The Literature of the Law of Restitution

John W. Wade
THE LITERATURE OF THE LAW OF RESTITUTION

By John W. Wade*

It is now commonly recognized that the concept of unjust enrichment is a pervasive one, and that the principle that restitution will be granted of an unjust enrichment has come into operation in all parts of the law. But this recognition is a fairly recent development. Applications of the principle grew up entirely independently of each other, especially as between law and equity.

As a result it has been only in recent years that legal writings have undertaken to cover more than particular areas of the law of Restitution. In the digests, the cases have not been grouped together, and any attempt to collect and collate them necessarily runs into serious difficulties. For this reason a summary but comprehensive treatment of the various writings in the field may prove useful, especially in the absence of any single treatise in the United States.

Treatises and Monographs

Evans. The first significant writing in the field of Restitution was Sir William David Evans’ essay on The Action for Money Had and Received,¹ published in 1802.

In his introduction, he declared that the “essay will be chiefly confined to the action for money had and received as enforcing an obligation to refund money which ought not to be retained,”² and he identified the concept as follows:

This obligation was enforced according to the general principles of natural equity, the foundation of it being a retention by one man of the property which he had unduly received from another, or received for a purpose, the failure of which rendered it improper that he should retain it. The mere legal liability to the original payment was not the question in consideration, but the injustice of permitting the money or other property, under all the circumstances, to be retained. The introduction of the action for money had and received with the English courts, is not novel, and several cases had occurred previous to the appointment of Lord Mansfield, in which it had been properly applied, so that it was familiar in point of practice. But it was reserved to that eminent judge, to trace the nature and principles of the action, with a most instructive perspicuity, and to direct the general application of it in its proper channel . . . . In the case of Moses v.

* Dean, Vanderbilt University School of Law. Author, Cases and Materials on Restitution (2d ed. 1966).
1 W. Evans, The Action for Money Had and Received, in Essays (1802). This essay covered 122 pages. It was published with other essays on insurance and bills of exchange.
2 Id. at 5.
The essay covered mistake, failure of consideration, duress, illegal contracts, payments under compulsion of law, parties plaintiff and defendant, and damages. Sir William wrote a year later a two-volume work entitled General View of Decisions of Lord Mansfield, in which he made several references to the action of money had and received. He also published in 1806 a translation of Pothier on Obligations, to which he added a second volume with an appendix of his own writings, containing 19 chapters and covering more than 600 pages. Some of these chapters treated restitutionary subjects, such as illegal contracts (ch. 1) and mistake of law (ch. 18). This two-volume work went through several English and American editions.

Keener. The first true treatise was Keener on Quasi-Contracts, published in America in 1893. Dean William A. Keener of Columbia based his treatise on his previously published two-volume casebook. His collection of the authorities was thorough, his analysis incisive, his reasoning mature and able, and his writing lucid. This was a fine book to introduce the subject of Quasi Contracts. He defined a quasi contract as an obligation imposed by law, referred briefly to quasi contracts founded on a record or a statutory, official or customary duty, and then declared:

By far the most important and most numerous illustrations of the scope of quasi-contract are found in those cases where the plaintiff's right to recover rests upon the doctrine that a man shall not be allowed to enrich himself at the expense of another. As the question to be determined is not the defendant's intention, but what in equity and good conscience the defendant ought to do, the liability, while enforced in the action of assumpsit, is plainly of a quasi-contractual nature.

The book is still used today, and is quite valuable, both for its collection of the early cases and for its analysis. Later cases, of course, have not always borne out its treatment of particular problems.

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3 Id. at 6-7.
4 See especially at 200-03, 400-08.
5 W. KEENER, QUASI-CONTRACT I-xxxiii, 1-470 (1893).
6 Id. at 19-20.
7 Since it is available in most law libraries of any size, no attempt will be made to describe the detailed analysis. After its publication two articles were written on it. Abbot, Keener on Quasi-Contracts, 10 HARV. L. REV. 209, 479 (1896), is a 55-page treatment of the book. Mr. Abbot offers several criticisms, including that of failing to offer a meaning for the adjective "unjust," and concludes: "When the plaintiff can establish that his loss is the defendant's gain, and that the defendant is guilty of a breach of a consensual obligation, or of a tort, he can by action compel restitution in value. So far as this principle agrees with the learned author's results, those results seem
Woodward. Twenty years after Keener, Mr. Frederic C. Woodward, then professor at Stanford Law School, published his text, *The Law of Quasi Contracts.* Woodward relied strongly on Keener, but disagreed with him in a number of respects. Instead of unjust enrichment, he spoke of inequitable retention of a benefit received from plaintiff. Benefit, he felt, was a broader term than enrichment. Retention of a benefit is to be regarded as inequitable when it was conferred in misreliance on a right or duty, through a dutiful intervention in another's affairs or under constraint. Also included, though analytically regarded as inappropriate, was the action for restitution as an alternative remedy for repudiation or breach of contract, and for tort.

The Woodward book is broken up into many rather short sections, so that it is easier to find a particular topic in it than in Keener, but the general reading is somewhat more choppy. Mr. Woodward had an interesting habit of inserting into the text short briefs of significant cases, with quotations from the opinions. His book has proved quite influential, and is still very useful.

*English Works.* Publications now switched to the other side of the Atlantic. In 1931, Sir Percy H. Winfield published his Tagore Law Lectures under the title, *The Province of the Law of Tort.* Chapter 7 of this, covering pages 116-89, entitled "Tort and Quasi-Contract," contains a modern collection and analysis of the English cases on the subject. Of the subject, Sir Percy said: "In England, the literature on quasi-contract is of the scantiest. The wilderness to me to be sound; but that beyond these limits there is any principle of unjust enrichment seems to me at least questionable." *Id.* at 512. The anonymous article, *Keener on Quasi-Contracts,* 2 N.W.L. Rev. 75 (1894), suggests that although the book "has certain imperfections that are likely to prevent it from becoming a legal classic, it contains much valuable and original matter, and must be regarded as indispensable to every lawyer and every judge."

8 *F. Woodward, Quasi Contracts i-lxi, 1-498 (1913).*

9 *Id.* at §§ 7-9. The concept of misreliance, taken from Wigmore, *A Summary of Quasi-Contracts,* 25 Am. L. Rev. 695, 696 (1891), is the central idea about which most of the text is built. It has, however, not proved especially influential in the later development of the law of Restitution.

10 Book reviews were generally favorable. See Burdick, Book Review, 13 Colum. L. Rev. 664 (1913) ("a very useful textbook in which the discussion is always stimulating, and the conclusions reached generally demand ... acquiescence"); Hogan, Book Review, 1 Geo. L.J. 229 (1913) ("indispensable"); L.F.S., Book Review, 26 Harv. L. Rev. 561 (1913) ("a timely book ... substantial claims to favorable consideration"); Costigan, Book Review, 8 Ill. L. Rev. 68 (1913) ("while he is conservative in his views, it is a reasoned conservatism"); J.G.P., Book Review, 30 L.Q. Rev. 242 (1914) ("a valuable contribution to the study of a branch of the law which deserves further consideration than it has had in this country"); J.S.E., Book Review, 61 U. Pa. L. Rev. 428 (1913) ("immensely valuable ... appears to be ... a reproduction of the class notes of an instructor").

11 *P. Winfield, The Province of the Law of Tort i-xii, 1-254 (1931).*
and the solitary place possess it. It is no man's land, not in the sense that there are constant battles for it but that nobody wants it."\(^{12}\)

A year later, Robert H. Kersley published a booklet entitled *Quasi-Contracts.*\(^ {13}\) It added little to the Winfield treatment and has not proved influential.\(^ {14}\) R. M. Jackson's historical monograph, *The History of Quasi-Contract in English Law,*\(^ {15}\) was much more successful. Based on an independent investigation of the original materials, it agrees largely with Ames' conclusions on the development of *indebitatus assumpsit*\(^ {16}\) but takes sharp issue with Langdell's conclusions on the action of account.\(^ {17}\) It received uniformly favorable reviews,\(^ {18}\) usually indicating eager anticipation of the author's pro-

\(^{12}\) Id. at 118. Further details are not given because Sir Percy later elaborated the chapter into a separate book. Most of the reviews were general treatments of the book and therefore are not listed. Sir Frederick Pollock gave "unqualified thanks" for the chapter on Quasi Contract and said that it contained a "thorough discussion which makes one rather wish he had carried out his half-formed intention . . . of devoting a whole book to the subject"; he preferred the term, "constructive contracts." Book Review, 47 L.Q. Rev. 588 (1931). Sir William Holdsworth declared that the "treatment of quasi-contracts is the most original and suggestive chapter in the book," but he disagreed with the author and preferred the notion of implied contract to the "Mansfield fallacy." Book Review, 1932 J. Soc'y Pub. Teachers L. 40. The same position was taken in an extensive article in *The Bell Yard,* which provoked a famous controversy on the issue. See Landon, *The Province of the Law of Tort,* 8 BELL YARD, Nov. 1931, at 19; Winfield, *The Province of the Law of Tort: A Reply,* 9 BELL YARD, May 1932, at 32; Stallybrass, *Landon v. Winfield: An Intervention,* 10 BELL YARD, Nov. 1932, at 19.

\(^{13}\) R. KERSLEY, QUASI-CONTRACTS i-viii, 1-50 (1932).

\(^{14}\) The only review of it was a short one in 74 L.J. 197 (1932), which referred to it as an "interesting little book." In a review of another book, it is characterized as "a short, valiant, but not very conclusive effort to arrange in some sort of form the valuable authorities on quasi-contract." Hopkins, Book Review, 14 Can. B. Rev. 765 (1936).

\(^{15}\) R. JACKSON, THE HISTORY OF QUASI-CONTRACT IN ENGLISH LAW i-XXV, 1-134 (1936). This was one of the Cambridge Studies in English Legal History.


**The Restatement.** In 1937, there occurred what was probably the most important event in the development of the law of Restitution since Lord Mansfield's decision in *Moses v. Macferlan*,20 177 years earlier. This was the publication of the *Restatement of Restitution* by the American Law Institute.21 Prepared according to the process developed for earlier restatements, it had two reporters, Professors Warren A. Seavey and Austin W. Scott of Harvard Law School, and a distinguished committee of advisors. For the first time in a textual treatment, all of the legal and equitable remedies for affording restitution were joined together. Part I, entitled "The Right to Restitution (Quasi Contractual and Kindred Equitable Relief)," was prepared by Mr. Seavey, and Part II, entitled "Constructive Trusts and Analogous Equitable Remedies," was prepared by Mr. Scott.22 The combination, though new and therefore protested by a few reviewers, was a logical and felicitous arrangement. Indeed, today, as a result of developments produced in large part by the Restatement, a new Restatement would probably not separate the two parts but would fully integrate them. The Restatement was greatly aided by the publication as a pocket part of the reporter's notes,23 which gave citations to cases regarding many of the sections in the Restatement.

The book was generally favorably received. Perhaps the encomium was offered by Sir Percy Winfield, who said:

> I doubt whether any of the output of the American Law Institute is more important than this Restatement. ... In conclusion we would express our unstinted gratitude for the Restatement and our great admiration for its compilers' breadth of view, depth of research and wise balancing of theory and practice. It is a new starting-point in the development of quasi-contract, for it has given the American practitioner a scientific and semi-authoritative textbook and it has provided the whole legal world with a storehouse of sound principles and a clear vision of their application and of their relation to other

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21 *Restatement of Restitution* i-xxv, 1-1033 (1937).
22 There is one significant omission in the *Restatement of Restitution*. The *Restatement of Contracts* had been previously prepared and published, and it had contained a number of sections regarding restitutory relief in connection with a contract. This material was not duplicated in the *Restatement of Restitution*. Section 108 of the *Restatement of Restitution* refers to the sections of the *Restatement of Contracts* which are not duplicated.
23 *Notes on Restatement of Restitution*, i-ix, 1-205 (1937).
parts of the legal system.\textsuperscript{24}

The work has also been well received by the courts. As of April 1, 1967, it has been cited in 1684 cases, with every state represented except Alaska and West Virginia. And it has played an important part in law review writing and the preparation of casebooks.\textsuperscript{25}

\textit{Later English Books.} There now appeared a series of three English texts, each entitled The Law of Quasi-Contracts. Mr. John H. Munkman published his "slim volume" in 1950.\textsuperscript{26} It has a somewhat unusual organization, but permits a quick finding of specific topics and it treats equitable subjects like tracing as well as the cases under the more narrow meaning of quasi contract.\textsuperscript{27}

Sir Percy H. Winfield published in 1952 an elaboration of his earlier treatment in the \textit{Province of the Law of Tort}.\textsuperscript{28} It brought citation up to date and included a chapter on equity and quasi contract.

The third is by Dr. S. J. Stoljar, of Australia.\textsuperscript{29} It is based upon intensive and scholarly research and performed the most complete

\textsuperscript{24} Winfield, \textit{The American Restatement of the Law of Restitution}, 54 L.Q. Rev. 529, 541-42 (1938). Other articles on the \textit{Restatement} include Hopkins, \textit{The American Law Institute's Restatement of Restitution}, 3 U. TORONTO L.J. 140 (1939); Jackson, \textit{The Restatement of Restitution}, 10 Miss. L.J. 95 (1938); Patterson, \textit{The Scope of Restitution and Unjust Enrichment}, 1 Mo. L. Rev. 223 (1938) (written by one of the advisors shortly before it was published in final form). Lord Wright's extensive book review, 51 HARV. L. Rev. 369 (1937), is of article caliber; his conclusion: "I wish again to express gratitude for this most admirable work, which has illuminated the whole range of this branch of law." \textit{Id.} at 383.


Reference should here be made to the article: Seavey & Scott, \textit{Restitution}, 54 L.Q. Rev. 29 (1938), written by the reporters to explain the \textit{Restatement} to English lawyers. \textit{See also} Scott, \textit{Constructive Trusts}, 71 L.Q. Rev. 3 (1955).

\textsuperscript{25} State annotations for the \textit{Restatement} have been published for California, Florida, Indiana, Michigan, Minnesota, Missouri, Pennsylvania and Rhode Island.

\textsuperscript{26} J. MUNKMAN, \textit{THE LAW OF QUASI-CONTRACTS} i-xiv, 1-104 (1950).

\textsuperscript{27} Reviews were not exceptionally favorable. Lloyd, Book Review, 1 J. Soc'y Pub. Teachers L. 1386 (1950) ("well and clearly expressed but... a certain scrappiness of treatment, and a general air of superficiality"); Adams, Book Review, 14 MOD. L. Rev. 103 (1951) ("a clear if possibly over-charged account of the law, but it is unlikely to be widely used by practitioners").

\textsuperscript{28} P. WINFIELD, \textit{THE LAW OF QUASI-CONTRACT} i-xiv, 1-140 (1952).

\textsuperscript{29} S. STOLJAR, \textit{THE LAW OF QUASI-CONTRACT} i-xxviii, 1-223 (1964).
job of collecting and analyzing the English cases to that date. Unfortunately, the author took a quite restricted view of the scope of the principle behind the cases. He espoused a “proprietary theory” of quasi contract, limiting it to a proprietary right to recover money, while the action itself is personal; and he was somewhat ruthless in bending the cases to his viewpoint. This limits the value of his book, and the reviews were mixed in their estimates of it.\

A fourth book, by D. W. M. Waters, is entitled The Constructive Trust, and subtitled “The Case for a New Approach in English Law.” A Ph.D. thesis, it frankly advocates a proposition—that the English authorities are in error in treating the constructive trust as a substantive institution requiring a pre-existing fiduciary relationship and to be treated like an express trust, and that it should instead be treated as a restitutionary remedy, as in the United States. His first and fourth chapters are interesting and provocative, but the two middle chapters (vendor and purchaser, mortgagor and mortgagee) might well have been omitted without detracting from the book. In a supplementary article the author has set out more precisely his views as to how the English law should develop.

30 Lucke, Book Review, 2 Adelaide L. Rev. 263 (1964) (“much to be said for his approach . . . approaches the historical evidence with a proprietary prejudice”); Turack, Book Review, 43 Can. B. Rev. 528 (1965) (“eminently worth while for those who share an interest in this almost neglected branch of the law”); North, Book Review, 82 L.Q. Rev. 131 (1966) (“in terms of scholarship and breadth and originality of ideas, this book is first class, but, unfortunately, in presentation it is rather second-rate”); Atiyah, Book Review, 29 Mon. L. Rev. 347 (1965) (“has several excellent features, while it not only combines these with some very irritating features, but also raises grave doubts about its practical utility”); Cuthbertson, Book Review, 40 Tulane L. Rev. 944 (1966) (“although the range of his inquiry is extensive . . . at every turn his analysis lacks depth and precision”); Scott, Book Review, 2 U. Tasm. L. Rev. 102 (1964) (“a practical and realistic treatment of his topic with scholarship of a high order”); Wade, Book Review, 16 U. Toronto L.J. 473 (1966) (“concept of the scope of quasi contract is narrow and confined . . . restrictions seem . . . to be distinctly retrogressive and essentially unsound”).


32 Reviews: Sealy, Book Review, 1965 Camb. L.J. 305 (1965) (“no question at all that Dr. Waters has succeeded in his object . . . and a great service has been done to the cause of law reform”); Davies, Book Review, 81 L.Q. Rev. 594 (1965) (“would be a brave man who . . . would venture to disagree, and in proving his case so convincingly Dr. Waters has performed a real service”); Angus, Book Review, 30 Sask. B. Rev. 256 (1965) (“the most searching and thought provoking criticism of the constructive trust in English law to date, and is to be commended for opening the door to further inquiry”); Scott, Book Review, 2 U. Tasm. L. Rev. 102 (1964) (“has little difficulty in showing the defects of” the English approach); Crawford, Book Review, 16 U. Toronto L.J. 240 (1965) (“might have been an important book . . . has added measurably ‘to the case’ for a new approach to constructive trusts in English law”).

American Lecture Series. During this same period two leading American writers have published sets of special lectures which were rendered on invitation. Professor John P. Dawson, of Harvard, delivered the 1950 Julius Rosenthal Lectures at Northwestern, and they were published in 1951 under the title, Unjust Enrichment: A Comparative Analysis.34 The first chapter contains an excellent treatment of the various restitutionary remedies which have developed in law and equity under the common law; the second treats "some European solutions," explaining the civil law approaches and remedies; and the third, entitled "Our Own Paths Through the Forest," compares the solutions and treats especially the means by which the remedies for unjust enrichment have been limited.35 The book is generally regarded as having been a significant contribution.36

Professor George E. Palmer of Michigan delivered the 1961 Ohio State Law Forum lectures and published them in 1962 under the title Mistake and Unjust Enrichment.37 The first lecture analyzes the types of mistake—listing them as misunderstanding, mistake in assumptions, mistake in integration and mistake in performance—and treats the remedies available. The second lecture is concerned primarily with mistake in basic assumptions and the third discusses unilateral mistake. The analysis is penetrating and the discussion not too complex to follow easily.38

34 J. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS i-viii, 1-201 (1951).
36 For reviews, see Schlesinger, Book Review, 37 Cornell L.Q. 120 (1951) ("brilliance and scholarship . . . a significant contribution to Comparative Legal History and, in general, to Comparative Law"); von Mehren, Book Review, 65 Harv. L. Rev. 532 (1952) ("indeed a significant contribution to understanding not only in the field of restitution but in the field of comparative law as well"); Patterson, Book Review, 46 Ili. L. Rev. 798 (1951) ("an enjoyable contribution to legal literature"); David, Book Review, 12 La. L. Rev. 109 (1951) ("a model study of comparative law . . . illustrates the practical value of comparative legal studies"); Durfee, Book Review, 49 Mich. L. Rev. 1264 (1951) ("brings new interpretations, new insights, to scholars working in the field of restitution . . . practical lawyer will find this book valuable"); Fraser, Book Review, 5 Okla. L. Rev. 266 (1952) ("valuable addition to the literature of unjust enrichment, practicing attorneys may find that it is not too useful"); Lord Wright, Book Review, 100 U. Pa. L. Rev. 612 (1952) ("noteworthy book which puts the whole idea of unjust enrichment on a larger basis and stimulates a new interest in this important branch of law"); Kimball, Book Review, 1952 Wash. U.L.Q. 159 ("a real contribution to scholarship, but it is for the specialist").
37 G. PALMER, MISTAKE AND UNJUST ENRICHMENT 1-114 (1962).
38 For reviews see Meyer, Book Review, 39 Ind. L.J. 416 (1964) ("specially commended for the dispatch with which he has accomplished his mission . . . he has illuminated one of the dark corners of the common law"); Kivnik, Book Review, 37 Temp. L.Q. 112 (1963) ("analysis of a branch of contract law which often presents difficult and complex problems . . . a
LITERATURE OF RESTITUTION

Goff and Jones. In 1966, Robert Goff and Gareth Jones produced an exceptionally fine general treatise on the Law of Restitution. This is an English book, but it is much broader in scope than any of the earlier ones. The authors state their "understanding of the scope of the subject" in the preface:

Briefly, it is that the law of Restitution is the law relating to all claims, quasi-contractual or otherwise, which are founded on the principle of unjust enrichment. . . . Our account cuts across the boundaries which traditionally separate law from equity. We have included topics from such diverse fields as, for example, trusts, admiralty and many branches of commercial law; and we have considered proprietary as well as personal claims. Indeed, it is our belief that only through the study of Restitution in its widest form can the principles underlying the subject be fully understood.

An excellent chapter I, on "General Principles" repudiates the concept of implied contract and presents the principle of unjust enrichment as having three presuppositions: (1) "that the defendant has been enriched by the receipt of a benefit" (2) "at the plaintiff's expense," and (3) that "it would be unjust to allow him to retain the benefit"; and a number of general principles are set out for determining whether the retention of the benefit is unjust. A second chapter treats "proprietary claims" and the subject of tracing.

Part II of the book, "The Right to Restitution," treats mistake, compulsion, necessity, ineffective transactions, acquisition of benefit from a third party, and acquisition of benefit through defendant's wrongful act. Part III treats defenses, and part IV, the conflict of laws.

The book has received uniformly favorable reviews; it is a worthwhile addition); York, 11 U.C.L.A.L. Rev. 653 (1964) ("a well-polished gem of legal thinking. . . . will become a classic"); Stoljar, Book Review, 15 U. Toronto L.J. 486 (1964) ("one may differ [widely] from [his] views . . . [and] also regret his various loose ends and his omission of mistake of identity"); Becht, Book Review, 1963 Wash. U.L.Q. 335 ("a much-needed approach to the Law of Mistake, which . . . will contribute greatly to the ordering of the field and its alignment with a fundamental policy").

An earlier English monograph on mistake was R. CHAMPNESS, MISTAKE IN THE LAW OF CONTRACT (1933). It seems to have had little influence.

40 Id. at v.
41 Harris, Book Review, 1967 CAMB. L.J. 114 ("scholarship . . . painstaking and thorough and will ensure that it will immediately become a standard work for both academics and practitioners. The authors deserve our congratulations"); Crawford, Book Review, 40 Can. B. Rev. 174 (1967) (leave[s] one in awe of the magnitude of the authors' achievement. . . . certain to become the standard beginning point of reference for all research with problems of restitution"); Lord Denning, Book Review, 83 L.Q. Rev. 277 (1967) ("a creative work . . . one of our necessary tools of trade"); Cornish, Book Review, 29 Mod. L. Rev. 579 (1966) ("not often that this Review can proclaim emergence of a new 'subject,' but Goff and Jones have done much to confer such a status on restitution. . . . When syllabuses come to be revised the place which restitution is to be afforded must now receive the attention it deserves"); See-
bound to have a beneficial effect on the law of England,\textsuperscript{42} and it is likely to be the first place to look in dealing with a particular problem in the law of Restitution. It is a source of real regret that there is no comparable work in this country.

*Treatises on Other Subjects.* Treatises in other fields of the law often cover particular aspects of the law of Restitution and are therefore valuable works to consult. This is especially true in the field of Contracts, where treatment is frequently given to such topics as illegal and unenforceable agreements, impossibility, restitution as an alternative remedy for breach of contract, mistake, fraud and duress, and incapacity to contract. Of course, the standard American treatises of Corbin\textsuperscript{43} and Williston,\textsuperscript{44} are most helpful, together with the *Restatement of Contracts.*\textsuperscript{45} Reference may be made to certain English works, such as Anson,\textsuperscript{46} and Cheshire and Fifoot.\textsuperscript{47}

Similarly, in the field of Trusts, the standard treatises by Scott\textsuperscript{48} and Bogert\textsuperscript{49} cover constructive trusts and tracing problems. In Equity, Pomeroy\textsuperscript{50} is the standard treatise; his earlier work on *Equitable Remedies*\textsuperscript{51} is also valuable.\textsuperscript{62} Black on *Rescission and Cancellation*\textsuperscript{53} is worthy of reference, though it is now out of date. There are numerous works on fraud.\textsuperscript{54}

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\textsuperscript{42} It has already been cited by the Queen's Bench Division and characterized as “admirable.” Chesworth v. Farrar, [1966] 2 All E.R. 107, 113.

\textsuperscript{43} A. Corbin, *Contracts* (1950-1951). Various replacement volumes have been issued in 1960-1963, but they have not been listed as a new edition.

\textsuperscript{44} S. Williston, *Contracts* (3d ed. W. Jaeger 1957-1964). This edition is not yet complete.

\textsuperscript{45} *Restatement of Contracts* (1932). A second restatement is now in the process of being prepared.

\textsuperscript{46} W. Anson, *Contracts* (22d ed. A. Guest 1964).


\textsuperscript{49} G. Bogert, *Trusts* (2d ed. 1955). Numerous later replacement volumes have been issued.

\textsuperscript{50} J. Pomeroy, *Equity Jurisprudence* (5th ed. S. Symons 1941).


\textsuperscript{52} See also H. Hanbury, *Modern Equity* (8th ed. 1962).

\textsuperscript{53} H. Black, *Rescission and Cancellation* (2d ed. 1929).

\textsuperscript{54} M. Bigelow, *Fraud* (1890); G. Spencer Bower, *Actionable Misrepresentation* (2d ed. 1927); G. Spencer Bower, *Actionable Non-Disclosure* (1915); J. Kerr, *Fraud and Mistake* (7th ed. 1952); H. Moncrieff, *Fraud and Misrepresentation* (1891); L. Sheridan, *Fraud in Equity* (1957). All except Bigelow are English.
Digests and Encyclopedias

The American Digest System has no "topic" for Restitution or Quasi Contract or Unjust Enrichment. It is necessary to look under such diverse topics as Action, Assumpsit, Attorney and Client, Cancellation of Instruments, Contracts, Contribution, Corporations, Damages, Election of Remedies, Equity, Fraud, Frauds (Statute of), Fraudulent Conveyances, Gaming, Improvements, Indemnity, Infants, Insane Persons, Liens, Marshaling Assets, Money Paid, Money Received, Reformation of Instruments, Replevin, Sales, Subrogation, Tenancy in Common, Use and Occupation, Vendor and Purchaser, Work and Labor. The British and Empire Digest does no better.

A similar search is required in the encyclopedias. Thus, American Jurisprudence has an entry for Restitution and Unjust Enrichment which covers only two and a half pages; the entry for Quasi Contracts merely contains a cross reference to Contracts and Work and Labor. Corpus Juris Secundum does not list Quasi Contracts. It lists Restitution and gives it about one page, and Unjust Enrichment and gives it about half a column. The indices to both do list extensive cross references. Halsbury's Laws of England does have a "part" of the topic of Contracts under the title Constructive Contracts (sections 361-417). Some of the earlier compilations did better, and it may be hoped that the second edition of American Jurisprudence may supply the need.

The Digest for American Law Reports does have a rubric on Restitution and Implied Contracts, which is useful, particularly regarding cross-references; but the Word Index to Annotations is quite inadequate.

Casebooks

Casebooks have proved a significant factor in shaping the law of Restitution, and even today they may prove more useful to the practicing attorney than those in other legal fields because of the difficulty of locating cases through the digest system.

The first organized presentation of the law of Quasi Contract was

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55 Even this extensive listing is not adequate. For example, consider the classification of some representative cases on the topic of recovery of benefits voluntarily conferred. Wilder Grain Co. v. Felker, 296 Mass. 177, 5 N.E.2d 207 (1936), and Cape Girardeau Bell Tel. Co. v. Hamel, 160 Mo. App. 521, 140 S.W. 951 (1911), are classified under Executors and Administrators. Cotnam v. Wisdom, 83 Ark. 601, 104 S.W. 164 (1907), is classified under Physicians and Surgeons. Meekins v. Simpson, 178 N.C. 130, 96 S.E. 894 (1918), is classified under Finding Lost Goods. Noble v. Williams, 150 Ky. 439, 150 S.W. 507 (1912), is classified under Schools and School Districts.

that of William A. Keener. A two-volume casebook, published in 1888-1889, while he was still on the Harvard faculty, it contains an excellent collection of the early cases, arranged according to a comprehensive organization; it served as the basis for his text, published in 1893.

Other casebooks on the law of Quasi Contracts followed. These include books by John D. Lawson of Missouri, James Brown Scott of George Washington, Edwin H. Woodruff of Cornell, William S. Pattee and Edward S. Thurston of Minnesota and Herbert D. Laube of Cornell. In the meantime, casebooks on Equity carried materials on contracts induced by mistake, fraud, duress or undue influence; casebooks on Trusts carried materials on constructive trusts; and casebooks on Contracts frequently carried materials on illegal contracts, unenforceable contracts, impossibility and restitutionary relief for breach of contract. To a certain extent they still do this.

The first casebook to merge legal and equitable principles was the third volume of Professor Walter Wheeler Cook's *Cases on Equity*. A similar combination, though organized on a different basis, was published by Edwin W. Patterson, of Columbia, in 1950. In 1940 Professor Edward S. Thurston, then of Harvard and an active participant in the production of the Restatement of Restitution, expanded his earlier casebook on Quasi Contracts and published *Cases on Restitution*. Containing 964 pages, it was the most extensive treatment to date, with comprehensive footnote citations, and covered the legal and equitable material in the first part of the Restatement, but did not include Part II, on constructive trusts, equitable liens and subrogation.

This last step was taken in 1939, by Professors Edgar N. Durfee and John P. Dawson of Michigan, in a casebook entitled *Cases on Remedies II Restitution at Law and in Equity*. This casebook, which attained a culmination of the evolution of the subject of Restitution, appeared in a second edition in 1958, entitled *Cases on Restitution*,

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58 W. Cook, *Cases on Equity* (1924). The preface speaks of a "combination course dealing with reformation, rescission, and restitution, at law and in equity, on the ground of misrepresentation and mistake. . . . The combination has been extended to cover other topics commonly grouped under quasi-contracts, and having as a rule corresponding doctrines in equity, such as duress, illegality, impossibility, waiver of tort, etc." The work went through four editions, with the last, in 1948, prepared by Professor M. T. Van Hecke, of North Carolina. Mr. Van Hecke published in 1959, *Cases on Equitable Remedies*, which is very similar to the third volume of Cook.

59 E. Patterson, *Cases on Contracts II* (1950). The volume was reprinted in 1950, with the title, *Cases on Restitution*. 
published by Professor Dawson, now at Harvard, and Professor Palmer, of the University of Michigan.

The same year, John W. Wade, of Vanderbilt, published the first edition of his *Cases and Materials on Restitution*, with a similar broad coverage. A second edition appeared in 1966. The Dawson and Palmer and Wade casebooks provide modern analyses of the subject of Restitution, with up-to-date materials. They are somewhat similar in their selection of cases for reprinting. The first carries citations to more additional cases, and the latter to more law review and annotation materials.

60 Book reviews of the two editions of both casebooks are listed below:

E. Durfee & J. Dawson (1939): Jennings, Book Review, 29 Geo. L.J. 531 (1941) (“standard of excellence in casebook production seldom excelled”); Mechem, Book Review, 25 Iowa L. Rev. 187 (1939) (“a really notable addition not only to the literature of the field but to the art of casebook-writing as well”); Patterson, Book Review, 7 U. Chi. L. Rev. 577 (1941) (“no doubt of the excellence of this casebook. . . . [The authors] have now . . . shown us the way in which the conception of restitution as an adaptable intellectual task can be made available to the same extent as are the basic conceptions of contracts and torts”); Orfield, Book Review, 89 U. Pa. L. Rev. 258 (1940) (“a happy climax to 50 years of development of American casebooks on Quasi-Contracts. . . . magnificent job of editing in the way of textual notes and footnotes”).


J. Wade (1st ed. 1958): Hogan, Book Review, 47 Geo. L.J. 426 (1958) (“a sound scholarly foundation for a rewarding and stimulating course”); York, Book Review, 11 J. Legal Ed. 425 (1959) (“excellent contribution to the subject. . . . selection of cases for the past twenty years is of the highest order, indicating the results of painstaking scholarship”); Wicker, Book Review, 28 Tenn. L. Rev. 579, 580 (1959) (“best features of predecessor casebooks . . . are included. . . . note material is of highest quality”); Keeton, Book Review, 37 Texas L. Rev. 365 (1959) (joint review—see above); Looper, Book Review, 12 Vand. L. Rev. 962 (1959) (“I have taught Restitution out of three different casebooks. . . . and find it not only most to my liking but indeed a superlative teaching tool”). See also Macauley, Restitution in Context, 107 U. Pa. L. Rev. 1133 (1959), an extended review suggesting that Restitution not be isolated but be incorporated with other remedies in factual classification; adds that the “casebook does not attempt much by way of fitting restitution into its total legal setting” but concludes by calling it a “good casebook” and pointing out its merits.


61 Reference should also be made to some other important casebooks. Dean Page Keeton of Texas offered his *Cases and Materials on Fraud and Mistake* in 1954. It covered not only the restitutatory remedies, but also such matters as injunction, specific performance and damages in general. For
Law Review Articles

Any treatment of the literature of the law of Restitution would be entirely inadequate if it failed to make reference to significant law review articles and student notes. There are many of these which are extremely valuable. But here, as with the cases, there has been difficulty in locating them. The Index to Legal Periodicals has had in recent years, a topic for Restitution and one for Unjust Enrichment, but items are not likely to be placed there unless they have the term in their titles. Any realistic search for law review treatments must go through a list of topics about as extensive as that for the American Digest System.

For this reason it has seemed helpful to include here a listing of the important writings from the legal periodicals. A few which are most significant have an asterisk placed in front of them and short remarks are occasionally added in parentheses. Recent case comments have not been listed, nor have articles or notes which were not regarded as significant. Treatments of the law of individual states are ordinarily included only when they also have general value. Aside from these limitations, a careful effort has been made to make

his explanation of the merits of this grouping see his preface and his book review in 37 Texas L. Rev. 365 (1959).

Another is Cases on Remedies (1965) by Professor Charles Alan Wright, then of Minnesota, now of Texas. It, too, while considering restitutionary remedies, has a much broader spectrum.

A third is York and Bauman, Cases and Materials on Remedies (1967), published after this article was prepared. It has a very good collection of cases on restitutionary remedies which are combined with cases on other legal and equitable remedies in a very useful and comprehensive fashion. The organizational arrangement of the materials warrants interested study.

Aside from this issue of the Hastings Law Journal, there are two other law review issues which have contained symposia on the subject. The Spring 1959 issue of the Ohio State Law Journal (vol. 20) was devoted to a symposium on “Damages in Contract,” and contained the following articles: Harvey, Foreword, p. 173; Dawson, Restitution or Damages? p. 175; Nordstrom & Woodland, Recovery by Building Contractor in Default, p. 193; Dunbar, Drafting the Liquidated Damage Clause, p. 221; Krauskopf, Solving Statute of Fraud Problems, p. 237; Palmer, The Contract Price as a Limit on Restitution for Defendant’s Breach, p. 264; Simpson, Punitive Damages for Breach of Contract, p. 284; Warren, Statutory Damages and the Conditional Sale, p. 289; Talbott, Restitution Remedies in Contract Cases; Finding a Fiduciary or Confidential Relationship to Gain Remedies, p. 320.

the list as complete as possible. They are normally arranged alphabetically according to authors (or law reviews in the case of student notes); but an internal arrangement by subtopics has frequently seemed helpful. This arrangement will be self-evident when it is used.

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Holdsworth, Unjustifiable Enrichment, 55 L.Q. REV. 37 (1939)


Maudsley, Proprietary Remedies for the Recovery of Money, 75 L.Q. REV. 234 (1959)


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David, Unjustified Enrichment in French Law, 5 CAMB. L.J. 205 (1934)

de Vos, Liability Arising from Unjustified Enrichment in the Law of the Union of South Africa (pts. 1-2), 1960 JURD. REV. 125, 256


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Trudel, The Usefulness of Codification: A Comparative Study of Quasi-Contract, 29 Tul. L. Rev. 311 (1955)

Conflict of Laws
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Bishop, Money Had and Received, An Equitable Action at Law, 7 S. Cal. L. Rev. 41 (1933)
Chandler, Quasi Contractual Relief in Admiralty, 27 Mich. L. Rev. 23 (1928)
Corbin, Quasi-Contractual Obligations, 21 Yale L.J. 533 (1912) (the "classic treatment")
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*Note, Quasi-Contracts—Concept of Benefit, 46 Mich. L. Rev. 543 (1948)
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*Jennings & Shapiro, The Minnesota Law of Constructive Trusts and Analogous Equitable Remedies, 25 Minn. L. Rev. 667 (1941) (good general treatment)

*Lacy, Constructive Trusts and Equitable Liens in Iowa, 40 Iowa L. Rev. 107 (1954) (good general treatment)

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*Van Hecke, Equitable Replevin, 33 N.C.L. REV. 57 (1954)
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