

A PLEA FOR RESTITUTION*

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My purpose in this paper is not to recapitulate the criticisms that have been made as to the chaotic nature of the existing law of quasi-contract¹ nor to make yet another desperate attempt to re-classify the intractable materials that have been traditionally collected in one way or another under that venerable rubric.² My object is more simple. At least more simple to state. It is to suggest that the time is ripe for the conscious reception and recognition of a third main branch of remedial justice. I believe that the dichotomy of torts and contract has become increasingly inadequate and that this dualism needs to be replaced by a trinity: torts, contract and restitution.

Perhaps unjust enrichment is a better term; it is perhaps better known in the law. But at least restitution, connecting both legal and equitable remedies, is more descriptive of its content than "equitable remedies" and less misleading than is "quasi contract."

The principle underlying contract is that one ought to perform one's promises; in tort that one ought to compensate for harm done; and in restitution that one who has been unjustly enriched at the expense of another ought to return to that other any benefit so received. Of course, these three principles are not independent of each other. In many situations a person may choose between a remedy in contract, tort, quasi-contract or specific relief in equity or at law. In other situations it is only on some theory of unjust benefit that there may be recovery at all.

The range of situations to which such a principle applies is very great and, as has been said, "once the principle is recognised cases tumble over themselves for inclusion."³ This makes it difficult to understand why it has been so neglected by legal writers. It is still more difficult to understand why otherwise learned and discerning judges continue to deny that there are rules which respond to the principle that one who is unjustly enriched at the expense of another must disgorge what he has.

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¹ See for example C. K. Allen, "Fraud, Quasi-Contract and False Pretences," 54 L.Q.R. 201; Gutteridge & David, "The Doctrine of Unjustified Enrichment," 1934 Camb. L.J. 204; Cf. Holdsworth, "Unjustifiable Enrichment," 55 L.Q.R. 37.

² See Winfield, "Province of the Law of Tort," 118; Cheshire & Fifoot, "Law of Contract," 4th Ed., 527 et seq.

³ Denning, "The Changing Law," p. 63.

I

The need has been felt, at some time or other, in many legal systems to classify actions, which implies classifying obligations. In English law it has been taken as axiomatic that the classification of quasi-contract is derived from Roman Law. We find the specific statement in the Institutes of Justinian⁴ dividing obligations "into four species: *ex contractu, quasi ex contractu, ex maleficio, quasi ex maleficio*." An earlier classification, that of Gaius, lists only contract, tort and an unclassifiable miscellaneous group, *ex variis causarum figuris*.⁵

The creation of a special category of obligations called quasi-contract, a category expounded and amplified by the work of the glossators, was not a successful creation. Although developed still further by the Renaissance jurists and officially accepted in s. 1370 of the French Civil Code, the inutility of the classification was early apparent. That it created a wrong impression was generally admitted. Firstly, it suggested that the obligations so classified had a common characteristic, which was demonstrably untrue, and secondly, that there was an implication that a sort of agreement could be presumed, which was directly opposed to the facts. In the later European codes the term quasi-contract found no place at all. In the Swiss Code of Obligations most of the material is presented under the general head of "unjustified enrichment," and the international French-Italian Code Commission classifies obligations in seven groups — 1, contracts; 2, unilateral undertakings; 3, *negotiorum gestio* (officious intervention); 4, payment by mistake (payment of money not due); 5, unjust enrichment; 6, illicit conduct; 7, action *ad exhibendum* (the duty to bring a *res* into Court).

This classification was not warmly received. M. Capitaint, in his treatise on the French Civil Law, rejects the seventh and treats the fourth as a type of unjust enrichment.⁶ M. Josserand, in a more modern approach, uses only four classes — 1, contract, including unilateral undertakings; 2, illicit acts; 3, unjustified enrichment; 4, statutory.⁷ In the United States, where much more attention has been paid to this question than in England, the term Restitution has been generally accepted to include both quasi-contractual remedies to secure the payment of money and also equitable remedies for the return of specific property. In both cases it is recognised that the basis of recovery is unjust enrichment of the defendant.⁸

II

In English Common Law, the original classification was by the name of the action, or rather of the writs by which obligations were enforced. In relatively recent times obligations came to be classified and the two

⁴ Institutes 3, 13.

⁵ D. 47, 7, 1.

⁶ Colin et Capitaint, "Elementaire de Droit Civil Francais" (7th Ed.) 11, 6-8.

⁷ Josserand, "Cours de Droit Civil Positif Francais" (1930) 11, 4-6; and see Renfret, "The Doctrine of Unjust Enrichment in the Law of Quebec," 15 Can. Bar Rev. 331.

⁸ American Law Institute: Restatement of Restitution; Seavey & Scott, "Restitution," 54 L.Q.R. 29.

classes of contract and tort obligations were established.⁹ In very modern times an additional class of obligations has received a grudging and limited recognition under the Roman Law name of quasi-contract.¹⁰ The fact that for centuries the Common Law talked in the language of procedure while developing substantive rules is probably the reason for the late emergence and hesitant acceptance given to this third broad area of obligations. The unfortunate adoption of the term "quasi-contract" has further retarded its development and distorted its true operation.

Relief for unjust enrichment can be found in early English law under many different names. Violent unjust enrichment occurred in disseisin of land and seizure of chattels for which relief was early made available. The same idea is but thinly disguised in the equitable relief from forfeitures and in cancelling transfers for fraud and duress. But this shows no more than the fact that preventing certain selected kinds of enrichment is the constant concern of any legal system. The central problem with which I am concerned here arises only when the unjustified enrichment is sufficiently isolated and identified as to become itself the operative factor for judicial intervention.

The first significant contribution towards this isolation and identification of unjust enrichment was made in 1760 by Lord Mansfield in *Moses v. Macferlan*.¹¹ This famous decision has been so often quoted and discussed that it need not be detailed here. Although the particular result was reversed by Lord Kenyon in *Marriott v. Hampton*¹² the principle declared by Mansfield that the action of general assumpsit, for money had and received, rested on justice and was available where the defendant "is obliged by the ties of natural justice and equity" to refund the money, was upheld.

The central significance of the decision lies in the fact that the basis of the obligations of quasi-contract was universalised. The ground of recovery in the action for money had and received was rested upon the ties of conscience and the necessity of restoring benefits unjustly obtained. For eighteenth century England this was a great achievement. The accidents of procedural history had already established the superiority of general assumpsit over its competitors and the pressing need was to broaden the base of this specific remedy. The action, with a flavour of "contract," had proliferated in various seemingly random directions, the only common factor being the form of action. More was needed and Lord Mansfield supplied that need.

Mansfield's contribution to the development of general assumpsit was not limited to *Moses v. Macferlan*. Under his leadership the King's Bench extended general assumpsit to new situations and the development was

⁹ Contracts around 1800 (Comyn, 1807), Torts around 1850 (Addison, 1860).

¹⁰ See Jackson, "History of Quasi Contract."

¹¹ (1760) 2 Burr. 1005.

¹² (1797) 7 Term Rep. 269.

universally expressed to be on the basis of unjust benefit. Chief Justice Tindal in 1844 said, "the ground and principle upon which this action is maintainable is that the defendant has received money which *ex aequo et bono* belongs to the plaintiff. . . . it has always rested upon that ground,"¹³ and this was reiterated by Chief Baron Kelly in 1869 in the words: "The principle is clear and simple in the extreme. No man should by law be deprived of his money . . . where it is against justice and conscience that the receiver should retain it."¹⁴

While the common lawyers thought in terms of procedure and associated quasi-contractual relief with the writ of *indebitatus assumpsit* they were content to accept the implications of unjust enrichment particularly as Lord Mansfield's successors were, like himself, aware of the dangers of pushing the action too far, too quickly. They did not commit themselves to the assertion that in every case of unjust enrichment an action would lie. As Mansfield declared: "I am a great friend to the action for money had and received and therefore I am not for stretching, lest I should endanger it."¹⁵

This promising development of quasi-contractual relief for unjust enrichment was checked towards the end of the nineteenth century, although it is difficult to determine a precise date. The extensions already confirmed by earlier decisions were followed but narrowly construed, resulting in an unconnected group of single instances which have remained largely unsynthesised to the present day. The curious effect of the abolition of the forms of action was that in this area they had greater influence after their abolition than before. Discussion of quasi-contract and unjust enrichment in modern times gives the sensation of moving back in time, while earlier discussions give a feeling of stepping into a future as yet unrealised.

The abolition of the forms of action, the beguilement of emerging analytical jurisprudence, and the establishment of the dichotomy of tort and contract combined to undermine the position adopted by Lord Mansfield and his successors. The older explanations seemed no longer sufficient. The various actions were clearly not tortious, and if the new antithesis between tort and contract was inevitable they must be contractual; but here equally clearly they were not based on genuine consent.

The deep-seated tendency of the human mind to over-generalize also played its part in the backward progress. Viewed objectively as a problem of corrective justice it offends one's sense of justice that the law should permit one person to retain a measurable gain that is the product of another's loss. Yet it is equally obvious that the adoption of this sense of justice as a rule of law would cover too wide a field. On the one hand it can be used as a rule of law from which subsidiary rules and solutions of specific cases can be derived, but on the other it can be used as a standard of judgment; an aspiration incapable of universal application.

¹³ *Edwards v. Bates* (1844), 7 Man. & G. 590.

¹⁴ *Freeman v. Jeffries* (1869), L.R. 4 Ex. 189.

¹⁵ *Weston v. Downes* (1778), 1 Doug. 23 p. 24.

A general principle prohibiting enrichment through another's loss appears first as a convenient explanation of specific results and serves quite practical and intelligible purposes. But once the idea becomes formulated as a generalisation it takes on a delusive simplicity. It conjures up not only a measure of recovery but also the need for a remedy without in itself providing a guide for determining the really important question as to under what circumstances an expenditure is an unjust loss or an acquisition an unjust gain.

These diverse considerations, in varying degrees, led to a hardening of professional and judicial attitudes towards the notion of unjust enrichment. The predominant attack was based on an exclusive and "self-evident" division of obligations into tort and contract. The situations in which the recovery had been allowed were clearly not tortious, therefore they must be contractual. As it was equally evident they were not based on actual agreement an agreement must be implied. The insidious rubric of quasi-contract added strength to such a contention.

The main protagonist in the attack upon the "Mansfield Fallacy" was Lord Sumner. His first memorable broadside was given in 1912 when, as Hamilton L.J., he said: "To ask what course would be *ex aequo et bono* to both sides never was a very precise guide, and as a working rule it has long since been buried. . . . Whatever may have been the case 146 years ago, we are not now free to administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man'."¹⁶ The other members of the Court of Appeal did not share his views, but two years later he was afforded a more important opportunity, with much stronger support, to expound his new revelation in the House of Lords. The vehicle for his strictures was the case of *Sinclair v. Brougham*.¹⁷ He took as his major premise the rigid, almost pre-ordained, exclusive analytical classification of common law obligation into tort and contract. After much research to prove that the action for money had and received was a common law and not a Chancery remedy, he then concluded that the action must be either in tort or contract and "all these causes of action are common species of the genus *assumpsit*. All now rest and have long rested on the notional or imputed promise to pay" and "there is now no ground left for suggesting as a recognisable 'equity' the right to recover money in personam merely because it would be the right and fair thing that it should be refunded to the payer."¹⁸

This rallying cry quickly attracted encouraging support in judicial circles whilst legal writers remained divided. Lord Sumner's views no doubt prompted Lord Justice Scrutton, an otherwise intelligent and very able Judge, to make his unforgettable remark, after lamenting the development of the action for money had and received, that "the whole history of this particular form of action has been what I may call a

¹⁶ *Baylis v. Bishop of London* [1913] 1 Ch. 127.

¹⁷ [1914] A.C. 398.

¹⁸ *Ibid.*, pp. 452, 456.

history of well meaning sloppiness of thought."¹⁹ The supposedly now discarded doctrine of Lord Mansfield was given a more temperate but equally firm farewell by Lord Greene, who agreed that "Lord Mansfield's views upon those matters, attractive though they be, cannot now be accepted as laying the true foundation of the claim."²⁰

III

But all was not lost. Although when in despondent mood it is easy to agree with the view that "the English law of restitution as a whole gives a remarkable example of the effects of freezing doctrine—still more of freezing minds—in an area still incompletely explored at the time the freeze set in"²¹ there are today unmistakable signs of thawing and reassuring movement can be detected. Lord Sumner's obituary notice on restitution and unjust enrichment has not gone unchallenged by either judges or writers and there are reasons to suppose that the reports of the death of the doctrine have been exaggerated. In addition the increased use of "equitable" devices and remedial techniques, coupled with the traditions of Chancery relief, has enabled "English judges who deny quasi-contract recovery" to "suddenly put on their equity hats and do the strangest things."²²

The suspicion and hostility inspired by *Moses v. Macferlan* has certainly not been universal. Mansfield's courageous attempts to enlarge the creative role of the judicial process at a time when English law was in a primitive condition has received enthusiastic support from modern judges with similar philosophies. The most notable among these have been Lord Wright, Lord Atkin and, more recently, Lord Denning.

The condemnation of unjust enrichment by Lord Sumner and the assumptions upon which such condemnation was based have been most effectively challenged by Lord Wright. In *Brooks Wharf & Bull Wharf Ltd. v. Goodman Bros.*,²³ as Wright L.J., he squarely based restitution on the unjust enrichment of the defendants as the expense of the plaintiffs, saying: "The obligation is imposed by the Court simply under the circumstances of the case and on what the Court decides is just and reasonable, having regard to the relationship of the parties. It is a debt or obligation constituted by the act of the law apart from any consent or intention of the parties or any privity of contract. . . . The defendant would be unjustly enriched at the cost of the plaintiff."²⁴

He enlarged this viewpoint in two articles in the same year. In one he exhaustively analysed *Sinclair v. Brougham*, showing that it did "not

¹⁹ *Holt v. Markham* [1923] 1 K.B. 504, p. 513.

²⁰ *Morgan v. Ashcroft* [1938] 1 K.B. 49, p. 62; and see re *Diplock* [1947] 1 Ch. 716; [1948] Ch. 465.

²¹ Dawson, "Unjust Enrichment," p. 21.

²² *Ibid.*, p. 19.

²³ [1937] 1 K.B. 534.

²⁴ *Ibid.*, p. 544. My italics.

touch the real reach and scope of the doctrine of unjust enrichment,"²⁵ and in the other, a review of the American Restatement of Restitution, he concluded with the encouraging, although as yet unfulfilled, prediction that it "has illuminated the whole range of this branch of law. It will be impossible in the future to refuse to recognise its character and importance, or to speak of it as other than logically and precisely elaborated on case law and precedent."²⁶

At this same period a fellow member of the Court of Appeal, Lord Justice Scott, also expressed doubts as to the validity of the fictitious implied contract basis urged in *Sinclair v. Brougham*. He suggested such a view was inconsistent with the common law history of implied contracts, and whilst doubting whether unjust enrichment could properly be regarded as "a universal or complete legal touchstone" to test this cause of action, he took care to emphasise "the importance of trying to find some common positive principles upon which these causes of action called 'implied contracts' can be said to rest and which will not altogether exclude that of unjust enrichment."²⁷

The principle of unjust enrichment as the basis for restitutionary relief has had other strong support from the bench in recent years. The incongruity and transparent unreality of the implied contract approach has made its continued acceptance increasingly difficult for judges and writers alike. The dispute is not merely a matter of words. It can be said with superficial attractiveness that the phrase "contract implied by law" is innocuous enough, that although less accurate it can be used equally as well as "unjust enrichment" to develop the remedial doctrine. But this is not so. "The room of the fiction is better than its company. Not only is it undesirable that English law should be defaced by superfluous solecisms and illogical phrases, but the ghost of this fiction has, I fear, actually delayed and hindered in England the systematic and scientific study of this important branch of law."²⁸ The contract fiction obscures the underlying relationship and co-ordination of the common law remedy of quasi-contract and the equitable remedies of constructive trusts, liens and subrogation and obfuscates the underlying harmony and interdependence of these seemingly separate and disparate remedies.

The sooner the notion of implied contracts is forgotten the better. I believe it is doomed and we should no longer worry about it except as a piece of curious history. As Lord Atkin so aptly and picturesquely put the matter in 1941, in considering a typical unjust enrichment situation: "These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared should not in these days be allowed to affect actual rights. When these

²⁵ "Sinclair v. Brougham," 6 Cambridge Law Journal 305. Reprinted in "Legal Essays and Addresses."

²⁶ "Restatement of the Law of Restitution," 51 Harvard Law Review 369 at p. 383. Reprinted in "Legal Essays and Addresses."

²⁷ *Morgan v. Ashcroft* [1937] 3 All E.R. 92, pp. 104-5.

²⁸ Wright, "Legal Essays and Addresses," p. 33.

ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undeterred."²⁹

The following year Lord Wright returned to the attack in *Fibrosa v. Fairburn*,³⁰ involving a claim for money paid for a consideration which had failed. In expressing a strong dissent from the view taken in *Sinclair v. Brougham* he said: "This observation of Lord Sumner, which was not necessary for the decision of the case, obviously does not mean that there is an actual promise of the party . . . yet serious legal writers have seemed to say that these words of the great judge in *Sinclair v. Brougham* closed the door to any theory of unjust enrichment. I do not understand why or how. It would indeed be a *reductio ad absurdum* of the doctrine of precedent."³¹ More important, he vigorously asserted that "it is clear that any civilised system of law is bound to provide remedies for cases of what have 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 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."³²

This view was promptly accepted by Mr. Justice Atkinson³³ as the real basis of the action and later taken up with enthusiasm by the then Mr. Justice Denning in a series of cases beginning with *Nelson v. Larholt*.³⁴ His judgment in this case was a typically creative piece of work involving the co-mingling of equitable and common law principles to arrive at the conclusion that if property is taken from the beneficial owner restitution can be obtained from any person into whose hands it can be traced unless he receives it in good faith for value and without notice. This principle, he stated, was evolved by common law and equity side by side. The equitable action took the form of an action to follow money impressed with an express or constructive trust and at law the form of an action for money had and received or damages for conversion. He did not find it necessary to canvass the niceties of the forms of action or the equity-law distinction because "remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. . . . The right here is *not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the Court orders restitution, if the justice of the case so requires.*"³⁵

²⁹ United Australia Ltd. v. Barclay's Bank Ltd. [1941] A.C. 1 at p. 29.

³⁰ [1943] A.C. 32.

³¹ *Ibid.*, p. 64.

³² *Ibid.*, p. 61.

³³ *Transvaal and Delagoa Bay Investment Co. v. Atkinson* [1944] 1 All E.R. 579, pp. 584-5.

³⁴ [1948] 1 K.B. 339.

³⁵ *Ibid.*, p. 343. *My italics.*

He applied this principle to the unusual circumstances arising in *Reading v. The King*.³⁶ In this case a British sergeant stationed in Egypt used his position and uniform to aid smugglers in introducing contraband goods into Cairo. By these enterprising activities he enriched himself by some £20,000. In holding him liable to pay this amount to the Crown, Denning J. relied on the restitution doctrine, holding that the claim by the Crown "does not rest in contract or in tort, but in the third category known as restitution. . . . The claim here is for restitution of moneys which in justice, ought to be paid over."³⁷ It may be remarked, in passing, that it appears the person who had been most unjustly deprived was the Government of Egypt, but it was not a party to the action and the claim of the Crown was clearly superior to that of the sergeant. It is true that the House of Lords was content to uphold the claim of the Crown on the particular facts without discussing the category in which it fell.³⁸ What is significant, however, is that it was not maintained that the sergeant had contracted expressly or impliedly to pay money to the Crown, or that it was recoverable as damages for breach of contract or tort. Recovery was upheld on principles of positive law outside the scope of contract or tort. The basis on which these positive principles of restitution rest, it is urged, is the concept of unjust enrichment of the defendant. Although Lord Porter guardedly observed that "the exact status of the law of unjust enrichment is not yet assured"³⁹ it is becoming increasingly apparent that a strong strain of judicial opinion and the predominant trend of juristic writing is in favour of this rationale.⁴⁰

IV

I believe there has emerged a body of principles under the general heading of Restitution generically different from contract and tort which attempts to assimilate a diversity of juridical situations under the common rationale of unjust enrichment. If I am correct in this it is illuminating to consider the reasons for the hesitancy and reluctance manifested, from time to time, to accept the existence of such a body of principles. The main reasons can be listed as follows:

1. The juristic outlook of English lawyers and their basic methods and traditions; the application of legal positivism to a system of case law.

³⁶ [1948] 2 K.B. 268.

³⁷ *Ibid.*, p. 275.

³⁸ 1951 A.C. 508.

³⁹ *Ibid.*, p. 513.

⁴⁰ e.g., Friedman, "The Principle of Unjust Enrichment in English Law," 16 *Can. B. Rev.* 242, 365; O'Connell, "Unjust Enrichment," 5 *Am. Journ. Comp. Law*; Winfield 54 L.Q.R. 527, and see *Metropolitan Police District v. Croydon Corp.* (1957) 2 W.L.R. 33. It is noteworthy that in this most recent case the Court of Appeal recognised the principle, although they rejected the restitutionary claim on the basis that on the facts the benefit received was not an unjust benefit. This actual finding is unimportant. What is important is that the justness or otherwise of the enrichment dictated the result.

2. A conservative preference for precise rules and limitations, within traditional and historically congenial categories, over the vagueness of universal propositions.
3. The contention that the fiction of implied contract became a rule of substantive law before the abolition of the forms of action or at least that it was made so as a matter of *stare decisis* in *Sinclair v. Brougham*.⁴¹
4. The uncritical acceptance of the tort-contract dichotomy as an established, closed and self-sufficient system and the mis-application of contractual principles to quasi-contractual obligations under the impact of the historical development of the forms of action and the predominance of procedural thinking.
5. The tendency to preserve the English law dualism of common law and equity, and to keep separate the methods and techniques and principles of these two parts of English law.
6. The belief that a principle of restitution is too vague and a rationale of unjust enrichment is so broad as to be meaningless.

Most of these matters can be briefly dealt with. The first two matters, involving the characteristic viewpoint of English professional opinion, have often been commented upon. The analytical character of English law has unduly emphasised the importance of accumulated decisions and dicta to the detriment of statements of principle couched in general terms. These self-imposed limitations result in an extreme reluctance to over-rule plainly wrong decisions and involve an uncritical acceptance of judicial utterances and a narrow and literal reading of earlier decisions within a closed and self-sufficient framework.

Those who wish to expand the common law by reference to its ultimate ethical and social principles are resisted by those who are content to confine it within clearly defined paths which permit of little deviation. This resistance inspired much of the hostility to and suspicion of *Moses v. Macferlan*. The reaction against Lord Mansfield was a vigorous and conscious resistance to the creative powers of judges, by "a bench and bar largely historically minded and educated through a study of decisions in which procedure has long played a predominant part."⁴²

There has been, in recent years, a significant swing away from traditional orthodoxy in this sphere, and even if the quantitative, rather than qualitative, technique of placing on one side the statements in favour of restitutionary relief based on unjust enrichment and accumulating the opposition statements on the other is applied it is doubtful if the latter would prevail. Even an application of the traditional analytical approach of accumulating and expanding precedent probably justifies the generalisation of unjust enrichment as a common law principle.

⁴¹ 1914 A.C. 398.

⁴² Seavey & Scott, "Restitution," 54 L.Q.R. 29, p. 32. Llewellyn attributes this to concentration upon material from a single jurisdiction. See his remarks in 40 Col. L. Rev. pp. 948-49.

The supposed elevation of the fictitious implied contract theory to the sanctity of a rule of law has been adequately dealt with by Lord Wright.⁴³ His masterly analysis of *Sinclair v. Brougham* and his pronouncement in the *Fibrosa* case are sufficient in themselves to finally dispose of this notable heresy, and subsequent events have removed any vestigial remains which may have lingered.

The exclusive classification of civil obligations into tort and contract is frequently assumed to be a venerable demarcation of ancient lineage. But this assumption does not bear investigation. The fact situations in which restitutionary relief has been granted go back to the earliest trials in common law courts, and it is not until the nineteenth century that treatises appear that represent much more than a collection of cases arranged in terms of procedure and the forms of action.

Contract as a separate category received no comprehensive treatment before 1807,⁴⁴ and torts did not emerge as a collective category until more than fifty years later.⁴⁵ Since then text book writers and law teachers have tended to regard this twofold division of the law, created by historical accident rather than by rational analysis, as self-contained and exclusive. The realisation that in many situations in which there is a right to restitution there is no right on any theory of the law of contracts or of torts was slow to crystallise. Although the principle of unjust enrichment was sporadically recognised the adherence to the tort-contract supremacy and the sacredness attached to "privity of contract" hindered its common acceptance and unified treatment.

The feeling persisted that a man was not obligated to another unless a formal or express contract could be spelled out. He need not compensate another for a benefit obtained unless he had requested the benefit and it became the consideration of his express promise to pay for it. Later, when the promise became inferred, by an "implied in fact" contract, it still remained a true contract. "Implied in law" or quasi-contracts were long in coming to English law and were little understood on their arrival, and are still little understood. The "contract" connotation caused them to be confused with formal contracts, and this confusion was increased when they were further referred to as implied contracts and were thus equated with and confused with "implied in fact" or tacit contracts.

The feeling that any approach outside or beyond the terms of contract was unwarranted, coupled with the strangeness of quasi-contract, with its equitable overtones demanding that the law should supply the consent

⁴³ 6 Camb. L.J. 317; *Fibrosa v. Fairburn* [1943] A.C. 32. There are still occasional doubts. See Lord Radcliffe in *Boissevain v. Weil* [1950] A.C. 327, 341, Lord Simonds in *Ministry of Health v. Simpson* [1951] A.C. 251, 275.

⁴⁴ Comyn.

⁴⁵ Addison's *Torts* (1860). In 1870 Mr. Justice Holmes' view still was that "we are inclined to think that Torts is not proper subject for a law book," O. W. Holmes *Book Notes*, etc., p. 45.

where unjust enrichment would otherwise result, and the confused use of the term "implied" to cover both tacit (implied in fact) and quasi (implied in law) contracts has resulted in an attitude and approach slow to dissipate and difficult to overcome. It succeeded in stunting and twisting the natural growth of legal doctrine and seriously hindered its adaptation to modern needs.

Even more stubborn and less susceptible to obvious explanation has been the resistance of English law to the assimilation of law and equity. This resistance has clearly been a major, even a vital, impediment to various attempts that have been made to establish a coherent system of unjust enrichment assimilating under the one principle a diversity of common law and equity situations and decisions. This traditional division of English law hinders the liberalising of precedent and obscures the essentially similar restitutionary nature of, say, the action for money had and received and the action for a declaration of trust in an unjust enrichment situation. They are merely alternative remedies appropriate to different circumstances.

The principles applied by both courts are the same although, for various reasons a plaintiff may not have access to one, or, for other reasons, mainly procedural, may obtain less redress in one than the other. There are some notable exceptions, but in the great bulk of cases the substantive principles are the same. The inappropriateness of the distinction between law and equity in modern conditions has frequently been commented on and, particularly in the field of restitution, principles need to be stated in the light of the combined effect of the two bodies of doctrine. It is probably true that if, instead of referring to "*ex aequo et bono*" and "the ties of natural justice and equity," Lord Mansfield had used some such phrase as "just and reasonable" much of the controversy surrounding restitution would never have arisen. It was this blurring of the distinction between law and equity that provoked much of the resentment.

Today when the one judge applies both common law and equity it might be expected that the distinction between the two would be eliminated, but almost the opposite has been the case. While English judges and English lawyers rejected the application of equitable principles to actions at law a harmonious and complete set of restitutionary principles was not possible. But this should no longer be regarded as a serious obstacle. Opposition to the blurring of this sacred distinction is rapidly diminishing and new values are being reflected in the law, with the result that differences between common law principles and equity principles have lost much of their former significance.

The main devices developed originally in equity which have particular relevance to restitution are the constructive trust, the equitable lien and various subsidiary devices such as estoppel, subrogation and equitable accounting. It is beyond the purpose of this short paper to discuss the operation of these devices at any length. The constructive trust (or constructive and resulting trust) has been by far the most important contribution of equity to the remedies for the prevention of unjust enrichment.

It emerged from the fog of eighteenth century equity but the extent of its contribution has not been fully explored.⁴⁶ It has not been satisfactorily defined and there has been no agreement as to what constitutes a constructive trust, and the definitions and description that have been attempted are widely divergent.⁴⁷ It is used here as an inclusive term covering trusts implied by law which are sometimes distinguished (not very successfully) as resulting trusts, constructive trusts and other trusts implied by law. It is not necessary here to discuss the shifting lines of demarcation that have been drawn between them. It is sufficient to observe that the concept is coming to be recognised as of wide scope and is an instrument capable, both potentially and actually, of applying and extending principles developed in the law of quasi-contract to specific property, whether chattels or land.

It is not yet possible to describe a constructive trust as broadly as in American law, where the Restatement indicates its scope as follows: "Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises." Nevertheless, it must be recognised that a constructive trust like a quasi-contractual obligation is a remedial and not a substantive institution. There is the same relation between a constructive trust and an express trust as there is between contract and quasi-contract. The court does not give relief because a constructive trust has been created or a quasi-contract formed; but the court does give relief because otherwise the defendant would be unjustly enriched, and because the court gives this relief it declares the defendant is liable as a constructive trustee or on a quasi-contractual obligation.

The common denominator in both cases is unjust enrichment. While equity and common law were regarded as distinct the general duty to make restitution remained obscured or concealed. When viewed as complementary components of one whole a general principle is revealed covering situations where the plaintiff seeks to recover a money judgment based on quasi-contractual obligation and situations where the plaintiff seeks to recover specific property, charging the defendant as a constructive trustee.

The other equitable devices can in general be considered as auxiliary to the constructive trust in enforcing restitution. An investigation of the elaboration and extension of tracing techniques, the development of the modern equitable lien as an offshoot of the constructive trust and the niceties and technicalities of equitable accounting⁴⁸ would be illuminating

⁴⁶ See Scott, "Constructive Trusts," 71 L.Q.R. 39, *Davis v. Otty* (1865), 35 Beav. 208; *Ministry of Health v. Simpson* [1951] A.C. 251.

⁴⁷ Lewin on Trusts (15th Ed.), 155; Restatement of Restitution s. 160; Hanbury, "Modern Equity," pp. 118, 183.

⁴⁸ e.g., in *re Hallett's Estate* (1879) 13 Ch. D. 696; *Ministry of Health v. Simpson* [1951] A.C. 251.

but would in the present context lead us too far afield. They are all useful devices which can be adapted to a variety of situations once their remedial character in providing restitution against a defendant who would otherwise be unjustly enriched is fully recognised.

Once the basic unity of common law and equity is admitted there is, I believe, no major obstacle preventing the adaptation of existing remedies to support a general body of restitutionary law based on unjust enrichment. The danger may indeed be in the very multiplicity of procedural resources available, on a liberal view of the authorities, for the prevention of unjust enrichment. This multiplicity of remedies is further complicated by their diversity of origin. Each functions somewhat differently and sometimes cuts across or competes with other earlier established and therefore more familiar principles. The real need, on which much still needs to be done, is to contain these remedies within their proper limits and to confine their operation to their appropriate sphere.

This question of delimiting the area of operation of restitution so as to prevent it colliding with and cutting across other established areas is closely related to the criticism that the concept of unjust enrichment is, like public policy, an unruly horse and so wide in its sweep as to be meaningless. "Once the idea has been formulated as a generalisation, it has the peculiar faculty of inducing quite sober citizens to jump right off the dock."⁴⁹ The generality of its premises seems to provoke lawyers and judges to disparage its usefulness. The approach implicit in any argument in favour of a general action for restitution seems alien to English law, which has not been built on general abstract principles but on the gradual extension and adaption of forms of action to new needs. It is also asserted that, not only is it alien and unworkable, but that it is also unnecessary.

In answer to this latter claim it can at once be said that while equitable solutions have been found to deal with a number of situations of unjust enrichment many problems are not at present satisfactorily solved and an adequate solution demands the elaboration of a general principle of restitution. As precedents increase, as law becomes increasingly complex and new social problems, demanding new remedies, multiply it becomes more and more urgent to find general principles for purposes of clarification and guidance of those engaged in legal administration.

This need for clarification and generalisation has been felt in torts and contract and the need is no less pressing in restitution. Furthermore, the principle of unjust enrichment is no less vague than many of the working concepts in tort and contract law. The key word "unjust," if unexplained and not implemented and delimited in decisions, is undoubtedly very vague; but no more vague in the abstract than the respectable generalities that one must pay for the harm one negligently causes another, or that one must observe binding promises made to another. They are all useful in giving direction to the specific rules. And specific rules must

⁴⁹ Dawson, "Unjust Enrichment," p. 8.

be worked out. But a court whose function it is to give justice should have no more difficulty in determining when enrichment is "unjust" than in determining when conduct is "unreasonable" or what was the "legal cause" of damage.

In the minority of cases, such as where there has been a loss and it must be decided which of two innocent parties is to bear it,⁵⁰ disagreement, not easy to resolve, will arise. These disagreements are, however, no greater than those arising in determining such questions as, for example, whether a master should be liable for a particular act of his servant or whether a contract has been frustrated by supervening events.

In many situations in which the principle of unjust enrichment is applicable the justice is clear. For this reason it has been possible for the courts to create and expand the subject case by case without articulate or even conscious realisation of the general principle. With necessary qualifications, such as the limitation that a person cannot benefit from his own wrong,⁵¹ cannot recover for a benefit officiously conferred on another,⁵² and that change of position (crystallised in the doctrine of *bona fide* purchaser for value) can make restitution unjust,⁵³ the principles are not difficult of application by the use of a refined judgment, ethical sense and a knowledge of commercial customs.

V

I hope that I have shown that technical legal considerations do not present any insuperable obstacle to the recognition of restitution. But is this enough? Are there sufficient countervailing pressures of legal and social policy to justify its exclusion? I do not believe there are, but there are some important considerations of policy which indicate some of the limitations which should be placed upon it.

The most important is the preservation of personal autonomy and self-direction. This feeling or sentiment takes many forms. Any interference in freedom of choice or movement is resented. The temperamental aversion to voluntary intervention of others in one's private affairs has resulted in a frigidly individualistic attitude towards any suggested adoption of the principle of *negotiorum gestio*. This hostility was expressed by Bowen L.J.: "The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not, according to English law, create any lien upon the property saved or benefitted, nor, even if standing alone, create

⁵⁰ e.g., *Kelly v. Solari* (1841) 9 M. & W. 54; *Phillips v. Brooks Ltd.* [1919] 2 K.B. 243; *Leaf v. International Galleries* [1950] 2 K.B. 86; *Solle v. Butcher* [1950] 1 K.B. 671.

⁵¹ e.g., *Berg v. Sadler & Moore* [1937] 2 K.B. 158; *B. & B. Viennese Fashions v. Losane* [1952] 1 All E.R. 909; *Parkinson v. College of Ambulance Ltd.* [1925] 2 K.B. 1.

⁵² e.g., *Falcke v. Scottish Imperial Insurance Co.* (1886) 34 Ch. D. 234.

⁵³ e.g., *Holt v. Markham* [1923] 1 K.B. 504; cf. *Larner v. London County Council* [1949] 2 K.B. 683.

any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will."⁵⁴

This attitude could have been more mildly expressed, but nevertheless it remains true today, in not quite so rigid a way, that voluntarily conferred benefits do not give rise to restitutionary claims. The policy considerations against voluntary intermeddling or officious interference underlie the attitude that philanthropy and social decencies are practised entirely at the risk of the doer. Any enrichment of the recipient is regarded as a pure windfall with no obligation to restore. In the case of services rendered and improvements made upon the property of another without his request, no other solution seems possible. If such action results in an unjust benefit for that other, so much the better for him. The inability of the courts to do a better job of giving justice seems inherent in the situation. A person who builds a house upon another's land which he mistakes for his own, or repairs a motor car sold to him by a thief, may believe it unjust to deny him recovery for the value of the improvement. But it would be strong judicial medicine to allow a trespasser not only to escape liability but to receive compensation for his trespass.

Another area in which countervailing policy considerations preclude restitution for what would otherwise be unjust enrichment arises in commercial transactions involving an element of risk and bargaining on a chance; a conscious assumption of risk as an incident of bargaining. English law is strongly influenced by the belief that a business man ought to know what he is doing and understand the customs and assumptions of his occupation. If there is an element of risk the business man acts at his peril in parting with property without being under a legal obligation to do so. The difficulty in this group of cases is to determine when the parties in fact bargain for a chance. I suggest a distinction needs to be drawn between two types of situations. In one, the parties enter the transactions on the basis of the mistaken assumption of the existence of some central fact. Here neither party has any doubt, no awareness of risk, and hence this was not bargained about. Restitution should be available in such cases.⁵⁵ On the other hand, there may be a conscious knowledge of ignorance. Thus in the sale of old objects of uncertain origin it may be understood that the buyer of a canvas labelled Constable takes a chance that it is but an imitation and bargained with that risk in mind. Here restitution can properly be denied,⁵⁶ as it can in a third situation where the transaction is on the same level as a poker game — with the ethics of a horse trader.⁵⁷

⁵⁴ *Falcke v. Scottish Imperial Insurance Co.* (1886) 34 Ch. D. 234, p. 248.

⁵⁵ cf. *Solle v. Butcher* [1950] 1 K.B. 671; *Strickland v. Turner* (1852) 7 Exch. 208.

⁵⁶ cf. *Leaf v. International Galleries* [1950] 2 K.B. 86.

⁵⁷ *Bell v. Lever Bros. Ltd.* [1932] A.C. 161 at p. 224 per Lord Atkin; *Smith v. Hughes* (1871) L.R. 6 Q.B. 597.

Similar principles of policy justify refusal of restitutionary relief where the plaintiff transfers property, while doubting his legal obligation to do so. Thus payment for goods already paid for, because the plaintiff could not find the receipt at the time, does not entitle him to restitution of the amount paid.⁵⁸ Analogous considerations, coupled with a policy in favour of finality of law suits, cover such transactions as compromise agreements.⁵⁹

Attitudes towards, and remedies for, unjust enrichment are decisively influenced by these trends of social policy and legal thought. In the absence, however, of some sufficiently strong countervailing trend it is submitted that unjust enrichment is entitled to unqualified recognition in its own right.

VI

I would have liked to trace out in detail the multitude of interesting problems that I have left untouched. It would have been a pleasure to vindicate the restitutionary claim against a tortfeasor,⁶⁰ faithless fiduciary⁶¹ or dishonest agent⁶²; to suggest that in vital areas of mistake recovery should be dependent upon the magnitude of the mistake, the degree of certainty in the minds of the parties and the attitude toward, and customs in relation to, the type of transaction involved; to explain under what circumstances a donee is unjustly enriched and should make restitution; or to follow the proceeds obtained by fraud, mistake or coercion through the possible transmutations.⁶³

I am also conscious of having neglected the whole question of defences including change of position, election, laches and others. These must remain as tales to be told at another time.

I am content merely to draw attention to a segment of the law: one of the youngest and yet one of the oldest to receive attention and one of which we may yet be proud. It is, I like to believe, entering a stage of rapid expansion after slumbering for years under the weight of procedural misdirection. The principles of restitution developed by the judiciary without recognising their sweep now need systematic testing. A certain fluidity will be necessary in this conscious application of the principles to actual disputes in the infinite variety of practice until the materials are properly synthesised.

I am aware that increasing experience may show that sweeping generalisations made by enthusiastic writers or judges on the basis either of the few concrete cases or of a tidy theoretical system will need modifica-

⁵⁸ *Higgs v. Scott* (1849) 7 C.B. 63; *Kelly v. Solari* (1841) 9 M. & W. 54.

⁵⁹ *Miles v. New Zealand Alford Estate Co.* (1886) 32 Ch. D. 266; *Callisher v. Bischoffsheim* (1870) L.R. 5 Q.B. 449.

⁶⁰ e.g., *Refuge Assurante v. Kettlewell* [1909] A.C. 243.

⁶¹ e.g., *Lamine v. Dorrell* (1705) 2 Ld. Raym. 1216.

⁶² e.g., *Boston Deep Sea Fishing & Ice Co. Ltd. v. Ansell* (1888) 39 Ch. D. 339.

⁶³ e.g., *Ministry of Health v. Simpson* [1951] A.C. 251; *Sinclair v. Brougham* [1914] A.C. 398.

tion. Much remains to be done by way of detailed application and systematised discussion. No branch of the law, however, touches on so many apparently diverse areas and gives them proper focus or is more amenable to sweet reasonableness. The principle of restitution based on unjust enrichment is able, indeed is necessary, to sustain the operation of a mature and complex, yet flexible system of just law. He who puts his hand to the plough in this expanding area will turn a very pleasing furrow.