

RESTITUTION
PAST, PRESENT AND
FUTURE

*Essays in Honour of
Gareth Jones*

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The Later History of Restitution

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THE modern law of restitution¹ traces mostly to two earlier bodies of English law: quasi-contract under the writ of *assumpsit* at common law, and the constructive trust in equity.²

Why fiction?

What is striking to the modern eye is the sheer dishonesty of both these historic roots. Even by the fiction-tolerant standards of early-modern English law, the two doctrinal bases of the law of restitution were unusually contrived. To put the matter bluntly, the law of restitution in its earliest guise was a pack of lies. And so it largely remained into the early decades of the twentieth century.

Under quasi-contract, as John Baker's succinct paper³ emphasises, the contract writ, *assumpsit*, was manipulated to give remedies in cases in which there was no contract, or no enforceable contract.⁴ The results became ever

* Chancellor Kent Professor of Law and Legal History, Yale University; Arthur Goodhart Professor in Legal Science, Cambridge University (1997–98). I wish to record my gratitude for the teaching and scholarship of Gareth Jones. I think I may safely claim to have been a student of Gareth's in more venues than anybody else. I first encountered Gareth when he was lecturing in the tripos at Cambridge in 1964. In 1966–67 Gareth taught trusts at Harvard, and I owe to that memorable course a life-long fascination with the subject. In the 1970s when we were colleagues at the University of Chicago, Gareth let me sit in on his Restitution course. Gareth brought wisdom and wit to every class. His teaching has been deeply influential on both sides of the Atlantic for an entire generation of equity lawyers.

¹ This paper is presented as a commentary to John Baker's paper, "The History of Quasi-Contract in English Law".

² See generally George E. Palmer, "History of Restitution in Anglo-American Law", in *International Encyclopedia of Comparative Law* (1989) vol. 10, ch. 3.

³ See p. 37 above.

⁴ For the suggestion that Blackstone's respectful treatment of quasi-contract helped shield the fiction "into the twentieth century", see Peter Birks and Grant McLeod, "The Implied Contract Theory of Quasi-Contract: Civilian Opinion Current in the Century before Blackstone", (1986) 6 *Oxford Journal of Legal Studies* 46.

more fictional, in the sense that these cases became less and less contract, more and more quasi.

And if you are queasy about quasi-contract, the constructive trust⁵ was worse. It was a transparent fiction, rooted in the chancellor's ability to overcome legal title by framing a decree to affect equitable title. The modern law of restitution, especially the American version, is now candid that what the chancellor is doing is remedying unjust enrichment, with no connection to the law of express trusts.⁶ The chancellor says to a defendant who is not a trustee, "Because the outcome can be made convenient, I'm going to treat you as though you were a trustee, even though we all know you are not".

Bentham, who loathed the fictions that survived in English law to his day, deprecated them with his famous remark that fiction is to law what swindling is to trade. A century later Lon Fuller took issue with Bentham. A legal fiction, wrote Fuller, is a lie that is not meant to deceive.⁷ When the King's Bench treated the Island of Jamaica as lying in Cheapside, everybody knew that Jamaica was still safely anchored in the Caribbean. Legal fictions are tell-tale signs of a legal system that is reaching results for which it does not have a theoretical basis. King's Bench, in my example, was fictionalising the location of Jamaica, because King's Bench jurisdiction rested on the venue of the bill of Middlesex. By pretending to find Jamaica in Cheapside, King's Bench spared itself from having to identify and delimit the real basis of the jurisdiction it was exercising.

The fiction of quasi-contract and constructive trust did comparable work. Looking back we can see that these were ways of doing restitution without having to articulate the doctrinal theory upon which restitution has come to rest, that is, the law of unjust enrichment.

Primitiveness

The question arises, why was the doctrinal basis of the English law of restitution so primitive for so long? One is tempted to look at John Baker's writ-based account of the machinations that passed under the name of quasi-contract and say: Here as in so many aspects of English law in early modern times, it was the distortions of the writ system that largely tell the

⁵ See Gareth Jones, "The Role of Equity in the English Law of Restitution", in E.J.H. Schrage (ed.), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (Berlin, 1995) p.149.

⁶ "A constructive trust does not, like an express trust, arise because of a manifestation of an intention to create it, but it is imposed as a remedy to prevent unjust enrichment": *Restatement of Restitution* (1937) § 160, comment a. "The constructive trust is not in fact a trust, but a remedy which is explained by analogy to trusts". Dan B. Dobbs, *Law of Remedies*, 2nd edn (1993), vol. 1, §4.3(2) at p. 401.

⁷ Lon L. Fuller, *Legal Fictions* (1967), p. 60.

story. Not until the writs were buried could judges and jurists take up the task of identifying the real principles of private law.

The trouble with that account is that English lawyers did not confront restitution until well after they had reconfigured the rest of the law of obligations. The Victorians and their immediate successors elaborated the general principles, first of the modern law of contract, and then of tort, all the while continuing to tell the old lies about quasi-contract and constructive trust. Not until the middle decades of the twentieth century was serious attention devoted to articulating the principles of the law of unjust enrichment. Accordingly, it is hard to see the breakdown of the writ system as a very proximate cause of the ultimate development of the law of restitution.

Another reason for thinking that the delayed recognition of restitution in Anglo-American law has a more complex history than the death throes of the writ system is that the Continental legal systems, which never knew the English writ system, experienced a broadly similar timing. In the nineteenth century, the German scholars in particular, but in truth legal theorists all over the Continent, devoted enormous effort to constructing a general law of contract from the several archaic contract types bequeathed by Roman law. The law of unjust enrichment was a stepchild, and even today it has had to be teased out of Code provisions that hardly foresaw it.⁸

This comparative history suggests that the law of unjust enrichment is in a sense historically contingent upon the rest of the law of obligations, and especially of contract. Only when the nineteenth-century legal systems had worked out the contours of the modern law of contract was it possible to see the range of unjust enrichment problems that contract law – honest contract law – could not solve. In both English and European law, learning the limits and the shortcomings of the law of contract was a precondition for developing the law of restitution.⁹

⁸ For Germany, see Reinhard Zimmermann, "Unjustified Enrichment", (1995) 15 *Oxford Journal of Legal Studies* 403; for Italy, see Paolo Gallo, "Remedies for Unjust Enrichment in the History of Italian Law and in the Codice Civile", in E.J.H. Schrage (ed.), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (Berlin 1995) p. 275; Eltjo J.H. Schrage, "The Law of Restitution: The History of Dutch Legislation", in *ibid* at 323. On the influence of Pothier and other civilians in the development of nineteenth-century English contract law, see A.W.B. Simpson, "Innovation in Nineteenth-Century Contract Law", (1975) 61 *L Q Rev.* 247, 255–57.

⁹ Jack Beatson, following John Dawson, has written in a similar vein: "Forty years ago in his important Rosenthal lectures, Professor Dawson showed that the prevention of unjust enrichment as a distinct and independent principle tends to be recognized late in the development of any legal system, after provision has been made for the primary institutions through which society is organized. It has to struggle for a place in the legal firmament because, as a latecomer, 'it cuts across other principles already expressed in doctrines and reinforced by rules': Jack Beatson, *The Use and Abuse of Unjust Enrichment* (1991) p. 244, citing John P. Dawson, *Unjust Enrichment* (1951).

English and American contributions

While I am speaking of comparative legal history, let me conclude by alluding to a sphere of comparison that is closer to home, at least to my home, and that is the peculiar interplay between the English and American law of restitution across the twentieth century.

The main points are well known. The Americans led the way in the development of the modern law. Keener's treatise¹⁰ on quasi-contract, first published in 1893, grew out of the curriculum at Harvard and Columbia. Keener's casebook and his treatise facilitated the spread of the course among other law schools. This curricular life made the subject sufficiently prominent that the American Law Institute included it in the first round of *Restatement-writing* in the 1930s.¹¹

Seavey and Scott, the reporters for the *Restatement of Restitution* (1937), produced their work just as the consolidation of law and equity in American federal procedure was being completed.¹² That reconstruction of American procedure helped them to take their giant step, linking quasi-contract and constructive trust as components in the larger field that they identified as the law of unjust enrichment.

The other contribution made by Seavey and Scott was to rechristen the field as "restitution". They were a little defensive about that move. In 1938, a year after the ALI published the *Restatement of Restitution*, Arthur Goodhart got Seavey and Scott to write a missive to their English brethren in the *Law Quarterly Review*, explaining what they were up to. This article, called simply "Restitution", describes the coverage of the *Restatement* and admits that "there was given to [this *Restatement*] a title which is indefinite in connotation and unfamiliar to the profession".¹³ The restitution label was, in other words, a deliberate marketing ploy. Seavey and Scott seized on a label that, as John Baker emphasises in his paper, offered plenty of antiquity but not much settled meaning.

The tenor of Seavey and Scott's article is that the backward English needed to be clued in to the important innovations that the Americans were making in restitution. This sense that the Americans were at the frontier of the law of restitution endured into the 1950s and 1960s, with the work of John Dawson

¹⁰ William A. Keener, *A Treatise on the Law of Quasi-Contracts*, 1st edn. (1893).

¹¹ On the history of the American Law Institute and the *Restatements*, see G. Edward White, "The American Law Institute and the Triumph of Modernist Jurisprudence", (1997) 15 *Law & History Review* 1.

¹² See generally Stephen N. Subrin, "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective", (1987) 133 *University of Pennsylvania L. Rev.* 909; Stephen B. Burbank, "The Rules Enabling Act of 1934", (1982) 130 *University of Pennsylvania L. Rev.* 1015.

¹³ Warren A. Seavey and Austin W. Scott, "Restitution", (1938) 54 *LQR* 29.

and George Palmer. (That, incidentally, is when Gareth Jones encountered the field as a student at Harvard.)

Then, just as Goff and Jones launched the modern era in England,¹⁴ the study of restitution collapsed in the USA. It is as though a neutron bomb has hit the field – the monuments have been left standing, but the people have been killed off. Today the *Restatement of Restitution* survives on the shelf in its pristine 1937 version, but the course has virtually disappeared from the American curriculum.¹⁵ The subject has all but vanished from the law reviews, and apart from Professors Kull and Laycock, it is hard to name a living American authority. What restitution is taught in American law schools today turns up mostly in snippets in the remedy units of contracts and trusts books; and in advanced civil procedure courses, which sometimes treat restitutionary remedies, but which are centred on the study of injunctive practice in complex federal constitutional litigation.

Meanwhile, in England and in the Commonwealth, restitution has attracted a huge following. Indeed, from afar, the subject sometimes seems to dominate legal intellectual life. The Fifth Edition of Goff and Jones is in press, there is a range of student textbooks, there has been a torrent of scholarly work of great distinction, and there is now a dedicated journal, the *Restitution Law Review*. This interest is not confined to the academy. The English courts exhibit a sensitivity to restitution issues that is uncommon in American judicial opinions.

How did these ships come to pass in the night? That is a large question, and I do not pretend to have much of an answer, but I can point to a few of the factors.

On the American side, the disappearance of restitution from the curriculum is inextricably linked to the larger phenomenon of the marginalisation of private law. Over the past generation, American law schools have increasingly become academies for the study of public law.¹⁶ The private law curriculum has been compressed to make room for the ever larger diet of public law offerings. When you find restitution taught as a tag-end in a course on remedies, you need to bear in mind that similar compromises are occurring right the way across the declining curricular turf of private law.

There are other reasons for the decline of private law in American legal culture, beyond the pressure from constitutional and public law. Among them, I would mention a couple of factors that may shed a little light back on the

¹⁴ Robert Goff and Gareth Jones, *The Law of Restitution*, 1st edn. (1966).

¹⁵ The annual directory of law teachers contains a listing of teachers by subject-matter. There is no longer a heading for “restitution”, although the heading for “remedies” has a note that it “Includes Damages and Restitution”: American Association of Law Schools, *The AALS Directory of Law Teachers: 1996–97* (1996), at p. 1216.

¹⁶ I have discussed this phenomenon in John H. Langbein, “Scholarly and Professional Objectives in Legal Education: American Trends and English Comparisons”, in P. Birks *What are Law Schools For?* (1996) pp. 1, 3–4.

great success story of restitution in contemporary English and Commonwealth law. I would point, first, to the terrible toll that the realist movement has inflicted on doctrinal study in the post-Second World War USA. When lawyers are trained to think that legal rules are mostly excuses, that doctrine is a smokescreen for the policies, politics, values, social forces, or whatever; that really motivate the decisions, the hard work of refining and articulating legal rules will not be regarded as an attractive enterprise. I am not alone in thinking that the precipitous decline of the treatise tradition in the USA owes much to the realists' scorn for legal doctrine.¹⁷

The other factor I would emphasise is the capture of so much of American private law by the "law and economics" movement. From about the 1970s onward, we have seen property, contract, tort, company law, commercial law, and various transactional fields become increasingly subordinated to the economic analysis of legal rules.

The study of restitution requires an environment that treats the study of legal doctrine with respect. Legal realism and "law and economics", by contrast, are movements that are inhospitable to doctrinal work, because they supply alternative accounts of why cases get decided. In England and the Commonwealth, the luxuriant flowering of restitution has taken place in a legal culture that has retained doctrinal integrity. The task of producing, criticising, reconciling, and improving the rules that govern private law is still taken seriously in the academy and on the bench.

To be sure, this English doctrinal tradition suffers the vices of its virtues. In a unitary legal system in which things can get decided once and for all, a kind of constriction of the legal arteries can occur. I have wondered whether part of the excitement of restitution for this generation of English scholars and judges has been the relative newness of the field. Restitution is still in many ways an open book, and what fun it is to write on blank pages.

There is, however, an element of chance, an element of the personal, in complex historical developments. The history of restitution in England has known some of that, too. Restitution over the past generation has come under the spell of a handful of charismatic scholar-teachers, people who have made the field so exciting. Foremost among them has been Gareth Jones.

¹⁷ See A.W.B. Simpson, "The Rise and Fall of the Legal Treatise", (1981) 48 *University of Chicago L. Rev.* 632, 677-79.