

*THE REQUIREMENT OF EXCUSABLE MISTAKE  
IN THE CONTEXT OF THE CONDUCTIO  
INDEBITI: SCOTTISH AND SOUTH AFRICAN  
LAW COMPARED*

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1. INTRODUCTION

The law of unjustified enrichment in both Scotland and South Africa is essentially civilian in origin. In both jurisdictions, transfers made under a mistake as to the transferor's liability are recoverable by means of the *condictio indebiti*. Both Scottish and South African law generally require positive proof of a liability mistake on the part of the transferor in order to found the restitution of mistaken transfers. Moreover, in both Scottish and South African law the excusability of the transferor's mistake is regarded as a relevant consideration in determining whether or not restitution should be permitted. Given the common origin of the law of unjust enrichment in these jurisdictions, the presence of a requirement of excusable mistake in both is perhaps unsurprising. Indeed, in both Scottish and South African law the requirement of excusable mistake in the context of the *condictio indebiti* does appear to derive — at least in part — from the general analysis of mistake of fact found in the Roman sources.

Yet the similarity between Scottish and South African law in this respect turns out to be a superficial one only. In fact, the requirement of excusable mistake has evolved very differently in each of these two jurisdictions. Scottish law demonstrates the relatively orderly and linear development of the *condictio indebiti* from its Roman origins. Having been introduced into

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Scottish law by Lord Brougham in 1830, the excusability requirement has been in decline since the second half of the nineteenth century. Certainly, in the decision of the Court of Session in *Morgan Guaranty Trust Company of New York v Lothian Regional Council*<sup>1</sup> in 1994 it was interpreted in such a way as to ameliorate its impact considerably. In South African law, on the other hand, the story of the excusability requirement contains some unexpected elements. In particular, the influence of the remedy of *restitutio in integrum* on the *condictio indebiti* has been a decisive factor. Having originated in the late nineteenth century, the requirement continues in full force today. Restitution by means of the *condictio indebiti* is frequently refused on this basis, as the decision of the Appellate Division in *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* in 1992 shows.<sup>2</sup>

Should the excusability requirement continue in force in modern South African law? Answering this question requires a more nuanced understanding of the nature of the requirement. In fact, it seems that there at least three different ways in which the concept of excusable mistake can be understood. Both Scotland and South Africa are characterized by a mixture of these ideas, but in each case one version of the requirement has come to dominate. If it is to have any claim to rationality, each version of the excusability requirement must be capable of being reconciled with the principled basis of the *condictio indebiti*. Moreover, even if such reconciliation is possible, the case for adopting or retaining a particular version of the requirement must be supported by positive considerations of policy or equity.

## 2. HISTORICAL BACKGROUND: THE REQUIREMENT OF EXCUSABLE MISTAKE IN THE CIVILIAN TRADITION

From an early stage in its development Roman law appears to have recognized a fundamental distinction between mistakes of law and mistakes of fact.<sup>3</sup> The late classical jurist Paul stated unequivocally that ‘mistake of law prejudices, mistake of fact does not’.<sup>4</sup> While a mistake of law would in no circumstances avail one who sought to rely on it, mistake of fact could be freely raised as a cause of action or defence. However, Paul himself qualified this statement by saying that specific classes of people — women, minors and soldiers — were exempt from the operation of the mistake of law rule.<sup>5</sup> Labeo, writing two centuries before, seems to have gone further than Paul, stating as a general proposition that only those who had access to legal advice

<sup>1</sup> 1995 SC 151 at 165–7 (Lord Hope), 173 (Lord Clyde) and 175 (Lord Cullen).

<sup>2</sup> 1992 (4) SA 202 (A) 223–5, 226–7. Another recent example of a claim refused on this basis in South African law is *Firststrand Bank Ltd (Formerly First National Bank of SA Ltd) v Absa Bank Ltd* 2001 (1) SA 803 (W) at 815.

<sup>3</sup> Laurens C. Winkel *Error Iuris Nocet: Rechtsdwaling als Rechtsorde-Probleem* (doctoral thesis, University of Amsterdam, 1982) 189–202; idem ‘Mistake of law: English and Roman comparisons’ in W Swadling (ed) *The Limits of Restitutionary Claims: A Comparative Analysis* (1997) 244 at 246.

<sup>4</sup> D 22.6.9 pr (Paul *Mistake of Law and Fact*) [Watson’s translation].

<sup>5</sup> D 22.6.9 pr -1 (Paul *Mistake of Law and Fact*).

or who were themselves legally competent should be prevented from relying on mistake of law.<sup>6</sup> In other words, Labeo appears to have argued that only where the mistake of law could reasonably have been avoided should the rule operate.<sup>7</sup> Thus Labeo rationalized the mistake of law rule in terms of the more fundamental idea that one cannot rely on a careless mistake: since everyone can reasonably be expected to know what the law is, mistakes of law are typically careless.<sup>8</sup> On the other hand, Labeo's analysis appears to have had implications for later jurists' understanding of mistake of fact too. Just as a mistake of law might not prejudice where, exceptionally, it could not have been avoided even through the exercise of reasonable care, according to Paul mistake of fact *would* prejudice if it was the product of carelessness or gross negligence (*summa neglegentia*).<sup>9</sup> Similarly, according to Ulpian,

'[t]here is no excuse for supine ignorance of fact, but scrupulous inquiry is not required. The sort of knowledge looked for is that which does not excuse gross negligence or laxity, but does not demand the curiosity of an informer.'<sup>10</sup>

It must be emphasized that this general analysis of mistakes of law and fact does not seem to have been applied to what later came to be called the *condictio indebiti*, at least during the classical period.<sup>11</sup> For example, in his account of this application of the *condictio* Ulpian simply asserted the requirement of mistake or ignorance without qualifying it.<sup>12</sup> Admittedly, the *condictio* may have been barred by mistake of law in particular cases: the Emperors Severus and Antoninus issued a rescript to the effect that where an heir had paid out a legacy or fideicommissum by mistake, not realizing that he could subtract the *quarta Pegasiana*, he could not recover the money so paid.<sup>13</sup> But it does not seem that the mistake of law rule was generally applied to the *condictio* at this time. However, later the position appears to have changed. Towards the end of the third century AD the Emperors Diocletian and Maximian issued a rescript which appeared to prohibit generally

<sup>6</sup> D 22.6.9.3 (Paul *Mistake of Law and Fact*, quoting Labeo).

<sup>7</sup> It seems that Labeo may have been using Aristotle's analysis of mistake to explain the indigenous Roman rule that 'mistake of law does not profit'. According to Aristotle, an act which is performed in ignorance ought not to be punished, since ignorance excuses, but where the actor's ignorance was careless, in the sense that it was in his power to avoid it, then the actor will nevertheless be held responsible for his act: *Nicomachean Ethics* 1110b18–1111a2; 1113b22–1114a3. See further Winkel 'Mistake of law' op cit note 3 at 244–5, 247.

<sup>8</sup> D 22.6.2 (Neratius *Parchments*).

<sup>9</sup> D 22.6.9.2 (Paul *Mistake of Law and Fact*).

<sup>10</sup> D 22.6.6 (Ulpian Book 18 *Lex Julia and Papia*) [Watson's translation].

<sup>11</sup> See Winkel *Error iuris nocet* op cit note 3 at 189–202; Daniel Visser *Die Rol van Dwaling by die Condictio Indebiti: 'n Regshistoriese Perspektief met 'n Regsvergelykende Ekskursus* (doctoral thesis, University of Leyden, 1985) 31–45.

<sup>12</sup> D 12.6.1 (Ulpian Book 26 *On the Edict*). Similarly, in a rescript of Diocletian and Maximian preserved in the Code, recovery by means of the *condictio* is permitted where the mistake in question is clearly one of law: see C 4.5.5. See also Gaius *Institutes* III. 91.

<sup>13</sup> D 22.6.9.5 (Paul *Mistake of Law and Fact*).

restitution on grounds of mistake of law: ‘when someone has paid money which is not owed in ignorance of the law, then there is no recovery’.<sup>14</sup> It may be that this rescript has been taken out of context, and was not formulated as a general prohibition after all.<sup>15</sup> Nevertheless, to later readers of the *Corpus Iuris Civilis*, the ancient law on this point seemed horribly confused.

Different ages adopted different approaches in their attempts to reconcile the apparent conflicts in the ancient sources. During the medieval period the weight of authority appears to have been in favour of the recovery of payments made under mistake of law. Following the Glossators, it was argued that recovery would be refused only where the claimant had honoured a natural obligation in the belief that he was legally bound to do so.<sup>16</sup> On the other hand, in the early modern period the pendulum seemed to swing: the French Humanists insisted on the application to the *condictio indebiti* of the mistake of law rule.<sup>17</sup> This meant that the requirement of non-negligent mistake of fact came to be applied here also, since it figured in the general analysis of mistakes of law and fact in D 22.6. In his *Commentary on the Pandects*, first published around the turn of the eighteenth century, the Roman-Dutch jurist Johannes Voet adopted a broadly Humanist position: not only did he apply the mistake of law rule to the *condictio indebiti*; he also stated that in order to found this action a mistake of fact must be *nec supina nec affectata* (neither negligent nor studied).<sup>18</sup> On the other hand, as Professor Visser has shown, although there appears to have been no unanimity among the Roman-Dutch Institutional writers regarding the mistake of law rule,<sup>19</sup> Voet appears to have been alone in embracing the requirement of excusable mistake of fact.<sup>20</sup> As for the Scottish Institutional writers, they do not appear ever to have adopted the mistake of law rule in the context of the *condictio indebiti*.<sup>21</sup> It follows that they also did not apply the other half of the analysis in D 22.6 to the *condictio indebiti*, namely the requirement of excusable mistake of fact.<sup>22</sup>

Ultimately the jurists of the nineteenth century German Historical School were able to reconcile the conflicts in the Roman sources by explicitly applying to the *condictio indebiti* the concept of avoidable mistake already

<sup>14</sup> C 1.18.10; also — by implication — C 4.5.6 (Diocl et Max).

<sup>15</sup> For an account of the debate see Visser op cit note 11 at 45–52; Winkel *Error iuris nocet* op cit note 3 at 189–202.

<sup>16</sup> Visser op cit note 11 ch 2.

<sup>17</sup> Ibid ch 3.

<sup>18</sup> Voet *Commentarius ad Pandectas* 12.6n7.

<sup>19</sup> Visser op cit note 11 at 152–77, especially 175–7.

<sup>20</sup> Ibid at 177–82; idem ‘Error of law and mistaken payments: A milestone’ (1992) 109 *SALJ* 177 at 183–4. See also the acceptance of this view in W de Vos *Verryking-saanspreeklikheid in die Suid-Afrikaanse Reg* 3 ed (1987) 69–70.

<sup>21</sup> Robin Evans-Jones *Unjustified Enrichment: Enrichment by Deliberate Conferral* vol 1 (2003) 77n9.

<sup>22</sup> Ibid at 87.

latent in D 22.6.<sup>23</sup> Savigny, for example, thought that although any mistake would in principle found the *condictio indebiti*, this assistance ought to be excluded where the mistake had been inexcusable (*verschuldeten*): the right to recover on grounds of mistake was founded on the principles of equity (*Begünstigung aus Billigkeit*), and it would be inequitable to permit restitution under these circumstances.<sup>24</sup> A few years later Vangerow formulated the principle even more broadly: ‘only excusable error, but then every excusable error, without distinction as to whether it is an error of law or an error of fact’.<sup>25</sup> This implied a general requirement of excusability applicable to every sort of mistake, wholly supplanting the mistake of law rule. However, most Pandectists followed Savigny in characterizing mistakes of law as typically avoidable and therefore typically inexcusable.<sup>26</sup> Similarly, regarding mistakes of fact, most took the view these were typically excusable (*entschuldbar*).<sup>27</sup> For example, according to Mackeldey’s *Lehrbuch*, first published in 1814, error of fact would found recovery unless it arose from gross negligence and carelessness.<sup>28</sup> This negative formulation — which once again closely tracked the analysis in D 22.6<sup>29</sup> — suggested that the claimant under the *condictio* could make out a *prima facie* claim merely by pointing to his mistake: only exceptionally would this *prima facie* claim be

<sup>23</sup> Augustin Leyser, writing around the middle of the eighteenth century, had already proposed subordinating the intractable law/fact distinction to a more fundamental principle of error *invincibilis*, unavoidable mistake: *Meditationes* Vol VI Spec 289, 1–2. See Reinhard Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 869–71. On the German Historical School and the Pandectists generally, see Visser op cit note 11 ch 5.

<sup>24</sup> Friedrich Carl von Savigny *System des Heutigen Römischen Rechts* vol III ‘*Irrthum und Unwissenheit*’ (1840) 448 para XXXV.

<sup>25</sup> Karl Adolph von Vangerow *Lehrbuch der Pandekten* vol III 7 ed (1876) 397–8. The translation is Daniel Visser’s: see ‘Unjustified enrichment’ in Reinhard Zimmermann & Daniel Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 523 at 529. Compare also the work of Otto Bähr, who argued that no mistake, even a mistake of fact, would found the *condictio indebiti* unless the circumstances were such that, given human nature, a mistake might easily have occurred. For Bähr, error *probabilis* — terminology already used by Johannes Voet at the beginning of the eighteenth century — had both substantive and procedural significance: the mistake must be one which could in theory have befallen even a careful person and was therefore likely to have occurred in this case. See Voet *Commentarius ad Pandectas* 22.6n6 and 7; Otto Bähr *Die Anerkennung Als Verpflichtungsgrund* 3 ed (1894) 55–6 para 19.

<sup>26</sup> For example, Savigny op cit note 24 at 448; Anton Thibaut *System des Pandektenrechts* (1814) para 29; Ferdinand Mackeldey *Handbook of the Roman Law* translated and edited by Moses Dropsie (1883) para 178; Bernard Windscheid *Lehrbuch des Pandektenrechts* (1906) para 79a.

<sup>27</sup> This seemed to fit in with Paul’s statement in D 22.6.9pr and 2, that mistake of law did not prejudice, provided that it did not arise from gross negligence (*summa neglegentia*).

<sup>28</sup> Mackeldey op cit note 26 para 178. Also e.g. W Moddermann *Handboek voor het Romeinse Recht* 5 ed (1913) para 79; Windscheid op cit note 26 para 79a.

<sup>29</sup> D 22.6.9.2 (Paul *Mistake of Fact and Law*).

barred by the fact that the mistake had been grossly negligent. Thus the Pandectists were able to harmonize the ancient texts by means of a general criterion of excusability, while in practice maintaining the distinction between mistakes of law and mistakes of fact.

### 3. THE REQUIREMENT OF EXCUSABLE MISTAKE IN SCOTTISH LAW

#### 3.1 *Wilson and McLellan v Sinclair and Dixons v Monkland Canal Co: The influence of Lord Brougham*

The requirement of excusable mistake was applied to the *condictio indebiti* for the first time in Scottish law in *Wilson and McLellan v Sinclair*, decided on appeal by the House of Lords in 1830.<sup>30</sup> No Scottish court had previously acknowledged any requirement of excusable mistake of fact in respect of the *condictio indebiti*.<sup>31</sup> Nor was this requirement established in English law at that time,<sup>32</sup> although the mistake of law rule had already become entrenched through the decision of the House of Lords in *Brisbane v Dacres*.<sup>33</sup> On the other hand, the writings of the German Historical School dominated civilian legal scholarship and indeed legal scholarship generally during the nineteenth century.<sup>34</sup> Thus it was the scholarship of the Historical School which formed the wider backdrop to the decision in *Wilson and McLellan v Sinclair*,<sup>35</sup> all the more so because Lord Brougham, who delivered the leading speech, was

<sup>30</sup> (1830) 4 W & S 398 at 409.

<sup>31</sup> It had been argued as a defence in *Duke of Argyle v Lord Halcraig's Representatives* (1723) Mor 2929 and *Carrick v Carse* (1778) Hailes 783: see Scottish Law Commission Discussion Paper No 95 'Recovery of benefits conferred under error of law' vol 2 at 55–56n6.

<sup>32</sup> The requirement of excusable mistake is not mentioned, for example, in *Bilbie v Lumley* (1802) 2 East 469 or *Brisbane v Dacres* (1813) 5 Taunt 143. See, however, *Milnes v Duncan* (1827) 6 B&C 671 at 677, where it was held that negligent mistake of fact on the part of the plaintiff — that is, negligence in not availing himself of the means of knowledge within his power — would defeat his claim to recover. Such a defence was however clearly rejected in *Kelly v Solari* (1841) 9 M&W 54. See generally Peter Birks 'The recovery of carelessly mistaken payments' (1972) 25 *Current Legal Problems* 179 at 180–1 and 197.

<sup>33</sup> *Brisbane v Dacres* supra note 32.

<sup>34</sup> Their influence was particularly strongly felt in Scotland, as an uncodified civil law system. See e.g. John W Cairns 'The influence of the German Historical School in early nineteenth century Edinburgh' (1994) 20 *Syracuse Journal of International Law and Commerce* 191; Alan Rodger 'Scottish advocates in the nineteenth century: The German connection' (1994) 110 *LQR* 563. From the last decade of the eighteenth century it became relatively common for Scottish advocates to spend time at one or other of the German universities, in order to familiarize themselves with the scholarship flourishing there. The Advocates Library at the Faculty of Advocates in Edinburgh began to acquire works by members of the Historical School. For example, in 1818 the library acquired a copy of Thibaut's *System des Pandektenrechts*. See Rodger at 580.

<sup>35</sup> (1830) 4 W & S 398 at 409.

himself a Scot educated in Edinburgh and admitted to the Faculty of Advocates in 1800.<sup>36</sup>

In fact, we can be sure that Lord Brougham was aware of the controversy surrounding the mistake of law rule in Roman law and its application to the *conductio indebiti* in particular because he referred to it in the speech he gave in *Dixons v Monkland Canal Company* in 1831:

‘No doubt there was a great difference of opinion among the Roman lawyers, as to the limits of the proposition, how far *ignorantia juris*, or *ignorantia facti* might be held to give a title to the protection of a *conductio indebiti*, and as to how far the doctrine relating to *indebiti solutio* was confined to cases where the fact was unknown or mistaken, or extended also to cases where the law was unknown or mistaken.’<sup>37</sup>

As for mistake of fact, in the *Wilson* case Lord Brougham set out the position as follows:

‘If the party who has paid the money is under an unavoidable mistake, if the mistake is no fault of his, then he may have it back again; but, if he has himself to blame — if he himself paid the money, ignorant of the fact, and had the means of knowledge of the fact within his power — and did not use those means, he shall in vain attempt, by means of proceedings at law, to have that repaid to him. That has been decided in our Courts repeatedly. It is a rule founded on the strict principles of ordinary and universal justice, which will never allow a man to take advantage of his own wrong, — or, what is the same thing, of his own gross negligence. The ground of action being ignorance, it must be avoidable ignorance, — it must not be ignorance through his own fault, or having shut out the light by wilfully closing his eyes.’<sup>38</sup>

Lord Brougham’s claim that a man may not take advantage of his own gross negligence strongly recalls the statement of Paul in D 22.6, that mistake of fact prejudices (*nocet*) if it is the product of carelessness or gross negligence (*summa neglegentia*).<sup>39</sup> On the other hand, Lord Brougham appears to have gone beyond the civilian sources in his formulation of this rule: rather than viewing gross negligence as an occasional bar to recovery for mistakes of fact, he required the pursuer actively to demonstrate an unavoidable and therefore blameless mistake. He would have refused recovery on this basis: the pursuer had had the papers on the face of which the mistake appeared in his possession for a year, and could during that time have inspected them and discovered the mistake.<sup>40</sup> In fact, Lord Brougham seemed to regard substantive excusability and probability as two sides of the same coin.<sup>41</sup> In the *Dixons* case he went further still:

<sup>36</sup> Michael Lobban ‘Brougham, Henry Peter, First Baron Brougham and Vaux (1778–1868)’ *Oxford Dictionary of National Biography* (2004).

<sup>37</sup> *Dixons v Monkland Canal Company* 5 W & S (1831) 445 at 448.

<sup>38</sup> *Wilson & McLellan v Sinclair* supra note 35 at 409.

<sup>39</sup> D 22.6.9.2 (Paul *De iuris et facti ignorantia*).

<sup>40</sup> *Wilson & McLellan v Sinclair* supra note 35 at 409.

<sup>41</sup> *Ibid.* Cf the work of Otto Bähr op cit note 25.

‘I do not think that it is necessary, in order to dispose of this case, to raise the general question, Whether a party can recover money paid under a mistake of law, or without due knowledge of all the facts, and . . . when there is nothing against good conscience in retaining the money — that is to say, where the payor has not been induced to pay by any ignorance impressed upon him, as it were, by the person procuring it to be paid, or any other fraudulent interposition, which would make it contrary to a good conscience for him to retain it.’<sup>42</sup>

Thus he questioned obiter whether a mistaken payment could ever be recoverable by means of the *condictio indebiti* in the absence of some unconscionable behaviour on the part of the recipient, specifically, the inducement of the payer’s mistake. Here the Lord Chancellor appears to have been drawing on the general principles governing relief on grounds of mistake in the English Courts of Equity. He appears to have regarded the *condictio indebiti* as a species of equitable relief against mistake.<sup>43</sup> It follows that although the defence of *summa neglegentia* inherent in the Roman sources was the ultimate source of the requirement of excusable mistake of fact in Scots law, Lord Brougham’s version of the requirement transcended those sources. The powerful dicta in *Wilson and McLellan v Sinclair* and *Dixons v Monkland Canal Company* established a positive requirement of excusable mistake of fact, to be demonstrated by the pursuer in every case. Moreover, his emphasis in *Dixons v Monkland Canal Company* on the need for some unconscionable behaviour on the part of the recipient had the potential to restrict restitution still further.

This version of the requirement of excusable mistake has been reiterated subsequently in several cases. In *Youle v Cochrane*<sup>44</sup> in 1868, the pursuer, the consignee of certain cargo, had paid the shipmaster the full freight, in ignorance of the fact that the shipper had already paid a third of that amount to the charterer. Lord Ardmillan held that ‘an error in fact arising from mere ignorance is not enough to sustain a plea of *condictio indebiti* — the ignorance must be excusable’.<sup>45</sup> Moreover, excusability was to be determined by asking whether the pursuer ‘had within his reach the means of knowing that of which he was ignorant’.<sup>46</sup> Since there was a receipt for the amount already paid written in the margin of the bill of lading, there could be very little doubt that the pursuer had failed to demonstrate excusable ignorance according to this test. Lord Ardmillan would have refused the pursuer’s claim for this reason; in fact, the case was decided on a different basis. A still more restrictive approach was adopted by Lord President Inglis in *Balfour v Smith and Logan* in 1877, a case which concerned an overpayment

<sup>42</sup> *Supra* note 37 at 447.

<sup>43</sup> This analogy is unsurprising, since Brougham himself appears to have been strongly in favour of the anglicization of Scots law: Cairns *op cit* note 34 at 199–201.

<sup>44</sup> (1868) SC 3rd series VI 427.

<sup>45</sup> *Youle v Cochrane supra* note 44 at 433. Cf Evans-Jones *op cit* note 21 at 90.

<sup>46</sup> *Ibid.*

of the amount due in respect of a joining contact.<sup>47</sup> He held that the pursuer could recover only if he could show some extrinsic cause for the mistake, aside from his own fault, in the form of ‘adverse circumstances’ or the conduct of the other party.<sup>48</sup> However, under the circumstances this test appeared to be satisfied: the pursuer alleged that the incorrect statements of the defender had induced the mistake, and indeed it even appeared that the defender had known these statements to be false.

As for the twentieth century, a positive requirement of excusable mistake appears to have been approved in principle by the Court of Session in two decisions, *Glasgow Corporation v Lord Advocate*<sup>49</sup> and *Taylor v Wilson’s Trustees*.<sup>50</sup> However, both cases concerned mistakes of law, and both were decided on that basis. Indeed, in the *Glasgow Corporation* case the question of excusability was considered almost exclusively as a justification for the rule excluding recovery for mistakes of law.<sup>51</sup> On the other hand, a restrictive version of the requirement was applied to a mistake of fact by the Sheriff Court in *Peter Walker and Sons (Edinburgh) Ltd v Leith Glazing Company Ltd* in 1980.<sup>52</sup> However, as in the *Balfour* case, which was cited, recovery was permitted. The case concerned a claim to recover part of an amount paid under a contract for the repair of windows; when the defenders submitted their account, the pursuers’ employee paid in full, wrongly believing the additional work to have been validly authorized. It was held that if proper inquiries had been made, the mistake would have been discovered; thus in a sense the mistake had been induced by the pursuers’ own carelessness. However, the account submitted by the defenders was held to be misleading, and on this basis the pursuers’ mistake of fact was characterized as excusable, despite their carelessness.<sup>53</sup>

<sup>47</sup> (1877) SC 4th series IV 454. Cf Evans-Jones op cit note 21 at 91.

<sup>48</sup> ‘[A] party, having made a payment in error, must, before he can recover, show that the error was not induced by his own fault, but was due to adverse circumstances, or to the proceedings of the other party.’ *Balfour v Smith and Logan* supra note 47 at 458–9.

<sup>49</sup> 1959 SC 203 at 233.

<sup>50</sup> 1975 SC 146 at 156.

<sup>51</sup> See the speech of Lord President Clyde in *Glasgow Corporation v Lord Advocate* supra note 49 at 232–3, as well as Lord Sorn at 243.

<sup>52</sup> 1980 SLT (Sh Ct) 104.

<sup>53</sup> ‘It is . . . not a complete bar to the recovery of money paid by mistake that the party who has paid it may have had the means of discovering the true facts, and it is also relevant to consider whether the actings of the other party have contributed to the mistake.’ *Balfour v Smith and Logan* supra note 47 was cited in support of this proposition: *Peter Walker* supra note 52 at 105.

### 3.2 *The emergence of a less restrictive version of the requirement*

Far more frequently the issue of excusability has been ignored, actively repudiated, or recast as an equitable defence.<sup>54</sup> In the early case of *Bell v Thomson*,<sup>55</sup> rates had been levied by the Police Commissioners of a town in respect of certain premises which the pursuer had erroneously represented to be within it; three years later the pursuer claimed repetition of the amounts paid from their representative. The Lord Justice-Clerk would have been prepared in principle to recognize a defence of negligent mistake, but he saw inexcusable mistake as merely one factor in determining the equities of the case: given that the current ratepayers were not the same as those who had originally received the rates from the pursuer, it would not have been equitable to restore the sums paid.<sup>56</sup> The Lord Justice-Clerk would have been prepared to allow the negligence of the pursuer to be outweighed by a similarly negligent mistake on the part of the defender, but as it turned out, the Commissioners had clearly not been negligent in acting on the information supplied by the pursuer, that is, in levying the rates.<sup>57</sup> In fact, it seems that in no case since *Youle v Cochrane* in 1868 has any member of a Scottish court been prepared to refuse the *condictio indebiti* on grounds of inexcusable mistake of fact.<sup>58</sup> The watershed in this respect appears to have come as early as *Balfour v Smith and Logan*.<sup>59</sup> As we have seen, in that case Lord President Inglis recognized proof of excusable mistake of fact as a requirement for success in the *condictio indebiti*. However, in the same case Lord Shand referred to the decision of Williams J in the English case of *Townsend v Crowdy*,<sup>60</sup> in which it was held that ‘it is not enough that the party had the means of learning the truth if he had chosen to make inquiry. The only limitation now is, that he must not waive all inquiry.’<sup>61</sup> He concluded that, contrary to the view of the Lord President, ‘the fact that the defender’s representations had induced the error is not essential to the pursuer’s

<sup>54</sup> Examples of cases in which the excusability requirement was simply ignored are *The Countess of Cromertie and Mackenzie v The Lord Advocate* (1871) SC 3rd series IX 988 and *Willet v Ramsay* (1904) 12 SLT 111.

<sup>55</sup> (1867) SC 3rd series VI 64.

<sup>56</sup> *Bell v Thomson* supra note 55 at 66–7.

<sup>57</sup> *Ibid* at 67. Cf Evans-Jones op cit note 21 at 91.

<sup>58</sup> Cf Evans-Jones note 21 at 88: ‘[A]lthough in the past the rule that the error must be excusable was often expressed in relation to errors of fact, it was very rarely applied.’

<sup>59</sup> *Supra* note 47.

<sup>60</sup> (1860) 8 CB Rep NS 477.

<sup>61</sup> *Townsend v Crowdy* supra note 60 at 494 per Williams J. Williams J in turn cited the speech of Baron Parke in *Kelly v Solari*, a decision of the English Court of Exchequer concerning the action for money had and received, according to which money may generally be recovered back but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back ‘however careless the party paying may have been, in omitting to use due diligence to inquire into the fact’. *Kelly v Solari* (1841) 9 M&S 54 at 59.

success'.<sup>62</sup> Thus the very idea of a substantive excusability requirement — whether positively or negatively formulated — was repudiated.

In a series of decisions during the late nineteenth and twentieth centuries, the Scottish courts have granted the *condictio indebiti* in circumstances which would have been insufficient to found recovery according to the restrictive version of the excusability test adopted by the Lord President in *Balfour v Smith and Logan*, and previously in *Youle v Cochrane* and *Wilson and McLellan v Sinclair*. For example, in *The Dalmellington Iron Company v The Glasgow and South-Western Railway Company*,<sup>63</sup> decided by the Court of Session in 1889, the defenders had contravened an earlier agreement with the pursuers that they would charge them no more than they were charging the pursuers' competitors. It was alleged that certain employees of the pursuers knew that other companies were in fact being charged lower rates, and that the pursuers had therefore paid the rates in full knowledge of the overcharge. But according to Lord Rutherford Clerk, knowledge that the full amount was not due was insufficient in itself to bar the claim: in fact, such knowledge must be 'present to the mind of the person who made the payment'.<sup>64</sup> On the other hand, he admitted that it might be sufficient if that knowledge *should* have been present to the mind of the employee in question, 'on the ground that he cannot be allowed to say that he did not know what he ought to have known'.<sup>65</sup> However, he concluded that the oversight of the employee in question had in fact been 'excusable'.<sup>66</sup> Clearly the test for excusability applied here was an extremely subjective one, since undoubtedly the pursuers had within their reach the means of discovering their mistake, nor had the defenders done anything to induce it.<sup>67</sup>

Similarly, in *Moore's Executors v McDermid*,<sup>68</sup> had Lord Chancellor Brougham's restrictive excusability requirement been applied the claim would certainly have failed. Here the pursuers were the executors of a deceased estate in which the defender had been a creditor. Having paid all the estate's creditors in full, the executors discovered that the defender's debt had already been discharged some years previously, while the testator was still alive. In fact, that initial payment had been made by the deceased's wife, who was herself one of the executors. Assuming that she had indeed forgotten making this initial payment, she had certainly had the 'means of knowledge'; nor was there any suggestion that the error had been induced by the

<sup>62</sup> *Balfour v Smith and Logan* supra note 47 at 462.

<sup>63</sup> (1889) SC 4th series XVI 523.

<sup>64</sup> *Dalmellington Iron Company* supra note 63 at 534.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid* at 535.

<sup>67</sup> Admittedly, Lord Rutherford Clerk also considered it significant that '[t]he defenders knew, or must be held to have known, that they were overcharging the pursuers. They knew the agreement, and of course they knew the rates which they were charging to the other traders . . .'. *Dalmellington Iron Company* supra note 63 at 532. Cf Evans-Jones op cit note 21 at 92.

<sup>68</sup> 1913 1 SLT 278.

defender. Thus the defender objected that the pursuers were unable to allege an excusable mistake.<sup>69</sup> Yet having considered *Kelly v Solari*, cited by Williams J in *Townsend v Crowdy*), Lord Shand's speech in *Balfour v Smith and Logan* and the *Dalmellington* case, Lord Ormisdale concluded that the pursuers had a relevant case: 'the knowledge of the true position was not present to their minds in fact or should not necessarily have been present'.<sup>70</sup> Again, although the excusability requirement applied here appears to have had some substantive content, nevertheless Lord Ormisdale's approach was an extremely subjective one.<sup>71</sup>

### 3.3 Morgan Guaranty Trust Company of New York v Lothian Regional Council

It follows that the positive requirement of objectively excusable or 'unavoidable' mistake applied in the nineteenth-century cases of *Wilson and McLellan v Sinclair*, *Youle v Cochrane* and *Balfour v Smith and Logan* has been comprehensively rejected in Scots law. Indeed, this was made explicit in the decision of the Court of Session in 1994 in *Morgan Guaranty Trust Company of New York v Lothian Regional Council*,<sup>72</sup> one of the void swaps cases generated by the decision of the House of Lords in *Hazell v Hammersmith and Fulham Borough Council*<sup>73</sup> in 1994. Having abrogated the mistake of law rule, Lord Hope went on to hold that 'it is not part of the law of Scotland that the error must be shown to be excusable'.<sup>74</sup> On the other hand, the Court did not go so far as to reject entirely the idea of a substantive excusability requirement, as Lord Shand had done in *Balfour v Smith and Logan*.<sup>75</sup> Rather, the substantive inexcusability of the transferor's mistake is one of several factors which the recipient of a transfer might point to in order to show that equity favoured its retention. 'Once the pursuer has averred the necessary ingredients to show that *prima facie* he is entitled to a remedy, it is for the defender to raise the issue which may lead to a decision that the remedy should be refused on grounds of equity.'<sup>76</sup> Lord Clyde expressed the matter in similar terms:

'Excusability is not an essential ingredient in the principle but may be an element in the decision to grant a remedy in particular circumstances. While I would hesitate to lay down any absolute principle on the specific requirements

<sup>69</sup> *Moore's Executors* supra note 68 at 279.

<sup>70</sup> *Ibid* at 280.

<sup>71</sup> The *Dalmellington* case supra note 63 was again followed in *Inverness County Council v McDonald* 1949 SLT (Sh. Ct) 79.

<sup>72</sup> *Morgan Guaranty Trust* supra note 1 at 165–7 (Lord Hope), 173 (Lord Clyde), 175 (Lord Cullen). Cf *Evans-Jones* op cit note 21 at 93–5.

<sup>73</sup> [1992] 2 AC 1.

<sup>74</sup> *Morgan Guaranty Trust* supra note 1 at 166.

<sup>75</sup> 'This is not to say that the nature of the error and the question whether it could have been avoided may not play a part in a decision as to where the equities may lie if the point is raised in answer to the pursuer's claim.' *Ibid*.

<sup>76</sup> *Ibid*.

of pleading so far as excusability is concerned, because cases might occur where the circumstances in which the payment was made might require the pursuer to explain why it was equitable in such a context that he should be repaid, it seems to me that almost always the *onus* will technically lie on the defender.<sup>77</sup>

Regarding the issues raised by the defender in this respect, Lord Hope concluded that ‘I do not find anything in these averments to suggest that the defenders have any legitimate criticism to make of the error which the pursuers were under at the time of the transaction, which is admitted to have been common to both parties.’<sup>78</sup> As in *Bell v Thompson*, whether the mistake in question had been shared by the defender was considered relevant in determining the balance of equities.

#### 4. THE REQUIREMENT OF EXCUSABLE MISTAKE IN SOUTH AFRICAN LAW

As we have seen, the majority of the Roman-Dutch institutional writers recognized neither the mistake of law rule nor the requirement of excusable mistake of fact in the context of the *condictio indebiti*, although Johannes Voet exceptionally embraced both.<sup>79</sup> Rather, as in Scottish law, these requirements began to be applied consistently to the *condictio indebiti* only during the nineteenth century; as in Scottish law, this development was driven by the courts. However, in South African law there appear to have been several additional elements at work, elements absent from Scottish law during the same period. It is these elements in particular that seem to account for the divergence between modern Scottish and South African law in this respect, explaining as they do the stringent approach to the requirement of excusable mistake which prevails in modern South African law.

##### 4.1 Divisional Council of Aliwal North v De Wet and Logan v Beit: *The influence of Chief Justice De Villiers*

The decision of Kotzé CJ in *Rooth v The State*<sup>80</sup> in the Supreme Court of what was then the South African Republic is widely regarded as the origin of both the mistake of law rule and the requirement of excusable mistake in South African law.<sup>81</sup> The applicants in the *Rooth* case had paid dues on the transfer of certain gold claims between August 1887 and August 1888, payments which it turned out had not been owing. The applicants sought to recover these payments by means of the *condictio indebiti*, already well established in South African law; they relied on their mistaken belief as to

<sup>77</sup> Ibid at 173.

<sup>78</sup> Ibid at 166. Cf Evans-Jones op cit note 21 at 93–4, who observes that in modern Scottish law an inexcusable mistake can only be relevant where it was not common to both parties.

<sup>79</sup> See Section 2 above.

<sup>80</sup> (1888) 2 SAR 259.

<sup>81</sup> In particular, Daniel Visser regards the *Rooth* case as the origin of the requirement of excusable mistake in South African law: See eg Visser op cit note 25 at 531–2.

their liability to make them, which was a mistake of law. Kotzé CJ followed Cujacius, Donellus, Merenda, Brunneman, Domat, Voet, Glück, Savigny, Mackeldey, Goudsmit, and Windscheid in concluding that, according to the correct reading of the Roman law, money paid under mistake of law could not be reclaimed by means of the *condictio*.<sup>82</sup> As for mistake of fact, here Kotzé CJ stated simply that ‘the commentators and expounders of the Roman law are all agreed that money paid in mistake of fact can be recovered back’.<sup>83</sup> Thus he appears to have seen recovery for mistake of fact as entirely unrestricted. However, later in his judgment the Chief Justice remarked with respect to the mistake of law rule that ‘the jurists of our own time . . . are more or less inclined to adopt a middle view and (as Glück expresses it) discard the distinction between mistake of law and mistake of fact, and simply consider if the error, whether *juris* or *facti*, be excusable (*verzeihlich*, *entschuldbar*) or not’.<sup>84</sup> The Chief Justice was clearly alluding — albeit rather cautiously — to the Pandectists’ idea of an overarching criterion of excusability, applicable to both mistake of law and mistake of fact, an idea previously unknown in South African law.<sup>85</sup> As we have seen, according to their analysis, mistakes of law were typically avoidable and therefore typically inexcusable, while mistakes of fact were typically excusable.<sup>86</sup> In fact, in the *Rooth* case it made no difference whether this ‘middle view’ was adopted or not, since there was in fact no such ‘special equity’ on the side of the applicants to justify departing from the characterization of mistakes of law as typically inexcusable.<sup>87</sup> Thus it does not seem that the Chief Justice meant to introduce into South African law a positive requirement of excusable mistake of fact, to be demonstrated by the plaintiff in every case, as Lord Chancellor Brougham had done in *Wilson and McLellan v Sinclair*.

However, only a few years later, a positive requirement of excusable mistake of fact was independently recognized, this time by the Supreme Court of the Cape Colony, in *Divisional Council of Aliwal North v De Wet*.<sup>88</sup> The Divisional Council of Aliwal North had made a series of payments to De Wet between 1883 and 1888, relying on a statutory provision according to which divisional councils were permitted to pay travelling expenses to their members provided that the member’s ordinary place of residence was more than fifteen miles away from the place of the meeting. De Wet had repeatedly

<sup>82</sup> Thus he rejected what he saw as the view of Van Leeuwen, Huber, Cocceius, Peckius, Carpzovius, Vinnius, D’Aguiseau, Leyser and Mühlenbruch, that money paid under mistake of law could be recovered in certain circumstances: *Rooth* supra note 80 at 263.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid* at 265.

<sup>85</sup> He referred explicitly to the Pandectists’ analysis of the Roman sources, citing works by Thibaut, Savigny, Mackeldey, Goudsmit, Modderman and Windscheid.

<sup>86</sup> See Section 2 above.

<sup>87</sup> *Rooth* supra note 80 at 265–7.

<sup>88</sup> (1890) 7 SC 232.

represented to the Aliwal North Divisional Council that he lived sufficiently far from the meeting place to be entitled to his expenses. In fact, when the council finally undertook to measure the distance, it turned out to be slightly shorter than the required fifteen miles. De Villiers CJ accepted the argument of counsel for the defendant that in order to found the *conductio indebiti* a mistake must not only be a mistake of fact but also a *iustus error*, a phrase which he translated as ‘excusable mistake’.<sup>89</sup> In support of this view he cited the view of Johannes Voet that in order to found the *conductio*, a mistake of fact must not be *supina aut affectata* (‘negligent or studied’).<sup>90</sup> He went on to approve the view expressed by Voet in his *Commentary* on D 22.6 (general analysis of mistake of law and fact) that a mistake would usually be regarded as negligent and studied if it pertained to the plaintiff’s own affairs.<sup>91</sup> That was certainly the case here: all public roads in the district were under the council’s control. However, De Villiers CJ immediately introduced the further qualification, not found anywhere in Voet, that even ignorance of one’s own affairs might be considered excusable if one had been led into the mistake by the recipient himself.<sup>92</sup> He concluded that the question of the distance from his house to the meeting place of the council was something the defendant ought to have known, since he himself travelled it all the time, and that for this reason the council had been justified in accepting his assurances, that is, they had not been bound to make further inquiry. Accordingly the council recovered the money paid out.

In one sense the version of the excusability requirement applied by De Villiers CJ in the *Aliwal North* case comes straight from Voet’s *Commentary*: he certainly used Voet’s negative formulation, that a mistake must not be *supina aut affectata* if it is to found the *conductio*. On the other hand, his formulation of the requirement in terms of ‘excusable mistake’ resembled the approach adopted by Lord Brougham in *Wilson and McLellan v Sinclair* and followed in *Youle v Cochrane* and *Balfour v Smith and Logan*, according to which the objective excusability of the transferor’s mistake had to be positively demonstrated:<sup>93</sup> in this case the defendant had misrepresented the distance in question to the council, it had been reasonable of the council to accept his assessment, and therefore it was the defendant rather than the plaintiff who was responsible for the mistake. Thus De Villiers CJ’s application of the rule in this context had the effect of shifting the burden of proof from the defendant — to demonstrate that the mistake had been negligent — to the plaintiff — to demonstrate that it had been excusable.

<sup>89</sup> *Aliwal North* supra note 88 at 234–5. Henry Juta’s arguments for the defendant are preserved at 233 in the report.

<sup>90</sup> Voet *Commentarius ad Pandectas* 12.6n7, cited in *Aliwal North* supra note 88 at 234.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Aliwal North* supra note 88 at 235.

<sup>93</sup> See Section 3.1 above: *Wilson and McLellan v Sinclair* supra note 35; *Youle v Cochrane* supra note 44; *Balfour v Smith and Logan* supra note 47.

The easiest way to discharge this burden was for the plaintiff council to show that the defendant had in fact caused its mistake.

In fact, in the decision of the Cape Supreme Court in *Logan v Beit*,<sup>94</sup> delivered by De Villiers CJ the day after his judgment in the *Aliwal North* case, he seemed to go further still. Here Beit (plaintiff in the court a quo) had bought shares from Logan ‘cum rights’, a phrase which he interpreted as entitling him to certain additional bonus shares which had accrued to Logan prior to the sale. In the first instance Beit sought specific performance according to his version of the contract; failing this, he wanted the ‘cancellation’ of the contract on grounds of mistake. De Villiers CJ endorsed Logan’s reading of the contract, that is, as excluding the bonus shares, but held that if the plaintiff’s unilateral mistake as to the contract’s terms had been a *iustus error*, ‘that is to say, a mistake which is reasonable and justifiable’ in the circumstances, he could recover his performance under the contract, subject to counter-restitution, by means of *restitutio in integrum*.<sup>95</sup> Turning to the facts of the case, De Villiers CJ held that the plaintiff had not been reasonably justified in supposing that the bonus shares were intended to be sold under the phrase ‘cum rights’. He could by inquiring have ascertained that the shares had already been distributed; ‘at all events the defendant was not responsible for the plaintiff’s ignorance’.<sup>96</sup> On the other hand, De Villiers CJ emphasized that if the defendant had known or had reason to know that the plaintiff had been mistaken as to the meaning of the phrase but had deliberately remained silent, ‘relying upon the literal meaning of the terms’, the plaintiff would have been entitled to restitution of his performance.<sup>97</sup> In other words, he seemed to regard unconscionable conduct on the part of the defendant — knowledge or inducement of the mistake — as a reason for restitution in itself.

Thus it appears that in *Logan v Beit* De Villiers CJ applied a version of the requirement of excusable mistake rather similar to the one which he had applied in *Aliwal North v De Wet*. In both cases the plaintiff was required to demonstrate positively that his mistake had been an ‘excusable’, ‘justifiable’ or ‘reasonable’ one. In both cases the crucial factor in determining restitution was whether the recipient of the transfer in question had been responsible for the transferor’s mistake. De Villiers CJ drew no analytical distinction between these two restitutionary claims, despite the fact that *Logan v Beit* concerned a claim to recover contractual performance — the transferor’s mistake had both to invalidate the contract and to found restitution of the performance — whereas the *Aliwal North* case concerned an extra-contractual transfer which had not been owing under the relevant statute. In fact, the only significant difference between the approaches adopted in the *Aliwal North* and *Logan* cases was the procedural mechanism used to effect

<sup>94</sup> (1890) 7 SC 197.

<sup>95</sup> *Logan* supra note 94 at 215–16.

<sup>96</sup> *Ibid* at 216.

<sup>97</sup> *Ibid* at 215.

restitution. Whereas the *Aliwal North* case was pleaded and decided as an instance of the *condictio indebiti*, the Chief Justice saw the restitution of performance in the *Logan* case as an instance of the equitable remedy of *restitutio in integrum*.<sup>98</sup> This remedy is critical to a proper understanding of De Villiers CJ's approach to the requirement of excusable mistake. In particular, it is in *restitutio in integrum* that we find the origins of the *iustus error* concept relied on in both the *Aliwal North* and *Logan* cases.

#### 4.2 *The influence of restitutio in integrum*<sup>99</sup>

There is no unanimity regarding the nature of *restitutio in integrum* in Roman law. Traditionally it has been supposed that it constituted a particular species of restitutionary remedy: as part of the *ius honorarium*, it was one of a range of procedural mechanisms used by the Praetor to mitigate the harshness of the *ius civile*.<sup>100</sup> More recently, this view has been challenged: it has been argued that in Roman law the term '*restitutio in integrum*' may simply have denoted a generic response.<sup>101</sup> But whatever the historical position in Roman law, among the Roman-Dutch institutional writers *restitutio in integrum* does appear to have been regarded as a restitutionary remedy in its own right, with a number of key characteristics flowing from its origins in the *ius honorarium*.<sup>102</sup> First, although the procedural distinction between the *ius civile* and *ius honorarium* had long lost its significance, *restitutio in integrum* continued to be seen as an equitable action, designed to provide relief in cases where the application of the ordinary rule would yield a harsh result. Secondly, unlike a conventional action, in terms of which relief is available under specific conditions as of right, the *restitutio in integrum* of Roman-Dutch law was seen as discretionary. Finally, it was regarded as belonging to a separate remedial jurisdiction: in the words of Huber, '[*restitutio in integrum*] is really not an action, but an extraordinary remedy, by which in default of an ordinary action the Judge is requested to exercise his duty and power'.<sup>103</sup>

<sup>98</sup> Ibid at 215–17. See also the *restitutio in integrum* of contractual performance on grounds of *iustus error* in *Heatlie v Colonial Government* (1887) 5 SC 353, *Wiggins v Colonial Government* (1899) 16 SC 425 and *De Villiers v Parys Town Council* OPD [1910] 55.

<sup>99</sup> See further Helen Scott *Unjust Enrichment by Transfer in South African Law: Unjust Factors or Legal Ground?* (DPhil thesis, Oxford University, 2005) ch 2.

<sup>100</sup> On this traditional view see Reinhard Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 656–7 and 680 ff.

<sup>101</sup> Zimmermann op cit note 100 at 656–7, discussing Berthold Kupisch *In integrum restitutio under vindicatio utilis bei Eigentumsübertragungen in klassischen römischen Recht* (1974) 158ff.

<sup>102</sup> See especially Grotius *Inleiding* 3.48; Van Leeuwen *Roomsche Hollandsche Recht* 4.42; Huber *Heedendaegse Rechtsgeleertheit* 4.37; Voet *Commentarius ad Pandectas* 4.1, as well as the works cited by Visser in D P Visser 'Rethinking unjustified enrichment: A perspective of the competition between contractual and enrichment remedies' 1992 *Acta Juridica* 202 at 220–2.

<sup>103</sup> Huber *Heedendaegse Rechtsgeleertheit* 4.37.1 [Gane's translation].

The characterization of *restitutio in integrum* as equitable, discretionary and extraordinary by the Roman-Dutch jurists lent the remedy certain distinctive features. On the one hand, it was understood to include a wide range of responses, chief among which was the restitution of money and goods.<sup>104</sup> As for the grounds on which relief might be granted, these too were treated as potentially unlimited: *metus*, *dolus*, minority and absence received by far the fullest treatment, but several Roman-Dutch writers included *iustus error* as a nominate ground in this list,<sup>105</sup> following the opening fragments of D 4.1, the general title on *restitutiones in integrum*.<sup>106</sup> Thus Huber says that ‘the error must be just, not merely free from duplicity and simulation, but such that the person who says he erred must adduce an actual, effective cause outside himself, by which he was entangled in error and a transaction resulting in loss . . .’.<sup>107</sup> This combination of features — the wide range of responses encompassed by *restitutio in integrum*, as well as the explicit recognition of justifiable mistake (*iustus error*) as a named ground of relief in the sources — meant that *restitutio in integrum* was extremely apt to overlap with the *condictio indebiti*. In fact, none of the Roman-Dutch writers appears to have conflated these two remedies: they knew their Roman law too well for that. But even in early South African law, *restitutio in integrum* retained a large measure of the vitality which it had enjoyed in Roman-Dutch law, and accordingly still retained the potential to be applied in entirely new situations. Thus *restitutio in integrum* began to compete with the *condictio indebiti*, the existing remedy for effecting the recovery of mistaken transfers.

In *White Brothers v Treasurer-General*, decided in 1883, the relief sought was the restitution of duty alleged to have been unlawfully levied by the colonial government. De Villiers CJ treated the *condictio indebiti* of the duty on grounds of mistake and *restitutio in integrum* of the duty on grounds of ‘justus error’ as essentially identical remedies.<sup>108</sup> On the other hand, in *Umhlebi v Estate of Umhlebi and Fina Umhlebi*, Judge President Kotzé, the judge in *Rooth v The State*, exercised a previously unrecognized equitable jurisdiction in granting *restitutio in integrum* in respect of an order of the Supreme Court which had effected the transfer of land from the plaintiff to

<sup>104</sup> For example, Voet *Commentarius ad Pandectas* 4.1n1. See also Huber’s discussion of responses in *Heedendaegse Rechtsgeleertheit* 4.37.10. On the other hand, certain other writers appear to have regarded the remedy as an exclusively contractual one: see Grotius *Inleiding* 3.48.1 (speaking of obligations generally); Van Leeuwen *Roomsche Hollandsch Recht* 4.42.4; Van der Linden *Koopmans Handboek* 1.18.10. This divergence is due to the fact that Voet and Huber reflect more closely the position in Roman law.

<sup>105</sup> For example, Huber *Heedendaegse Rechtsgeleertheit* 4.37.12; Voet *Commentarius ad Pandectas* 4.1n26; Van der Linden *Koopmans Handboek* 1.18.10.

<sup>106</sup> D 4.1.1 (Ulpian Book 11 *On the Edict*) lists *metus*, fraud, minority and absence. To this, D 4.1.2 (Paul Book 1 *Opinions*) adds change of status and *iustus error* [translated by Watson as ‘justifiable mistake’].

<sup>107</sup> Huber *Heedendaegse Rechtsgeleertheit* 4.41.6 [Gane’s translation].

<sup>108</sup> (1883) 2 SC 322, 349.

her son, thus effectively ordering the restitution of the land itself. The basis for such intervention was the plaintiff's mistaken belief at the time of the order that her marriage was governed by customary rather than civil law, a mistake held to be a *iustus error* in the circumstances.<sup>109</sup> In granting *restitutio in integrum*, both De Villiers CJ and Kotzé JP understood themselves to be exercising a specifically equitable jurisdiction, relieving the deserving plaintiff of the consequences of his or her mistake by reversing the transfer which he or she had made. But while Kotzé JP distinguished between the causes of action inherent in the *condictio indebiti* and *restitutio in integrum*, as his decisions in the *Rooth* and *Umhlebi* cases respectively show, De Villiers CJ did not. The Chief Justice was encouraged to treat these remedies as interchangeable by the tradition, originating with the ancient sources, of emphasizing the 'equitable' character of the *condictio indebiti*.<sup>110</sup>

Thus it appears that the concept of *iustus error* was transplanted to the *condictio indebiti* directly from *restitutio in integrum*. *Restitutio in integrum* was the immediate source of the *iustus error* requirement applied by De Villiers CJ in both *Aliwal North v De Wet* — in which restitution was treated as an instance of the *condictio indebiti* — and *Logan v Beit* — in which restitution was treated as an instance of *restitutio in integrum*. This borrowing is perhaps unsurprising, since both these remedies could be used in the *ius commune* to effect the recovery of money or goods transferred by mistake. However, to the extent that the *condictio indebiti* and *restitutio in integrum* were regarded by the Chief Justice as essentially similar remedies — and it is clear from his decision in the *White Brothers* case in particular that they were — this was to have a profound effect on the way in which South African judges understood the *condictio indebiti*.<sup>111</sup>

#### 4.3 Consolidation of the requirement of *iustus error* in the context of the *condictio indebiti*

Chief Justice De Villiers' *iustus error* requirement quickly became orthodox throughout the British Colonies at the Cape and Natal. In *Chaffer v Wade and*

<sup>109</sup> *Umhlebi v Estate of Umhlebi and Fina Umhlebi* (1905) 19 EDC 237 at 249. The plaintiff's mistake was acknowledged to be a mistake of law. Nevertheless, it was held to be sufficient to found restitution. Cf *Rooth* supra note 80. See also *Stewart's Assignee v Wall's Trustee* (1885) 3 SC 243.

<sup>110</sup> According to Pomponius, 'by the law of nature it is fair that no-one become richer by the loss and injury of another': (Pomponius Book 21 *On Sabinus*, D 12.6.14, and Book 9 *Various Readings*, D 50.17.206 [Watson's translation].) By the *ius commune* this view was ubiquitous: hence for example the statement of the Roman-Dutch jurist Vinnius, to the effect that the *condictio indebiti* is an action granted 'ex bono et aequo': Vinnius *Selectae Quaestiones* 1.47. See the discussion of this passage in *Rooth* supra note 80 at 263. Also *Port Elizabeth Divisional Council v Uitenhage Divisional Council* 1868 Buch 221 at 225 (Connor J) and *Weinerlein v Goch Buildings Ltd* 1925 AD 282 at 296 (Kotzé JA).

<sup>111</sup> Moreover, it appears that *restitutio in integrum* — and the concept of *iustus error* in particular — acted as a conduit for the importing into South African law of the doctrine of equitable mistake in the English law of contract. See further Scott op cit note 99 ch 2.

*Sons*,<sup>112</sup> decided in 1905, the Supreme Court of Natal stated obiter that excusable mistake of fact was required to found the *condictio indebiti*. Bale CJ held, citing the *Aliwal North* case, that 'nor does every error of fact excuse, but only such errors as a man might fall into, notwithstanding ordinary care'.<sup>113</sup> Similarly, in *Peters v Adams*, decided in 1907, the court explicitly followed the *Aliwal North* case in regarding the inducement of the plaintiff's mistake by the defendant as crucial to determining 'justus error'.<sup>114</sup> It was held, following the reasoning in the *Aliwal North* case, that while an error concerning the plaintiff's own affairs would generally be considered 'supina aut affectata', 'if the plaintiff has been led into the mistake by the defendant himself he is entitled to relief. . .'.<sup>115</sup>

On the other hand, the courts of the South African Republic (after 1902 the Transvaal Province) rejected it out of hand. Like the Scottish courts of the late nineteenth and early twentieth centuries, they sought to repudiate this conception of the excusability requirement in favour of the English approach typified in *Kelly v Solari*<sup>116</sup> and *Townsend v Crowdy*.<sup>117</sup> In *Natal Bank Ltd v Roorda*,<sup>118</sup> a decision of the Witwatersrand High Court in 1903, the plaintiff bank had mistakenly honoured a cheque which had been countermanded by the drawer, having failed to pass on his letter to the ledger clerk on duty. Yet recovery of the money paid out was nevertheless permitted: having quoted extensively from that portion of the speech of Baron Parke in *Kelly v Solari* in which he held that 'money . . . paid under the impression of the truth of a fact which is untrue . . . may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact',<sup>119</sup> Smith J simply remarked that 'the principles of Roman-Dutch law are similar'.<sup>120</sup> Four years later, in *Natal*

<sup>112</sup> NLR 27 (1905) 6 at 75–6.

<sup>113</sup> *Chaffers* supra note 112 at 75.

<sup>114</sup> NLR 28 (1907) 429. See also the very similar decision in *Bell v Ramsay* 1928 NPD 266.

<sup>115</sup> *Peters* supra note 114 at 433. In fact the plaintiff, a clerk at the Government Savings Bank, had paid out £5 to the defendant in the mistaken belief that there were sufficient funds in his account; this mistake arose from a previous error on the part of the plaintiff (he had entered a withdrawal as a credit instead of a debit) and not from any conduct on the part of the defendant. Thus the plaintiff's mistake in this respect was held to be insufficient to found the *condictio*, although ultimately the case was decided on another ground.

<sup>116</sup> *Supra* note 61.

<sup>117</sup> (1860) 8 CB Rep NS 477. Cf Section 3.2 above: *Kelly v Solari* and *Townsend v Crowdy* were precisely the English cases relied on by Lord Shand in *Balfour v Smith and Logan* supra note 47, the decision in which he repudiated Lord Chancellor Brougham's approach. See also *Dalmellington Iron Company* supra note 63 and *Moore's Executors v McDermid* supra note 68.

<sup>118</sup> 1903 TH 298.

<sup>119</sup> *Kelly v Solari* supra note 61 at 59.

<sup>120</sup> Oddly he cited the *Aliwal North* case as authority for this proposition: *Roorda* supra note 118 at 303.

*Bank v Kurunda*,<sup>121</sup> another member of the same court stated the position even more strongly, remarking obiter that ‘where an action is brought to recover money paid under mistake, the question is whether the claimant was ignorant of the facts, not whether with greater diligence he might have discovered them . . . though the neglect of means of knowledge may be important on the question of waiver or acquiescence’.<sup>122</sup> The similarities between the development of the excusability requirement in South African and Scottish law are striking.<sup>123</sup>

However, during the course of the twentieth century this conception of the excusability requirement was comprehensively rejected by the South African courts in favour of the far more restrictive versions of the requirement adopted in *Divisional Council of Aliwal North v De Wet* and *Logan v Beit*.<sup>124</sup> In *Rahim v Minister of Justice*,<sup>125</sup> decided by the Appellate Division in 1964, the same vehicle had mistakenly been attached twice by a messenger of the court in respect of two different judgment debts. The Minister sought to recover the amount paid to the second creditor by means of the *condictio indebiti*. Like Kotzé CJ in the *Rooth* case, Van Blerk JA cited the work of the eighteenth-century jurist Glück as authority for the proposition that payment should have been made as the result of an excusable error, in the sense that it should not have been based on gross ignorance.<sup>126</sup> He also referred to Leyser’s *Meditationes*, to the effect that gross and inexcusable mistake bars the *condictio indebiti*.<sup>127</sup> Thus far, he appeared to be embracing the negative formulation of the excusability requirement found in D 22.6, in Voet,<sup>128</sup> and in the writings of the Pandectists on the *condictio indebiti*, according to which mistake of fact was presumed to be excusable and restitution was precluded only by gross negligence. On turning to the facts of the case, however, Van Blerk JA denied recovery, emphasizing that

<sup>121</sup> 1907 TH 155 (Bristowe J).

<sup>122</sup> *Kurunda* supra note 122 at 165. Bristowe J relied specifically on *Kelly v Solari* and *Townsend v Crowdy* in this respect. In fact, this approach was applied as late as 1949 by the Natal Provincial Division. In *Durban Corporation Superannuation Fund v Campbell* 1949 (3) SA 1057 (N), the plaintiff sought to recover an overpayment made to the defendant as executrix of her deceased husband’s estate. De Wet J chose to regard the claimant’s ‘gross negligence’ as a matter of purely evidentiary significance: ‘I do not think that one can spell out from the acts of negligence an intention to make a gift of the excess payment . . . Although negligence contributed toward the mistake being made, it, nonetheless, was a genuine mistake.’ (At 1066.) See also *Vorster v Marine & Trade Versekeringsmaatskappy Bpk* 1968 (1) SA 130 (O) 133.

<sup>123</sup> See Section 3.2 above.

<sup>124</sup> However, in *Union Government v National Bank of South Africa* 1921 AD 121 the Appellate Division, while referring specifically to the requirement of *iustus error*, appears to have interpreted it rather loosely, in that recovery was permitted despite the fact that the defendants were in no way responsible for the plaintiffs’ rather careless mistake: At 126 (Innes CJ) and 140 (Juta JA).

<sup>125</sup> 1964 (4) SA 630 (A).

<sup>126</sup> *Rahim* supra note 125 at 634.

<sup>127</sup> *Ibid.*

<sup>128</sup> Voet *Commentarius ad Pandectas* 12.6n7.

'[the employee of the Minister] . . . had the means of knowledge and the opportunity to ascertain the true facts. He was not led into the mistake by somebody else. . . . He was by no means justified in assuming after a futile enquiry that the vehicle was the property of Hoosen.'<sup>129</sup>

Thus it seems that Van Blerk JA in fact treated objectively blameless mistake as a positive element in the Minister's claim to recover. In particular, he appears to have regarded the inducement of the mistake by the recipient of the transfer as largely determinative of the question of liability. Thus his approach strongly resembled that of De Villiers CJ in *Aliwal North v De Wet*.

Since the decision in the *Rahim* case the inducement of the payer's factual error by the recipient has frequently been identified as a key factor in determining excusable mistake in the context of the *condictio indebiti*. Although he decided the case on a different basis, in *Vorster v Marine & Trade Versekeringsmaatskappy, Bpk*<sup>130</sup> Smit J emphasized the importance of inducement in determining the equities as between the parties:

'Defendant himself helped to mislead the claimant. It would be a pity if the law was not to allow an insurance company, which in good faith accepted a claim against it and paid it, to recover the amount when it finds out that the policy is no longer operative and defendant had submitted the claim wrongfully.'<sup>131</sup>

This dictum was referring to with approval in *Calder v South African Mutual Life Assurance Society*,<sup>132</sup> a case in which the inducement of the plaintiff's error by an outsider to the transaction was considered sufficient to found restitution. On the other hand, in *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd*<sup>133</sup> McEwan J denied that inducement of the plaintiff's mistake was always a necessary condition for success in the *condictio indebiti*, permitting restitution despite the absence of such inducement.<sup>134</sup> However, his decision appears to have been based on the fact that the claimant's mistake must in fact have been known to the defendant:

'[I]t was immediately apparent to [the agents of the defendant] that somewhere along the line someone had made an unintentional mistake . . . [Thus] it becomes clear that both in law and in equity the defendant was not entitled to take the benefit of the money merely because there may have been some negligence in the way in which the matter was handled . . .'.<sup>135</sup>

<sup>129</sup> *Rahim* supra note 125 at 634–5.

<sup>130</sup> 1968 (1) SA 130 (O) 133.

<sup>131</sup> *Vorster* supra note 130 at 133. See also the discussion of the *Vorster* case in the *Calder* case (see note 132 below) where the English translation of the passage reproduced here is given at 289.

<sup>132</sup> 1972 (4) SA 285 (R).

<sup>133</sup> 1977 (1) SA 298 (W).

<sup>134</sup> *African Diamond Exporters* supra note 133 at 307–9.

<sup>135</sup> *Ibid* at 306.

## 4.4 Willis Faber Enthoven v Receiver of Revenue

This trend culminated in 1992, in the decision of the then Appellate Division in *Willis Faber Enthoven v Receiver of Revenue*.<sup>136</sup> Willis Faber Enthoven (Pty) Ltd, a company formed when two separate companies trading as insurance brokers merged, sought to recover certain money paid as tax by those companies to the Receiver of Revenue in the mistaken belief that they were obliged by statute to do so. The main obstacle to the claims was the fact that the mistakes in question has been mistakes of law; thus the Appellate Division had first to grapple with the question whether the mistake of law rule established in the *Rooth* case ought to be abrogated. In this Hefer JA was influenced by the fact that there was a large body of South African authority in which the rule that ignorance of the law could not found restitution had been relaxed on equitable grounds, that is, in the law relating to the renunciation of rights.<sup>137</sup> In particular, he singled out a number of early twentieth-century decisions, such as that in *Umhlebi v Estate of Umhlebi and Fina Umhlebi*,<sup>138</sup> in which *restitutio in integrum* on grounds of *iustus error* had been granted despite the fact that the plaintiff's mistake was one of law.<sup>139</sup>

Having concluded that the mistake of law rule should be abrogated, the question then arose whether the requirement of excusable mistake should be extended to include mistake of law as well as mistake of fact. Hefer JA reviewed the authority in which the requirement of an excusable mistake of fact had been approved,<sup>140</sup> particularly the *Rahim* case, and concluded that all mistakes should be subjected to the same requirement, 'so that the assimilation between the two kinds of error be complete'.<sup>141</sup> Indeed, despite academic criticism of the excusability requirement,<sup>142</sup> its retention and expansion were justified by considerations of equity underlying the *conductio indebiti*: 'the historic nature of the remedy as one granted *ex aequo et bono* should be preserved and care should be taken to avoid it being turned into a tool of injustice to the receiver of money paid *indebite*'.<sup>143</sup> Regarding the exact meaning of 'excusable mistake', 'all that need be said is that, if the payer's conduct is so slack that he does not in the Court's view deserve the

<sup>136</sup> *Supra* note 2.

<sup>137</sup> *Willis Faber supra* note 2 at 221–3.

<sup>138</sup> *Supra* note 109.

<sup>139</sup> For example, *Stewart's Assignee v Wall's Trustee supra* note 109; *Ex parte Joannou et Uxor* 1942 TPD 193. *Willis Faber supra* note 2 at 221–2.

<sup>140</sup> *Union Government v National Bank of South Africa supra* note 124; *Rahim v Minister of Justice supra* note 125; *Müller v Bellville Municipality* 1973 (1) SA 914 (C); *Rulten NO v Herald Industries (Pty) Ltd* 1982 (3) SA 600 (D)

<sup>141</sup> *Willis Faber supra* note 2 at 224.

<sup>142</sup> See generally De Vos *op cit* note 20 at 184–5; J C van der Walt 'Die *conductio indebiti* as verrykingsaksie' (1966) 29 *THRHR* 220 at 226; Visser *op cit* note 11 at 253–4, 294–8.

<sup>143</sup> *Willis Faber supra* note 2 at 224.

protection of the law, he should, as a matter of policy, not receive it'.<sup>144</sup> More specifically,

'[m]uch will depend on the relationship between the parties; on the conduct of the defendant who may or may not have been aware that there was no *debitum* and whose conduct may or may not have contributed to the plaintiff's decision to pay; and on the plaintiff's state of mind and the culpability of his ignorance in making the payment.'<sup>145</sup>

Finally, Hefer JA emphasized that the burden of proving such an excusable mistake rested on the plaintiff throughout.<sup>146</sup>

Applying these principles to the facts, Hefer JA concluded that the incorrect belief as to its liability to pay the tax had been induced in the mind of Robert Enthoven's agent by a circular distributed by the Registrar of Insurance, this mistaken belief having been later confirmed by a conversation with the Assistant Registrar of Insurance. It followed that Robert Enthoven's mistake had indeed been an excusable one.<sup>147</sup> However, concerning the second company, Willis Faber, here there was no evidence to show that it was the Registrar's circular that had induced their mistake, or that Willis Faber had made inquiries on the point. Thus Willis Faber failed to recover, despite the admitted plausibility of their mistaken view, and the fact that their error was shared by many others, including the recipients.<sup>148</sup>

Thus the approach adopted by Hefer JA in *Willis Faber Enthoven v Receiver of Revenue* — the culmination of a line of authority in South African law starting with the decisions of De Villiers CJ in the last decade of the nineteenth century — required that excusable mistake be positively demonstrated in every case: 'equity' required that the plaintiff's mistake be shown to be a reasonable or justifiable one in order to merit 'the protection of the law'. As we have seen, Hefer JA referred — in the context of the mistake of law rule — to a number of cases in which the remedy of restitutio in integrum had been applied, either on the basis of *iustus error* or for some other reason.<sup>149</sup> Although he did not specifically relate these cases to the excusability question, it is difficult to resist the conclusion that he was

<sup>144</sup> Ibid at 224.

<sup>145</sup> Ibid at 224.

<sup>146</sup> Ibid at 224–5.

<sup>147</sup> Ibid at 225.

<sup>148</sup> In fact, Van den Heever JA went even further in her minority judgment regarding Robert Enthoven's claim. She held that in a case like this one, taxpayers were under a duty to take reasonable steps to establish the true legal position: 'Mere casual enquiry will not suffice to excuse ignorance. (*Willis Faber supra* note 2 at 227). The fact that Robert Enthoven's agent had made positive inquiries as to the meaning of the circular, and that the Assistant Registrar had misrepresented to him the true legal position, was not sufficient to discharge that duty. In fact, Van den Heever JA appeared to be swayed by the fact that the Assistant Registrar's misrepresentation was subjectively excusable under the circumstances.

<sup>149</sup> It had been applied, for example, where the parties to an antenuptial contract had been mistaken as to its effects: see *Ex parte Joannou et Uxor supra* note 139; and in cases involving the exercise of an heir of his right to adiate or repudiate the terms of a

influenced in this respect by the reasoning employed there. As for the circumstances in which a mistake would be said to be excusable, as in *Aliwal North v De Wet*, *Logan v Beit* and those twentieth-century cases considered in the previous section, inducement of the plaintiffs' mistakes by the Receiver's agents seems to have been regarded as a crucial factor in determining whether the *conductio indebiti* would lie. But in addition to this consideration, Hefer JA also specifically enumerated as a factor relevant to excusability whether or not the defendant had been aware of the plaintiff's mistake. In this he seemed to be looking towards the version of the *iustus error* requirement applied in *Logan v Beit* in particular: his focus appears to have been exclusively on the conduct of the defendant. The plaintiff's state of mind and the culpability of his ignorance in making the payment was treated as a third, independent factor, in addition to inducement of the mistake or knowledge of the mistake on the part of the recipient. Thus it seems that Hefer JA did not view the inducement of the error by the recipient of the transfer solely as a pointer to the plaintiff's culpability. Rather, he saw this — and the question of the recipient's knowledge of the claimant's mistake — as considerations relevant in themselves.

In the fifteen years since it was decided, *Willis Faber Enthoven v Receiver of Revenue* has frequently been referred to and applied. For example, in *Firstrand Bank Ltd (formerly First National Bank of SA Ltd) v Absa Bank Ltd*, a bank was denied recovery of an amount paid out in consequence of a complex fraud on the ground that it was unable to demonstrate that its mistake as to its liability to make the payment had been excusable.<sup>150</sup> Hefer J regarded as particularly decisive the failure of one of the bank's employees to obtain confirmation of its indebtedness, having been alerted to the possibility of fraud by a third party. He concluded that 'the applicant's ignorance . . . was culpable and self-induced. Such excuses as were offered . . . fall a long way short of persuading me that the Court should come to the applicant's assistance.'<sup>151</sup>

## 5. ANALYSIS: THREE VERSIONS OF THE REQUIREMENT OF EXCUSABLE MISTAKE

The conclusions reached so far can be briefly summarized. In both Scottish and South African law the excusability of the transferor's mistake is a relevant consideration in determining liability to restore under the *conductio indebiti*. The use of the term 'excusable' in both systems suggests that the requirement is a homogenous one. However, as we have seen, the requirement has in fact evolved very differently in each of these jurisdictions. It appears from sections 3 and 4 that there are at least three distinct ways in which the concept of 'excusable mistake' can be understood.

will: see *Van Wyk v Van Wyk's Estate* 1943 OPD 117 and *Ex parte Estate Van Rensburg* 1965 (3) SA 251 (C).

<sup>150</sup> *Supra* note 2.

<sup>151</sup> *Firstrand Bank Ltd v Absa Bank Ltd* *supra* note 2 at 815.

First, excusability can be understood as a defence — a bar to recovery — to be raised by the recipient of the transfer in response to the transferor's prima facie claim. The thinking underlying this version of the excusability requirement is that while mistaken payments ought prima facie to be given back, carelessness on the part of the payer in believing himself liable to pay might disqualify him from succeeding in the *condictio indebiti*. It follows that this version of the excusability requirement is closely associated with the rule precluding restitution on grounds of mistake of law, since it is often advanced as a justification for the mistake of law rule that such mistakes are necessarily careless. Moreover, according to this version of the requirement, whether or not the recipient of the transfer shared the careless mistake seems to be a relevant consideration in determining liability: if indeed he did, it seems reasonable that restitution should be permitted; in other words, carelessness on the part of the recipient offsets carelessness on the part of the claimant.<sup>152</sup> To the extent that the requirement of excusable mistake has been recognized in Scottish law, it is this version of the requirement which has emerged as the dominant one during the course of the nineteenth and twentieth centuries. It has recently been entrenched in Scottish law through the decision of the Court of Session in *Morgan Guaranty Trust Company of New York v Lothian Regional Council*, in which it was held that careless or inexcusable mistake is one of the factors to be taken into account in determining the balance of equities between the parties.<sup>153</sup> This is also the version of the requirement found in the Roman sources themselves;<sup>154</sup> in the work of the Roman-Dutch writer Voet;<sup>155</sup> in the writings of the German Pandectists;<sup>156</sup> and in the judgment of Kotzé CJ in *Rooth v The State*.<sup>157</sup>

A second, distinct version of the excusability requirement is one in terms of which the claimant himself must demonstrate that he was not to blame for the mistake. Although this second version resembles the first, in that both turn on the culpability of the transferor's mistake, here the transferor must positively demonstrate that his conduct was free of negligence, and that therefore his mistake ought to be excused. This shift in emphasis, from defence to positive requirement for recovery, seems to owe something to the influence of *restitutio in integrum*, at least in South African law. It means that the requirement of excusability tends to be understood more objectively here than in the context of the first version. An important factor in this respect appears to be the lack of a general test for determining the culpability of mistakes, like the foreseeability test employed in the law of negligence. The transferor cannot compare his conduct with that of a notional reasonable person. Given that the transferor has to demonstrate the absence

<sup>152</sup> Cf Evans-Jones op cit note 1 at 93–4.

<sup>153</sup> Supra note 1 at 166 (Lord Hope), 173 (Lord Clyde), 175 (Lord Cullen).

<sup>154</sup> See Section 2 above.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid.

<sup>157</sup> Supra note 80. See Section 4.1 above.

of negligence, this lack of a stable test tends to militate in favour of an objective approach to fault. In practice, the transferor will succeed only if he can show that he was not responsible for his mistake at all: that it was caused by something beyond his control. The simplest way for the transferor to do this is to demonstrate that his mistake was induced by a representation made by the other party to the transaction, or by a third party. This is the approach which appears to have been introduced into Scottish law by Lord Brougham in *Wilson and McLellan v Sinclair*<sup>158</sup> and followed in *Youle v Cochrane*<sup>159</sup> and *Balfour v Smith and Logan*,<sup>160</sup> although as we have seen this version of the excusability requirement was comprehensively rejected in Scottish law during the course of the nineteenth and twentieth centuries.<sup>161</sup> Moreover, it appears to have been dominant in the judgment of De Villiers CJ in the Cape Supreme Court in *Aliwal North v De Wet*, and in the decision of the South African Appellate Division in *Rahim v Minister of Justice*.<sup>162</sup> Hefer JA also enumerated the culpability of the plaintiff's ignorance as one of the factors to be addressed by the plaintiff in order to demonstrate excusability in the *Willis Faber Enthoven* case.<sup>163</sup>

As for the third version of the excusability requirement, it resembles the previous one, in that here too it must be actively demonstrated that the transferor's mistake was excusable. But in fact this version of the requirement seems to go further: according to this approach, the recipient will be compelled to give up the benefit transferred only if it would be unconscionable for him to retain it. Most frequently, the consideration justifying such intervention is the fact that the recipient himself induced the transferor's error. This is one of the simplest and most direct ways for the transferor to demonstrate that it would be unconscionable for the recipient to insist on keeping the money or goods transferred. Thus the second and third versions of the requirement tend to converge in practice, since each tends to permit restitution only where the transferor's mistake has been induced by the representation of another. However, in the case of the second version, the payment can be induced by an outsider to the agreement, whereas in the case of the third, it must be the recipient who induced it. On the other hand, knowledge of the transferor's mistake on the part of the recipient is relevant to the third version only. Where the circumstances are such that relief is granted, according to this approach the transferor's mistake is designated an 'excusable' or 'reasonable' mistake. But in truth this term is a misnomer, since the focus of this approach is on the knowledge and conduct of the recipient. Although this third version of the excusability requirement is evident in the

<sup>158</sup> *Supra* note 35 at 409.

<sup>159</sup> *Supra* note 44.

<sup>160</sup> *Supra* note 47.

<sup>161</sup> See Section 3.2 and 3.3 above.

<sup>162</sup> *Supra* note 125.

<sup>163</sup> *Willis Faber supra* note 2.

speech of Lord Brougham in *Dixons v The Monkland Canal Company*,<sup>164</sup> decided in 1831, it appears never to have taken root in Scottish law. On the other hand, it is this third version of the requirement which appears dominant in modern South African law, due to the influence of the equitable remedy of *restitutio in integrum* on the *condictio indebiti*. It is particularly evident in the majority judgment of Hefer JA in *Willis Faber Enthoven v Receiver of Revenue*. Moreover, while the decision in *Calder v SA Mutual Life Assurance Society*<sup>165</sup> is compatible only with the second version of the excusability requirement, since it concerns inducement of the plaintiff's error by an outsider to the transaction, the decision in *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd*<sup>166</sup> can be reconciled only with the third version of the requirement, since the fact that the recipient of the transfer knew or must have known of the plaintiff's mistake appears to have been regarded as a critical factor in founding restitution in that case.

#### 6. IS ANY OF THESE THREE VERSIONS OF THE EXCUSABILITY REQUIREMENT DEFENSIBLE?

Finally, the question arises whether any or all of these three versions of the requirement of excusable mistake is compatible with the principles underlying the *condictio indebiti*. This in turn raises a more fundamental question: what precisely are these principles? In fact, both Scotland and South Africa appear to recognize a 'mixed approach' to the *condictio indebiti*, in terms of which the transferor must demonstrate not only a mistake as to his liability to pay but also the absence of that liability. According to Lord Hope in the *Morgan Guaranty* case, 'the essentials of the *condictio indebiti* are that the sum which the pursuer paid was not due and that he made the payment in error'.<sup>167</sup> The dominant conception of the *condictio indebiti* in South African law is similar,<sup>168</sup> although in the *Willis Faber* case Hefer JA de-emphasized the mistake element.<sup>169</sup> However, it has recently been argued with respect to both jurisdictions that the mistake element is extraneous, and that both Scottish and South African law should adopt instead a 'pure' absence of legal ground approach, in terms of which liability is triggered solely by the transfer of an amount not owed, an *indebitum*, subject to a

<sup>164</sup> *Supra* note 37.

<sup>165</sup> *Supra* note 132.

<sup>166</sup> *Supra* note 133.

<sup>167</sup> *Morgan Guaranty Trust* *supra* note 1 at 165.

<sup>168</sup> See e.g. the recent decision of the Supreme Court of Appeal in *ABSA Bank Ltd v Leech NNO* 2001 (4) SA 132 (SCA), in which the need to demonstrate mistake as well as the transfer of an *indebitum* was strongly stated. South African law also recognizes other unjust factors such as compulsion in the context of the *condictio indebiti*: see De Vos *op cit* note 20 at 172; Daniel Visser 'Unjustified enrichment' in Francois du Bois et al (eds) *Wille's Principles of South African Law* 9 ed (2007) 1041 at 1058–64.

<sup>169</sup> *Willis Faber* *supra* note 2.

defence of knowledge or voluntariness.<sup>170</sup> Thus in addressing the question posed in this section it is important to consider both analyses of the *condictio*. However, even if it is concluded that a particular version of a requirement is compatible with the principles underlying the *condictio indebiti*, a further question arises, namely, whether there is any compelling argument of policy or equity in favour of its adoption or retention. This question will be addressed primarily with respect to South African law, since it is here that the requirement continues to have practical effect.

### 6.1 *The defence of careless mistake*

As we have seen, according to the first version of the excusability requirement, the version which appears to be dominant in Scottish law, inexcusable mistake on the part of the transferor is regarded as a defence to be raised by the recipient once a *prima facie* cause of action has been established. Although the subjective carelessness of the pursuer's mistake may defeat liability if established by the defendant, its absence is not an ingredient in the pursuer's claim. It follows that whether the elements of this claim are correctly analysed as mistake together with the payment of an *indebitum*, or whether the transfer of the *indebitum* is itself enough to found the claim, subject to a defence of knowledge or voluntariness, this version of the excusability requirement is compatible with the principles underlying the *condictio indebiti*. As a defence, it functions independently of the elements necessary to constitute a *prima facie* claim. This point was specifically made by Lord Hope and Lord Clyde in the *Morgan Guaranty* case.<sup>171</sup> It seems that this version of the requirement would be equally compatible with the principles underlying the *condictio indebiti* in South African law.

Nevertheless, the question arises whether there is any compelling argument of equity or policy in favour of the retention of this requirement. Peter Birks argued in the context of English law that the best justification for the defence of careless mistake was to be found in its role as a mechanism for protecting the recipient's reliance: he proposed rationalizing this defence as an instance of estoppel by representation.<sup>172</sup> Clearly the carelessness of the transferor's error does not necessarily correspond to the degree of reliance which the transfer engenders on the part of the recipient.<sup>173</sup> Nor is the representation inherent in the transfer — namely, that the recipient was entitled to it — normally sufficient in itself to found an estoppel, at least in

<sup>170</sup> On the analysis of the *condictio indebiti* in Scottish and South African law see e.g. Niall R. Whitty & Daniel Visser 'Unjustified Enrichment' in Reinhard Zimmermann, Daniel Visser & Kenneth Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 399 at 410–15.

<sup>171</sup> *Morgan Guaranty Trust* supra note 1 at 166 (Lord Hope), 173 (Lord Clyde); also 175 (Lord Cullen)

<sup>172</sup> Birks op cit note 32.

<sup>173</sup> Ibid at 182–4.

English law.<sup>174</sup> But where the transferor was under a duty of accuracy because he alone had the means of knowledge by which the mistake could have been avoided, he ought to be estopped from denying that the recipient was entitled to the transfer.<sup>175</sup> Birks argued that estoppel might also operate where the transferor, although not under a duty of accuracy, nevertheless made an implicit collateral representation that he had carefully checked the relevant facts, in circumstances where there was considerable inequality between the parties as to the means of knowledge necessary to avoid the mistake.<sup>176</sup> In cases of this kind, where the recipient has suffered prejudice or detriment as a result of his reliance on the transferor's representation, the defence of estoppel will arise.<sup>177</sup> As Birks pointed out, the carelessness of the transferor constitutes the factual background to the defence, although analytically 'estoppel and negligence have nothing to do with one another'.<sup>178</sup>

South African law recognizes a defence of estoppel by representation which is essentially similar to that applied in English law: where the defendant has relied on a (negligent) representation made by the plaintiff to his detriment, the plaintiff is estopped from denying its truth.<sup>179</sup> Although there is little discussion of estoppel by writers on the law of unjustified enrichment, estoppel has occasionally been pleaded in South African law in response to the *condictio*, both in respect of the representation inherent in the fact of the transfer in cases where the plaintiff appears to have been under a duty of accuracy<sup>180</sup> and in cases where the transferor has made a collateral representation as to the recipient's entitlement to the transfer.<sup>181</sup> Thus Birks's reinterpretation of the defence of careless mistake as an instance of estoppel appears to be potentially available in South African law too. However, there does not seem to be any scope for the operation of the doctrine of estoppel outside cases where the recipient has consumed the money or goods transferred, at least in part, since as we have seen, these defences arise only where the recipient has suffered prejudice or detriment as a result of his reliance on the transferor's representation.<sup>182</sup> Thus it seems that any role which the defence of estoppel might play in blocking the restitution of

<sup>174</sup> For a recent account of the doctrine of estoppel in English law, see Andrew Burrows *The Law of Restitution* 2 ed (2002) 529–32; Graham Virgo *The Principles of the Law of Restitution* 2 ed (2006) 675–84.

<sup>175</sup> Birks op cit note 32 at 188–90.

<sup>176</sup> Ibid at 193–7.

<sup>177</sup> Ibid at 181–2; Burrows op cit note 174 at 532–8; Virgo op cit note 174 at 679–81.

<sup>178</sup> Birks op cit note 32 at 198.

<sup>179</sup> See PJ Rabie 'Estoppel' in W A Joubert (founding ed) *The Law of South Africa* vol 9, 2 ed (2005) paras 652–76.

<sup>180</sup> *Durban Corporation Superannuation Fund v Campbell* 1949 (3) SA 1057 (D) 1066–8. See Section 4.3 above.

<sup>181</sup> *Absa Bank Ltd v De Klerk* 1999 (1) SA 861 (W).

<sup>182</sup> On the requirement of prejudice in the South African law of estoppel, see LAWSA op cit note 179 para 663.

transfers made under careless mistakes is largely obviated by the recognition of the defences of change of position or loss of enrichment. This is particularly so if estoppel operates not as a complete defence to the transferor's cause of action but rather bars his claim only to the extent that the recipient has relied on it to his detriment.<sup>183</sup> In this respect it is significant that the defence of change of position was formally recognized in English law only in *Lipkin Gorman (a firm) v Karpnale Ltd*,<sup>184</sup> almost two decades after Birks's views on this question were first published. In modern South African law, if the recipient has divested himself of the goods or money received in the belief that he was entitled to it, at least where that belief was reasonable, he cannot generally be compelled to make restitution in kind.<sup>185</sup> It follows that even if the defence of carelessness could be reinterpreted so that it functioned as a species of estoppel, the defence of loss of enrichment would render such a defence largely unnecessary. For example, in *Absa Bank Ltd v De Klerk*,<sup>186</sup> a case involving an express representation, the defence of estoppel was refused because the defendant was held to have suffered no prejudice: he had paid the money received from the plaintiff bank to a third party to whom he was indebted. Thus the requirement of prejudice was understood in such a way as to make the overlap between estoppel and loss of enrichment almost complete.<sup>187</sup>

In fact, as we have seen, the defence of careless mistake has only very seldom influenced the outcomes of cases in Scottish law. Moreover, in the *Morgan Guaranty* case the inexcusability of the pursuer's mistake was specifically characterized as only one of a potentially unlimited range of factors which might give rise to an equitable defence to the *condictio indebiti* in Scottish law.<sup>188</sup> Whether such a global equitable defence is desirable is a question beyond the scope of this treatment. But it is clear at least that this (re)characterization of the defence by the Court of Session makes it even more unlikely that careless mistake will be successfully relied upon as a defence in the future. Moreover, this marginalization of the defence in Scottish law suggests that it is not adequately supported by arguments of policy or equity. As Daniel Visser has observed, the law

<sup>183</sup> Regarding the position in English law see *Avon County Council v Howlett* [1983] 1 WLR 605 and *Scottish Equitable plc v Derby* [2001] 3 All ER 818 (CA), discussed by Burrows *op cit* note 174 at 533–8 and Virgo *op cit* note 174 at 684 and 711–13.

<sup>184</sup> [1991] 2 AC 548.

<sup>185</sup> See *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A); Visser *op cit* note 168 at 1048–51.

<sup>186</sup> *Supra* note 181.

<sup>187</sup> See also *Durban Corporation* *supra* note 180 at 1066–68. Here the defendant's attempt to argue that the plaintiff was estopped by its negligence from recovery was rejected by the court on the basis that the defendant had failed to allege that she had suffered any prejudice.

<sup>188</sup> *Morgan Guaranty Trust* *supra* note 1 at 166 (Lord Hope), 173 (Lord Clyde); also 175 (Lord Cullen). See further Section 3.3 above.

recognizes no general policy in favour of the sanctioning of carelessness.<sup>189</sup> Equally, the circumstances in which equity requires that the defender be permitted to retain unjustified enrichment in the absence of a change of position are extremely limited, if they exist at all.<sup>190</sup> Indeed, the demise of the defence of careless mistake in Scottish law may be directly linked to the rise of the defence of change of position, particularly after the decision in *Credit Lyonnais v George Stevenson & Co Ltd* in 1901.<sup>191</sup>

## 6.2 *The requirement of blameless mistake*

According to the second version of the excusability requirement, blameless mistake must be demonstrated by the transferor in every case. Absence of fault on the part of the transferor is treated as one of the elements of the *condictio indebiti*, along with mistake. In other words, unlike the previous one, this version of the excusability requirement assumes that blamelessness is an essential ingredient in the pursuer's cause of action. In fact, this version of the excusability requirement rests on an analogy between mistake as a reason for restitution and mistake as an excuse for wrongful conduct. It is as if the transferor has done something wrong — as if he has committed a crime or a delict — and is now seeking to exonerate himself by reliance on his mistake. If this analogy is accepted, the requirement of blameless mistake follows quite naturally. According to Aristotle,<sup>192</sup> wrongful conduct which is performed in a state of ignorance ought not to be punished, since ignorance excuses the act in question. But where the actor's ignorance was careless, in the sense that it was in his power to avoid it, then the actor will nevertheless be held responsible for his act. Accordingly, following the analogy through to its conclusion, just as a culpable mistake cannot be relied upon as an excuse for wrongful conduct, so it cannot substantiate the *condictio indebiti*. The transferor is seeking the court's pardon for the transfer, and where he is at fault, he forfeits that pardon.

However, it seems that this analogy must be false. Mistake plays an entirely different role in the context of the restitution of transfers to the one which it plays in exonerating wrongful acts. Whether the elements of the *condictio indebiti* are correctly analysed as mistake together with the payment of an *indebitum* (an amount not owed) or whether the transfer of an *indebitum* is enough in itself to found this claim subject to a defence of knowledge, mistake is relevant because it shows that the transfer was involuntary, or at least not voluntary. According to the 'mixed' approach to the *condictio indebiti* in particular — the approach which is necessarily implied by this version of the requirement of excusable mistake — it is this involuntariness which gives at least part of the reason for restitution.<sup>193</sup> To borrow the

<sup>189</sup> Visser op cit note 11 at 294.

<sup>190</sup> For example, Evans-Jones op cit note 21 at 94.

<sup>191</sup> (1901) 9 SLT 93 (OH).

<sup>192</sup> *Nicomachean Ethics* 1110b18–1111a2; 1113b22–1114a3. Cf note 7 above.

<sup>193</sup> See Whitty & Visser op cit note 170 at 410–15.

language of Herbert Hart, mistakes which found the *condictio indebiti* are invalidating mistakes, not excusing mistakes.<sup>194</sup> It follows that the fact that the mistake was ‘inexcusable’ — culpable — cannot logically affect the pursuer’s cause of action in unjust enrichment, as it might do if he were seeking to rely on his mistake as an excuse for wrongful conduct. Nor can the concept of ‘probable’ or ‘plausible’ mistake have any role to play here.<sup>195</sup> As long as the evidence establishes a genuine mistake on the part of the plaintiff, that is sufficient to demonstrate the necessary involuntariness on the part of the plaintiff (or at least it is sufficient to exclude voluntariness). The requirement of blameless mistake rests on a fundamentally mistaken conception of the *condictio indebiti*. It follows from this that to the extent that this version of the requirement is present in Scottish and South African law, it cannot be defended. This conclusion is more significant in respect of South African law than Scottish law, since as we have seen, this version of the requirement of excusable mistake has been comprehensively rejected by the Scottish courts, whereas it continues to be applied in modern South African law.

In fact, like the defence of careless mistake, the requirement of blameless mistake effectively protects the recipient’s interest in the security of his receipt. But because this version of the requirement places the burden of demonstrating excusable mistake on the transferor, the protection which it affords is significantly more extensive than that provided by the first version of the requirement: indeed, its effectiveness is amply demonstrated by the decisions in *Rahim v Minister of Justice*,<sup>196</sup> *Firstrand Bank Ltd v Absa Bank Ltd*<sup>197</sup> and the *Willis Faber* case. However, this shows that the requirement of blameless mistake is indefensible as a matter of policy and equity. As we have seen, the representation as to entitlement inherent in the transfer is not sufficient to found an estoppel. This suggests that the reliance of the recipient on the appearance of entitlement created by the transfer does not in itself deserve specific protection: why should the transferor be held wholly responsible for informing the recipient of the state of his own affairs? On the other hand, the purpose of the change of position or loss of enrichment defence is precisely to ‘reconcile[s] the interest in obtaining restitution of unjust enrichment with the competing interest in the security of receipts’.<sup>198</sup> It follows from this that to the extent that it provides greater protection than the defence of loss of enrichment, the requirement of blameless mistake necessarily leads to the over-protection of the recipient’s interest in the

<sup>194</sup> H L A Hart *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) Ch II at 29. See also E Allen Farnsworth *Alleviating Mistakes: Reversal and Forgiveness for Flawed Perceptions* (2004) 12–17 and ch 12.

<sup>195</sup> Cf the concept of error *probabilis* employed by Voet and Bähr, and also by Lord Brougham in *Wilson and McLellan v Sinclair* supra note 35 at 409: see Section 2n25 and Section 3.1 above.

<sup>196</sup> Supra note 125.

<sup>197</sup> Supra note 2.

<sup>198</sup> Peter Birks *Unjust Enrichment* 2 ed (2005) 209.

security of his receipt. Of course, one might argue that the protection provided by the loss of enrichment defence is inadequate. However, such concerns should be addressed through the expansion of the loss of enrichment defence. In Scottish law, for example, the defender may raise the defence of change of position in order to defeat the *condictio indebiti* where he had reasonable grounds for believing that he was entitled to the transfer and that he acted upon that belief in such a way as to ‘make repetition unjust’.<sup>199</sup> The English defence of change of position appears to extend well beyond mere loss of enrichment, to include any circumstances in which the recipient’s position has so changed that it would be inequitable to order restitution.<sup>200</sup> South Africa could provide greater protection to the recipient’s interest in the security of his receipt in a rational way by widening the scope of its loss of enrichment defence. It need not rely in this respect on the irrational limitation on recovery represented by the requirement of blameless mistake.

### 6.3 *The requirement of justifiable mistake*

Finally, according to the third version of the excusability requirement, the recipient of the transfer will be compelled to give it up only if there is some feature of his conduct which would make it unconscionable for him to retain it: whether he knew of the transferor’s mistake, or induced it himself. Although there are hints of this version of the requirement of excusable mistake in Scottish law, it is only in South African law that it has achieved dominance. The emergence of the requirement of justifiable mistake in particular appears to be due to the influence of the Roman-Dutch remedy of *restitutio in integrum*, via the concept of *iustus error*. It rests on a conception of the *condictio indebiti* as a species of equitable intervention triggered by of the unconscionable conduct of the recipient. Thus according to this version of the excusability requirement it is only through the equitable, discretionary, extraordinary intervention of the court that the claimant’s completed transaction — the mistaken transfer — can be reversed.

In fact, as we have seen, the excusability requirement applied in the context of the *condictio indebiti* shares a common origin with the contractual doctrine of *iustus error*, which determines the validity of contracts where one of the parties labours under a unilateral mistake as to terms: both the contractual and enrichment versions of the *iustus error* doctrine have their roots in the Roman-Dutch remedy of *restitutio in integrum*.<sup>201</sup> Moreover, the concept of *iustus error* in modern contract law still carries essentially the same meaning as it did in the decision of De Villiers CJ in *Logan v Beit* in 1890, that is, before the two doctrines were

<sup>199</sup> See e.g. *Credit Lyonnais v George Stevenson & Co Ltd* supra note 191; *Royal Bank of Scotland v Watt* 1991 SC 48; Evans-Jones op cit note 21 at 291–303.

<sup>200</sup> See e.g. the formulation adopted by Lord Goff in *Lipkin Gorman* supra note 184. Also Burrows op cit note 174 at 512–17; Virgo supra note 174 at 691–3.

<sup>201</sup> See Sections 4.1 and 4.2 above.

distinguished.<sup>202</sup> It refers to a mistake as to terms on the part of the party seeking to escape the contract which was either known to the other party at the time of contracting,<sup>203</sup> or ought to have been known to him,<sup>204</sup> or which was in fact induced by him, either through a positive misrepresentation<sup>205</sup> or by remaining silent in circumstances in which there was a duty to speak, because of a prior misrepresentation<sup>206</sup> or where a term in the contract constitutes a 'trap for the unwary'.<sup>207</sup> As recently held by the Supreme Court of Appeal in *Brink v Humphries & Jewell (Pty) Ltd*, '[t]he law recognises that it would be unconscionable for a person to enforce the terms of a document where he misled the signatory, whether intentionally or not'.<sup>208</sup> It follows that *iustus error* in the modern law of contract still has a meaning very similar to that of the requirement of justifiable mistake in the context of the modern *conductio indebiti*. Again, according to Hefer JA in *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue*, when determining justifiable mistake in the context of the *conductio*,

'[m]uch will depend on the relationship between the parties; on the conduct of the defendant, who may or may not have been aware that there was no *debitum* and whose conduct may or may not have contributed to the plaintiff's decision to pay'.<sup>209</sup>

However, in the modern South African law of contract the requirement that the claimant's unilateral mistake be a *iustus error* has been rationalized through the doctrine of quasi-mutual assent, in terms of which the primary source of the contractual obligation, consensus, is supplemented by a secondary doctrine of reliance.<sup>210</sup> In this respect the modern South African law regarding unilateral mistake is strongly influenced by English common

<sup>202</sup> Supra note 94. The canonical statement of the modern doctrine of *iustus error* in contract appears in *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) and *National and Overseas Distributors Corporation v Potato Board* 1958 (2) SA 473 (A). For recent treatments see e.g. R. H. Christie *The Law of Contract in South Africa* 5 ed (2006) 314–19; Dale Hutchison & Francois du Bois 'Contracts in general' in Francois du Bois et al (eds) *Wille's Principles of South African Law* (2007) 747–9.

<sup>203</sup> For example, *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A).

<sup>204</sup> For example, *Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd* 1984 (3) SA 537 (W); *Nasionale Behuisingskommissie v Greyling* 1986 (4) SA 917 (T).

<sup>205</sup> For example, *Allen v Sixteen Sterling Investments (Pty) Ltd* 1974 (4) SA 164 (D).

<sup>206</sup> For example, *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A); *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA).

<sup>207</sup> For example, *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA). The test for what constitutes a misrepresentation by silence is of course an objective one.

<sup>208</sup> Supra note 207 para 2 (Cloete JA).

<sup>209</sup> Supra note 2.

<sup>210</sup> *George v Fairmead* supra note 202 at 471; *Sonap Petroleum* supra note 203 at 239–41. See also Christie supra note 202 at 318–19; Hutchison & Du Bois supra note 202 at 748–9.

law, and in particular by the decision in *Smith v Hughes*.<sup>211</sup> If the other party knew of the contract denier's mistake, then it follows that he did not rely on the appearance of consensus. On the other hand, if he ought to have realized that the other was mistaken as to the objective terms of the contract, his reliance, although real, was unreasonable, and therefore does not deserve protection. Finally, it has been held that where the party seeking to affirm the contract himself induced the mistake, either by active representation or by remaining silent when there was a duty to speak out, he cannot claim that his reliance on the appearance of consensus was reasonable.<sup>212</sup>

Thus the question arises whether either the original or the rationalized form of the requirement of justifiable mistake is compatible with the principles underlying the *condictio indebiti* in South African law. Taking first the original form of this requirement, it is immediately clear that the conception of the *condictio indebiti* as a form of equitable intervention based on of the unconscionable conduct of the recipient is entirely alien to the principled basis of the action. Regardless of whether that basis is the mere transfer of an *indebitum* or whether proof of mistake is necessary also, a priori these elements are sufficient in themselves to give rise to a substantive cause of action: restitution does not arise by virtue of equitable intervention only. It follows that, like the second version, the third version of the requirement of excusable mistake is incapable of being reconciled with the principles underlying the *condictio indebiti* in modern South African law. To regard the restitution of mistaken transfers as a species of equitable intervention triggered by unconscionable conduct on the part of the recipient means denying the existence of the law of unjustified enrichment altogether.

As for the rationalized form of the requirement of justifiable mistake found in modern contract law, the introduction to the *condictio* of a secondary doctrine of reliance, akin to that applied in the law of contract, would mean departing from the principles which have governed restitution by means of the *condictio indebiti* since its origins in classical Roman law: according to those principles, where restitution is denied, this is because the transferor failed to make out a claim in unjustified enrichment, not because of the existence an objectively constituted agreement between the parties that the recipient was entitled to retain the transfer. Moreover, there does not seem to

<sup>211</sup> (1871) LR 6 QB 597. Here it was held by Blackburn J (at 607) that even where the parties were not subjectively in agreement, a party to an objective contract would be held to its terms if, 'whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party . . .'. This approach was specifically approved by the South African Appellate Division in *Pieters & Co v Salomon* 1911 AD 121. For more recent references to *Smith v Hughes* in South African law see again *Sonap Petroleum* supra note 203 at 239 (Harms AJA); *Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A) 61 (Botha JA) and *HNR Properties CC v Standard Bank of SA Ltd* 2004 (4) SA 471 (SCA) paras 22–23 (Scott JA). See also Christie op cit note 202 at 318–19;

<sup>212</sup> *George v Fairmead* supra note 202 at 471 (Fagan JA).

be any compelling argument in favour of treating mistaken transfers and the mistaken expression of contractual intention in the same way, that is, by denying restitution entirely unless the transferor can positively demonstrate the absence of reasonable reliance in the contractual sense. Indeed, the very fact that South African law appears to afford the same level of protection to an objective contract and an extra-contractual transfer is in itself grounds for criticism. On the one hand, while a party to a contract makes conscious representations as to his contractual intention (which representations are received as such by the other contracting party), in the case of one who mistakenly pays an indebitum, the representation as to the other party's entitlement is inherent in the transfer itself. As we have seen, the reliance of the recipient of the transfer on that inherent representation does not in itself appear worthy of specific protection in any form:<sup>213</sup> it is certainly less deserving of protection than the reliance of a contracting party on the appearance of consensus created by a contractual document or other objective agreement. More importantly, however, the wider policy arguments in favour of restricting the avoidance of contracts on grounds of unilateral mistake by means of a secondary doctrine of reliance — the need to hold contracting parties to the appearance of consensus in the interests of commercial certainty — are necessarily much weaker in the context of extra-contractual transfers. Protecting the reasonable expectations of contracting parties is vital to the smooth working of commercial transactions. But by its very nature the mistaken transfer of an indebitum is a windfall for the recipient, not something for which he has bargained. Thus it seems perverse for the law to protect any expectation on the part of the recipient engendered by that receipt as vigorously as it protects the appearance of contract. It follows that whether the third version of the excusability requirement, the requirement of justifiable mistake, is understood in its original or its rationalized form, this version of the requirement is profoundly incompatible with the principles underlying the *condictio indebiti* in South African law. Nor can there be any justification for supplementing or varying those principles.

## 7. CONCLUSION

There are certain striking similarities between the requirement of excusable mistake in the context of the *condictio indebiti* adopted by the Appellate Division of South Africa in *Willis Faber Enthoven v Receiver of Revenue*<sup>214</sup> in 1992 and that adopted by the Scottish Court of Session in *Morgan Guaranty Trust Company of New York v Lothian Regional Council*<sup>215</sup> in 1994. Both courts emphasized the flexibility of the excusability requirement, as well as the fact that excusability was only one of many factors to be considered in

<sup>213</sup> See Sections 6.1 and 6.2 above.

<sup>214</sup> *Supra* note 2.

<sup>215</sup> *Supra* note 1.

determining whether equity required restitution. But these apparent similarities mask what are really profound differences between the dominant conceptions of the requirement in each of these two jurisdictions. As we have seen, Scottish law originally recognized no excusability requirement at all. However, such a requirement was introduced into Scottish law by Lord Chancellor Brougham in *Wilson and McLellan v Sinclair* in 1830,<sup>216</sup> in which he held that the *condictio indebiti* would be granted only if the transferor's mistake could be shown to be unavoidable and therefore blameless. Excusability in this sense proved to be a highly objective inquiry, and therefore very restrictive. In practice, it could be demonstrated only by pointing to some extrinsic cause for the mistake, generally some representation by the recipient. However, this positive excusability requirement had been largely repudiated by the Scottish courts well before the end of the nineteenth century. As a result, in no case since *Youle v Cochrane* in 1868 has a Scottish court been prepared to deny restitution on this basis. In the *Morgan Guaranty Trust* case it was held that the excusability of the pursuer's mistake remains a relevant factor in determining whether the *condictio indebiti* will lie.<sup>217</sup> However, this is only in the sense that negligence on the part of the transferor — to be raised by the defender — may act as a bar or 'equitable defence' to restitution.

South African law has developed differently. As in Scottish law, during the nineteenth century the analysis of mistake of fact found in the Roman sources was supplanted by a more restrictive approach to the requirement of excusable mistake, but unlike in Scottish law, this restrictive approach took root and continues to flourish in the modern law. In South African law this approach appears to have had its origins at least in part in the *ius commune* remedy of *restitutio in integrum*, of which *iustus error* is identified as a ground in the Roman sources. As a result, in modern South African law the plaintiff in this action is often required to demonstrate that he was not to blame for the mistake which led him to make the transfer in question, by pointing to some extrinsic cause for the mistake, such as a representation by the recipient or by a third party. Indeed, in many cases the focus of the excusability inquiry has shifted entirely to the conduct and circumstances of the recipient: the critical question according to this version of the excusability requirement is whether there was some feature of the defendant's conduct — either inducement of the error or knowledge of the transferor's mistake at the time at which the transfer was made — which would make it unconscionable for him to retain the payment.

Thus it appears that rather than a single, homogenous excusability requirement, there are in fact at least three different versions of the excusability requirement at work in Scottish and South African law. The question arises whether any of these three versions of the excusability

<sup>216</sup> *Supra* note 35.

<sup>217</sup> *Morgan Guaranty Trust* *supra* note 1 at 165–7 (Lord Hope), 173 (Lord Clyde), 175 (Lord Cullen).

requirement is compatible with the principles underlying the *condictio indebiti*, and if so, whether it is supported by any compelling argument of policy or equity. This question is particularly pressing with respect to South African law, since it is here that the requirement continues to have practical effect.

First, inexcusable or careless mistake can be understood as a defence — a bar to recovery — to be raised by the recipient of the transfer in response to the transferor's *prima facie* claim. It is this view which emerged as the dominant one in modern Scottish law. In this context careless mistake is not an element of the transferor's cause of action. Rather, it is only one factor in a global inquiry into the equities of the case. Because this form of the requirement functions independently of the elements necessary to constitute a *prima facie* claim, it follows that it is compatible with the principles underlying the *condictio*, however those are understood. However, the defence of careless mistake does not appear to fulfil any useful purpose. Peter Birks argued that it might serve as a mechanism for the protection of the reliance of the recipient: in particular, he argued that the defence could be rationalized as a form of estoppel. However, estoppel does not appear to have any role to play outside cases where the recipient has consumed the money or goods transferred. Thus any role which the defence of careless mistake might play as a mechanism for protecting reliance is largely obviated by the defence of change of position or loss of enrichment in Scottish and South African law. South African law has nothing to gain by adopting this version of the requirement.

A second version of the excusability requirement is that in terms of which the transferor himself must demonstrate that he was not to blame for the mistake. Although this version of the excusability requirement has not survived in Scottish law, it has been applied in several important twentieth-century decisions in South Africa. Although this second version resembles the first, in that both turn on the culpability of the transferor's mistake, the shift in emphasis, from defence to positive requirement for recovery, means that the requirement of excusability is understood more objectively here than in the context of the first version. In practice the simplest way for the transferor to demonstrate that his mistake was blameless is to show that it was induced by a representation made by the other party to the transaction, or by a third party. This version of the excusability requirement appears to rest on an analogy between mistake as an excuse for wrongful conduct and mistake as a reason for restitution: just as a culpable mistake cannot be relied upon as an excuse, the analogy goes, so it cannot substantiate the *condictio indebiti*. However, it seems that this analogy must be false. Mistakes which found the *condictio indebiti* are invalidating mistakes, not excusing mistakes: mistake is relevant here because it shows that the transfer was involuntary, or at least not voluntary. It follows that the blamelessness or otherwise of the transferor's mistake cannot logically affect his cause of action in unjust enrichment. In any event, as long as South Africa recognizes a loss of enrichment defence in respect of the *condictio indebiti*, it need not protect the recipient's interest in the security of his receipt by means of the requirement.

As for the third version of the excusability requirement, according to this approach the transferor will be relieved of the consequences of his mistake only if it would be unconscionable for him to retain it. It is this third version of the excusability requirement which appears to be dominant in modern South African law. As in the case of the second version of the requirement, here the consideration most often relied upon to justify such intervention is the fact that the recipient himself induced the transferor's error, but knowledge of the transferor's mistake on the part of the recipient at the time when the transfer was made is also relevant, and it must be the recipient himself who induced the transferor's error, not an outsider to the transaction. It is clear that the conception of the *condictio indebiti* upon which this version of the excusability requirement rests — according to which the *condictio* is a form of equitable intervention triggered by the recipient's unconscionable conduct — is entirely alien to the principled basis of the action. Moreover, even if this version of the requirement is rationalized as an expression of a secondary doctrine of reliance, on analogy with the doctrine of *iustus error* in the modern South African law of contract, it does not seem that it can be defended as a matter of principle. Indeed, the parallel treatment of unilateral mistakes vitiating consensus and mistakes giving rise to the transfer of money or goods not owed is inherently problematic. In any event, as long as South African law recognizes a loss of enrichment defence in respect of the *condictio indebiti*, it need not protect the recipient's reliance by means of the requirements of blameless or justifiable mistake as well. Thus it appears there can be no justification for retaining either of these versions of the requirement of excusable mistake in modern South African law. Instead, the requirement of excusable mistake should be entirely abrogated at the first opportunity.