RESTITUTIONARY REMEDIES

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Restitutionary Remedies in Common Law Canada

It is fascinating to reflect on the fact that civilians look to the Emperor Justinian's Corpus Juris Civilis of the 6th century A.D. as their fons et origo of the principle of unjust enrichment,(1) because for us of the non-civilian tradition the situation is quite different.

Restitution has been described as the last great frontier of the common law. In our courts so much of it is unchartered country, and some say our compass is too elementary to be of much help. Contract (as opposed to contracts) long since emerged as a concept, well before the abolition of the forms of action in the nineteenth century. Indeed, many think the time has come for its codification. And the law of torts has been transformed since the emergence in 1932 of the single concept of fault liability and duties of care with the House of Lords' judgments in Donoghue v. Stevenson.(2) By contrast only very recently has restitution assumed even the respectability of that name as another distinct concept of obligation. In the U.S.A. it has had a conceptual character of sorts since the Restatement of Restitution, published in 1937, but other major common law jurisdictions, notably England and Australia, have yet to acknowledge there is such a head of obligation as Restitution and Unjust Enrichment.

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(1) Digest 12.6.14. 'Hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem'.

(2) [1932] A.C. 562.

For the English courts, despite the judicially acclaimed seminal treatise by Sir Robert Goff and Professor Gareth Jones, first published in 1968,(3) there is still essentially a list of situations for which there is precedent granting relief to the plaintiff. Sametimes the plaintiff seeks specific recovery of tangible property or a fund, sometimes he is seeking recompense for having discharged the fiscal obligation of another, sometimes he wants a reasonable and appropriate sum for services rendered or goods supplied, and on yet other occasions he is after the concealed profits made by a defendant who is a fiduciary vis-a-vis the plaintiff. 'Restitution' seems an oddly amorphous notion when you look at this range of claims. It does not seem to add anything conceptual. English courts, it would seem, look upon a contract as an objectively determinable event when two or more persons have expressly or impliedly agreed - the obligation is their agreement; tort is an objectively determinable wrongful act or omission giving rise to an involuntary obligation between the actor and a consequently injured person. By contrast 'restitution' is a description of the law's response to a situation, it does not inherently tell us what that situation is. And, if we say restitution is concerned with 'unjust enrichment', the question is asked as to what that means. Is it a moral principle masquerading as a legal doctrine? If we are concerned with injustice, where is the line to be drawn between the situations that the law is to redress, and those which must be left to the

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(3) See, infra, note 41.

societal pressures that emanate from ethics and what is commonly regarded in our society as appropriate behaviour? A common lawyer would see understandable qualifications in the reference by Louisiana civilians to 'unjustifiable' and 'unjustified' enrichment.(4)

Common law Canada, however, has unequivocally adopted the notion of 'Restitution'. In a series of Supreme Court of Canada decisions stretching from the Deglman decision in 1954(5) to the Palachik v. Kiss decision in 1983,(6) that matter has been put beyond doubt. Whatever others in England, Australia and New Zealand have chosen to do, we are now fully committed to the rubric of Restitution. But what does that mean? What has it added to that which our English, Australian and New Zealand counterparts would probably continue to describe as quasi-contractual claims' and equitable relief? Have any principles or criteria been established since 1954, so that we can recognize when we are in the presence of a legally enforceable restitution claim? What is it that our courts are now to do that they were not doing before?

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(4) See, for the latest reported example of this, McCarty Corporation v. Pullman-Kellogg, 571 Supp. 1341 (La. 1983), at 1362-1364, interpreting art. 2292 ('Of Quasi Contracts') of the Louisiana Civil Code. See also Albert Tate, Jr., 'The Louisiana Action for Unjustified Enrichment', 50 Tulane L.R. 883 and 51 Tulane L.R. 446 (1976), two short papers which well merit reading. Cf., however, Fridman and McLeod, Restitution, infra, note 41 at pp. 1-6, and 38-42.

(5) Deglman v. Guaranty Trust Co. of Canada, [1954] S.C.R. 725, [1954] 3 D.L.R. 785.

(6) (1983), 146 D.L.R. (3d) 385, 33 R.F.L. (2d) 225.

These are the questions that I want to pursue in this paper.

From Remedied Situations to Principle

The present law of 'restitution' cannot be appreciated without an awareness of its historic evolution and development; and the courts of both of the former jurisdictions, law and Equity, have played their part in that history. Today their respective influences remain as part of the warp and woof of 'Restitution'.

The notion that the defendant must return it, who has received an involuntary payment from the plaintiff, has roots deep in the history of the common law. As early as the thirteenth century the plaintiff might claim in an action of debt the repayment of the disputed moneys. Debt was the mediaeval action for the enforcement of contractual obligation, and because the money was seen as 'owed' by the defendant to the plaintiff, this action was employed to compel re-transfer of involuntary payments.(7) It was with Slade's Case in 1602,(8) building upon the beginnings of the modern law of contract a century earlier, that the twentieth century law of 'quasi-contracts' was to be born.

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(7) The action of account made the bailiff responsible to his lord, but this potentially useful action was never extended to other relationships, except those concerning the guardian and the receiver in trade, and, being for a fixed sum of money, fell into disuse. During and after the seventeenth century Chancery's bill of account could be brought against all fiduciaries, and was a superior remedy involving a true accounting. See further C.H.C. Fifoot, History and Sources of the Common Law: Tort and Contract, 1949, p. 268 et seq.

(8) 76 E.R. 1072 and 1074.

Indebitatus assumpsit came into being in 1602 as a 'form of action', and it was through this action that the action for money had and received to the defendant's use, the action of quantum valebat for the value of goods sold and delivered where price had not been fixed, and the action for quantum meruit for the value of services rendered where terms had not been agreed, were originated and developed. The non-technical and flexible nature of the pleadings required for this most unusual action permitted the plaintiff to plead, and the courts to find, an implied promise to repay moneys, or to pay for value received. Gradually throughout the seventeenth, eighteenth and earlier nineteenth centuries the common law courts recognised what came to be a number of situations, each fashioned by analogy with precedents which had gone before, where there was no intention of gift but also no consideration, and where as a consequence the law would compel repayment or fix a value. The implied promise was really a fictional element, everyone recognised that, but the action in implied contract gave a shape, a set of criteria for the development of 'quasi-contractual' situations. Contract was an in personam obligation, and its concepts of privity and of consideration completed what have been described as the 'control devices' for the recognition of 'restitution' situations.(9) The notion of contractual relationship fenced in, if you will, the situations which could be recognised as actionable in law.

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(9) G.B. Klippert, 'The Juridical Nature of Unjust Enrichment', (1980), 30 U. of T.L.J. 356.

However, there were those who were not content to see a fictional promise as the premise for this kind of recovery. In the eighteenth century Lord Mansfield, Chief Justice of the King's Bench, insisted in a series of decisions that this recovery was based on broad equitable principles of good faith and fairness - equity in the layman's sense - but his views did not prevail. To common lawyers of the years prior to 1875, when the forms of action were finally abolished, form and substance were merely aspects of the same thing. Precedent itself had long since accepted that the implied promise was an essential precursor to the plaintiff's assertion of his entitlement. And for the next sixty years after 1875, when the great treatises on the law of the common law jurisdictions were being written in both England and the United States, the law of quasi-contract would remain unchallenged as a list seriatim of remedied situations rooted in the soil of reciprocal promises, privity and consideration.

The Court of Chancery, within its own areas of jurisdiction, exclusive and concurrent, was meanwhile developing its own ideas as to the circumstances in which Equity, also, would not tolerate the unjustifiable withholding of property. The seventeenth, eighteenth and nineteenth centuries saw the building up, within the exclusive jurisdiction, of something quite new to the law of England, a body of doctrine concerning fiduciary relationships, their formation and the liabilities that arise in the event of their breach. Pre-eminent among these, of course, is the rela-

tionship of trustee and beneficiary. Where no express trust was present, acquisition by fraud (to adopt a comprehensive description) was remedied by the constructive trust, an obligation to restore property simply imposed by courts of Equity upon the faithless fiduciary in a number of significant and specific situations where it was considered appropriate that the title to property, and the fruits of that property, be transferred to the claimant. Associated with the fiduciary/beneficiary claim was the right of the beneficiary to trace his proprietary interest into other property than the original, and into the hands of recipients from the fiduciary. Meanwhile, within the concurrent jurisdiction, the equitable lien and the charge afforded a claimant with a proprietary interest the means to recover it from the fund with which it had been merged, while subrogation permitted the claimant to pursue his property interest by adopting the rights of others. Suretyship and contribution (and indemnity) made others responsible for the defendant who did not honor his obligations. But here we have to be careful; many of these doctrines of Equity served to ensure that the abused plaintiff might recover or acquire property that was properly his, but they applied in many other circumstances than those which we would today readily recognise as the area of unjust enrichment.

And this takes us to a realisation from history which is all important. Many relief measures at Equity, and we might particularly have in mind rescission of contract, whether for undue influence, unconscionability, mistake or misrepresentation, may

have brought about restitution, but they were conceived of as part of Equity's concurrent (or supplementary) remedies in aid of the law of contract. At law, also, remedies in contract and tort might result in damages, or in specie reinstatement, which constituted restitution. But they were not conceived of in terms of Restitution; they were part of the law of contract or of tort.

In truth when the American Law Institute came to issue what is called its Restatement of Restitution in 1937 it was attempting to isolate those remedies which it thought of as essentially restitutionary in purpose, from among a mass of remedies, both legal and equitable, playing a number of different roles. The whole task was not only intensely ambitious, it was to a large extent, and necessarily, reflective of the personal viewpoint of the authors. Moreover, and this was to prove very significant when later developments took place, no attempt was made to cut across the lines drawn by the former distinct jurisdictions of law and equity. Warren Seavey handled the quasi-contractual remedies at law, and Austin Scott dealt with the equitable remedies. The two were put together, back to back, to form the Restatement, a decision which to be fair was no doubt wise if the publication was to have any general acceptability. The notion of Restitution, based upon unjust enrichment, was born, but it was a tenuous proposition, with many a square peg arguably in a round hole. As great an achievement as it was, it had none of the crystal clarity of a civilian's codified principle; to its critics, and they were many, it was a laboured, if brave, reconciliation of the disparate.

Since 1937 the principle of restitution, or unjust enrichment, has only very gradually made progress. It has generated over the years a vast amount of academic debate, and views have swung between those who at one extreme regard the principle of unjust enrichment as vacuous or, as that emminent authority Lord Justice Scrutton once described it, "well-meaning sloppiness of thought",(10) and those who at the other extreme believe in it wholeheartedly and proselytize with some passion. In England Lord Wright was one of those who was convinced that the conceptions of the Restatement were right, and he did much in the 1940s, especially in the Fibrosa case,(11) and in his ex cathedra writings, to swing the courts away from the implied promise of the 'quasi-contract' inheritance to the thesis of restitution and unjust enrichment. This, he said, was the true character of the precedents. But the time was not yet ripe; the majority of English lawyers, especially outside the universities, were not convinced. Then came in the later 1960s and the 1970s the epoch of Lord Denning who consistently took Equity doctrines, especially the resulting and constructive trusts, and made them serve as vehicles to produce justice, as he saw it, between the contesting parties before him. His judgment in Hussey v. Palmer,(12) for example, praised by restitution advocates, and savaged by his

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(10) Holt v. Markham, [1923] 1 K.B. 504, 513.

(11) Fribrosa Spolka Akcynja v. Fairbairn Lawson Combe Barbour Ltd., [1943] A.C. 32.

(12) [1972] 1 W.L.R. 1286, [1972] 3 All E.R. 744.

critics, is typical of his zeal for the 'new equity'.

Whether the precedents of the Denning era will survive, or survive as he intended them, time has yet to tell, but in 1954 the rationale of unjust enrichment was adopted in Deglman v. Guaranty Trust Co.(13) by the Supreme Court of Canada for what was essentially a quasi-contractual claim of quantum meruit, and in common law Canada the dye of the principle of unjust enrichment was cast. Pettkus v. Becker(14) and Palachik v. Kiss(15) from the same Court have deepened, and confirmed, that dye by extending the same rationale to Equity's constructive trust.

From Principle to Remedies

Now that the principle is established in common law Canada, the question is what it has accomplished. Have we now a new name for existing, often long-established precedents, or are we now to judge all fact situations afresh by the light of the unjust enrichment principle? In 1978 Lord Diplock said in Orakpo v. Manson Investments Ltd.,(16) "There is no general doctrine of unjust enrichment in English law. What [that law] does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based on the civil law".

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(13) [1954] S.C.R. 725, [1954] 3 D.L.R. 785.

(14) [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257.

(15) (1983), 146 D.L.R. (3d) 385, 33 R.F.L. (2d) 225.

(16) [1978] A.C. 95, 104, [1977] 3 All E.R. 1, 7.

To date most of the achievement of Deglman (a quantum meruit situation, we should recall) is that the quasi-contractual relief of the action for money had and received, long known to English law for its list of the 'money counts', is now described in Canada as a restitutional relief based on unjust enrichment. Quasi-contractual remedy is available when there has been payment through mistake of fact; it is not available, as a rule, when there is mistake of law. Restitutional relief in Canada continues to adhere to that distinction.(17) Quasi-contractual relief, emanating as it does from indebtitatus assumpsit, is an in personam remedy; so is the restitutional relief in Canada which follows the quasi-contractual precedents. No court appears to have made the statement one might expect, namely, that the restitutional remedy is neither inherently in personam nor proprietary, but that in a quasi-contractual setting only an in personam remedy is under consideration.

On the other hand, as MacKinnon J. said in Nicholson v. St. Denis,(18) when he spoke of a "specific relationship" being nearly always present in an unjust enrichment case, that relationship in any event is frequently contractual at the outset. It may well be, in view of this remark, that for the courts to

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(17) The Hydro Electric Commission of the Township of Nepean v. Ontario Hydro, [1982] 1 S.C.R. 347, 132 D.L.R. (3d) 193.

(18) (1975), 8 O.R. (2d) 315, 317-8; 57 D.L.R. (3d) 699, 701-2, cited in Geldhof v. Bakai (1982), 139 D.L.R. (3d) 527 (Ont.).

draw upon the quasi-contractual precedents of English law is a natural and practical course of action. Moreover, most of the considerations which enter into a traditional quasi-contractual action are equally relevant to an unjust enrichment action. The "officious" payment, or confirment of services or property upon another, merits the invocation both of a quasi-contractual action and an unjust enrichment action. There are signs, however, that the unjust enrichment principle is indeed leading the courts to assess what is truly equitable - ex bono et aequo - as between the parties, whatever the old quasi-contractual decisions may have held. In Rural Municipality of Storthoaks v. Mobil Oil Canada Ltd.(19) the Supreme Court in an action for money had and received was prepared to find that if the defendant has experienced a "change of circumstances" since acquiring the payment in question, so that it would be inequitable to require him later to make repayment, that consideration is a valid defence to the action, even though it could not be, and is not, relevant in a remedial action based upon implied promise to repay. It has also been suggested that the Supreme Court's decision in County of Carlton v. City of Ottawa,(20) where the plaintiff in error had provided medical services and welfare allowances to an indigent who was in fact the defendant's responsibility, and the Court held for the plaintiff exclusively in the language of Restitution, might not have been the same had the action been brought

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(19) [1976] 2 S.C.R. 147, 55 D.L.R. (3d) 1.

(20) [1965] S.C.R. 663, 52 D.L.R. (2d) 220.

under the traditional quasi-contractual head. Certainly the courts are clearly aware of the considerable scope they now have in 'restitution' even if so much of the terrain remains to be charted. In an action for money had and received, heard in 1981, in circumstances which involved mistake of law and practical compulsion,(21) Berger J. of the B.C. Supreme Court said, "The relief sought by the plaintiff is equitable in nature. It may be some time before the principles upon which this jurisdiction is to be exercised have been regularised. The judge, in the meantime, has a discretion almost like that of the Cadi under the palm tree".

This kind of realisation tends to breed caution in the common law mind, accustomed as it is to the discipline of inductive reasoning, and this may explain why the courts have fallen back so consistently during the past 30 years upon the quasi-contractual precedents. Without doubt, however, the existence of a complete discretion to do what is fair as between the parties, that is, without the "regularisation" of the appropriate principles, could have the opposite result. Professor Dawson, the American restitution authority, gave it in 1951 as his observation that a "general principle prohibiting enrichment through another's loss appears first as a convenient explanation of specific results. ...Yet once the idea has been formulated as a generalization, it has the peculiar faculty of inducing quite sober citizens to jump

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(21) J.R.S. Holdings Ltd. v. District of Maple Ridge (1981), 122 D.L.R. (3d) 398, 410-411 (B.C.).

right off the dock."(22)

It is with this thought in mind that one turns to the measures involving inherently discretionary relief which have been developed over the centuries by Equity. In the Commonwealth countries it was the matrimonial and cohabitation property disputes of the 1960s and 1970s which brought the constructive trust out of its little known Chancery world into the forefront of the common lawyer's attention. Unlike the quasi-contractual remedies at law, the constructive trust gives rise to proprietary relief. English law, followed in Australia and New Zealand, has never regarded it as a remedy. Certainly it is unlike specific performance or injunction. The constructive trust is thought of as an entity, a trust like any other. It enables the plaintiff to claim specific property, or an interest in that property, as his, and its awards him any increase in value it has acquired while in the defendant's hands. The constructive trust was traditionally available in Chancery if there was a fiduciary relationship between the plaintiff and the defendant, and because of this relationship it put the defendant to an accounting, which is an in personam remedy. But because, by analogy with the express trust, the plaintiff also claimed that that specific property belonged to 'the trust', he was entitled to the restoration of that property by the fiduciary to 'the trust', and to call upon an equitable remedy, namely, tracing, if that property had been wrongfully converted by the fiduciary or transferred by him to

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(22) J. Dawson, Unjust Enrichment, 1951, at p. 8.

another person who either took with actual or constructive notice of the wrongdoing, or though innocent took the property as a donee.(23)

It was this trust action which Pettkus v. Becker held was a restitution remedy, based upon the principle of unjust enrichment. And in Palachik v. Kiss the same Court held that the essence of the relief given by both the constructive trust and quasi-contract, the latter as exemplified in the Fibrosa decision of the House of Lords, is the same. "Equity fastens on the conscience of the payee and requires him to deliver up that which it is manifestly inequitable that he retain".(24) The constructive trust, the Court said, "arises from the duty to return the money".

In the Palachik case the plaintiff was suing inter alia for the return of money paid by him to his now deceased wife further to an agreement between them that upon the completion of his instalment payments to her he would acquire from her a one-half interest in the property in which they made their home. His wife had died before the payments were complete, and he claimed the

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(23) It is because the beneficiary of a fiduciary relationship (e.g., an express trust) has his equitable interest in the 'trust' property, and invariably has the right to trace, that the constructive trust is commonly described solely as a proprietary institution. In the case of an express trust this does not much matter in practice, but once the constructive trust is designated as a remedy, and plays a role quite distinct from the express trust, the accounting and proprietary elements must be distinguished. Each has a distinct function.

(24) Supra, note 15, at p. 395.

estate was a constructive trustee for him of the moneys he had paid. This was an in personam claim, essentially for an accounting, and the Court held that the requirements demanded of the plaintiff claimant are the same in both constructive trust and quasi-contract. He must not himself be in breach of the agreement, the breach must be the other's or the agreement must have been frustrated by events beyond the claimant's control, and the result of the breach or frustration must be a total failure of consideration, meaning that the claimant did not receive the benefit of the payee's performance in exchange for which he made the payments. The plaintiff hsuband succeeded in his claim, and the Court allowed him interest on the moneys paid.

The effect of these two decisions, Pettkus and Palachik, is that, where the remedies overlap, a claimant in restitution may select the remedy in quasi-contract or constructive trust which is best suited to his claim.(25) Indeed, it seems now that, given its two-fold characteristic as an in personam remedy (accounting) and as a proprietary remedy (a 'trust' with the right to trace), the constructive trust is potentially available over the entire field of Restitution, as it exists to date. There is no reason of principle that I can see why the constructive trust should not now be available to remedy other situations that in the days of the divided jurisdictions of law and equity were handled by the courts of law alone.

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(25) In Royal Bank of Canada v. LVG Auctions Ltd. (1984), 43 O.R. (2d) 582, 2 D.L.R. (4th) 95, an action to recover money paid by mistake, the plaintiff argued in both.

Let me expand on that a little. Equity intervened when there was equitable fraud or undue influence, thus supplementing, when there was a fiduciary relationship, the remedy for fraud at law. One interpretation of Pettkus v. Becker, a widely- drawn interpretation and I think persuasive, is that for the plaintiff to be able to invoke the constructive trust a fiduciary relationship is no longer required. In Waselenko v. Touche Ross Ltd.(26) this was decided to be so, and there the court went on to decide that it was also no longer a requirement in a tracing action. This development is in line with the earlier Canadian decisions(27) that a victim of theft may bring a tracing action against the thief, or a mala fide or donee recipient from the thief, in order to recover assets bought with the stolen property, or the proceeds of sale located in a bank account. It is difficult to believe, launched as they are on an American-type restitution route which rejects this requirement, that our courts will any longer look for a fiduciary relationship in connection with any aspect of an unjust enrichment remedy. The injustice of the improper enrichment and the deprivation are enough, whether the claimant seeks recovery in personam or in rem.

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(26) (1983), 24 Sask. R. 260, [1983] 2 W.W.R. 352.

(27) Goodbody v. Bank of Montreal (1974), 4 O.R. (2d) 147, 47 D.L.R. (3d) 335; Simpson-Sears Ltd. v. Fraser (1974), 7 O.R. (2d) 61, 54 D.L.R. (3d) 225; B.C. Teachers' Credit Union v. Betterley (1975), 61 D.L.R. (3d) 755 (B.C.). Simpson-Sears Ltd. and B.C. Teachers' Credit Union are essentially phrased in terms of restitution, Goodbody in terms of the constructive trust.

Another implication is that the victim of tortious conduct can bypass the proprietary tort remedies and sue in 'constructive trust', if that would give him more. In Goodbody v. Bank of Montreal(28) the court held that the plaintiff was entitled to constructive trust relief, and damages for conversion in addition. Of course, there are those who conceive of 'restitution' as a remedy where existing remedies in contract or tort do not exist, but I confess I do not follow this. 'Restitution' is merely the plaintiff's recovery of compensatory value or specific property when unjust enrichment has occurred. There is no apparent reason why the breach or failure of a contract, or the commission of a tort, should not result in an unjust enrichment, so that the plaintiff chooses his remedy, as he once waived the tort in favour of a quasi-contractual remedy.

Indeed, Dean McCamus(29) sees the logical development as the availability of the restitution trust when legal title remains with the plaintiff (e.g., a contract subsequently held void), but the plaintiff's action is for the benefit acquired by the defendant by means of the property in dispute while the defendant was in possession of the plaintiff's property. The logic is compelling; why should the constructive trust be available when the contract is voidable (e.g., for fraud), but not when it is void

(28) Ibid.

(29) See J. McCamus, 'The Restitutionary Remedy of Constructive Trust', Special Lectures, 1981, Law Society of Upper Canada, esp. at pp. 116-123, for an examination of the potential of the constructive trust.

(e.g., for mistake)? But we should be under no illusions; we must not again fall into fictional thinking, with all its misleading connotations. This is a move right away from the conception of the constructive trust held by the old Equity jurisdiction. This remedy would not be a 'trust' at all. It is a sui generis restitution remedy, conferring in rem rights.

The ramifications of this state of affairs are obviously far-reaching. To guide them in this uncharted country the courts to date have only the broad constituent elements which Dickson J. (as he then was) spelt out in his Rathwell judgment,(30) and again in the Pettkus case. For the remedial constructive trust to apply there must be an enrichment, a corresponding deprivation, and the lack of a juristic cause, such as contract or gift.(31) There must also be a causal connection between the enrichment and the deprivation. That is to say, there must be a sufficient link between the claimant's contribution and the disputed asset in the defendant's ownership that it is fair and just to order that the claimant has a proprietary interest in that asset. If those elements exist, said Dickson J. in the Rathwell case, then the defendant is "accountable as a constructive trus-

(30) Rathwell v. Rathwell, [1978] 2 S.C.R. 436, 83 D.L.R. (3d) 289.

(31) In Re Ontario Egg Producers' Marketing Board and Clarkson Co. (1981), 33 O.R. (2d) 657, 125 D.L.R. (3d) 714, a "juristic reason" was absent, and the plaintiffs failed to obtain restitution. This case was distinguished in Ontario Wheat Producers' Marketing Board v. Royal Bank of Canada (1983), 41 O.R. (2d) 294, 312, 145 D.L.R. (3d) 663, 682. See also Re Barrett's Estate (1984), 46 Nfld. & P.E.I. R. 169 (Nfld.)., and Waselenko v. Touche Ross Ltd., supra, note 26.

tee".(32)

Those last words of the now Chief Justice are very significant because the Supreme Court has heard to this date only disputes where one party to the dispute held title to disputed assets, and the other sought the whole or a share in that ownership. Murdoch,(33) Rathwell, Pettkus, and Palachik were therefore strictly accounting actions; the defendant in each was ordered to surrender ownership in property actually in the defendant's hands.(34) To decide on the competing positions of two parties inter se, the one having acquired property from the other or benefited through property acquisition in breach of a relationship with the other, is one thing. It is quite another when innocent third parties are involved, such as unsecured creditors in the enriched party's bankruptcy or insolvency. Advocates of the restitution principle will often maintain that the deprived party should nevertheless prevail over the unsecured creditors because the party was never a creditor; he is merely claiming what is his own. But I suggest that, if Restitution is truly an unjust enrichment remedy, such a response begs the question of whether the deprived party should be able to call the disputed asset his own. In Professor Dawson's colourful language, such advocates to my mind have taken a dive off the dock. The answer

(32) Supra, note 30, at p. 454.

(33) Murdoch v. Murdoch, [1975] 1 S.C.R. 423, 41 D.L.R. (3d) 367.

(34) I am aware, of course, that the majority in Murdoch, and again in Rathwell, decided each case on the basis of a resulting trust.

cannot depend solely upon whether Equity's constructive trustee was always able to assert the right to trace, and his sole task was to establish that the property was still identifiable. That, I suggest, is the technical character of Equity's constructive trust. The task for the court today is to determine in all the circumstances whether restitution, as a new and distinct formulation of the obligation, is appropriate if there are innocent third parties who are going to be injured by an in rem remedy. Sometimes there may be a case for the court to invoke the proprietary aspect of a restitution (constructive trust) remedy; on many occasions there will not. An accounting by the bankrupt or insolvent to the claimant will be sufficient redress of the injustice; thereafter the claimant takes his place among the unsecured creditors.

It is easier perhaps to become accustomed to this idea of seeing accounting and tracing as separate remedies, if one considers the position of a claimant who seeks to recover money paid by mistake, or the value of goods supplied or services rendered. For centuries his claim has been regarded as quasi-contractual; indeed, as MacKinnon J. said, it is most likely that the situation before the court originated in the circumstances of contract. Such a claim was in personam, giving no priority rights to the claimant in the event of the defendant's bankruptcy. Now the constructive trust remedy is available to that claimant. Should it follow, if he can identify 'his' moneys, that such a claimant can automatically trace, and take priority as if he were

a secured creditor? I doubt whether many would see the 'justice' of this outcome. And, since the restitution remedy is based on an independent principle of unjust enrichment, where competing equities from each side have to be weighed, there is no reason why tracing should inevitably follow. Indeed, there is every reason why it should not.

However, I cannot say that this was the approach taken in Waselenko v. Touche Ross Ltd.(35) where the court held the constructive trust to be a proprietary remedy, which left only the question of whether the claimants could identify 'their' property among the insolvent's assets. This was a case where the claimants had contracted with the defendant company (Swertz Bros. Ltd.) for the construction of a pre-built home, and had made a total pre-delivery payment of $33,000 out of a price of $65,000, when the defendant was placed in receivership by its bank, the home only partially completed. The claimants succeeded in obtaining the home in its unfinished state as the identifiable asset they sought, ahead of all unsecured creditors; its value was taken to be $33,000. Whether this is the kind of analysis that is going to become established, it is much too early to say. One swallow does not make a summer - or one storm a winter. I have to say with respect that, while opinions will obviously differ, in my view unjust enrichment was merely switched from Swertz Bros. to the claimants who succeeded at the expense of Swertz Bros. unsecured creditors. These people did not even receive a

(35) (1983), 24 Sask R. 260, [1983] 2 W.W.R. 352.

mention.

My thesis is that, as the law now stands, the principle of unjust enrichment is firmly established. We have yet to see what the courts will do with the equitable lien, which the Americans treat as a complementary remedy to the constructive trust,(36) or with subrogation. But it is already clear that, though the situations formerly brought under quasi-contract and constructive trust are now within the scope of the new restitutionary remedy, the technical origins and characteristics of those former actions are gone. The courts have now to decide in each case on its merits what order is appropriate to rectify, where they conclude it exists, unjust enrichment. The best remedy may be personal, it may be proprietary; it may be that the deprived party voluntarily entered into a deal which went wrong or that in some other way he was wholly or partly responsible for the deprivation; each party, the enriched and the deprived, may have put his own resources or effort into the enrichment that came about, when proportionate divisions of the enrichment will be appropriate (as in the matrimonial and cohabitation property dispute cases). As to the defences open to the enriched party, it will now surely be accepted that after the Storthoaks and Palachik decisions all enriched parties are able to plead change of position (or circum-

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(36) The constructive trust remedy confers accretion upon the claimant; the lien (which may be accompanied by an award of interest) the return of his money. This was not spelt out in B.C. Teachers' Credit Union v. Betterley, supra, note 27. The claim was for a lien, and the Court (at p. 760) awarded both a lien and a share of the accretion.

stances). And when there is an insolvent or bankrupt party who acquired the unjust enrichment, the courts will surely have to have in mind all those third parties who will be injured, perhaps unfairly, by an order that merely looks to the two principal parties. The considerations that are at present entertained in connection with estoppel,(37) contributory negligence pleas, and unconscionability, and that arise in cases like Ingram v. Little,(38) are the kinds of consideration that now become part of the judicial attempt in unjust enrichment cases to secure results which are truly ex bono et aequo.

The task ahead is daunting; indeed, one English authority has said that "the specific instances from which [unjust enrichment] might be constructed by the usual case law method are almost, if not quite, non-existent."(39) But it is no more daunting than that which faced the courts and the practitioners after the judges' en banc decision in Slade's Case in 1602, when the wide-open action of indebitatus assumpsit was approved. It is likely the courts will again combine imagination with an adherence to the directions of precedent,(40) and again likely that

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(37) See, e.g., in a restitution/quasi-contractual setting, Dominion Securities Ltd. v. Toronto-Dominion Bank (1984), 24 Man. R. (2d) 235.

(38) [1961] 1 Q.B. 31, [1960] 3 All E.R. 332 (C.A.).

(39) F.H. Lawson, Remedies of English Law, 2nd ed., 1980, p. 52.

(40) The manner in which the Pettkus v. Becker constructive trust should operate as between husband and wife, or cohabiting man and woman, has already been fairly well worked out. For a recent comment, see J.G. McLeod, Annotation, (1983) 32 R.F.L. (2d) 235-239. For a comment on the relationship

for some time the judicial experience will continue for some time to be comparable to that of the 'Cadi under the palm tree'. But it is also a great opportunity for the Canadian courts to lead other Commonwealth jurisdictions, in a direction that those jurisdictions, too, will eventually have to follow.(41)

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between the Family Law Reform Act (Ont.) and the constructive trust, see J.S.M. Mitchell, (1983) 34 R.F.L. (2d) 7 at 25-32.

(41) The leading words of reference are George E. Palmer, The Law of Restitution, 1978, four vols. (U.S.A.); G.L. Fridman and J.G. McLeod, Restitution, 1982 (Canada); R. Goff and G. Jones, The Law of Restitution, 2nd ed., 1978 (England and Wales).