A. Restitutionary Technique under Common Law

2.1 Introduction

The law of restitution is that a person who has been unjustly enriched at the expense of another is required to restore the value of the benefit received to the other. In respect of the branch of the subject which concerns restitution in response to wrongdoing, a second principle underlies recovery, namely that a person is not permitted to profit by his own wrong at the expense of another.

These principles clearly have their roots in moral philosophy. This does not detract from their usefulness as organising principles for instances of recovery in the law of restitution. The principles are no more vague than the injunction that bargains should be upheld, which underpins the law of contract, or the neighbour principle in the tort of negligence. The principles afford no licence to a judge to follow his own moral convictions or to attempt to achieve natural justice. They are fleshed out by the instances of recovery in the decided cases. The principle of unjust enrichment has been entrenched as the general theory since *Lipkin Gorman v Karpnale Ltd* but it has not always held sway. In the eighteenth century Lord Mansfield had recognised a principle akin to unjust enrichment as underpinning the action for money had and received. In *Moses v. Macferlan* it was observed: ‘In one word, 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 money.

Such ‘generalities’ attracted the scorn of early twentieth-century judges such
as Hamilton LJ in Baylis v. Bishop of London\textsuperscript{3} and Scrutton LJ in Holt v. Markham.\textsuperscript{4} Later on it was observed that the whole history of this particular form of action has been what I may call a history of well-meaning sloppiness of thought.’ Perhaps fearing that too large a generalisation would upset settled law, such judges clung to the notion that the basis of the obligation in restitution was implied contract or implied promise. Such was the emphatic opinion of Lord Sumner in Sinclair v Broughan,\textsuperscript{5} the leading early twentieth century House of Lords case which stunted the development of a coherent law of restitution for the next 50 years. The implied contract fallacy, which necessitated the bizarre pretence that the thief of money impliedly promised to repay it, had apparently deep roots in Roman Law and the old system of pleading.

Only in Westdeutsche Landesbank Girozentrale v. Islington London Borough Council\textsuperscript{6} was the fiction eventually rejected. Lord Browne-Wilkinson asserted.

“For subsequent developments in the law of restitution demonstrate that this reasoning is no longer sound. The common law restitutionary claim is based not on implied contract but on unjust enrichment: in the circumstances the law imposes an obligation to repay rather than implying an entirely fictitious agreement to repay…. In my judgment, your Lordships should now unequivocally and finally reject the concept that the claim for moneys had and received is based on an implied contract. I would overrule Sinclair v Brougham on this point.”

Nevertheless, given the abstraction of the underlying principle, Lord Wright’s comment on Lord Mansfield’s statement of principle is instructive: ‘Like all large generalizations, it has needed and received qualification in practice (Fibrosa Spolka Akcyjna v Fairbairn Lawson Cobe Barbour Ltd.)\textsuperscript{7} In some

\textsuperscript{3} (1913) 1 Ch 127.
\textsuperscript{4} (1923) 1 KB 504.
\textsuperscript{5} (1914) AC 389.
\textsuperscript{6} (1996) AC 669.
\textsuperscript{7} (1943) AC 32, at p.62.
respects the cautious conclusion of Lord Diplock in *Orakpo v. Manson Investments Ltd*\(^8\) still represents an accurate statement of English law: ‘there is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based upon the civil law.

Contrast the view of the High Court of Australia, where unjust enrichment was described by Deane Jin Pave and *Matthews Pty Ltd v Paul*:\(^9\) It constitutes a unifying legal concept which explains what the law recognizes, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of the plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognize such an obligation in a new or developing category of case.

The implied contract fiction has now been jettisoned in England. Accordingly restitution is now capable of developing and adapting to meet new situations and new modes of transacting. As Sir Donald Nicholls V-C observed in *CTN Cash and Carry Ltd v Gallaher*:\(^10\)

“It is suggested that English law should recognise a generalised right to restitution. It is not always easy to discern what this call involves, although it appears to be a suggestion that once a defendant has been enriched at the expense of the claimant, there must presumptively be restitution unless the defendant can affirmatively prove some legal justification for retaining the benefit. Such is the approach of some civil law systems. However, it is submitted that it is still necessary and desirable for the claimant affirmatively to prove some unjust factor or ground for restitution which entitles him to relief. It is a general rule of English law that he who asserts must prove. A presumption in favour of restitution would be detrimental to the public

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\(^8\) (1978) AC 95, at p.104.
\(^9\) (1987) 162 CLR 221.
\(^10\) (1994) 4 All ER 714, at p. 720.
interest in the stability of transactions and the security of receipt. It would encourage speculative and wasteful litigation.”

2.2 Historical Backgrounds

Lord Mansfield, the Chief Justice of the King’s Bench in Moses v Marferlan\(^{11}\) describing the action for money had and received, stated:

“It lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff’s situation, contrary to laws made for the protection of persons under those circumstances.”

This taxonomy is substantially similar to any modern list of grounds for restitution. Therefore by the mid-eighteenth century much of the modern law of restitution was already in place, in the form of a body of common law doctrine usually termed quasi-contract. This name, and the implied contract theory upon which it was supposedly based, owes much to the circumstance that after Slade’s Case\(^{12}\) actions in what we would now describe as contract and restitution, were both brought utilising the form of action called assumpsit. The forms of action were the nominate sequence of writs which entitled the plaintiff to a remedy if he could ring his case within the parameters of a particular form. This old-fashioned system of pleading was abolished by the Common Law Procedure Act, 1852. However this primitive system of pleading had formed the organising categories in legal thought for centuries. As Birks has recently written:

“When the scaffolding provided by the forms of action was knocked away in the nineteenth century, the common law had not yet prepared the rational structures necessary for stability. Much as some crabs scuttle into a crevice while a new shell hardens, it found temporary security in tighter respect for precedent.”

\(^{11}\) Supera Note 4
\(^{12}\) (1602) 4 Coke 92 b, 76 ER 1074.
As regards the new intellectual framework for organising the disparate body of legal material, some subjects fared better than others. For example, it was contemporaneous with Victorian procedural reforms that the first modern treatises on the law of contract began to be written and the subject was taught in the emerging university law schools. It was at this stage that quasi-contract, with its common procedural heritage and fictional promises and requests, was hived off as an appendix to the law of genuinely consensual transactions. As far as English law is concerned, the two landmarks of the second half of the twentieth century were the publication of Goff and Jones’s magisterial account of precedent, The Law of Restitution (1966), and of Peter Birks’s classic of analytical jurisprudence, An Introduction to the Law of Restitution (1985). On the judicial front, in the 1990s doctrine came full circle with the acceptance of the principle of unjust enrichment in Lipkin Gorman v Karpnale Ltd.13 and the rejection of the implied contract heresy in Westdeutsche Landesbank Girozentrale v Islington London Borough Council14

A foundational distinction in civil law is between obligation and ownership. An obligation or right in personal is a claim against a person. In contrast, a claim to ownership or a right in term is a claim to an interest in a thing, which depends upon the continued existence of that thing. Therefore if A agrees to buy B’s car for £1000 we can distinguish between A’s claim against B for compensation for non-delivery of the car which is a personal right, and a claim by A against B for delivery of the car, which is a real claim. Claims for the return of property which has been lost or stolen are not within the province of the law of restitution. Such claims are analytically within the law of property, although traditionally handled by English law via tortious remedies for interference with rights. In contrast, most claims in the law of restitution are personal claims. Usually property has passed in the money or property which has been transferred to the defendant. The claim is a personal one which, if successful, results in judgment in debt correlating to the value

14 (1996) 1 AC 669.
by which the defendant has been unjustly enriched.

However, the law has occasionally permitted restitutionary proprietary claims, whereby the claimant succeeds in demonstrating that not only has the defendant been unjustly enriched at his expense, but that the defendant remains unjustly enriched at his expense through the retention of money or other property which represents the value subtracted from him. The advantage of pursuing an in rein claim of this nature, is potentially two-fold. First, the claimant will be a secured creditor in the event of the defendant’s insolvency. Secondly, in some circumstances, (he asset in question may have increased in value. A restitutionary proprietary claim results in the judgment granting an interest in an asset or assets of the claimant usually by way of trust or charge. The basis for permitting and recognising such restitutionary proprietary claims remains controversial. They are, however, to be distinguished from pure proprietary claims which belong with the law of property and are outside the boundaries of the law of unjust enrichment. A defendant is not enriched by receiving or retaining property which the law recognises as belonging to the claimant. A claim for its return is purely proprietary.

2.3 Common Law and Equity

Restitution traditionally known as quasi-contracts which developed at common law, constitutes the foundations of most of the modern law. However, techniques also developed in equity for reversing unjust enrichment; but it was not until the publication of the Restatement in the United States or of Goff and Jones in England that the two components of the modern law were systematically analysed alongside each other. The situation was neatly encapsulated by Lord Wright in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd.*15 where he said In fact the common law still employs the action for money had and received as a practical and useful, if not complete or ideally perfect. Instrument to prevent unjust

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15 (1943) 1 AC 32 at p. 64.
enrichment, aided by the various methods of technical equity which are also available.’

Despite the passing of the Judicature Act, 1873, fusing the administration of law and equity, restitution has been hampered by continuing asymmetry between the differing approaches of common law and equity to particular problems. For historical reasons, equitable techniques have been more commonly employed where wealth has gone astray at the instance of a recalcitrant fiduciary, such as a trustee or company director, or where trust funds or corporate assets have been dissipated. The tension between competing strategies and the possibility of inconsistent results is one of the major problems faced by the modern law. It is still necessary to introduce separately the common law forms of action and the devices of technical equity which are still employed either directly or by analogy in modern case law.

2.4 Quasi-Contract

It is to distinguish between ‘implied contracts in facts’ and ‘implied contracts in law’. The former encompassed situations where the courts, employing the objective approach, discerned a genuinely consensual contract in the acts or performance of the parties, without any explicit contractual intention being voiced. Such cases belong in the province of the law of contract. For a recent example consider G. Percy Trentham Ltd v Aechital Luxfer Ltd.¹⁶ The latter category, of implied contracts in law, involved cases where the promise was entirely fictional. These are now the common law components of the law to restitution. Historically they utilised the same form of action as genuinely consensual contracts, namely assumpsit (‘he undertook’) and in particular the writ of indebitatus assutnpsit (‘having become indebted he promised to pay’). In Fibrosa v Fairbairn¹⁷ Lord Wright stated.

¹⁷ (1943)1 AC 32, at p. 63.
“The writ of indebitatus assumpsit involved at least two averments, the debt or obligation and the assumpsit. The former was the basis of the claim and was the real cause of action. The latter was merely fictitious and could not be traversed, but was necessary to enable the convenient and liberal form of action to be used in such cases. This fictitious assumpsit or promise was wiped out by the Common Law Procedure Act, 1852.”

In quasi-contractual cases the plea of the promise was entirely fictional and could not be denied by the defendant. Four sub-categories of *indebitatus assumpsit* were employed in situations we would now classify as being concerned with reversing unjust enrichment:

(a) The action for money had and received;
(b) The action for money paid;
(c) *Quantum meruit*; and
(d) *Quantum valebat*.

In respect of the last two, these species of *indebitatus assumpsit* replaced earlier nominate writs of *quantum meruit* and *quantum valebat*.

### 2.4.1 Action for Money had Received

Being a common Law, this was the core of quasi-contract, personal action which lay only to recover money.\(^\text{18}\) As such it forms the core of the modern law of restitution and is the branch where the courts have been most explicit about the unjust factor or ground for restitution. The five principal situations in which action for money had and received was employed were:

(a) Money paid under a mistake;
(b) Money paid under compulsion;
(c) Money paid where there was a failure of consideration;
(d) In Situation where the plaintiff was permitted to employ the device of

\(^{18}\) *Nightingal v Devisme* (1770) 5 Burr 2589.
waiver of tort, whereby he could recover the benefits received by a tort feasor, rather than claim Compensation for loss; and

(e) Where the plaintiff could trace money at common law into the hands of the defendant, usually an indirect recipient.

Since the Victorian procedural reforms there is no need to plead the fictional promise. Further, the ancient restriction to money would no longer apply today and as long as problems of enrichment were overcome, an action for restitution would apply in respect of the non-money benefits by analogy with the old action for money had and received.

2.4.2 Action for Money Paid

This was a common law, personal form of action. It lay where a plaintiff paid money to a third party resulting in the defendant’s benefiting because his debt to that third party was discharged by the payment. It lay only where the plaintiff and defendant were liable to a common claimant, in circumstances where the defendant was primarily liable for the debt. Therefore it was a pre-condition of recovery that the plaintiff was legally compellable to make the payment and that the payment had the effect of discharging the defendant’s debt. The action was thus concerned with enrichment in the shape of discharge of another’s liability. The restriction to money paid to a third party could not be maintained in principle today. Further, it is an open question whether the right to recover should be extended to circumstances where a claimant pays or transfers benefits, not because of any legal compulsion, but as a result of reasonably necessary intervention in the defendant’s affairs. Before the Victorian procedural reforms, it was necessary to plead a request to make the payment by the defendant, but this was obviously fictional.

2.4.3 Quantum Meruit

This was a common law, personal claim, meaning ‘as much as he deserved’, or, in modern parlance, ‘reasonable remuneration’. The enrichment took the
form of services rendered. It had both contractual and restitutionary manifestations. In *British Steel Corporation v Cleveland Bridge & Engineering Co*¹⁹. A *quantum meruit* claim (like the old actions for money had and received and for money paid) straddles the boundaries of what we now call contract and restitution, so the mere framing of a claim as a *quantum meruit*, or a claim for a reasonable sum, does not assist in classifying the claim as contractual or quasi-contractual.

Contractual claims are now embodied in statute. If there is an otherwise complete express contract for services but no price is specified, a reasonable charge is payable.²⁰ As with the action for money paid, before the Victorian procedural reforms it was necessary to plead a request by the defendant. Claims in restitution for services rendered faced difficulties in establishing enrichment. Usually this could be demonstrated where the services were requested, freely accepted or incontrovertibly beneficial. The courts have been less explicit with regard to grounds for restitution in respect of claims for services rendered. However, there are instances of quantum merit recovery which can be categorised as arising from mistake.²¹ Necessity²² and failure of consideration²³.

### 2.4.4 Quantum Valebat

This was a common law, personal form of action meaning ‘as much as it was worth’, or, in modern parlance, ‘a reasonable price’. This is the appropriate form where the enrichment received is in the form of tangible personal property. It is less commonly encountered because *quantum meruit* is often used compendiously in respect of claims for work and materials in this context often described as the common counts for work and materials. Similarly, the action ‘straddles’ contract and restitution. In an express contract

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¹⁹ (1984) 1 All ER 504 at p. 509  
²⁰ Section 15 Supply of Goods and Services Act, 1982.  
²¹ *Craven-Ellis v Canons Ltd* (1936) 2KB 403.  
²² *Rogers v Price* (1829) 3 Y & J 28, 148 ER 1080.  
²³ *Rover International Ltd v Cannon Film Sales Ltd* (1989) 1 WLR 912.
for the sale of goods, if the price is not determined by the parties, a reasonable price is payable. Historically, a request had to be pleaded, but this was clearly fictional. There appear to have been quasi-contractual instances of recovery. There is little explicit discussion in the case law of issues of enrichment and grounds for restitution. As with quantum meruit claims, enrichment will be established by demonstrating that goods were requested, freely accepted or incontrovertibly enriching. With regard to grounds for restitution, these should be symmetrical with the unjust factors developed in relation to money claims.

2.5 Rescission

Rescission is the process of setting aside and unwinding a contract or other transaction, where the integrity of the transferor’s intent has been vitiated. It constitutes the paradigm restitutionary response to benefits transferred under apparently binding contracts, where the transferor’s consent to the transaction is defective, it developed both at common law and in equity. Before the Judicature Act, for example, rescission was available at common law for misrepresentation, but only where there was proof of fraud. After the Victorian reforms it was the more liberal rules and flexible machinery of the courts of equity which were adopted and rescission is now available for a negligent or even wholly innocent misrepresentation. The right to rescind or avoid a contract now extends to cases of duress, undue influence and mistake.

Where the transaction is wholly executory, rescission extinguishes the obligations which the parties have assumed. However, where there has been some performance of the transaction, rescission operates as a reslitutionary proprietary claim under which there is mutual restitution of all the species of benefits: money, goods, land, and intangibles.

25 Sumpter v Hedges (1898) 1 QB 673.
26 Erlanger v New Sombrero Phosphate Co. (1878) 3 App Cas 1218
In *Whittaker v Campbell*²⁷ Robert Goff Li stated:

> “Looked at realistically, a misrepresentation, whether fraudulent or innocent, induces a party to enter into a contract in circumstances where it may be unjust that the representor should be permitted to retain the benefit acquired by him. The remedy of rescission, by which the unjust enrichment of the representor is prevented, though for historical and practical reasons treated in books on the law of contract, is a straightforward remedy in restitution subject to limits which are characteristic of that branch of the law.”

Theory, rescission is available as a self-help remedy, but ultimately it may require the support of a judicial order.

Rescission which operates retrospectively by restoring benefits which have been transferred is sometimes termed rescission and *initio*, although it may not perfectly restore parties to their pre-transaction position. It should therefore be contrasted with termination in response to a breach of contract and discharge by frustration which operates prospectively only. Different considerations apply to restitution of benefits in respect of broken and frustrated contracts.

There was some insistence that the restitution of benefits should be of precisely the same benefits as were originally transferred. It was said that there should be *restitutio in integrum*. That is, there was a rule that rescission would be allowed only where precise counter-restitution was possible. However, the courts were astute to do what was ‘practically just’²⁸ and were particularly robust on the plaintiff’s behalf where he was the victim of fraud²⁹. There was even House of Lords authority suggesting that services could never be restored.³⁰ More recently, both juristic writings and the courts have insisted upon the flexible nature of the remedy of rescission and there are suggestions that precise counter-restitution will not be insisted upon, but that

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²⁷ (1983) 3 All ER 582, at p. 586
²⁸ *Erlanger v New Sombrero Phosphate Co.* (1878) 3 App Cas 1218, at p. 1279.
²⁹ *Spence v Crawford* (1939) 3 All ER 271.
³⁰ *Boyd & Forrest v Glasgow & South-Western Railway Company* (1915) SC (HL) 20.
there may be substitutionary counter-restitution.  

2.6 Tracing and Claiming

In most of the restitution claims concern direct recipients of subtracted benefits. In such cases the ‘enrichment’ and ‘at the expense of’ stages of the enquiry are satisfied by applying common-sense rules on benefit and causation. More complicated cases occur where the claimant’s wealth passes through several hands, or the value subtracted from him is now to be found in a new form, Claims against remoter recipients or to a new repository of the claimant’s wealth are often made and a sophisticated regime obtains in respect of them. Both juristic and judicial authority now insists on sharply distinguishing tracing and claiming.

First of all it is necessary to distinguish pure proprietary claims, where the claimant seeks to recover an asset belonging to him which still exists in its original form, These are part of the law of property, although usually they don tortious garments in the English courts. Thus, ill locate my stolen bicycle, my claim to be entitled to it is proprietary in nature. Tracing is the process whereby the restitutionary claimant may identify wealth subtracted from him even though the original property has been exchanged with other assets. The essential concern is with substitutions. The reach of restitution is extended by recognising, somewhat artificially, that value derived from the claimant inheres in the product of the exchanges. Therefore, if the thief exchanges my stolen bicycle for £100 or for a video recorder, the law may regard the substituted asset as traceably derived from my wealth. Despite the artifice, tracing through substitutions of assets is permitted.

Technical rules and presumptions have been developed to identify value subtracted from a claimant in the hands of a potential defendant. Differing approaches were observable at common law and in equity, although the latter’s approach was more liberal to claimants and tended to supersede the

former in practice. However, tracing was neither a right, nor a remedy. It satisfied the identification threshold set by the ‘enrichment’ and ‘at the expense of’ inquiries. It could also identify the quantum of relief, whether value received or value surviving. It did not, however, complete the investigation. Claiming required a ground for restitution, and ultimately an election as to the measure and nature of relief. Tracing could support a personal claim either at law. More commonly the motive for tracing was to lay the foundation for a restitutionary proprietary claim, especially where the defendant was insolvent. Therefore tracing assists the restitutionary claimant in more complicated cases to identify what has become of his assets in order ultimately to lay claim to them.

The Judicial discussion of the distraction in leading case,32 Millett observed:

“Tracing properly so-called, however, is neither a claim nor a remedy but a process. Moreover, it is not confined to the case where the plaintiff seeks a proprietary remedy; it is equally necessary where he seeks a personal remedy against the knowing recipient or knowing assistant, it is a process by which the plaintiff traces what has happened to his property, identifies the persons who have handled or received it, and justifies his claim that the money which they handled or received (and, if necessary, which they still retain) can properly be regarded as representing his property. He needs to do this because his claim is based on retention by him of a beneficial interest in the property which the defendant handled or received. Unless he can prove this he cannot (in the traditional language of equity) raise an equity against the defendant or (in the modern language of restitution) show that the defendant’s unjust enrichment was at his expense.... The plaintiff will generally be entitled to a personal remedy; if he seeks a proprietary remedy he must usually prove that the property to which he lays claim is still in the ownership of the defendant. If he succeeds in doing this the court will treat the defendant as holding the property on a constructive trust for the plaintiff and will order the defendant to transfer it in specie to the plaintiff”.

Therefore in a personal claim for money received, the cause of action is

32 Boscawen v Bajwa (1996) 1 WLR 328 at pp. 334-35
constituted once the defendant receives the property. In contrast, where a restitutionary proprietary claim is made, the claimant must reach beyond the veil of receipt and demonstrate that the defendant remains enriched at his expense; that is, there is some identifiable asset in which value subtracted from him still inheres. The divergent common law and equitable techniques for tracing and claiming will now be considered.

2.6.1 Tracing and Claiming at Common Law

The money could be traced from the plaintiff into the hands of either a direct or indirect recipient who was not a bona fide purchaser for value, the plaintiff had a quasi-contractual, personal claim to recover in the form of an action for money had and received. The cause of action was constituted when it was demonstrated the money had reached the hands of the recipient. It did not have to be shown that money remained in the hands of the recipient. Where the recipient was a good faith purchaser the money passed into currency.33

It is stated that the common law power to trace is defeated if the money was mixed with other money en route to the defendant recipient. However, it was possible at common law to trace value through a substitution of money for other assets.34 For a recent application seeing Trustee of the Property of F C. Jones & Sons Ltd v Jones35. In practice tracing at common law is not often relied on, because of the more sophisticated approach of equity. The only claim available at common law was a personal judgment for money had and received.

2.6.2 Tracing in Equity

The power to trace in equity aided a plaintiff in identifying benefits which had been subtracted from his assets into the hands of direct and indirect recipients. The plaintiff was entitled to trace through mixtures and substitutions and

33 Miller v Race (1758) 1 Burr 452.
34 Taylor v Plumer (1815) 3 M & S 562.
35 (1997) 1 Ch 159.
sophisticated rules and presumptions were developed governing how the interests of competing claims to combined assets should be adjudicated. There were two essential pre-conditions before this power could be exercised:

(a) The wealth must have been subtracted in circumstances which involved a breach of trust or other fiduciary relationship.

(b) The plaintiff must have been able to establish a proprietary base.

In *Borden (UK) Ltd v Scottish Timber Products Ltd* Buckley UK stated:

“it is a fundamental feature of the doctrine of tracing that the property to be traced can be identified at every stage of its journey through life.” According to Birks: If the plaintiff wishes to assert a right in rem to the surviving enrichment, the plaintiff must show that at the beginning of the story he had a proprietary right in the subject-matter, and that nothing other than substitutions or intermixtures happened to deprive him of that right in rem.”

It must be stressed that tracing is a power or technique, and not a cause of action in itself. Tracing may lead to a personal claim in equity, termed knowing receipt (although the need for knowledge is controversial), where the cause of action is complete once the value reaches the hands of the defendant recipient. Alternatively, where an asset can still be identified as representing the claimant’s wealth, in the defendant’s hands, a restitutionary proprietary claim may be sought.

### 2.6.3 Constructive Trust

The most important contribution of equity to the remedies for prevention of enrichment is the device we all know as the constructive trust. For the device Lord Mansfield deserves neither credit nor blame. It emerged from the fog of eighteenth-century equity and in its modern applications is much more recent.

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than the remedy of quasi-contract.37 Dawson further identified the two different spheres in which constructive trusts have been recognised.38

It should nevertheless be clear by now that the constructive trust in its modern form is a purely remedial device, aiming principally at the prevention of unjust enrichment. It has taken a place beside quasi-contract as a generalised remedy, giving specific rather than money restitution. It has contributed to the efficient and ingenious techniques reaching particular assets. It has contributed also an additional motive for prevention of enrichment, the motive compelling restitution of profit as a means of deterring wrongdoing.

Within subtractive unjust enrichment the constructive trust functions as a restitutionary proprietary claim which can be the result of a successful tracing exercise. In this context the English courts are moving towards the American Position voiced by Dawson, that the device is remedial rather than institutional ‘Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises.’ The recognition of a constructive trust with the claimant as beneficiary has two keys advantages: first, the claimant obtains priority over unsecured creditors in the event of the defendant’s insolvency; secondly, if the trust property has increased in value the claimant is entitled to the profits. Further, within restitution for wrongs, constructive trusts are composed for prophylactic reasons to force wrongdoers to disgorge their ill-gotten gains.39 In this latter context the cause of action does not depend upon tracing, but breach of a legal duty arising in another category, usually fiduciary duty.

38 Id. at p. 26.
39 Attorney-General for Hong Kong v Reid (1994) 11 AC 324.
2.6.4 Equitable Lien or Charge

Equitable lien as a device for accomplishing restitution is for the most part an off-shoot of the constructive trust. In its modern applications it is the end result of tracing.40

Whereas a consensual lien or charge is the right of a creditor to have a particular asset appropriated to the discharge of his debt, the equitable lien or charge identifies an asset in the hands of the defendant to which value belonging to the plaintiff has been contributed. The claimant is held entitled to a quantified interest or part-share of the assets. The remedy is more proportionate to the enrichment received by the defendant. Accordingly an equitable lien or charge is a restitutionary proprietary claim which entitles a restitutionary claimant to priority over unsecured creditors. Where the lien takes the form of a quantified interest it seems that the claimant will not be entitled to profits, but where the lien takes the form of a proportionate share in an unidentified asset, it seems the claimant is entitled to a proportionate share of any profits: The greater sensitivity or proportionality of the equitable lien has led to it being favoured in some recent authorities: for example, Lord Napier and Ettrick v Hunter.41

2.6.5 Subrogation

Subrogation means substitution, or, using the favoured metaphor, stepping into the shoes of another. It is the transfer of a right of action from one party to another by operation of law. Whereas ‘assignment’ is the technique by which a right of action is transferred consensually, where the transfer results by operation of law it is termed ‘subrogation’. The entitlement of the restitutionary claimant to enforce the right of action vested in him as a result of subrogation constitutes a restitutionary proprietary claim. For example, in indemnity insurance, where an insurer pays the insured following the

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40 Supra Note 41 at P. 34
41 (1993) 1 AC 713.
occurrence of an insured event, the insurer is entitled to be subrogated to the
position of the insured with respect to any claim the insured may have against
any wrongdoer in respect of the event. Subrogation typically arises in respect
of insurance, guarantees and invalid loans.

2.6.6 Resulting Trusts

An equitable restitutionary proprietary claim in the context of subtractive
unjust enrichment. Resulting trusts arise in many contexts, but there have
been attempts in justice writings to explain resulting trusts on unjust
enrichments grounds. The potential for resulting trusts as a vehicle for
restitution in response to unjust enrichment has been curtailed by the decision
in Westdeutsche Landesbank Girozentrale v Islington London Borough
Council.

2.7 Restitutionary Claims

The monetary claim which is sometimes called a claim to restitution
‘damages’, though it is not strictly a claim for damages at all. A claim of this
kind can arise if the defendant obtained a benefit as a result of the breach of
the contract that he ought to return or hand over to the claimant, in such a
case, the claimant is not asking for compensation for any injury or loss that he
suffered (though he may have suffered an injury or loss), but, instead, that the
defendant simply return or hand over the benefit he obtained from the breach.
The basis of such a claim is therefore that the defendant was unjustly
enriched, while the remedy that is sought is that the enrichment be undone.
Historically, such claims were closely intertwined with the law of contract-
until recently some of them were called claims in ‘quasi contract’ but it is
now recognized that they are based on the distinct legal ground of unjust
enrichment. It is important, nonetheless, to examine such claims in some
detail in this chapter. Although arguably undeveloped in certain respects, they

43 (1996) 42 at p. 69.
play an important role in filling what might otherwise be considered large
gaps in the scheme of remedies available to contracting parties.

There are two distinct ways in which a defendant who has broken a contract
may have been enriched, and the law distinguishes sharply between them.
Firstly, the defendant may have been enriched by receiving or taking
something from the claimant himself. And secondly, he may have been
benefited by receiving or taking some benefit from a different source
altogether.

2.8 Restitution on Grounds of Failure of Consideration

The first situation is very common and is illustrated by the ordinary case of a
claimant who has paid something under a contract where the defendant
subsequently fails to perform at all, that is to say, where there has been a
‘total failure of consideration’. In cases of this kind, it has long been
recognized that the claimant has a right to recover his payment, not as
damages for breach of contract, but in a quasi-contractual action or, as it
would today be called, a claim for restitution. This action is not confined to
cases of contract, although it finds its most frequent application in this field. It
is, in many cases, an alternative remedy for the complete non-performance of
a contract. Where money has been paid in advance by one party and the other
party fails to perform, the innocent party may simply bring an action for
general damages, which will include what he has paid, or it may bring an
action to recover what he has paid, without making any further claim for
damages. Thus, if a buyer pays for goods which are not delivered, he may sue
for damages or he may claim the return of his price on the ground of total
failure of consideration.

In some cases, this remedy is available where no action can be brought for
breach of contract, either because there has been no contract, no breach of
contract, or no loss from the breach. For example, an alleged contract may

45 Dies v. British and International Mining and Finance Corporation Ltd (1939) 1 KB 724.
prove to be void owing to lack of a proper offer or acceptance, or a valid contract may fail to become operative owing to the failure of a condition precedent. In these cases, there is a right of recovery of money on a total failure of consideration, although there is no question of a breach of contract for example frustrated contract. If a person pays money under a contract which is subsequently frustrated before he has received any benefit from it, he cannot sue the other party for breach, because there is no breach, but he can recover what he has paid on the ground that there has been a total failure of consideration.

It is therefore frequently advantageous for a person who is content to recover his money to claim it on the ground of total failure of consideration rather than to sue for damages. If he takes the former course he establishes a good prima facie case simply by showing that he has received nothing for his money, whereas if he chooses the latter course he must actually prove that there has been a contract and a breach and some loss flowing from the breach. The restitutionary route particularly advantageous where the value, of performance is less than the contract price. This can happen when the claimant made a mistake in entering the contract or because circumstances subsequently changed. For example, if a defendant contracts to build a store for the claimant at a cost of £100,000 and the defendant then breaches the contract, it may be found that the value of the store, if built, would not be anything close to £100,000. Obviously, it would be outrageous to allow the defendant to retain the advance payment on the basis that he had thereby saved the claimant some wasted expenditure. In such a case, the money can again be recovered on a total failure of consideration.

The concept of total failure of consideration is somewhat technical. There may be a total failure of consideration even though the defendant has actually done some work or expended some money in the performance of the contract, provided that what he has done has not benefited the other party. For example, if a person orders machinery to be specially constructed for him,
there will be a total failure of consideration if none of the machinery is delivered to him, although work may have been commenced and money expended on it.\footnote{Fibrosa Spolka Akeyjna v. Fairbairn Lawson Combe Barbour Ltd (1943) AC 32.}

On the other hand, if some benefit has been received under the contract, no matter how trifling, there is no total failure of consideration. Just as there is generally no right to part payment for part performance, so also there is generally no right to part recovery for partial failure of consideration. Very often, this does not matter because the claimant will have an ordinary action for damages for breach, which will enable him to recover the value of the partial failure of consideration. But in some cases the total failure rule leads to results that appear highly unjust. The American case of \textit{City of New Orleans v. Firemen’s Charitable Association}\footnote{(1819) 9 So 486.} provides a good example. A contract was entered into between the claimant city authorities and the defendants for the supply of fire-fighting services. The defendants contracted to keep 124 men, a specified number of horses, and a quantity of horses available for the fighting of fires. The claimant city claimed that the defendants had in fact maintained fewer men, horses, and equipment than the contract required, and thereby saved themselves some $38,000, but the claimants did not allege, and presumably could not prove, that the defendants had failed to put out any fires as a result of this deficiency. It was held by the Louisiana court that the claimants had no redress for this breach of contract because they had not proved any ‘loss’ resulting from it, a decision which is entirely in accordance with English law. No separate claim was made for a restitutionary award, but under English law (and American law as well) such a claim would have been denied on the basis that there was no total failure of consideration, as the claimant city had received some of the benefit of the contract.

The refusal to make a restitutionary award in such circumstances seems difficult to justify. In \textit{City of New Orleans} the claimants paid a certain sum of
money on the condition that the defendants have ready a certain number of
men, etc. to fight fires. If the defendants had not agreed to supply this number
of men, the contract price would have been different. Thus, the claimants paid
for something they did not get, and the defendants were able to keep
something they did not deserve. These are, or at least should be, compelling
grounds for ordering restitution of the price that was paid for the extra men In
this case, recall, the defendant mining company was paid (through a reduction
in the price that they had to pay for mining rights) to replant mined lands,
which obligation they deliberately breached. But the court awarded the
claimant islanders only nominal damages, on the basis that the breach had not
in fact harmed them (as they had moved to another island). In terms of
compensating the claimants for the harm caused by the breach, this result (as
we saw earlier) may be justified. But issues of compensation aside, it seems
clear that the mining company was unjustly enriched—they had retained a
payment that was given to them on the condition that they do something
which they failed to do. If the replanting obligation had been contained in a
separate contract, the claimants clearly could have recovered their payment on
the basis of failure of consideration. But because the obligation was included
within a larger, partly performed contract, such recovery was not possible; the
necessary ‘total’ failure of consideration could not be proven. Fortunately, the
courts have given some indication in recent years that they recognise the rule
needs to be revisited.48

The modern law will provide a remedy to a claimant for a partial failure of
consideration in certain cases where there has been no breach of contract at
all. Where the contract is frustrated, the Law Reform (Frustrated Contracts)
Act, 1943 enables the court to order part payment in the event of a partial
failure of consideration. Thus if a house-holder pays a painter £100 to
decorate his house, and the contract is frustrated after one room has been
painted (e.g. by the destruction of the house by fire) a proportionate part of

the £500 can be recovered. So if a contract like that in *City of New Orleans* was frustrated instead of being breached, the claimants might have been able to recover a proportionate part of the price they had paid.

The 1943 Act, also modifies the nature of the right to recover for failure of consideration, whether partial or total. If the contract is not performed owing to frustration as distinct from breach, it seems particularly unfair to permit recovery of all the money paid on the ground of total failure of consideration if work has been done and money expended on the contract, even if the other party is left with no benefit from the work and money. In such Cases, the Act of 1943 enables the court to permit some or all of the money to be set off against the cost of what has been done. The same applies to the right to recover for partial failure of consideration.

### 2.9 Restitution for ‘Wrongs’

The second type of restitutionary claim—where the defendant’s enrichment has come from some other source—is much more restricted. Here we come up against a fundamental principle of the law, which some see as a further illustration of the relative weakness of contractual sanctions. If the defendant simply breaches his contract and proceeds to devote his time and resources elsewhere, any gains he makes from that other source are, in general, his, and the claimant has no claim to them. Similarly, he is not required so account for any gains that he makes in the form of saved expenses.

There are two long-standing exceptions to this principle. First, if the defendant’s gain comes from exploiting the claimant’s property, then a restitutionary claim will be available, even if there is no loss and hence no claim to ordinary damages. For instance, if, in breach of contract, a chauffeur uses his employer’s Rolls to take a party of friends for a day’s outing, any payment he receives for this breach of contract will be recoverable by the
employer. Secondly, a contracting party who owes fiduciary obligations by reason of the nature of the contract or the relationship between the parties, and who obtains gains from some outside source by breaching these obligations, will be liable to pay these gains over in a restitutionary claim. The agent who accepts a bribe front a third party, for instance, is liable to the employer in a restitutionary action even though no loss can be proved.

Neither of these traditional exceptions makes much of a dent in the general principle that gain-based awards are not available for breach of contract. Indeed, each may be explained not so much as responses to breaches of contract per se, but as responses to other kinds of wrongdoing, in particular the wrongs of unlawfully using another’s property (the tort of conversion or trespass) and breach of fiduciary duty (an equitable wrong). Two more recent exceptions to the traditional approach are potentially more far-reaching. In *Wrotham Park Estate Co Ltd v. Parkside Homes Ltd*, the defendant built a number of homes in breach of a restrictive covenant that had been included in the contract for the land on which the houses were built. The development caused no loss or injury to the claimant, so a claim for ordinary compensatory damages was not possible.

The Court of Appeal nonetheless awarded the claimant 5 per cent of the developer’s expected profits, which they held was a reasonable estimate of the amount the claimant would have demanded to relax the covenant. The decision is intuitively appealing, but it raises a number of questions. Clearly, the claimant in Wrotham could have sought an injunction preventing the development, and it could have then waived this injunction for a fee, but given that it did neither of these things and given, further, that it might have refused to relax the covenant for any price—it is somewhat artificial to make an award on this basis. More generally, the decision seems to mix compensatory and restitutionary aims: the award supposedly seeks to give the claimant what

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49 *Reading v. Attorney General* (1951) AC 507.
50 (1974) 1 WLR 798.
it would have received by way of payment for relaxing the covenant, but then appears to calculate this amount according to the defendant’s profits (a kind of partial restitution—though no formulae has emerged from determining how much of the profits must be returned; the courts have awarded anywhere from 5 per cent to 0 per cent). But notwithstanding these questions the basic idea that a contracting party should not be able to breach clauses of this kind with impunity is compelling and so it is not surprising that the courts have subsequently applied the Wrotham principle to a number of cases involving breaches of restrictive covenants. The Court of Appeal has also recently applied the principle to a case dealing with intellectual property rights.

In *Experience Hendrix LLC v PPX Enterprises Inc* the claimant was awarded a percentage of the profits the defendant had made through awarding recording licenses in breach of the contract by which it had obtained master recordings of the musician Jimi Hendrix. Despite one Court of Appeal to the contrary, it now appears that a Wrotham-style award is in principle available in any case where the defendant gained from the breach of a (valid) contractual covenant not to use property or property rights in certain ways.

Even where it is successfully invoked, the Wrotham principle only supports awarding the claimant a percentage of the profits earned by the defendant. The second exception to the rule against gain-based awards is potentially more far-reaching because where it is successfully invoked it permits the court to award the full measure of the defendant’s profit. In *Attorney-General v. Blake* the defendant was a former member of the intelligence services who published an autobiography in breach of a contractual covenant not to divulge information obtained during his employment. In a clear break with past jurisprudence, the House of Lords held that the Crown was entitled to an award calculated as the amount of the defendant’s royalties from the book.

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51 (2003) All ER (D) 328 (Mar.).
The scope of the exception introduced in Blake is unclear. The court stressed that a gain-based award of this kind should only be made in exceptional circumstances, but unfortunately, they said little more except that ordinary damages must be inadequate and that all the circumstances must be taken into account. In the Court of Appeal, it was suggested that there were at least two categories of cases where such an award would be appropriate. The first are cases of ‘skimped performance’ where the defendants fail to provide the full extent of contractually specified services. Examples would include cases such as City of New Orleans and Tito F Waddell, mentioned earlier. In these cases, the ‘gain’ awarded to the claimant would be the savings that the defendant made by failing to perform fully (not the amount of the contract price that was paid for the relevant obligation—though in practice these amounts will be very similar). The second category is illustrated by the facts of Blake itself. This is where the defendant has profited by doing the very thing that he contractually agreed not to do. Wrotham Park, which was mentioned earlier, also fits into this category.

The House of Lords’ reasons for refusing to support these categories are not difficult to imagine. In cases such as City of New Orleans, the claimant’s real complaint (as we have seen) is not that the defendant made an unjust fail from an external source, but that the defendant unjustly held on to something—part of the contract price that was given to him by the claimant. The answer to this complaint, in principle anyway, is not to permit a gain-based award, but to remove the artificial ‘total failure of consideration’ limitation on ordinary restitutionary claims. The issues raised by the second category of cases, where the defendant makes her gain by ‘doing the very thing’ she agreed not to do, are more complex.

The defining feature of these cases is not merely that the defendant made a gain by breaching a negative covenant, but that the claimant did not (it appears) suffer any loss from the breach. It is this feature, indeed, that seems to support a restitutionary remedy, for otherwise the claimant is left with no
apparent remedy for a deliberate breach. But, again, in many of these cases the real culprit appears to be the limits imposed on ordinary restitutionary claims. If the claimant paid for the covenant (as will typically be the case), then, as in cases of skimped performance, the claimant should in principle be able to recover the price paid for the covenant in an ordinary action for restitution. The reason this is not possible is, again, the ‘total failure of consideration’ rule.

Finally, the parties to an unenforceable agreement may have a right to restitution of any benefits that they conveyed to the other party in performance of the agreement. Such rights are often extremely important in practice: as was mentioned earlier, in most disputes involving substantive limitations on enforceability the real issue is not whether the agreement is enforceable, but whether one or both of the parties can get back the value of benefits they conveyed under the agreement. In a book of this nature, however, restitution can be discussed only in brief outline. The rules in this area are highly complex and are, in any event, a part of the law of unjust enrichment rather than the law of contract.

An initial observation is that the mere enforceability or ‘illegality’ of an agreement is not itself a basis for ordering restitution. Restitution is normally awarded in order to reverse an unjust enrichment, and the fact that an agreement was unenforceable does not establish that benefits transferred under it led to an unjust enrichment. An ordinary completed sale of illegal narcotics, for example, does not lead to an unjust enrichment: the transaction is voluntary and each party gets what he or she bargains for.

In most cases involving unenforceable agreements, the basis on which it is argued that one party was unjustly enriched is ‘failure of consideration’ meaning that the basis on which the benefit was conveyed (namely the counter performance ‘failed’ or did not materialize. The ‘failure of consideration’ principle only applies, of course, in cases involving partly
executed contracts: where both parties have performed (as in the above narcotics example) there is no failure of consideration. But even where a prima facie case for restitution exists on this basis, the courts will normally deny restitution for another reason. There is a general legal principle to the effect that the courts will not assist wrongdoers: *ex turpi causa non oritur* action (no action can be based on a disreputable cause). This principle has traditionally been applied so as to deny claims for restitution brought by any party associated with undesirable activities in any of the ways.

This result is clearly appropriate where the claimant was involved in serious wrongdoing. But in other cases, the blind application of the *ex turpi* principle can (as we have already seen) lead to injustice. A contract may be unenforceable even if only one of the parties to it was involved in the undesirable activity. More generally, the consequences of denying restitution are often disproportionate to the gravity of the illegality. Refusing to order restitution may have more severe consequences than any penalty the law attaches to the activity and at the same time may give the other party (who may be more guilty) a wholly undeserved windfall. In response to such concerns, the courts have developed three exceptions to the general role.

The first exception is that restitution may be allowed where the claimant and defendant are not in pari-delicta (not equally guilty). For example, if only the defendant was aware of facts that made performance illegal or had fraudulently misrepresented that performance was legal, or if the statute that was infringed was designed to protect the claimant, then the claimant would normally be able to get back any money paid under the agreement. This principle is often applied to cases involving technical illegalities. *In Shelley v. Puddock* 55 a buyer of a house overseas who paid the price in breach of exchange control regulations was permitted to recover it from a fraudulent seller who failed to convey the house. The buyer was found (perhaps generously) not to know anything about the exchange control regulations, and

55 (1990) I All ER 1009.
in such circumstances, the technical illegality committed by one party is grossly outweighed by the fraud of the other.

The second exception is that the claimant may be awarded restitution if he ‘withdraws’ from the transaction before it has been substantially performed. In such a case, restitution is not strictly awarded on the basis of failure of consideration (since it may be ordered even where there is a counter-performance), but rather on the basis of a policy of encouraging parties to withdraw from illegal or otherwise undesirable activities. Perhaps unsurprisingly, both the meaning of ‘withdraw’ and ‘performance’ are not easy to define, but it has recently been held that claimants need not genuinely ‘repent’ of the transaction: it is sufficient that they withdraw from it.\(^56\)

The third exception is where claimants can establish their right to the money or property without ‘relying’ on the unenforceable agreement. The leading case on this difficult area of the law is the House of Lords’ decision in *Tinsley v. Milligan*.\(^57\) The claimant and defendant bought a house together as a joint venture, each contributing to the purchase price. The house was conveyed into the sole name of the defendant to facilitate a fraud on the social security authorities, but it was held that this illegality did not prevent the claimant claiming a share in the house when the parties split up. While it is clear that the court will not enforce an executory contract designed to facilitate such frauds, the court will recognize a transfer of property where the contract is executed, as it was here, and the claimant does not need to rely on the illegality to make good her claim. Here, the claimant was able to make good her claim by relying on the normal equitable rules that a person contributing part of the price of a property is presumed to be entitled to a share in the property.

The exceptions just described undoubtedly allow the courts to take a more nuanced approach to determining whether parties to an unenforceable


\(^57\) (1991) 3 All ER 65.
agreement can obtain restitution. But the law in this area is still far from ideal. The main difficulty is that it is still often the case that the consequences of denying restitution are out of proportion to the nature of the illegality. As we have seen, many agreements are unenforceable for what are essentially technical breaches of minor regulations.

The in pari delicto exception is of no help in such cases if, as frequently happens, both parties are ignorant of the regulation while the third exception applies regardless of relative guilt. It was also suggested that this and other problems in this area of the law are probably best approached by a careful consideration of all the circumstances of a case rather than by a mechanical application of general rules, and there were a number of lower court decisions which favoured this approach. But in Tinsley v. Milligan, the House of Lords rejected this approach, and insisted that, at least where proprietary claims are at stake, they must be judged by fixed rules.

2.10 Conclusion

When we take all these remedies together the main source of our present difficulties becomes quite evident. It is the multiplicity of our procedural resources for prevention of unjust enrichment, a multispecialty which greatly exceeds those in any other legal system. But the multiplicity of remedies is complicated further by diversity of origins. Each remedy has come to us from a separate source, with its own mode of tradition. Each function is somewhat different and prevents enrichment by different means.

This embarrassment with remedial riches complicates claims of the modern law of restitution Successful actions must be argued by reference to, and by analogy from, historically derived principles and techniques. However, it is likely that future years will see some rationalisation of the techniques needed. First, there is likely to be an elimination of inconsistency and overlap between the approaches of common law and equity, especially in the field of tracing. Secondly, the recognition that tracing is a process or means of identification
should simplify the debate as to when it is appropriate, if ever, to award a restitutionary proprietary remedy. Thirdly, where possible antiquated and easily misunderstood language should be jettisoned in favour of the more analytically exact language of juristic writings and more recent judicial pronouncements.

B. Restitutionary Techniques under Specific Relief Act

2.11 Introduction
Specific relief, as a form judicial redress, belongs to the Law of Procedure, and, in a body of Written law arranged according to natural affinities of the subject matter, would find its space as a distinct part or other division of the Civil Procedure Code. This did not happen in India because of the development of these remedies under the English law.

2.11 Development of Law under Specific Relief Act
In England, sonic centuries ago, the King’s ordinary civil courts of law had in general no other instrument of coercion than distant on property (though by the series of statutes, many of them early, imprisonment was authorised in aid of the preliminary stages of process; hence the so called imprisonment for debt which makes a large figure in English prose fiction down to the middle of the nineteenth century).

The earlier medieval actions for the recovery of land were practically obsolete after the restoration at latest; the action of ejectment which took their place has a peculiar history; the action of detinue professed by- the form of the judgment to give specific relief, with the value of the goods and damages as an alternative but specific delivery could not be enforced; nor of these actions were founded on contract.

Payment of Jones was only satisfaction the suitor could obtain from the court of common pleas, or other courts winch shared or imitated its jurisdiction, in

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58 Mouli Ali Hossain Main V Rajkumar Haldar AIR (1943) cat 417.
the regular course of justice. Therefore, in many cases where money compensation, even if available, was not an adequate satisfaction, the King’s Justice was in default. As is well known, in the early stages of judicial institutions, the power of courts to enforce decisions to even to compel the appearance of parties was rudimentary, if not wholly wanting and scope of the common law remedies in the Middle Ages was limited.

The reason why it was not enlarged until the latter part of the nineteenth century is that down to the eighteenth century any such proposal, at any rate coming from official quarters, would have been looked on with suspicion. Meanwhile, the Chancellor, exercising the King’s reserved power of doing justice in an extraordinary way where the ordinary means failed, had undertaken to make the defect good. The Chancellor’s justice, in a proper case, would compel a person actually to perform what he had undertaken, not merely to pay damages for breaking his promise. Disobedience to the Chancellor’s order was contempt of the King, a personal offence punishable by imprisonment until the command in theory a special royal command, was obeyed. This was the sanction of all equitable jurisdictions. A very obstinate party might choose to remain in prison rather than execute a conveyance, and sometimes did. It is much later that the courts acquired power to do, without any concurrence of a party in default, which he ought to have done.

Courts of common law could not give specific relief in their ordinary civil jurisdiction till after the middle of the nineteenth century, so courts of equity had no power to award damages. According to plaintiff who sought specific relief might not claim damages in the alternative; if he failed, his only remedy was to commence an action in the appropriate common law jurisdiction. He may make what he can of it at law; was a current phrase.

The Specific Relief Act, 1877 ‘was originally drafted on the lines of the Draft New York Civil Code, 1862 and its main provisions embody the doctrines evolved by the Equity Courts of England; and it was amended from time- to-
time.

Hence, the Indian law derived both the strength and the weakness of courts of equity. They could do; much that a court of common law could not do; but they had to justify their action on the ground that the suitor showed some special cause for seeking a kind of relief which was originally conceived as extra ordinary. This was especially so, in cases where the plaintiff had a legal right, a right for which the common law provided some remedy, but the common law was inadequate in the sense of not being fitted to do full justice in the case. The doctrine and practice of specific performance belongs to this class. Although the Act of 1877 had worked well, there was scope for improvement in the expression of the language, and the substance of the provisions.

The Law Commission of India submitted its Ninth Report in July 1958.\textsuperscript{59} The Law Commission was of the opinion that the Act contained certain able principles and remedies which stand apart, both historically as well as intrinsically from the ‘common law rules embodies in the Code of civil Procedure and chose not to disturb the existing arrangement of having a separate law on the subject. The report was acted upon, and the specific Relief Act, 1963 was enacted. Its recommendation formatting a examples in the act, of 1877 was accepted in the Act of 1963, since the Indian Legislature had given up the practice of inserting examples in Acts, and the Law Commission of India were of the view that the examples in the repealed Act had not, on the whole, served to clarify the provisions of that Act.

The researcher is having of the view that the law relating to specific relief could well be part of the Code of Civil Procedure and the Transfer of Property Act, but such a drastic reform was not worth the labour. Accordingly, the Act of 1877 was repealed and by the Specific relief Act, of 1963 with suitable modifications and alterations.

\textsuperscript{59} The Law Commission of India, 9\textsuperscript{th} report, submitted report in July, 1958.