HIGH COURT OF JUSTICE (QUEEN'S BENCH DIVISION)—10 AND 11 MARCH AND 12 JULY 1988

COURT OF APPEAL—18, 19, 20, 21 AND 22 MARCH AND 22 MAY 1991

HOUSE OF LORDS—17, 18, 19, 23, 24, 25 AND 26 MARCH AND 20 JULY 1992

Woolwich Building Society *v.* Commissioners of Inland Revenue[1]

Income Tax—Building Society—Tax on interest and dividends—Without prejudice payments of tax whilst challenging vires of the Income Tax (Building Societies) Regulations 1986—*Regulations later declared ultra vires—Tax repaid—Whether interest payable for periods between payments of tax and that decision—Supreme Court Act* 1981, *s* 35A.

The Woolwich Building Society ("Woolwich") paid three instalments of tax amounting to £56,998,221 to the Revenue under the Income Tax (Building Societies) Regulations 1986 ("the Regulations") and Sch 20 Finance Act 1972 without prejudice to the right to recover the tax in the event of a successful challenge to the validity of the Regulations by way of judicial review proceedings. Woolwich wished to avoid the damage to its reputation of any collection proceedings following a refusal to pay tax, and also to avoid liability to interest or penalties.

Subsequently Woolwich applied for judicial review, and Nolan J. granting the application, held (63 TC 589) that the Regulations were *ultra vires* and void to the extent that they purported to impose a tax liability on building societies in respect of dividends and interest paid before 6 April 1986. [Nolan J.'s decision was later reversed by the Court of Appeal but restored by the House of Lords (63 TC 589)]. In anticipation of that decision Woolwich issued a writ for recovery of the £56,998,221 together with interest under s 35A of the Supreme Court Act 1981 from the respective dates of payment of each instalment.

After the judicial review decision, negotiations took place which resulted in repayment of the £56,998,221 but with interest only from the date of the decision. The writ action continued only in respect of Woolwich's claim for interest for the periods from the respective dates of payment of each instalment to the date of the decision.

Woolwich contended (i) that on general restitutionary principles, the payments had discharged no liability and there was no consideration for

[1] Reported (QBD) [1989] 1 WLR 137; [1989] STC 111; (CA) [1993] AC 70; [1991] 4 All ER 577; [1991] STC 364; (HL) [1993] AC 70; [1992] 3 All ER 737; [1992] STC 657.

them, and/or (ii) that they had been made under duress. The Revenue contended (i) that the payments had been made voluntarily, and were thus not repayable, or (ii) that there had been an implied agreement that the money would be repaid if and when the Woolwich succeeded in its judicial review proceedings, or (iii) that the Court could have imposed a constructive trust on the Revenue in recognition that it would have been unconscionable for the Revenue to retain the money after the decision.

The Queen's Bench Division held, dismissing Woolwich's claim:

(1) that no general restitutionary principle applied to claims by taxpayers against the Crown in the absence of mistake of fact or duress, neither of which applied, but

(2) Woolwich, having expressly made the payments to the Revenue without prejudice, pending the outcome of judicial review proceedings which both parties knew would determine the Revenue's entitlement to the money, an agreement for the repayment of the money, if and when those proceedings were resolved in the taxpayer's favour, had to be implied, in the absence of an express statutory provision to that effect:

Sebel Products Ltd. v. *Commissioners of Customs & Excise* [1949] 1 Ch 409 followed, but

(3)(i) that Woolwich had no right to recover interest in the absence of any statutory authority or any express or implied agreement for interest to be paid:

President of India v. *La Pintada Compania Navigacion SA* [1985] 1 AC 104 followed.

(ii) the payments, being both exigible and repayable by express statutory provision, did not constitute "debts" for the purposes of s 35A of the Supreme Court Act 1981;

Western United Investment Co. Ltd. v. Inland Revenue Commissioners [1958] 1 All ER 257 applied.

(iii) that, according to the implied agreement between Woolwich and the Revenue, the Revenue were bound to hold the payments as a deposit on account of tax which might be held to have been due at the dates of payment, thus relieving Woolwich from the risk of having to pay interest: accordingly, the payments fell to be repaid only when that risk had disappeared, whereupon Woolwich's cause of action arose; but there was no basis in law for implying an agreement to pay interest.

Woolwich appealed.

The Court of Appeal held, allowing Woolwich's appeal (Ralph Gibson L.J. dissenting), that the law of restitution includes by way of a distinct head, a general principle that a subject who makes a payment in response to an unlawful demand for tax, or any like demand, i.e. a demand for which there is no basis in law, immediately acquires a *prima facie* right to be repaid the amount so paid. That principle is subject, at least where the matter in issue is the interpretation of a statute, to two limitations, i.e. that the payment may

not be recoverable if it was made to close the transaction or under a mistake of law, but neither those nor any other possible limitations applied because Woolwich made it quite clear from the start that it made the payment without prejudice to the argument in judicial review proceedings that the Regulation was invalid.

The Crown appealed.

Held, in the House of Lords, dismissing the Crown's appeal (Lord Keith of Kinkel and Lord Jauncey of Tullichettle dissenting), that money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an *ultra vires* demand by the authority is *prima facie* recoverable by the citizen as of right.

Per Lord Goff of Chieveley and Lord Slynn of Hadley: mistake of law does not provide a defence to a claim for the repayment of money so paid.

By writ issued out of the High Court, Queen's Bench Division, the Woolwich Building Society sought judgment to recover £56,998,221 and interest thereon from the respective dates of the payments (which together amounted to the principal sum). The facts are stated in the judgment.

The action was heard in the Queen's Bench Division before Nolan J. on 10 and 11 March 1988 when judgment was reserved. On 12 July 1988 judgment was given in favour of the Crown.

John Gardiner Q.C. and *Nicholas Underhill* for the Society.

Anthony Grabiner Q.C. and *Alan Moses* for the Crown.

No cases were cited in argument in addition to the cases referred to in the judgment.

Nolan J.: This action was begun by a writ issued by the plaintiffs (whom I shall call "Woolwich") against the defendants (whom I shall call "the Revenue") on 15 July 1987. It was brought in anticipation of a decision which I gave on 31 July 1987 in judicial review proceedings entitled *Regina* v. *The Commissioners of Inland Revenue* ex parte *Woolwich Equitable Building Society*. The effect of my decision was that the Income Tax (Building Societies) Regulations 1986 were *ultra vires* and void in so far as they purported to provide for the imposition of tax on dividends and interest paid by building societies prior to 6 April 1986.

Before I gave my decision, the Revenue had already sought and obtained from Woolwich a total sum of £56,998,221 in reliance upon the Regulations which I declared to be *ultra vires* and void. That total sum had been paid as to £42,426,421 on 16 June 1986, as to £2,856,821 on 15 September 1986 and

as to £11,714,969 on 16 March 1987. By its action in the present case, Woolwich claimed the repayment of the total sum together with interest under s 35A Supreme Court Act 1981 on each of the three instalments by which it had been paid, running in each case from the date of payment. After I had given my decision in the judicial review proceedings, negotiations took place between the parties which resulted in the repayment to Woolwich of the sum of £56,998,221, with interest from the date of the decision, but not from any earlier date. Thus the substantial issue in the present case is whether or not Woolwich is entitled to interest on the three instalments running from the dates upon which they were respectively paid to 31 July 1987.

Both the payments and the repayment of the principal sum were made without prejudice to the rights and liabilities of the parties as ultimately to be established. My decision of 31 July 1987 is under appeal to the Court of Appeal where it will no doubt be joined by my decision in the present case, but the present case has been argued on the basis that my decision of 31 July 1987 was right.

The claim was originally pleaded on the simple ground that the payments were made pursuant to demands which were unlawful, and that in the premises the Revenue were liable to repay them together with interest under s 35A Supreme Court Act 1981. The broad basis of the claim, as argued by Mr. Gardiner for Woolwich, was that the Revenue had unjustly enriched themselves at the expense of Woolwich. He referred me to the speech of Lord Wright in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* [1943] AC 32, at page 61, where His Lordship said:

> "It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution."

On page 62 of the report, Lord Wright quoted remarks of Lord Mansfield C.J. in the case of *Moses* v. *Macferlan* (1760) 2 Burr. 1005, at page 1012, where Lord Mansfield described the action for money had and received in these terms:

> "It lies,' he said, 'for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express, or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.' Lord Mansfield prefaced this pronouncement by observations which are to be noted. 'If the defendant be under an obligation from the ties of natural justice, to refund; the law implies a debt and gives this action (*sc. indebitatus assumpsit*) founded in the equity of the plaintiff's case, as it were, upon a contract ("*quasi ex contractu*" as the Roman law expresses it).' Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing."

A In deference to a query which was raised by Mr. Grabiner for the Revenue, Woolwich particularized its claim on the lines envisaged in Lord Mansfield's judgment, amending it with my leave to a claim for money had and received to the plaintiffs' use. It seems to me that this is the correct way for Woolwich to plead its claim. So pleaded, it constitutes a claim for the recovery of a debt within the meaning of s 35A Supreme Court Act 1981: see B *B. P. Exploration* v. *Hunt* (*No. 2*) [1983] 2 AC 352, *per* Lord Brandon, at page 373. It follows that, if the claim is well founded, the Court has power to award interest on the debt to Woolwich running from the date when the cause of action arose.

C I may say at once that I am greatly attracted by the Woolwich argument that it should receive restitution in the shape of interest running from the original dates of payment to compensate it for the unjust enrichment enjoyed by the Revenue at its expense. I shall have to deal in detail with the precise factors which led to the payment by Woolwich of the £56,998,221 but it is clear that the money would never have been received by the Revenue but for D the *ultra vires* Regulations made by them. Their *ultra vires* action has thus been instrumental in their obtaining from Woolwich the equivalent of an enormous interest-free loan. The benefit of an interest-free loan to the borrower, and the detriment to the lender is, of course, all the greater in times of inflation since the value of the principal sum will have fallen between the date of the loan and the date of its repayment.

E It is plain, however, from the decided cases that the Courts have not extended the general principle of restitution to those who have submitted to unauthorized demands for tax. On the contrary, the general rule has been that the maker of the payment has no right to recover the principal sum paid, let alone to receive interest on it. As Professor Birks has written in his F "Introduction to the Law of Restitution" (1985), at page 295:

> "There is already no doubt whatever that in other respects the courts take a strict view of powers which are claimed to allow the imposition of anything in the nature of a levy or a tax. In construing provisions which are said to confer such power the courts insist that only very G clear words can have that effect, and if the demand is found to be *ultra vires*, there will be no hesitation in declaring it void. Such a declaration suffices in the case in which the demand is challenged before payment is made.
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> Where the challenge is made after payment, the effect of a declaration that the demand was unlawful is sometimes to induce repayment on H an *ex gratia* basis. The crucial question is, however, whether there is ever restitution as a matter of right.
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> The dominant modern view appears to be that the citizen who pays an *ultra vires* demand must establish the same facts against the public authority as would entitle him to restitution from a private individual. I This is assumed to mean that he must in practice show that he paid under a mistake of fact or under duress, or that he made a contract for repayment in the event that it should turn out that the money was not payable. On the other side of the line, those who pay by mistake of law, or even under no mistake at all but simply because they despair of making their view prevail against the position taken by the bureaucratic

machine, must on this view be said to have no hope whatever of obtaining restitution." A

To this must be added the well-established rule, re-affirmed by the House of Lords in *President of India* v. *La Pintada Compania Navigacion SA* [1985] 1 AC 104, that the common law gives the creditor no right to interest on his debt. Such a right can only arise by agreement or by statute. Hence the reliance by Woolwich on s 35A Supreme Court Act 1981. B

Accordingly, the questions for decision in the present case are (1) was Woolwich entitled to the repayment of the £56,998,221, and if so (2) when did the right to repayment arise? Woolwich contends that the payments which it made have now been shown to have been immediately repayable on general restitutionary principles. The payments discharged no liability and there was, accordingly, no consideration for them. Further, or in the alternative, submits Mr. Gardiner, the payments were made under duress. They were not made under a mistake of law and they were not voluntary payments. C

The Revenue accept that the payments were not made under a mistake of law, but contend that they were voluntary payments. Thus they were not repayable and the repayment which the Revenue had in fact made was *ex gratia*. Alternatively, submits Mr. Grabiner, there was an implied agreement that the money would be repaid if and when the judicial review proceedings were resolved in favour of Woolwich. If there was no such agreement, the same result could be reached by the Court imposing a constructive trust on the Revenue in respect of the money since the Revenue recognize, and have demonstrated by making the repayment, that it would have been unconscionable for them to retain the money after I had given my decision on 31 July 1987. D E

It will be seen that, at any rate in the circumstances of the present case, the Revenue have by no means set their face against the principle of repaying money which has been paid to meet an *ultra vires* claim. The question of a refusal to repay does not arise. It is, nonetheless, necessary for me to consider the basis upon which repayment has been refused in other cases in order to determine whether, and if so when, Woolwich could have demanded it as of right. I deal first with the circumstances in which the payment came to be made. F G

The Income Tax (Building Societies) Regulations 1986 came into operation on 6 April 1986. Regulation 3 provided that each building society "shall pay" to the Revenue on the specified quarterly dates the appropriate amount of tax in respect of dividends and interest paid by it to its members. Regulation 7 provided that Sch 20 Finance Act 1972, with certain modifications, should have effect for the collection of the tax, and that interest should be chargeable on overdue payments. H

Paragraph 4 (1) of Sch 20 provides that income tax in respect of any payment which is required to be included in a return under the Schedule "...shall be due" at the time when the return is made and "...shall be payable" without the making of any assessment. An assessment may, however, be made under para 4 (3) if the taxpayer fails to include in his return a payment which, in the Inspector's opinion, ought to have been included. The issue of liability will then be resolved by way of an appeal against the assessment. If the appeal fails, then interest runs in favour of the Revenue from the I

time when the tax should have been paid. If it turns out that the taxpayer has paid more tax than was due, then the overpayment becomes repayable (but without interest) on the determination of the appeal: see para 10 (4).

Section 61 Taxes Management Act 1970 provides that, if a person neglects or refuses to pay the sum charged, upon demand made by the collector, the collector shall distrain the person charged by his goods and chattels, and may obtain a warrant authorizing him to break open the premises of the person charged for the purpose of levying the distress. Sections 66 and 68 provide for the recovery of tax from the person charged therewith as a debt due to the Crown in the County Court or the High Court. Section 98 of the same Act imposes a penalty not exceeding £50 upon a taxpayer who fails to make a return which has been required of him, and provides for greater penalties if the failure is fraudulent or negligent. That is the statutory background against which the payments by Woolwich were made.

By a letter dated 17 April 1986 the Revenue wrote to Woolwich setting out the arrangements by which Woolwich was to account for tax under the Regulations. The letter said that for all building societies there would be return periods ending on the last days of May, August, November and February, and that the return form and payment should be forwarded within 14 days of the end of the return period. The return form CT61(Z) repeats that payment should be made within 14 days and adds in heavy type "Remember—interest is chargeable on tax paid late".

On 17 June 1986 Mr. Mason, a taxation accountant employed by Woolwich, wrote a letter to the Revenue Accounts Office referring to the first and largest of the three payments and saying:

> "You should be aware that we are presently seeking leave to commence legal proceedings in connection with the Regulations and accordingly this payment is made without prejudice to any right to recover any payments made pursuant to the Regulations which may arise as a result of legal proceedings, or as a result of any future extinguishment or reduction of any liability under the said Regulations or otherwise."

On 13 March 1987 Mr. Mason wrote again to the Revenue Accounts Officer with reference to the third payment, repeating what he had said in his letter of 17 June 1986, and it is not in dispute that all three payments were made on the same "without prejudice" basis. The factors which induced Woolwich to make the payments are set out in paras 12 to 16 of Mr. Mason's affidavit dated 1 December 1987 and may be summarized as follows. First and foremost, the requirements of the Regulations as amplified in communications from the Revenue amounted on their face to lawful demands from the Crown. Woolwich would have expected any refusal of payment to lead to collection proceedings which would have been gravely embarrassing for Woolwich, the more so as it would have been the only building society refusing to pay. Any publicity suggesting that Woolwich might be in difficulty in meeting its financial obligations, or that alone amongst building societies it was pursuing a policy of confrontation with the Crown, might have damaging effects far outweighing Woolwich's prospects of success on the issue of principle. Secondly, Woolwich feared that if it failed in its legal arguments it might incur penalties. Thirdly, the three payments to which I have referred formed parts of larger quarterly payments,

the other parts of which were agreed to have been correctly charged. At the time when the payments were made, it had not been possible to identify the amounts in dispute. Fourthly, Woolwich was not, of course, to know at the time of the payments that it would succeed in the judicial review proceedings. Had Woolwich failed in those proceedings, it would have faced a bill for interest, which would not have been deductible for tax purposes, in an amount far exceeding the net return which Woolwich could have obtained from investing the money withheld. For example, at the time of the first payment the rate of interest payable on overdue tax was 11 per cent., corporation tax was at an effective rate of 37.5 per cent., and thus Woolwich would have needed to earn interest at 17.5 per cent. before tax in order to break even, which would have been quite impractical. Mr. Mason estimates that the overall cost to Woolwich in interest would have been about £4,000,000.

In their affirmations on behalf of the Revenue, Mr. Green, who is a Principal in the Policy Division concerned, and Mr. Bousher, who is a Senior Principal Legal Officer, assert that in practice, and having regard to the known intention of Woolwich to challenge the validity of the Regulations, the Revenue would not have instituted collection proceedings until the issue of principle had been resolved in their favour. I accept their evidence, of course, but I do not see why Woolwich should be expected to have assumed that this would necessarily be the case. It seems to me, judging from the language of para 4(1) of Sch 20 Finance Act 1972, that Woolwich could reasonably have anticipated at least the raising of an assessment under para 4(3), and possibly the issue of a writ pursuant to s 68 Taxes Management Act 1970 with the result in either case of highly undesirable publicity for Woolwich if it had withheld the very large sums claimed by the Revenue to be due. There was some discussion in the course of argument as to whether the expressions used in the communications from the Revenue, when read against the background of the Regulations and statutory provisions on which the Revenue relied, amounted to a demand by a collector for a sum charged, the neglect of which would expose Woolwich to the risk of proceedings by way of distress upon its goods and chattels under s 61 Taxes Management Act 1970, but I do not think it is necessary to decide the matter because there is no evidence that Woolwich either contemplated or had reason to contemplate the prospect of bailiffs arriving at their office doors in pursuit of the £56,998,221. The substantial point made by Woolwich in the first of its reasons for making the payment lies in the damage to its reputation which it feared from failing to meet an ostensibly lawful claim for tax, and the importance of this factor is something upon which the judgment of Woolwich is entitled to respect. Again, although the risk of penalty proceedings must have seemed remote, there being no question of negligence, let alone fraud, on the part of Woolwich, and although Mr. Green and Mr. Bousher say that in practice there was no risk of penalty proceedings at all, I can understand that the prospect of being even technically in breach of a penal provision if it failed in the judicial review proceedings is one which would weigh with Woolwich. And there can be no dispute about the significance of the interest factor. Subject to the outcome of the present case, the scales in this respect were tilted heavily in favour of the Revenue. I accept that, as a practical matter, Woolwich had little choice but to make the three payments.

Now that they have been shown not to have been lawfully claimed, were they immediately recoverable? The first ground upon which Woolwich contends for an affirmative answer to this question is, as I have mentioned, that the payments were immediately recoverable by virtue of a general restitution-

A ary principle which may be invoked by a subject who has paid money in response to a tax demand made by the Crown without lawful authority. Money thus paid is recoverable, says Woolwich, even in the absence of duress or of a mistake of fact. It is, I think, necessarily implicit in this contention that, contrary to what Professor Birks described as the dominant modern view in the passage which I have cited above, different considera-
B tions apply to claims by the subject against the Crown or public authority from those which apply as between subject and subject. Woolwich relies in this connection on the doubt expressed *obiter* as to the correctness of this view by Dixon C.J. in *Mason* v. *State of New South Wales* (1959) 102 CLR 112, at page 116.

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For my part, however, I cannot find any positive support in the decided cases for the application of a general restitutionary principle, operating in the absence of mistake of fact or duress, upon claims by the subject against the Crown or public authorities. What the decided cases do show, to my mind, is a realistic, though limited, acknowledgment that the ability of the Crown or
D a public authority to apply duress to the subject may be very much greater than that of another subject.

This acknowledgment has been extended, for example, to money wrongfully exacted from the subject *colore officii*. Many of the authorities cited by Mr. Gardiner in argument were decided in reliance upon what I might call
E the *colore officii* principle. The limits within which that principle applies have not always been clear, but were defined with admirable conciseness by Windeyer J. in *Mason* v. *State of New South Wales* [*supra*]. He said, at (1959) 102 CLR 112, at page 140:

> "Extortion by colour of office occurs when a public officer demands
F and is paid money he is not entitled to, or more than he is entitled to, for the performance of his public duty. Examples of such exactions are overtolls paid to the keepers of toll-bridges and turnpikes, excessive fees demanded by sheriffs, pound-keepers, etc."

The principle thus defined, clearly does not apply to the present case.
G There is no question of the Revenue demanding money in return for the performance of a public duty. There is, however, an analogous and broader principle embracing demands for money by the Crown or public authorities which come under the heading of duress because of the nature of the sanctions levied or threatened against the subject if he refuses to pay. This principle has been applied, and the money held to be recoverable, in cases where
H the sanction has amounted to duress of the person of the subject or of his goods. The principle does not, however, apply if the sanction involves only the institution of legal proceedings for the recovery of the money and penalties. These propositions are illustrated by the decisions in *William Whiteley Ltd.* v. *The King* (1910) 101 LT 741 and in the *Mason* case.

I In *William Whiteley* the plaintiffs employed a number of waiters in respect of whom the Revenue claimed annual licence fees under a provision concerning "male servants" in the Revenue Act 1869. The plaintiffs regarded the claim as invalid, but for six years they paid the fees under protest. In the seventh year they refused to pay. Penalty proceedings were brought against them, which they successfully resisted. They established that the Revenue

claim was indeed invalid. They then sought to recover the fees already paid. They failed. In giving judgment against them Walton J. said, at page 745:

> "The question which I have to decide here is whether the payments made during the years which I have mentioned—from 1900 to 1905—were or were not voluntary payments. Was there any duress here? I cannot find any evidence of duress or compulsion beyond this, that the supervisor, the officer of Inland Revenue, told Messrs. Whiteley Limited that in the opinion of the Commissioners of Inland Revenue these duties were payable, and that if they were not paid proceedings would be taken for penalties. That is the only evidence of anything which could be called duress or compulsion. The suppliants knew all the facts. They had present to their minds plainly, when these payments were made, that there was a question as to whether upon such servants as those in question duty was payable. They themselves raised that question and they paid the duties. They could have resisted payment. They must have known that if proceedings were taken for penalties it would be open for them in such proceedings to raise the question as to whether the duties were payable or not, as they did, in fact, in 1906. They must have known and must have had present to their minds all that. I think the most that took place was this, that the officer of Inland Revenue told the suppliants that in his opinion and in the opinion of the Commissioners of Inland Revenue the duties were payable. The suppliants knew that that was only an expression of opinion. They knew that the Commissioners of Inland Revenue could not determine whether the duties were payable or not. They could take no action if the duties were not paid except by legal proceedings. They could not distrain if the suppliants did not make a declaration in respect of these servants. In these circumstances I have come to the conclusion that there was nothing in this case which amounted to compulsion."

That decision has been consistently followed. It is one of a number of cases which, to quote Goff and Jones on the Law of Restitution 3rd Ed., at page 121, "...provides rigorous illustrations of the principle that payments in settlement of an honest claim are irrecoverable".

The *Mason* case is on the other side of the line. In that case, the plaintiffs paid for a licence in order that they could carry on their trade as inter-State carriers. If they had not paid, they could reasonably have apprehended that their vehicles would or might be stopped and seized, so that they could no longer carry on their business. The statute relied upon by the State of New South Wales in its claim for the fees was subsequently held to be *ultra vires*. The High Court of Australia decided that, in these circumstances, the plaintiffs were entitled to recover the fees paid. The judgments of the majority in the High Court travel somewhat different paths, but appear to coincide in the view that it was not a *colore officii* case. Nor, however, was it covered by the *William Whiteley* principle. As Menzies J. put it, at page 133:

> "I am satisfied that the defendant was aware that the payments were made not because the plaintiffs grudgingly accepted liability nor because they preferred to pay rather than to litigate but substantially because they felt they had to pay in order to carry on the business which they were asserting that they were entitled to carry on without payment."

Mr. Grabiner submits that, so far as the presence or absence of duress is concerned, the present case falls on the *William Whiteley* rather than the *Mason* side of the line. I agree. The potential cost to Woolwich of refusing to pay in terms of damage to reputation and interest liabilities may have been commercially unacceptable but I cannot regard it as involving duress on the part of the Revenue. The position might be different if Woolwich had paid under threat of the Revenue taking distress proceedings without a court order under s 61 Taxes Management Act 1980, but as I have said there is no evidence that such drastic and highly unusual proceedings were either threatened by the Revenue or anticipated by Woolwich, still less that Woolwich had a reasonable apprehension of being put out of business by them.

Does it then follow that Woolwich like *William Whiteley* had no right to recover the payments? That is a proposition which I would not for a moment accept. The payments in the *William Whiteley* case were made under protest but they were outright payments. The payments in the present case were made expressly without prejudice to the right of the Woolwich to recover them if it succeeded in the judicial review proceedings. The present case is governed in my judgment by the principle applied by Vaisey J. in *Sebel Products Ltd.* v. *Commissioners of Customs and Excise* [1949] 1 Ch 409. In that case, the plaintiffs brought an action for a declaration that one of their products was not liable to purchase tax. While the action was awaiting trial, the plaintiffs paid the purchase tax claimed on the clear understanding that it would be repaid if the plaintiffs obtained the declaration sought, as in due course they did. The defendants refused to repay the money. Thereupon the plaintiffs successfully sued for it. In his judgment, Vaisey J. said at page 412:

> "I ask myself first with what intention the plaintiffs paid the money, and, secondly, with what intention the defendants received it? If the intention was the same on both sides, the result, in my judgment, was that an agreement was made between the parties by implication.
>
> The intention of the plaintiffs was, to my mind, clear; they expected to recover the money if they won their action. What was the intention of the defendants? It is obviously irrelevant to speculate on what if anything was in the mind of the clerk or other subordinate officer who actually received the money, or in the mind of the officer (whoever he or she may have been) who paid it into the bank to the defendants' credit. I think that I must assume the existence of some person in the defendants' employment who accepted and appropriated the money with a full knowledge of all the facts, particularly the discussion which had preceded the institution of the action, and the pending of the action itself, who knew and realized that the right of the defendants to receive the money was at the moment sub judice, and indeed on the point of coming before this court for decision. What would that hypothetical person have thought about it? In my judgment, he would inevitably have come to the conclusion, as a matter of necessary inference, that the plaintiffs were paying and the defendants accepting the money subject to repayment if the action resulted in the plaintiffs' favour. If however he had entertained any doubt on the matter, I feel sure that he would as a matter I will not say of honesty but of courtesy have refused to accept the money until the position had been made clear to him. What is, to my mind, incredible, is that he could ever have supposed that the money was being either paid by the plaintiffs or received by the defendants with the intention or on the footing that the defendants were to keep it in any

event. I come, therefore, to the conclusion that the intentions of the plaintiffs and the defendants were identical. In other words, I find that there was an agreement." A

I can see no material difference between the facts of that case and those of the present case. The understanding upon which the plaintiffs made the payment in that case cannot to my mind be distinguished from the understanding conveyed to the Revenue by Mr. Mason in his letters of 17 June 1986 and 13 March 1987. That understanding was tacitly accepted by the Revenue at the time, and its acceptance has been confirmed by the repayment of the money and by the defence pleaded (albeit in the alternative) in para 7 of the Revenue's defence. I would say more generally that whenever money is paid to the Revenue pending the outcome of a dispute which, to the knowledge of both parties will determine whether or not the Revenue are entitled to the money, an agreement for the repayment of the money, if and when the dispute is resolved in the taxpayer's favour, must inevitably be implied unless the statute itself produces that result, as it does, for example, in cases falling within para 10(4) Sch 20 Finance Act 1972. In my judgment, the Revenue must be assumed to have behaved honestly and honourably, and thus to have accepted the money in the present case on terms that it would be repaid if the judicial review proceedings went against them, but would be retained as having discharged a tax liability from the due date—thus obviating any interest liability—if that decision went in their favour. B C D E

The order made in the *Sebel* case shows that the money was repaid without interest. The question of interest does not appear to have been mentioned in argument in either that or any of the earlier cases. Most of them were, of course, decided before the provisions now contained in s 35A Supreme Court Act 1981 were first introduced by s 3 Law Reform (Miscellaneous Provisions) Act 1934. The only relevant case put before me in which interest was claimed under that section was the stamp duty case of *Western United Investment Co. Ltd.* v. *Commissioners of Inland Revenue* [1958] 1 All ER 257. In that case, the plaintiffs had appealed under s 13(1) Stamp Act 1891 against an assessment to stamp duty. Section 13(1) provides that an appeal can only be made "on payment of the duty in conformity with" the assessment under appeal. When their appeal succeeded, the plaintiffs became entitled to the repayment of the "excess of duty" which had been paid in conformity with the erroneous assessment. They claimed interest on that sum pursuant to s 3 of the 1934 Act. It does not appear from the report whether the interest was claimed from the date of the original payment or from the date when the appeal succeeded, but, in any event, the claim failed on the ground that the sum in dispute was not a debt within the meaning of the section. At page 261 of the report, after referring to the provisions of s 13 Stamp Act 1891, Upjohn J. said: F G H

"So as a condition precedent to an appeal the appellant has to pay the duty and the document is stamped accordingly. In my judgment that gives rise to no relation of debtor and creditor at all. Of course, sub-section (4) in justice to the subject makes provision for repayment where there has been an over payment in complying with sub-section (1), but that cannot affect the fact that the original payment was a payment of stamp duty. In my judgment the payment under Section 13 cannot be brought in as a debt under the umbrella of the Law Reform I

(Miscellaneous Provisions) Act 1934 Section 3(1), nor can these proceedings properly be described as proceedings for recovery of a debt."

At first sight, the terminology employed by Upjohn J. seems surprising. It might have been thought that the sum repaid became repayable precisely because it was not stamp duty lawfully exigible under the terms of the Act. The explanation is, I think, that the Stamp Act, like the Income Tax Acts, authorizes the making of estimated assessments by which the taxing authorities are entitled to collect, as stamp duty or as tax, sums which may ultimately be found to be in excess of the true liability, or even wholly immune from liability. As appears from the language of s 13 Stamp Act 1891 and paras 4(3) and 10(4) Sch 20 Finance Act 1972, these sums retain the quality of stamp duty or tax until they are repaid. Being both exigible and repayable by express statutory provision, they do not constitute debts for the purposes of s 3 of the 1934 Act and s 35A Supreme Court Act 1981.

Mr. Gardiner pointed out correctly that the *Western United* case is distinguishable. It was concerned with the repayment of a sum lawfully exigible under s 13(1) Stamp Act 1891, whereas the sum repaid in the present case was not lawfully exigible under any statutory provision, and was thus recoverable as a debt. That does not, however, serve to answer the critical remaining question, namely when did the sum in dispute, regarded as a debt, fall to be repaid? I give full weight to Mr. Gardiner's argument that, on the basis of my decision of 31 July 1987, the Revenue were never entitled to retain the money as tax. According to what I regard as the implied agreement between the parties, however, the Revenue were entitled and indeed bound to hold it as a deposit on account of tax which might be held to have been due at the dates of payment. Only thus could the payments relieve Woolwich from the risk of having to pay interest. Woolwich only became entitled to reclaim the money, and would only have wished to do so, when that risk was set at nought. Consequently, Woolwich's cause of action did not arise until then. I find no difficulty in implying an agreement for the return of the money at that point. To my regret, I can find no basis in law for implying an agreement to pay interest on it. There must, therefore, be judgment for the defendants.

Action dismissed, with costs.

The plaintiffs' appeal was heard in the Court of Appeal (Glidewell, Ralph Gibson and Butler-Sloss L.JJ.) on 18, 19, 20, 21 and 22 March 1991 when judgment was reserved. On 22 May 1991 judgment was given against the Crown, with costs (Ralph Gibson L.J. dissenting).

John Gardiner Q.C., Nicholas Underhill and *Jonathan Peacock* for the Society.

Anthony Grabiner Q.C. and *Alan Moses Q.C.* for the Crown.

The following case was cited in argument in addition to the cases referred to in the judgment:—*Commissioners of Inland Revenue* v. *Aken* 63 TC 395; [1990] 1 WLR 1374.

Glidewell L.J.:—In his judgment, Ralph Gibson L.J. explains the judicial review proceedings which resulted in the relevant parts of the 1986 Regulations being declared *ultra vires* and, therefore, void insofar as they purported to require the payment by building societies of tax on dividends and interest paid by such societies for the period immediately preceding 6 April 1986. He also summarises the circumstances in which the Woolwich paid the total sum of £56,998,000 to the Revenue, including the relevant correspondence before and at the time of payment, and the history of this action. I gratefully adopt what Ralph Gibson L.J. says.

I, therefore, need only summarise briefly certain of the facts referred to by Nolan J. and Ralph Gibson L.J. in their judgments, which are, in my view, necessary for the determination of this appeal. They are:

(i) From the start, the Woolwich challenged the validity of the Regulations, even when they were in draft.

(ii) The form on which the Woolwich was required to make a return for the period ending 31 May 1986 and for subsequent quarterly periods and the accompanying notes for guidance, made it clear that when each form was returned to the Revenue it had to be accompanied by payment of the amount calculated in accordance with the form. There was also in the notes a reminder that interest was chargeable on tax paid late, which was not an allowable deduction for tax purposes.

(iii) All three payments made by the Woolwich were made without prejudice to their contention that the Regulations were *ultra vires*.

(iv) At the same time as it made the first payment on 16 June 1986—to be precise on the following day—the Woolwich applied for leave to move for judicial review of the validity of the Regulations.

(v) Nolan J. summarised the factors which induced Woolwich to make the three payments in the following terms[1]:

"First and foremost, the requirements of the Regulations as amplified in communications from the Revenue amounted on their face to lawful demands from the Crown. Woolwich would have expected any refusal of payment to lead to collection proceedings which would have been gravely embarrassing for Woolwich, the more so as it would have been the only building society refusing to pay. Any publicity suggesting that Woolwich might be in difficulty in meeting its financial obligations, or that alone amongst building societies it was pursuing a policy of confrontation with the Crown, might have damaging effects far outweighing Woolwich's prospects of success on the issue of principle. Secondly, Woolwich feared that if it failed in its legal arguments it might incur penalties. Thirdly, the three payments to which I have referred formed parts of larger quarterly payments, the other parts of which were agreed to have been correctly charged. At the time when the payments were

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[1] Pages 271H/272B *ante*.

made, it had not been possible to identify the amounts in dispute. Fourthly, Woolwich was not, of course, to know at the time of the payments that it would succeed in the judicial review proceedings. Had Woolwich failed in those proceedings, it would have faced a bill for interest, which would not have been deductible for tax purposes, in an amount far exceeding the net return which Woolwich could have obtained from investing the money withheld."

The Judge found in relation to these reasons(1):

"It seems to me, judging from the language of para 4(1) of Sch 20 Finance Act 1972, that Woolwich could reasonably have anticipated at least the raising of an assessment under para 4(3), and possibly the issue of a writ pursuant to s 68 Taxes Management Act 1970 with the result in either case of highly undesirable publicity for Woolwich if it had withheld the very large sums claimed by the Revenue to be due... The substantial point made by Woolwich in the first of its reasons for making the payment lies in the damage to its reputation which it feared from failing to meet an ostensibly lawful claim for tax, and the importance of this factor is something upon which the judgment of Woolwich is entitled to respect. Again, although the risk of penalty proceedings must have seemed remote, there being no question of negligence, let alone fraud, on the part of Woolwich, and although Mr. Green and Mr. Bousher say that in practice there was no risk of penalty proceedings at all, I can understand that the prospect of being even technically in breach of a penal provision if it failed in the judicial review proceedings is one which would weigh with Woolwich. And there can be no dispute about the significance of the interest factor. Subject to the outcome of the present case, the scales in this respect were tilted heavily in favour of the Revenue. I accept that, as a practical matter, Woolwich had little choice but to make the three payments."

Nolan J. gave his decision in the judicial review proceedings on 31 July 1987. He declared the Regulations *ultra vires* and void. Before that date, the writ in the present action claiming repayment of the capital sum with interest had been issued. Although the Revenue appealed against Nolan J.'s decision, by agreement pending the hearing of the appeal it made repayment of the capital sum, leaving the issue as to whether the interest was payable to be decided later.

The Woolwich's claim, therefore, is to interest on the capital sum, calculated from the various dates on which it paid the three sums which make up the total to the date of Nolan J.'s judgment in the judicial review proceedings. The claim is made under s 35A of the Supreme Court Act 1981 which, so far as is relevant, provides:

"(1) ... In proceedings ... in the High Court for the recovery of a debt ... there may be included in any sum for which judgment is given simple interest, at such rate as the Court thinks fit or as Rules of Court may provide, on all or any part of the debt in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and

(1) Page 272D/I *ante*.

(*a*) in the case of any sum paid before judgment, the date of the payment."

It follows that, in order to succeed in its claim to interest, the Woolwich must show:

(i) that the Revenue was under a legal obligation to repay the capital sum, and thus owed the Woolwich a debt; and

(ii) that the Woolwich had a right to be repaid, so that its cause of action arose, at the dates on which it made the three payments which together totalled £56,998,000.

The case argued for the Woolwich before Nolan J. and in this Court can be summarised as follows:

(i) The primary submission of Mr. Gardiner is that a subject who makes a payment in response to an unlawful demand for tax, or any like demand, i.e. a demand for which there is no basis in law, immediately acquires a *prima facie* right to be repaid the amount so paid. This is a distinct head of the law of restitution.

(ii) Alternatively, the Woolwich made payment under duress, and thus had an immediate right to claim repayment.

The response of Mr. Grabiner, for the Revenue, before this Court as before Nolan J., is:

(i) There is no such general principle as that suggested by the Woolwich.

(ii) The facts of this case do not come within the established principles of restitution of sums paid under duress.

(iii) Thus the Revenue were under no obligation to make any repayment, and did so only as a matter of grace.

(iv) Alternatively, Nolan J. was correct to find an implied agreement that the Revenue would hold the monies paid by the Woolwich as a deposit on account of tax which might be held to have been due at the dates of payment. The Judge held that, on this basis, the Woolwich only became entitled to reclaim the money once the risk that the tax might be due was set at nought, and thus interest only began to run from that date, i.e. the date of Nolan J.'s judgment in the judicial review proceedings.

The principal issue is, therefore, is there such a general principle of law as that for which the Woolwich contends? If so, what, if any, are the limitations on the operation of that principle? This issue, which is obviously of considerable importance, has been much discussed by distinguished academic commentators, but has not been directly the subject of any modern decided case.

I think it right to draw a distinction between cases in which a plaintiff claims restitution, i.e. repayment from a defendant who is a private citizen or body or who, although acting on behalf of a public body, had received the payment in the course of a commercial transaction between them, and cases in which the defendant is an instrument or officer of central or local govern-

A ment, exercising a power to require payment of a tax, customs duty, licence fee or other similar impost. Cases in the first category are clearly part of ordinary private law. Cases in the second category, however, seem to me properly to fall in the sphere of what is now called public law. The main distinguishing feature between the two types of case is that in the public law cases there is no question of the defendant having given, offered, or pur-
B ported to give any consideration for the payment by the plaintiff. The payment is required under what purports to be a statutory power entitling the defendant to claim such a payment, sometimes in return for a licence, in other cases simply as part of a general power to levy a tax or customs duty.

C The argument which Mr. Gardiner advances in support of his primary proposition that, since the Revenue were not empowered to demand or receive the payments of tax under the invalid Regulation, it was repayable immediately to the Woolwich when paid, is based in part upon general principle, and in part upon previous decided cases. I will examine each in turn.

D *General Principles*

Mr. Gardiner starts by reminding us of the words of Article 4 of the Bill of Rights 1689:

> "That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted illegal."

E

As to the general principles of the law of restitution, in a well-known passage in his judgment in *Moses* v. *Macferlan* (1760) 2 Burr 1005, Lord Mansfield C.J. described the basis of the action for money had and received, i.e. for restitution(1):

F > "It lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.
>
> G In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

In his speech in the House of Lords in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] AC 32, Lord Wright said at the
H beginning of his speech, at page 61:

> "The claim was for money paid for a consideration which had failed. It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he
I should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."

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(1) (1760) 2 Burr 1005, at page 1012.

On the following page Lord Wright quoted the passage from the judgment of Lord Mansfield which I have set out above.

Clearly, in the circumstances of the present case, there was no question of consideration for the payment by the Woolwich to the Revenue. The question is, to use Lord Mansfield's phraseology, was the Revenue's demand for the tax an implied imposition, or did the Revenue take an undue advantage of the Woolwich? Is it obliged by the ties of natural justice and equity to refund the money?

Decided Cases

There have been decisions in what is now recognised as the field of public law in which a plaintiff who has paid to an officer of government or of some other public body a sum which he was under no legal obligation to pay has successfully claimed repayment of that sum. The cases are by no means unanimous, nor indeed sometimes clear, as to the principle under which such repayment was ordered by the Court. In some of the cases it is said that the right to recover arose because the unjustified demand for payment was made by the officer under "colour of his office". This archaic phrase is at best vague and at worst almost meaningless at the present day. Certainly of itself I find it unhelpful.

However, in his judgment in the decision of the High Court of Australia in *Mason* v. *State of New South Wales* (1959) 102 CLR 108, Windeyer J. gave a most helpful definition of one category of the cases with which we are concerned, at page 140. He said:

> "Yet, although all forms of extortion will ground an action for money had and received, all forms of extortion by officials are not properly described as being by colour of office. Exortion by colour of office occurs when a public officer demands and is paid money he is not entitled to, or more than he is entitled to, for the performance of his public duty. Examples of such exactions are overtolls paid to the keepers of toll-bridges and turnpikes, excessive fees demanded by sheriffs, pound-keepers, etc. The parties were not on an equal footing; and generally the payer paid the sum demanded in ignorance that it was not due."

Some of the textbook writers have referred to cases in this category as "withholding cases". Whatever description is applied to the cases, there have been over the past two centuries a number of decisions of the courts in which the plaintiffs have succeeded in recovering the money they had paid in circumstances which fell within Windeyer J.'s definition. These cases include:

> *Irving* v. *Wilson* (1791) 4 TR 485. The plaintiff's goods were unlawfully seized by a Revenue officer, who refused to return the goods without payment of a fee. The plaintiff paid, and recovered the goods. He then sued to recover the payment and succeeded.
>
> *Morgan* v. *Palmer* (1824) 2 B & C 729. The mayor of a borough improperly charged a fee for renewing a publican's licence. The fee was recoverable.
>
> *Maskell* v. *Horner* [1915] 3 KB 106, a decision of the Court of Appeal. For many years the plaintiff had carried on business in a market. The market owner each year demanded a toll from the plaintiff under threat of seizure of his goods if he refused to pay. On the first

A occasion the plaintiff objected and the market owner did seize the goods. The plaintiff thereupon paid the toll in order to secure the release of the goods. In later years the plaintiff paid under protest.

After twelve years it was held in other proceedings that the defendant had no right or power to demand the toll, which was, therefore, unlawful. B The plaintiff brought action to recover the amounts he had paid. This Court held that he was entitled to recover the amount of tolls he had paid except those which were barred by the Limitation Acts, i.e. he was entitled to recover for the preceding six years.

In his judgment, Lord Reading C.J. said, at page 118:

C

"Upon the second head of claim the plaintiff asserts that he paid the money not voluntarily but under the pressure of actual or threatened seizure of his goods, and that he is therefore entitled to recover it as money had and received. If the facts proved support this assertion the plaintiff would, in my opinion, be entitled to succeed in this action.

D

If a person with knowledge of the facts pays money, which he is not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift, and the transaction cannot be reopened. If a person pays money, which he is not bound to pay, under the compulsion E of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received. The money is paid not under duress in the strict sense of the term, as that implies duress of person, but under the pressure of seizure or detention of goods which is analogous to that of duress. Payment under such pressure establishes that the payment is not made voluntarily to close the transaction ... The payment is made for the purpose of averting a threatened F evil and is made not with the intention of giving up a right but under immediate necessity and with the intention of preserving the right to dispute the legality of the demand."

Later, at page 121, his Lordship said:

G

"There is no doubt that if a person pays in an action or under threat of action the money cannot be recovered by him, as the payment is made to avoid the litigation to determine the right to the money claimed. Such payment is not made to keep alive the right to recover it, inasmuch as the opportunity is thus afforded of contesting the demand, and payment in such circumstances is a payment to close the transaction H and not to keep it open. Even if the money is paid in the action accompanied by a declaration that it is paid without prejudice to the payer's right to recover it, the payment is a voluntary payment, and the transaction is closed. (See *Brown* v. *M'Kinally*.) It is argued that as unpaid tolls can be recovered by distress levied upon the goods of the person who fails to pay, the seizure is to be regarded like the issue of a writ, and I therefore that a payment of tolls on seizure must be treated as a voluntary payment. I cannot agree with this contention. When goods are seized, the owner can only relieve them from seizure by payment. He has no opportunity of contesting the right to demand tolls from him except by allowing the seizure and detention of his goods to continue, or by making payment to protect them."

Buckley L.J. quoted a *dictum* of Parke B(1):

> " 'If my goods have been wrongfully detained, and I pay money simply to obtain them again, that being paid under a species of duress or constraint, may be recovered back.' "

Buckley L.J. commented(1):

> "The same is true, I think, when payment is made not to release goods seized but to intercept a threat to seize them. When the defendant demanded payment of the plaintiff, the latter, if he refused payment, exposed himself to the seizure and sale, rightfully or wrongfully, of his goods. When he made payment to escape such seizure and sale, the payment was, I think, within Parke B.'s words, not a voluntary payment. Further, if there be added to the above facts the further fact that the party making the payment protests that the money is being wrongfully taken from him, a further factor is added which goes to show that the payment was not voluntary."

Pickford L.J. gave judgment to the same effect.

Attorney-General v. *Wilts United Dairies Ltd.* (1921) 37 TLR 884 was another decision of this Court. Under wartime legislation, the defendant company, who were milk wholesalers, applied for a licence entitling them to purchase milk outside the area where they were based. The Food Controller required them to pay 2d per gallon for the grant of the licence. The defendants agreed to the payment and the licence was granted. The defendants then refused to make any payment. The Attorney-General claimed from them the amount due under the agreement. This Court held that the imposition of the charge was not within the statutory powers of the Food Controller, and thus could not be justified. The defendants, therefore, could not be required to make payment despite their agreement. Atkin L.J., in a judgment agreeing with Bankes and Scrutton L.JJ., said, at page 887:

> "It makes no difference that the obligation to pay the money is expressed in the form of an agreement. It was illegal for the Food Controller to require such an agreement as a condition of any licence. It was illegal for him to enter into such an agreement. The agreement itself is not enforceable against the other contracting party; and if he had paid under it he could, having paid under protest, recover back the sums paid, as money had and received to his use."

The decision of this Court was upheld in the House of Lords.

The same result followed in another decision of this Court, *T. & J. Brocklebank Ltd.* v. *The King* [1924] 1 KB 647, which expressly followed the decision in *Attorney-General* v. *Wilts United Dairies Ltd.* That was a case, also under wartime legislation, in which the Shipping Controller had required an unlawful payment as a condition of a licence to the plaintiffs to sell one of their ships to a foreign firm.

Mr. Gardiner makes the point that, although both *Attorney-General* v. *Wilts United Dairies Ltd.* and *T. & J. Brocklebank Ltd.* v. *The King* were cases within Windeyer J.'s definition, nevertheless the passage which I have quoted from Atkin L.J.'s judgment is of wider application. To this Mr. Grabiner

(1) [1915] 3 KB 106, at page 124.

A answers that if that be so, Atkin L.J.'s observation in the circumstances was not part of his reasoning in the decision itself.

In a number of other cases the present parties dispute whether or not the facts of the case were withholding cases i.e. within Windeyer J.'s definition. These cases include:

B

Dew v. *Parsons* (1819) 2 B & Ald 562, in which the sheriff charged an attorney's clerk for issuing warrants a sum greater than the amount he was authorised to charge. It was held that the attorney was entitled to reclaim the balance. The defendant's plea that the payment was made under a mistake of law failed.

C

Mr. Gardiner points out correctly that in none of the three judgments is there any suggestion that the basis of the entitlement to payment was that the attorney's clerk paid under compulsion. Indeed, the reasoning in the second judgment, that of Holroyd J., is in the following terms:

D "If the defendant has paid more money than the sheriff is allowed by law to demand as his fee, the sheriff cannot retain that surplus, and must (if required so to do) return it to the defendant."

Mr. Gardiner, therefore, argues that this case is one which does not fall within Windeyer J.'s definition.

E In *Steele* v. *Williams* (1853) 8 Ex 625, the defendant, a parish clerk, was entitled to charge fees for making certified copies of extracts from the parish registers. The plaintiff, an attorney's clerk, wished to examine the registers and to make his own extracts, which would not be certified by the defendant. Nevertheless the defendant said that the charge would be the same whether the plaintiff made the extracts himself or was given certificates. After the F plaintiff had made the extracts he desired, the defendant demanded a charge from him which the plaintiff paid. The attorney then sought to recover it and succeeded.

In his judgment Parke B. said, at page 630:

G "I think that, upon the true construction of the evidence, the payment in this case was not voluntary, because, in effect, the defendant told the plaintiff's clerk, that if he did not pay for certificates when he wanted to make extracts, he should not be permitted to search."

Later, the Judge said, at page 631:

H "Therefore, in the first place, I think that there is evidence that this payment was not voluntary, but necessary for the exercise of a legal right; and further, I by no means pledge myself to say that the defendant would not have been guilty of extortion in insisting upon it, even without that species of duress, viz. the refusal to allow the party to exercise his legal right, but *colore officii*. *Dew* v. *Parsons* certainly goes to that I extent. But it is not necessary to decide this case on that ground."

Platt B. agreed. Martin B. said:

"As to whether the payment was voluntary, that has in truth nothing to do with the case. It is the duty of a person to whom an Act of Parliament gives fees, to receive what is allowed, and nothing more. This

is more like the case of money paid without consideration—to call it a voluntary payment is an abuse of language. If a person who was occupied a considerable time in a search gave an additional fee to the parish clerk, saying, 'I wish to make you some compensation for your time,' that would be a voluntary payment. But where a party says, 'I charge you such a sum by virtue of an Act of Parliament,' it matters not whether the money is paid before or after the service rendered; if he is not entitled to claim it, the money may be recovered back."

Martin B. was thus not basing his judgment on facts which fall within Windeyer J.'s definition, though it seems that the other two Judges probably were.

Another case in this category was *The Queens of the River Steamship Company Ltd.* v. *Conservators of the River Thames* (1899) 15 TLR 474. That decision is not binding upon us, and for my part I do not think it adds anything to what is contained in the decisions to which I have already referred.

We were referred also by Mr. Gardiner to two cases upon which he strongly relies in which the plaintiff recovered payments he had made in circumstances which undoubtedly do not fall within Windeyer J.'s definition. The first was *Campbell* v. *Hall* (1774) Cowp 204, another decision of Lord Mansfield C.J. The Customs Collector, without any lawful authority, imposed upon the export of sugar from the island of Grenada a customs duty. The plaintiff paid and then brought action to recover back the amount he had paid. He was held entitled to recover. Lord Mansfield's reasoning was contained in one short passage in his judgment:

"The action is an action for money had and received; and it is brought upon this ground; namely, that the money was paid to the defendant without any consideration; the duty, for which, and in respect of which he received it, not having been imposed by lawful or sufficient authority to warrant the same."

The second case is the decision of the Divisional Court in *Hooper* v. *Mayor and Corporation of Exeter* (1887) 56 LJQB 457. The corporation had power under a Private Act to charge dues for the landing of stone, but there was an exception that dues were not payable on limestone intended to be burned into lime. The plaintiff, who landed considerable quantities of limestone to burn into lime, was unaware of this exception. Upon discovering it, he reclaimed the dues he had paid upon stone to be burned into lime. The corporation refused but he succeeded in his claim. *Morgan* v. *Palmer* was cited during the course of the argument. In his judgment Lord Coleridge C.J. said, at page 458:

"From the case cited in the course of the argument it is shown that the principle has been laid down that, where one exacts money from another and it turns out that although acquiesced in for years such exaction is illegal, the money may be recovered as money had and received, since such payment could not be considered as voluntary so as to preclude its recovery.

I am of opinion that that principle should be adopted here, and that accordingly the plaintiff is entitled to recover his money on the ground that he has paid it involuntarily."

A Smith J. agreed and referred also to the decision in *Steele* v. *Williams*.

The proposition set out by Lord Coleridge undoubtedly is much wider than that relating merely to the cases which fall within Windeyer J.'s definition, and thus supports Mr. Gardiner's argument.

B We were on the other hand referred to a number of cases which tend to suggest that there is no such general principle as that submitted on behalf of Woolwich. The first is *Slater* v. *Mayor and Corporation of Burnley* (1888) 59 LT 636. The corporation demanded and the plaintiff paid water rates for some houses based upon the gross value of the properties. The corporation were only empowered to charge rates based on the net value. The plaintiff C claimed back the balance. He succeeded in the County Court but failed on appeal to the Divisional Court. *Steele* v. *Williams* and *Hooper* v. *Mayor and Corporation of Exeter* were referred to in the argument but not in either of the judgments. The defence which succeeded was that the payment was voluntary. It is set out most clearly in the judgment of Wills J., at page 639:

D "In my opinion, the payment in this case was a voluntary payment. The respondent gave way and paid. It seems to me in these circumstances that it is idle to say that there is anything like duress—there was nothing in the nature of a threat used; it is simply the ordinary case of a person raising a contention when a demand is made upon him. This is not sufficient to constitute duress, so as to prevent a payment being a E voluntary one. It seems to me, therefore, in this case that the contention of the appellants on this ground is well founded, and that on this ground the appeal must succeed."

A case upon which Mr. Grabiner much relies is the decision of Walton J. in *William Whiteley Ltd.* v. *The King* (1909) 101 LT 741. The employers of F "male servants" were required to take out licences for such employees, for which fees were payable to the Inland Revenue. Whiteley employed a number of men to prepare and serve meals to their shop assistants. The Revenue claimed that these men were "male servants", but Whiteley consistently disputed this. Nevertheless, for six years under protest Whiteley paid the fees claimed by the Inland Revenue. In the seventh year they refused to pay. The G Inland Revenue took proceedings to recover the fees for the seventh year, but Whiteley were held to be correct in their contention that the employees were not "male servants" within the proper interpretation of the relevant regulations. Whiteley then sought to recover the monies they had paid during the past six years, but were held not entitled to do so. Walton J. held that they were not entitled to recover because they had paid voluntarily, not under H compulsion. He held, correctly in my view, that the facts did not show anything in the nature of duress or a demand for payment *colore officii* within Windeyer J.'s definition. Therefore, he decided that since Whiteley had not taken the step in earlier years of refusing to make payment and arguing the matter in court, they must be taken to have paid voluntarily.

I In *National Pari-Mutuel Association Ltd.* v. *The King* (1930) 47 TLR 110, the company, without objection, paid betting duty to operate a totalisator. Later another company, on identical facts, brought proceedings in which it was held not liable to pay the duty. The plaintiff company now brought an action for repayment of the duty it had paid. They failed in this Court, on the ground that the payment had been made as a result of a mistake of law

made by the company, and thus on general principle the amount paid could not be recovered. Scrutton L.J., in a judgment with which Greer and Romer L.JJ. agreed, said, at page 111:

> "What was the mistake which the appellants had made in this case? They knew all the facts, their own rules, and what they were doing with the totalisator. They had considered the Finance Act, 1926, and they had come to the conclusion that they were liable to pay the betting tax. ... The question of liability was one of law. It was a question of the construction of the Act of Parliament. The Act of 1926 provided for a tax on every bet made with a bookmaker, and a bookmaker was defined as a person receiving and negotiating bets. The appellant company carried on business of that class. ... The company thought that they were liable to pay the tax. After they had paid it, the House of Lords, in the case already referred to, decided that a company doing similar business were not liable to the tax. Mr. Justice Branson held that the mistake was one of law, and that the company could not recover. That decision was right."

In *Twyford* v. *Manchester Corporation* [1946] Ch 236, the corporation sought to charge fees to a monumental mason for permission to work on memorials in the cemetery. The plaintiff paid fees under protest. After some time he brought an action claiming that the corporation were not entitled to make the charges. It was held that the charges had been levied improperly, but nevertheless the plaintiff was not entitled to recover them.

In his judgment Romer J. referred to *William Whiteley Ltd.* v. *The King* and *Slater* v. *Mayor and Corporation of Burnley*. He said of the former case that Walton J.[1]:

> "... treated the case as one of payment under a mistake of law. I should myself have doubted whether it was a true case of money paid under a mistake of law, because William Whiteley, Ltd., on their view of the law, were not liable to pay it and, indeed, said so. Even so, however, I respectfully agree with the rest of Walton J.'s judgment, particularly with his statement that a general rule applies, namely, the rule that, if money is paid voluntarily, without compulsion, extortion, or undue influence, without fraud by the person to whom it is paid and with full knowledge of all the facts, it cannot be recovered, although paid without consideration, or in discharge of a claim which was not due or which might have been successfully resisted. In my judgment that covers the present case in which, having regard to the evidence, the principle of duress colore officii cannot prevail."

In *Sebel Products Ltd.* v. *Commissioners of Customs and Excise* [1949] Ch 409, Sebel Products claimed a declaration that one of the articles they manufactured was not liable to purchase tax within the Finance Act 1947. The action was heard on 2 July 1948 when Vaisey J. granted a declaration in favour of the plaintiffs. Two months before that, the plaintiffs paid the Custom and Excise the amount of purchase tax which would have been owing if their claim had failed. They now took out a summons for an account of the purchase tax which they had paid and for repayment of the amount due.

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[1] [1946] Ch 236, at page 241.

The Customs, basing themselves on *William Whiteley Ltd.* v. *The King* and *National Pari-Mutuel Association* v. *The King*, argued that the money had been paid voluntarily and was thus irrecoverable.

Vaisey J. found that Sebel Products were entitled to recover the money paid on the ground that when they made payment to the Customs and Excise, it was the intention of both parties, and thus there was an implied agreement, that if Sebel Products succeeded in their action for a declaration the money would be repaid. This of course is the basis upon which Nolan J. had found for Woolwich in the present case.

However, in the course of his judgment, at page 413, Vaisey J. said:

> "By the Crown Proceedings Act, 1947, the defendants are placed in the same position as the ordinary subjects of the Crown (see s. 21) and I see no reason why they should not in appropriate cases refuse to refund money paid to them voluntarily under a mistake of law, as the Revenue Authorities were held to be entitled to do in the case of *William Whiteley Ltd.* v. *The King* and *National Pari-Mutuel Association Ltd.* v. *The King*. At the same time I cannot help feeling that the defence is one which ought to be used with great discretion, and that for two reasons. First, because the defendants being an emanation of the Crown, which is the source and fountain of justice, are in my opinion bound to maintain the highest standards of probity and fair dealing, comparable to those which the courts, which derive their authority from the same source and fountain, impose on the officers under their control: see *In re Tyler*. Secondly, because the taxpayer, who is too often tempted to evade his liability and to keep in his own pocket money which he ought to have paid to the Revenue, will find too ready an excuse in the plea that the Revenue Authorities will, if they can, keep in their coffers, if they can get it there, money which the taxpayer was under no obligation to pay to them, and they had no right to demand. Although such an excuse would have no validity in either a court of law or in the forum of the taxpayer's own conscience, I think that, in the public interest, grounds for proffering it should, so far as possible, be avoided."

These last observations of Vaisey J. find an echo in the speech of Lord Bridge of Harwich in *Regina* v. *Tower Hamlets London Borough Council* Ex parte *Chetnik Developments Ltd.* [1988] AC 858, to which Mr. Gardiner refers as guidance on the general approach which taxing or rating authorities, and thus the courts, should adopt.

Chetnik Developments constructed two warehouse units under a consent granted under the London Building Acts. The consent was subject to a condition that the buildings should not be occupied until the consent of the Tower Hamlets London Borough Council had been obtained to the proposed user. Chetnik could not say what the proposed user would be until they had obtained a tenant for each of the warehouses. This, for some time, they failed to do. The council served a completion notice on Chetnik under para 1 of Sch 1 of the General Rate Act 1967. Chetnik did not appeal against the notice. Accordingly, from 16 November 1976 they were required to pay rates on the warehouses, although unoccupied, as if they were the occupiers. Chetnik duly paid rates until 31 March 1979, on which date the first ware-

house was eventually let and occupied. The second warehouse remained unoccupied until November 1980. A

It was only after 31 March 1979 that Chetnik appreciated that Sch 1 para 2 of the Act of 1967 provides that no rates shall be payable on an unoccupied hereditament under that Schedule for any period during which the owner is prohibited by law from occupying the hereditament or allowing it to be occupied. Chetnik, therefore, declined to pay any further rates on the second warehouse. They argued that until they had obtained consent to the proposed user of the warehouse, they were prohibited by law from allowing it to be occupied. This contention was upheld in proceedings brought by the London Borough Council in the magistrates' court, and the council did not appeal. Chetnik then sought to reclaim the amount of rates they had paid on both warehouses for the period from November 1976 to 31 March 1979. B C

The claim was made under s 9 of the Act of 1967 which provides so far as is material:

> "... where it is shown to the satisfaction of a rating authority that any amount paid in respect of rates, and not recoverable apart from this section, could properly be refunded on the ground that ... D
>
> (*e*) the person who made a payment in respect of rates was not liable to make that payment,
>
> the rating authority may refund that amount or a part thereof." E

It was conceded that this gave the council a discretion to decide whether to repay the amount of rates which Chetnik had not been liable to pay. The council decided not to make any repayment. Chetnik applied for judicial review of that decision. They failed at first instance, but succeeded on appeal to the Court of Appeal, and the council's appeal to the House of Lords was dismissed. F

The case was of course one in which the power to repay was contained in the statute. Nevertheless, the issue before the Court was whether the reasons which the council gave for exercising its discretion not to repay were proper and valid reasons, or whether they did not justify the exercise of the discretion to refuse repayment. Although the decision is of course direct authority in relation to the Rating Act, in his speech, with which the remainder of their Lordships all agreed, Lord Bridge based his decision upon general principles. Mr. Gardiner submits, and I agree, that his Lordship's observations apply as much to an authority exercising a power to levy taxes as they do to a rating authority. G H

At page 873H, Lord Bridge said:

> "In general terms it is, of course, obvious that the section authorises the refund of rates overpaid. But, to articulate the apparent principle underlying the section more precisely it is surely envisaged in each of the five cases where the section authorises refunds of amounts paid in respect of rates which would otherwise be irrecoverable that the ratepayer who has paid rates in compliance with a demand note which he might have successfully resisted may appropriately be relieved of the consequences of his oversight." I

Lord Bridge then shortly described the five situations in which under s 9 a rating authority may decide to make a repayment. At page 874E, he said:

> "The common feature of all the five cases is an error or oversight on the part of the ratepayer. Only in the case of paragraph (b) is it necessary to predicate any error on the part of the rating authority, which may in any event have been no more than a clerical error. In none of the other cases is the rating authority likely to have been aware of the ratepayer's error which occasioned the overpayment. To these considerations must be added the important qualification that section 9(2)(b) precludes any refund of overpaid rates when the underlying error affected current general practice, so that either ratepayers generally or all ratepayers in the class affected by the error are in the same position. In each case, except paragraph (a), where the obstacle to recovery is the conclusive evidential effect of an unchallenged entry in the valuation list, the amount paid would be irrecoverable apart from the section because paid under a mistake of law. In each case because of his mistake the individual ratepayer has borne more than his proper share of the rate burden. In each case the Section envisages that the amount overpaid in a past year may be refunded in a future year.
>
> The rule that money paid under a mistake of law is irrecoverable is said to stem from the principle that there must be an end to litigation. But there is an instructive line of authority showing circumstances in which the court will not permit the rule to be invoked.

In *Ex parte James* (1874) LR 9 Ch App 609, a judgment creditor had levied execution in satisfaction of a judgment debt against a debtor subsequently adjudicated bankrupt. The judgment creditor later paid over the proceeds of the execution to the trustee in bankruptcy mistakenly believing that he was legally obliged to do so. The trustee in bankruptcy claimed to retain this sum for the benefit of the general body of unsatisfied creditors on the ground that it had been paid under a mistake of law. Rejecting this claim, James L.J. said, at p. 614:

> 'I am of opinion that a trustee in bankruptcy is an officer of the court. He has inquisitorial powers given him by the court, and the court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The court, then, finding that he has in his hands money which in equity belongs to someone else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people.'

Ex parte Simmonds (1885) 16 QBD 308 was another case of a trustee in bankruptcy claiming to retain money paid to him under a mistake of law. Lord Esher M.R. said, at p. 312:

> 'When I find that a proposition has been laid down by a Court of Equity or by the Court of Bankruptcy which strikes me as a good, a righteous, and a wholesome one, I eagerly desire to adopt it. Such a proposition was laid down by James L.J. in *Ex parte James*, L.R. 9 Ch. App. 609. A rule has been adopted by courts of law for the purpose of putting an end to litigation, that, if one litigant party has obtained money from the other erroneously, under a mistake of law, the party who has paid it cannot afterwards recover

it. But the court has never intimated that it is a high-minded thing to keep money obtained in this way; the court allows the party who has obtained it to do a shabby thing in order to avoid a greater evil, in order that is, to put an end to litigation. But James, L.J., laid it down in *Ex parte James* that, although the court will not prevent a litigant party from acting in this way, it will not act so itself, and it will not allow its own officer to act so. It will direct its officer to do that which any high-minded man would do, viz., not to take advantage of the mistake of law.'"

At page 876H, Lord Bridge said:

"So it emerges from these authorities that the retention of moneys known to have been paid under a mistake of law, although it is a course permitted to an ordinary litigant, is not regarded by the courts as a 'high-minded thing' to do, but rather as a 'shabby thing' or a 'dirty trick' and hence is a course which the court will not allow one of its own officers—such as a trustee in bankruptcy, to take."

At page 877C–E, he said:

"I in no way dissent from this reasoning, but I should myself have been content to derive the same conclusion from the broader consideration that Parliament must have intended rating authorities to act in the same high principled way expected by the court of its own officers and not to retain rates paid under a mistake of law, or in paragraph (a) upon an erroneous valuation, unless there were, as Parliament must have contemplated there might be in some cases, special circumstances in which a particular overpayment was made such as to justify retention of the whole or part of the amount overpaid."

There have, of course, been cases in other common law jurisdictions both of the payment of taxes later held to be invalid or unconstitutional and of fees or other duties demanded under some threat or duress. I wish to refer to three such cases.

The first is *Sargood Brothers* v. *The Commonwealth and another* (1910) 11 CLR 258, a decision of the High Court of Australia. Customs duty was demanded and paid under a change in legislation which was proposed and announced but which at the relevant time had not yet come into force. It was held that the amount paid was recoverable as not having been paid voluntarily. O'Connor J. said, at page 276:

"The first ground is taken that the payment was voluntary. In one sense it was. It was in fact made without protest and in the ordinary course of Customs business.

But it was paid with the knowledge on both sides that Customs control over goods imported may be exercised in support of illegal as well as of legal demands of duty. The principle of law applicable in such cases is well recognized. Where an officer of Government in the exercise of his office obtains payment of moneys as and for a charge which the law enables him to demand and enforce, such moneys may be recovered back from him if it should afterwards turn out that they were not legally payable even though no protest was made or question raised at the time of payment. Payments thus demanded *colore officii* are regarded by the law as being made under duress. The principle laid down in *Morgan* v.

A *Palmer*, *Steele* v. *Williams*, and adopted in *Hooper* v. *Exeter Corporation* clearly establish that proposition."

It will be seen that in this passage O'Connor J was using the expression *colore officii* in a much wider sense than that used by Windeyer J. in the passage I have already quoted and to which I shall shortly return, and was B enunciating a principle which effectively was the same as that for which the Woolwich are contending in the present case.

A year later, in *Atchison, Topeka & Santa Fe Railway Co.* v. *O'Connor* (1911) 223 US 280, a decision of the US Circuit Court for the District of Colorado, the plaintiff was held entitled to recover money paid as tax under C a law which was later held unconstitutional, and which he had paid under threat of distress and under protest. Holmes J. said, at page 286:

> "It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that apart from special circumstances he cannot interfere by injunction with the D State's collection of its revenues, an action at law to recover back what he has paid is the alternative left. Of course we are speaking of those cases where the State is not put to an action if the citizen refuses to pay. In the latter he can interpose his objections by way of defence, but when, as is common, the State has a more summary remedy, such as distress, and the party indicates by protest that he is yielding to what he E cannot prevent, courts sometimes perhaps have been a little too slow to recognize the implied duress under which payment is made. But even if the State is driven to an action, if at the same time the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional, rights, by defence in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly F and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms."

Holmes J. then referred to disadvantages which the taxpayer would suffer under the relevant statute if he did not pay, and continued:

> G "As appears from the decision below, the plaintiff could have had no certainty of ultimate success, and we are of opinion that it was not called upon to take the risk of having its contracts disputed and its business injured and of finding the tax more or less nearly doubled in case it finally had to pay. In other words, we are of opinion that the payment was made under duress."

H It follows that this decision also was made upon facts very similar to those of the present case, and upon a principle similar to that for which Woolwich are arguing.

The third case is one to which I have already referred, the decision of the High Court of Australia in *Mason* v. *State of New South Wales* (1959) I 102 CLR 108. The plaintiffs were carriers of goods by road based in the State of Victoria. Under New South Wales legislation, they required a licence to entitle them to carry goods in their vehicles into that State. The New South Wales authorities demanded the payment of a fee for the issue of the licence. The plaintiffs paid under protest. There was some tenuous evidence that the plaintiffs believed that if they did not pay the fee and nevertheless

ran their vehicles into New South Wales they might be seized. After some years it was decided in another case that the requirement of the licence fee was unconstitutional. The plaintiffs brought action to recover the fees they had paid and were held by a majority entitled to succeed. Windeyer J., who gave the last judgment, in a passage I have already quoted at page 140 said:

> "Extortion by colour of office occurs when a public officer demands and is paid money he is not entitled to, or more than he is entitled to, for the performance of his public duty."

Both he and Menzies J. held that, on the facts, the money had been demanded by the State officials' bona fides, under the law as they understood it to be, and thus not within his restricted definition:

> "[The plaintiffs] must establish that there was, in a legal sense, compulsion by something actually done or threatened, something beyond the implication of duress arising from a demand by persons in authority, which suffices in a true *colore officii* case. Further the plaintiffs must establish that they actually paid because of this compulsion, and not voluntarily despite it. 'Voluntary payment' has a special meaning here. Clearly it does not import a payment by way of gift. And equally clearly it means more than payment willingly, in the sense of without reluctance. ... In my view, a payment may be said to be voluntary, in this context and for present purposes, when the payer makes it deliberately with a knowledge of all relevant facts, and either being indifferent to whether or not he be liable in law, or knowing, or having reason to think, himself not liable, yet intending finally to close the transaction. ... It seems plain that a man compelled by pressure *colore officii* or any other form of duress may yet say 'well I have really no option but to pay, nevertheless I will not dispute the matter further. I will pay to put an end to the question'."

Dixon C.J. and Kitto J. went rather further. The former said, at page 117:

> "I have not been able completely to reconcile myself to the view that if the weight of a *de facto* governmental authority manifested in a money demand is not resisted although it is incompatible with s. 92 the money belongs to the Crown unless the payment was the outcome of the actual threatened or apprehended withholding of something to which the payer was entitled or the actual threatened or apprehended impeding of him in the exercise of some right or liberty. But English authority seems now to say that moneys paid to the Crown as and for taxes cannot be recovered from the Crown upon its turning out that the moneys were not exigible notwithstanding that they were demanded by the Crown, unless the circumstances were such that they would be recoverable as between subject and subject, *exempli gratia* as involuntary payments or payments made under a mistake of fact. See *William Whiteley Ltd.* v. *The King*; *National Pari-Mutuel Association Ltd.* v. *The King* and *Sebel Products Ltd.* v. *Commissioners of Customs and Excise*."

However, he held that the plaintiffs were entitled to recover because of the implied threat to seize the plaintiffs' vehicles if they did not pay.

Kitto J. said, at page 125:

> "The general principle to be considered is that which Pollock called 'the common principle ... that if a man chooses to give away his money,

A or to take his chance whether he is giving it away or not, he cannot afterwards change his mind; but it is open to him to show ... that he really had no choice': *Principles of Contract*, 13th ed. (1950), p. 481. The defendant says that the plaintiffs had ample choice. They might defy the State of New South Wales, entering its territory and using its roads in their inter-State journeys without regard to its statute, pinning their faith B to s. 92 as a guarantee that they would emerge scatheless from the enterprise. But when Pollock referred to a choice he was using the language of practical affairs. He meant a free choice, uninfluenced by compulsion of any sort. Hodges J. expressed the conception in *Kelly* v. *The King*: 'The expression "voluntary payment" does not mean a payment which the petitioner or any other person wishes to make. In the case of many C persons such payments never are voluntary in that sense. A "voluntary payment" means at most a payment made to get rid of a liability (*scil.* asserted by the payee though not sustainable in law), made with a free exercise of the will, where no advantage is taken of the position of the person or the situation of his property'.

D An actual or threatened seizure or detention of the payer's property has often been the feature relied upon as showing that there really was no choice. But other circumstances may show it also."

Kitto J. then referred to two other earlier decisions of the US Supreme Court, *Maxwell* v. *Griswold* and *Robertson* v. *Frank Bros.* in 1889, and E quoted the judgment in the latter case as follows:

"'When such duress [moral duress not justified by law] is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary. But the circumstances of F the case are always to be taken into consideration. When the duress has been exerted by one clothed with official authority, or exercising a public employment, less evidence of compulsion or pressure is required,—as where an officer exacts illegal fees, or a common carrier excessive charges. But the principle is applicable in all cases according to the nature and exigency of each'."

G

Kitto J. continued:

"These observations, accurately reflecting, as I believe they do, the common law of England, seem to me to have special force in the case of a payment made to a government in order to obviate adverse conse- H quences which a statute invalidly purports to provide as the alternative."

At page 129, the learned Judge concluded:

"I do not myself feel justified in attaching much weight to the tenuous evidence upon which we were invited to find that the plaintiffs made their payments because of apprehensions induced by words or conduct I of State officials that vehicles would or might be seized and detained under s. 47. My judgment rests upon the view that plaintiffs had quite enough compulsion upon them from the terms of the Act itself, apart altogether from anything that may have been said or done by officers of government. Under that compulsion they parted with their money. ... it was still their money that they parted with, and there is nothing to

account for their parting with it except the pressure they were under. In my opinion they are entitled by law to have it back." A

It seems that the reasoning of Menzies J. and Windeyer J. in that case would not entitle the Woolwich to succeed on the facts of the present case, but the principle enunciated by Kitto J. would support the Woolwich's propositions as probably would have Dixon C.J. B

I should also refer to a decision of the Court of Session, in which the issues canvassed were similar, but not identical, to those before us. In *Glasgow Corporation* v. *Lord Advocate* 1959 SC 203, the corporation sued the Commissioners of Customs and Excise for a declarator that purchase tax was not chargeable on stationery manufactured in its own printing department, and for repayment of purchase tax paid for the years 1951 to 1957. The First Division of the Inner House concluded that stationery manufactured for the purposes of carrying out the corporation's public services was not chargeable to purchase tax, that the corporation had paid tax in the past as a result of a mistake made by it as to the proper interpretation of s 18(1) of the Finance Act 1946, and that monies paid under a mistake as to the proper interpretation of a statute were irrecoverable. In their judgments, both Lord Wheatley, the Lord Ordinary, and the Lord President, specifically referred with approval to the conclusion of this Court to the same effect in *National Pari-Mutuel Association Ltd.* v. *The King* (1930) 47 TLR 110. C D

The Judgment of Nolan J. E

Nolan J.'s judgment in this action is reported at [1989] 1 WLR 137([1]). The reasons which led the learned Judge to his eventual conclusion are to be found in various places in his judgment. At page 140, he quoted a passage from a work by Professor Birks, his "Introduction to the Law of Restitution" (1985) at page 295, to the following effect([2]): F

" 'Where the challenge is made after payment, the effect of a declaration that the demand was unlawful is sometimes to induce repayment on an ex gratia basis. The crucial question is, however, whether there is ever restitution as a matter of right. The dominant modern view appears to be that the citizen who pays an ultra vires demand must establish the same facts against the public authority as would entitle him to restitution from a private individual. This is assumed to mean that he must in practice show that he paid under a mistake of fact or under duress, or that he made a contract for repayment in the event that it should turn out that the money was not payable. On the other side of the line, those who pay by mistake of law, or even under no mistake at all but simply because they despair of making their view prevail against the position taken by the bureaucratic machine, must on this view be said to have no hope whatever of obtaining restitution.' " G H

At page 144A, Nolan J. said([3]):

"Now that [the payments made by Woolwich to the Revenue] have been shown not to have been lawfully claimed, were they immediately recoverable? The first ground upon which Woolwich contends for an affirmative answer to this question is, as I have mentioned, that the payments were immediately recoverable by virtue of a general restitutionary I

([1]) Pages 267G/277G *ante*. ([2]) Pages 269G/270A *ante*. ([3]) Pages 272I/273D *ante*.

principle which may be invoked by a subject who has paid money in response to a tax demand made by the Crown without lawful authority. Money thus paid is recoverable, says Woolwich, even in the absence of duress or of a mistake of fact. It is, I think, necessarily implicit in this contention that, contrary to what Professor Birks described as the dominant modern view in the passage which I have cited above, different considerations apply to claims by the subject against the Crown or public authority from those which apply as between subject and subject. Woolwich relies in this connection on the doubt expressed obiter as to the correctness of the dominant modern view by Dixon C.J. in *Mason* v. *New South Wales* (1959) 102 CLR 108, 116.

For my part, however, I cannot find any positive support in the decided cases for the application of a general restitutionary principle, operating in the absence of mistake of fact or duress, upon claims by the subject against the Crown or public authorities. What the decided cases do show, to my mind, is a realistic though limited acknowledgement that the ability of the Crown or a public authority to apply duress to the subject may be very much greater than that of another subject."

The learned Judge then referred to cases where money has been exacted from the subject under colour of office, quoting the definition of that concept in the judgment of Windeyer J. in *Mason's* case. Nolan J. commented:

"The principle thus defined, clearly does not apply to the present case."

I respectfully agree, and indeed Mr. Gardiner concedes that this is correct.

The learned Judge then contrasted the situations in *Mason* v. *State of New South Wales* and *William Whiteley Ltd.* v. *The King,* and said, at page 146B(1):

"Mr. Grabiner submits that, so far as the presence or absence of duress is concerned, the present case falls on the *William Whiteley* rather than the *Mason* side of the line. I agree. The potential cost to Woolwich of refusing to pay in terms of damage to reputation and interest liabilities may have been commercially unacceptable but I cannot regard it as involving duress on the part of the revenue. The position might be different if Woolwich had paid under threat of the revenue taking distress proceedings without a court order under section 61 of the Taxes Management Act 1980, but as I have said there is no evidence that such drastic and highly unusual proceedings were either threatened by the revenue or anticipated by Woolwich, still less that Woolwich had a reasonable apprehension of being put out of business by them."

The learned Judge then went on to consider whether the Woolwich had a right to recover the capital sum under any other head, and concluded that it was so entitled under an implied agreement with the Revenue which arose when it made the payments, i.e. that if its contentions about the invalidity of the Regulation proved to be correct, the monies would be repaid, but that the right to repayment would only arise at the moment when the decision as

(1) Page 275A/B *ante.*

to the invalidity of the Regulations was made. It was for this reason that Nolan J. refused the claim by Woolwich to be awarded interest.

Summary of Arguments

What then are the arguments in favour of there being a general restitutionary principle, i.e. a principle of law that, if a government body or officer makes a demand for the payment of a tax or duty which he has no legal power to require, and payment is made in response to the demand, there is a presumption of law that the payer has an immediate right to recover the payment? There is no doubt that such a presumption arises in the withholding cases, i.e. where there has been an actual or threatened seizure of the plaintiff's goods, or the withholding of a service he wishes to receive, as a sanction for the plaintiff complying with the demand made by the official. This concept, though it may not strictly amount to duress in the sense in which that word is understood in private law, nevertheless clearly bears a relationship to duress.

The argument for the Woolwich in the present case is that it is illogical and unjust that the presumption should only arise in such circumstances. I summarise the arguments in favour of the wider presumption as follows:

(i) The Bill of Rights point, i.e. that where there is no Parliamentary authority for the imposition of a tax or duty, the taxing authority never was entitled to any money paid on an invalid demand, and thus must be obliged to repay.

(ii) The taxing officer or body has powers conferred by statute to enforce his demand over and above the private citizen's right to bring an action at law. In addition, in some situations, of which this is one, the statutory provisions may put the taxpayer at a disadvantage if he does not make a payment which in the end it proves he was obliged to make as against his position if he does make a payment which he was not obliged to make. I refer here to what Nolan J. called "the interest factor".

(iii) Such a general restitutionary principle must have underlain, though it was not expressly articulated, in the decisions in *Campbell* v. *Hall* (which expressly relied on the Bill of Rights ground); *Dew* v. *Parsons*; the judgment of Martin B. and of Parke B., possibly *obiter*, in *Steele* v. *Williams*; and *Hooper* v. *Mayor and Corporation of Exeter*.

(iv) It accords also with the general approach of the House of Lords in *Regina* v. *Tower Hamlets London Borough Council* Ex parte *Chetnik* [1988] AC 858.

(v) It also accords with the judgments in Australia and America of O'Connor J. in *Sargood Brothers* v. *The Commonwealth and another*, Holmes J. in *Atchison, Topeka & Santa Fe Railway Co.* v. *O'Connor* and Dixon C.J. and Kitto J. in *Mason* v. *State of New South Wales*.

(vi) Not least, the principle is based upon a general standard of fairness in the relations and dealings between officers and organs of government who require the payment of a tax or customs duty, and the taxpayer.

I am persuaded by these arguments. I am clearly of the view that there should, in the interests both of justice and good government, be such a general restitutionary principle as that for which the Woolwich contends. The

A authorities I have quoted support the view that such a principle is part of the common law, though it is not always by any means articulated clearly in those decisions. I have, therefore, considered whether there are any authorities, binding on this Court, which would compel us to adopt the contrary view.

B *Limitations on the principle*

Before I do so, however, I must refer to two principles which are established by the decided cases, and which are relevant to the question. The first is, to use the words of Lord Reading C.J. in *Maskell* v. *Horner* [1915] 3 KB 106, at 118, in a passage which I have already quoted more extensively:

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> "If a person with knowledge of the facts pays money, which he is not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift, and the transaction cannot be reopened."

Later in his judgment, at page 121, Lord Reading referred to the analogous D principle:

> "There is no doubt that if a person pays in an action or under threat of action the money cannot be recovered by him, as the payment is made to avoid the litigation to determine the right to the money claimed."

E I also revert to a short passage from the judgment of Windeyer J. in *Mason* v. *State of New South Wales* (1959) 102 CLR 108, at 143, where he said:

> "In my view, a payment may be said to be voluntary, in this context and for present purposes, when the payer makes it deliberately with a knowledge of all relevant facts, and either being indifferent to whether or not he be liable in law, or knowing, or having reason to think, him- F self not liable, yet intending finally to close the transaction."

The second concept is that of mistake of law. It is frequently said that a person who makes a payment under mistake of fact has a right to recover it, while a person who makes a payment under a mistake of law has not. The G subject is discussed by Lord Goff of Chieveley and Professor Jones in "The Law of Restitution", 3rd edition, at pages 117 onwards. They argue that confusion arises from the misunderstanding of a judgment of Lord Ellenborough in *Bilbie* v. *Lumley* (1802) 2 East 469. The learned authors suggest that the true rationale of that decision was that a payment made in settlement of an honest claim is irrecoverable. They comment:

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> "In our view the principle in *Bilbie* v. *Lumley* should only preclude recovery of money which was paid in settlement of an honest claim. Any other payment made under a mistake of law should be recoverable if it would have been recoverable had the mistake been one of fact."

They are also of the view that many of the English cases which appear I to be based on a mistake of law are, when properly analysed, based upon the principle of settlement of a claim.

In *National Pari-Mutuel Association Ltd.* v. *The King* (1930) 47 TLR 110, a decision of this Court to which I have already referred, it is clear that the issue argued in the Court below and in the Court of Appeal was whether

the mistake which the company had made when it made payment of betting duty was one of fact or of law. No reference was made to any of the earlier cases on a different line, such as *Hooper* v. *Mayor and Corporation of Exeter*. Branson J. and this Court, held unanimously that the mistake was of law, and thus that the company could not recover. Although the case was no doubt one in which it could equally have been argued by the Revenue that the company had paid to close the transaction, it is short but clear authority for the proposition that a payment under a mistake as to the interpretation of the statute is not thereafter recoverable.

However, our attention was also drawn to a passage in the judgment of Lord Denning, giving the decision of the Judicial Committee of the Privy Council in *Kiriri Cotton Co.* v. *Ranchhoddas Keshavji Dewani* [1960] AC 192. He said, at page 204:

> "Nor is it correct to say that money paid under a mistake of law can never be recovered back. The true proposition is that money paid under a mistake of law, by itself and without more, cannot be recovered back. James L.J. pointed that out in *Rogers* v. *Ingham*. If there is something more in addition to a mistake of law—if there is something in the defendant's conduct which shows that, of the two of them, he is the one primarily responsible for the mistake—then it may be recovered back. Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other—it being imposed on him specially for the protection of the other—then they are not in *pari delicto* and the money can be recovered back; see *Browning* v. *Morris* by Lord Mansfield. Likewise, if the responsibility for the mistake lies more on the one than the other—because he has misled the other when he ought to know better—then again they are not in *pari delicto* and the money can be recovered back; see *Harse* v. *Pearl Life Assurance Co.* by Romer L.J."

I come back, therefore, to consider the cases upon which Mr. Grabiner relies for his submission that there is no general restitutionary principle in English law. Neither *Slater v. Mayor and Corporation of Burnley* nor *William Whiteley Ltd.* v. *The King* are binding upon us, and for my part I am inclined to think that they were both wrongly decided. Nevertheless, they have been referred to and relied upon in a number of later decisions, and for that reason we should not lightly set them aside. On one view, both decisions were based, not upon a denial of any general principle, but upon one or more of the possible limitations to that principle to which I have just referred. In *Slater* v. *Mayor and Corporation of Burnley* both judges in the Divisional Court decided that the payment was made voluntarily and thus could not be recovered. Wills J. based his judgment upon the principle that a payment made to close the transaction may not be recovered. He said(1):

> "The respondent gave way and paid. It seems to me in these circumstances that it is idle to say that there is anything like duress—there was nothing in the nature of a threat used; it is simply the ordinary case of a person raising a contention when a demand is made upon him. This is not sufficient to constitute duress; so as to prevent a payment being a voluntary one."

(1) (1888) 59 LT 636, at page 639.

A In *William Whiteley Ltd.* v. *The King* Walton J. based his decision upon two principles, firstly that the payment had been made by the company under a mistake of law and thus could not be recovered, and secondly, on the principle that the company had paid to close the transaction. As to the first of those matters, I do not myself think that the reported facts of the case justify Walton J.'s conclusion, with all respect to him. In my view, therefore, B if these two decisions were correct, they should be held to be so only because they were based on the "close the transaction" principle.

As I have already said, the decision of this Court in *National Pari-Mutuel Association Ltd.* v. *The King* is binding upon us and was undoubtedly decided upon the basis that money paid under a mistake of law as to the proper inter- C pretation of a statute is irrecoverable. Subject to what I say below, the general restitutionary principle must, therefore, be subject to that limitation.

In *Twyford* v. *Manchester Corporation* Romer J. expressed the view, with which I have just said I agree, that in the *William Whiteley* case it seems that the payment by the company had not been made under a mistake of law. D However, Romer J. agreed with the remainder of Walton J.'s judgment. This case also must, therefore, be considered as a "close the transaction" case. If it was not decided on this principle, again I believe it to have been wrongly decided.

Finally in *Sebel Products Ltd.* v. *Commissioners of Customs and Excise* E Vaisey J. was bound by the decision in *National Pari-Mutuel Association* v. *The King* to hold that a payment under a mistake of law as to the proper interpretation of a statute was irrecoverable. It is clear to me from the passage in his judgment I have already quoted that, if he had not held himself so bound, he would have found for Sebel Products on a general principle of restitution, rather than on the applied agreement which he found was the F basis on which he was able to give judgment in their favour.

It follows, in my view, that none of these authorities, even the decision of this Court which is binding upon us, impels us to the view that there is no general restitutionary principle. What they appear to show is that there are limitations upon the application of such a principle, both in cases where it G can properly be said that the payment was made in order to close the transaction, and in cases where the payment was made as a result of the payer being mistaken as to the proper interpretation of the relevant statute. It is arguable that it is illogical that a general restitutionary principle should be subject to these limitations. However, in the light of the authorities to which I have referred, it is not, in my view, open to us in this Court to accept this H argument. We are bound by this Court's previous decisions in *Maskell* v. *Horner* and *National Pari-Mutuel Association Ltd.* v. *The King*.

I, therefore, conclude that there is such a general principle as that for which the Woolwich contends, but, at least in cases where the matter in issue is the interpretation of the statute, that principle is subject to the two limita- I tions to which I have just referred, i.e. that the payment may not be recoverable if it was made to close the transaction or under a mistake of law. Whether these limitations apply in a situation where what is in issue is not the proper interpretation of the statute, but an *ultra vires* Regulation, I doubt. But in the circumstances of this case I do not find it necessary to consider that matter further.

I have considered whether there may not be one further limitation to the general principle of restitution. This, however, is a matter which has not been argued before us, and I, therefore, wish to do no more than refer to it without expressing any concluded view. In a case such as the present where a demand is made for payment of tax and the taxpayer wishes to contend that the Regulation under which the tax is claimed is *ultra vires* and, therefore, invalid, he brings his proceedings as Woolwich did by way of judicial review. It is, however, a normal principle of administrative law that the judicial review jurisdiction will not be exercised where there is an alternative remedy by way of appeal, save in exceptional circumstances (see the decision of this Court in *Regina* v. *Chief Constable of Merseyside Police* Ex parte *Calveley* [1986] QB 424, and cases there cited.)

If a claim is made for tax and the dispute is as to whether the particular provision of the statute has been properly interpreted, or even more basically whether the amount assessed is too great, then the taxpayer will normally have a statutory right of appeal. If for instance a person charged to income tax appealed to the Commissioners under s 55 of the Taxes Management Act 1970, and the Commissioners concluded in the event that he had overpaid tax, then s 55(9)(b) requires that "...any tax overpaid shall be repaid".

It maybe that the courts would decide that where there was a clear avenue of appeal laid down by statute, that was the course which should be taken and that a remedy by way of judicial review was not available even if the result was that the taxpayer was repaid the capital overpayment without any interest. As I say, however, this possible limitation has not been discussed before us, and I do not wish to express any concluded view about it.

Conclusion

I have considered the limitations upon a general restitutionary principle in cases of payment made to close the transaction or under a mistake of law, and the possible further limitation where there is an alternative remedy available. However, in my view, on the facts of this case none of these limitations applies. The Woolwich made it quite clear from the start that it was not making payment to close the transaction; it paid without prejudice to the argument in the judicial review proceedings that the Regulation was invalid. Since the Woolwich correctly asserted that invalidity from the start, it cannot be suggested that it made any payment under a mistake of law. The suggestion of an alternative statutory remedy has not been canvassed.

I would, therefore, hold that when the Woolwich made the various payments under the *ultra vires* Regulation it immediately acquired a right in law to recover the amount of those payments. It follows that it was entitled also to be paid interest on those amounts, at an appropriate rate, from the date of payment to the date of Nolan J.'s judgment in the judicial review proceedings.

I would, therefore, allow the appeal. It follows, in my view, that the Woolwich is entitled to judgment for the appropriate amount of interest, and it remains to be considered how that amount should be assessed.

Ralph Gibson L.J.:—Woolwich Building Society ("the Woolwich") appeals against the decision of Nolan J. (as he then was) of 12 July 1988 whereby he dismissed the claim of the Woolwich against Her Majesty's Commissioners of Inland Revenue ("the Revenue"). The claim was for inter-

A est upon sums of money, totalling £56.998m, which the Woolwich had paid to the Revenue in respect of claims to tax which claims were unlawful because based upon Regulations which were *ultra vires* and void. No issue arose as to recovery of the capital sum of £56.998m because that had been repaid. The amount claimed for interest, which would require to be assessed by the Court if not agreed, is put by the Woolwich at about £7.8m.

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The appeal raises issues of great public importance and, in particular, the relationship of the constitutional principle, namely that there can be no taxation without the authority of Parliament, to the rules of law governing recovery from the Crown of money paid in respect of an unlawful demand for tax.

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The Judicial Review Proceedings

(i) The Woolwich obtained in earlier proceedings a declaration that the relevant Regulations were void. The course of those proceedings, which provide the background to the present dispute, can be summarised briefly because a full account is available in the reported decisions of Nolan J. on 31 July D 1987, [1987] STC 654(1); of the Court of Appeal of 12 April 1989, [1989] STC 463(1); and of the House of Lords of 25 October 1990, [1990] 1 WLR 1400(1).

(ii) Between 1894 and 1985 the tax position of building societies, so far as concerned accounting for tax deducted by a society upon interest paid or credited to its members, was regulated by extra-statutory arrangements made E between individual building societies and the Revenue. By s 23 of the Finance Act 1951, those arrangements received Parliamentary recognition: see now s 343 of the Income and Corporation Taxes Act 1970 ("the 1970 Act"). The effect of such an arrangement was that a building society was required to account to the Revenue for a lump sum representing the tax on the interest paid to its members.

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(iii) For the year 1985–1986 the lump sum paid by the Woolwich, whose accounts were made up to 30 September in each year, only took into account payments to members down to 30 September 1985: the interest paid during the period 1 October 1985 to 5 April 1986 ("interest for the omitted period") G was not taken into account.

(iv) In 1986, under powers contained in s 343(1A) of the 1970 Act (now s 476 of the 1988 Act), the Board of Inland Revenue made Regulations imposing a new system whereby building societies from 1986–1987 onwards were required to account in respect of interest payments made to members H on a quarterly basis in respect of interest paid in the quarter concerned. The Regulations (S.I. 1986/482) contained transitional provisions which purported to require building societies to account in respect of interest payments made to members after the end of the last accounting period but before 1 March 1986.

I (v) Section 343(1A) of the 1970 Act was amended by s 47(1) of the Finance Act 1986, which provided that s 343(1A) "...shall have effect and be deemed always to have had effect" as providing that the sums in respect of which the Board was empowered to make Regulations requiring building

(1) 63 TC 589.

societies to account "...included sums paid or credited before the beginning of 1986-1987 but not previously brought into account under s 343(1)". A

(vi) The Woolwich challenged the validity of the 1986 Regulations and applied by judicial review for a declaration that the Regulations were void. On 31 July 1987 Nolan J. granted the application and declared that, to the extent that the Regulations purported to impose a liability on the Woolwich in 1986–1987 and 1987–1988 in respect of interest for the omitted period, they were *ultra vires* and void. B

(vii) On appeal to this Court, the Revenue contended that interest for the omitted period consisted of sums paid or credited before the beginning of 1986–1987 but not previously brought into account under s 343(1), within the meaning of s 343(1A) as amended, and that, therefore, the Regulations could not be *ultra vires* in imposing liability in respect of that interest. It was conceded by the Revenue that Regulation 11(4) was *ultra vires:* it provided that C

> "...the sum payable to the Board to which paragraph (3) refers is the sum of the reduced rate amount arrived at by reference to a rate of 25.25% and the basic rate amount arrived at by reference to a rate of 30%." D

The invalidity of that provision was accepted because it purported to charge the sum so brought into account at a reduced rate of 25.25 per cent. and a basic rate of 30 per cent. which were the rates appropriate to the tax year 1985–1986; but subs (1A) of s 343 provided that the sum for which the society was to be liable in respect of the interest brought into account was to be an amount representing income tax calculated at the rates "determined for the year of assessment concerned". It was, however, contended for the Revenue that that partial invalidity did not invalidate the rest of Regulation 11. E F

(viii) This Court allowed the appeal of the Revenue. It was held that Regulation 11 did not have the effect of charging to tax the income of a period of more than one year; and Regulation 11 did not involve any element of double taxation. The fact that, as had been conceded, Regulation 11(4) was invalid did not render the whole of the Regulations invalid. G

(ix) On appeal to the House of Lords the order of Nolan J. was, on 12 April 1989, restored. Their Lordships upheld the reasoning of the Court of Appeal so far as concerned their holding that Parliament had conferred power upon the Revenue to make Regulations requiring the taxation in the year 1986–1987 and subsequent years of assessment of sums paid or credited in the omitted periods; but they held that the admitted invalidity of Regulation 11(4) infected the whole of that Regulation and, therefore, Regulation 11 and Regulation 3, so far as it related to the period after February and before 6 April 1986, were declared to be invalid. H

The Payment of the Money I

The judicial review proceedings were commenced by notice of application on 17 June 1986. The first relevant payment, of an amount of £42.426m, was made on 16 June 1986 in the following circumstances. The Woolwich had disputed the validity of the Regulations when they were in draft and before they were made on 13 March 1986. The Regulations came into force on 6 April 1986. Regulation 3 provided that each building society "...shall

pay" to the Revenue on the specified quarterly dates the appropriate amount of tax in respect of dividends and interest paid by it to its members. By letter of 11 April to the Woolwich Mr. Brunsden, the District Inspector, referred to the "...need to agree the income tax due for the 'transitional' period 1 October 1985 to 28 February 1986, splitting figures between basic rate and composite rate in the usual way" and asked for Woolwich's "computation on the same basis as that used in previous years for the annual assessment". That was followed by a letter of 17 April 1986 in which Mr. Fletcher, the collector of taxes, sent to the Woolwich the return form CT61(Z), with which the Woolwich was required to make its returns at the end of each of the stated return periods, together with the payment, calculated in accordance with the form, within 14 days of the end of each period. With the form were sent printed "notes for guidance" which included a statement that "...your returns have to be made to the collector of taxes and this form provides you with space for both types of return". The form itself contained the reminder that "...interest is chargeable on tax paid late—it is not an allowable deduction for tax purposes".

By letter of 12 June 1986 the Woolwich returned to the Revenue the form CT61 for the period 1 March to 31 May 1986. The form showed the "net tax due on payments" as £42.426m due on 14 June. The letter noted that, on transfer by automated payment of that sum on 16 June to the account of the Revenue, no interest would be charged in respect of the two days between 14 and 16 June. The letter concluded:

> "You should be aware that we are presently seeking leave to commence legal proceedings in connection with the regulations and accordingly this payment is made without prejudice to any right to recover any payments made pursuant to the regulations which may arise as a result of legal proceedings, or as a result of any future extinguishment or reduction of any liability under the said regulations or otherwise."

On 15 September 1986 the Woolwich paid £2.856m and on 16 March 1987 £11.714m. It is common ground that the second and third payments were made on the same "without prejudice" basis and it is not necessary to consider the terms of any further letter.

The Statutory Background

The Regulations of 1986 were directed at the tax liabilities of building societies. The provisions contained in the Regulations, and the demands and requirements sent by the Revenue to the Woolwich in reliance upon the validity of the Regulations, inevitably made it clear to the responsible managers of the Woolwich that the Revenue possessed and would, if necessary and when appropriate, use the powers of enforcement which the Revenue have under the provisions of the Taxing Acts. That statutory background, which is said by the Woolwich to justify a finding that the payments were made under duress, was as follows. Regulation 7 provided that Sch 20 of the Finance Act 1972, with certain modifications, should have effect for the collection of the tax under the Regulations and that interest should be chargeable on overdue payments. Paragraph 4(1) of Sch 20 provides that income tax, in respect of any payment which is required to be included in a return under the Schedule, "...shall be due" at the time when the return is made and "...shall be payable" without the making of any assessment. An assessment may, however, be made under para 4(3) if the taxpayer fails to include

in his return a payment which, in the Inspector's opinion, ought to have been included. The issue of liability will then be resolved by way of an appeal against the assessment. If the appeal fails, then interest runs in favour of the Revenue from the time when the tax should have been paid. If it turns out that the taxpayer has paid more tax than was due, then the payment becomes repayable on the determination of the appeal but without interest: see para 10(4). It is not expressly provided that there shall be no interest but it is common ground that that is the effect of the absence of any express provision for the payment of interest. A power of distress upon goods and chattels in the case of failure to pay a sum charged is provided by s 61 of the Taxes Management Act 1970; and by ss 66 and 68 tax may be recovered from the person charged as a debt due to the Crown by action in the County Court or the High Court. Under s 98 of the same Act, a penalty not exceeding £50 may be imposed upon a taxpayer who fails to make a return which has been required of him and provision is made for greater penalties if the failure is fraudulent or negligent.

The Proceedings to Recover the Money and Interest

The Woolwich issued their writ on 15 July 1987 between the conclusion of the hearing before Nolan J. and the giving by him of his reserved judgment on 31 July 1987. The claim asserted that, since the payments were made pursuant to demands based upon void Regulations, the demands were unlawful: the payments had been made under protest; and, therefore, the Revenue was liable to repay the capital sums with interest pursuant to s 35A of the Supreme Court Act 1981.

After the giving of judgment by Nolan J. on 31 July 1987, the Woolwich and the Revenue agreed, after discussions, for the repayment of the capital sums with interest from the date of the judgment. It has always been the contention of the Revenue that the payments were voluntary; and that the Woolwich, although they may have had a confident expectation that the Revenue would return the capital as an *ex gratia* payment if the Woolwich succeeded in the judicial review proceedings, had in law no right to recover the capital sums save under any contract for repayment which could be implied from the circumstances in which the payments were made.

The defence of the Revenue set out those contentions, and alleged that, if the Woolwich had any entitlement in law to repayment, the Revenue would contend:

> "...that the payments were made pursuant to an implied agreement between the Woolwich and the Revenue whereby it was agreed that the Revenue would hold the sums pending the outcome of proceedings to determine the validity of the regulations. Any entitlement to repayment arose on the date of judgment of Nolan J. and interest ran from that date."

At the hearing of the recovery proceedings before Nolan J., in response to submissions for the Revenue that the statement of claim disclosed no cause of action, the claim of the Woolwich was amended so as to allege that the payments were made in discharge of unlawful claims to tax and that, therefore, since the payments were thus made without consideration, the capital was repayable by the Revenue as money had and received to the use of the Woolwich. Further, it was alleged that the payments were, in the circumstances, made under compulsion and were recoverable on that ground.

Since the capital sums had been repaid with interest from 31 July 1987, the only issue before Nolan J. was whether the Woolwich could make good a claim to be paid interest for the periods of time that the Revenue had held the capital between the dates of payment and 31 July 1987. That depended upon proof that the Woolwich had a cause of action to recover the capital independent of any contract arising by implication upon the circumstances of payment. The Woolwich did not then allege that any such agreement could be held to have contained a term providing for such interest.

The Judgment of Nolan J.

It was common ground before Nolan J., as it has been in this Court, that if the Woolwich had a valid claim against the Revenue, based upon ordinary principles of restitution, by reason of the invalidity of the Regulations, or because the circumstances in which the payments were made are in law the equivalent of duress, then the sums repayable were debts within the meaning of s 35A of the 1981 Act: see *B. P. Explorations* v. *Hunt* [1983] 2 AC 352; and that, therefore, interest would be recoverable at such rate and for such period as the Court might think fit. There were placed before Nolan J. the relevant authorities and the comments upon those authorities made in textbooks of learned authors and in articles in the journals of academic lawyers. His conclusions are set out fully in the report of his judgment at [1989] 1 WLR 137(1). In brief summary he held:

(i) He was greatly attracted by the argument advanced for the Woolwich since it was clear that the capital would never have been received by the Revenue but for the *ultra vires* Regulations made by them. In effect the Revenue had, in times of inflation, received a large interest-free loan from the Woolwich.

(ii) Nevertheless, it was clear that the courts had not extended the general principle of restitution to those who have submitted to unauthorised demands for tax. On the contrary, the general rule has been that the maker of the payment has no right to recover the principal sum paid let alone to recover interest upon it.

(iii) After stating the statutory context in which the purported claims by the Revenue had been made under the void Regulations, and after reference to the letters and documents passing between the parties, Nolan J. held that four factors had induced the Woolwich to make the payments, namely:

(a) The requirements of the Regulations, as stated in communications from the Revenue, amounted to apparently lawful demands from the Crown. Refusal of payments could be expected to lead to enforcement proceedings and to result in publicity, possibly suggesting that the Woolwich might be in difficulty in meeting its financial obligations, or that it alone among building societies was pursuing a policy of confrontation with the Crown, and such publicity might have damaging effects outweighing the prospects of success in the judicial review proceedings.

(b) The Woolwich feared that, if it failed in the judicial review proceedings, it might incur penalties.

(1) Pages 267G/277G *ante*.

(c) The payments made formed part of larger quarterly payments of which the remainder was correctly charged and, at the time of payment, the amount in dispute was not precisely identified.

(d) The prospects of success in the judicial review proceedings were uncertain. If the Woolwich had failed, sums due for interest upon the unpaid demands, which would not have been deductible for tax purposes, would have far exceeded the net return which the Woolwich could have obtained by investing the £56.98m. The overall cost to the Woolwich in interest, if they had refused to pay and had failed in the judicial review proceedings, was estimated at £4m.

He concluded that "...as a practical matter ... the Woolwich had little choice but to make the three payments".

(iv) No positive support could be found in the decided cases for the application of a general restitutionary principle, in the absence of mistake of fact or duress, upon claims by the subject against the Crown or public authorities.

(v) The principles applied in cases where money has been exacted from the subject *colore officii* are confined to cases where "...a public officer demands and is paid money he is not entitled to, or more than he is entitled to, for the performance of his public duty": see *per* Windeyer J. in *Mason* v. *State of New South Wales* (1959) 102 CLR 112, at page 140: and were thus not applicable in this case.

(vi) The analogous and broader principle of duress is not applicable where there is no threat to the person of the subject or to his goods: see *Mason's* case: and where the sanction involves only the threat of legal proceedings: see *William Whiteley Ltd.* v. *The King* [1909] 101 LT 741.

(vii) The decision of Walton J. in *Whiteley*'s case has been consistently followed and this case falls within the principles stated in that case.

(viii) The potential cost to the Woolwich of refusing to pay, whether in terms of damage to reputation or of interest liabilities, may have been commercially unacceptable but did not amount to duress by the Revenue.

(ix) There had, however, been a right at law in the Woolwich to recover the capital upon the principle stated by Vaisey J. in *Sebel Products Ltd.* v. *Commissioners of Customs and Excise* [1949] Ch 409, namely upon an implied contract for the repayment of the capital by the Revenue in the event of the Woolwich succeeding in the judicial review proceedings. There was, however, no basis in law for implying an agreement to pay interest.

The Appeal to this Court

The contentions and argument of the Woolwich on appeal have been substantially the same as they were before Nolan J. save for one further point. The Woolwich has submitted that, if the only ground of recovery of the capital available to the Woolwich was in contract arising by implication upon the facts, that contract should be held to include a term that the Revenue would pay interest upon the capital sums from the dates of payment. No objection was taken by the Revenue to the raising of that point in this Court. The Revenue's notice under Order 59, Rule 6(1)(b) maintained

A that, if there was no implied agreement for repayment of the capital, no right to repayment ever arose; alternatively, it was said that once the dispute was resolved in favour of the Woolwich in the judicial review proceedings, it became unconscionable for the Revenue to retain the money and that it was open to the Court to impose upon the defendants a constructive trust in respect of that money.

B

It is to be noted that the Revenue did not there contend that, if the Woolwich should show that the circumstances in which the demands for tax and payments on account of tax were made gave rise to a right to recover the capital sums with interest, nevertheless the making of the implied agreement for repayment of capital without interest should be held to have comprised C or brought that right to an end. Mr. Grabiner indicated that, in the submission of the Revenue, such a result might well be effected by an agreement in similar circumstances, but did not argue that the Court should so find on the facts of this case.

D *The Submission for the Woolwich*

(i) Mr. Gardiner has contended that the relevant authorities are inconsistent and confused and that there is no authority binding on this Court which prevents this Court from giving effect to the claim of the Woolwich as properly based upon well-established principles: reference was made to *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* [1943] AC E 32, *per* Lord Wright, at pages 61–64, and to *Kiriri Cotton Co. Ltd.* v. *Ranchoddas Keshavji Dewani* [1960] AC 192, at 204, 205.

(ii) The claim was advanced on two grounds. The first was that, on principle, he who makes a payment in response to an unlawful demand of taxation, or other like demand from the Crown, acquires a *prima facie* right F to recover the money forthwith as money had and received. This should be held to be a distinct head of recovery independent of mistake or duress. It could be limited in this case to circumstances where the demand is based upon an *ultra vires* Regulation.

(iii) The law should, as a matter of policy, encourage by its rules the G sort of responsible conduct shown by the Woolwich in this case, namely to pay under protest and to seek at once the ruling of the Court. The law should not permit the Revenue to enjoy the right to behave with less than the highest standard of conduct: see Vaisey J. in *Sebel Products Ltd.* v. *Commissioners of Customs and Excise* [1949] Ch 409, at pages 412, 413 and *per* Lord Bridge in *Regina* v. *Tower Hamlets London Borough Council* Ex H parte *Chetnik Developments Ltd.* [1988] AC 858, at pages 876–877. Further, to deny the *prima facie* right of recovery would be to depart from the constitutional principle, contained in the Bill of Rights, against taxation unauthorised by Parliament: see *per* Atkin L.J. in *Attorney-General* v. *Wilts United Dairies Ltd.* (1921) 37 TLR 884, at page 887. Reference was also made to the European Convention for the Protection of Human Rights and Fundamental I Freedoms, Article 13 for the proposition that there should be an effective remedy for the violation of a substantive right: *Amministrazione delle Finanze dello Stato* v. *San Giorgio* [1985] 2 CMLR 658.

(iv) It was acknowledged for the Woolwich that such a right may, in particular circumstances, be defeated by defences arising upon the facts, e.g.

that the payer voluntarily submitted to the unlawful demand in full knowledge of the position and intending to close the transaction. Proof of such intention would depend not upon subjective uncommunicated intention but upon that which the recipient would reasonably understand from what was said and done.

(v) The second basis of claim was duress or practical compulsion which should be held to be proved upon the findings of the Judge that the Woolwich had "...little choice but to make the payments".

(vi) To have to resort to implied agreement, as the basis for holding that the Revenue had not on the facts been free in law to retain the capital sums paid by the Woolwich, was to apply a fiction and to revert to the discredited "implied contract" analysis of restitutionary rights: reference was made to Goff and Jones, Law of Restitution, 3rd edition, pages 5–12. There was, on the facts, no agreement according to ordinary principles of contract law. To hold, as Nolan J. did, that(1)

> "...generally ... whenever money is paid to the Revenue pending the outcome of a dispute which, to the knowledge of both parties, will determine whether or not the Revenue are entitled to the money, an agreement for the repayment of the money, if and when the dispute is resolved in the taxpayer's favour, must inevitably be implied unless the statute itself produces that result, as it does, for example in cases falling within para 10(4) of Sch 20 Finance Act 1972"

is to create a cause of action under a "contract" imposed by law as contrasted with an agreement made by the parties.

(vii) If, however, it is to be held that there was an implied contract, there should be implied a term for the payment of interest by the Revenue from the date of receipt of the sums paid.

(viii) The Woolwich never argued that this was a "mistake" case. If, however, the case should be categorized as one of mistake, then it was submitted that the sums paid were recoverable notwithstanding that the mistake was one of law. The rule excluding recovery for mistake of law should be abrogated as wrong: reference was made to *Air Canada* v. *British Columbia* (1989) 59 DLR (4th) 161 and to *Hydro Electric Commission* of *Nepean* v. *Ontario Hydro* (1982) 132 DLR (3rd) 193. In the alternative, the case was said to be within established exceptions to the rule: see *Kiriri Cotton Co. Ltd.* v. *Ranchhoddas Keshavji Dewani* [1960] AC 192.

The Submissions for the Revenue

The Revenue has claimed no special right or immunity. Its case has been that the law applicable to the claims of the Woolwich is the same as that applicable in disputes between private individuals. In summary, the case put forward by Mr. Grabiner for the Revenue was as follows:

(i) The law allows no general right of restitution. Since there was no duress, and no unlawful demand *colore officii*, the payments were made voluntarily: i.e. in law there was no right to recover them save under any implied contractual promise.

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(1) Page 276B/D *ante*.

(ii) Mr. Grabiner relied upon the *William Whiteley* case as authority, strikingly similar on its facts, which has been consistently followed and never doubted: he referred, for support, to *Twyford* v. *Manchester Corporation* [1946] 1 Ch 236, Romer J.; *Mason* v. *State of New South Wales* [1958–9] 102 CLR 108, High Court of Australia; *Sharp* v. *Chant* [1917] 1 KB 771, CA; *Slater* v. *Mayor and Corporation of Burnley* [1888] 59 LT 636, Divisional Court; *National Pari-Mutuel Association Ltd.* v. *The King* [1930] 47 TLR 110, CA; and Goff and Jones: the Law of Restitution, 1986, 3rd edition, pages 120–122 and 218.

(iii) The *colore officii* line of authority is, said Mr. Grabiner, clearly distinguishable. The Revenue, as Nolan J. held, did not demand money in return for the performance of a public duty.

(iv) The only implied threat which supported the claims to tax under the void Regulations was that of legal process. It is well established in law, he submitted, that payments made "under compulsion of legal process" are not to be held to be recoverable as involuntary payments: *Brown* v. *M'Kinally* 170 ER 356; *Hamlet* v. *Richardson* (1833) 9 Bing 644; *Maskell* v. *Horner* [1915] 3 KB 106, at 121–2; *William Whiteley Ltd.* v. *The King* and Goff and Jones, at page 207.

(v) Upon examination of the statutory provisions enacted by Parliament for the recovery of sums overpaid in respect of claims to tax, it appeared that, when recovery is ordered after successful appeal, interest is not generally allowed. Parliament should be taken to have made provisions for recovery upon the assumption that the common law gives no right of action to recover money overpaid in respect of tax in the absence of ordinary grounds of claim such as mistake of fact or duress.

(vi) The implied contract was properly found by Nolan J. to have been made. There was no fiction and it was implied on the facts and not imposed by law. No term for payment of interest could properly be implied on the facts: see *President of India* v. *La Pintada Compania Navigacion SA* [1985] AC 104.

(vii) This Court was invited to resist any temptation to make new law in this field and in particular to resist the beguiling submission that the Revenue, by the making of *ultra vires* Regulations, had been unjustly enriched to the extent of the interest on the payments made by the Woolwich. The Woolwich were, in effect, in the same position as any other taxpayer who has demonstrated that the Revenue has taken his money without lawful authority. The fact that, in this case, the relevant Regulations were made in good faith but without statutory authority should not secure to the Woolwich the lost interest which would not be recoverable under the statutory provisions in a case where, for example, the Revenue had in good faith misconstrued the Regulation lawfully made. The statutory provisions relating to tax are considered frequently by Parliament and the making of new law, most particularly in the field of taxation, should be left to the legislature.

The Revenue and Ex Gratia Repayment of Money

If there is no right of recovery of a payment, made in response to a bona fide but unlawful demand of tax, then, if the circumstances do not give rise to a claim based on duress or mistake of fact or to an implied promise by the Revenue to repay the money, the only hope of recovery by the payer must

rest upon the ability and willingness of the Revenue to repay either as a matter of grace or by the exercise of a discretion to make repayment. The Court asked for assistance from counsel as to the nature and origin of such a right of payment by the Revenue because, if money is received which the Revenue is at law entitled to retain, whence comes the right to pay it back? In *Auckland Harbour Board* v. *The King* [1924] AC 318, cited by Goff and Jones, at page 134, Viscount Haldane said, at page 326:

> "... it has been a principle of the British Constitution now for more than two centuries ... that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself. The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorization or ratify an improper payment. Any payment out of the consolidated fund made without Parliamentary authority is simply illegal and ultra vires, and may be recovered by the Government if it can, as here, be traced."

The Revenue submitted that it has a general right outside statute to agree and settle disputed assessments and claims and, as part of its duty of care and management of the recovery of taxes imposed by Parliament, a discretion to make *ex gratia* payments. Reference was made to *Commissioners of Inland Revenue* v. *National Federation of Self-Employed* [1982] AC 617; *In re Preston* [1985] AC 835; *Regina* v. *Commissioners of Inland Revenue* Ex parte *M. F. K. Ltd.*[1] [1990] 1 WLR 1545; and *Commissioners of Inland Revenue,* v. *Nuttall*[2] [1990] STC 194. It was acknowledged that, upon ordinary principles, the decisions of the Commissioners are open to judicial review but, it was said, in restricted circumstances only because of the rule that, if there is an alternative remedy provided by Parliament, relief by judicial review is not available. The Revenue did not seek to set out any principles by reference to which there might be assessed the reasonableness of any refusal to repay money received in respect of an unlawful demand to tax. That was not surprising because, as we understand it, there are waiting for resolution possible claims by other building societies by which tax was paid under the *ultra vires* Regulations without it may be such protestations as might justify a finding of an implied promise to repay.

The question of the reasonableness of the exercise of the discretion to make or to refuse payment under a statutory provision, namely under s 9(1)(e) of the General Rate Act 1967, was considered in *Ex parte Chetnik*. That section provides:

> "(1) Without prejudice to sections 7(4)(b) and 18(4) of this Act, but subject to subsection (2) of this section, where it is shown to the satisfaction of a rating authority that any amount paid in respect of rates, and not recoverable apart from this section, could properly be refunded on the ground that...
>
> (e) the person who made a payment in respect of rates was not liable to make that payment,
>
> the rating authority may refund that amount or a part thereof."

Lord Bridge, at page 874, referred to the rule that money paid under a mistake of law is irrecoverable and noted that it was said to stem from the

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(1) 62 TC 607. (2) 63 TC 148.

A principle that there must be an end to litigation. There was, however, an instructive line of authority showing circumstances in which the Court will not permit the rule to be invoked. After reference to *Ex parte James* (1874) LR 9 Ch App 609, to *Ex parte Simmonds* (1885) 16 QBD 308, to *In re Tyler* [1907] 1 KB 865 and *Blackpool & Fleetwood Tramroad Co.* v. *Bispham with Norbeck Urban District Council* [1910] 1 KB 592, Lord Bridge, at page 876H,
B continued:

> "So it emerges from these authorities that the retention of moneys known to have been paid under a mistake of law, although it is a course permitted to an ordinary litigant, is not regarded by the courts as a highminded thing to do, ... and hence is a course which the court will
C not allow one of its own officers, such as a trustee in bankruptcy, to take."

Therefore, the conclusion that the purpose of s 9 was to enable rating authorities to give redress and to remedy the injustice that would otherwise ordinarily arise, if they were to retain sums to which they had no right, in
D cases where persons had paid rates which they were not liable to pay, could properly be derived

> "... from the broader consideration that Parliament must have intended rating authorities to act in the same high principled way expected by the court of its own officers and not to retain rates paid
E under a mistake of law, or ... upon an erroneous valuation, unless there were, as Parliament must have contemplated there might be in some cases, special circumstances in which a particular overpayment was made such as to justify retention of the whole or part of the amount overpaid.": page 877D.

F For my part, although we have not heard full argument upon the point, because neither side has had occasion to dispute it, and although it is not necessary in this case to reach any detailed conclusions upon it, it seems clear to me that the Revenue must be held to have in law the capacity to make such an *ex gratia* payment. By that I mean a repayment of money, which has been paid to the Revenue in respect of an *ultra vires* claim to tax and which,
G because of the circumstances of payment, was in law a voluntary payment to recover which the payer has no cause of action. Such a power of repayment is, I think, a necessary part of the power of the management of the recovery of taxes. A decision by the Revenue, whether or not to repay such a voluntary payment, must be made, as it seems to me, in the exercise of the discretion which the Revenue has been left by Parliament to use in the care and
H management of the recovery of taxes imposed by Parliament; and would be *prima facie* reviewable by the Court. In the absence of such delay or other circumstances which could justify a decision not to repay, a refusal to repay could, of course, be held by the Court to be unreasonable and, therefore, unlawful. No doubt difficult questions could arise as to the nature of the circumstances which could be regarded as justifying a decision not to repay,
I such as, for example, a contention that the tax was in substance intended by Parliament to be exacted and that the lack of *vires* for the particular demand had resulted from no more than a technical failure in drafting the Rule or Regulation. The principles stated by Lord Bridge with reference to the discretion under s 9 of the 1967 Act appear to me to be generally applicable to the exercise of the non-statutory discretion which the Revenue, rightly as I think,

claim to have. In the absence of statutory guidelines the relevant principles will have to be further developed as cases arise.

The relevance in this case of the existence and nature of the power to make such *ex gratia* repayments, as it seems to me, is that it is part of the whole structure of the existing rules of law relating to the repayment by the Crown of money paid in respect of an unlawful claim to tax. To the extent that the citizen is thus effectively protected against the misfortune of paying tax which is not lawfully due, the need for any extension of the existing law of restitution is reduced. There is, of course, no reason to suppose that the Revenue would, in any event, refuse to refund money which it would be unreasonable for the Crown to retain but there is a large and important difference between a right to claim restitution at law and the mere ability to ask that money paid be returned in the exercise of executive discretion even if the exercise of that discretion is subject to judicial review. Retention may be reasonable from the point of view of the Revenue and the public interest but appear both unfair and unprincipled to the person who has paid.

The Implied Contract

Before considering the two main submissions for the Woolwich it is convenient to consider the issue of implied contract. It was argued for the Woolwich that Nolan J. was wrong to find an implied contract for repayment on the facts of this case; and wrong to hold that, generally(1),

> "... whenever money is paid to the Revenue pending the outcome of a dispute which, to the knowledge of both parties will determine whether or not the Revenue are entitled to the money, an agreement for the repayment of the money, if and when the dispute is resolved in the taxpayer's favour, must inevitably be implied unless the statute itself produces that result ...": see [1989] 1 WLR 147D.

The force of this point, if it is right, would be that the taxpayer who pays, as did the Woolwich, would be in greater need of protection by means of right of recovery contended for by the Woolwich. For my part, I do not accept the submissions made for the Woolwich on the implied contract point.

The point is, I think, of greater complication than importance. Nolan J. cited and applied the judgment of Vaisey J. in *Sebel Products Ltd.* v. *Commissioners of Customs & Excise* [1949] Ch 409. The cited passage begins:

> "I ask myself first with what intention the plaintiffs paid the money, and, secondly, with what intention the defendants received it? If the intention was the same on both sides, the result, in my judgment, was that an agreement was made between the parties by implication."

As stated, that, I think, cannot be right. Contracts cannot be made merely by uncommunicated subjective intentions. Thus, in the *Paal Wilson & Co. AS* v *Partenreederei Hannah Blumenthal* [1983] 1 AC 854, Lord Diplock, at page 915E, said:

> "To create a contract by exchange of promises between two parties where the promise of each party constitutes the consideration for the promise of the other, what is necessary is that the intention of each *as it has been communicated to and understood by the other* (even though that

(1) Page 276C *ante*.

A which has been communicated does not represent the actual state of mind of the communicator) should coincide. That is what English lawyers mean when they resort to the Latin phrase *consensus ad idem* and the words that I have italicised are essential to the concept of *consensus ad idem*, the lack of which prevents the formation of a binding contract in English law."

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Nevertheless, in *Sebel Products Ltd.* v *Commissioners of Customs & Excise* Vaisey J., as the following passage in his judgment shows, based his finding of implied contract upon the inferences which a reasonable person, knowing what was said and done, would draw from those facts. Mr. Gardiner argued that there was no evidence here of offer or acceptance; that C the terms of any agreement were wholly uncertain; and that the officers of the parties to the contract, who are said to have made it, can have had no authority to do so. I accept that the question of authority was barely considered in the evidence and not mentioned in the judgment. The reason is clear. Neither party had raised the implied contract as a basis of relief. The Revenue had pleaded in para 7 of the defence that

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> "If ... [the Woolwich] ... is entitled as a matter of law to repayment of the said sums, the [Revenue] will contend that the said payments were made pursuant to an implied agreement ... whereby it was agreed that the [Revenue] would hold the said sums pending the outcome of proceedings to determine the validity of the Regulations. In pursuance of E [that] agreement, entitlement to repayment arose on the date ... [of the] Declaration and interest runs from that date."

There was no reply disputing authority. In his affidavit, Mr. Mason, on behalf of the Woolwich, did not contend that those concerned on either side lacked authority or ostensible authority to make the implied agreement F which the Revenue had alleged. Mr. Mason said in para 17 of his affidavit of 1 December 1987:

> "I did not intend by my correspondence with the Revenue ... to enter into any agreement or contract with regard to the sums paid, or to be paid. Had that been the Plaintiff's intention, we would not have sought to achieve it by means of a covering letter accompanying our G return, without prior discussion, and immediately preceding payment. Nor, in my opinion, would either Mr. Fletcher or myself have been the appropriate individuals to commit our respective employers to an agreement. Nor to the best of my knowledge did anyone else at the Woolwich or in the Revenue seek such an agreement."

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The substance of the implied agreement as alleged was no more than that, if the Woolwich succeeded in their contention, the money would be repaid. No other terms were alleged or found. There was, in my view, nothing uncertain about the terms of the promise by the Revenue. On the part of the Woolwich, the consideration for the promise was the act of payment. The agreement was said to have arisen upon the undisputed actions of the parties I which were of stark simplicity, namely the express reservation by the Woolwich that the payment should not prejudice their right of recovery and the receipt and retention of the money in apparent acceptance of that term. Both sides obviously intended the agreed term to control the legal relationships between the parties. I think the Judge was plainly right in his conclusion that the Revenue had agreed to refund the money.

It is convenient to deal at this point with the issue whether the Woolwich could found a claim to interest on the money, for the time between payment and repayment, upon a term to be implied into the implied agreement. Mr. Gardiner's argument was that a term providing for compound interest at commercial rates should be implied, if this Court should uphold the finding of this "fictitious" or "judge made" agreement. It was, he said, inconceivable that the Woolwich should have agreed to pay over to the Crown £56m for an indeterminate period on the basis that no interest should be paid on principal eventually found to be repayable. Mr. Grabiner's answer was that, on the ordinary principles by which terms are to be implied into contracts, no such term could be implied since it was not necessary to give business efficacy to the agreement made and it was impossible to assert that, if asked, the Revenue would at once have acknowledged that an obligation to pay interest from the date of receipt had been assumed by the Revenue. In addition, Mr. Grabiner relied upon the decision of their Lordships in *President of India* v. *La Pintada Compania Navigacion SA* [1985] AC 104.

For my part, although, for the reasons given, I accept the finding of Nolan J. that there was a real agreement properly implied on the facts, I reject without hesitation this submission for an implied term to pay interest. Express reference was made by the Woolwich at the time to interest payable by the Woolwich. None was made by either side to payment of interest by the Revenue. I agree that it is impossible to imply such a term for the reasons put forward by Mr. Grabiner.

I do not think that much, if any, assistance is to be derived from the reasoning of their Lordships in *President of India* v. *La Pintada Compania Navigacion SA*, which was not concerned with the implication of a term for the payment of interest but with the power of the Court or of an arbitrator to award interest in the absence of any promise to pay it. The contention for the Woolwich that it is inconceivable that the Woolwich should have agreed to pay over £56m on the basis that no interest should be paid seems to me to be acceptable but entirely irrelevant. The implied agreement, as I have explained earlier in this judgment, was not at any stage relied upon by the Revenue as excluding any right to interest which the Woolwich might have under a cause of action prior to and independent of the agreement. It is not suggested that the Woolwich impliedly agreed to forgo interest: it is only asserted by the Revenue that, in impliedly agreeing to repay the capital sum if the Court should hold the claim to have been *ultra vires*, they did not promise to pay interest on that sum from the date of payment. Such belief as the Woolwich have had that they are entitled to interest from the date of payment has clearly, in my view, rested upon a belief in some right at law to recover the money with interest and not upon any apparent promise by the Revenue.

As to Nolan J.'s general observation, to the effect that in similar circumstances a promise of repayment must inevitably be implied, I see no reason to disapprove or to qualify it. It was, I think, no more than recognition of the fact that, if the Revenue receives money upon the express stipulation that it is paid, by a payer who asserts the illegality of the demand, without prejudice to the payer's right of recovery if the payer's contention is upheld, the Revenue will, in the absence of some circumstances justifying a different answer, be held to have promised to repay it when and if the payer's contention is upheld. The fact that such a promise may properly be held to have

A been impliedly made does not mean that the payer is thereby deprived of any other cause of action to recover the money, which he may have independently of that promise.

In summary, therefore, the recognised principles of law provide for the payer of money in respect of an *ultra vires* tax demand more protection than
B the argument for the Woolwich acknowledged. When the payment is made under mistake of law, the payer would have at least such protection as is given by the reviewable power of the Revenue to repay; and where the payment is made without mistake on the part of the payer but with express reservation of the right of recovery, a contractual obligation to repay would normally arise. It should, I think, be emphasised that the payer could stipu-
C late for the payment by the Revenue of interest from the date of payment if he should succeed on the issue of law. The Revenue could lawfully, as I understand the law, and no submission was made to the contrary, agree to pay such interest. The Revenue, however, would also be free to refuse to agree to pay interest in those circumstances. Parliament, as it seems to me,
D has expressly approved a scheme, where the legislation is applicable, whereby, if a payer does not pay pending determination of his liability, he must pay interest on the unpaid sums if they are found to be due and that such interest is not chargeable to profits. There is, in other words, and not surprisingly, no provision for the remission of interest during resolution of a dispute, whether bona fide or not. When they paid, the Woolwich assessed
E the position as being such that, having regard to the position with reference to interest, they had no real option but to pay, and Nolan J. in substance accepted that. It was, in my view, intended by Parliament that proceedings to dispute liability to tax should be to that extent at the risk of the taxpayer at least in the sorts of cases covered by specific legislation. There is, therefore, nothing which the Court can regard as inherently unjust in the fact that the
F Woolwich would have risked the payment of unchargeable interest if they had refused to pay and had thereafter lost on the issue of liability.

Examination of the Submissions made for the Woolwich
Constructive Trust

It is necessary first to mention one matter which was introduced into the
G case but not, in this Court, relied upon by either side. The Woolwich did not rely upon constructive trust before Nolan J. The Revenue, however, raised before Nolan J. and in their Respondents' notice in this Court the contention that, if there was no implied agreement by the Revenue for the repayment of the capital, it might be held that, once the dispute over the legality of the demand was resolved in favour of the Woolwich by the Court, it became
H unconscionable for the Revenue to retain the money and a constructive trust for repayment might be imposed by the Court. The force of the point was, presumably, to show that, in the absence of the right contended for by the Woolwich and where no agreement for repayment could be implied, the law could afford protection to the taxpayer greater than that provided by the power to review a decision not to exercise the discretion to repay. This point
I of constructive trust was not developed by Mr. Grabiner for the Revenue before us. The written summary of argument for the Woolwich gave notice in para 34 that the Woolwich would, if necessary, submit that the Revenue held the capital sums upon constructive trust arising as at the date when payment was made. Reference was there made to *Chase Manhattan Bank NA* v. *Israel-British Bank (London) Ltd.* [1981] Ch 1025; *In re Sharpe* [1980] 1 WLR 219

and *Muschinski* v. *Dodds* [1986] 62 ALR 429. Therefore, it was submitted, compound interest at commercial rates was due as a matter of equity from the date of payment: *La Pintada* [1983] 1 Lloyd's Law Reports 37; *O'Sullivan* v. *Management Agency and Music Ltd.* [1985] QB 428; *Buckingham* v. *Francis* [1986] 2 All ER 738. In argument, however, Mr. Gardiner did not develop the submission save to say, in answer to a question from Butler-Sloss L.J., that the principle of constructive trust supported the position of the Woolwich.

In my judgment, the Woolwich cannot in this case recover upon the ground of constructive trust the interest which it claims. If the primary submission for the Woolwich succeeds, no question of trust arises. If that submission fails, then, in my judgment again, no question of trust arises. The Revenue, having received the money without (if I am right) having used duress to obtain it, were entitled to retain it subject to the lawful exercise of the discretion to repay and subject to any obligation arising from the terms upon which or from the circumstances in which the payment was made. That obligation was, in my judgment, rightly held by the Judge to be contractual. If the Revenue received money, voluntarily paid, on terms that the money be repaid in the event that the payer succeeded on the issue as to lawfulness of the demand, but without any implied promise to pay interest between receipt and repayment, it cannot, in my judgment, be held to be unconscionable for the Revenue not to pay interest for that period.

The Claim based upon Duress

I will take first Mr. Gardiner's alternative submission, to the effect that the Woolwich are entitled to succeed on the ground of duress or "practical compulsion". I take it first because it seemed to me to be necessary, before dealing with the primary submission, to determine whether the Woolwich are to be held in law to have made the payments under duress. If they are to be so held, then the cause of action to recover the money arose, in my judgment, upon the making of the payments and not at the time when the illegality of the demand was demonstrated by the first decision of Nolan J.; and it would not be strictly necessary to decide whether the payments would have been recoverable in the absence of duress. Further, I reached the conclusion without hesitation that this duress submission could not succeed. Examination of the primary submission must, therefore, proceed, as I see this case, on the basis that the appeal of the Woolwich must fail if the primary submission does not succeed.

Mr Gardiner submitted that the concept of duress should be held to extend, beyond threats of physical injury or imprisonment, or detention of goods, to include all circumstances where the actor is to be held to have been illegitimately deprived of his right of voluntary action. Reference was made to cases including *Universe Tankships Inc. of Monrovia* v. *International Transport Workers' Federation* [1983] 1 AC 366; to *Barton* v. *Armstrong* [1976] AC 104; *Lynch* v. *D.P.P.* [1975] AC 653; and to *B. & S. Contracts and Design Ltd.* v. *Victor Green Publications Ltd.* [1984] ICR 419. Since, as Nolan J. found, the Woolwich had "...little choice but to make the three payments"; and since the consequences of non-payment were perceived by the Woolwich to be "commercially unacceptable", the Woolwich, it was said, had been subjected to duress because "...subjected to an improper motive for action" in the phrase used by Holmes J. in *Fairbanks* v. *Snow* (1887) 13 NE Reporter 596, 598 and cited in *Barton* v. *Armstrong*, at page 121; or

A because subjected to "pressure ... which the law does not regard as legitimate": *per* Lord Diplock, *Universe Tankships Inc. of Monrovia* v. *International Transport Workers' Federation* [1983] 1 AC 366, at 384B-C. Mr. Gardiner acknowledged that the duress submission, although theoretically distinct, could be regarded as overlapping with his primary submission which, itself, might be regarded as justified by a presumption of duress.

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I have found it impossible to accept the alternative submission for the Woolwich based on duress because nothing done or communicated by the Revenue, whether expressly or impliedly, could, in my judgment, properly be held to be the exerting of pressure which the law regards as illegitimate. The C claim to tax was made by the Revenue in good faith. It was the duty of the Revenue, therefore, to advance the claim and to obtain the decision of the Court upon it if it was disputed. The Revenue did nothing more. There was nothing which in the law applicable to private citizens could be regarded as duress or unlawful coercion. I see no good reason to treat the threat of legal proceedings by the Revenue as the equivalent of duress in order to create a D right to repayment against the Revenue where the bona fide threat of legal proceedings is made in respect of an *ultra vires* demand. If the right to repayment exists as contended for, it must rest, in my judgment, upon the *ultra vires* nature of the demand although, of course, the burden of such a demand made by the Revenue is relevant to the question whether that right should be held to exist.

E

If I am right on this part of this case, the Woolwich must be held to have chosen to pay the *ultra vires* demands for the reasons which they gave: they decided that it was better for them to pay and to exercise such rights to recovery as the law might provide. Such payment would not prevent the Woolwich from recovering the payments, under the right of recovery asserted F upon the primary submission, if that right exists. If payment in respect of an *ultra vires* demand to tax creates a cause of action to recover the money paid, it would be for the Revenue to prove some ground in law which would justify the retention and none has been alleged.

G *The Primary Submission*

The primary submission put forward by Mr. Gardiner invites the Court to revive what is said to be an old rule, once recognised, which was thereafter lost to view: namely, a right of recovery independent of mistake or duress and based simply on the *ultra vires* nature of the demand to tax. It is first necessary to consider what must be the nature and extent of such a right, if H the submission were accepted, and the consequences, as they would be likely to be, of holding that such a right exists. In particular, consideration of these matters will show how far such a general right of recovery of money paid in respect of an *ultra vires* tax demand could be established by decision of this Court having regard to authority.

I (i) It is first to be noted that the right contended for is concerned with cases where the claim to tax is made in good faith without any actionable misrepresentation or duress. Any claim based upon misfeasance in public office: see *Bourgoin SA and Others* v. *Ministry of Agriculture, Fisheries & Food* [1986] QB 716: or in respect of a payment induced by actionable misrepresentation would be covered by separate and recognised rules.

(ii) The Woolwich, in this case, proceeded on the basis that a necessary preliminary to the civil action for restitution of the sums paid was the obtaining of a declaration in judicial review proceedings that the demand was unlawful; and that separate subsequent proceedings for restitution were necessary because the Court had no power in the judicial review proceedings to order payment of a liquidated sum. By s 31(4) of the Supreme Court Act 1981 there is provision for the award of damages but, unlike the provision in Scotland, there is no express reference to an order for restitution. No submissions were addressed to the Court on these points by Mr Grabiner for the Revenue. The importance of a requirement, in these circumstances, for the initial proceedings by judicial review is that the time-limit imposed by Order 53, Rule 4, subject to the power of extension of time, would provide some protection to the Revenue against delayed claims, which would otherwise be limited only by the six-year period of limitation of action. When, however, a demand for tax has been held in proceedings by one payer to be unlawful. because the basis of the charge to tax is *ultra vires*, it is not clear why there would be any bar, other than under the statute of limitations, in subsequent proceedings by other payers who have paid in respect of demands based upon the same *ultra vires* provision.

(iii) It has been submitted that the right contended for by the Woolwich can be in this case, and may generally be, limited to a case where there is no basis whatever in law for any such charge as was sought to be made. Mr. Gardiner described the point by comparing it to a claim to tax windows when there is no statutory authority for a window tax. For my part, I do not see how the right, if it exists in law, can properly be limited to such "window tax" cases. In principle, payment in respect of any demand which is bad in law, is payment of tax exacted without the authority of Parliament and it should matter not whether the demand is bad because based upon a bona fide but mistaken construction of a valid provision or upon a bona fide belief that an invalid provision has been lawfully enacted. If the right exists, I do not see how it could, consistently with principle, be limited in the way suggested.

(iv) Next, in this case the Woolwich asserts that there was no mistake: the Woolwich believed the demand to be *ultra vires*; asserted that it was; and then made the payments without prejudice to the right to recover. But if the right of recovery asserted by the Woolwich is based upon the established principles of justice to which Mr. Gardiner has referred (Lord Wright in *Fibrosa* and Lord Denning in *Kiriri Cotton*) I am unable to see why (apart from the existence of any authority which prevents such a course) that right should not be equally available to the person who has paid under mistake of law. Most people who receive a tax demand are likely to suppose that the basis in law is valid and concentrate upon the factual basis. The essential justice of their position is no different, by reference to those established principles of justice, from that of the vigilant payer who believes the demand to be invalid in law but calculates that his position as to interest will be protected better by paying than by withholding payment while he puts his belief to the test. The rule of mistake of law, as I understand it, is not that a mistake of law bars recovery if a right of recovery exists independently of the mistake: the rule is that, if the only ground of claim is mistake and the mistake is a mistake of law, the law gives no right of recovery.

(v) So far as concerns payment under mistake of law, there is authority binding on this Court, namely *National Pari-Mutuel Association Ltd.* v. *The*

King [1930] 47 TLR 110. There a claim to recover tax paid in circumstances where in law the money was not payable was rejected by this Court. The case was argued for the claimant on the basis that the payment was made under mistake of fact. No argument was advanced to the effect that there could be recovery if the mistake was rightly held to be a mistake of law. Glidewell L.J. has cited the passage from the judgment of Scrutton L.J. in which the ground of decision is set out. The mistake was, as he has pointed out, a mistake as to the construction of a valid statutory provision. Mr Gardiner submitted that it is, therefore, to be distinguished from a case where the statutory provision is *ultra vires*. For my part, I do not think that such a distinction could be properly made. As I have said, there is, in my judgment, no relevant difference between honest misconstruction of a statutory provision and honest assertion of the validity of an invalid statutory provision. The point was not argued in *National Pari-Mutuel* on the constitutional ground put forward in this case but the decision there was that there is no general right to recover money paid as tax which was not due in law. It follows that, if the primary submission is accepted, the general right of recovery would arise in cases of *ultra vires* demands and in cases of demands based on misconstruction where there has been payment but not under mistake of law, and in cases of *ultra vires* demands even if payment is made under mistake of law if the Court were able to extinguish the *National Pari-Mutuel* case on the ground put forward. This seems to me to be an unsatisfactory description of a general right of recovery and suggests that no such general right exists.

(vi) If the general right of recovery contended for by the Woolwich is held to exist in our law it is likely to extend to a considerable number of cases. The number would depend, of course, upon whether it is limited to cases of *ultra vires* demands or extends also to demands based upon misconstruction of statutory provisions. Mr. Gardiner submitted that the concept of "...paying to close the transaction" would be available, when appropriate, to the Revenue particularly in cases of mistake of law by the payer because in such cases the payer will not do what the Woolwich did in this case, namely protest at the illegality of the demand, stipulate that the payment should be without prejudice to recovery, and take immediate steps to establish the illegality by proceedings at law. Mr. Gardiner submitted that, when a taxpayer has paid "...so as to close the transaction", he has accepted that the money has gone with no right of recovery and, thereby, he has waived any right to restitution. For my part, I am uncertain as to the efficacy of a defence of "...payment to close the transaction" and as to the principles by which it would be held to be or not to be established. The question whether a payment is made voluntarily to close a transaction seems to me to be apt to an enquiry whether the payer was acting under duress by, for example, a threat to seize his goods or was paying to settle an honest claim. If, on the other hand, the law gives the right of action to recover money paid as tax based simply on the illegality of the demand, as contended for by the Woolwich, it is not clear to me why, short of contract or estoppel, that right of recovery should be lost because, when he paid, the taxpayer appeared to be paying to close the transaction. When a payment is made in the belief that there is a valid basis in law for the claim which is made, I cannot see on what basis the payer could be taken to have paid to close the transaction so as to be taken to have waived his right of recovery. Nor can I see that the repetition over time of such payments would by itself amount to waiver. For such a waiver, it would be essential, I think, to prove that the payer knew of the point as to the legality of the demand and nevertheless made the payment

with the apparent intention of not seeking to recover it. I would add that it is not clear to me how an intention not to seek recovery would be demonstrated.

(vii) Next, in this case, the Woolwich protested about the terms of the Regulation before any payment was made; payment was made without prejudice to the right to recover the money; and proceedings to establish the invalidity of the claims were at once commenced. Little difficulty for the management of the Revenue would arise, in my view, from the existence of a right of recovery arising upon payment in such circumstances. The right asserted, however, goes far beyond such limits. It could, to the extent explained above, arise in the case both of *ultra vires* demands and of demands based on misconstruction, and subject to the point mentioned above with reference to the requirement of preliminary proceedings for a declaration under Order 53 the proceedings could be commenced within six years of payment. No doubt, in some circumstances, as Mr. Gardiner submitted, having regard to any knowledge of and reference to the possible invalidity of the demand on the part of the payer, payment might be held to be irrecoverable because "...paid voluntarily to close the transaction"; but, potentially, as it seems to me, the right could be asserted by a large number of payers. It is true that, if grave difficulties should be anticipated for the Revenue, Parliament might agree to enact retrospective legislation since there is, in our law, no bar to such legislation, but the trouble and expense arising from such proceedings, if not prevented by legislation, has in the past and should, in my judgment, still be regarded as a relevant consideration when the Court is asked to extend the law.

Thus, in *Glasgow Corporation* v. *Lord Advocate* 1959 SC 203, the corporation claimed to recover sums paid for purchase tax which were not lawfully due. It was argued in that case that, on constitutional grounds since the Crown could not levy tax without the authority of Parliament, it should not be permitted to retain it if collected without such authority, notwithstanding any supposed rule against recovery of money paid under mistake of law. Lord Wheatley, the Lord Ordinary, refused to allow recovery on that ground. His decision was upheld by the Court of Session. Lord President Clyde, in a judgment with which Lord Carmont and Lord Russell on this point agreed, said, at page 230:

> "This brings me to the second main issue in the case, namely, the question of repayment of the tax in so far as it was wrongly charged and paid. Repayment was sought to be justified on two separate grounds.
>
> The first was a broad constitutional point. It was said that the Commissioners of Customs and Excise had no authority from Parliament, nor from anyone else, to impose these charges now found to be illegal; that no one could be forced to pay a single shilling of tax which was not legally due, and that therefore the Corporation were entitled to recover what now turns out to have been unwarrantably charged upon them. But although the premises are unexceptionable, the conclusion does not follow from them, and no authority of any kind was quoted to us to justify the conclusion. The case of the *Attorney-General* v. *Wilts United Dairies, Limited*, is not in point in this connexion. If the conclusion did follow the premises, I should have expected the point frequently to have arisen before now. Indeed, the elaborate statutory provisions in various Finance Acts regarding the precise circumstances in which income tax already paid may be reclaimed would have been quite unnecessary if the conclusion

A sought to be drawn by the Corporation were sound. It may well be that the payment thought erroneously to be due at the time should never have been made. But it does not therefore follow that, when the error is established, the money must automatically be paid back by the taxing authority. For a repayment in such circumstances has wider repercussions, and affects far more interests than those of the one taxpayer. It would, in my B opinion, introduce an element of quite unwarrantable uncertainty into the relations between the taxpayers and the Exchequer if there could be a wholesale opening up of transactions between them whenever any court put a new interpretation upon an existing statutory provision imposing a tax. Yet this is necessarily involved in the argument for repayment upon this constitutional ground."

C

That case is not, of course, binding upon this Court but it is, in my view, of persuasive authority. At this point, I have referred to it only in justification of reference to the possibly damaging effect of accepting the primary case for the Woolwich.

D

(viii) The right contended for would, if I have understood the nature and extent of it correctly, in the case of payment of tax in respect of an *ultra vires* demand, be effective in widely differing circumstances; and (subject to the decision in *National Pari-Mutuel Association Ltd.* v. *The King* being distinguished on the grounds that it is limited to cases of misconstruction of a E valid provision) would set aside in this context two generally accepted principles, namely that a payment made under mistake of law is not recoverable and that a payment made, in the absence of any mistake of fact, and under no compulsion other than the threat of legal proceedings, is not recoverable.

The Attractiveness of the Primary Submission

F Our law has long recognised a rule that, subject to exceptions, money paid under a mistake of law is irrecoverable. It has also long been a principle of our law that, if a defendant is under an obligation from the ties of natural justice to refund money which he has received, the law implies a debt which the payer may recover: see the speech of Lord Wright in the *Fibrosa* case, quoting Lord Mansfield C.J. in *Moses* v. *Macferlan* (1760) which Nolan J. G cited in his judgment: [1989] 1 WLR 137, at page 139G. There is, clearly, much to be said in favour of the contention that money paid in respect of an *ultra vires* tax demand should *prima facie* be recoverable on that ground alone. Nolan J. described the submission as attractive and I agree with him. The argument advanced for the Woolwich based upon constitutional principle seems to me to have much force and to deserve to be given effect unless H there is some reason to be found in the authorities to prevent that course. Since the Bill of Rights forbids "...levying money for the use of the Crown without grant of parliament": see *Attorney-General* v. *Wilts United Dairies Ltd.* (1921) 37 TLR 884, *per* Scrutton L.J., at page 886: money obtained by an *ultra vires* demand for tax should be recoverable even though the only form of compulsion has been the implied threat of recovery by legal proceed- I ings unless there is some reason to deny the right.

Our law, however, has not in all respects developed rules which can be regarded as fully in accordance with what "...an ideal system of justice would ensure": see *per* Lord Brandon of Oakbrook: *President of India* v. *La Pintada Compania Navigacion SA* [1985] 1 AC 104, at 129E. Sometimes the

reasons for the apparent deficiency in a rule are to be found in a wider view of the public interest than that required by the private economic interest of individual citizens. A blunt-edged rule may fail to distinguish as carefully between the circumstances of one person and another as payers would wish; but the general good is not always advanced by the extended refinement of rules. Such refinement may well produce an ever increasing number of justiciable issues which will require to be resolved largely at public expense. In short, the theoretical attractiveness of the primary submission does not mean that this Court is necessarily able to accept it.

Conclusion

I do not think that the right answer to this case is to be found by examination of the precise words used by various judges in a large number of different cases. The basic principles of our law clearly favour, I think, the primary submission. There are *dicta* which support it. The limitations upon the rule of recovery, for which limitations the Revenue contends, seem to me to be necessarily based, particularly where the limitation is applied so as to protect the Revenue as contrasted with the private citizen, upon policy grounds.

If in this Court we were free, as we are not, to approach this matter as a law-reform exercise, I would start with a preference in favour of the law being based upon a *prima facie* right of recovery, such as contended for by the Woolwich; but, as in any law-reform exercise, that preference would have to be tested by consideration of the answers given on consultation by those capable from experience of discerning the difficulties which might be caused by following that preference. We have received the help (similar in effect to the response on consultation, but necessarily incomplete) of being referred to a number of learned articles and textbooks, and to the decisions of courts in other jurisdictions, where various possible improvements in the law have been considered together with possible forms of protection for the Revenue and other recipients of money if the improvements should be made. I wish to express my gratitude for the assistance and instruction I have obtained from those sources.

Our task, however, is narrower. We cannot mould and limit a cause of action as we might wish to see it defined by legislation. If the principles of the common law and of the Bill of Rights, properly understood, create the right of recovery for which the Woolwich contend, then we must so find and the Revenue must look for protection to Parliament. If our law has developed the limitations upon recovery which the Revenue says are to be found in the authorities, then we should, in my view, only set aside those authorities if we are convinced that they are wrong either because of defects in the reasoning upon which they are based or because they cannot stand in the light of decisions in the House of Lords. It is also relevant, in my view, to the question whether long-accepted authority should be reversed, to consider how far Parliament itself has apparently accepted the law as set out in that authority, whether expressly or impliedly, in legislation enacted in the relevant context.

The main cases concerned with claims to recover money exacted on *ultra vires* demands of public officials or authorities began in the 18th century. There was, then, little direct taxation by central government and most of the cases were concerned with the exaction of fees or tolls or duties by public

officials whether for performance of a duty or for release of goods. Those cases, accordingly, tend to justify any order for recovery by reference to the circumstances of those cases, namely a demand for payment of money not lawfully due for performance of a public duty or for release of goods to seize which there was no lawful right. Even so, as Mr. Gardiner has pointed out, there are examples to be found of reliance being placed more upon the unlawfulness of the demand than upon the coercion exercised by the threat, express or implied, to withhold performance of the duty or the goods.

Thus, in *Irving* v. *Wilson* (1791) 4 TR 485, 100 ER 1132, a Revenue officer seized goods as forfeited which were not liable to seizure, and then took money from the owner for the release of the goods. The owner was held entitled to recover the money in an action for money had and received by Lord Kenyon C.J., Ashhurst and Grose JJ. Lord Kenyon said that, since the taking of the money could not be justified, the payment was not voluntary. Ashhurst J. described the payment as "by coercion". Grose J. held that the money could be recovered because it had been taken for delivery up of the goods.

In *Morgan* v. *Palmer* (1824) 2 B & C 729, 107 ER 554, Abbott C.J., Bayley, Holroyd, Littledale JJ., the plaintiff was a publican. In order to obtain a renewal of his liquor licence he was required by the Mayor of Yarmouth, who had the power to grant and renew licences, to pay a sum of money. The conduct of the Mayor was illegal. He had no right to any payment as a condition for granting or renewing a licence. The plaintiff was held entitled to recover the money paid. Abbott C.J. said:

> "It has been well argued that the payment having been voluntary, it cannot be recovered back in an action for money had and received. I agree that such a consequence would have followed had the parties been on equal terms. But if one party has the power of saying to the other, 'That which you require shall not be done except upon the conditions which I choose to impose,' no person can contend that they stand upon anything like an equal footing. Such was the situation of the parties to this action."

Bayley J. agreed upon that aspect of the case with Abbott C.J. Holroyd J. merely held that the payment was not voluntary. Littledale J. agreed, saying that

> "... the plaintiff was merely passive, and submitted to pay the sum claimed, as he could not otherwise procure his licence."

In *Steele* v. *Williams* (1853) 8 Ex 625, 155 ER 1502, the plaintiff, a lawyer, applied to the defendant, a parish clerk, for liberty to search the register book for burials and baptisms. He did not want certificates but only to make extracts. He was told by the defendant that the charge would be the same whether he made extracts or had certificates. He was charged £4. 7s. 6d. for 25 extracts. The Court, (Parke, Platt and Martin BB.), held that the charge for extracts was illegal; and that, since the payment was not voluntary, it could be recovered. Parke B. said:

> "...upon the true construction of the evidence, the payment in this case was not voluntary, because, in effect, the defendant told the plain-

tiff's clerk, that if he did not pay for certificates when he wanted to make extracts, he should not be permitted to search."

He continued that:

"... this payment was not voluntary, but necessary for the exercise of a legal right."

Platt B. agreed with Parke B. The decision of Martin B. was on wider ground:

"As to whether the payment was voluntary, that has in truth nothing to do with the case. It is the duty of a person to whom an Act of Parliament gives fees, to receive what is allowed, and nothing more. This is more like the case of money paid without consideration — to call it a voluntary payment is an abuse of language."

Hooper v. *Mayor and Corporation of Exeter* (1887) 56 L.J.Q.B. 457, (Divisional Court, Lord Coleridge C.J. and Smith J.), belongs in this category of decisions but goes further. Mr. Grabiner has submitted that it was wrongly decided unless it can be seen as a mistake of fact case. The defendants were empowered by statute to charge dues "upon the landing of stone". There was an exception in favour of limestone landed for the purpose of being burned into lime. The statute also contained a power of distress in case of non-payment. The plaintiff was unaware that he was entitled to the benefit of the exception and paid the dues demanded. He then claimed the return of the monies previously paid. The report is brief and unsatisfactory. The plaintiff cited *Morgan* v. *Palmer* but was stopped by the Court. For the defendants it was submitted that the payments were voluntary. The Court reversed the County Court Judge and held that the plaintiff was entitled to recover what he had paid. By reference, it would appear, to *Morgan* v. *Palmer*, Lord Coleridge held that:

"... where one exacts money from another and it turns out that although acquiesced in for years such exaction is illegal, the money may be recovered as money had and received, since such payment could not be considered as voluntary so as to preclude its recovery."

Smith J. was of the same opinion.

It was in the 1880's that, in the contention of the Woolwich, the courts began to go wrong in deciding the cases on which the Revenue relies.

About one month after the Divisional Court decided *Hooper* v. *Mayor and Corporation of Exeter*, the case of *Slater* v. *Mayor and Corporation of Burnley* (1888) 59 LT 636 was also decided by the Divisional Court, Cave and Wills JJ. The plaintiff there claimed to recover an overcharge which he had paid in respect of water rates. There was no statutory power to distrain for the water rates but the defendant had the power to cut off the water supply on non-payment. There had been, however, no cutting off of the water, nor any threat to do so, nor legal proceedings for recovery of them. The County Court Judge held the payments to have been not voluntary and, therefore, recoverable, because of the powers which were available to the defendants. The Divisional Court reversed that decision. Reference was made by counsel for the plaintiff to *Hooper's* case and to *Steele* v. *Williams*. It was treated as common ground in argument that the plaintiff could have waited

for the six-year period of limitation before applying for recovery. (There was then no question of the requirement for proceedings by judicial review within the time-limit for such proceedings under Order 53). The reasons for the decision of the Divisional Court were that the payment was not shown to have been involuntary merely by reason of the existence of the power to stop the water: so to hold would be very far-reaching and no payment of rent to a landlord would be a voluntary payment. Nothing was said to distinguish the case from *Hooper* or from *Steele* v. *Williams*. Mr. Grabiner has contended that the Court must be taken to have regarded those two cases as distinguishable because they were within the principle of the *colore officii* cases, where money is unlawfully demanded and received in return for the performance of a public office. Although it is not, in my view, possible to fit *Hooper* into the category so limited, I think Mr. Grabiner is correct in his submission as to how the Divisional Court must be taken to have regarded those two cases.

More than 20 years later came the case of *William Whiteley Ltd.* v. *The King*: a decision of Walton J. This case was concerned with tax demanded by the Revenue on behalf of the Crown. Waiters employed by Whiteleys were said to be "male servants" within the meaning of a statutory taxing provision and duties were claimed. Whiteleys disputed their liability. They were informed that, if the duties were not paid, they would incur penalties. Whiteleys paid. Later, the duties were paid under protest. Some six years after the dispute first arose, in proceedings by the Revenue to recover penalties, it was held that, on the true construction of the provision, the duties were not payable but the claim by Whiteleys to recover duties previously paid was rejected. Again, *Steele* v. *Williams* and *Morgan* v. *Palmer* and *Hooper* were cited and the submission was advanced in precisely the terms now put forward for the Woolwich: namely, that when money is paid under an illegal demand *colore officii* the payment can never be voluntary. Walton J. referred to the general rule that if money is voluntarily paid under a mistake of law then it cannot be recovered back. As to the question whether the payments were voluntary, he held that they were because there had been no duress or compulsion beyond the threat of proceedings for penalties. Then, at page 745, he continued(1):

> "But it was suggested that the case came within that class of cases in which money has been held to be recoverable back if it has been paid in discharge of a demand illegally made under colour of an office. Those cases ... seem to me all to come within that class of cases to which I have just referred, which is described in Leake on Contracts (5th edit., p. 61) in these words: 'Money extorted by a person for doing what he is legally bound to do without payment, or for a duty which he fails to perform, may be recovered back.' In all those cases in order to have that done which the person making the payment was entitled to have done without a payment, he had to make the payment, and someone who was bound to do something which the person paying the money desired to have done, refused to do his duty unless he was paid the money. If in those circumstances money is paid, then it can be recovered back. There is there an element of duress."

(1) (1909) 101 LT 741.

Next, 36 years later in *Twyford* v. *Manchester Corporation* [1946] Ch 236, Romer J. followed and applied the decision in *William Whiteley Ltd.*. For the proposition that fees unlawfully charged for permission to recut or regild monumental stones in a cemetery were recoverable, the plaintiff cited only *Somes* v. *British Empire Shipping Co.* (1860) 8 H.L.C. 338, and relied on the fact that the fees had been paid under protest. Romer J. differed from Walton J. in refusing to regard the *William Whiteley* case as a case of mistake of law but continued([1]):

> "Even so, however, I respectfully agree with the rest of Walton J.'s judgment, particularly with his statement that a general rule applies, namely, the rule that, if money is paid voluntarily, without compulsion, extortion, or undue influence, without fraud by the person to whom it is paid and with full knowledge of all the facts, it cannot be recovered, although paid without consideration, or in discharge of a claim which was not due or which might have been successfully resisted."

My first impression was that Romer J. was right to regard *William Whiteley Ltd.* as not having been a case of mistake of law. I am now not sure. I do not think that the point is of great importance and it is, I think, no more than an issue as to the use of words. Payment under mistake of law is not, and, I think, has never been itself a ground for relief: frequently it is used to describe a payment made under mistake where there was no mistake of fact and hence no ground of recovery. Nor, as I have said above, does mistake of law, by itself, bar recovery if there is a recognised basis of claim, for example duress or actionable misrepresentation inducing the mistaken belief. Accordingly, if payment is made under mistake, in the sense that it would not have been made but for a mistaken belief which induces the payment, then if it is not a mistake of fact it is probably capable of being categorised as a mistake of law. The fact that the point of law has been perceived does not by itself prevent there having been an effective mistake of law by reference to the prospects of success in legal proceedings to settle the point. Mistake of law could be categorised in such a way as to exclude mistake of law if the point has been perceived. This matter is not, in my view, of importance. The question whether a right of recovery exists, or does not exist, in the case of payment of an *ultra vires* demand should not depend, if the decision can be made on basic principles of justice, upon whether the point of law upon which refusal to pay could be justified was or was not perceived at the time of payment.

Those three cases, *Slater* in the Divisional Court and *William Whiteley Ltd.* and *Twyford* at first instance, have not hitherto been doubted or commented upon adversely in any decision in this country. Mr. Gardiner relied upon *Attorney-General* v. *Wilts United Dairies Ltd.* as providing support for his primary submission and, therefore, as casting doubt upon the three decisions upon which the Revenue case is based. The *Wilts United Dairies* case contains no matter of decision upon the recovery of payments made because there had been no payments. In that case the Food Controller sought to impose, by means of an agreement to that effect, a charge of 2d per gallon on purchases of milk as a condition of the grant of a licence to buy milk. Bailhache J. gave judgment for the Crown for the sum claimed under the agreement. The question before the Court of Appeal was whether the Food Controller had legal authority to impose that condition and it was held that

([1]) [1946] Ch 236, at page 241.

A he had not. The contract was, therefore, illegal and unenforceable. At page 887, Atkin L.J., in a passage much relied upon by Mr. Gardiner for the Woolwich, said(1):

> "It makes no difference that the obligation to pay the money is expressed in the form of an agreement. It was illegal for the Food
B Controller to require such an agreement as a condition of any licence. It was illegal for him to enter into such an agreement. The agreement itself is not enforceable against the other contracting party; and if he had paid under it he could, having paid under protest, recover back the sums paid, as money had and received to his use."

C Atkin L.J. did not explain, and it was not necessary in that case to explain, on what ground in law, after payment under protest recovery could have been claimed.

In *Mason* v. *State of New South Wales* (1959) 102 CLR 162, the *colore officii* cases in England were considered by the High Court of Australia. Mr.
D Grabiner cited the case as persuasive authority in support of the submission of the Revenue. The plaintiffs in that case sued the defendant state for money had and received being fees paid for permits to carry goods for payment issued under a state statute of 1931. The requirement of payment was held to be *ultra vires*. It was argued for the plaintiffs that the right to recover rested on a general principle such as that now contended for by the
E Woolwich, namely that payments in respect of an official demand for payment, which was illegal, gave rise to a right of recovery. In addition, it was argued that the plaintiffs had paid under compulsion because (a) the defendants had been withholding the plaintiffs' common law right to use the highway except upon payment; or (b) the parties were in an unequal situation; or (c) the plaintiffs were threatened with ruinous legal proceedings and had no
F practical choice but to pay; or (d) they were threatened with seizure of their vehicle. Dixon C.J., after reference to the English cases which "...seemed ... to say that moneys paid to the Crown as and for taxes cannot be recovered unless the circumstances were such that they would be recoverable as between subject and subject ...", said that "However this may be, the plaintiffs must ... recover because they had paid only because they apprehended
G on reasonable grounds that without the permit ... the state ... would or might stop the vehicle". Dixon C.J. clearly had doubts whether the possible grounds of recovery were so limited but found it unnecessary to resolve those doubts. Kitto J. accepted, in effect, the primary submission now made for the Woolwich. The majority view, however, was expressed by Menzies J. and Windeyer J. with whom Fullagar J. and Taylor J. agreed. Menzies J. held
H that the charges were unlawfully exacted by a threat to force the plaintiffs' vehicles off the road and recovery was justified on the principles stated in such cases as *Morgan* v. *Palmer*, *Steele* v. *Williams* and *Hooper* v. *Mayor and Corporation of Exeter*. *William Whiteley* was distinguished because in that case there was no compulsion beyond the threat of legal proceedings.

I Windeyer J. held that it could not be said that any official had extorted or even demanded money by colour of his office. The plaintiffs could not succeed simply because of the superior position of the defendant. In his view, the plaintiffs were required to go further and establish that there was, in a

(1) (1920) 37 TLR 884.

legal sense, compulsion by something actually done or threatened, something beyond the implication of duress arising from a demand by person in authority, which suffices in a true *colore officii* case. It was not sufficient for the plaintiffs merely to point to the provisions of the statute. They were required to show that the Crown by its servants was exercising or threatening to exercise power under the statute in such a way as to constitute compulsion in law. A threat of proceedings for a mere pecuniary penalty did not make a payment made thereafter involuntary because the payer might have defended the proceedings and relied upon the unlawfulness of the demand: reference was made to the *William Whiteley Ltd.* case. In the end, Windeyer J. held that the evidence did enable the plaintiffs to bring themselves within the principles stated by him.

Although the reasons given by Menzies J. and Windeyer J. are not the same, they clearly agreed in holding that the claim to recovery could not be based simply upon the *ultra vires* nature of the original demand.

In my judgment, the principles applied in the *colore officii* cases decided in this country, and of which some have been examined above, are accurately summarised by Windeyer J. in *Mason's* case in the passage cited by Nolan J. in his judgment, namely that they should be confined to cases where "...a public officer demands and is paid money he is not entitled to, or more than he is entitled to, for the performance of his public duty". Those cases do not establish a principle from which the primary case for the Woolwich can be derived. If it is to succeed, that primary case must be based in the first place upon the basic principle stated by Lord Wright in the *Fibrosa* case in 1943 and must demonstrate that the limitations imposed by the *William Whiteley* case were wrong when devised or must be held to be wrong in the light of later authority such as the decision of the House of Lords in *Ex parte Chetnik*.

For my part, I am unable to accept that the grounds of decision in *Slater*, in *William Whiteley Ltd.* and in *Twyford* were wrong in refusing to recognise any general right of recovery of money paid in respect of an unlawful claim to tax. I acknowledge that the law could have been developed in accordance with the wider basis of decision in *Hooper's* case but it was not; and the decision that no general right of recovery exists, based simply upon the unlawfulness of the demand, was clearly based upon the Court's assessment of the requirements of the policy of the law. That view has stood without effective challenge for 100 years.

It is also clear, in my judgment, that when Parliament has accepted the need for additional protection for the taxpayer, specific statutory provision has been enacted for repayment of money wrongly paid as tax, such as s 9 of the General Rate Act 1967 and s 33 of the Taxes Management Act 1970, upon the assumption that there is in law no such general right of recovery as that now asserted by the Woolwich. Thus, in s 33 of the Taxes Management Act 1970, in the case of an excessive assessment by reason of error or mistake in a return, the Board may give by repayment such relief as is reasonable and just provided that "...no relief shall be given under this section in respect of an error or mistake as to the basis on which the liability of the claimant ought to have been computed where the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when the return was made". That provision would, of course, have no application to a case such as this but, if the primary case made for the Woolwich is right, I

A am, as I have said, unable to see how the alleged right could be limited to cases where the basis of purported charge is non-existent in law, and, if it is not so limited, there could be concurrent remedies available in some cases to the taxpayer to one of which the limitations posed by Parliament would not be applicable. It might be said that, where Parliament has created a specific remedy, the taxpayer must be limited to that remedy in cases to which it B applies but, to employ such reasoning, it would be necessary to attribute to Parliament an intention to disapply any relevant common law remedy which was already recognised or which might thereafter be held to exist, and I find it difficult to see clear justification for so doing.

C One other persuasive authority, which, in my view, supports the Revenue case, should be mentioned. It was not separately relied upon by Mr. Grabiner but was discussed in the essay by Professor Birks to which we were referred in argument. I refer to the decision of the Court of Session in *Glasgow Corporation* v. *Lord Advocate* already mentioned earlier in this judgment. It is clear from that decision that, when the rule against recovery of D money paid in respect of an unlawful tax demand, in the absence of duress, was expressly challenged on the constitutional ground put forward here by the Woolwich, the argument was rejected by the Court of Session at least so far as concerns a claim based upon misconstruction as contrasted with a claim based upon an *ultra vires* decision. In other words, the Court of Session rejected the argument which was not advanced in *National Pari-*E *Mutuel Association Ltd.* v. *The King*. Lord Wheatley, at page 220, in a passage which, in reverse, seems to me to apply precisely to our consideration of this decision of the Court of Session, said([1]):

> "[It is] said that it would be most unfortunate, particularly in regard to exactions of tax, if the law of Scotland and England were to differ on F the question of the right of recovery of tax paid but not due as a result of an error in law, and while I agree that it would be unfortunate, that in itself is no reason for equiparating the law of Scotland to the law of England if the principles of the law of Scotland do not justify such a course. On the other hand, if the matter is open it is always proper to consider the persuasiveness of the English opinions in matters touching G the laws of both countries without being bound by them."

I find the decision persuasive because, although it was concerned with misconstruction and not an invalid provision, the present argument based upon basic principles of justice was raised, argued and rejected. So far as H concerns the force of the basic principles, there is, in my judgment, no sustainable distinction between cases of misconstruction and cases of *ultra vires* demand.

I come now to consideration of the later cases which, it was submitted, require or justify the overruling of *William Whiteley Ltd.* v. *The King* and its I attendant cases. The main cases relied upon were the *Wilts United Dairies* case, *Ex parte Chetnik* and *South of Scotland Electricity Board* v. *British Oxygen Co. Ltd.* [1959] 1 WLR 587, supported by the Canadian case of *Air Canada* v. *British Columbia* in the Supreme Court of Canada.

([1]) 1959 SC 203.

Reference has already been made to the passages in the judgments in the *Wilts United Dairies* case. That case was not concerned with the recovery of payments made but with an attempt by the Crown through the form of an action upon a contract to enforce a claim to tax not authorised by Parliament. It provides, in my view, no significant support for the primary case of the Woolwich.

The *South of Scotland Electricity Board* case was concerned with a claim by British Oxygen to recover from an electricity board alleged overpayments exacted in breach of s 37(8) of the Electricity Act 1947 which forbade "any undue discrimination against any person" in the fixing of tariffs. It was held by the House of Lords that there was nothing in law to prevent the recovery of sums which could be proved to have been overcharged.

Viscount Kilmuir L.C., at page 596, said:

> "...the first governing principle is that a tariff which imposes a charge upon the respondents involving their being unduly discriminated against is contrary to section 37(8) of the Electricity Act, 1947. The respondents were charged more than is warranted by the statute. Then it is clear that, until a court so declares, the respondents have no alternative but to continue to pay the charges demanded of them. In principle the appellants should not be permitted to retain payments for which they have no warrant to charge."

Lord Tucker (page 615) agreed with the reasons given by Viscount Kilmuir. Lord Merriman, at page 606, said:

> "As regards the claim for the repayment of moneys overpaid, ... It is sufficient to say that in *Maskell* v. *Horner* [1915] 3 K.B. 106, 119, Lord Reading C.J referring ... in particular to the advice given by Willes J. in *Great Western Railway Co.* v. *Sutton* L.R. 4 H.L. 226, 249— where that learned judge said that he had 'always understood that when a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion or concussion in respect of which he is entitled to recover the excess by *condictio indebiti*, or action for money had and received'—said that 'such claims made in this form of action are treated as matters of ordinary practice and beyond discussion'."

Lord Reid, at page 609, said:

> "... I think there is nothing in law to prevent recovery of any sums which can be proved to have been overcharged. The only reason advanced for the contrary view was that overcharges made by railway companies were said to be irrecoverable if they were due to the company having given an undue preference to another consumer. It is therefore necessary to look at the railway legislation and the authorities under it. [The report says "unnecessary"; that must be an error in the report].
>
> The Railways Clauses Acts of 1845, and certain other private Acts, contained an equality clause which made it illegal for a company to charge one customer more than they charged another under similar circumstances, and it is quite clear that a person who proved breach of an equality clause could recover from the company any overcharge which he had paid, i.e., the difference between what he had paid and what he would have paid if the company had charged him as the equality clause

A required (*Great Western Railway Co.* v. *Sutton* LR 4 HL 226), and recovery was not prevented by the fact that when he paid the charge demanded he knew that he was being overcharged."

Later Lord Reid said:

B "If there were clear and binding authority under the railway legislation that overcharges resulting from undue preference or prejudice could not be recovered, I might be inclined to hold that the same rule should apply here, but there is not."

It is to be noted that the decision in the *South of Scotland* case was C dated 16 April 1959 on appeal from the Court of Session. The decision in *Glasgow Corporation* v. *Lord Advocate*, to which I have referred, was dated 20 March 1959. Neither case at any stage appears to have been cited in the other. The references set out above to the speeches of their Lordships are sufficient to demonstrate that they did not consider the question whether the law applied in *William Whiteley Ltd.* v. *The King* was right or wrong. The D passage in the speech of Lord Reid cited above shows the case was argued for the electricity board on the basis that the issue of recovery of overpayments was to be decided upon the construction of the particular statute and cases decided upon the railway legislation. The comments of Viscount Kilmuir and of Lord Merriman show that the case was seen by them as similar to the *colore officii* cases in that the users of electricity had no choice but E to pay the price demanded if they were to obtain the electricity and were thus in the position of the plaintiff in *Maskell* v. *Horner* which was, in effect, a duress case. The plaintiff was there held to have paid to avoid seizure of his goods. There is, in my judgment, nothing in the reasoning of their Lordships which requires this Court to overrule *William Whiteley Ltd.*

F

Ex parte Chetnik has been considered above in this judgment. The ratepayer had paid, through mistake of law, some £51,000 as rates which were not payable. The question was whether, in refusing to repay the money under the power given by s 9 of the 1967 Act, the council had misdirected itself or acted unreasonably. The argument was directed to the proper con- G struction of the statutory provisions by which the discretion to make repayment was conferred. No doubt was cast upon the proposition that, without the statutory power, the council would have been unable to repay the money paid to it under a mistake of law. Cases such as *William Whiteley Ltd.* were not mentioned. The rule of our law which provides no recovery for money paid under mistake of law, even when the money is paid to a public author- H ity such as a council receiving rates, was not doubted although it was noted by Lord Goff as a rule much criticised and especially by comparative lawyers: see page 882. The decision, of course, provides support, which, in my view, is not required, for the basic principle of our law stated by Lord Wright in the *Fibrosa* case, namely that a man should not retain the money of or some benefit derived from another which it is against conscience that I he should keep; but the decision was not directed at, nor does it, in my view, cast doubt upon, the validity of the limitation of the principle long established by *William Whiteley Ltd.* and the other cases.

In the end, and after much hesitation, I have reached the conclusion that this appeal should be dismissed. In summary, my reasons for reaching that

conclusion, which are more fully set out above in this judgment, are as follows: A

(i) The rules applied in *Slater*, *William Whiteley Ltd.* and *Twyford* were based upon the rule which denies recovery of voluntary payments, and the principle that the threat of bona fide legal proceedings is not in law duress, coupled with the principle that those rules apply to claims against the State as they apply to claims against a private citizen or corporation. The mistake of law rule was seen as part of the relevant system of rules although, as explained above, the correctness of the application of the rule in the *William Whiteley Ltd.* case is arguable. B

(ii) The mistake of law rule can be criticised but has long been part of our law. It is a central part of the law of restitution. Legislation, which apparently assumes the validity of the rule, has been passed, and Parliament has, apparently, been content not to abolish it. It was treated, without question, as part of our law with reference to a public body with taxing powers in *Ex parte Chetnik*. If the primary submission is right, the mistake of law rule would be set aside in cases of *ultra vires* demand, if *National Pari-Mutuel* is distinguished, but would be applicable in cases of mere misconstruction by reason of the decision in *National Pari-Mutuel*. I am not persuaded by a submission which, if right, disturbs the long-established mistake of law rule in one class of case, that of *ultra vires* demand, but cannot be applied in another class of case, that of misconstruction of a valid provision, although there is no satisfactory distinction in principle between the two classes. C D E

(iii) The rules in *Slater*, *William Whiteley Ltd.* and *Twyford* have stood unquestioned in our courts for 100 years. A large number of claims, by taxpayer or Revenue, must have been settled or not pursued or not defended, upon the assumption that the rules are good law. If this Court should overrule those cases and accept the primary submission for the Woolwich, the law must be regarded as always having provided for that cause of action: we cannot provide for it to exist only from the date of our decision or attach limitations upon the advancing of other existing or past claims. Such claims could be advanced or revived on the basis that the cause of action has always existed, subject to any effective defences or answers based upon limitation, compromise or estoppel. F G

(iv) The reasoning upon which the rules in those cases were based rests substantially upon an assessment of the policy consequences of recognising the existence of the cause of action contended for. In my judgment, the policy consequences could, with no less convincing reasoning, have been assessed differently; and if the cause of action contended for had been recognised long ago, it would rapidly have been assimilated into the law with such special legislative provisions as would have been judged to be necessary. That, however, does not, in my judgment, justify the upheaval and potential consequences which would be likely to follow from overruling at this date *Slater*, *William Whiteley Ltd.* and *Twyford*. H

(v) The argument based upon legality, constitutional propriety and simple fairness was as clear and compelling in 1888 when *Slater* was decided; or in 1959 when the Court of Session decided the *Glasgow Corporation* case and the High Court of Australia decided *Mason*; as it is today. There are, however, respectable reasons of public interest and in the convenience of public administration for retaining the rules as they are. The nature of the consequences of overruling the long-standing I

A authorities is such that, in my judgment, that course should be left to legislation.

Butler–Sloss L.J.:—The Woolwich Equitable Building Society (the "Woolwich") paid the Inland Revenue Commissioners (the "Revenue") nearly £57m in response to an income tax demand formulated under provi-
B sions of Regulations found by the House of Lords to be *ultra vires*. (*Regina* v. *Inland Revenue Commissioners* Ex parte *Woolwich Equitable Building Society*(1) [1990] 1 WLR 1400). The Revenue repaid the £57m but have refused to pay interest claimed by the Woolwich of approximately £7m. I gratefully adopt the summary of the facts set out in the judgment of Ralph Gibson L.J. which I have had an opportunity of reading in draft. In order to
C decide whether, and, if so, on what basis the Woolwich is entitled to claim interest on the money paid to the Revenue in response to an unlawful demand, it is necessary to consider first the bases upon which the payments were made by the Woolwich and the repayment made by the Revenue. If a cause of action arose at the dates of payment of the tax, interest would be payable, but if the right to repayment arose at the date of judgment or did
D not arise at all, no interest would be payable. The Woolwich make two main submissions:

(1) The primary submission, that as a matter of principle a subject who makes a payment in response to an unlawful demand for tax (or other like demand) from the Crown, thereby acquires a *prima facie* right to its repayment forthwith as money had and received.

E

(2) In the alternative, there is a right to restitution on the basis of duress or practical compulsion. In either case, the cause of action would arise at the date of payment and interest would be payable on a claim for the recovery of a debt within the meaning of s 35A of the Supreme Court Act 1981.

F

If both submissions fail, the Woolwich contend that the implied agreement as found by the Judge included repayment of the sum from the dates of payment and not the date of judgment and, consequently, interest would be payable.

G The Revenue contend that there is no general principle of restitution; that the payment by the Woolwich was made voluntarily and not under duress and was repaid by the Revenue either:

(1) by virtue of the implied agreement found by the Judge, which did not include the payment of interest, or

H (2) alternatively it was an *ex gratia* payment made in accordance with their general powers under the Taxes Management Act 1970 to settle disputed claims and make compromises with taxpayers in pursuance of their duties to collect taxes. (See *Commissioners of Inland Revenue* v. *Nuttall*(2) [1990] STC 194.) There was no question of the Revenue not repaying the £57m to the Woolwich.

I

The Primary Submission

This is the general principle of restitution of monies had and received through unjust enrichment. I start, as Nolan J. did, with the speech of Lord

(1) 63 TC 589. (2) 63 TC 148.

Wright in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* [1943] AC 32, at page 61:

> "It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution."

Historically, these claims were brought in the Court of King's Bench in the action of *indebitatus assumpsit* and during the 18th century actions for money had and received had increased in number and variety. Lord Wright in his speech in *Fibrosa* said, at page 62:

> "Lord Mansfield C.J., in a familiar passage in *Moses* v. *Macferlan* (1760) 2 Burr. 1005, sought to rationalize the action for money had and received, and illustrated it by some typical instances. 'It lies,' he said, 'for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express, or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.' Lord Mansfield prefaced this pronouncement by observations which are to be noted. 'If the defendant be under an obligation from the ties of natural justice, to refund; the law implies a debt and gives this action [sc. *indebitatus assumpsit*] founded in the equity of the plaintiff's case, as it were, upon a contract ("*quasi ex contractu*" as the Roman law expresses it).' Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact, he denies that there is a contract; the obligation is as efficacious as if it were upon a contract. The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort, though it resembles contract rather than tort. This statement of Lord Mansfield has been the basis of the modern law of quasi-contract, notwithstanding the criticisms which have been launched against it. Like all large generalizations, it has needed and received qualifications in practice. There is, for instance, the qualification that an action for money had and received does not lie for money paid under an erroneous judgment or for moneys paid under an illegal or excessive distress. The law has provided other remedies as being more convenient. The standard of what is against conscience in this context has become more or less canalized or defined, but in substance the juristic concept remains as Lord Mansfield left it."

The question is: whether there is a general right to repayment of monies unlawfully demanded subject to certain defences which may be raised, or whether a specific right arises in certain narrow categories and there is no redress for those outside those categories. Goff and Jones in The Law of Restitution (3rd edition) said, at page 15 of the introduction:

A "In our view the case law is now sufficiently mature for the courts to recognise a generalised right to restitution."

But the learned editors then point out that this is not a recognition of palm tree justice. The law of restitution has its own highly developed and reasonably systematic complex of rules.

B

The Judge found:

"It is plain, however, from the decided cases that the courts have not extended the general principle of restitution to those who have submitted to unauthorised demands for tax. On the contrary, the general
C rule has been that the maker of the payment has no right to recover the principal sum paid, let alone to receive interest on it."

That conclusion is challenged by Mr. Gardiner, for the Woolwich, and from the many decisions cited to us he has sought to extract the general proposition contained within his primary submission. Mr. Grabiner, for the
D Revenue, has sought to limit restitution to specific categories also derived from the cases cited.

I respectfully agree with Glidewell L. J., whose judgment I have had an opportunity of reading in draft, that a distinction should be drawn between public and private law. In the category of public law, someone with actual or
E ostensible authority to require payment in respect of tax, duty, licence fee or other payment on behalf of central or local government makes the demand for payment by a private individual or company or other organisation. In respect of such a demand no question of consideration arises. If demanded unlawfully, however, is it, to use Lord Mansfield's phrase, money obtained by imposition, express or implied, which the authority is obliged by the ties
F of natural justice and equity to repay to the payer? Lord Mansfield applied the general obligation to repay by the ties of natural justice and equity to demands imposed by the Crown in *Campbell* v. *Hall* (1774) Cowp 204. This was an action by a plantation owner in the Island of Grenada against the collector of duty unlawfully imposed on the export of sugar from the island after its capture by the British from the French. He paid the duty and
G claimed it back. Lord Mansfield said:

"The action is an action for money had and received; and it is brought upon this ground; namely, that the money was paid to the defendant without any consideration; the duty, for which, and in respect of which he received it, not having been imposed by lawful or sufficient
H authority to warrant the same."

The plantation owner was held entitled to recover the duty paid.

There is one group of cases described as "*colore officii*" or "withholding cases" where the private citizen has successfully recovered money demanded
I under claim of authority. The narrow definition of this group was expressed by Windeyer J. in *Mason* v. *State of New South Wales* (1959) 102 CLR 108, at page 140, to be:

"Extortion by colour of office occurs when a public officer demands and is paid money he is not entitled to, or more than he is entitled to, for the performance of his public duty. Examples of such exactions are

overtolls paid to the keepers of toll-bridges and turnpikes, excessive fees demanded by sheriffs, pound-keepers, etc. The parties were not on an equal footing; and generally the payer paid the sum demanded in ignorance that it was not due."

Examples of this group where the plaintiff succeeded include *Irving* v. *Wilson* (1791) 4 TR 485; *Morgan* v. *Palmer* (1824) 2 B & C 729; *Maskell* v. *Horner* [1915] 3 KB 106.

Nolan J. held, in my view correctly, that the present case could not fall within the definition of *colore officii* cases.

There are, however, other decisions which do not come within Windeyer J.'s definition but are wider in ambit. They include *Campbell* v. *Hall* (*supra*); *Dew* v. *Parsons* (1819) 2 B & Ald 562; *Steele* v. *Williams* (1853) 8 Ex 625 and *Hooper* v. *Mayor and Corporation of Exeter* (1887) 56 LJQB 457. I have already referred briefly to the facts in *Campbell* v. *Hall*. In *Hooper* v. *Mayor and Corporation of Exeter*, a decision of the Divisional Court, the Corporation of Exeter were entitled to charge dues on all stone landed at Exeter docks. There was an exception that dues were not payable on limestone to be burned into lime. The plaintiff landed considerable quantities of limestone over many years in ignorance of this exemption and, on becoming aware of it, reclaimed the dues already paid from the corporation. He succeeded in his claim. In his judgment Lord Coleridge L.C. referred to *Morgan* v. *Palmer* (*supra*) and said, at page 458:

"From the case cited in the course of the argument it is shown that the principle has been laid down that, where one exacts money from another and it turns out that although acquiesced in for years such exaction is illegal, the money may be recovered as money had and received, since such payment could not be considered as voluntary so as to preclude its recovery.

I am of opinion that that principle should be adopted here, and that accordingly the plaintiff is entitled to recover his money on the ground that he has paid it involuntarily."

Those observations of Lord Coleridge, supported by Smith J., are much wider than the definition of *colore officii* cases and both *Campbell* v. *Hall* and *Hooper* v. *Mayor and Corporation of Exeter*, in my view, support the primary submission of the Woolwich.

Support for the principle of repayment of tax unlawfully demanded is also to be found in the decision of the House of Lords in *Regina* v. *Tower Hamlets London Borough Council* Ex parte *Chetnik Developments Ltd.* [1988] AC 858. The facts related to repayment of rates which the applicant was not liable to pay but the principles enunciated by Lord Bridge in his speech are of more general application. At page 876, he said:

"So it emerges from these authorities that the retention of moneys known to have been paid under a mistake of law, although it is a course permitted to an ordinary litigant, is not regarded by the courts as a 'high-minded thing' to do, but rather as a 'shabby thing' or a 'dirty trick' and hence is a course which the court will not allow one of its own officers, such as a trustee in bankruptcy, to take."

A And, at page 877:

> "... I should myself have been content to derive the same conclusion from the broader consideration that Parliament must have intended rating authorities to act in the same high principled way expected by the court of its own officers and not to retain rates paid under a mistake of
B law, or in paragraph (a) upon an erroneous valuation, unless there were, as Parliament must have contemplated there might be in some cases, special circumstances in which a particular overpayment was made such as to justify retention of the whole or part of the amount overpaid."

There are two categories of cases in which it is clear from decisions
C binding upon this Court that a plaintiff cannot succeed. The first is where he has paid voluntarily in order to close the transaction.

In *Maskell* v. *Horner* (*supra*) Lord Reading C.J. said, at page 118(1):

> "If a person with knowledge of the facts pays money, which he is
D not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift, and the transaction cannot be reopened."

The second is a payment under a mistake of law, (subject to the observations of Lord Bridge in *In re Chetnik, supra*).

E

The Revenue relied upon a number of decisions to demonstrate that there is no general principle of restitution. In *Slater* v. *Mayor and Corporation of Burnley* (1888) 59 LT 636, Wills J. in the Divisional Court did not refer to *Hooper* v. *Mayor and Corporation of Exeter* which had been cited in argument and held that the overpayment of water rates by the plaintiff
F was a voluntary transaction and not paid under duress. In *William Whiteley Ltd.* v. *The King* (1909) 101 LT 741, a decision of Walton J. much relied upon by the Revenue, Whiteleys paid fees under protest to the Revenue in respect of male employees for six years. They refused to pay the fees for the seventh year and were held to be correct in their interpretation of the relevant Regulations. Walton J. held that the payments were voluntary and not
G under compulsion and had been paid under mistake of law. In *National Pari-Mutuel Association Ltd.* v. *The King* (1930) 47 TLR 110, the company without making any objection paid betting duty on the operation of a totaliser, but after another company was held not liable to pay the duty sought the repayment of the duty it had paid. This Court held that the question of liability was one of law and the construction of an Act of Parliament and the
H company had made a mistake of law in respect of which it could not recover. In *Twyford* v. *Manchester Corporation* [1946] Ch 236, the corporation unlawfully levied fees on a monumental mason working on memorials in the cemetery, which he paid under protest. He brought an action to recover the fees and Romer J. held that the payments were not made under duress or *colore officii* and were, therefore, voluntary.

I

This question has also been considered in the United States and Australia. Holmes J., sitting in the US Circuit Court for the District of Colorado, in *Atchison, Topeka & Santa Fe Railway Co.* v. *O'Connor* (1911)

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(1) [1915] 3 KB 106.

223 US 280, found for the taxpayer who had paid under a law later found to be unconstitutional, in circumstances very similar to those of the present case and upon grounds supporting the argument advanced by the Woolwich. In two decisions, *Sargood Brothers* v. *The Commonwealth* (1910) 11 CLR 258 and *Mason* v. *State of New South Wales* (*supra*), the first relating to custom duty unlawfully demanded and the second the payment of a fee for a licence for a road haulier which was also held later to have been demanded unlawfully, the High Court of Australia found that the money should be repaid. In *Sargood Brothers* v. *The Commonwealth* O'Connor J., in coming to that conclusion, set out principles which support the contentions of the Woolwich. In *Mason* v. *State of New South Wales* the majority of the Court held the money repayable upon the narrow ground of duress. However, Kitto J. clearly and Dixon C.J. by implication enunciated wider principles which support the primary submission of the Woolwich.

Both in principle and from decided cases, I consider that there is a general principle of repayment of tax unlawfully demanded. The decisions to the contrary can be distinguished as coming within the well-established categories of a voluntary payment to close the transaction or a mistake of law. The decisions in *Whiteleys*, *Slater* v. *Mayor and Corporation of Burnley* and *Twyford* v. *Manchester Corporation* have stood for many years but I am inclined to the view that they were wrongly decided.

We were urged not to extend the law and to leave it to Parliament to deal with any injustice which may arise. But, significantly, Parliament, in the legislative structure which governs taxation, has provided for repayment of tax which has been overpaid under Regulations which are *intra vires*. No structure is in place to deal with the demand for and payment of tax which has been unlawfully demanded under legislation found to be *ultra vires*. To deal with that eventuality the courts are thrown back upon the common law and precedent. Although there is no decision upon facts which are entirely similar, I do not see an enunciation of the general principle of restitution subject to limitations as an extension of the law but rather as a re-defining of long-established principles, enshrined in the Bill of Rights, established and acted upon in many decisions both in this jurisdiction and in the United States and Australia. It accords also with the general standards of fair dealings between the taxpayer and the emanations of government where the individual is likely to be at a disadvantage.

In the present case, the Judge found that, although the Revenue would not have instituted collection proceedings pending the judicial review proceedings, nonetheless:

> "Subject to the outcome of the present case, the scales in this respect were tilted heavily in favour of the Revenue. I accept that, as a practical matter, Woolwich had little choice but to make the three payments."

I agree with the Judge that the demand from the Revenue did not amount to duress. But it was clearly not a voluntary payment made to close the transaction, nor was there any mistake of law. The money was paid throughout under protest and proceedings were immediately instituted to establish that the Regulations were *ultra vires*. In my judgment, for the reasons I have set out above, I consider the Judge was wrong to find there was

no general principle of restitution and to limit categories of relief to mistake of fact or duress.

Had it been necessary to consider the alternative argument of the implied agreement, I agree with the Judge that an agreement could well be implied in these circumstances that the money was to be repaid to the Woolwich. I do not consider, however, that into that agreement could be inferred a term to pay interest. Equally, I do not consider that the repayment the Revenue was *ex gratia*. But, having come to the conclusion that the primary submission of the Woolwich is correct, it is not necessary further to explore the alternative arguments.

I would allow the appeal.

Appeal allowed, with costs. Leave to appeal to the House of Lords granted.

The Crown's appeal was heard in the House of Lords (Lords Keith of Kinkel, Goff of Chieveley, Jauncey of Tullichettle, Browne-Wilkinson and Slynn of Hadley) on 17, 18, 19, 23, 24, 25 and 26 March 1992, when judgment was reserved. On 20 July 1992 judgment was given against the Crown, with costs (Lords Keith of Kinkel and Jauncey of Tullichettle dissenting).

([1])*Ian Glick Q.C.*, *Alan Moses Q.C.* and *David Pannick* for the Revenue. For well over a century, it has been settled law in England and other Commonwealth jurisdictions that, in the absence of a contract, an action for money had and received against a public authority must be on one of the well-established grounds: mistake of fact, total failure of consideration, fraud and duress.

(1) A payment made voluntarily is not recoverable.

(2) In the eyes of the law, payment made under the threat of legal proceedings or in response to legal proceedings is voluntary and not recoverable: *William Whiteley Ltd.* v. *The King* (1909) 101 LT 741 and *Maskell* v. *Horner* [1915] 3 KB 106.

(3) A payment made under the threat to the person or the goods of the payer if involuntary and is *prima facie* recoverable: see *Hooper* v. *Mayor and Corporation of Exeter* (1887) 56 LJQB 457; *Sargood Brothers* v. *The Commonwealth and another* (1910) 11 CLR 258; *Maskell* v. *Horner* and *Mason* v. *State of New South Wales* (1959) 102 CLR 108.

(4) A payment made to a public officer in response to a demand for money he is not entitled to, or for more money than he is entitled to, for the performance of his public duty is involuntary and is *prima facie* recoverable; it is a payment in respect of a claim *colore officii*: see *Morgan* v. *Palmer* (1824) 2 B & C 729; *Steele* v. *Williams* (1853) 8 Ex 625; 17 Jur 464; *Hooper* v. *Mayor and Corporation of Exeter*; *Sargood Brothers* v. *The Commonwealth and another*; *Attorney-General* v. *Wilts United Dairies Ltd.* (1921) 37 TLR

([1]) Argument reported by J. A. Griffiths Esq., Barrister-at-Law.

884; *Julian* v. *Mayor of Auckland* [1927] NZLR 453 and *Mason* v. *State of New South Wales.* A

(5) A payment made to any person who is bound by statute to provide a service at a particular charge is involuntary and recoverable if he demands a higher charge to perform it: *Great Western Railway Co.* v. *Sutton* (1869) LR 4 HL 226 and *South of Scotland Electricity Board* v. *British Oxygen Co. Ltd.* [1959] 1 WLR 587. B

(6) A payment made under a mistake of law but not in any of categories (3), (4) or (5) is not recoverable: *Henderson* v. *Folkstone Waterworks Co.* (1885) 1 TLR 329; *Slater* v. *Mayor and Corporation of Burnley* (1888) 59 LT 636; *Julian* v. *Mayor of Auckland* and *National Pari-Mutuel Association Ltd.* v. *The King* (1930) 46 TLR 594; 47 TLR 110. C

(7) A payment made under protest but not in any of categories (3), (4) or (5) is voluntary and is not recoverable, except under a contract: *William Whiteley Ltd.* v. *The King; Maskell* v. *Horner; Twyford* v. *Manchester Corporation* [1946] Ch 236; *Sebel Products Ltd.* v. *Commissioners of Customs & Excise* [1949] Ch 409 and *Mason* v. *State of New South Wales.* D

Woolwich's primary submission, that there is a *prima facie* right to repayment of an unlawful demand for tax by the Crown, is contrary to settled English authority. It is also contrary to the law of Scotland: see *Glasgow Corporation* v. *Lord Advocate* 1959 SC 203. That submission involves creating a special ground of recovery applicable only to public authorities. If it is appropriate to treat public authorities differently from other persons then, in the absence of legislative intervention, this should be done by the application of public law principles of abuse of power. It does not call for the creation of new private law liabilities to which only public authorities are subject. [Reference was made to *Regina* v. *Tower Hamlets London Borough Council* Ex parte *Chetnik Developments Ltd.* [1988] AC 858 and *Regina* v. *Inland Revenue Commissioners* Ex parte *National Federation of Self-Employed & Small Businesses Ltd.* [1982] AC 617.] E F

Woolwich's primary submission is also inconsistent with the well-settled principle that, in general, there is no common law right to compensation for loss occasioned by a public authority acting outside its powers, unless the action complained of is tortious or is carried out maliciously or in bad faith or in the knowledge that it is *ultra vires:* see *Bourgoin SA and Others* v. *Ministry of Agriculture, Fisheries and Food* [1986] QB 716. G

If a right to recover payments from public authorities ought to be created, that should be done by Parliament, not the courts. Parliament has already intervened repeatedly in this area to fix the circumstances and the terms under which overpayments of tax should be repaid. Any new common law right would either have to apply only where Parliament has made no such provision or, alternatively, across the board, in which case such a right might be different from, and even inconsistent with, the rights of recovery already laid down by statute. The nature of the statutory provisions already made and the issues raised and discussed in the authorities and in the Law Commissions' Consultation Paper (Law Com. No. 120) "Restitution of Payments Made Under a Mistake of Law" (1991) demonstrate that there are many complex and competing policy considerations that have to be weighed and reconciled before any satisfactory solution can be found. [Reference was H I

A also made to *Air Canada* v. *British Columbia* (1989) 59 DLR (4th) 161.] The same solution will not necessarily suit every type of person.

The particular area with which we are concerned, taxation, is one which Parliament visits annually and so Parliament can be expected to legislate if and when policy dictates that change is necessary. Parliament's clear legislative assumption, demonstrated by the existing statutory provisions, is that there is at present no such right as that for which Woolwich contends, a right which is calculated to put it in a better position than other taxpayers who use the statutory appeals procedure.

As to Woolwich's alternative claim that it has a right to restitution on the basis of duress, where a claim is made in good faith it is contrary to both principle and well-established authority to treat as duress the threat, express or implied, that the claimant will bring legal proceedings to vindicate the claim. Nor does the fact that the person against whom the claim is made fears that proceedings may lead to adverse publicity turn the threat of them into duress. A claimant is only guilty of duress if he puts on the other party pressure the law regards as illegitimate, i.e., if he takes, or threatens to take, action against the person or the goods of the other party or (if he is a public officer) makes a demand that he be paid money he is not entitled to, or more than he is entitled to, for the performance of his public duty: *Universe Tankships Inc. of Monrovia* v. *International Transport Workers' Federation* [1983] 1 AC 366, 384. No such pressure was alleged here. The payment was voluntary and, apart from contact, would not be recoverable at law. The parties agreed that Woolwich would pay to the Revenue the tax in dispute to abide the result of the judicial review proceedings in *Regina* v. *Commissioners of Inland Revenue* Ex parte *Woolwich Equitable Building Society* [1990] 1 WLR 1400. If they succeeded (as they did), the Revenue would repay the principle sum, as they did. That agreement made no provision for interest, and interest cannot be implied into it.

John Gardiner Q.C., *Nicholas Underhill* and *Jonathan Peacock* for Woolwich. As a matter of principle, a subject who makes a payment in response to an unlawful demand for tax from the Crown thereby acquires a *prima facie* right to its repayment forthwith as money had and received. This is a distinct head of restitutionary recovery: it is not necessary to bring it within any of the conventionally identified textbook heads of money had and received, such as duress and mistake. The conventional classifications of restitution merely reflect particular examples of a fundamental principle against unjust enrichment: see *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* [1943] AC 32, 61–64; *Kiriri Cotton Co. Ltd.* v. *Ranchhoddas Keshavji Dewani* [1960] AC 192, 202 and *Lipkin Gorman (A Firm)* v. *Karpnale Ltd.* [1991] 2 AC 548.

The Revenue were enriched, and Woolwich impoverised, to the tune of £57m in consequence of demands which the Revenue had no right to make and in the absence of any underlying right or obligation. This is a plain case of unjust enrichment. Moreover there are close analogies between the right claimed and the conventionally identified heads of restitution, reflecting the fact that the same principles are involved. Where payment is made pursuant to an unlawful demand by the Crown (a) the payment is made without "consideration" and (b) it cannot properly be regarded as made voluntarily. [Reference was made to *Campbell* v. *Hall* (1774) 1 Cowp 204, 205; *Steele* v.

Williams 8 Ex 625, 632–633; *Hooper* v. *Mayor and Corporation of Exeter* 56 LJQB 457, 458; *The Queens of the River Steamship Co. Ltd.* v. *Conservators of the River Thames* (1899) 15 TLR 474; *Sargood Brothers* v. *The Commonwealth and another* 11 CLR 258, 276–277; *Attorney-General* v. *Wilts United Dairies Ltd.* 37 TLR 884, 887; *Mason* v. *State of New South Wales* 102 CLR 108, 116–117 and *Air Canada* v. *British Columbia* 59 DLR (4th) 161, 169.]

As to want of consideration, the sense here is not the contractual sense. But the principle which allows recovery of a payment made under a contract the consideration of which has wholly failed ought equally to apply. There is nothing to substantiate the claim for the money: the payment discharges no legal liability.

As to voluntariness, payment to the Crown in response to an *ex facie* lawful demand for tax is made in submission to the apparent authority of the demand and not as a free act of will. The Crown is in a special position of authority. A subject will rightly and reasonably feel under an obligation of comply with demands of the Crown unless and until they have been authoritatively declared to be unlawful. It should not, therefore, be necessary for him to establish duress in the strict private law sense. In this area of the law "voluntariness" is to some extent a term of art expressing considerations of legal policy: see *Barton* v. *Armstrong* [1976] AC 104, 121.

A subject who pays money to the Crown in response to an unlawful demand for tax has been "subjected to an improper motive for action:" *Fairbanks* v. *Snow* (1887) 13 NE 596, 598. There would be a serious constitutional *lacuna* if there were no *prima facie* right of recovery against the Crown, or other public authorities, of sums unlawfully exacted. The rule, enshrined in the Bill of Rights, against taxation unauthorised by Parliament, carries with it as a necessary corollary the right of the subject to recover such unlawful taxes if paid: see the *Wilts United Dairies* case 37 TLR 884, 887 and *Air Canada* v. *British Columbia* 30 DLR (4th) 24, 29. It is to be noted that the European Court of Justice accepted that where there is a *prima facie* right there should be a correlative remedy for violation of that right: *Amministrazione delle Finanze dello Stato* v. *SpA San Giorgio* (Case 199/82) [1983] ECR 3595, 3612. [Reference was also made to *Christian Deville* v. *Administration des Impôts* (Case 240/87) [1988] ECR 3513 and *Commission of the European Communities* v. *Italian Republic* (Case 104/86 [1988] ECR 1799.] It is repugnant to fairness and common sense that the Crown can say to a subject "Pay me a sum of money" and then, when the subject establishes through the courts that the demand was unlawful, should be entitled to say "You cannot have your money back—you should not have paid me when I asked you" or "You should have made me threaten you first".

Further, it is an established rule that if the Crown pays money out of the consolidated fund without authority the Crown is, by reason of that fact alone, entitled to recover the money: *Auckland Harbour Bourd* v. *The King* [1924] AC 318, 327. It would be inequitable if the equivalent rule did not apply in the converse situation.

The right of recovery may not be unlimited. But whatever the precise limits of recovery, Woolwich is well within them: it paid expressly under protest and took immediate steps to challenge the lawfulness of the demand with the intention of recovering the money. [Reference was made to

A *Newdigate* v. *Davy* (1693) 1 Ld Raym 742; *Dew* v. *Parsons* (1819) 2 B & Ald 562; *Morgan* v. *Palmer* 2 B & C 729; *Slater* v. *Mayor and Corporation of Burnley* 59 LT 636; *William Whiteley Ltd.* v. *The King* 101 LT 741; *Maskell* v. *Horner* [1915] 3 KB 106; *T. & J. Brocklebank Ltd.* v. *The King* [1924] 1 KB 647; [1925] 1 KB 52; the *National Pari-Mutuel* case 47 TLR 110; *Twyford* v. *Manchester Corporation* [1946] Ch 236; the *Sebel Products* case [1949] Ch B 409; *Glasgow Corporation* v. *Lord Advocate* 1959 SC 203; *Commissioners of Customs and Excise* v. *Cure & Deeley Ltd.* [1962] 1 QB 340; *South of Scotland Electricity Board* v. *British Oxygen Co. Ltd.* [1959] 1 WLR 587; *Eadie* v. *Township of Brantford* (1967) 63 DLR (2d) 561 and *Hydro Electric Commission of Township of Nepean* v. *Ontario Hydro* (1982) 132 DLR (3d) 193.]

C

The disputed payments, however, also fall within the established restitutionary head of payments made under duress or practical compulsion. The question in any case of an alleged payment under duress is whether "[the payer's] apparent consent was induced by pressure exercised upon him ... which the law does not regard as legitimate": *Universe Tankships Inc. of* D *Monrovia* v. *International Transport Workers' Federation* [1983] 1 AC 366, 384, *per* Lord Diplock. [Reference was also made to *Barton* v. *Armstrong* [1976] AC 104, 121.] The test is not whether the party's will has been coerced: *Dimskal Shipping Co. SA and Others* v. *International Transport Workers' Federation* [1992] 2 AC 152. Compulsion for this purpose can take many different forms. There may be explicit threats, or implied or "veiled" threats E (see *B. & S. Contracts and Design Ltd.* v. *Victor Green Publications Ltd.* [1984] ICR 419) or other forms of compulsion short of threats. Exactions *colore officii* are no more than a particular species of illegitimate pressure. A party seeking to rely on duress by a public authority does not have to prove explicit pressure of any particular nature, still less actual threats. It is enough if he has a reasonable apprehension that non-payment will result in some F substantial damage to his interests: *Mason* v. *State of New South Wales* 102 CLR 108, 117, 127, 145. Where moral duress not justified by law is exerted in "... circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary": *Robertson* v. *Frank Brothers Co.* (1889) 132 US 17, 23. [Reference was also made to *Atchison, Topeka & Santa* G *Fe Railway Co.* v. *O'Connor* (1912) 223 US 280.]

As regards sums overpaid pursuant to *intra vires* demands, the aggrieved taxpayer's remedy is to challenge the erroneous but validly made decision (e.g. assessment) through the appeal procedures enacted by Parliament: see *Inland Revenue Commissioners* v. *Aken* [1990] 1 WLR 1374 and *Zaidan Group* H *Ltd.* v. *City of London* (1990) 64 DLR (4th) 514. Where the Revenue have acted *ultra vires*, there is no statutory basis whatever (and thus no Parliamentary authority) for the demand made of the taxpayer. Any payment made pursuant to such a demand cannot be recovered by the taxpayer by reference to any statutory provisions. The statute cannot touch something wholly outside the legal framework.

I

As to the risk of disruption to public finances which could arise if the unlawful tax were recoverable at law, any submission that a right of recovery which would (*ex hypothesi*) otherwise apply should be excluded for reasons of expediency, however weighty, must be wrong: see *Regina* v. *Paddington Valuation Officer* Ex parte *Peachy Property Corporation Ltd.* [1966] 1 QB

380, 419. The seriousness of the risk is in any event exaggerated, since the great majority of errors by authorities with power to tax will be *intra vires* errors and will, therefore, fall within the scope of the statutory repayment regime. And there is no such risk in the instant case, where the Revenue were immediately put on notice of Woolwich's challenge and Parliament has legislated retroactively to contain any possible problem of fiscal disruption.

Glick Q.C. in reply. The general right of recovery contended for in Woolwich's primary submission has never been recognised by, and is incompatible with, authority. The unlawfulness of a demand is not in itself enough to permit recovery: there has to be a second factor e.g. *colore officii.* As to the doctrine of presumed compulsion adopted by Kitto J. in *Mason* v. *State of New South Wales* 102 CLR 108, 129, this was expressly rejected by the other dissenting Judge and impliedly rejected by the other Judges in that case, who required actual, not presumed compulsion. It was also rejected by the majority in *Air Canada* v. *British Columbia* 59 DLR (4th) 161.

Woolwich's alternative submission, on duress, would extend to every case where an unlawful demand was backed by the power of the state. That, in effect, is the same as the primary submission. It is not enough to say that the payer has no commercial alternative to paying—the payee must do something wrong. To suggest that in this branch of the law alone, wrongful compulsion can be gleaned from the inequality of position of the respective parties, would undermine the whole law of duress as it has developed in this country over the last century.

By placing limitations into the statutory provisions for the recovery of overpaid tax, Parliament has plainly rejected the principle of recovery at large. The House should not recognise a right that the legislature has hitherto refused to enact. However attractive, superficially, the argument that Woolwich should be entitled to recovery, the nature of that supposed legal right is shown, on examination, to be unsound, unrecognised by the common law and unworkable unless provided for and regulated by statute.

The following cases were cited in argument in addition to the cases referred to in the speeches:—*Barton* v. *Armstrong* [1976] AC 104; *Regina* v. *Commissioners of Inland Revenue* ex parte *National Federation of Self Employed & Small Businesses Ltd.* 55 TC 133; [1982] AC 617; *Universe Tankships Inc. of Monrovia* v. *International Transport Workers' Federation* [1983] AC 366; [1982] 2 All ER 67; *B. & S. Contracts and Design Ltd.* v. *Victor Green Publications Ltd.* [1984] ICR 419; *Regina* v. *Commissioners of Inland Revenue* ex parte *Preston* 59 TC 1; [1985] AC 835; *Bourgoin SA and Others* v. *Ministry of Agriculture, Fisheries and Food* [1986] QB 716; [1985] 3 All ER 585; *Murphy* v. *Brentwood District Council* [1991] 1 AC 398; [1990] 2 All ER 908; *Lipkin Gorman (A Firm)* v. *Karpnale Ltd.* [1991] 2 AC 548; *Robertson* v. *Frank Bros. Co.* (1889) 132 US 17; *Zaidan Group Ltd.* v. *City of London* (1990) 64 DLR (4th) 514; *Julian* v. *Mayor of Auckland* 1927 NZLR 453; *Christian Deville* v. *Administration des Impôts* [1989] 3 CMLR 611; *Commissioners of Customs & Excise* v. *Cure & Deeley Ltd.* [1962] 1 QB 340; [1961] 3 All ER 641; *Dimskal Shipping Co. SA* v. *International Transport Workers' Federation* [1992] 2 AC 152; *Commissioners of Inland Revenue* v. *Aken* 63 TC 395; [1990] 1 WLR 1374; [1990] STC 497; *Regina* v. *Paddington*

A *Valuation Officer* ex parte *Peachey Property Corporation Ltd.* [1966] 1 QB 380; [1965] 2 All ER 836; *F. Hoffmann-La Roche & Co. AG* v. *Secretary of State for Trade and Industry* [1975] AC 295; [1974] 2 All ER 1128.

Lord Keith of Kinkel:—My Lords, by s 40 of the Finance Act 1985
B Parliament terminated, as from 5 April 1986, the system of annual voluntary arrangements which had, since 1894, regulated the payment by building societies to the Inland Revenue of sums representing income tax on interest and dividends due to depositors and investors. The purpose was to make applicable to building societies the composite rate system which had been in force as respects bank interest since the Finance Act 1984. Parliament did not by pri-
C mary legislation introduce the new system as regards building society interest and dividends but instead, by adding a new s 343(1A) to the Income and Corporation Taxes Act 1970, authorised the Board of Inland Revenue to do so by Regulations made by statutory instrument. So the Board made the Income Tax (Building Societies) Regulations 1986 (S.I. 1986 No. 482). The effect of these Regulations, so far as Woolwich was concerned, was to subject
D it over a period of 24 months (6 April 1986 to 5 April 1988) to tax on 29 months of income, amounting to an excess of some £76m. Woolwich challenged by judicial review the validity of the particular Regulations which had this effect. Before the case came to a hearing Parliament sought to improve the Revenue's position by enacting with retrospective effect s 47(1) of the Finance Act 1986, but this proved ineffective for the purpose and on 31 July
E 1987 Nolan J. decided that the Regulations complained of were *ultra vires* and void insofar as they purported to provide for the imposition of tax on interests and dividends paid by building societies prior to 6 April 1986, and made an order accordingly ([1987] STC 654)(1). His order was reversed by the Court of Appeal ([1989] STC 463)(1) but restored on appeal to this House
F ([1990] 1 WLR 1400)(1).

Before the order of Nolan J. was made, Woolwich had paid to the Inland Revenue sums totalling £56,998,221 claimed by way of tax for the period before 6 April 1986. The first payment of £42,426,421 was made on 16 June 1986. On 12 June an accountant employed by Woolwich had written to
G the Revenue Accounts Office:

> "You should be aware that we are presently seeking leave to commence legal proceedings in connection with the Regulations and accordingly this payment is made without prejudice to any right to recover any payments made pursuant to the Regulations which may arise as a result of legal proceedings, or as a result of any future extinguishment or
H reduction of any liability under the said Regulations or otherwise."

A further payment of £2,856,821 was made on 15 September 1986, being accompanied by a letter in similar terms, and a third payment of £11,714,969 on 16 March 1987. On 15 July 1987 Woolwich issued a writ of summons against the Commissioners of Inland Revenue claiming repayment of these
I sums with interest under s 35A of the Supreme Court Act 1981 from the respective dates of payment. Following the order of Nolan J. negotiations ensued between the parties, as a result of which the Commissioners repaid to Woolwich the sum of £56,998,221 with interest from 31 July 1987, the date

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(1) 63 TC 589.

of the order, but refused to pay interest from any earlier date. So the one issue remaining on Woolwich's writ of summons came to be whether or not Woolwich had grounds for claiming interest on the three payments which they had made from their respective dates up to 31 July 1987. The amount of such interest, if due, is agreed between the parties to be £6,730,000. Whether or not Woolwich can claim to be awarded that interest depends on whether it had a cause of action to recover each payment as a debt due it on the date when it was made. If it did have such a cause of action, then the Court would have power to award interest from the moment it arose by virtue of s 35A of the Supreme Court Act 1981.

Woolwich's writ of summons was tried by Nolan J. on 10 and 11 March 1988. The primary submission for Woolwich was that a subject who makes a payment in response to an unlawful demand for tax, or any similar demand, at once acquires a right to recover the amount so paid as money had and received to the subject's use. There was an alternative submission that the money had been paid under duress and was, therefore, immediately recoverable. On behalf of the Crown it was contended that the law did not recognise any such general principle as was involved in the primary submission for Woolwich, that the facts of the case did not meet the established principles governing the restitution of sums paid under duress, and that the Revenue were never under any obligation to make any repayment and did so only as a matter of grace. As an alternative to the last submission it was argued that the money was paid to and received by the Revenue under an implied agreement that it would be held as a deposit against tax that might be held to have been due at the dates of payment and that it would be repaid if and when it turned out that no tax was due. By a judgment given on 12 July 1988 ([1989] 1 WLR 137) Nolan J. dismissed Woolwich's action, holding that Woolwich was not entitled to recover the sums in issue under any general principle of restitution or as having been paid under duress. He took the view that the sums were paid under an implied agreement that they would be repaid if and when the dispute about the validity of the Regulations of 1986 was resolved in the taxpayer's favour. So Woolwich had no cause of action to recover the money until the date of his order of 31 July 1987. Woolwich appealed, and on 22 May 1991 the Court of Appeal by a majority (Glidewell and Butler-Sloss L.JJ., Ralph Gibson L.J. dissenting) allowed the appeal and awarded the interest claimed: ([1991] 3 WLR 790). The majority accepted Woolwich's primary submission that, where money was paid under an illegal demand for taxation by a government body, the payer had an immediate *prima facie* right to recover the payment. The Commissioners of Inland Revenue now appeal, with leave given in the Court of Appeal, to your Lordships' House.

The first matter which logically falls to be considered is whether or not Nolan J. was correct in the view, which was accepted by Ralph Gibson L.J. in the course of his dissenting judgment in the Court of Appeal, that the payment by Woolwich of the principal sums demanded and the acceptance of these sums by the Revenue created, having regard to the terms of Woolwich's letters of 12 June and 15 September 1986, an implied agreement that the Revenue would repay the sums in question in the event of Woolwich succeeding in its action for judicial review. If that view were correct, it would appear to pre-empt Woolwich's arguments in favour of a right to repayment arising at common law, though it is fair to say that this was not the position adopted by counsel for the Appellants before your Lordships' House. In my

opinion, no such implied agreement can properly be inferred. The letters of 12 June and 15 September 1986 did not say that the Woolwich was offering the money to the Revenue upon the condition that it would be repaid if ultimately found, in the pending litigation, not to be due. The letters said that the payments were made without prejudice to any right to recover them which might arise as a result of legal proceedings. That means that Woolwich were asserting a legal right to recover the payments in the event of the relevant Regulations being held to be *ultra vires*, and stating that the payments were made without prejudice to such right. In accepting the payments the Revenue were doing no more than agreeing that they would not be treated as prejudicing any such right. In reaching the conclusion he did, Nolan J. founded upon the decision of Vaisey J. in *Sebel Products Ltd.* v. *Commissioners of Customs and Excise* [1949] Ch 409. In that case a claim to purchase tax in respect of one of their products was made against the plaintiffs. They brought an action for a declaration that the product was not so liable and, while the action was awaiting trial, they paid the sum claimed. The circumstances under which they did so do not appear from the report of the case. The plaintiffs succeeded in their action for a declaration, but the defendants refused to repay the money. Vaisey J. held that they were bound to do so. He said, at page 412:

> "...I ask myself first with what intention the plaintiffs paid the money, and, secondly, with what intention the defendants received it? If the intention was the same on both sides, the result, in my judgment, was that an agreement was made between the parties by implication.
>
> The intention of the plaintiffs was, to my mind, clear; they expected to recover the money if they won their action. What was the intention of the defendants? It is obviously irrelevant to speculate on what if anything was in the mind of the clerk or other subordinate officer who actually received the money, or in the mind of the officer (whoever he or she may have been) who paid it into the bank to the defendants' credit. I think that I must assume the existence of some person in the defendants' employment who accepted and appropriated the money with a full knowledge of all the facts, particularly the discussion which had preceded the institution of the action, and the pending of the action itself, who knew and realised that the right of the defendants to receive the money was at the moment sub judice, and indeed on the point of coming before this court for decision. What would that hypothetical person have thought about it? In my judgment, he would inevitably have come to the conclusion, as a matter of necessary inference, that the plaintiffs were paying and the defendants accepting the money subject to repayment if the action resulted in the plaintiffs' favour. If however he had entertained any doubt on the matter, I feel sure that he would as a matter I will not say of honesty but of courtesy refused [sic] to accept the money until the position had been made clear to him. What is, to my mind, incredible, is that he could ever have supposed that the money was being either paid by the plaintiffs or received by the defendants with the intention or on the footing that the defendants were to keep it in any event. I come, therefore, to the conclusion that the intentions of the plaintiffs and the defendants were identical. In other words, I find that there was an agreement."

Nolan J. regarded the facts of that case as being indistinguishable from the present, and he enunciated the following general proposition(1):

> "I would say more generally that whenever money is paid to the Revenue pending the outcome of a dispute which, to the knowledge of both parties, will determine whether or not the Revenue are entitled to the money, an agreement for the repayment of the money, if and when the dispute is resolved in the taxpayer's favour, must inevitably be implied unless the statute itself produces that result, as it does, for example, in cases falling within para 10(4) of Sch 20 to the Finance Act 1972."

For my part, I would not be prepared to accept that as a proposition of law. Whether or not there is an agreement must depend on the facts of the particular case, and whether or not the decision of Vaisey J. was correct I consider that the facts of the present case, including as they do the letters of 12 June and 15 September 1986, are not consistent with an agreement on the lines suggested. This does not mean, however, that a taxpayer would necessarily be without remedy in such a situation. The possible existence of a remedy in the law of restitution is for consideration later, but assuming there is not one, relief by way of judicial review would, in my opinion, be available. In *Regina* v. *Tower Hamlets London Borough Council* Ex parte *Chetnik Developments Ltd.* [1988] AC 858, this House had occasion to consider s 9 of the General Rate Act 1967 which provides, so far as material:

> "where it is shown to the satisfaction of a rating authority that any amount paid in respect of rates, and not recoverable apart from this section, could properly be refunded on the ground that— ...(e) the person who made a payment in respect of rates was not liable to make that payment, the rating authority may refund that amount or a part thereof."

The facts were that Chetnik constructed two warehouses under a consent granted under the London Buildings Acts 1930–39, the consent being subject to a condition that the buildings should not be occupied until the consent of Tower Hamlets had been obtained to the proposed user. Tower Hamlets, acting under para 1 of Sch 1 to the Act of 1967, required Chetnik to pay rates on the buildings over a period of some years during which they were unoccupied because tenants could not be found. Chetnik paid the rates not appreciating that, by virtue of para 2 of Sch 1 to the Act, rates were not payable on any unoccupied hereditament for any period during which the owner was prohibited by law from occupying the hereditament or allowing it to be occupied. As Tower Hamlets had not consented to the proposed user Chetnik were prohibited during the material period from allowing the warehouses to be occupied. When Chetnik came to appreciate this, it sought to reclaim the rates it had paid under s 9 of the Act of 1967. Tower Hamlets declined to make the repayment and Chetnik applied for judicial review of the adverse decision, unsuccessfully at first instance but successfully in the Court of Appeal and in your Lordships' House. Lord Bridge of Harwich, having reviewed two 19th century cases which decided that a trustee in bankruptcy was not entitled to retain moneys paid to him under a mistake of law, said, at page 876:

> "So it emerges from these authorities that the retention of moneys known to have been paid under a mistake at law, although it is a course

(1) Page 276B/D *ante*.

A permitted to an ordinary litigant, is not regarded by the courts as a 'high-minded thing' to do, but rather as a 'shabby thing' or a 'dirty trick' and hence is a course which the court will not allow one of its own officers, such as a trustee in bankruptcy, to take."

and later, at page 877:

B

"I in no way dissent from this reasoning, but I should myself have been content to derive the same conclusion from the broader consideration that Parliament must have intended rating authorities to act in the same high principled way expected by the court of its own officers and not to retain rates paid under a mistake of law, or in paragraph (*a*) upon C an erroneous valuation, unless there were, as Parliament must have contemplated there might be in some cases, special circumstances in which a particular overpayment was made such as to justify retention of the whole or part of the amount overpaid."

In that case the discretionary power to refund payment of rates for D which the person who made the payment was not liable had been expressly conferred on local authorities by Parliament. But it is not open to serious doubt that central revenue departments have a similar discretionary power to make refunds of tax payments which were not legally due. Indeed, it is a power of that nature which the Appellants claim to have exercised in the present case, in the course of their general function of managing and administer- E ing the tax system. So, if the Appellants had refused in the exercise of their discretion to make the repayment they did in the present case, I am of opinion that, in the absence of any other remedy, it would have been open to Woolwich to claim repayment in proceedings for judicial review, and there would appear to be no reason why such proceedings would not have been successful.

F

I turn now to consider the arguments advanced on behalf of the Woolwich in support of its right to recover the payments it made as money had and received or as having been made under duress, two grounds which it was accepted shaded into one another. At this stage it is appropriate to introduce Nolan J.'s account of the reasons which led the Woolwich to make the G payments ([1989] 1 WLR 137, pages 142–143)[1]:

"The factors which induced Woolwich to make the payments are set out in paragraphs 12 to 16 of Mr. Mason's affidavit dated 1 December 1987 and may be summarized as follows. First and foremost, the requirements of the Regulations as amplified in communications from H the revenue amounted on their face to lawful demands from the Crown. Woolwich would have expected any refusal of payment to lead to collection proceedings which would have been gravely embarrassing for Woolwich, the more so as it would have been the only building society refusing to pay. Any publicity suggesting that Woolwich might be in difficulty in meeting its financial obligations, or that alone amongst build- I ing societies it was pursuing a policy of confrontation with the revenue, might have damaging effects far outweighing Woolwich's prospects of success on the issue of principle. Secondly, Woolwich feared that if it failed in its legal arguments it might incur penalties. Thirdly, the three

[1] Pages 271G/272B *ante*.

payments to which I have referred formed parts of larger quarterly payments, the other parts of which were agreed to have been correctly charged. At the time when the payments were made, it had not been possible to identify the amounts in dispute. Fourthly, Woolwich was not, of course, to know at the time of the payments that it would succeed in the judicial review proceedings. Had Woolwich failed in those proceedings, it would have faced a bill for interest, which would not have been deductible for tax purposes, in an amount far exceeding the net return which Woolwich could have obtained from investing the money withheld."

Nolan J. accepted that, as a practical matter, Woolwich had little choice but to make the three payments.

The argument for Woolwich starts with the general principle enunciated by Lord Wright in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* [1943] AC 32, 61:

> "The claim was for money paid for a consideration which had failed. It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution."

This general principle has, however, been circumscribed in various ways by decided cases, not least by the rule that money paid under a mistake of law is not recoverable, a rule which, though heavily criticized in academic writings and elsewhere, is, in my opinion, too deeply embedded in English jurisprudence to be uprooted judicially. There is a considerable tract of authority, both in England and in other jurisdictions, which must be examined in order to ascertain whether or not the circumstances of the present case fall within Lord Wright's principle. The earliest case is *Newdigate* v. *Davy* (1693) 1 Ld Raym 742, where before the Revolution of 1688 the plaintiff had sentence from James II's High Commissioners to pay a sum of money to the defendant and did pay it. After the Revolution the plaintiff succeeded in recovering the money on the ground of *indebitatus assumpsit*. Leaving aside the political implications, the circumstance that the money was paid under the sentence of a court, albeit one that was held to have no jurisdiction, gives the case a flavour of duress, so that it is not a significant authority in Woolwich's favour. Then in *Campbell* v. *Hall* (1774) Cowp 204, the plaintiff brought a successful action against the King's Collector to recover duty which he had paid upon sugar exported from the island of Grenada. The question principally debated was whether the duty had been validly imposed by the Sovereign, though not consented to by the British Parliament or the local Assembly, and this question was answered in the negative. The nature of the action was thus stated by Lord Mansfield, at page 205:

> "The action is an action for money had and received; and it is brought upon this ground; namely, that the money was paid to the defendant without any consideration; the duty, for which, and in respect of which he received it, not having been imposed by lawful or sufficient authority to warrant the same."

A The judgment does not, however, contain any examination of this ground, there being no opposition on the part of the Crown to the duty being recoverable in the event of its being invalid. So no weight can be attached to the decision.

In *Dew* v. *Parsons* (1819) 2 B & Ald 562, an attorney was held entitled B to set off against a claim by a sheriff the excess amount which he had paid to the sheriff for the issue of warrants over what the sheriff was legally entitled to charge. The short judgments proceed on the simple ground that the sheriff was not entitled to retain sums which he had no legal right to demand, but the sums were demanded in return for the rendering of a service, namely the issuing of warrants, so the case is capable of being rationalized on the basis C that they were exacted *colore officii*, a concept which emerged more clearly in later cases. That concept was thus described by Windeyer J. in *Mason* v. *State of New South Wales* (1959) 102 CLR 108, 140:

> "Extortion by colour of office occurs when a public officer demands and is paid money he is not entitled to, or more than he is entitled to, D for the performance of his public duty. Examples of such exactions are overtolls paid to the keepers of toll bridges and turnpikes, excessive fees demanded by sheriffs, pound-keepers, etc. The parties were not on an equal footing; and generally the payer paid the sum demanded in ignorance that it was not due."

E Some of the early cases seem to turn upon a consideration of whether or not a payment which it is sought to recover was made voluntarily or not. In Morgan v. Palmer (1824) 2 B & C 729, it was held that the plaintiff was entitled to recover from the Mayor of Great Yarmouth a sum which he had been required to pay as a condition of being granted a renewal of his publican's licence, the payment having been demanded without lawful authority. Abbott F C.J., with whom Bayley J. agreed on this point, said the payment might have been voluntary if the parties had stood on equal terms, and continued, at page 735:

> "But if one party has the power of saying to the other, 'That which you require shall not be done except upon the conditions which I choose to impose,' no person can contend that they stand upon any thing like G an equal footing."

Holroyd J. simply said that the action did not fall within that class of cases which apply to voluntary payments. Littledale J. said that the payment was not voluntary because the plaintiff submitted to pay the sum claimed, as he could not otherwise procure his licence. I consider that this is properly to H be regarded a case of extortion *colore officii*.

Steele v. *Williams* (1853) 8 Ex 625 is also, in my opinion, such a case. The plaintiff was unlawfully charged for making extracts from a parish register, and was held entitled to recover back the payments. It clearly weighed with Parke B. and Martin B. that if the plaintiff had not agreed to pay the I sums asked he would not have been allowed to make the extracts. *Hooper* v. *Mayor and Corporation of Exeter* (1887) 56 LJQB 457 is an interesting case. Exeter Corporation were entitled under a private Act to charge dues upon the landing of limestone, but there was an exemption for limestone landed for the purpose of being burnt into lime. The plaintiff, being unaware of this exemption, paid dues upon limestone which he had landed and ultimately

burnt into lime. He was held entitled to recover the sums which he had paid. Lord Coleridge C.J. observed that the corporation would not have insisted on payment of the dues if they had known the facts. He regarded the case as governed by *Morgan* v. *Palmer* (*supra*), which was cited in argument. Smith J. held that the plaintiff was entitled to recover on the authority of *Morgan* v. *Palmer* and *Steele* v. *Williams* (*supra*). Both Judges expressed the view that the payments could not be considered to have been voluntary. The interesting feature of the case is that the corporation exacted the payments under a mistake of fact—they did not know that the limestone was to be burnt into lime, while the plaintiff made the payments under a mistake of law—he did not know of the exemption. Counsel for the plaintiff pointed out that under the private Act the corporation had a power of absolute and immediate distress in the event of non-payment of dues, though the Court did not advert to this. If, however, *Morgan* v. *Palmer* and *Steele* v. *Williams* are properly to be regarded as cases of extortion *colore officii*, the same must be true of *Hooper* v. *Mayor and Corporation of Exeter* which followed them.

In all the foregoing cases recovery was allowed, but a contrary trend then set in. In *Slater* v. *Mayor and Corporation of Burnley* (1888) 59 LT 636, the plaintiff sued to recover an overcharge of water rates which he had paid for one quarter, but did not succeed. Both Cave J. and Wills J. held that the payment was a voluntary one. Although the corporation had power to cut off the water supply in the event of non-payment of rates it had not threatened to do so. Wills J. observed that the case was simply the ordinary one of a person raising a contention when a demand was made of him, which was not sufficient to constitute duress. *Steele* v. *Williams* and *Hooper* v. *Mayor and Corporation of Exeter* were cited in argument, but no reference to them appears in the judgments. These cases must, therefore, have been regarded as distinguishable, presumably on the ground that *Slater's* case did not involve any refusal to perform a service unless an unlawful payment was made. In *The Queens of the River Steamship Co. Ltd.* v. *Conservators of the River Thames* (1899) 15 TLR 474, Phillimore J. held that the steamship company was entitled to recover a charge for making use of the conservators' pier facilities which was greater than that authorised by statute, the ground being simply that there was no consideration for the payment without any further reasoning. The report contains no citation of authority nor any account of the argument, so that the decision cannot be regarded as significant.

William Whiteley Ltd. v. *The King* (1909) 101 LT 741 is a further case where a claimant was held not to be entitled to recover payments which were not legally due. The claimant employed a number of persons for the purpose of preparing and serving meals to other employees of its business. The revenue authorities maintained that these persons were "male servants" in respect of whom licence duties were payable under the Revenue Act 1869. This was disputed but the payments were made under protest for a number of years, and finally refused. Proceedings were brought by the Inland Revenue which ultimately resulted in a Divisional Court holding that the employees in question were not "male servants" within the meaning of the Act. The employers then presented a petition of right seeking repayment of the sums paid in the past years. *Morgan* v. *Palmer*, *Steele* v. *Williams* and *Hooper* v. *Mayor and Corporation of Exeter* were founded on by the claimant and *Slater* v. *Mayor and Corporation of Burnley* by the Respondent. Walton J. dismissed the petition on the ground that the payments were not made in discharge of a demand illegally made under colour of office, though in the course of his judgment, he observed that the moneys were paid under a mis-

A taken belief on the part of the employers that they were bound to pay them. That must be extremely dubious, considering that for a number of years the payments were made under protest. But it did not constitute the *ratio* of the decision.

B *Maskell* v. *Horner* [1915] 3 KB 106, a decision of the Court of Appeal, was a fairly straightforward case of duress. The plaintiff carried on business in a market, the owner of which demanded tolls from him. The plaintiff objected to paying the tolls and, on the first occasion when he did so, the owner seized his goods. On other later occasions there was either a threat of seizure or an actual seizure of goods followed by payment under protest. It C was eventually decided, in proceedings to which the plaintiff was not party, that the owner of the market was not entitled to levy tolls. The plaintiff sued to recover payments he had made in past years, and the Court of Appeal, reversing the judgment of Rowlatt J., held that he was entitled to do so. Lord Reading C.J. said, at page 118:

> D "If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received. The money is paid not under duress in the strict sense of the term, as that implies duress of person, but under the pressure of seizure or detention of goods which is analogous to that of duress."

E It had been argued for the defendant that the payments had been made voluntarily to close the transaction, but Lord Reading held that payment under the type of pressure he had described was not so made. Later he distinguished payment under threatened seizure of goods from payment in consequence of a threat of action, saying, at pages 121–122:

> F "There is no doubt that if a person pays in an action or under threat of action the money cannot be recovered by him, as the payment is made to avoid the litigation to determine the right to the money claimed. Such payment is not made to keep alive the right to recover it, inasmuchas the opportunity is thus afforded of contesting the demand, and payment in such circumstances is a payment to close the transaction G and not to keep it open. Even if the money is paid in the action accompanied by a declaration that it is paid without prejudice to the payer's right to recover it, the payment is a voluntary payment, and the transaction is closed."

H *Attorney-General* v. *Wilts United Dairies Ltd.* (1921) 37 TLR 884 was not a case concerned with the recovery of a payment unlawfully demanded. The position was that the Food Controller, purporting to be acting under Defence of the Realm Regulations, had imposed as a condition of the grant of a licence to purchase milk the payment to him by the purchaser of a charge of 2d per gallon. The defendant agreed to this and obtained a licence I but later refused to pay the charge. In proceedings against him by the Attorney-General it was held in the Court of Appeal that the charge was unlawful and that the defendant was under no obligation to pay it. However, Atkin L.J. said, at page 887:

> "The agreement itself is not enforceable against the other contracting party; and if he had paid under it he could, having paid under

protest, recover back the sums paid, as money had and received to his use." A

This *dictum*, though carrying the authority of Atkin L.J., was uttered without any reference to authority and cannot be accorded great weight as a general statement of law. It is capable however, of being correct in its application to a case where the Food Controller had unlawfully demanded and B received payment as a condition of allowing any purchase of milk. That would be a case of extortion *colore officii*, which was the position in *T. & J. Brocklebank Ltd.* v. *The King* [1924] 1 KB 647; [1925] 1 KB 52. The Shipping Controller, purporting to act under Defence of the Realm Regulations, had imposed as a condition of licensing the sale of a ship to a foreign purchaser the payment to him by the seller of 15 per cent. of the purchase price, and C the seller made the payment. It was held by Avory J. and the Court of Appeal that the condition was illegal. Avory J. held that the payment was recoverable but was reversed by the Court of Appeal on a point concerned with the Indemnity Act 1920. But for that point the Court of Appeal would have allowed recovery. Bankes L.J., at page 62, held that the case was covered by the decision in *Attorney-General* v. *Wilts United Dairies*. Scrutton D L.J., at page 67, said that the payment was demanded by the Shipping Controller *colore officii* as one of the only terms on which he would grant a licence for the transfer, and he quoted Abbott C.J. and Littledale J. in *Morgan* v. *Palmer*. Sargant L.J. said, at page 72, that the payment was made under compulsion and was recoverable under the principles of the judgments in *Morgan* v. *Palmer*. E

In *National Pari-Mutuel Association Ltd.* v. *The King* (1930) 47 TLR 110, the suppliant company claimed repayment of betting duty which they had paid for three years in respect of the operation of a totalisator. In proceedings involving another such operator the House of Lords had held that, on a proper construction of the relevant legislation, there was no liability to F pay the duty. The argument for the suppliants was concerned only with whether the mistake under which they had paid the duty was one of fact or of law. Branson J. and the Court of Appeal held that the mistake was a mistake of law, and that the payments were not recoverable.

The last English case in point is *Twyford* v. *Manchester Corporation* G [1946] Ch 236, a decision by Romer J. The corporation owned a cemetery and it charged the plaintiff, a monumental mason, fees for permission to cut, recut, repaint and regild inscriptions on monuments and stones in the cemetery. The plaintiff paid under protest, and later brought an action for a declaration that the charges were illegal and for recovery of past payments. H Romer J. held that the charges for recutting, repainting and regilding were illegal but refused to allow recovery of past payments for these. He followed and applied *William Whiteley Ltd.* v. *The King* and *Slater* v. *Mayor and Corporation of Burnley*, holding that the principle of duress *colore officii* did not apply to the case.

Next to be considered are two Scottish cases, very close to each other in I time. The first is *Glasgow Corporation* v. *Lord Advocate* 1959 SC 203. The corporation for a number of years paid purchase tax on stationery manufactured by it and used in its various departments. Finally it raised an action for declarator that it was not liable to purchase tax on such stationery and for recovery of past payments. It was held by the Lord Ordinary (Lord Wheatley) and a majority of the First Division that the corporation was not

liable to purchase tax on stationery manufactured by it and supplied to its public service departments but was liable to the tax on stationery supplied to its trading departments. The claim to recovery of past payments was dismissed by Lord Wheatley and the First Division unanimously. The first ground upon which recovery was sought was based upon the constitutional argument that, since Parliament had not authorised the collection by the Commissioners of Customs and Excise of the tax, the corporation was entitled to recover the amounts illegally exacted from it. The Lord President (Lord Clyde) stated two reasons for rejecting the argument. The first was that there was no authority for it. He added, at page 230:

> "Indeed, the elaborate statutory provisions in various Finance Acts regarding the precise circumstances in which income tax already paid may be reclaimed would have been quite unnecessary if the conclusion sought to be drawn by the Corporation were sound."

The second reason he expressed thus, on the same page:

> "It would, in my opinion, introduce an element of quite unwarrantable uncertainty into the relations between the taxpayers and the Exchequer if there could be a wholesale opening up of transactions between them whenever any Court put a new interpretation upon an existing statutory provision imposing a tax."

The second ground for recovery was based on the *condictio indebiti*. In relation to this ground it was held unanimously that the *condictio* did not apply to the case of an error in law in interpreting an Act of Parliament.

The second Scottish case is *South of Scotland Electricity Board* v. *British Oxygen Co. Ltd.* [1959] 1 WLR 587, a decision of your Lordships' House. Certain industrial consumers of high voltage electricity claimed that tariffs applied by the electricity board resulted in undue discrimination against them as compared with consumers of low voltage electricity, and sought recovery of sums alleged to have been overcharged. The actual decision of the House was that a proof before answer of the pursuers' averments should be allowed, but in the course of reaching that decision it was necessary to consider whether they would be entitled to recover overcharges if their complaint of undue discrimination was made out. That question was answered in the affirmative. Viscount Kilmuir L.C., at page 596, stated that the pursuers might recover whatever sum they might prove was in excess of such a charge as would have avoided undue discrimination against them, and he supported this by reference *inter alia* to *Great Western Railway Co.* v. *Sutton* (1869) LR 4 HL 226. Lord Merriman, at page 606, after referring to a number of authorities, said:

> "It is sufficient to say that in *Maskell* v. *Horner* Lord Reading C.J., referring to these authorities, and in particular to the advice given by Willes J. in *Great Western Railway Co.* v. *Sutton*—where that learned judge said that he had 'always understood that when a man pays more than he is bound to do by law for performance of a duty which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion or concussion in respect of which he is entitled to recover the excess by *condictio indebiti* or action for money had and received'—said that 'such claims made in this form of action are treated as matters of ordinary practice and beyond discussion'."

Lord Reid, at page 609, also founded on *Great Western Railway Co.* v *Sutton.* In that case the railway company had carried the parcels of other persons at a rate less than similar parcels were carried by it for the plaintiff. It was held by this House, after taking the opinion of the consulted judges, that the plaintiff was entitled to recover the excess. Lord Chelmsford, with whom Lord Colonsay and Lord Cairns agreed, said, at page 263:

> "Now if the defendants were bound to charge the plaintiff for the carriage of his goods a less sum, and they refused to carry them except upon payment of a greater sum, as he was compelled to pay the amount demanded, and could not otherwise have his goods carried, the case falls within the principle of several decided cases, in which it has been held that money which a party has been wrongfully compelled to pay under circumstances in which he was unable to resist the imposition, may be recovered back in an action for money had and received. In the language of the Court of Common Pleas, in the case of *Parker* v. *The Great Western Railway Company*, 'the payments made by the plaintiff were not voluntary, but were made in order to induce the company to do that which they were bound to do without them'."

That case can thus be seen to proceed on the same basis as the *colore officii* cases.

The foregoing review of the native authorities satisfies me that they afford no support for Woolwich's major proposition. The principle to be derived from them, in my opinion, is that payments not lawfully due cannot be recovered unless they were made as a result of some improper form of pressure. Such pressure may take the form of duress, as in *Maskell* v. *Horner* [1915] 3 KB 106. It may alternatively take the form of withholding or threatening to withhold the performance of some public duty or the rendering of some public service unless a payment is made which is not lawfully due or is greater than that which is lawfully due, as was the position in the *colore officii* cases. The mere fact that the payment has been made in response to a demand by a public authority does not emerge in any of the cases as constituting or forming part of the *ratio decidendi.* Many of the cases appear to turn upon a consideration of whether the payment was voluntary or involuntary. In my opinion, that simply involves that the payment was voluntary if no improper pressure was brought to bear, and involuntary if it was. In the present case no pressure to pay was put upon Woolwich by the Inland Revenue. Woolwich paid because it calculated that it was in its commercial interest to do so. It could have resisted payment, and the Inland Revenue had no means other than the taking of legal proceedings which it might have used to enforce payment. The threat of legal proceedings is not improper pressure. There was no improper pressure by the Inland Revenue and, in particular, there was no duress.

To give effect to Woolwich's proposition would, in my opinion, amount to a very far-reaching exercise of judicial legislation. That would be particularly inappropriate having regard to the considerable number of instances which exist of Parliament having legislated in various fields to define the circumstances under which payments of tax not lawfully due may be recovered, and also in what situations and upon what terms interest on overpayments of tax may be paid. Particular instances are s 33 of the Taxes Management Act 1970 as regards overpaid income tax, corporation tax, capital gains tax and petroleum revenue tax; s 24 of the Finance Act 1989 as regards value added

tax; s 29 of the Finance Act 1989 as regards excise duty and car tax; s 241 of the Inheritance Tax Act 1984 as regards inheritance tax; and s 13(4) of the Stamp Act 1891 as regards stamp duty. Mention may also be made of s 9 of the General Rate Act 1967 which, as described above, was considered by this House in *Regina* v. *Tower Hamlets London Borough Council* Ex parte *Chetnik Developments Ltd.* It is to be noted that the section only applies where overpayment of rates is not otherwise recoverable, and it plainly did not occur to the House in that case that the overpayment might be recoverable apart from the section. It seems to me that formulation of the precise grounds upon which overpayments of tax ought to be recoverable and of any exceptions to the right of recovery, may involve nice considerations of policy which are properly the province of Parliament and are not suitable for consideration by the courts. In this connection the question of possible disruption of public finances must obviously be a very material one. Then it is noticeable that existing legislation is restrictive of the extent to which interest on overpaid tax (described as "repayment supplement") may be recovered. A general right of recovery of overpaid tax could not incorporate any such restriction.

I would add that, although in the course of argument some distinction was sought to be drawn between overpayment of tax under Regulations later shown to be *ultra vires* and overpayment due to the erroneous interpretation of a statute, no such distinction can, in my view, properly be drawn. The distinction had particular reference to Article 4 of the Bill of Rights 1688, but I do not consider that this Article has any relevance to the present case, being concerned, as it was, with the denial of the right of the executive to levy taxes without the consent of Parliament.

Reference was made in the course of the argument to a number of Commonwealth and American decisions, but I have not found in them any reasoning persuasive of a view contrary to that which I have formed in the light of the English and Scottish authorities. *Sargood Brothers* v. *The Commonwealth* (1910) 11 CLR 258 seems to me to be a clear case of extortion *colore officii*. *Mason* v. *State of New South Wales* (1959) 102 CLR 108 was a case where the *ratio decidendi* of the majority turned on the principle of duress. If the plaintiffs had refused to pay the illegal fees for a permit to run their vehicles, they would have been at risk of having their vehicles seized and their business disrupted. In *Atchison, Topeka & Santa Fe Railway Co.* v. *O'Connor* (1912) 223 US 280, Holmes J., delivering the judgment of the Circuit Court for the District of Colorado, was of the opinion that the illegal tax paid by the plaintiff was paid under duress. If the plaintiff had not paid he would not only have been subject to legal proceedings for recovery of the tax but would have been liable to forfeiture of his business until it had been paid. The case does not vouch the proposition that a mere illegal demand for tax by a public authority is a sufficient ground for recovery of payment under it.

Finally, in *Air Canada* v. *British Columbia* (1989) 59 DLR (402) 161, the Supreme Court of Canada, by a majority, held that there was no right to recover tax paid under a statute later found to be unconstitutional. La Forest J., at page 199, dealing with the argument that the tax had been paid under compulsion, said:

> "What the rule of compulsion seems to require is that there is no practical choice but to pay in the circumstances, or to put it another

way, before a payment will be regarded as involuntary there must be some natural or threatened exercise of power possessed by the party receiving it over the person or property of the taxpayer for which he has no immediate relief than to make the payment:"

and he referred to *Maskell* v. *Horner*. Wilson J. disagreed. She said, at page 169:

> "It is, however, my view that payments made under unconstitutional legislation are not 'voluntary' in a sense which should prejudice the taxpayer. The taxpayer, assuming the validity of the statute as I believe it is entitled to do, considers itself obligated to pay. Citizens are expected to be law-abiding. They are expected to pay their taxes. Pay first and object later is the general rule. The payments are made pursuant to a perceived obligation to pay which results from the combined presumption of constitutional validity of duly enacted legislation and the holding out of such validity by the legislature. In such circumstances I consider it quite unrealistic to expect the taxpayer to make its payments 'under protest'. Any taxpayer paying taxes exigible under a statute which it has no reason to believe or suspect is other than valid should be viewed as having paid pursuant to the statutory obligation to do so."

It is sufficient to say that the majority view appears to be in line with that which I have formed in the light of the British authorities, and that the dissenting opinion of Wilson J. does not persuade me that that view is wrong.

My Lords, for these reasons I would allow this appeal.

Lord Goff of Chieveley:—My Lords, the factual and legal background to this appeal are summarised with scrupulous care and accuracy in the judgment of Ralph Gibson L.J. in the Court of Appeal, at pages 819–822. His account I gratefully adopt. The question which lies at the heart of the appeal is whether money exacted as taxes from a citizen by the Revenue *ultra vires* is recoverable by the citizen as of right; if so, the Woolwich will be entitled to interest on the sums repaid to it by the Revenue, running from the dates when those sums were paid to the Revenue by the Woolwich. A majority of the Court of Appeal (Glidewell and Butler-Sloss L.JJ.) held that, as a matter of principle, such a payment is recoverable as of right, although Glidewell L.J. considered it to be irrecoverable where the money was paid to close the transaction or was paid under a mistake of law. I only comment at this stage that the latter exclusion would render the remedy of little practical use. This is a matter to which I will return later. Ralph Gibson L.J., in a powerful dissenting judgment, concluded that both principle and authority prevented him from reaching the same conclusion. I should record that the Woolwich also sought recovery of the money paid to the Revenue on the alternative ground of compulsion. This alternative submission did not, however, occupy much time in argument before your Lordships.

There can be no doubt that this appeal is one of considerable importance. It is certainly of importance to both parties—to the Revenue, which is concerned to maintain the traditional position under which the repayment of overpaid tax is essentially a matter for its own discretion; and to the Woolwich, which adopted a courageous and independent stance about the lawfulness of the underlying Regulations, and now adopts a similar stance about the obligation of the Revenue to repay tax exacted without lawful authority. In addition, of course, there is a substantial sum of money at

stake. But the appeal is also of importance for the future of the law of restitution, since the decision of your Lordships' House could have a profound effect upon the structure of this part of our law. It is a reflection of this fact that there have been cited to your Lordships not only the full range of English authorities, and also authorities from Commonwealth countries and the United States of America, but in addition a number of academic works of considerable importance These include a most valuable Consultation Paper (No. 120) published last year by the Law Commission, entitled Restitution of Payments made under a Mistake of Law, for which we owe much to Mr. Jack Beatson and also, I understand, to Dr. Sue Arrowsmith; and a series of articles by academic lawyers of distinction working in the field of restitution. I shall be referring to this academic material in due course. But I wish to record at once that, in my opinion, it is of such importance that it has a powerful bearing upon the consideration by your Lordships of the central question in the case.

My first task must be to review the relevant authorities. I am very conscious, however, that this task has already been performed in considerable detail, not only by Ralph Gibson and Glidewell L.JJ. in the Court of Appeal, but also by my noble and learned friends, Lord Keith of Kinkel and Lord Jauncey of Tullichettle. Rather than once again review the authorities in chronological order, therefore, I propose to encapsulate their effect in a number of propositions which can, I believe, be so stated as to reflect the law as it is presently understood with a reasonable degree of accuracy. The law as so stated has, I think, been so understood for most of this century, at least at the level of the Court of Appeal; but it has been the subject of increasing criticism by academic lawyers, and has been departed from in significant respects in some Commonwealth countries, both by legislation and by judicial development of the law. A central question in the present case is whether it is open to your Lordships' House to follow their judicial brethren overseas down the road of development of the law; and, if so, whether it would be appropriate to do so, and which is the precise path which it would then be appropriate to choose. But the answer to these fundamental questions must follow a review of the law as understood at present, which I would express in the following propositions.

(1) Whereas money paid under a mistake of fact is generally recoverable, as a general rule money is not recoverable on the ground that it was paid under a mistake of law. This principle was established in *Bilbie* v. *Lumley* (1802) 2 East 469. It has, however, been the subject of much criticism, which has grown substantially during the second half of the present century. The principle had been adopted in most, if not all, Commonwealth countries; though in some it has now been modified or abandoned, either by statute or by judicial action. No such principle applies in civil law countries, and its adoption by the common law has been criticised by comparative lawyers as unnecessary and anomalous. This topic is the subject of the Consultation Paper (No. 120) published by the Law Commission last year, in which serious criticisms of the rule of non-recovery are rehearsed and developed, and proposals for its abolition are put forward for discussion.

(2) But money paid under compulsion may be recoverable. In particular:

(a) Money paid as a result of actual or threatened duress to the person, or actual or threatened seizure of a person's goods, is recoverable. For an example of the latter, see *Maskell* v. *Horner* [1915] 3 KB 106.

Since these forms of compulsion are not directly relevant for present purposes, it is unnecessary to elaborate them; but I think it pertinent to observe that the concept of duress has in recent years been expanded to embrace economic duress.

(b) Money paid to a person in a public or quasi-public position to obtain the performance by him of a duty which he is bound to perform for nothing or for less than the sum demanded by him is recoverable to the extent that he is not entitled to it. Such payments are often described as having been demanded *colore officii*. There is much abstruse learning on the subject (see, in particular, the illuminating discussion by Windeyer J. in *Mason* v. *State of New South Wales* (1959) 102 CLR 108, pages 139–142), but for present purposes it is not, I think, necessary for us to concern ourselves with this point of classification. Examples of influential early cases are *Morgan* v. *Palmer* (1824) 2 B & C 729 and *Steele* v. *Williams* (1853) 8 Ex 625; a later example of some significance is *T. & J. Brocklebank Ltd.* v. *The King* [1925] 1 KB 52.

(c) Money paid to a person for the performance of a statutory duty, which he is bound to perform for a sum less than that charged by him, is also recoverable to the extent of the overcharge. A leading example of such a case is *Great Western Railway Co.* v. *Sutton* (1869) LR 4 HL 226; for a more recent Scottish case, also the subject of an appeal to this House, see *South of Scotland Electricity Board* v. *British Oxygen Co. Ltd.* [1959] 1 WLR 587.

(d) In cases of compulsion, a threat which constitutes the compulsion may be expressed or implied (a point perhaps overlooked in *Twyford* v. *Manchester Corporation* [1946] Ch 236).

(e) I would not think it right, especially bearing in mind the development of the concept of economic duress, to regard the categories of compulsion for present purposes as closed.

(3) Where a sum has been paid which is not due, but it has not been paid under a mistake of fact or under compulsion as explained under (2) above, it is generally not recoverable. Such a payment has often been called a voluntary payment. In particular, a payment is regarded as a voluntary payment and so as irrecoverable in the following circumstances:

(a) The money has been paid under a mistake of law (see (1) above). See e.g. *Slater* v. *Mayor and Corporation of Burnley* (1888) 59 LT 636 and *National Pari-Mutuel Association Ltd.* v. *The King* (1930) 47 TLR 110.

(b) The payer has the opportunity of contesting his liability in proceedings, but instead gives way and pays: see e.g., *Henderson* v. *Folkestone Waterworks Co.* (1885) 1 TLR 329 and *Sargood Brothers* v. *The Commonwealth and another* (1910) 11 CLR 258, especially at page 301 *per* Isaacs J. So where money has been paid under pressure of actual or threatened legal proceedings for its recovery, the payer cannot say that for that reason the money has been paid under compulsion and is, therefore, recoverable by him. If he chooses to give way and pay, rather than obtain the decision of the Court on the question whether the money is due, his payment is regarded as voluntary and so is not recoverable: see e.g. *William Whiteley Ltd.* v. *The King* (1909) 101 LT 741.

A (c) The money has otherwise been paid in such circumstances that the payment was made to close the transaction. Such would obviously be so in the case of a binding compromise; but even where there is no consideration for the payment, it may have been made to close the transaction and so be irrecoverable. Such a payment has been treated as a gift: see *Maskell* v. *Horner* [1915] 3 KB 106, at page 118, *per* Lord B Reading C.J.

(4) A payment may be made on such terms that it has been agreed, expressly or impliedly, by the recipient that, if it shall prove not to have been due, it will be repaid by him. In that event, of course, the money will be repayable. Such was held to be the case in *Sebel Products Ltd.* v. *Commissioners of* C *Customs and Excise* [1949] Ch 409 (although the legal basis upon which Vaisey J. there inferred the existence of such an agreement may be open to criticism). On the other hand, the mere fact that money is paid under protest will not give rise of itself to the inference of such an agreement; though it may form part of the evidence from which it may be inferred that the payee did not intend to close the transaction (see *Maskell* v. *Horner* [1915] 3 KB D 106, at page 120, *per* Lord Reading C.J).

The principles which I have just stated had come to be broadly accepted, at the level of the Court of Appeal, at least by the early part of this century. But a formidable argument has been developed in recent years by leading academic lawyers that this stream of authority should be the subject of rein- E terpretation to reveal a different line of thought pointing to the conclusion that money paid to a public authority pursuant to an *ultra vires* demand should be repayable, without the necessity of establishing compulsion, on the simple ground that there was no consideration for the payment. I refer in particular to the powerful essay by Professor Peter Birks (in the volume of Essays in Restitution, edited by Professor Finn, at pages 164 *et seq.*) entitled F Restitution from the Executive: a Tercentenary Footnote to the Bill of Rights. I have little doubt that this essay by Professor Birks, which was foreshadowed by an influential lecture delivered by Professor W. R. Cornish in Kuala Lumpur in 1986 (the first Sultan Azlan Shah Lecture, published in 1987 in 14 Jo. of Mal and Comp Law 41), provided the main inspiration for the argument of the Woolwich, and the judgments of the majority of the G Court of Appeal, in the present case.

I have a strong presentiment that, had the opportunity arisen, Lord Mansfield would have seized it to establish the law in this form. His broad culture, his knowledge and understanding of Roman law, his extraordinary gift for cutting through technicality to perceive and define principle, would H surely have drawn him towards this result. Mr. Gardiner Q.C., for the Woolwich, relied upon *Campbell* v. *Hall* (1774) Cowp 204 as authority that he did in fact reach that very conclusion. But that case was the subject of research by Mr. Glick Q.C. and his team, and was revealed (from the reports in Lofft and in the State Trials) to be a cause célebre in which the great issue (of immense public interest) related to the power to levy taxes in the Island I of Grenada following its capture from the French King, it being accepted by the Crown without argument that the relevant taxes, if not duly levied, must be repaid. Lord Mansfield's judgment in the case, adverse to the Crown, became known as the Magna Carta of the Colonies. The fact that the basis of recovery was not in issue, and indeed was overshadowed by the great question in the case, must detract from its importance in the present context;

even so, the simple fact remains that recovery was stated to be founded upon absence of consideration for the payment. Furthermore, there are other cases in the late 18th and early 19th centuries, of which *Dew* v. *Parsons* (1819) 2 B & Ald 562 is a significant example, which support this approach.

Later cases in the 19th century, upon which Professor Birks places much reliance, are *Steele* v. *Williams* (1853) 8 Ex 625 and *Hooper* v. *Mayor and Corporation of Exeter* (1887) 56 LJQB 457. In *Steele* v. *Williams* the judgment of Martin B. was certainly on the basis that the money, having been the subject of an *ultra vires* demand by a public officer, was as such recoverable. That approach seems also to have provided considerable attraction for Parke B; but although the point was left open by him, the case was decided by the majority (Parke and Platt BB.) on the ground of compulsion. Both of them treated the case as one in which there was an implied threat by the defendant to deprive the plaintiff's clerk of his right to take extracts from the parish register for no charge; and both appear to have concluded that, in the circumstances, although that threat was made before the plaintiff's clerk obtained the extracts he needed, nevertheless it was causative of the payment which was, therefore, recoverable on the ground of compulsion. In the case of *Hooper* v. *Mayor and Corporation of Exeter* Professor Birks is perhaps on stronger ground, although the basis on which the Court proceeded is not altogether clear. The plaintiff sought to recover dues paid by him for landing stone for which, unknown to him, he was not liable because the stone was covered by an exemption. It was argued on his behalf that the payment was not voluntary, citing *Morgan* v. *Palmer* (a case of compulsion). Reliance was also placed upon the power of absolute and immediate distress in the statute. The Court accepted the plaintiff's argument. Both Lord Coleridge C.J. and Smith J. relied on *Morgan* v. *Palmer;* Smith J. also invoked *Steele* v. *Williams* without however referring to the judgment of Martin B. Neither referred to the power of immediate distress. The case, brief and obscure though it is, might well have provided a basis upon which judges could later have built to develop a principle that money demanded *ultra vires* by a public authority was *prima facie* recoverable.

Professor Birks also places reliance upon *The Queens of the River Steamship Co. Ltd.* v. *Conservators of the River Thames* (1899) 15 TLR 474, and an *obiter dictum* of Atkin L.J. in *Attorney-General* v. *Wilts. United Dairies Ltd.* (1921) 37 TLR 884, at page 887. The former case, so far as it goes, is undoubtedly consistent with his thesis; but it is very briefly reported, without any indication of the arguments advanced or cases cited, and the conclusion is encapsulated in one brief sentence. The *dictum* of Atkin L.J. is to the effect that such a payment is, if paid under protest, recoverable on the simple ground that it was a sum received by the public authority to the use of the citizen. However, the subsequent decision of the Court of Appeal in *T. & J. Brocklebank Ltd.* v. *The King* [1925] 1 KB 52 shows that, in circumstances similar to those of the *Wilts United Dairies* case, recovery could be, and indeed there was, founded upon compulsion and not upon the simple fact that the money was paid pursuant to an *ultra vires* demand: see [1925] 1 KB 52 at pages 61–62, *per* Bankes L.J. (accepting the opinion of the trial Judge, Avory J. in [1923] 1 KB 647, 652–3), page 67, *per* Scrutton L.J. and page 72, *per* Sargant L.J.. So the question of the soundness of Atkins L.J.'s *dictum* did not arise for decision in that case. Even so, a similar approach to that of Atkin L.J. is to be found in an *obiter dictum* of Dixon C.J. in *Mason* v. *State of New South Wales* (1959) 102 CLR 108, at page 117, which was to the effect that he had not been able completely to reconcile himself to the

A view that, if the weight of a *de facto* governmental authority manifested in a money demand, the money belonged to the Crown unless the payment was made under compulsion.

In all the circumstances, it is difficult to avoid the conclusion that in this country, at the level of the Court of Appeal (see, in particular, the decisions B of that Court in *T. & J. Brocklebank Ltd.* v. *The King* and *National Pari-Mutuel Association Ltd.* v. *The King*), the law had settled down in the form which I have indicated. I have little doubt that a major force in the moulding of the law in this form is to be found in the practitioners' text books of the time, notably Bullen and Leake's Precedents of Pleading, 3rd ed. (1868), at page 50 and Leake on Contracts, 5th ed., page 61; we can see this reflected in C the form of the arguments advanced in the cases, and the manner in which the Court reacted to submissions by counsel challenging the accepted view. I fear that the courts sorely missed assistance from academic lawyers specialising in this branch of the law; but the law faculties in our universities were only beginning to be established towards the end of the 19th century. It can, however, be said that the principle of justice, embodied in Martin B.'s judg- D ment in *Steele* v. *Williams* and perhaps also in *Hooper* v. *Mayor and Corporation of Exeter*, and expressed in the *dicta* of Lord Atkin and Sir Owen Dixon, still calls for attention; and the central question in the present case is whether your Lordships' House, deriving their inspiration from the example of those two great Judges, should rekindle that fading flame and reformulate the law in accordance with that principle. I am satisfied that, on E the authorities, it is open to your Lordships' House to take that step. The crucial question is whether it is appropriate for your Lordships to do so.

However, before considering whether your Lordships should proceed in that direction, it is first necessary to have regard to the impact of any relevant statutory provisions governing the repayment of overpaid tax by the F Revenue to the taxpayer. Statutory regulation of such repayments is a commonplace of our law, not only in the case of overpaid income and corporation tax, but also in the case of other taxes (such as value added tax, capital gains tax and inheritance tax) and other duties and charges. These statutory provisions, which vary in their effect to a remarkable degree, are usefully G summarised and considered in the Law Commission's Consultation Paper No. 120, at pages 74–84.

Your Lordships were referred by the Revenue to a number of statutory provisions of this kind, but in particular to s 33 of the Taxes Management Act 1970, subs (1) and (2) of which provide as follows:

H "(1) If any person who has paid tax charged under an assessment alleges that the assessment was excessive by reason of some error or mistake in a return, he may by notice in writing at any time not later than six years after the end of the year of assessment (or, if the assessment is to corporation tax, the end of the accounting period) in which the assessment was made, make a claim to the Board for relief.

I (2) On receiving the claim the Board shall inquire into the matter and shall, subject to the provisions of this section, give by way of repayment such relief...in respect of the error or mistake as is reasonable and just:

Provided that no relief shall be given under this section in respect of an error or mistake as to the basis on which the liability of the claimant

ought to have been computed where the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when the return was made." A

There is some doubt whether this section is in any event applicable in the case of composite rate tax, which was the tax demanded of the Woolwich in the present case. By s 118(1), the interpretation section of the Act, it is provided that, where neither income tax nor capital gains tax nor corporation tax is specified, the word "tax" means any of those taxes. Composite rate tax is not defined as falling within the description of income tax, but only as "...an amount representing income tax" (see the Income and Corporation Taxes Act 1970, s 343). However, there is, in my opinion, a more fundamental reason why the section has no application in the present case. This is because the present case is not one in which an excessive assessment was made on a taxpayer, through some error of fact or law, as is contemplated by s 33(1). This is a case where there is no lawful basis whatever for any demand of tax to be made by the Revenue. In such circumstances, the demand itself is *ultra vires* and is, therefore, a nullity. It follows that in a case such as the present there can be no valid assessment. No assessment was in fact raised on the Woolwich in the present case, because the money alleged to be due by way of tax was paid, though under protest. It was pointed out in argument that, pursuant to Regulation 7 of the Income Tax (Building Societies) Regulations 1986 (S.I. 1986 No. 482), tax which was due but not paid on or before the due date could have been the subject of an assessment on the Woolwich under para 4(2) or (3) of Sch 20 to the Finance Act 1972; but for the reasons I have already given any such assessment would, in my opinion, have been a nullity in the circumstances of the present case. In particular, I do not see how there could have been an appeal against such an assessment pursuant to para 10(3) of Sch 20; because such an appeal presupposes an assessment which, apart from the impugned error, would otherwise have been valid. If the assessment is alleged to have been made (as here) under *ultra vires* Regulations, the proper course is to take proceedings by way of judicial review to quash the aberrant Regulations and the assessment made thereunder, not by way of an appeal under procedure which presupposes that the assessment, although it may be erroneous, is basically lawful. Just as the appeal procedure presupposes a lawful assessment, so does s 33(1) of the Act of 1970, which is concerned with a lawful assessment which is excessive by reason of some error or mistake in a return. This, as I understand it, was the view accepted by Nolan J. (at page 148E) and by Butler-Sloss L.J. (at page 855E–G), whose view on this point I respectfully prefer to that of Ralph Gibson L.J. (at page 846A–E), despite the doubt expressed in para 3.38 of the Law Commission's Consultation Paper. B C D E F G H

This is, in my opinion, a point of some significance in the present case. It is for these reasons that the Woolwich is not enabled or required to seek its remedy through the statutory framework, but must fall back on the common law. It also follows that the common law principles, whatever they may be, are applicable to a case such as the present, unconstrained by the provisions of any statute. It was submitted by Mr. Glick that statutory provisions creating a discretionary regime for the repayment of taxes or charges presuppose that the common law principles give no right to recovery. Historically, that may be correct; but having, where applicable, overlaid and replaced the common law principles, whatever those principles may be, they become neutral in their effect when the development of those principles is considered by the courts. Of course, Mr. Glick was fully entitled to point out to your I

A Lordships that the vast majority of cases concerned with the recovery of tax which is not due will indeed be covered by statutory provisions regulating the right of recovery; he also suggested that, if it should be held that s 33 has no application in the present case, steps can easily, and may well, be taken at an early opportunity to bring cases such as the present, which are in any event likely to be very rare, within its ambit. These are practical considerations, the B force of which I accept and understand. But, in my opinion, they cannot, in the last analysis, touch the point of principle, which is that we are here concerned with the question of the basis of the common law right of recovery in these circumstances, upon which statute law has no direct impact.

In the present case, the primary argument of the Revenue has been that C the repayment of sums paid by the Woolwich was made by them on a voluntary basis, i.e. that the payment was repaid *ex gratia*. In the alternative, however, they contended that the payments by the Woolwich had been made pursuant to an implied agreement between the Woolwich and the Revenue whereby it was agreed that the Revenue would hold the sums pending the outcome of proceedings to determine the validity of the relevant Regulations, D and that any entitlement of the Woolwich to repayment arose on the date of the first judgment of Nolan J. with the effect that interest ran only from that date. It was the latter view which was accepted both by Nolan J. at first instance, and by Ralph Gibson L.J. in his dissenting judgment in the Court of Appeal. (The point whether any such implied agreement came into existence was not considered either by Glidewell L.J. or by Butler-Sloss L.J., no E doubt because it was not material on their approach to the case.) Whether or not any such implied agreement did come into existence must depend on the terms upon which the money was paid by the Woolwich, as set out in letters from the Woolwich to the Revenue dated 12 June and 15 September 1986, construed in the light of the surrounding circumstances. My noble and learned friend, Lord Keith of Kinkel, has expressed the opinion that these F letters, on their true construction, did not give rise to any such implied agreement. With respect, I appreciate the force of his reasoning. On the view which I have formed of the case, it is not necessary to reach any conclusion on that point. But I wish to observe that, if there was no such agreement, then, for the reasons I have given, there is no statutory basis for the discretionary repayment of the money by the Revenue. Such a repayment could G only be authorised by the exercise of a general, residuary, extra-statutory discretion. Furthermore, the exercise of such discretion would not in my opinion be amenable to judicial review on the basis set out in the decision of your Lordships' House in *Regina* v. *Tower Hamlets London Borough Council* Ex parte *Chetnik Developments Ltd.* [1988] AC 858. In that case, this House decided that a failure by the defendant council to repay rates overpaid by H mistake was subject to judicial review. Under s 9 of the General Rate Act 1967 a discretionary power was conferred on the council to refund amounts paid in respect of rates, and the council purported, in the exercise of its discretion, to decide not to make such a refund. The House held that the discretion, being a discretion conferred by statute, must be exercised in accordance with the statutory intention. Having regard to the true construction of s 9 of I the Act, the House concluded that the refusal of the council to make a refund was not in accordance with the statutory intention and so affirmed the decision of the Court of Appeal allowing the taxpayers' claim for judicial review of the decision. It is plain that those principles cannot apply where the discretion is not exercised pursuant to a statutory power. If, therefore, in the present case the Revenue was under no contractual obligation to repay the

money, and had refused to exercise such residuary discretion as it had to repay, it is difficult to see on what ground its refusal to repay could have been challenged, except on very narrow grounds such as bad faith (cf. *Ex parte Chetnik* at page 873G *per* Lord Bridge of Harwich). However the point is for present purposes academic, and it is not therefore necessary for me to consider it further. The present appeal falls to be considered on the basis that the sums were in fact repaid, and further that (as is now no longer in dispute) there was no contractual right to interest. I think it only right to comment that the fact that it is, in a case such as the present, open to a taxpayer to stipulate, if he wishes, that the money shall be repaid if it is found not to be due in pending proceedings, provides another practical reason why a case such as the present is likely to occur only in very rare circumstances indeed.

I now turn to the submission of the Woolwich that your Lordships' House should, despite the authorities to which I have referred, reformulate the law so as to establish that the subject who makes a payment in response to an unlawful demand of tax acquires forthwith a *prima facie* right in restitution to the repayment of the money. This is the real point which lies at the heart of the present appeal; in a sense, everything which I have said so far has done no more than set the stage for its consideration.

The justice underlying the Woolwich's submission is, I consider, plain to see. Take the present case. The Revenue has made an unlawful demand for tax. The taxpayer is convinced that the demand is unlawful, and as to decide what to do. It is faced with the Revenue, armed with the coercive power of the State, including what is in practice a power to charge interest which is penal in its effect. In addition, being a reputable society which alone among building societies is challenging the lawfulness of the demand, it understandably fears damage to its reputation if it does not pay. So it decides to pay first, asserting that it will challenge the lawfulness of the demand in litigation. Now, the Woolwich having won that litigation, the Revenue asserts that it was never under any obligation to repay the money, and that it in fact repaid it only as a matter of grace. There being no applicable statute to regulate the position, the Revenue has to maintain this position at common law.

Stated in this stark form, the Revenue's position appears to me, as a matter of common justice, to be unsustainable; and the injustice is rendered worse by the fact that it involves, as Nolan J. pointed out, the Revenue having the benefit of a massive interest-free loan as the fruit of its unlawful action. I turn then from the particular to the general. Take any tax or duty paid by the citizen pursuant to an unlawful demand. Common justice seems to require that tax to be repaid, unless special circumstances or some principle of policy require otherwise; *prima facie*, the taxpayer should be entitled to repayment as of right.

To the simple call of justice, there are a number of possible objections. The first is to be found in the structure of our law of restitution, as it developed during the 19th and early 20th centuries. That law might have developed so as to recognize a *condictio indebiti*—an action for the recovery of money on the ground that it was not due. But it did not do so. Instead, as we have seen, there developed common law actions for the recovery of money paid under a mistake of fact, and under certain forms of compulsion. What is now being sought is, in a sense, a reversal of that development, in a particular type of case; and it is said that it is too late to take that step. To that objection, however, there are two answers. The first is that the retention by

A the State of taxes unlawfully exacted is particularly obnoxious, because it is one of the most fundamental principles of our law—enshrined in a famous constitutional document, the Bill of Rights—that taxes should not be levied without the authority of Parliament; and full effect can only be given to that principle if the return of taxes exacted under an unlawful demand can be enforced as a matter of right. The second is that, when the Revenue makes a B demand for tax, that demand is implicitly backed by the coercive powers of the State and may well entail (as in the present case) unpleasant economic and social consequences if the taxpayer does not pay. In any event, it seems strange to penalize the good citizen, whose natural instinct is to trust the Revenue and pay taxes when they are demanded of him. The force of this C answer is recognized in a much-quoted passage from the judgment of Holmes J. in *Atchison, Topeka & Santa Fe Railway Co.* v. *O'Connor* 223 US 280 (1912), at pages 285–6, when he said:

> "...when, as is common, the State has a more summary remedy, such as distress, and the party indicates by protest that he is yielding to what he cannot prevent, courts sometimes perhaps have been a little too D slow to recognise the implied duress under which payment is made. But even if the State is driven to an action, if at the same time the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional, rights, by defence in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side. He is entitled to assert his supposed right E on reasonably equal terms."

This particular answer might, however, point at first sight to a development of the common law concept of compulsion, rather than recognition of the broad principle of justice by which the Woolwich contends. This was F what in fact occurred in the leading Australian case of *Mason* v. *State of New South Wales* (1959) 102 CLR 108. It is impossible to summarize the effect of that complicated case in a few lines, but in practical terms the High Court of Australia found duress to exist in the possibility that the State might seize the plaintiff's property. A similar tendency to expand the concept of compulsion is to be discovered in the majority judgment of the Supreme G Court of Canada in *Eadie* v. *Township of Brantford* (1967) 63 DLR (2d) 561 (though events of a more dramatic character have since occurred in that jurisdiction, to which I will refer in a moment). This type of approach has also been advocated by Mr. Andrew Burrows in his interesting essay entitled Public Authorities, Ultra Vires and Restitution (Essays on the Law of Restitution, ed. Burrows, Oxford 1991, at pages 39 *et seq.*). We may expect H that, in any event, the common law principles of compulsion, and indeed of mistake, will continue to develop in the future. But the difficulty with this approach for the present case is that the Woolwich was in reality suffering from no mistake at all, so much so that it was prepared to back its conviction that the Revenue was acting *ultra vires* by risking a very substantial amount of money in legal costs in establishing that fact; and, since the possi- I bility of distraint by the Revenue was very remote, the concept of compulsion would have to be stretched to the utmost to embrace the circumstances of such a case as this. It is for this reason that the Woolwich's alternative claim founded upon compulsion did not loom large in the argument, and is difficult to sustain. In the end, logic appears to demand that the right of recovery should require neither mistake nor compulsion, and that the simple

fact that the tax was exacted unlawfully should *prima facie* be enough to require its repayment. A

There is, however, a second objection to the recognition of such a right of recovery. This is that for your Lordships' House to recognise such a principle would overstep the boundary which we traditionally set for ourselves, separating the legitimate development of the law by the judges from legislation. It was strongly urged by Mr. Glick, in his powerful argument for the Revenue, that we would indeed be trespassing beyond that boundary if we were to accept the argument of the Woolwich. I feel bound, however, to say that, although I am well aware of the existence of the boundary, I am never quite sure where to find it. Its position seems to vary from case to case. Indeed, if it were to be as firmly and clearly drawn as some of our mentors would wish, I cannot help feeling that a number of leading cases in your Lordships' House would never have been decided the way they were. For example, the minority view would have prevailed in *Donoghue* v. *Stevenson* [1932] AC 562; our modern law of judicial review would have never developed from its old, ineffectual origins; and Mareva injunctions would never have seen the light of day. Much seems to depend upon the circumstances of the particular case. In the present Mr. Glick was fully entitled to, and did, point to practical considerations to reinforce his argument. The first was that a case such as the present was so rare that it could not of itself call for a fundamental reformulation of the underlying principle—a point which I find unimpressive, when I consider that our task is essentially to do justice between the parties in the particular case before us. Second, however, he asserted that, if your Lordships' House were to accept the Woolwich's argument, it would be impossible for us to set the appropriate limits to the application of the principle. An unbridled right to recover overpaid taxes and duties subject only to the usual six-year time-bar was, he suggested, unacceptable in modern society. Some limits had to be set to such claims; and the selection of such limits, being essentially a matter of policy, was one which the legislature alone is equipped to make. B C D E F

My reaction to this submission of Mr. Glick is to confess (to some extent) and yet to avoid. I agree that there appears to be a widely-held view that some limit has to be placed upon the recovery of taxes paid pursuant to an *ultra vires* demand. I would go further and accept that the armoury of common law defences, such as those which prevent recovery of money paid under a binding compromise or to avoid a threat of litigation, may be either inapposite or inadequate for the purpose; because it is possible to envisage, especially in modern taxation law which tends to be excessively complex, circumstances in which some very substantial sum of money may be held to have been exacted *ultra vires* from a very large number of taxpayers. It may well, therefore, be necessary to have recourse to other defences, such as for example short time-limits within which such claims have to be advanced. An instructive example of this approach is to be found in German law, in which we find a general right of recovery which is subject to the principle that an administrative act is, even if in fact unlawful, treated as legally effective unless and until it is cancelled, either by the authority itself or by an administrative court. Furthermore, a citizen can only enforce the cancellation by making a formal objection within one month of notification; and if that objection is rejected by the authority, the citizen must take legal action within another month. In addition, one citizen cannot benefit from the successful formal objection of another citizen; he must object in due time himself. Such Draconian time-limits as these may be too strong medicine for our G H I

A taste; but the example of a general right of recovery subject to strict time-limits imposed as a matter of policy is instructive for us as we seek to solve the problem in the present case.

At this stage of the argument, I find it helpful to turn to recent developments in Canada. First, in a notable dissenting judgment (with which Laskin B C.J.C. concurred) in *Hydro Electric Commission of Township of Nepean* v. *Ontario Hydro* (1982) 132 DLR (3rd) 193, Dickson J. (as he then was) subjected the rule against recovery of money paid under a mistake of law to a devastating analysis and concluded that the rule should be rejected. His preferred solution was that, as in cases of mistake of fact, money paid under a mistake of law should be recoverable if it would be unjust for the recipient to C retain it. Next, in the leading case of *Air Canada* v. *British Columbia* (1989) 59 DLR (4th) 161, the question arose whether money in the form of taxes paid under a statute held to be *ultra vires* was recoverable. It is impossible for me, for reasons of space, to do more than summarise the most relevant parts of the judgments of the Supreme Court of Canada. Of the seven judges who heard the appeal, four thought it necessary to consider whether the D taxes paid were recoverable at common law. The leading judgment was delivered by La Forest J., with whom Lamer and L'Heureux-Dube JJ. agreed. First, he decided (at page 192) to follow Dickson J.'s lead, and to hold that the distinction between mistake of fact and mistake of law should play no part in the law of restitution. This did not, however, imply that recovery E would follow in every case where a mistake had been shown to exist. "If the defendant can show that the payment was made in settlement of an honest claim, or that he has changed his position as a result of the enrichment, then restitution will be denied". However, he went on to hold that, where "unconstitutional or ultra vires levies" are in issue, special considerations arose. These were twofold. First, if the plaintiff had passed on the relevant tax to F others, the taxing authority could not be said to have been unjustly enriched at the plaintiff's expense, and he was not, therefore, entitled to recover. As La Forest J. said, "The law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss". On that basis alone, he held that the plaintiff's claim in the case before the Court must fail (pages 193–4). However, he went on to hold that the claim failed on another ground, viz., G that as a general rule there will, as a matter of policy, be no recovery of taxes paid pursuant to legislation which is unconstitutional or otherwise invalid. Basing himself on authority from the United States, La Forest J. concluded that any other rule would at best be inefficient, and at worst could lead to financial chaos (see pages 194–197). The rule against recovery should not, however, apply where a tax is exacted, not under unconstitutional legislation H but through a misapplication of the law. He added that, in his opinion, if recovery in all cases is to be the general rule, then that was best achieved through the route of statutory reform (page 198).

Wilson J. dissented. She did not think it necessary to consider whether the old rule barring recovery of money paid under mistake of law should be I abolished, though had she thought it necessary to do so, she would have followed the approach of Dickson J. She considered that money paid under unconstitutional legislation was generally recoverable (page 169).

> "The taxpayer, assuming the validity of the statute as I believe it is entitled to do, considers itself obligated to pay. Citizens are expected to be law-abiding. They are expected to pay their taxes. Pay first and object

later is the general rule. The payments are made pursuant to a perceived obligation to pay which results from the combined presumption of constitutional validity of duly enacted legislation and the holding out of such validity by the legislature. In such circumstances I consider it quite unrealistic to expect the taxpayer to make its payments 'under protest'. Any taxpayer paying taxes exigible under a statute which it has no reason to believe or suspect is other than valid should be viewed as having paid pursuant to the statutory obligation to do so."

Furthermore, she was unable to accept the view of La Forest J. that the principle of recovery should be reversed for policy reasons. She spoke in forthright terms (also at page 169):

"What is the policy that requires such a dramatic reversal of principle? Why should the individual taxpayer, as opposed to taxpayers as a whole, bear the burden of Government's mistake? I would respectfully suggest that it is grossly unfair that X, who may not be (as in this case) a large corporate enterprise, should absorb the cost of Government's unconstitutional act. If it is appropriate for the courts to adopt some kind of policy in order to protect Government against itself (and I cannot say that the idea particularly appeals to me), it should be one that distributes the loss fairly across the public. The loss should not fall on the totally innocent taxpayer whose only fault is that it paid what the legislature improperly said was due."

She also rejected the proposed defence of "passing on" (at pages 169–170). Accordingly, in her opinion, the taxpayer should be entitled to succeed.

I cannot deny that I find the reasoning of Wilson J. most attractive. Moreover I agree with her that, if there is to be a right to recovery in respect of taxes exacted unlawfully by the Revenue, it is irrelevant to consider whether the old rule barring recovery of money paid under mistake of law should be abolished, for that rule can have no application where the remedy arises not from error on the part of the taxpayer, but from the unlawful nature of the demand by the Revenue. Furthermore, like Wilson J., I very respectfully doubt the advisability of imposing special limits upon recovery in the case of "unconstitutional or ultra vires levies". I shall revert a little later to the defence of passing on.

In all the circumstances, I do not consider that Mr. Glick's argument, powerful though it is, is persuasive enough to deter me from recognising, in law, the force of the justice underlying the Woolwich's case. Furthermore, there are particular reasons which impel me to that conclusion. The first is that this opportunity will never come again. If we do not take it now, it will be gone forever. The second is that I fear that, however compelling the principle of justice may be, it would never be sufficient to persuade a government to propose its legislative recognition by Parliament; caution, otherwise known as the Treasury, would never allow this to happen. The third is that, turning Mr. Glick's argument against him, the immediate practical impact of the recognition of the principle will be limited, for (unlike the present case) most cases will continue for the time being to be regulated by the various statutory regimes now in force. The fourth is that, if the principle is to be recognised, this is an almost ideal moment for that recognition to take place. This is because the Law Commission's Consultation Paper is now under active consideration, calling for a fundamental review of the law on this

A subject, including a fresh look at the various, often inconsistent, statutory regimes under which overpaid taxes and duties either may or must be repaid. The consultation may acquire a greater urgency and sense of purpose if set against the background of a recognised right of recovery at common law. But, in addition, there is an immediate opportunity for the authorities concerned to reformulate, in collaboration with the Law Commission, the appro-
B priate limits to recovery, on a coherent system of principles suitable for modern society, in terms which can (if it is thought right to do so) embrace the unusual circumstances of the present case. In this way, legislative bounds can be set to the common law principle, as Mr. Glick insists that they should. Fifth, it is well established that, if the Crown pays money out of the consolidated fund without authority, such money is *ipso facto* recoverable if
C it can be traced: see *Auckland Harbour Board* v. *The King* [1924] AC 318. It is true that the claim in such a case can be distinguished as being proprietary in nature. But the comparison with the position of the citizen, on the law as it stands at present, is most unattractive.

D There is a sixth reason which favours this conclusion. I refer to the decision of the European Court of Justice, in *Amministrazione delle Finanze dello Stato* v. *San Giorgio SpA (Case 199/82)* [1985] 2 CMLR 658, which establishes that a person who pays charges levied by a Member State contrary to the rules of Community law is entitled to repayment of the charge, such right being regarded as a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions prohibiting the relevant charges
E (see para 12 of the judgment of the Court in *San Giorgio*, at page 688). The *San Giorgio* case is also of interest for present purposes in that it accepts that Community law does not prevent a national legal system from disallowing repayment of charges where to do so would entail unjust enrichment of the recipient, in particular where the charges have been incorporated into the price of goods and so passed on to the purchaser. I only comment that, at a
F time when Community law is becoming increasingly important, it would be strange if the right of the citizen to recover overpaid charges were to be more restricted under domestic law than it is under European law.

G I would, therefore, hold that money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an *ultra vires* demand by the authority is *prima facie* recoverable by the citizen as of right. As at present advised, I incline to the opinion that this principle should extend to embrace cases in which the tax or other levy has been wrongly exacted by the public authority not because the demand was *ultra vires* but for other reasons, for example because the authority has misconstrued a relevant statute
H or Regulation. It is not, however, necessary to decide the point in the present case, and in any event cases of this kind are generally the subject of statutory regimes which legislate for the circumstances in which money so paid either must or may be repaid. Nor do I think it necessary to consider for the purposes of the present case to what extent the common law may provide the public authority with a defence to a claim for the repayment of money so
I paid; though for the reasons I have already given, I do not consider that the principle of recovery should be inapplicable simply because the citizen has paid the money under a mistake of law. It will be a matter for consideration whether the fact that the plaintiff has passed on the tax or levy so that the burden has fallen on another should provide a defence to his claim. Although this is contemplated by the European Court of Justice in the *San Giorgio* case, it is evident from *Air Canada* v. *British Columbia* that the point is not

without its difficulties; and the availability of such a defence may depend upon the nature of the tax or other levy. No doubt matters of this kind will in any event be the subject of consideration during the current consultations with the Law Commission.

For these reasons, I would dismiss the appeal with costs.

Lord Jauncey of Tullichettle:—My Lords, my noble and learned friend, Lord Keith of Kinkel has set out in detail the background to this appeal. I gratefully adopt his account thereof. I further agree with my noble and learned friend that there can be inferred no implied agreement between the Woolwich and the Revenue that the latter would repay the sum of £57,000,000 in the event of the former succeeding in their challenge to the Regulations.

I turn, therefore, to what I consider to be the primary issue in this appeal, namely, whether there exists a principle whereby a subject who makes a payment in response to a demand of taxation (or other like demand) from the Crown which is unlawful, either because it is wholly *ultra vires* or merely excessive, thereby acquires a *prima facie* right to its repayment forthwith as money had and received. The existence of such a principle was negatived by Nolan J. but accepted by a majority of the Court of Appeal. Glidewell L.J., after an extensive review of authority, concluded that such a principle existed subject to two limitations and Butler-Sloss L.J. agreed with him. The two limitations were that recovery will not be available: (1) where it can properly be said that the payment was made to close the transaction, and (2) where the payer was mistaken as to the proper interpretation of the statute.

In *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* [1943] AC 32, Lord Wright, at page 61, said:

> "It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep."

If the remedies provided in England were of universal application then it is clear that this appeal would not have been before your Lordships. However, since Lord Mansfield C.J. in *Moses* v. *Macferlan* (1760) 2 Burr 1005, said, at page 1012, that the gist of the action of *indebitatus assumpsit* "...is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money" it is clear that the remedies which the law has provided have been subject to certain important limitations. Mr. Gardiner, for the Woolwich, accepted that none of the cases directly vouched the principle but argued that a detailed analysis of authority from the 18th century to date supported its existence. There is, of course, no doubt that a payment made in response to an unlawful demand under duress or compulsion may be recovered. Duress need not be physical and can take many forms. For example, an official may refuse to issue a necessary certificate except upon payment of a fee which exceeds that which he may lawfully exact or an authority may threaten seizure of goods or disconnection of vital supplies if an unlawful demand is not met. In some of the cases reference is made to recovery after demands *colore officii*. This phrase has been described

as confusing and was so in the present case by Ralph Gibson L.J. If it is necessary to define it would adopt the following passages: (1) in the judgment of Isaacs J. in *Sargood Brothers* v. *The Commonwealth and another* (1910) 11 CLR 258, at page 301:

> "The right to recovery after a demand *colore officii* rests upon the assumption that the position occupied by the defendant creates virtual compulsion, where it conveys to the person paying the knowledge or belief that he has no means of escape from payment strictly so called if he wishes to avert injury to or deprivation of some right to which he is entitled without such payment."

and (2) the judgment of Windeyer J. in *Mason* v. *State of New South Wales* (1959) 102 CLR 108, at page 140:

> "Extortion by colour of office occurs when a public officer demands and is paid money he is not entitled to, or more than he is entitled to, for the performance of his public duty. Examples of such exactions are overtolls paid to the keepers of toll-bridges and turnpikes, excessive fees demanded by sheriffs, pound-keepers, etc. The parties were not on an equal footing; and generally the payer paid the sum demanded in ignorance that it was not due."

These passages, in my view, admirably define what is meant by *colore officii* and effectively dispose of any suggestion that because the person making the demand holds some official position that of itself amounts to a form of compulsion. Before turning to consider the main authorities I should emphasise that the Woolwich paid the principal sum under neither mistake of fact nor of law, rather did it pay under protest and take immediate action to challenge the validity of the demand.

In the Woolwich's case the main authorities are set out chronologically as an appendix and I find it convenient to deal with them in that order and to describe the principle above referred to as "the Woolwich principle". The first case is *Newdigate* v. *Davy* (1693) 1 Ld Raym 742 (91 ER 1397) in which it was held that *indebitatus assumpsit* lay for money paid under the sentence of a court which had no jurisdiction. The report runs to only a few lines and Treby C.J. of the Common Pleas is reported as holding that "...when money is paid in pursuance of a void authority, etc. indebitatus assumpsit lies for it". Although this proposition is wide enough to cover payment made in response to an illegal demand, it was stated in the context of a court order of which the compulsitor must be assumed to be very much stronger than that of a mere demand which has yet to be enforced. It thus appears to be a case in which the payment was made under duress or compulsion and does not support the Woolwich principle.

The next case is *Campbell* v. *Hall* (1774) Cowp 204 (98 ER 1045) in which duty unlawfully exacted on the export of sugar from Grenada was held to be recoverable. The basis of the action for money had and received was that the money was paid to the defendant without any consideration, the duty having been unlawfully imposed. Mr. Gardiner relied on this case as demonstrating that it was considered self-evident that the right to recovery arose directly from the unlawful exaction irrespective of whether any element of compulsion existed. I think that this is to take too much from the decision. In the first place, almost the entire judgment was devoted to a consider-

ation of whether or not the letters under the Great Seal were good and valid to impose the duty whereas the right to recover was dealt with in 10 words as a necessary consequence of invalidity. In the second place, Mr. Glick, for the Revenue, pointed out that in the State Trials Report it appeared that the Crown did not suggest that if the duty was not payable in law it nevertheless could not be recovered. The Crown's failure to present such an argument may not have been unconnected with the tension existing between the King and the North American Colonies consequent upon the recent Boston Tea Party. I do not, therefore, think that support for the Woolwich principle can be derived from this case.

In *Dew* v. *Parsons* (1819) 2 B & Ald 562 (106 ER 471) a sheriff demanded a fee for the issue of a warrant which was larger than that to which he was in law entitled, and received payment from an attorney who was in ignorance of the law. It was held that the sheriff was not entitled to retain the surplus. Abbott C.J. and Holroyd J. decided the case on the simple ground that the sheriff could not retain what he was not entitled to demand without any suggestion of a demand *colore officii* or an involuntary payment. Best J. appeared to consider that the payment was involuntary inasmuch as the attorney, being in ignorance of the true situation, both parties were not in an equal position. Mr. Gardiner submitted that this case supported the Woolwich principle because it showed that a sum unlawfully demanded as of right by a person in authority could be recovered. Mr. Glick maintained that this was a *colore officii* case. The description of the facts is somewhat exiguous and I cannot help feeling that if they had been fully stated the case would fall to be treated as involving a demand *colore officii* rather than as supporting the Woolwich principle.

Morgan v. *Palmer* (1824) 2 B & C 729 (107 ER 554) concerned the recovery of fees unlawfully demanded for the grant of a publican's licence. It was held that the payment was not voluntary so as to preclude recovery. Abbott C.J. said:

> "Then as to the last point. It has been well argued that the payment having been voluntary, it cannot be recovered back in an action for money had and received. I agree that such a consequence would have followed had the parties been on equal terms. But if one party has the power of saying to the other, 'that which you require shall not be done except upon the conditions which I choose to impose,' no person can contend that they stand upon any thing like an equal footing. Such was the situation of the parties to this action."

The Chief Justice's reference to the lack of an equal footing was, in my view, to the fact that the defendant was in a position to force the plaintiff to comply with the lawful demand if he wished to obtain the necessary licence to continue to trade, and not simply to the fact that the defendant held an official position whereas the plaintiff did not. Bayley, Holroyd and Littledale JJ. all agreed that the payment was not voluntary, the latter remarking that the plaintiff had "...submitted to pay the sum claimed, as he could not otherwise procure his licence". This was a clear case where the defendant was in a position to and did in fact exert duress to require payment of the sum unlawfully claimed.

In *Steele* v. *Williams* (1853) 8 Ex 625 (155 ER 1502) the plaintiff's clerk was unlawfully charged for taking extracts from a parish register the larger

A fee which was chargeable in respect of certificates. The plaintiff was held entitled to recover the unlawfully demanded excess. Although the conclusion of the Court was unanimous the reasoning of the three judges differed. Parke B. at page 630 concluded that the payment "...was not voluntary, because, in effect, the defendant told the plaintiff's clerk, that if he did not pay for certificates when he wanted to make extracts, he should not be permitted to B search". However, he later went to countenance the possibility that the defendant might have been guilty of extortion in insisting upon payment "...even without that species of duress, viz. the refusal to allow the party to exercise his legal right, but *colore officii*". It appears that Parke B. was there using the words *colore officii* merely to denote an official demand and not in the more C limited, and in my view, correct sense referred to by Isaacs J. and Windeyer J. in the cases to which I have already referred. Platt B. at page 631 said:

> "But, inasmuch as before the search began the defendant told the plaintiff's clerk that the charge would be the same whether he made extracts or had certified copies, and under that pressure the extracts were obtained, and it would have been most dishonourable for the D party, after having got the extracts, to refuse to pay, the money so obtained may be recovered back."

This is an interesting passage because the Baron is effectively saying that an undertaking to pay this excessive charge had been extracted from the clerk before he commenced his search and that he could not honestly have gone E back on that undertaking. Martin B., at page 632, said:

> "As to whether the payment was voluntary, that has in truth nothing to do with the case. It is the duty of a person to whom an Act of Parliament gives fees, to receive what is allowed, and nothing more. This is more like the case of money paid without consideration—to call it a F voluntary payment is an abuse of language. If a person who was occupied a considerable time in a search gave an additional fee to the parish clerk, saying, 'I wish to make you some compensation for your time,' that would be a voluntary payment. But where a party says, 'I charge you such a sum by virtue of an Act of Parliament,' it matters not whether the money is paid before or after the service rendered; if he is G not entitled to claim it, the money may be recovered back."

Although the last sentence in that passage could be read as covering any demand for payment in purported reliance upon a statute, Martin B. does relate it to a "service rendered" and the following interjection by him during H argument at page 629 suggests that he was thinking of a demand *colore officii* in the sense referred to by Isaacs J. and Windeyer J.:

> "The case of *Morgan* v. *Palmer* (2 B & C 729) shows, that if a person illegally claims a fee *colore officii* the payment is not voluntary so as to preclude the party from recovering it back."

I This sentence should also be read in the light of the sentence in the judgment of Platt B. to which I have referred.

It is, therefore, in my view taking too much out of this case to read it as supporting the broad proposition that payment in response to an unlawful demand by an official is *ipso facto* recoverable.

In *Hooper* v. *Mayor and Corporation of Exeter* (1887) 56 LJQB 457, the plaintiff paid harbour dues on all limestone which he landed, being unaware that such dues were not payable in respect of limestone to be burnt. Having discovered the true position he successfully claimed recovery of all dues paid in respect of exempted limestone. The judgments were very short and appeared to have been extempore. Lord Coleridge C.J. said, at page 457:

> "I feel sure that if the Corporation of Exeter had had the facts of the present case brought before them they would never have insisted upon the payment of a toll which they clearly would have had no right to insist on if the plaintiff had but claimed exemption upon landing the limestone."

Lord Coleridge C.J. went on, at page 458, to say:

> "From the case cited [*Morgan* v. *Palmer*] in the course of the argument it is shown that the principle has been laid down that, where one exacts money from another and it turns out that although acquiesced in for years such exaction is illegal, the money may be recovered as money had and received, since such payment could not be considered as voluntary so as to preclude its recovery."

Smith J. agreed referring to the authority of *Morgan* v. *Palmer* and *Steele* v. *Williams*. Mr. Gardiner argued that this case supported the Woolwich principle inasmuch as recovery depended solely upon the fact that the corporation had been placed by statute in a position of authority. *Morgan* v. *Palmer* was, as I have already said, a case in which the defendant used his authority to exert pressure upon the plaintiff to pay the sum demanded. I do not doubt that Lord Coleridge fully understood the *ratio* of that case and he must, therefore, have considered that there were facts in the case before him which were comparable to those obtaining in *Morgan* v. *Palmer*, although the report does not suggest the existence of any such facts. Indeed, whereas in *Morgan* v. *Palmer* the defendant had no statutory authority to demand a fee and the plaintiff had no option but to pay it in order to obtain the licence, in this case the corporation were fully entitled to levy a toll on the landing of limestone which they were not informed was to be burnt. The exaction in this case was, accordingly, unlawful not because of what the corporation did but because of what the plaintiff did not do. I find this a difficult case to understand but I do not think that it can be said to support the Woolwich principle.

The next case is *Slater* v. *Mayor and Corporation of Burnley* (1888) 59 LT 636, where the plaintiff without objection paid water rates which were wrongly charged on the basis of a "gross rental" instead of a "rateable value". Although the defendants had power to cut off the water supply for non-payment of rates, they had neither done so nor threatened to do so. The plaintiff, who did not give evidence in the County Court, failed to recover the excess payments on the ground that they were made voluntarily. Both Judges of the Divisional Court, Cave and Wills JJ., considered that the mere existence of the power to cut off the water supply without any threat to exercise that power did not prevent the payment from being voluntary. The plaintiff argued for the Woolwich principle and referred to both *Hooper* v. *Mayor and Corporation of Exeter* and *Steele* v. *Williams* but no reference to these cases appears in the reserved judgment. The lack of such a reference stems, in my view, not from the fact that the Judges were wrong, as Mr.

A Gardiner submitted, but rather from their recognition that the cases did not support the existence of such a principle as was contended for.

In *The Queens of the River Steamship Company Ltd.* v. *Conservators of the River Thames* (1899) 15 TLR 474, improper charges levied for use of a pier were held by Phillimore J. to be recoverable on the ground that, the B charges being illegal, there was no consideration for the payment made. No further reason was given by the Judge and no authority was referred to in his very short judgment. While the case may appear to support the Woolwich principle, it cannot be treated as a decision of any weight.

In *William Whiteley Ltd.* v. *The King* (1909) 101 LT 741, a company was C charged duties by the Inland Revenue on "male servants" whom they employed. The company initially expressed doubts as to their liability to duty but were informed that the Inland Revenue were of the opinion that the duties were payable and that they would incur penalties if they did not pay. The company then paid the duties for 3 years. At the end of that time they again expressed doubts as to their liability to pay and for the next 3 years D paid under protest. Finally they refused to pay and a Divisional Court held that they were not liable to do so. A petition of right to cover the duties paid was unsuccessful. Walton J. held that the payments were voluntary and therefore irrecoverable and he rejected the submissions of the plaintiffs that they were paid (1) in discharge of an illegal demand *colore officii*, or (2) in any event under duress. Although Walton J. referred on two occasions to the E plaintiff being under a mistaken belief that they were bound to pay the duties it is clear from his findings that in relation to at least the last three payments they were in considerable doubt as to their liability and at page 745 he said:

> "The suppliants knew all the facts. They had present to their minds plainly, when these payments were made, that there was a question as to F whether upon such servants as those in question duty was payable. They themselves raised that question and they paid the duties. They could have resisted payment. They must have known if proceedings were taken for penalties it would be open to them in such proceedings to raise the question as to whether the duties were payable or not, as they did, in fact, in 1906. They must have known and must have had present to their G minds all that."

Earlier the learned Judge, after referring to the rule that money paid under mistake of law is irrecoverable had said at page 745:

> "There is no doubt as to the general rule stated in Leake on Contracts to which I have already referred, that money paid voluntar- H ily—that is to say, without compulsion or extortion or undue influence, and, of course, I may add without any fraud on the part of the person to whom it is paid, and with knowledge of all the facts, though paid without any consideration, or in discharge of a claim not due, or a claim which might have been successfully resisted, cannot be recovered back."

I Mr. Gardiner argued that Walton J. erred in a number of respects although he may have reached the right answer by the wrong route. I do not agree. His conclusion that there was no duress where the defendant could only put pressure on the plaintiff by the institution of proceedings, to which proceedings there would have been available the defence which ultimately prevailed, was, in my view, unimpeachable since there is ample authority for

the view that a mere threat of action does not *per se* constitute duress. This accords with common sense since if there is a defence to an unlawful demand the most appropriate time to raise it is when the demand is sought to be enforced by action. If the defence is good, that will be the end of the matter. His conclusion that the case did not fall within the class of cases involving unlawful demands *colore officii* is in line with what I consider to be the correct approach as enunciated by Isaacs J. and Windeyer J. Walton J. did not purport to decide the case on the basis of a payment made under a mistake of law and I agree with the doubts expressed by Romer J., at page 241 in *Twyford* v. *Manchester Corporation* [1946] Ch 236, as to this being a true case of money paid under a mistake of law having regard to the plaintiffs' expressions as to their understanding of the law at the time of the payments. Indeed, I would go further and conclude that at least in relation to the last three payments the plaintiffs were not under a mistake of law but were strongly of the view that they were under no liability to pay. What is important about this case is that, in factual circumstances similar to those before this House, the plaintiffs contended for the principle relied upon by Mr. Gardiner and failed to persuade the Judge that such a principle existed.

Maskell v. *Horner* [1915] 3 KB 106 concerned unlawful demands for market tolls. On the plaintiff's refusal to pay seizure took place, and thereafter on his solicitor's advice the plaintiff paid under protest. Later when the plaintiff challenged the defendant's demands seizure either took place or was threatened. Some years later it appeared from a decision in the Chancery Division that the tolls had been unlawfully demanded and the plaintiff sued for their recovery. It was held that as he had only paid to avoid seizure of his goods and never voluntarily nor intending to give up his rights to the sums paid nor to close the transactions, he was entitled to recover those payments which were not barred by the Statute of Limitation. Lord Reading C.J. drew a distinction between payments made to close a transaction and those made to avoid seizure in the following passage:

> "If a person with knowledge of the facts pays money, which he is not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift, and the transaction cannot be reopened. If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received. The money is paid not under duress in the strict sense of the term, as that implies duress of person, but under the pressure of seizure or detention of goods which is analogous to that of duress. Payment under such pressure establishes that the payment is not made voluntarily to close the transaction."

He later quoted with approval the following *dicta* of Willes J. in *Great Western Railway Co.* v. *Sutton* (1869) LR 4 HL 226, at page 249:

> "... when a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion or concussion in respect of which he is entitled to recover the excess by *condictio indebiti*, or action for money had and received. This is every day's practice as to excess freight."

A The Lord Chief Justice later, at page 121, explained why payment in or under threat of an action is irrecoverable:

> "There is no doubt that if a person pays in an action or under threat of action the money cannot be recovered by him, as the payment is made to avoid the litigation to determine the right to the money
B claimed. Such payment is not made to keep alive the right to recover it, inasmuch as the opportunity is thus afforded of contesting the demand, and payment in such circumstances is a payment to close the transaction and not to keep it open. Even if the money is paid in the action accompanied by a declaration that it is paid without prejudice to the payer's right to recover it, the payment is a voluntary payment, and the transac-
C tion is closed."

Mr. Gardiner submitted that this case was neutral in relation to the Woolwich principle but I think that is to take too favourable a view of it. In the passages to which I have referred, I understand Lord Reading to be predicating some measure of compulsion in addition to the unlawful demand
D before recovery is available.

In *Attorney-General* v. *Wilts United Dairies Ltd.* (1921) 37 TLR 884, the defendants resisted an unlawful demand for a levy on milk purchased by them under a licence granted by the Food Controller. The following passage from the judgment of Atkin L.J., at page 887, was relied upon by Mr.
E Gardiner as showing that recoverability was not dependent upon any measure of compulsion:

> "It makes no difference that the obligation to pay the money is expressed in the form of an agreement. It was illegal for the Food Controller to require such an agreement as a condition of any licence. It
F was illegal for him to enter into such an agreement. The agreement itself is not enforceable against the other contracting party; and if he had paid under it he could, having paid under protest, recover back the sums paid, as money had and received to his use."

The reference to recovery of money paid was *obiter* and Atkin L.J. referred
G to no authority throughout his judgment. It may well be that he considered payment of the levy was a necessary prerequisite of obtaining the licence and hence amounted to a form of compulsion. If, on the other hand, he was stating as a matter of principle that the coupling of a protest with a payment of money unlawfully demanded *per se* rendered that payment recoverable, he
H was expressing views for which no authority prior to that date has been cited to this House and which were contrary to those expressed by Lord Reading in *Maskell* v. *Horner*. At page 120 in that case, Lord Reading said:

> "I do not think that the mere fact of a payment under protest would be sufficient to entitle the plaintiff to succeed; but I think that it affords some evidence, when accompanied by other circumstances, that
I the payment was not voluntarily made to end the matter."

This comment was made in the context of the *dictum* of Willes J. in *Great Western Railway Co.* v. *Sutton* which he had previously cited with approval and which presupposed that compulsion had induced the payment. As Windeyer J. said in *Mason* v. *State of New South Wales* 102 CLR 108, at

page 143: "But there is no magic in a protest; for a protest may accompany a voluntary payment or be absent from one compelled". A

T. & J. Brocklebank Ltd. v. *The King* [1924] 1 KB 647, [1925] 1 KB 52 concerned the grant by the shipping controller of a licence to sell a ship under an unlawful condition as to the payment to him of a proportion of the sale price. It was held both by Avory J. and the Court of Appeal that the payment in terms of the unlawful condition was not voluntary, having been made for the purpose of obtaining the licence and could, therefore, be recovered as in *Morgan* v. *Palmer*. The case does not assist the Woolwich. Nor does the case of *National Pari-Mutuel Association Ltd.* v. *The King* (1930) 47 TLR 110, in which it was held that payment of betting duty under a statutory provision thought by the plaintiffs to be applicable but later held by this House in a similar case to be inapplicable, was made under a mistake of law and not of fact and was, therefore, irrecoverable. No question of payment under duress was raised. B C

In *Twyford* v. *Manchester Corporation* [1946] Ch 236, the plaintiff, although believing that he was not liable, for some years paid fees under protest for permission to recoat and repaint tombstones in a cemetery. In an action to recover these fees it was held that the registrar of the cemetery had no right to demand fees for recutting and repainting but, that there being no suggestion that any unpleasant result would follow from non-payment, the plaintiff must be taken to have paid voluntarily. Romer J. relied on *William Whiteley Ltd.* v. *The King* and *Slater* v. *Mayor and Corporation of Burnley* in reaching his decision, and he also referred to the "principle of duress *colore officii*" in a manner which showed that the necessary duress required something more than a simple demand by an official. This is another case in which the Woolwich principle could readily have been applied in favour of the plaintiff had it existed. D E F

In *Glasgow Corporation* v. *Lord Advocate*, 1959 SC 203, the corporation, having for a number of years paid purchase tax on manufactured stationery, erroneously believing it to be due, sought to recover it when it was held not to be chargeable. Two separate grounds were advanced in support of the claim, namely, (1) the broad constitutional point that, as the Commissioners of Customs & Excise had no authority from Parliament to impose the charges and the corporation were under no legal liability to pay them, the latter should be entitled to recover, and (2) that the *condictio indebiti* applied where there was error in the interpretation of a public general statute. Lord President Clyde rejected both grounds and in relation to the first observed that no authority of any kind had been cited to justify it and that *Attorney General* v. *Wilts United Dairies Ltd.* was not in point. The Lord President also made the following observation in relation to the consequences of sustaining the first ground: G H

> "It would, in my opinion, introduce an element of quite unwarrantable uncertainty into the relations between the taxpayers and the Exchequer if there could be a wholesale opening up of transactions between them whenever any Court put a new interpretation upon an existing statutory provision imposing a tax." I

South of Scotland Electricity Board v. *British Oxygen Co. Ltd.* [1959] 1 WLR 587 (also reported as *British Oxygen Co.* v. *South of Scotland Electricity Board*, 1959 SC (HL) 17) concerned an action by the pursuer com-

panies against an electricity board seeking declarator and payment in respect of unlawful overcharges by the defenders for the supply of electricity. The issue before this House was whether the action should go to proof before answer or be dismissed and proof before answer was allowed. In the course of his speech Viscount Kilmuir L.C., at page 596, said:

> "The respondents were charged more than is warranted by the statute. Then it is clear that, until a court so declares, the respondents have no alternative but to continue to pay the charges demanded of them. In principle the appellants should not be permitted to retain payments for which they have no warrant to charge. The respondents may therefore recover whatever sum they may be able to prove was in excess of such a charge as would have avoided undue discrimination against them.
>
> ...
>
> I cannot find anything in the cases decided under the railway and electricity statutes which would necessitate or lead to a contrary view. I respectfully agree with Lord Patrick that *Great Western Railway Co.* v. *Sutton* and *Lancashire* and *Yorkshire Railway Co.* v. *Gidlow* support this view."

Mr. Gardiner relied on the first part of this quotation as stating the principle of recoverability in wide terms. I do not, however, consider that Viscount Kilmuir was intending to state that any payment in response to any unlawful demand could be recovered. His reference to the Respondents having no alternative but to continue to pay and to *Great Western Railway Co. Ltd.* v. *Sutton* suggests that he was referring to payments made to avoid unpleasant consequences other than a simple action of payment.

My Lords, that concludes my analysis of what I perceive to be the important British cases but before seeking to draw conclusions therefrom I must refer to certain Commonwealth and American cases. In *Sargood Brothers* v. *The Commonwealth and another* (1910) 11 CLR 258, duties were charged under a proposed tariff which exceeded the tariff subsequently enacted. The excess was held to be recoverable as not having been paid voluntarily. Mr. Gardiner relied on the following passage in the judgment of O'Connor J. as supporting the Woolwich principle inasmuch as he made no mention of the payment having to be exacted for the performance of a duty:

> "The first ground is taken that the payment was voluntary. In one sense it was. It was in fact made without protest and in the ordinary course of Customs business.
>
> But it was paid with the knowledge on both sides that Customs control over goods imported may be exercised in support of illegal as well as of legal demands of duty. The principle of law applicable in such cases is well recognized. Where an officer of Government in the exercise of his office obtains payment of moneys as and for a charge which the law enables him to demand and enforce, such moneys may be recovered back from him if it should afterwards turn out that they were not legally payable even though no protest was made or question raised at the time of payment. Payments thus demanded *colore officii* are regarded by the law as being made under duress. The principle laid down in *Morgan* v.

Palmer (1), *Steele* v. *Williams* (2), and adopted in *Hooper* v. *Exeter Corporation* (3) clearly establish that proposition."

After referring to a section of the relevant Customs Act which was said to give an importer an opportunity to obtain his goods without making an irrevocable payment of the duty claimed, O'Connor J. continued:

> "The Collector has the power to keep the goods under Customs control until the importer either pays the duty or takes the advantage of the section. The latter he can do only by depositing with the Collector the whole amount of the duty. He may, it is true, exercise his free will as to which of these courses he shall adopt. But there is a compulsion to adopt one or the other, and whichever course he may take he cannot obtain possession of his goods without handing over to the Collector either absolutely or conditionally the amount claimed as duty."

I do not read these passages as stating that an unlawful demand which is enforceable is *per se* sufficient to found recovery. The references to *Morgan* v. *Palmer* and the other two cases and to the compulsion on the importer to adopt one of two courses suggest that O'Connor J. was referring to a situation where there was not only an unlawful demand but a means of enforcing it without recourse to litigation. This judgment, therefore, does not support the Woolwich principle.

Mason v. *State of New South Wales* (1959) 102 CLR 108 concerned fees paid by the plaintiffs to obtain licences to carry goods between states. It was subsequently held by the Privy Council that permits were not required by persons in the position of the plaintiffs. In paying the fees the plaintiffs were aware of the pending appeal and paid under protest. The Act under which the permits were purportedly required empowered authorised officers to seize unlicensed vehicles. The High Court of Australia (McTiernan J. dissenting) held that the payments were not made voluntarily but under duress and were, therefore, recoverable. Dixon C.J., at page 116, said:

> "In all these circumstances I think that it is a proper inference that, in the case of each journey in question, the plaintiffs paid the money unwillingly and only because they apprehended on reasonable grounds that without the permit which could not otherwise be obtained officers acting under the authority of the State of New South Wales would or might stop the motor vehicle and refuse to allow it to proceed upon the journey."

At page 117, he expressed doubts as to whether money paid in response to an unlawful demand by the Crown could not be recovered in the absence of some threatened action or inaction, but he considered that English authority seemed to say that it was not recoverable. At page 117, he said:

> "We are dealing with the assumed possession by the officers of government of what turned out to be a void authority. The moneys were paid over by the plaintiffs to avoid the apprehended consequence of a refusal to submit to the authority. It is enough if there be just and reasonable grounds for apprehending that unless payment be made an unlawful and injurious course will be taken by the defendant in violation of the plaintiffs' actual rights."

A Fullagar J., at page 124, considered that the payments "...were made in order to avoid a very real risk that a refusal to pay would be followed by action which could be ruinous to the plaintiffs". Kitto J., at page 126, said:

> "The proposition need not be questioned that where an Act purports, invalidly, to require a payment to be made, leaving the liability to be enforced by means of an action in which the invalidity of the statute is an available defence, a person who might have relied upon that defence but has paid without raising it should not be held, just because he was obeying the de facto command of a legislature, to have made the payment involuntarily. But even in the case of such an Act, if there are superadded provisions which attach to non-payment consequences other than a bare liability to be sued, there can be no justification for refusing to have regard to those consequences and to consider whether the existence of the provisions creating them has placed the payer under such pressure that the payments have not in truth been voluntary."

The final paragraph of his judgment included the following passage:

> "I do not myself feel justified in attaching much weight to the tenuous evidence upon which we were invited to find that the plaintiffs made their payments because of apprehensions induced by words or conduct of State officials that vehicles would or might be seized and detained under s 47. My judgment rests upon the view that the plaintiffs had quite enough compulsion upon them from the terms of the Act itself, apart altogether from anything that may have been said or done by officers of government. Under that compulsion they parted with their money."

As I understand it, Kitto J. is saying that the mere availability to the payee of summary remedies for non-payment may amount to sufficient compulsion on the payer to entitle him to recover irrespective of whether the payee has given any indication that he proposes to exercise such remedies. In this view he was alone. Windeyer J. rejected any idea that mere superiority of position of the defendant was a ground of recovery in the following passage, at page 142:

> "The importance of the matter is that the plaintiffs cannot succeed simply because of the superior position of the defendant. They must go further and establish that there was, in a legal sense, compulsion by something actually done or threatened, something beyond the implication of duress arising from a demand by persons in authority, which suffices in a true *colore officii* case. Further the plaintiffs must establish that they actually paid because of this compulsion, and not voluntarily despite it."

He differed from Kitto J. in his approach to the amount of compulsion necessary in this passage, at page 144:

> "...but the mere appearance on the statute book of a measure providing for penalties and forfeitures does not mean that all moneys collected pursuant to the statute are extorted by the Crown. It is, in my view, necessary for the plaintiffs to do more than point to the provisions of the statute. They must show that the Crown by its servants was exercising, or threatening to exercise, powers under the statute in such a way as to constitute compulsion in law. A threat of proceedings for a pecu-

niary penalty does not make a payment made thereafter involuntary; for the payer might have defended the proceedings and relied upon the unlawfulness of the demand (*William Whiteley Ltd.* v. *The King* and *Werrin* v. *The Commonwealth*). But a payment made under pressing necessity to avoid a seizure of goods, or to obtain the release of goods unlawfully detained, or to prevent some interference with or withholding of a legal right, is compelled and not voluntary and is recoverable in an action for money had and received."

I consider that the foregoing reason of Windeyer J. accords better with prior authority such as *Slater* v. *Mayor and Corporation of Burnley* (1888) 59 LT 636, and is to be preferred.

Mr. Gardiner founded on a passage in the dissenting judgment of Wilson J. in *Air Canada* v. *British Columbia* (1989) 59 DLR (4th) 161, 169:

"It is, however, my view that payments made under unconstitutional legislation are not 'voluntary' in a sense which should prejudice the taxpayer. The taxpayer, assuming the validity of the statute as I believe it is entitled to do, considers itself obligated to pay. Citizens are expected to be law-abiding. They are expected to pay their taxes. Pay first and object later is the general rule."

While there may be much to be said for the views expressed in this passage it seems to me with all respect to Wilson J. that she was stating what she thought the law ought to be rather than what it is. La Forest J. who delivered the leading judgment on behalf of the majority concluded at page 196 that: "...the rule should be against recovery of ultra vires taxes, at least in the case of unconstitutional statutes", and went on at page 199 to reject the proposition that payment under an *ultra vires* statute constituted compulsion.

Finally, I refer to two American cases, *Fairbanks* v. *Snow* (1887) 13 NE Reporter 596 and *Atchison, Topeka & Santa Fe Railway Co.* v. *O'Connor* (1912) 223 US 280. In the former, the defendant alleged that her signature to a promissory note was obtained by duress and threats on her husband's part. Holmes J. at page 598 said:

"Again, the ground upon which a contract is voidable for duress is the same as in the case of fraud, and is that, whether it springs from a fear or a belief, the party has been subjected to an improper motive for action."

The latter case was an action to recover taxes paid under duress and protest, the plaintiff contending that the levying statute was unconstitutional, and the defendant contending that the payment was voluntary. Holmes J. at page 285–6 said:

"It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that apart from special circumstances he cannot interfere by injunction with the State's collection of its revenues, an action at law to recover back what he has paid is the alternative left. Of course we are speaking of those cases where the State is not put to an action if the citizen refused to pay. In these latter he can interpose his objections by way of defence, but when, as is common, the State has a more summary remedy, such as distress, and the party indicates by protest that he is yielding to what he cannot prevent, courts sometimes perhaps have been a little too slow to

A recognize the implied duress under which payment is made. But even if the State is driven to an action, if at the same time the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional, rights, by defence in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side. He is entitled to assert his supposed right
B on reasonably equal terms."

The serious disadvantages to which the plaintiffs could have been put in that action were (1) the possible forfeiture of their right to do business within the State until the tax was paid. Holmes J. recognised that it might not be possible to establish the forfeiture without *quo warranto* but considered that
C even before or until such a proceeding the effect of the clause upon the plaintiffs' business could be serious, and (2) the incurring of a penalty which would continue to accrue and accumulate pending litigation should the plaintiffs ultimately fail. Holmes J. considered that, in these circumstances, the payment was made under duress. He was there dealing not with summary remedies available to the State to which a citizen had no opportunity to state
D a defence but rather to additional consequences which might adversely affect a citizen should he fail in his defence to the claim to the principal sum. These views, which have undoubted attraction, give some support to the Woolwich principle but they are inconsistent with the reasoning in *Slater* v. *Mayor and Corporation of Burnley, William Whiteley Ltd.* v. *The King, Twyford* v. *Manchester Corporation* and with that of Windeyer J. in *Mason* v. *State of*
E *New South Wales.*

My Lords, that concludes my somewhat prolonged analysis of the main authorities. Running through the authorities is the distinction between payments voluntary and payments made under compulsion or duress—the former being irrecoverable, the latter recoverable. The difference in the various
F authorities lies in the determinations as to what constitutes compulsion or duress. Although the matter does not arise in this appeal because the Woolwich were fully aware of all the relevant circumstances, I cannot help feeling that there is some illogicality in treating as voluntary a payment by someone who justifiably believes that the demand is lawful whereas in fact it turns out to be unlawful. Voluntary to my mind suggests that the payer
G being aware of all relevant circumstances including the true state of the law or perhaps having a doubt but not caring which way that doubt is resolved consciously makes a decision to pay. Indeed, I very much doubt whether in all cases the distinction between mistake of fact and of law can be justified any longer. Can the reasoning of Lord Ellenborough C.J. in *Bilbie* v. *Lumley* (1802) 2 East 469 (102 ER 448) be appropriately applied to the complex leg-
H islation both primary and subordinate to which the citizen is subject in present times? These are, however, matters for the Law Commission and not for this appeal. The Woolwich did not suggest that the difference between the treatment of voluntary and compulsory payments was wrong, rather did the principle involve the proposition that an unlawful demand by the Crown for tax or other similar impost *per se* implied a measure of compulsion or duress
I which entitled the payer to recover. My Lords, I have no doubt that the weight of authority is against such a proposition and does not support the Woolwich principle. If this House were to apply such a principle it would involve going beyond what any of the authorities have decided, departing from such decisions as *Slater* v. *Mayor and Corporation of Burnley, William Whiteley Ltd.* v *The King* and *Twyford* v. *Manchester Corporation* which have stood for many years and would involve making new law. For reasons to

which I shall refer later, I do not think that we should do that. In reaching this conclusion I desire to express my general agreement with the very careful reasoning of Ralph Gibson L.J.

Further support for the view that there does not exist a principle such as the Woolwich contend for, is to be found in statutory provisions for the recovery of imposts which should not have been paid. The Law Commission Consultation Paper No. 120 on the "Restitution of Payments Made Under a Mistake of Law" paras 3.20–3.36 set out a number of statutory provisions for the recovery of payments made to public authorities. These include such matters as value added tax, excise duty and car tax, income tax, corporation tax, capital gains tax, petroleum revenue tax, inheritance tax, stamp duty, social security contributions and community charges. I do not propose to refer to the various provisions in detail. If the Woolwich principle comprehends payments made under a mistake of law, then such payments are also covered by the statutory provisions. If the principle does not comprehend such payments, as the majority of the Court of Appeal held to be the case, then there are other situations covered by the provisions which would also be within the ambit of the Woolwich principle. The importance of these statutory provisions appears to me to be that Parliament has considered at various times and in various contexts the need for recovery of imposts paid but not due and has legislated in a manner which suggests that no such general principle as the Woolwich contends for was thought to be in existence. It is in this context relevant to mention briefly s 9 of the General Rate Act 1967 which provided that an amount paid in respect of rates "...and not recoverable apart from this section" could properly be refunded on five specified grounds, some of which would fall within the Woolwich principle. In *Regina* v. *Tower Hamlets London Borough Council* Ex parte *Chetnik Developments Ltd.* [1988] AC 858, Lord Bridge of Harwich explained the principle underlying the section, at page 873, as follows:

> "But, to articulate the apparent principle underlying the section more precisely it is surely envisaged in each of the five cases where the section authorises refunds of amounts paid in respect of rates which would otherwise be irrecoverable that the ratepayer who has paid rates in compliance with a demand note which he might have successfully resisted may appropriately be relieved of the consequence of his oversight."

This passage is interesting as it assumes that there would have been no right of recovery in any of the cases to which the section referred although, had the Woolwich principle been applicable, there would have been recovery, apart from the section, in some.

Mr. Gardiner submitted as an alternative that even if the Woolwich principle did not apply, nevertheless the payment to the Revenue was made under duress and was, therefore, recoverable. He accepted that his submissions on duress were substantially subsumed in his primary argument but he maintained that a threat by the Crown to sue put the Woolwich on unequal terms and that this was sufficient to constitute duress. Nolan J. rejected this argument as did Ralph Gibson and Butler-Sloss L.JJ. Nolan J. referred to Windeyer J.'s definition of *colore officii* and continued at [1989] 1 WLR 137, at page 144([1]):

([1]) Page 273G/H *ante*.

A "There is, however, an analogous and broader principle embracing demands for money by the Crown or public authorities which come under the heading of duress because of the nature of the sanctions levied or threatened against the subject if he refuses to pay. This principle has been applied, and the money held to be recoverable, in cases where the sanction has amounted to duress of the person of the subject or of his B goods. The principle does not, however, apply if the sanction involves only the institution of legal proceedings for the recovery of the money and penalties. These propositions are illustrated by the decisions in *William Whiteley Ltd.* v. *The King* (1910) 101 LT 741, and in *Mason* v. *New South Wales*, 102 CLR 108."

C At page 146, he said(1):

"The potential cost to Woolwich of refusing to pay in terms of damage to reputation and interest liabilities may have been commercially unacceptable but I cannot regard it as involving duress on the part of the revenue. The position might be different if Woolwich had paid D under threat of the revenue taking distress proceedings without a court order under s 61 of the Taxes Management Act 1980, but as I have said there is no evidence that such drastic and highly unusual proceedings were either threatened by the revenue or anticipated by Woolwich, still less that Woolwich had a reasonable apprehension of being put out of business by them."

E

Nolan J.'s reference to "duress on the part of the revenue" is important because the duress with which the law is concerned is that exerted by the defendant and not that exerted by extraneous circumstances such as general commercial considerations. Duress to be relevant must be found within the four walls of the transaction. In this case the Woolwich would, in relation to F the Revenue, have been no worse off if they had refused payment of the tax claimed and raised the defence which subsequently proved successful. I, therefore, agree with Nolan J. and the majority of the Court of Appeal that the Woolwich are not entitled to recover on the ground of duress.

That is sufficient for the disposal of this appeal which I would allow G albeit with no little regret. The Revenue obtained a huge sum of money which they had no right to demand and they are now hanging on to a very large amount of interest which they have no moral right to retain.

In *Sebel Products Ltd.* v. *Commissioners of Customs & Excise* [1949] Ch H 409, Vaisey J., at page 413, said:

"By the Crown Proceedings Act, 1947, the defendants are placed in the same position as the ordinary subjects of the Crown (see s. 21, (1)) and I see no reason why they should not in appropriate cases refuse to refund money paid to them voluntarily under a mistake of law, as the Revenue Authorities were held to be entitled to do in the case of I *William Whiteley Ltd.* v. *The King* and *National Pari-Mutuel Association Ltd.* v. *The King*. At the same time I cannot help feeling that the defence is one which ought to be used with great discretion, and that for two reasons. First, because the defendants being an emanation of the Crown,

(1) Page 275A/B *ante*.

which is the source and fountain of justice, are in my opinion bound to maintain the highest standards of probity and fair dealing, comparable to those which the courts, which derive their authority from the same source and fountain, impose on the officers under their control: see *In re Tyler*."

In *Regina* v. *Tower Hamlets London Borough Council* Ex parte *Chetnik Developments Ltd.* [1988] AC 858, Lord Bridge of Harwich, at page 877, referred to:

> "...the broader consideration that Parliament must have intended rating authorities to act in the same high principled way expected by the court of its own officers and not to retain rates paid under a mistake of law, or...upon an erroneous evaluation, unless there were, as Parliament must have contemplated there might be in some cases, special circumstances in which a particular overpayment was made such as to justify retention of the whole or part of the amount overpaid."

These observations are, in my view, equally applicable to the Revenue and to sums by way of principal or interest retained by them.

If I could have seen a respectable way to dismiss this appeal I should have been happy to do so. However, as I have already remarked, I do not consider that it would be appropriate for this House to make new law in this instance. In *Glasgow Corporation* v. *Lord Advocate* 1959 SC 203, Lord President Clyde, at page 230, pointed out the problems which could arise if there were a wholesale opening up of prior transactions and Ralph Gibson L.J. clearly had such problems in mind when he summarised his reasons at [1991] 3 WLR 849. The application of the Woolwich principle in the present case might well create no administrative difficulties inasmuch the payment was made under protest and was almost immediately followed by an application for judicial review. The Revenue were thus aware from the outset that the validity of their demand was being challenged. The position would have been very different in the case of a payment made some years before which was sought to be recovered because a court in another case had ruled that the Regulation under which the demand had been made had all along been *ultra vires*.

There is in theory a good deal to be said for the submission of Professor Birks in his *Introduction to the Law of Restitution* (1985), page 295, that a payer should be able to recover payments demanded *ultra vires* by a public authority on the sole ground that retention of such payment would infringe the principle of "no taxation without Parliament" enshrined in the Bill of Rights. However, it is clear that in practice some limitation would have to be imposed on any such principle. During the course of argument Mr. Gardiner suggested certain alternative modifications to the Woolwich principle as initially enunciated by him. First and foremost he maintained that a mistake of law would be no defence to the application of the principle but as alternatives he submitted that the principle would be subject to the mistake of law defence or that the defence of mistake of law should be abrogated altogether. He also sought to draw a distinction between an unlawful demand made under an *ultra vires* instrument and one made under an *intra vires* instrument which was misconstrued or misapplied. A distinction which I consider to be without a difference. Public authorities are creatures of statute and can do no more than the statute permits them to do. A demand by such an authority

under an *ultra vires* Regulation is no more or no less unlawful than a demand under a valid Regulation which does not apply to the situation in which the demand is made. I mention these matters because they show that to accept the Woolwich principle in one or other of its forms would appear to involve a choice of what the law should be rather than a decision as to what it is.

To apply the Woolwich principle as initially enunciated without limitation could cause very serious practical difficulties of administration and specifying appropriate limitations presents equal difficulties. For example, what, if any, knowledge is required on the part of a payer at the time of payment to entitle him to recovery at a later date? Or how long should any right to repayment last? Is it in the public interest that a public authority's finances should be disrupted by wholly unexpected claims for repayment years after the money in question has been received? These are all matters which would arise in any reform of the law to encompass some such principle as the Woolwich contend for and are matters with which the legislature is best equipped to deal.

Lord Browne-Wilkinson:—My Lords, in this case your Lordships are all agreed that, as the law at present stands, tax paid under protest in response to an *ultra vires* demand is not recoverable at common law. The authorities are fully analysed in the speeches of my noble and learned friends Lord Keith of Kinkel, Lord Jauncey of Tullichettle and Lord Goff of Chieveley and I agree with those analyses.

The issue which divides your Lordships is whether this House should now reinterpret the principles lying behind the authorities so as to give a right of recovery in such circumstances. On that issue, I agree with my noble and learned friend Lord Goff that, for the reasons he gives, it is appropriate to do so.

Although as yet there is in English law no general rule giving the plaintiff a right of recovery from a defendant who has been unjustly enriched at the plaintiff's expense, the concept of unjust enrichment lies at the heart of all the individual instances in which the law does give a right of recovery. As Lord Wright said in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Coombe Barbour Ltd.* [1943] AC 32, at page 61:

> "The claim was for money paid for a consideration which had failed. It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution."

In the present case, the concept of unjust enrichment suggests that the plaintiffs should have a remedy. The Crown demanded and received payment of the sum by way of tax alleged to be due under Regulations subsequently held by your Lordships' House to be *ultra vires*. The payment was made under protest. Yet the Crown maintains that it was under no legal obligation

to repay the wrongly extracted tax and, in consequence, is not liable to pay interest on the sum held by it between the date it received the money and the date of the order of Nolan J. If the Crown is right, it will be enriched by the interest on money to which it had no right during that period. In my judgment, this is the paradigm of a case of unjust enrichment.

As in so many other fields of English law, the occasions on which recovery is permitted have been built up on a case by case basis. For present purposes there are, in my judgment, two streams of authority relating to moneys wrongly extracted by way of impost. One stream is founded on the concept that money paid under an *ultra vires* demand for a tax or other impost has been paid without consideration. The other stream is based on the notion that such payments have been made under compulsion, the relative positions and powers of the two parties being unequal.

The stream based on the concept of payment without consideration stems from what Lord Mansfield said in *Campbell* v. *Hall* (1774) Cowp 204 effected in the decision in *Dew* v. *Parsons* (1819) 2 B & Ald 562. In *Steele* v. *Williams* (1853) 8 Ex 625, Martin B. said that the payment in that case was not a voluntary payment but was "...more like the case of money paid without consideration". In *The Queens of the River Steamship Company Ltd.* v. *Conservators of the River Thames* (1899) 15 TLR 474, Phillimore J. founded his decision on the fact that there was no consideration for the payment. Although this stream seems subsequently to have run into the sand, I find the approach attractive: money paid on the footing that there is a legal demand is paid for a reason that does not exist if that demand is a nullity. There is, in my view, a close analogy to the right to recover money paid under a contract, the consideration for which has wholly failed.

The other stream, based on compulsion, stems from *Morgan* v. *Palmer* (1824) 2 B & C 729 and the majority decision in *Steele* v. *Williams* (*supra*). In their inception, these authorities were based on the fact that the payer and payee were not on an equal footing and it was this inequality which gave rise to the right to recovery. However, most of the cases which arose for decision were concerned with payments extracted *ultra vires* by persons who in virtue of their position could insist on the wrongful payment as a precondition to affording the payer his legal rights i.e. they were payments *colore officii*. In consequence, the courts came to limit the cases in which recovery of an *ultra vires* impost was allowed to cases where there had been an extraction *colore officii*. I can see no reason in principle to have restricted the original wide basis of recovery to this limited class of case. In my judgment, as a matter of principle the *colore officii* cases are merely examples of a wider principle viz. that where the parties are on an unequal footing so that money is paid by way of tax or other impost in pursuance of a demand by some public officer, these moneys are recoverable since the citizen is, in practice, unable to resist the payment save at the risk of breaking the law or exposing himself to penalties or other disadvantages.

In my view, the principle is correctly expressed by Holmes J. in *Atchison, Topeka & Santa Fe Railway Co.* v. *O'Connor* (1912) 223 US 280, where he said:

> "It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that apart from special circumstances he cannot interfere by injunction with the

A state's collection of its revenues, an action at law to recover back what he has paid is the alternative left. Of course we are speaking of those cases where the state is not put to an action if the citizen refuses to pay. In these latter he can interpose his objections by way of defence, but when, as is common, the state has a more summary remedy, such as distress, and the party indicates by protest that he is yielding to what he B cannot prevent, courts sometimes perhaps have been a little too slow to recognise the implied duress under which payment is made. But even if the state is driven to an action, if at the same time the citizen is put at a serious disadvantage in the assertion of his legal, and in this case of his constitutional, rights, by defence in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly C and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms."

In cases such as the present, both the concept of want of consideration and payment under implied compulsion are in play. The money was demanded and paid for tax, yet no tax was due: there was a payment for no D consideration. The money was demanded by the state from the citizen and the inequalities of the parties' respective positions is manifest even in the case of a major financial institution like the Woolwich. There are, therefore, in my judgment, sound reasons by way of analogy for establishing the law in the sense which Lord Goff proposes. I agree with him that the practical E objections to taking this course are not sufficient to prevent this House from establishing the law in accordance with both principle and justice. I too, therefore, would dismiss this appeal.

Lord Slynn of Hadley:—My Lords, the Respondents to this appeal ("Woolwich") paid to the Inland Revenue Commissioners almost £57m pur- F suant to demands made under the Income Tax (Building Societies) Regulations 1986. They did so under protest that the money was not due because the Regulations were *ultra vires* and void. They immediately began proceedings for judicial review to challenge the validity of the Regulations. In those proceedings they succeeded. (*Regina* v. *Inland Revenue Commissioners* Ex parte *Woolwich Equitable Building Society*(1) [1987] STC G 654, Nolan J., [1990] 1 WLR 1400 (House of Lords).)

The Revenue repaid the amount of the tax and interest which accrued subsequent to the date of the decision of Nolan J. on 31 July 1987, but refused to pay interest prior to that date contending that the principal sum could not be recovered as a debt under s 35A of the Supreme Court Act H 1981. In these proceedings Woolwich claims interest from the date of payment to 31 July 1987 amounting in total to some £6.7m.

The question on the appeal can be stated shortly: does the citizen have the right to recover from the Revenue money demanded by the Revenue and paid by him which was not due in law because the demand was *ultra vires*? It I is, however short, a question of fundamental importance. Many authorities have been cited. These have been considered in depth in the judgments of the Court of Appeal and in the speeches of my noble and learned friends, Lord Keith of Kinkel and Lord Jauncey of Tullichettle; the principles to be

(1) 63 TC 589.

derived from them have been analysed by my noble and learned friend, Lord Goff of Chieveley. I have had the advantage of reading those speeches and it seems appropriate that I should set out my conclusions without repeating in detail the facts and points for decision in those authorities.

It is convenient, however, before turning to the central question, to deal with a number of other issues which have arisen in argument.

In the first place this tax was not, in my view, paid pursuant to a contract that if the money was held not to have been payable it would then fall due to be repaid, thus excluding any right to interest before Nolan J.'s decision. It was paid and accepted without prejudice to Woolwich's contention that it was never due and to any right to recover any payments made pursuant to the Regulations (letters of 12 and 23 June 1986 between Woolwich and the Revenue).

Secondly, this is not a case where the tax was paid under a mistake of law made by the payer and the Revenue thus cannot, and does not, rely on the authorities which rule that a claim for money had and received does not lie where they were paid under a mistake of law. It is thus not necessary in this case to consider whether that rule is well-founded, though it seems to me that it is open to review by your Lordships' House.

Thirdly there is, as I see it, no statutory provision upon which Woolwich can rely to reclaim this money or any interest. Section 33 of the Taxes Management Act 1970, even if it applies to composite rate tax, is not applicable for a number of reasons, not least that no valid assessment could be made under an invalid Regulation, that no assessment was in fact made and that, even if made, the assessment could not on the facts of the present case have been said to be "excessive by reason of some error or mistake in a return". In other areas Parliament has specifically provided that tax paid which was not lawfully due to be paid may be recovered and it has laid down the machinery and the conditions for repayment, including the payment of interest. None of these other statutory provisions applies to the present case.

I do not consider that the fact that Parliament has legislated extensively in this area means that no principle of recovery at common law can or should at this stage of the development of the law be found to exist. If the principle does exist that tax paid on a demand from the Crown when the tax was the subject of an *ultra vires* demand can be recovered as money had and received then, in my view, it is for the courts to declare it. In so doing they do not usurp the legislative function. I regard the proper approach as the converse. If the legislature finds that limitations on the common law principle are needed for reasons of policy or good administration then they can be adopted by legislation, e.g. by a short limitation period, presumptions as to validity, even (which I mention but do not necessarily think appropriate since the matter has not been discussed) a power in the courts to limit the effects of any order for recovery comparable to that conferred on the European Court of Justice by Article 174 of the Treaty of Rome. Because of the other legislative provisions dealing with repayment of various taxes, it seems in any event that the number of cases where any principle of common law would need to be relied on is likely to be small. The "flood gates" argument is, therefore, not a persuasive one in this case. If it were a risk, then the Revenue would need to consider appropriate legislation.

A Finally, the Revenue has contended that the proper procedure was for Woolwich to seek to challenge its decision not to pay interest by way of judicial review, although it would of course contend that no order should be made on such a review in the present case. I do not accept this. If a claim lies for money had and received, judicial review adds nothing. If the money falls in law to be repaid, a direct order for its repayment is more appropriate than
B a declaration that it should be repaid or an order setting aside a refusal to repay it. Moreover, if it is right here that the tax was repaid as a matter of extra-statutory discretion, and interest from the date of Nolan J.'s order was paid on the same basis, it is not clear to me how a review of the discretionary refusal to pay interest which was not due in law can properly be examined by way of judicial review.

C

The cases cited, and referred to in depth by my noble and learned friends, have proceeded on the basis that, on the one hand money paid under a mistake of fact or under duress or as it is said "*colore officii*" can be recovered, whereas money paid under a mistake of law or voluntarily "to close a transaction" or to avoid threatened litigation cannot.

D

The present case does not fall clearly into any of these separate categories.

On the one hand, so as to exclude recovery, the present was not a payment made under mistake of law nor was there any payment to avoid threat-
E ened litigation. It is quite impossible to say that Woolwich paid to close a transaction since it protested that it was not liable and it immediately sought to establish that the Regulation was void.

On the other hand, none of the conditions which permit recovery was satisfied. There was no mistake of fact. There was no duress in a sense of an
F actual or threatened interference with the person or property of Woolwich as occurred in many of the cases (though I am of the view that the notion of duress or coercion should not be narrowly confined). There was not strictly a demand *colore officii* in the sense defined by Windeyer J. in *Mason* v. *State of New South Wales* (1959) 102 CLR 108, at page 140.

G It thus has to be accepted that none of the cases cited provides in its *ratio* a decisive basis upon which Woolwich can rely to support its claim. As Mr. Glick showed, *Campbell* v. *Hall* (1774) Cowp 204 which appears to be favourable to Woolwich, was really concerned with constitutional issues rather than with the present question. *Steele* v. *Williams* (1853) 8 Ex 625;
H *Great Western Railway Co.* v. *Sutton* (1869) LR 4 HL 226; *Morgan* v. *Palmer* (1824) 2 B & C 729; *Maskell* v. *Horner* [1915] 3 KB 106; *Sargood Brothers* v. *The Commonwealth and another* (1910) 11 CLR 258; and *Mason* v. *State of New South Wales* (1959) 102 CLR 108 were all concerned with claims for money paid under compulsion or *colore officii*.

I Yet, in my view, there is nothing in the authorities which precludes your Lordship's House from laying down that money paid by way of tax following an *ultra vires* demand by the Revenue is recoverable. On the other hand, there are in some cases statements of principle in general terms, which do not form part of the *ratio decidendi* and in others statements in dissenting judgments which it seems to me should be considered when the present question has to be resolved.

Thus Lord Mansfield C.J. in *Campbell* v. *Hall* (*supra*) at page 205, said:

> "The action is an action for money had and received; and it is brought upon this ground; namely, that the money was paid to the defendant without any consideration; the duty, for which, and in respect of which he received it, not having been imposed by lawful or sufficient authority to warrant the same."

Lord Mansfield said further in *Moses* v. *Macferlan* (1760) 2 Burr 1005, 1012:

> "In one word the gist of this kind of action [for money had and received] is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

In *Morgan* v. *Palmer* (1824) 2 B & C 729, Abbott C.J. said:

> "Then as to the last point. It has been well argued that the payment having been voluntary, it cannot be recovered back in an action for money had and received. I agree that such a consequence would have followed had the parties been on equal terms. But if one party has the power of saying to the other, 'that which you require shall not be done except upon the conditions which I choose to impose,' no person can contend that they stand upon any thing like an equal footing. Such was the situation of the parties to this action."

In *Steele* v. *Williams* (1853) 8 Ex 625, Martin B., at pages 632–633, said:

> "As to whether the payment was voluntary, that has in truth nothing to do with the case. It is the duty of a person to whom an Act of Parliament gives fees, to receive what is allowed, and nothing more. This is more like the case of money paid without consideration—to call it a voluntary payment is an abuse of language. If a person who was occupied a considerable time in a search gave an additional fee to the parish clerk, saying, 'I wish to make you some compensation for your time,' that would be a voluntary payment. But where a party says, 'I can charge you such a sum by virtue of an Act of Parliament,' it matters not whether the money is paid before or after the service rendered; if he is not entitled to claim it, the money may be recovered back."

In *Attorney-General* v. *Wilts. United Dairies Ltd.* (1921) 37 TLR 884, Atkin L.J., at page 887, said:

> "It makes no difference that the obligation to pay the money is expressed in the form of an agreement. It was illegal for the Food Controller to require such an agreement as a condition of any licence. It was illegal for him to enter into such an agreement. The agreement itself is not enforceable against the other contracting party; and if he had paid under it he could, having paid under protest, recover back the sums paid, as money had and received to his use."

Finally, amongst the English cases, I refer to Lord Wright's statement in *Fibrosa Spolka Akcyjina* v. *Fairbairn Lawson Combe Barbour Ltd.* [1943] AC 32, at page 61:

> "The claim was for money paid for a consideration which had failed. It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he

A should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."

There are passages from other common law jurisdictions. Thus in *Mason* B v. *State of New South Wales* (1959) 102 CLR 108, Sir Owen Dixon C.J. clearly had doubts as to whether it was right that money paid pursuant to an unlawful demand of the Crown should not be recoverable. Kitto J. considered it sufficient that:

> "The plaintiffs had quite enough compulsion upon them from the C terms of the Act itself, apart altogether from anything that may have been said or done by officers of Government. Under that compulsion they parted with their money."

This was a lone voice but his view reflects the sort of pressure which compels the taxpayer to pay even on an unlawful demand by the Revenue. A D similar lone voice is to be found in the recent judgments of the Supreme Court of Canada in *Air Canada* v. *British Columbia* (1989) 59 DLR (4th) 161, at pages 169–170. Extracts from the forceful judgment of Wilson J. have been set out by my noble and learned friends, Lord Keith of Kinkel and Lord Jauncey of Tullichettle. I repeat that they are part of a dissenting judgment but, if one is to consider what principle of law is to be applied in an E area where there is no direct authority of your Lordships' House, it is relevant to have regard to them.

At the end of the day I find that the statement of Holmes J. in *Atchison, Topeka & Santa Fe Railway Co.* v. *O'Connor* (1912) 223 US 280, to be particularly persuasive when considering the principle of law to be applied. F Holmes J. said:

> "It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that apart from special circumstances he cannot interfere by injunction with the state's collection of its revenues, an action at law to recover back what he has paid is the alternative left. Of course we are speaking of those G cases where the state is not put to an action if the citizen refuses to pay. In these latter he can interpose his objections by way of defence, but when, as is common, the state has a more summary remedy, such as distress, and the party indicates by protest that he is yielding to what he cannot prevent, courts sometimes perhaps have been a little too slow to recognize the implied duress under which payment is made. But even if H the state is driven to an action, if at the same time the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional, rights, by defence in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms.

I

> ...

> As appears from the decision below, the plaintiff could have had no certainty of ultimate success, and we are of opinion that it was not called upon to take the risk of having its contracts disputed and its business injured and of finding the tax more or less nearly doubled in case it

finally had to pay. In other words, we are of opinion that the payment was made under duress." A

With these passages in mind it is well to recall the circumstances in which Nolan J. found that Woolwich paid. They are set out strikingly in his judgment [1989] 1 WLR 137, at page 142(1): B

"The factors which induced Woolwich to make the payments are set out in paragraphs 12 to 16 of Mr. Mason's affidavit dated 1 December 1987 and may be summarised as follows. First and foremost, the requirements of the Regulations as amplified in communications from the revenue amounted on their face to lawful demands from the Crown. Woolwich would have expected any refusal of payment to lead to collection proceedings which would have been gravely embarrassing for Woolwich, the more so as it would have been the only building society refusing to pay. Any publicity suggesting that Woolwich might be in difficulty in meeting its financial obligations, or that alone amongst building societies it was pursuing a policy of confrontation with the revenue, might have damaging effects far outweighing Woolwich's prospects of success on the issue of principle. Secondly, Woolwich feared that if it failed in its legal arguments it might incur penalties. Thirdly, the three payments to which I have referred formed parts of larger quarterly payments, the other parts of which were agreed to have been correctly charged. At the time when the payments were made, it had not been possible to identify the amounts in dispute. Fourthly, Woolwich was not, of course, to know at the time of the payments that it would succeed in the judicial review proceedings. Had Woolwich failed in those proceedings, it would have faced a bill for interest, which would not have been deductible for tax purposes, in an amount far exceeding the net return which Woolwich could have obtained from investing the money withheld." C D E F

The Judge added that, if Woolwich had not paid, there might have been an assessment or a writ "...with the result in either case of highly undesirable publicity for Woolwich if it had withheld the very large sums claimed by the revenue to be due". There was an understandable fear by Woolwich of damage to its reputation. "I accept that, as a practical matter, Woolwich had little choice but to make the three payments". G

Although as I see it the facts do not fit easily into the existing category of duress or of claims *colore officii*, they shade into them. There is a common element of pressure which by analogy can be said to justify a claim for repayment. H

If I felt compelled to hold that the taxpayer in this case could not recover, I would share the no little regret expressed by my noble and learned friend, Lord Jauncey of Tullichettle. With great deference to him and to Lord Keith of Kinkel I do not, however, feel so constrained by authority, by statute or by principle. I

I find it quite unacceptable in principle that the common law should have no remedy for a taxpayer who has paid large sums or any sum of money to the Revenue when those sums have been demanded pursuant to an

(1) Pages 271G/272B *ante*.

A invalid Regulation and retained free of interest pending a decision of the courts.

It is said that *William Whiteley Ltd.* v. *The King* (1909) 101 LT 741 and *Twyford* v *Manchester Corporation* [1946] Ch 236 are authorities to the contrary. I consider that they are cases where payments were made to close a
B transaction and are to be treated as cases of voluntary payments. If they were not, in my view they were wrongly decided and they should not influence your Lordships' decision.

Accordingly, I consider that Glidewell L.J. and Butler-Sloss L.J. were right to conclude that money paid to the Revenue pursuant to a demand
C which was *ultra vires* can be recovered as money had and received. The money was repayable immediately it was paid.

I do not, however, agree that this principle cannot apply where there is a mistake of law. That is the situation where the relief is most likely to be needed and, if it is excluded, not much is left.

D

This is not a case where the demand was based on an erroneous interpretation of legislation by the Revenue; my provisional view is that there is no distinction between such a case and a case like the present where the demand is based on an invalid Regulation and is, therefore, *ultra vires*. That does not have to be decided in this case, nor is it necessary to consider what
E defences would be open to such a claim for recovery of the money paid if it lay.

My Lords, for the reasons given I would, however, dismiss this appeal.

Appeal dismissed, with costs.

F

[Solicitors:—Solicitor of Inland Revenue; Messrs. Clifford Chance.]

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