Plaintiff's Measure of Recovery for Tortious Inducement of Breach of Contract--Profits or Losses

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COMMENTS

PLAINTIFF'S MEASURE OF RECOVERY FOR TORTIOUS INDUCEMENT OF BREACH OF CONTRACT—PROFITS OR LOSSES?

It is recognized in most jurisdictions today that an action in tort for damages will be allowed against a defendant who has unjustly induced a third person to breach a contract with a plaintiff, or who has otherwise interfered with the contractual relationships of others. Although the comparatively recent English case of Lumley v. Gye is the leading decision establishing the present form and nature of such an action, the roots of the tort are deeply embedded in both the ancient Roman statutory law and the early English common law. Initially, the courts of the United States were reluctant to embrace this particular tort action, but the doctrine of liability has gradually spread and is now accepted almost everywhere in this country. In the early case of Boyson v. Thorne California at first limited the action to situations involving means of inducement unlawful in themselves. However, both legal writers and later California decisions quickly indicated dissatisfaction with these restrictions and in 1941 the California Supreme Court modified its position in the land-

1 The cases are collected in Annot., 84 A.L.R. 43 (1933), and Annot., 26 A.L.R.2d 1227 (1952).
2 See, e.g., Bradford Corp. v. Webster, [1920] 2 K.B. 135 (party to contract disabled by injuries); McNary v. Chamberlain, 34 Conn. 394 (1867). See generally Carpenter, Interference with Contract Relations, 41 Harv. L. Rev. 728, 731 (1928); Note, Tortious Interference with Contractual Relations, 31 Harv. L. Rev. 1017 (1918) (cases cited therein).
4 For a good look at the historical background of this action, see Sayre, Inducing Breach of Contract, 36 Harv. L. Rev. 683 (1923).
5 The history of the New York decisions is quite typical. See W. Prosser, Torts § 123, at 553 n.62 (3d ed. 1964).
6 Louisiana continues to hold that inducing breach of a contract is no tort unless unlawful means in themselves are used. Robert Heard Hale, Inc. v. Gaiennie, 102 So. 2d 324 (La. App. 1958). This attitude is echoed by what is evidently the last word from Kentucky. Brooks v. Patterson, 234 Ky. 757, 29 S.W.2d 26 (1930).
7 98 Cal. 578, 33 P. 492 (1893).
10 Boyson has never been overruled. Justice Traynor distinguished Boyson on the grounds that the agency relationship in Boyson furnished an absolute privilege for the defendant. See Imperial Ice Co. v. Rossier, 18 Cal. 2d 33, 112 P.2d 631 (1941). For a discussion of the results of this distinguishment, see Comment, Torts: Privilege to Interfere with Contract Relations, 30 Calif. L. Rev. 181 (1942).
mark case of *Imperial Ice Co. v. Rossier,* adopting the majority viewpoint. Although the remedy for such an invasion in California and other jurisdictions has been almost uniformly one in tort for damages, a different measure of recovery may be warranted where the defendant has not only caused damage to the plaintiff by his interference, but has also managed to harvest a profit for himself as a result of his tortious actions. The question has been raised whether a plaintiff in this situation may elect to appropriate these ill-gotten profits in lieu of any damages to which he might have recourse in a tort action. It is the purpose of this comment to provide a foundation for answering that general question in the affirmative by discussing two possible alternatives for so reaching those profits: (1) waiving the tort of inducing a breach of contract and suing in quasi-contract for recovery of the benefits reaped by the defendant; or (2) reclassifying the particular tort of inducing a breach of contract under the more diverse nomenclature of "unfair competition," thus gaining access to the defendant's profits through the use of the equitable remedies of accounting and constructive trust.

**Waiver of Tort and Suit in Assumpsit**

**Waiver of Torts Generally**

The practice of "waiving" a tort and suing in quasi-contract arose out of the common law action of assumpsit, and was extended to its present day form with the aid of various legal fictions and fantasies. Perhaps the most succinct summary is that given by Dean Prosser:

> Out of this common law procedure [assumpsit] there has developed the doctrine that where the commission of a tort results in the unjust enrichment of the defendant at the plaintiff's expense, the plaintiff may disregard, or "waive" the tort action, and sue instead on a theoretical and fictitious contract for restitution of the benefits which the defendant has so received.

But a quasi-contractual remedy is not available for all torts;

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11. 18 Cal. 2d 33, 112 P.2d 631 (1941).
12. For a discussion of the different measures of damages possible in a tort action, see Note, *Damages Recoverable in an Action for Inducing Breach of Contract*, 30 Colum. L. Rev. 232 (1930). If the defendant has acted maliciously, punitive damages may also be recoverable.
14. For a discussion of California law, see text accompanying notes 158-72, infra.
15. "Waiver" is an unfortunate term since the quasi-contract action itself exists only because of the tort, and there is merely an election between alternative, co-existing remedies. See W. KEENER, *QUASI-CONTRACTS*, 159-60 (1893); Teller, *Restitution as an Alternative Remedy for a Tort*, 2 N.Y.L.F. 40 (1956).
beyond the fact that a tort has been committed, it must further appear that the tortfeasor has been enriched.\(^{19}\) The initial guidelines for determining the type of tort which could be waived were promulgated by Lord Mansfield in two early English cases,\(^{20}\) and while there have been some attempts to restrict the use of waiver to specific wrongdoings\(^ {21}\) or to abolish it altogether,\(^ {22}\) the general criteria established in those cases have endured to the present day.\(^ {23}\)

In the first of these cases,\(^ {24}\) Lord Mansfield indicated that restitution would be limited to those cases where the tortfeasor had been unjustly enriched by his wrong and was "under an obligation, from the ties of natural justice, to refund" this amount.\(^ {25}\) Sixteen years later in the case of *Hambly v. Trott*,\(^ {26}\) Lord Mansfield again had occasion to define the area of injuries in which assumpsit would be allowed as an alternative remedy. He elaborated upon his earlier statements with the following words:

If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, ... the person injured has only a reparation for the delictum in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor.\(^ {27}\)

Thus, where the defendant has merely damaged the plaintiff, negligently\(^ {28}\) or otherwise,\(^ {29}\) without benefit to himself, the plaintiff cannot raise an implied debt by merely declaring his "waiver" of the tort.\(^ {30}\) Similarly, restitution will not lie against a wrongdoer where a third party, not the wrongdoer himself, received the benefit.\(^ {31}\) It is only when the tortfeasor himself has reaped an inequitable profit as a direct result of his wrongful conduct that the alternative remedy of quasi-contract is available.

\(^{19}\) Reynolds Bros. v. Padgett, 94 Ga. 347, 21 S.E. 570 (1894); Greer v. Newland, 70 Kan. 315, 78 P. 835 (1904); Kyle v. Chester, 42 Mont. 552, 113 P. 749 (1911); *Restatement of Restitution*, Introductory Note §§ 128-38, at 523 (1937). See also Corbin, *Waiver of Tort and Suit in Assumpsit*, 19 *Yale L.J.* 221 (1910).


\(^{21}\) Professor Woodward was of the opinion that the particular tort of inducing a breach of contract was not one that could be waived. F. Woodward, *Quasi Contracts* § 286, at 458 (1913).


\(^{24}\) Id. at 678.


\(^{26}\) Id. at 1139.


Waiving the Tort of Inducing a Breach of Contract

While the history of the tort action of inducing a breach of contract is rooted in antiquity, the practice of waiving this particular tort and suing for restitution in quasi-contract is of much more recent vintage. Not surprisingly, the earliest cases of waiver for this tort were concerned with providing an alternative remedy for a master who had been denied the services of his apprentice as a result of a third party's interference. While personal service contracts have historically been under the jealous watch and protection of all courts, the English courts in particular have stressed the integrity of the employment relationship. Forty-five years before *Lumley* crystallized the tort action for inducing a breach of contract, an English court held that a master of an apprentice who had been lured away by the defendant might waive the tort and bring an action of indebitatus assumpsit for the work and labor done by his apprentice for the defendant. Although some doubt has been expressed as to the validity of this decision, it was followed in 1814 by the case of *Foster v. Stewart* which confirmed a recovery in restitution for the services of an apprentice who had been induced to work elsewhere. Meanwhile, in the United States, the New York Supreme Court in 1810 had adopted the English view and held that a master could recover for the reasonable value of the work done by his apprentice for the defendant, without having to deduct from his recovery the wages advanced to the apprentice by the defendant. Some time later, in yet another master-servant case, the Georgia Supreme Court indicated it would allow an employer whose cotton pickers had been enticed away to recover from the defendant for the reasonable value of such services, and boldly measured the value of the labor by concluding:

"The correct rule of damages, when one person entices away the servant of another, is the . . . average net profits that were made by men of fair business capacity out of the labor of such a servant during the year for which the servant was hired."

Thus, there is competent case authority establishing an early rule that an action in quasi-contract for the labor of a servant induced by another to breach his employment contract will be allowed, with at least one case permitting the plaintiff to reach the profits of the tortfeasor. Contemporary legal writers have generally accepted this judicial view.

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38 *Lee v. West*, 47 Ga. 311 (1872).
39 *Id.* at 318.
40 *But see Huff v. Watkins*, 20 S.C. 477 (1883).
41 *Lee v. West*, 47 Ga. 311 (1872).
The immediate effect of these decisions upon other areas of contractual relations was perhaps somewhat delayed by the fact that the courts had always regarded a master-servant situation as a rather special one that was worthy of extraordinary protection. Nevertheless, these cases did provide some foundation not only for the validity of an action in quasi-contract as an alternative remedy in general, but also for the waiver of the particular tort of inducing a breach of contract. Their significance should be neither overlooked nor underestimated.

Measure of Recovery in Quasi-Contract—An Introduction to the Problem

Before considering the measure of recovery in quasi-contract for the particular tort of inducing a breach of contract, a somewhat extended digression into the background of quasi-contracts is necessary to ascertain what principles of recovery apply generally. Is recovery in quasi-contract to be limited to the value of what the plaintiff has lost or will recovery extend to all that the defendant has acquired, although the latter amount may exceed the former? The primary difficulty is that any search for a general rule as to whether or not the profits of a tortfeasor are recoverable in a quasi-contractual action is initially complicated by the welter of semantic and substantive inconsistencies prevalent both in judicial opinions and in the textual writings of authors and authorities. Indeed, the very nature of the action of quasi-contract has been vociferously disputed since Lord Mansfield’s sweeping use of language in the early case of Moses v. Macferlan purported to cement the action upon equitable principles of “natural justice.” While this theory has been hailed as “rescuing” the law of quasi-contracts from “the marsh of technicality into which it was sinking,” it has also been dismissed as too “sloppy” or “vague” to be of any realistic value. The dominant controversy has centered around the issue of whether Lord Mansfield separated quasi-contract from the antiquated grasp of assumpsit and established a whole new action founded upon and absorbing the law of equity as practiced in the chancery courts, or whether he merely


44 “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 the money.” Id. at 681. Prior to Macferlan, the plaintiff had based his action upon an implied promise of the defendant. See Slade’s Case, 76 Eng. Rep. 1074 (K.B. 1602). But in Macferlan Lord Mansfield went one step further and implied a debt. 97 Eng. Rep. at 678. See note 86 infra and accompanying text.

45 P. Winfield, Quasi-Contracts 9 (1952).

46 “[T]he whole history of this particular form of action [money had and received] has been what I may call a history of well-meaning sloppiness of thought.” Holt v. Markham, 1923] 1 K.B. 504, 513 (Scrutton, L.J.).

47 “Whatever may have been the case 146 years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled ‘justice as between man and man.’” Baylis v. Bishop of London, [1913] 1 Ch. 127, 140 (Hamilton, L.J., later Lord Sumner).

utilized equitable terms to describe an action that was primarily contractual in nature as well as form. By ignoring the fiction of an implied promise as the basis for quasi-contract and turning instead to equitable principles of unjust enrichment, the measure of recovery in quasi-contract could be expanded by the use of the equitable remedies of the constructive trust or accounting, both of which are effective to recover the profits of a tortfeasor. Mansfield himself later referred to quasi-contract as a “liberal action in the nature of a bill in equity,” thus apparently linking his own concepts of its nature to the nonlegal considerations of morality and natural justice found in the chancery courts. It is interesting to note that this stressing of “justice” as the basis of quasi-contract brought no immediate repercussions. Later English authorities periodically sniped at Mansfield’s broad language in Moses v. Macferlan, but it was not until the dawn of the 20th century that any really harsh criticisms appeared. The derogations culminated in 1914 with Sinclair v. Brougham a House of Lords decision in which Lord Sumner, vigorously striking down any connection between the “equity” of chancery and the “equity” of Lord Mansfield, reunited the action of quasi-contract to its historical basis of an implied promise, effectively relegating the field of quasi-contract to a “neglected backwater in the province of contract.” It was to remain there, however, for only a relatively short period of time. But before considering briefly the events in England which led to the repudiation of this “implied promise” doctrine and the subsequent rehabilitation of the theories of Lord Mansfield, it is best to examine the status of quasi-contract as it existed in the United States during these early years.

While nearly all early American authorities had uncompromisingly founded the nature of quasi-contract upon principles of “unjust enrichment,” they did not fully succeed in escaping the substantive difficulties of their English counterparts. On the contrary, it seems to be clear that any concept of “unjust enrichment” used by these early American writers as a basis for quasi-contract enjoyed neither the depth nor scope of the concept of “unjust enrichment” underlying remedies in equity. Their use, however, of this particular term is not surprising. At the time the first authoritative American work

49 “All these causes of action are common species of the genus assumpsit. All now rest, and long have rested, upon a notional or imputed promise to repay.” Sinclair v. Brougham, [1914] A.C. 398, 452.


51 “He [Mansfield] seems to have regarded the ‘equity’ administered in the Court of Chancery as synonymous with natural justice, and to have hoped to introduce it into the common law courts.” J. MUNKMAN, QUASI-CONTRACTS 6 (1950).

52 Note 20 supra.


54 J. MUNKMAN, QUASI-CONTRACTS 7 (1950).

55 “[T]he plaintiff’s right to recover rests upon the doctrine that a man shall not be allowed to enrich himself unjustly at the expense of another.” W. KEENER, QUASI-CONTRACTS 19 (1893). “It is of the essence of the quasi contractual obligation that the retention of the benefit received by the defendant would be unjust.” F. WOODWARD, QUASI CONTRACTS § 9, at 9 (1912). See also CORBIN, QUASI-CONTRACTUAL OBLIGATIONS, 21 YALE L.J. 533 (1912).
on quasi-contracts was published by Professor Keener in 1893[^56], the "natural justice" theory of Lord Mansfield had not yet been effectively discredited, thus making Keener's adoption of this phrase together with its theoretical connotations almost imperative. But while Professor Keener was explicit in pointing out that the equitable principle of unjust enrichment was the basis for a quasi-contractual remedy[^57], he was not ready to fully assimilate the liberal measures of recovery allowed in a court of equity for unjust enrichment, as Lord Mansfield probably intended. Instead, Keener theorized that any unjust enrichment had to be at the expense of the plaintiff, or clearly identifiable with the loss of such plaintiff, before he could seek a recovery in quasi-contract. As Keener put it: "[I]t is not sufficient for the plaintiff to prove that defendant has committed a tort whereby he has enriched himself. It must further appear that what has been added to the defendant's estate has been taken from the plaintiff's. That is to say, the facts must show, not only a plus, but a minus quantity."[^58]

Anxious to adopt unjust enrichment as the basis for quasi-contract and also limit quasi-contractual recovery to "plus and minus" quantities, Keener was forced to accept the fiction of an implied contract between the plaintiff and the defendant at least for purposes of measuring the recovery[^59]. As Keener cautioned:

> But it does not follow that [because the unjust enrichment of the defendant is the basis for quasi-contract] the measure of recovery is to bear any relation to the amount of profit made by the defendant. The plaintiff in a case of this sort [waiver of tort] should recover such a sum as the jury would have been authorized to give, had there been a contract between the plaintiff and the defendant. . . . Any question as to incidental or collateral profit made by the tortfeasor—in fact, the entire question of profit—should be excluded."

With this conclusion limiting the recovery of a plaintiff to losses measured by contractual standards, it is clear that Keener retreated somewhat from his earlier statements that any idea of a contract between the tortfeasor and the plaintiff was an unnecessary "fiction" and should be abolished[^61]. This brings into focus, then, what Keener considered to be the nature of unjust enrichment as it was applicable to recovery in quasi-contract. Rather than stressing the unjustness of all defendant's gains tortiously acquired, only those gains which could be clearly associated with another's losses could be denominated as "unjust enrichment," leaving the defendant free to keep those remaining benefits which the plaintiff could not prove to have been directly taken from his own estate[^62]. Keener further clarified his position on the measure of recovery with his emphasis of unjust en-

[^56]: W. Keener, Quasi-Contracts (1893).
[^57]: Id. at 19; see note 55 supra.
[^58]: Id. at 163 (emphasis added).
[^59]: As to the nature of quasi-contracts, Keener explicitly excluded any idea of a contract between the parties. "It is idle to speak of the possibility of contract where there is not even the suggestion of a meeting of minds." Id. at 24.
[^60]: Id. at 166 (emphasis added).
[^61]: Id. at 160.
[^62]: This is merely a logical extension of Keener's "plus and minus" theory. See text accompanying note 58 supra.
richment as the basis for what the defendant could keep.\footnote{63} Since the plaintiff's claim rests upon the fact that the defendant cannot be allowed in good conscience to keep what he has obtained, the measure of the plaintiff's recovery is not the entire amount [of benefits tortiously acquired] . . . but [only] the amount which it is against conscience for the defendant to keep.

While this recourse to the defendant's conscience to limit the plaintiff's recovery appears to be a rather unique concept of unjust enrichment, it is really only an extension of other arguments that unjust enrichment within the framework of quasi-contract is synonymous with "compensation" and should not be utilized to widen a plaintiff's recovery in law.\footnote{64} The conclusion can only be drawn that while Keener may have picked up the phraseology of Lord Mansfield, he did not absorb the broad sentiments of true equity underlying them. This point assumes additional importance in light of the fact that other American authorities on quasi-contract published subsequent to Keener borrowed freely from his writings and theories in support of their own concepts of the profit-loss relationship in quasi-contract.

Professor Woodward, writing in 1913\footnote{65} quoted directly from Keener's "plus and minus" passage, adding his own confirmation of this theory with the following:

Perhaps it was arguable at one time that the obligation of a tortfeasor in assumpsit is analogous to that of a constructive trustee and that he should be held accountable for any profits derived by him from his wrongful act. It seems to be now taken for granted, however, that the obligation is not to account for profits but to make restitution. It follows that it is not enough to show that the defendant has been enriched by his wrong; it must further appear that the benefit received by him has been taken from the plaintiff.\footnote{66}

Perhaps the most interesting feature of this statement is that while Woodward categorically excludes the influence of equitable remedies from those in quasi-contract by taking for "granted" that profits are not recoverable, he cites no authority other than Keener to support this statement. One possible explanation for this dogmatism is that at the time Woodward was writing his text, Lord Mansfield's equitable theory of natural justice as the basis for quasi-contract was under heavy attack by England's "traditional"\footnote{67} school of quasi-contractual authorities. While Woodward definitely rejected the theory of an implied promise as being the nature of quasi-contract,\footnote{68} he did

\footnote{63} W. KEENER, QUASI-CONTRACTS 183 (1893) (emphasis added).
\footnote{64} "[I]n assumpsit the party cannot recover more than in an action of tort . . ." Foster v. Stewart, 105 Eng. Rep. 582, 586 (K.B. 1814) (dictum). "[T]he measure of damages should be the same as in a tort action, or at any rate no greater. The legal fiction should not be indulged to enlarge the right." Corbin, Waiver of Tort and Suit in Assumpsit, 19 YALE L.J. 221, 245 (1910).
\footnote{65} F. WOODWARD, QUASI CONTRACTS (1913).
\footnote{66} Id. at 441-42 (emphasis in the original).
\footnote{67} As used by contemporary authorities on English law, "traditionalists" refers to those authorities viewing the action of quasi-contract as resting upon an implied contract rather than a theory of "natural justice" or unjust enrichment. See S. STOLJAR, QUASI-CONTRACTS 3 (1984).
\footnote{68} "It cannot be too strongly emphasized . . . that quasi-contracts are in no sense genuine contracts. . . . [Q]uasi-contractual obligations are imposed without reference to the obligor's assent. He is bound, not because he has promised to make restitution . . . but because he has received a benefit the
not exclude the use of such a "fiction" to limit the measure of recovery. To at least that extent he was somewhat influenced by both the virility of the English denunciations of Mansfield and the identical use of such contractual considerations by Professor Keener to limit a plaintiff's recovery. But while Keener and Woodward both may have employed contractual standards to limit recovery in quasi-contract, this was not the only argument which was available to cut off from a plaintiff's recovery any benefits of the tortfeasor which exceeded the plaintiff's losses. There had been some broad language in early English cases indicating that the action of quasi-contract should never be allowed where it would be "prejudicial" to a defendant. This could, theoretically at least, be interpreted as restricting the plaintiff's recovery in quasi-contract to tort damages. While this argument has attracted few converts, it did influence at least one early American writer on quasi-contracts—Professor Corbin.

Writing shortly after the turn of the century, Corbin expressed a "grave doubt as to the propriety of the whole doctrine of waiver of tort and suit in assumpsit." Stressing the importance of the tort giving rise to such an action in quasi-contract, rather than the unjust enrichment of the defendant, Corbin logically concluded that the amount recoverable in quasi-contract "ought never to be allowed to exceed the amount of the plaintiff's injury." Corbin, however, did at least recognize the argument that a tortfeasor should not be allowed to keep any part of his "unholy enrichment," but proposed an alternative solution to the plaintiff receiving any amount in excess of his loss. Arguing that since any judicial disgorging of gains exceeding a plaintiff's loss was nothing more than a "punitive" measure anyway, Corbin concluded that the state should confiscate any such excess on behalf of the general public. This suggestion has met with little approval.

retention of which would be inequitable." F. Woodward, QUASI CONTRACTS 6 (1913).

"[T]he whole law of quasi-contract, from the remedial point of view, depends upon the fiction that the defendant has promised to do that which in justice he ought to do." Id. at 440 (emphasis in the original).

"The continuance of such a fiction [implied promise of the tortfeasor to make restitution] does exist "for the purpose of a remedy." W. Keener, QUASI-CONTRACTS 160 (1893).


Corbin, Waiver of Tort—Suit in Assumpsit, 19 YALE L.J. 221, 245-46 (1910).

"But it may be said that the plaintiff ought to recover the full amount of the defendant's unholy enrichment because it is unjust for the defendant to retain any of it." Id.

"[T]he fine ought to go to the state, and it ought to be measured by the character of the wrong . . . ." Id. at 245.

The reporters of the Restatement of Restitution realized that allowing a plaintiff to recover the ill-gotten profits of the defendant introduced an
While Corbin, Woodward and Keener may all have agreed that the obligation of a tortfeasor to make restitution in quasi-contract would not include a requirement to account for profits, none of them foresaw the subsequent disintegration between the theories of equitable unjust enrichment and legal unjust enrichment which has altered not only the nature of quasi-contract but also the measure of recovery for such an action. In England, the disintegration achieved rather dramatic proportions because of the necessity to overcome the direct authority of the Sinclair case that an "implied promise" was the basis for quasi-contract.

As stated earlier, the Sinclair case was the high water mark of this implied contract theory within England. But the seeds of "natural justice" planted in quasi-contract by Lord Mansfield, instead of being strangled by English traditionalists, were only "pruned." What started as a mere trickle of discontent over Lord Sumner's eradication of Mansfield's equitable propositions soon became a swelling tide of judicial and textual authority calling for a theory of quasi-contract based upon "modern" notions of unjust enrichment. The final blow seems to have been delivered in 1943 with Lord Wright's opinion in the case of Fibrosa Spolka Akcyjna v. Fairbairn.

"element of punishment" to restitution, but did not find this to be "shocking." Seavey & Scott, Restitution, 54 L.Q. Rev. 29, 37 (1938).

78 "[T]he criticisms of Lord Mansfield's doctrine [of natural justice] . . . may be regarded rather as pruning some of the exuberance of his doctrine than as axes laid at the roots of it." P. Winfield, Quasi-Contracts 13-14 (1952).
80 "These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared should not in these days be allowed to affect actual rights." United Australia, Ltd. v. Barclay's Bank, Ltd., [1941] A.C. 1, 29 (Lord Atkin). See also Brook's Wharf & Bull Wharf, Ltd. v. Goodman Bros., [1937] 1 K.B. 534, 546; Craven-Ellis v. Canins, Ltd., [1938] 2 K.B. 403.
82 This is just another way of saying a "return" to the views of Lord Mansfield. In reviewing Mansfield's comment that "[T]he defendant [in quasi-contract] . . . is obliged by the ties of natural justice and equity . . .", two very recent English writers have concluded: "We have only to substitute 'make restitution' for the last three words of his statement to make it appropriate for the whole law of restitution." R. Goff & G. Jones, Restitution 12 (1966).
83 Not all English authorities would agree to this. As late as 1952, Sir Winfield wrote that while the implied contract theory was wrong, it was still "prevalent." P. Winfield, Quasi-Contracts 20 (1952). In 1964, Sir Allen observed that the question of whether or not quasi-contract in English law was based on principles of natural justice was "still hotly disputed." C.K. Allen, Law In The Making 406 (7th ed. 1964). But other recent writers have concluded that any discussion of an implied contract was a "barren topic." R. Goff & G. Jones, Restitution 11 (1966). Lord Simonds has likewise labeled it a "rather arid dispute." Ministry of Health v. Simpson, [1951] A.C. 251, 275.
Lawson Barbour, Ltd. Referring to the “ghosts” of implied promises that had haunted the field of quasi-contract since the days of assumpsit, Lord Wright returned quasi-contract to Mansfield’s principles of natural justice, finishing with this interpretation of that theory:

Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. . . . The obligation is a creation of the law . . . [and] belongs to a third class, distinct from either contract or tort, though it resembles contract rather than tort. This statement [of natural justice] of Lord Mansfield has been the basis of the modern law of quasi-contract, notwithstanding the criticisms which have been launched against it.

In the United States, the merging of the principles of quasi-contract with those of equity was far less climactic. This is hardly surprising in view of the fact that as far as the nature of quasi-contract was concerned, both Woodward and Keener had rightly concluded that its true foundation lay upon the equitable bedrock of unjust enrichment. While both of them, however, had qualified this term with respect to the measure of recovery to be allowed in quasi-contract, subsequent authorities have failed to make this distinction. Instead, there has gradually accumulated nonrestrictive utterances from the bench and elsewhere to the effect that actions in quasi-contract, although legal in form, are equitable in nature and governed by equitable principles. Countless repetitions of this broad theme have had their effect on both the structure and scope of restitution in quasi-contract. The unjust enrichment theory supporting the equitable remedies of the constructive trust and accounting have been more and more absorbed into the law of quasi-contract, expanding the legal measure of recovery for unjust enrichment by placing emphasis on the defendant’s unjust gain rather than on the plaintiff’s loss or expense. This is reflected in the dilution of Professor Keener’s “plus and minus” theory of recovery by modern authorities. As Dean Prosser has concluded: “Restitution in quasi-contract . . . looks to what the defendant has received which in good conscience should belong to the plaintiff; and this may be either more or less than the amount of the plaintiff’s actual loss.”

84 [1943] A.C. 32.
85 The language was borrowed from Lord Atkin’s opinion in the United Australia case: “When these ghosts of the past [theory of implied contracts] stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred.” United Australia, Ltd. v. Barclay’s Bank, Ltd., [1941] A.C. 1, 29.
87 Note 55 supra.
88 See text accompanying notes 55-71 supra.
89 The cases are too numerous to cite. They are collected in 58 C.J.S. Money Received § 1, at 907 nn.3-4 (1948). See also W. Prosser, TORTS § 94, at 647 (3d ed. 1964); York, Extension of Restitutional Remedies in the Tort Field, 4 U.C.L.A.L. Rev. 499, 546 (1957).
91 W. Keener, QUASI-CONTRACTS 165 (1893); see text accompanying note 58 supra.
Other contemporary American writers have echoed this shift of emphasis.93 The American Law Institute has combined all remedies based on unjust enrichment (legal and equitable) into one coherent and separate body of law known as Restitution.94 The effect of the disintegration between unjust enrichment in equity and unjust enrichment in quasi-contract is reflected in the introductory note to the Restatement of Restitution:

The Restatement of this Subject deals with situations in which one person is accountable to another on the ground that otherwise he would unjustly benefit or the other would unjustly suffer loss.95

This emphasis upon either an unjust gain or an unjust loss, with the inherent possibility of recovering a defendant's profits, is even better illustrated in the introductory note to the topic on "Measure of Recovery." Commenting upon the situation where the benefits gained by a tortfeasor are either more or less than the losses of the plaintiff, the Institute recommended as follows:

In such cases the measure of restitution is determined with reference to the tortiousness of the defendant's conduct or the negligence or other fault of one or both of the parties in creating the situation giving rise to the right in restitution. If the defendant was tortious in his acquisition of the benefit he is required to pay for what the other has lost although that is more than the recipient benefited. If he was consciously tortious in acquiring the benefit, he is also deprived of any profit derived from his subsequent use of it.96

Writing the year after the Restatement of Restitution had been published, the official reporters for this work had this to say about the benefits of waiving a tort and suing in quasi-contract for restitution:

[F]requently the measure of recovery would be the same upon either the tort theory of damage or the restitution theory of value received. However, in the quasi-contractual proceeding, the accent may change from 'restitution' to 'unjust enrichment'; in many cases the plaintiff is entitled to get back more than he lost, since ill-gotten profits can be required to be surrendered.97

By now it should be clear that as far as contemporary writers are concerned, the measure of recovery in quasi-contract should not be limited by contractual standards but should be broadened to reflect those types of recovery allowed in equity for unjust enrichment. The courts, however, have been hesitant to apply equitable remedies explicitly to enlarge a plaintiff's measure of recovery in quasi-contract to so include the profits of a tortfeasor. The majority of courts have predicated any use of the equitable remedies of accounting or constructive trust on either a fiduciary relationship98 or "special cir-

94 RESTATEMENT OF RESTITUTION (1937).
95 Id., General Scope Note, at 1.
96 Id., Introductory Note §§ 150-59, at 596.
97 Seavey & Scott, Restitution, 54 L.Q. Rev. 29, 37 (1938) (emphasis added).
cumstances involving complicated factual situations. There is evidence, however, that the courts will go far to bring a case within these judicially acceptable boundaries of extraordinary recovery, and the tort of inducing a breach of contract has not been overlooked. Having illustrated the underlying principles of recovery in quasi-contract generally, it is now appropriate to turn to an analysis of those cases seeking recovery in quasi-contract for the particular tort of inducing a breach of contract.

Measure of Recovery in Quasi-Contract for Inducing a Breach of Contract

The expansion of the measure of recovery in quasi-contract where the tort involves an inducement of a breach of contract has been, at best, an uncoordinated, unauthoritative extension of legal remedies. Much of this inconstancy arose, however, because the instances where a plaintiff has sought the profits of a defendant have been rare and the merger of equitable and legal remedies based on unjust enrichment is only of recent development. The result has been that no positive rule or body of law has yet emerged to guide the courts in their handling of such cases. Consequently, the courts have relied not so much upon each other for specific authority as upon general axioms of unjust enrichment developed elsewhere. By so doing, these courts have both extended recognition to the dissolution of the barriers between legal and equitable remedies, and have also significantly contributed to that decomposition. It is interesting to note that the cases which have expanded the measure of recovery in quasi-contract have used as their common denominator a decision which was actually rendered in equity. This case, then, becomes the starting point.

In Angle v. The Chicago, St. Paul, Minneapolis & Omaha R.R., the United States Supreme Court, recognizing the rule that a right of action will lie against a tortfeasor who has procured a breach of the plaintiff's contract, allowed the plaintiff to bring a suit in equity to have the defendant declared a trustee ex maleficio of tortiously secured property. Angle, the plaintiff, was a construction contractor. See generally J.N. Pomeroy, Equity Jurisprudence & Equitable Remedies §§ 2356-62 (4th ed. 1919).


100 A good example is Automatic Laundry Serv., Inc. v. Demas, 216 Md. 544, 141 A.2d 497 (1958). In this case the court found a "special relationship" existing between the plaintiff and the other party to the contract because of a profit-sharing agreement. The court allowed the plaintiff to recover all the profits of the tortfeasor who induced the breach of this contract on the rationale that such tortfeasor had "full knowledge" of such contract. The court, however, had not found any "special relationship" between the plaintiff and the tortfeasor on which to base this accounting.

101 151 U.S. 1 (1893).
hired to build a railroad on land granted to his employer for that purpose. The defendant, a competitor of the grantee, wrongfully induced the state legislature to revoke this grant, thus forcing a breach of the grantee's contract with Angle and obtaining for itself the title to these lands. Although Angle secured a judgment against the grantee for this breach, it was uncollectable due to insolvency. This suit was subsequently brought to have the defendant declared a trustee ex maloificio of the lands. The Supreme Court overruled the defendant's demurrer, and awarded a constructive trust with this broad comment: "Waiving the question as to the solvency of the Omaha Company [defendant] ... there remains the proposition that it is contrary to equity that the defendant should be permitted to enjoy unmolested that particular property ... [secured] by its wrongful acts."102

This principle of unjust enrichment utilized by the Supreme Court in a suit in equity was seized upon by the District Court of New York 27 years later as authority for its decision in Federal Sugar Refining Co. v. U.S. Sugar Equalization Board,103 an action at law for restitution.

In the Federal Sugar Co. case the Norwegian Food Commission had entered into a contract with the plaintiff for the purchase of 4,500 tons of refined sugar at a contract price of $6.60 per hundred pounds. The defendant, Rolph, taking advantage of his influential office as head of the Sugar Division of the United States Exports Administration Board,104 by fraudulent and unjustified interference induced the Commission to breach its contract with the plaintiff and to purchase the sugar at a price of $11 per hundred pounds from a company in which Rolph was president and director. This secured for the defendant a larger profit than the plaintiff would have made had the plaintiff's contract never been breached. The plaintiff decided to waive the tort of contractual interference, bringing his action in quasi-contract for money had and received. Since the case was decided on a demurrer, the court was not required to state specifically that it was awarding to the plaintiff all the profits which the defendant had realized from his own contract with the Food Commission regardless of the disparity between these profits and the damages suffered by the plaintiff. But it was obvious to the court on the facts presented that the plaintiff had not suffered any tangible out-of-pocket loss as a result of the defendant's action, nor could the plaintiff ever have realized from his own contract the pecuniary amount he was now seeking to recover from the defendant. Nevertheless, while the court acknowledged that the plaintiff could not have recovered such profits under Keener's "plus and minus" theory of recovery in quasi-contract, it felt that the definition of unjust enrichment had become extended,105 and it desired to give recognition to this extension by basing its decision on "broader grounds."106

102 Id. at 25.
103 268 F. 575 (S.D.N.Y. 1920).
104 The defendant had told the Food Commission that the United States Government had ordered the sugar sold at $11 per pound. Id. at 579.
105 Id. at 582 n.1.
106 "In the case at bar it might further be contended, not without merit, that the case comes within the limitations [of recovery] stated by Keener and
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Citing the equitable principles espoused in Angle and elsewhere, the court summed up its interpretation of quasi-contractual restitution with these words:

The point is not whether a definite something was taken away from the plaintiff and added to the treasury of the defendant. The point is whether defendant unjustly enriched himself by doing a wrong to plaintiff in such manner and in such circumstances that in equity and good conscience defendant should not be permitted to retain that by which it has been enriched.

Although Judge Mayer's language in the Federal Sugar Co. case was initially criticized as "ignoring the fundamental theory of restitution," it has more recently been praised as properly interpreting the present equitable trend of the law of quasi-contract. It is actually less an extension of the law of quasi-contract than a belated unification of those principles underlying the remedies for unjust enrichment in equity with those principles supporting restitution in law. Since the nature of quasi-contract has always, at least in America, been based upon equitable foundations of unjust enrichment, it seems justifiable that the measure of recovery in quasi-contract would follow the same pattern. By its recognition of equitable concepts supporting the measure of recovery in quasi-contract as well as the nature of quasi-contract, the court in Federal Sugar did much to reform and strengthen the practicality of an action at law for restitution.

But while the unusually forthright language of the Federal Sugar Co. case makes it perhaps the most dramatic example of the deterioration of Keener's antiquated fiction of an implied contract limiting the measure of recovery in quasi-contract, it is not the only example. This anachronism of an implied contract has suffered further erosion as exemplified in the following two cases.

In 1926, the circuit court of appeals in New York added to this erosion with its decision in Second Nat'l Bank of Toledo v. Samuel & Sons, Inc. While the question of profits was not directly involved, the case is applicable since the court further cleared the way for reaching a tortfeasor's profits in quasi-contract by an equitable outflanking of Woodward's stringent requirement that the benefits of a defendant sought by a plaintiff in quasi-contract must be singularly identifiable with the losses suffered by such plaintiff.

In Samuel & Sons, the defendant had procured an irrevocable letter of credit from a trust company to be used as partial payment for acquiring scrap metal from an Army ordnance depot. The plaintiff bank was the purchaser of a draft which had been issued by the

Woodward; but I prefer to rest my conclusion on the broader ground [of equitable principles]." Id. at 583.


268 F. at 582 (emphasis added).

See 5 Minn. L. Rev. 401 (1921); id. at 567.


See text accompanying notes 55-71 supra.

12 F.2d 963 (2d Cir. 1926), cert. denied, 273 U.S. 720 (1926).
commanding officer of the depot in reliance upon the defendant's letter of credit. Although the draft was subsequently offered by the plaintiff to the trust company for payment in accordance with its terms, the defendant induced the trust company not to honor the draft. The plaintiff then chose to bring a suit in equity to have the defendant declared a trustee ex maleficio as to the proceeds emanating from the sale of the scrap metal. Recognizing that the plaintiff had a good cause of action for a tortious inducement of a breach of contract, the court preferred to keep inviolate the hallowed sanctuary of equity by establishing plaintiff's right to a "full and complete" recovery at law via waiver of tort and suit in assumpsit. While the court took comfort in Woodward's statement that quasi-contractual obligations "rest... solely upon the universally recognized moral obligation of one who has [unjustly] received a benefit... to make restitution," it scrupulously omitted any reference to Woodward's subsequent and damaging comment that "it is not enough to show that the defendant has been enriched by his wrong; it must further appear that the benefit received by him has been taken from the plaintiff." Realizing that there was no direct benefit flowing from the defendant to the plaintiff, the court nevertheless upheld an action in quasi-contract by stressing the "equitable" nature of such an action. Using as its foundation for quasi-contract Lord Mansfield's theory of "natural justice," the court reasoned that the plaintiff could pursue such a legal remedy since the defendant had been "benefited to the extent of the draft which remained unpaid," and the retention of this benefit "would work a serious injustice to the plaintiff." In remanding the cause to the district court with directions to transfer the case to the law side, the court summarized its theory of the plaintiff's right to an action in quasi-contract with this statement:

As there is no question but that defendant has received property for which it has not paid... there is a clear moral obligation to make restitution to the plaintiff, who parted with its money... in reliance upon a letter of credit... which the defendant induced the bank wrongfully to revoke.

This de-emphasis of Woodward's principle that "what has been added to the defendant's estate... must have been taken [directly] from the plaintiff's" was followed 10 years later, by the Supreme Court of Pennsylvania in *Caskie v. Philadelphia Rapid Transit Co.* There the defendant had fraudulently induced a railroad company...

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113 "[W]here the remedy by assumpsit is full and complete, the resort must be to that action and not to a suit in equity." *Id.* at 968. But see *Angle v. Chicago, St. P., M. & O. Ry.*, 151 U.S. 1 (1893). In that case, the defendant had argued that the plaintiff's suit in equity should be dismissed because an action at law would lie for damages. Mr. Justice Brewer answered as follows: "[I]t is contrary to equity that the defendant should be permitted to enjoy unmolested... property [secured]... by its wrongful acts." *Id.* at 25.

114 F. WOODWARD, QUASI CONTRACTS § 6 (1913).

115 *Id.* § 274, at 442 (emphasis in the original).

116 See note 44 *supra*.

117 12 F.2d at 968.

118 *Id.* at 967.

119 *Id.* at 968.

120 F. WOODWARD, QUASI CONTRACTS 442 (1913).

121 321 Pa. 157, 184 A. 17 (1936).
to pay over proceeds which the railroad owed to the plaintiff on an employment contract. The plaintiff brought his action in assumpsit for money had and received against the defendant, alleging unjust enrichment. The court noted approvingly Judge Brewer's use of the constructive trust in Angle as an alternative remedy to reach property secured by tortious contractual interference, but in the present case the plaintiff was not seeking to have the defendant declared a trustee ex maleficio.122 Turning to the plaintiff's right of recovery in quasi-contract, the court, in language strongly reminiscent of Judge Mayer's comments in the Federal Sugar Co. case,123 suggested this simple test for establishing the right to restitution in quasi-contract: "The inquiry is: Had the defendant . . . received money or property which he is not entitled to keep and which in equity and good conscience should be paid to plaintiff in accordance with principles of natural justice? If he has, the plaintiff may recover."124 The court drew deep from the well of authority established by Angle, Federal Sugar, and Samuel & Sons to conclude that recovery in quasi-contract was no longer "limited to cases in which something [had] been taken from plaintiff's pocket."125

But there is one other element in Caskie which supports the argument that the measure of recovery in quasi-contract for tortious inducement of breach of contract should be expanded to include profits. The court made a point of establishing the propriety of the plaintiff's recovery in quasi-contract upon the principle that the tort of inducing a breach of contract involved a violation of the plaintiff's "rights."126 While the court did not explain what it considered the nature of these intangible contractual "rights" to be, Judge Rogers in Samuel & Sons had no misgivings as to their true substance. As he so bluntly stated:

Contract rights are property, and as such are entitled to the protection of the law, and knowingly to induce one of the parties wrongfully to repudiate a contract is as distinct a wrong as it is to injure or destroy his property.127

Having thus established the tort of inducing a breach of contract upon a violation of property rights, the court in Samuel & Sons progressed to its application of equitable principles to broaden the measure of recovery in quasi-contract. To understand fully the importance of this legal redefinition of "property" rights and its effect upon the measure of recovery in quasi-contract, it is necessary to explore the function of such redefined "property" interests within the sphere

122 The court, however, indicated by way of a footnote that if plaintiff had sought relief in equity, the court would have followed the example of Judge Rogers in Samuel & Sons and certified the case to the law side. 321 Pa. at 160 n.3, 184 A. at 19 n.3.
123 The court later referred by way of footnote to Judge Mayer's language. Id. at 163 n.6, 184 A. at 20 n.6.
124 Id. at 161, 184 A. at 19.
125 Id. at 163, 184 A. at 20.
126 "[T]he general principle [is] that a 'contract confers certain rights on the person with whom it is made, and not only binds the parties to it by the obligation entered into, but also imposes on all the world the duty of respecting that contractual obligation.'" Id. at 159, 184 A. at 18, quoting from Temperton v. Russell [1893] 1 Q.B. 715, 730 (Lopes, L.J.).
127 12 F.2d at 967 (emphasis added).
of equitable jurisdiction, as the mystique of "property" has long since afforded recovery of tortiously appropriated property in a court of equity via the remedy of a constructive trust.\textsuperscript{128} What is important is that while Judge Rogers and others\textsuperscript{129} have been concerned with including intangible contractual rights within the scope of property rights protected by courts of law, there has been a similar and significant movement in the equity courts towards relaxing the jurisdictional requirement of a "property" interest to allow for an expanded use of the equitable remedies of accounting and constructive trust. Either of these equitable remedies can be used for recovery of profits. Thus, the adoption of a "property" interest as the foundation for an action in quasi-contract for tortious inducement of breach of contract should also lead to a corresponding expansion of the legal measure of recovery. To clarify this, some further analysis of the movement in equity to de-emphasize "property" interests is required. As one writer has commented:

[The abandonment of the property requirement as a condition of equitable relief has been an erosive one, more often than not accomplished by a redefinition and enlargement of the definition of the idea of "property" [to include intangible interests] \ldots . The hurdle with respect to the existence of a "property" interest [in intangibles] is cleared by simply redefining property to include intangibles; or, if this proves too great a wrench to hallowed concepts, to speak in terms of "rights of substance," "pecuniary rights," or "quasi-property rights" as worthy of equitable protection, avoiding for the moment at least a flat repudiation of time honored language.\textsuperscript{130}

Judge Brewer's use of the equitable remedy of the constructive trust in \textit{Angle} has already been noted,\textsuperscript{131} but since that case involved tangible property interests as well as contractual "property" interests, the application of such a trust was not a clear and unequivocal extension of an equitable remedy. The honor of so extending equitable protection when the only property interest involved was the intangible one of contractual interests was reserved for the Court of Errors and Appeals of New Jersey in the case of \textit{Schechter v. Friedman}.\textsuperscript{132} The case is unique in that the court allowed a plaintiff to recover the profits of the tortfeasor directly in equity without a pleading of any of the traditional requirements for equitable jurisdiction except the "property" interest of the breached contract.

In \textit{Schechter}, the plaintiff had a contract with a sink manufacturer giving the plaintiff the exclusive rights of distribution for the sinks. With full knowledge of such contract the defendant induced the manufacturer to accept from him an order for 1,000 sinks in violation of its contract with the plaintiff. On the basis of this tort, the plaintiff brought an action in equity for an accounting of any profits reaped by the defendant from the sale of such tortiously

\textsuperscript{128} See J.N. Pomeroy, \textit{Equity Jurisprudence \\& Equitable Remedies} § 1053, at 119 (5th ed. 1941), and cases cited therein.

\textsuperscript{129} The cases are collected in Annot., 84 A.L.R. 52 (1933) and Annot., 26 A.L.R.2d 1240 (1952).


\textsuperscript{131} See text accompanying notes 101-02 \textit{supra}.

\textsuperscript{132} 141 N.J. Eq. 318, 57 A.2d 251 (Ct. Err. \\& App. 1948).
acquired sinks. While there was a hint of a fiduciary relationship, and some reference to possibly fraudulent statements made by the defendant, the court ignored these elements as establishing the plaintiff's right to an action in equity for an accounting, emphasizing instead the integrity of the contractual relationship with which the defendant had interfered. In upholding a decree for an accounting for all of defendant's profits arising out of his interference, the court reasoned as follows:

The case pleaded falls naturally into the classification of an actionable infringement of a property right, i.e., the right to pursue one's business, calling, or occupation free from undue interference or molestation. Natural justice dictates that a remedy shall be provided for such unjust interposition in one's business.

This parallel expansion of legal and equitable remedies through a redefinition of property interests may yet prove to be the best argument that the measure of recovery in quasi-contract for tortious unjust enrichment should be co-extensive with that of equity for unjust enrichment, particularly where contractual interference is involved. While it may be impossible to ignore the historical divergence between law and equity, this should not preclude a recognition of the interdependence of these two streams of law when unjust enrichment is the issue. Maintaining semantic barriers to exclude a plaintiff from a court of law or a court of equity on the basis of a factual situation is unjustified. Since the theory supporting unjust enrichment is common to both law and equity, the remedy should be the same regardless of the court to which the plaintiff goes. Unfortunately, such a complete merger has not yet occurred. The reasons why are perhaps best given by Professor Dawson:

When we take all these remedies [for unjust enrichment] 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 multiplicity which greatly exceeds that known 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 load of traditions. Each functions somewhat differently and prevents unjust enrichment by different means. Every one of them has been subjected in recent times to generalization of grounds, so that we have finally come to see the common purpose that underlies them all. But something more than this realization is needed to cast off the accumulations of history. Tying them all together, while growth goes on, is one of our great unfinished tasks.

Action to Recover Profits of Tortfeasor for Unfair Competition

The judicial redefining of property has also had its influence upon a rather unique and independent area of equity—the ever expanding

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133 The plaintiff and the defendant had done business as partners previous to this litigation, but at the time of the tortious acts of the defendant they were in direct competition.
134 While the court alludes to the “maliciousness” of the defendant’s conduct, at no point does the court refer to any statements of the defendant as being fraudulent.
field of unfair competition. This is the second main channel through which a plaintiff might move to recover profits of a tortfeasor who has interfered with his contractual relations. A reclassification of the particular tort of inducing a breach of contract under this broad conglomerate of tortious business activities would make available to the plaintiff the powerful remedy of accounting.

For various financial and moral considerations, now obscured by the haze of antiquity, courts have seen fit to allow a plaintiff to appropriate any profits a tortfeasor might have gained as a result of certain unfair business practices. Historically, however, the liberal remedies of accounting and injunction available in unfair competition litigations were restricted to situations involving two prerequisites: (1) direct competition between the plaintiff and the defendant, and (2) a confusion of the public either by a "palming off" of the defendant's goods as those of the plaintiff or some other action intended to create or likely to create uncertainty in the minds of consumers. Most jurisdictions, including California, have negated the requirement for head-on competition, but there is a general hesitancy, especially in this state, to disregard completely the criterion of public confusion as being determinative of whether or not there has been unfair competition. The primary difficulty with attempting to classify a tortious inducement of a breach of contract as "unfair competition" is that the tortious inducement seldom involves any "palming off" of goods or confusion of the public. It is clear, however, that there has been a gradual judicial relaxation of the "palming off" requirement so that it can no longer be said that the concept of unfair competition is so confined. Employment relationships have again provided the initial stimulus for a broadening of remedies.

In the realm of personal service contracts, it was first held that inducing a breach of an employee's contract with a rival employer,

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137 For an extensive review of the underlying theories of unfair competition, see 1 R. Callmann, The Law of Unfair Competition Trademarks and Monopolies 1-201 (3d ed. 1967).


142 "The earlier concept that a 'palming off' or fraudulent representation of the goods of the seller as those of another was essential to injunctive relief has undergone an extensive evolution. The law has demonstrated its capacity to meet the ethical as well as the economic needs of modern society and the exigencies of our more complex business concepts and relationships. The extension of the doctrine has resulted in granting relief where there was no fraud on the public but where one, for commercial advantage, has misappropriated the benefit or property right of another." Beecham v. London Gramophone Corp., 104 N.Y.S.2d 473, 475 (Sup. Ct. 1951).
either by getting such employees to desert their jobs "under such cir-
cumstances rendering it difficult or embarrassing for him [the em-
ployer] to fill their places," or by enticing the employees to reveal
trade secrets or other special information in violation of their
employment contracts, could be enjoined as unfair competition. It
readily be seen that the unfair competition involved in these
cases could, at best, be only remotely connected to any "palming
off" of goods or confusion of the public. But at this point, the
previously described judicial redefining of "property" interests to
include intangibles assumes importance, for if the "palming off"
theory of unfair competition is disregarded, the criteria for bringing
an action for this tort must "shift to other theoretical foundations,
which bring to the surface the idea of misappropriation of intangible
values and with it the clear cut possibility of unjust enrichment."

While there are a great many cases tracing this evolution of
criteria, most of them have stemmed from the celebrated New York
case of International News Service v. Associated Press, which held
that the unfair copying of news bulletins from a competitor's sources
was a misappropriation of property rights which would be remedied
by a court of equity. Speaking for the majority, Justice Pitney con-
cluded:

It is said that the elements of unfair competition are lacking because
there is no attempt by defendant to palm off its goods as those of the
complainant, characteristic of the most familiar, if not the most typ-
ical, cases of unfair competition . . . But we cannot concede that the
right to equitable relief is confined to that class of cases . . . Re-
garding news matter as . . . quasi property . . . defendant's conduct
differs from the ordinary case of unfair competition in trade prin-
cipally in this that, instead of selling its own goods as those of
complainant, it substitutes misappropriation in the place of misrepre-
sentation, and sells complainant's goods as its own.

While the plaintiff in International News was not asking for any
of defendant's profits, the court's language made it clear that if
a plaintiff under such circumstances sought an accounting it would
be granted.

This judicial protection of intangible property rights from mis-
appropriation has been extended to cover property "rights" in opera
performances, boxing matches, baseball games, and even

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144 Conmar Prods. Corp. v. Universal Slide Fastener Co., 172 F.2d 150
(2d Cir. 1949); California Intelligence Bureau v. Cunningham, 83 Cal. App.
2d 197, 188 P.2d 303 (1948).
145 See Beecham v. London Gramophone Corp., 104 N.Y.S.2d 473 (Sup.
Ct. 1951).
146 York, Extension of Restitutional Remedies in the Tort Field, 4 U.C.L.A.
147 248 U.S. 215 (1918).
148 Id. at 241-42.
Div. 459, 7 N.Y.S.2d 845 (1938) (profits asked for and allowed).
150 Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 199 Misc.
151 Twentieth Century Sporting Club v. Transradio Press Serv., 165 Misc.
71, 300 N.Y.S. 159 (Sup. Ct. 1937).
152 Mutual Broadcasting System, Inc. v. Muzak Corp., 177 Misc. 489, 30
N.Y.S.2d 419 (Sup. Ct. 1941).
“trick” golf shots\(^{153}\) by classifying such misappropriations as unfair competition, thus justifying the equitable intervention. That a contract right is an intangible property right has been firmly established elsewhere\(^{154}\) so that a classification of the particular tort of inducing a breach of contract under the broader title of unfair competition would seem to be both possible and desirable. The re-evaluation throughout the entire spectrum of the law as to what constitutes a property right protectable by equitable remedies makes such an action possible, while the economic and mercantile overtones intimately associated with both the motive for the inducement of the breach of contract and the subsequent profits of a successful inducement seems to make it an appropriate and desirable classification.

### Summary

While recovery might preferably be sought in quasi-contract for profits tortiously acquired by interference with contractual relations, it cannot be predicted that a particular jurisdiction will consider the *Federal Sugar Co.*\(^{155}\) case sufficient authority for disregarding the more traditional “plus and minus” theories of recovery in quasi-contract as postulated by Keener and Woodward. A plaintiff may be faced with the choice as to whether he will pursue the profits of the defendant directly in a court of equity\(^{156}\) or detour through the realm of unfair competition. Since either of these latter two actions is in equity, the plaintiff may have to overcome formidable barriers hoisted by many courts to maintain the distinction between the legal and the equitable.\(^{157}\) But a tort by any other name is still a tort, and whether we impose on it the broad nomenclature of unfair competition or the self-descriptive narrowness of “inducing a breach of contract,” the adequacy and scope of the remedy should depend on neither an arbitrary classification of the tort nor an overly stringent distinction between the actions of law and equity. It is hoped, rather, that a judicial synthesis of all restitutionary recoveries based on unjust enrichment, whether in law or equity, will alleviate the necessity for such distinctions.

### Recovery of Profits in California

The foregoing discussion has attempted to cover the general status of the law as applicable to a cross section of jurisdictions throughout the United States. Some brief mention should be made of California law. Seeking the profits of a tortfeasor who has induced a breach of plaintiff's contract in California either through an action in quasi-contract or one for unfair competition, will be encumbered by the fact that there is a significant dearth of authority in this state for either approach. However, an action in quasi-contract for the


\(^{154}\) Note 129 *supra*.

\(^{155}\) Note 103 *supra*.

\(^{156}\) Schechter v. Friedman, 141 N.J. Eq. 318, 57 A.2d 251 (Ct. Err. & App. 1948).

\(^{157}\) See notes 113 & 122 *supra*. 
profits of such a tortfeasor would have some support in this jurisdiction. In an early case California indicated an express policy not to permit a wrongdoer to “derive any benefits” from his tortious conduct, and language in other California cases suggests a position on unjust enrichment in conformity with that of the Restatement of Restitution and modern writers. The California courts have also stressed the element of benefit as being of more significance than loss or expense so that while the courts in California have not been faced with the particular facts or issues of the Federal Sugar Co. case, the general policies and views of this state would seem to be in harmony with those laid down in that decision.

As for detouring through unfair competition, while language can be found in early California cases indicating a desire to follow a flexible and independent policy in classifying acts as unfair competition, the following recent holdings in California have definitely restricted the actions for such a tort to situations where there is, or is likelihood of, confusion of the public as to the nature, quality or ownership of an article sold on the market.

In the 1965 federal case of Filon Plastics Corp. v. H. Koch & Sons the United States District Court summed up its interpretation of present California law in these words: “Under the law of California the test of unfair competition is whether there is likely to be deception of the public, whether there has been a palming off of defendant’s goods as those of plaintiff.” The California Supreme Court echoed this interpretation in Tri-Q, Inc. v. Sta-Hi Corp with the statement that “the wrong in unfair competition consists of the sale of goods of one manufacturer as those of another.” There is substantial recent authority for both of these statements.

Although the California lawmakers have provided legislation on this subject, it is of an unusually vague nature so that California courts have construed this legislation as simply providing nonrestrictive guidelines, and that in the last analysis what constitutes un-

158 Alvarez v. Brannan, 7 Cal. 503, 509 (1857).
163 Id. at 649.
164 63 Cal. 2d 199, 404 P.2d 486, 45 Cal. Rptr. 878 (1965).
165 Id. at 214, 404 P.2d at 495, 45 Cal. Rptr. at 887.
167 CAL. CIV. CODE § 3369.
fair competition in a particular case is a question of fact to be determined by the courts.\textsuperscript{168} While this liberal construction of legislation would seem to foreshadow a broadening of the concept of unfair competition, it has actually produced just the opposite result. With such ambiguous authority as the only support for restraining acts of unfair competition, the courts in this jurisdiction have been most cautious in their use of injunctions\textsuperscript{169} and accountings.\textsuperscript{170}

Again, while language can be found basing the action of unfair competition on a protection of property rights\textsuperscript{171} (which \textit{should} include contractual "rights"), the courts in California have managed to uphold the sanctity of contract rights as property rights and still divert any argument from leading to a broadening of the concept of unfair competition. To accomplish this the courts have stated on a number of occasions\textsuperscript{172} that rules of unfair competition are based not \textit{only} upon the protection of property rights existing in a plaintiff, but are predominantly based on the rights of the public to protection from fraud and deceit. Thus, while the protection of property rights does provide some foundation for an action for unfair competition in some jurisdictions, it is neither the sole nor dominant criterion in California. Therefore, if contractual interference is involved a plaintiff in this jurisdiction would have a better chance at securing the defendant's profits via the action of quasi-contract.

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