

MISTAKES OF LAW.

Lord Ellenborough asked the plaintiff's counsel "whether he could state any case where, if a party paid money to another voluntarily, with full knowledge of the facts of the case, he could recover it back again, on account of his ignorance of the law?" No answer being given, his lordship continued, that the only case he ever heard of was that of *Chatfield v. Paxton*, where Lord Kenyon, at *nisi prius*, had intimated something of the sort. "But, when it was afterward brought before the court, other circumstances were relied on, and it was so doubtful on what ground it turned that it was not reported." "Every man," continued Lord Ellenborough, "must be taken to be cognizant of the law; otherwise there is no saying to what extent ignorance might not be carried. It would be urged in almost every case." The only case cited by his lordship to sustain this doctrine was that of *Lowry v. Bourdieu*, Dougl. 468, in which he said, "money paid under a mere mistake of law was endeavored to be recovered back; and there Buller, J., observes, that *ignorantia juris non excusat, etc.*" But an examination of that case shows that it was decided on entirely other grounds. The action was brought to recover back money paid on a policy of insurance on a ship and cargo, in which the insured had no interest, and three of the justices, Lord Mansfield, Buller and Ashhurst, J. J., were of the opinion that it was a gaming policy, and against an act of parliament, and that, therefore, the law could not aid the plaintiff in recovering back what he had paid according to the rule, *pari delicto melior est conditio possidentis*. Mr. Justice Willes did not concur, however, but said he supposed the parties believed there was an interest, and that it would be very hard that a man should lose what he had paid under a mistake. Mr. Justice Buller, in the course of his remarks, observed that there was no mistake in matter of fact, and if the law was mistaken, the rule applies, *ignorantia juris non excusat*. This observation was clearly *obiter*, as he, with the majority of the judges, had expressly held the policy to be a gaming policy, and the transaction beyond the aid of the court. Still, it is urged that Lord Mansfield and Mr. Justice Ashhurst would not have suffered the *dictum* to pass without animadversion if they had not assented to its correctness.* It is hardly necessary to remark that this argument can have but little weight in the consideration of the question. It will be seen, therefore, that the case of *Bilbie v. Lumley*, which is very often cited, and which is "one of the main pillars on which the subsequent decisions and *dicta* on the subject rest," is itself based upon a very doubtful foundation.

The case of *Chatfield v. Paxton*, referred to by Lord Ellenborough, and given in a note

to *Bilbie v. Lumley*, need not be noticed in full, as it turned on other points.

It may be well at this point to refer to two or three cases decided prior to *Bilbie v. Lumley*, apparently holding a different doctrine. The first is *Farmen v. Arundel*, 2 W. Black. 825, which was an action for money had and received, and in which Chief Justice De Grey said: "Where money is paid by one man to another on a mistake, either of fact or of law, or by deceit, this action will certainly lie." In *Bize v. Dickason*, 1 T. R. 285, where there were mutual debts between two persons, and one of them becoming bankrupt, the other, instead of setting off his own claim, as he might have done, paid the assignees in full; and it was held that he might recover an amount corresponding to that which he had neglected to set off, in an action for money had and received against the assignees. In rendering judgment, Lord Mansfield said; "The rule has always been, that, if a man has actually paid what the law would not have compelled him to pay, but what, in equity and in conscience, he ought, he cannot recover it back;" and he gave, in illustration, the case of a debt barred by the statute of limitations, or contracted during infancy. "But," he continued, "where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back."

These two cases were cited by the plaintiff in the subsequent case of *Brisbane v. Dacres*, 5 Taunt. 143, and were commented on by the judges in their opinions. Gibb, J., after quoting the declaration of De Grey, C. J., given above, said: "Now, the case did not call for this proposition so generally expressed; and I do think that doctrine, laid down so very widely and generally, where it is not called for by the circumstances of the case, is but little to be attended to; at least, it is not entitled to the same weight in a case where the attention of the court is not called to a distinction as it is in a case where it is called to the distinction." And of the conclusion of Lord Mansfield, in *Bize v. Dickason*, he said: "I cannot think Lord Mansfield said 'mistake of law,' for Lord Mansfield had, six years before, in *Lowry v. Bourdieu*, heard it said: "Money paid in ignorance of the law could not be recovered back," and had not dissented from the doctrine; and Buller, J., sat by him who had expressly stated, six years before, in *Lowry v. Bourdieu*, and would not have sat by and heard the contrary stated without noticing it." It may be remarked, in passing, that conjectures of what Lord Mansfield or Mr. Justice Buller would or would not have done are worth but little. Lord Mansfield undoubtedly said "mistake," and it can hardly be doubted, from the context, that he meant *mistake of law* as well as of fact. Chambre, J. in *Brisbane v. Dacres*, said; "The opinion of De Grey is not a mere *dictum*, it is part of the argument—it is a main part of the argument." Mansfield, C. J.,

* Per Gibb, J., in *Brisbane v. Dacres*, 5 Taunt. 143, and Sutherland, J., in *Clarke v. Duicher*, 9 Cow. 681.