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I. Introduction

It is still something of a surprise to American lawyers that the principle of unjust enrichment is not yet commonly recognized in English law as being the underlying theme of the so-called quasi-contract at law, and as being the basis for the remedying of much unconscionable conduct in equity. While Americans tend to think of this recognition as the battle of the 1930's, and have long since moved on to debate the situations wherein unjust enrichment exists. English lawyers are still much concerned with the nature of the various remedies, and indeed with the question of their adequacy. This is not to say that English law lacks remedies to deal with the areas of liability that American lawyers bring within the heading of Restitution. In view of the history of the common law and of equity, a history shared by all common law jurisdictions, it would be nonsense to say that English law does not offer the deprived plaintiff relief. Of course, it does. What we have not been willing to do, however, is to rationalise the miscellany of remedies that exist. And, since we have not been prepared to rationalise, there are inconsistencies between and within remedies, and a marked lack of development, particularly on the equity side. This has long been the complaint of the English lawyers who, since Lord Wright's first writings and speeches in the late 1930's,[1] have looked for an avowed rationalisation on the basis of unjust enrichment, and for the adoption of the title, Restitution.

On a previous occasion,[2] the writer explored the present state of English thinking on the nature of the constructive trust, attempting to show that, if English law is to adopt a new approach to the constructive trust and treat it as a purely remedial device, a fundamentally different approach has to be made. The prime difficulty

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1. See Wright, Legal Essays and Addresses (1939). See also 51 Harv. L. Rev. 369 (1937).

2. Waters, The Constructive Trust: The Case for a New Approach in English Law (1964).

English lawyers, particularly Chancery lawyers, seem so often to have is in seeing what is wrong with the present institutional constructive trust. The writer also attempted to show how English law might move to the remedial device, and suggested some useful purposes which such a device might immediately perform. On this occasion it is intended to examine from the author's viewpoint some of the ideas which his earlier writing provoked, and so to demonstrate something of the thinking which is currently taking place in England. In particular, the writer would like to follow up the interesting view of Mr. J. D. Davies, put forward in *The Law Quarterly Review*,[3] that the constructive trust should be a flexible remedy where the proprietary aspect of the constructive trust is not emphasized, and where, though the remedy may be available, the right to trace does not necessarily arise.[4]

Overall, this paper aims to take a broad look into the future, examining what path English law might most usefully follow in the place it gives to the constructive trust.

II. THE RATIONALIZATION OF REMEDIES

If rationalization along the lines of unjust enrichment and restitution were to be recognized, many areas where law and equity have not been synthesized since the Judicature Acts[5] would appear in a new light, and constructive thinking would inevitably be focused not only on the results of historical accident, but on the kind and degree of restitution we wish to see in specific situations.

For example, it is quite clear that while a man should be able to recover his property from another who has wrongfully deprived him of it, it is a different question whether that man should have priority over the general creditors of the wrongdoer. And, if priority over creditors is in general permissible, it is yet a further question whether all creditors should be placed in a position inferior to the man who is attempting to recover. These are policy questions involving a number of considerations, and historic remedies will not always take cognisance of them. They will assist some plaintiffs and not others. There may be no remedy at all,[6] there may be historic limits to the relevant remedy,[7] or though recovery is possible, the remedy may award

3. Davies, Book Review, 81 L.Q. REV. 594 (1965).

4. Mr. Davies was kind enough to set out his view, as it appears here, in a subsequent letter to the writer. The interpretations and views recorded in this paper are the writer's own, of course, for which he alone is responsible.

5. Supreme Court of Judicature Act, 1873, 36 & 37 Vict., ch. 66 (amended by 38 & 39 Vict., ch. 77 (1875)).

6. See Bell v. Lever Bros., Ltd., [1932] A.C. 161, 224 (separate opinion).

7. The action for money had and received can only lie where a contract can be implied.

priority over creditors merely because it happens to be proprietary rather than personal.

Indeed, as the remedying of unjust enrichment comes gradually into focus, the remedies themselves must be constantly re-examined so that they can be made to bring out the substantive issues. And we have to re-examine the borders that we have assigned to the remedying of unjust enrichment.

It is arguable that an express trust beneficiary, who is capacitated, *sui juris* and able to wind up the trust, but merely keeps it going for tax purposes, should not always have priority over the general creditors of the fraudulent and insolvent trustee. The beneficiary[8] took a risk that the trustee would conduct the affairs of the trust honestly, and the creditor who advanced money on loan or gave credit took the risk that the debtor would manage his affairs with honesty. Both men entered into a business transaction; they took commercial risks. Why should the trust beneficiary in these circumstances have priority over the insolvent trustee-debtor, who has not the funds to meet both calls? Surely, it is said, the creditor could have taken security, but so could the trust beneficiary. Should not the trust beneficiary have looked with as much care for a suitable trustee to manage his affairs as the creditor should have looked for a secure investment for his money?

Yet in this example, even a doctrine of restitution would simply disclaim responsibility.[9] The obligations of the trustee and the beneficiary towards each other spring from the express trust, and when the beneficiary calls for his property out of the insolvent's assets, he is not seeking to rectify unjust enrichment, he is enforcing his rights under the express trust. This does not seem at all satisfactory. One can see a case where the beneficiary had no hand in appointing the particular trustee, where the beneficiary is incapicitated in some way or even where he is unable to wind up the trust. But to argue that the trust, whatever its terms or purpose on the particular occasion, is a working concept independent of unjust enrichment remedies, and that this right of priority is an aspect of the trust's operation, seems as arbitrary as telling the man who lends money for an ultra vires activity that he cannot have an action for money had and received because a contract cannot be implied. Are restitutionists happy with this explanation? But, it is said, where would the trust be if the beneficiary could not look to automatic priority over the trustee's creditors. Even in a part common law, part civil law jurisdiction like South Africa, it is regarded as cardinal to any trust concept, whether

8. He may be the settlor.

9. The law of restitution is commonly associated with those rights of action that are *founded* upon the prevention of unjust enrichment.

or not that concept is expressed through the medium of legal and equitable estates, that the trust beneficiary must be able to attach the trust property in the insolvent trustee's hands. Yet, one must ask, does the trust require that the beneficiary prevail in *all* circumstances?

What gives cause for concern about the automatic priority of the trust beneficiary, and particularly the beneficiary just mentioned, is that logically once the principle of unjust enrichment is avowed, it ought not only to provide alternative remedies, but possibly deny remedies in other substantive fields of obligation. How far the principles of restitution carry into other substantive fields, and alter the effect of the availability or non-availability of existent remedies, is something we need constantly to reconsider. The existing remedies arising out of a transaction, be it sale, mortgage, or trust, may be adequate when one is considering the mutual obligations of the parties to that transaction; but they may well be unsatisfactory when the question concerns one party to that transaction and a stranger to it. Why should the unsecured creditor, particularly if he has given credit or a loan because of the borrower's apparent means, find himself faced both with a trust, of which he neither had nor could reasonably be expected to have had notice, and with a trust beneficiary who claims the priority of a secured creditor? If the identifiable trust property has increased in value, while the trustee's own property has depreciated, restitution principles would award that increase to the trust beneficiary.

Where there is no express trust, however, and the question is simply whether *A* should be able to call for legal title to property which is presently vested in *B*, remedies can still be random, though we are now within the accepted domain of Restitution. If *B* is solvent, it does not much matter whether recovery of value is sought in law or equity. Historic jurisdictions of law and equity, and the relative efficacy of the available remedies where jurisdiction is concurrent, are of little practical concern, though the array of remedies may be inelegant and cumbersome.[10] But where *B* is insolvent, the position is quite different. Are the other creditors to give way to *A* so that he may take that to which he claims title, and leave the creditors to divide what, if anything, remains?

That policy issues arise here at every stage is evident, and it is possibly tedious for the American reader to have these simple propositions set out once more. No envious English reader of the *Restatement*

10. There is the occasional area like mistake where the remedy in equity is better, but this is an anomaly which ought to be put right. There can hardly be a case for the perpetuation of the present position. Why not make the only remedy reseission?

of Restitution[11] can but admire the clean lines of the personal and proprietary remedies discussed there. Nevertheless, even in the *Restatement* an English lawyer finds the perpetuation of the time-worn nomenclature, the quasi-contractual remedies and the constructive trust. Is this inevitable? One can find the underlying principle of all these remedies, and draw up a classification which emphasizes those situations where unjust enrichment occurs and where it is or ought to be remedied; but if, because of the precedents, the remedies have to retain their old names, the chains of the past remain to distract and sometimes to confuse. The action for restitution applied in *Deglman v. Guaranty Trust Co. of Canada*[12] and *County of Carleton v. City of Ottawa*[13] is on this score much more appealing. Here is a wholly fresh title, free of associations, where the substance of the claim is immediately uppermost. We have little as yet to tell us what the Canadian courts are going to make of it, but the potential is obvious. However, and this is my point, the American lawyer is quite clear that by a constructive trust or an equitable lien, he has in mind remedies which permit the plaintiff to recover, to impose a charge upon, ascertainable property, the limit to his recovery being principally the bona fide purchaser for value and defendant's change of position.

English law has not developed the remedial constructive trust,[14] and therefore the questions which we pose are likely to differ considerably from those of American lawyers. In the view of English law, the constructive trust is an institution very like the express trust. The constructive trust is seen to arise by operation of law, but in most English eyes it arises when one person is under an existent obligation to hold ascertained property for another. And it does not matter how that obligation has come into existence. When there is a contract for the sale of land, the rights and duties of the parties are fully laid down by the law of contract and land law. Yet we add gratuitously that between contract and sale, the vendor's obligation to convey the land when title has been shown is very like the obligation of the express trustee to hold property for the beneficiary. On the other hand, the holder of the property may simply have acquired title by fraud. Every civilized jurisprudence remedies this situation, and in England there are remedies in both law and equity to secure compensation or restitution. Now the basis of undoing fraud may very well be to prevent unjust enrichment, but we do not find any need to go that far. Fraud is unconscionable on any basis. We are content to say, when fraudulent acquisition is proved, that the holder's obligation to hold

11. RESTATEMENT, RESTITUTION (1937).
12. [1954] Can. Sup. Ct. [1954] 3 D.L.R. 785.
13. 52 D.L.R.2d 220 (1965).
14. WATERS, *op. cit. supra* note 2.

prior to restoration for the deprived person is much like the obligation of the express trustee. In other words, whether a transaction creates obligations independent of unjust enrichment, or obligations arising from an unfair withholding of property from a plaintiff (which situation is completely capable of rationalization in terms of preventing unjust enrichment), the constructive trust merely means that by the application of existing remedies the defendant has an obligation which is like the fundamental obligation of the express trust.

This type of reasoning is, of course, arid, but it is as old as our law of trusts, and property lawyers have grown up with the present nomenclature. It is a useful shorthand. How then do we get away from it, and on to the high road of the remedial constructive trust?

III. THE CONSTRUCTIVE TRUST AS A GENERAL REMEDY, EMBRACING BOTH PERSONAL AND PROPRIETARY CLAIMS

One line of approach is to "take the bull by the horns" and argue that wherever an equitable remedy now lies, the object of which is to prevent unconscionable retention of benefit, the underlying principle is the prevention of unjust enrichment. Such an approach requires the assembly of all those various situations where equity intervenes to prevent the unconscionable withholding of gain.

In their recently published treatise on English law, *The Law of Restitution*,[15] Messrs. Goff and Jones have brought together the following situations:

Mistake

1. Assisting trustees who have paid under a mistake of fact.
2. Assisting trustees and personal representatives who have overpaid beneficiaries by mistake of law.
3. Assisting individuals who have paid an officer of the court under mistake of law.
4. Perfecting gifts of subsequently incapacitated donors when by mistake donation has been made to the wrong person.

Fraud

1. Remedying one person's acquiescence in an improvement to his property made by another, who is ignorant of the true ownership.
2. Preventing the utilisation of the Statue of Frauds as

15. GOFF & JONES, RESTITUTION (1966). The writer has assembled the following list from the topics discussed in various places in the work.

a means of perpetuating fraud. (The remedy of specific performance will be available when there is part performance of an oral contract.)
3. Dissolving unconscionable bargains.
4. Preventing fraud on creditors (largely overlaid now by statute.)
5. Compelling trustees to contribute *inter se* following a successful action for breach against one.

Coercion

1. Preventing undue influence.

Illegality

1. Setting aside marriage brokage contracts, and separation agreements when the parties are living together. (Fraud or oppression must probably have been used by the other for one party to recover.)

1. Awarding restitution following a plea of incapacity by an infant.
2. Subrogating the payor to the paid-off creditor's rights; and remedying the adoption of the benefit of unauthorized transactions.
3. Handling claims under wills, intestacies, or inter vivos trusts.
4. Causing restitution of benefits acquired in breach of fiduciary relationships.

In all these situations, say Messrs. Goff and Jones, the reason for equity's intervention is to prevent unjust enrichment.[16] In each case equity makes available to the deprived plaintiff a personal, and sometimes also a proprietary, remedy. Now the question is, would it be an advantage if the term "constructive trust" were used to mean (1) that every such unjustly benefiting party is under an obligation to the deprived, and (2) that equity compels him to discharge that obligation by the payment of equivalent monetary value or, if preferable, the restitution of the withheld sum, chattel, chose, or land?

A. *Bringing Uniformity of Approach*

It is certainly probable that such a comprehensive remedy would tend, by stressing the theme of liability, to bring the existing remedies and their treatment of the situations discussed into greater uniformity. The *Restatement of Restitution*,[17] for example, makes much of the

16. *Id.* at 3-5, 11-26. The present writer has omitted references to the remedies, like rescission, rectification, and account, which *inter alia* prevent unconscionable retention of gain.

17. RESTATEMENT, RESTITUTION §§ 127, 165 (1937).

liability of the unintended donee to restore to the intended donee when the donor, subsequent to his act of donation and due to his intervening death or incapacity, has been prevented from rectifying the mistake. Messrs. Goff and Jones can only point to the merest straws in the wind that English law will perfect such a gift.[18] Yet equity's remedies for fraud are fully developed. So here we have a curious inconsistency. Is it not as unjust an enrichment for the person having the deceased donor's property to withhold it from the intended donee, as it is for the owner of property to acquire advantage by letting another, who believes that the property is his own, work upon it? This proximity of situations under the single head of "constructive trust" would compel the courts to work out whether the principle that equity will not perfect a gift should always prevail over the principle that no one should be enriched at the expense of another.[19] Equity's yardstick, unconscionability, is a comprehensive term which, unlike "unjust enrichment," does not suggest so starkly the choice of policy which the court must make, and the balance it must strike.

B. *Constructive Trustee of the Obligation to Perform*

A further advantage of such an approach would be that the constructive trust would no longer be dominated by the express trust notion that there must be specific property which the claimant seeks to recover. And a question which at once comes to mind is this. If there is unconscionability in the defendant's acquisition or retention of property which was paid to him by the plaintiff in the expectation that certain conduct would be forthcoming from the defendant, can one usefully say that the defendant is a constructive trustee of the benefit of that obligation which the plaintiff hopes to derive?

Take the case of *Harrison v. Gardner*.[20] Two partners had been in business as cheesemongers for some seven years. One of them, the defendant, was anxious to retire, and in the winding up of the partnership, arbitrators settled the goodwill of the business at 1000 pounds. Five hundred pounds was accordingly paid to the defendant by the remaining partner, the plaintiff, and there was mentioned at the time of payment that it was assumed the defendant would not thereafter compete in the vicinity of the business. No contract to this effect was made, however, and the Vice Chancellor found the authorities to be clear that sale of the goodwill did not automatically

18. GOFF & JONES, RESTITUTION 423 (1966).

19. Professor Dawson points out that the notion of a volunteer merely means "that in spite of clear enrichment we are helpless or unwilling to act." DAWSON, UNJUST ENRICHMENT 128 (1951).

20. 2 Madd. 198, 56 Eng. Rep. 308 (V.G. 1817).

impose a restraint upon the vendor. The defendant had simply remained silent when non-competition was mentioned. Subsequently he set up a similar business in the vicinity, and the plaintiff sued for an injunction to restrain hi mfrom carrying on this business. The Vice Chancellor decided for the plaintiff on the ground that the 500 pounds had been paid to the defendant upon "the good faith and understanding"[21] that he would not compete. The payment of 500 pounds assumed this. Then the judge said, "It is a bill for an injunction on the ground of fraud, by receiving 500 [pounds] for not doing what he afterwards does do; and resembles the case put in the argument, of a testator intending to give a legacy, which the residuary legatee says is unnecessary, as he will pay it."[22] Both cases are decided by the Vice Chancellor on the basis of fraud. "[It] is a relief sought in respect of the fraud upon the intended legatee."[23]

In this case of the promising residuary legatee there is specific property over which a constructive trust can be imposed. But, putting the obligation of the defendant in the language of constructive trust, it was beside the point to declare him a trustee of the 500 pounds. The plaintiff, when he brought suit, was interested solely in preventing the defendant from setting up a competing business; it was the benefit of that obligation which the plaintiff wanted. Nor was the obligation contractual, so that the plaintiff might have said that he was entitled to specific performance, or to the 500 pounds on a total failure of consideration. In any case, again, he was not interested in the 500 pounds. What he wanted was an injunction, and the court held he was entitled to an injunction because of the defendant's fraud. No one doubts that fraud is the obvious occasion upon which a constructive trust can come into operation. The only difficulty is the nature of the "trust property." If secret trusts are essentially constructive trust obligations, as American courts and probably most English writers think they are,[24] then *Harrison v. Gardner* is authority for the notion that the "trust property" can be the defendant's moral obligation.[25] The more so would the defendant be a trustee of any contractual obligation, which he had undertaken.

In *Mocatta v. Bell*,[26] *A* returned securities to *B*, a broker, in ex-

21. *Id.* at 221, 56 Eng. Rep. at 316.

22. *Ibid.*

23. *Id.* at 222, 56 Eng. Rep. at 316.

24. GOFF & JONES, RESTITUTION (1966), except the secret trust from their study of restitution.

25. Sheridan thinks *Harrison v. Gardner* decides that "where, for valuable consideration, a person sells something and makes a promise (not amounting to a contract), and where the value of the things sold depends substantially on the vendor's keeping his promise, he is bound in equity to keep his word." SHERIDAN, FRAUD IN EQUITY 46 (1957).

26. 24 Beav. 585, 53 Eng. Rep. 483 (Rolls. 1857).

change for *B*'s cheque. *B* had insufficient funds to meet this cheque, but was relying on *C*'s promise that he would give *B* a cheque for an equivalent sum. *C*, who owned the securities, recovered them from *B*, but refused to hand over his cheque on the assertion that *B* was attempting to defraud him. *A* sued *C* for the value of *B*'s dishonoured cheque and interest, or for redelivery of the securities. Sir John Romilly, Master of the Rolls,[27] had no doubt that *C*'s action in not honouring his promise to *B*, when he had recovered the securities, was fraudulent. And an account of *C*'s liability was ordered. There is no mention of constructive trust here, but was not *C* a constructive trustee of the obligation to keep his promise? Would it be an advantage to have a constructive trust remedy which extends from a *British Syphon Co. v. Homewood*[28] situation (abuse by a fiduciary of the obligations of his office in order to make private gain)[29] to the specific performance of moral obligations? It is arguable.

C. *Criticism*

The great advantage of such a constructive trust is presumably that the courts would concentrate on the equitable obligation of the defendant rather than upon the appropriate character of the remedy which is to be available to the plaintiff. Once an obligation has been found, then is the time to start thinking what sort of order ought to be made. And there is no need to tie the courts down in the making of appropriate orders.

Clearly there is much to be said for the common sense of this approach, but the mind boggles at the extraordinary assortment of orders and situations calling for remedy which would be brought together under this head of constructive trust. And this may not be purely the voice of conservatism. Several important questions are raised by such a new bracket of constructive trusts. If constructive trust were to be so broad as to cover all those equitable rules designed to prevent or remedy gain by unconscionable conduct, would the term really have much significance other than as a general synonym for equitable relief? Can a remedy be too flexible? In the writer's view, we in England are sufficiently far away from any general judicial recognition of such a category of restitution liability that it is difficult to see what the courts would make of the remedy. First reactions might well be that such a device, a purported remedy, is shapeless and

27. "Master of the Rolls" will hereinafter be referred to as "M.R."

28. [1956] 1 Weekly L.R. 1190 (Ch.).

29. The employer sought an injunction against future disclosures of information, an order for delivery up of the invention, documents, and all profits derived from the invention, and an inquiry into the damages sustained by the claimant as a result of the defendant's breach of contract.

open-ended. After all, we would be doing something new in introducing the title "constructive trust" to a whole range of situations, some already remedied in equity, and others not now so remedied or not remedied at all. We may at the moment have isolated remedies and examples in the law reports of remedial action. With express trust rules in our minds, we may at present sometimes employ the term "constructive trust." But at present we go no further.

One thing could certainly be said in its favour, and this supports the point that it would bring uniformity of approach. We imagine the relationship between the legal and equitable remedies in restitution to be much clearer than in fact is the case. Whatever may be the position in the United States, in England there is no clear distinction, and to group so many equitable remedies and remedied situations under the head of "constructive trusts" would compel us to rethink those many areas where the two have an uneasy juxtaposition, administered in the same high court, and never adequately rationalised though the Judicature Acts are so many years away. Yet it seems futile to advocate such a change just to jog our courts into thinking out the relationship of law and equity in this field. In view, too, of the attitude of most modern judges, who hold to the opinion that law reform is the job of Parliament, it is the more difficult to see the value of this change. In an era when we have a permanent Law Commission, it seems best to do the job of rewriting the relation of legal and equitable restitution remedies in one fell swoop. Surely the time has come for putting the jigsaw together. In view of the pressure upon judicial time this is also a more realistic plan.

With a comprehensive constructive trust, divorced from proprietorship and concerned with all equitable obligations to compel the making good of unjust benefit, however, there are other problems which call for a code of Restitution. The new constructive trust, assuming that it comprehends all equitable relief against unjust enrichment, would surely comprehend both personal and proprietary remedies. And there are three questions which would be posed by such a remedial trust: (1) Should the claimant recover relief of any kind against the immediately benefited party? (2) Should the claimant have priority over the general creditors of the insolvent benefited party? and (3) Should the claimant be able to assert rights of property over land, goods, or money in the third party's hands? It would seem that without a statutory code of restitution we should be a very long time indeed, and sacrifice many a litigant on the anvil of our inductive method, before reaching a satisfactory separation and individual treatment of these three questions. Assuming a code of restitution, however, we might well wish to make it a matter of judicial discretion, as

with the normal equitable relief, whether the claimant's equity prevailed over general creditors. As for the third party we might wish to adopt the solutions of the *Restatement*.

Indeed, the radical change which such a constructive trust involves encourages one to be yet more radical. If we are to set in motion a move of such a character, allowing the pursuit of equitable obligations to carry us where it will, should we not also be concerned with the unification of the remedies at law? Earlier, reference was made to the relationship of law and equity; now we are concerned with the range of common law relief. Again it is the writer's view that any development on this scale should be thought out in its entirety, and not within the jurisdictional strait jackets that law and equity have fashioned. It is hard to find enthusiasm, ninety years after the Judicature Acts, for the isolated development of another partially personal remedy, this time in equity; a remedy which, proceeding independently along lines of equity considerations, will often duplicate the action for money had and received. Such a situation is foreshadowed by *Reading v. Attorney-General*,[30] to which we shall return.

The reporters of the *Restatement of Restitution* open their remarks on the constructive trust with these words,[31] "The term 'constructive trust' is not altogether a felicitous one. It might be thought to suggest the idea that it is a fiduciary relation similar to an express trust, whereas it is in fact something quite different from an express trust." The writer can appreciate the argument that judicial terminology is slow in growth, and increasingly pregnant with meaning, and that on these grounds we should be slow to jettison it. But one cannot help thinking that if all unjust enrichment relief in equity is to be brought under the title of constructive trust, why not abandon that term altogether. It is *too* pregnant with meaning in English law. That is the trouble, as Lord Westbury's words remind us.[32] As long as we talk of constructive trust, we are always bound to ask, "What is the defendant trustee of?" It is possible to reply, as the writer has said, that the defendant is trustee of an obligation to put the deprived party into the position where, but for the injustice, he would have been. In the absence of codification, however, would there be sufficient compensation from an attempt to gain judicial recognition of such a trust remedy as this? One would not hesitate for a moment in agreeing that rationalisation of the existing personal remedies in equity, account and debt,[33] is more than desirable, but whether or not the constructive

30. [1951] A.C. 507.

31. RESTATEMENT, RESTITUTION § 160, comment *a* (1937).

32. McCormick v. Grogan, L.R. 4 H.L. 82, 97 (1869).

33. See part IV § B of this paper *infra*.

trust is the medium for this advance is most questionable. We shall return to this matter again.

IV. The Constructive Trust as a Proprietary Remedy: A Reaction to the Restatement

Another approach to the use of the term is to employ it as a means of giving the claimant rights in specific property. This, of course, is what the *Restatement* has in mind. Writing in the *Law Quarterly Review* just after the publication of the *Restatement*, the reporters, Professors Seavey and Austin Scott had this to say of their work:

> The constructive trust is dealt with separately not because it is equitable in nature, for that is true of the entire subject of restitution, and not because it is enforceable in a Court of Equity, because the first part of the Restatement deals with equitable rights as well as legal rights. It is dealt with separately because it involves the idea of a proprietary right in particular property rather than a merely personal right against an individual. This part of the *Restatement* might perhaps more properly have been entitled 'Rights in Property Created as the Result of a Right to Restitution.'[34]

The immediate reaction to such a proposal may well be that it pays too much respect to the evident roots of the term constructive trust, and that it very closely confines the horizons of the remedy. The alternative, however, is to use the term to cover all unjust enrichment in equity, and the desirability of this has already been reviewed. It can also be said that the *Restatement* itself is not altogether happy in its use of the term. Professor Scott[35] conceives of the term both as a remedy for all those situations where title to property has been acquired, the benefit of which ought (on grounds of unjust enrichment) to be another's, and as a complementary device to the equitable lien. The constructive trust secures to the claimant the increased value of the withheld property. But here, too, there is a good case for the *Restatement* use of the term. The attraction of this second usage is evident, having such an association as it does with the ability of the express trust beneficiary to recover trust property and any accretion thereto. And the writer, for his part, would advocate its adoption in English law, even against the background of the law as it is now. If the claimant wants a monetary judgment, and is not concerned with priorities, he sues personally. If he wants to claim specific property, he asks for a constructive trust order. If he wants or can only assert part interest in specific property, he asserts a lien over that property, and must now argue his right to a first lien. The ad-

34. L.Q. Rev. 29, 42 (1938).

35. 3 Scott, Trusts §§ 462-63 (1939).

vantage of the clarity of this scheme seems to the writer to outweigh all other considerations.

What is more important, however, is that in its conception of the constructive trust the *Restatement* assumes two things of considerable significance. First, that law and equity are so related that the constructive trust can simply complement the remedies at law by being available when the legal remedies are inadequate.[36] Secondly, that if a right to or over specific property is available, it also involves, in respect of that property, a right to priority over the general creditors, a priority which can only be avoided by one of the defenses outlined.

A. *Complementing the Remedies at Law*

Let us take the first assumption. It is difficult to say how a proprietary constructive trust would complement the personal actions at law and in equity, because there is so little authority in English law. What little there is concerns itself solely with the breach of fiduciary relationships. One problem in saying that proprietary remedies shall be available only when personal remedies are inadequate is that personal actions may not be available when unjust enrichment has occurred. Should the claimant have a right in specific property when he has no personal action? Should a real right be permitted to arise to supply the lack of a personal right?

I sell you my car, which I know to have an irritating engine fault. The fault is spasmodic, and gives particular trouble in low winter temperatures. The sale takes place in summer, and the fault is then much more difficult to discover on inspection. The car looks well, and the engine sounds well. You buy at a price which reflects those qualities. I make no representations or warranties, but I know that that car is going to run you into considerable expense when the winter comes. Indeed, that is the main reason I am selling the car. As Lord Atkin reminds us,[37] there is no recovery for money had and received in these circumstances. Indeed, there is no remedy at law; but does this necessarily bar recovery of your money by a proprietary lien remedy? I may even concede that the down payment on a new car, which I have just acquired, was the same sum which you paid me. Should you not in justice have a lien on my new car for the monetary difference between the true value of the vehicle you bought from me, and the price you paid? And, if you can show that I deposited the sale money in a bank savings account which has since earned interest or any similar accretion, should you have no remedy at all against me? It is arguable against such a lien, of course, that

36. For introductory remarks, see RESTATEMENT, RESTITUTION § 160, comment *e* (1937).

37. *Supra* note 6.

you should have protected yourself by securing warranties from me, and that you have only yourself to blame for the expense of repairs. But the fact is that you did not, and that I was wise enough to keep myself on the right side of actionable fraud. There is much to be said both for the justice and the injustice of letting this loss lie where it falls. On the one hand, it is possible to say that this is not a restitution situation since here is a deliberate lacuna in the law of contract. The parties have satisfied the requirements in order to bring a contract into existence, and thereafter their remedies and the scope of those remedies are governed by contract law. On the other hand there is much appeal in the contention that before English law has explained satisfactorily why some unjust enrichment situations are not rectified and has worked out a logical and defensible set of rules on when conversion, detinue and the indebitatus accounts can be brought,[38] the constructive trust should not be restricted to those situations where there is an action at law, but the defendant is insolvent.

B. *Constructive Trust as a Right To Trace; and Subrogation*

Second, should the constructive trust carry an automatic right to trace into the assets of the insolvent withholder, a right lost only if one of the restitutionary defenses is available? Should the duty to account be a distinct issue from the right of the claimant to trace? The question has been put in this way:

> Even in the case of an express trust, such as *Williams v. Barton* [1927] 2 Ch. 9, it is difficult to see why, supposing the defendant to have become bankrupt, the plaintiff should have priority over the defendant's general creditors in respect of the sum earned on commission. What is the principle that prefers that plaintiff to the plaintiff in *Brook's Wharf v. Goodman* [1937] 1 K.B. 534? Such a question poses large issues. . . .[39]

In *Williams v. Barton*[40] a trustee was employed as a clerk in a firm of stockbrokers, and was paid on a commission basis. The trustee secured for his firm the valuation of trust securities, and was accordingly paid by the firm half the fees which it had charged the trust. The trustee had no part in the valuation, nor in the size of the fees, yet in an action for breach of trust the trustee was held liable to restore completely the half fees he had been paid by the firm. Russell J. had little difficulty in finding that the trustee, being subject to the conflict of interest and duty rule, had increased his remuneration by virtue of his trusteeship. "In my opinion this increase of remuneration

38. The writer has made some comment on this problem. Waters, *Restitution, The Need for Reform*, 17 CURRENT LEGAL PROBLEMS 42 (1964).

39. Davies, *supra* note 3, at 595-96.

40. [1927] 2 Ch. 9.

is a profit made by the defendant out of and by reason of his trusteeship, which he would not have made but for his position as trustee."[41] The problem in *Brook's Wharf & Bull Whirt, Ltd. v. Goodman Bros.*,[42] however, did not involve the conflict of interest and duty rule. The defendants had consigned goods under contract of bailment to bonded warehousemen, the plaintiffs. The goods were imported by the defendants from Russia, and while in the warehouse were stolen. The Crown exercised its statutory right to claim customs duties on these goods, and under the statute the plaintiffs were obligated to pay. The plaintiffs were refused reimbursement by the defendants, and brought an action to recover the sum they had been compelled to pay. They succeeded before Bronson J. and his judgment was upheld in the Court of Appeal. In effect *A* had had to pay *B's* debt owed to *C*, and *A* sought to recover from *B* the benefit which *B* had gained in the discharge of his debt. "The case is analogous," said Lord Wright, "to that of a payment by a surety which has the effect of discharging the principal's debt and which, therefore, gives a right of indemnity against the principal."[43] The plaintiffs' liability to the Crown was analogous to that of a surety.

In the *Williams* case, the trust recovered the commission because of the rule in *Keech v. Sanford*,[44] that a trustee shall not allow his interest to conflict with his duty. This rule is applied strictly because the courts have only the trustee's word as to the real intention behind his acts, and the value of the trust as a working concept hinges upon the disinterested business efficiency of the trustee as the person with sole powers of management and disposition. And in the *Brook's Wharf* case, though to date English law has not developed the doctrine of subrogation so extensively as have American jurisdictions, it is possible in the event of the debtor's bankruptcy that the courts would subrogate the claimant to the rights of the Crown against the insolvent debtor.[45] The answer to Mr. Davies' question, then, is that the whole basis of the trust concept requires that the trustee be effectively deterred from putting his interest ahead of his duty. The obligation to

41. *Id.* at 12.

42. [1937] 1 K.B. 534 (1936).

43. *Id.* at 544.

44. Cas. t. King 61, 1 Eq. Cas. Abr. 741 (1726).

45. The possibility is, however, a slim one. Subrogation in English law is only applied in certain situations. See COFF & JONES, RESTITUTION 375-92 (1966); 14 HALSBURY, LAWS OF ENGLAND 618-19 (3d ed. 1956). Suretyship is one of these, and in *Brook's Wharf*, as we have said, Lord Wright several times analogises the statutory liability of the plaintiff to pay the customs duties to suretyship. On the other hand the preferential right of the Crown to tax or duty payments stems from consideration of public policy which would not necessarily apply to any private citizen who seeks subrogation to the Crown's right.

turn over to the trust any advantage that *could* have resulted from the pursuit of interest, compels utter loyalty to the trust. The plaintiff warehousemen in the *Brook's Wharf* case were not express trust beneficiaries. And, if this loyalty principle is not satisfactory, then we return to that same basic question of whether restitution remedies, and the problem of what is a sufficiently unjust enrichment to merit remedy, should invade the law of trusts and other distinct fields of obligation.

But Mr. Davies' question becomes more forceful, one would suggest, if it is assumed that Barton was not a trustee, but an agent of the claimant. Let us again assume that Barton, the agent, is insolvent when the claim for the commission is made by his principal. In these circumstances the principal will be able to trace the commission moneys until they are no longer ascertainable among the insolvent agent's assets, and in this way the principal will be in the position of a secured creditor. The body of unsecured creditors will accordingly take less on the dollar than they would have had the commission moneys not been ascertainable. On the other hand, in the event of Goodman Brothers' insolvency the claimants in the *Brook's Wharf* case would have found themselves merely subrogated to the paid-off creditor,[46] and their chances of recovery in full would have depended quite fortuitously on the type of creditor in whose rights they found themselves subrogated. Subrogation to the secured creditor is the most fortunate outcome for the claimant, assuming that the security has not been disposed of before the payor of the debt claims subrogation rights. And subrogation to the preferred creditor holds more promise for the claimant than subrogation to the general creditor. But it is the general creditor who is most likely to have pressed the debtor for payment, and if the debtor has already achieved payment or acquired the claimant's money for this purpose, in either case by wrongful action, the claimant will consequently find himself more often with only the rights of the general creditor.

This makes the *Restatement* look arbitrary, for the constructive trustee with his right to trace is really a most fortunate man. Is this a satisfactory result? Should priority over the general creditors of the insolvent recipient of gain turn upon the accident of the mode of deprivation inflicted upon the claimant? Should it turn, that is to say, upon whether property over which the claimant can assert proprietary rights has come into the hands of the wrongdoer or his transferee, so that the constructive trust remedy becomes available to the claimant? Second, should the unfortunate claimant, whose resources paid off an innocent third party, find that his ranking among the creditors de-

46. If they had a right of subrogation.

pends upon the chance of which creditor was paid off with the claimant's money?

1. *The Unjust Enrichment View.*[47]—There are two possible lines of argument on this point. The first stresses the fact that remedies are applied because unjust enrichment has occurred. And if there has been unjust enrichment, there is no reason why one wronged claimant should be in any better position in relation to general creditors than other claimants. Why should the claimant who can ascertain his property among the wrongdoer's assets, or possibly the third party's, have that security while another claimant with an equally strong equity to restitution finds himself taking his luck among the body of creditors? It is sometimes argued that the reason for giving priority over the creditors to the claimant who can still ascertain the property, to which he makes claim, is that he did not take any commercial risk in leaving property in the wrongdoer's hands or in advancing loans or credit to him. The man whose property was taken, or even whose office held by the wrongdoer was abused for gain, took no risk. The general creditors did. From this point of view it is logical that the creditors should not expect that any property, which finds its way by mistake of the transferor, the fraud or duress of the bankrupt into the bankrupt's hands, should increase the fund available for distribution among the creditors.

But, the unjust enrichment argument proceeds, should this reasoning apply only to the claimant who is fortunate enough to be able to point to the property which he claims? If the claimant's moneys have been used to pay off one general creditor, then the bankrupt's assets are increased by that sum, because that standing sum of assets is now to be distributed among the creditors, less one. Should not the claimant now be entitled to a charge or lien over the assets available for distribution among the unsecured creditors? This would recognise that the inequity of the claimant's deprivation puts him ahead of the general creditors who deliberately took the risk of the wrongdoer's continued solvency. In other words, it is no justification of the superior restitution rights of the man who can identify his property that he, unlike the creditors, took no commercial risk. Nor did the claimant, whose only rights lie in subrogation, take such a risk.[48]

English law, as we have said, has a less developed use of subrogation, and this means that the claimant in *Brook's Wharf*, faced

47. Perhaps it would have been more exact to call this the "unjust deprivation" view, for that is really the point. The wrongdoer has deprived the claimant of his property.

48. The unjust enrichment view has clear points of contact with the "swollen assets" theory, familiar in the United States.

with the insolvency of the wrongdoer, may be in an even worse position than his counterpart in the United States.

2. *The Benefit-Acquired View.*—The alternative line of argument is that claims based on unjust enrichment assume that a benefit has been acquired. The correct question is, who has benefited or stands to benefit by reason of the deprivation of the claimant. It is that benefit which must be prevented from unjustly enriching another. If property has passed from the claimant to the wrongdoer, or specific property in the wrongdoer's possession is earmarked as the produce of conduct abusive of office, then it is right that the claimant should have rights of property over that asset or obvious benefit, whatever form it may take. The creditors of the wrongdoer cannot possibly assert that the ascertained property should go to swell the general assets of the bankrupt. The creditors of the insolvent transferee who knows of the transferor's wrongdoing are in no better position. In other words, the equity of the claimant is so obvious that if ascertainable property which is the product of the wrongful act exists, the claimant should have it. So much for the proprietary remedies of constructive trust and equitable lien.

What of the claimant in a *Brook's Wharf* situation where the wrongdoer is insolvent? Here it would be stressed that the general creditors gain nothing if the claimant is subrogated to the rights of the paid-off creditor. There were x creditors claiming the general assets; there remain x creditors, though one creditor has given his place to the claimant.[49] It is arguable, though, that if there is evidence that the wrongdoer would in any event have satisfied the now paid-off creditor out of his remaining funds, had the claimant's money not been available, then the claimant's money has in effect increased the bankrupt debtor's assets by preventing depletion. And, it seems, this argument has succeeded in the United States.[50] But the weight of American authority appears to be against it.[51]

The real difficulty, of course, is that the paid-off creditor is the one who has benefited and he will almost always be a bona fide purchaser for value, so that no claim can be brought against him. There is no overcoming this difficulty. In the outcome most courts in the United States seem to feel that subrogation is the answer to the *Brook's Wharf* insolvency problem. In England, too, it could be said by way of justification of a subrogation result that the existence of the nation-wide

49. Nor, of course, does the bankrupt acquire any benefit. He still faces x creditors.

50. Jones v. Chesebrough, 105 Iowa 303, 75 N.W. 97 (1898).

51. 3 SCOTT, TRUSTS § 521.2 (1939). Scott appears to be the leading proponent of the benefit acquired view, though the writer must confess that he is not convinced by Scott's forceful advocacy. See DAWSON, UNJUST ENRICHMENT 31-32 (1951); Taft, *A Defense of a Limited Use of the Swollen Assets Theory Where Money Has Wrongfully Been Mingled With Other Money*, 39 COLUM. L. REV. 172, 174-75 (1939).

banks does away with so many familiar American problems arising out of the failure of private local banks, and that it is the secret lien that general creditors are concerned about rather than the claimant in unjust enrichment, who would in any case be a rarer phenomenon. But of course these facts can also be used to bolster the unjust enrichment view. If there is no considerable volume of such cases of unjust enrichment, at least the *Jones v. Chesebrough*[52] decision should prevail, giving priority to the claimant when there is evidence that the wrongdoer would have paid the pressing creditor out of his own assets. The benefit-acquired view, however, would still regard subrogation as sufficient remedy.

3. *Criticism of These Two Views.*—To the writer there seems a nice balance between these arguments. There is much force in the suggestion that, if there is to be a proprietary constructive trust, subrogation should give way to a right to an equitable lien over the assets of the insolvent, thus giving priority to the unfortunate who has paid another's debt.[53] On the other hand there is equal force in the fact that a bona fide purchaser halts all proprietary claims since he prevents the *Brook's Wharf* claimant (assuming insolvency) from ever having a proprietary remedy. The claimant can only take over the personal claim of the unsecured creditor. The paid-off unsecured creditor is a bona fide purchaser for value.[54]

In these circumstances, it seems to the writer unsatisfactory to deny *any* proprietary remedy (constructive trust or lien) because *some* acts of deprivation immediately result in the benefiting of a bona fide purchaser for value. To deny the remedy would seem almost churlish. It seems to be saying that if we cannot give a right to specific property in all cases, we will give it in none. This may be carrying "equity" to the point where it practically defeats itself. The right to trace might be at the discretion of the court, as we have previously said, but this must essentially mean that the claimant's right to label the defendant a constructive trustee is to be at the discretion of the court. Courts in the United States appear to have avoided this result by developing further than we have done the bars to the constructive trust, in particular, the defenses of change of

52. *Supra* note 50.

53. In the writer's view Taft, *supra* note 51, puts up a very persuasive case on the merits of a limited "swollen assets" theory. Particularly interesting is the view that as the equitable lien, unlike the constructive trust, is not necessarily tied to the situation where the property taken can be identified, there is no reason why it should not be imposed on equitable considerations over the general unencumbered property of the wrongdoer. *Id.* at 186-89.

54. Though Taft, *supra* note 51, thinks the "swollen assets" theory can be of value where the misuse of the claimant's moneys took place during the solvency of the wrongdoer. At that time uncommitted moneys of the wrongdoer could have been used to pay off the pressing creditor.

position and the meaning of purchaser for value. In the outcome the writer is persuaded that the American courts are right. Certainly it is difficult to see how a constructive trust can give a right to specific property and deny the right to trace. If it is justifiable for the claimant to recover earmarked property in the solvent defendant's hands, why may it no longer be justifiable when all the assets in the defendant's hands are insufficient to meet the general creditors?[55] The general creditors may well have a better argument to resist the claimant's tracing when the constructive trust extends beyond the fiduciary relationship to the remedying of all types of unjust enrichment. But the general creditors in England could not at present put up this argument. The possibly limited value of the subrogation right is not in itself persuasive that there ought to be a distinction within the constructive trust of the duty to account and the right to trace. Rather than take away a *right* to trace, it would be preferable to have a well-developed set of defenses to an assertion of this right, or even a priority over general creditors instead of subrogation.[56]

As a postscript to this criticism of the two views, it must be said that in England it is odd that money had and received, and money paid, are such complementary remedies at law, while the real rights, so important when the benefited party is bankrupt, may well be nonexistent. With us the constructive trust needs the existence of a fiduciary relationship, and subrogation may not be available, applying as it presently does to only a narrow set of circumstances. This is our present problem. We are still far back on the unjust enrichment trail.

4. *The English Position on Subrogation.*—In England there is some precedent apparently giving such priority over general creditors, but it is merely a priority within the principle of subrogation. It is fundamental that in insurance law the insurer is "entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued. . . ."[57] This means that, if the assured has a contractual right to a sum of money, is in receipt of

55. The property does not cease to be identifiable when general creditors enter upon the scene.

56. The formular character of the doctrine of tracing probably pleases few people in its attempt to hold the balance between claimants against wrongdoing and general creditors. It involves a heavy burden of proof on the claimant, and its fictions and presumptions, as Taft says, leave little room for admiration. But at least it is a bulwark against unpredictable judicial discretion, and on that score is in principle defensible.

57. Castellain v. Preston, 11 Q.B.D. 380, 388 (1883).

indemnification from the insurer because of non-receipt, and subsequently receives a sum of money from the contractually obligated payor, the insurer is so subrogated to the rights of the assured that he can claim that specific sum ahead of the assured's general creditors.

In *In re Miller, Gibb & Co.*,[58] though the court found that there had been a legal assignment from the assured to the insurer of the rights to the sum due, and that this had taken place prior to the assured's liquidation, Wynn-Parry J. made it clear that the effect of the insurer's subrogation to the contractual rights of the assured would be that, should any sum be subsequently paid to the assured after indemnification, the assured would be a trustee of that sum for the insurer. And in *In re Johnson*,[59] Jessel, M.R., pointed out another case where subrogation would give creditors of the bankrupt a right to specific property. An executor/trustee has powers to carry on a trader's business, and the settlor/trader directs that a specific portion of his estate shall be available for this purpose. The trustee carries on the business, becomes personally bankrupt, and it is then found that he owes moneys to the trust estate, and other moneys to creditors of the business.[60] The effect of the creditors' stepping into the trustee's shoes, said Jessel, M.R., was that they took both the disadvantages and advantages of his position. Repair of breaches of trust would be a first charge on the trustee's assets, but the business creditors would be entitled thereafter to be subrogated to the trustee's rights of indemnification out of the specific portion of the estate designated for running the business. It follows that, had there been no breaches of trust, and the portion of the estate set aside to be used for trading had alone not deteriorated in value, the creditors would yet have been able to idemnify themselves, ahead of all others, out of that trading fund.

In both these situations, however, the right is essentially of subrogation. Neither in the insurance case nor the trust estate case could the insurer or creditor do other than enforce in his favour the rights to which he was subrogated. These cases are no authority for a priority over the general creditors; they are merely examples of claims to specific assets arising out of subrogation to contractual rights. *In re Johnson* is a good example. The trustee went bankrupt owing to the estate moneys for which he had not accounted, and owing to creditors of the business which he had carried on, the payment of their bills. The estate beneficiaries took priority. The technical explanation is that the creditors of the business stood in the

58. [1957] 1 Weekly L.R. 703, 710, [1957] 2 All E.R. 266, 271 (Ch.).
59. 15 Ch. D. 548 (1880).
60. The trustee becomes indebted to the business creditors in his own name.

bankrupt's shoes, and the bankrupt's right to indemnification out of the trust fund assigned for trading could only exist if he himself were not otherwise in debt to the estate for breaches of trust. But this merely conceals the real question. Why did the trust beneficiaries prevail over the business creditors? Because the personal claim of the trust beneficiaries over the bankrupt trustee's assets was a remedy superior to the mere subrogation of the creditors to the trustee's rights of indemnification out of the trust fund, even though part of the trust assets were set aside for trading. Indeed, once Jessel, M.R., had determined that the creditors' right was merely one of subrogation, the case was at an end. The breaches of trust were not then questioned as giving other than a first claim to the beneficiaries.[61] For this reason, it is hard to accept Jessel, M.R.'s comment that the creditors' right to be indemnified out of the assets devoted to trading, "is a mere corollary to those numerous cases in Equity in which persons are allowed to follow trust funds." It is a proprietary right in the sense that it is a right to attach specific property, but it is also personal insofar as it must give way to a superior and fully proprietary right.[62]

V. The Values of a Proprietary Remedy

Looking at the *Restatement* and the whole question of a proprietary constructive trust remedy from the position of an English lawyer, we are brought back to the two dominant questions. First, should the new constructive trust in English law, like the *Restatement* trust, be proprietary in character, that is, concerned only with specific restitution? Second, assuming that it should be proprietary, should the right to specific restitution survive the insolvency of the benefited party?

A. *"Proprietary" Remedies at Law and in Equity*

On the first point, it has already been argued that a general remedy under the name of constructive trust, permitting the courts to award either specific restitution or a money judgment, is undesirable. What we should be concerned with today in England is the substance and merits of restitution, not so much with the scope of remedies and the niceties of pleading. We want a medium for the clear judicial

61. Had the executor/trustee used his office to win a commission from a third party, and mixed that sum with the fund set aside to meet business expenses, the trust beneficiaries could also have followed with priority into that mixed fund.

62. As this paper has argued, subrogation merely constitutes a compulsory assignment of the creditor's contractual rights to the claimant. There is no right to specific property of the bankrupt. On this question of subrogation, see Goff & Jones, Restitution 40, ¶ (e) (1966).

question, what does the claimant want? We do not want the age old query, has he brought the right action? In the writer's view, we will get the right question if our remedies exactly frame what the claimant wants. Broad remedies in equity tend to be a medium for judicial freedom in making orders, not for the clarity of the law. Again, a proprietary trust faces the court with a clear choice—monetary judgment or an order giving an exclusive right to specific property. Different considerations go to each. Then, third, much needs to be done in building up our proprietary remedies in English law. They just do not exist in many fields, causing an immediate void.[63] Is not this the obvious role for the constructive trust—to raise the question how and when there ought to be a right to specific property rather than for equity to duplicate personal remedies?

One of the main arguments for the proprietary constructive trust, however, seems to be rooted in the nature of quasi-contractual claims at law. It is well established that the reason for the action for money had and received being a personal action is that property in the money has passed from the claimant, or was never in the claimant, so that he is compelled to seek an equivalent sum. However, this formulation conceals the true nature of the right the claimant seeks to enforce, which is not compensation or damages, but the restitution of that sum to which he was entitled. It has recently been said, as the basis of a theory of quasi-contracts, that "whereas the *right* to money is proprietary, the *action* by which we enforce it is 'personal.' "[64] And there are judicial dicta of weight in English law to support this analysis.[65] Indeed, the old common lawyers thought that the action for money had and received was logically a remedy for the following of moneys into the defendant's assets. It was not the *principle* of following that pulled the remedy up short; it was the technical arguments about mixed funds. To the writer's mind this means that, since a theme of property recovery allies both the largest area of quasi-contractual remedy and the equitable remedies of constructive trust, lien, and account, there is the stronger case for not deliberately creating at this stage a pattern of overlapping remedies.

Are the considerations, which would encourage equity to award a monetary judgment to the claimant, so different from those which would exist at law that in 1966 we need a remedy which obviously overlaps the field of the money had and received action? It is true that the criteria of equity have always been broad, moralistic, and vague enough to make the equitable remedies more sensitive to such situations as unjust enrichment, and more discretionary in ap-

63. See *id.* at 40 n.39.
64. STOLJAR, QUASI-CONTRACT 7 (1964).
65. *Id.* at 6-7.

plication. But then, as Dr. Stoljar has recently shown in considering the "following" aspects of the legal remedy, the money had and received action was unnecessarily stunted by uncomprehending courts. Its potential remains enormous.[66] It would be a happier solution if the legal remedy dealt with personal money claims, and constructive trust were to find its natural function in handling specific restitution claims. At the moment the constructive trust fiduciary action and the action for money had and received overlap. What remains for equity to do by way of monetary judgments, and ideally this would be very much a residual remedy, could be done by a broadened action of account. In the last analysis, if new situations of unjust enrichment are to be remedied, it would be much better if they were considered within the context of the law of restitution as a whole, rather than in terms of whether a remedy can be found or be pressed into service.

Where the claimant seeks recovery of land or chattels which he asserts are unjustly withheld to the solvent defendant's benefit, but title to which has previously passed to the defendant from the plaintiff or was never in the plaintiff, then one can see no objection to the constructive trust complementing in this way, too, the inadequacy of the legal remedies.[67] The accent of constructive trust invocation is again complementing of existing remedies. Supposedly, it could again at this point be asked, if we are to go as far as this with our constructive trust, why impose any limitations on this equitable remedy. Let it apply in *any* circumstances, whatever the subject matter sought, if the plaintiff feels the doctrines of equity are a better medium for the arguments which he wishes to present. Why should the plaintiff be told that the remedy at law is adequate for his purposes, so that he must make his way on a moot point through the old common law cases rather than take advantage of the no doubt crisper and cleaner lines of an equitable remedy? The answer to such an objection seems to spring from the demise of the old Court of Chancery. Our pattern of remedies should reflect a pattern of consistent thought on when there ought to be restitution, how far it should extend and what form it ought to take. It is more than improbable, one would concede, that the single jurisdiction in England and Wales is going to produce such a proliferation of remedies as exist in the United States, but this seems an insufficient reason for letting Equity in England have its head, so to speak, in 1966. Its role should be to supplement the law in a new and orderly fashion.[68]

66. *Id.* at 99. See also GOFF & JONES, RESTITUTION 36 n.12 (1966).

67. *Cf.* GOFF & JONES, RESTITUTION 20 (1966). Bannister v. Bannister, [1948] 2 All E.R. 133 (C.A.), is exactly on these lines.

68. A critic of this might say that the constructive trust ought to be sufficiently

Another thing which gives one confidence in this argument is that, though the reason for the quasi-contractual remedies being personal is largely the product of history and of the forms of action employed to gain recovery, times are changing. Today in England there is widespread recognition that there was little, if any, justification for the judicial castigation Lord Mansfield received in English courts during the early twentieth century for his view that the basis of the indebitatus claims lay in equitable principles.[69] Since there is this recognition, and a good argument that the action for money had and received may still be available against third parties,[70] we come yet closer to the interrelationship of all "proprietary" remedies at law and equity.

But if the constructive trust is to have shape and an obvious and exclusive place in the pattern of remedies, rather than act as a general catch-all for situations where for one reason or another other remedies are not open to the claimant,[71] we have both to be watchful of misleading trends, and ready to analyse the equitable rights of which we speak. Indeed, the present need of this analysis seems only likely to be satisfied if we disassociate the right to monetary restitution from the right to specific property. Let us look at one misleading trend, and at one situation where analysis is needed.

1. *Avoidance of False Hares.*—At present in English law the constructive trust is a post facto rationalisation. If a man is a fiduciary, then he may not, without informed consent, employ his office or his beneficiary's property in any way so as to secure personal material advantage. Any proprietary advantage which he makes must be disgorged. Some courts, having applied this rule, will then describe the fiduciary as a constructive trustee or simply as a trustee. Others will not bother to echo this incantation. Either technique merely describes the results of the relief; the inspiration for the liability comes from the express trust rules. Indeed, the obvious area in which the phrase "constructive trust" or "made a trustee" is likely to be used is in connection with express trust actions, where, ironically enough, it is hard to discover clear unjust enrichment prevention thinking at all.

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flexible in character to come to the relief of the law, as Lord Cairns' principle in Hughes v. Metropolitan Ry., 2 App. Cas. 439 (1877), came to the relief of the law in the guise of equitable estoppel. To the writer's mind, however, the substance of the law of restitution is still too little settled for a real parallel with the law of contract to be drawn.

69. The latest example is GOFF & JONES, RESTITUTION 3-14 (1966).

70. See authorities cited in note 66 *supra*.

71. Sinclair v. Brougham, [1914] A.C. 398 (no contract could be implied at law and the equitable remedy was therefore pressed into service).

Suppose an agent to the trustee acts in such a way that he deliberately puts his own personal interests ahead of the trust affairs which he is conducting. He may act fraudulently, in which case he would obviously be accountable, or he may simply have so involved his personal interests in the matter in which he is concerned as an agent (to use Lord Langdale's words),[72] that he is held accountable. He may have acted in collusion with a trustee who was himself acting in breach of trust, or he may be acting alone. In each case (again to borrow Lord Langdale's words), the question is whether the act of the agent has been such that the court "ought to impute to [the agent] . . . the character of a trustee."[73] But, as Lord Selbourne put it,

> strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps, of which a court of equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.[74]

Lord Langdale's language is more exact in defining the types of conduct which will result in the liability to account, but we are not concerned with this matter. Rather, we are concerned with the order making the agent a trustee. The cases are confused in the use of the terms constructive trustee and trustee *de son tort,* because whichever one is used is of no real importance. The effect of the order is not necessarily to make the agent disgorge personal gain, but usually to make the agent subject to the express trustee's liability, a personal liability arising out of breach. The obligation may be to repair loss which the trust has suffered or restore gain made by employment of the agency office. But, essentially, the agent is made subject to the breach of trust action, which holds the express trustee personally liable and, in the event of the trustee's insolvency, allows tracing of ascertainable property in which, through the breach, the trust has an equitable proprietary interest.

This means that the agent will have to make good out of his own pocket any trust property which was lost through his essentially self-seeking act, as in *Alleyne v. Darcy.*[75] It is irrelevant that the agent never made any personal gain out of his act, and equally irrelevant even that he never had control of the trust property.[76] It is his *act*

72. Fyler v. Fyler, 3 Beav. 550, 561, 49 Eng. Rep. 216, 221 (Rolls. 1841).

73. *Ibid.*

74. Barnes v. Addy, L.R. 9 Ch. 244, 251-52 (1874).

75. 4 Ir. Ch. R. 199 (1854).

76. Participating in an express trustee's fraudulent scheme would be enough.

which makes him subject to the breach of trust action. Kekewich J. in *In re Barney*,[77] however, was uncertain how an agent could be any kind of trustee when he has never had control of trust property. His judgment, therefore, equates the constructive trustee and the trustee *de son tort*, and, because there has been no subsequent quarrel with this, his judgment also makes it perfectly clear that it does not matter what you call the agent who is subject to the breach of trust action. The decisions do not seem too concerned whether the man "made a trustee" is constructive, *de son tort*, or simply a trustee, and whether or not that man had control of trust property, so long as the conditions for his subjection to the breach of trust action are clearly understood.[78]

It is clear there has to be a remedy in this kind of case. Few would dispute this, and subjection to the remedy for breach of trust makes perfectly good sense. But would it not be better to have the description of the process as "making the stranger a trustee," or even as trusteeship *de son tort*, and leave it at that? There is no remedial constructive trust here. The writer can find no enthusiasm for including Lord Selbourne's constructive trustee within the situations that are suitable jumping-off points in the formulation of an independent remedial constructive trust. Dare one suggest that to follow Lord Selbourne's constructive trust thinking is to be more imbued with express trust analogy than to employ "constructive trust" as the title for a specific restitution action?

2. *Analysis of Equitable Rights.*—The need for clarification of what we mean by equitable rights, and for a distinct allocation of equitable remedies to a place in the framework of restitution remedies, is well brought out by the discussion in English courts over the recovery by the principal from the agent of bribes or commissions which the agent has received from third parties. The entitlement of the principal (*P*) to any moneys or property which the agent (*A*) gains through abuse of his office is debated by no one. The discussion is on a purely procedural point. What remedies are available to *P*, and what do the remedies secure to him? It is important to remember this.

It is well known that in *Lister & Co. v. Stubbs*[79] the Court of Appeal held, following *Metropolitan Bank v. Heiron*,[80] that, since *P* did not have title to the commission, he could not gain an injunction against

77. [1892] 2 Ch. 265.

78. MARSHALL, NATHAN'S EQUITY THROUGH THE CASES 470 (4th ed. 1961), suggests a possible reconciliation of the cases.

79. 45 Ch. D. 1 (1890).

80. L.R. 5 Ex. D. 319 (1880). Here the question was whether the Statute of Limitations ran against the principal who claimed a secret commission received by his

A to prevent *A* from disposing of either the investments or the proceeds of the commission, nor could he gain an order requiring other investments to be brought into court. The relationship between *P* and *A*, said Lord Justice Lindley, was that of creditor and debtor, not trustee and *cestui que trust*. There was no doubt that *A* had to pay over and account for the money he had received, but to call him a trustee of those moneys would be unsound, "the unsoundness consisting in confounding ownership with obligation."[81] The duty of the fiduciary to hold in trust could only arise when moneys, or other property belonging to *P*, came into *A's* hands. In the court below, Stirling J. was prepared to say[82] that *P* might sue *A* in an action for money had and received, but since the money had never belonged to *P*, *P* could not invoke *Taylor v. Plumer*[83] and follow the money into the investments. Putting it in the language of equity, and adopting Lord Justice Cotton's words in *Metropolitan Bank*, Stirling J. said this was "a suit founded on breach of duty or fraud by a person who was in the position of trustee, his position making the receipt of the money a breach of duty or fraud. . . . [But] the whole title [of *P*] depends on its being established by a decree of a competent court that the fraud of the trustee has given the *cestui que trust* a right to the money."[84]

The Court of Appeal agreed, Lord Justice Bowen concurring.[85] In *Metropolitan Bank*, however, Lord Justice James had described the offence of *A* as "concealed fraud." The fiduciary, who received a bribe for misconduct, had to give it up. "But it must be borne in

agent. The court held that, since the commission had never belonged to the principal, he was not in an analogous position to the beneficiary of an express trust. Therefore the statutory period did run from the discovery by the principal of the agent's receipt. The writer has elsewhere discussed how different is this constructive trust problem of the limitation statutes from the nature and operation of the remedial constructive trust. WATERS, THE CONSTRUCTIVE TRUST: THE CASE FOR A NEW APPROACH IN ENGLISH LAW 292-321 (1964). In Lister & Co. v. Stubbs, *supra* note 79, the principal was seeking an injunction and an order against the agent, presumably intending to argue at a later date the agent's fraud in acquiring the commission. On its facts Metropolitan Bank, *supra*, was a reasonable enough decision, but the problem of Lister & Co. v. Stubbs, *supra* note 79, was on a different point and properly involved different reasoning. Certainly there is no evidence that any member of the Metropolitan Bank court was thinking of anything other than the limitation issue.

81. Lister & Co. v. Stubbs, *supra* note 79, at 15.

82. *Id.* at 10. He based this conclusion on Morrison v. Thompson, L.R. 9 Q.B. 480 (1874), not on the words of Bowen, L.J., in Boston Deep Sea Fishing & Ice Co. v. Ansell, 39 Ch. D. 339 (1888) to which he made no reference.

83. 3 M. & S. 562, 105 Eng. Rep. 721 (K.B. 1815).

84. Lister & Co. v. Stubbs, *supra* note 79, at 9.

85. Cotton, L.J., agreed with his own judgment in the *Metropolitan Bank* case, and Lindley, L. J., decided that the relationship was one of debtor and creditor, and referred to no precedent at all. No other distinction was made between legal and equitable rights.

mind," he had said, "that that liability is a debt only differing from ordinary debts in the fact that it is merely equitable . . . ."[86]

This view of the nature of *P's* rights has caused trouble ever since. First of all, there is an action at law and an action in equity, and because they entirely duplicate each other, and are based on the same broad equity of which Lord Mansfield spoke in *Moses v. Macferlan*[87] the courts have found little incentive to analyse either precisely. After all, the rightness of *P's* recovery is self-evident. Second, the objection that *A* cannot be a constructive trustee of the proceeds of the bribe or illicit commission until a decree of the court has been made because to do otherwise would confuse ownership and obligation, strikes at the whole basis of preventing nnjust enrichment. There may indeed be debate as to whether the trust arises at the moment of the wrongful acquisition, or at the time of the court decree with retrospective effect to the moment of wrongful acquisition; but it is preposterous that the inevitable time lag before a decree can be gained should allow a known dishonest agent to put the known proceeds of ill-doing beyond the limits of traceability. No procedure is justifiable which allows such timely dissipation to occur. Yet, due to the confusion over the nature of the equitable rights, this objection has never clearly been stated, least of all in the House of Lords.

In *Boston Deep Sea Fishing and Ice Co. v. Ansell*[88] in 1888, eight years after *Metropolitan Bank,* and two years before *Lister v. Stubbs,*[89] Lord Justice Bowen said that the action for money had and received to *P's* use certainly lay to recover a secret bonus, but the use arose from the relation of principal and agent.[90]

> It is because it is contrary to equity that the agent or the servant should retain money so received without the knowledge of his master. Then the law implies a use, that is to say, there is an implied contract, if you put it as a legal proposition—there is an equitable right, if you treat it as a matter of equity—as between the principal and agent that the agent should pay it over, which renders the agent liable to be sued for money had and received, and there is an equitable right in the master to receive it, and to take it out of the hands of the agent, which gives the principal a right to relief in equity.[91]

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86. Metropolitan Bank v. Heiron, *supra* note 80, at 323.

87. 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760).

88. *Supra* note 82. In this case Kekewich J. and the Court of Appeals made a finding of fraud.

89. *Supra* note 78.

90. In the court below Kekewich J. appears to have taken the view that the action for money had and received would not lie. Money gained by secret bonus could not have been received to the principal's use. Boston Deep Sea Fishing & Ice Co. v. Ansell, *supra* note 82, at 345.

91. *Id.* at 367-68. Cotton and Fry, L.J.J. do not discuss this point.

Were the legal and equitable actions, whatever the character of the latter, both dependent on the fiduciary relationship? Even if there were privity between *P* and *A* sufficient to enable the legal action to be brought, the action at law achieved nothing less than the action in equity, if, which is not clear, Lord Justice Bowen conceived of the latter as personal only.[92]

It was in *Metropolitan Bank* in 1880 that the "equitable right" was dubbed the right to compel payment of an equitable debt. This view stuck. It was adopted in *Lister v. Stubbs* in 1890, and in *Powell & Thomas v. Evan Jones & Co.*[93] in 1904. The Court of Appeal there felt bound to say that *Lister v. Stubbs* had negatived *P's* right to make *A* a trustee of his nondisclosed contractual right to receive future commissions from the third party, and discussed the matter no further. In *Attorney-General v. Goddard*,[94] where the Crown was seeking by English information to recover bribes received by a police sergeant who had been charged with the task of making certain enquiries, Rowlatt J. had no doubt that *Metropolitan Bank*, the *Boston Deep Sea Fishing* case, and *Lister v. Stubbs* had "conclusively" established that these bribes might be recovered as an equitable debt. "Therefore, if it is an equitable debt," he said, "there must be an equitable remedy, and as far as I know the equitable remedy of the Crown is by way of English information. . . ."[95]

Moreover, Rowlatt J. had difficulty with whether the action for money had and received was available. In the *Metropolitan Bank* case both Lord Justice James and Lord Justice Brett had held[96] that such an action would not lie where *P* had never owned the bribe moneys. In the *Boston Deep Sea Fishing* case, and without referring to the earlier view of Lords Justices James and Brett, Lord Justice Bowen held, as we have seen, that the action did lie, it being "contrary to equity" that *A* should retain such money without *P's* knowledge. In the *Goddard* case, Rowlatt J. followed the two earlier judges and held there was no action at law, though he had just quoted Lord Justice Bowen's remarks! So there was room for confusion here, too.

In *Reading v. Attorney-General*[97] in 1951, more difficulties occurred. Military authorities had seized sums which Sergeant Reading had received as a result of lending his uniformed presence to certain

92. Bowen, L.J., made no reference to the views of James, L.J., in the *Metropolitan Bank* case, views probably held by each member of that court.

93. [1905] 1 K.B. 11.

94. 98 L.J.K.B. 743 (1929).

95. *Id.* at 746.

96. *Supra* note 80, at 323 (James, L.J.), 324 (Brett, L.J.).

97. [1951] A.C. 507.

nefarious traffickers in Cairo. His presence had prevented the searching of trucks. Reading now sought by petition of right to recover those moneys, and the three courts who heard the case were concerned to determine whether the Crown would have been able to recover from the sergeant the moneys in question. Denning J. decided the case on simple unjust enrichment principles, holding that the sergeant was not a fiduciary vis-à-vis the Crown.[98]

In the Court of Appeal,[99] Lord Justice Asquith held that there *was* a fiduciary relationship, and that, following Lord Justice Bowen in the *Boston Deep Sea Fishing* case, the Crown could have recovered the moneys either in an action for money had and received to the Crown's use, or as an equitable debt. "Assuming a fiduciary relation is necessary to enable the Crown to recover," he then held that there was such a relation; "But we do not wish to be taken as holding that if the fiduciary relation were absent the appeal [of the sergeant] would necessarily succeed."[100] And that was all. What was the nature of this equitable remedy, which had so baffled Rowlatt J.? Why were the moneys a debt only in this case, and not constructive trust property? Because, while the Crown was in physical possession of the moneys, no decree had yet been made? But then what kind of finding of fraud on A's part is necessary? Did not the court in *Reading* find fraud, and that the moneys were the produce of it? And, if there had been no fiduciary relationship, was it the legal remedy that would have been available to the Crown so that Reading's appeal would still have had to be dismissed? As to the legal remedy, Lord Justice Asquith could not understand, in view of Lord Justice Bowen's later and contrary remarks, why Rowlatt J. had adopted the views of Lord Justices Brett and James that the action for money had and received would not lie. But Lord Justice Asquith added no more insight on the merits of the dispute.

In the House of Lords, Lord Porter thought the fiduciary relationship not essential in order to substantiate the Crown's claim, "but another ground for succeeding where a claim for money had and received would fail."[101] But how would the legal claim, without the principal/agent relationship,[102] get on its feet; especially in view of the

98. Reading v. The King, [1948] 2 K.B. 268. Lord Porter in the House of Lords, Reading v. Attorney General, *supra* note 97, at 514, thought that this was not the "essence" of Denning J.'s judgment.

99. Reading v. The King, [1949] 2 K.B. 232 (C.A.).

100. *Id.* at 238.

101. Reading v. Attorney General, *supra* note 97, at 516.

102. Lord Porter said, "It is true that the right of the master to demand payment of the money is often imputed to a promise implied from his relationship to the servant. I doubt whether it is necessary to raise such an implication in order to show that the money has been received to the master's use . . . ." *Ibid.*

controversy between Lord Justices Brett and James on one side and Lord Justice Bowen on the other? And what are the circumstances in which the learned judge contemplates a failure? Does he mean for procedural reasons or on the merits of the claim? His lordship otherwise agreed with the Court of Appeal, quoted Lord Justice Bowen's words in the *Boston Deep Sea Fishing* case, and made no reference to *Lister v. Stubbs.* Lord Normand was not convinced the Crown would have succeeded in money had and received, but felt the fiduciary obligation of Reading to the Crown required him to give up all profits and advantages. Lord Oaksey agreed with the Court of Appeals, thought there was nothing to prevent an implied promise by the servant to restore from coming into existence, and said nothing about remedies. Lord Radcliffe simply concurred with the Court of Appeal.

Hosts of questions arise from all this, as we have seen. But the most important for present purposes concern the equitable right. If Lord Justice James was wrong in *Metropolitan Bank* in saying the money had and received action would not lie, was his other view correct that there existed prior to the court decree merely an "equitable debt"? In his inconclusive remarks on the "equitable right" in the *Boston Deep Sea Fishing* case, Lord Justice Bowen says nothing of Lord Justice James' remarks. Do we construe his agreement with Lord Justice James from his concurrence in *Lister v. Stubbs*? Rowlatt J. had repeated the words, "equitable debt," in *Goddard,* as had Lord Justice Asquith in *Reading,* but neither examined the point, and Lord Porter in *Reading* merely adopted Lord Justice Bowen's "equitable right" words. So we are left with the authority of *Metropolitan Bank* and of *Lister v. Stubbs.* Nothing has been said to shake the 1880 view that, prior to court judgment, *P* can claim only an equitable debt from *A* who has accepted bribes or secret commissions.[103]

What is this equitable action? As a claim for a debt, it must be personal, and the oddities of the English information aside, it must

103. It is difficult to understand how Reading v. Attorney General, *supra* note 97, can be said to have impaired the authority of Lister & Co. v. Stubbs, *supra* note 79. Would that it did so. The Crown had control of Reading's money, the mouey clearly constituted the proceeds of Reading's wrongdoings, and when Reading sought its return, the courts asked themselves whether the Crown was entitled to it. *I.e.,* had the Crown a remedy with which it could have recovered the money? The answer was yes, both at law and in equity. As to the remedy in equity, the writer cannot see how Reading v. Attorney General, *supra* note 97, makes any advance on the position of Bowen, L.J., in Boston Deep Sea Fishing & Ice Co. v. Ansell, *supra* note 82, which both the Court of Appeal and Lord Porter were content to accept. And, as we have seen, Bowen, L.J., concurred in Lister v. Stubbs, *supra* note 79, two years after the *Boston Deep Sea Fishing* case. Reading owed a debt to the Crown. The Crown won the appeal as a satisfied creditor. Nothing here challenges Lister v. Stubbs, *supra* note 79.

be the action for an account. This action assumes the existence of a fiduciary relationship. Is this what Lord Porter had in mind in *Reading* when he referred to the fiduciary relationship? So is there still a distinction in English law between ownership and obligation, as Lord Justice Lindley said? It seems so. When, then, does the equitable proprietary interest of *In re Diplock*[104] come into existence? This interest requires in English law the existence of a fiduciary relationship, but that was what was held to be present in all the cases under review, except *Metropolitan Bank*.

The truth is that English courts have not been required to think out these questions. And the writer suggests that this general fog of well-meaning equity will always overhang the legal remedies, preventing them, too, from acquiring crisp, clear lines, unless we begin to think in terms of the *place* of constructive trust and lien within the general pattern of restitution remedies. It is difficult to see why we should perpetuate the action for an account as a personal equitable action to remedy unjust enrichment, but there may be a case for the existence of a personal action in equity. If there is, then account is available.

On the other hand, if we are to say that the the equitable right of *Metropolitan Bank* and *Reading v. Attorney-General* is a constructive trust, we are compelled to say that *A* is constructive trustee of a debt. When the decree of the court fastens the duty to restore upon *in specie* property, *A* becomes a constructive trustee of that property. This result may stress the fact that from the moment of acquisition *A* has an obligation to give up the secret commission arising out of his unjust enrichment, possibly at *P's* expense, although it is doubtful whether it does anything more. It creates a comprehensive claim, but the nebulous sort of claim which English courts dislike. Furthermore, while no one doubts that an equitable obligation rests upon *A* from the moment of acquisition, why is the remedy personal only prior to judicial decree, and proprietary afterwards. There may have been no fraud in the acquisition by *A* from a third party, yet we know he has to disgorge that gain.[105] If there is no fraud, is the equitable remedy then proprietary from the moment of gain? This seems odd.

Or is the point that the court has to give judgment decreeing that the property claimed is in fact the gain which came to *A* from the third party? This worried Rowlatt J. in *Attorney General v. Goddard*; he was concerned that the police could seize and hold onto moneys "belonging" to the constable on the suspicion only that that

104. [1948] Ch. 465 (C.A.).

105. Phipps v. Boardman, [1965] Ch. 992 (C.A. 1964). Stubbs had also used his office to make a gain in the form of receipt from a third party. Lister v. Stubbs, *supra* note 79.

money was the consideration for his suppressing information he had been detailed to collect. Of course, there was also the element that the police had not proved the actual wrongdoing when they withheld the fund. But both elements, proof of wrongdoing and ascertainment of the property gained, were in Rowlatt's J. mind. What is the answer to this situation? Is this the problem known to American courts as the moment at which the constructive trust arises,[106] or is it something more fundamental—whether the constructive trust can arise from obligation and not solely ownership—a problem which American courts have solved? This is the kind of question with which we are concerned, and it really seems as if we would be preventing this question from being examined, rather than encouraging its solution, if we were to sweep both the personal and the proprietary remedy into the bag of the constructive trust.

B. *A "Right" to Priority in Bankruptcy?*

Indeed, it is doubtful also with such a comprehensive constructive trust whether we would be encouraged to explore sufficiently the question whether *P* ought to have a proprietary remedy which he can employ in the insolvency of *A*. Professor Dawson wrote in 1951[107] that American courts have been so fascinated with the tracing remedy that they have been more concerned with discovering the equitable proprietary interest and the "fictions" of tracing than with looking at the injustices of enrichment as between claimant and defendant. We in England employ a kind of constructive trust to remedy the fiduciary's withholding of gain, and we permit tracing against or through the fiduciary only. The tracing remedy, therefore, has not yet taken on the significance for us which it has in the United States. But we are now envisaging a broad and truly remedial constructive trust, and hence we have to ask ourselves how we are to avoid the mechanical approach to tracing which Professor Dawson deplores. That we have seen the danger of losing sight of the defendant's equities was evidenced by the Court of Appeals' approach in *In re Diplock*.[108] The court there was leaning over backwards to limit the proprietary claims of the next of kin against the innocent charities. A good deal has been written on the results produced by the court,[109] but for our purpose it is noteworthy that the effort to limit the claims was made.

106. 4 SCOTT, TRUSTS § 462.4 (1939).

107. DAWSON, UNJUST ENRICHMENT 28 (1951).

108. *Supra* note 104, *aff'd sub nom.* Ministry of Health v. Simpson, [1951] A.C. 251.

109. The latest comment is in GOFF & JONES, RESTITUTION 42-56 (1966).

In the writer's view, then, we need a vivid proprietary constructive trust remedy for two reasons: (1) to get us away from express trust analogy and "ownership" so that we no longer allow the trust only against the fiduciary if he has made away with money "owned" by the claimant. And in this connection we have to cease asking ourselves how many duties of an express trustee the particular fiduciary has. That seems simply irrelevant; (2) to permit further consideration of the merits of the claimant's right to trace. When the plaintiff claims funds, as he normally does, we want to ask: should he be able to invoke a constructive trust? This focuses the question of whether this claimant should have priority over the general creditors of the insolvent defendant, over the solvent third party, or over the general creditors of that third party. It is the focusing of the tracing claim which is surely the vital need at this stage in English law. Our approach to the merits, whether and to what extent we are going to allow tracing, is, though vital, a later and independent matter.

Assuming, then, that the constructive trust should be the means of enforcing specific restitution, should the right to specific restitution, provided the claimant can ascertain his property or its product, be unaffected by the financial position or character of the defendant? The defendant may be the immediately benefited party or his transferee. The immediately benefited party may be insolvent, and the fight may therefore be between the claimant and the general creditors. The transferee may know of the circumstances of the immediate acquisition, or know nothing. Knowing nothing at the time of the transfer, he may later have learned the truth and yet have gone ahead in his dealings with the acquired property. The transferee may have given value for the property acquired, or he may be a donee.

There is no magical inevitability in the process of tracing, and there is obviously no reason why the claimant who, according to the present rules, can ascertain his property in others' hands, should for that reason alone be able to recover it. But in distinguishing between the kinds of parties who may be found with the property or its product, the *Restatement* seems fairly to come to terms with this problem of balancing the equities between claimant and defendant. Moreover, even where a constructive trust or equitable lien is imposed by the *Restatement* or by existing precedents in the various American jurisdictions,[110] the miscellany of defences open to the constructive trustee constitutes a formidable weapon to protect him from an overly burdensome duty to restore.

An English lawyer looking at the American scene, however, may

110. 4 SCOTT, TRUSTS §§ 474-81 (1939).

still find himself with reservations. He may be concerned with the position of the general creditors vis-à-vis the claimant, or be hesitant to lend his support to a truly remedial constructive trust lest it should be absorbed with the mathematics of tracing at the expense of weighing of the relative merits between particular claimants and defendants. And in this regard his fears are underlined when he further reads Professor Dawson's Rosenthal lectures of 1951. Having explained that tracing is "the most important contribution of the modern constructive trust,"[111] Professor Dawson points out that the extension of the constructive trust in 1877 to reach the product of the larcenous act "clearly marks the transformation of the constructive trust into a generalized remedial device, with tracing as its most prominent feature,"[112] capable of dealing with acquisition by fraud, undue influence, duress or simple breach of contract. He goes on,

> Since the remedy was labeled constructive trust it was thought to follow inevitably that all the machinery of tracing must likewise be transferred. Each extension seemed right and almost inevitable, on a narrow view of each case. The extensions, added together, have given us something new. In the very short space of seventy-five years we have created a monster.[113]

Should the plaintiff have a right to elect whether he will sue for a monetary judgment representing the amount of the enrichment or for an order of specific restitution on the grounds that he can trace his property or its proceeds? There are many forms of unjust enrichment which find a remedy under the head of remedial constructive trust. Should all those forms entitle the plaintiff to recover specific property against a solvent defendant?[114]

Should the common law or statutory lienor over a specific property, which is subject to a constructive trust claim, take his place behind the constructive trustee because the trustee can show that the wrongdoer's act was done before the lien attached? Or should the lienor have priority because the constructive trust only arises on an order of the court, and the constructive trustee, though he advanced money as a result of fraudulent inducement, could have protected himself by taking a common law lien on the property in question? In *International Refugee Organization v. Maryland Drydock Co.*,[115] the Court of Appeals for the Fourth Circuit decided the second question in the affirmative; the constructive trustee did not get any priority. Clearly

111. DAWSON, UNJUST ENRICHMENT 27 (1951).

112. *Id.* at 28.

113. *Id.* at 30.

114. See Shearer v. Barnes, 118 Minn. 179, 136 N.W. 861 (1912).

115. 179 F.2d 284 (1950). Followed in Papazian v. American Steel & Wire Co., 155 F. Supp. 111 (N.D. Ohio 1957).

the court felt that the International Refugee Organization had largely itself to blame in advancing money without the security of a lien. It is the same attitude which convinces many English lawyers that *Lister v. Stubbs* is correct. The "equitable right" before and after the judicial decree is properly a very different creature. The reply comes again, though, that if it is the injustice of the wrongdoer's gain that gives rise to the "equitable right" before decree is made, as well as the trust obligation after the decree is made, why should the plaintiff claimant have no right to trace before decree, but be able to trace afterwards. Is not this equally arbitrary?

Then there are policy questions, familiar to the American lawyer. For example, should the constructive trustee succeed against the homestead, a right denied to the general creditor? Should the constructive trustee be able to claim the proceeds of an insurance policy on the life of the enriched party, when the claimant's money has been used to purchase the policy? The policy may be in favor of wife and children of the enriched party, which raises some of the same policy considerations as the homestead issue. And there are more technical policy questions. Should the negligence of the claimant in parting with his property affect his right against the benefited party's general creditors? Should the right to trace vary with the mode of deprivation? If all the answers are in the affirmative, the *Restatement* rules would need some amendment to meet policies along these lines.

On the other hand, should the express trustee be barred from pleading a limitation period, while the constructive trustee, whatever his degree of wrongdoing, can plead it? At the moment this escape route from liability is open to the constructive trustee, but little if any thought has been given to why this should be so. Part of the answer in England lies in the fact that the constructive trust grew in the seventeenth, eighteenth and nineteenth centuries as a country cousin of the express trust. No one thought of the constructive trust as being of equal importance to the clear and significant express trust, and it was not until the three last quarters of the nineteenth century that it appeared there were equally good reasons for barring some fiduciaries from pleading limitation periods. Certainly there was a good reason if *all* express trustees were barred. The result, as I have argued elsewhere,[116] was a constant juggling act by the courts with the langauge of the statute, and with earlier decisions. Some constructive trustees were barred from pleading the statute; others were not. In order that desired results on the particular occasion might be achieved, the courts developed a fine art in finding reasons for following some precedents and distinguishing others. Here, too, we have clear

116. WATERS, *op. cit. supra* note 80, at 292-321.

policy decisions before us for consideration at the same time as we attempt to fashion the fully remedial constructive trust. And the pages of Scott suggest that these policy decisions still have to be faced to some extent in the United States, where work with the constructive trust is so much more advanced.

Professor Dawson's comment, then, exactly represents the reaction of many English lawyers to talk of a remedial constructive trust. The constructive trust seems to them to be adjectival, rather than inherently remedial. It is a description of a result, not a remedy. To those who *would* see a fully remedial trust, indeed, this may be why they would employ the term to cover all equitable relief to prevent unjust enrichment. The real trouble behind English conservatism, however, may well be that while the remedying of unjust enrichment is an avowed and reputable doctrine in the United States, there is still in England, despite a few noteworthy exceptions, a judicial reluctance to admit to the existence of such a rubric. If you cannot bring yourself to accept that there is such a branch of liability as opposed to a mere tenet of moral jurisprudence, then it is unlikely that your constructive trust will move far from merely applying to fiduciaries some of the duties of express trustees. No one can doubt that the obligation of a man not to allow his interest to conflict with his duty is a fundamental idea in any system of law. Equity lawyers merely applied the time-old principle to the express trustee. They developed it in English law by applying it to the express trustee, but there was no need for the principle to be applied generally throughout English law through the express trust rules.[117] It naturally happened in that way because express trust precedents were at hand. The analogy to the express trust was too obvious for the extension of the rule to fiduciaries to come in any other way. And in any case Equity cornered the award of relief to abused fiduciaries.

The application of the rule to fiduciaries is sometimes not desirable, however. The conflict-of-interest-and-duty rule is very strictly applied in Equity in order to deter trustees from acts which may be both difficult to discover and hard to prove, as well as being in total opposition to the idea of the trust. Now it may be very sound to use the rule as a deterrent device where express trustees are concerned. It may well discourage trustees from the slightest questionable deal if they know that, whatever their justification and even if they are totally in good faith, they will have to account for any gain that comes to them personally. But this policy does not necessarily apply when one is not dealing with the express trustee. For one thing there is a

117. Stoljar is of the view that in fact equity played a limited role in developing the doctrine of accountability. STOLJAR, QUASI-CONTRACT 82 (1964).

wide range of fiduciaries,[118] only some of whom could be expected to show or need show the trustee's utter exclusion of self in any form. So the deterrent policy is irrelevant on this ground. For another thing, the object of an unjust enrichment doctrine is to allocate benefits between claimant and defendant. Unlike the express trust, where punitive measures may be justifiable, the constructive trust is not concerned with such matters. And it is a remedy, not a trust institution. There is much force in the argument that *Regal (Hastings), Ltd. v. Gulliver*[119] was altogether too severe in its result, and harmful in its meaning for the company director's freedom of movement in conducting the business of his company. One can well understand the recent contrary view of the British Columbia Court of Appeals in *Peso Silver Mines, Ltd. v. Cropper.*[120]

Many English lawyers, in short, see only a vague equitable principle in the term "constructive trust," and they fear the evolution of a "monster" on their own shores. Professor Dawson thinks that "without much conscious purpose or plan [Americans] have created this shambling creature. It is time to fence it in."[121] Most English lawyers, if they see any case for change, would like to fence as they go. So far as the remedy should have a clear proprietary character, and be a claim to specific restitution, I think they are right. But how the law experiments with the constructive trust, which it must, works out its policy judgments, and fences—all at the same time—is a conundrum we have yet to start seriously discussing. I suspect that where my Law Quarterly Review critic and I differ is that, with a single jurisdiction[122] and a bench not noted for its radicalism, he would like English law to experiment and work out its policies, while I think the time has already come for some fencing.

118. The words of Asquith, L.J., and Lord Porter in Reading v. Attorney General, *supra* note 97, make the fiduciary category have largely unforeseeable width. A recent example of this width is provided by the reasoning of Sheppard, J.A., in Morrison v. Coast Fin., Ltd., 55 D.L.R.2d 710, 722-26 (B.C.C.A. 1966).

119. [1942] 1 All E.R. 378 (H.L.). The decision is criticized in GOWER, MODERN COMPANY LAW 486-88 (2d ed. 1957).

120. 54 West. Weekly R. (n.s.) (B.C.C.A. 1965).

121. DAWSON, UNJUST ENRICHMENT 33 (1951).

122. For present purposes the Scottish jurisdiction is omitted.