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# 不當利得制度に關する比較法的一研究

——ドーソン「不當利得の研究*」を中心として——

小 林 規 威

## Foreword

Professor John P. Dawson's "Unjust Enrichment" is a scholarly study of the development and present application of an important doctrine. When I had a chance to read this book for the first time, I was very much impressed by the following points. In the first place, this is a work of penetrating research of an important but neglected field of law. Secondly, the above-mentioned research was undertaken by a professor of law who was trained in the American case-method, and who also had an opportunity to experience traditional European learning at Oxford. Because of his extensive study on both sides of the Atlantic, Professor Dawson was successful in presenting his thought on the ancient doctrine of unjust enrichment to his "civil" as well as "common" law trained readers. Thirdly, Professor Dawson's use of the case-method was very effective in producing a vivid and dynamic picture of the actual working of the doctrine in the mind of the readers.

In reviewing Professor Dawson's research in this article, I want not only to introduce the substance of his scholarly work but to apply my insight to the author's method of case-studies. I am also interested in adding my own explanations to the review of the chapter entitled, "Some of Our Difficulties", in order to provide a new and clear understanding to the reader of Anglo-American restitution remedies which have been relatively unknown here in Japan.

## Introduction

In this small volume Professor John P. Dawson of Michigan University Law School has undertaken a comparative analysis of the ancient and

* John P. Dawson, UNJUST ENRICHMENT (1951).

modern European as well as the Anglo-American system of prevention of unjust enrichment. This book is based on a series of lectures originally delivered at Northwestern University Law School as the Rosenthal Foundation Lectures of 1950.

* * *

As an introduction, Professor Dawson cites the following two statements to explain the principle of prevention of unjust enrichment through another's loss:(1)

> "A person who has been unjustly enriched at the expense of another is required to make restitution to that other." (Section 1 of the American Law Institute, Restatement of Restitution)
>
> "For this by nature is equitable, that no one be made richer through another's loss." (Pomponius, in the second century A. D.)

In the beginning, the author draws his readers' attention to an element of causation which appears in the statement of Pomponius as well as Section 1 of the Restatement: "It implies a type of enrichment that is caused by another's loss." (p. 5)

The discussion of causation is followed by the author's analysis of the two aspects of the above-mentioned statements. In one aspect, it takes "on the look of a 'rule' of law, from which subsidiary rules or even the solutions of particular cases can be directly derived". (p. 7) Meanwhile, "it is also a standard of judgment which cannot be applied universally in human affairs, and it expresses an aspiration that will never be realized". (p. 7) Professor Dawson tries to explain the principle of prevention of unjust enrichment as one which moves in constantly changing perspectives.

Lastly, the author points out the so-called "delusive appearance" (p. 8) of the principle. The ideal of preventing enrichment through another's loss has a very strong appeal to the sense of equal justice of the people. Since the appeal is so strong people have tended to be intoxicated by what they are talking about and to forget about the "relativity" and "complexity" of the principle that must enter into their judgment. Moreover, we must find a measure of recovery to apply the universal principle of unjust enrichment to specific cases: "It is an instrument for quite practical and intelligible purposes." (p. 8)

## The Sources of Our Present Difficulties

Note: The citation of figures in parentheses in the body of the text refers to the page number(s) of Dawson's above-cited treatise.

(1) Pomponius' statement has an advantage over the Restatement for advocating more clearly an aspiration to establish a general principle of justice. This is partly because the Restatement, unlike Pomponius, omits any reference to the law of nature, which always has had a strong appeal. Here, the author does not enter into the ancient controversies on the subject concerning the law of nature.

The first lecture, "The Sources of Our Present Difficulties", explains relief against unjust enrichment under many different names.

Professor Dawson explains the modern development of the common law of restitution in the history of general assumpsit. At first, if a creditor wanted to bring an action of assumpsit it was essential that the debtor should have made an express promise to pay the debt. "Later a step in advance was taken by the recognition of promises implied in fact, not only for debts of specific amounts but also for unliquidated claims, when the elements of a contract could be found in the acts of the parties though not in their words. A still further step was taken when quasi-contractual obligations were enforced in the action of *indebitatus assumpsit* under the guise of promises implied in law." Williston, *Contracts* (student ed., 1938) Sec. 143.

To the development of quasi-contract remedies, Lord Mansfield made a significant contribution in *Moses* v. *Macferlan*, 2 Burr 1005 (1760). The facts of the case may be summarized as follows: In the first action, an endorsee of a promisory note took a judgment in a small claims court against his endorser. The second assumpsit action was brought by the endorser for the endorsee's breach of an express agreement in that it had been orally agreed that the endorsement of the note would be without recourse. Lord Mansfield of the Court of King's Bench declared in this case that the action of general assumpsit for money had and received would lie. The remedy rested no equity and was available where the defendant was "obligated by the ties of natural justice and equity" to refund money. (pp. 11–12) [2] Professor Dawson thinks this case to be an instance where Lord Mansfield applied "the methods of legal positivism to a system of case law". (p. 20) However, this free decision[3] had a tremendous impact upon the rule of a single jurisdiction which was administered traditionally by "freezing doctrine"; the House of Lords denied itself the power to overrule itself.

Meanwhile, Lord Sumner[4] contributed to the development of restitutionary relief through his application of the so-called "tracing into the fund" theory to *Sinclair* v. *Brougham*, A. C. 398 (H. L. 1914). In this case, a building society, which was in process of liquidation, was proved to have engaged *ultra vires* in a general banking business and to have accepted large sums by way of ordinary banking deposit. The depositors brought an action against the building society to recover the amount of their

(2) The confusion of contract with restitution was deeply rooted in the history of assumpsit and was not due to Mansfield's borrowing of a Latin phrase.

(3) "We know Mansfield was no revolutionary, not even in legal matters. But the issue he raised in *Moses* v. *Macferlan*, more plainly than in any other of his 'free' decisions, was the issue as to the creative powers of judges." (p. 19)

(4) Lord Sumner assumed leadership in the campaign to repudiate Lord Mansfield.

deposits. On the side of the defense the stockholders of the corporation relied upon the *ultra vires* character of the original deposit agreement. The decision of the court may be summarized as follows: 1) The action for money had and received is a common law and not a Chancery remedy; 2) The Court orders restitution through "tracing into the fund" which consists of all the remaining assets of the corporation, with prorating the sums paid in. This use of the constructive use was a great extension of earlier English decisions.

In American jurisdictions, the development has been too gradual to make a noticeable impact. (p. 22) Lord Mansfield applied his remark to the common count for money had and received, which presupposed a transfer or at least a receipt of money. In America, however, 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, etc.

"... Any unexpected gain must ordinarily be restored through quasi-contract if a money judgment will suffice. This is not a rule .... It is at most a working hypothesis. We have built up this hypothesis step by step, through the methods of case law." (pp. 25–26) But this is not a problem for quasi-contract only, since similar developments have appeared on the equity side.

The equitable remedy for prevention of unjust enrichment, the constructive trust, "emerged from the fog of the eighteenth century equity". (p. 26) If trust assets were wrongfully used by the trustee himself for the acquisition of other assets, it seems unlikely that there would have been any scruple about ordering restoration of the newly acquired assets instead of directing satisfaction by means of a money decree. It is this latter feature, tracing, that is the most important contribution of the modern constructive trust. (p. 27) At first, there were two obstacles to tracing: One was the Statute of Frauds in cases where the substitute asset was land; The other was the requirement as to the proof of an actual intent in the trustee to subject the newly acquired assets to the trust obligation. See *Perry* v. *Phelips*, 4 Ves. 108 (1798). The extension of tracing remedies to persons not express trustees or otherwise subject to fiduciary obligations was the work of the nineteenth century. (p. 28) Meanwhile, in American jurisdictions, it was *Newton* v. *Porter*, 69 N. Y. 133 (1877), that dispensed with any requirement of an antecedent "fiduciary" obligation by making the constructive trust available to reach the product of old fashioned larceny.

Then the author reviews the modern refinements of the use of the constructive trust remedy. *Hallet's Estate*, 13 Ch. Div. 695 (1879) established the presumption of rightful withdrawal, which has so greatly expanded the

possibility of tracing into and through commingled funds. (*Note*: It was accepted as such in the United States and became a rule of law.) In the decisions of the nineteenth and twentieth centuries the newly expanded apparatus of the constructive trust was transferred to cases of contract, where the ground for relief was fraud, mistake, undue influence, duress, or simple breach of contract. In the short space of 75 years "we have created a monster". (p. 30)

Thereafter Professor Dawson points out a blind-point for the use of this equitable remedy.

> "No particular effort has been made to distinguish the problem of reviewing the fairness of transactions with such persons from the very separate problem of enforcing specific restitution of gains received through violation of 'equitable' obligations. The 'conscience of equity', expressed through the constructive trust, has helped to obscure somewhat the purpose of preventing enrichment. This purpose has been still further obscured by ... the tendency to conceive of an equitable ownership of the substitute asset, arising automatically when the requirements of tracing are met." (pp. 30–31)

A concluding remark is drawn after this discussion of equity by the author. "Without much conscious purpose or plan we have created this shambling creature. It is time to fence it in." (p. 33)

The modern equitable lien as a device for accomplishing restitution is for the most part an offshoot of the constructive trust. The equitable lien was used to enforce an express or implied-in-fact agreement to give security. However, these cases shade off gradually into purely remedial cases of the lien to ensure a promised performance of the restitution to which the plaintiff would otherwise be entitled; recovery for expenditures made in improvement or preserving assets, vendee's lien on land or chattels, etc. To date, American courts have retained a considerable range of discretion in adapting the ultimate relief through constructive trust to the needs of individual situations. Professor Dawson hopes that "this discretion will be retained and that the choice between specific restitution and lien will continue to be determined by something more than the motive of extracting the highest possible measure of recovery through tracing". (p. 34) [5]

Where assets of one person are used in discharging an obligation owed

(5) "If one person misappropriates money of another and with it purchases property, the other can at his option either enforce an equitable lien upon the property so acquired, holding the wrongdoer personally liable for the balance, if any, or enforce a constructive trust of the property. If the property falls in value, the equitable lien is his better remedy; if it rises in value, the constructive trust is his better remedy." American Law Institute, *Restitution Restatement*, Section 161, Comment a.

by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder.(6) Here the remedy takes on the aspect of another form of tracing. It rests on the valid belief that the process of tracing should not be terminated because assets are used to extinguish a debt rather than for the acquisition of a new asset. To substitute the plaintiff in place of the paid-off creditor is an easy and natural solution.

Last and perhaps least is the equitable accounting, with an equity money decree. Its traditional measuse of recovery has been the profit realized in cases of express trustees and other fiduciaries as well as in cases already in equity on other grounds, as with injunctions against various kinds of torts, foreclosure or redemption of mortgage or land contracts and so forth. There has been some slight tendency in modern decisions to generalize the grounds by including cases of gains received by persons not in any sense fiduciaries. (p. 38) See also *Fur & Wool Trading Co.* v. *Fox*, 245 N. Y. 215, 156 N. E. 670, 58 A. L. R. 181 (1927).

As the conclusion of the first lecture, Professor Dawson states that: The main source of our present difficulties is the multiplicity of our procedural resources for prevention of unjust enrichment. Moreover, the multiplicity of remedies is complicated by the diversity of origins. Each remedy functions differently and prevents enrichment by different means.

> "Every one of them has been subjected in recent times to generalization of grounds, so that we have finally come to see the common purpose that underlies them all. But something more than this realization is needed to cast off the accumulations of history. Tying them all together, while growth goes on, is one of our great unfinished tasks." (p. 39)

## European Solutions

The second lecture, "European Solutions", deals with questions of unjust enrichment to which hard thinking has been devoted for more than two thousand years.

### (1) Roman Law

The author divides remedies for the prevention of unjust enrichment in classical Rome into three groups: the *condiction*, *negotiorum gestio*, and other remedies such as *restitutio in integrum* and praetorian system of fraud.

(6) American Law Institute, *Restitution Restatement*, Section 162 (Subrogation).

The *condiction* was the most important remedy in Roman law for the prevention of unjust enrichment. It was the Roman form of general assumpsit, giving only a money judgment. Until the second century A. D. the *condiction* could be used only where the subject of the action was a fixed sum of money, a stated quantity of fungible goods, or an identified object. However, later, 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. This led lawyers to an interesting generalization, that whenever there was an "unjust cause" for detention the *condiction* could be used. (pp. 42–43)

Then Professor Dawson introduces four different kinds of remedies against unjust enrichment: 1) *Condictio furtiva* was a *condiction* for theft. 2) *Condictio indebiti, condiction* for the "not due", rested on mistake, and it was available to recover payments of non-existent debts. 3) *Condictio ob turpen causam* meant a *condiction* for "illegal" purpose which precluded recovery where illegality operated. And 4) *Condictio ob causam datorum* gave a relief in cases which involved a purpose that could not be or was not accomplished.(7) (pp. 44–47) Thereafter, Justinian's compilers gave a "most ingenious twist" (p. 47) to the original context of the classical *condiction* and established a much more general concept of transfers made "without cause".(8)

There were two limitations of the use of the *condictions*. The *condictions* did not touch some grounds for restitution familiar to American lawyers, such as fraud and duress; impossibility and frustration; enrichment of the donee in an outright and deliberate gift; the payment of a sum not due, where mistake of a payer could not be demonstrated; and transfers for a purpose. (p. 49) In addition to this, the author cites a case of improvements on another's land. A mistaken improver could recover nothing for a structure erected on another's land, after the owner of the land had recovered possession, because there was no direct dealing between the improver and the true owner of the land.

The second group of remedies for unjust enrichment was called *negotiorum gestio* or management of another's affairs. This was a Roman system to give relief to absent persons in litigation by permitting the intervention of the praetor on behalf of such persons. As a result of the intervention, the intervener assumed an obligation to exercise due care in his management. However, in the latter classical period, *negotiorum gestio* became

(7) A gift *causa mortis* where the donor recovered his health.

(8) It is pointed out by the author that the concept of cause as used in connection with the *condictions*, had nothing to do with the formation of contract. (p. 47) Cf. French Civil Code of 1804.

a generalized legal technique, extended by analogy to various cases of defective mandate and guardianship and mistake as to status and applying to persons who were living and certainly not "absent". (p. 58)

Originally there was a requirement of intent to seek a remedy under *negotiorum gestio*. Nevertheless, there was another tendency to invoke the principle of unjust enrichment and, with its aid, to expand the remedy given the intervener. The latter partly neutralized the former.

Lastly, the *negotiorum in integrum* was a remedy to restore a cause to its first state in duress cases. Among the last group of remedies, the praetorian exception (defense) of fraud was greatly expanded in scope and at times was transformed into a defensive measure for preventing unjust enrichment. (p. 62)

## (2) Medieval Law (1100–1400)

For a medieval glossator, the *Corpus Juris* was "the sum of human wisdom, ranking certainly with the Bible". (p. 64) It was his duty to expound the *Corpus Juris* as a complete and unified system. He tried to resolve the many contradictions of the book by strict textual analysis and to reproduce the whole with the greatest fidelity. Therefore, the attitude of the glossators towards problems of unjust enrichment was based on the above explained assumption as to the sacredness of the *Corpus Juris*. Actually there was only one significant change by compilers as to the context of *condictions*. This was the concept of transfers without cause, *condictio sine causa*.

Meanwhile, the glossators faced several difficult problems in their study of interpolated texts of the *Corpus Juris*. First of all, cases of improvement on another's land haunted the admirer of the Roman Code. There was an interpolated text which allowed recovery for *negotiorum gestio* by a person who had enriched another in attempting to benefit himself. Is this text applicable to the above-mentioned improver's case? At first, this text was considered to be inapplicable because it meant more favorable treatment for the occupant aware of his want of title than to the improver acting under mistake. However, this contradiction was avoided by Martinus, one of the four doctors of Bologna, who refused to draw any distinction between good and bad faith improver, and gave relief to the improver to the extent of the owner's enrichment. Later, it was established that *negotiorum gestio* was to be used "if the improver could show that he acted for his own advantage". (p. 69)

The second group of difficult cases involved misappropriated property whose proceeds had reached a stranger. Where the price took the place of the thing, as in this case, the owner could no longer maintain an action

for specific recovery of the appropriated property.[9] But he was allowed to recover the proceeds from the unauthorized seller. Meanwhile there were cases of misappropriation where "the thing took the place of the price". (p. 72)[10] The problem is whether an asset purchased with misappropriated money could be followed and received in place of money itself. It was admitted that there was no dealing between the owner of the misappropriated money and the buyer of the assets purchased with the above-mentioned money. Yet, it was stated that no one was harmed since the seller of the assets who had been paid with stolen money would be discharged by the judgment so that the whole account would be closed.[11]

A following case indicates problems which were raised by the third group of cases. They involve gains realized through contract by a stranger to the transaction. Money is loaned to an insolvent person. He uses it to buy food for his sons. The sons then inherit property from their mother. The issue of the case is whether, in view of the father's insolvency, the lender can sue the sons for the gains they have received. The glossators gave a somewhat doubtful answer for the recovery by the lender in view of a text which said that the *condiction* couid be used only against "those to whom money is in some manner paid, and not against those who thereby derived an advantage". (p. 75)

There was another text. It involved a loan of money which in fact belonged to the plaintiff, but in which the defendant borrower actually believed that he was receiving it from a third person and gave a promise to the third person to repay it to him. The grant of *condiction* was rested on "equity". (p. 76) The difficulty was that there had been no dealing between the plaintiff and the defendant.

The *condiction* had been redefined in very broad terms by the efforts of the compilers. But the action for *negotiorum gestio* was in many ways still more useful not only for the crucial enrichment cases but for other separate services such as the development of the law of agency. It was used as a remedial device in multiparty transactions where mistake was the essential ground. From these cases the glossators extracted some generalizations which made it appear that certain classes of acts (such as payment of another's debt) by their own nature constituted a management of affairs, without further inquiry into motives. (p. 77)

No general recasting of the Roman legal system was brought about

(9) ...the limitation expressed in the Roman law texts, requiring that the property itself be not recoverable, was maintained by Martinus' successors. (p. 70)

(10) It can be discussed in America in terms of tracing. See p. 72

(11) The problem involved, as to tracing of proceeds remains one of the disputed issues of modern German law... (p. 74)

by the glossators' work of the first three centuries.

> "Development came through work on specific problems, mostly anomalous solutions scattered around the fringe.... By the techniques of analysis they developed and by their selection of the crucial texts, the medieval lawyers, provided the main material for the debates of later centuries. They also supplied an extensive array of resources for their successors to choose between." (p. 78)

### (3) Modern Law (1500–1800)

The steady progress of natural-law ideas was a vital factor in emancipating lawyers from the tyranny of the Roman texts and in providing a new look at the problem of enrichment during the period of three hundred years from 1500 to 1800. Historical criticism was applied by modern lawyers to the text of *Corpus Juris*. This led to the important discovery that many texts had been corrupted by Justinian's compilers. In the field of unjust enrichment, the validity of the doctrine was affirmed by French Romanists such as Cujas and Faber. These lawyers also came to agreement that "equity" requires a remedy against the third persons benefited. However, it was in the area of the German "common law" that new adaptations of the Roman law doctrines chiefly occured. (p. 83) To give a relief for enrichment through a third person's contract, German lawyers inherited the Roman *actio de in rem verso* and made it into the general unjust-enrichment remedy of the German common law.

In the classical Roman law ownership was attributed only to the head of the household. It meant that the sons and slaves of the household did not have power to create correlative liabilities by contract or through representation. Under the circumstances, the Roman praetors established a formula for rendering judgment against parents and masters for their benefit of some assets through their sons and slaves. The form of action was called *de in rem verso*, "concerning what has been converted to father's or master's account". (p. 85) Originally, it represented a very special context. Therefore, it was "one of the most extraordinary accidents of history" (p. 85) that a remedy with such origins as these should have become the general unjust enrichment remedy of the German common law.

After the discussion as to the origins of the *actio de in rem verso*, Professor Dawson cites a late imperial rescript reproduced in Justinian's Code. The text stated, in a case involving a loan of money made to a free person acting in his own name but on behalf of another, that no action lies against the undisclosed stranger for whom the borrower acted. Then one crucial clause was added, probably by the compilers, that "unless the money is converted to his account or he ratifies the contract". (p. 86) The

additional clause of the text completely altered the sense of the first half of the text and imposed liability on the third party in a case where there was no authority given the borrower to act as agent and no ratification had occured. This contradiction came from the fact that unjust enrichment intruded to fill the gap left by a total absence of authority, and this applied to a free person not a subordinate member of a household. This indicated a need for a modernized law of agency.

Despite the above-mentioned confusion and some medieval lawyers' attitude of reverence towards Justinian's text, the majority of the lawyers of the middle age were willing to stretch Roman doctrine in cases of enrichment through a third person's contract.(12) It was, however, in Germany during the seventeenth century that the *actio de in rem verso* became a remedy for enrichment through a third person's contract. Moreover, the climate was most favorable to generalization, especially to a universal principle that could be stated so simply and that expressed itself seductively as "equity". The net result was that the *actio de in rem verso* in the course of the eighteenth century escaped all limitations and became a universal remedy for the prevention of unjust enrichment. (pp. 89–90)(13)

Although German lawyers were very enthusiastic for applying the unjust enrichment principle, their purposes in invoking it were often very practical and specific as has already been suggested and as we should expect. This chief means for influencing solutions of litigated cases came through the wide-spread practice of consulting the doctors, a practice inherited from the medieval period. (p. 90) Within this practice, the unjust enrichment principle could have become "most like a buzz bomb, whose behavior was quite unpredictable for anyone within its range". (pp. 90–91)

### (4) France

The development of unjust enrichment principles in France is divided by the author into four stages: 1) Pothier's introduction of the Roman doctrine to French law; 2) Promulgation of French Civil Code of 1804; 3) The great case of June 15, 1892; and 4) Problems in the twentieth century.

Professor Dawson is rather critical of Pothier (1699–1772), the French Blackstone, whose legal work was used as a model for establishing the French Civil Code of 1804. "The chief feature of Pothier's discussion was its total lack of originality. He was in general a man of quite inferior

(12) The text made it appear that all this was done by a modified form of *actio de in rem verso*. (p. 86)

(13) The debates on the "universality of the unjust enrichment principle continued in Germany through the nineteenth century and all through the period of drafting a national German code. The end result was the Code of 1900, which contained the most carefully considered solutions to be found in any modern legislative system." (pp. 91–92)

talent, with a gift for simplification..." (p. 95) On unjust enrichment Pothier produced only two of many grounds for relief recognized in Roman law, the *condiction* for the "not due" and *negotiorum gestio*. In substance Pothier's appeal to the Roman text was a "misleading simplification". (p. 96) The author concludes his remarks about Pothier with, "French law was to pay a price for using Pothier as its model". (p. 96)

In the Code of 1804, the two grounds of recovery for unjust enrichment were recognized, *negotiorum gestio*, and payment of the "not due". The first of the two remedies was classified under the general heading of "engagement formed without agreement". The second was not expressed as an unjust enrichment remedy but included the two-way liabilities of Roman law. For recovery of transfers "not due", mistake was required as in Roman law, and the remedy included not merely money but land and goods and even the release of debt.

As to the multiparty transactions, Article 1165, Civil Code, provided that "agreements have no effect except on the contracting parties." This meant a real break in the continuing European development of the principle as to the prevention of unjust enrichment through another's loss. Since these restraints on the multiparty unjust enrichment theory proved to be so severe, French Courts "within a century burst through the limits and rediscovered unjust enrichment in their own terms, by their own means, and quite outside the Code." (p. 109)

In France, unlike in Germany, the *actio de in rem verso* was the remedy most commonly suggested by the proponents of a more liberal attitude, though the action was not given a sanction independent of the Code and was explained most commonly as a kind of extension of the *negotiorum gestio*.(14) Then the author reviews the court decisions in the period from 1820 to 1873; a standard remedy for a third person who discharged a husband's duty to support his wife, the case of a seller of seed (1867), and the case of street lamps (1873).

In the great case of June 15, 1892, (D. 92. 1. 596; S. 93. 1. 281) a plaintiff sold fertilizer to a farmer, lessee of a defendant's land. After the fertilizer had been applied to the leased land, the lease was canceled for the lessee's default and the land returned to the defendant, through an agreement of the lessee and the defendant. The debt of the lessee to the plaintiff for the fertilizer sold remained unpaid. The lessee was insolvent. The issue in the case was whether the plaintiff could sue the defendant directly for the gain received through the application of fertilizer to the land. According to Article 1165 of the French Civil Code, the plaintiff could not bring an

(14) "So far as I can ascertain, the discussions did not refer at all to German eighteenth-century experience." (p. 99)

action against the defendant since there was no direct dealing between the two. However, the Court of Cassation declared that the judgment did not falsely apply the principle of the *actio de in rem verso* in circumvention of the above-mentioned article of the French Code. As a result, the French Court 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. (p. 101)

The French Court in the following century used a case law technique and established two useful formulae to keep the modern unjust-enrichment remedy within manageable limits. The first formula is a requirement that enrichment to be recoverable must be "without just cause". This technique has been used increasingly to eliminate the more extravagant claims. There is another limitation to the use of the unjust enrichment remedy, expressed in the proposition that the *actio de in rem verso* is "subsidiary" and cannot be used when any other remedy is available. By the use of these formulae, the Court of Cassation has retreated a long distance from the extreme position taken in the 1892 decision on enrichment through a third person's contract.

## Evaluation

"From the survey just attempted it should at least be clear that we are surrounded by a wilderness, into which we have built many roads. Our problem is to determine how far we can travel along these various roads without losing our way entirely." (p. 111)

* * *

### (1) Problem of Classification

In Anglo-American countries, the doctrine concerning prevention of unjust enrichment has grown "so rapidly, from so many different directions and by the methods of case law". (p. 112) It has kept judges constantly exposed to all kinds of new experience. As a result there is nothing in present concepts that prevents an appropriate unjust enrichment remedy from being used in any field. However, the way through which Americans and Englishmen developed their doctrine produced some disadvantages such as "a serious and growing confusion in analysis, a lack of over-all intelligibility and much difficulty in prediction." (p. 112)

The author discusses the Anglo-American system of the law of restitution in comparison with the system of German law. The German lawyers treat rescission of contract in the law of contract. Where the rescission is permitted, restitution is provided by specific regulations. The starting

point in this analysis is that restitution is a by-product of rescission and does not rest on unjust enrichment. As a result, the unjust enrichment section of the Code, when needed, is brought into consideration by express cross reference. There exists a clear-cut classification as to the use of rescission, restitution and unjust enrichment remedies in the German Code of 1900.(15)

Meanwhile, in America, the Restatement straddles the issues of classification by treating some restitution problems only in the Restatement of Contract and not at all in the Restatement of Restitution, and by treating other restitution problems in both. (p. 104) Then the author predicts that a German may the criticize American law of restitution for "mixing in of unjust enrichment with the grounds for rescission of contract". (p. 113) However, the above-mentioned statement may be a misleading criticism, for even when rescission is found to be needed, restitution problems remain.

The restitution remedies have had a special contribution to the development of the general contract law. They raised the question of fairness. Do we have any general standard of fairness in bargain transactions; so that we will at least compel "special bargaining advantages"? (p. 115)(16) The problem is the same whether the remedy sought is restitution or some other form of action. The fairness in bargain transactions can be achieved not only by restitution but also some other forms of actions which are based on various grounds, such as insanity and defective capacity. The problems again are those of general contract law, but they are in an immediate sense remedial, very often framed through claims for restitution. Therefore, when we use the test of fairness in bargain transactions that restitution remedies help to provide, "the whole problem takes on a new aspect and is seen in different perspective". (p. 116)

### (2) The Method for Containment

Since the functions of restitution remedies came to be so broadly conceived(17) it is necessary for us to have a means of containing these

(15) Fraud, mistake and duress have been conceived as "defect of consent". Impossibility, frustration and substantial breach are considered to be almost entirely problems of contract law. (p. 113) Remedy for redressing unequal bargains in the German Code of 1900, (usury) it was placed under the rubric of illegality (rather than being lumped with unjust enrichment). (p. 114)

(16) The question raised by a claim of economic duress is a general question of contract law, much mixed with economic policy.

(17) Among the quasi-contract cases, there are numerous decisions that rest on no more than the receipt of some asset (usually money) that should have gone to the plaintiff. In some of the constructive trust cases, the equitable wrong is so attenuated that one can find only the conscience of equity at work, retrieving the gains. There are also some other scattered cases that hardly fit anywhere...: See also Green, *Proof of Mental Incompetence and the Unexpressed Major Premise*, 53 Yale L. J. 271 (1944).

broadly interpreted functions. But do we have means to do so? The author answers this question by reviewing the comparative study of the Anglo-American, German and French laws which he made in the previous chapters of this book.

According to German law, there are two requirements for a plaintiff to seek the restitution remedy. In the first place, the detention of gains by a defendant at the expense of a plaintiff should be without legal ground or "*sine causa*". (p. 119) Secondly, the transfer of an asset must have been made by the aggrieved plaintiff directly to the benefited defendants except in two particular types of cases that are specially defined by the German Code: Article 822 permits recovery against third persons to whom an asset, received *sine causa*, is transferred without payment of value; Article 816 allows recovery of the proceeds of an unauthorized disposition.(18) It must be remembered that the requirement of "direct" enrichment provides an essential safeguard in the German system: It is by this means that Germans avoid the excess of the *actio de in rem verso*. (pp. 120–121)

In America or England, however, the system of distinguishing between direct and indirect enrichment cannot be used because remedies have been given in cases where enrichment is received through both quasi-contract and constructive trust. It is also true that Anglo-American lawyers did not accept the result of the great French case of 1892.(19) Then where do they stand on interpreting the means of containment as to the exercise of unjust enrichment remedies? The author answers this question by restating a case which he cited in the previous chapter. This case involves a simple loan of money. The borrower was insolvent. The money received through the loan was used to buy food for the borrower's sons who then presumably consumed it. The sons inherited property from another source and were solvent. The court decided in this case that it was a loan on general credit. Nonpayment through the borrower's insolvency is the most obvious of the lender's business risks.(20) Therefore, the restitution remedies with tracing and all the rest are entirely excluded. (pp. 123–124)

In conclusion, the Anglo-American system does not have an essential safeguard against the abusive use of the restitution remedies. However, it still has the practical limitations of its own working method.

(18) It has been extended by judicial decision into a variety of misappropriation cases, through an "election to affirm" technique very similar to that used in our tort-restitution remedy of quasi-contract.

(19) See pp. 13 & 14 (case of fertilizer)

(20) The mechanics' lien statutes rest on special considerations of policy and do not commit us beyond their limits. (p. 125)

### (3) The Effect of Our Working Methods

The author, then, deals with problems concerning the "volunteer" or "officious intermeddler".[21] According to the American Restatement of Restitution, "those who thrust benefits on others" are deemed to be "officious intermeddlers" and restitution is denied to them. Meanwhile, Article 814 of the German Code provides that "a performance rendered for the purpose of fulfilling an obligation cannot be recovered if the person rendering the performance knew that he was not obliged to make it." What then if the payment of a non-existent obligation occurs through mistake of law? This question presents a question of a duty to know the law. The Code provision in such a case shifts the burden of proof: The party recovering an enrichment must affirmatively show that the person from whom it was received knew no obligation existed. (p. 131)

### (4) The Management of Another's Affairs

The modern development of *negotiorum gestio* involves a problem of "unsolicited intervention" into another's affairs.

According to the German Code, the recovery for unsolicited benefits is restricted to cases where the intervention is in the public interest or else it is in the other party's interest and corresponds to his "actual" or "probable" desire. In addition to this, the Code provides liability to restore gains received if the unauthorized action has been ratified. (p. 140)

In America, the clearest ground for recovery in cases involving "unsolicited intervention" is the preservation of the intervener's own interest. Moreover, sometimes public policy, such as medical services rendered in an emergency, etc., fulfills the requirements for a recovery. But the attitude of American courts to the problem is represented by the fact that the intervener must have excuse and that the intervention must be good. (p. 141)[22]

The unsolicited discharge of obligations is another difficult problem. To deal with it, American lawyers have the generalized remedial device of subrogation, with its imaginary substitution of creditors. (p. 142) As an argument against permitting remedy in such a case, Professor Scott of the Harvard Law School stated that "there is clearly a policy against permitting one person to paint a house belonging to another and to charge him for the benefit thereby conferred." 3 Scott, *Trusts*, § 464 (1939) But permitting

(21) Cf. It can also mean that the person so labelled is either a donor or donee in an intended gift, that there is no consideration for the promise which the plaintiff can seek to enforce... (p. 128)

(22) Cf. attitude of lawyers towards water-borne altruists.

people to pay other's debts does not necessarily mean they will go around painting their houses. (p. 142)

A number of solutions are suggested by Professor Dawson: A distinction may be established either between the types of benefit, whether or not a substitution of creditor is prejudicial to the obligor, or between the types of obligations, whether they are based on money debts or contract to support. The Restatement of Restitution also suggests that "a person who officiously pays the debt of another may be entitled to recover the amount of such payment if the other affirms the payment." (p. 142) Is it too much to say that a decision by the obligor to retain the benefit amounts to ratification not only in the payment of money debts but also in other situations ?(23) This question suggests a basic dilemma to be solved in the future.(24) The problem of rewarding the altruist has not yet been marked off, in American law, from the problem of gains conferred by self-seekers.

> "What we do for one we will feel we should do for others and where, then, will we stop ?" (p. 143)

## (5) Our Forms of Liberality

In a concluding section, "Our Forms of Liberality", the author discusses the modern expansion of the grounds for restitution.

In the first place, restitution can be used as a substitute for damage liability in tort cases where there is in truth no real enrichment, as where an innocent party has given value for the chattel received. This use of restitution is admitted in principle in the German system though apparently not in the French system.

Secondly, American courts have developed grounds for restitution through equitable remedies such as those created by undue influence, fiduciary and confidential relationships, fraud and constructive trust.

Lastly, the most important development of the Anglo-American law of restitution is made by the modern elaboration of tracing techniques. This development is the "real peculiarity of the Anglo-American law of restitution". (p. 148)(25)

After discussing various classifications of tracing techniques and confusions produced thereby, Professor Dawson repeats the same warning against the application of mathematical simplicity for finding "ownership" of the substitute assets that he gave in the introductory part of the book.

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(23) Perhaps this is the American remedy *de in rem verso*. (p. 143)

(24) Cf. the case of payment of negotiable instruments to preserve the maker's "honor".

(25) In modern French and German law, the technique is called "real subrogation" and is used in special cases arising, for example, in the law of married persons' property and in the law of real security (allowing the substitution of another asset for one subject to a consensual lien). p. 149.

He emphasizes the need to consider other equities, especially those of the forgotten men, the general creditors. (p. 150)

## Conclusion

It is hard to say whether the Anglo-American law of prevention of unjust enrichment is ahead of or behind that of the Europeans. Yet, even today, grounds for restitution in American law are expansible and expanding, and the so-called working methods provide American lawyers with reasonably efficient means to satisfy people's conscience of fairness.

> "We can move ahead by gradual progressions as we have in the past, without committing ourselves any further than we can see our way." (p. 144)