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## The Presumption of Legal Knowledge

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## THE PRESUMPTION OF LEGAL KNOWLEDGE

BY FREDERICK G. MCKEAN, JR.\*

Is a subsidiary assertion contained in a lawyer's argument in support of a legal point, which point has been expressly overruled by the court wherein it was raised, authority for an irrebuttable presumption of law? To state the proposition would seem to refute it, and yet, as will be seen later, various authorities have taken that very position and assert that every man is presumed to know the law, and some aver that such presumption is conclusive, a principle which, if carried to its logical conclusion, would render the judges of inferior courts liable to impeachment when reversed on questions of law.

Frequently the presumption is stated to be the equivalent of the maxim, *Ignorantia legis neminem excusat*, which is a very different proposition. The general rule that ignorance of the law excuses no one, is sanctioned by both the Anglo-American and Roman or Civil law systems.<sup>1</sup> It is not rooted in dogma, but is based upon considerations of expediency and necessity, the public advantages of the rule vastly outweighing occasional individual inconveniences.<sup>2</sup> As Professor Leonard has said, in discussing another phase of the law,

Human customs everywhere fit themselves to the law. As a rule whoever follows these customs may be sure of not offending the law even if he ignores the statutes and the other local forms of law. Only in this way can the ordinary man, to whom all the rules are not accessible or intelligible in practice, escape the disagreeable consequences of ignoring the law.<sup>3</sup>

The dogmatic fiction that every one is presumed to know the law is not essential as a support of the maxim of inexcusable ignorance, and, it is submitted, is not a part of the *ratio decidendi* of cases decided thereunder. The justification for its creation is stated by the anonymous writer of the article "Fictions," in the Encyclopaedia Britannica, to be "that the presumption that every one knows the law was invented to reconcile the rule that ignorance is no excuse for crime, with the moral common-place that it is unfair to punish a man for violating a law, of

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<sup>1</sup> D. 22, 6, 9; Spanish Civil Code, art. 2; ERSKINE PRINCIPLES OF THE LAWS OF SCOTLAND, 1, 1, 6; SALMOND, JURISPRUDENCE, 147.

<sup>2</sup> See, however, the criticism of the maxim *ignorantia legis non excusat*, as a "decrepit doctrine unsupportable on principle, and unjust in its operation," in 32 HARV. L. REV. 283-285.

<sup>3</sup> LEONARD, THE VOCATION OF AMERICA FOR THE SCIENCE OF ROMAN LAW, 26 HARV. L. REV. 389, 407.

whose existence he is unaware." In other words a fiction which, as we shall see, has been discountenanced by many, is offered as a specious argument in favor of a widely recognized doctrine which needs no such basis. Its universal form has led a New York court to hold, contrary to most authorities, that advice of counsel is not admissible as evidence of probable cause in an action for malicious prosecution, inasmuch as "the defendant was bound to know the law."<sup>4</sup> While Mr. Justice Holmes seems to adopt the maxim of presumptive legal knowledge;<sup>5</sup> he, it is conceived, would have considered this as one of the cases where courts will not sacrifice good sense to a syllogism;<sup>6</sup> and if we accept the common translation of the maxim, *regula pro lege si deficit lex*: when the law is deficient the maxim rules; it is submitted that the doctrine as developed in the courts of common law of advice of counsel as a defence, leaves no gap to be filled by the fictitious ascription of legal knowledge.

It is practically a universal rule that ignorance of the law is no excuse for infractions of the criminal code, and in most instance where that principle is applied, the result would be the same were the presumption of knowledge, (which some authorities aver to be its equivalent), substituted for the rule which, it is conceived, is the correct one. Where, however, it is shown that the defendant in a criminal case has made a mistake of fact, which constitutes a good defence, the circumstance that such error of fact is due to a mistake of law does not detract from the validity of the defence; which would be the case were the presumption of knowledge deemed to be in force and applicable. Thus, where a criminal statute has been declared unconstitutional, and a breach thereafter has been committed, and subsequent thereto said statute has been held constitutional, a prosecution for such breach cannot be maintained.<sup>7</sup> And a bona fide belief that a defendant takes what is his own, or what he has a right to take, has been held to be a good defence in prosecutions for robbery or larceny.<sup>8</sup> So also, wherever a specific intent is an essential ingredient of a crime, and ignorance of law will refute the existence of such intent, such ignorance may be shown.<sup>9</sup>

<sup>4</sup> Hazzard v. Flurry, 120 N. Y. 223. (1890).

<sup>5</sup> HOLMES, THE COMMON LAW, 47, 48, 125, 126.

<sup>6</sup> Id. 36.

<sup>7</sup> State v. O'Neil, 147 Iowa 513, 126 N. W. 454 (1910). Brent v. State, 43 Ala. 297, 302 (1869) (*Semble*).

<sup>8</sup> Com. v. Stebbins, 74 Mass. 492 (1857); People v. Husband. 36 Mich. 306 (1877); Rex. v. Hall, 3 C. & P. 409, 14 E. C. L. 635 (1828); Queen v. Reed, Car. & Mar. 398 (1841).

<sup>9</sup> State v. O'Neil, 147 Iowa, 513, 33 L. R. A. N. S. 788 (1910); Com. v. Stebbins 74 Mass. 492 (1857); Vogel v. Brown, 201 Mass. 261. 87 N. E. 686 (1909); People v. Husband, 36 Mich. 306 (1877); Rex. v. Hall, 3 C. & P. 409, 14 E. C. L. 635 (1828); Queen v. Reed, Car. & Mar. 398 (1841); KEENER, QUASI-CON-

While a statute takes effect even in localities too remote to make any knowledge of its existence possible;<sup>10</sup> it is conceived that where there is an infraction of a new criminal law, which does not amount to a breach of current ethical standards, ignorance of such law would be so far admissible in extenuation that courts would impose a merely nominal penalty or suspend sentence. And where the law is not settled, or is obscure, it has been held that the maxim *ignorantia legis* etc., is not applicable, for "To give it any force in such instance would be to turn it from its rational and original purpose, and to convert it into an instrument of injustice."<sup>11</sup>

The rule *ignorantia legis neminem excusat* is in form a doctrine that a man cannot escape liability for breach of law by a plea of ignorance thereof. In criminal cases it is a great boon to the public prosecutor, and in civil cases it is a great protection to private rights. It applies to the blameworthy and is not intended as a trap for the unwary or a tool for the crafty. Liability for torts is sometimes attributed to ascribed legal knowledge, but it is submitted that it is predicated upon considerations of community or social expediency, public policy requiring that harms done in violation of legal duty shall be compensated by the tortfeasor. Ignorance of the law, even of private rights of ownership, (which Lord Westbury in a frequently quoted opinion says is not included in the maxim, "*Ignorantia juris haud excusat*"),<sup>12</sup> is not permitted to disturb the security of legal rights as a plea of immunity for infringement of personal rights. Therefore, the *dictum* of Lord Chancellor King that "the maxim of law, *Ignorantia juris non excusat* does not hold in civil cases"<sup>13</sup> is patently incorrect. In cases of advice of counsel as a defence for abuse of process or malicious prosecution,<sup>14</sup> the rule of *ignorantia legis* etc., evidently yields to the weightier principle that parties should invoke the arm of the law, in lieu of taking the law into their own hands. Any other rule would tend to discourage public-spirited citizens from co-operating with the government in checking crime, and deter the law-abiding from pursuing legal remedies in vindication of private rights.

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TRACTS, 87-79; 1 WHARTON, CRIMINAL LAW (10th ed.) §85a. *Contra*, Reynolds v. United States, 98 U. S. 145, 167 (1878) (*dictum*).

<sup>10</sup> Rhodes v. Sragent, 17 Cal. App. 58, 118 Pac. 727 (1911).

<sup>11</sup> State v. Cutter, 36 N. J. L. 125, 127 (1873).

<sup>12</sup> Cooper v. Phibbs, (1867) L. R. 2 H. L. 149.

<sup>13</sup> Lansdowne v. Lansdowne, 2 Jac. & W. 205, Mos. 364 (1730).

<sup>14</sup> Garnier v. Bernard, 45 La. Ann. 1265 (1893); Black v. Buckingham, 174 Mass. 102 (1899); Alexander v. Harrison, 38 Mo. 258, 90 Am. Dec. 285 (1866); Turner v. O'Brien, 5 Neb. 542 (1877); Madison v. Railroad Co., 147 Pa. 509 (1892); Goldstein v. Foulkes, 19 R. I. 291 (1895); *Compare* Hogg v. Pickney, 16 S. C. 387 (1881).—*Contra*, Hazzard v. Flurry, 120 N. Y. 223 (1890).

While ignorance of the law is inadmissible as a plea by way of confession and avoidance in ordinary actions of tort, it does not fetter the victim of a tort, as would be the case if the fictitious presumption, which is the subject of these notes, were deemed to be applicable to him. Hence we find that a release of claim for damages in tort, obtained through a misrepresentation of law, or by taking advantage of the releasor's ignorance of his legal rights, is voidable.<sup>15</sup> An extreme extension of this principle is afforded by the case of *Clark v. Clark*,<sup>16</sup> wherein a divided court relieved against a settlement of tort claim, because of the complainant's ignorance that the statute of limitations barred the claim which he had been induced to settle. "Ignorance of the law does not excuse from compliance with the same," says the Spanish Civil Code.<sup>17</sup> Here again we find the concept of responsibility for breach of law, and not a requirement of legal omniscience. The language of the Scotch law points this out more explicitly, "After a law is published, no pretence of ignorance can excuse the breach of it. L. 9. pr. et. 3. de jure et fact. ign."<sup>18</sup> Most authorities, even those that cling to the fiction of legal omniscience, concede that there are situations in which relief is afforded or rights are conferred where the law is not accurately known. Thus we find instruments reformed for mistakes of law such as, contracts,<sup>19</sup> deeds,<sup>20</sup> mortgages,<sup>21</sup> notes,<sup>22</sup> and releases.<sup>23</sup> And instruments have been cancelled, set aside, or action therein enjoined, for mistake of law,<sup>24</sup> where there are no intervening equities. In some

<sup>15</sup> *Rockwell v. Traction Co.*, 25 App. Cas. D. C. 98, 116 (1905); *Jones v. Railway Co.* 72 Miss. 22, 19 South. 105 (1904).

<sup>16</sup> 55 N. J. Eq. 814, 42 Atl. 98 (1896).

<sup>17</sup> WALTON, CIVIL LAW IN SPAIN AND SPANISH AMERICA, art. 2.

<sup>18</sup> ERSKINE, PRINCIPLES OF THE LAWS OF SCOTLAND, 1, 1, 6.

<sup>19</sup> *Philippine Sugar & Co. v. Philippine Islands*, 247 U. S. 385 (1918); *Parks v. Blodgett*, 64 Conn. 28 (1894); *Bonbright v. Bonbright*, 123 Iowa 305, 98 N. W. 784 (1904); *Eastman v. Assn.* 65 N. H. 176 (1889); *Pitcher v. Hennesey*, 48 N. Y. 415 (1872); *Maher v. Ins. Co.* 67 N. Y. 283 (1876); *Bank v. Mann*, 100 Wis. 596, 76 N. W. 777 (1898).

<sup>20</sup> *Philippine Sugar & Co. v. Philippine Islands*, (*supra*); *Carrel v. McMurray*, 136 Fed. 661 (1905); *Orr v. Echols*, 119 Ala. 340 (1898); *Griffith v. Sebastian Co.* 49 Ark. 24 (1886); *Williams v. Hamilton*, 104 Iowa, 423 (1898); *Cooke v. Husbands*, 11 Md. 492 (1857); *Wall v. Meilke*, 89 Minn. 232, 94 N. W. 688 (1903); *Corrigan v. Tierney*, 100 Mo. 276 (1889); *Trusdell v. Lehman*, 47 N. J. Eq. 218 (1890); *Clayton v. Freet*, 10 Ohio St. 544 (1860); *Kornegay v. Everett*, 99 N. C. 30 (1888); *Beardsley v. Knight*, 10 Vt. 185, 33 Am. Dec. 193 (1838); *Biggs v. Bailey*, 49 W. Va. 188, 38 S. E. 499 (1901).

<sup>21</sup> *Ryder v. Ryder*, 19 R. I. 188 (1895).

<sup>22</sup> *Richmond v. Street Railway Co.*, 44 Ore. 48, 74 Pac. 333 (1903).

<sup>23</sup> *Rauen v. Insurance Co.* 129 Iowa 725, 106 N. W. 198 (1906).

<sup>24</sup> *Wheeler v. Smith*, 9 Howard (U. S.) 55 (1850); *Griswold v. Hazard*, 141 U. S. 260, 284 (1890); *McCormick v. Miller*, 102, Ill. 208, 40 Am. Rep. 577 (1882); *Freeman v. Curtis*, 51 Me. 140, 81 Am. Dec. 564 (1862); *Wilson v. Insurance Co.*, 60 Md. 150 (1883); *Blair v. Railroad Co.* 89 Mo. 383, 1 S. W. 350 (1886); *Toland v. Corey*, 6 Utah 396, 24 Pac. 190 (1890); *Broderick v. Broderick*, 1 P. Wm. S. 239 (1713); *Lansdowne v. Lansdowne*, 2 Jac. & W. 205, Mos. 364 (1730).

jurisdictions where this is done, the courts assimilate mistakes as to private rights to mistakes of fact, but this position is incompatible with the doctrine that a man infringes personal rights at his peril.<sup>25</sup> Another exception to the doctrine of legal knowledge is found in those cases in which relief has been granted, where under a mistake of law as to his title, a person has purchased or agreed to purchase his own title.<sup>26</sup> While such decisions, as those just referred to, are consistent with the theory that ignorance of the law is inexcusable only in the blameworthy and that there is no presumption of legal knowledge, it is conceded that they are also consistent with the rulings of those jurisdictions where it is held that there is such a presumption, but that private legal rights are not within the meaning of its doctrine.

If we utilize the old adage, "The exception proves the rule," and interpret the verb in accordance with its primary meaning of "tests" and not in accordance with the secondary and too often fallacious signification of "establishes," we will observe so many instances where the doctrine of imputed legal knowledge has been abridged or discarded, even in jurisdictions which dogmatically assert that the presumption is conclusive or irributable, as to warrant the belief that no such presumption has a legitimate place in Anglo-American jurisprudence.

A knowledge of law will not be presumed in order to charge a party with bad faith, in a case where a plaintiff brings suit upon a defendant's promise to pay, in consideration of the former's forbearance to sue;<sup>27</sup> nor will such presumption be raised to settle the question whether or not a man has acted corruptly.<sup>28</sup> *Brent v. State*,<sup>29</sup> abridges the rule by holding that "it must be confined to presuming that all persons know the law exists, but not that they are presumed to know how the courts will construe it, and whether, if it be a statute, it will, or will not be held to be constitutional." *Cobb v. Coleman*,<sup>30</sup> concedes that ignorance of the unconstitutionality of an act is excusable, and relieves against mistake caused by proceeding under such an act. *Evants v. Strode*,<sup>31</sup> lays down the proposition that "the presumption that every one knows the law . . . should be permitted to be rebutted by proof, and relief granted against a mistake of Law." *Allen v. Allen*<sup>32</sup> avers that "Every one is conclusively

<sup>25</sup> HOLMES, THE COMMON LAW, 97, 98, 99, Ill.; KEENER, QUASI-CONTRACTS, 90 91; SALMOND, JURISPRUDENCE, 147.

<sup>26</sup> *Freemen v. Curtis*, 51 Me. 140, 81 Am. Dec. 564 (1862); *Houston v. Railway Co.* 109 Minn. 273, 123 N. W. 922, 18 Ann. Cas. 325 (1909).

<sup>27</sup> *Lockwood v. Title Ins. Co.* 73 Misc. 296, 130 N. Y. 824 (1911).

<sup>28</sup> *Vogel v. Brown*, 201 Mass. 261, 87 N. E. 668 (1909).

<sup>29</sup> 43 Ala. 297, 302 (1869).

<sup>30</sup> 14 Tex. 594 (1855).

<sup>31</sup> 15 Ohio 480, 488 (1842).

<sup>32</sup> 95 Cal. 184, 16 L. R. A. 646 (1892).

presumed to know the law"; but it is submitted that this California rule is repealed, by implication by the Code provision: "Mistakes may be either of fact or law."<sup>33</sup> *Cessante ratione legis, cessat ipsa lex.*

Rules developed or tolerated in jurisprudence, are binding where they have intrinsic merit and apply to existing conditions, but where, in process of change, the reasons which constitute their sanction cease to exist, such rules should no longer be regarded as binding precedents, as they would thereby become mere arbitrary static obstructions, clogging the progress of the law.

In his brilliant treatise on quasi-contracts, Professor Keener attributes much of the doctrine that money paid under a mistake of law is not recoverable, to the maxim "that every one is presumed to know the law."<sup>34</sup> He emphatically says that there is no presumption that every one knows the law, and quotes various judges to the same effect, among them Chief Justice Abbott and Mr. Justice Maule. The former, in charging a jury, exclaimed: "God forbid that it should be imagined, that an attorney, or a counsel, or even a judge, is bound to know all the law."<sup>35</sup> The latter held, "There is no presumption in this country that every person knows the law. It would be contrary to common sense."<sup>36</sup> Mr. Justice Williams, in a case not included among those cited by the learned professor in his attack upon the above presumption, was evidently of the same opinion, for he is recorded as saying, "It is a far-fetched and somewhat startling supposition that the testator must have been conversant with Coke upon Littleton, and the profound maxim, *Nemo est haeres viventis.*"<sup>37</sup>

However much there may be of the doctrine that money paid under a mistake of law is not recoverable, that may be attributed to the presumption of knowledge of the law, it is surmised that it did not derive solely therefrom, for there are passages in the Roman law to the effect that such is the general rule.<sup>38</sup> This general rule, in Roman jurisprudence, was far from being universal in its application for the following classes were relieved from the consequences of errors of law: minors;<sup>39</sup> women, sometimes;<sup>40</sup> soldiers;<sup>41</sup> persons who had had no opportunity of obtain-

<sup>33</sup> 96 Cal. 655, 31 Am. St. Rep. 247, 31 Pac. 623 (1892).

<sup>34</sup> QUASI-CONTRACTS, 87.

<sup>35</sup> *Montrion v. Jefferys*, 2 C. & P. 113, 116, 12 E. C. L. 479, 481 (1825).

<sup>36</sup> *Martindale v. Falkner*, 2 C. B. 706, 719, 135 English Reprint, 1124, 1129 (1846).

<sup>37</sup> *Doe ex dem. Winter v. Perrott*, 6 Mann. & G. 314, 334, 46 E. C. L. 314, 333 (1843).

<sup>38</sup> C. 4, 5, 6; C. 1, 18, 10; D. 12, 6, 1, 1; HUNTER, ROMAN LAW (4th ed.), 658, 660.

<sup>39</sup> D. 22, 6, 10; D. 22, 6, 9, pr.; HUNTER, 660.

<sup>40</sup> D. 22, 6, 9, pr.; HUNTER, 660.

<sup>41</sup> D. 22, 6, 9, 1; HUNTER, 660.

ing the advice of a jurisconsult, and who were not themselves acquainted with the law;<sup>42</sup> peasants or like ignorant persons.<sup>43</sup> It is not suggested that these passages in the Roman law are authorities for Lord Ellenborough's views; but it is recalled that from the days when the Lombard Vacarius founded the first English law school at Oxford, down through Bracton, Kent and Story, much Roman law has been absorbed without formally accepting it; and there is a possibility that the passage "*Cum quis ignorans indebitam persolverit, cessat repetitio*,"<sup>44</sup> may have left its impression upon Lord Ellenborough's mind.

The doctrine that money is not recoverable where paid under mistake of law, has been attributed to the decision in *Bilbie v. Lumley*,<sup>45</sup> the material portions of which have been reported as follows:

Lord Ellenborough, C. J. asked the plaintiff's counsel whether he could find any case where if a party paid money to another voluntarily with a full knowledge of all the facts in the case, he could recover it back again on account of his ignorance of the law? (No answer being given, his Lordship continued), . . . Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might be carried.

Dean Keener's conclusion is that *Bilbie v. Lumley* not only introduced the general principle that money is not recoverable when paid under mistake of law, but further established that the doctrine includes, and does not except, cases where it would be against conscience for the payee to retain the money.<sup>46</sup> He is supported in the conclusion that money paid through error of law is irreclaimable even where its retention would be against conscience, by Sir William Markley;<sup>47</sup> Sir Frederick Pollock;<sup>48</sup> Professor Pomeroy;<sup>49</sup> and Professor Salmond.<sup>50</sup>

With all due deference to the accomplished dean, who has done so much to clarify the law of quasi-contracts, it is submitted that, while his criticism of the reasoning in *Bilbie v. Lumley* is sound, the result reached by the Chief Justice is correct; and it is not conceded that such result necessarily excludes cases where it would be against conscience for a payee to retain money erroneously paid. It is difficult to see why a mistake of law, in itself, should be a ground of action. Courts exist to enforce legal rights and redress legal wrongs, but it is neither legis-

<sup>42</sup> D. 22, 6, 3; HUNTER, 660.

<sup>43</sup> D. 22, 3, 25, 1; HUNTER, 660.

<sup>44</sup> C. 1, 18, 10.

<sup>45</sup> 2 East 469, 102 English Reprint 448 (1802).

<sup>46</sup> QUASI-CONTRACTS, 85.

<sup>47</sup> ELEMENTS OF LAW, (5th ed.) sect. 267.

<sup>48</sup> WALD'S POLLOCK ON CONTRACTS, (WILLISTON'S ED.) 579.

<sup>49</sup> 2 EQUITY JURISPRUDENCE, (3d. ed.) 851.

<sup>50</sup> JURISPRUDENCE, 147 n. 1.

lative nor judicial policy to encourage litigation. Hence a man cannot impose himself upon another as his creditor. *Volenti non fit injuria*.<sup>51</sup> On the other hand we need not subscribe to the view that as a general rule, "money paid under mistake of law cannot be recovered when it is against conscience for the defendant to retain the money so paid."<sup>52</sup> Nor need we unreservedly agree with the eminent text-book writer who states, "While no amount of mere negligence avoids the right to recover back money paid under a mistake of fact, money paid under a mistake of law cannot in any case be recovered,"<sup>53</sup> or assent to the latter part of the statement of the learned professor, who says of the rule *ignorantia legis neminem excusat*:<sup>54</sup> "The rule is not limited to civil and criminal liability, but extends to all other departments of the law. It prevents, for example, the recovery of money paid under a mistake of law, though that which is paid under a mistake of fact may be reclaimed."

While not within the scope of these notes, it may here be observed that, broadly speaking, money paid under mistake of fact is recoverable only where the mistake was material and payment made under a belief that it was due, without consideration to one who is not a bona fide holder for value and retention by whom would be against conscience.<sup>55</sup>

The most widely accepted rule respecting the recovery of money paid under a mistake of law has been codified in Georgia, (Civil Code, Sect. 4317), in the following terms:

Payment of taxes or other claims, made through ignorance of the law, or where the facts are all known and there is no misplaced confidence and no artifice, deception, or fraudulent practice used by the other part, are deemed voluntary, and cannot be recovered back, unless made under an urgent and immediate necessity therefor, or to release person or property from detention, or to prevent an immediate seizure of person or property. Filing a protest at the time of payment does not change the rule.<sup>56</sup>

There is also authority for the rule that money paid by mistake of law may be had in an action for money had and received, where there is a full knowledge of all the facts, and the defendant cannot in good con-

<sup>51</sup> It is observed that MARKLEY'S ELEMENTS OF LAW (5th ed.) sect. 267, finds no reason for a distinction between errors of law and errors of fact, in erroneous payment of money.

<sup>52</sup> KEENER, QUASI-CONTRACTS, 85.

<sup>53</sup> WALD'S POLLOCK ON CONTRACTS (WILLISTON'S ED.), 456.

<sup>54</sup> SALMOND, JURISPRUDENCE, §147 n. 1.

<sup>55</sup> Bell v. Shepard, 202 N. Y. 247 (1911); Price v. Neal, 3 Burr, 1354, 1 W. Bl. 390, 97 English Reprint 87 (1762); KEENER, QUASI-CONTRACTS, chapter 2; WALD'S POLLOCK ON CONTRACTS (WILLISTON'S ED.), 564.

<sup>56</sup> McCarty v. Mobley, 14 Ga. App. 225, 228 (1914); Kempton v. Studebaker, 14 Idaho 552, 125 Am. St. Rep. 185, 94 Pac. 1039 (1908); Beck v. Bank, 161 N. C. 201 (1912); Haradway v. Railway, 90 S. C. 475 (1912); Scott v. Slaughter, 35 Tex. Civ. App. 524 (1904); KEENER, QUASI-CONTRACTS, 85 n. 1; Accord.

science retain the same.<sup>57</sup> Neither rule requires the presumption of legal knowledge for its support. As a matter of fact, the second rule is in square collision with such a presumption. It is hardly necessary to observe that mistakes of foreign law are treated as mistakes of fact;<sup>58</sup> and this doctrine has been extended to mistakes of the law of the forum, in cases of non-resident parties litigant.<sup>59</sup>

Many jurists state that, as a rule, money paid by mistake is recoverable, but that money paid by mistake of law is an exception to the rule. This exception reminds us of sundry exceptions in the Latin grammar, in that it has its own recognized exceptions. The best defined of these exceptions to an exception, are the cases of moneys paid by public officers or officers of the court, under mistake of law, which are recoverable;<sup>60</sup> and moneys paid to a public officer under mistake of law, which are likewise reclaimable.<sup>61</sup> The text-book statements that money paid through error of law is not recoverable, even where it is against conscience to retain it, are not universally correct, for we learn that in England, where the rule is said to have originated, that

It is not accurate to say that relief can never be given in respect of a mistake of law. It was laid down by Turner, L. J. in *Stone v. Godfrey*,<sup>62</sup> that this court (Chancery Division) has power to relieve against mistakes of law as well as against mistakes in fact, and this statement was recognized in the judgments of the Court of Appeals in *Rogers v. Ingham*,<sup>63</sup> and particularly by Mellish, L. J., who refers to it and explains it thus: 'That is to say, if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it.'<sup>64</sup>

The Code Napoleon makes no distinction between errors of fact and errors of law, as grounds for relief.<sup>65</sup> Connecticut and Kentucky take

<sup>57</sup> *Northrop v. Graves*, 19 Conn. 548, 50 Am. Dec. 264 (1849); *Culbreath v. Culbreath*, 7 Ga. 64, 50 Am. Dec. 479 (1843); *Spalding v. Lebanon*, 156 Ky. 37, 160 S. W. 751 (1913); *Cormick v. Rur. Mun. of Carmichael*, (1923) 4 Dominion L. R. 994; *Rogers v. Ingham*, (1876) 3 Ch. D. 351, 357; *Allcard v. Walker*, (1896) 2 Ch. D. 369, 65 L. J. Ch. 660.

<sup>58</sup> *Lyle v. Shinnebarger*, 17 Mo. App. 66 (1885).

<sup>59</sup> *Osincup v. Henthorn*, 89 Kan. 58, 130 Pac. 652 (1913).

<sup>60</sup> *Railroad v. United States*, 164 U. S. 190 (1896); *State v. Young*, 134 Iowa 505, 110 N. W. 292 (1907); *Allegheny County v. Grier*, 179 Pa. 639 (1897); *London Guarantee v. Henderson*, 23 Dominion L. R. (1915); *In re Opera Limited*, (1891) 2 Ch. D. 154; *Finch v. Smith*, (1915) 2 Ch. 96; *In re Birbeck etc. Soc.*, (1915) 1 Ch. 91.

<sup>61</sup> KEENER, *QUASI-CONTRACTS*, 94, 95; WALD'S *POLLOCK ON CONTRACTS* (WILKINSON'S ED.) 580.

<sup>62</sup> 5 D. M. & G. 76, 90 (1854).

<sup>63</sup> (1876) 3 Ch. D. 351, 357.

<sup>64</sup> *Allcard v. Walker* (1876) 2 Ch. D. 369, 65 L. J. Ch. 660.

<sup>65</sup> Arts. 1235, 1238, 1377, 1378, 1109, 1110.

the same position as the French Civil Code;<sup>66</sup> and, as a general rule of private law, mistake as such, has no legal effect anywhere<sup>67</sup>—some other factor is needed to make it relevant and material.

The authorities that have asserted that every man is presumed to know the law are numerous, both text-books and treatises,<sup>68</sup> and decisions.<sup>69</sup>

In Volume I of Sir Matthew Hale's Pleas of the Crown, we find it laid down at page 42 that:

Ignorance of the municipal law of the kingdom, or of the penalty thereby inflicted upon offenders, doth not excuse any, that is of the age of discretion and *compos mentis*, from the penalty of the breach of it; because every person of the age of discretion and *compos mentis* is bound to know the law, and presumed so to do: *Ignorantia eorum, quae quis scire tenetur, non excusat* (a).

The note (a) reads: Plowd. 343a. Further on, at page 499 of his admirable work, the learned Chief Justice concedes that "*ignorantis legis* doth in some cases excuse a judge." Turning to the reference to Plowden's Reports, it appears, according to the version of 75 English Reprint, 520, that in the case of *Britt v. Rigden*, decided in the year 10 Elizabeth, that the point cited by Sir Matthew, is thus reported:

But because I heard all the arguments very attentively when this demurrer was argued except the argument of Manwood, part of which I only heard, I shall repeat some things which were said by the Sergeants Loveless and Manwood in their first arguments. 1 point. For the defendant *Whether lands purchased after the making of a will shall pass by the devise of all his lands*. Negatur. S. P. Fitzgib. 229. Strange 26. Swinb. 141, 194. Godolph. Orph. Leg. 307. 6. 389. *Treat. of Wills* 15, 28. Nels. Lex. Testam. 480. Gilb. Law of Devises 85, 149. 150.—And as to the first point Manwood held, that by the words in the devise of *all his lands and tenements*, as well the 12 acres as the 10 acres should pass. For he said, it is to be presumed that no subject of this realm is misconusant of the law whereby he is governed. For ignorance of the law excuses none. . . .

<sup>66</sup> See cases cited in note 57, *ante*.

<sup>67</sup> WALD'S POLLOCK ON CONTRACTS (WILLISTON'S ED.) 564.

<sup>68</sup> E. g.—IV BLACKSTONE, COM. 27; BROOME, LEGAL MAXIMS, (8th Am. ed.) 253; 1 HALE, PLEAS TO THE CROWN; HOLMES, THE COMMON LAW, 47, 48, 125; 1 JONES, EVIDENCE (HORWITZ' 54.), 23; SALMOND, JURISPRUDENCE, 147; 2 POMEROY, EQUITY JURISPRUDENCE (3d ed.) 841 n. 2, 842, 877; 1 TAYLOR, EVIDENCE (9th ed.) 80; WALD'S POLLOCK ON CONTRACTS, (WILLISTON'S ED.) 574, 575.

<sup>69</sup> E. g.—*Yates v. Royal Insurance Co.* 200 Ill. 202, 65 N. E. 726 (1902); *State v. Young*, 134 Iowa 505, 110 N. W. 92 (1907); *Motherway v. Wall*, 168 Mass. 333 (1896); *Hazzard v. Flurry*, 120 N. Y. 223 (1890); *Scott v. Ford*, 45 Ore. 531, 536 (1904); *Scott v. Slaughter*, 35 Tex. Civ. App. 524 (1904); *Bilbie v. Lumley*, 2 East 469, 102 English Reprint, 448 (1802).

The report shows that Sergeant Manwood was overruled upon the first point.

Blackstone's Commentaries, (IV, 27), cites Plowden, 343, as authority for the position that "a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence."

Broom's Legal Maxims, (8th Am. ed.) 253 cites 2 Rep. 3b and 1 Plowd. 343, as authorities for stating that there is a "presumption of legal knowledge." The first reference is to *Manser's Case*, 2 Coke Rep. 3a, 3b, 76 English Reprint 392 (1584), which does not sustain the proposition that there is such a presumption. The second reference is to Sergeant Manwood's argument.

III Greenleaf's Evidence (16th ed.) 20, avers that "every person is bound to know the law of the land, regulating his conduct, and he is presumed so to do." The accomplished doctor cites 1 Hale P. C. 42; Doctor and Student, Dial. 2, c. 46; 2 Co. 3b; *Bilbie v. Lumley*, 2 East 469; Co. Litt. Pref. p. 36, and Broom's Maxims, p. 122; in support of his position. The reference to Hale, has already been discussed with its citation of the case in Plowden containing an *ex parte* statement alleging that there is a presumption of legal knowledge, made by Sergeant Manwood, in a losing argument, 2 Co. 3b, refers to *Manser's Case*, which, as already stated, makes no allusion to any such presumption as is mentioned. . . *Bilbie v. Lumley* does contain such a statement couched in language closely approximating that of Sergeant Manwood, but the proposition for which that case has been cited, as has been previously shown, has been repudiated in England.<sup>70</sup> Coke upon Littleton at page 36 of the preface, merely observes, "*Ignorantia juris non excusat*, Ignorance of the law excuseth not." Broom's Legal Maxims, as just noted, merely refers to 1 Plowden 343 and 2 Coke's reports 3a, 3b, both of which have been previously discussed. The subject-matter of the reference to the canonist, Saint Germain's Doctor and Student, Dialogue 2, c. 46, has largely to do with a law student discussing the criminal law with a doctor of divinity. The chapter cited begins as follows:

Where ignorance of the law excuseth in the law of England, and where not.

Ignorance of the law (though it be invincible) doth not excuse as to the law but in few cases: for every man is bound at his peril to take knowledge what the law of the realm is, as well the law made by statute as the common law: but ignorance of the deed, which may be called the ignorance of the truth of the deed, may excuse in many cases.

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<sup>70</sup> See cases cited in notes 62, 63 and 64, *ante*.

Doct. I put the cases that a statute penal be made, etc.

It is submitted that the doctrine laid down by Dr. Saint Germain, amounts to this, that where ignorance of the law does not exonerate the wrongdoer, he acts at his peril—which is law to this day.

The weight of the argument of Sergeant Manwood, as authority, has often been misapprehended. An extreme instance of this is found in 2 Pomeroy's Equity Jurisprudence (3d. ed), at page 1480, where we find note 2 observing "See 1 Plowd. 342, per Manwood, J.: 'It is to be presumed that no subject of this realm is miscognizant of the law whereby he is governed. Ignorance of the law excuseth none.'" A curious instance of an able and much quoted authority mistaking counsel for a judge.<sup>71</sup>

The life of the law has been experience, and experience has taught that the presumption, discussed in these notes, has been abridged or ignored, and even discarded, so many times, that it has proved unworkable. It is hard to find a decision in which the doctrine has been asserted, where some other reason, founded upon considerations of justice or expediency, does not support the conclusion reached, consequently there is no necessity for its continued recognition, and it should be permanently discarded. Its repudiation would not affect such rules, as are generally accepted, for which it has been claimed to be a partial justification. Repealing one reason for a rule, does not repeal such rule, where other reasons sustain its doctrine. "If several reasons concur together, and only one ceases, the others do not immediately expire, or become less able to support the Efficiency of the Law."<sup>72</sup>

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<sup>71</sup> At page 103 of his COMMON LAW, Mr. Justice Holmes calls attention to a similar error on the part of Sir William Blackstone.

<sup>72</sup> VON PUFENDORF'S LAW OF NATURE AND NATIONS, v. 12, 10 (KENNETT'S TRANSLATION).