BOOK REVIEW


This is a noteworthy book which puts the whole idea of unjust enrichment on a larger basis and stimulates a new interest in this important branch of law. It has too long been depressed, at least in England, to the level of a subsidiary and dependent status; it has been too often regarded as a mere heterogeneous collection of various odds and ends of remedies, or, to change the metaphor, as a poor relation of the categories of contract and tort, vainly seeking admission into their lordly domains. It has been labelled by an eminent English Lord Justice in an "unforgettable" remark (I adopt Professor Dawson's epithet) as a history of well-meaning sloppiness of thought. Professor Dawson is a little severe also on Lord Sumner's observations while Lord Justice and later in the House of Lords in Sinclair v. Brougham,¹ "there is now no ground for suggesting as a recognizable 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". This may be true in a limited sense, but it disguises the real value of the idea. As an English lawyer I should like to dwell a little more at length on the English attitude to Restitution, which perhaps is the best description of this category in the law. But I shall reserve what I have to say on the English, and let me add the Scotch, approach to it until a later part of this review. I may, however, in passing refer to some of our author's strictures on certain aspects of English juristic methods.

May I say at once that though there is, perhaps, some truth in these, there is much to praise also in the English and Scotch contributions to this part of the law; let me incidentally here mention Moses v. Macferlane,² Sinclair v. Brougham,³ notwithstanding Lord Sumner's unfortunate remark already quoted, and some more recent cases, for instance Fibrosa Spalka Akcynja v. Fairbairn⁴ decided in 1943 and some others quite recently calculated to advance the understanding of this doctrine. In the last mentioned of these, for instance, it was said in the House of Lords, "It is clear that any civilized system of law is bound to include remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money 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

2. 2 Burr. 1005 (K.B. 1760).
tort and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution. 5

This would, so far as it goes, agree with the doctrine which our Professor advocates, but on the other hand in English decisions and writings there is much to a contrary effect. This leads our author to say “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 sets in”. Speaking of the English reaction against Lord Mansfield’s statement as a vigorous and quite conscious reaction, Professor Dawson says “to me it is only one phase of a basic change in English legal methods and attitudes accomplished over the last seventy-five years. It cannot be explained by the concentration of English lawyers on the rules of a single jurisdiction, for this concentration existed before. It involves an extreme reluctance, almost a total refusal, to overrule plainly wrong decisions, reaching its culmination with the House of Lords, which denies itself the power to overrule itself. It involves an uncritical acceptance of rules expounded by judges, a narrow and literal reading of earlier decisions and a view of the established system as almost closed and almost self-sufficient. It means in short the application of the methods of legal positivism to a system of case law. A verbal facility and analytical skill have been developed that are at least equal to those employed by nineteenth-century positivists when engaged in interpreting codes”. Then he adds the passage I have quoted about freezing.

These are hard sayings. Onlookers, it is said, see more of the game than the players. There is always in case law a great danger in treating the language of judges as if one were construing the words of a statute. Lord Sumner himself has warned us against “the will o’ the wisp of the obiter dictum”. We must certainly be aware of undue insularity. I think what Professor Dawson says is true in the sense that we are suffering from an excessive reverence for precedents and a mistaken view that they tend to produce certainty. That is clearly a delusion. On the other hand there must be continuity in a case law system, and the constant problem is to combine elasticity with it as well. That is a practical problem which needs to be solved from time to time. But our author is not concerned specifically or solely with English Law. His book, which he describes in the heading as “a Comparative Analysis” is really a study in comparative law, limited to the narrow field of unjust enrichment. He wishes to counter the gibe of “sloppiness of thought”. His plan has been to trace the concept of undue enrichment right down from Roman times to the present day in Anglo-American and in Western European law. This is a daring attempt, in which he has largely succeeded. He has picked his way through the centuries, gathering, as he went, samples to illustrate his theme. So far from sloppiness of thought, he finds, as he goes along, the work of the strongest brains over 2000 years. It is certainly an ambitious project, especially when included as it is in a book of 200 pages. It is necessarily all much com-

5. *Id.* at 61.
pressed. He defines at the very outset his thesis. The governing note is struck in the introduction by two quotations, the former from the American Law Institute Restatement of Restitution, the latter from Pomponius, of the classical period, a Roman lawyer writing in the second century A.D. The former statement is: "A person who has been unjustly enriched at the expense of another is required to make restitution to that other". The latter is: "For this by nature is equitable, that no one can be made richer through another's loss".

I think our author prefers the latter formulation to the earlier. I am not sure that I do not prefer the former. But in any case he is careful to emphasize that neither is a "rule" but merely "a general guide for the conduct of the courts". He adds in favour of the formulation by Pomponius that "to any careful reader he expressed with great precision the relationship of his principle to any legal system at any time and place". As to each statement, he says it "suggests an element of causation, it implies a type of enrichment that is caused (and perhaps also measured) by another's loss". He adds that the translation of loss by one individual into a gain for another is felt as an aggravation, multiplying both factors in the equation.

That however is by the way: the principle he has derived from these two quotations, he says, is "a standard of judgment which cannot be applied universally in human affairs, and it expresses an aspiration that will never be realised".

I should like to say (much on the same lines) that it is one of those motivating principles of justice which inspire, however imperfectly in effect, the whole system of any civilised law. For present purposes the operation of that principle can be ascertained by studying the body of the Restatement, remembering that it is meant to express the present situation and also the author's warning against premature "freezing". The common law, with its case law or casuistical, as contrasted with a positive and exegetical, method, is always changing though it still remains the same thing. The exegetical method, especially if it concentrates on particular passages drawn from judgments, tends to formalism and ossification, as well as to confusion and uncertainty of thought. But law can never be divorced from actuality: selected "moot" cases cannot take the place of the constant succession of live problems which the courts have to deal with day after day, and which constantly test by trial and error the correctness of the "rules" on which the courts act and modify, expand, limit or explain them. A study of the Restatement will show how the process has worked on this head of the law. The reader will find there, I think, the elucidation and explanation of the dominant principle and the satisfaction from time to time of the need to bring down to the level of practical affairs the actual juristic value which it possesses. But that result surely cannot be attained by minuteness of exegetical study of particular texts either of judicial deliverances or academic studies, however valuable.

I think I have indicated that in my view a most original part of the book being considered is the summary of the historical development of
unjust enrichment onward from Roman times. But our author begins with a more modern survey, starting with Lord Mansfield’s famous summation in *Moses v. Macferlane*.\(^6\) I can deal better with the English position on these issues at a later stage of this review. I only note in passing that Professor Dawson is of the opinion that Mansfield’s judgment has had greater and more consistent influence in America than in England. I gather that he also regards Keener on “Quasi Contracts”, published in 1895, as of great influence in America. I think I can best sum up his bird’s eye view by a somewhat long quotation. He says (p. 22):

“It is doubtful even now whether most lawyers have an adequate conception of the range and resources of the remedy [of restitution]. It is broadly true of the modern remedy in the United States that there are no distinctions based on the form or nature of the gain received. Lord Mansfield applied his remarks to the ‘Common Counts’ for money had and received, which presupposed a transfer or at least a receipt of money. But we have other counts which are almost as common and the same tests apply to them. The benefit may consist of the acquisition or use of chattels, services rendered or acts performed, the use of ideas or the discharge of an obligation. The list is not yet closed. It is true that two limitations have survived in cases of simple misappropriation—the refusal of quasi-contract relief for use and occupation of land, and the requirement that the taking of chattels be followed by a sale. But both these limitations have been greatly restricted, even in the tort cases to which they apply. In many States they have been entirely rejected. Where they do survive they are recognised as anomalous and they may in due course disappear. Indeed there seems no rational ground for such distinctions . . . As to grounds, there has been a similar expansion . . . As to torts, quasi-contract restitution as an alternative remedy has made steady progress. We can probably say now that the damage remedies can be ignored and quasi-contract can be used as to any kind of legal wrong from which gains are realised.”

He eventually concludes his summation by reference to the frequently occurring position where a stakeholder or one in any analogous position, i.e., holding property entrusted to him to pass on to a third person, or one who can in some other way be assimilated to a stakeholder, will be ordered to account to the third person. Want of privity would not generally be an objection. Whatever that may mean, it is in most cases sufficiently supplied by the fact that the defendant is possessed of the thing or profit which the other is entitled to.

This survey may usefully be compared with the list given in *Moses v. Macferlane* based on actual English cases up to Lord Mansfield’s day, or to go further back, to the list given by Bracton as quoted by Dr. Hazeltine in his Preface to Dr. Jackson’s excellent “History of Quasi-Contract in

\(^6\) *Supra*, note 2.
The system of classification there is different, but there is the underlying similarity that we have a remedy by money payments for matters independent of contract or tort. What our author is seeking to drive home is his thesis that “any unexplained gain (not merely money) must ordinarily be restored by quasi-contract if a money judgment will suffice”. “This is not a rule”, he says. “Strictly speaking it never can be a rule. It is at most a working hypothesis. We have built up this hypothesis step by step, through the methods of case law.” As proof of this he might refer his reader to the Restatement. After mentioning the need of organising the result of the gradual growth he points out that this is not a problem for quasi-contract regarded as a common law matter only, because there are similar developments on the equity side. These remedies he goes on to enumerate, such as the constructive trust, the equitable lien, subrogation and equitable accounting. These certainly justify the thesis that the prevention of unjust enrichment has been a constant motive. He says of constructive trust that “in its modern form it is a purely remedial device, aiming principally at the prevention of unjust enrichment. It has taken a place beside quasi-contract as a generalised remedy, giving specific rather than money restitution”. It has been extended like “tracing” from the cases of real fiduciaries to whom the remedy first applied. An English lawyer will here think of the case of *Sinclair v. Brougham* as a striking illustration. Much the same considerations apply to the other equitable remedies just mentioned. He is anxious that the basic purpose of preventing unjust enrichment in all these equitable remedies should not be obscured by dwelling on the conscience of equity or on the purpose of achieving a preference over other creditors of an insolvent debtor. As to subrogation, our author insists that that is a remedial device to ensure that liability ultimately rests where justice requires it to rest. It is clear from what he says that restitution by a money decree is only one of the remedies available for preventing unjust enrichment. He finds in the multiplicity of remedies, complicated by diversity of sources, a cause of our present difficulties, even though we realise the common purpose that underlies them all. He adds in the conclusion of this section, “The more universally the motive is conceived, the more relative it must become. Whether we quote Mansfield or Pomponius, however, we must recognise that they raised one of the basic questions of distributive justice, all the harder to answer because it appears in so many different forms.”

Then under the heading of some “European Solutions” he proceeds to Roman Law, Medieval and Modern Roman Law, the Law of France with special reference, limited to this issue, and the German code. I cannot pretend to do more than to indicate how by these sections he seeks to enforce his main thesis. My reader should study them for himself, always keeping in mind that their importance for the author is their bearing on his governing thesis, the principle of and remedy for preventing unjust enrichment.

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Thus when we turn to Roman Law, the reader will have his attention directed to the *condictio* and to *negotiorum gestio*, and some other techniques of redress. He will not expect a critical essay on the technicalities and refinements of Roman Law, what is more essential is the continuing after-effects in regard to restitution.

Our author is principally interested in the *condictio* which he described as the Roman general assumpsit. He says that by all tests the condiction was the most important remedy in Roman Law for the prevention of unjust enrichment. "It was", he says, "the oldest, it covered the widest range of transactions, it suggested the most fruitful ideas. It has also provided the terrain for one of the great battles of modern scholarship, over the limits of relief for unjust enrichment in Roman Law."

It is really impossible to summarise the very abbreviated sketch which he gives of the extent and effect of the condition specifically limited to unjust enrichment. He seems to establish conclusively that the idea held a large place both in classical Roman Law and in the work of the compilers. The condiction could only be used "until the second century A. D. in an action for a fixed sum of money, a stated quantity of fungible goods, or an identified object." But, he adds, by the first century B. C. and probably earlier the condiction became available in cases of outright theft, provided the owner could express his claim as a claim for a certain sum, quantity or thing. It was apparently the theft cases that led lawyers of the first century B. C. to an interesting generalisation, that "whenever there was an 'unjust cause' for detention the condiction could be used". Later the grounds were defined and elaborated. There was the condiction for theft (*condictio furti*, for the "not due" (*condictio indebiti*) which rested essentially on mistake, including overpayments, transfers or payments by or to the wrong person. I do not attempt more than an indication, to which any student of Roman Law can give life, of the great scope of the condicions in the way of restitution. The word "cause", was destined to have a great rôle in history and even to-day, and in regions of the globe of which the Romans never dreamt. However, the prevention of unjust enrichment appears as a motive in enough other contexts to indicate that the idea was in general circulation among the classical jurists. "But," the author adds as an important generalisation, "it is perfectly plain that in classical law enrichment was not enough." As a specimen limitation, our author takes "the famous case of 'improvements' on another's land. Julian asserted quite definitely that a mistaken 'improver' could recover nothing for a structure erected on another's land, after the owner of the land had recovered possession. . . . Julian himself appears to have been more generous in granting condicions than most of his contemporaries." The main reason of his refusal in the case of the improver seems to have been the absence of direct dealing between plaintiff and defendant which often figures as a kind of working rule.

The other main type of Roman Law remedy was the *negotiorum gestio*, the main elements of which are still recognised in most modern codified
systems. It had a similarity to mandate and was originally limited to the representation of absent persons in litigation, but was extended to include many other acts, e.g., repairing a house, providing medical care for a slave, or necessaries for the support of a family or guarantee of a principal's debt and many other similar cases. "Mutual aid was not merely a duty imposed by religion and the whole body of doctrine was reinforced by the principle of unjust enrichment. Our author concludes that the Romans found that problems of enrichment arise as by-products of every conceivable type of human transaction—in the property law of married persons, in the settlement of decedents' estates, in claims for recovery of land or goods, in the administration of cities, or of wards' estates." The fragmentary specimens I have extracted will indicate how Professor Dawson's exposition justifies his claim that unjust enrichment was a widely spread element in Roman Law.

He then passes to the place of unjust enrichment in medieval and modern Roman Law, the revival of which began about the early part of the twelfth century. Our author develops his thesis up to and beyond the Code Napoleon in France and in Germany until the German Code of 1900 and its applications. This is an enormous span of history in space and time. I shall not attempt to do more than make a few general observations and call attention to the references he makes to certain outstanding features in the historical development.

The glossators had the Justinian Code to work upon and accepted from it that the condiction was a general remedy: but they stressed the importance of "causa" and held that the condictio sine causa should be labelled as one of the most general forms of the condiction. Growth came through work on specific problems, where there were gaps in the Roman system. "The problem that haunted the doctors was the case of improvements on another's land." "The second main group of problems lay on the fringe of tort. They involved misappropriated property whose proceeds had reached a stranger." To this problem the negotiorum gestio was applied as a solution. The equity of the remedy was strongly affirmed and was rested on the principle forbidding enrichment through another's loss. Our author refers to the conflicting views of Martinus, Accurius, Bartolus and Baldus. Then claims realised through contract by a stranger to the transaction were considered. Money lent to an insolvent and used by him to feed his sons who later inherit property raised a great problem. Can the lender sue the sons in later life directly? Then there were cases of a borrower being mistaken as to the identity of the lender to him. Baldus was emphatic. "Whenever something of mine has come to you and you have no cause for retaining it, it is equitable that you restore it. This text is founded on general equity. Note it well. Note that even through an erroneous act a remedy is allowed because of general equity." The action of negotiorum gestio was here coming to the fore. By the techniques of analysis the medieval lawyers provided the main material for the debates of later centuries.
Then Professor Dawson turns to the later period, 1500 to 1800, years which "brought a general diffusion throughout continental Europe of the Roman legal system, as modified and adapted by the medieval Italian lawyers". In the sixteenth and seventeenth century writers, the necessity and the extreme practical usefulness of the principle of unjust enrichment was emphasised, for example by Grotius. Our author, after referring to the reception of Roman Law in Germany in the sixteenth century, so that it became the basic source of doctrine—"the German common law," proceeds to discuss the remedy named *actio de in rem verso*. This, we are told, had originally been in Roman Law a procedural device, a Praetorian formula, which developed into an important application of the principle of unjust enrichment. But our author regards it as a most extraordinary accident of history, that a remedy with such origins should become the general enrichment remedy of the German common law, and later became adopted by the French Court of Cassation and the law of the European nations which followed the French law; there is now, says our author, an *actio de in rem verso* in Belgium, the Province of Quebec, Spain and much of South America, and other Code jurisdictions. The relevant sections of the German Code of 1900 will be noted a little later.

The curious terminology to denote the *actio* can perhaps be best explained as a remedy relating to some asset which has become transferred to the property of another (in the original instances the *pater familias*), the claimant being the original owner and the transfer having been made in earlier days through the intermediation of his son or slave. By a long historical process, the idea of unjust enrichment which was originally involved was gradually extended to the general type of cases in which transfers took place by a third party's act. How far the principle could be made to extend was illustrated by a striking case to which Professor Dawson refers, decided by the French Court of Cassation in 1892: the plaintiff, who was a supplier of fertilizer, sold and delivered a quantity to a lessee who used it on his land and then became insolvent. His lease being forfeited, the unpaid lessor entered into possession and had the benefit of the crop on which the fertilizer had been used. The supplier sued the lessor for the gain accruing from the increased fertility due to the use of the fertilizer. The court on appeal affirmed the judgment of the lower court in favour of the claim in respect of this gain, declaring that the judgment did not falsely apply the principle of the *actio de in rem verso*. "By this simple phrase", says our author, "it elevated the principle of unjust enrichment to a rank beside the Code and made it a rule whose violation was admitted to be ground for reversal by the Court of Cassation. This is still true." The Anglo-American lawyer may be a little taken aback by so extensive a reading of the remedy of unjust enrichment, as they will also be astonished at the courage of the French courts in creating rules of law outside the Code Napoleon and in developing a body of pure case law. Our author explains that this course was necessary because the Code was so inadequate as it was in dealing with unjust enrichment. He points out that it is "a difficult
matter for the courts to introduce large scale correctives, by case law methods, into a system of codified law”. The reader will find this topic of French law discussed very usefully in an admirable article by M. David, Professor in the University of Grenoble, in the Cambridge Law Journal, which concludes: “The doctrine of unjustified enrichment is one of the most interesting features of modern French law. It shows how, notwithstanding codification of the law, the judges under the influence of textbook writers, have been able to create a general working principle which satisfies the requirements of natural justice. The doctrine has always been applied in practice with due regard to the principles of natural justice. . . . French legal writers are unanimous in praising the caution and wisdom which has been displayed in this instance by the judges”. I should add that the paramount importance of a system of unjust enrichment, in whatever form, is illustrated by the experience of French law. If the system did not exist, it had to be created. It is a striking exemplification of the principle which our author has sought to vindicate by the whole historical analysis which is the main thesis of his book. He adds that in Italy the actio de in rem verso was given statutory recognition in the revision of the Italian Civil Code in 1938. Other countries have also adopted the principle.

A little later in his book our author refers to the separate section on relief for unjust enrichment in the German Code of 1900. The basic provision is Article 812. The whole section comprises Articles 812-822, but I may quote Article 812. “A person who has acquired something without legal ground through the performance of another or otherwise at his expense is obligated to surrender it. The same obligation also exists where the legal ground fails or the purpose intended in a contract which induces a performance is not accomplished.” I cannot prolong this article by citing our author’s comments on various features which have arisen in Germany in interpreting and enforcing the Code, for instance on mistake, or on the requirement of directness, or on what has been called officiousness or on the ancient problem of improvement on another’s land, or on accession, or on the developments of negotiorum gestio, or on unsolicited intervention and the effect of the individualistic idea. As to maritime salvage, our author seems to regard that as a special rule of the sea law, outside the general principles of the law on land. I agree with that. The ancient sea law has always been international in character and can throw no light on the principles of the municipal, civil or common law. The altruism it involves can be explained by the comradeship of the mariners in face of the constant and common dangers which face those who go down to the sea in ships and the special provisions for salvage in respect of property saved reflect the general policy.

Professor Dawson is deeply apprehensive that unjust enrichment remedies may fail in practical efficiency because too liberal or too lacking in limitations. He heads the last chapter, “Our Path Through the Forest”. So far as Anglo-American law is concerned, I should counter that doubt

by asking the reader to consider the Restatement of Restitution, which subdivides the whole subject and analyses the different rules and their limitations in practice. The Restatement has worked through the whole scheme and all its details and shows how the principle has been applied in actual decisions. The persistence and pervasiveness of the idea through the centuries, its undertones and overtones, have seemed to me so illuminating as to preclude in this place more detailed reference to or consideration of particular illustrations. I may however atone in small degree for that failure, by supplementing the history he gives with some references to English cases later than the few our author cites. English judges and text writers have helped in the development which has brought, by different routes, the Anglo-American law to results similar to those reached in the Latin and Western European countries by their different systems. I ought, however, not to overlook Scotch Law, which has developed in many respects its own rules on a civil law basis, rather than a common law basis, for instance in certain fundamental rules of contract. In particular it has its own rules of unjust enrichment. If I may refer back to *Moses v. Macferlane* and Lord Mansfield's famous judgment, I may note that he, one of the greatest common law judges and Chief Justice of England, was by birth a Scotchman, familiar with the Roman and Civil Law as well as the common law. His judgment in *Moses v. Macferlane* clearly draws a distinction between restitution and contract; the Court imposes on the defendant the obligation to pay "as it were upon a contract." Contract, as it has often been said, involves and arises from the intention of the parties, their intentional consensus; restitution is imposed by order of the court and is independent of contract. Lord Mansfield was clearly not responsible for any confusion between contract and restitution. The English courts have, however, been troubled, perhaps still are, by a confusion between restitutionary and contractual remedies, a confusion based, as the Lord Chancellor, Lord Simon, said in 1940, upon a misreading of obsolete technical rules. The Lord Chancellor went on to say that our courts are primarily concerned to see that the rules of procedure should serve to secure justice between the parties. Lord Atkin in the same case said that the fantastic resemblances to contract invented to meet requirements of the law as to forms of action which have now disappeared, should not in those days be allowed to affect actual rights. The Scotch courts are not troubled by these difficulties. Their law is based, in relation to (inter alia) restitution, on the Roman Law. Hence the Scotch Court, affirmed by the House of Lords on appeal, granted restitution of the amount of a deposit paid on a ship-building contract which had been dissolved by the intervention of law and had not been completed. In doing so, they cited as authorities the Digest XII and VII. Ulpian and Africanus were quoted and the Scotch Institutional writers, Stair, Bankton, Erskine and Bell were cited as authorities. They pointed out that the claim for return of the deposit was not a claim


under or on the contract, but a claim for restitution outside the contract, indeed because the contract has ceased to exist, which claim the law will give unless it is provided to the contrary by the contract. Africanus is quoted as saying "Nihil refert, utrumne ab initio sine causa quid datum sit an causa, propter quam datum sit, secuta non sit." It was held that restitution of the deposit must be given, to prevent unjust enrichment.

At the time of that decision, the opposite decision had been given by the Court of Appeal in England. It was there decided that where a contract had failed by what is called frustration there could be no recovery of payments made in advance and not earned. The loss must lie where it fell. That was indeed an exception to the general rule of the common law providing for recovery of money for failure of consideration by the proceeding indebitatus assumpsit. But after that judgment had stood in English law for nearly 40 years (though often criticised) the principle of restitution was applied by the House of Lords in 1943 in a case I have already referred to, and a more civilised rule was laid down. The decision in 1943 did not rest on a contractual bargain between the parties but on the doctrine of restitution, the object of which is to prevent unjust enrichment. The contract had been rescinded by the outbreak of war, but as it has been said, restitution is then a by-product of rescission. The property in, or possession of, the deposit reverted to the depositor, on the ground of failure of consideration. Its purpose had failed. The English and Scotch Courts thus arrived at the same result, but by different routes, the English by way of the common law and the Scotch on the basis of the civil law.

Though the decision in the Court of Appeal, refusing recovery upon failure of consideration where the contract was frustrated, was a great reactionary step from the doctrine of unjust enrichment, it cannot be regarded as characteristic of the ordinary tendencies of the English courts on this topic. The decision, however, stood and was quoted in the books for about four decades. The House of Lords, when the case came before them, had, I have stated, no difficulty in reversing the decision of my earlier namesake, Wright, J., and expounded in clear terms the true nature of unjust enrichment or restitution or quasi-contract (whichever word is preferred); I shall not add to the quotations I have already made. Indeed the action of money had and received had long served to give practical effect to the principle before and after Lord Mansfield's famous pronouncement. There were similar cases involving the same principle where the claim was for money paid, which was also one of the money counts. But the distinction from contract or tort was well settled. Thus in 1937 a claim was allowed so as to prevent unjust benefit where the plaintiff had paid a debt primarily owing by the defendant though the plaintiff was liable also on his default. The common case of the surety involved a similar principle. Again in 1936 the plaintiff who had rendered services to

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a company under the common belief that there was a contract, was held entitled to recover on what was called a quantum meruit when it turned out that the contract was invalid. The company had got the man's services; they were not rendered as a gratuitous gift and had to be paid for. All these and many other decisions, such as those on the liability of infants and lunatics were true examples of quasi-contract. It is difficult to understand Lord Sumner's observation, made no doubt in his haste, that all these decisions were based on a "notional or imputed" contract to pay. This appears to me to be quite contrary to the effect on a fair reading of the authorities, both recent and of an older date. It was condemned as I have already shown by Lords Simon and Atkin in the House of Lords in 1941 and by all their Lordships in the deposit case in 1943 already referred to. It was based on a confusion between contracts implied in fact and contracts implied in law and a misreading of the nature of the old action for money had and received, the indebitatus assumpsit and the old money counts. This is now particularly emphasised by the Common Law Procedure Act of 1852 and the Judicature Act of 1873. In the Fibrosa case Lord Macmillan in an ironical vein said he felt that the decision in that case (and I may add others like it) would cease to furnish an enlivening topic of discussion in lecture rooms and periodicals. This certainly should be true of the idea of the "notional or imputed contracts," about which it is still fashionable in some quarters to contend has replaced in English Law the idea of quasi-contract. In one sense the fashion is harmless, but it has the mischievous effect that the English scientific theory of English law has not evolved a reasoned concept of quasi-contract or unjust enrichment. This is a serious defect which may have practical repercussions. Quite recently the "notional or imputed contract" has been brought into what was a perfectly clear case, though it did not affect the result. The judge, the Court of Appeal and the House of Lords concurred in the result. But there was great confusion in the reasoning of the courts. The case was simple enough: an army sergeant in Egypt in the British army of occupation, by the use of his army lorry, his uniform and military prestige, assisted others in committing frauds on the Egyptian customs. He received large sums of money from the criminals for his help. The judge held that the Crown as the man's employer could take as against him these illicit gains, made by use of his position in the army, on the ground of restitution, there being neither contract nor tort. The trial judge put his decision simply on the ground of unjust enrichment. In the Court of Appeal more elaborate grounds were put forward in the judgment, including, it seems, an imputed contract between the sergeant and the Crown to pay

17. See, on this, Wright, Essays and Addresses (1941).
over the illicit gains to the Crown, which led to the serious objection that such a contract could not be imputed because it would involve the Crown participating in an illegality. That objection was met by fixing the imaginary date for the imaginary agreement as being before the criminal conduct was committed. A curious imbroglio, and a curious picture of the fiction being clothed in real life. In the House of Lords three of their Lordships substantially agreed with the reasons of the Court of Appeal, but the Lord Chancellor and Lord Porter, while agreeing in substance with the judge that the test was not the loss or damage suffered by the Crown, said that “It is receipt and possession of the money that matters, not the loss or prejudice to the master.” This might appear to point to an application of the principle of “unjust enrichment” but they also said that the judge went too far in basing himself on unjust enrichment. As to the latter they said that the doctrine had not an assured status in and formed no part of the law of England, though it had a place in the law of Scotland and in the United States. These somewhat obscure remarks seem difficult to understand and seem to me a curious confusion. How much simpler to have followed the judge and simply put the decision on the principle of preventing unjust enrichment.

So far I have been dealing with the common law side of the principle of restitution in English law. But there is the Equity or Chancery side. Here the court has not suffered from the imagining of fictitious agreements, so that Lord Simonds in dealing with one of the two leading cases in Chancery to which I shall refer here,\(^{20}\) was able to say that it was not a case of the common law action of indebitatus assumpsit, and that he need not embark upon “the rather arid dispute” whether the gist of the action was an implied promise. “Arid” it certainly is, and, I may add, meaningless and illogical. I should think it is time it was banished from serious legal thinking. While I look with some satisfaction on the whole upon the work of the English law on its common law side, I feel that its work on the Chancery side in *Sinclair v. Brougham*, is of the first importance in this branch of law. It certainly gives an illustration of what a court can do in a complicated situation to prevent unjust enrichment by securing (as it did in that particular case) a fair proportionate distribution of losses and burdens, and a sharing of what was left. It was a case in Chancery, in the last stage of the administration of a society in liquidation. When the liquidator had reached the final stage of liquidation, and had paid what were called the “outside creditors”, that is, those who were neither shareholders nor ultra vires lenders in the sense I shall indicate, he found himself in possession of a “mixed fund”, as it was called, and the question arose as to those entitled to share in that surplus. In a sense the case presented an illustration of a special and complicated type of constructive trust. In the end the trust attached to the “mixed” fund, which was the final resultant, on the one hand, of monies lent by ultra vires lenders or provided by contributors and on the other hand, of monies expended out of those receipts, all

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taking place in the conduct of the ultra vires business over a period of years. It was a feature that the whole banking business was ultra vires of the Society. In that sense it was not the business of the Society. But what was left in the Society's hands when it was wound up could be treated as belonging jointly to the ultra vires lenders and to the shareholders or contributories (all creditors outside and all expenses having been settled), and hence it could be justly shared by these parties in their appropriate proportions, i.e., in proportion to what they had put in. Lord Parker, whose judgment may-be here accepted as containing the heart of the matter, after saying that he assumed that the liabilities of the business and the expenses of liquidation have all been found, goes on to say, "What is left may be taken to represent in part the monies of the ultra vires lenders and in part the monies of the Society wrongfully employed in the business. The equities of the ultra vires lenders and of the Society are equal and it follows that the remainder of the assets ought to be divided between the ultra vires lenders and the Society rateably, according to the capital amount contributed by such members and the Society respectively". This may well seem an oversimplified rendering of a very complex situation. The test, however, was to decide what was "in accordance with equity and good conscience." The equity was "the same as that on which a tracing order is based." Lord Parker quoted from an earlier case the principle that on "the plainest principles of equity" the persons who advanced the money should have the surplus back. Strict tracing was impossible because the money advanced could not be traced specifically. It had disappeared in specie among the myriad operations of the business. "No one," said Lord Sumner in his turn, "could show what particular assets were the fruits of the borrowed money." He was applying the ruling in a somewhat similar earlier case. But he held that the case being decided was well within the "tracing" equity and that among the persons making up these two groups (ultra vires lenders and contributories) the principle of rateable division was sound. He laid down as the principle "if precedent fails, the most just distribution must be directed, so only that no recognised rule of law or equity be disregarded." He had taken however, as we have seen, too narrow a view of the common law action for money had and received: his reference to the notional or imputed contract was both misleading and mistaken and has had disastrous consequences for the English law of quasi-contract. Lord Mansfield knew better. But for many reasons the action for money had and received could not have been used in the case. It was beyond the scope of the common law. Lord Sumner found in In re Hallett a principle which would justify an order allowing the appellants to follow the assets not merely to the verge of actual identification but even further: "after a process of exclusion only two classes or groups of persons having equal claims were left in and all superior claims had been eliminated."

I have spent some time in a very imperfect summary, because the case is one of great value in explaining the Chancery side of restitution,

and it shows a very liberal and enlightened treatment by the English court of a novel and complicated situation of fact. We see the triumph of equity (not in a technical sense), of the moral sense and what I should like to call "natural justice" if the term had not been abused for centuries. I think the moral sense is an instinct in human nature (in some ways like the colour sense, but differs because it sets a standard) which is in the last resort the motivating force in all law and also in another aspect the sort of "referee in case of need." No doubt its judgment may go wrong in particular cases but I know of no other motive for regulating conduct and duty except that of authoritarian positivism, which in truth, by itself, is mere power. The moral sense may lose itself at times in the chances and changes of the centuries and in the infinite complexities of human life, but by and large it is the only ultimate guide. It has certainly been constantly quoted as the criterion in matters of unjust enrichment.

I have referred to a more recent case of equitable restitution. I may examine it a little further. The facts briefly were that executors of a large estate in the course of administration distributed it to a number of charities intending to carry out, as they thought, the will. But they misconstrued the terms of the will as it eventually appeared and the next-of-kin succeeded in claiming the estate as on an intestacy when the will was held to be invalid by the courts. On the face of it the next-of-kin might, it seems, have claimed the pieces of property from the different recipients in proceedings for money had and received: the property belonged to them and their rights were not destroyed by the wrongful transfers by the executors. But there was the difficulty that the transfers were made under a mistake of law and prima facie transfers so made were irrecoverable. However, the transfers were made in the course of the administration of the estate in Chancery, and the courts held that by century-old precedents mistake of law did not prevent recovery in such a case. The House of Lords rejected a contention that the recipients having received a legacy in good faith and spent it without knowledge of the flaw in their title ought not in conscience to be ordered to refund. This argument having been rejected, it was also held that there was no bar in equity, or under the statute of limitations to recovery by the claimants on the basis of intestacy. The claim was, as I have noted, a direct claim for a refund of the money paid. There are, however, in the Court of Appeal 22 some interesting observations on possible limitations on a tracing order where the money had been spent and had disappeared and there was nothing capable of monetary valuation left behind or capable of disentanglement.

I have sufficiently indicated how an English Court of Chancery, has proceeded to prevent unjust enrichment. Speaking broadly, however, it would generally apply the same equitable remedies as those explained in part II of the Restatement, and also by the remedies at common law. The law has gone a long way to satisfy the demands of preventing unjust enrichment. The great defect of the English law in this respect is that there

has not been a real attempt to formulate a complete theory of restitutionary relief both in law and in equity. These systems, though fused in one sense, have kept their distinctiveness in England as in most parts of the United States.

I must conclude my inadequate review of this valuable and stimulating work. It has set out to establish and has, I think, established its thesis that the concept of unjust enrichment and its applications in different countries embodies the work of the strongest brains for about 2000 years.

The final chapter is full of general speculations which I can only touch upon. I have indicated he complains of the lack of system in the law of restitution. It suffers, I think, from being late in attaining, in England at least, a recognised distinct place in the legal categories. In England also it has been tied for long to the sphere of the forms of action on the common law side, though on the Chancery side it has had a freer opportunity. As to the American law of restitution, Professor Dawson says it suffers from lack of system. But I wonder if he does not exaggerate the defects. These are inseparable from our case law or casuistical methods. They have at least kept the concept in touch with actuality, while what they are applying, it is felt throughout, is a constant endeavour to apply the dictates of good conscience and equitable dealing to the infinitely diversified needs experienced, and to adjust the rules of conduct so as to satisfy these dictates. This is the characteristic throughout of restitution.

There have thus been established under one form or another legal rules of conduct outside the regions of statute, contract or tort. A great difficulty has been to realise how different in certain ways is the position. In contract or statute or tort there is an objective rule by which the court can mould its decision in the particular case. In restitution the courts have had to make their own rules in truth, as I think, by the light of fair and equitable dealing or, in short, justice. In the formula which has been quoted from the Restatement, the essential weight is on the word "unjustly." There are many ways in which enrichment consistently with fair and honest dealing can be justified even though the other party is giving up somewhat. So it is in cases of competition, which is a mode of progress. But it does not follow that the loss is unjust or even unqualified or unreduced.

I feel difficulty in agreeing completely with all Professor Dawson's views on the contest between altruism and individualism in regard to the important question in this context of the intermeddler or officious negotiorum gestor. In law this question comes to the front generally because the gestor wants to be paid for what he has done. Take the classic case of painting or repairing or improving another man's house. The owner may be content with the house as it is before the improvement; even if he likes the improvement he may find it difficult or even impossible to pay for what is done. It is this payment that the court is asked to order; but this hardship on the owner may outweigh any benefit. Can it be said that he is enriched but unjustly enriched?
Then some cases quoted by Professor Dawson from continental courts seem definitely unjust in ordering recompense for benefits which are too indirect or remote, either in time or in place. For instance, the famous French case of the fertiliser. The seller, I gather, did not get the stipulated price but the subsequent possessor of the land got the increased crop. I do not rely on absence of privity, whatever that may mean. That belongs to contract and we are outside the range of contract. There are, it is true, in England, cases where either by statute or contract or otherwise a subsequent possessor has to compensate for outlays and improvements on the land made by his predecessor, but in general I should not think it good sense that the subsequent possessor should be liable to be sued by the supplier of the fertiliser. He takes the land as it is and gets the benefit of any incidental benefits which are inseparable from it. The case of the children whose parents had borrowed money to support them, and when later in life they or their parents became prosperous, were held liable to repay the loans to the lender, seems to me quite beyond the scope of the law, and contrary to the general system of domestic, or social business arrangements. But these are extreme instances. The general value of the principle, with its fundamental test of justice, seems to me untouched by rejecting such instances.

As to unsolicited gifts, these again may give a claim for restitution of their value in particular cases of fact, but broadly speaking and in the abstract they involve no claim to restitutionary remedies. In the same way the unsolicited discharge of obligations may give no right. Generally speaking they would do so, as when the discharge of the other man’s obligation also frees a chattel or discharges an obligation or in some such way is in the interest of the payer. But if the payment is merely officious the position may be different. The debtor may be content to remain in debt rather than be under an obligation to his officious “helper”.

Quasi-contract or restitution is an integral part of our law, but it has to be carefully watched like any other part of our law. But we have, as Professor Dawson points out, as our guides when we come to detailed applications those very distinguished lawyers, Professor Seavey and Professor Scott, who, after putting in the forefront of the Restatement the passage I have quoted, explore the practical possibilities through some hundred pages of what would only be an aspiration if left by itself.

All students of this difficult and essential branch of our law must be grateful to Professor Dawson for his book. He is deeply conscious of the further contribution to the cause of justice which restitution may make as the judges apply the principle to the ever recurring diversities of practical problems in the world of fact. The same will be true in England also. His book cannot fail to help in the good work.

Lord Wright of Durley†