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Book Reviews

John W. Wade Dean
Vanderbilt Law School

Gray Thoran Professor
Cornell Law School

Ronald M. Maudsley Professor of Law
King's College, Univ. of London

BOOK REVIEWS

THE LAW OF RESTITUTION. By Robert Goff and Gareth Jones. London: Sweet & Maxwell, 1966. Pp. xxix, 540. 5 pounds, 10s.

Aside from the *Restatement,* this is the first comprehensive treatise in the field of Restitution. It is a fine product and an excellent culmination of the books which have preceded it.

The law of Restitution has grown in completely separate parts which have been put together as common applications of the same general principle of unjust enrichment only in recent years; writings prior to that time were confined to narrower topics. The first publication was an *Essay on the Action for Money Had and Received,* by Sir William David Evans, issued in 1802. Sir William was an ardent admirer of Lord Mansfield, and aside from several "essays" on other topics, published a two-volume work entitled *General View of the Decisions of Lord Mansfield* (1803). His *Essay* lays emphasis upon the famous case of *Moses v. Macferlan*[1] and is built around the concept of an "obligation . . . enforced according to the general principles of natural equity, the foundation of it being a retention by one man of the property which he had unduly received from another, or received for a purpose, the failure of which rendered it improper that he should retain it." It treats mistake, duress, benefits conferred in performance of an agreement and payments under judicial proceedings.

It was 86 years later that the next publication appeared, this time in America. In 1888-89, Professor William A. Keener, of Harvard, published a two-volume casebook on *The Law of Quasi-Contracts,* which reprinted in full most of the leading cases in the area and carefully analyzed and organized the subject. Five years later, Professor Keener, then at Columbia, used these materials to prepare and publish the first treatise on *Quasi-Contracts.* Though a pioneering work, it was quite well done and is a valuable treatise even today. Professor Frederic C. Woodward, then of Stanford, published his treatise on the *Law of Quasi Contracts,* in 1913. Built around the concept of "misreliance," initially suggested by John H. Wigmore,[2] it, too, is an excellent work which has substantial present-day value. Both are limited in their scope, and do not attempt to treat equitable remedies or to demonstrate the pervasiveness of the principle of unjust enrichment.

1. 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760).
2. Wigmore, *A Summary of Quasi-Contracts,* 25 AM. L. REV. 695, 696 (1891).

The first attempt to combine and merge the legal and equitable principles was made by Professor Walter Wheeler Cook, then of Yale, who in 1924 devoted the third volume of his *Cases on Equity* to a combination of "the material usually presented in advanced equity courses dealing with reformation, rescission, and restitution with that combined in the course commonly called quasi-contracts . . . ." A second edition appeared in 1932.[3] This was a remarkable advance forward, but it still did not include the remedy of constructive trust, with its concomitant remedies of equitable lien and subrogation.

The step of joining these remedies was left for the *Restatement.* Throughout the discussions of the tentative drafts and the proposed final draft, which was published in 1936, it was known as the *Restatement of Restitution and Unjust Enrichment.* As finally published in 1937, however, it was the *Restatement of Restitution.* There were two reporters, Professors Warren A. Seavey and Austin W. Scott, and somewhat unfortunately, their work was separated into two distinct parts. Mr. Seavey's Part I dealt with "Quasi-Contractual and Kindred Equitable Relief" and Mr. Scott's Part II dealt with "Constructive Trusts and Analogous Equitable Remedies." This permitted a certain amount of duplication and overlap, and perhaps some slight inconsistency. It is most interesting, in studying the *Restatement,* to observe the differences in style of the two reporters. The *Restatement of Restitution* is a definite precursor and one of the more valuable Restatements produced by the American Law Institute. Though its list of case citations is somewhat less than that for some of the other Restatements, it has proved more influential than some others in molding the law and in demonstrating the pervasiveness of the application of the unjust enrichment principle.[4] The value of this *Restatement* has been augmented by the publication of the *Reporters' Notes,* which give citations to cases supporting the text of many of the sections in the *Restatement* itself.[5]

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3. Casebooks appearing in the meantime include LAWSON, CASES ON QUASI-CONTRACTS (1904); SCOTT, CASES ON QUASI-CONTRACTS (1905); WOODRUFF, CASES ON QUASI-CONTRACTS (1st ed. 1905) (2d ed. 1917) (3d ed. Laube, 1933); THURSTON, CASES ON QUASI CONTRACT (1916). Later casebooks using a combination of law and equity similar to that of Cook include PATTERSON, CASES ON CONTRACTS II (1932) (reprinted in 1950, with the title CASES ON RESTITUTION); and THURSTON, CASES ON RESTITUTION (1950). See also VAN HECKE, CASES ON EQUITABLE REMEDIES (1959), which is to some extent the successor to Cook's third volume; LAUBE, CASES ON QUASI-CONTRACTS (1952).

4. For some contemporary discussions of the *Restatement,* see Jackson, *The Restatement of Restitution,* 10 MISS L.J. 95 (1938); Patterson, *The Scope of Restitution and Unjust Enrichment,* 1 MO. L. REV. 223 (1936); Lord Wright, Book Review, 51 HARV. L. REV. 369 (1937). See also Seavey & Scott, *Restitution,* 54 L.Q. REV. 29 (1938).

5. State annotations to the *Restatement* have been prepared for Florida, Indiana, Michigan, Minnesota, Missouri, Pennsylvania and Rhode Island.

There have been no subsequent American treatises in the field. It remained for a casebook to complete the task of integrating the legal and equitable remedies for the prevention of unjust enrichment. This was Durfee and Dawson's *Cases on Remedies—II Restitution at Law and in Equity,* appearing in 1939. A second edition appeared in 1958, under the title of Dawson and Palmer, *Cases on Restitution.*[6] Wade, *Cases and Materials on Restitution,* with a first edition in 1958 and a second edition in 1966, adopts the same broad viewpoint of the scope of restitution and attempts to integrate the treatment of the legal and equitable remedies.

In the meantime there have been a good number of English texts. The first was Robert H. Kersley's 50-page *Quasi-Contract,* published in 1932. Its value is rather limited.[2] More useful is John H. Munkman's *Law of Quasi-Contracts,* published in 1949, and containing 102 pages. It has a rather unusual organization but can still be used profitably. In 1952, Sir Percy Winfield published his 137-page *Law of Quasi-Contracts.* Its organization, too, is quite unusual and it is somewhat difficult to use.[8] S. J. Stoljar's *Law of Quasi-Contract* appeared in 1964. It was much more complete than the earlier English texts, thoroughly researched and carefully written. It is, however, somewhat retrogressive, since it espouses a very restricted view of the scope of quasi contract, being concerned only with "actions for the recovery of money." In addition, it urges that the right to recover the money must be a proprietary right, and this proprietary theory is the theme about which the book is written.[9] In sharp contrast with the Stoljar book is D.W.M. Waters' *The Constructive Trust: The Case for a New Approach in English Law* (1964). A frank advocate's presentation, it argues for the principle of unjust enrichment and for the English adoption of the American concept of the constructive trust as a remedial device.[10]

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6. Both Professors Dawson and Palmer have had short books published containing a lecture series which they delivered. DAWSON, UNJUST ENRICHMENT (1951), a comparative treatment with the civil law of the continent; PALMER, MISTAKE AND UNJUST ENRICHMENT (1962).

7. R. M. Jackson's scholarly monograph on THE HISTORY OF QUASI-CONTRACT IN ENGLISH LAW appeared in 1936. See Wade, Book Review, 9 MISS. L.J. 400 (1937).

8. Indeed, in his PROVINCE OF THE LAW OF TORTS (1932), the lengthy Chapter 7, entitled "Tort and Quasi-Contract," covers the field and it is easier to locate his treatment of particular topics.

9. For further treatment, see Wade, Book Review, 16 U. TORONTO L.J. 473 (1966).

10. Any catalog of the writings in the field of Restitution would be incomplete if it failed to call attention to the fact that numerous topics within the area are covered in standard treatises in other fields. Thus the current editions of CORBIN, CONTRACTS, and WILLISTON, CONTRACTS, cover many topics, such as illegal and unforceable agreements, impossibility, breach of contract and mistake. The same is true of British works on contracts, such as those by Anson and Cheshire and Fifoot. The treatises on trusts by Scott and Bogert cover constructive trusts and tracing problems. POMEROY, EQUITY

All of this is a long and perhaps tedious introduction to a review of the new treatise on Restitution by Messrs. Goff and Jones. But it nevertheless may serve a useful purpose in showing the background of the book and in demonstrating its value. For this is an excellent book, in a very real sense the culmination of the previous development.

The authors state their "understanding of the scope of the subject" in the Preface:

> Briefly, it is that the law of Restitution is the law relating to all claims, quasi-contractual or otherwise, which are founded on the principle of unjust enrichment. It follows that, in our view, the terms Restitution and Quasi-Contract are by no means synonomous; the scope of Restitution is wider and its basis more rational. We have cast our net very wide. Our account cuts across the bounderies which traditionally separate law from equity. We have included topics from such diverse fields as, for example, trusts, admiralty, and many branches of commercial law; and we have considered proprietary as well as personal claims. Indeed, it is our belief that only through the study of Restitution in its widest form can the principle underlying the subject be fully understood.

Chapter I, entitled "General Principles," is further indicative of the approach which the authors take. After some discussion of the concept of "implied contract," they categorically state that it is "a meaningless, irrelevant and misleading anachronism" and they present the principle of unjust enrichment as having three presuppositions: (1) "that the defendant has been enriched by the receipt of a benefit," (2) "at the plaintiff's expense," and (3) that "it would be unjust to allow him to retain the benefit." Each of these elements is discussed in some detail,[11] but the third element is given the most complete consideration, with the exposition of a number of "limiting principles."[12] Chapter 2, entitled "Proprietary Claims," completes the first

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JURISPRUDENCE (5th ed. 1941) is also useful. This is more true of the 4th edition, in 1919, than of the 5th edition in 1941, since the former contains in volumes 5 and 6, the two volumes of the second edition of Pomeroy's book, EQUITABLE REMEDIES (1919), while the latter omits them. More specialized works which might be cited include BLACK, RESCISSION AND CANCELLATION (2d ed. 1929) and KERR, FRAUD AND MISTAKE (7th ed. 1952).

But some of the most valuable writings in the field are found in law review articles. Of course, it is not possible to refer to them in this review. Many are cited in the casebooks by Dawson and Palmer, and an especial effort has been made to collect citations at appropriate places in the latest edition of the casebook by Wade.

11. For example, the benefit may be saving of expense; and plaintiff's loss need not be equal in value to defendant's gain, and may indeed not be an actual loss at all, if the benefit is at plaintiff's expense.

12. These are worth repeating: The benefit must not have been conferred officiously. The benefit must not have been conferred in submission to an honest claim. The benefit must not have been conferred as an out-and-out gift. The courts will not set aside or rewrite contracts merely because their terms are unjust or unreasonable. Where a benefit has been conferred under a binding contract which cannot be rescinded, brought to an end or rectified, the claimant must seek his remedy under the contract

part, or Introduction. It is concerned primarily with the subject of tracing, and accurately portrays the unsatisfactory condition of the English law on the subject, making suggestions for its amelioration.

Part II contains the real text of the book and is titled, "The Right to Restitution." Its organization indicates the care with which the authors have organized the subject. Section One is "Where the Defendant has Acquired a Benefit from or by the Act of the Plaintiff," and contains subtopics of mistake, compulsion, necessity and ineffective transactions, each with several chapters. Section Two is "Where the Defendant has Acquired from a Third Party a Benefit for which he must Account to the Plaintiff," and contains seven chapters. Section Three is "Where the Defendant has Acquired a Benefit through his own wrongful Act," and contains five chapters. Part III covers defenses (7 chapters), and Part IV, restitution and the conflict of laws.

The work is well-planned and organized, the analysis of the cases is measured and mature, and the writing is lucid and interesting, making the entire text a pleasure to read. Unlike many British writers, the authors have not hesitated to criticize the reasoning or the holdings in cases such as *Sinclair v. Brougham*,[13] *In* re *Diplock*,[14] *Falcke v. Scottish Imperial Ins. Co.*,[15] and *Phillips v. Homfray*.[16] They have cited some American cases and some Australian and Canadian authorities, and can, perhaps, in later editions add to the number.[17]

It is hard to find significant criticisms, but a few minor ones may be mentioned, some involving a matter of personal preference. There is no mention of the case of the Pusey horn[18] and specific restitution in equity, or of the restitutionary remedy of self-help. When the authors recognize the complete fiction of the implied contract and deprecate it so thoroughly, it is hard to see why they cannot do the same thing with the constructive trust and treat it as a restitutionary remedy like quasi-contract, rather than as a substantive concept; similarly with subrogation, and what they call a "right akin to subroga-

and not in restitution. (Quaere if this is categorically true under American law.) Restitution will not be awarded if such an award would lead to the indirect enforcement of a transaction which the law refuses to enforce. Restitution will not be awarded to enable a person to make a profit out of his own wrong. The claimant must put the other party back in his original position.

13. [1914] A.C. 398.

14. [1948] Ch. 465, aff'd *sub. nom.* Ministry of Health v. Simpson, [1951] A.C. 251 (1950).

15. 34 Ch. D. 234 (C.A. 1886).

16. 24 Ch. D. 439 (1883).

17. The citations to the American cases are often incomplete or inadequate. It is too bad, too, that in the law review citations they never give the title to an article.

18. Pusey v. Pusey, 1 Vern. 273, 23 Eng. Rep. 465 (Ch. 1684).

tion." There is an inadequate treatment of restitution as an alternate remedy for breach of contract by the defendant, perhaps because the British authorities do not warrant more. The treatment of mistake in the formation of a contract is also somewhat inadequate and gives rather cavalier attention to the valiant attempt by Denning, L. J., in *Solle v. Butcher*[19] to systematize it on a more rational basis.

To repeat: This is an excellent book, and it is greatly hoped that it will prove as influential in England as the *Restatement of Restitution* has been in the United States, and will become recognized as a standard treatise running through many editions. We badly need a treatise like this in this country but until one is written Goff and Jones will prove to be most helpful to American lawyers, judges and scholars.

JOHN W. WADE*

19. [1950] 1 K.B. 671 (C.A. 1949).

* Dean, Vanderbilt University School of Law.

CASES AND MATERIALS ON RESTITUTION. Second Edition. By John W. Wade. Brooklyn: The Foundation Press, Inc., 1966. P. xl, 866. $12.00.

The first edition of Dean Wade's *Cases and Materials on Restitution*, was published in 1958, the same year as Dawson and Palmer's casebook.[1] In a field where development has been so rapid and extensive, a new edition of Dean Wade's book containing up-to-date materials and cases is most welcome.

There has been considerable reorganization of the material. The introductory first chapter deals with basic principles in broad sweeps, taking the reader through the historical development of quasi-contract, discussing some problems of implied in fact and implied in law contracts, and introducing him to the remedies of constructive trusts, liens and subrogation. A review of the first edition criticized such an introduction on the ground that "a series of individual cases on each of the remedies will only provoke questions and discussions that can more profitably be left to later complete development."[2] Our experience would be to the contrary. The subject of Restitution is one that draws upon and develops many other fields; its unity is something that can well be demonstrated to students at an early stage.

Chapter 2 deals with benefits conferred in the absence of a con-

1. DAWSON & PALMER, CASES ON RESTITUTION (1958).

2. Hogan, Book Review, 47 GEO. L.J. 426, 427 (1958).

tractual relationship. Here we find the elusive problem of the volunteer, so differently tackled by common law and civil law systems. Also included are benefits resulting from mistake, legal compulsion, or the protection of some interest. Chapters 3 and 4 cover benefits acquired through wrongful conduct and benefits conferred by mistake in contractual transactions. The last chapter is entitled "Benefits Conferred in Performance of an Agreement." Here we have a wide selection of topics under sub-headings of breach of contract; unenforceable contracts; impossibility; illegality; and defective capacity.

We have found this to be a sound organization and one that permits easy adjustment to the teacher's own style and to the varying demands of different law school curricular arrangements. Like its predecessor, this edition is adaptable to either a two or three credit hour course covering the full field of Restitution, or to two hour courses in either Quasi-Contracts or in Fraud and Mistake.

The first chapter concludes, as in the first edition, with a thorough bibliography of Restitution. This is particularly useful in a field in which, as Dean Wade says, "There is no single legal treatise covering the whole subject of Restitution."[3] The obvious response to this is to beg Dean Wade to write one. Surprising as it may seem to those who know how reluctant English lawyers have been to take Restitution seriously, an important new treatise has recently appeared in England, which Dean Wade would surely wish to include in his bibliography and his library.[4]

The absence of a treatise in this country makes references to the *Restatement of Restitution,* to specialized works like Dawson's *Unjust Enrichment,*[5] and to law review articles all the more important. Such references are plentifully given in the compact and stimulating notes that follow most of the cases, as are references to law review casenotes. There is always a question of deciding how many references to include. Dean Wade has decided, rightly in our view, to be generous with them. It would, however, be more helpful to students if, at least with the casenote references, advice was given to show which were the most useful. Several cases refer to six casenotes, *Ingram v. Little*[6] and *Sheldon v. Metro-Goldwyn Pictures Corp.*[7] have eight and *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*[8] no less

3. WADE, CASES ON RESTITUTION 50 (2d ed. 1966).

4. GOFF & JONES, RESTITUTION (1966). [See review of this book, p. 1429 *supra.*] We would also list in the bibliography PALMER, MISTAKE AND UNJUST ENRICHMENT (1962), and MCCORMICK, DAMAGES (1935).

5. DAWSON, UNJUST ENRICHMENT (1951).

6. [1961] Q.B. 31 appearing in WADE, CASES ON RESTITUTION (2d ed.) at 529.

7. 309 U.S. 390 (1940), appearing in WADE, CASES ON RESTITUTION at 237.

8. [1943] A.C. 32, appearing in WADE, CASES ON RESTITUTION (2d ed.) at 758.

than twenty-one! Unless engaged in research, students cannot be expected to consult so many references, and one of us who has the misfortune to be only a visitor to this country has found, along with his students, that an indication of those references which are especially recommended would be helpful.

American law teachers are becoming increasingly aware of the desirability of giving students some exposure to problems of professional responsibility and conscience as a part of their academic training. We are pleased to note that Dean Wade is sympathetic to this notion and that in this edition he has included among the notes a number of worthwhile and provocative questions relating to the lawyer's professional role.[9]

Each of us has given a course in Restitution since Dean Wade's second edition was published. We both used this book and found our choice a thoroughly happy one. Our verdict in short is that Dean Wade has maintained the high standards which he always sets, and that he has produced an even better teaching tool than his well-received earlier edition.

GRAY THORON*
RONALD H. MAUDSLEY**

9. See, *e.g.*, WADE, CASES ON RESTITUTION (2d ed.) at pp. 60, 76, 100, 303-04, 343, 477, 517, and 522.

* Professor of Law, Cornell Law School.

** Professor of Law, King's College, University of London, and Visiting Professor of Law, Cornell Law School (1966-67 Fall Term).