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I. Introduction

It is surprising to many observers that the home of Lord Mansfield should have been so reluctant to develop the potential of the "very beneficial"[1] quasi-contractual remedies. Yet this is what happened in England. The hopeful prospects offered by *Moses v. MacFerlan*[2] and later eighteenth century decisions[3] were dimmed by the unsympathetic approach of many judges of the late nineteenth and early twentieth centuries and by the increasing strictness with which the stare decisis principle was applied.

It is not only in this field, of course, that the modernization of English law has been restricted by that doctrine. The doctrine lays down that lower courts are bound by decisions of higher courts, and this rule was extended in 1898 to hold that the House of Lords was bound by its own decisions;[4] and in 1944[5] the Court of Appeal held itself also bound by its own decisions. Such a rule leads to great concentration upon refinements of the rules for ascertaining the *ratio decidendi* of a case; for this is the rule which is binding on subsequent occasions. *Obiter dicta,* however persuasive, never carry the same binding force. The hope, of course, is that such a rule will lead to added certainty in the law. Even if the law may not be perfect, at least it will be known. And it is often better for a litigant to know that he has no claim than for him to be told that his success or failure will depend upon the view which the judge who happens to try the case might take. English lawyers much dislike palm-tree justice.

The Victorian era was one of great development of judge-made law in England; but quasi-contract failed to benefit. The first half of the twentieth century was, in broadest terms, one of consolidation. The judges tended to take the view that their duty was to apply the law

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1. Moses v. Macferlan, 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760).
2. *Ibid.*
3. Astley v. Reynolds, 2 Str. 915, 93 Eng. Rep. 939 (K.B. 1731); Lamine v. Dorrell, 2 Ld.Raym. 1216, 92 Eng. Rep. 303 (K.B. 1705); Newdigate v. Davy, 1 Ld.Raym. 742, 91 Eng. Rep. 1397 (K.B. 1693).
4. London Street Tramways Co. v. London County Council, [1898] A.C. 375.
5. Young v. Bristol Aeroplane Co., [1944] K.B. 718 (C.A.).

and not to make it. If the law was not satisfactory, it was up to Parliament to change it.[6] It is difficult for Parliament to find time to deal with specific points of private law on which amendment is needed; and all the more difficult to enact changes involving broad principles of law.

This strict observance of precedent restricted development and modernization, and failed to give to the law the certainty which was claimed to be its great merit. Doctrines which have long lost their relevance have been successfully relied upon in cases in which the court has been compelled to express its regret at the conclusion to which it has come;[7] and the litigation, indeed, only became necessary because of the existence of the shackles of an out-of-date rule. The problem, of course, is to find a balance between a system where previous decisions count for nothing, and those where they are so closely followed as to add unnecessary rigidity to the law. A more liberal tendency has been observable in a number of recent decisions,[8] and earlier this year Lord Chancellor Gardiner has stated[9] that the Lords "propose . . . to modify their present practice and, while treating former decisions of this house as normally binding, to depart from a previous decision where it appears right to do so . . ." This way of escape from the compulsory binding effect of previous decisions is not likely to be often used; but it has the great virtue of discarding the unmeritorious argument that a previous authoritative decision cannot be attacked. Previous mistakes can now be challenged and not merely distinguished.

This point need not be further labored. It must, however, be made for there is a formidable collection of authority[10] which must be distinguished or discarded before the law of restitution can fully develop. For example, it was possible to produce authority for the following propositions:

1. That no quasi-contractual action would lie unless a contract to repay could be implied.[11]

2. That apart from the case of payment over by an agent to his

6. And there are no legal limits upon the powers of Parliament, and no means of challenging a statute on grounds of unconstitutionality.

7. *E.g.*, Samuel v. Jarrah Timber & Wood Paving Corp., [1904] A.C. 323, 325, per Lord Halsbury, L.C.

8. Beswick v. Beswick, [1966] 3 Weekly L.R. 396; Hedley Byrne & Co. v. Heller & Partners Ltd., [1964] A.C. 465; Nagle v. Fieldcn [1966] 2 weekly L.R. 1072.

9. [1966] I W.L.R. 1234.

10. Not all of course in the House of Lords.

11. Sinclair v. Brougham, [1914] A.C. 398; but distinguished by Lord Wright in (1938) 6 CAMB. L.J. 305.

principal and the rule in *Price v. Neal*[12] there was no defense of change of position.[13]

3. That the possibility of rescission for innocent misrepresentation terminated with the passage of property.[14]

4. That a plaintiff in breach of contract could recover nothing.[15]

5. That there could be no quasi-contractual recovery for the defendant's breach unless there was a total failure of consideration.[16]

6. That until 1941 there could be no recovery when a contract was frustrated.[17]

7. That until 1935 there was no right to contribution between joint tortfeasors.[18]

8. That, apart from cases of rectification or cancellation of documents (where equitable doctrines apply), relief was only to be obtained on the ground of mistake where there was mistake as to the identity of the parties or as to the identity or existence of the subject matter.[19]

9. That a constructive trust is only known as an institution and not as a remedy.[20]

10. That a lien upon a mixed fund, being an equitable remedy, is only available where the claimant has some equitable proprietary interest in the property claimed. Legal ownership is not sufficient.[21] The claimant must be owner in equity as opposed to owner at law of the property in question.

That is not a promising situation for the development of a thorough system of restitution. And, until World War I, judges and writers, for the most part, feared the great unknown of the field of unjust enrichment. "Well-meaning sloppiness of thought," said Lord Justice Scrutton.[22] "Better a system which is too rigid than no system at all," added Sir William Holdsworth.[23]

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12. 3 Burr. 1354, 97 Eng. Rep. 871 (K.B. 1762).

13. Durrant v. Ecclesiastical Comm'rs for England & Wales, 6 Q.B.D. 234 (1880); Baylis v. Bishop of London, [1913] 1 Ch. 127 (C.A.).

14. Wilde v. Gibson, 1 H.L.C. 605, 9 Eng. Rep. 897 (1848); Seddon v. North Eastern Salt Co., [1905] 1 Ch. 326; Angel v. Jay, [1911] 1 K.B. 666; Leaf v. International Galleries, [1950] 2 K.B. 86 (C.A.); Long v. Lloyd, [1958] 1 Weekly L.R. 753.

15. Sumpter v. Hedges, [1898] 1 Q.B. 673 (C.A.).

16. Hunt v. Silk, 5 East. 449, 102 Eng. Rep. 1142 (K.B. 1804); Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd., [1943] A.C. 32, 49-50, 54-55.

17. Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd., *supra* note 16.

18. Merryweather v. Nixan, 8 T.R. 186, 101 Eng. Rep. 1337 (K.B. 1799); Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30.

19. Bell v. Lever Bros., [1932] A.C. 161.

20. *In re* Hallett's Estate, 13 Ch.D. 696 (C.A. 1880); *In re* Diplock, [1948] Ch. 465 (C.A.); see Maudsley, *Proprietary Remedies for Recovery of Money*, 75 L.Q. REV. 234 (1959).

21. *In re* Diplock, *supra* note 20, at 530.

22. Holt v. Markham, [1932] 1 K.B. 504, 513.

23. Holdsworth, *Unjustifiable Enrichment*, 55 L.Q. REV. 37, 53 (1939).

Thirty years ago, this would have been a most discouraging paper to write. But in recent years, there has been a basic change among leading legal thinkers, and there is no doubt that the pendulum has swung substantially toward the acceptance of the principle of unjust enrichment and the development of a system. The judges who have given the greatest impetus to this movement are Lord Wright, Lord Atkin and Lord Denning, each one a distinguished and liberally-minded lawyer with no wish to submit to old fashioned technicalities because of their acceptance in previous times.

Writers too have shown great interest in this field. Studies have been made of restitutionary problems in common law and civil law societies,[24] and each of them recommend substantial development in this field. The most comprehensive of them is Goff and Jones, *The Law of Restitution.* This is a learned, thoughtful and constructive account of the whole field and provides the British answer to the American view that quasi-contract failed to develop in England because no books corresponding to Keener and Woodward were written. We now wait for a treatise on restitution from an American pen, to supplement the excellent *Restatement* and case books and a host of valuable articles. The object of this paper is to examine certain aspects of the law of restitution in England in order to see how further development can proceed. Much will be based upon the research of the authors just mentioned, and their views will be recorded. Their book will do much to foster the improving climate in this field in England; and in observing upon the needs of English law, one can substitute the despair of thirty years ago for a feeling of optimism and hope.

It is not possible to cover the whole field and the following subjects have been chosen for consideration:

1. Services Performed in an Emergency.
2. Change of Position.
3. Mistake of Law.
4. Tracing and Constructive Trusts.

II. SERVICES PERFORMED IN AN EMERGENCY

It is extremely difficult to lay down a dividing line between those cases of voluntary intervention in another's affairs which are deserving of recompense or reimbursement, and those cases which are not. The

24. GOFF & JONES, THE LAW OF RESTITUTION (1966); MUNKMAN, QUASI-CONTRACTS (1949); STOLJAR, QUASI-CONTRACTS (1964); WATERS, THE CONSTRUCTIVE TRUST (1964); WINFIELD, QUASI-CONTRACTS (1952); Nicholas, *Unjustified Enrichment in the Civil Law and Louisiana Law* (pts. 1-2), 36 TUL. L. REV. 605, 37 TUL. L. REV. 49 (1962).

English decisions clearly demonstrate the establishment of the rule denying recovery: "Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will."[25] There are exceptions; but apart from situations where there is already an existing relationship between the parties, these exceptions are very limited. Indeed, Goff and Jones are constrained to rely upon two Canadian cases,[26] and to a section of the Road Traffic Act, 1960,[27] in their discussion of claims in respect to the preservation by a stranger of the life and health of another person. The English cases, as we shall see, are more generous in allowing recovery where there was a pre-existing relationship between the parties and the plaintiff has exceeded his existing authority in an emergency; and also in allowing claims for performing another's duty in an emergency such as providing necessaries for a wife who requires support, and in the provision of a decent burial for the dead.[28]

On the other hand, Roman Law, and the modern systems based upon it, allow recovery under the principle of *negotiorum gestio*: "he who acted for another, by transacting his business, or by making repairs on his property, could recover the amount of the expenses incurred, or the value of the repairs; provided the acts of the negotiorum gestor were necessary and useful to the person for whom he acted."[29]

American cases have been less reluctant to allow recovery than have the English; but neither system has been generous enough to satisfy their critics. Goff and Jones are now added to the list, and they approach the matter in an interesting and novel way. They point out that the law, originally in the context of enabling a master of a ship to deal in an emergency with the ship or his cargo, permits an agent, acting beyond the scope of his authority, to be treated as an agent for the purpose of a particular operation. Such a doctrine makes it necessary for the court to determine what circumstances are sufficient to call the doctrine into play. Goff and Jones lay down four requirements: (1) that the agent must not have been able to obtain his principal's instructions; (2) that there must have been a "necessity"; (3) that the agent must satisfy the court that he acted

25. Bowen, L.J., in Falcke v. Scottish Imperial Ins. Co., 34 Ch. D. 234, 248 (1886).

26. Matheson v. Smiley, 40 Man. 247, [1932] 2 D.L.R. 787; Marshall v. Curry, [1933] 3 D.L.R. 260; GOFF & JONES, THE LAW OF RESTITUTION 236-37 (1966).

27. 8 & 9 Eliz. 2, c. 16, § 213.

28. GOFF & JONES, THE LAW OF RESTITUTION 244-45 (1966), and cases cited therein.

29. Police Jury v. Hampton, 5 Mart. (n.s.) 389 (La. 1827); Dawson, *The Altruistic Intermeddler*, 74 HARV. L. REV. 817, 1073 (1961); Heilman, *The Rights of the Voluntary Agent Against His Principal in Roman Law and in Anglo-American Law*, 4 TENN. L. REV. 34, 76 (1925); Lorenzen, *The Negotiorum Gestio in Roman and Modern Civil Law*, 13 CORNELL L.Q. 190 (1928); Nicholas, *supra* note 24.

bona fide in the interests of the parties concerned; and (4) that the agent's action must have been reasonable and prudent in the circumstances.[30] But there is no reason why a previously existing contractual relation between the parties should have any relevance to the justification of the acts of an intervenor. Without such a contractual relation, additional questions arise; whether the intervenor was a suitable person to act; whether he will be taken to have intended to give his services gratuitously; whether recovery should be allowed only to professional men, and if so which? These are subsidiary questions; the essential one concerns the establishment of the circumstances in which the law accepts intervention as justifiable. Goff and Jones urge that recovery should be allowed in the case of a stranger on grounds "substantially the same as those which determine the success or failure of a claim by an agent of necessity."[31] They argue that it is sound legal policy to:

> reimburse and even remunerate a necessitous intervener when, for example, he intervenes to save property or to preserve life. The fears that necessitous intervention is a fluid, inchoate and dangerous doctrine are, we think, misplaced. The stringent requirements that the intervener must not have acted officiously in the place of a more suitable person; that he should have acted reasonably and in good faith; that there must have been an emergency; and that it must have been impracticable to communicate with the defendant, should ensure that only in the most exceptional cases will an intervenor be able to recover. Moreover, it is always open to the defendant to show that the intervener intended to give his service gratuitously.[32]

If this suggestion does not meet all the questions that must be asked on this topic, it is at least a rational basis consistent with the authorities, on which English law can hope for continuous development in the future.

III. MISTAKE OF LAW

The English courts have had their difficulties with the problem of the effect of mistake of law. Much of the difficulty, as is well known, stems from Lord Ellenborough's over-simplification of the problem by his statement, in denying recovery, that "every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case."[33] The rule denying recovery has been generally

30. GOFF & JONES, THE LAW OF RESTITUTION 234-35 (1966).

31. *Id.* at 247.

32. *Id.* at 246.

33. Bilbie v. Lumley, 2 East. 469, 472, 102 Eng. Rep. 447 (K.B. 1802).

criticized[34] and some American states have reversed it.[35] Goff and Jones take the view that:

> the rationale of the case has been misunderstood and the influence of the rule exaggerated. In so far as it lays down that a voluntary payment, which in this context, means a payment made in settlement of an honest claim, is irrecoverable, it embodies a sound rule of policy. Such settlements should not be lightly set aside. The payee has had his opportunity to dispute his legal liability in court and has chosen to forgo it . . . the crucial question should not, therefore, be whether the money was paid under a mistake of law or a mistake of fact, but whether it was voluntarily paid in settlement of an honest claim. If it was a voluntary payment, it will generally be irrecoverable. It is unnecessary, therefore, for us to join those who have attempted the difficult, if not impossible, task of distinguishing law from fact in this context.[36]

The acceptance of this view and of the refusal to distinguish law from fact in this context is not to say that money paid under mistake of law will be recoverable as readily as money paid under mistake of fact. Assuming for the present that a payor who has "had his opportunity to dispute his legal liability in court and has chosen to forgo it" is unable to recover, the denial of liability on this ground will apply much more commonly to payors who pay under mistake of law than to those paying under mistake of fact. In most cases involving payments made under mistake of law—as the payment of a debt or tax claim—the parties are aware of the fact that some question of law is at issue in respect to the claim. The claim is based upon a legal right, and the payor knows this. Either he must pay, or dispute the claim by denying liability. If he disputes liability and the parties reach a settlement, the payor will be bound by that compromise. He is similarly bound if, after argument, he accepts liability and decides to pay. In a payment made under mistake of law, he knew at the time of payment that there was a legal issue which could be challenged; in payment under mistake of fact, there is usually no suspicion that the facts as assumed might be wrong.

Of course, if a payment is made in reliance upon an incorrect factual situation, the payment may be made with knowledge of the uncertainty of the facts and restitution may be for that reason denied. The *Restatement* treats the matter as one of degree. Section 10(1): "A transferor is not precluded from restitution for mistake because, at the time of the transfer, he had some doubt as to the facts . . ." This is further explained in the comment: "Nevertheless, the policy against

34. KEENER, QUASI-CONTRACTS 85-86 (1893); Winfield, *Mistake of Law*, 59 L.Q. REV. 327 (1943).

35. WADE, CASES AND MATERIALS ON RESTITUTION 127 (2d ed. 1966).

36. GOFF & JONES, THE LAW OF RESTITUTION 80-81 (1966).

permitting one to reopen a transaction into which he has entered with a consciousness of the risk involved and the desirability of protecting the interests of contracting parties may prevent rescission and the consequent restitution." Section 11 denies restitution to one who accepts the risk of the mistake and gives, as illustration the case in which recovery was denied to a life insurance company for payments made to a beneficiary while there was still doubt concerning the death of the insured.[37] The discussion in such cases depends very much upon their special facts; "no definite statement can be made as to the amount of doubt on the part of the transferor which will prevent restitution;"[38] and, if I rightly judge the present tendency of American decisions, they are moving in favor of allowing recovery in these cases.[39]

A second major point of difference between payments made under mistake of fact and those made under mistake of law is that in the former case it is held that the payor may recover even though he was at fault in making the mistake.[40] No such rule, to my knowledge, has been applied to cases of mistake of law; and it will be surprising if a payor could avoid the rule that he must "fight or submit" by showing that it was through his fault that he failed to obtain a proper understanding of the law.[41]

Acceptance of these propositions will go a long way toward an explanation of many of the cases on mistake of law without relying upon Lord Ellenborough's arbitrary rule. And the disappearance of that rule would allow claims to be made under other heads, where appropriate.

> If the money has been paid under a mistake of law induced by the payee's fraud, oppression,[42] undue influence or breach of fiduciary relationship, or if the money has been received by the payee in bad faith,[43] it may be recoverable. Even if the payment is made under an illegal contract, the payor can recover if he was not *in pari delicto* with the payee.[44]

37. New York Life Ins. Co. v. Chittenden & Eastman, 134 Iowa 613, 112 N.W. 96 (1907). See also cases in GOFF & JONES, THE LAW OF RESTITUTION 75 nn. 84-85 (1966).

38. RESTATEMENT, RESTITUTION § 10 (1937).

39. Pilot Life Ins. Co. v. Cudd, 208 S.C. 6, 36 S.E.2d 860 (1945), 44 MICH. L. REV. 1154 (1945).

40. Kelly v. Solari, 9 M. & W. 54, 153 Eng. Rep. 24 (Ex. 1841); GOFF & JONES, THE LAW OF RESTITUTION 73 (1966).

41. Beauchamp v. Winn (1873) L.R. 6 H.L. 223, 233.

42. Rogers v. Ingham, 3 Ch. D. 351, 355-56 (1876), per James, L.J., in exceptional cases such a payment may be voluntary, if, despite the oppression, there is a real intention to close the transaction. See Maskell v. Horner [1915] 3 K.B. 106, 118 (opinion by Lord Reading, C.J.).

43. Ward & Co. v. Wallis [1900] 1 Q.B. 675, 678, (opinion by Kennedy, J.); see also Nicholls v. Leeson, 3 Atk. 573, 575, 26 Eng. Rep. 1131, 1132 (Ch. 1747) (Lord Hardwicke.).

44. GOFF & JONES, THE LAW OF RESTITUTION 85 (1966). Notes 42, 43 are sub-

There are also a number of recognized exceptions to the *Bilbie v. Lumley* rule,[45] where the payor can recover even though he voluntarily submitted to a claim. The most substantial exception is the provision for the repayment of money paid by taxpayers. The Commissioners of Inland Revenue are required, when a taxpayer has overpaid by reason of an excessive assessment based upon a mistake in a return or statement made by him for the purpose of assessment "to give by way of repayment such relief . . . . as is reasonable and just."[46] "Relief may apparently be given even though the taxpayer's mistake is one of law, but no relief is given where the return is made on the basis of, or in accordance with, the revenue practice prevailing generally at the time of the return or statement, but which has subsequently been shown to be wrong in law."[47] This is a welcome and fully justifiable provision which, it is suggested, might well be extended to other forms of excessive payments. And, as Goff and Jones suggest,[48] it is anomalous that although overpayment by a trustee or personal representative to a beneficiary may be adjusted by deductions from later entitlements, there is no right of recovery of money paid in such circumstances. The trustee or personal representative is placed in a worse position than the underpaid beneficiary who may recover from those overpaid after first exhausting his rights against the trustee or personal representative.[49]

It is well known that equity was more ready to give relief for mistake of law, whether by rescission[50] or by providing a defense against a claim for specific performance.[51] But Lord Ellenborough's rule invaded the Chancery Courts, who occasionally found it necessary to disguise their practice by dressing up a mistake of law as if it were a mistake of fact. The classic statement of this rule is that of Lord Westbury in *Cooper v. Phibbs* where he said:

> Ignorantia juris haud excusat; but in that maxim the word "jus" is used in the sense of denoting general law, the ordinary law of the country. But when the word "jus" is used in the sense of denoting a private right, that

stantially theirs also.

45. *Supra* note 33.

46. Income Tax Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 10, § 66(2).

47. GOFF & JONES, THE LAW OF RESTITUTION 89 (1966); WADE, CASES AND MATERIALS ON RESTITUTION 130-33 (2d ed. 1966).

48. GOFF & JONES, THE LAW OF RESTITUTION 86-87 (1966).

49. *In re* Diplock [1948] Ch. 435 (C.A.), *aff'd sub. nom.* Ministry of Health v. Simpson [1951] A.C. 251.

50. Cooper v. Phibbs (1867) L.R. 2 H.L. 223; Solle v. Butcher, [1950] 1 K.B. 671 (C.A.); Huddersfield Banking Co. v. Henry Lister & Sons Ltd., [1895] 2 Ch. 273 (C.A.); Rogers v. Ingham, *supra* note 42; Bingham v. Bingham, 1 Ves. Sen. 126, 27 Eng. Rep. 934 (Ch. 1748); Lansdown v. Lansdown, Mos. 364, 25 Eng. Rep. 441, (Ch. 1730); Grist v. Bailey [1966] 2 All E.R. 875.

51. Hood v. Oglander, 34 Beav. 513, 55 Eng. Rep. 733 (Rolls. 1865); Powell v. Smith L.R. 14 Eq. 85 (1872); Hart v. Hart 18 Ch.D. 670 (1881).

> maxim has no application. Private right of ownership is a matter of fact: it may be the result also of matter of law: but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake.[52]

Goff and Jones say of this and of a further statement by Lord Chelmsford in *Earl Beauchamp v. Winn*:[53] "these dicta have been repeatedly approved. They enable the courts to grant relief even though the parties acted under a mistake of law; and, in this context, this is justification enough."[54] But it is an extremely clumsy and artificial way to achieve a desired result. The difficulties will be avoided if the opportunity is taken to escape from the strict rule denying relief for mistake of law.

There is no reason why the English courts cannot escape from this rule. In cases where there has been no voluntary submission to an honest claim, relief can be given, by either rescission or recovery of money paid; whether or not there was such submission is admittedly a difficult question, but it has to be decided in cases of mistake of fact, and must be tackled with mistakes of law. Statutory intervention is no doubt necessary where policy requires that money should be recoverable even if paid after submission—as in the case of taxes wrongly paid; but this appears to be necessary in isolated cases only and not in respect of the general principle of restitutionary relief.

IV. CHANGE OF POSITION

A defendant to a claim for restitution in England cannot raise as a defense the fact that "circumstances have so changed that it would be inequitable to require . . . [him] to make full restitution."[55] Goff and Jones consider this regrettable. "In our view, if the defendant can show that his expenditure was incurred in consequence of the payment *and* that it would be inequitable to compel him to restore the money, he should be allowed to plead change of position as a defense to a restitutionary claim, whether it is personal or proprietary."[56]

It is thought that the reluctance to recognize a general defense of change of position is connected with the unwillingness of the English courts to recognize unjust enrichment as a principle. In an action in tort or contract, there is no room for change of position. The plain-

52. Cooper v. Phipps, L.R. 2 H.L. 149, 170 (1876).

53. Beauchamp v. Winn, *supra* note 41, at 234.

54. GOFF & JONES, THE LAW OF RESTITUTION 133 (1966).

55. RESTATEMENT, RESTITUTION § 142 (1937); see also §§ 69, 178.

56. *Id.* at p. 486.

tiff has his right to compensation, and the defendant must pay. An action based upon a principle which requires a defendant to disgorge a benefit which he wrongly or unjustly retains will naturally be terminated if the defendant no longer has the benefit. But if quasi-contractual claims are based, as Lords Haldane and Sumner[57] would have us believe, upon actions of contract or tort, it is natural to suppose that the defendant's obligation, once the claim is established, is to pay.

However, there are two recognized exceptions to the rule denying the defense. The first is that when an agent "before hearing of the claim, has paid . . . [the money] over to his principal or done something equivalent thereto or otherwise altered his position in relation to his principal on the faith of the payment, he will have a good defense to the claim and the claimant will have to sue the principal."[58] The second is the rule in *Price v. Neal*,[59] which gives protection to a defendant who has received payment under a forged bill of exchange. As Goff and Jones point out, it is not clear whether this rule is based upon change of position, or upon estoppel by leading the holder of the bill to believe that the signatures were genuine; but it is difficult to see how the drawee can, by mere payment, be taken to represent the genuineness of the signature of an indorsee. Perhaps as Woodward suggests, the real basis is "the policy of maintaining confidence in the security of negotiable paper . . . ."[60] Lord Mansfield himself gave several reasons for the decision.[61]

For a general doctrine relating to change of position, the English cases rely on estoppel, but this is of very limited application in this context. There must be a "representation" in reliance on which the defendant has acted to his detriment; there is then no difficulty in applying the doctrine of estoppel to a claim for restitution.[62] But in these circumstances there is rarely a sufficient representation; unless the courts will go to the length of saying, inconsistently with the usual rule in estoppel cases, that the mere fact of payment was a representation of the truth of the (mistaken) facts upon which the payment was based. As Jones says:

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57. In Sinclair v. Brougham, *supra* note 11, at 417 (Viscount Haldane), 452 (Lord Summer).

58. GOFF & JONES, THE LAW OF RESTITUTION 492 (1966), and cases cited note 58 therein; see also RESTATEMENT, RESTITUTION § 143 (1937); Cohen, *Change of Position in Quasi-Contracts*, 45 HARV. L. REV. 1333, 1345-49 (1932).

59. 3 Burr. 1354, 97 Eng. Rep. 871 (K.B. 1762).

60. WOODWARD, QUASI-CONTRACTS § 87 (1913).

61. GOFF & JONES, THE LAW OF RESTITUTION 496-97 (1966).

62. Deutsche Bank v. Beriro & Co., 73 L.T.R. (n.s.) 669 (C.A. 1895).

> [T]he necessity for a representation would, it is suggested, prevent a payee who has received money under a mistake and who has acted to his detriment from pleading that the payer was estopped by the payment. If A pays £100 to B, a volunteer, under a mistake of fact, it is difficult to see what existing state of things A represents. He certainly does not represent that he, A, has title to the money, or that B can now lawfully deal with the money. There is no word or act by A inducing B to change his position, neither does he owe any duty of care to B.[63]

But estoppel has occasionally played its part. In the well-known case of *Holt v. Markham*,[64] the plaintiff, as government paying agent, had paid the defendant a gratuity at the conclusion of World War I in excess of that to which he was entitled. The defendant was informed of the mistake a year later, and the plaintiffs took more than three months to reply to his letter supporting his claim to the full amount. In the meantime a company in which he had invested his money went into liquidation. Recovery was denied. Lord Justices Warrington and Bankes thought that the mistake was one of law, but they also found from the facts a sufficient misleading of the defendant to act as an estoppel. Lord Justice Scrutton treated the case as one of estoppel, but failed to indicate where he found the representation.[65]

This requirement of a representation other than the fact of payment is obviously a serious limitation upon the use of estoppel to deal with situations involving change of position. There are, however, no decisions upholding a defense of change of position independent of estoppel. The leading cases in common law actions for the recovery of money paid under mistake where the defendant relied upon a defense of change of position are *Durrant v. Ecclesiastical Commissioners for England and Wales*,[66] and the Court of Appeal decision in *Baylis v. Bishop of London*.[67] In the latter case, the rent charge was paid by the plaintiffs in respect of some leaseholds, not knowing that the leases had terminated. Part of the money was applied by the Bishop, who had no notice of the mistake, for certain church purposes, and the surplus paid to the trustee in bankruptcy of the parish rector who was bankrupt. It was held to be no defense that the Bishop had "applied it in accordance with his duty"; "unless . . . the Bishop can establish that he received this money as an agent and has paid it over to his principal, I do not think that his defense can prevail."[68]

63. Jones, *Change of Circumstances in Quasi-Contracts*, 73 L.Q. REV. 48, 50 (1957).
64. [1923] 1 K.B. 504, (C.A. 1922); Skying v. Greenwood, 4 B. & C. 281, 107 Eng. Rep. 1064 (K.B. 1825).
65. See also R. E. Jones Ltd. v. Waring & Gillow Ltd., [1926] A.C. 670, where the House of Lords split 3-2 in holding that there was no representation.
66. 6 Q.B.D. 234 (1880).
67. [1913] 1 Ch. 127 (C.A. 1912).
68. *Id.* at 134.

In *R. E. Jones Ltd. v. Waring & Gillow Ltd.*,[69] there is much confusion on the distinction between the defense of change of position and estoppel. But the majority holding that there could be no defense of estoppel because there was no representation presumably means that there was no defense of change of position available without it. Jones concludes: "there is no doubt from the cases that the courts have rejected the defense of change of circumstances as a defense to an action for money had and received on the grounds that it is a defense unknown to the common law and is a mere shifting quicksand of natural equity."[70]

One might have expected that a defense of change of position would have had a better chance of success in equity. Jones suggests that no authority was necessary for the recognition of such a defense for "this equitable defense is an integral part of the claim in equity. If one admits the claim in equity, one must admit all equitable defenses including change of circumstances."[71] But in the *Diplock* litigation,[72] the defense was either misunderstood or disregarded. It appears the defense was misunderstood in that it was supposed that, if accepted, it would apply whenever the recipient of money paid under mistake had spent it. Lord Simonds said:

> The Court of Chancery, it was said, acted upon the conscience, and, unless the defendant had behaved in an unconscientious manner, would make no decree against him. The appellant or those through whom he claimed, having received a legacy in good faith and having spent it without knowledge of any flaw in their title, ought not in conscience to be ordered to refund. My Lords, I find little help in such generalities. Upon the propriety of a legatee refusing to repay to the true owner the money that he has wrongly received, I do not think it necessary to express any judgment. It is a matter on which opinions may well differ. The broad fact remains that the Court of Chancery, in order to mitigate the rigour of the common law or to supply its deficiencies, established the rule of equity which I have described and this rule did not excuse the wrongly paid legatee from repayment because he had spent what he had been wrongly paid. No doubt the plaintiff might by his conduct and particularly by laches have raised some equity against himself; but if he had not done so, he was entitled to be repaid. In the present case the respondents have done nothing to bar them in equity from asserting their rights.[73]

In that case, executors, wrongly believing that a will gave a large sum of money on charitable trusts, distributed substantial sums among

69. *Supra* note 65.

70. Jones, *supra* note 63, at 60.

71. *Id.* at 63.

72. Ministry of Health v. Simpson, [1951] A.C. 251, *affirming In re* Diplock, [1948] Ch. 465 (C.A.).

73. *Id.* at 276, quoted GOFF & JONES, THE LAW OF RESTITUTION 484.

selected charities. Later it was established that the trusts were void;[74] the next of kin then claimed the money, relying both on a personal action in equity and on the right to trace the money into the hands of the charities with whose funds it had been mixed. Both claims succeeded, but the proprietary claims were subject to limitations inherent in the scope of the available remedies.[75] The results sometimes accorded with those which a defense of change of position would have demanded, and sometimes restricted recovery even further. Subrogation was denied where the money was used to pay secured or unsecured debts. Such a result would not be required by a doctrine of change of position; for the defendant "would be restored to his original position except for the change of creditors."[76] Where the money was spent on improvements to land, the Court of Appeal held that it could not be traced, because a lien on the property would prejudice the defendant.

As G. K. Scott points out,[77] there is no reason to protect the defendant unless he can show that he would not have spent his own money on the improvements. Presumably, if he could establish this point, there is no reason why he should not be subjected to a lien for the increased value of the land.

Thus there are various ways in the *Diplock* case in which the proprietary claims failed. But these were due to the supposed limits of the remedy, and not to a conscious imposition of a defense of change of position upon wider remedies.

V. TRACING AND CONSTRUCTIVE TRUSTS

Proprietary remedies for the recovery of money in England have been plagued by the continued significance of their separate legal and equitable origins, and by the fact that development has been spasmodic, moving step by step as issues have arisen according to the chance of litigation and not according to a rational and analytical theory.

Tracing at common law, so as to give the plaintiff a right of recovery in priority to the general creditors, was very limited, for tracing depended upon continued identification of the money claimed; money has no "earmark," and the means of identification are easily lost. The leading case is *Taylor v. Plumer*[78] and the classic statement that of Lord Ellenborough:

74. Chichester Diocesan Fund v. Simpson, [1944] A.C. 341.
75. See notes 78-101 *infra* and accompanying text.
76. Scott, *Restitution from an Innocent Transferee Who is Not a Purchaser for Value,* 62 HARV. L. REV. 1002, 1012 (1949).
77. *Id.* at 1013.
78. 3 M. & S. 562, 105 Eng. Rep. 721 (K.B. 1815).

> It makes no difference in reason or law into what other form, different from the original, the change may have made, whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the principal, as in *Scott v. Surman*[79] . . . or into other merchandise, as in *Whitecomb* v. *Jacob*[80] . . . for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases where the means of ascertainment fails, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood in the same way; i.e., as predicated only of an undivided and undistinguishable mass of current money. But money in a bag, or otherwise kept apart from other money, guineas, or other coin marked (if the fact were so) for the purpose of being distinguished, are so far ear-marked as to fall within the rule on this subject, which applies to every other description of personal property whilst it remains (as the property in question did), in the hands of the factor, or his general legal representatives.[81]

Thus money could not be traced into a mixed fund at common law. This limitation would not be a matter of great importance if an alternative and better remedy were available in equity. Equity does possess a better tracing remedy, which allows tracing into a mixed account, but its application has been limited to "equitable claims."

Until the *Diplock* litigation,[82] many people thought that the equitable tracing remedy was one available to a plaintiff who could show that the defendant was unjustly holding his money, and that the legal remedy was inadequate. In *Banque Belge Pour l'Etranger v. Hambrouck*,[83] Hambrouck fraudulently obtained money from the plaintiff's bank, paid it into his account at "X" bank, and paid some of the money to his mistress who paid it into a deposit account at "Y" bank, where some £350 still remained. The question was whether the money could be traced through Hambrouck's account into that of his mistress. The mixing in Hambrouck's bank account would seem to exclude the common law remedy, as Lord Justice Scrutton thought; Lord Justice Bankes thought differently, and Lord Justice Atkin in a famous passage thought that the plaintiff could succeed with either a common law or equitable remedy. After referring to *Taylor v. Plumer*,[84] he said:

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79 Willes 400, 125 Eng. Rep. 1235 (C.P. 1742).

80. 1 Salk. 160, 91 Eng. Rep. 149 (K.B. 1710).

81. Taylor v. Plumer, *supra* note 78, at 575, 105 Eng. 105 Eng. Rep. at 726.

82. *Supra* note 72.

83. [1921] 1 K.B. 321 (C.A. 1929).

84. *Supra* note 78.

> I venture to doubt whether the common law ever so restricted the right as to hold that the money became incapable of being traced, merely because paid into the broker's general account with his banker. The question always was, Had the means of ascertainment failed? But if in 1815 the common law halted outside the banker's door, by 1879 equity had had the courage to lift the latch, walk in and examine the books: *In re Hallett's Estate*.[85] I see no reason why the means of ascertainment so provided should not now be available both for common law and equity proceedings. If, following the principles laid down *In re Hallett's Estate*, it can be ascertained either that the money in the bank, or the commodity which it has bought, is "the product of, or substitute for, the original thing," then it still follows "the nature of the thing itself." On these principles it would follow that as the money paid into the bank can be identified as the product of the original money, the plaintiffs have a common law right to claim it, and can sue for money had and received. In the present case less difficulty than usual is experienced in tracing the descent of the money, for substantially no other money has ever been mixed with the proceeds of the fraud.[86]

The wider equitable remedy had, however, grown up as a remedy available to those who wished to follow their money into mixed funds held by trustees and other fiduciaries. Until common law and equity jurisdiction was combined by the Judicature Act of 1873, such remedy was available only to litigants with a claim in equity. In *In re Diplock*, the Court of Appeal could do no better than to recreate this distinction; and to lay down that "equity may operate on the conscience not merely of those who acquire a legal title in breach of some trust, express or constructive, or of some other fiduciary obligation, but of volunteers, provided that as a result of what has gone before some equitable proprietary interest has been created and attaches to the property in the hands of the volunteer."[87] This requirement of a previous "equitable proprietary interest" (as opposed to legal ownership) cannot be right; at best it used to be a test for the admission to the special privileges of litigants in equity whose jurisdiction ceased to be exclusive nearly a century ago. The requirement means that there is no right in England to trace money taken by a thief and paid into a mixed account, for there is no fiduciary relationship between a thief and his victim, and no equitable proprietary interest in the money. Again:

> If B holds money as a fiduciary agent of A, and pays it by mistake to C who mixes it with money of his own, A can trace the money into C's hands. . . . And if C passes the property to D, A can trace against D. But if A and B were the same person, if A had the legal ownership as well as the equitable, his rights would be taken away. It is submitted, therefore, that proprietary

85. 13 Ch. D. 696 (C.A. 1879).

86. Banque Belge Pour l'Entranger v. Hambrouck, *supra* note 85, at 335-36.

87. [1948] Ch. 465, 530.

> remedies must protect beneficial ownership, whether or not such ownership carries with it legal ownership or not. No decision to the contrary since the Judicature Act is known, but *In re Diplock* lays down the law to the contrary.[88]

This requirement prevents the establishment of the rule that proprietary remedies are available in cases of unjust enrichment.

Further, the equitable tracing remedies against a mixed fund appear to be confined to a lien, and to a limited use of subrogation.[89] There are no decisions, so far as I am aware, which draw the distinction made in the *Restatement of Restitution,* section 210, between the lien[90] and constructive trust as alternative remedies against a mixed fund. The point was made in respect to a beneficiary of an express trust in the *Lord Provost, Magistrates and Town Council of Edinburgh v. Lord Advocate,*[91] where Lord Hatherly said:

> A cestui que trust has a right, when his fund has been dealt with in an illegitimate manner as regards the true legal construction of the bequest, to say at his option whether he will have a decree for the restoration of the fund with or without interest in the meantime, or whether he will take the result of the employment of that fund when it has been employed together with other funds in a payment resulting in an acquisition of profits by taking a share of those profits. The remedy is given to him in either case on account of the impossibility, when funds have been mixed, of attributing to each a particular property, and ear-marking it as belonging to the one rather than the other.[92]

I have already expressed, in another article, the belief that this distinction should be recognized;[93] and Goff and Jones take a similar view.[94]

A factor which has played a part in the different development in the United States and England on these matters is the different view taken as to the nature of a constructive trust. Dean Pound wrote that, "an express trust is a substantive institution. Constructive trust,

88. Maudsley, *Proprietary Remedies for the Recovery of Money,* 75 L.Q. REV. 234, 243 (1959).

89. *In re* Diplock, *supra* note 87, at 548-50.

90. RESTATEMENT, RESTITUTION § 210 (1937): "(1) Where a person wrongfully mingles money of another with money of his own and with the mingled fund acquires property, the other is entitled to an equitable lien upon the property to secure his claim for reimbursement. (2) If the wrongdoer knew that he was acting wrongfully, the other is entitled at his option to a share of the property in such proportion as his money bore to the whole amount of the fund."

91. 4 App. Cas. 823 (1879).

92. *Id.* at 841.

93. Maudsley, *supra* note 88, at 234.

94. GOFF & JONES, THE LAW OF RESTITUTION 52 (1966).

on the other hand, is purely a remedial institution."[95] The *Restatement* says:

> An express trust and a constructive trust are not divisions of the same fundamental concept. . . . A constructive trust does not, like an expressed trust, arise because of a manifestation of an intention to create it, but it is imposed as a remedy to prevent unjust enrichment. A constructive trust, unlike an express trust, is not a fiduciary relation, although the circumstances which give rise to a constructive trust may or may not involve a fiduciary relation.[96]

The English approach has been very different. Constructive trusts have been variously described in the books, but all the explanations contain the idea of a trust being imposed by operation of law. Once imposed, however, it is looked upon as an institution and not as a remedy, although it is appreciated that the duties and responsibilities of a constructive trustee will not necessarily be as extensive as those of an express trustee, and may not be the same as those of other constructive trustees.

This concept of a constructive trust has been criticized by Dr. Waters,[97] who argues that the attempt to deal with certain situations—he treats in detail those of vendor and purchaser, mortgagor and mortgagee, and principal and agent—by thinking by analogy to trust situations has been harmful to the proper examination of those matters, and also has impeded the proper development of the constructive trust on remedial lines. Others[98] have been content to accept the view that the "institutional" constructive trusts and "remedial" constructive trusts are not the same thing; but have suggested that the constructive trust as an institution cannot be discarded, and that if there are two distinct concepts, we might have different names for them.

The difficulty with the theory that a constructive trust is purely remedial appears to be that there are some situations where trusts are imposed upon a person by operation of law, and he must carry them out. Admittedly, the trust analogy is a poor way of explaining special situations such as that of vendor and purchaser, and mortgagor and mortgagee. But where a trustee for an infant obtains a renewal of a lease for his own benefit;[99] or land subject to trust is fraudulently sold to a transferee with notice;[100] or where an agent administers a

95. Pound, *The Progress of the Law: Equity*, 33 HARV. L. REV. 420 (1920).
96. RESTATEMENT, RESTITUTION § 160 comment (a) (1937).
97. WATERS, *The Constructive Trust* (1964).
98. Maudsley, *supra* note 88; Sealy, *Some Principles of Fiduciary Obligation*, 1963 CAMB. L.J. 119.
99. Keech v. Sandford (1726) Cas. t. King 61; *In re* Knowles, [1948] 1 All E.R. 866.
100. Barnes v. Addy (1874) 9 Ch. App. 244; Nelson v. Larhoft [1948] 1 K.B. 339.

family trust and makes a profit for himself;[101] these are surely all cases where a person is required by operation of law to be a trustee. Admittedly, the trust in these cases may have originally been expressly declared; but that does not necessarily mean that these situations are indistinguishable from express trusts. The point here is that there is a legal situation which is unlike an express trust situation, in that the trust is imposed upon a person against his will. These situations are not "purely remedial." Without saying a word against the concept of a remedial constructive trust, I think that there is no need to deny the existence of this other category. Goff and Jones accept the usual English view and "have been content to use both 'equitable lien' and 'charge' in the remedial sense, while we have confined our use of 'constructive trust' to those special and defined cases where equity has imposed on a person at least some of the duties of a trustee, so as to prevent his unjust enrichment."[102]

My expectation is that English law will continue to keep its terminology; there appears to be no reason to change. So long as a constructive trust will be imposed whenever it is necessary to prevent unjust enrichment, the terminological question is unimportant. If a situation requires a trustee's duties to be imposed upon a constructive trustee, the English court will do that. It may be that this will be a trust which the "beneficiary" can terminate by demanding the property and in that situation the two views of the constructive trust coalesce. If the problem is one of tracing it into a mixed fund by claiming a proportionate share of the fund or of the property purchased with it, then there is a need for the development in England of more advanced remedies than those put forward in a simpler context over eighty years ago in *In re Hallett's Estate*.[103]

VI. Conclusion

There are other aspects of restitution in England which it would be interesting to examine. But for the present, those discussed here must suffice. The opposition in England to the development of a

101. Phipps v. Boardman, [1965] 2 Weekly L.R. 839.

102. Goff & Jones, The Law of Restitution 37-38 (1966) where, in discussing this question, they say: "English lawyers do not think of a constructive trust in the sense defined in the Restatement of Restitution. In English law a constructive trust is not a remedy. It is true that it is imposed in certain cases to prevent unjust enrichment, but it is also akin to an express trust in that it normally carries with it at least some of the ordinary duties of trusteeship. Various examples of such constructive trusts will be found throughout this book. For example, a trustee or fiduciary who makes an unauthorized profit is a constructive trustee of that profit, as is a person who fraudulently attempts to invoke a statutory provision so as to defeat a beneficial interest."

103. 13 Ch. D. 696 (C.A. 1880).

branch of law under a principle of unjust enrichment has largely disappeared, and the climate, both judicial and academic, has greatly improved in recent years. The American experience will be utilized as progress is made; and it is expected that there will be a number of interesting cases and situations emerging in the English law reports in the next few years.