{25} Supra Note 17 at pp. 503-504.
\end{itemize}
\end{footnotesize}
(Southern) Ltd 26 ‘if the money was due under a contract between the payer and payee, there can be no recovery on this ground unless the contract itself is held void for mistake... or is rescinded by the plaintiff.’ In contrast, the paradigm instances of autonomous restitutionary recovery are situations where a party makes a payment supposing himself to be under a contractual or other legal liability to pay, when in fact there is no such liability. Restitution was first authoritatively granted in respect of such mistakes as to liability. 27 However, the notion of a liability mistake was extended to cases where the liability was to a third party, 28 where the liability was anticipated rather than actual, 29 and even where the liability arose under a moral obligation rather than legal one. 30

In the first half of the twentieth century it was proposed that the ground of recovery should be limited to cases of ‘fundamental’ mistake. 31 However, the leading discussion rejects the test of fundamentality and instead substitutes a simple causation-based strategy. The seminal first instance decision of Robert Goff J in Barclays Bank Ltd v W. J. Simms, Son & Cooke (Southern) Ltd 32 established the casual approach. The defendant entered into a written building contract with a housing association. The housing association drew a cheque for £24,000 upon the plaintiff bank, in favour of the defendant. The next day the defendant was placed in receivership. The housing association, learning of this, instructed the bank not to pay the cheque when presented, in the belief that it was entitled to do so under the building contract. The receivers, who did not know of the stop instruction, presented the cheque at the company's bank for aided special clearance. An employee of Barclays overlooked the stop instruction and raid the cheque. Barclays, learning of its error, sought restitution from the company or the receiver on the basis of a mistake of fact. It was held that they were entitled to recover, and there were no applicable defences. Robert Goff J stated the law in two propositions: one establishing the

26 1980 QB 677, at p. 695.
27 Kelly v Solari (1841) 9 M & W 54, 58, 152 ER 24
28 R. E. Jones Ltd v Waring & Gillow Ltd (1926) AC 670.
29 Kerrison v Glyn, Mills, Currie & Co. (1911) 81 LJKB 465.
30 Lamer v London County Council (1949) 2 KB 683.
31 Norwich Union Fire Insurance Society Ltd v W. H. Price Ltd (1934) AC 455
32 Supra Note, 22 at p. 677.
principle of recovery; the other elaborating exceptions. The first proposition provides that: ‘If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact.’ It is not necessary to show that the mistake was ‘as between’ payer and payee, or that it was shared by both,\(^ {33}\) where Neuberger J suggested that the mistake must be directly connected to the payment or else connected to the relationship between payer and payee.

The *Barclays Bank v. Simms*\(^ {34}\) approach has been held to be appropriate for cases of mistake of law, as well as mistake of fact, by the High Court of Australia in *David Securities Pvt Ltd. v Commonwealth Bank of Australia*.\(^ {35}\) This approach is likely to be followed by the English courts, despite the curious failure of the House of Lords to do little more than allude to the applicable test of recovery in the Kleinwort Benson case.\(^ {36}\) The causation-based strategy is assumed by the second question in Lord Hope’s three-stage test for mistaken payments. Confirmation that this is likely to be the approach of the English courts is provided by *Nurdin & Peacock plc v D. B. Ramsden & Co. Ltd.*,\(^ {37}\) where Neuberger J concluded: whether one looks at it as a matter of logic, as a matter of authority, or as a matter of common sense, it seems to me that the test propounded by Robert Goff J in the Barclays Bank case\(^ {38}\) should apply equally to a case where the money was paid under a mistake of law.

### 3.1.5 Restrictions on Recovery

Such a liberal regime of restitution must necessarily be curtailed by appropriate defences which are characteristic of restitutionary recovery. The second proposition of law in *Barclays Bank v Simms*\(^ {39}\) establishes three key limitations on recovery in mistake cases. Robert Goff J stated that a claim may

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33 *Jones Ltd v Waring & Gillow Ltd* (1926) AC 670.
34 Supra note 26 at p. 695.
36 Supra note 6, at p. 349
37 (1999) 1 All ER 941.
38 Supra note 26 at p. 677.
39 Supra Note 26 at p. 695.
fail where:

(a) The payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend.

(b) The payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorized to receive the payment) by the payer or by a third party by whom he is authorized to discharge the debt.

(c) The payee has changed his position in good faith, or is deemed in law to have done so.

3.1.6 Submission to an honest claim: Proposition (2)(a)

The liberalisation of the ground for recovery by the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council*, appeared to some commentators to constitute too great an interference with the stability of transactions. However, it is submitted that this is not necessarily the case. It clear from a close reading of the speeches of the majority of the House of Lords that the intention of their Lordships was to switch attention from unprincipled restrictions on the cause of action to a more sensitive regime of appropriate defences. What will prove crucial in the context of claims for the return of money paid under a mistake, especially one of law, is the policy upholding compromises entered into in good faith and payments made in submission to an honest claim. The concept of the settlement of or submission to an honest claim has been prominent in the work of Goff and Jones in establishing restrictions on the reach of restitution. In particular, Goff and Jones have consistently argued that the cases on payment under a mistake of law should be reinterpreted on the basis that the courts were upholding payments made in

submission to a honest claim. Goff and Jones stated:\footnote{Ibid.}:

In so far as the rule in \textit{Bilbie v Lumley}\footnote{(1802) 2 East 469, 102 ER 448.} lays down that a payment made to close a transaction in settlement of an honest claim is irrecoverable, it embodies a sound rule of policy. Such settlements should not be lightly set aside. The payer has had his opportunity to dispute legal liability in court and has chosen to forego it.

Goff and Jones suggest that the only practical consequence of the distinction between facts and law is the greater likelihood of the payer under a mistake of law assuming the risk that he is mistaken, whereas this is uncommon in relation to mistakes of fact. The principle is well established. Robert Goff J explicitly based his proposition 2(a) in \textit{Barclays Bank v Simms} upon the dictum of Parke B in \textit{Kelly v Solari}.ootnote{(1841) 9 M & W 54, 152 ER 25.} There, the learned Baron suggested the following limit on recovery for a mistake of fact:

\textit{If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all enquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it.}

The practical problem remains that while it appears that the law now recognizes the defense of submission to an honest claim, it has never been explicitly applied in the cases. Therefore it is hard to state with certainty the circumstances in which it will be established. Goff and Jones are agnostic whether submission to an honest claim is properly described as a defence or a limit upon the availability of restitution: \textit{Goff} and \textit{Jones}. It is submitted on the basis of the ordinary principle that he who asserts must prove, that it is best recognised as a defence. Accordingly the burden of proof for establishing a binding settlement on payment and submission to an honest claim is upon the recipient. This would also be consistent with Robert Goff J’s classification of
submission to an honest claim alongside the defences of good faith purchase and change of position in *Barclays Bank v Simms*\(^{45}\) If it were considered that the security of transactions requires more protection, the courts could adopt the position that good faith is presumed in the absence of evidence to the contrary. These matter could not yet be said to be settled. Furthermore

Lord Hoffmann pointed out that:

> “I should say in conclusion that your Lordships’ decision leaves open what may be difficult evidential questions over whether a person making a payment has made a mistake or not. There may be cases in which banks which have entered into certain kinds of transactions prefer not to raise the question of whether they involve any legal risk. They may hope that if nothing is said, their counter-parties will honor their obligations and all will be well, whereas any suggestion of a legal risk attaching to the instruments they hold might affect their credit ratings. There is room for a spectrum of states of mind between genuine belief in validity, founding a claim based on mistake, and a clear acceptance of the risk that they are not.”

However, it may be that Lord Hoffmann’s formulation goes to the question of what is an operative mistake, rather than envisaging a distinct defence of submission to a honest claim.

The third member of the majority in Kleinwort Benson\(^ {46}\) identified three distinct restrictions on recovery which are relevant here. Lord Hope of Craighead stated that ‘a payment made in the knowledge that there was a ground to contest liability will be irrecoverable’. This formulation was explicitly based upon the judgment of Lord Abinger CB in *Kelly v Solari*:\(^ {47}\) ‘there may also be cases in which, although he might by investigation learn the state of facts more accurately, he declines to do so, and chooses to pay the money notwithstanding’. Lord Hope treated this restriction as an additional ingredient of the cause of action. Subsequently, Lord Hope identified several

\(^{45}\) Supra note 26, at p. 695.

\(^{46}\) Supra note 6, at p. 349.

\(^{47}\) (1841) 9 M & W 54, 152 ER 24.
defences of general application. Leaving aside estoppel and change of position, his Lordship clearly accepted that 'there is the defence that the money was paid as, or as part of, a compromise'. This can be explained as a matter of a principle, the payment resulted in a binding contract supported by consideration (accord and satisfaction) which could not be easily re-opened (as explained by Brennan J in *David Securities Pty Ltd v Commonwealth Bank of Australia* 48 (1992) 175 CLR 353). Alternatively the defence could be explained as a matter of policy, promoting the validity of freely entered into compromises (as explained by Dickson J in *Hydro Electric Commission of Township of Nepean v Ontario Hydro*, 49 In addition, Lord Hope acknowledged Goff and Jones's suggestion that settlement of an honest claim should be a defence. Its existence had been acknowledged by the Supreme Court of Canada by Dickson J in the Ontario Hydro case and by Le Forest J in *Air Canada v British Columbia*, 50 and by the High Court of Australia in the *David Securities case*. 51 Returning to the facts of Kleinwort Benson, 52 Lord Hope gave the most detailed guidance of any of the members of the court as follows:

In the *Westdeutsche Case* 53 Hobhouse J said that:

> “the principle of voluntary payments could not be applied unless there was a conscious appreciation by the payer that the contracts were or might be void, and that on the evidence in the Islington case there clearly was no voluntary assumption of risk in any respect that was relevant. It is not clear, as there has been no evidence, whether there was a voluntary assumption of risk in any of the cases which are before us in these appeals. So I would not be prepared to say that it was a defence which in these cases was available. It is sufficient for my purpose that, while the precise limits of it have still to be clarified, it is a defence which applies generally irrespective of the nature of the mistake.”

48 Supra Note, 30 at p 395.
52 Supra note 6, at p. 349.
Accordingly it is for the recipient who seeks to rely upon the principle of submission to an honest claim to plead and lead evidence of the nature of the risk which would materialize if it transpired that the payer was mistaken, and that the payer nevertheless made the payment with a conscious appreciation of that risk. It may be that such evidence is difficult to garner. It is likely that a judge will have to take a commonsense view of the nature of the transaction, how parties in that context understood it and the relative sophistication of the players. The kind of documents which might support such an allegation may occasionally turn up upon disclosure, but it seems more likely than not that any such explicit discussion of the risk in a mistaken payments case would be found in documents with the benefit of legal professional privilege.

3.1.7 Good Faith Purchase: Proposition 2(b)

Robert Goff J’s second proposed defence reflects the primacy of contractual reasoning in determining whether a payment was properly made. *Aiken v Short*, 54 the facts of the case have a passing resemblance to Victorian melodrama, centering on the discovery of a later will. George Carter, who was not a party to the action, owed money to Short. Carter acknowledged his debt under a bond and further mortgaged his interest in property, which he believed he was entitled to receive under the will of his brother, Edwin Carter, to secure the debt. Subsequently the same interest was mortgaged to the plaintiff bank as second mortgagee. When Short’s widow and executrix applied to George Carter for payment, he suggested she approach the bank. The bank, supposing itself to be the second mortgagee, paid the executrix in order to improve the quality of its security. Only then was a later will of Edwin Carter discovered, under which it transpired that George Carter had no substantial interest under the will. The plaintiff bank sought to recover the money from the executrix on the basis of mistake of fact.

Bramwell B stressed that the bank had the option to pay, and would have

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54 (1856) 1 H & N 210, 156 ER 1180.
limited the ground of recovery to mistakes as to liability. This is no longer a reason which would preclude restitution today given the liberalisation of the ground for recovery. More significantly, Pollock CB and Platt B stressed that the defendant had a valid debt and a clear right to the money as against Carter. Given that the defendant had approached Carter first and he had referred her to the bank, Pollock CB concluded: “The money was, in fact, paid by the Bank, as the agents of Carter”. Pollock CB stressed that the defendant had not contributed to the plaintiff’s mistake. The plaintiff was itself at fault in paying the money without more careful investigation. On the latter point, it would not in view of *Kelly v Solari*\(^{55}\) be correct to suggest that contributory negligence would bar a claim to recover money now on the grounds of mistake of fact. Pollock CB sketched the following hypothetical which clearly illustrates the operation of good faith purchase in this context. The learned Chief Baron asked rhetorically:

> “Suppose it was announced that there was to be a dividend on the estate of a trader, and persons to whom he was indebted went to an office and received installments of the debts due to them, could the party paying recover back the money if it turned out that he was wrong in supposing that he had funds in hand”

Goff and Jones, had accepted the characterization of this defence as good faith purchase, now treat *Aiken v Short*\(^{56}\) as an example of change of position: The concern appears to be that the ground of restitution is mistake, not a claim based on title. The strict view is taken that good faith purchase should be a defence only where a claim is based upon title either at common law or in equity. This reasoning should not be accepted. First, it is clear from *Aiken v Short*\(^ {57}\) and dicta in the subsequent House of Lords case of *Kerrison v Glyn, Mills, Currie & Co.*,\(^ {58}\) that good faith purchase is an autonomous defencehere. Secondly, good faith purchase extinguishes a restitutionary claim in full, and

\(^{55}\) Supra note 27.

\(^{56}\) (1856) 1 H & N210.

\(^{57}\) Ibid.

\(^{58}\) (1911) 81 LJKB 452, at p. 470.
not merely pro tanto as is the case with change of position. Thirdly, and most importantly, payment in such circumstances amounts to a valid accord and satisfaction, which can be set aside only in accordance with the rules of contract law. The primacy of contract ousts the possibility of restitutionary recovery here, unless the contractual matrix can be set aside. As Robert Goff J said in *Barclays Bank v Simms*:\(^{59}\)

However, even if the payee has given consideration for the payment, for example, by accepting the payment in discharge of a debt owed to him by a third party on whose behalf the payer is authorized to discharge it, that transaction may itself be set aside (and so provide no defence to the claim), if the payer's mistake is induced by the payee, or possibly even where the payee, being aware of the payer's mistake, did not receive the money in good faith.

This suggests that the contractual matrix could be side-stepped in at least two cases. First, where it can be rescinded because of a misrepresentation by the payee. Secondly, where there is no contract in accordance with the objective principle of construction of contract formation. As a matter of principle, other contractual vitiating factors could equally result in the contract being set aside.

Returning to the facts of *Barclays Bank v. Simms*\(^6^0\), the crucial question was whether the bank had acted with authority in making the payments. If it had the recipient could rely upon the defence of good faith purchase. Robert Goff J held that where a bank overlooks a countermand and pays a cheque it acts outside its mandate or authority. Accordingly it is not entitled to debit its customer's account and the debt owed to the payee is accordingly not discharged.

Robert Goff J’s reasoning in *Barclays Banks v Simms*,\(^6^1\) has been criticized by Goode J. He states that it concentrates too much upon the actual authority of the bank, and neglects to consider the apparent authority of the bank. In the law of agency, authority is either actual (whether express or implied) or apparent. In

\(^{59}\) (1980) QB 677, at p. 695.

\(^{60}\) Ibid.

the former category the principal manifests his consent to the agent acting on his behalf to the agent. In the latter species of authority the principal manifests his consent that the agent represents him, directly to the third party who deals with the agent. The principal represents that the agent is empowered to act on his behalf, or in the usual parlance ‘holds out’ the agent as his representative, and the third party relies upon that manifestation of consent by entering into the transaction proposed by the agent. Goode argues that the consequence of the reasoning is that ordinary transactions would be upset by allowing the bank to recover in such circumstances. Suppose a customer pays for goods with a cheque, and despite the goods being wholly satisfactory, subsequently instructs his bank to stop the cheque. If the bank overlooks the countermand and pays, why should it be entitled to recover from the seller.

The view of Robert Goff J was that by granting restitution to the bank, the result was that the parties could concentrate on the proper dispute between debtor and creditor. It is not clear what the true dispute here was. The bank’s customer appeared concerned that its creditor had been placed in receivership. It should be noted that in my dispute between the customer and the defendant, the defendant may be able to rely upon the ‘cheque rule’ by which payment under a bill of exchange constitutes a specially insulated payment upon which summary judgment can be readily obtained. It seems difficult to see what defence the bank’s customer would have to a claim upon the cheque, unless there was a total failure of consideration. For example, if there had been no work done in respect of the payment. This appears unlikely on the facts, as the payment was pursuant to an interim certificate issued by the architect.

It is a further curious feature of Barclays Bank v Simms that the insolvency of the defendant company did not appear to be a problem. The receiver had requested special clearance for the cheque, although it was not suggested that this indicated he was aware of the stop instruction. The bank soon demanded return of the money, and brought its claim against the company and/or the receiver, who

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62 Ibid.
from the date of the writ kept the £24,000 in dispute in a separate account pending the outcome of the proceedings. Presumably the receiver having notice of the dispute over the £24,000 was unable to use the money validly to discharge obligations of his appointing bank.

A restrictive approach to the question of the bank's authority could work injustice where the bank's customer became insolvent and a defendant recipient was made to disgorge money to the bank, with little prospect of ever recovering from the now insolvent customer. This was the situation in *Lloyds Bank plc v Independent Insurance Co. Ltd.*

Insurance agents owed some £162,387.90 of premium income to the defendant insurance company. The agents had cashflow problems. A director of the insurance agents paid cheques into its bank account, including one for £168,000, and these were credited to the agents’ account with the plaintiff as uncleared effects. The director informed the bank manager that he would like payment to be made to the defendant insurance company of the debt as soon as possible. The payment was to be made by a Chaps transfer which is an irrevocable instantaneous electronic inter-bank payment. The manager informed the director that payment would take place once the cheques had cleared. However, two of the bank’s other employees, mistakenly believing that the state of the account represented cleared funds, made the payment. Subsequently the cheque for £168,000 was dishonoured pushing the agents’ account into overdraft.

The Court of Appeal held that although the money was prima facie recoverable by the bank as paid under a mistake of fact, here the money was paid for good consideration and was accordingly irrecoverable. The payment had discharged a debt owed to the payee. The payment by the bank, made with the actual authority to do so on behalf of its customer, was effective to discharge the debt. The crucial fact was the director of the agents’ insistence on speedy payment to the defendant. When the bank manager had told the agents’ director that payment would not be made until the cheques had cleared, this was simply the bank

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63 (1999) 2 WLR 986.
manager telling the customer that it was not obliged to make the Chaps transfer until it was satisfied as to its own receipt. It could not be said that the insurance agents had qualified the bank’s authority by insisting it did not make the payment until the funds had cleared. Accordingly, though it was not obliged to do so, the bank was entitled to make the payment within the scope of its actual authority.

Curiously the Court of Appeal did not accept in the alternative that the bank had apparent authority to make the payment. It seems there was no holding out by the agent of its bank in relation to this particular transaction. Further, the Court of Appeal found it difficult to identify any reliance by the defendants upon such holding out or representation. It may seem curious, at first sight, that the courts are reluctant to recognize apparent authority in this context. The reason appears to be that if it were held that the bank had no actual authority, but only apparent authority, the payee would be entitled to keep the money. In this situation the bank, having acted outside its mandate, would not be entitled to debit its customers account. Accordingly the bank would be the loser and its customer would have its debt paid off without having to make any contribution. It is the perceived unfairness of this which makes the courts unwilling to recognize apparent authority, in the absence of underlying actual authority. On the particular facts of the Lloyds Bank case the holding that the bank paid with actual authority appears to be correct. However, given the insolvency of the customer and the fact that the bouncing cheque pushed the account massively into overdraft, the bank was the eventual loser in this scenario. Lastly, in Lloyds Bank plc v Independent Insurance Co. Ltd64, Peter Gibson LJ stated: ‘I cannot accept that the defence of bona fide purchase has been overtaken by or sub-assumed in the defence of change of position. Both defences may co-exist.’

For general discussion of good faith purchase, and in particular the position of banks. It seems the autonomy of good faith purchase in the mistaken payments context is now entrenched, given it forms the ratio of a modern Court of Appeal

64 Ibid.
decision.

3.1.8 Change of Position: Proposition 2(c)

Robert Goff J's proposed defence of change of position in *Barclays Bank v Simms* was technically premature. The decisions of the House of Lords in *R. E. Jones Ltd v Waring & Gillow Ltd*\(^\text{65}\) and *Ministry of Health v Simpson*\(^\text{66}\) were obstacles in favour of the recognition of change of position. *Lipkin Gorman v Karpnale Ltd*\(^\text{67}\) retrospectively legitimates this first instance discussion of principle. Change of position existed in prototype form under the guise of estoppel. The defence succeeded in *Holt v Markham*,\(^\text{68}\) where a First World War RAF officer was overpaid a gratuity upon demobilization. It was held that he was misled into believing that he was entitled to the money, which he had subsequently invested in a company which went into liquidation. Estoppel was also successful in extinguishing the claim of a local authority which had overpaid sick pay to a teacher in *AvonCounty Council v Howlett*,\(^\text{69}\) even though the reliance expenditure was only half the value of the sums received.

However, estoppel had two key disadvantages. First, it required a breach of duty: payer or a representation by him that the payment was a proper one. Secondly, estoppel to be an all-or-nothing defence, rather than operating proportionately to the expenditure incurred in reliance upon a payment. Lipkin Gorman removes these obstacles. Estoppel was most prominent in the case law on mistaken payments, and it seems that in the future change of position will be most prominent in the same context.

3.1.9 What Constitutes a Mistake of Law

Relief for payments made under a mistake of law gives rise to some particular problems of their own. We have already considered the importance of

\(^{65}\) (1926) AC 670.
\(^{66}\) (1951) AC 251.
\(^{67}\) (1991) 2 AC 548.
\(^{68}\) (1923) 1 KB 504.
\(^{69}\) (1983) 1 WLR 605.
submission to an honest claim which appears to have more potential application as a defence in respect of payments made under a mistaken understanding of the law rather than of the factual context. In addition there are intractable problems in determining what amounts to a mistake of law. This is an issue on which a number of different opinions are held, as is evident by the split in the Judicial Committee of the House of Lords in the *Kleinwort Benson case*. The Law Commission, in proposing the statutory abrogation of the mistake of law rule, considered that the characterization of a mistake as one of law of itself should not make any difference to whether a claim to restitution should succeed. However, they considered the difficult problem of how the courts should deal with a judicial change in the law. According to the declaratory theory of common law, an authoritative statement of the law is deemed always to be the law. This potential retrospective effect was viewed as having implications for the security of transactions.

The majority of the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council* took the opposite view. The House of Lords was expressly asked to rule on the question of whether a payment made under a settled understanding of the law was irrecoverable. Lord Goff of Chieveley in the leading speech considered the declaratory theory of judicial decision at length. His Lordship concluded:

The historical theory of judicial decision, though it may in the past have served its purpose, was indeed a fiction. But it does mean that, when judges state what the law is, their decisions do, in the sense I have described, have a retrospective effect. That is, I believe, inevitable. It is inevitable in relation to the particular case before the court, in which events must have occurred sometime, perhaps some years, before the judge's decision is made. But it is also inevitable in relation to other cases in which the law as so stated will in future fall to be applied. I must confess that I cannot imagine how a common law system, or

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70 Supra note 6, at p. 349.
71 Ibid.
indeed any legal system, can operate otherwise if the law is to be applied equally to all and yet be capable of organic change.

In Lord Goff’s view it was not appropriate to hold that the settled understanding of the law of defence formed part of the common law. The supposed defence was not a true defence, but rather reflected a theoretical view that a payment made in such circumstances was not made under an operative mistake at all. Lord Goff was emphatic that the mistake in the Swaps cases was plainly a mistake of law. When the money was paid, it was the belief of the payer that he was under a legal obligation to do so. Once the true legal position was declared by the Divisional Court and subsequently by the House of Lords in *Hazell v Hammersmith and Fulham London Borough Council*, the payer discovered that, under the law now held to be applicable at the date of the payment, there was no such obligation. If one accepts Lord Goff’s premise as to the impact of the declaratory theory of common law, the conclusion that the money is prima facie recoverable does inevitably follow. Lord Goff’s view should be immediately contrasted with the leading minority of Lord Browne-Wilkinson that 'the moneys are not recoverable since, at the of payment, the payer was not labouring under any mistake’. His Lordship eluded:

Although the decision in Hazell is retrospective in its effect, retrospection cannot falsify history: if at the date of each payment it was settled law that local authorities had capacity to enter into Swaps contracts, the bank were not laboring under any mistake of law at that date. The subsequent decision in Hazell could not create a mistake where no mistake existed at the time.

In 1990 a payment was made on the basis of the rule in that case. The payer received advice that the decision was good law. In 1997 the House of Lords overruled the 1930 case. Would the payer be entitled to recover the money? Lord Browne-Wilkinson adverted to the rule that the cause of action in

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restitution vests when the mistake payment is made: *Baker v Courage & Co.* \(^{73}\) However, under the hypothetical there would be no cause of action at the date of payment. On the majority view the money would, however, be recoverable, although the majority did not explicitly discuss when the cause of action arose. Lord Browne-Wilkinson found this too fanciful:

It would not have been possible to issue a writ claiming restitution on the grounds of mistake of law until the 1997 decision had overruled the 1930 Court of Appeal decision. Therefore a payment which, when made, and for several years thereafter, was entirely valid and irrecoverable would subsequently become recoverable. This result would be subversive of the great public interest in the security of receipts and the closure of transactions.

In Lord Browne-Wilkinson's view the money was irrecoverable whether the payment was made where law had been established by a previous judicial decision which was subsequently overruled, or where there is settled law in the absence of a judicial decision. There was simply no mistake:

What constitutes the unjust factor is the mistake made by the payer on the date of payment. If, on the date of payment, it was settled law that payment was legally due, I can see nothing unjust in permitting the payee to retain moneys he received at a time when all lawyers skilled in the field would have advised that he was entitled to receive them and the payer was bound to pay them. Again it is critical to establish the position at the time of payment: if, on that date, there was nothing unjust or unmeritorious in the receipt or retention of moneys by the payee in my judgment it was not an unjust enrichment for him subsequently to retain the moneys just because the law was, in one sense, subsequently changed.

Accordingly Lord Browne Wilkinson would have recognized the defence where there was a decision which was subsequently overruled, and where there was settled law in the absence of a judicial decision (such as textbook law).

\(^{73}\) (1910) 1 KB 56.
Given these complications, Lord Browne Wilkinson preferred to wait for statutory reform of the rule pursuant to the Law Commission’s proposal. His Lordship suggested that any new law should also regulate the appropriate limitation period of this type of action.

Lord Lloyd of Berwick agreed, stating that ‘for your Lordships to accept half the package proposed by the Law Commission and reject the other half, would cause me some disquiet’. Lord Lloyd considered cl. 3 of the Law Commission’s proposal to be a definitional clause, clarifying and limiting what is meant by a mistake in this context Lord Lloyd also clearly articulated one policy and one moral reason for this conclusion. First, the policy favouring finality in transactions, especially in the commercial context. Secondly, Lord Lloyd could see no moral reason why the payee should be obliged to make restitution in such circumstances: ‘Where is the unjust factor?’.

Lord Hoffmann’s speech proved crucial, not least because his Lordship candidly acknowledged that he had changed his mind. Lord Hoffmann's first thoughts were that not only would a payment on a settled view of the law lead to the conclusion that there was no operative mistake, but also a payment on the basis of a tenable view of the law. In the context of the retrospectively of judicial decisions, the state of mind of the payer should be characterized as a misprediction, rather than a mistake. However, Lord Hoffmann's ultimate view was in accord with Lord Goff's view. His Lordship considered it important to place the right to recover mistaken payments in its wider context of the law of unjust enrichment. It did not matter where there was a mistake of fact whether or not the payer could have discovered the true state of affairs. Money paid under a mistake of fact was recoverable because the payer would not have paid if he had known the true state of affairs. The only oddity about mistake of law was that the true state of affairs could not be discerned at the time of payment. Lord Hoffmann concluded: ‘Retention is prima facie unjust if he paid because he thought he was obliged to do so and it subsequently turns out that he was not.’
Lord Hoffmann accepted that there was an alternative reason for recognizing the settled understanding of the law of defence. However, in reasoning suffused with the theory of judicial decision-making of the legal philosopher Ronald Dworkin, his Lordship decided that such a policy-motivated defence was not a matter for the judiciary:

“The adoption of the ‘settled view’ rule would be founded purely upon policy; upon a utilitarian assessment of the advantages of preserving the security of transactions against the inevitable anomalies, injustices and difficulties of interpretation which such a rule would create. That is not a course which I think your Lordships should take.”\textsuperscript{74}

I accept that allowing recovery for mistake of law without qualification, even I taking into account the defence of change of position, may be thought to tilt the balance too far against the public interest in the security of transactions.

While acknowledging strong arguments in favour of leaving the whole matter for Parliament, Lord Hoffmann ultimately sided with the majority, urging Parliament to take action over the difficult question of limitation. One view of Lord Hoffmann's speech is that it is the furthest that English law has gone towards the civil law position of presuming that restitution should be awarded where a transfer has taken place and it turns that there is no legal justification for the transfer. Such an approach would dispense with the need for the claimant affirmatively to prove a ground for restitution or just factor. On Lord Hoffmann’s view it seems sufficient that as it turned out the payment was unnecessary. It is hard to see how this counters the view of the minority that in such circumstances it is difficult to identify the moral reason why the payee should refund the money. It is submitted that the potential wider interpretation and implications of Lord Hoffmann's speech should not be the future path of English law. It should always be for the claimant to establish a reason why money should be returned. The principle of the finality of transactions and in favour of the security of receipt demands this.

\textsuperscript{74} Supra note 41, at p. 214.
The final speech of the majority, that of Lord Hope of Craighead, has also provoked debate. Lord Hope explicitly adverted to the difference of approach between the common law, which demands an unjust factor, and civil law systems which look for the absence of the legal justification for the enrichment. Lord Hope was clear that under English law a payer had to address three questions: ‘(1) Was there a mistake? (2) Did the mistake cause a payment? And (3) Did the payee have a right to receive the sum which was paid to him?’ Only the first question was in dispute in the present case. Lord Hope would have liked to have known more about the circumstances of the mistake, and bemoaned the sparseness of the pleadings in the absence of a request for further and better particulars. Lord Hope spends more time than any of the other judges addressing the question of whether there was a mistake of law on the facts of Kleinwort Benson. His Lordship stated:

On the whole it seems to me to be preferable to avoid being drawn into a discussion as to whether a particular decision changed the law or whether it was merely declaratory. It would not possible to lay down any hard and fast rules on this point. Each case would have to be decided on what may in the end be a matter of opinion, about which there may be room for a good deal of dispute. It is better to face up to the fact that every decision as to the law by a judge operates retrospectively, and to concentrate instead on the question - which I would regard as the critical question - whether the payer would have made the payment if he had known what he is now being told was the law. It is the state of the law at the time of the payment which will determine whether or not the payment was or was not legally due to be paid, and it is the state of mind of the payer at the time of the payment which will determine whether he paid under a mistake. But there seems to be no reason in principle why the law of unjust enrichment should insist that that mistake must be capable of being demonstrated at the same time as the time when the payment was made. A mistake of fact may take some time to discover. If there is a dispute about this, the question of whether there was a mistake may remain in doubt until the issue
has been resolved by a judge. Why should this not be so where the mistake is one of law?

It appears that this passage is internally contradictory. Whereas the general thrust of the argument supports the majority viewpoint, the italicized words appear to support the minority view. If the state of law at the time of payment governs whether it is legally due, surely the money is irrecoverable and the subsequent decision must be overlooked. This contradicts the general tenor of Lord Hope's speech. The only way to resolve the conundrum is to read the italicized words as implicitly qualified by the declaratory theory. That is, the state of law at the time of the payment is only established later, but with retrospective effect. Lord Hope, drawing upon the judgment of Hobhouse J in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*,75 decided explicitly that there was an operative mistake here. Lord Hope had earlier said that mistake extended to cases of ignorance. This seems to be Lord Hope’s view of the state of mind of market participants in relation to swaps when the transactions were entered into and payments were made. Such parties were blissfully unaware of the legal risk posed by the provisions of the Local Government Act, 1972 and the subsequent stringent interpretation applied to them by the Audit Commission, the Divisional Court and ultimately the House of Lords. This clearly demonstrates the repudiation of the reasoning of *Bilbie v Lumley*,76 in which the mistake of law bar was explicitly based upon the maxim that ignorance of the law is no excuse.

### 3.1.10 Contributory Negligence

A mistaken payment is recoverable however negligent the payer may have been. This is established by the leading case of *Kelly v Solari*,77 which held that it was no defence that the plaintiff had the means of knowledge of the truth within its own records. Lord Abinger CB stated: ‘I think the knowledge of the

75 (1994) 4 All ER 890, at p. 931.
76 (1841) 9 M & W 54, 152 ER 24.
77 (1841) 9 M & W 54, 152 ER 24.
fact which disentitles the party from recovering, must mean a knowledge existing in the mind at the time of the payment.’ Therefore careless forgetfulness was no bar to recovery. This principle has been affirmed in *Rover International Ltd v Cannon Film Sales Ltd*, 78 where Kerr LJ stated that ‘a genuine mistake is not vitiated by carelessness’. Most recently, in *Banque Financiere de la Cite v Pare (Battersea) Ltd*, 79 Lord Steyn referred to the failure of the bank to take elementary precautions to protect its position (which had persuaded Morritt LJ in the Court of Appeal to decline restitution). Lord Steyn stressed that restitution was not fault-based and there was no need to prove any misrepresentation. The negligence of the bank was ‘akin to the carelessness of a mistaken payer: it does not by itself undermine the ground of restitution’.

### 3.1.11 Non-Money Benefits

There is a paucity of authority here. Two factors account for this. First, the comparative immaturity of the law of restitution. Secondly, even under the modern law, it will be difficult to satisfy the test of enrichment in relation to non-money benefits. Even so, there is some modern authority, and indeed partial statutory recognition of a role for unjust enrichment reasoning here. There are cases both at common law and in equity.

### 3.1.12 Common Law

In the rather unsatisfactory, war-time case of *Upton-on-Severn Rural District Council v Powell*, 80 Powell’s Dutch barn caught fire. Hetelephoned his local police station at Upton to ask for ‘the fire brigade to be sent’. UK police sent for the Upton fire brigade who came and dealt with the fire. All the parties were unaware that although the barn was in the Upton police district, it was the Pershore, not the Upton, fire district. Powell would have been entitled to the services of Pershore fire brigade for free, whereas the Upton fire brigade was

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78 (1989) 1 WLR 912.
79 (1999) 1 AC 211.
80 (1942) 1 All ER 220.
entitled to make contracts and charge for services performed outside its area. The Court of Appeal held that the Upton fire brigade was entitled to remuneration for the services performed for Powell upon the basis of an ‘implied promise’.

First, the case is irreconcilable with ordinary contractual principles. As was argued 21 vain, by counsel for Powell, neither party had any relevant contractual intention. The Upton fire brigade thought it was rendering gratuitous services in the normal course of its duty. Powell thought he was receiving the services of the appropriate fire brigade without charge; Secondly, despite the reference in the brief judgment of Lord Greene MR to an implied promise, the case is also difficult to reconcile with unjust enrichment principles. Powell did not request or accept services which he knew he would be expected to pay for. Goff and Jones think it unlikely that Powell was incontrovertibly benefited since he was entitled to the Pershore fire brigade services for free. The better view is that Pershore fire brigade was the party enriched by Upton’s mistaken discharge of its (Pershore’s) duty to extinguish Powell’s fire. Accordingly, the wrong person was made liable in this case.

A more promising authority is *Gebhardt v Saunders*,81 in which the plaintiff tenant discharged the statutory obligation of the landlord to abate a nuisance under Section 4 of the Public Health (London) Act, 1891. It was impossible to tell at the time when the work was done whether the nuisance was caused by a structural defect and accordingly the defendant landlord's responsibility, or by improper use by the tenant and accordingly his liability. It turned out to be the former. While the case is commonly discussed in chapters on legal compulsion, it seems preferable to characterize the unjust factor as mistake: That mistake was the appropriate ground for restitution appears faintly in the judgment of Day J:

“If two people are required to do certain work under a penalty in case of disobedience, and one does the work, and it turns out

81 (1892) 2 QB 452.
afterwards that the other ought to have done it, the expenses are properly money paid at the request of the person who was primarily liable, but who neglected to do the work."82

The most interesting common law authority is *Greenwood v Bennett*.83 Bennett, who managed a garage, required some repairs to be done to a Jaguar car before selling it in the course of trade. The car was worth between £400 and £500. Bennett entrusted the car to Searle to do the necessary repairs at a cost of £85. Searle, while driving the car on a frolic of his own, crashed it and decided to sell it in its unreppaired state. Harper bought the car from him for £75, which was a fair price in its damaged state. Harper made good the damage to the tune of £226 in labour and materials. He subsequently sold the car to Prattle for £450. Later, the police took possession of the car and Searle was convicted of theft. The chief constable brought an interpleaded summons to determine title to the car. The county court judge ordered the car to be returned to Bennett who then sold it for £400. It was accepted on appeal that Bennett's garage owned the car, but Harper claimed £226 from Bennett for the improvements to the car. Lord Denning MR considered the case as if it had been brought as a claim for specific delivery. In such a case his Lordship was of the view that a court of equity would order the return of the vehicle only upon condition that payment was made to Harper for the work done. The car having been already returned here, it was necessary to order the plaintiffs to pay Mr. Harper the £226. Lord Denning referred to the individualistic dictum of Pollock CB in *Taylor v Laird*:84 ‘One cleans another’s shoes; what can the other do but put them on?’ Lord Denning MR distinguished that case:

That is undoubtedly the law when the person who does the work knows, or ought to know, that the property does not belong to him. He takes the risk of not being paid for his work on it. But it is very different when he honestly believes himself to be the owner of the property and does the work in that belief. Here we have an innocent purchaser who bought the car in good faith and without

82 Ibid.
83 (1973) QB 195.
84 (856) 35 LJEx 329, at p. 332.
notice of any defect in the title to it. He did work on it to the value of £226. The law is hard enough on him when it makes him give up the car itself. It would be most unjust if the company could not only take the car from him, but also the value of the improvements he has done to it - without paying for them. There is a principle at hand to meet the case. It derives from the law of restitution. The plaintiffs should not be allowed unjustly to enrich themselves at his expense. The court orders the plaintiffs, if they recover the car, or its improved value, to recompense the innocent purchaser for the work he has done on it. No matter whether the plaintiffs recover it with the aid of the courts, or without it, the innocent purchaser will recover the value of the improvements he has done to it.

Lord Denning MR accordingly countenanced the possibility not just of a passive claim (as a defense and counterclaim where the true owner sought specific delivery), but also an active claim which could be advanced by the improver as claimant. Phillimore and Cairns LJ agreed that at least the passive claim was available. Further, it was appropriate on the instant facts to order the plaintiffs to pay for the value of the work done. There was little explicit discussion of the issue of enrichment. However, Phillimore LJ said that it was ‘not seriously disputed in this case that the £226 had improved the value of the car, making its value far above what: it was’. There was no possibility of free acceptance or request on the facts of this case. Accordingly, Greenwood v Bennett constitutes one of the leading examples of the recognition of incontrovertible benefit in the English law of unjust: enrichment. It is further clear that the ultimate beneficiary of the mistaken improvement is the true owner. The appropriate ground for restitution is mistake. In the modern law, it seems clear that both an active as well as a passive claim will be friable.

3.1.13 Statutory Recognition

The power of the court to grant an allowance to the improver of personal property as a condition for an order of the delivery of the goods is now
recognized by section 3(7) and section 6 of the Torts (Interference with Goods) Act, 1977. The Act is confined to the passive claim which was recognized in Greenwood v Bennett,\(^8\) and does not explicitly advert to the active claim. Section 6 of the 1977 Act explicitly recognizes a significant counterclaim where the owner claims his property or its value, based upon the principle of unjust enrichment. By section 6:

1. If in proceedings for wrongful interference against a person (the ‘improver’) who has improved the goods, it is shown that the improver acted in the mistaken but honest belief that he had good title to them, an allowance shall be made for the extent to which, at the time at which the goods fall to be valued in assessing damages, the value of the goods is attributable to the improvement.

2. If, in proceedings for wrongful interference against a person (the ‘purchaser’) who has purported to purchase the goods:

   (a) From the improver, or

   (b) Where after such a purported sale the goods passed by a further purported sale on one or more occasions, on any such occasion, it is shown that the purchaser acted in good faith, an allowance shall be made on the principle set out in subsection.

For example, where a person in good faith buys a stolen car from the improver and is used in conversion by the true owner the damages may be reduced to reflect the improvement, but if the person who bought the stolen car from the improver sues the improver for failure of consideration, and the improver acted in good faith, subsection (3) below will ordinarily make a comparable reduction in the damages he recovers from the improver.

(3) If in a case within subsection (2) the person purporting to sell the goods acted in good faith, then in proceedings by the purchaser for recovery of the

\(^8\) Supra note 83
purchase price because of failure of consideration, or in any other proceedings founded on that failure of consideration, an allowance shall, where appropriate, be made on the principle set out in subsection (1). By section 6(4) the principle also applies to contracts of hire purchase and other purported bailment of personal property.

3.1.14 Other Authority

In *Rover International Ltd v Cannon Film Sales Ltd*, valuable work was carried out on behalf of Rover in respect of films belonging to Canon. The work was done in the mistaken belief that there was a contractual obligation to do the work and a contractual right to reimbursement in the shape of a portion of the profits from distributing the films. In fact, the underlying purported contract turned out to be void because of the incapacity of Rover at the relevant time. It was conceded on appeal that Rover was entitled to a *Quantum Meruit* in respect of the work done.

Lastly, brief mention should be made of the counterclaim by the defendant Ward in the case of *Guinness plc v Sounders*. A director of the plaintiff company had been paid £5.2 million in connection with services rendered during a takeover bid. However, the underlying contract turned out to be void for want of authority. Ward claimed to be entitled to retain the money either on a *quantum meruit* basis, or as an equitable allowance. The claim must evidently have been based upon mistake or failure of consideration. The House of Lords gave short shrift to the counterclaim. Briefly, an award to a director in such a case would contradict the policy governing fiduciaries, their remuneration and the obligation to avoid a conflict between duty and interest.

3.1.15 Equity

Similar principles have developed in equity in relation to the mistaken improvements of land. The seminal statement is in the speech of Lord

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86 (1989) 1 WLR 912.
87 (1990) 2 AC 663.
Cranworth LC in *Ramsden v Dyson*. A tenant took leases over two plots of land in Huddersfield and Bolton, spending in excess of £1,800. The tenant knew he had only a tenancy from year to year, or a tenancy at will, but believed that by building he became entitled to call for a 60-year lease. The landlord’s successor sought to eject the tenant. The House of Lords held that on the evidence there was no encouragement or conduct on the part of the landlord which would justify equitable intervention, either to resist the ejection or to compensate the tenant for his improvement. The case is perhaps better known for its recognition of the doctrine of proprietary estoppels in the speech of Lord Kingsdown, dissenting. In contrast, the statement of principle by Lord Cranworth LC is more akin to unjust enrichment reasoning:

If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and state my adverse title; and that it would be dishonest in me to remain willfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.

This statement of principle clearly establishes two restitutionary principles. First, a defendant may be enriched where he freely accepts a benefit, knowing that he has the opportunity to reject it. Secondly, the benefit is an unjust one, either on the basis of free mistake by the improver, or again on the basis of free acceptance. In the instant so, the tenant made no mistake as to his present rights but was simply in error about to future conduct of a landlord. Accordingly it was only a miss-prediction rather than a mistake.

This doctrine of acquiescence was restated by Fry J in *Willmott v Barber*.  

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88 (1866) LR 1 HL 129.  
89 Supra Note 1 at pp 277-279  
90 (1880) 15 Ch D 96 at pp. 105-106.
In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiffs mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in other acts which he has done, either directly or by abstaining from asserting his legal right.

Fry J, consistently with the principle as it has developed in relation to mistaken payments, held the contributory negligence by the mistaken improvement would not preclude recovery. Fry J commented: ‘when the plaintiff is seeking relief, not on a contract, but on the footing of a mistake of fact, the mistake is not the less a ground for relief because he had the means of knowledge’.

Despite these seminal statements of principle, there has to date been little evidence of successful recovery by mistaken improvers of land. The subsequent history of proprietary estoppel has been more concerned with the doctrine of encouragement, as recognized by Lord Kingsdown in his dissenting speech in Ramsden v Dyson,91 rather than the doctrine of acquiescence as recognized by Lord Cranworth LC in the same case. The former doctrine appears to have more to do with perfection of expectations, rather than the reversal of unjust enrichment.

The burden of proof rests upon the payer or transferor to prove both the mistake and the causal efficacy of the error. There is no authoritative guidance in this context as yet as to whether the latter enquiry is satisfied where it is shown that the mistake was a cause, or whether it needs to be a significant cause. It is

91 Supra note 88
submitted that the former should suffice. As explained above, it is no bar to recovery that one factor in making the payment was the payer's own carelessness. As a matter of principle, and given the modern emphasis upon defences, it seems that where the ‘but for’ test of causation is satisfied, the claimant can succeed. Authority seems to support the wide formulation of mistake to include cases of what has been termed ignorance.

Does the payer need to give evidence that the person responsible for making the payment (if any such person exists or can be identified) did in fact make a mistake? In Avon County Council v Hewlett,\(^92\) the defendant teacher was overpaid by the council while absent from work through sickness. There was no evidence from the relevant pay clerk(s), but the Court of Appeal inferred that the plaintiff council continued to pay the defendant at a full rate because the pay clerks concerned were unaware or had forgotten that the defendant had been sick and absent for more than six months. It was held that human error gave rise to the mistakes because the incorrect information had been fed into the computer. The Court of Appeal pointed out that the plaintiffs had not been able to identify the individual person or persons who were responsible for the errors. However, the Court suggested that in similar cases the responsible individuals should be identified and called as witnesses. Slade LJ stated: ‘Employers who pay their employees under a computerized system should not in my opinion assume from the decision of this court in the present case that, if they overpay their employees through some kind of mistake, they are entitled to recover it simply for the asking.’

It is submitted that this stringent approach to the question of evidence may not be good law now. One fact weighing on the Court's mind in the *Avon County Council*\(^93\) case was the distinction between mistakes of fact and mistakes of law. Given the liberal approach of cases such as Barclays Bank and Kleinwort Benson, it is unlikely that the defence will have much to gain from insisting

\(^92\) (1983) 1 WLR 605.
\(^93\) Supra note 93.
upon evidence as to the nature and quality of the mistake involved. It has been submitted that ignorance of a transfer will qualify as an operative mistake, as well as an active but an erroneous decision-making process. In modern conditions there is little need for detailed probing of the actual conditions which generated the mistake.

B. MISREPRESENTATION

3.2.1 Introduction

Where the alleged operative mistake takes place in the context of an apparently binding contractual arrangement, a distinct regime applies. There is a stark asymmetry between the treatment of spontaneous mistakes which result in binding contractual arrangements, where relief is rare, and spontaneous mistakes which result in extra-contractual payments or other transfers, where a liberal regime of recovery obtain section Turning to contractual mistake, it is necessary to distinguish between a mistake which is induced by a misrepresentation by the transferee, and one which was spontaneously entertained by the transferor. Since the Judicature Acts English courts have followed the liberal regime of the old Courts of Equity, in prima facie granting relief where contracts are entered as a result of misrepresentation, whether fraudulent negligent or innocent. This leaves little room for the autonomous doctrine of mistake in the contractual context. Relief in response to a spontaneous mistake is rare. The remedy for an actionable misrepresentation is rescission, a cause of action in unjust, enrichment.

Its juridical nature was examined by Robert Goff LJ in Whittaker v Campbell:

“A misrepresentation, whether fraudulent or innocent induces a party to enter into a contract in circumstances where it may be unjust that: the representor should be permitted to retain

95 (1983) 3 All ER 582 at p. 586.
the benefit (the chose in action): acquired by him. The remedy of rescission by which the unjust enrichment of the representor is prevented, though for historical and practical reasons treated books on the law of contract, is a straightforward remedy in restitution subject to limits which are characteristic of that branch of the law."

Nineteenth century decisions on misrepresentation and non-disclosure by company directors and promoters provide a rich seam of case law, yielding sophisticated mechanisms for effecting mutual restitution under tainted transaction section the details of Act law can be found in the contractual texts and it is proposed here to consider only briefly conditions for the availability of rescission and the limits upon its availability.

3.2.2 Actionable Misrepresentation

First, it is traditionally stated that there must be a representation of fact, although to the extent that this formulation excludes representations of law it must be regarded with suspicion in the wake of *Kleinwort Benson Ltd v Lincoln City Council*. There remain difficulties over whether a non-expert opinion can ground relief. As Lord Campbell LC famously stated, a representation can extend to a ‘nod or a wink, or a shake of a head or a smile’ *Walters v Morgan*. However, where the transaction is not one of insurance, nor the representor a fiduciary, English law does not grant relief for non-disclosure.

The representation must be false and causally efficacious. The deceit case of *Edgington v Fitzmaurice*, suggests that it is sufficient if the representation was a cause and not necessarily the cause of the representee entering into the transaction. Where the representation was material, in a sense of being capable of inducing a reasonable person to enter into the transaction, the burden of proving that the actual representee was not so induced shifts to the

97 (1999) 2 AC 349.
98 Supra note 3 at pp.261-263.
99 (1861) 3 De GF & J 718-724.
100 (1885) 24 Ch D 459.
Alternatively, even where the representation was not material, the representee will succeed if he can demonstrate that it was calculated to induce him to enter into the transaction, and that he was so induced. Where the conditions are fulfilled a prima facie right to rescind obtains.

Where the transaction is executor, rescission simply takes the form of setting aside the otherwise binding obligations which the parties have assumed. Further, even where the transaction is partly or fully executed. The setting aside of extant obligations can be supplemented by an order that there be mutual restitution of benefits transferred under the contract, including money, land and personal property.

3.2.3 Rescission and Indemnity

Claims for rescission for misrepresentation have been less common in the last three decade section prior to the 1960s, compensatory damages for misstatements had been confined to cases where fraud could be proved. However, in the wake of section 2(1) of the Misrepresentation Act, 1967 and the common law developments since Medley Byrne & Co. Ltd v Heller & Partners Ltd, there has been greater focus on compensatory option section due to this shift of emphasis, it can be forgotten that rescission can encompass the grant of an indemnity against potential future liabilities.

In Newbigging v Adam, the plaintiff was induced to enter into a partnership on the basis of misrepresentations as to the state of the business section rescission was ordered comprising the return of the net sums which had been contributed to the business, together with an indemnity from the remaining partner against partnership debts and liabilities which he might be liable to pay. Bowen LJ observed:

There ought, as it appears to me, to be a giving back and a taking back on both

8 Redgrave v Hurd (1881) 20 Ch D 1, at p 21.
102 Misrepresentation Act, 1976, Sec. 1.
103 (1964) AC 465.
104 (1886) 34 Ch D 582.
sides, including the giving back and taking back of the obligations which the contract has created, as well as the giving back and the taking back of the advantage.

Bowen LJ would confine the indemnity to obligations created by the contract. Cotton LJ held that the plaintiff was entitled to be ‘relieved from the consequences and obligations which are the result of the contract which is set aside’; Fry LJ held: ‘the plaintiff is entitled to an indemnity in respect of all obligations entered into under the contract when those obligations are within the necessary or reasonable expectation of both the contracting parties at the time of the contract.’ However, even on the wider formulations of Cotton LJ and Fry LJ the entitlement is not equivalent to a right to compensation. The question of the indemnity was no longer a live issue before the House of Lords, where it was accepted that there were no outstanding liabilities.105

In *Whittington v Seale-Hayne*,106 the plaintiff entered into a lease of premises for the purpose of poultry breeding. There were misrepresentations as to the sanitary conditions of the premise section. It was held that the indemnity did not extend to the value of lost poultry, lost profits and other expense section. However, given the wide availability of damages for misrepresentation, the issue is one of pedagogical interest rather than practical importance.

### 3.2.4 Limits to the Right to Rescind

By its very nature rescission is a drastic and stringent remedy the availability which is circumscribed by a number of bar section it was at one time thought that the remedy was unavailable where a contract was fully executed, but such doubts have been removed by section 1 of the Misrepresentation Act, 1967. More significant: rescission has often been perceived to be confined to the realm of the tangible. The aim of the courts, according to Lord Blackburn, ‘has always been to give this relief whenever, by the exercise of its powers, it can do

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105 (1888) 13 App Cas 398.
106 (1990) 82 LT 49.
what is practically just thought it cannot restore the parties precisely to the state they were in before the contract.'107 However, there has been insistence that mutual restitution be possible. Therefore, unless the party seeking relief can himself provide counter-restitution in integrum rescission will not be available. Birks has written of the regarding the impossibility of counter-restitution as being a defense in the law restitution.108

Certain benefits have been perceived by their very nature to be incapable of being restored, for example, service section In Boyd & Forrest v Glasgow & South-Western railway Company,109 the House of Lords would have denied rescission of a railway construction contract on this ground. Lord Shaw of Dumferm line stated:

“The railway is there, the bridges are built, the excavations are made, the rails are laid, and the railway itself was in complete working two years before this action was brought. Accounts cannot obliterate it, and unless the railway is obliterated restitution in integrum is impossible.”

Similarly, a transferee cannot eat a cake and restore it. In contrast, it was possible in the sale of a business for the court to order an account of profits and make allowances for the deterioration in the subject-matter transferred.110 The fact that the transferee can escape a bad bargain, for example, where the value of shares had dropped astronomically between the date of purchase and rescission, does not bar relief.111 Conversely, where the representee had sold shares to the representor following fraudulent misrepresentations as to the company’s profitability, and the value of the shares had increased in the intervening period, the seller was entitled to be recovery of the shares.112 Lord Wright stressed that the court would be more drastic in exercising its powers in a case of fraud than in a case of innocent misrepresentation: Though the

14 Erlanger v New Sombrero Phosphate Co. (1878) 3 App Cas 1218, 278-79.
108 Supra note 1 at pp 415-424 & 475-476.
109 (1915) SC (HL) 20.
110 Lagunas Nitrate Co. v Lagunas Syndicate (1899) 2 Ch 392.
18 Armstrong v Jackson (1917) 2 KB 822.
112 Spence v Crawford (1939)3 All ER 271.
defendant has been fraudulent, he must not be robbed, nor must the plaintiff be unjustly enriched, as he would be if they both got back what they had parted with and kept what he received in return. In that case the seller had to give credit for the purchase moneys received, but the buyer had to give up dividends received while off-setting subsequent loss.

The approach of the older cases could be utilized in support of the modern imperative to disregard difficulties of precise counter-restitution, and rather insist on mutual restitution, if necessary by valuing benefits transferred, and allowing substitutionary counter-restitution in money. The leading twentieth-century authorities concern undue influence. However, in a case concerning fee tort of deceit, the House of Lords has signaled its preference for the flexible approach. In *Smith New Court Securities Ltd v Citibank NA*,113 Lord Browne-Wilkinson was skeptical of a concession that a share purchase contract could not be rescinded simply because the stock that had been disposed of:

If the current law in fact provides (as the Court of Appeal thought) that there is no right to rescind the contract for sale of quoted shares once the specific shares purchased have been sold, the law will need to be closely looked at hereafter. Since, in such a case, identical shares can be purchased on the market, the defrauded purchaser can offer substantial *restitutio in integrum* which is normally sufficient.

A particular incidence of the counter-restitution obstacle, which is stated as a separate bar to rescission, is where a third party has acquired rights to the subject-matter of the original contract. In addition the remedy must be sought promptly (in practice meaning within weeks and months, rather than years) and the party seeking relief must unequivocally evince an intention no longer to treat the contract as binding, otherwise the right to rescind will be lost on the

113 (1997) AC 254.
grounds of lapse of time or affirmation.

3.2.5 The Misrepresentation Act, 1967

The stringency of full restitution as a response to what might be a comparatively minor or trivial misrepresentation prompted the legislature to give the courts an unparalleled discretion in section 2(2) of the 1967 Act to disallow restitutionary relief and instead substitute compensation. Section 2(2) counter-balances the liberating influence of section 1 which removed bars to rescission. It applies only in cases of non-fraudulent misrepresentation.

Given what little authority there has been on rescission in the last three decades, there is accordingly even less on this sub-section. The discretion is explicitly stated to be equitable. The court must have regard to:

a) The nature of the misrepresentation;

b) The loss that would be caused by it if the contract were upheld; and

c) The loss that rescission would cause to the representor.

Section 2 (3) seems to anticipate that damages under section 2(2) would be in a lesser amount than damages under section 2(1). In *William Sindall plc v Cambridgeshire County-Council*,114 it was alleged that a valuable piece of land had been purchased as a result of misrepresentation concerning the non-existence of a sewer crossing the property. The allegation was not made out, but Hoffmann LJ indicated that if it had, he would have exercised the discretion under section 2 (2). In valuable guidance Hoffmann LJ stated that the measure of recovery under the subsection could never exceed recovery for damages for breach of warranty. Ordinarily the measure would be the difference between the property as it was represented to be an: the property as it actually was section it will not encompass consequential losses.115

114 (1994) 1 WLR 1016.
115 *Thoma Witter Ltd v TBp Industries Ltd* (996) 2 ALL ER 573 at PP 588-91.
3.2.6 Rescission for Mistake

3.2.7 Common Law Mistake

The English jurisdiction to relieve against even innocent misrepresentations leaves little room for relief for mistake. It appears inapt to speak of weak streams of case law where there has been only a trickle of authority, but what little there is suggests a different approach at common law to that which obtains in equity.

The common law case is *Bell v Lever Brothers Ltd*,\(^{116}\) supplement by the influential discussion of Steyn J in *Associated Japanese Bank International v Credit du Nord SA*.\(^{117}\) Where a contract governs the transfer of benefits there is no room for the operation of the law of unjust enrichment, but where the contract is held to be void relief may be available. In Bell, Brothers sought restitution of generous golden handshakes paid to the plaintiff who were the management team of one of its subsidiary companies. The plaintiff cooperated in the merger of this subsidiary company with its nearest and had given up valuable service contracts. However, Lever Brothers subsequently discovered that earlier, in breach of duty, the plaintiffs had made small profits on their own account by speculating on the cocoa market. Lever Brothers I to establish fraud or non-disclosure. The House of Lords held that the contract would have been void where both parties were labouring under a mistake, and subject-matter of the contract was essentially different to that which the parties assumed it to be. However, by a majority, it was held that the mistake was not of that magnitude.

The case is authority for a narrow doctrine of mistake at common law. A contract will be held to be void at common law if the subject-matter no longer exists or where the subject-matter already belongs to the purchaser (res sua). Where the mistake is only as to a quality of the subject-matter of the contract it will be void only where, first, the mistake is common to both parties, secondly,

\(^{116}\) (1932) AC 161.
\(^{117}\) (1989) 1 WLR 255.
the difference render the subject-matter essentially and radically different from what both parties through it to be, and thirdly, there were reasonable grounds for that belief in *Associated Japanese Bank International v Credit du Nord SA*.118 In that case an accessory guarantee contract for the obligations under a sale-and-leaseback transaction in respect of non-existent engineering machines, was held to be void as closely analogous to the *res extinguita* case section once the contract is void, in accordance with the third question, the contractual matrix is inapplicable, and claims may be brought for restitution of any money or property transferred. It was assumed in Bell that had the contract been void for mistake, the £50,000 golden handshakes would be recoverable, presumably on the ground of mistake or total failure of consideration.

### 3.2.8 Equitable Mistake

There was some authority for equitable relief on the grounds of mistake in contract before the Judicature Acts (for example, *Cooper v Phibbs*,119 a *res sua* case), but there was little authority for a coherent doctrine of equitable mistake until the bold synthesis of Denning LJ in *Solle v Butcher*.120 It seems that mistake in equity does not render a contract void, but the court may set aside the contract where, first, the mistake is common, secondly, the subject matter is rendered fundamentally different to what the parties supposed it to be, and thirdly, the party seeking relief is not himself at fault. *Solle* and *McGee v Pennine Insurance Co. Ltd*,121 suggest that the test of fundamentally is less stringent than the common law test of ‘essentially and radically different’. More recently, however, the Court of Appeal has signaled a return to the principle of sanctity of bargain, marginalizing cases,122 which followed the equitable route, by insisting on greater respect for the contractual allocation of risks in assessing allegations of mistake.123 What is clear about the equitable

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118 Ibid
119 (1867) LR 2 HL 149.
120 (1950) 1 KB 671.
121 (1969) 2 QB 507.
doctrine is that the relief available to the court goes beyond simply awarding restitution, but can encompass setting aside contractual obligations and imposing new terms upon the parties. Therefore, these cases are of only marginal significance to the law of restitution.

Thus, if one party acting innocently sues another party to a make mistake as to the substance of the thing which is the subject of the agreement, these is said to be misrepresentation.

In cases of misrepresentation the person making the statement is innocent and he makes the statement without any intention to deceive the other party, this statement is false although he himself believes that the brand where the person making a false statement knows that the same is false but makes the same intentionally to deceive the other party and to make him enter into an agreement which he would not have done otherwise.

C. DURESS

3.3.1 Introduction

A contract procured by duress i.e. by actual violence or the threat of violence or dishonour is voidable at the option of the person who has been forced to enter into it. The apparent consent of a party who has acted under duress is clearly not his real consent and therefore, he is entitled to avoid the contract.

3.3.2 Coercion under Indian Contract Act, 1872

Section 15 of the Indian Contract Act, defines coercion which provides:

“Coercion” is the committing, or threatening to commit, any act, forbidden by the Indian Penal Code (Act XLV of 1860) or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.”

Explanation to Section 15 further provides that:
“It is immaterial whether the Indian Penal Code (Act XLV of 1860) is or is not in force in the place where the coercion is employed.”

A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code (Act XLV of 1860). A afterwards sues B for breach of contract at Calcutta. Here A has employed coercion, although his act is not an offence by the law of England, and although Section 506 of the Indian Penal Code was not in force at the time when or place where the act was done.\(^{124}\)

### 3.3.3 Scope of Section 15

As pointed out by *Pollock and Mulla\(^{125}\)* “The words of this section are far wider than anything in the English authorities….. In England the topic of duress\(^{126}\) at Common Law has been almost rendered obsolete partly by the general improvement in manner and morals, and partly by the development of equitable jurisdiction under the head of undue influence. Detaining property is not duress.”

### 3.3.4 Essential Ingredients of Coercion

Following are the essential ingredients of coercion:

a) Committing or threatening to commit any act forbidden by the Indian Penal Code; or

b) The unlawful detaining or threatening to detain any property to the prejudice of any person whatever; or

c) With the intention of causing any person to enter into an agreement.

It may be noted here that even if there be coercion, but it does not appear that it was instrumental in making the promisor to do the act in question, the existence

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\(^{124}\) Illustration of the Indian Contract Act, 1872, Sec. 15.

\(^{125}\) *Indian Contract Act and Specific Relief Act*, 9\(^{th}\) edn. 1972, at p. 133.

\(^{126}\) Ibid.
of coercion would be of no avail. The word “cause” is not a term of art; but it is a term of science. Nothing can be said to be the cause of a particular effect, unless it is the proximate and immediate cause of the effect. If the alleged cause is remote and not proximate, is distant and not immediate, such a cause cannot be said to be the cause in legal parlance. It is also to be noted that a factor that would cause a particular effect with a particular man, may not be able to achieve that result in the case of another man. In other words, the casual relationship can be said to the established, only if it is proved that in the facts and circumstances of a particular case, the said factors had weighed with the promisor and that but for those factors, the said promisor would not have acted in the manner he is found to have acted. Thus the totality of circumstances is required to be viewed before a decision one way or the other is reached in this regard.\(^{127}\)

For example, in M/s. Gunjan Cement Pvt. Ltd. v. Rajasthan State Industrial Development and Investment Corporation Ltd.,\(^{128}\) a loan of Rs. 90.00 lacs as financial assistance was sought by the petitioner from the respondent, Rajasthan State Industrial Development and Investment Corporation Ltd. (RIICO). The loan was sanctioned subject to Industrial Development Bank of India (IDBI) and Small Industries Development Bank of India (SIDBI), agreeing to refinance the loan to the RIICO. Loan agreement was entered into on 12th March 1991 between the petitioner and RIICO. Subsequently on 13.12.1991 a deed of modification was signed by the petitioner on mutual agreement of both the parties. In this deed of modification, the petitioner voluntarily agreed for change of rate of interest to be charged from 12.5 per annum to 18.75% per annum. In the instant writ petitions, the petitioner challenged the enhanced rate of interest on the ground that, the deed of modification was got signed by the petitioners under duress. Rejecting the contention of the petitioners the Rajasthan High Court held, that the petitioner

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\(^{128}\) AIR 1996 Raj 88.
knowing fully well the legal implication of the contract has signed the ‘deed of modification.’ It was not a case of an illiterate person signing the deed without understanding the contents thereof. The theory of coercion and duress submitted by the petitioner is therefore, not acceptable. Dismissing the writ petition, the court held that unless the ‘deed of modification’ is set aside or cancelled by a court of competent jurisdiction on the ground of duress or Coercion, it is binding between the parties as they have signed it with their eyes wide open. The petitioner has failed to make out a case and the writ petitions are devoid of merit. 129

3.3.5 Coercion under English Law

As pointed earlier, the scope of the term “coercion” under Section 15 of the Contract Act is much wider than the term “duress” under English Law. Under English Law, a contract obtained by duress is voidable because it lacks the element of free consent which is deemed essential for it. As pointed out by Cheshire and Fifoot “Duress at Common Law, or what is sometimes called legal duress, means actual violence or threats of violence to the person i.e. threats calculated to produce fear of loss of life or of bodily harm. Cheshire and Fifoot, however, add, “that a contract Should be procured by actual violence is difficult to conceive, but a more probable means of inducement is threat of violence. The rule here is that the threat must be illegal in the sense that it must be threat to commit a crime or a tort. Thus to threaten an imprisonment that would be unlawful if enforced constitutes duress, but not if the imprisonment would be unlawful.”130 It may also be noted that “For duress to afford a ground of relief, it must be duress of a man’s person, not of his goods.”131

131 Ibid.
3.3.6 Distinction between English Law and Indian Law

Under Indian Contract Act, coercion consists of (1) committing or threatening to commit any act forbidden by the Indian Penal Code or (2) the unlawful detaining or threatening to detain any property to the prejudice of any person whatever, and (3) with the intention of causing any person to enter into an agreement. Thus as provided under Section 15, coercion can be aimed not only against a person but also against his property. Moreover, it is not necessary that coercion be caused by a party to the contract. It may be caused by a third person or a person who is not a party to the contract. “Coercion differs from duress in that it can be aimed (1) against a stranger to the Contract, (2) against goods, (3) and it can proceed from any person (4) immediate violence is not necessary, it need not be such as to affect a man with ordinary firmness of mind.”\(^{132}\) Thus it is obvious that the scope of the term coercion is far wider than the term duress under English Law.

For example, where the plea was made that the plaintiff was dispossessed of premises forcibly under threat that he would be arrested and detained under Maintenance of internal Security Act (MISA), such a threat, would clearly fall within the mischief of Section 15 of Indian Contract Act.\(^{133}\)

3.3.7 Act Forbidden by the Indian Penal Code

According to Section 15, coercion is the committing or threatening to commit any act forbidden by the Indian Penal Code. It will, therefore, be necessary to understand the import of these words. The words act forbidden by the Indian Penal Code make it necessary for the court to decide in a civil action, if that branch of the section is relied on, whether the alleged act of coercion is such as to amount to an offence.\(^{134}\) A leading case on the point is *Rangnayakarnma v.*


\(^{134}\) Pollock and Mulla OP. cit at p. 133.
Alwar Setti, a Madras case. In this case, the husband of a girl of 13 years dies and the relations of the deceased did not allow the corpse to be removed unless she adopted a child of their choice. The Madras High Court held that since the adoption was not made by free consent and the act was prohibited under the Indian Penal Code, it was not binding on her. Although the decision of the Court is correct yet the reasoning’s given for the same are not convincing. That is why this decision has been subjected to criticism. As a matter of fact, this case should come under Section 16 rather than Section 15 of the Act.

“The decision errs in the reasoning given. May be the option is invalid as having been obtained by undue influence under Section 16 but there appears to be no ‘coercion within the meaning of Section 15. It will be difficult to bring the act of the relatives under Section 297 which penalises persons offering any indignity to a human corpse with the intention of wounding the religious feelings of any person; Pollock and Mulla also subscribe this view. Section 297 of the Indian Penal Code provides as follows: ‘Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in place of worship or any place of sculptor, any place set apart for the performance of formal rites or as a depository of the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any person assembled for the performance of funeral ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.” It is clear from the above provision that in the above noted case offence alleged to have been committed did not fall within the scope of Section 297 and in fact should have been taken to be under Section 16 of the Indian Contract Act”.

3.3.8 Threat to Commit Suicide, Whether Coercion

There is some controversy regarding the question whether an attempt to commit suicide constitutes coercion within the meaning of Section 15.

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135 (1890) 13 Mad 214.
136 VG Ramachandran OP. cit at p. 410.
137 Supra note 11 at p. 134.
According to Section 15, an offence to constitute coercion should be an act forbidden by the Indian Penal Code. Under the Indian Penal Code, attempt to commit suicide is punishable and not the threat to commit suicide. In a Madras case, *Ammiraju v. Seshamma*, a man gave a threat to his wife and son to commit suicide if they did not execute a release bond regarding some properties which the wife and son claimed as their own. By a majority of 2 to 1, the court held, the release deed was vitiated by coercion within the meaning of Section 15. The majority decision pointed that to threat to commit suicide must be deemed to be forbidden since the attempt to commit suicide was punishable under Section 30 of the Indian Penal Code. But in his dissenting judgment Oldfield, J., rightly argued that Section 15 of the Indian Contract Act must be interpreted strictly. An act could be said to be forbidden by the Indian Penal Code only when it was punishable under it. Since the threat to commit suicide was not punishable, it could not be said to be forbidden.

3.3.9 Recommendations of the Law Commission

As regards the words “any act forbidden by Indian Penal Code,” the Law Commission recommended the following the words ‘any act forbidden by the Indian Penal Code’ should be deleted and a wider expression be substituted therefore, so that the Penal Laws other than the Indian Penal Code may also be included. The explanation should also be amended to the same effect.” The Law Commission has made this recommendation because in its view, “The proper function of the Indian Penal Code is to create offences and not merely to forbid. The Penal Code forbids only what it declares punishable. There are other laws other than the Indian Penal Code performing the same function.”

3.3.10 Whether an Act done under Compulsion of Law constitutes Coercion

An act done under the compulsion of law is no coercion within the meaning of

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138 (1917) 41 Mad 33.
140 Ibid.
Section 15 of the Contract Act. This was clearly laid down by the Supreme Court in *Andhra Sugar Ltd. v. State of Andhra*.\(^{141}\) In this case the Supreme Court had to decide the validity of the provisions of the Andhra Pradesh Sugar (Regulation of Supply and Purchase) Act which provides that the sugar factory is bound to accept sugarcane if offered by a cane grower to the factory but the cane grower is not bound to offer the cane to the factory of the area. The Supreme Court held that under Section 14, compulsion of law is not coercion within the meaning of Section 15 of the Act, and as such, the said agreement was not caused by coercion.

### 3.3.11 Unlawful Detaining of Property

As pointed out earlier, coercion as defined under Section 15 of the Act includes “the unlawful detaining or threatening to detain any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.”

But it has been held that if a mortgage imposes certain conditions for conveying the equity of redemption, it may not amount to an unlawful detaining or threatening to detain any property under Section 15 of the Contract Act.\(^{142}\)

### 3.3.12 Difference between Coercion and Duress

1. Coercion in India means committing or threatening to commit an act forbidden by the *Indian Penal Code*. Duress, under Common Law, consists in actual violence or threat of violence to a person. It includes doing of an illegal act against a person, whether it be a crime or a tort. Thus unlike coercion, duress is not confined to unlawful acts forbidden by any specific penal law like the Indian Penal Code in India.

2. In India, coercion can also be there by detaining or threatening to detain any property. In other words, in coercion an act may be directed against

\(^{141}\) A1R 1968 SC 599.

\(^{142}\) *Bengal Co. Ltd. v. Joseph Hyam*, (1918) 27 Cal LJ 78 at pp. 80-82.
a person or his property. In England, duress is constituted by acts or threats against the person of a man and not against his property.

3. In India, coercion may proceed from a person who is not a party to the contract, and it may also be directed against a person who, again, may be a stranger to the contract. In England, duress should proceed from a party to the contract and is also directed against the party to the contract himself or his wife, parent, child, or other near relative.

So we can say that duress consists in actual violence or threat of violence to a person. It only includes fear of loss to life or bodily harm including imprisonment but not a threat of damage to goods.\textsuperscript{143} The threat must be to do something illegal, i.e., to commit a tort or a crime.\textsuperscript{144} There is nothing wrong in threat to prosecute a person for an offence, \textsuperscript{145} or to sue him for a tort\textsuperscript{146} committed by him, although threatening illegal detention would be duress.\textsuperscript{147} Moreover, duress must be directed against a part in the contract or his wife, child, parent or other near relative,\textsuperscript{148} and can also be cause by the party to the contract or within his knowledge.\textsuperscript{149}

D. UNDUE INFLUENCE

3.4.1 Introduction

The doctrine of undue influence under the common law was evolved by the courts in England for granting protection against transactions procured by the exercise of insidious forms of influence, spiritual and temporal. The Indian Contract Act, 1872, is founded substantially on the rules of English Common Law. The general principles enunciated in English Law are applicable subject to the provision in Section 16 of the Indian Contract Act. The law of undue

\textsuperscript{144} Ware and De Frevile Ltd. v. Motor Trade Association (1921) 3 KB 40.
\textsuperscript{145} Fisher & Co. v. Appolinaris Co., (1875) 10 Ch. App. 297.
\textsuperscript{146} Powell v Hoyland (1851) 6 Ex. 67.
\textsuperscript{147} Cumming v. Ince, (1847) 11 Q.B. 112; Briffin v. Bignell, (1862) 7.
\textsuperscript{148} Seev v. Cohen (1881) 45 L.T. 589.
\textsuperscript{149} Kesarmal v. Valliappa Chettiar, (1954) 1 W.L.R. 380.
influence has grown in its application to numerous cases in which pardenashin woman’s are concerned. There are also cases of guardian and ward, trustee and cities que trusty, mentally deficient persons, extravagant profligates, expectant heirs etc.

3.4.2 Applicability of English Equity Principles in India

A caution is urged that the english Law is not applicable when Section 15 clearly controls the law of undue influence. The Madras High Court in *Ram Patter v. Manikishan* held that principles followed by the guilty Courts in England in respect of transaction flowing from fiduciary relationship are quite applicable in India. It was also printed out in the same case that a gift rescinded on the ground of undue influence must fail in one of the following categories:

(a) Cases where some unfair and improper conduct, some coercion from outside, some over-reaching, some form of cheating and generally though can always some personal advantage obtained by a donee placed in seine confidential and close relation to the donor. In these cases the court has to be satisfied that the gift was the result of influence expressly exercised by the donee for the purpose. The court will be guided by the principle that no one shall be allowed to retain any benefit arising from his own fraud.

(b) The other group of cases arises in donor-donee relationship where it was the duty of the donee to advise the donor or even to manage his property for him. The burden is cast on the donee to prove that he has not abused his position and that the gift to him was untainted by undue influence. In such cases it has further to be shown that the donor had independent advice and was thus removed from the Influence when the gift to him as in fact made.

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151 Toolsegdoss v. Premji, 13 Bom. 61.
152 Balgangaardhar Tilak v. Srinivas Pandit, 39 Bom. 441.
155 Balkishan v. Madanlal, 29 All. 303.
156 Dhanipal Das v. Maneshwar Baksh Singh, (1985) 1 All ER 303.
157 AIR 1938 Mad. 726.
158 Ibid.
The Allahabad High Court gave relief in a case of hard and unconscionable bargain on principles of equity though no question of undue influence arose in that case.\textsuperscript{159}

The Law Commission of India in its 13th Report\textsuperscript{160} has examined the position and states:

\begin{quote}
\textit{There are some cases in which on principles of equity, relief has been given against a hard and unconscionable bargain, even though there was no question of undue influence involved. We favour the view taken in Kesevala v. Arithulaiammal\textsuperscript{161} that unless undue influence is proved no relief can be given on the ground of unconscionableness of the Contract}.
\end{quote}

We, however, are of the view and submit that such a rigid attitude may not serve the ends of justice. The judgment of \textit{A.L. Rama Patter's case}\textsuperscript{162} still stand good and due weigh should be given. There can be an unconscionable bargain outside the ambit of section 16 (where undue influence has to be proved) which can invoke the court’s intervention. To be an unconscionable transaction there ought to be proof of fraud or misrepresentation or proof that the creditor took an improper advantage of his position or of the difficulties of the defendant.

The judgment of Varadachari and Burn JJ. of the Madras High Court in \textit{A.L. Rama Patter v. Manikkam}\textsuperscript{163} already referred to lends support to the view that unconscionable bargains can be struck down even outside the statutory provision in Section 16 on the principles of English equitable rules.

Their Lordships observe:\textsuperscript{164}

\begin{quote}
\textit{It may be conceded that Section 16 of the Contract Act deals in terms with the exercise of undue influence by one party to}
\end{quote}

\textsuperscript{159} \textit{Kirpa Ram v. Samiuddin} 25 All 284.
\textsuperscript{160} (1958) at p. 21.
\textsuperscript{161} 36 Mad. 53.
\textsuperscript{162} AIR 1935 Mad. 726, 58 Mad. 454.
\textsuperscript{163} Ibid.
\textsuperscript{164} Ibid.
the contract on the other. Indeed this is the ordinary type of
cases of undue influence. The question of the effect of undue
influence exercised by somebody other than the grantee or
promises, does not seem to have arisen in cases that went up
to the judicial committee from India except in Possithurai v.
Kannappa Chettier. 165 We are not sure whether the
observation of Lord Shaw in that case, about the exercise of
influence, ‘in conspiracy with or through the agency of other’
is not wide, enough to take in the full scope of the doctrine as
illustrated by the eng1ish cases, far ‘agency’ may in such
cases well undue instance in which the creditor or transferee
knowingly or intentionally leaves everything in the hands of
the principal debtor”.

Their Lordships in the next para add:

“Confining ourselves, however, to the statute law of India, it
is clear that the principle of the English cases referred by
Venkatasubba Rao, J.166 has been made applicable in this
country by section 89, Trust Act.”

It is interesting to note that in the foot note to Section 89 of the Trust Act in
Stoke’s Anglo Indian Codes the reference given in Maitland v. Irving,167 an
English case. In that case A and B consented to postpone the payment of £5,000
due to then from C in consideration of C procuring and giving them the
plaintiff’s guarantee for that sum; and C at the same time informed A and B that
the plaintiff was his niece and possessed considerable property, that she had
resided with him for sometimes, that he had been her guardian and that he had
been of age for about a year and a half, The guarantee given by the plaintiff was
held unenforceable. The Vice-Chancellor observed in that case:

“It seems extra-ordinary that with the full knowledge of those
circumstances, they (creditors) hold at once acceded to the
proposal without making any inquiry or taking any pains to
ascertain whether the young lady was a free agent and
perfectly willing, with a full knowledge of the consequences
to do what the guardian he would invite her or propose to her
to do…….”

They must have perceived that by accepting the suggestion of Maclean (the

165 AIR 1920 PC 160.
167 (1846) 15 Sim. 437.
debtor), they relied on the influence that he had over the young lady....knowing
the defenseless situation of the young lady, they combined with Maclean who,
disclosed it to thee, in order that advantage might be taken of her defenseless
situation for the benefit of all the three, and my opinion is that they must all
three be considered as standing in the same situation”.

The Judges of Madras High Court in *Rena Patter & Brothers case*, therefore, added:

> “When it is found that the principle of this decision (Maitland v. Irving) has been adopted by the Indian Legislature in enacting Section 89, Trust Act, there is no substance in the contention that later English authorities of the same type furnish no guidance to us in the application of the rule”.

They relied on *Lancashire Loans v. Black* where a married daughter’s guarantee to the mother for her debts was rescinded on the ground that young person should be protected from the undue influence inherent in the mother-daughter relationship and that in that case the creditor had notice of the relevant facts. In Ram Patter’s case the facts were similar to Maitland case, for here the plaintiff creditor unsuccessfully sued to recover monies due to him by defendant 1 and 2 even against the third defendant who was their nephew and ward inveigled to stand guarantee for their past, present and future debts. Their Lordships concluded:

> “It does not seem to wrong to say that where a third party stands in no confidential relation to the prisoner or grantor, the onus does not in the first instance lie on the former, to show that no undue influence was used. It is only when he is found or could be assumed to have had notice of the exercise of undue influence by another, or at least of circumstances raising a presumption or probability of undue influence that the onus will be shifted. We are of the opinion that the principles followed by courts of equity in England in dealing with similar transactions are equally applicable in this country and budging the suit transaction by those principles

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168 Supra Note 8.
169 (1934) 1 K.B. 380.
170 Supra Note 13.
the plaintiff cannot hold the third defendant liable.”

It would thus seem to be clear that in India the equitable principles of English Law can be applied in appropriate cases where there is unconscionable bargain though there may not be ‘undue influence’ such as defined in section 16 of the Act. Equity never hesitated to interfere in the cage of fraud and as Lord Hardwicke put it171 ‘the equitable jurisdiction based on undue influence is only a development of the principle of relief on the ground of fraud’.

The Law Commission of India in its 13th Report, however, felt no need to make any change in Section 16 of the Act, and refuses to recognize that there can be court’s intervention in the matter of unconscionable bargain even though undue influence is not proved.

In Balkishan v. Madanlat172 case the son of a wealthy father aged 28 but profligate in habits, executed a bond at a high rate of interest, as his father refused to supply him, the bond contained unconscionable stipulations, there was, of course, no undue influence exercised but yet the court held that the bargain was definitely unconscionable, oppressive and extortionate and therefore, unenforceable in law.

The Kesavalu case173 preferred by the law commission in its report does not eschew altogether the application of the equitable doctrine. The decision can be authority for the proposition that mere high rate of interest which may be hard and unconscionable is not enough for equity intervention. In addition there ought to be some disparity in the position of parties such as surprise, ignorance, distress or even poverty which prevented the parties from dealing on equal terms. 174 After the passing of the Usurious Loans Act, 1918, it is unnecessary for courts to invoke equitable doctrine in cases of excessive interest since under section 3 of the said Act unfairness and excessiveness in the matter of interest

172 ILR 29 All. 309.
173 Kesayalu v. Arithulai (1913) 36 Mad. 533.
can be put down by the court even if no undue influence is established.\textsuperscript{175} So the Kesavalu case decided in 1913 is covered by the statutory protection in Section 3 of the Usurious Loans Act 1918. As stated already the \textit{Rama Patter Bros case}\textsuperscript{176} covers a wider and different field where a young nephew was induced to guarantee for the uncle’s debts past, present and future so unconscionable in the nature of it, that the creditor who had notice of the relationship was refused a decree against the nephew. So the Law Commission statements in its report that in no case relief can be given on the ground of unconscionableness of the contract unless undue influence is provided appears too wide for acceptance, one can agree that \textit{Kesayalu’s}\textsuperscript{177} case in so far as high rate of interest be accepted but that is no authority for cases like \textit{Rama Patter & Bros},\textsuperscript{178} where infect no undue influence or pressure was used. The nephew was living with his uncle and was well to do and so he put his signature to the document at the suggestion of the uncle. No undue pressure, force or cajolery was exercised. The bargain was clearly unconscionable, the additional factor being the intimate fiduciary relationship of the parties and the amiability of the nephew to the uncle.

In \textit{Kesavalu Naidu case}\textsuperscript{179} it was pointed out that since the plaintiffs endorser ended the ladies negotiated only through a power of Attorney, in the absence of proof that the agent himself was subjected to domination at the hands of the original holder, a mere herd stipulation of 60\% interest does not by itself render it a voidable transaction in equity.

This proposition so stated cannot in any way affect the applicability of the English doctrine of equity in unconscionable bargains to India. Even in \textit{Dhanipal Das case},\textsuperscript{180} the Privy Council had stated:

\begin{quote}
\textit{“Apart from a recent statute an English court of equity could}
\end{quote}

\begin{footnotes}
\textsuperscript{175} Kumar Narendra v.Paton (1930) 52 cal. L.J. 73.
\textsuperscript{176} Supra Note 13.
\textsuperscript{177} Supra note 24
\textsuperscript{178} Supra note 13
\textsuperscript{179} 36 Mad. 533: 22 Ic 769.
\textsuperscript{180} 33 I.A. 118.
\end{footnotes}
not give relief from a transaction or contract merely on the ground that it is a hard bargain, except where the extortion is so great as to be itself evidence of fraud, which is not in this case. In other cases there must be some other equity arising from the position of the parties or the particular circumstances of the case”.

What emerges from the above discussion is that not only the term of the impugned contract should be harsh and unconscionable but the nature of the transaction and the relationship of the parties must be such that the presumption of domination in such contract is not rebutted. Thus stated even then it will be not exactly applying section 16, except to suggest that the domination of the will of one party is so patent in the unconscionableness of the transactions that undue influence should be presumed. Without proof of actual undue influence such a contract can be set aside, in accordance with rules of equity. This is what was done in the *Rama Patter & Bros case of Madras*181 where the relationship of the parties and the circumstances of the transaction made it clear that the transaction was so unconscionable that the Court had to intervene, whether section 16 applied to the case or not, so the Law Commission’s view182 that unless influence is actually proved an unconscionable bargain cannot by itself be set aside, seems to be wide off the mark.

In cases of unconscionable bargain even in England a theory of constructive fraud was developed which included cases of undue influence strictly so called of which *Huguenin v. Basely*183 was the type and cases of unconscionable bargains of which *Barly of Chesterfield v. Janson*184 was the type. In a Madras case the judges referred to these cases and added:

“But these cases were based on the common principle that where one person is in a position to dominate the will of another either on account of antecedent relationship or because of the circumstances attending a particular transaction so as to prevent that other from giving an

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181 supra Note 13.
183 (1807) 14 Ves 279: R.R. 276.
184 (1750) 2 Ves Sen 155.
intelligent or free consent to the bargain, the person who obtained an undue advantage by using his position should not in justice be allowed to return it. What those circumstances were the court declined to define. To the substantive doctrine there were added certain rules of evidence or presumption which in some cases subsequently crystallized into rigid rules of law as in the cases of alps of reversions and certain other dealings with expectant heirs necessitating the interference of the legislature. The Indian Legislature has included all these matters in the comprehensive definition or explanation under the head of undue influence in section 16 of the Indian Contract Act. The section is originally enacted was found inadequate to meet all cases and has, therefore, been amended and re-enacted in 1899. Clause 3 of Section 16 is in substantive accord with the English doctrine of unconscionable bargains, though in its application the different circumstances of this country will have to be taken into account; for instance as the english courts invented the class ‘expectant heirs’ we have developed the class of pardanashin women. At the same time in as courts of equity in England and following them the court here did not in this class of cases wholly set aside the transaction, but gave relief only on terms, a new section 19-A was added to this rule”.

3.4.3 General Principles: Section 16

Section 16 of Indian Contract Act, 1872 deals with the law relating to undue influence gives the elements of undue influence a dominant position and the use of it to obtain an unfair advantage, the words “unfair advantage” must be taken with the context. They do not limit the jurisdiction to cases where the transaction would be obviously unfair as between persons dealing on an equal footing.

“The principle applies to cases where influence is acquired and abused, where confidence is reposed and betrayed185 or, as Sir Samuel Romilly expressed it in his celebrated argument in Huguenin v. Baseley, which has been made authoritative by repeated judicial approval, 186 “to all the variety of relations in which domination may be exercised by one person over another”. “As no court has ever attempted to define fraud, so no court has ever attempted to define undue

186 (1807) 14 Ves. 285.
Some forms of pressure which the law would regard as improper would be
undue influence. An unconscientiously use of pressure exercised under certain
circumstances and conditions whereby the defendant was victimized by the
plaintiff’s unfair and improper conduct, the nature of benefit gained by the
plaintiff, or the age or capacity or health and surrounding circumstances of the
defendant are to be taken into account. The doctrine of undue influence does
not protect persons who deliberately and voluntarily agree to the terms out of
folly, Imprudence or lack of foresight.

The general purport of the entire section and the principles emerging from them
have been succinctly envisaged by the Privy Council in Raghunath Prasad v.
Surya Prasad thus:

By that section three matters are dealt with. In the first place the relations
between the parties to each other might be such that one is in a position to
dominate the will of another, once that position is substantiated, the second
stage has been reached, viz the issue whether the contract has been induced by
undue Influence upon the determination of this issue, and third point emerges,
which is that of the onus probandi. If the transaction appears to be
unconscionable, the burden of proving that the contract was not induced by
undue influence is to lie on the person who was in a position to dominate the
will of the other. Error is almost sure to arise if the order of these propositions
be changed. The unconscionableness of the bargain is not the first thing to be
considered. The first thing to be considered is the relations of the parties. Were
they such as to put one in a position to dominate the will of the other?

So it would appear that these are 3 elements to bring the doctrine of undue
influence into operation:

1. One party dominates the will or the other due to some special

189 AIR 1934 PC 60: 3 Pat. 279.
A relationship or otherwise.

2. He used such power to obtain an unfair advantage over the other

3. That in fact the unfair advantage was obtained thereby

Clause (1) of Section 16 postulates:

1. Undue influence as between parties to the contract (third parties are not mentioned)

2. The relationship between the parties is such that one of them is in a position to dominate the will of the other

3. And use that position to obtain unfair advantage over the other.

### 3.4.4 Parties to the Contract

The clause (1) in Section 16 adverts to ‘undue influence’ where relations subsisting between the parties are such that there is domination of will and obtaining of unfair advantage by one over the other. The term parties clearly mean parties to the contract. The question, therefore, arises of persons other than parties can exercise undue influence over any of the parties to the contract so as to render the same voidable. The section strictly construed clearly shows that the undue influence must be exercised by a party to the contract and not by a third party.

The case of *Cobett v. Brook*\(^{190}\) is sometimes cited to show that it may be possible that a contract may be avoided on the plea of undue influence exercised by a third party. In such a case it would appear that the other party should be proved to be aware at the time of entering into the contract that such undue influence had in fact been exercised.

In *Rhodes v. Bate*\(^{191}\) the plaintiff was a lady about fifty year’s old living with

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\(^{191}\) (1886) 1 Ch. 252: 13 LT 778.
her brother-in-law Codrington who became greatly indebted to Bate. For this debt the plaintiff along with Codrington signed bonds in favour of Bate and further charged almost the whole of her estate with the payment of the debt. The plaintiff brought an action that the documents and securities were obtained by undue influence exercised on her by Codrington and Bate, both were alleged to stand in confidential relation to her. Lord Justice Turner accepted the contention and set aside the transaction, postulating, as settled principles of law in the following manner:

(a) Where confidential relations exist those standing in such relations cannot entitle themselves to hold benefits unless they can show that the persons who have conferred the benefits had competent and independent advice.

(b) Age and capacity are considerations which may be of importance in cases where no confidential relation exists.

In *Espy v. Lake*\(^{192}\) case where a young lady, the plaintiff, just come of age joined in making with her stepfather a Promissory Note in favor of Lake to whom she owed a sum of money, The plaintiff was living with her mother and step-father from infancy. They received no consideration for the note and so challenged the same, Turner V.C. set aside on the ground that step-fathers stood to the plaintiff in a relation which gave rise to confidence between the parties. The step-father, too, stood in loco-parentis to the plaintiff which was held as sufficient reason. It will be seen that the relationship in this case was not in the nature of a trust nor was it strictly that of guardian and ward. It was a case of influence arising by inference from the situation of parties. No direct evidence of deception or fraud was necessary. It was held that step-father being in confidential position it was incumbent on him affirmatively prove that he did not take advantage of the position of influence which subsisted between the parties. Lake had notice of the equities arising.

\(^{192}\) (1853) 10 Hare 260; 1 WR 59.
from the position of the parties and so judgment was given against them both. As the learned Vice-Chancellor made an oft quoted observation that the creditor the third party though not guilty of moral fraud nor had he knowledge of the principles which guide a court of equity in such cases and yet he was liable to surrender the benefit on account of the relation of confidence he stood in and he had proved that he had taken any advantage of such a situation.

Discussing the above English case Justice Venkatasubba Rea of the Madras High court observed in *Naravandas v. Buchraj*. There is a close resemblance between this (Espey v. Lake) and the present case. If it is shown that the parties stood in such a situation as to give rise to confidence between them and that the third party who derives the benefit was aware of the existence of this relation, if this is shown the third party is not entitled to retain the security unless he shows that the party conferring the benefit was a free agent and had independent and disinterested advice. It is not necessary for the party impeaching the transaction to prove that he was deceived by the person who put himself in loco-parentis towards him, nor is it necessary for him to make out that the third party connived at any actual fraud, The doctrine is the result of the jealousy and solicitude with which courts of equity watch the interest of weaker party where a special confidential or fiduciary relation is established. On the basis of the above discussion it can be concluded that:

1. If there is a relation which gives rise to confidence between the parties and if the person in fiduciary position obtains an advantage, where this alone is established and nothing further, the court gives relief to the party conferring the benefit unless the other party shows that he did not avail himself of the confidence which subsisted between the parties. The burden is; therefore, upon him and .If he does not discharge the burden of the plaintiff succeed.

193 *Naravandas v. Buchraj* AIR 1928 Mad. 6 at p. 11.
194 Ibid.
Where there is a third party involved the position is not dissimilar. If it is shown that he was aware of the existence of such confidential or fiduciary relation, he is under the same disability as the party who occupied the position of confidence, that is to say, the court gives relief to the plaintiff without proof of fraud or imposition or any specific act of undue influence. It is enough that the third party was aware of the existence of the confidential relation and the court do not insist on proof that he was further aware of the actual exercise of undue influence.

These two propositions are well settled and both these principles have been applied in the case discussed below:

In *Narayandas v. Buchraj* the plaintiff impeached a mortgage executed by him to the first defendant for a debt due by his maternal uncle the second defendant in whose loco-parentis he was brought up after the demise of his own father. Purshothamdas the maternal uncle was on the verge of bankruptcy and the creditor brought such pressure on him that he prevailed upon the plaintiff, then only 20 years of age, to mortgage his (plaintiff’s) share of the properties to liquidate the debts. The first defendant’s creditor did not persuade the plaintiff though he was fully aware of the special relationship between his debtor and the plaintiff, The plaintiff besides have been a ward of the second defendant, the later was also a Trustee of the former’s property under a trust deed, The court held that the plaintiff was not a free agent equal to protecting himself, was persuaded to enter into this transaction b’ the second defendant, the first defendant being quite aware of this had in a measure contributed to the undue influence. The judge concluded this on the principle:

“......When a stranger takes the gift tainted with undue influence of the person in fiduciary position, with notice of the circumstances giving rise to the equity, the court will compel him to give up the benefit”.

195 Ibid.
The stranger creditor in the three English cases\textsuperscript{196} claimed immunity on the ground that he took no part in the transaction but left it entirely to the person in fiduciary position. But a mere knowledge of the situation of the parties in law gives rise to a presumption of undue influence and this was affirmed in the \textit{Madras case}.\textsuperscript{197} Justice Venkatasubba Rao\textsuperscript{198} dissented from the view of the Calcutta decision \textit{Raj Coomar Roy v. Alfuzaddin Ahmed} \textsuperscript{199} where the court said:

\begin{quote}
\textit{“But I do not find any authority for holding that a third party who stands in no confidential relation to the grantor, is bound in the first instance to show that no undue influence was used”}.
\end{quote}

In \textit{Rama Patter v. Manikkam}\textsuperscript{200} already adverted to clearly states that the decision in \textit{Maitland v. Irving}\textsuperscript{201} has been adopted in enacting section 89 of the Indian Trusts Act, that the principles followed by the courts of equity in England in dealing with third party who have notice of the fiduciary or otherwise special relationship between the parties will equally apply in India. Such a third party cannot retain any benefit in such circumstances unless he shows that the affected party was sufficiently protected by independent advice.

From the above discussion we may state that on a strict interpretation of the wording of section 16, clause(1), it refers to undue influence as between parties, i.e., the influence should have been unduly exercised by one party to the contract over the other but a stranger who is aware of such influence or who is aware of the special relationship of the parties as would lead to a presumption of such influence, would equally be affected if he had derived any benefit out of the transaction as per the Madras decision.\textsuperscript{202} Even if the influence was unduly exercised by the third party, if the latter was in same special relationship with the affected debtor party and the creditor was aware of the relationship, the

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\textsuperscript{196} Espey v. Lake (1853).
\textsuperscript{197} Supra Note 44.
\textsuperscript{198} Ibid.
\textsuperscript{199} AIR 1935 69 MLJ 104
\textsuperscript{200} 1934 LR 4KB 380.
\textsuperscript{201} AIR 1928 Mad 6.
\textsuperscript{202} Ibid.
\end{flushright}
burden as on the creditor to prove, that there was no undue influence.\textsuperscript{203} Even if the influence was unduly exercised by the third party, if the later was in same special relationship with the affected debtor party and the creditor was aware of the relationship, the burden is on the creditor to prove, that there was no undue influence. This proposition is, however, questioned in the \textit{Calcutta case}.\textsuperscript{204} Shri T.R. Desai\textsuperscript{205} appears to be of the view that the Madras decision in \textit{Narayan’s cases}\textsuperscript{206} is not sound and prefers the Calcutta decision.\textsuperscript{207} It is submitted that the Madras decision in no way contradicts section 16. Section 16 defines undue influence as between parties. Undue influence from third parties not specifically dealt with the section. All that the Madras decision\textsuperscript{208} says is that if third party’s influence is unduly exercised so as to affect a contract, it is voidable. The third party in that case was the uncle of the plaintiff and the creditor of the uncle knew of this relationship and so he allowed the uncle to get his nephew execute the mortgage in liquidation of the uncle’s debt. The creditor need not exercise undue influence but it is enough he knew it was so exercised by he uncle on he nephew, the plaintiff. This is quite just and equitable and the High Court was right in setting aside the mortgage.

\textit{“The case, of course, would be different if any connivance of connection between the person using undue influence and the party benefitting by the contract is established”}.

In fact in the Madras case the court found that the creditor to some extent aided the uncle. Even otherwise the fact he knew of the strength of the uncle-nephew relationship and that the uncle was the real debtor but the nephew just come of age was prevailed upon to execute the deed in discharge of the uncle’s debt is enough to make the creditor’s hand unclean. He must be deemed to have acquiesced in the matter to get a benefit for himself and Mr. Desai’s phrase “connivance or connection between the peon using undue influence and the

\textsuperscript{203} Ibid.
\textsuperscript{204} 8 CLR 419.
\textsuperscript{205} Pollock & Mullah, \textit{The Indian Contract Act} (16\textsuperscript{th} edn.1972 M.N Tripathy Pvt.Ltd. Bombay at p. 90.
\textsuperscript{206} (1927) 53 MLJ 62.
\textsuperscript{207} Supra Note 55 at p .419
\textsuperscript{208} (1927) 53 MLJ 842.
party befitting by the contract” is amply proved by implication if not expressly.

There is clear authority of the Privy Council in *Poosathurai’s case*\(^{209}\) that “in the category of cases of undue influence might be covered cases where the party to a transaction exercised that influence in conspiracy with or through the agency of heirs”. That would in effect mean influence can proceed from a third party who may act in collusion with the benefited party or be his agent. In *Tungabai Bhrator v. Yeshwant Dinkar*\(^{210}\) Privy Council (Lord Croddard) said clearly:

“When a third party who benefits by a transaction has notice of the facts which raise the presumption of undue influence, he is in no better position than the person who exercised the influence.”

In that case the wife was acting under the influence of the husband who was heavily indebted and who manages her properties. The wife executed a mortgage at his bidding to liquidate his debt, the creditor having full knowledge of the position of the parties. The court further was of the opinion no proof of actual fraud by the husband was necessary. It was enough to show that the wife was acting under his influence and not as a free agent.

In *Lingo Bhimrao Naik v. Dattatraya Shripad*\(^{211}\) a widow made certain gifts before adopting the plaintiff to his natural father to be ratified by adoptee on attaining majority. After adoption confirmation deeds were executed by the plaintiff, under threat from the widow that the adoption will be set aside, and no funds given to him for education. The deeds were in favour of his natural father in his absence, who, however, had knowledge and had given preconsent for a deed to his own benefit. The High Court set aside the confirmation deeds as vitiated by undue influence proceeding from a third party to the deed, the widow, i.e., adoptive mother. An early Madras case *Lakshmi Dass v. Roop*

\(^{209}\) AIR 1920 PC 65.
\(^{210}\) AIR 1945 PC 8.
\(^{211}\) AIR 1938 Bom.97,
Laul²¹² states the position tensely that if an alienation by son to a parent himself or to a third party at the instance of the parent is made to the detriment of the son’s interest, courts will render Justice to the son in equity, even if the limitation barred the son, a remedy to an action to set aside the deed. Be can raise the pin of undue influence successfully by way of defence. For in the instant case beyond signing the deed the defendant (son) did not do anything to show that he considered the deed effectual. He was hence not barred by lapse of time from setting up the invalidity of the deed.

So from the catena of authorities above discussed it would appear that undue influence by a third petty is a good defence provided the other party had knowledge of the special relationship of the third party with the opposite party. The stray decision of the Calcutta²¹³ or Lahore High court²¹⁴ to the contrary do not appear to be sound in law.

The above statement of the law is when third parties are the person to exercise their influence unduly and the party to the contract to benefits cut of it is aware of such influence. The implication is that the party then gets into the shoes of the third party and has to suffer all the disabilities arising from the undue influence.

In so far as the application of the section 16 itself, strictly speaking, one of the parties should have dominated over the will of the other.²¹⁵ Further only a party to the contract can raise the plea of undue influence and not a third party.

3.4.5 Special Relationship and Domination of Will

The 1st clause of Section 16 further postulates that the relations subsisting between the parties should be such that one of them is in a position to dominate the will of the other.

²¹² ILR 30 Mad.169.
²¹³ supra note 50 at p. 104.
²¹⁴ Sardari Mal v. Abdul Samad, AIR 1925 Lah. 430.
²¹⁵ Raghunath Prasad v. Sarju Prasad, 511 AP : AIR (1924) PC 60.
In *Raghunath Prasad V. Sarju Prasad*\(^{216}\) the judicial committee laid down the first essential that the relationship of the parties should lead one of them to dominate over the will of the other. Then follows the enquiry as to whether there was undue influence. Next is the question of onus which would naturally fall on the dominating party to prove that there was no such undue influence, that the other party has independent advice and gave his free consent to the contract unconscionableness of the contract apart, the first query should be about the relationship of the parties and the domination of the will of one party over the other. \(^{217}\) Domination of will has first to be found before any finding even as to unfair advantage over the promisor is given.\(^{218}\) If there is proof of over-powering influence and the transaction itself is immoderate and irrational, it is a clear case of undue influence.\(^{219}\)

In *Possathurai v. Kannappa Chettier*\(^{220}\) the Privy Council laid down that it must be established that the person in a position of domination has used that position to obtain an unfair advantage for him and so to cause injury to the person relying upon his authority or aid. And where the relation or influence as set forth, has been established and the second thing is also made clear viz, that the bargain is with the ‘influencer’ and in itself unconscionable than the person in a position to use bidominating power has the burden upon him, and it is a heavy burden of establishing affirmatively that no domination was practiced so as to bring about the transaction but the granor of the deed was scrupulously advised in the independence of a free agent.

### 3.4.6 Obtains an Unfair Advantage over the Other

It is incumbent that as a result of the undue influence, the dominating party should have obtained an unfair advantage over the other. The unfair advantage

\(^{216}\) Ibid.
\(^{217}\) Ibid.
\(^{218}\) *Tulsi Ram v. Chunnilal*, AIR 1938, Nag. 391.
\(^{219}\) *Ahmed Ibrahim v. Mayyappa*, AIR 1940, Mad. 285.
\(^{220}\) Supra Note 60 at pp 65
may consist in obtaining an exorbitant rate of interest\textsuperscript{221} or in getting a purchase of property at a very low value.\textsuperscript{222} In the case of a donor and donee or settler and settle, their relationship was such that a presumption of dominant influence on the part of donee or settlee could be made, the gift or settlement could be set aside unless there was clear proof of free and independent consent.\textsuperscript{223} But a fair end proper bargain intelligently made by a Hindu lady freely or voluntarily to benefit her husband can be sustained in law.\textsuperscript{224} The test of good faith should be the fairness of the bargain. Hard bargaining evidenced by a grossly inadequate conversation is sufficient to make whole thing suspect in the eye of law and condemn the transaction.\textsuperscript{225}

3.4.7 Clause (2)-Types Domination of Will

The clause (2) of section 16 affirms the principle stated in clause (l) as to undue influence and unfair advantage and posits what is domination of will by one over another. The domination may be

(a) (i) By a person who holds real or apparent authority over the other,

(ii) Or where he is in fiduciary relation to the other;

(b) Or where he makes a contract with a person of weak mental capacity (temporary or permanent). This may be due to age, illness or mental or bodily distress.

The law does not require that there should be direct evidence of actual exercise of undue influence. Having regard to the relationship of the parties, the course of dealing, the position of advantage occupied by the person who is alleged to have exercised undue influence, the undue benefit derived by him in consequence of that position and from the consideration of the further circumstances adverted to in section 16, the court can draw a presumption in

\textsuperscript{221} Dhanipal Das v. Maneshwar Bakhs Singh, 1906 33 IA 118.
\textsuperscript{222} 1901 25 Bom. 126.
\textsuperscript{223} Annum Kattiammal v. Vaiyapuriodayar, 1961 2 MLJ 36.
\textsuperscript{224} Sawarma Mitra v. Durga Prasad, ILR 1955 2 Cal. 214.
\textsuperscript{225} Sonia Prashini v. Shaik Moula Bakhs, AIR 1935 Cal. 17.
favour of the exercise of undue influence.\textsuperscript{226}

According to Section 16(2)(a) a person is deemed to dominate the will of another where he stands in a fiduciary relation to the other. It has to be stated that a person who is not in loco-parentis is to another may still stand in a fiduciary relation to him. The term ‘fiduciary relation’ is a broad one and not susceptible of precise definition, In cases in which a person acquires an influence and then abuses it, or confidence is reposed which is subsequently is betrayed, a fiduciary relationship is said to exist regardless of the origin of confidence and the source of influence.\textsuperscript{227}

Thus we can say that a party to a transaction, though consenting to it, may not give a free consent because he is exposed to such influence from the other party as to deprive him of the free use of his judgment. In such a case, the transaction will be set aside. If property has passed, equity will order restitution, and, if necessary, follow the property into the hands of third parties.

‘Influence’ has been defined as the ascendancy acquired by one person over another; it may be used wisely, judiciously and helpfully. \textsuperscript{228} ‘Undue influence’ is improper use by the ascendant person of such ascendancy for the benefit of himself or someone else, so that the acts of the person influenced are not, in the fullest sense of the word, his free, voluntary acts. It is any influence brought to bear upon a person entering into an agreement, which having regard to the age and capacity of the party, the nature of the transaction and all the circumstances of the case appears to have been such as to preclude the exercise of free and deliberate judgment.\textsuperscript{229} It means the domination of a weak mind by a strong mind to an extent which causes the behavior of the weaker person to assume an unnatural character. \textsuperscript{230} The person influenced- is constrained to do against his will that which but for the influence he would have refused to do if

\textsuperscript{226} Karnal Distillery Co. Ltd. V. Ladli Prasad, AIR 1958 Punj. 190.
\textsuperscript{227} Ibid.
\textsuperscript{228} Poosathural v. Kannappa Chettier, 1919 47 IA I, AIR (1920) PC 65 at P. 66.
\textsuperscript{229} Syed Noor v. Qutubuddin, AIR (1956) AP 114 at p. 117.
\textsuperscript{230} Rambali Prasad v. Kishori kuer, AIR 1937 Pat 362 at P. 363.
left to exercise his own judgment.  

It is said to be a subtle species of fraud, whereby mastery is obtained over the mind of the victim, by insidious approaches and seductive artifices. Sometimes, the result is brought about by fear, coercion, importunity or other domination, calculated to prevent expression of the victim’s true mind. It is a constraint undermining free agency overcoming the powers of resistance, bringing about a submission to an overmastering and unfair persuasion to the detriment of another.

E. INEQUALITY AND UNCONSCIONABILITY

3.5.1 Introduction

If a contract or clause in a contract is found unreasonable or unfair or irrational, one must look to the relative bargaining power of the contracting parties. In contracts there would be no occasion for a weaker party to bargain or to assume to have equal bargaining power. His option would be either to accept the unreasonable or unfair terms or forego the service for ever. An unfair and untenable or irrational clause in a contract is unjust and amenable to judicial review. In U.S.A., the standard forms of contracts are called ‘Contracts of Adhesion’. Whether the presence of the correlative social role of the drafting party and adherent is available in equal terms in the test.

3.5.2 Unconscionable Bargains

Law relating to hard and unconscionable bargains has been codified in the form of Contract Act and the Courts cannot go outside the statutory provisions and follow some rules or supposed rules that have been applied in certain cases by the Courts of Equity in Englan. Mere pecuniary inadequacy of consideration

will not generally make the terms of a contract seem too familiar for enforcement unless the degree of inadequacy is extreme.\textsuperscript{235}

Professor Ellinghaus “In Defence of Unconscionability”\textsuperscript{236} agrees that, it is very difficult to lay down any guideline to determine whether a particular agreement suffers from unconscionability but finds in this very vagueness a frank and purposeful invitation to the Courts to fashion a new body of law, in time, honoured common law fashion, by “reasoned and creative exegesis and implementation.”

Where the transaction is undoubtedly improvident in the absence of any evidence to show that the money-lender had unduly taken advantage of his position, it is difficult for a Court of justice to give relief on grounds of simple hardship.\textsuperscript{237}

When a deed of perpetual lease was executed in consideration of large sum of money alleged to have been advanced by the agent and it was highly unlikely that the agent, who was a man of ordinary means and there was no expressly reserved right of re-entry in the lessor, it was held that the contract was unconscionable.\textsuperscript{238}

A Court should look at the transaction at its inception and see if at that time it was so hard and unconscionable that a Court of justice would not enforce it.\textsuperscript{239} The mere fact that the principal sum claimed in suit exceeds enormously, the amount originally advanced would be no ground for holding the transaction unconscionable.\textsuperscript{240}

In order to establish undue influence, it must appear that there was something unconscionable either in the original dealing or in the subsequent stages of the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{235} Vinayakappa Suryabhanappa Dahenkar v. Dulichand Hariram Murarka, AIR 1986 Bom 193.
\item \textsuperscript{236} (1969) 78 Yale LJ 757.
\item \textsuperscript{237} Aziz Kkan v. Duni Chand, AIR 1918 PC 48:23 CWN 130.
\item \textsuperscript{238} Sant Bax Singh v. Ali Raza Khan, AIR 1946 Oudh 129.
\item \textsuperscript{239} Risal Singh v. Manohar Lal, AIR 1927 Lah 748.
\item \textsuperscript{240} Balla Mal v. Ahad Shah, AIR 1918 PC 249: 124 PR 1918.
\end{itemize}
\end{footnotesize}
The mere fact that the rates of interest are somewhat high affords no evidence that there was any undue influence or that there was anything unfair or unconscionable about the transaction.242

Where the donor was an old man of 100 years of age and was very intimate with the donee and had lent money, that the old man not only disinherited his son and his wife of all the property which he was possessed, it was held that the donor’s son had merely to prove that the donee was in a position to dominate the will of the aged donor and that the gift was unconscionable.243

When the property valuing over rupees two lakhs was gifted by the donor, an illiterate old lady, to her advocate who was in no way related to her and both of them were living in separate villages, the transaction could by no means be said to be conscionable.244

In law of contract by G.H. Treitel,245 it is stated:

“It is sometimes said that one party should be entitled to relive if the other has taken unfair advantage of the fact that there is a marked inequality of bargaining power between them. The first group of such statements is concerned with the special problem of the Validity of covenants in restraint of trade. This depends on whether the covenant is ‘reasonable’, and the adequacy of consideration is taken into consideration in determining the issue of reasonableness. The fairness of the bargain (which to some extent depends on the relative bargaining positions of the parties) is therefore obviously relevant to the validity of the restraint. The fact that it is for this purpose taken into account scarcely supports a general principle of relief against harsh bargains on the ground of inequality of bargaining power.”

3.5.3 Concept of Unconscionability

The doctrine of unconscionability differs from the doctrine of undue influence,

241 Hanuman Bux v. Lal Nilmoni Nath Sahi Deo, AIR 1919 Pat 566.
244 Takri Devi v. Rama Dogra, AIR 1984 HP 11: 1983 Sim LC 255.
is that the former depends on the defendant’s unconscionable conduct. The former is seen as ‘defendant-sided’ and concerned with the defendant’s exploitation of the plaintiff’s vulnerability. The latter is seen as ‘plaintiff-sided’, being concerned with the weakness of the plaintiff’s consent owing to an excessive dependence upon the defendant. In *Morrison v. Coast Finance Ltd.*,\(^{246}\) it was stated:

“The equitable principles relating to undue influence and relief against unconscionable bargains are closely related, but the doctrines are separate and distinct. A plea of undue influence attacks the sufficiency of consent; a plea that a bargain it is unconscionable invokes relief against an unfair advantage gained by the unconscientious use of power by a stronger party against a weaker.”

Again in *Commercial Bank of Australia Ltd. v. Amadio*, Deane J stated:\(^{247}\)

“Undue influence, like common law duress, looks to the quality of the consent or assent of the weaker party. Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so.”

In the same case, Mason J put the difference as follows:

“Although unconscionable conduct in this narrow sense bears some resemblance to the doctrine of undue influence, there is a difference between the two. In the latter the will of the innocent party is not independent and voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.”\(^{248}\)

It has been suggested that the doctrine of undue influence and unconscionability are sufficiently similar in their objectives; that the two share the main features of relational inequality, transactional imbalance and

\(^{246}\) (1965) 55 DLR (3d) 710 at p 713.

\(^{247}\) (1983) 151 CLR 447 at p 474.

\(^{248}\) Id at p 461.
unconscionable conduct of the defendant, and therefore can profitably be merged into one.  

### 3.5.3.1 Position in United Kingdom

Two English cases provide support for recognition of a general principle entitling a court to intervene on the grounds of unconscionable bargains, where arguments to set aside transactions on the grounds of their being unconscionable bargains was not accepted, but both judgments support a recognition for a general principle. The elements of unconscionability were formulated in *Alec Labb (Garages) Ltd. v. Total Oil GB Ltd.* as:

1. One party must be at a serious disadvantage vis-à-vis the other;
2. This weakness must be exploited by the other party in a morally culpable manner; and
3. The transaction must be; not merely hard or improvident, but oppressive and overreaching.

The judgment hints at requiring subjective knowledge on the part of the stronger party both of the weakness of the other party, and of the fact that a bargain was obtained. The general principle has not been accepted in the English law, because the doctrine of undue influence has been considered as a preferable technique, and it was desirable to bring about this change by legislation.

The law in the UK about unconscionable bargains has been stated thus:

> Where by reason of the unfair manner in which it was brought into existence (procedural unfairness) as where it was induced by undue influence, or where it came into being through an

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251 (1983) 1 WLR 87 per Millett QC at pp 94-95.
unconscientious use of the power arising out of the circumstances and conditions of the contracting parties: in such cases equity may give a remedy; but where by reason of the fact that the terms of the contract are more unfavourable to one party than to the other (contractual imbalance); contractual imbalance or inadequacy of consideration is not, however, in itself a ground for relief in equity, but it may be an element in establishing such fraud as will avoid the transaction or the transaction may be so unconscionable as to afford in itself evidence of fraud. A bargain cannot be unfair and unconscionable, however, unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say in a way which affects his conscience, as by taking advantage of the weakness or necessity of the other.

3.5.3.2 Position in India

The Law Commission of India in its 13th Report considered whether relief ought to be given against hard and unconscionable bargain, even though where no question of undue influence was involved. The Law Commission preferred the view in U Kesavulu Naidu v. Arithulai Ammal that unless undue influence was proved, no relief should be granted on the ground of unconscionableness of a contract.

In Central Inland Water Transport Corpn Ltd. v. Brojo Nath Ganguly, the Supreme Court considered the question whether relief could be granted for an unconscionable bargain, and under which head should it fall. A question arose whether a court would have the power to strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract between parties, who were not equal in bargaining power. In this case, undue influence was neither alleged nor pleaded. The court recognized that all such contracts may not fall within the definition of undue influence. After discussing

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254 Earl of Aylesford v. Morris (1873) 8 Ch App 484 at pp 490-91.
255 Borell v. Dann (1843) 2 Hare 440.
256 Earl of Aylesford v. Morris (1873) 8 Ch App 484 at p 490.
257 Heathcote v. Paignon (1787) 2 Bro CC 167.
258 Multiservice Bookbinding Ltd. v. Marden (1979) Ch 84 at p 110.
259 The Law Commission of India, 13th Report, 1958, para 41.
260 (1912) 36 Mad 533, IC 769.
261 (1986) 2 SCR 278, AIR 1986 SC 1571
the development of law in a number of countries, it held that the courts adjudged such contracts void as contrary to public policy under Section 23 of this Act. The judgment gives stress on the procedural test of unconscionability, when it refers to the requirements of ‘great disparity in the economic strength of parties’, whether inequality arises as a result of circumstances or is the creation of the parties; that weaker party has no meaningful choice but to give assent to the contract, or to sign it. But it also suggests that the substantive test must be satisfied; that contracts which contain ‘terms which are so unfair and unreasonable that they shock the conscience of the court’ are opposed to public policy.

3.5.4 Report of the Law Commission

In its Report on the Unfair Terms of Contract, the Law Commission of India was concerned with standard form contracts imposing unfair and unreasonable terms upon unwilling consumers or persons who had no bargaining power. It considered the inadequacy of the present statute law to give justice to the weaker party. Although, the discussion in the report focuses on standard form contracts, its recommendation is wide, and does not restrict itself to any particular type of contract. It recommended adding a new chapter and section into this Act. Chapter IVA, Section 67A:

(1) Where the court, on the terms of the contract or on the evidence adduced by the parties, comes to the conclusion that the contract or any part of it is unconscionable, it may refuse to enforce the contract or the part that it holds to be unconscionable.

(2) Without prejudice to the generality of the provisions of this section, a contract or part of it is deemed to be unconscionable if it exempts any party thereto from- (a) the liability for wilful breach of the contract, or

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262 Id at p 1611.
263 Ibid at p 1611.
264 Id at p 1613.
(b) the consequences of negligence.

3.5.5 Statutory Intervention in Unfair or Unconscionable Transactions

The Usurious Loans Act, 1918 empowers the courts to reopen transactions of money or grain loans to revise the transaction between the parties, and if necessary, to reduce the amount payable to such sum as the court, having regard to the risk and all the circumstances of the case, may decide to be reasonable.

It gives the power to the court to go behind the particular transaction and examine antecedent agreements and attendant circumstances. The enactment was necessary because even after the amendment to section 16 of the Indian Contract Act, where undue influence was not established, the court could not grant relief, however, exorbitant the demand, and however, unconscionable the bargain. Under the Act, the court can reopen the transaction of the loan, reopen any account taken between the parties, or set aside or alter any security given for a loan if:

1. Interest is excessive; and
2. The transaction was substantially unfair.

3.5.6 The Doctrine of Inequality of Bargaining Power

There are cases under the English law, where equity intervened not because the terms were harsh or oppressive, but because it refused one party to take advantage of the other’s weakness or need. The pressure in these cases was not of undue influence or personal pressure, but arose because the other party took advantage of its economic power and necessity of the vendor or the borrower which has been termed as pressure resulting from an inequality of bargaining position.\footnote{Lloyds Bank Ltd v Bundy (1975) QB 326, (1974) 3 All ER 757, (1974) 3 WLR.} This doctrine has been applied as an independent principle.
In *Lloyds Bank Ltd v Bundy*, a further guarantee and a charge were given by the father to a bank on the advice of the bank manager in regard to the debt of his son. The father was held to have complete faith and did not get out of his son. The father was held to have complete faith and did not get outside advice. The court of appeal held that a special relationship of confidence existed between the bank and the father, and the last guarantee and charge were liable to set aside for undue influence. Lord Denning MR considered them voidable on the larger ground of inequality of bargaining powers. He stated:

*There are cases in our books in which the courts will set aside a contract, or a transfer of property, where the parties have not met on equal terms—when one is so strong in the bargaining power and the other so weak that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall. And later, by virtue of it the concept of inequality of bargaining power, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influence or pressure brought to bear on him by or for the benefit of the other.*

*He also stated that no bargain should be upset which was ‘the result of ordinary interplay of economic forces’, but the court should interfere only ‘where there has been inequality of bargaining power such as to merit the intervention of court’.*

Inequality of bargaining powers has not been accepted as a general principle in the English law, and its need has been doubted in later cases, the principle has not been accepted as a general doctrine for setting aside a contract, unless it fell within one of the recognised categories of ‘victimisation’ such as duress, undue influence and unconscionable advantage.

The principle, established by a series of English decisions, that ‘where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having not independent advice, a court of equity will set aside a
transaction’, by raising the presumption of undue influence. This section does not recognise a general principle of inequality of bargaining powers of striking down contracts.

3.5.7 Inequality of Bargaining Power and Public Policy

In *Central Inland Water Transport Corpn Ltd. v. Brojo Nath Ganguly*,268 a company entered into a scheme of arrangement with the corporation, a government company, with the approval of the High Court. Under the scheme, an officer of the company could accept the job of the corporation or in the alternative, leave the job and receive a meagre amount by way of compensation. The rules of the corporation provided that the services of officers could be terminated by giving three months notice. The petitioner’s service were terminated in this manner. The petitioner challenged this rule as arbitrary under art. 14 of the constitution, and alleged that a term in a contract of the employment entered into by a private employer, which was unfair, unreasonable and unconscionable was bad in law. This rule formed part of contract of employment and its validity fell to be tested by the principles of the law of contracts. The petitioners did not make out a case of coercion, fraud or misrepresentation. After discussing the judgements of English courts, and the law in the UK, USA and Germany, the Supreme Court observed:

“...the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power.”

Observing that the different situations in this would occur could not be visualized, it stated:

“......the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties,...where the inequality is the result of circumstances whether of the creation of the parties or not. It will apply to situations in

268 Supra note 29.
which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without the. It will also apply where the man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract. However unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where both parties are businessman on the contract is a commercial transaction.”

There is another class of cases analogous to those undue influence, but with the element of personal influence wanting, in which equity also throws the burden of justifying the righteous of a bargain on the party who claims the benefit of it.

According to the language of Lord Hardwick’s, raise, ‘from the circumstances or conditions of the parties contracting- weakness on one side, usury on the other, or extortion, or advantage taken of that weakness’ - a presumption of fraud. Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the positions of the parties is such as prima facie to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just and reasonable.

F. NECESSITOUS INTERVENTION

3.6.1 Introduction

There is no general principle of English law that those who render necessary services, or confer other necessary benefits in an emergency or other necessitous circumstance to the advantage of another, have a right to reimbursement for their efforts. However, there are pockets of case law from disparate contexts - maritime salvage, burial of the dead, care of the mentally incompetent and agency of necessity - where something akin to restitution has been awarded. Scholars have sought to generalise these single instances, but
the current law forms an uneven patchwork. Often-cited judicial dicta express
the robust individualism of the common law. Most famous, Bowen LJ stated in
Falcke v Scottish Imperial Insurance Co. 269

The general principle is, beyond all questions, that work and
labour done or money expended by one man to preserve or
benefit the property of other do not according to English law
create an lien upon the property saved or benefited, nor, even
if standing alone, create any obligation to repay the
expenditure. Liabilities are not to be forced upon people
behind their backs any more than you can confer a benefit
upon a man against his will.

In Falcke the owner of the equity of redemption in a life insurance policy paid a
premium in order to ensure the policy did not lapse. His claim for a lien against
the mortgagee of the policy failed. There was no evidence of any request or free
acceptance of his intervention. Further, it could be observed there was no
necessity, and that he acted out of self-interest. Lord Diplock in China Pacific
SA v Food Corporation of India, 270 it is, of course, true that in English law a
mere stranger cannot compel an owner of goods to pay for a benefit bestowed
upon him against his will.

There are twin concerns. First, the characteristic difficulties of establishing
enrichment where the intervention takes the form of transferring property or
rendering services. Recourse to an objective measure of benefit will be possible
only where the conditions for free acceptance or incontrovertible benefit can be
satisfied, though the later test would appear more appropriate in such
circumstances. It is interesting to speculate whether such an argument would
now succeed on the facts of the Flack case. Secondly, prior to the development
of the modern law of restitution there was no explicit recognition of an unjust
factor or ground for restitution based upon necessitous intervention, outside of
the maritime context. The thrust of modern scholarship promotes such
development. For the future, a party wishing to argue for wider relief on the

269 (1886) 34 Ch D 234, at p 248.
grounds of necessity may find comparative material of more assistance than domestic developments to date.

3.6.2 Maritime Salvage

The details of the law of maritime salvage are beyond the scope of this book. Its concerns are rewarding necessitous interventions at sea where they preserve life and property. It has been rationalised as being concerned with the reversal of unjust enrichment:²⁷¹ however, the calculation of salvage awards in practice reflects more diverse policies. For a useful survey from a restitution perspective.²⁷²

The courts have had the opportunity of extending the principles of salvage, but to date have confined it within its original context. In Nicholson v Chapman,²⁷³ a quantity of timber was secured in a dock by the Thames, but broke loose from its ropes and was carried by the tide to Putney where it was left at low water upon a towpath. Chapman carried the timber to a nearby place of safety beyond the reach of the tide. He then refused to deliver the timber to Nicholson, its owner, unless he was remunerated for his efforts. It was held that Chapman had no lien and was guilty of wrongful interference with Nicholson’s goods. Eyre CJ stated that the question was whether this could be equated with salvage. He concluded:

Goods earned by sea are necessarily and unavoidably exposed to the perils which storms, tempest and accidents (far beyond the reach of human foresight to prevent) are hourly creating, and against which, it too often happens that the greatest diligence and the most strenuous exertions of the mariner cannot protect them. When goods are thus in imminent danger of being lost, it is most frequently to the hazard of the lives of those who save them, that they are saved. Principles of public policy dictate to civilised and commercial countries, not only the propriety, and even the absolute necessity of establishing a

²⁷³ (1793) 2 H BI 254, 126 ER 536.
The Court of Common Pleas held that property going astray on a navigable river far from the sea did not fall within the scope of this policy. In dicta the court suggested that it might uphold a claim for recompense by the finder and preserver of another’s property if it was brought as a personal claim. However, the claim to a lien (a proprietary remedy), which is available in true maritime salvage, was not available in land-based cases.\textsuperscript{274} The court further adumbrated two public policy reasons why a lien should be denied the land-based finder and preserver of property. First, concern about the ‘wilful attempts of ill-designing people to turn their floats and vessels adrift, in order that they might be paid for finding them’. That is, the existence of a proprietary remedy might endanger as much as preserve property in the long run. Secondly, if a lien was available there was a danger that the owner of property would always pay too much in order to secure its release.

The boundaries of maritime salvage were preserved by the House of Lords in,\textsuperscript{275} where classic salvage services were performed again on the Thames near Reading Bridge for the eponymous vessel. Lord Brandon held that the salvage jurisdiction did not extend to non-tidal inland waters. Further, he rejected the suggested extension by way of analogy and for reasons of public policy put forward by Sheen J and Sir John Donaldson MR in the lower courts.\textsuperscript{276} In \textit{Falcke v Scottish imperial Insurance Co.},\textsuperscript{277} Bowen U observed of the doctrine of maritime salvage: ‘No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea.’

3.6.3 Agency of Necessity

The principles of agency of necessity originated in the law merchant in two particular situations. First, the power of the master of a vessel in an emergency

\textsuperscript{274} \textit{Binstead v Buck} (1777) 2 W Bl 1117, 96 ER 660.
\textsuperscript{275} \textit{The Goring} (1988) AC 831.
\textsuperscript{276} (1987) QB 687 at pp 693 and 706-707.
\textsuperscript{277} (1886) 34 Ch D 234.
to dispose of the cargo and perform other necessary actions. Secondly, the right of reimbursement of the acceptor of a bill of exchange for the honour of the drawer. There is respectable authority that the principle is confined to such exceptional cases.\textsuperscript{278} In contrast, in cases where there is a pre-existing relationship between the parties, commonly bailment, there has been some judicial support for an expansion of doctrine. In \textit{Prager v Blatspiel, Stamp and Heacock Ltd},\textsuperscript{279} McCardie J stated that agency of necessity would arise if three conditions were satisfied;

(a) The agent must be unable to communicate with the principal in order to obtain instructions as to what to do to safeguard the latter’s interests;

(b) The action taken must be commercially necessary;

(c) The agent must act bonafide and in the best interests of the principal.

It is controversial whether there is anything particularly agency-orientated about many of the authorities where agency of necessity is adverted to. It is necessary to distinguish two distinct situations. In \textit{China Pacific SA v Food Corporation of India},\textsuperscript{280} observed:

\begin{quote}
\textit{“Whether one person is entitled to act as agent of necessity for another person is relevant to the question whether circumstances exist which in law have the effect of conferring on him authority to create contractual rights and obligations between that other person and a third party that are directly enforceable by each against the other. It would, I think, be an aid to clarity of legal thinking if the use of the expression ‘agent of necessity’ were confined to contexts in which this was the question to be determined and not extended, as it often is, to cases where the only relevant question is whether a person who without obtaining instructions from the owner of goods incurs expense in taking steps that are reasonably necessary for their preservation is in law entitled to recover from the owner of the goods the reasonable expenses incurred by him in taking those steps.”}
\end{quote}

\textsuperscript{278} \textit{Hawtayne v Bourne} (1841) 7 M & W 595, at p 599, 151 ER 905
\textsuperscript{279} (1924) 1 KB 566.
\textsuperscript{280} The Winson (1982) AC 939.
Only the former, triangular configuration raises agency issues. The latter, linear configuration raises no issues of legal representation, but only of a direct right to restitution. The facts of The Winson involved a linear claim. Salvors off-loaded wheat from a stranded vessel and arranged and paid for its storage pending collection by the cargo-owners. They were held entitled to reimbursement. Lord Diplock stated that, as regards two-party cases, impossibility of communication with the owner was not a condition precedent to the claim. The owner’s failure to give instructions when apprised of the situation sufficed. Note that the triangular situation would have arisen with a variation of the facts if the warehouses in which the cargo was stored had sued the owner directly on a contract purportedly made upon the owner’s behalf by the salvor. The determination of this question was expressly left open. In *obiter dicta in In re F (Menial Patient: Sterilisation)*, Lord Goff of Chieveley stated that the intervener must act prudently, and must not be acting officiously.

Lastly, it is worth citing Lord Diplock’s observation in The Winson that ‘English law is economical in recognising situations that give rise to agency of necessity’.

### 3.6.4 Principle of Necessitous Intervention

The origin of the principle of necessitous intervention rests in the idea of agency of necessity, where an agent exceeds his authority by acting on behalf of the principal in an emergency situation. As a result of the conditions of the necessity, especially the impracticality of the agent’s contact with the principal, the courts were taking the role of the agent as if he had the authority to do what was logically necessary to safeguard the principal's property. If an agency of necessity was found, the agent could be compensated for the expenses resulting from rescuing or saving the principal’s property.

Indeed, the idea of agency of necessity was primarily applicable for only those cases in respect to carriage of goods by sea, as the captain or master took action

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281 (1990) 2 AC 1.
to save a ship or cargo in critical conditions. Then, the doctrine was extended to cover conditions and cases that are related to the carriage of goods by land.

3.6.5 Requirements for Validity of Necessity

1. Communication with the Principal must have been impracticable or impossible.
2. The action must have been for the benefit of the Principal.
3. It must have been for the benefit of the Principal
4. Competency of the person the agent is acting on behalf of must not be in doubt.
5. Authority cannot be upheld where an earlier express contrary instruction of Principal was received.

3.6.6 A Critique of the Doctrine of Necessity

The dichotomous dilemma of courts to approach this doctrine from a purely legal perspective or a philosophical one has been a serious subject of debate. Bowen L.J. explained in *Falcke v. Scottish Imperial Insurance* 282 “The general principle is, beyond all question, that work and labor done or money expended by one man to preserve or benefit the property of another do not, according to English law, create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will” 283

The requirement of the doctrine to extreme situations of the inability of the agent to communicate with the principal is also under serious challenge by the 21st century’s modern technology, as Bowstead observed; Markesin is and Monday similarly commented, “with today’s improved communications, it may be difficult for the agent to establish that communication was practically

282 (1886) 34 Ch D 234 at p 248.
impossible”. Professor Friedman further suggests, “it must be impossible for the master to be able to communicate with the owners of the ship or cargo and ask for instructions (which seems severely to limit the operation of this form of agency in the light of modern communications although it may be relevant where there are numerous cargo owners).”

With global improvement in financial services “provision by several private and public institutional bodies, not to mention the ever increasing competitive banking environment, the assertion of disposing goods to raise money for a justification of necessitous intervention will surely be put to rest. This is because the same ease of communication achieved in today’s modern world is reflected in the speed at which money can now be freely transferred from one end of the globe to another. Vollans observed, “if communications have all but eliminated the impossibility of obtaining instructions, those communication systems have also facilitated global money transfer almost to the extinction of agency of necessity”.

It is, therefore, not surprising that the agency of necessity is seen as a rare exception to the rule developed for, policy ‘reasons, which might eventually go the way of other similar exceptions, as seen in, salvage and acceptance of a bill’.

### 3.6.7 Bailment

The linear restitutionary claim traditionally discussed in terms of agency of necessity most commonly involves a pre-existing bailment. Bailment involves the transfer of possession of tangible personal property. In *Prager v. Blatspiel, Stamp and Heacock Ltd*, London fur merchants acted on behalf of a Bucharest furrier in buying and dressing skins. World War I intervened. After Romania was invaded by Germany, the London agents sold skins belonging to the Bucharest furrier on their own account. A plea of agency of necessity was

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284 Ibid.
286 (1924) 1 KB 566.
rejected as a defence to a claim for wrongful interference with goods when the
war was over. There was no factual necessity: dressed furs were not perishable
goods and the sellers, who had sold the skins after a great increase in value, had
not acted bonafide.

The clearest authority granting restitution in a case of pre-existing bailment is
*Great Northern Railway Co. v Swaffield*.\(^{287}\) The railway company carried a
horse on behalf of the defendant to a station, but the horse was not collected
from the station. The company accordingly arranged for this horse to be looked
after by a stable. The defendant refused to pay for the charges incurred, and
eventually the plaintiffs met the sum themselves, delivered the horse, and made
a personal claim for the stabling charges. The Court of Exchequer held that they
were entitled to reimbursement. The court stressed that the railway company as
a carrier had a duty to take reasonable care of the horse such as a man who
would take reasonable care of his goods. By analogy with maritime
authority,\(^ {288}\) it was held that there was a correlative right to reimbursement for
necessary expenses incurred. This is consistent with the dicta in *Nicholson v
Chapman*,\(^ {289}\) favouring a personal claim, but rejecting a proprietary claim in
the form of a lien. Further, the House of Lords in *China Pacific SA v Food
Corporation of India*,\(^ {290}\) The Winson stressed the relationship between the
salvors and the cargo-owners gave rise to a direct relationship of bailment.
Salvage services required the off-loading of the cargo and its conveyance to a
place of safety. Thereafter, according to Lord Diplock:

> “The bailment which up to the conclusion of salvage services
had been a bailment for valuable consideration became a
gratuitous bailment; and so long as that relationship of bailor
and bailee continued to subsist the salvors, under the ordinary
principles of the law of bailment too well known and too
well-established to call for any citation of authority, owed a
duty of care to the cargo owner to take such measures to
preserve the salved wheat from deterioration by exposure to

\(^{287}\) (1874) LR 9 Ex 132.
\(^{288}\) *Notara v Henderson* (1872) LR 7 QB 225.
\(^{289}\) (1793) 2 H BI 254, 126 ER 536.
\(^{290}\) (1982) AC 936.
the elements as a man of ordinary prudence would take for the preservation of his own property. For any breach of such duty the bailee is liable to his bailor in damages for any diminution of the value of the goods consequent upon his failure to take such measures; and if he fulfils that duty he has, in my view, a correlative right to charge the owner of the goods with the expenses reasonably incurred in doing so.”

Burial of the dead provides another pocket of case law from which the inchoate general principle of relief for necessitous intervention might be developed. In Jenkins v Tucker,291 a father paid the funeral expenses of his married daughter while her husband, who was primarily liable for the expense, was abroad on his estate. The Court of Common Pleas allowed the father, as a proper person to interfere, to recover his expenses in an action of money paid. This supports the requirement that the intervention should not be officious. The style of funeral should be suitable to the standing of the person. Similarly in Rogers v Price,292 the plaintiff undertaker who was called to attend the deceased, who had died at his brother’s house, succeeded in quantum meruit against the estate of the deceased. It was admitted that the funeral was suitable to the degree of the deceased. The policy underlying recovery was stated by Justice Garrow J:

“Suppose a person to be killed by accident at a distance from his home; what, in such a case ought to be done? The Common principles of decency and humanity, the common impulses of our nature, would direct every one as a preliminary step, to provide a decent funeral, at the expense of the estate; and to do that which is immediately necessary upon the subject, in order to avoid what, if not provided against, may become an inconvenience to the public.”

This case appears to allow any appropriate person to make a claim (including professional undertakers) provided the action was not officious.

In In re Rhodes293 the Court of Appeal held that a brother who had provided for his sister’s confinement in a private asylum was prima facie entitled to reimbursement for the expenses incurred. It was held that the mental of her was

291 (1788) 1 H BI 90, 126 ER 55.
292 (1829) 3 Y & J 28, 148 ER 1080.
293 (1890) 44 Ch D 94.
liable. The court emphatically enunciated that the obligation was one imposed by law, and rejected an earlier Court of Appeal’s reliance on the implied contract fallacy.\footnote{Cf In re Weaver (1882) 21 Ch D 615.} However, the decision is marred by an additional requirement that money must have been paid with intention on the part of the intervener that it should be repaid. There being little evidence of this, the claim was rejected.\footnote{Birks, Negotiorum Gestic and the Law (1971) CLP 199.}

We have seen the global importance of common law in solving difficult and complicated socio-economic relations among people. The expectations upon it are enormous in that it shapes and guides our collective behavior towards a just and free society. It is inevitable that the English Law has come to be integrated within almost all legal systems throughout the world. As a society is never static, the law needs to keep up with changing circumstances, or face an undignified loss of relevance. It is in response to this that the agency of necessity resolved issues pertaining to problems, as articulated by Lynskey J. in \textit{Munro v. Willmott},\footnote{Munro v Willmott (1949) 1 K.B. pp. 295-297.} where masters of ships found themselves in foreign parts and unable to get immediate instructions from their owners when they needed money for expenses which had not been provided for. While different jurisdictions were only able to handle the issue by extending implied authority in an emergency,\footnote{Arthur v Barton (1840) – 6 M & W pl 38.} the English law was able to adequately address the loop-hole through the doctrine of, Agency of Necessity, “an offshoot of the law of salvage, where sale of cargo or the pledging of a vessel to raise funds was permitted to enable a voyage to proceed.”\footnote{Arthur v Barton (1840) – 6 M & W pl 38.} Whilst the courts sought for the establishment of existence of pre-existing contractual obligations between principals and their agents, and proof that the goods are perishable, instances abound that enabled the doctrine’s application despite the absence of either (or both). Nevertheless the doctrine “sought to accommodate commercial realism within the constraints of a strict legal doctrine; and consequently, the doctrine
has, over the years, unwrapped a number of separate (and disparate) sub doctrines, some of which (such as the wife’s agency of necessity) have been abolished." 299

299 Ibid.