Chapter - I
UNJUST ENRICHMENT AND RESTITUTION:
A CONCEPTUAL FRAMEWORK

1.1 Introduction

Literally speaking ‘Unjust Enrichment’ means when a person takes benefit from other person and does not give anything in return i.e. the person unjustly enriches himself at the expense of another.

Unjust enrichment is:

- The retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected.
- A benefit obtained from another, not intended as a gift and not legally justifiable for which the beneficiary must make restitution or recompense.
- The area of law dealing with unjustifiable benefits.

The principle of unjust benefit implies that the person having passed on the burden of tax to another, directly or indirectly, would not be entitled to get the refund, even if such refund is permissible. Having passed on the burden of tax to another person, directly or indirectly, it would be clearly a case of unjust enrichment if the importer seller is then able to get the refund of the duty paid from the government notwithstanding the incidence of tax having already been passed to the purchaser.

A principle developed at the common law and equity, whereby, roughly, a person who is unjustly enriched, either by receipt of value from the plaintiff in circumstances where he or she ought to return it, or by profiting from a wrong done to the plaintiff, is required to pay over the value of that enrichment to the plaintiff.

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1 Black Law dictionary, 8th edn. at p. 1573.
3 J.E. Penner, Oxford Law Student Dictionary at p. 302.
Person taking advantage of unclear legal position during the pendency of lease would be subjected to the doctrine of unjust enrichment and will be liable to refund back the money so received⁴.

Where a person unjustly obtains a benefit at the expense of another, in certain cases where money is obtained by mistake or through fraud or for a consideration which has wholly failed the law implies a promise to repay it. The rule against unjust enrichment is embodied in Section 70 of Indian Contract Act, 1872 and founded not upon any contract or tort but upon a third category of law, namely quasi contract or restitution⁵.

The retaining of a benefit (as money) conferred by another when principles of equity and justice calls for restitution to the other party also the retaining of property acquired especially by fraud from another in circumstances that demand the judicial imposition of a constructive trust on behalf of those who in equity ought to receive it⁶. It is a doctrine that requires an equitable remedy on the behalf of one who has been injured by the unjust enrichment of another.

Thus the basic meaning is that it would be unjust to allow one person to retain a benefit received at the expense of another person. There is a legal maxim also that *Nemo Debet Locupletari ex Aliena Jactura* which means that no one should grow rich out of another person’s loss. The unjust enrichment has been stated to have three things:

- That the defendant has been enriched by the receipt of benefit.
- He must have been enriched at the expense of plaintiff and
- Allowing defendant to keep the benefit will be unjust.⁷

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1.2 Unjust Enrichment: Historical Perspective

The historical background of the theory of unjust enrichment can be divided into three phases. The first phase lasted till the second half of eighteenth century. Although there are clear traces of remedies being given in the situations that would later coalesce as unjust enrichment, there was no consciousness of any feature linking them to each other. Although the medieval English lawyers knew nothing about the general principles of unjust enrichment, even then in number of situations they did give remedies that would later be explicitly categorized in this way. Apart from this a number of statutory writs were present to deal with such specific cases and majority of these claims were taken into consideration in the common writs of debt and account. It is a basic concept of contractual liability that the parties had legal capacity. In the 15th century, it was laid down that an infant, though not normally liable on contract, would be liable to pay the price of necessary items like food, clothing or educational purposes. Sophisticated analysis would want to differentiate between liability of price and liability for price of goods, but there was no hint of this before the end of sixteenth century.

The development of the action of as sumpsit did not produce any immediate changes in the substance of these rules, though as a matter of form it came to supersede the older remedies of debt and account. So the person who had discharged another’s liability might bring as sumpsit to obtain an indemnity only in case when the payment is made at the request of the defendant. The capacity of as sumps it is best seen in the development of quantum meruit which means that what one has earned. Here the plaintiff typically alleged that the defendant in consideration of some service rendered to the plaintiff at his request, promised to pay to the plaintiff the reasonable value of the service. It may be possible that sometimes there is no such express agreement but then it can be deduced from the circumstances of each case. If a person takes a cloth to tailor for making shirt then it was not difficult to infer that the person has promised to pay for the shirt. Before the middle of 18th century,
quantum meruit claims were being allowed where the inference of a genuine agreement to pay a reasonable sum was far less secure.

In the second half of the 18th century Lord Mansfield introduced the principle that in some cases the action would be allowed where both the request and promise were fictitious. The quantum meruit and indetatitus assumpsit for money laid out essentially took over and expanded those situations that in medieval law had clustered around the central core of contractual liability. Alongside these, taking over and expanding those situations clustering around property notions in the middle ages was the action of indebitatus assumpsit for money had and received. This action started to emerge at the beginning of 17th century but it was in the eighteenth century that it really came into its own.

Since, the early years of eighteenth century the courts have moved from the proposition that these are based on implied promises to the wholly inaccurate proposition that they were based on implied contracts.

The doctrine of unjust enrichment was originally based in English law upon the principle of assumpsit or a contract which has and received and was declared by Lord Mansfield in Moses v. Mcfarlon\(^8\), that the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money. In the case of Sadler v. Evans\(^9\), he commented that the action for money had and received was: a liberal action, founded upon large principles of equity, where the defendant cannot conscientiously hold the money.

The defence is any equity that will rebut the action. The courts of equity covered much ground as the common law action for money had and received, by the eighteenth century, the courts of equity exercised a general jurisdiction to grant relief where there is unjust for are recipient of property to retain the

\(^8\) (1760) 2 Burr 1005 at 1012.
property himself.

The second half of eighteenth century and in the nineteenth century the law of torts and the law of contract were structured around each other in theoretical framework in which former based on the natural lawyer’s theory of imputation and the latter on the will theory. The American lawyers at the start of twentieth century brought the broad principles of Joseph Story i.e. equitable jurisprudence and were able to manipulate constructive trusts into remedial devices so as to reverse the unjust enrichment.

The first, faltering steps away from the implied contract theory were taken in India in the 1860s in the case of *Rambux Chittangeo v Modhoosoodun Paul Chawdhary*\(^{10}\), it was held in this case with reference to Pothier and Austin jurisprudence that a claim for contribution from a co surety was not a contractual claim, that the use of the language of implied contracts was something forced on the common law by the purely fortuitous fact that the remedy was framed in the as sups it and the system like Indian was not dependent on the forms of action could profitably abandon all the talks of implied contracts.

The Indian Contract Act, 1872 followed this line: under the heading of certain relations resembling those created by contract where it included claims for necessaries supplied to those without contractual capacity, claims for indemnity or contribution, claims to be paid for the beneficial services provided without the intention of making any gift, claims against the finder of goods and claims for the money paid by the mistake. It went certain changes through judicial interactions and came to be based more and more on the doctrine of restitution.

In India, the principle was developed under Section 69 and Section 70 of Indian Contract Act, 1872. Within a decade of the passing of the act it was held that the co surety claims for contribution was in fact a contractual term

\(^{10}\) (1867) 7 WR (India) 377.
after all and the earlier cases discussing its contractual nature, it was said, were delivered before the passage of the act, especially when legislation had not stepped in the plain language to give distinct vitality and affect to certain relations between parties out of those moral obligations one to another a legal fiction had grown up for implying a contract and while as learned expositions of law, they can be read with interest and advantage for practical purposes to the point under consideration they are absolute and irrelevant.

The judicial mind is unconsciously moved by the major inarticulate promise, in this breach of the law that none should be allowed to unjustly enrich himself at the expense of another. The law so developed by judicial conscience appears to discover obligations to defeat unjust enrichment or unintended acquisition by their situation. The natural tendency of courts is that wherever they find unjust enrichment is to order restitution.

According to Section 68, if a person, incapable of entering into a contract or anyone whom he is legally bond to support, is supplied by another person with necessaries suited to his conditions in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person. For example, A supplies B, a lunatic, with necessaries which are necessary for his survival. A is entitled to be reimbursed from the B property.

In the case of *Jai Indra Bahadur Singh v. Dilraj Kaur*\(^1\), a minor being bound to support his sister, money advanced to a minor for marriage of his sister has been held to be necessaries under this section and also recoverable from the property.

In the case of *Benaras Bank Limited v. Dip Chand*\(^2\), it was said that a creditor can recover money advanced to the minor for necessaries and can recover the money out of the minor’s estate.

According to Section 69, a person who is interested in the payment of money

\(^{11}\) AIR 1921 Oudh 14.
\(^{12}\) AIR 1936 ALL 172.
which another is bound by law to pay, and who therefore pays it is entitled to be reimbursed by the other.

In the case of *Govindram Gordhandas Seksaria v State of Gondal*\(^{13}\), the party had agreed to purchase certain mills, he was allowed to recover from the seller the amount of already overdue municipal taxes paid by him in order to save the property from being sold at the auction.

In the case of *Dakshina Mohun Roy v Saroda Mohun Roy Chowdhry*\(^{14}\), it was held that money paid by a person while in possession of an estate under the decree of the court for preventing the sale of the estate for covering the arrears of government revenue may be recovered by him under this section.

According to Section 70, where a person lawfully does something for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. For example, if A, a tradesman, leaves goods at B’s house by mistake. B treats the goods as if they are of his own and uses that good. Then B is required to or bound to pay the amount to A for the goods.

In the case of *Great Eastern Shipping Company Limited v. Union of India*\(^{15}\), the plaintiff lawfully carried a cargo of coal and delivered it to the defendants union. The correspondence showed that the plaintiff did not intend to do it gratuitously and the defendant had accepted the cargo and thus defendant became liable to pay compensation to the plaintiff under Section 70.

In the case of *State of Rajasthan v Raghunath Singh*\(^{16}\), a grantee of loses of minor minerals is entitled to recover by way of compensation various amounts deposited by him in pursuance of the grant of the lease in the event of cancellation of lease.

\(^{13}\) AIR 1950 PC 99.
\(^{14}\) (1893) 21 Cal 142.
\(^{15}\) AIR 1971 Cal 150.
\(^{16}\) AIR 1974 Raj 4.
In the case of *Bhagavadas Krishnadas v. P. S. Soma Iyer*\(^{17}\), the purchaser of property allowed the defendants to continue their residence in the building until they found other occupation and there was no indication in the evidence that the plaintiff had done so gratuitously, the plaintiff was entitled to remuneration for use and occupation.

In the case of *Bhicoobai v. Hariba Raghuji*\(^{18}\), a property belonging to a caste is attached in execution of a decree and a member of the caste pays to the decree holder the amount due to him under the decree to save the property from sale in execution then it was held that he is entitled to be reimbursed out of the caste property.

In the case of *Kashi Nath Singh v Nawab Alam Ara*\(^{19}\), the villagers utilised water from the pay on the construction of bund, contribution towards the construction was payable on the account of villages under Section 70.

In the case of *Modi Sugar Mills Limited v Union of India*\(^{20}\), X had a contract with Union of India for the manufacture of biscuits for the Union, and component material was to be supplied by the union which it did in containers. Later, X failed to return the containers, despite demand from the union. The union deducted the amount of value of containers from the security deposit and other sums due to X. X bought a suit for the recovery of amounts deducted. It was held that the material and containers were always the property of union and it never passed to X. The union did not intend to pass the containers gratuitously and respondent had received benefit, in that it did not have to supply in its own containers. Section 70 was applied in this case and respondent was liable to pay compensation.

In the case of *Noor Mohommad v Mohammad Jiajddin*\(^{21}\), a Muslim groom after solemnization of the marriage refused to take his wife because of her

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\(^{17}\) AIR 1969 Ker 263.

\(^{18}\) AIR 1917 Bom 556.

\(^{19}\) AIR 1934 Pat 346.

\(^{20}\) AIR 1984 SC 1248.

\(^{21}\) AIR 1992 MP 244.
father’s refusal to pay for the nautch girl brought with the marriage party, the expenses borne by the girl father on the meals for the marriage party and for the band and lights paid to the groom’s father were not gratuitous but for consideration of marriage, and could be restituted to the bride’s father.

According to Section 71, a person who finds goods belonging to another and takes them into his custody is subject to the same responsibilities as that of bailee.

In the case of *Union of India v. Amar Singh* 22, goods booked for Quetta before the partition of the country were found to be missing when the wagon containing the goods was received at New Delhi. The owner sued East Punjab railway which was handling the wagon from Indo- Pakistan border into India. It was held that when the railway administration in Pakistan left the wagon containing goods within the borders of India and the forwarding railway administration took them into their custody, it could not deny liability under Section 71.

In the case of *Newman v. Bourne and Hollingsworth* 23, P, a customer in D’s shop, put down a brooch with her coat and forget to pick it up. One of the D’s assistant found it and placed it in a drawer over the weekend. It was found missing on Monday, D was held liable to P in view of the absence of that ordinary care which in the circumstances a prudent man would have taken.

In the case of *Union of India v. Mahommad Khan* 24, plaintiff’s timber was lying on a piece of land which was subsequently leased out to the defendant. The latter gave notice to the owners of timber to remove it but it was not removed. The defendant then cleared the site and the timber was damaged or removed.

The plaintiff’s claim under section 71 was dismissed as the defendant had not

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22 AIR 1960 SC 233.
23 (1915) 31 TLR 209.
24 AIR 1959 Ori 103.
taken the goods into the custody.

According to Section 72, a person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it. For example, A and B jointly owe 100 rupees to C, A alone pays the amount to C and B not knowing of this fact, pays 100 rupees over again to C. Then C is bound to repay the amount to B

In the case of Tilokchand Motichand v Commissioner of Sales Tax25, a firm paid sales tax of more than twenty six thousand rupees in respect of sales to consumers outside the state of Bombay and which were not liable to pay any sales tax. The firm had itself collected the tax money from its customers. The amount was ordered to be refunded on one condition that it should produce receipts from customers outside Bombay showing that the refund in question had been passed over to them. The firm was order to return the tax money and it would be recovered as arrears of land revenue. The firm paid it. The firm sought to recover back the money as it is paid under mistake under coercion. The court held that payment was made under coercion and would have been recoverable under Section 72.

In the case of Associated Cement Company limited v. Union of India26, the railway authorities charged extra fare under the mistaken belief that the goods would have to be carried by longer route, they were ordered to return the extra fare.

In the case of S. Ketrabarsappa v. Indian Bank27, a bank mistakenly credits entry in customers account and customer withdraws the amount. He would be bound to pay back the money along with the interest.

In the case of Food Corporation of India v. K. Venkateswara28, where the rice

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26 AIR 1987 Kant 236.
27 (1988) 1 Andh LT 930.
28 Nailaya Goudar v Ramaswami Gounder (1958) 2 Mad LJ 86; Muppudathi Pillai v Krishnaswami Pillai AIR 1960 Mad 1 (FB).
millers were paid an amount in excess of the agreed rate because of a mistake in the classification according to quality, they were required to disgorge the unjust enrichment

1.3 Doctrine of Unjust Enrichment

The Sections 68-72 embodies the doctrine of unjust enrichment\(^\text{29}\). The general purport of the section is to afford to a person who pays money in furtherance of some existing interest, an indemnity in respect of the payment against any other person who, rather than he, could have been made liable by law to make the payment\(^\text{30}\). The Section converts the natural obligation into a legal obligation to pay on the part of the person who has received benefit of the payment by another person of what he was bound to pay\(^\text{31}\). If there is a direct contractual relation between the parties, there is no occasion to rely upon this section\(^\text{32}\).

This Section lays down a wider rule than once required by the English Authority. The word ‘interested in the payment of money which another is bound by law to pay’ might include the apprehension of any kind of loss or inconvenience, and not merely the actual detriment capable of being assessed in money\(^\text{33}\). It was not enough, in the common law, to find a claim to reimbursement by the person interested, if he made the payment himself. It was stated for example:

If A is compellable to pay to B damages which C is also compellable to pay to B, then A, having been compelled to pay to B, can maintain an action against C for money paid for the circumstance raise an implied request by C to A to make such payment in this case. In other words A can call upon C to

\(^{30}\) Nath Prasad v Baij Nath (1880) 3 All 66.
\(^{31}\) Subbakke Shettithi v Anthamma, Shethi AIR 1934 Mad 628.
\(^{32}\) Tulsa Kunwar v Jageshar Prasad (1906) 28 All 563, Jagarnath Prasad v Chunni Lal (1940) All 580.
\(^{33}\) Bonner v Tottenham and Edmonton Permanent Investment Building Society (1898) 1 QB 161.
indemnify him\textsuperscript{34}.

The obligation here had thus to be stated as a fictitious contract in order to find a place for it within the rules of the common law pleading. The meaning was that C, who did not in fact ask A to pay, was treated as if he had done so. Such a right to indemnity arose, for example, where one man’s goods were lawfully seized for another’s debt, e.g. as being liable to distress, and were redeemed; by the owner would be entitled to indemnity from the debtor, thought he may have exposed his goods to the risk of distress by a voluntary act done at the debtor’s request or for his benefit\textsuperscript{35}. Such claims would now fall in the English law under the head of restitution or unjust enrichment\textsuperscript{36}.

But under this Section, the fiction is superfluous, and the duty may be expressed, as in this section, in plain and direct terms without any talk of an implied request\textsuperscript{37}. It has been stated authoritatively with judicial approval:

Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability, under such circumstances the defendant is held indebted to the plaintiff in the amount\textsuperscript{38}.

The requirements for the application of the provisions of this section are:\textsuperscript{39}

(i) The plaintiff must have made an actual or virtual payment of money.

(ii) The plaintiff must have been compelled to pay this money to a third party.

(iii) The defendant must have been legally liable to pay the third party.

\textsuperscript{34} Edmunds v Wallingford (1885) 14 QBD 811.
\textsuperscript{35} Chitty on Contracts, 28\textsuperscript{th} edn, para 30-001 et seq. especially at p. 1500.
\textsuperscript{36} Eastern Mortgage and Agency Co. Ltd. V Mohammad Fazlukarim (1925) 52 Cal 914.
\textsuperscript{37} Moule v Gerett (1872) LR Ex 101.
\textsuperscript{38} Halsbury’s Laws of England, 4\textsuperscript{th} edn vol. 9.
\textsuperscript{39} Supra note 34.
Though the plaintiff would usually stand in some kind of relationship to the person for whom he paid, no relationship of privity is necessary to give a right of action.

1.4 Theory of Unjust Enrichment

“A person who has been unjustly enriched at the expense of another is required to make restitution to the other.”

Lord Mansfield who is considered to be the real founder of such obligations, explained them on the principle that law as well as justice should try to prevent “unjust enrichment”, that is, enrichment of one person at the cost of another. His Lordship offered this explanation in Moses v Macferlan⁴⁰:

“Jacob issued four promissory notes to Moses and the latter indorsed them to Macferlan, excluding, by a written agreement, his personal liability on the endorsement. Even so Macferlan used Moses on the endorsement and he was held liable despite the agreement. Moses was thus compelled to discharge a liability which he had excluded and, therefore, sued to recover back his money from Macferlan.”

He was allowed to do so. After stating that such money cannot be recovered where the person to whom it is given can “retain it with a safe conscience”, Lord Mansfield continued:

“But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition; or extortion; or oppression; or for an undue advantage taken of the plaintiff’s situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by ties of natural justice and equity to refund the money.”

A liability of this kind is hard to classify. Partly it resembles liability under the law of tort inasmuch as it arises independently of any contract. Partly it resembles contract inasmuch as it is owed only to one party and not “to

⁴⁰ Supra note 8.
persons generally”. Thus, it can be accounted for either under an implied contract or under natural justice and equity for the prevention of unjust enrichment. Lord Mansfield preferred the latter theory.

But beginning with the decision of the House of Lords in *Sinclair v Brougham* it became fashionable to discard Lord Mansfield’s formulation and to rely upon an implied-in-fact contract.

A building society undertook banking business which was outside its objects and, therefore, *ultra vires*. The society came to be wound up. After paying off all the outside creditors, a mixed sum of money was left which represented partly the shareholders money and partly that of the *ultra vires* depositors, but was not sufficient to pay both of them. The depositors tried to get priority by resorting to the quasi-contractual action for recovery of money had and received for the depositors’ benefit, for otherwise the shareholders would be unjustly enriched.

The House of Lords allowed rateable (*paripassu*) distribution of the mixed fund among the claimants, but did not allow any remedy under quasi-contract. Lord Haldane maintained that common law knows personal actions of only two classes, namely, those founded on contract and those founded on tort. “When it speaks of action arising *quasi ex contract* it refers only to a class of action in theory which is imputed to the defendant by a fiction of law.” Similarly, Lord Sumner observed that an action for money had and received rests, not on a contractual bargain between the parties, but “upon a notional or imputed promise to repay”. Lord Parker expressly pointed out that if a promise to pay back an *ultra vires* loan could be imputed to the company as quasi-contractual obligation, the result would be to validate a transaction which has been declared to be void on the ground of public policy and the law would be enforcing a notional contract where an express contract would have

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41 (1914) AC 398.
42 Id at p. 415.
43 *Sinclair v Brougham* (1914) AC 392.
been void\textsuperscript{44}.

This approach dominated decisions for a long time and the decision was taken to have settled that the juridical basis of quasi-contract was the implied, notional or fictional contract. Where the circumstances of a case do not lead to an inference of this kind or where such an inference would be against the law, no liability will arise\textsuperscript{45}.

1.5 Relation between Unjust Enrichment and Restitution

Unjust enrichment is unfamiliar, even too many lawyers. A central example is a mistaken payment. Suppose that I pay you $1000 in the mistaken belief that I owe it to you. Provided that my claim does not get caught up in the finer tuning, I will be entitled to restitution from you. You have been enriched any my expense, and there is, in the mistake, an ‘unjust factor’, a factual reason why you should make restitution. ‘Unjust enrichment’ is the generalised description of the event. It forms the genus; mistaken payment is a particular species. Like cases must be treated alike. The generic description serves to gather together all the other events which ought to be treated in the same way as mistaken payment. For example, it money is paid over on a specified basis, and the basis fails, restitution must likewise follow. The ‘unjust factor’ is different in this case. It is failure of basis or, in the traditional phrase, failure of consideration.

If rather few common lawyers have yet had a legal education which built the category of unjust enrichment into their intellectual armoury, it is because until quite recently no law school could do the job. It is still a novel category. Its content was formerly fragmented arid dispersed by language, and concepts, thrown up by the intuitive pragmatism of the past. Yet its identification and organisation has been one of the great success stories of the twentieth century. That stone has now been rolled to the top of

\textsuperscript{44} Union of India v Solar Pesticide P Ltd. AIR 2000 SC 862.
\textsuperscript{45} Holt v Markham, (1923) 1 KB 504.
the hill, and there it will certainly stay, unless some jurist manages to send it rolling down the other side.

There are some who are inclined to try. The High Court of Australia has played an important part in disengaging the new law of unjust enrichment from its muddled earlier history\textsuperscript{46}. Nevertheless, some distinguished Australian lawyers have shown themselves to be sceptical, even hostile. They either doubt its claims to have sorted out a large area of the common law or believe that the sorting out could have been done, and still can be done, much better in some other way. This lecture is about some Australian species of that sceptical hostility or hostile scepticism. It is of course wholly right to test and probe. If the stone is unstably perched on the summit, it is dangerous. If it is dangerous, it should be pushed down under supervision as soon as possible. But my theme today will be that it is not unstable. These particular Australian suspicions are false. On the contrary, the recognition of the law of unjust enrichment is a genuine advance in the rationality of the common law. Since, rationality and justice go hand in hand, it should not be repudiated.

On the civilian side of the Western legal tradition the law of unjust enrichment goes back two millennia. The seeds were sown in the first life of Roman law, when the \textit{ius civile} was the law of the Romans themselves. It was ultimately brought to flower in its second life, but not till some centuries after Justinian’s \textit{Corpus Iuris Civilis} had become once again the law library of Europe. This is not the place to trace that history, nor to examine the different positions taken by different national codifiers. In the codes the \textit{ius commune} split up, much as the Rhine when it reaches its delta. However, we ought not to contemplate the twentieth century story within the common law without taking note of the fact that a century ago, in 1900, the enactment of the German \textit{Bürgerliches Gesetzbuch} included a compact set of outline rules for the operation of the fundamental principle that, in the event of unjust enrichment, the party enriched must make restitution. That was one

\textsuperscript{46} Pavey and Mathews Pty Ltd v Paul (1987) 162 CLR 221.
culmination of the long history of the subject, or perhaps more accurately a staging post. But, if in experience difficult, the singularly clear German statement also serves as a marker for the beginning of common law’s attempt to make sense of its own position in the same matter. Under the rubric *Ungerechtfertigte Bereicherung* (‘Unjustified Enrichment’), of the German Civil Code stated the principle in these words:

A person who, through a performance by another or in some other way at the expense of that other, has received something without any legal ground is bound to make restitution to that other. This obligation also arises in the case in which the legal ground later falls away or the result contemplated by the performance, as judged by the nature of the legal transaction in question, fails to materialize.

On the common law side, no detailed account has yet been written of the history of this subject in the first third of this century. The forces gathered which would eventually assemble the scattered pieces. It is difficult to prove that the German Civil Code at 812 was a catalyst. It is difficult to believe that it had no role at all. This formative period issued in the restatement of restitution, which the American Law Institute commissioned from Professor Austin Scott and Professor Warren Seavey in 1933 and published in 1937. As Justice Gummow has recently written, the early work was all American. ‘England,’ he says ‘followed well behind. Sixty years later, in 1997, the American Law Institute finally set Professor Andrew Kull working on the second *Restatement*. That will be a twenty-first century event. If it takes a decade it will have been done quickly, for in the meantime the subject has grown and grown up. But it has grown up in a manner which in some ways poses serious problems for Professor Kull.

A great wave of learning has swept around the major common law jurisdictions of the world. Justice Gummow is quite right to emphasise the American initiative, and the very brevity of his brief account no doubt
justifies his making no reference to the English chapter. But in truth the story cannot be understood without any reference to England. The work which started in America later moved across the Atlantic, and it was from there that it spread through the Commonwealth and, ultimately, back to the United States. Professor Kull’s problem is that the American case law is still in a relatively raw condition. Structural doctrine in private law has been largely forsaken by the great American law schools, just at a period in which this particular subject stood in particular need of more attention of precisely that kind.

England reacted instantly to the first restatement. But between the first enthusiastic reaction and the substantive response, the Second World War intervened. Wars disrupt. Despite the length of the interruption, Goff and Jones was the response to the restatement. About the same time, graduate courses sprang up in Oxford, London, and Cambridge- in Cambridge under Gareth Jones himself, in London under George Webber, who was my own inspiring teacher, in Oxford under Guenter Treitel and Derek Davies. It was that book and those courses which provided the momentum which carried this exciting new learning throughout the Commonwealth and provoked the writing of new books in Canada, Australia, and New Zealand.

The literature has in turn produced the cases, and one court after another has accepted that the common law does indeed have a law of restitution of unjust enrichment. The torrent shows no sign of abating. Professor Andrew Burrows’ Law of Restitution, together with the marvellous volume of cases and materials which he has recently put together with Professor Ewan McKendrick, has made the subject accessible at the LL.B. level. The subject has acquired its own dedicated journal, the Restitution Law Review. Only the other day Dr. Robert Chambers, previously of this University, and I, as the persons responsible for a biennial publication called ‘The Triple R’ (The

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47 Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour (1943) AC 32, 61.
Restitution Research Resource), were bemoaning the fact that the days when it was possible to achieve comprehensive coverage were over.

That this has been a major twentieth century story is not in doubt. Whether it is a success story we will not know for certain for another hundred years. Great advances in knowledge and understanding take time to test, and they are not often achieved without errors and digressions. The errors and digressions have to be rooted out. The deepest question is whether the whole story ought really to be reversed. Mr Ian Jackman, a Sydney barrister, thinks it should. He studied the subject in Oxford and believes that he has discovered congeries of latent defects. In the varieties of restitution his aim is to send the stone rolling down the hill. And Justice Gummow’s preface to Mr Jackman’s book, though it stops short of saying it in so many words, suggests that that most learned judge would have the reader believe that in his view Mr Jackman’s attack has not missed its mark. That which Justice Gummow endorses will command attention all over the world.

1.6 Scope of Unjust Enrichment and Restitution

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, 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 success 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 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 behind this 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, 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 contracts50.

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 1893 that quasi contracts became a recognized part of the system of
English or American private law.

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
delicts51.

50 Keener, A treatise on the of Quasi Contracts (1893) at p.287.
51 Austin, Jurisprudence 4th edn. (1873) at p. 55.
In making this classification, how-ever, 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 the quasi contractual obligation was concealed beneath the fiction of implied contract.

The historical antecedents of this threefold division are to be found in the Roman law as early as the second century, 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. A fourth category of the later Roman law also mentioned by Austin\(^{52}\), 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.

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.’

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\(^{52}\) Id at p. 945-959.
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 minority of courts in recent years, enlightened by the work of Keener or by the excellent treatise of Professor Woodward published twenty years later[^53], have begun the work of staking out this third estate of the private law of obligations[^54]. 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 un-certainty 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[^55], 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

[^53]: Woodward, *Quasi Contracts* (1913) at p. 124.
[^55]: Ames, ‘The Histroy of Assumpsit’ (1888) 2 Harv. L. Rev. 64.
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, 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. Here again the obligation, which was in the nature of a tax or a penalty, was not based upon any conduct 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; 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. 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

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57 Woodward, op. cit at p. 180.
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 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 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 oblige.

The distinction between a negative duty and an affirmative duty was thus made the boundary wall. 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 of a trustee to invest idle funds 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 tortuous 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 cover 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,” 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.

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 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 benefit 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 have 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. 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. 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 based upon unjust enrichment, from the legal doctrines based upon 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 knowledge of the historical antecedents of the doctrines which item

58 Supra note 8.
braces 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
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 services59. Some authorities
argue that the property owner is enriched by each stroke of the hammer or the
paint brush60, but others refuse to accept this somewhat Pick Wickian
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 house61. 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. The profits are received from third persons, yet they
belong to the beneficiary because acquired by the wrongful use of his

60 Woodward op.cit at p. 117.
61 Matthews Cont. Co. v Brady 104 N.J.L. 438 140 at p. 433 (1928).
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.\textsuperscript{62}

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”. In an article which has stood the test of time (as few of them do!), Judge Learned Hand nearly forty years ago\textsuperscript{63} 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 fact 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 analyzing the facts of a particular case and determining their legal consequences, seems pertinent here. Courts using the Re-statement 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” 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.\textsuperscript{64}

\textsuperscript{62} Schwasnick v Bland-in, 65 F (2d) 354.
\textsuperscript{63} Hand, ‘Rstitution or Unjust Enrichment’ (1897) 11 Harv. L. Rev. 249.
\textsuperscript{64} Graf v Neith co-operative Diary Products, 216 Wis. 519 257 N.W. 618 (1934).
Professor Woodward, on the other side, has criticized unjust enrichment as too narrow a formulation of the quasi contractual obligation\(^{65}\). 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\(^{66}\) the benefit to the owner in advancement of the ends to be promoted by the contract. If the painter was at the time of his death performing labor and 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

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\(^{65}\) Woodward op. cit at p. 8.

out of the deal\textsuperscript{67}.

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\textsuperscript{68}.

Professor Woodward considers the principal as having received a benefit for which he should make restitution\textsuperscript{69}. The courts generally hold there is no liability in such a case\textsuperscript{70}, 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\textsuperscript{71}.

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, especially

\textsuperscript{67} Woodward op. cit. at p. 102.
\textsuperscript{68} First National Bank of Las Vegas v Oberne, 121 Ill. 25, 7 N.E. 85 (1886).
\textsuperscript{69} Woodward op. cit. at pp. 72, 75.
\textsuperscript{70} Ibid.
\textsuperscript{71} Supra note 68.
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”. 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.

With some reservations one can also say that people do not plan to incur or to
avoid quasi contractual duties. 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” for instance, embraces not only duress and undue influence, but also the payment of a debt which is owed by the payor 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” and benefits conferred under contracts or other bargains.

Among these are supplying necessaries 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.

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

The Restatement of Restitution and Unjust Enrichment does not contain all
the rules of quasi contracts. 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.72
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
writing, accepted trusts which “result by the implication or construction of
law.”73 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

73 29 Chas. II, C. 3 (1976) at p. 8.
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.

The concluding chapter is based 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 form of the earlier restatements black letter text, comment and illustrations has been retained. The black letter 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.

1.7 Doctrine of Restitution

Restitution as enunciated in Section 65 aims at preventing a party to a void contract to retain benefits received under it. “Restitution” means “the restoring anything unjustly taken from another.” The word ‘restitution’ in its etymological sense means restoring to a party on the modification, variation or reversal of a decree what has been lost to him in execution of the decree or in direct consequence of the decree. In fact, restitution or restoration is synonym words. The word ‘restitution’ means, “action or an act of restoring or giving hack something to its proper owner; an act of reparation for loss or injury previously inflicted; action or an act of restoring a person or persons to a previous status or position, the fact of being restored or reinstated”. As per the same dictionary, the word ‘restore’ means “(i) Give back, return, make

74 N. Purkayastha v Union of India, AIR 1953 Assam 33.
76 Zafar Khan v Board of Revenue, AIR 1985 SC 39.
restitution of something previously taken away or lost; (ii) make amends for; compensate for; make good (loss or damage); set right, repair, etc.”

As explained in Aiyer’s Judicial Dictionary, ‘restitution’ means “the rescinding contract or transaction so as to place the parties to it in the same position with respect one another which they occupied before the contract was made or the transaction took place”. Fraud renders any transaction voidable at the option of the party defrauded; and if, when it is avoided, nothing has occurred to alter the position of affairs, the rights and remedies of the parties are the same as if it had been void from the beginning. The party exercising his option to rescind is entitled to be restored, as far as possible, to his former position. Such a restoration is restitution in integrum77.

Under Section 65, when an agreement is discovered to be void or when a contra becomes void, a person who has received any advantage in respect of such agreement or contract is bound to restore or to make compensation for it to the person from whom he received. This intention envisages the principle of restitution after benefits has been received and the agreement is latter discovered to be void or the contract became void. But section 65 has no application to a case of contract which is known to both parties to be illegal or to be tainted with fraud78. Section 65 envisages the principle of restitution after benefit has been received. The Section is based on the doctrine of restitution in integrum and as such it does not make a new contract between the parties but only provides for restitution of the advantage taken by a party under the contract. But in a case who’s the plaintiff was aware of the illegal object of the agreement or illegality or void character of the agreement he cannot invoke Section 65 to his aid79. In other words, Section can be invoked in a case where the contract is void from its inception hut the parties or at least the plaintiff laboured under a bona fide mistake and the contract is later discovered to be void or later on became void. In such a case, the plaintiff is

77 Satgur Prasad v Her Narain Des, AIR 1932 PC 89.
78 Nihal Singh v Rambai, AIR 1987 MP 126.
entitled to get back his money or property but Section 65 would have no application as the contract is void from its inception and the plaintiff was aware of it\textsuperscript{80}. The question of restoration of benefit would not arise if a party had received the benefit after the agreement ceases to be a contract enforceable by law i.e. after it ceases to be a contract\textsuperscript{81}.

1.8 Persons not Competent to Contract

In order to appreciate the issue whether a minor or a person not competent to contract under law is liable to restore any benefit received by him under the contract under Section 65 of the Act. It says that “when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.” The Contract Act does not provide that the expression “any person” occurring in Section 65 would not include a minor or any other person not competent to contract. In the absence of such specific exclusion, it may not be in conformity with the provisions of Section 65 to take a view that Section 65 does not apply to a void contract entered into with a minor or other person not competent to contract.

It is true that in \textit{Mohori Bibee v. Dharmodas Ghose}\textsuperscript{82}, the Privy Council had refused to apply the provision to a contract by minor on the ground that “this section, like Section 64 starts from the basis of their being an agreement or contract between competent parties and has no application to a case in which there never was and never could have been, any contract”. Sections 64 and 65 of the Contract Act envisages contract between competent parties and that since in case of a contract by minor, no contract comes into being as it is void \textit{ab initio}. The Privy Council in that case held that a moneylender who has advanced money to a minor on the security of the mortgage is not entitled to

\textsuperscript{80} Sundara Gownder v Balachandran, AIR 1990 Ker 324.
\textsuperscript{81} Jagdis Prasad v Produce Exchange Corporation, AIR 1946 Cal 245.
\textsuperscript{82} (1903) ILR 30 Cal 539.
repayment of the money when the mortgage is declared to be invalid. But the view taken by the Privy Council cannot be said to lay down a correct law, if one goes by the language of Section 65 of the Contract Act. As observed by the Law Commission of India in its 13th report on “Contract Act, 1872”, “in the other line of cases, Section 65 and sometimes Section 70 was held to be applicable” to a contract by minor or any other person not competent to contract. In Mohori Bibee’s case, supra, the Privy Council seems to have not taken note of the distinction between an agreement and a contract. In fact, Section 65 of the Act deals not only with agreements enforceable by law, but also with agreements not enforceable by law as has been held by the Privy Council itself in its later judgment in Thakurane Harnath Kaur v. Thakur Inder Bahadur Singh, in which the Privy Council has clearly held that “an agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and, on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void”. The Mysore High Court in Dyaviah v. Shivamma, observed that:

> “the section covers two types of cases. The First relates to agreements discovered to be void and the second relates to contracts which become void. So far as the second part is concerned, the implication is that the contract must be a valid one when it was made and that it becomes void subsequently. The first part which contemplates cases where “an agreement is discovered to be void”.

### 1.9 Restitution under English Law

According to English law if a minor has obtained undue benefit in any transaction, he is required to restore back the benefit so received by him, under the equitable doctrine of restitution. Under the doctrine he is asked to restore back the exact things taken by him. It is applicable only to goods or property received by a minor so long as they can be traced, and are still in his’
possession. Since, it is difficult to identify money and to prove whether it is
the same money or different one, the doctrine does not apply to money. Even
as regards goods or property, if the same have been consumed or transferred
and are no more traceable, the doctrine of restitution does not apply there.

The case of Leslie v. Sheill\(^85\) explains the doctrine. In this case, the defendant,
a minor, falsely misrepresented himself to be a major, and obtained two loans
of £200 each from the plaintiff who was money-lenders. The plaintiffs
brought an action to recover £ 475 being the amount of loan taken and interest
thereon. It was held by the Court of Appeal that the money could not be
recovered if that were allowed that would amount to enforcing the agreement
to repay loan, which is void under the Infants’ Relief Act, 1874.

It was explained that the object of the doctrine of restitution is to restore back
the ill-gotten gains taken by the minor, rather than enforcing the contract. If a
minor is asked to pay money which cannot be traced and which he no more
possesses, it would amount to enforcing the agreement. Where the question of
repayment is there, the doctrine of restitution does not help, or as stated by
Lord Sumner, “Restitution stops where repayment begins.\(^86\)”

The doctrine has been explained by Lord Sumner in the following words\(^87\):

\[ \text{“When an infant obtained an advantage by falsely stating}
\text{himself to be of full age, equity required him to restore his ill-}
\text{gotten gains, or to release the party deceived from}
\text{obligations or acts in law induced by the fraud, but}
\text{scrupulously stopped short of enforcing against him a}
\text{contractual obligation, entered into while he was an infant,}
\text{even by means of a fraud.”} \]

As regards the question of restoring back the property is concerned, Lord
Sumner referred to the following judgment of Lush J. in Stocks v. Wilson\(^88\):

\(^{85}\) (1914) 3 KB. 607.
\(^{86}\) Id. at p. 618.
\(^{87}\) Ibid.
\(^{88}\) (1913) 2 KB. 235, at 247.
“What the Court of Equity has done in cases of this kind is to prevent the infant from retaining the benefit of what he has obtained by reason of his fraud. It has done no more than this, and this is a very different thing from making him liable to pay damages and compensation for the loss of the other party's bargain. If the infant has obtained property by fraud he can be compelled to restore it.”

As regards the question of refund of money which had arisen in Leslie v. Sheill, Lord Sumner further observed:

“In the present case the money was paid over in order to be used as the defendant's own and he has so used it and, I suppose, spent it. There is no question of tracing it, no possibility of restoring the very thing got by fraud, nothing but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources, in a word nothing but a judgment in debt to repay the loan. I think this would be nothing but enforcing a void contract. So far as I can find, the Court of Chancery never would have enforced any liability under circumstances like the present, any more than a Court of Law would have done so.”

1.10 Compensation by minor under Indian Law

It has been noted above that in England restitution, that is, the restoring back the property by a fraudulent minor is permitted, if the property can be traced. According to Leslie v. Sheill, the money obtained by a minor cannot be recovered from the minor as the same cannot be traced. If a minor is asked to pay back the money, it may mean enforcing contractual obligation against a minor, which the law does not permit.

The question which has arisen in India is how far a minor can be asked to restore back the benefit wrongly obtained by him under a void agreement? Can a minor be asked to pay compensation to the other party?

In India, the question of compensation under the following two kinds of provisions has arisen before the Courts:

89 Supra note 85.
90 Supra note 85.
1. Whether a minor can be asked to pay compensation under Sections 64 and 65, Indian Contract Act for the benefit obtained by him under a void agreement?

2. Whether a minor can be asked to pay compensation in view of the provisions contained in Sections 39 and 41, Specific Relief Act, 1877?

1.10.1 Compensation under Indian Contract Act

The question, whether a minor can be asked to pay compensation to the other party, under Sections 64 and 65, Indian Contract Act had arisen in Mohori Bibee v. Dharmodas Ghose91, While discussing this case, it has already been noted that in this case the Privy Council had held that the question of compensation under Sections 64 and 65, Indian Contract Act, arises where the parties are competent to contract, and these provisions do not apply to the case of a minor’s agreement. The matter came for consideration before the Law Commission of India 92. The Law Commission disagreed with this interpretation put to Section 65 by the Privy Council. In its view compensation under Section 65 be allowed even if the invalidity of the agreement is because of the fact that a party is incompetent to contract. It has recommended that an Explanation be added to Section 65 to indicate that the Section is applicable where a minor enters into an agreement on the false representation that he is a major93. Inspite of the above stated recommendation by the Law Commission, no amendment has been made in the Act so far.

Section 70 of the Indian Contract Act recognises quasi-contractual liability to compensate a person at whose cost some benefit has been enjoyed. According to that provision, where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore, the thing so done or

91 Supra note 82.
93 Ibid.
delivered, The question which arises is? Can a minor who has enjoyed the benefit as contemplated under Section 70 be required to pay compensation under that provision? It has been held that Section 70 cannot be invoked against a minor⁹⁴. In this context, it has been observed⁹⁵:

“The minor is excluded from the operation of Section 70 for the reason that his case has been specifically provided for by Section 68... Besides, in the case of a minor, even the voluntary acceptance of the benefit of work done or thing delivered which is the foundation of the claim under Section 70 would not be present, and so on principle, that Section cannot be invoked against a minor.”

It is submitted that the above stated interpretation is neither logical nor in consonance with the provision contained in Section 70. Section 70 deals with every “person”, which would include a minor, and moreover, there is nothing in the Indian Contract Act, which prevents the case of a minor being covered both under Sections 68 and 70 of the Act.

1.10.2 Compensation under Specific Relief Act

Whether a fraudulent minor can be asked to pay compensation in view of provisions of Sections 39 and 41, specific Relief Act, 1877, came in for consideration in some cases. Before discussing the case, the relevant provisions may be noted:

Section 39: “Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious Injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.”

Section 41: “On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to

⁹⁴ Bankay Behari Prasad v Mahendra Prasad, AIR 1940 Pat. 324.
the other which justice may require.”

In Mohori Bibee's case, the minor had applied for the cancellation of the mortgage deed, executed by him, under Section 39, Specific Relief Act and the Privy Council considered the question of compensation to be paid by him under Section 41 of that Act. It was held that since in this case the loan had been advanced to the minor with the full knowledge of his minority, the question of payment of compensation to such a money-lender did not arise.

On the question of compensation under Section 41, Specific Relief Act, there is a sharp difference of opinion between two sets of High Courts, one view having been expressed by the Lahore High Court and another by the Allahabad High Court.

1.10.3 Lahore High Court View

The question of compensation arose before the Lahore High Court in Khan Gul v. Lakha Singh. There the plaintiffs, who had advanced a sum of Rs. 17,500 to a minor, brought an action against him to recover the amount. The minor was held liable to refund the same.

While deciding the case Sir Shadi Lal, C.J. made a liberal interpretation of the above stated statutory provisions and also the equitable doctrine of English law. Decision on the following points in the case needs a mention:

(i) According to section 39, Specific Relief Act, 1877, a minor may sue for the cancellation of an instrument pertaining to a void agreement, and when he so goes to the Court (as a plaintiff) to claim the relief, the Court may ask the minor to pay compensation to the other side under Section 41. In this particular case the minor was not the plaintiff but was the defendant. The Lahore High Court still held that the minor should be asked to pay back the money. In its view the other party deserves to be compensated by a fraudulent minor, in equity,

96 AIR 1928 Lahore 609.
irrespective of the fact that the minor is the plaintiff or the defendant.

(ii) Sir Shadi Lal, C.J. also made a significant departure from the English doctrine of restitution and the decision of Leslie v. Sheill\textsuperscript{97}, according to which there can be only restoration of specific property wrongfully obtained by a fraudulent minor, if the same can be traced in his hands and he cannot be asked to pay back money as the same cannot be identified, otherwise it would amount to enforcing an agreement which is void.

According to the decision in the present case, asking a minor to return the ill-gotten gain in the form of money is not the enforcement of contract but it is only the restoration of the pre-contract position. The relief is allowed not because there is a contract between the parties, but it is because there is no contract but one of the parties has unjustly benefited at the cost of the other.

1.10.4 Allahabad High Court View

In Ajudhia Prasad v. Chandan Lal\textsuperscript{98}, the Full Bench of the Allahabad High Court considered at length the decision of the Lahore High Court and expressed entirely the opposite view. As regards the two points discussed above, i.e., firstly, compensation under the Specific Relief Act, and secondly, the question of restitution of compensation, the conclusions were different from those arrived at by the Lahore High Court.

(i) Regarding the minor’s responsibility to compensate under Specific Relief Act, it was held that a minor cannot be asked to give any relief to the other party when the minor is a defendant in the case. A minor can be asked to give relief when he himself is plaintiff and wants some relief for himself. If the minor, who is defendant in a case, is asked to provide relief, that is contrary to the spirit and language of section 41, Specific Relief Act 1877 and will also amount to enforcing a contract,

\textsuperscript{97} Supra note 85.
\textsuperscript{98} AIR 1937 All 610.
which is void.

(ii) Regarding the question of paving money compensation by a minor, the rule laid down in *Leslie v. Sheill*\(^99\) was followed and it was held that a minor may be asked to restore back the property if the same can be traced, but he cannot be asked to pay money compensation because that would amount to enforcing void contract against a minor. Sulaiman, C.J., while expressing his disagreement with the views of Sir Shadi Lal, C.J. said\(^100\):

“Where the contract of the transfer of property is void, and such property can be traced, the property belongs to the promise and can be followed. There is every equity in his favour for restoring the property to him but where the property is not traceable and the only way to grant compensation would be by granting a money decree against the minor, decreeing the claim would be almost tantamount to enforcing the minor’s pecuniary liability under the contract which is void.”

The view expressed by Sir Shadi Lal, C.J. in the Lahore case has been considered to be better, by Pollock and Mulla\(^101\). The Law Commission also in its Reports\(^102\), has preferred the views of Shadi Lal, C.J. expressed in the Lahore case on both the points discussed above. In other words, it was in favour of permitting an action against a fraudulent minor irrespective of the fact whether in the case the minor is the plaintiff or the defendant. It also stated that requiring a minor to refund the money gain made by him unjustly did not amount to enforcement of the contract. It recommended a suitable amendment of the Specific Relief Act for the purpose of clarifying the position. The Law Commission’s views and recommendations are as under\(^103\):

“Having considered the rival points of view we are inclined

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\(^99\) Supra note 85.
\(^100\) AIR 1937 All. 610, at p. 617.
\(^101\) Indian Contract Act, 8th edn. (1957), at p.77.
\(^103\) Id. at p. 46.
to prefer the view of Shadi Lal, C.J. in the Lahore case\textsuperscript{104}. We have already recommended the acceptance of the doctrine of unjust enrichment.”

According to that doctrine, the obligation to restore an unjust benefit should not depend upon the mere accident of a person coming before the Court as a plaintiff or defendant. We also agree with the view that restoration of status ante would not amount to the enforcement of the void contract against the defendant. The principle applicable to a minor will also apply to the case of a person of unsound mind. We recommend, therefore, that a subsection should be included in the new provision suggested by us to the effect that when a defendant successfully resists a suit on the ground that the contract is void owing to his incapacity at the time of the contract, he must restore any benefit, whether proprietary or monetary, which he has actually received under the contract. But no question of liability to make any compensation would arise in such a case.”

Unjust Enrichment means that no one should be unjustly enriched at the expense of another. It also means that no person should take advantage of position of another person which causes some loss to one party and gain to another party. The theory of unjust enrichment came through English law. In the early 18\textsuperscript{th} century, the general lawyers knew nothing about the theory of unjust enrichment, even then in number of situations they had given remedies that were later categorized under theory of unjust enrichment.

The researcher has assumed that the person is required to pay if he is liable. The hypothesis of the researcher is true that if a person has taken benefit from another person and has not given anything in return, then he is liable to pay back. In all the cases of unjust enrichment wherever the court feels that one person has taken benefit out of another person and has not given anything in return, the court makes the person liable and directs the person to compensate or return the benefit.

\textsuperscript{104} Supra note 96.
The main objective of conducting the project was to understand the decision of courts in Indian Scenario on the topic of unjust enrichment. Various remedies are available for unjust enrichment in Indian Contract Act, 1872. Sections 68-72 deals with remedies available in the case of unjust enrichment in various cases like when necessary goods are provided to one person, obligation of a person enjoying benefit of a non gratuitous act, responsibility of the finder of goods, thing delivered to another person by mistake or coercion. The courts also in most of the cases have always tried to give decision in favour of plaintiff in the case of unjust enrichment.

Whenever the court feels that the defendant has taken benefit from the plaintiff and has not compensated him, then court directs the defendants to either compensate the benefit received by the defendant.

In Section 72 of Indian Contract Act, only thing delivered by mistake or coercion is taken into consideration.

Like coercion and mistake there are other ways also like undue influence, misrepresentation, fraud which can be used by a person to take benefit out of another person. So, provision related to misrepresentation, fraud and undue influence should also be made under Indian Contract Act, 1872.