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### Review of The Law of Restitution

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for the mission of each is to impose a measure of order on the disorder of experience without stifling the underlying diversity, spontaneity, and disarray. New vistas open in art as in law. In neither discipline will the craftsman succeed, unless he sees that proportion and balance are essential, that order and disorder are both virtues when held in a proper tension. The new vistas give a false light unless there are cross-lights. There are, I am afraid, no absolutes in law or art except intelligence. (p. 22.)

But how good are the artists of today's Court? Do they see their art as Professor Freund does, or are they rather asserting the artist's private vision, his idiosyncrasy, caprice, whim, irrationality masquerading as intuition? By what standards does one criticize the special art of constitutional interpretation? Why was *Lochner v. New York* less "creative" than *Nebbia v. New York*? What is the principle for resolving tensions and escaping or seizing dilemmas? How do we persuade "infallible" justices that "the profoundest reality and the most demanding morality lie not in particular judgments or results but in the process of moving toward them?" (p. v). What shall we make of the success of that very different craftsman, Mr. Justice Black, who yearns for absolutes and appears to know no dilemmas?

Yes, there is much food for talk and thought in these essays. It is not surprising that students of all ages hearing Professor Freund think they hear the small still voice of the Constitution.

LOUIS HENKIN \*

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THE LAW OF RESTITUTION. By Robert Goff<sup>1</sup> and Gareth Jones.<sup>2</sup> London: Sweet and Maxwell. 1966. Pp. lxxix, 540. \$17.60.

The appearance of this excellent treatise is a major step toward a better understanding of the place of restitution in Anglo-American law. The authors' exhaustive treatment of the English case law and the inclusion of much American authority give a perspective on the field which has not previously been available. Like the 1937 *Restatement of Restitution*, this is a presentation in one volume of legal and equitable remedies for enforcing a substantive right to restitution.<sup>3</sup> It goes well beyond the uneasy, loose association of the legal and equitable parts of the *Restatement*, however, and gives us a unified treatise. Until we have a

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<sup>3</sup> Other recent English texts have dealt with one or another aspect separately.

similar treatment of American law, this book will certainly be a major research tool for American lawyers.

The history of thinking in the two countries about restitution makes it surprising that the English should beat us to a major treatise in this field. While the two systems shared a common heritage, based in large part on Lord Mansfield's attempt to introduce a general principle in *Moses v. Macferlan*<sup>4</sup> in 1760, the English became disillusioned with this aberration from the traditional common law contract-tort dichotomy in the field of obligations. The conservative spirit which arrested the development of quasi-contract in England as a means to recovery of unjust enrichment is typified by Lord Justice Scrutton's famous characterization of the field as "well-meaning sloppiness of thought."<sup>5</sup> While there is more recent English authority to the effect that the common law is not "condemned . . . to no further growth in this field,"<sup>6</sup> and the constructive trust remedy has been ingeniously used to provide relief,<sup>7</sup> the flowering of restitution in America as a panacea for a variety of substantive ills has found only a faint reflection in English law in this century.

The 1937 *Restatement of Restitution* gave the common law world its first chance to see whether there was in fact another basic area of rights in the obligations field in addition to those subsumed under contract and tort. Professor Dawson published a pioneering casebook in 1939,<sup>8</sup> and later a set of lectures putting our law in comparative perspective.<sup>9</sup> A revised version of the casebook published by Professors Dawson and Palmer in 1958<sup>10</sup> and a second, similar casebook by Dean Wade later that year<sup>11</sup> completed the major books with which the American lawyer today approaches his research in restitution.<sup>12</sup>

While Professors Dawson, Palmer, and Wade have led us into a stimulating discussion of the variety of solutions to restitution problems advanced by the case law, they have not given a final

See, e.g., S. STOLJAR, *THE LAW OF QUASI-CONTRACT* (1964); D. WATERS, *THE CONSTRUCTIVE TRUST* (1964).

<sup>4</sup> 2 Burr. 1005, 1008, 97 Eng. Rep. 676, 678 (K.B. 1760).

<sup>5</sup> *Holt v. Markham*, [1923] 1 K.B. 504, 513 (C.A. 1922).

<sup>6</sup> *In re Cleadon Trust Ltd.*, [1939] 1 Ch. 286, 314 (C.A. 1938) (Scott, L.J.).

<sup>7</sup> See generally D. WATERS, *supra* note 3.

<sup>8</sup> Professor Dawson's casebook appeared as E. DUFFEE & J. DAWSON, *CASES ON REMEDIES — II RESTITUTION AT LAW AND IN EQUITY* (1939), though Professor Duffee's Volume I was never published.

<sup>9</sup> J. DAWSON, *UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS* (1951).

<sup>10</sup> J. DAWSON & G. PALMER, *CASES ON RESTITUTION* (1958).

<sup>11</sup> J. WADE, *CASES AND MATERIALS ON RESTITUTION* (1958). A second edition was published in 1966.

<sup>12</sup> In the specialized area of mistake, there are the excellent lectures by G.

answer to its place in our conceptual system.<sup>13</sup> Is it a field of substantive "rights," or just a remedy with special problems which is useful to effectuate a wide range of substantive goals? The *Restatement* failed to locate restitution in our systematic thinking, for its neat division according to legal and equitable remedies limited its ability to create a sudden awareness of restitution as a separate ground of substantive rights. Neither it nor the subsequent casebooks have led to a general recognition among American lawyers of restitution as a field of law.

Perhaps it is the resistance of our law school curriculum which has perpetuated this state of affairs, for a majority of law schools offer no course in restitution. Or perhaps this is an appropriate place to ask a more basic question: whether the attempt to create an awareness of a law of restitution is really justified. Much of what is taught in the ordinary restitution course should have been learned in contracts and torts. Recognizing the lack of student preparation on some important preliminaries to the treatment of restitution questions, our casebooks have included material dealing with capacity to contract, avoidance for mistake, and even termination because of the other party's breach. While all of these situations might involve a need for restitution in favor of a party who has performed, the problem of avoidance or termination can arise before any performance.<sup>14</sup> It does not seem unfair, therefore, to relegate the principal treatment of such problems to courses and texts on contracts.

The same argument might be made regarding some tort situations where restitution remedies are often used. A good argument can be made that in both the tort and contract situations teaching and doctrine would benefit from a fuller presentation of all possible remedies in the individual fields. The restitution teacher would quickly point out, of course, that a comparison of the different problems in using restitutionary remedies in tort and contract situations would also be of value.<sup>15</sup> If this were the

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PALMER, MISTAKE AND UNJUST ENRICHMENT (1962). Restitution was also discussed in *A Symposium on Restitution*, 19 VAND. L. REV. 1019 (1966).

<sup>13</sup> As Professor Dawson says:

The most obvious comment about the American law of restitution is that it lacks any kind of system . . . . Specific solutions in restitution cases are still, on the whole, both ingenious and sensible. It is only when one tries to string them together that one becomes confused.

J. DAWSON, *supra* note 9, at 111-12.

<sup>14</sup> However, the fact that there has been performance, *i.e.*, that restitution problems exist, may well lead a court to decide that the contract in question should not be set aside.

<sup>15</sup> The same argument could be made regarding the field of "damages," where only C. McCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* (1935), emphasizes the common problems in tort and contract applications.

sole task of restitution, however, it would hardly justify a whole course, much less a treatise or field of law.

Is there in addition an area of "pure" restitution? Here Goff and Jones come to our aid, for they have devoted most of their attention to the large area of cases where a benefit has been conferred or taken, and where restitution is allowed although traditional tort or contract doctrines would bar recovery. For example, *A* paints *B*'s house in *B*'s absence, thinking he has a contract. When there turns out to be no enforceable agreement, does he get paid? Contract says no, and unless the error was caused by *B*'s tortious misconduct tort provides no remedy. Here is a middle ground between expectation based on promise and compensation for harm inflicted. It is this third source of obligation, based on unjust enrichment and complementing the traditional tort and contract doctrines, on which Goff and Jones concentrate. They have included such topics as recovery of benefits conferred under duress; the right to contribution among various groups such as co-sureties, partners, and joint tortfeasors; maritime general average and salvage claims;<sup>16</sup> benefits conferred under trusts which fail; recovery to avoid circuity of action; and others.

It should become clear to any American lawyer as he reads this text that there are many problems for which his background in tort and contract theories alone is insufficient. Whether this treatise will give him the help he needs is a different question. It is an excellent, detailed treatment of the English case law, and the American lawyer is likely to find included some treatment of almost any problem he may have. But despite the many references to American cases and writers and to the *Restatement*, it is primarily concerned with the present and possible future law in England. Some of the problems in England are no longer major obstacles to recovery here, and the English have taken care of some problems by statute which continue to trouble us. A few American lawyers may be familiar with the English Frustrated Contracts Act of 1943,<sup>17</sup> which brought about a halfway solution to the problem of apportioning the loss involved in frustration of contract. While this statute only allows apportionment of losses following frustration where these can be deducted from a recovery in restitution, it still constitutes a dramatic advance beyond our own situation. Many other statutes are cited in the

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<sup>16</sup> In fact, the use of admiralty materials is a major contribution of the book. Professor Dawson has already used the salvage analogy in his study *Rewards for the Rescue of Human Life?*, in *XXTH CENTURY COMPARATIVE AND CONFLICTS LAW* 142 (K. Nademann, A. von Mehren, & J. Hazard eds. 1961), but the authors here draw on many other areas, such as review of contracts for fairness in admiralty (p. 171).

<sup>17</sup> Law Reform (Frustrated Contracts) Act, 6 & 7 Geo. 6, c. 40 (1943).

text,<sup>18</sup> and proposals by the Law Reform Committee have also been incorporated.

The writers' forte is their exhaustive presentation of the case law in an original and helpful organization, coupled with criticism of unfortunate lines of authority,<sup>19</sup> or more often, criticism in detail of an individual case.<sup>20</sup> In many places this criticism takes the form of suggestions for continued development of the law,<sup>21</sup> including suggestions that England follow the lead of courts in this country.<sup>22</sup> While in general the authors seem sanguine that the English courts will find their way out of precedential cul-de-sacs, they inject a note of caution where the solution would involve a retreat to the shelter of some vague general principle. When they say that solutions which introduce a measure of uncertainty would have little chance of gaining English judicial approval (p. 305), they echo some of English scholarly opinion as well. "Better a system which is too rigid than no system at all," said Sir William Holdsworth in 1939.<sup>23</sup> "English lawyers much dislike palm-tree justice," wrote Professor Maudsley in 1966.<sup>24</sup> Perhaps Americans have had a better chance than the English to date to see the salutary effect of the unjust enrichment idea turned loose, though we are probably ready now to pay somewhat more attention to systematic description of our experience.

All in all, the authors' attempt at a ground-breaking treatise is very successful. Despite the occasionally unfamiliar English terminology,<sup>25</sup> an American should be able to find ammunition here to fight some of our pressing doctrinal battles in the restitu-

<sup>18</sup> Some of the statutes deal with matters where we might expect legislative modifications, such as infants' capacity to contract (p. 308), but many institute reforms worthy of attention here, such as contribution among tortfeasors (p. 195).

<sup>19</sup> See, e.g., the discussions of the marriage broker (p. 303), *pari delicto* (p. 290), contract and duress of goods (p. 150), and limiting "waiver of tort" to cases where a specific sum of money is received (p. 429).

<sup>20</sup> See, e.g., *Skeate v. Beale*, 11 Ad. & E. 983, 113 Eng. Rep. 688 (Q.B. 1841), discussed at p. 150.

<sup>21</sup> See, e.g., the extension of the subrogation doctrine beyond the established categories (p. 377).

<sup>22</sup> See, e.g., the discussion of the deduction of expenses by a good faith usurper (p. 405). Also, in presenting the argument that reformation should be available if parties use the wrong words to get the desired legal effect, the authorities cited are two Michigan cases (p. 138).

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

<sup>24</sup> Maudsley, *Restitution in England*, 19 VAND. L. REV. 1123 (1966).

<sup>25</sup> For example, reformation is referred to as "rectification" (p. 101), and what the text calls "proprietary remedies" are the equivalent of the constructive trust and the equitable lien (pp. 34, 38). The American reader might first read the excellent article by Maudsley, *supra* note 24, which was written as an introduction to contemporary English restitution concepts for Americans.

tion field. The American reader might have preferred a slightly broader sweep in painting a new field of law, and he may find himself somewhat bogged down in the excellent detail regarding the English case law. On the other hand, since the authors have gone farther than an American might in looking for material dealing with "unjust enrichment," he in fact will find much to flesh out the broad principles we have developed.

Whether or not this seminal effort will bear its well-deserved fruit in England is difficult to predict at this time. As the authors say, "The law is . . . in an embryonic state" (p. 70).<sup>26</sup> Certainly the English climate of receptivity has improved substantially, and a comprehensive treatise should smooth the way for lawyers and judges. It is at least obvious that it will not receive immediate enthusiastic reception in all quarters. It is reported that the library of one ancient English university classified this "restitution" treatise under criminal law, and that the library of one of the Inns of Court refused to acquire it at all.<sup>27</sup> It should at any rate meet with an enthusiastic response in this country.

WHITMORE GRAY \*

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<sup>26</sup> This remark regarding one aspect of the law of mistake is in fact a theme which recurs throughout the book.

<sup>27</sup> Cornish, Book Review, 29 *MOD. L. REV.* 579, 581 (1966).

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