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COMMENT

THE FUTURE OF THE LAW OF RESTITUTION

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The Editor of this journal has honoured me by an invitation to write a few words about the future of the law of restitution.

This topic can, I suppose, be subdivided into two questions, each one of which can in its turn be subdivided, in the following manner:

1(a) Is there a law of restitution?
(b) If so, what is it?
2(a) Has the law of restitution a future?
(b) If so, what form is that future likely to take?

I expect that the Editor, with subtle flattery, has invited me to write only about question 2(b). But, pedant to the fingertips, I propose remorselessly to consider each question in logical order.

So I ask myself first: is there a law of restitution? We are, of course, speaking about the common law (in its broadest sense, and therefore including equity), the shared inheritance not only of the inhabitants of

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England and Australia, but of between a quarter and a third of the population of the world. Now, let us not forget that, only twenty five years ago, the question would have been answered, both in England and in Australia, with an unhesitating No. Today, in England—apart from some growling by one or two scholars over-enamoured of the law of contract—the answer is, without doubt, Yes. I am not quite sure what the position is now in Australia: the readers of this journal will know better than I. But in England, not only is the law of restitution now taught as a subject in a number of universities, including both Oxford and Cambridge (as a postgraduate subject), but it is widely accepted as a subject by the legal profession. There is, of course, an inevitable time lag. Those lawyers who have never studied the law of restitution as a whole (and they include the vast majority of the legal profession) have only glimpsed tiny parts which have arisen in the course of their practices, and so they only have a very general idea of what the whole subject might look like. As has so often been said, it is taught law that is tough law. Only when those who have studied the law of restitution at universities rise to the higher ranks of the profession, may we expect to see a deeper understanding of the subject by professional men. I will hazard a guess that much the same sort of development is likely to take place in Australia.

Question 1(a) is fairly easy to answer. I am afraid that the next question, 1(b), is rather more difficult. What is the law of restitution?

It is not too difficult, of course, to begin by saying that the principle lying at the root of the subject is the prevention of unjust enrichment. That some such principle has to be recognised by every developed system of civil rights and obligations is really beyond dispute. A famous text of Pomponius preserved in *Justinian's Digest* records this recognition in classical Roman times; the principle occupies a central position in the German B.G.B.; a volume of the American Law Institute's Restatement is devoted to a law of restitution based upon the principle; and it is not unreasonable to state that a mass of English authority, stretching back over two hundred years, is implicitly founded upon the principle. Even so, merely to state the underlying principle in these general terms, though basic to the subject, tells us little about the substantive content of this branch of the law. I am, of course, delighted when judges and jurists speak or write with reference to the principle of unjust enrichment; but in truth this does not take us very far. For me, the really important thing is not so much the recognition of the basic principle (which nowadays is, frankly, not very difficult); it is rather the analysis of the subject, deriving from that principle, as it is, or should be, applied in the courts, which is of real importance to the development of the law.

It is at this point that we must, as always, recognise the different functions, and the different methods, of judge and jurist—though their work is, of course, complementary. Judges, rightly, tend to reason upwards from the facts of individual cases which come before them for decision, searching for principles (often only of limited application) which accord

with a professionally developed sense of justice and an (to that extent) intuitive sense of a just result in the case before them. Jurists, rightly, tend to think in terms of formulation of legal principles (often of some breadth) and of their future development, and they tend also to reason downwards from those principles to individual cases. Both these statements are, of course, over-simplifications; moreover the work of judge and jurist interacts. Even so, in the present state of affairs in England (and, I assume, Australia), where the law of restitution is still very much in a state of development, even of fluidity, and where most judges have little experience of the subject as a whole, their judgments are unlikely to reflect any deep analysis of the more profound principles underlying the subject—indeed judges tend in any event, very wisely, to shy off any such activity, unless it is absolutely necessary to the decision of the case before them. It is therefore in the writings of jurists that, at present, there must be found the work of analysis in this branch of the law—illuminated from time to time by shafts of light from judicial reaction to facts in particular cases. And this work of analysis by the jurists, to be useful, must consist, not simply in banging away about the principle of unjust enrichment without analysing, in great depth, what that principle entails; nor simply in peddling other people's ideas, without embarking upon the labour, often painful, of original analysis and criticism. They have to ask themselves, and attempt to answer, the really hard questions. What *is* the principle of unjust enrichment? What constitutes *enrichment* for this purpose? Does the enrichment always have to be at the plaintiff's *expense*? And, if so, what does this mean? Perhaps most difficult of all, in what circumstances is enrichment to be regarded by the law as being *unjust*? And then, how is the whole subject best organised and expounded? And so on, and so on.

The answering of these questions is made all the more difficult by the fact that our law of restitution has never had any established or recognised form. In most other branches of the law, principles have come to be more or less established (though not, I hope, fixed); they at least provide guiding lights in the form of widely accepted statements of principle from which the judges can generally work. In the law of restitution, these guiding lights are missing. In truth, we are still in the position where we are asking ourselves the most fundamental questions about the subject—not only about its constituent principles, and about its form, but also about its relationship with other branches of the law, notably the law of contract and the law of property. It is not too difficult for jurists to separate off certain fairly narrow sections of the law of restitution and then to subject those sections, in isolation, to criticism. For example, it is not difficult to suggest answers to the question whether money paid under a mistake of law should be generally recoverable (as it is in, for example, Germany), or to the question whether a defence of change of position should be recognised. But if we spread our wings and ask ourselves questions such as—what are the respective roles of the law of contract and the law of restitution in relation to the recovery of benefit conferred

under ineffective contracts, especially contracts which are not ineffective *ab initio*, or what is the role of subrogation in the law of restitution, we find ourselves in deeper waters. And, to happily mix my metaphors (as well as split my infinitives), if we fasten our seatbelts and rocket up into the stratosphere inhabited by fundamental principles, capable of identification but not yet identified, and interdependent in a manner not yet perceived, we will find ourselves struggling in waters of oceanic depth unassisted by much in the way of navigational aids. Yet this is the task that faces jurists today working in the field of restitution; and gradually the work is being done. For example, there have been a few admirable articles in the journals; and one admirable new book, devoted entirely to original work of analysis, has recently been published in England.

I have just realised that I have let my pen run away with my thoughts; and, undisciplined, I have departed from the rigorous programme which I set myself at the outset of this brief note. I think, looking back over what I have written, I can claim to have given some sort of answer to question 1(b). Implicitly, I have answered question 2(a): everything I have written so far assumes that the law of restitution has a future. But what about question 2(b)—the question which I believe that the Editor really wants me to write about—and which I have subconsciously been avoiding by rambling on about all sorts of other things? What form *is* the law of restitution likely to take in the future?

The correct answer is: I do not know, any more than you do. As a convinced gradualist, I expect the map to be gradually unfolded, by many hands, as the years pass by. But I think that it is right that I should briefly look at one of the most fundamental questions of all. At the moment we have a number of independent heads of recovery. May the time come when we shall see a generalised right of recovery, based upon the principle of unjust enrichment, to which we can turn as a source from which we can derive new remedies in new situations? In the last two editions of our book, Professor Gareth Jones and I sketched out, I believe for the first time, what such a generalised right of recovery might look like in the common law. In a sense we were turning the law on its head. Instead of specific heads of recovery derived from a generalised principle, we were proposing a generalised right of recovery, subject to certain limits of general application. Will this ever come about? I can see no conceptual reason why it should not do so; but, in practical terms, it must be a long way away. Not only is there so much more work of analysis to be done, but it asks too much of the judges to suggest that they should swallow, in swift successive mouthfuls, the existence of a subject called the law of restitution, consisting of specific heads of recovery; acceptance of fundamental principles linking these heads of recovery; and then the great step of recognising a generalised right of recovery derived from the principle of unjust enrichment. This is a type of development which, in the past, has taken many decades to come to fruition. But who knows? The pace of life has speeded up immeasurably, and perhaps one remarkable case may tip the balance. We shall just have to wait and see.