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The Scope of Restitution and Unjust Enrichment

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“Restatement of Restitution and Unjust Enrichment” is the title adopted by the American Law Institute for the compilation of legal doctrines most recently completed under its auspices.¹ The title is unwieldy and unfamiliar. Unlike the divisions of the Restatement heretofore published in definitive form,² this one does not at once bring to mind a well recognized division of the field of private law. To the bench and bar it may seem disturbingly novel. It is true that the words “restitution” and “unjust enrichment” are words of common speech, but they are words of vague and uncertain significance, and their vagueness is not clarified or restricted by familiar established usage which gives them meanings as words of art in the law. There is danger that this Restatement, when it is published in final form in the fall of 1936,³ will speak to the legal profession not with the tongues of angels but with the voices of Babel. It would be most unfortunate if this Restatement were to attain only a *succès d'estime*. An examination of its scope and content will reveal that, far from being esoteric, it deals with some rather simple and basic notions of justice, that it has many applications to situations which arise in the ordinary affairs of life, and that its doctrines cut across almost the whole field of private

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1. The Proposed Final Draft of the RESTATEMENT was presented to the Institute for approval at its Annual Meeting in May, 1936. The Proposed Final Draft is in two parts: Part I. The Right to Restitution, including Quasi Contractual and Kindred Equitable Relief. Part II. Constructive Trusts and Analogous Equitable Relief. The sections (1-215) are numbered consecutively in this draft, and it is expected that the official draft will be published in a single volume. Work on Part I was begun in June, 1933, and Tentative Draft No. 1 was presented to the Institute in May, 1935. The time which elapsed between the beginning and the completion of this RESTATEMENT was much less than that of the RESTATEMENTS previously completed.

2. The titles previously published in official form are: CONTRACTS (1932); AGENCY (1933); CONFLICT OF LAWS (Vol. I, 1934); TORTS (Vols. I and II, 1934); TRUSTS (1935). The RESTATEMENT OF PROPERTY is nearing completion. SALES OF LAND and BUSINESS ASSOCIATIONS are still in tentative stages.

3. Since the foregoing was written, the Proposed Final Draft was approved by the Institute at its annual meeting in May, 1936. It is expected that the final draft will be published early in 1937.

law. Every practicing lawyer, with only a few possible exceptions, will at some time have need for an understanding of the law which this Restatement is designed to expound and clarify. The purpose of this article is to indicate the scope of the Restatement of Restitution and Unjust Enrichment, and to place its subject matter in the system, if it be a system, of American law. Although the present writer has served from the beginning as one of the Advisers to the Reporters engaged in formulating this Restatement,⁴ in presenting these comments he does not speak either for them or for the Institute.

The scope of the Restatement may be described roughly as the field of quasi contracts and the field of constructive trusts. The legal profession is probably less familiar with the former subject than with the latter. For this reason, as well as because it is the subject with which the present writer is more familiar, the greater part of the following discussion will be devoted to the field of quasi contracts.

Quasi Contracts is, among the major branches of private law, the latest to receive recognition as a distinct part of the law of obligations. Contracts emerged from the interstices of procedure near the close of the eighteenth century. Torts appeared as a distinct subject matter about the middle of the last century. It was not until the publication of Professor William A. Keener's treatise in 1893⁵ that quasi contracts became a recognized part of the system of English or American private law.⁶ This is not to say that the tripartite division of the law of private obligations was not thought of before the close of the nineteenth century. As early as 1832, John Austin in his lectures on jurisprudence at the University of London, divided rights *in personam* into contracts, quasi contracts and delicts.⁷ In making this classification, however, he was not using the language of the contemporaneous English bench and bar, but was borrowing from the more subtle analysis and the more orderly system of the civil law of continental Europe. He recognized that in the English common law (excluding the Romanized admiralty law⁸) the quasi contractual obligation was concealed beneath the fiction of implied contract.⁹

4. The Reporter of Part I was Professor Warren A. Seavey (Harvard); of Part II, Professor Austin W. Scott (Harvard). The Advisers were: Professor Ralph J. Baker, Professor Francis H. Bohlen, Judge Oliver W. Branch (Supreme Court of New Hampshire), Professor Erwin N. Griswold, Mr. Charles McH. Howard, Professor William E. McCurdy, Professor Edward S. Thurston, Judge John D. Wickhem (Supreme Court of Wisconsin), Professor Samuel Williston, and the present writer.

5. KEENER, A TREATISE ON THE LAW OF QUASI CONTRACTS (1893).

6. Of course it is somewhat arbitrary to mark the recognition of a subject by the publication of treatises on it, just as all historical lines are somewhat arbitrary. I have seen an English case of the early seventeenth century in which the term "quasi contract" was used; unfortunately my note of it is lost.

7. 1 AUSTIN, JURISPRUDENCE (4th ed., 1873) 55.

8. See 2 *id.* at 944, citing salvage as an example of quasi contractual obligation in English law.

9. 2 *id.* at 945.

The historical antecedents of this threefold division are to be found in the Roman law as early as the second century,¹⁰ and the textbook which the Emperor Justinian had compiled for law students, known as the *Institutes* of Justinian, sets forth a distinct though limited category of quasi contractual obligations.¹¹ A fourth category of the later Roman law¹² also mentioned by Austin,¹³ was the quasi delict, but this distinction, which Austin thought useless, has not been received in English or American law. Nor did Austin's attempt to introduce the conception of quasi contract have any immediate influence. Thus the recognition of quasi contract did not come in American law until near the close of the nineteenth century.¹⁴

Even after the publication of Keener's learned treatise, the reception of the concept of quasi contract in American judicial opinions was very slow. The courts continued, as they had been doing long before that publication, to make many applications of the principles of quasi contractual liability without using the terminology and without developing the basic ideas of the subject.

The Romans had a word for it which clearly denoted the fictitious character of the "contract"; but the English and American courts, with characteristic reluctance to accept new terminology, continued to apply the term "implied contract" which left conveniently unsettled the question whether the implication was an inference of fact or a rule of law. In resorting to the fiction of an "implied contract", the courts were often led astray. At the worst they conjured up an artificial consent as the basis of the obligation.¹⁵ At best they uttered some hornbook formula and left the true grounds of decision unexpressed. Even in the grist of current judicial decisions applying the doctrines of quasi contract, only a minority label them or analyze them correctly; and for this reason it is all the more important that the practicing lawyer should be able to recognize the thing without its proper label. Yet a mi-

10. The DIGEST of Justinian contains an excerpt from Gaius' INSTITUTES, written in the second century, which indicates that the category of quasi contract was invented to denote obligations which arose neither out of contract nor out of wrongdoing (*ex maleficio*). DIG. 44, 7, De O. et A., 5.

11. INST. III, 27. (The date is 533).

12. INST. IV. 5.

13. 2 AUSTIN, *op. cit. supra* note 7, at 945, 959.

14. The law review articles of Ames, which antedated by a few years the publication of Keener's treatise, are not overlooked; they are referred to further on.

15. Note, for instance, the attempt to justify recovery by a building contractor, substantially in default, on the ground that the owner, by using the building or other structure permanently affixed to his land, "elected" or consented to pay its reasonable value. E. g., Otis Elevator Co. v. Headley, 81 N. J. L. 173, 80 Atl. 109 (1911). When asked to push this line of reasoning to its logical conclusion, courts ordinarily refuse to treat such conduct as consent. See 1 PATTERSON, CASES ON CONTRACTS II (1935) 244, n. 1; RESTATEMENT, CONTRACTS (1932) § 298. See also Keener's comment on the opinion in Hertzog v. Hertzog, 29 Pa. St. 465, 468, at pp. 7-8 of his treatise. In this case and in a few others, the court used the term "constructive contract."

nority of courts in recent years, enlightened by the work of Keener or by the excellent treatise of Professor Woodward published twenty years later,¹⁶ have begun the work of staking out this third estate of the private law of obligations.¹⁷ Thus the restatement of quasi contracts is not an attempt to force a wholly esoteric body of professor-made law upon a suffering profession; it is an attempt to find the boundaries of a field which has been well trodden for at least two centuries; and it is badly needed at this time because the boundary lines are uncertain.

The historical development of quasi contract serves to explain the uncertainty as to its scope. In Anglo-American law, as in Roman law, it was invented as a category to include obligations which could not be conveniently subsumed under either contract or tort, as soon as those two categories came to be defined by general principles. Quasi contracts was the catch-all. It is not surprising that into this limbo of unlabeled specimens were thrown some which could not be allowed to remain when a general theory of quasi contract came to be developed. Two examples are debts of record (e. g., judgments) and statutory, official, or customary duties. Ames included in quasi contracts these two classes of obligations, and a third class, those founded upon unjust enrichment.¹⁸ Of the latter much will be said later on. The inclusion of the two former illustrates the rationale of quasi contract in its earlier American stages. A judgment had long been called a "contract of record," presumably because an action of debt could be maintained upon a judgment, and in the modern category of contract the action of debt was included. Yet it was too violent a fiction to suppose that the defendant who had bitterly fought a tort action to the court of last resort had consented to pay the judgment. It might have been called a tort obligation, since the original cause of action was in tort; but this forthright manner of speaking would have been offensive to some other venerable doctrines of the common law, notably the doctrine of merger by judgment. Thus Ames, and Keener following him,¹⁹ placed the obligation of record in the old Roman junk room. The statutory or customary duty was placed there for a similar reason, namely, because the action of debt could be maintained upon such an obligation.²⁰ Here again the obligation, which was in the nature of a tax or a penalty, was not based upon any conduct

16. WOODWARD, *QUASI CONTRACTS* (1913).

17. E.g., *Matter of Buccini v. Paterno Construction Co.*, 253 N. Y. 256, 170 N. E. 910 (1930); *Sanders v. Ragan*, 172 N. C. 612, 90 S. E. 777 (1916); *Sommers v. Putnam County Board of Education*, 113 Oh. St. 177, 148 N. E. 682 (1925); *Dunnebacke v. Pittman*, 216 Wis. 305, 257 N. W. 30 (1934); *Michigan Central R. Co. v. State*, 85 Ind. App. 557, 155 N.E. 50 (1927). The civil law term is referred to in *People ex rel. Dusenbury v. Speir*, 77 N. Y. 144, 150 (1879).

18. Ames, *The History of Assumpsit*, (1888) 2 HARV. L. REV. 64; *LECTURES IN LEGAL HISTORY* (1913) 160.

19. KEENER, *op. cit. supra* note 5, at 16.

20. *City of London v. Goree*, 1 Ventris 298 (1667) (duty to pay a scavenger).

of the obligor which a layman or even a clear-headed lawyer would call "consent". The obligation imposed by an official duty might have been squeezed under contract, just as marital duties sometimes are;²¹ yet the refinement of the conception of contract which took place in the nineteenth century left no room for these long-range consents. Despite his inclusion of the first two classes of quasi contractual obligations, Keener devoted almost his entire book to the third class. And when Professor Woodward reviewed the subject two decades later, he gave only a bare mention to the first two categories, and urged that the title "quasi contract" should be reserved for the third category alone.²² Thus it seems fair to say that obligations of record (which are *sui generis*) and statutory or official duties (which presumably belong in the domain of public law) are not included under quasi contract. They are not included in this Restatement.

To distinguish quasi contract from tort, another rather ingenious but highly artificial distinction was made. Both obligations are imposed by the law regardless of the consent of the obligor. They cannot be distinguished by reference to the type of conduct which gives rise to the obligation, or by the moral aspects of that conduct, since some tort obligations are imposed without fault of the obligor (e. g., liability for trespassing animals, for blasting, in some states) and many quasi contractual obligations are based upon morally wrongful conduct, as in the case of waiver of tort, fraud, etc. The distinction which was devised to separate the two was this:—The primary tort obligation is negative, to refrain from acting; the primary quasi contractual obligation is affirmative, to act. The law imposes a primary duty not to commit a tort; upon the breach of this primary duty the secondary (affirmative) duty to make reparation, to pay damages, arises. On the other hand, the law never imposes a duty not to commit a quasi contract; it imposes a quasi contractual obligation only to make recompense for the obligor's unjust enrichment, or, as will be noted later, to make restitution to the obligee. The distinction between a negative duty and an affirmative duty was thus made the boundary wall.²³

Of this distinction it may be said that it is clear and fairly workable and not without value in fixing an artificial boundary. Some objections to it may be pointed out. To begin with, the proposition that tort obligations are never affirmative may be open to question. If one includes equitable torts, the duty

21. I. e., the consent arising from accepting a public office, or from the marriage ceremony.

22. WOODWARD, *op. cit. supra* note 16, at 1-2.

23. See Ames, *op. cit., loc. cit. supra* note 18; KEENER, *op. cit. supra* note 5, at 15, citing AUSTIN, JURISPRUDENCE, Lecture XIV, for the statement that tort duties are negative. See also Corbin, *Quasi-Contractual Obligations* (1912) 21 YALE L. J. 533. A valuable survey of the subject is given in Dean Wigmore's article, *A Summary of Quasi Contracts* (1891) 25 AMERICAN L. REV. 695.

of a trustee to invest idle funds²⁴ would seem to be an affirmative duty, since a court of equity will make him pay for the *cestui's* loss regardless of whether the trustee profited by the failure to act. The trustee's liability arises out of an affirmative tort obligation. A more serious objection is that the same tortious conduct may give rise to an action in tort (based upon the secondary tort duty) or an action in quasi contract (often called "waiver of tort") to recover for the unjust enrichment of the tort-feasor. In other words, the distinction is drawn between the primary tort duty and the quasi contractual duty which is secondary or remedial. Thus the distinction fails to mark a boundary between primary tort duties and the antecedents of quasi contractual duties.

It has frequently been said that quasi contract, like constructive trust, is a purely remedial concept. This statement implies that there are no primary or antecedent quasi contractual duties. This is true in the sense that the quasi contractual obligor does not necessarily breach any antecedent duty to the obligee in receiving or acquiring the benefit in question. For instance, a payee who unwittingly receives money paid by mistake, in supposed satisfaction of a debt which was previously paid, does not violate any legal duty to the obligee by receiving the money; the only breach of duty is in failing to pay it back when he learns of the mistake. If, however, primary rights are merely concepts or hypotheses useful in predicting how courts will decide,²⁵ it seems there is a hypothetical quasi contractual right, and its correlative duty, before the money was paid. A further objection to this distinction between quasi contract and tort is that it takes no account of the ethical or social aspects of the conduct which gives rise to the respective obligations.

The principle that one who has been unjustly enriched at the expense of another must make restitution is the basic principle of this Restatement.²⁶ For the sake of convenience this will be called the principle of unjust enrichment. This principle satisfies the requirements of a synthetic or classificatory principle for all of the doctrines of quasi contracts and of constructive trusts, with possibly a few exceptions. This is not to say that such a vague principle is a workable test of liability in a particular case, if unaided by precedent; the analytic aspect of the principle will be referred to later on. It may be objected that the principle does not serve to differentiate tort from quasi contract; many tort actions involve restitution for benefits unjustly acquired, as in the actions for the conversion of chattels, or in actions for the specific

24. RESTATEMENT, TRUSTS (1935) § 181; see also §231. Of course, one need not go so far afield to find affirmative duties arising out of a relation: The bailee's common law duty to exercise ordinary care in protecting the bailed chattel from loss or damage is an affirmative duty, long sanctioned by a tort action (action on the case); but the borderline position of this duty is indicated by the fact that a contract action (special assumpsit) is also available.

25. HOLMES, COLLECTED LEGAL PAPERS (1920) 168-169.

26. PROPOSED FINAL DRAFT § 1.

recovery of land or chattels. The answer is that these remedies fulfill a dual function, that of reparation for a tort and that of restitution for benefits acquired. The distinction between tort and quasi contract relates to the substantive law of obligations; the system of remedies which grew up under the common law and which has been liberalized by the codes of procedure does not dovetail neatly with the divisions of substantive law. In any practical or applied science the same instrument may be used for different purposes.

The field of quasi contract has been restricted by most writers to obligations enforceable in an action at law. This restriction may be explained by the fact that the various doctrines which were later assembled in the category of quasi contract were developed in courts of law through the application of the common counts in general assumpsit, and by the further fact that a great law judge, Lord Mansfield, was the first to liberate some of these doctrines from the stifling fiction of a promise.²⁷ But the principle of unjust enrichment is applicable to suits in equity, and a considerable body of equitable doctrine may be subsumed under it. That these doctrines were omitted from the field of quasi contract was an historical accident arising from the fact that substantive law in its early stages is concealed beneath the forms of procedure (to paraphrase Maine). The American codes of procedure have generally abolished the distinction between actions at law and suits in equity. Whatever else this may mean (and one need not rush into this well-trodden arena of controversy), it indicates that there is no longer any reason for separating the substantive equity doctrines (i. e., those equitable in origin) based upon unjust enrichment, from the legal doctrines (i. e., those developed in the common law) based upon²⁸ the same principle. The Restatement is a systematic presentation of substantive law. It therefore includes rules which are equitable as well as those which are legal. Since, however, the term quasi contract had already acquired a meaning which restricted it to obligations remediable at law, it was decided to discard the term "quasi contract" from the title of the Restatement. It has accordingly been relegated to the subtitle of Part I.

The title, as has been said, is cumbersome and unfamiliar. To understand it requires a knowledge of the historical antecedents of the doctrines which it embraces and a careful study of those doctrines. For these reasons this Restatement may be slow in gaining acceptance by the bench and bar. Yet it has the distinct advantage of sweeping away the accumulations of several centuries of confused and misleading terminology; and the legal problems for

27. The leading case is *Moses v. Macferlane*, 2 Burr. 1005 (1760), a striking example of a case which because of its opinion has long outlived any value as a precedent which may be attached to the decision; on the particular facts it has little present value. Lord Mansfield based recovery on "equity and good conscience."

28. Using "based upon" in the sense indicated above, as meaning a classificatory principle, not as meaning that these doctrines were historically derived by deduction from that principle.

which it offers a solution are so common and pervasive that, if it proves to be properly drawn for this purpose, it ought to be widely used. Only time will tell.

Neither "restitution" nor "unjust enrichment" is quite comprehensive enough to include all the situations which fall within the field covered by the Restatement. Two examples may suffice. It is generally accepted that a person who performs services in repairing another's building under an entire contract which he is prevented from performing by the fortuitous destruction of the building can recover the reasonable value of his services.²⁹ Some authorities argue that the property owner is enriched by each stroke of the hammer or the paint brush;³⁰ but others refuse to accept this somewhat Pickwickian conclusion. At all events the measure of restitution to the plaintiff exceeds the amount of increase in the assets of the defendant, since the increment of value due to half-painting a house, for instance, seems scarcely equal to the value of the labor and materials used in half-painting it. Hence restitution seems to be the basis of recovery, although recovery is limited to the benefits received by the owner; he would not be liable for materials which the painter had bought for this purpose but had not yet used on the house.³¹ On the other hand, there are some rules which compel the acquirer of a benefit to make "restitution" to a person who never had the benefit. An example is the duty of a trustee to account to the beneficiary of a trust for profits received by the trustee from his investment of the trust funds in violation of his trust, as by buying and selling speculative securities.³² The profits are received from third persons, yet they belong to the beneficiary because acquired by the wrongful use of his property. Here unjust enrichment is the basis of recovery. However, it is not easy to find examples which cannot be subsumed readily under either heading. There is much to be said for limiting the title to "Restitution," a term which has some recognition in judicial opinions.³³

The principle of unjust enrichment has been attacked on two sides. On the one hand it has been argued that it is too vague and indefinite to be a guide to decision, since it does not define what is "unjust."³⁴ In an article which

29. E. g., *Butterfield v. Byron*, 153 Mass. 517, 27 N. E. 667 (1891).

30. Professor Woodward, who discards "unjust enrichment" for "benefit received," regards this as a case of benefit received by the property owner. *Op. cit. supra* note 16, § 117.

31. *Matthews Const. Co. v. Brady*, 104 N. J. L. 438, 140 Atl. 433 (1928).

32. PROPOSED FINAL DRAFT, § 198.

33. See, for example, the excellent opinion of Learned Hand, J. in which he discusses one of the major problems of quasi contract (recovery by a defaulting contractor), using the term "restitution" and carefully avoiding the term "quasi contract". *Schwasnick v. Blandin*, 65 F. (2d) 354 (C. C. A. 2d, 1933).

34. Abbot, *Keener on Quasi Contracts* (1896) 10 HARV. L. REV. 226, criticizing Keener's treatise. Abbot urged that the basic principle of quasi contract was restitution upon breach of a consensual obligation or a tort. Judge Hand pointed out that this would not include the well recognized quasi contractual recovery of money paid under mistake, in which there is neither tort nor breach of contract. See next note.

has stood the test of time (as few of them do!), Judge Learned Hand nearly forty years ago³⁵ defended this principle on the broad ground (if I interpret him rightly) that a basic principle may be "logically perfect" although it refers to other legal principles or rules which in turn denote the operative facts on which rights or duties rest. The distinction referred to above, between using the principle of unjust enrichment as a classificatory instrument, and using it as an instrument for analysing the facts of a particular case and determining their legal consequences, seems pertinent here. Courts using the Restatement will not be given blank checks to fill in with the amount of unjust enrichment which the judicial hunch of the moment tells them the plaintiff is entitled to. No more than in the decision of tort cases they have used the ancient principle of "*sic utero tuo*"³⁶ to invent new species of tort liability. The species of quasi contract liability are defined by rules which are no vaguer than the rules of many portions of the law of torts, although the latter have a much larger body of judicial precedents. The principle of unjust enrichment will be used deductively, if at all, only in the novel or boundary-line case. Even there it will be used as a general test of the propriety of extending the law to include new obligations to make restitution, and will be restricted in application by the absence of analogous precedents.³⁷

Professor Woodward, on the other side, has criticized unjust enrichment as too narrow a formulation of the quasi contractual obligation.³⁸ He insists that the receipt of benefit is sufficient; it is not necessary that the recipient's estate should be enriched as a result of the transaction. The obligation of the house-owner to pay the house-painter for half-painting the house which was burned down gives him no qualms; the owner received the product of the painter's labor and materials, and it is immaterial that he was fortuitously prevented from enjoying them to the fullest extent. In this simple case the present writer has no difficulty in finding that the owner was enriched by the painting, since the painting was useful in protecting the house from sun and storm. A more difficult case is the one in which recovery was sought for the wages of an artist, a noted mural painter, who died when he had partly completed the mural decorations of a palatial residence in New York City. Here the personal representative of the painter was allowed to recover the reasonable value of the services, and Judge Cardozo gave as the measure of recovery "the benefit to the owner in advancement of the ends to be promoted by the contract."³⁹ If the painter was at the time of his death performing labor and

35. Hand, *Restitution or Unjust Enrichment* (1897) 11 HARV. L. REV. 249.

36. See Hand, *supra* note 35, at 250.

37. E. g., for a case dealing with a novel kind of quasi contractual claim, see *Graf v. Neith Co-operative Dairy Products Ass'n.*, 216 Wis. 519, 257 N. W. 618 (1934).

38. WOODWARD, *op. cit. supra* note 16, § 8.

39. *Matter of Buccini v. Paterno Construction Co.*, 253 N. Y. 256, 170 N. E. 910 (1930).

services in the manner called for by the contract, it would make no difference that the painting was a modernistic nightmare which would decrease rather than increase the sale price of the house. Here the concept of enrichment, if applicable at all, becomes slightly artificial. The owner was enriched, it may be said, in the sense that he got what he asked for. The painting had value to him in so far as it satisfied his want; even the economist, who treats of value in a different way, does not inquire into the sanity of wants. Thus the decision can be squared with the principle of unjust enrichment. A recent Connecticut case went further than any other case has gone, in allowing an owner to recover the expense of redecorating a house at the request of a purchaser who had made an oral and illusory promise to buy it, and who subsequently backed out of the deal.⁴⁰ Here the defendant received nothing tangible, yet in a highly artificial sense he got what he asked for. In construing enrichment to mean an enhancement in the net value of one's estate Professor Woodward gave it too narrow a meaning.

Another class of cases in which this problem becomes acute is one in which an agent purporting to act as such but without actual or apparent authority, obtains money from a third person, deposits it in the principal's bank account, and then draws it out and embezzles it before the principal knows it is there.⁴¹ Professor Woodward considers the principal as having received a benefit for which he should make restitution.⁴² The courts generally hold there is no liability in such a case,⁴³ on the ground that the principal received no benefit. It is arguable, of course, that money in the bank is necessarily a benefit; but an asset of which the principal learns only after it has disappeared seems too fleeting for practical evaluation. Since the knowledge of the faithless agent is not to be imputed to the principal, the case is analogous to the use of one's premises as a temporary hiding place for stolen money. If, however, the agent uses some of his ill-gotten gains to pay off the principal's debts, the principal is to that extent liable, although he never had the money in his pocket.⁴⁴ Discharge of one's debt is a benefit; it is also an enrichment. It seems, then, that either benefit or enrichment must be taken in a sense sufficiently broad to cover substantially the same ground.

Quasi contractual duties are enforced by the recovery of a money judgment; constructive trust implies the existence of a trust *res*, which may be the object of specific restitution. This distinction has important consequences,

40. *Kearns v. Andree*, 107 Conn. 181, 139 Atl. 695 (1928). In the Statute of Frauds cases, the recovery is not limited to benefits received. *WOODWARD, op. cit. supra* note 16, § 102; *WILLISTON, CONTRACTS* (1920) § 536.

41. *First Nat'l Bank of Las Vegas v. Oberne*, 121 Ill. 25, 7 N. E. 85 (1886).

42. *WOODWARD, op. cit. supra* note 16, §§ 72, 75.

43. *First Nat'l Bank of Las Vegas v. Oberne*, 121 Ill. 25, 7 N. E. 85 (1886); *Credit Alliance Corp. v. Sheridan Theatre Co.*, 241 N. Y. 216, 149 N. E. 837 (1925); *WOODWARD, op. cit. supra* note 16, §§ 72, 75.

44. *First Nat'l Bank of Las Vegas v. Oberne*, 121 Ill. 25, 7 N. E. 85 (1886).

especially when the obligor is insolvent. Hence the Restatement is divided into two main parts:—Non-specific restitution, which embraces quasi contracts and equitable obligations to make restitution in money; and specific restitution, which includes the subject-matter of constructive trusts and also some rights to specific restitution which may be redressed in an action “formerly denominated legal” (to paraphrase the New York code). For instance, the defrauded seller of a chattel can maintain replevin or a similar legal action to recover the chattel, while the defrauded grantor of land is required, in most jurisdictions, to seek an equitable remedy for restitution of the land. Yet the obligation to make specific restitution seems the same in both cases, and both are appropriately brought together in the Restatement.

Almost every transaction or other activity of man in society may somehow come within the scope of application of the law of quasi contracts; and yet no one by planning to can acquire a quasi contractual right. A person who plans to acquire such a right by thrusting a benefit upon another person is an officious intermeddler and is denied restitution.⁴⁵ With some reservations one can also say that people do not plan to incur or to avoid quasi contractual duties.⁴⁶ The law of quasi contracts is the hospital of frustrated plans and expectations. The performance of a contract is prevented by the default of the contractor or by supervening impossibility, or the hopes and expectations aroused by the contract are frustrated by the discovery that they were aroused through fraud or mistake. The task of quasi contracts is to salvage from the wreckage that minimum of legal redress which is represented by restitution for unjust enrichment. It offers a last resort to the victims of mistake, oppression and misfortune. Since transactions involving large amounts of money are ordinarily well planned, it is not surprising to find that the amounts involved in quasi contract litigation are usually small. In a system of law which relies upon appeal to courts of last resort to get its rules settled, rules which involve ordinarily only small amounts are likely to remain unsettled. The scarcity of reported precedents on many questions of quasi contract law bears out this hypothesis. Hence a restatement of this subject will, if it proves effective to accomplish its ends, help those who are least able to help themselves.

Merely to list the topics covered by the quasi contracts part of the Restatement would fail to disclose the subject matter with which it deals. The topic of “Coercion” (Chapter 3), for instance, embraces not only duress and undue influence, but also the payment of a debt which is owed by the payor

45. PROPOSED FINAL DRAFT § 2.

46. Of course there are many exceptions. A trustee may be deterred from speculating with trust funds because he knows that he will have to pay over the profits to the beneficiary if his venture is successful. Likewise, the draftsman of a contract may well bear in mind quasi contractual rights and duties in framing the contract.

and by another person, who is thus benefitted. Hence the right of a surety to indemnity from his principal and the right of contribution between co-sureties or between joint tort-feasors, are within the scope of the subject. Mistake, "waiver of tort"⁴⁷ and benefits conferred under contracts or other bargains⁴⁸ are the three remaining principal topics. Certain exceptional grounds of quasi contractual liability are grouped together in chapters five and six. Among these are supplying necessities to a person in an emergency, and the conferring of benefit necessary to save a person's life, as in the case of the physician who treats the unconscious victim of an accident. These rules are exceptions to the general principle, stated above, that one who thrusts his services upon another is officious. The law of torts, it is generally assumed, imposes no duty upon the good Samaritan to help the friendless victim; but the law of quasi contract gives the good Samaritan a right to restitution if he chooses to intervene and if his intervention was urgently necessary.⁴⁹ To such an unofficious benefactor it is not enough to say that virtue is its own reward.

The bulk of quasi contractual litigation falls under the broad category of mistake. In this topic are included the case where the mistake of one party was induced by the fraud of the other, the case where the mistake was induced by the innocent misrepresentation of the other, and the case where the mistake was not attributable in any sense to the other party. In the last case the mistaken party has no tort remedy, and in the second case he has no tort remedy in most jurisdictions. In these two cases the right of restitution is the only right of the unfortunate. Mistake of law, perhaps the most confused subject in the entire field of law (unfortunately it has many rivals for that distinction), is comprehensively discussed in the Restatement, and it is believed that, although an ideal solution of this problem is not yet attained, the rules there presented will help to clarify the decisions on this subject. A careful study of the precedents⁵⁰ shows that the maxim, every man is presumed to know the law, is a hoary old imposter in the field of quasi contract, and he has

47. PROPOSED FINAL DRAFT, Chapter 7, "Benefits Tortiously Acquired."

48. *Id.* Chapter 4, "Benefits Conferred at Request."

49. *Id.* § 116. Chapter 5 of the Restatement is a catch-all, as is indicated by the title:—"Benefits Intentionally Conferred without Mistake, Coercion or Request." The general rule that benefits so conferred do not give rise to a right of restitution (§ 112) is followed by a number of exceptions. At least one of these is well established, namely, the right to recover from a husband or father for necessities furnished to an abandoned wife or minor child (§ 113). The right to recover for emergency services is not as well established, but finds some judicial support; e. g., *Cotnam v. Wisdom*, 83 Ark. 601, 104 S. W. 164 (1907) (approving recovery by physician for first-aid services given to unconscious victim of street accident).

50. The Reporter, Professor Seavey, read well over a thousand cases on this subject before formulating his conclusions.

accordingly been banished to the field of criminal administration, where he may properly belong.⁵¹

The Restatement of Restitution and Unjust Enrichment does not contain all the rules of quasi contracts. Many of these have already been stated in the Restatement of Contracts, and the chapter devoted to them in the present restatement⁵² consists chiefly of cross-references to the earlier restatement. Another group of quasi contractual obligations which are only touched upon in the present restatement are those arising out of marital relations and those imposed upon persons having limited or no contractual capacity, such as infants, lunatics and municipal corporations.⁵³ There may be others which a succeeding generation of lawyers will discover, or invent.

The fictitious character of the constructive trust has longer been understood by the legal profession than that of the quasi contract. The term "constructive trust" seems to have been derived from section eight of the English Statute of Frauds which, after requiring that all trusts be manifested and proved by a writing, excepted trusts which "result by the implication or construction of law."⁵⁴ This famous phrase is the foundation of both resulting and constructive trusts. Without going into the distinction between "implication" and "construction" one can say that the resulting trust has come to be classified as a genuine trust, and the constructive trust as a fictitious or remedial trust based upon the principle of unjust enrichment. The facts which give rise to constructive trusts ordinarily include those which give rise to a quasi contractual obligation; the constructive trust presupposes that the benefit is in the form of a specific thing and is capable of restitution. The special field of constructive trusts, however, contains three main groups of rules:—Those in which land is acquired under an oral agreement, those in which property is wrongfully acquired or retained under a will (including by analogy, a policy of life insurance) and those in which a fiduciary is benefitted by his breach of duty. Certain rights analogous to those of the beneficiary of a constructive trust, such as the right to an equitable lien on a wrongdoer's property and the right of subrogation, are included along with the constructive trust proper. A final chapter on the rules as to tracing of ill-gotten gains rounds out this part of the Restatement.

The Restatement of Restitution and Unjust Enrichment will repay careful study by the legal profession. Unfortunately it will require a great deal of careful study if one is to understand its pronouncements. Lacking the authority of the state, it can command the attention of its readers only by the learning and wisdom of those who prepared and approved it, and by its intrinsic merit as a reliable and comprehensible treatise on law. The tripartite

51. Smith, *Surviving Fictions* (1918) 27 YALE L. J. 317.

52. Chapter 4, "Benefits Conferred at Request."

53. Tooke, *Quasi-Contractual Liability of Municipal Corporations* (1934) 47 HARV. L. REV. 1143.

54. 29 CHAS. II, c. 3, § 8 (1676).

form of the earlier restatements—blackletter text, comment and illustrations—has been retained. The blackletter statement of many of the doctrines of quasi contracts is vague and cryptic, and one must go to the comment and illustrations for enlightenment. Fortunately, the comment of this Restatement endeavors to present, more clearly than in some earlier ones, the underlying ethical principles which justify the rules; and the illustrations are commonly taken from reported decisions. The decisions, however, are nowhere cited in the proposed final draft.

To the present writer this seems a mistake of major consequence. The law of quasi contracts is not a well understood subject. No digest heading brings together its precedents. They are scattered from Abandonment to Zoning, and only the practiced eye can pick them out. Even one who has studied the subject for many years has difficulty in recognizing quasi contract decisions under their many disguises. The scarcity of precedents on many topics, as above indicated, affords another reason why the publication of annotations would have been a boon to the legal profession. It may be true that one of the original purposes of the restatement was to break with the unwieldy and stifling bulk of precedent in American law. Yet the transition from case law to code law cannot be made abruptly, if indeed, it can be made at all. The quest for certainty does not end on the barren heights of abstract formulas.

As in the case of other Restatements, this one represents many compromises between conflicting views. Any composite intellectual product will have this characteristic. The present occasion is not the one to criticize in detail the formulations finally adopted. In making a restatement of the law one must "be bold, young man, but not too bold." It is believed that this Restatement is a valuable clarification of some difficult and important legal problems, and that it will lead to further discussion and clarification as it comes to be widely used by the legal profession.