EQUITY, LAW AND RESTITUTION

C. Granger *

I. INTRODUCTION

The Chief Justice of the Ontario High Court, in the recent case of *Royal Securities Corp. v. Montreal Trust Co.*, [1] made the following statement, when discussing the action for money had and received : "There has been great divergence of opinion as to the basis of the action, with implied promise to pay and unjust enrichment being two of the most common grounds relied on by the Court." [2] He made no attempt to indicate which of these theories of quasi-contract seemed to him to be substantially correct.

In *Knupp v. Bell*, [3] Mr. Justice Macpherson applied a little known equity jurisdiction of the court to set aside an "unconscionable transaction." He relied upon the decision of the British Columbia Court of Appeal in *Morrison v. Coast Finance*, [4] and a comment upon this case in the *Canadian Bar Review*. [5]

At first sight, there seems to be no relation between these two recent decisions. Yet they do raise certain trains of thought concerning two basic questions, as yet without satisfactory answers in the courts, bearing on the future of "the law of unjust enrichment." These two questions are : (1) What is the prospect for the development of the law of quasi-contract, especially in the light of its present piecemeal position and its shifting theoretical basis ? (2) What is, and what should be, the relationship between law and equity ? The purpose of this paper is to consider these questions, to suggest how they may be related and to discuss how they may affect the future development of a law of restitution.

II. QUASI-CONTRACT AND RESTITUTION

The area of law known as "quasi-contract" sprang from the fictitious use of the writ of *indebitatus assumpsit*, involving an implied promise to pay the amount claimed, a promise which the defendant was not permitted to

* LL.B., 1965, University of Southampton; LL.M., 1966, University of Michigan. Lecturer, Faculty of Law (Common Law Section), University of Ottawa.

[1] 59 D.L.R.2d 666 (Ont. High Ct. 1967), *aff'd*, 63 D.L.R.2d 15 (Ont. 1967).

[2] *Id.* at 689.

[3] 58 D.L.R.2d 466 (Sask. Q.B. 1966).

[4] 55 D.L.R.2d 710, 54 W.W.R. (n.s.) 257 (B.C. 1966).

[5] Crawford, Comment, 44 CAN. B. REV. 142 (1966).

deny. [6] From the precedents, specific rules and principles have developed governing "quasi-contractual" actions. Many of them came into being as a result of reliance upon the "traditional" theory of quasi-contract, *i.e.*, that liability rests upon an obligation based on an implication of law. The substance of this obligation has been affected by the procedural requirements of the old form of action. [7]

However, there has been no uniformity of opinion upon the basis of quasi-contractual liability. Dispute as to the fundamental theory behind the rules has been continuous during the past three centuries. Such dispute has been largely between two schools of thought: those who adhere to the "implied obligation" theory; and those who prefer to look to the principle of natural justice, or "unjust enrichment." Professor Stoljar has added to this catalogue a third school: those who would support the notion that quasi-contract is essentially a "proprietary" action. [8]

The dispute as to the basis of quasi-contract has not been confined within academic circles. Judges and practitioners have taken sides on the question. Although a distinguished member of the House of Lords in England [9] has termed this "an arid dispute"—hence it would be a matter of indifference for practical purposes "whether the liability is put on the ground of an implied contract, or of an obligation implied by law" [10]—the existence of this controversy has in fact affected, on some occasions adversely, the development of the law in this field.

In cases where judges adopt different theories of quasi-contractual liability, the results are not, as might be expected if this were indeed purely a matter of practical indifference and mere academic controversy, always clear decisions. Dissenting opinions are often the results. In fact, the law of quasi-contract has no real doctrinal cohesion or consistency. The law is in a state of flux and far from satisfactory, either from the point of view of common justice, or from the point of view of legal doctrine.

The field of quasi-contract does, however, possess its areas of clarity. Stable lines of precedents have been produced. The courts have not hesitated to imply obligations based on the fiction of agreement where the facts do not render such a fiction unrealistic. [11] The courts have occasionally reverted to the more basic principle of *ex aequo et bono* where they could not imply

---

[6] *See* J. MUNKMAN, THE LAW OF QUASI-CONTRACTS 5-6 (1950).

[7] *See* J. F. WILSON, THE LAW OF CONTRACT 505 (1957).

[8] *See* S. STOLJAR, THE LAW OF QUASI-CONTRACTS 5 (1964).

[9] Ministry of Health v. Simpson, [1951] A.C. 251, at 275 (per Lord Simonds).

[10] Moule v. Garrett, L.R. 7 Ex. 101, at 104 (1872) (per Cockburn, C. J.).

[11] For a clear statement on what follows, see Deglman v. Guaranty Trust, [1954] Sup. Ct. 725, at 734 (per Cartwright, J.). Note the difference of opinion on the basis of recovery in *Deglman*, where Cartwright seems to prefer "implied obligation," but Rand, J., employs the direct *ex aequo et bono* principle to permit recovery. The case, however, is good authority for a general principle of unjust enrichment, with "implied obligation" kept in its correct perspective.

promise and agreements from the facts. But they have often wavered between these two courses. Statements have been made which confuse the issues involved. An incorrect view of the basis of the liability involved in such cases was produced by use of the term "implied contract." Confusion between "contract implied from fact," "contract implied by law," and "obligation implied by law" arose. If one tried to rationalise the cases in the area of quasi-contract in general, one might come up with a number of principles of basic practical significance. Thus, one could say of certain decisions : "In these cases, the judges reviewed the facts, decided on *'ex aequo et bono'* grounds, and stated that the defendant must pay the plaintiff, refusing to allow him to deny the procedural allegation that he promised to pay that amount." Of other decisions, one might say : "The judges looked at precedents and held that the defendant was under an implied obligation to pay the plaintiff because the precedents so decided." Of still others, one concludes : "The judges looked at the facts, and being unable to deduce therefrom an agreement to pay, stated that they could not find any liability on an implied promise or agreement." Finally, one might say of rare cases : "The judges decided '*ex aequo et bono*' that the defendant was liable to pay the plaintiff, and did not bother to base this upon an 'implied promise or obligation' of a procedural and fictional nature, nor upon any implied agreement or promise deduced from the facts of the case." A misunderstanding of the significance of the procedural nature of the "implied promise," which the defendant could not be permitted to traverse, is revealed in many instances.

One cannot say that the above rationales provide a sufficient basis for the future development of a cohesive law of quasi-contract. The factor of the "implied promise, obligation, or contract," essentially a procedural device, has acted as an artificial bar to recovery in many fact-situations. The "voluntary" benefit should, in many cases, be irrecoverable. But in other cases, we cannot be so definite. It is in these cases that judicial conflicts, uncertainty, and occasionally, injustice, have most frequently occurred.

I do not propose, at this point, to discuss the theoretical validity of the different views on the juridical basis of quasi-contract. Arguments for and against each one may be found elsewhere. [12] I shall suggest later which is to be preferred. The point presently to be emphasised is the detrimental effect upon the law produced by the existence and varying application of different fundamental principles or rationales to new or uncertain situations. It is enough to cite only a few examples of problems which have arisen in order to illustrate this point.

---

[12] *See, e.g.*, in favour of implied obligation, Gutteridge & David, *The Doctrine of Unjustified Enrichment*, 5 CAMB L.J. 204, at 223 (1933); Landon, Note, 53 L.Q.R. 304 (1937); Radcliffe, Note, 54 L.Q.R. 25 (1938). In favour of the theory of unjust enrichment see Friedmann, Note, 53 L.Q.R. 450 (1937); LORD WRIGHT, LEGAL ESSAYS AND ADDRESSES 29 (1939).

Voluntary payments or benefits are as a general rule irrecoverable or cannot be compensated for. [13] What is meant by a "voluntary" benefit? If *A* pays to *B* money without reserving to himself the right to claim it back, and does so with full knowledge of what he is doing and under no pressure from *B*, then he may truly be said to have made a "voluntary" payment. The natural implication is that if (a) *B* brings "immoral" pressure to bear upon *A* to secure payment, (b) *A* is expecting to get his payment back under certain circumstances, or (c) *A* is misled in some way as to affect his intent to benefit *B* willingly, then *A* should be able to recover his money. In any case, he should not be prevented from doing so on the ground that he has made a "voluntary" payment. But is this in fact the law?

I suggest that it is not. In two recent Canadian cases, the combined operation of the "implied promise" theory, and of the restricted common-law concept of pressure recognised as invalidating the voluntary nature of a benefit, prevented a plaintiff from success in court. In *Peter Kiewit Sons' Co. v. Eakins Constr. Ltd.*, [14] the Supreme Court of Canada held that a subcontractor who performed, under protest, work which he considered over and above his contract obligations, at the demand of the contractor on the latter's own interpretation of the contract between them, and under the threat of what has been accurately termed "industrial murder" [15] could not recover for the extra work either for breach of contract, or in *quantum meruit*. The majority judgment, as expressed by Mr. Justice Judson, held that since the parties had made an express contract covering the situation litigated, and that contract remained open and unrescinded, no theory of quasi-contractual recovery could be applied. Judson, however, helpfully indicated the proper course of action which the plaintiff should have taken: "If Eakins had asked the engineer for a written order for the performance of the work which it claimed to be beyond the subcontract and that had been refused, and Kiewit had persisted in its attitude, Eakins might then have treated the contract as repudiated and sued for damages." [16] This, unfortunately, would have been tantamount to self-destruction. In short, the majority of the court considered that: "There is, therefore, no room for the application of any theory of quasi-contractual recovery whether by way of the fiction of an implied contract or the decision of the Court in the particular case to impose an obligation *ex aequo et bono*." [17] Further, impliedly that there was no pressure exerted upon the plaintiff of a nature which would enable the Court to grant him relief.

---

[13] *See* Falcke v. Scottish Imperial Ins. Co., 34 Ch. D. 234, at 248 (1886) (per Bowen, L. J.), and J. MUNKMAN, *op. cit. supra* note 6, at 39-40.

[14] [1960] Sup. Ct. 361 (1959).

[15] Crawford, *op. cit. supra* note 5, at 150.

[16] *Supra* note 14, at 369 (per Judson, J.).

[17] *Id.* at 369.

In a strong dissent, however, Mr. Justice Cartwright indicated that the plaintiff was correct in taking the position that the work it was being called upon to perform was outside its contract. He based the liability of the defendants to compensate for that extra work not upon an implied contract, but upon "unjust enrichment" :

> I find some difficulty in basing the appellant's liability on an implied contract when the evidence shows that the respondent was repeatedly pressing the appellant to agree that it would pay for the work which it was doing and which did not fall within the terms of the sub-contract.... I prefer to use the terminology... adopted by this Court in *Deglman v. Guaranty Trust Company of Canada and Constantineau*... and to say that the appellant having received the benefits of the performance by the respondent of the work which the latter did at the insistence of the former the law imposes upon the appellant the obligation to pay the fair value of the work performed. [18]

Cartwright continued, in the strongest terms :

> I can discern no difference in principle between compelling a man to pay money which he is not legally bound to pay and compelling him to do work which he is not legally bound to do.... The remedy in the former case is to order repayment of the money; the remedy in the latter case should be, in my opinion, to order the person who has compelled the doing and has reaped the benefit of the work to pay its fair value. It would, I think, be a reproach to the administration of justice if we were compelled to hold that the courts are powerless to grant any relief to a plaintiff in such circumstances. [19]

Cartwright considered that the work done in respect of which the claim was made was done "under continuing protest [and] under circumstances of practical compulsion"; [20] the compulsion exercised was such as to render the benefit conferred upon the defendant "involuntary." His view of the argument that the plaintiff precluded himself from recovering by his failure to contest the demands of the defendant is apparent from the following statements :

> To say that because in such circumstances the respondent was not prepared to stop work and so risk the ruinous loss which would have fallen on it if its view of the meaning of the contract turned out to be erroneous the appellant may retain the benefit of all the additional work done by the respondent without paying for it would be to countenance an unjust enrichment of a shocking character which, in my opinion, can and should be prevented by imposing upon the appellant the obligation to pay to which I have referred above. [21]

Two judicial attitudes are evident. The majority considered, basically, that the work done was performed "voluntarily" because the plaintiff did not contest to the point of action the pressure exerted by the defendant to compel

---

[18] *Supra* note 14, at 379 (per Cartwright, J.).
[19] *Id.* at 380-81.
[20] *Id.* at 378.
[21] *Id.* at 380.

compliance with the latter's demands, and, in any case, that they could not in view of the facts of the case have implied an obligation based on agreement over and above the existing and open contract terms. The dissent considered that the work done was over and above the contract and was not performed "voluntarily" but was done under "duress," [22] and that, although on the facts no implied *contractual* obligation could be used as a basis for liability, [23] the Court should impose an obligation upon the defendant to compensate for the benefit conferred upon it.

Behind these attitudes are policy considerations. One may agree with the majority that pressure such as the plaintiff in this case was subjected to is "no more than what the average businessman must tolerate in the daily friction of trade." [24] On the other hand, one may feel considerable sympathy for the victim of "industrial blackmail." The case affords, however, an excellent illustration of differences of judicial opinion where the scope of the term "voluntary" benefit is concerned. It also reveals lack of basic principle and theoretical consistency in the area of restitution. It is difficult to see why, in *Kiewit*, and in *Morton Constr. Co. v. City of Hamilton*, [25] a similar case, the claimant could not recover compensation for benefits conferred under protest and as a result of practical compulsion over and above what they had legally undertaken to confer, whereas in *Knutson v. Bourkes Syndicate*, [26] recovery of payments made under such circumstances was permitted. In the one type of case, recovery of compensation is sought, through *quantum meruit*, for services involuntarily rendered, whereas in the other, recovery is sought, by way of the action for money had and received, of payments involuntarily made. One can only conclude that either the meaning of "voluntary" differs in these two actions, or the courts apply totally different principles where claims for money "unjustly retained," and claims for compensation for services "unjustly taken advantage of," are concerned. Whichever of these possible conclusions is valid, clearly the position

---

[22] Cartwright, J., is clearly using the term in its widest sense, even though it is arguable that the pressure employed in this case might be said to fall within the stricter sense of the word, as defined and used in Knutson v. The Bourkes Syndicate, [1941] Sup. Ct. 419, [1941] 3 D.L.R. 593, *cited* by Cartwright, J., in the *Kiewit* case, at 380.

[23] Emphasis supplied. It is a little difficult to see why Cartwright, J., finds it necessary to base liability upon an implied contract, if he were to use the traditional view of "quasi-contract," unless he had made the mistake of trying to imply a "contract" from the facts of the case. It is possible that he just finds the use of any fiction based on an implied obligation and promise too unrealistic to be true on the facts of the case before him.

[24] Crawford, *op. cit. supra* note 5, at 150.

[25] 31 D.L.R.2d 323 (Ont. 1961) where a company replaced sidewalks laid by it in accordance with contract specifications after damage had occurred because of freezing and salting, because of a threat by the defendant that the plaintiff company would not be considered for any other contracts unless it performed this extra work at its own expense. Although the plaintiff company made it quite clear that it reserved the right to claim compensation for the extra work before performing it, it was held that the plaintiff company could not recover. The court considered that there was no understanding as to compensation, and, also, that since the threat made was "perfectly legal," the work done by the plaintiff company was "voluntary."

[26] [1941] Sup. Ct. 419, [1941] 3 D.L.R. 593.

is far from satisfactory. No consistent system of principles governing the "unjust retention" of benefits exists.

The above illustration should be enough to reveal that we possess, not a law of "unjust enrichment" or "restitution," but a collection of isolated rules for isolated situations, which rules may be traced back historically to the writ of *indebitatus assumpsit*, and which very often do not tie in with each other. Other areas of doubt include the question of the status of "mistake of law" as a defence to a claim for money paid out by mistake, [27] and the question of the "defences" of estoppel or change of circumstances. [28] The position has been aptly summarised by Professor Bromley :

> In no branch of English law do the forms of action still rule us from their graves so completely as in restitution. Such law as we have has developed piecemeal, largely in that little understood and faintly abhorrent corner of the common law, quasi-contract, partly in such nooks of equity as constructive trusts, equitable charges, and subrogation. The casual academic observer would be forgiven if he found little principle here and concluded that the practitioner, like his predecessors before the Common Law Procedure Act, must fare for himself and look for the appropriate peg on which to base his claim. [29]

This statement, mentioning as it does the second "source" of those rules we do possess which are occasionally collected together under the heading of "restitution," leads us to our second area of discussion, the relationship between law and equity.

III. Law and Equity

Until 1875, the common-law courts developed and applied one set of rules and precedents to problems of restitution : rules and precedents mainly developed from *indebitatus assumpsit*, while the courts of equity developed and applied certain other principles and precedents to such problems, these being principles which very often had little or no relation to those developed by the common law. Thus, the courts of equity developed the constructive trust, equitable charge and subrogation. The disadvantages of two separate, and occasionally competing, systems of courts and law had been recognised before 1875. Attempts had been made to enable both systems to take advantage of remedies formerly exclusive to each. Thus, in 1854, the Common Law Procedure Act [30] had enabled the courts of common law to grant injunc-

---

[27] For recent research into the problematical history of this odd "defence," see Sutton, Comment, 2 N.Z.U.L. Rev. 173 (1966).

[28] For further discussion, see Lord Denning, *The Recovery of Money*, 65 L.Q.R. 37, at 49 (1949); Jones, *Change of Circumstances in Quasi-Contracts*, 73 L.Q.R. 48 (1957); and S. Stoljar, *op. cit. supra* note 8, at 31-39.

[29] Book Review, 9 J. Soc'y of Pub. Teachers of L. 263 (1966).

[30] The Common Law Procedure Act, 17 & 18 Vict., c. 125 (1854).

tions, in certain limited cases, while in 1858 the Chancery Amendment Act [31] empowered the Court of Chancery to give damages in certain cases. [32]

Finally, in 1875, the Judicature Acts [33] came into effect. The forms of action and the old court system were finally abolished. A single system of courts was created, with jurisdiction to administer both common law and equity. It has been said that a "fusion of law and equity" was achieved. We are here concerned with the truth of that statement and the effect of the Judicature Acts, as evidenced by subsequent comment and practice.

A conflict of opinion exists on the effect of the Judicature Acts. One view, perhaps the orthodox one, is that there has been merely a fusion of administration of law and equity. [34] Clearly, the effect of the acts has been to make the principles of law and equity available to all judges in all courts. Indeed, a duty is imposed upon such judges to apply both legal and equitable principles to the cases before them. The claimant today does not separate his hearings and claims, but takes his case to court, is heard, and receives a decision based upon the application of legal and equitable principles and precedents to his case. Provision was made in the Judicature Acts for the solution of variance or conflicts between common law and equitable rules. [35] Although such variances have proved relatively rare, they have arisen, [36] and, in such situations, the rules of equity prevail.

A more recent and more radical view, however, is that the effect of the Judicature Acts and subsequent practice has been to "fuse" law and equity per se. The thesis is presented that we no longer can make any separation of "legal" and "equitable" ideas. Leading protagonists of this view include Lord Denning and Professor Hanbury. [37] This view must be explained and qualified before it can be said to be correct insofar as the present state of affairs is concerned.

Subsequent to the Judicature Acts, which contained the seeds of a complete abolition of any distinction between common law and equity, such

---

[31] Chancery Amendment Act, 21 & 22 Vict., c. 27 (1858).

[32] Unfortunately, this act has always been interpreted restrictively so that a distinction is still maintained between common-law and equitable remedies where an award of damages is concerned. *See* Lavery v. Pursell, 39 Ch. D. 508, at 519 (1888) (per Chitty, J.); and H. HANBURY, MODERN EQUITY 561 (1962).

[33] Judicature Act, 36 & 37 Vict., c. 66 (1873); Judicature Act, 38 & 39 Vict., c. 77 (1875).

[34] *See, e.g.*, E. SNELL, PRINCIPLES OF EQUITY 15 (1966); MEGARRY & WADE, LAW OF REAL PROPERTY 1133 (3d ed. 1966); G. KEETON, INTRODUCTION TO EQUITY 43 (1965); Lord Evershed, *Reflections on the Fusion of Law and Equity after 15 Years*, 70 L.Q.R. 326 (1954), and Delaney, Comment, 24 MODERN L. REV. 116 (1961).

[35] Judicature Act, 36 & 37 Vict., c. 66, 25 (11) (1873), replaced in England by Judicature Act, 15 & 16 Geo. 5, c. 49, § 44 (1925). The comparable provision in Ontario is ONT. REV. STAT. c. 197, § 22 (1960).

[36] Walsh v. Lonsdale, 21 Ch. D. (C.A. 1882); Lowe v. Dixon, 16 Q.B.D. 455 (1885); and Berry v. Berry, [1929] 2 K.B. 316.

[37] *See, e.g.*, Errington v. Errington, [1952] 1 K.B. 290, at 294 (C.A., per Denning, L.J., as he then was); and H. HANBURY, *op. cit. supra* note 32, at 19.

distinction has been maintained by conservatism and rigid adherence to the system of stare decisis. In the words of Professor Hanbury : "The vast majority of practitioners must be prepared to meet points of equity, mixed up with points of law, in the same case, and they will be faced with the necessity of pooling together the sum of the resources of the two systems and arriving at a composite result." [38] On the other hand, principles of law and equity have interacted upon each other in certain areas in such a way that it is now difficult to maintain any real distinction between them. Two such areas are the law of property and the law of contract. Judicial amalgamation of doctrine and precedent and the fresh breeze of statutory enactment have together resulted in the reduction of historical significances and distinctions in these areas. But it would not be true to assert that this has occurred in every area of the law, for the day has not yet come when "lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law." [39] The historical sources and precedents of rules still remain separate, and with different spheres of application, where such areas are concerned. Judicial thinking still maintains, by clinging to the past, distinctions between law and equity. Such distinctions should not be maintained.

One may agree with Lord Denning that distinctions between law and equity are out of date, and with Hanbury that "it is neither serviceable nor rational to ascribe each component to its historical antecedent and to label it as a matter of law or of equity." [40] The position as it stands and the policy which should be adopted for the future are aptly expressed in the following excerpts from a recent American work :

> The general or common law has taken on an ambivalent attitude towards equity, to which it is attracted by reason of the inescapable identity of equity with justice, but which it rejects for reasons which are of purely historical origin but which have been reinforced by an elaborate facade of legal rationalisation. Of the opposing forces the resistance to equity has been the stronger, and the principles of equity have not been fully received into the main body of Anglo-American law. [41]

But : "The need is more and more for general principles. The time becomes unsuited for a regime of rules. Continuance of a double system of law and equity defeats rather than promotes justice. It disappeared in the classical Roman law, has no place in the modern civil law, and is fast disappearing in the common law." [42]

These distinctions between what used to be rules of common law and rules of equity should be abandoned in favour of a cohesive system of general

---

[38] H. HANBURY, *op. cit. supra* note 32, at 21.

[39] F. MAITLAND, EQUITY, A COURSE OF LECTURES 20 (1936). The same conclusion has been reached by Steer, Comment, 3 ALTA. *L.* REV. 5, at 15 (1963). The writer suggests that a true fusion of the principles of equity and the common law can only be brought about through legislation.

[40] H. HANBURY, *op. cit. supra* note 32, at 21.

[41] R. NEWMAN, EQUITY AND THE LAW: A COMPARATIVE STUDY 11 (1961).

[42] R. Pound, *Introduction* to R. NEWMAN, *op. cit. supra* note 41, at 9.

principles. But how does this tie in with the main subject matter of this paper, the law of restitution?

IV. Restitution, Law and Equity

The law of restitution represents one of the areas mentioned in the foregoing section where a distinction has been maintained between legal and equitable ideas. And yet, in another sense, this is an area in which legal and equitable theory, as opposed to precedents and lines of authority, have interacted in a most confusing and undesirable way. We must return to the development of the law of quasi-contract for an explanation of these statements.

Lord Mansfield made spirited attempts to draw the basic theory of quasi-contract away from the procedural fictions involved in the use of the common-law writ *indebitatus assumpsit,* and to place it upon the "equitable" basis of *ex aequo et bono* result.[43] Our textbooks and precedents reveal that these attempts did not meet with unqualified success, and in fact indirectly resulted in the divided opinions now existing upon the juridical basis of quasi-contract. A detrimental effect was hence produced by this interaction of "legal and historical" theory, and "equitable" notions, upon the development of a law of restitution.

However, the "interaction" mentioned above was taking place only within the sphere of common-law decision. The Court of Chancery was developing its own ideas in the realm of restitution, ideas which remained separate from quasi-contract law. With the passing of the Judicature Acts the courts were presented with an opportunity to combine common-law and equity doctrines and to place them all upon one theoretical basis, namely, the concept of *ex aequo et bono* restitution. This opportunity was not, however, taken. Since 1875, we have remained the proud possessors of rules of quasi-contract, around which the old controversy concerning implied obligation and equitable result still rages, and of rules of equity touching problems of restitution. We have emphasised historical origins and respected the lines of precedents inherited from the days of separate jurisdictions of common law and equity. We have steadfastly rejected a coherent and cohesive law of restitution and have opted for the confused situation in which we now find ourselves.

This is not to say that we shall remain in such a situation. There has existed for many years a substantial body of judicial and academic opinion in favour of a uniform law of restitution. In fact, a Canadian judge recently stated, possibly a little over-optimistically, that the "present judicial trend" justified him in imposing liability on a defendant, on the principle of "unjust

[3] See the oft-quoted decision, Moses v. MacFerlan, [1760] 2 Burr. 1005, at 1012.

enrichment," to pay for benefits to his land done by the plaintiff under an honest, if mistaken, belief that a contract of sale of that land existed between them. [44]

Authority may be found in both English and Canadian decisions in favour of a law of unjust enrichment, resting upon the principles of natural justice. In England, despite Professor Gutteridge's pessimistic view that the "natural justice" theory of quasi-contract had received its death-blow in *Sinclair v. Brougham*, [45] support may be found for a law of unjust enrichment in the dicta of various members of the House of Lords, [46] and in the comments of several contributors to legal periodicals. [47] But it would be unrealistic and premature to conclude that English case law supports the view that the present judicial trend is to move swiftly and surely towards a law of restitution. [48]

The same is true of the position in Canada. Despite *Deglman*, [49] it is difficult to see either a uniform acceptance of a basic theory of equitable restitution, or a clear judicial tendency to develop a systematic set of cohesive principles selected from the best of law and equity, and designed to avoid the problems of maintaining the distinction between rules of quasi-contract and former equity doctrines. [50]

The fact remains that judicial minds in many cases are still split over the issue. Some prefer to follow the older precedents, ignoring the potentiality of newer decisions, and to maintain distinctions which are now out-of-date. Some, like Lords Denning and Wright in England, and Justices Rand and Cartwright in Canada, would prefer a more liberal and progressive approach. It would indeed be optimistic, however, to assume from opinions expressed by individuals in isolated cases which have not always been followed, even in the highest courts, that a new and authoritative attitude has emerged and been accepted. Conflict still exists, and equally clear opinions appear in the House of Lords and the Supreme Court of Canada against a liberal approach, as appear for it. While such a division of opinion continues to exist, and lower courts follow sometimes one view, sometimes the other, it cannot be safely said that either opinion is authoritative. We

---

[44] Brown, J., in Estok v. Heguy, [1963] 40 D.L.R.2d 88 (B.C. Sup. Ct.), after a review of extracts from judicial decisions and recent academic contributions on the subject of unjust enrichment.

[45] [1914] A.C. 398.

[46] *See, e.g.*, Fibrosa Spolka Akcyjna v. Fairbairn, [1943] A.C. 32, at 62 (per Lord Wright); and United Australia Ltd. v. Barclay's Bank Ltd., [1941] A.C. 1, at 29 (per Lord Atkin).

[47] *See*, especially, Winfield, Note, 53 L.Q.R. 447 (1937); Friedmann, Note, 53 L.Q.R. 449 (1937); Winfield, *The American Restatement of the Law of Restitution*, 54 L.Q.R. 529 (1938); Winfield, Comment, 64 L.Q.R. 46 (1948).

[48] See, for example, Reading v. Attorney General, [1951] A.C. 507, at 513-14 (per Lord Porter).

[49] The case is generally agreed to lend judicial support to a theory of unjust enrichment. *But see* note 11 on division of opinion in the case.

[50] For arguments to the contrary, but perhaps on a more limited aspect of the question, see Angus, *Restitution in Canada Since the Deglman Case*, 42 CAN. B. REV. 529 (1964).

may, for example, find authority in *Fibrosa* and *Deglman* in favour of a law of restitution, but we cannot say that this authority has been clearly followed, or that these cases have not been distinguished on later occasions.

However, the seeds of development which have existed since Mansfield's time and which were given fertility by the Judicature Acts have not lost their potentiality. But the longer we cling to a distinction between law and equity in this field, and the longer the continuing conflict and uncertainty where the development of new precedents to meet new situations is concerned, the more difficult it will prove to organize and perhaps reform the law in this area.

It is easy to assert that the present position is unsatisfactory, and to criticise the judiciary. This, however, is not enough. Criticism should walk hand in hand with an appreciation of the practical problems which beset a would-be reformer. Our system is one which attempts to combine flexibility with certainty, effecting the difficult compromise between these two criteria by developing its principles from time-honoured judicial decision on the facts. The common law, relying as it does upon the doctrine of stare decisis, places a theoretical and practical significance upon history. It very often finds itself in the position of having to vary a hallowed line of precedents to meet changing social and economic needs without totally discrediting its previous decisions. Sometimes, it finds this impossible and must rely upon legislative action to correct the deficiency. Sometimes, it can only rely upon the ingenuity of judicial legislation through the application of subtle and devious distinctions or distortions of lines of precedent. Occasionally, it will go so far as to throw out an early line of precedent quite openly, and begin again. Whatever method is employed, it must be used carefully, and must respect the basic structure and criteria of the common-law system of decision and legal development. This means, that reform, especially in an area which, although confused, contains many excellent principles, and possesses a long and hallowed history, will be slow and difficult. But it need not prove impossible.

What, then, should and could be done to achieve a cohesive law of restitution?

V. Suggested Lines for Reform

One argument which can be disposed of at the outset is one which might well be espoused by the "traditionalists." It is that in order to cause as little disturbance to historical precedent and origin as possible, reform, if required, should be effected through slow judicial process, which will follow what has been done in the past, modifying those rules we have at present without attempting any drastic revision of theory or law. The drawbacks of this approach have already been suggested. The process will be slow and will

only tend to increase the already dangerous confusion in the area of law under debate. Moreover, it seems difficult to defend this approach from the accusation that it will only increase unpredictability, and that it relies heavily upon changing judicial policy and therefore upon dangerous methods of judicial rationalisation. It will not avoid the source of the problems, the lack of systematic basic principles. To preserve a historical conflict is merely to prolong it, and perhaps to proliferate its effects.

Yet another method of reform lies at the other extreme. It is to place the law of restitution on a uniform and systematic basis through parliamentary legislation. Such legislation could state a basic principle of restitution, effect a fusion of law and equity in this area, and enable the courts to develop more detailed rules therefrom, utilising such former precedents as might prove suitable and not in conflict with the fundamental statute. This method may be accused of hastiness. To some, it smacks too greatly of a completely fresh start. It could be viewed as too drastic. It would also necessarily involve considerable problems of preliminary study and drafting, as well as leaving the judiciary with the headache of co-ordinating its policy and provisions with previous law. The method has, however, much to recommend it in theory. It would involve a "clean slate approach," enabling the construction of a cohesive system of law based on a sound and authoritative foundation of principle, yet utilising, and rooted upon, worthwhile practical experience of the past. The practical difficulties of such an approach, however, render its use an extreme step which may earn the disapproval of both legislators and practitioners. This does not mean we should discard it or discount the possibility of its success. English law possesses at least two outstanding examples of the use of such a method of reform, in the Sale of Goods Act, 1893, and the 1925 property legislation. In Anglo-American law, the present trend is toward codification and the amalgamation of what used to be separate common-law and equity ideas through statutory enactment.

A multitude of compromise schemes lie between these two extremes. But a number of points can be made on the question of basic policy, regardless of what method is employed to put this into effect. These points have been made before, but the more they are repeated, perhaps the greater will be the chance of their implementation.

What should be the policy objectives of those who would seek a cohesive system of restitution? The first concern should be with the removal of barriers and of conflicts. The primary goal must be uniformity and co-ordination. This implies two points. First, the fundamental conflict over the theoretical basis of restitution law must be settled. Second, the duality of law and equity in this area must be finally removed. These two points, though bearing some relationship to each other, will be viewed separately.

Little real difficulty need be experienced in resolving the conflict of opinion on the judicial basis of restitution. This is largely a historical and

academic controversy, and should be viewed from the realist's standpoint. We cling to the theory of the "implied obligation" because of the requirements of the old writ of *indebitatus assumpsit*, but we cling too rigidly to this historical survival, and occasionally permit it to affect decision on the facts of a given case. Thus procedure, itself outdated, is permitted to affect substance in circumstances which may result in the application of formality in the place of justice. The result is something to be admitted and deplored, not admitted and adhered to.

To view realistically the theory of "implied obligation," we should imply an obligation where we think we should, not imply where we can and have implied such obligation. For the source of the "implied obligation" in present quasi-contract law should rest upon the answer to another, more fundamental question : Should we imply an obligation in these circumstances, and why ? There is no magic, and little sense, in an "obligation" which does not rest upon a reason for finding, as a matter of justice, a practical liability to do, or to refrain from doing, an act.

To be practical and to get the significance of "implied obligation" in its proper place therefore, it should be admitted that there is little difference between asking, "Should we imply an obligation in this case ?" and asking, "Is it just, in these circumstances, that we should find *A* liable to do something, and utilise an implied obligation to support this finding?" If we adopt this approach, the arguments between the two schools of thought in quasi-contract, namely, that the *ex aequo et bono* approach is too vague, and that the "implied obligation" approach is too rigid, are invalid. The real difference between the two schools is one of emphasis. When we get to the root of the matter, we ask the same single question, one of natural justice, and when we have answered this question, the "traditionalists," hide the question under the "implied obligation," and try to deny that it is ever asked.

In view of the fact, then, that the phrase "implied obligation" has always been nothing more than a concession to the procedural requirements of *indebitatus assumpsit*, except where incorrectly employed, and also the fact that we have long since abolished the forms of action, we could well settle our academic differences, admit we can abandon the secondary term "implied obligation," and look openly to the question behind it. In short, we could adopt the real and theoretically basic principle of "equitable result" for the law of restitution and discard the fiction of the "implied obligation."

This step ties in with the second point involved here. If we seek a modern uniform system of restitution, we cannot tolerate the continuance of a double system of legal and equitable rules in this area. Equity proceeds straightway from the conception of the "just result," and is considered, should conflicts occur between its rules and those of the common law, to "prevail."

There is, however, no real conflict here between the basis of the quasi-contract rules and the rules of equity relating to restitution. If we admit that in both areas, we proceed on the basis of the "just result," we have an instantaneous removal of barriers between the two systems, and a lever for accelerating the interaction of the rules which formerly belong to each, banishing those rules which in quasi-contract have totally escaped the criterion of the "just result" and sought hiding amongst the artifices of a misunderstanding of "implied obligation." It is not proposed to abandon those rules of quasi-contract which make sense in the light of modern conditions and natural justice, and to substitute a new regime of equity in their place. What is envisaged involves rather the retention of the best of both systems, and the removal of the artificial hedges and ditches which have grown up between them. This is the fusion of doctrines, rather than the abolition of old rules and creation of entirely new ones.

Thus, for example, to return to the starting-point of this paper, although at the present time the equity jurisdiction for the relief of hard bargains, whether for undue influence, mistake or duress, or for the kind of undue advantage taken in such cases as *Morrison v. Coast Finance* [51] and *Knupp v. Bell*, [52] is separate from the common-law rules of quasi-contract, the motivating policy behind both is, as pointed out by Professor Crawford, [53] essentially a policy against "unjust enrichment." The interaction of the equity jurisdictions and common-law rules with this common policy can only prove beneficial, where the development of one system of restitution is concerned.

Once we have resolved the controversy over the juridical basis of the law of restitution and have accepted that distinctions between law and equity in this subject should be abolished, we should proceed to the elaboration of a framework of good general principles based on the concept of unjust enrichment and expanding that theoretical foundation-stone by the careful selection and utilisation of suitable rules, formerly legal and equitable. This implies a study, from the point of view of doctrinal soundness and practical utility, to "weed out" undesirable rules and lines of precedent, whether found formerly in common-law quasi-contract, or the "nooks of equity" previously referred to. Such a study could not be performed adequately in the process of judicial decision, which cannot always, on the facts of a particular case, achieve the necessary breadth of perspective, volume of research, or devotion of time, to enable the theoretical and practical revisions, presently conceived, to be successfully concluded.

What is, therefore, proposed is an independent codification, collecting together under classified headings both legal and equitable rules of restitution,

---

[51] *Supra* note 4.
[52] *Supra* note 3.
[53] *See* Crawford, *op. cit. supra* note 5, at 143 n.7.

and, if possible, the general principles behind them, somewhat on the lines of the American *Restatement.*[54] This should be followed by a comparative study, measuring these collected rules and principles against the criteria of justice, modern needs and the principles of other systems of restitution which have been operating successfully for substantial length of time in other countries. Through such a codification and comparative study, the process of reappraising our own system, and re-placing it upon a logical and consistent doctrinal structure, should be facilitated. Finally, the results of this process should be put into practical effect through whatever method seems desirable in view of what has been learnt during the study, who has conducted it, and how much emphasis is thought to be put upon the need for statutory enactment.

Obviously, the work involved in the proposals advanced above may be both time-consuming and frustrating. However, it is a necessary prerequisite to any substantially useful reform in the area of restitution which is to measure up appreciably to any of the objectives outlined. It may, furthermore, prove appreciably less time-consuming and frustrating than relying upon the standard judicial process to reach the same goals. The emphasis today is upon codification and collation, which can prove most successful, whether rewarded by statutory implementation or not.

VI. Conclusion

An attempt has been made in the preceding pages to re-emphasise a problem which no academic or practising lawyer can afford to ignore. Much of what has been said consists of a restatement, which the author thinks necessary, even though today discernible changes for the better are occurring in the area of restitution. It would be wrong to deny a movement in the direction of unjust enrichment, evident both in court decisions and academic writings. It would, however, be premature to anticipate from this movement a steady development of a logically consistent and uniform system of law where restitution is concerned. Many problems still remain, and policy reminders are still thought important. We are moving in the right direction, but we are a long way from our goal, and a good way behind other systems. The American *Restatement on Restitution* was first published in 1937, and then represented "a new starting-point in the development of quasi-contract, for it . . . [gave] the American practitioner a scientific and semi-authoritative text-book and . . . provided the whole legal world with a storehouse of sound principles and a clear vision of their application, and of their relation to other parts of the legal system."[55] The *Restatement* abandoned the "implied obligation" concept in favour of the principle of unjust enrichment, and it was

[54] Winfield, Book Review, 54 L.Q.R. 529 (1938).
[55] *Id.* at 542.

said, perhaps optimistically, that it "in effect obliterates the distinction between Common Law and Equity in the region of quasi-contract." [56] We are twenty years behind the *Restatement*. Only in 1966 did we come into possession of what is termed by Professor Crawford "a comprehensive and synthesizing study of the whole area in which the principle of unjust enrichment may be found to operate." [57] And we have as yet no way of telling what attention will be paid to this English study of the area.

Let us hope, however, that we shall soon be in a position to defend ourselves from the accusation that, in English and, one ventures to say, Canadian common law : "There is as yet . . . no general doctrine of or action to remedy unjust enrichment as there is in France and Quebec." [58]

[56] Winfield, Comment, 64 L.Q.R. 46 (1948).

[57] Book Review, 45 CAN. B. REV. 174 (1967).

[58] G. CHALLIES, THE DOCTRINE OF UNJUSTIFIED ENRICHMENT IN THE LAW OF THE PROVINCE OF QUEBEC 178 (1952).