REFLECTIONS ON RESTITUTION

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I. INTRODUCTION

Canadian devotees of that arcane corner of the law variously called, at different periods, quasi-contract, unjust enrichment, or restitution, will always be indebted to Professor Angus for his scholarly and illuminating discussion of the *Deglman* case [1] and its aftermath, published a decade ago. [2] Notwithstanding his exposition, there is still a lack of comprehension in some quarters as to the nature and scope of the modern notion of restitution. There are occasions when a particular judge feels that justice needs to be done, but is somewhat uncertain as to how to do so save by invoking a very nebulous idea of unjust enrichment or restitution, in other words, by falling into the trap long ago referred to by Lord Justice Hamilton in England of applying "that vague jurisprudence which is sometimes attractively styled 'justice as between man and man'", [3] without proper regard for, or consideration of the legal nature and logical structure of the rules of restitution. [4] Or else, there is a reluctance to do so, simply because the individual judge thinks that, by so doing, he *will* be behaving in the manner castigated by Lord Justice Hamilton. [5]

Perhaps a first step in understanding what the law is doing, why it is doing it, and whether what is being done is (a) sufficient, (b) correct, and (c) capable of legitimate and logical extension, is to identify the true legal nature of the principles that are being applied by the courts. Assistance is to be found in the more recent literature on the subject. In England, there is the book written by Goff and Jones. [6] In Australia, Professor Stoljar produced an innovative study in 1964. [7] In the United States, there is the

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[1] Deglman v. Guaranty Trust Co., [1954] Sup. Ct. 725, [1954] 3 D.L.R. 785.

[2] Angus, *Restitution in Canada Since the Deglman Case*, 42 CAN. B. REV. 529 (1964).

[3] Baylis v. Bishop of London, [1913] 1 Ch. 127, at 140, [1911-13] All E.R. Rep. 273, at 280 (C.A. 1912). Compare the same judge, subsequently Lord Sumner, in Sinclair v. Brougham, [1914] A.C. 398, at 456, [1914-15] All E.R. Rep. 622, at 650.

[4] A good example of this, it is suggested, is to be found in the dissenting judgment of Laskin, J., as he then was, in Murdoch v. Murdoch, [1975] 1 Sup. Ct. 423, at 451, 41 D.L.R.3d 367, at 385 (1973), in his reference to the application of the principles in the *Deglman* case.

[5] *See, e.g.*, Swan v. Public Trustee, [1972] 3 W.W.R. 696 (Alta. Sup. Ct.).

[6] R. GOFF & G. JONES, THE LAW OF RESTITUTION (1966). For earlier, briefer works, *see* P. WINFIELD, THE LAW OF QUASI-CONTRACTS (1952); J. MUNKMAN, THE LAW OF QUASI-CONTRACTS (1950).

[7] S. STOLJAR, THE LAW OF QUASI-CONTRACT (1964).

more recent work of Dawson and others.[8] In Canada, apart from a book on the law in Quebec,[9] the topic did not receive much attention[10] until first the essay by Angus referred to above, which performed useful pioneer work, and then a few years later the more theoretical and jurisprudential essay by Professor Samek.[11] The former was concerned with discussing the background to the *Deglman* case and the decisions which followed it, with a view to isolating some general principles which could be said to have been accepted by Canadian courts. The learned writer concluded[12] that "[w]hat is emerging . . . is a Canadian statement on the operation of the restitution principle", and gave seven examples, culled from the cases, where restitution would be granted,[13] and seven where it would not.[14] Professor Samek's study was directed towards the clarification of the relation of unjust enrichment to quasi-contract on the one hand and to restitution on the other, with a view to locating the principle which gave the coherence and unity of a separate branch of the law to the substantive legal rules applied in instances of recovery. His conclusion was that to speak of quasi-contract was mis-

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[8] J. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS (1951); J. DAWSON & G. PALMER, CASES ON RESTITUTION (2d ed. 1958). *See also* RESTATEMENT OF RESTITUTION (1937), *discussed in* Seavey & Scott, *Restitution*, 54 L.Q.R. 29 (1938), *and* P. WINFIELD, *supra* note 6, at 135.

[9] G. CHALLIES, THE DOCTRINE OF UNJUSTIFIED ENRICHMENT IN THE LAW OF THE PROVINCE OF QUEBEC (2d ed. 1952). *See also now* Fine, *Cause in the Quebec Law of Enrichment Without Cause*, 19 McGILL L.J. 453 (1973).

[10] *But see* the book reviews of G. CHALLIES, *supra* note 9, *in* 18 CAN. B. REV. 509 (1940), 30 CAN. B. REV. 851 (1952); Notes, 14 CAN. B. REV. 758 (1936), 20 CAN. B. REV. 557 (1942), 20 CAN. B. REV. 712 (1942); and Baxter, *Unjust Enrichment in the Canadian Common Law and in Quebec Law: Frustration of Contract*, 32 CAN. B. REV. 855 (1954); Shelton, *Unjust Enrichment and the Deglman Case*, 1 ALTA. L. REV. 30 (1955); Schiff, *The Deglman Case and Canada's Law of Unjust Enrichment*, 13 U. TORONTO FAC. L. REV. 30 (1955).

[11] Samek, *Unjust Enrichment, Quasi-Contract and Restitution*, 47 CAN. B. REV. 1 (1969).

[12] Angus, *supra* note 2, at 559.

[13] *Viz.*,
1. Benefits conferred under a contract rendered unenforceable by the Statute of Frauds.
2. Benefits conferred with the intention of receiving compensation or reward.
3. Repairs effected without regard to liability to be determined later.
4. Benefits involuntarily conferred.
5. Legal services relating to an estate, etc.
6. Improvements to land under mistake.
7. Payments under legal compulsion of the debt of another primarily liable.

[14] *Viz.*,
1. Where the contract covers the situation.
2. Where a benefit is conferred in anticipation of contract.
3. Where a benefit is conferred in reliance on a future relationship.
4. Where a benefit is conferred without expectation of compensation.
5. Where there was no basis for a belief that compensation would be paid.
6. Where the recipient of the benefit communicated that compensation would not be paid.
7. Where a subrogation claim does not fall within certain recognized categories.

leading, and to use the expression "restitution" was to confuse the *remedy* with the underlying principle which underlay the legal conceptual scheme. [15] In the result Professor Samek preferred the rubric or title of "unjustifiable enrichment" (which he thought was more correct than "unjust enrichment" though for the sake of uniformity he employed the latter phrase).

One might have thought that with this new-found wealth of academic and textual discussion, there would by now be some measure of agreement among writers and judges as to the legal nature of the remedies that were being granted in the courts, and the underlying bases for their application or refusal. That this is far from the case, it is suggested, is demonstrated by two things. First of all, there is the continued argument in the writings of scholars as to the proper name to call this branch of the law and the true relationship between this branch and other areas of legal activity, as well as the definition of the scope and application of such principles as have emerged over the years. Secondly, there is the confused use of language by judges in recent years, notably in Canada, making it evident that they, at least, are still uncertain as to (i) what is involved by the various terms that have been employed by earlier judges and writers, and (ii) the real nature of the claims that they allow or dismiss in such cases. My purpose in this article is not to re-examine and reconsider what has been written previously on the history and development of this part of the law, but to examine the most recent cases in Canada with a view to exposing the uncertainties which I have suggested flourish, and in the hope of elucidating some of the fundamental ideas.

As will be seen in due course, my examination may not lead to the same result or conclusion as that of Professor Samek. In this regard it may be useful to cite an early passage from his essay in which he says:

> It is a necessary condition of a legal conceptual scheme that it be *used* by judges, but their verbal approval is not a sufficient condition of such a scheme, and their verbal disapproval is not necessarily fatal. The adequacy of a legal conceptual scheme should be judged mainly . . . by its relevance to the legal rules with reference to which it is constructed, by its simplicity and elegance, and by its legal and social fruitfulness. [16]

This statement might, indeed, be taken as a text, upon which to base a consideration of the whole question of restitution. As I understand him, Professor Samek is suggesting that what this branch of the law should be called, or, more importantly than a name, (which after all is only a convenient and universally agreed label for a collection of legal rules), to what basic general principle it should be referred, does not depend upon what the judges say or do not say (however desirable their accord might be in the long run) but upon (i) relevance, (ii) simplicity and elegance, and (iii)

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[15] I agree with his views on "Quasi-Contract", but suggest respectfully that in discussing the term "restitution", Professor Samek has been misled into adopting and arguing for *American* use of that expression, rather than Anglo-Canadian.

[16] Samek, *supra* note 11, at 3.

fruitfulness. In other words, it would seem, what is important is the workability of the terminology. As he also says: "A legal conceptual scheme is not a purely theoretical construct, but a construct with a certain empirical content and with a certain predictive power." [17] With this, nobody would disagree. But it does not follow that everyone would agree with his argument that such a scheme does not have to have support from judicial statements, nor with his conclusion that, applying such an approach, the proper way of describing the scheme that applies to this area of legal and judicial activity is "unjust enrichment" (or his variation on this—"unjustifiable enrichment"). His conclusion, however, is drawn from his statement [18] that a legal conceptual scheme fulfills three main functions, which are all interdependent. They are a *systematizing*, a *developmental*, and a *social* function. As long as a scheme fulfills these, it would appear, it does not matter whether the scheme itself receives judicial approval. It is the underlying juridical analysis that is important. In other words, I would suggest, as long as Professor Samek's analysis and conclusions satisfy his own logical and sociological premises, the answer he reaches is correct, and, presumably, it is the answer which the judges should acknowledge as being the right one, the one that is to be blessed, adopted and utilized by them in the future.

My immediate response is to say that an analysis that does not accord with the facts of judicial activity and exposition of the law does not have much chance of acceptance and approval, nor can it properly rank as a valid explanation of what is happening in the courts. It may be highly imaginative and well-reasoned, even logical, viable, and capable of practical use. But it will not really guide the courts by explaining to them what they have been doing and showing them how to continue in the future. I would prefer to adopt the approach of examining the language, as well as the decisions of the courts, and extracting from both the applicable reasoning, principles and concepts, in the hope of rationalizing within the framework of the current law the present position that has been reached. In this connection, I suggest, with great respect to a writer whose subtlety of mind and depth of analysis are both admirable, that there is no little confusion underlying his explanation of the reason, or the main reason, why he prefers the name "unjustifiable enrichment" to that of "unjust enrichment." What he says [19] is that the question of what is an unjust enrichment is never a question of fact; it is always a question of values. Hence, to avoid moral connotations and a priori reasoning and decision-making, and to show concern with values rather than facts, "unjustifiable enrichment" is the preferable term. I find this hard to understand. I also have the impression that there has been a shift in the reasoning somewhere along the line, and a confusion of the various ideas Professor Samek is attempting to express. Furthermore, I am critical of the apparent suggestion in this part of his discussion

[17] *Id.*
[18] *Id.* at 4.
[19] *Id.* at 17.

that this area of law is not concerned with moral values, but with legal ones, as though, ultimately, in this regard, it is possible to isolate the one from the other. If he is endeavouring to escape from the translation of moral values and considerations into legal ones by some judges and writers, (in other words to render inaccurate the remarks of Lord Justice Hamilton quoted earlier), which seems likely in view of his discussion [20] of "Lord Mansfield and the moral concept of unjust enrichment", then I would make two comments. First of all, I think that his conclusion confounds his earlier remarks; secondly, I am not convinced that it is either so easy or so desirable to differentiate moral and legal values in relation to claims for restitution. Even if one talks in terms of *social* values, it seems to me that basically it is moral values that are in issue, perhaps as seen from a narrow point of view, *i.e.*, what is socially, as contrasted with what is ethically desirable, but nonetheless values that are moral as contrasted with coldly and purely legal.

Which brings me back to the earlier point, that it is necessary to examine what the courts are saying and doing. This, it is suggested, will reveal a certain moral bias on the part of the courts, perhaps not always clearly or decisively expressed, but nevertheless there, and within this is to be found the underlying legal nature of this part of the law. My conclusion will be that what comes out of recent cases (bearing in mind their foundation in, and upon, earlier ones) is firstly, an acceptance of the concept of *restitution* as what Professor Samek would call the "legal conceptual scheme" which properly describes how the law has developed and how it is going to develop in the future, and secondly, a moral foundation for recovery.

II. The Restitutionary Principle

"Just as the categories of negligence are never closed", said Mr. Justice Morden of the High Court of Ontario in *James More & Sons v. University of Ottawa*, [21] "neither can those of restitution. The principles take precedence over the illustrations or examples of their application." What the learned judge was saying, in effect, copying the famous remark of Lord MacMillan in *Donoghue v. Stevenson* [22] with respect to the generality of the principle of negligence, which transcended any individual examples of liability for negligent conduct and at once comprehended them all as well as providing the basis for new ones, was that there is a general restitutionary principle which operates with respect to existing and future instances of recovery, in just the same way as the principle of negligence. But, to quote another famous comment made with regard to negligence, this time by Lord Wright: "It may be possible to put the principle of negligence in a nutshell, but [it is] difficult to keep it there . . . ." [23] So, too, in the present instance,

[20] *Id.* at 15 *passim*.
[21] 5 Ont. 2d 162, at 172, 49 D.L.R.3d 666, at 676 (High Ct. 1974).
[22] [1932] A.C. 562, at 618-19, [1932] 1 All E.R. Rep. 1, at 29-30.
[23] Glasgow Corp. v. Muir, [1943] A.C. 448, at 462, [1943] 2 All E.R. 44, at 51.

with respect to the restitutionary principle. Prior to the *Deglman* case many accepted instances of restitutionary recovery were well-established at common law, and acknowledged by Canadian courts. Since that case, as Professor Angus demonstrated in 1964, others have been introduced, either as logical, necessary and reasonable extensions of previous situations, or as entirely new instances, albeit culled from the general principles which were enunciated by courts in England and Canada. In this respect, much reliance has been placed upon, and much use made of, the following statement by Lord Wright in the *Fibrosa* case [24] in 1943:

> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution. [25]

From this, and other similar statements, [26] much has been deduced, and courts in Canada, even if not in England, where there has been some vestigial reluctance to extend or develop the law in consequence of the decision of the House of Lords in *Sinclair v. Brougham*, [27] have been fully aware of the possibilities. They have received and applied the accepted categories of restitution: to some extent they may be said to have refined or restated their constituent elements. Over and beyond that, however, they have made new advances, by using the concept of restitution in ways which, as yet, may not have appealed to courts in England. Despite the numerous instances of what is treated by Goff and Jones as restitutionary recovery, the English courts have not been as resolute in their enunciation of the principle of restitution, and its recognition as a basis of recovery. In respect of many of the suggested instances presented by Goff and Jones, it may be said that the common law or equity provided a remedy without reference to any principle of restitutionary recovery, and, in particular, without any reference to the doctrine as formulated in judgments such as that of Lord Wright in the *Fibrosa* case. One notable exception to the general English reluctance, or possibly even distaste, for such novelty is Lord Denning. Years ago, in extra-judicial writing, [28] and on the bench, [29] he propounded with fervour and embraced with eagerness such a general doctrine. Most recently, in *Green-*

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[24] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd., [1943] A.C. 32, [1942] 2 All E.R. 122.

[25] *Id.* at 61, [1942] 2 All E.R. at 135.

[26] *See, e.g.*, Morrison v. Canadian Surety Co., 12 W.W.R. (n.s.) 57, at 75-81, [1954] 4 D.L.R. 736, at 750-57 (Man.) (Coyne, J.A.).

[27] *Supra* note 3.

[28] Denning, *Quantum Meruit and the Statute of Frauds*, 41 L.Q.R. 79 (1925); Denning, *Quantum Meruit: The Case of Craven-Ellis v. Canons Ltd.*, 55 L.Q.R. 54 (1939); Denning, *The Recovery of Money*, 65 L.Q.R. 37 (1949).

[29] *Compare* Nelson v. Larholt, [1948] 1 K.B. 339, [1947] 2 All E.R. 751 *with* Larner v. London County Council, [1949] 2 K.B. 683, [1949] 1 All E.R. 964 (C.A.).

wood v. Bennett, [30] he, and only he of the three members of the Court of Appeal who sat in that case, was prepared to found his judgment in favour of the plaintiff on the restitution doctrine. What happened in that case was that the plaintiff purchased a car which ultimately turned out to have been stolen by the man who sold it to him. When the truth was discovered the police restored the car to the rightful owner. In the meanwhile the plaintiff, ignorant that he had not acquired title, expended money on improving the car. As a result, when the true owner regained his car, it was worth more than when it had been stolen, and this had occurred at the plaintiff's expense. In the circumstances, the Court of Appeal, reversing the county court judge, held that the plaintiff was entitled to be reimbursed by the defendant. This could have been based upon the law of detinue and conversion. But Lord Denning applied a principle derived "from the law of restitution" to achieve the same result. [31]

Such English examples are rare in modern times. They are not as rare in Canada. Nor is the plain, indeed blatant reliance by the courts upon the "law of restitution". However, as the account by Professor Angus shows, and the discussion by Professor Samek underlines, the courts which are prepared to expose their acceptance of, and reliance upon, this law or set of legal principles, are not always as definite on the issue whether it is the law of restitution, or the law of unjust enrichment. Less and less, it must be said, do Canadian courts in modern times employ the term "quasi-contract", and their decisions and reasoning show that they have become acclimatized to the more modern and accurate rejection of that expression, with its overtones of contractual obligation, and its inherent and antiquated historicism. They have indicated that they are free from the trammels of history in a manner so far unstated by their English brethren, even if history still maintains some relevance and importance. As Mr. Justice Seaton of the Supreme Court of British Columbia said in *Samilo v. Phillips*: [32] "Restitution is based on a broad general principle underlying the decisions in many diverse fields. At this stage in its evolution one reluctantly, but necessarily, deals with it in its historical categories." [33] But he might have added, though it was probably not essential for the decision in that case, of which more will be said later, that while the historical categories are still important, and cannot be ignored, the operation of the law is not confined to those categories. The banks have been broken, even if what has eventuated may not as yet qualify as a flood. The contrast between the statement by Mr. Justice Seaton in 1969 and that of Mr. Justice Morden in 1975, which was quoted earlier, is significant. It marks a possible change in outlook, a further step in the direction of final and complete recognition of some kind of restitutionary doctrine. The question is, however, what is that doctrine? Is it founded on unjust enrichment? Or is it a doctrine of restitution?

[30] [1973] Q.B. 195, [1972] 3 All E.R. 586, [1972] 3 W.L.R. 691 (C.A.).
[31] *Id.* at 202, [1972] 3 All E.R. at 589, [1972] 3 W.L.R. at 695.
[32] 69 D.L.R.2d 411 (B.C. Sup. Ct. 1968).
[33] *Id.* at 420.

III. The Underlying Principles

In the most recent cases which have been determined by Canadian courts over the past few years, it seems to me that three different doctrines or principles can be seen in operation. They are (i) the notion of unjust enrichment; (ii) the concept of obligations imposed by law; and (iii) the idea of restitution. It is interesting that the fact situations involved in these cases are so varied and raise such different issues, that they illustrate the broad range of this area of the law, its potential, as well as actual scope, and the possible limitations that can be placed upon the operation of the doctrine. There is an awareness of the dangers of going too far, as witness the judgment of Mr. Justice Fulton in *Hazelwood v. West Coast Securities Ltd.*,[34] and, at the same time, a willingness to be creative and imaginative and to employ the law in as broad a manner as possible, as exemplified by the judgment of Mr. Justice Morden in *James More & Sons v. University of Ottawa.*[35] It is as though the judges realize that they have been presented by earlier decisions with a very useful tool which can be wielded to achieve a just result, but are fearful lest, by over use or by too indiscriminating a use they might blunt it, or, at the very least, misshape it until it loses both elegance and utility.

A. *Unjust Enrichment*

In *Caledonia Community Credit Union Ltd. v. Haldimand Feed Mill Ltd.*,[36] the plaintiff was seeking to recover money lent to a borrower. Consideration had been given for the borrower's promise to repay but the lender, in making the loan, had acted ultra vires. The plaintiff company had no legal power to make such loan. By way of response to the suit the borrower pleaded the fact that the transaction was ultra vires the plaintiff company, in accordance with the well-established principles of company and contract law. Although, therefore, no contractual remedy was available to the plaintiff, it was held that the money was recoverable. A distinct, non-contractual promise to repay was imputed, in order to prevent the unjust enrichment of the borrower at the lender's expense. There is good English[37] and Canadian authority[38] for such a decision. And it shows that

[34] 49 D.L.R.3d 46 (B.C. Sup. Ct. 1974).

[35] *Supra* note 21.

[36] 3 Ont.2d 460, 45 D.L.R.3d 676 (High Ct. 1974). *Compare* this case *with* D'Amore v. McDonald, 1 Ont.2d 370, 40 D.L.R.3d 354 (1973) where the contract was *illegal*, not merely *ultra vires*.

[37] *Compare In re* Cork & Youghal Ry., (1869), L.R. 4 Ch. App. 748, 39 L.J. Ch. 277; *with* Blackburn Bldg. Soc'y v. Cunliffe Brooks & Co., 22 Ch. D. 61, 52 L.J. Ch. 92 (C.A. 1882); *and In re* Wrexham, Mold & Connah's Quay Ry., [1899] 1 Ch. 440, 68 L.J. Ch. 270 (C.A.); *and* Bannatyne v. MacIver, [1906] 1 K.B. 103, [1904-07] All E. R. Rep. 425 (C.A. 1905); *and* Reversion Fund & Ins. Co. v. Maison Cosway Ltd., [1913] 1 K.B. 364, 82 L.J.K.B. 512 (C.A. 1912); *and In re* Cleadon Trust, Ltd., [1939] Ch. 286, [1938] 4 All E.R. 518 (C.A.).

[38] *Compare* La Caisse Populaire Notre Dame Ltée v. Moyen, 59 W.W.R. (n.s.) 129, 61 D.L.R.2d 118 (Sask. Q.B. 1967); *with* Breckenbridge Speedway Ltd. v. The Queen in Right of Alberta, [1970] Sup. Ct. 175, 9 D.L.R.3d 142 (1969).

despite the technical doctrines of the law of contract and the strictness of the law relating to corporations, the courts will seek to avoid an unjust and unreasonable result, by the use of what might be termed the outflanking doctrine now being considered. In this instance, the basis for the court's granting of a remedy was expressed to be the prevention of an unjust enrichment.

So, too, in *Hazlewood v. West Coast Securities Ltd.* [39] the judgment of Mr. Justice Fulton of the Supreme Court of British Columbia, while invoking the notion of restitution as well as unjust enrichment, seems to come down more firmly in favour of the latter as the basis for the recovery that was permitted in that case. What had happened was that an agent of a company had acted for the company without authority to do so, and had borrowed money from the plaintiff. The circumstances were such, as the learned judge found after a thorough review, as to put any reasonable person in the position of the plaintiff upon his inquiry as to the authority of the agent. He did not make sufficient inquiries "upon the basis of which he could assume at the time of the respective transactions that it was within the actual or implied authority of [the agent] to enter into such transactions on the defendant's behalf or to commit the defendant thereto". [40] Hence, the defendant could not be liable contractually for the return of the money lent, the agent in question lacking express, implied or usual authority to obtain the loan, and the loan never having been ratified by the defendant. That did not conclude the question. For the agent had misappropriated the money and had used some of it to reduce the debts which he, the agent, owed to his principal, the defendant. In those circumstances, after examining the law of restitution or unjust enrichment, the learned judge held that the defendant was liable to repay the plaintiff to the extent to which the unauthorized loan had been utilized to discharge the agent's debt, because to that extent the defendant had been unjustly enriched at the plaintiff's expense. It is interesting to note that Mr. Justice Fulton felt obliged to investigate the law relating to property in, and traceability of, moneys (including what was said in *Sinclair v. Brougham* [41] in this respect), even though the more generalized approach in the *Deglman* case [42] justified or substantiated his conclusion. He did this, as he explained, "because of the importance of the matter and the concern I felt lest I should be making a too liberal interpretation or unwarranted extension of the doctrine . . . ." [43] Having done so, he felt satisfied that the doctrine of restitution was applicable to the circumstances and required that the defendant should pay the plaintiffs "an amount equivalent to those portions of the various advances of which it has had the benefit and by which it would otherwise be unjustly

[39] *Supra* note 34, especially at 66-70.
[40] *Id.* at 64-65.
[41] *Supra* note 3.
[42] *Supra* note 1.
[43] *Supra* note 34, at 69-70.

enriched as against the plaintiffs." [44] Thus, although the learned judge spoke of the doctrine of restitution, he seems to have been motivated by the notion of unjust enrichment as the real basis for the application of the earlier case-law. In the equivalent language of Mr. Justice Gould of the same court in the earlier case of *Arnett & Wensley Ltd. v. Good*, [45] where the plaintiff was seeking to recover from the defendant money which had been paid by the former to the latter when the former had also paid the same sum to the defendant's bank under a prior arrangement, thereby releasing the defendant from liability to the bank, the claim for repayment, which was successful in that case also, "sounded in unjust enrichment".

By way of contrast, however, in two other cases the decision was against allowing a claim on the basis of unjust enrichment. In *Simplot Chemical Co. v. Manitoba*, [46] the plaintiffs were consumers of electricity supplied by the defendant, a governmental agency. Payment was on the basis of electricity consumed. But the plaintiffs in fact paid more than the price of the electricity which they had used. Their claim for repayment, however, was not in respect of this overpayment, mistaken though it may have been. It was based on the extra amount of *tax* which they had paid. Under the appropriate legislation there was a tax of five per cent exigible on electricity consumed, *i.e.*, added to its cost. The plaintiffs, by reason of their excessive payment, had also paid too much tax. This they were endeavouring to recoup from the defendants. The claim was unsuccessful, on a number of grounds. So far as the present context is concerned, it failed because there had been no unjust enrichment of the defendants at the plaintiffs' expense. The judgment of Mr. Justice Nitikman which relied heavily upon the statement of the principle contained in the judgment of Mr. Justice Coyne in *Morrison v. Canadian Surety Co.*, [47] concluded that the plaintiffs did not pay the tax through a mistake, nor by reason of any other circumstances that could bring their situation within the scope of the term "unjust enrichment". They were legally obliged to pay the tax. The payment had not been made as a result of any deception practised on them by the defendants, nor had the defendants misled the plaintiffs. [48] Consequently there was no recovery. On appeal this judgment was affirmed. [49]

This judgment suggests, therefore, that the concept of unjust enrichment is only to be called into operation and effect, so as to entitle a plaintiff to recover money which he has given to the defendant, when there was (i) payment under mistake; (ii) deception; (iii) misleading conduct by the defendant; or (iv), possibly, some other equally reprehensible behaviour on

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[44] *Id.* at 70.

[45] 64 D.L.R.2d 181 (B.C. Sup. Ct. 1967), *relying on* Carleton v. Ottawa, [1965] Sup. Ct. 663, 52 D.L.R.2d 220.

[46] [1975] 1 W.W.R. 289, (Man. Q.B. 1974), *aff'd*, [1975] 3 W.W.R. 480 (Man. 1974).

[47] *Supra* note 26.

[48] *Supra* note 46, at 291.

[49] Without going into the matters relevant to this discussion.

the latter's part. Admittedly, the payment of tax was legally exigible under the relevant legislation of Manitoba. But such tax was calculable on the price of electricity. What would seem to have been decided was that the tax was payable on *whatever was actually paid* in respect of electricity, whether *that* amount had been correctly calculated or not. The mistake as to the quantity of electricity consumed, which bore upon the price payable by the plaintiffs in respect of electricity, was not in any way to be taken into account when considering the amount of tax exigible from the plaintiffs. There does not appear to be any suggestion that there was a mistake of law involved (*i.e.*, since any mistake which caused the overpayment of tax was a mistake of law) which might support the conclusion that therefore the money was irrecoverable (in the absence of some element of compulsion, as is made clear in several English and Canadian cases).[50] It would be hard to construe what happened as a mistake of law, since there was no error as to the existence of the tax, or the liability, in general terms, of the plaintiffs to pay, only as to the *quantum* of tax, a question of fact. That being so, it is respectfully suggested that the overpayment here could have been treated as a payment made under a mistake of fact, which consequently benefited the defendants unjustly at the expense of the plaintiffs. It has never been said that, in cases of mistake, the mistake must result from some deception or misleading conduct on the part of the payee, the defendant. On the contrary, the cases support the contention that a totally innocent payee is as liable to disgorge the overpayment or mistaken payment as a guilty one, as was recently underlined by the Supreme Court of Canada by its decision in *Storthoaks v. Mobil Oil Canada Ltd.*[51]

Why was this not therefore, a suitable instance for the application of the doctrine and the recovery of the money? I would suggest that underlying the reasoning and language of the court were two ideas. In the first place, that the foundation of recovery is not restitution of money which formerly belonged to the plaintiff but unjust enrichment. In other words, where there was no vitiating element present in the transaction, such as fraud or deception, the party paying the money must be treated as having made a gift of the money to the recipient. He acted voluntarily, notwithstanding the fact that he was making a payment which was founded upon a legal obligation to pay, under certain conditions, since it was voluntary in the sense that the party paying did not sufficiently ensure or ascertain whether or not he fell within the scope of the legal obligation. Secondly, the doctrine under which money was recoverable was founded upon some moral fault on the part of the recipient, making it unjust for him to retain the payment and so be benefited or enriched at the other party's expense. In this case, the recipient of the tax was not guilty of any conduct deserving

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[50] *See, e.g.*, Kiriri Cotton Co. v. Dewani, [1960] A.C. 192, [1960] 1 All E.R. 177 (P.C. 1959) (Uganda); George (Porky) Jacobs Enterprises Ltd. v. Regina, [1964] Sup. Ct. 326, 47 W.W.R. (n.s.) 305, 44 D.L.R.2d 179.

[51] [1975] 4 W.W.R. 591 (Sup. Ct.).

of moral obloquy, and therefore, whatever enrichment occurred was not "unjust". There was an unconscious, but nevertheless voluntary enrichment of the defendants by the plaintiff, which could not now be reversed by the court. On both grounds, I would suggest, the decision was bad and incorrect. A better analysis of the legal principles of restitution would have revealed this.

Much the same sort of thinking as, it is suggested, underlay the *Simplot* case can be seen at work in *Re Spears.*[52] A woman believed that she was married to a certain man, as did the man himself. He died intestate, whereupon it was discovered that they had never been validly married. In consequence, she was unable to obtain any share of his estate on the basis of widowhood. She therefore brought an action, based upon decisions such as that in the *Deglman* case, claiming recompense for the years that she had lived with him and helped him. The court drew a distinction between the services she rendered in a business capacity, as his assistant, and those of a domestic nature. The former were compensable; the latter were not. The ground for this decision was that, while there might be some expectation of reward in respect of the former type of services, there was none in respect of the latter. A woman lived with a man, and performed domestic services for him, not out of any expectation of financial reward or compensation, but for other, less material, more sentimental reasons.[53] This was a ground of distinction between the facts in this case and those in many others in the last two decades, where a relative, or a stranger, had helped someone for many years in their home in the hope and belief that there would be some reward in the will of the person who was being served or helped only to find that the will left nothing, or not the thing which was expected, such as a house. In such instances, if no contractual remedy was available since there was no written contract or document which satisfied the Statute of Frauds, nor was there part performance capable of rectifying the lack of writing, Canadian courts have sometimes applied the doctrine stated in the *Deglman* case, and given some reasonable sum by way of compensation for the services rendered.[54] But to establish such a claim, as was said by Mr. Justice MacDonald in the Alberta case of *Swan v. Public Trustee*[55] (where the plaintiff in such a case was unsuccessful), "it must be found that the services and cohabitation were to be paid for". The fact that the provider of the services cohabited with the one for whom the services were

[52] 40 D.L.R.3d 284 (N.S. Prov. Ct. 1973), *aff'd on other grounds*, 52 D.L.R.3d 146 (N.S. Sup. Ct. 1974).

[53] *Compare with* Holli (Kost) v. Kost, 7 R.F.L. 77 (B.C. Sup. Ct. 1972).

[54] Brownscombe v. Public Trustee of Alberta, [1969] Sup. Ct. 658, 5 D.L.R.3d 673; Ross v. Ross, 33 D.L.R.3d 351 (Sask. Q.B. 1973); Johnson v. Nova Scotia Trust Co., 6 N.S.2d 88, 43 D.L.R.3d 222 (1973); Hink v. Lhenen, [1975] 3 W.W.R. 306, 52 D.L.R.3d 301 (Alta. 1974). *Contrast* Thompson v. Guaranty Trust Co., [1974] Sup. Ct. 1023, 39 D.L.R.3d 408 (1973), where there was part performance which established an enforceable contract despite the lack of writing as required under the Statute of Frauds.

[55] *Supra* note 5, at 699.

provided might even lead to the inference or conclusion that no payment was to be expected, so that none was recoverable. In the *Spears* case, the fact of cohabitation did not affect the claim for business services. But it did negate a claim for those which were of a more intimate, domestic nature.

In reaching his decision, the trial judge in that case [56] referred to the principle of *equity* [*sic*!] by which no one was allowed to enrich himself unjustly at the expense of another by reason of an innocent mistake of law or fact entertained by both parties. Having concluded that this was the law, although with respect, it seems to be a very broad generalization that should certainly be qualified, the learned judge then proceeded to deny the complete remedy sought by the woman, even though he awarded her something for all she had done. If the principle the judge stated was in truth a valid and correct statement of the law, why was the woman not entitled to money for *both* kinds of services? In respect of both, the deceased man had been enriched, in different ways, admittedly, but nonetheless enriched in ways which could be quantified monetarily. In running the man's household, the woman must have conferred some material, financial benefit upon him, which, to some extent, the law recognizes, so far as a lawful wife is concerned, by giving her certain rights as to dower, on intestacy, and even where she has been disinherited. All that was missing here was the valid marriage. And the learned judge rightly stressed that the woman should not be penalized, nor the man (or his estate) unjustly enriched, because of their common, innocent mistake. Could it be said, therefore, that beneath the language employed by the judge there lurks another reason? That claims for unjust enrichment depend upon the morality of the claim, and a woman, albeit in innocence, who lives with a man without being married to him should not be able to claim payment for her "domestic" services, as this is possibly tainted with the suggestion of payment being granted for an immoral consideration. If I am correct in this, and the suggestion is put forward very hesitantly and tentatively, then, despite Professor Samek, it may be that moral values are as important as legal ones in this context.

B. *Obligations Imposed By Law*

The line of cases just mentioned, dealing with recovery of money for "services rendered", where the situation did not support a valid or enforceable contract, but the question was whether some alternative legal basis for compensation existed, stem directly and starkly from the decision and reasoning in the *Deglman* case. [57] It should be pointed out that in that case the Supreme Court of Canada appears to have provided two alternative bases for recovery, both generally and with special reference to the type of fact-situation involved in that case itself. Mr. Justice Rand spoke of "the principle of restitution against what would otherwise be an unjust enrichment

[56] *Supra* note 52, at 291.
[57] *Supra* note 1.

of the defendant at the expense of the plaintiff". [58] It is not clear, therefore, whether his Lordship was intending to stress or proceed from the notion of restitution or that of unjust enrichment (a lack of clarity and precision which, it has already been noted, has affected subsequent courts). Mr. Justice Cartwright, however, rejecting, quite rightly, the doctrine of "quasi-contract" or "implied contract" which has bedevilled the law in England, and which, it has been suggested, is now discredited and dethroned from its former pre-eminence as an explanation and juridical basis for decision, preferred to rest his determination that the nephew in the *Deglman* case was entitled to something in respect of his years of working for the deceased aunt, "not on the contract, but on an obligation imposed by law". [59] This formulation of the doctrine of restitutionary recovery is still very much alive and evident in the courts of Canada, and must therefore be considered as a rival theory underlying this area of judicial activity.

It appears to be based upon the notion that recovery is permitted only where the facts and the circumstances generally substantiate the existence of an "implied" or "imputed" promise to pay, or to repay in appropriate instances, the party seeking recovery. As Mr. Justice Martland said recently in the *Storthoaks* case, [60] referring to some cases in the House of Lords, but in a manner which suggests that he regarded this as a distinct possibility in Canada as well as England, "there is an indication that the question as to whether the action for money had and received is dependent upon an imputed promise to pay is still not finally determined". [61] By this action, for money had and received, the learned judge was referring to a claim for restitutionary payment or recovery, as for example, in cases of mistaken payment or in circumstances resembling the facts of the *Deglman* case. Thus, even at this late stage in the recent development of the law, there would appear to be some judges who seriously consider that the determination of the issue of liability or no liability rests upon the possibility of an implied obligation, arising at law, which, in turn, is derived from an imputation of a promise by the defendant that he will pay or repay the plaintiff.

This suggestion is most clearly seen operating in what I may call *Deglman* type cases or situations. In the reported cases which deal with such claims, the court seems to be searching for some fact or facts, some evidence, which will support the inference or conclusion that, at some time or another, the person for whom the services were rendered impliedly, if not explicitly promised some reward for those services. If such facts or evidence can be discovered, then a promise will be imputed, despite the lack of a formal, enforceable contract, and, in consequence, an obligation will be imposed by the law. The nature of that imputed promise, and the subsequent im-

[58] *Id.* at 728, [1954] 3 D.L.R. at 788.
[59] *Id.* at 734, [1954] 3 D.L.R. at 794.
[60] *Supra* note 51.
[61] *Id.* at 604.

plied obligation, is to pay a reasonable sum by way of compensation for what has been done, which will not always, if ever, correspond to the claim made by the one performing the services. A house may have been promised, but the claim will be restricted to a sum of money. [62] A sum of money will be alleged as having been promised, but what is awarded may be less than that allegedly promised amount. [63] The courts, in effect, are substituting their views as to what should be paid, in place of the claim which the plaintiff states is based upon the "agreement" that may have been reached or understood in fact, but is inoperative in law.

However, a recent decision by Mr. Justice Osler in Ontario, *McCarthy Milling Co. v. Elder Packing Co.*, [64] indicates that this basis for recovery is not confined to cases of the *Deglman* type. In that case, under a contract of sale, goods were sold at a stipulated price based upon the belief of both parties that a government subsidy would be paid to the seller in respect of such sales. For that reason the seller agreed to sell the goods at a lower price, the difference between the agreed price and the proper market price being made up by the subsidy. Subsequently it was discovered that the subsidy was not properly paid. As a result, the seller brought an action to obtain the difference in price from the buyer. It was held that, in these circumstances, the buyer could be compelled to pay the full amount of the value of the goods else he would have been unjustly enriched at the seller's expense. Applying the *Fibrosa* and *Deglman* dicta, the learned judge declared that the buyer was under an obligation imposed by law to make up the difference. It is difficult to understand the rationale or justification of this decision. The learned judge stated [65] that the matter was not strictly one of contract or tort but fell "within that principle somewhat vaguely defined as quasi-contract or unjust enrichment". But why? There was no deception here. The parties believed that the subsidy was payable, and it was paid for a time. But later it was made clear that the goods in question did not qualify for the subsidy. Was this an instance of common or mutual mistake going to the root of the contract? If so, what was its effect? To render the contract void? Possibly, [66] but surely not to entitle the seller to extra money from the buyer. If it was not a case of mistake, then how could the seller justify making the buyer pay more than the agreed price, in the absence of any improper conduct on the latter's part? The only possible answer would seem to lie in the fact that the seller had repaid the subsidy actually paid in the past. But did that mean that the buyer should correct the unfortunate misapprehension of the seller? Commercially speaking, one would have thought that the loss had to lie where it fell, *i.e.*, on the seller who had not assured himself of his entitlement to a subsidy.

[62] *See, e.g., Deglman, supra* note 1.

[63] *See, e.g.,* Ross v. Ross, *supra* note 54.

[64] [1973] 2 Ont. 96, 33 D.L.R.3d 54 (High Ct.).

[65] *Id.* at 100, 33 D.L.R.3d at 56.

[66] *Compare and contrast* Imperial Glass Ltd. v. Consolidated Supplies Ltd., 22 D.L.R.2d 759 (B.C. 1960). *See* Note, 39 CAN. B. REV. 625 (1961).

Furthermore, was this not, possibly, a mistake of *law*, not of fact? And if so, does this decision mean that, in modern times, it makes little difference whether the mistake is in one category or the other? [67] Or is the solution to be found not in commercial *behaviour*, (*i.e.*, merchants do not make such favourable deals unless they have a good reason, such as the payment of a government subsidy, and a mistake as to that justifies re-opening the whole transaction), but in commercial *morality* (*i.e.*, merchants should not be permitted to take advantage of each other, even if no fraud or similar conduct is involved)? The language of unjust enrichment employed by the judge, even though he referred to an obligation imposed by law, suggests, at least to this writer, that something of the sort was in his mind.

C. *Restitution*

The third group of cases suggest that the underlying basis for recovery, where it is permitted, is the doctrine or notion of restitution. That this is so underlines the judgment of Mr. Justice Seaton in *Samilo v. Phillips* [68] from which an important sentence has earlier been cited. There a son paid to the revenue authorities taxes owed by his father, in order to protect his father from possible civil and criminal litigation and to ease the father's dying days. The son then committed suicide, and his estate was claiming from the father's estate the amount paid by the son to the revenue authorities. In holding the father's estate liable, the learned trial judge applied the doctrine of restitution, but he did so by analogy to two possible, but doubtful instances of its operation, *viz.*, necessitous intervention, and agency of necessity. The first illustrated by cases such as *In Re Rhodes*, [69] in which payment could be recovered in respect of necessaries supplied to an insane person from that person's estate, is in many ways a questionable authority or precedent for the doctrine of restitution. True there are situations in which provision of necessaries, in the form of goods or services, (but not so frequently the latter), will justify a later claim for compensation on the basis of *quantum meruit* or *quantum valebat* (the use of which expressions has helped to promote the confusion between contractual obligations and those arising out of the law of restitution, in the absence, or unenforceability of any contract). [70] But this is not so widely accepted as to support the conclusion that there is a general principle of restitutionary recovery in all such cases. The second source of the learned judge's conclusion as to the doctrine of restitution, namely agency of necessity, is equally suspect. The

[67] A question which is still open to debate, it is suggested, despite the decision in *In re* Diplock, [1948] 1 Ch. 465, [1948] 2 All E.R. 429 (C.A.), *aff'd sub nom.* Ministry of Health v. Simpson, [1951] A.C. 251, [1950] 2 All E.R. 1137. See the discussion in George (Porky) Jacobs Enterprises v. Regina, *supra* note 50.

[68] *Supra* note 32. For the subsequent history of that case, *see* [1972] Sup. Ct. 201, 20 D.L.R.3d 283 (1971).

[69] 44 Ch. D. 94, [1886-90] All E.R. Rep. 871 (C.A. 1890).

[70] R. GOFF & G. JONES, *supra* note 6, chs. 14 & 21. *See also* chs. 18, 20, & 22.

writer has elsewhere examined that doctrine of law in detail. [71] From what is said there, it is obvious that the very attenuated, and even criticized, idea of agency of necessity, which has somehow survived in the twentieth century despite the disappearance or dilution in importance of some of its main ingredients or examples, cannot seriously be regarded today as sufficiently well-accepted, or broad enough in its operation, to merit the conclusion that there is some general doctrine of restitution based upon the performance of unauthorized acts, by someone who is not, and never has been the agent of the party for whose benefit the acts are performed, when an alleged emergency or "necessity", of so sudden an occurrence that prior authority cannot be sought or given, moves the so-called "agent" to act to his detriment or expense. Yet from these slender threads the learned judge in this case fashioned a garment which could clothe the plaintiff's claim with legal merit. If he was correct in his analysis and its results, then the doctrine of restitution has, indeed, travelled far.

Whether or not the decision was justified in law (as opposed to any moral justification), it is suggested that it was firmly rooted in the idea that there was a duty of restitution upon the estate of the deceased father, to make good the losses incurred by the son's estate in order to protect the father from harrassment and shield his good name while he lived. Two more recent cases, which led to different results, although the claim in both was for restitution, raise the issue in perhaps more appropriate circumstances; and it is interesting to note that, while the problems did not pose so starkly the moral issues raised in the *Samilo* case, these decisions, it is suggested, do indicate the connection between the moral worth of a plaintiff's claim for restitution, and the legal basis of such claim. They also suggest that possible differences in commercial practice may make a difference when it comes to determining whether restitution should or should not be ordered.

The first of these is *James More & Sons v. University of Ottawa.* [72] The plaintiffs undertook to construct a building for the defendant. The costs of the construction included the taxes on certain building materials up to a certain date. Later those taxes were increased. The written contract between the parties did not include any provision for recognizing the increase in the taxes (and so proportionately increasing the amount of the contract price). However, the defendant's architect made an oral representation to the plaintiffs that such increase would be met by the defendant. The defendant, as a university, received a tax free grant from the government. The plaintiffs later sought to recover from the defendant the increases in the taxes paid by the plaintiffs on the materials used in the construction of the defendant's building. It was held that there was no contractual basis for such a claim, since the written contract contained no

[71] G. FRIDMAN, THE LAW OF AGENCY 72-79 (4th ed. 1976).

[72] *Supra* note 21. *Compare* the decision in Owen v. Tate, [1975] 2 All E.R. 129 (C.A.).

provision to such effect, and the architect had no authority to bind the defendant, so that his undertaking or representation had no contractual effect. But there was a good claim based on the doctrine of restitution. Mr. Justice Morden of the Ontario High Court, from whose judgment citation has already been made, stated categorically: [73] "That the doctrine of restitution, which is based neither on contract nor tort is firmly established in the law of Canada is clear from decisions of the Supreme Court in *Deglman* [74] . . . and *Carleton v. Ottawa* [75] . . . ." More importantly, perhaps, the learned judge went on to say, later in his judgment, that "where a Court, on proper grounds, holds that the doctrine of restitution is applicable, it is not necessary to fit the case into some existing category, apparently established by a previous decision, giving effect to the doctrine". [76] This was because, as quoted earlier, "the categories of restitution are never closed". Indeed, the law of Canada was clearer and more firmly established than the law of England in this respect.

In this decision it is possible to see operating, so it is suggested, a number of different factors. First, the recognition of the doctrine of restitution, as restitution, in other words, founded upon the principle of restoring to the plaintiff, in a meritorious case, money which he no longer has, through no fault of his own, by reason of the conduct or situation of the defendant. Secondly, the idea that, in a case of the kind before the court, commercial practice probably justified a decision in favour of the plaintiffs, even though, contractually speaking, they had not "taken care" of themselves by inserting the appropriate term in the contract, or obtaining the necessary statement or representation from one who was an agent of the defendant. Thirdly, the unquestionable moral basis for the plaintiff's claim, in that they had been compelled to pay tax on the necessary building materials; they had purchased such materials in order to fulfill the contract for the defendant, and so, in effect, were purchasing such materials and paying the tax thereon on behalf of the defendant; and the defendant was being given a tax free government grant for the purpose of erecting the building in question. Taking all these considerations together, it would appear that Mr. Justice Morden in this case was fully justified in applying the general doctrine of restitution to a case which, as he rightly pointed out, [77] was not quite the same as earlier decisions involving payments on behalf of others, such as *Brooks Wharf v. Goodman Bros.* [78] in England and *Carleton v. Ottawa* [79] in Canada. The fact-situations may have differed slightly, but the essential problem was the same, and the underlying notion of restitution was general and broad enough to cover such new fact-situation.

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[73] *Id.* at 171, 49 D.L.R.3d at 675.

[74] *Supra* note 1.

[75] [1963] 2 Ont. 214, 39 D.L.R.2d 11 (High Ct.) *aff'd with variation*, [1965] Sup. Ct. 663, 52 D.L.R.2d 220.

[76] *Supra* note 21, at 172, 49 D.L.R.3d at 676.

[77] *Id.* at 172-73, 49 D.L.R.3d at 676-77.

[78] [1937] 1 K.B. 534, [1936] 3 All E.R. 696 (C.A.).

[79] *Supra* note 75.

In contrast, the Ontario Court of Appeal, reversing the trial judge, felt unable to apply the doctrine of restitution, though they recognized its existence, to the facts in *Nicholson v. St. Denis.*[80] This case involved the sale of some realty, in consequence of which the purchaser of the property requested the plaintiff to do certain work on the property, without the knowledge of the vendor. When the work had been done, the plaintiff sought recompense from both vendor and purchaser. It was held by the Court of Appeal that he was not entitled to judgment against, and restitution from, the vendor. For a claim for restitution to be successful there had to be: (i) a special relationship between the parties, properly constituted at the outset; and either (ii) an express or implied request by the defendant for the benefit in question in respect of which the claim is being made; *or* (iii) subsequent acquiescence by the defendant in its performance, and, therefore, adoption of such benefit with knowledge that it had been conferred by the plaintiff. These features were absent in the instant case; hence there was no liability on the part of the vendor.

The differences betwen this case, and the one involving the University of Ottawa are striking and plain. There was no direct relationship between the plaintiff and the vendor here; it was not possible to argue that what the plaintiff had done was obviously and immediately for the benefit of the vendor (however much it might have been so in a remote, indirect sense); there was no need for the plaintiff to do the work in order to satisfy some pre-existing obligation between himself and the vendor (since none had ever so existed); there was no moral obligation on the vendor, nor any kind of commercial necessity or morality, so to speak, that bound his conscience. All in all, therefore, this was not the kind of situation which, in accordance with precedent, or by analogy with earlier cases and examples of the operation of the restitution doctrine, justified the application of that doctrine.

IV. Conclusions

What conclusions can be drawn from the cases which have been considered? I said earlier that, in my opinion, restitution, rather than unjust enrichment was the basis for decisions in this area, or, in Professor Samek's terminology, the "legal conceptual scheme" which properly describes how the law has developed and how it is going to continue to develop. My understanding of what the judges are saying, and, even more importantly, what they are doing, is that they have received from England the idea of permitting recovery of money, or payment for services rendered, in the absence of a contractual relationship in the strict sense, whenever the circumstances justify the making of restitution. What that involves is the more expanded notion that one person has acted to his financial detriment

[80] As of yet unreported, [1975] C.C.L. 1253 (Ont.) *rev'g* 4 Ont.2d 480, 48 D.L.R.3d 344 (Dist. Ct. 1974).

and ought to be restored to his previous financial position. This may mean restoring the money he has expended or compensating him for the value of what he has done. Admittedly, there is another aspect of this, namely, what might be called the correlative enrichment of the other party, the recipient, at the expense of the party claiming restitution. As seen above, the judges sometimes refer to the need to make restitution to prevent an unjust enrichment. But such enrichment, I would suggest, is merely an element in the concept of restitution, a factor which is relevant to the determination of the question whether the claimant has suffered detriment at the hands of the recipient. It is not itself the conceptual basis of recovery. To draw an analogy which might make my argument clearer, a contract is the product of agreement between the parties, but, without consideration, any such agreement is not a legal, enforceable contract.[81] Consideration is therefore a vital element or feature of contract, but it is not the conceptual basis of contract. The true conceptual basis, it is suggested, is agreement.

The reception of the idea of restitution from England, it must be reiterated, has led to greater development and utilization of the idea than in its original home. At the same time, as has been pointed out by the judges in Canada, that idea crossed the Atlantic in the form of categories of restitution, rather than a generalized doctrine. It has been subsequent case-law which has increased the number or list of categories and has made these isolated, heterogeneous instances of restitution or restitutionary recovery into a broad, sweeping, acceptable doctrine that is capable of producing new instances of the application of the fundamental doctrine in novel situations, hitherto not strictly covered by precedent. The cases discussed earlier make this abundantly clear. They illustrate on the one hand the inheritance from the past, the well-settled instances of recovery, and the technical rules which emerged in the past one hundred and fifty years by which recovery is governed; and on the other hand, the ability and willingness of the courts, at least in Canada, if not always in England, to advance further, and to apply those rules, *mutatis mutandis*, in slightly different circumstances. They also illustrate and support, so it is suggested, the further idea that underlying both the older instances of restitutionary recovery and the newer ones (and indeed the possibility of additional instances in the future) is the aim and intent of achieving not only a just, but also a moral result. These different aspects of restitution are evidenced in the last recent case to be considered, *Storthoaks v. Mobil Oil Canada Ltd.*[82]

In that case, the plaintiffs paid compensatory royalties to the defendant, the municipality, under two oil and gas leases granted by the latter to the former in April, 1962 and March, 1964. In July, 1964, the leases were surrendered by the plaintiffs, which should have terminated their obligation to pay further royalties. However, the surrender of the leases was not

[81] Omitting for this purpose contracts under seal, which have always been regarded as different and anomalous.

[82] [1975] 4 W.W.R. 591, 5 N.R. 23 (Sup. Ct.).

made known to the plaintiffs' accounting department, for some unexplained reason. Thus the royalties continued to be paid until August, 1967, when they were temporarily discontinued. This resulted in a letter to the plaintiffs from the secretary-treasurer of the municipality, in consequence of which, the fact of surrender still being unknown to the accounting department, further payments were made for the period August, 1967 to January, 1968, and then for February and March, 1968. It was not until after these payments that it was discovered by the accounting department that the leases had been surrendered. By this time more than 31,000 dollars had been overpaid. The plaintiffs thereupon sued to recover such money on the basis of a payment made under a mistake of fact (a well-recognized category of restitutionary recovery going back, if not before, then at least to the decision in *Kelly v. Solari*[83] in 1841). One defence was based on the argument that the money had been paid voluntarily, not under mistake, by reason of the knowledge of *some* of the plaintiffs' agents that the surrender had taken place, so that the royalties were not due. This met with no success in view of earlier decisions in England[84] that such knowledge did not preclude a claimant from recovering money if there had been a mistake because of which the payment had been made. The defendant also raised a number of other answers to the claim. In effect they may all be considered as slightly different ways of putting the same basic argument, namely, that, despite the mistake, the plaintiffs' claim should be denied since, in the circumstances of this overpayment, they ought not to be allowed restitution because the municipality and not the plaintiffs would suffer the greater detriment if restitution were allowed.

Much was made of the statement, that is found in several cases of mistaken payments,[85] that to permit recovery there must be established not only that the money was paid under a mistake of fact, but also that the recipient is not entitled, or ought not in conscience to be allowed, to retain it. Indeed, of the recent case of *Royal Bank v. Huber*,[86] it might be said that the basis of the decision *against* recovery or restitution, even though the bank had honoured a cheque on which they had received a stop-notice, was that the defendant was entitled to the money, as against the drawer of the cheque, since it was for wages or salary due to him, and the drawer of the cheque was not itself complaining about the payment. In other words,

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[83] 9 M. & W. 54, 152 Eng. Rep. 24 (Ex. 1841).

[84] Anglo-Scottish Beet Sugar Corp. v. Spalding Urban Dist. Council, [1937] 2 K.B. 607, [1937] 3 All E.R. 335 (1936); Turvey v. Dentons (1923) Ltd., [1953] 1 Q.B. 218, [1952] 2 All E.R. 1025 (1951); *but see* Platemaster Pty. Ltd. v. M. & T. Investments Pty. Ltd., [1973] Vict. 93 (Sup. Ct.), where in such circumstances there was no mistake according to the court.

[85] Kelly v. Solari, *supra* note 83, at 58, 152 Eng. Rep. at 26 (Parke, B.); Garden River v. Montreuil, [1929] 1 W.W.R. 486, at 490, [1929] 2 D.L.R. 396, at 400 (McKay, J.A.); Bank of Montreal v. The King, 38 Sup. Ct. 258, at 280 (1906) (Idington, J.).

[86] [1972] 2 W.W.R. 338, 23 D.L.R.3d 209 (Sask. 1971), *and contrast with* Shapera v. Toronto-Dominion Bank, [1971] 1 W.W.R. 442, 17 D.L.R.3d 122 (Man. Q.B. 1970).

despite the mistake which caused the payment, there was nothing inequitable or unconscientious in permitting the payee to retain the money. But this case, referred to, but not analysed by Mr. Justice Martland, delivering the judgment of the Supreme Court of Canada, was not used to support the defendant's proposition. To the contrary, Mr. Justice Martland, referring to the remarks of Baron Parke in *Kelly v. Solari*, [87] declared them to mean not that there must be a mistake *and* it must be against conscience for the payee to keep the money, but that where there is an operative mistake *it is* against conscience for the payee to retain the money. [88] Martland then considered various dicta in Canadian and English cases which raise the question whether restitutionary recovery is based on implied contract or upon "equitable" grounds, *i.e.*, in the sense of some general doctrine of fairness, conscientiousness, and so forth. He adverted to the fact that if the basis were equitable, the payee or recipient could plead *any* equitable defence, by which he seems to have intended to mean a defence which related to the fairness and conscientiousness of the conduct of the parties, not merely a technical equitable defence. If the basis were contractual, however, which would not depend upon whether the requirement to repay were just and equitable, the only valid defence would be proof of *a legal estoppel.* [89] The matter was not yet settled in England. But it was decided in favour of the equitable nature of the claim, and the possible defence of repayment being inequitable, in the United States. Furthermore, it would seem, by reason of the approval of the more "liberal", widely expressed language of Lord Wright in the *Fibrosa* case, by the Supreme Court in the *Deglman* and *Carleton* cases, it would appear to have been decided in the American way in Canada. [90]

Thus, certainly in cases of mistake, but probably in other instances where restitutionary recovery is allowed by the law, it would seem to have been accepted by the Supreme Court of Canada that there may be a good defence to an otherwise cast-iron claim based upon the inequity of ordering repayment. The court has recognized, it is suggested, that proving certain prima facie restitutionary facts is not enough; there must be a good, conscientious basis for such claim, vis-à-vis the defendant, the payee or recipient of the money. The question, therefore, arises: when is a prima facie good claim for restitution otherwise lacking in merit? I would suggest, as a tentative answer to that question: when the circumstances are such that it would be fundamentally "immoral" to disrupt the recipient's situation, in order to restore the claimant to his former financial position. In other words, when, as between the two parties, greater injustice would be done to the "innocent" payee by ordering repayment, than would be done to the "innocent" mistaken party who originally paid if repayment were not ordered.

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[87] *Supra* note 83.
[88] *Supra* note 82, at 601, 5 N.R. at 34-35.
[89] *Id.* at 603, 5 N.R. at 36-37.
[90] *Id.* at 603-05, 5 N.R. at 36-39.

The Supreme Court, while not using such terminology, approached this issue basically along those lines, it is suggested, by saying [91] that it was open to the municipality "to seek to avoid the obligation to repay the moneys it received if it can be established that it had materially changed its circumstances as a result of the receipt of the money". In other words, while strictly speaking the defence might be called one of "change of circumstances" underneath, so to speak, there runs the idea that it would be unfair or comparatively immoral to order repayment. The problem is, however, to decide when there has been a "material" change of circumstances, or, to put it another way, what sort of change of circumstances justifies the retention of money which did not originally belong, and should not have been paid to the recipient. [92]

In the *Storthoaks* case, although the money received from Mobil Oil had been spent, in the same general way all revenue of the municipality had been spent, there was "no evidence of any special projects being undertaken or special financial commitments made because of the receipt of these payments, nor that the municipality altered its position in any way because these moneys were received". [93] It is clear, and has long been understood and accepted, that the simple fact that money received after a mistake has been spent is not itself an answer to an otherwise valid claim for repayment. [94] The difference between the decisions in the two earlier cases of *General Dairies v. Maritime Electric Co.* [95] (which was reversed on other grounds by the Privy Council) [96] and *Purity Dairy Ltd. v. Collinson,* [97] lies in the fact that in the former there was some specific act which was performed by the recipient of the mistaken payment in reliance upon, and as a consequence of, such payment, namely, the reduction in the price charged to buyers or consumers from the recipient; whereas in the latter case, the party from whom recovery was sought could not establish that his subsequent expenditures, such as the purchase of a farm, were brought about in consequence, and only or substantially in consequence of the mistaken payment. Does this mean that, to entitle a party to resist repayment, it must be shown that the one paying knew that the recipient was going to adopt a specific course of action, or become involved in a specific financial transaction or consequence, because of the payment? Or, possibly, that such a result

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[91] *Id.* at 605, 5 N.R. at 38-39.

[92] For an earlier discussion of this, which canvasses the English and American, but not the Canadian authorities, *see* Jones, *Change of Circumstances in Quasi-Contract,* 73 L.Q.R. 48 (1957).

[93] *Supra* note 82, at 605, 5 N.R. at 39.

[94] Standish v. Ross, 3 Ex. 527, 154 Eng. Rep. 954 (1849); Baylis v. Bishop of London, [1913] 1 Ch. 127, [1911-13] All E.R. Rep. 273 (C.A. 1912); R. E. Jones, Ltd. v. Waring & Gallow Ltd., [1926] A.C. 670, [1926] All E.R. Rep. 36. Note however, the difference if recovery is being sought from an *agent* who has already paid out the money to his principal, and the special position with respect to bills of exchange: R. GOFF & G. JONES, *supra* note 6, at 492-99.

[95] [1935] Sup. Ct. 519, [1935] 4 D.L.R. 196.

[96] [1937] A.C. 610, [1937] 1 D.L.R. 609.

[97] 13 W.W.R. (n.s.) 401, 58 D.L.R.2d 67 (B.C. 1966).

was foreseeable? And must the foreknowledge be of the exact action by the recipient? Or of some general possibility not necessarily specified? This is not clear. To ask the question raises the spectre of foreseeability or causation as the test of recovery in such instances.

Nor had any other kind of detriment been suffered by the municipality in the *Storthoaks* case, in the form of deprivation of the opportunity of seeking to obtain another lessee following the surrenders, because the payments may have led the municipality to believe that Mobil Oil were still bound by the lease. Neither the Saskatchewan Court of Appeal nor the Supreme Court of Canada could find any such detriment. Indeed, as Mr. Justice Maguire pointed out in the lower court, [98] the ratepayers (as distinct from the municipality, yet in a sense the people who stood to gain or lose most by the decision) may have received a benefit from the overpayment, in the form of works done in consequence which might not have been performed without additional taxation. Even if, as a result of the litigation, increased taxes might follow, the ratepayers of the municipality were still advantaged, it might be said, and not put to any detriment, in that things were done which might otherwise not have been done. The present writer would be sceptical of such an argument, and would still prefer to say that, ultimately, the results of the overpayment were detrimental to the municipality and its ratepayers, since they had been misled, innocently no doubt, but nonetheless definitely, into believing that the financial state of the municipality was better than it actually was by reason of the payments. In this respect, a comparison could be made with the situation of an owner of property who permits it to remain with a debtor, so as to "swell" his assets, only to find that in the event of the latter's bankruptcy, title may be lost to the general creditors of the bankrupt, under the doctrine of "reputed ownership". Obviously this approach to, and solution of, the problem did not appeal to the courts in this case.

Similarly, the doctrine of estoppel, in its strict sense, if it can be distinguished at all from the notion of "change of circumstances", did not succeed in helping the municipality. Since there was no detriment as a result of the overpayment, there could be no defence based upon estoppel. [99] Here again, as was made plain in the Supreme Court of Canada, mere spending of the money in the belief that it is one's own is not a detriment that relates back to any representation by the mistaken payer. [100] It might, however, in two situations. The first is where there was some special duty on the maker of the payment not to mislead the recipient of the payment. In such circumstances it could be argued that there was fault on the part

[98] Mobil Oil Canada, Ltd. v. Storthoaks, [1973] 6 W.W.R. 644, at 652, 39 D.L.R. 3d 598, at 605-06 (Sask.).

[99] *Compare* Jones, *supra* note 92, at 53: "In the estoppel line of cases the court had been careful to emphasize not only that the party must act on the representation but also that he must act on it to his detriment, namely, that the payee should have altered his position to his prejudice before he can plead the defence."

[100] R. E. Jones Ltd. v. Waring & Gillow Ltd., *supra* note 94.

of the payer, which disentitled him to recover. This argument has succeeded in some cases, but not many. [101] It would seem that the courts are reluctant to declare any general duty to be careful in the way one pays money to others. Perhaps if the payer of the money has some special relationship with the recipient (possibly a governmental or otherwise official position) [102] this might be the case. But not otherwise, and certainly not in general. Is this a recognition of the special moral, and therefore legal responsibility of some people in some positions? The second situation is, as already mentioned, where the recipient has spent the money on some specific enterprise which he would not otherwise have undertaken (though it is not clear whether this also involves the knowledge or foresight of the payer). This seems to stem from the strange and awkward decision in *Holt v. Markham*, [103] where the recipient invested the overpayment in a company which, prior to trial, had gone into liquidation, so that the funds had disappeared. Would it have been different if the company had been successful, and the recipient's investment had prospered? Would it have been different if the use of the money had been of a kind to be looked at a trifle askance by a court, for example, a highly speculative, or an immoral, or a questionable or colourable investment or transaction? What is the true basis for this kind of decision, and the distinction which appears to emanate from it? All this is far from clear in the present state of the law. I would merely hazard the observation that, in considering the "equities", or the question whether conscience entitles or disentitles the payer to recover the money, regard may well be paid to the use to which the recipient put the money in question. It would not be beyond the bounds of reason, nor would such an inquiry conflict with the essential principles of restitutionary recovery. Whatever may be said as to that, the Supreme Court of Canada was not prepared to hold that the expenditure of the money in the case before it operated as a detriment so as to permit the application of an estoppel. Nor did the allegation of lost opportunities to release the properties which produced the royalties serve any greater purpose in relation to estoppel than with regard to the argument based on alleged change of circumstances.

In the event, therefore, the claim for repayment was totally successful. There was no defence, neither in terms of the nature of the mistake, nor in terms of any alleged equity. What, then, may be concluded from this case? I would suggest the following. First, the acceptance of the doctrine of restitution, based upon the notion of allowing someone who has parted with his money without a valid legal reason or cause to recover it from the

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[101] *See, e.g.*, Skyring v. Greenwood, 4 B. & C. 281, 107 Eng. Rep. 1064 (K.B. 1825); Holt v. Markham, [1923] 1 K.B. 504, 128 L.T.R. (n.s.) 719 (C.A. 1922); Greenwood v. Martins Bank Ltd., [1933] A.C. 51, [1932] All E.R. Rep. 318. *Contrast, e.g.*, Larner v. London County Council, *supra* note 29.

[102] Compare the situation with respect to cases of payments made under a mistake of law where there has been compulsion: R. GOFF & G. JONES, *supra* note 6, at 85-87; George (Porky) Jacobs Enterprises v. Regina, *supra* note 50.

[103] *Supra* note 101.

recipient, and for this purpose, following other decisions, I would include within the expression "money", work, labour, and the like, *i.e.*, services performed for another. Secondly, this doctrine is not necessarily rooted in the notion of "unjust" or, in Professor Samek's words "unjustifiable" enrichment, since the real test of recovery is not, or not always, so much the lack of merit of the recipient, and the need to prevent his gaining a benefit at the other party's expense, as the need and desire to restore the claimant to the position he was in before he made the payment or performed the services, as the case may be. Thirdly, that claims, and defences to claims, are firmly rooted in what have been called "equitable" notions. What this means, I suggest, is not "equitable" in the strict, formalistic sense, with which comment it is doubtful that anyone would disagree, but in the sense of being based upon feelings of fairness, justice, conscionability, in short, morality, as that term is understood and given effect to in and by the law. This latter assertion may be less acceptable, and is more likely to be the subject of disagreement. Nevertheless, I put it forward in the hope and belief that it will, ultimately, have some impact, and will become recognized as the underlying basis of restitutionary recovery in cases which will arise in the future. Of one thing there can be no doubt. There will be many more instances in which courts will be confronted with the problem of deciding whether recovery of money or payment for services should be permitted when there is no contractual, tortious, or proprietary basis for the action. In such situations, hopefully, the courts will realize that they can only decide the issues between the parties by (a) understanding the true nature of the doctrine of restitution; (b) applying it correctly to the facts before them; and (c) giving effect to the innate desire of the law to do what is right, morally speaking, rather than what is technically correct.