Vanderbilt Law Review

Volume 19
Issue 4 *Issue 4 - A Symposium on Restitution*

Article 1

10-1966

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VANDERBILT LAW REVIEW

VOLUME 19 OCTOBER, 1966 NUMBER 4

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Foreword

The editors of the *Vanderbilt Law Review* deserve praise for arranging this symposium on the neglected subject of Restitution, a great and growing area of our private law whose literature is extraordinarily meager. Partly because of this neglect by legal scholars, the practicing profession as a whole remains unaware of the range and variety of restitutionary remedies and the possibilities they offer for solving problems that are otherwise intractable. The volume of restitution cases reported in current advance sheets shows that courts and lawyers are learning to make use of restitution remedies, but the subject still inspires hesitation and diffidence, for knowledge is diffused in fragments and an overview is difficult to acquire.

Our problems in comprehending Restitution are not unlike some other problems in present-day society which are being multiplied by our affluence. We have restitutionary remedies—equitable and legal, specific and by way of money equivalent—that in their range and variety far exceed those of any other legal system. We have a vast accumulation of case law that has not yet been closely analyzed; its bulk has so far discouraged attempts at a broader view. But the difficulties lie deeper. The core idea of restoring gains acquired through another's loss cannot operate in the same ways, with uniform incidence, over the whole legal order. In each of the areas that they infiltrate, restitution doctrines are shaped, modified, expanded or restricted by policies and purposes that have been defined by other means and that have been brought into adjustment by rules framed in other terms. Not only are there many kinds of enrichment, but many factors converge in determining whether it is unjust. Any comprehensive survey of Restitution must take account of these variables. A first and essential step is a series of close and careful studies in detail of the kind this symposium contains.

The important article of Dean Wade surveys comprehensively one of the outer boundaries of restitution remedies, expressed as the refusal of relief to the "intermeddler." As he makes clear, this boundary follows a wavering course and presents no impenetrable barrier. By renouncing the standard epithets "volunteer" and "officiousness," with

their implicit value judgments, he exposes to view the central question, whether the enforced restitution of unsolicited benefits will unduly restrict the receiver's freedom of choice. The answer to this question should depend on the nature of the benefit, the opportunities to reject it and the reasons for conferring it. Whether or not Restitution is to be conceived as a unitary "subject," Dean Wade's article indicates how much insight can be gained from a cross-section view.

A different approach has been advocated by Professor Stewart Macauley[1] and is followed in his article, here included, on the duty to read, especially as applied to credit cards. It is true, as he has contended, that ideas brought to the surface by restitutionary remedies are an indispensable part of the operative law in many subject-matter areas, though more important in some than in others. The law of Contracts, for example, cannot be understood if restitutionary remedies are left out of account and most teachers of the subject are fully persuaded of this. The same is true of some branches of the law of Torts, though teachers of that subject do not seem to be so fully persuaded. But one can say more. The test or measuring-rod of enrichment-through-another's-loss sneaks into the analysis of problems in which standard damage remedies are sought and standard doctrines are seemingly applied. This is intelligible if one conceives of the prevention of unjust enrichment as a goal that is not isolated, independent and ultimate but as one that is never fully attainable, highly qualified and relative. If it is viewed as one of the tests of fairness, one is left free to search out other needs, interests and standards that are also relative, competing and often conflicting. Restitution remedies and the ideas that inspire them, then, form, inextricably, part of the mix of the problem area under study. The article by Professor Macauley is an impressive demonstration of the great dividend made possible by this approach, especially when followed with energy, imagination and novel experimental methods.

Persons interested in Restitution, whether in or out of "context," have been glad to hear the news of recent stirrings in England. Within the last two years three treatises on Restitution have been published, two of them comprehensive in scope and one a special study of the constructive trust.[2] The author of the latter study, Professor Waters, is represented in this symposium, repeating his severe criticism both of methods of analysis and of many specific solutions in English decisions. His main thesis is one that was accepted long ago on this side of the Atlantic, that the constructive trust is a remedial

1. Macauley, *Restitution in Context,* 107 U. PA. L. REV. 1133 (1959).

2. GOFF & JONES, RESTITUTION (1966); STOLJAR, QUASI-CONTRACT (1964); WATERS, THE CONSTRUCTIVE TRUST (1964).

device, that is not tied, as later English cases would have it, to some form of "fiduciary" relationship. Perhaps an American observer, speaking from a distance that involves more than geography, can be permitted to say that Professor Waters seems over-sanguine in his hope that rapid expansion of the constructive trust will be the path to emancipation of English courts from their self-made restrictions. If this expansion were to include "tracing orders" in the directions we have already followed, all the doubts that surround our own use of tracing would arise, as he points out.

Other articles in this symposium include an illuminating study of bankruptcy as an occasion for restitutionary claims by Professor William F. Young, Jr., a comprehensive treatment of restitution in England by Professor R. H. Maudsley, a thorough analysis of the role of restitution under article 2 of the Uniform Commereial Code by Professor Robert J. Nordstrom, and a complete discussion of the fact pattern of the plaintiff in default by Professor Richard H. Lee.

Though this service of the *Vanderbilt Law Review* has been volunteered, it is to be hoped that it will have the desired reward, appreciation by a large audience of readers.

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