Unjust Enrichment in the Canadian Common Law and in Quebec Law: Frustration of Contract

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Unjust Enrichment

That the law should provide relief in suitable cases, where one man has received an unfair benefit at the expense of another, derives from ancient concepts of justice. *Justitia est constans et perpetua voluntas jus suum cuique tribuere.*[1] Some modern writers create the impression that unjust enrichment is rather a new discovery. No doubt there is some novelty in the manner and emphasis of modern development, but the fundamental principles of unjust enrichment have for centuries lain close to the hearts of true lawyers.

The origins appear distinctly in Roman law, although it is doubtful if the Roman positive law contained a general principle of unjust enrichment.[2] The Romans adopted the distinction of the Greek philosophers between *idios nomos* and *koinos nomos* and *æquitas* characterized an attitude of mind rather than a substantive concept for practical application.[3] But *æquitas* was a guiding in-

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[1] Institute, I, 1, 1.

[2] Paton, A Text Book of Jurisprudence (2nd ed , 1951) p 388. There is a fragment without context from a treatise of Pomponius, "Jure naturæ æquum est neminem cum alterius detrimento et injuria fieri locupletiorem", D. 50, 17, 206, which is referred to by Challies, Unjustified Enrichment in Quebec (2nd ed., 1952) p. 1, and quoted by Story J. in *Bright* v *Boyd* (1841), 1 Story 478 But the *jus naturæ* was not positive law.

[3] Aristotle defined equity as the correction of the law where it is defective on account of its generality, but Cicero seems to have considered it as "the internal, living, intellectual principle which is an element in all law and consequently not a distinct source from which a particular kind of positive law is generated": Moyle, Imperatoris Justiniani Institutiones (1883) 1, 28.

fluence in the production of rules of law,[4] and certainly so in the law relevant to modern doctrines of unjust enrichment.

Roman law did, however, contain a mixed group of obligations, usually classified as arising *quasi ex contractu*,[5] which bore (more or less) the characteristic stamp of unjust enrichment. Their precise relation to contract is obscure, and Justinian used the phrase "quasi ex contractu" to classify obligations which, although not originating in any contract, could not be classified under delict. One such obligation was to reimburse a *negotiorum gestor*, that is, one who without authority attended to the business of another.[6] The *gestor* had to show both that the act was beneficial when done or was approved by the principal and that it was a reasonable act of intervention. It must be neither prohibited by the principal nor *donandi animo*, and the *gestor* might be unaware of the principal's identity. There was also a miscellaneous group in which the appropriate form of action was a *condictio*. The *condictio indebiti* applied where property had been transferred in good faith under a supposed obligation which did not exist.[7] A *naturalis obligatio* was sufficient, but the error had to be of fact not of law.[8] The *condictio ex turpi causa, ob iniustam causam* enabled an innocent party to an illegal or immoral transaction to recover money paid. When something was handed over for a return not given, the action was a *condictio ob rem dati*. The *condictio certæ pecuniæ* served for the repayment of enrichment on a void contract.[9] If a *lex* created an *obligatio* but gave no remedy there was a *condictio ex lege*. There were various others with no definitive head of classification.[10]

These Roman remedies *quasi ex contractu* are the easily discernible ancestors of the modern law on unjust enrichment, and the concept of *æquitas* is still the major philosophic influence behind the development of positive law in this field.

[4] On occasion explicitly so. Cf. the constitution of Severus and Antoninus (A D 202), "prout edicti perpetui monet auctoritas vel jus reddentis decernit æquitas", Code II, 1, 3

[5] In 3, 27.

[6] Seemingly of some antiquity. There was an earlier *formula in factum* and the formulary system was introduced in the 2nd century B.C., G. 4, 30, 31. It possibly first arose from the prætorian edict regulating the rights of parties who carried on litigation for absent friends: Lorenzen (1928), 13 Corn L Q. 190

[7] In 3, 27, 6 & 7; Hanbury (1924), 40 L.Q. Rev. 31. It was called "promutuum" by Pothier: Gutteridge and David (1935), 5 Camb. L.J. 204.

[8] Save in the case of women, children, soldiers and some others: Buckland, A Manual of Roman Private Law (1928) p. 313.

[9] Rabel, The Conflict of Laws, Vol. 3 (1950) p. 375. The classical name of the action was *actio certæ pecuniæ creditæ*. It served also for recovery of a valid loan. Such remedial associations with contract may have influenced the classification of unjust enrichment claims as *quasi ex contractu*

[10] For example the *condictio sine causa*.

The common law

A short excursus is required into English legal history to explain the modern common-law position, for this particular set of trees owes much to the early growth from their roots. It has been suggested that the most fruitful manifestation of the concept of unjust enrichment in early English law was in the action of account.[11] The feudal system permitted land ownership whereby the lords granted out manors to bailiffs who had to account for the rents.[12] A legal compulsion to account was desirable and the writ of account was in use by the thirteenth century.[13] From an early time a beneficiary had a direct right to sue in account, so that if money was given by *A* to *B* for delivery to *C*, *C* could bring an action should *B* default.[14] But the subject matter was confined to money. In such cases, account was the only appropriate remedy, for there could be no action in debt, and detinue applied merely to coins in a bag and similar cases. It is interesting to note this early development outside contract and tort (as these existed) and bearing on unjust enrichment. Finally, the action of indebitatus assumpsit engulfed both debt and these cases of account, which would now be classified under the action for money had and received.[15] The common-law account fell out of use and, by the end of the fifteenth century, account had come mainly under the Chancellor's jurisdiction because he provided more effective procedure and remedies. The root of the action of indebitatus assumpsit was the fact of indebtedness coupled with an express promise to pay. But, in certain cases, the law would import a promise where there was no actual promise express or implied.[16]

Lord Mansfield is the most controversial figure in the historical development of common-law doctrines related to unjust enrichment. Quasi-contract, as he found it, was a collection of cases not bound together by clear general principles[17] and he tried to produce system

[11] Ames (1888), 2 Harv. L. Rev. 53, at p. 66.

[12] Belsheim (1932), 45 Harv. L. Rev. 466, at p. 468.

[13] Not used against women for ". . . it is folly of a man that he should deliver any money to a woman for her to account for it": (1388) Y.B. 12 Rich. II, 164, 165.

[14] (1340) Y.B. 14 Edw. III, 8.

[15] "Wherever the plaintiff may have *an account*, an *indebitatus* will lie": *Arris and Arris* v. *Stukely* (1678), 2 Mod. 260.

[16] "Promises in law only exist where there is no express stipulation between the parties . . .": *Toussaint* v. *Martinnant* (1787), 2 T.R. 100, *per* Buller J. The promise was a troublesome requirement in the action, and there were various circumventing devices. For example, in the latter half of the 16th century an unpaid seller would pay a sum to the purchaser for his express promise to pay: Kiralfy, The Action on the Case (1951) p. 185.

[17] Fifoot, History and Sources of the Common Law (1949) p. 366.

and to extend the scope of indebitatus assumpsit, seeing perhaps in this action a potential instrument for the fusion of law and equity.[18] His most celebrated case in this field is *Moses* v. *Macferlan*.[19] Moses received four promissory notes from Jacob and endorsed them to Macferlan under a written agreement that the endorsements should involve him in no liability. On dishonour of the notes, they were paid by Moses under the order of a court of conscience. Moses then sued Macferlan in the Court of King's Bench for money had and received. Lord Mansfield described the action for money had and received as useful and worthy of encouragement, saying that it lay only for money "which *ex æquo et bono* the defendant ought to refund". It did not lie for a payment "in point of honour and honesty". He gave a series of instances where the action lay, (1) mistake, (2) failure of consideration, (3) money obtained through imposition, extortion or oppression, (4) money obtained by an undue advantage "contrary to laws made for the protection of persons" in certain circumstances. He added that the gist of the action was that the defendant "is obliged by the ties of natural justice and equity to refund the money".[20] The "equity" to which he referred was clearly the philosophical *æquitas* of Roman law and not the technical equity of English law,[21] but he has been criticized for having attempted to lead the law into the quicksands of natural equity,[22] a charge it is hard to justify when his statements are read in context.

Blackstone mentions a class of implied contracts arising from "natural reason and the just construction of law", involving "all presumptive undertakings and assumpsits, which though never perhaps actually made, yet constantly arise from the general implication and intendment of the courts of judicature, that every man hath engaged to perform what his duty or justice requires".[23] Lord Mansfield's views seem to have been in accord with his own time and to have found support in the immediately ensuing period.[24]

New rules of pleading were introduced in 1834.[25] Pleading the

[18] Holdsworth (1939), 55 L.Q Rev 37

[19] (1760), 2 Burr. 1005.

[20] He sometimes "allowed himself some rhetorical generalities": Allen (1938), 54 L.Q. Rev. 201. But no doubt the words are meant to be read *jusdem generis* with the specific examples.

[21] *Baylis* v. *Bishop of London*, [1913] 1 Ch. 127, *per* Farwell L. J. at p. 137

[22] Hanbury (1924), 40 L Q Rev 31. Cf. Scrutton L J. in *Holt* v *Markham*, [1923] 1 K B 504, at p 513.

[23] Comm. III, 163.

[24] They do not seem to have been seriously questioned until *Baylis* v *Bishop of London* (by Lord Sumner, not the other judges) and *Sinclair* v *Brougham*, [1914] A C 398 (chiefly by Lord Sumner)

[25] Holdsworth (1923), 1 Camb. L.J. 261.

"general issue" had been permitted until then, which meant briefly a general traverse enabling a party to conceal the facts he would prove at the trial. For example, in an action on assumpsit a general traverse of *non assumpsit* was allowed by ancient usage. By the new rules the plea of *non assumpsit* was excluded or largely restricted and so a greater strictness of pleading was required. But the immediate consequence of the rules was a maze of technicalities,[26] and the final solution was the Common Law Procedure Act, 1852, which had the effect of abolishing the traditional forms of action in pleading. Then lawyers no longer thought in terms of quasi-contract associated with a rather elastic writ of indebitatus assumpsit and there was substituted a dichotomy of contract and tort as the exclusive types of common-law action. It is important to notice the manner and time of this development.[27]

Due to the procedural necessities of indebitatus assumpsit, the fiction of an implied promise raised by the law in a suitable case played an important rôle in the development of quasi-contract in the common law. But the implied promise must be recognized as a fiction.[28] Maine states that the three dynamic agents bringing law into harmony with society after the primitive stage are fiction, equity and legislation, in that order historically.[29] The usefulness of the fiction is to achieve desirable new results without upsetting the stability of the system, since a fictional "as if" is less violent than direct reform.[30] The essence of a fiction is a *suggestio falsi*, involving the use of words in their ordinary meaning but under an acknowledged pretence that something exists to which they apply.[31] It is an ancient and useful device[32] to be accepted as a servant in the development of the law.[33] The "metaphysical" implied promise was invented to allow a remedy in accordance with procedural forms, where the instincts of justice required one but the law of the time did not provide it.

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[26] Fifoot, *op cit*, p. 370.

[27] Especially in view of some of the speeches in *Sinclair* v. *Brougham*, [1914] A.C. 398, see p. 865 *infra*.

[28] Holt C. J. referred to the implied promise as a "metaphysical notion". (Quoted in *Sinclair* v. *Brougham*, *supra*, footnote 24, at p. 416, where Pollock (as editor of the reports) comments, "I.e. fanciful, as certain poets about the same time and later, were classed as "metaphysical". Cf. *United Australia, Ltd.* v. *Barclay's Bank, Ltd.*, [1941] A.C. 1, *per* Lord Atkin at pp. 27-29.

[29] Maine, Ancient Law (ed. Pollock) pp. 26, 29.

[30] Paton, *op. cit.*, pp. 42, 43.

[31] Hart (1954), 70 L.Q Rev. 37, at p 58.

[32] An early example was the *fictio legis Corneliæ*, D. 35, 2, 18.

[33] Cf. *Radcliffe* v. *Ribble Motor Services Ltd.*, [1939] A.C. 215, *per* Lord Macmillan at p 235

Some topics in the common law will now be examined, related to the idea of unjust enrichment. The first concerns the payment of money in error, where there is no contractual right to repayment. There is a distinction between mistakes of law and of fact. In *Landsdown* v. *Landsdown*,[34] it was said that "ignorantia juris non excusat" applied only to crime. But *Bilbie* v. *Lumley*[35] seems to have decided that a mistake of law was insufficient in a civil action. Lord Ellenborough asked if counsel could refer him to any decision where a man who had paid voluntarily with knowledge of the facts had been able to recover "on account of his ignorance of the law". There was no reply and the decision was that a mistake of law was of no avail.[36] So the rule was established.

But an error as to a private right of ownership has the same effect as a mistake of fact, although it may involve misinterpretation of law.[37] Further, where an arrangement has been reached among beneficiaries on the basis of wrong legal advice on a will, the courts may consider it desirable not to disturb the "peace" of the agreement.[38] A payment in full knowledge of the facts is not recoverable,[39] but the existence of means of knowledge as distinct from actual knowledge does not prevent recovery.[40] Recovery has been refused of payments where an agreement contravened a statute,[41] and the error of a director (who was solicitor) as to the validity of a company resolution has been held a mistake of law.[42] Even where a payment under a mistake of law was alleged to have been made under protest and without prejudice, it was held to be irrecoverable.[43] A mistake as to foreign law is a mistake as to fact.[44] But seemingly court officers, by reason of the nature of their office,

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[34] (1730), Mos 364, at p. 365.

[35] (1802), 2 East 469. Mistake of either fact or law was said to be enough in *Farmer* v *Arundel* (1772), 2 W. Bl. 824, *per* De Grey C. J. at p. 825.

[36] Lord Ellenborough followed remarks of Buller J. in *Lownie* v. *Bordieu*, but these were clearly *obiter dicta* for the case concerned a "gambling" contract of insurance, which the court refused to enforce for that reason.

[37] *Cooper* v. *Phibbs* (1867), L.R. 2 H.L. 149.

[38] *Rogers* v. *Ingham* (1876), 3 Ch. D. 351; *Cashin* v. *Cashin*, [1938] 1 All E R. 536.

[39] *Cushen* v *City of Hamilton* (1902), 4 O.L.R. 265; *M. J. O'Brien Ltd.* v. *Seaman Kent Company* (1929), 36 O.W.N 51; *Ottawa Electric Railway Company* v *The City of Ottawa*, [1934] O R. 765

[40] *Kelly* v. *Solari* (1841), 9 M. & W. 54; *Imperial Bank of Canada* v *Bank of Hamilton*, [1903] A.C. 49; *Jones Ltd.* v. *Waring and Gillow Ltd.*, [1926] A.C., 670; *Royal Bank of Canada* v. *The King*, [1931] 2 D.L.R. 685; *Grand River Motors Limited* v. *Commercial Finance Corporation Ltd.*, [1932] O.R. 712.

[41] *McHugh* v. *Union Bank*, [1913] A.C. 299.

[42] *Premier Trust Company* v. *McAlister*, [1933] O.R. 195.

[43] *Pardee* v. *Humberstone Summer Resort Company*, [1933] O.R 580.

[44] *Leslie* v. *Baillie* (1843), 2 Y. & C. Ch. Cas. 91.

may not refuse repayment on the ground that the mistake was of law.[45]

Where money has been paid by mistake of fact, the payee may innocently alter his position before the mistake is discovered, for example where an agent has paid over the money received to his principal. If the payee has been misled by the conduct of the payer (even although innocent) into believing that the payment is regular and has altered his position on the faith of the belief, the payer may be estopped from recovering,[46] but there is no estoppel if the only fault is that of the payer.[47] But it is not any mistake of fact which will suffice, for the mistake must be related to the payment of the money and the payee.[48]

It is difficult to find a satisfying commonsense reason for the opposite effects of mistake of law and fact. Clearly, a general plea of ignorance of the law cannot be allowed, for, if it were, the frequency of its appearance and the problem of proof would embarrass the proper administration of justice. But there seems no reason why, when *A* has paid money to *B* in the *bona fide* but erroneous belief that the law required him to (and this is properly established by evidence), he should not have as much right to recover as if the mistake had been of fact.[49] Why should *B* reap undeserved profit if the error is construed as of law and have to refund if it is construed as fact?[50]

The general rule is that an unconditional voluntary payment under no mistake of fact is irrecoverable. Similarly, work done by a mere volunteer usually receives no compensation.[51] But there are circumstances in which a payment made on work done will not be regarded as voluntary. The following rough classification has been suggested.[52] (a) Payment of money not due under application of legal process may be recovered. The *locus classicus* is *Exall* v. *Partridge*,[53] where Partridge's landlord distrained *inter alia* a carri-

[45] *Ex parte James* (1874), L.R. 9 Ch. 609.

[46] *Holt* v. *Markham*, [1923] 1 K B. 504; *Jones Ltd* v *Waring and Gillow Ltd.*, [1926] A.C. 670.

[47] *Larner* v. *L.C.C.*, [1949] 2 K.B. 683.

[48] *Dominion Bank* v. *Jacobs*, [1951] 3 D.L.R. 233.

[49] Such is the prevailing rule in the United States: Restatement, Restitution, § 44. It is doubtful if the law of Scotland recognizes a distinction between mistakes of fact and of law: Gloag, The Law of Contract (2nd ed., 1929) p. 62.

[50] The distinction between law and fact may be difficult and obscure: *Eaglesfield* v. *Marquis of Londonderry* (1875), 4 Ch. D. 693, *per* Jessel M.R, at p. 703.

[51] *Macclesfield Corporation* v. *Great Central Railway*, [1911] 2 K.B. 528; *Twyford* v. *Manchester Corporation*, [1946] Ch. 236; Restatement, Restitution, § 112.

[52] Winfield (1944), 60 L.Q. Rev. 341. [53] (1799), 8 T.R. 308.

age belonging to Exall, left on the premises. Exall, to prevent seizure of the carriage, paid the arrears and was held entitled to recover from Partridge. Payment of an excessive sum as a condition of release of an animal distrained damage feasant will found an action for repayment.[54] But the principle does not apply where the process consists in actual litigation, for *interest rei publicae ut sit finis litium.* (b) A payment to a third person by *A* is not voluntary if made under a legal obligation even if *B* has the same legal obligation to pay to that person. There is a right of recovery by *A* against *B*.[55] (c) One who makes a payment at the request, express or implied, of a third party may be entitled to recover.[56] (d) Where the circumstances infer coercion, repayment will be possible.[57] But there will be no recovery if the transaction is illegal (and the parties are in *pari delicto*).[58] Restitution may sometimes be obtained for work done on the land of another. The criterion is that if *C* builds on *D*'s land for example, supposing it to be his own, and *D* makes no move to interfere, equity will grant relief to *C*.[59] Professor Hanbury classifies this sort of case under equitable estoppel and the maxim "He who seeks equity must do equity".[60] In *Bright* v. *Boyd*[61] it was said to exemplify the maxim, "Qui tacet, consentire videtur; Qui potest, et debere vetare, jubet si non vetat", and a general principle of unjust enrichment.

The common law has not accepted the doctrine of *negotiorum gestio.* Its apparent policy is to penalize those who "officiously and without reason"[62] confer benefits on others and to protect the recipients of such benefits.[63] *Falcke* v. *Scottish Imperial Insurance Com-*

[54] *McKay* v. *Howard* (1884), 6 O.R. 135

[55] *Brook's Wharf* v. *Goodman Brothers*, [1937] 1 K.B. 534.

[56] If *X* requests *Y* to pay money on his behalf to a stranger, under a promise to pay express or implied, payment creates a debt due by *X* to *Y*: *Brittain* v. *Lloyd* (1845), 14 M. & W. 762, *per* Pollock C.B.; Restatement, Restitution, §112. *Sed aliter* where there is no request or acquiescence: *Stokes* v. *Lewis* (1785), 1 T.R. 20; *Re Hewitt*, [1933] O.W.N. 641; *Re Cleadon Trust*, [1939] Ch 286 (The creation of an agency relation does not always require an enforceable contract: Dowrick (1954), 17 Mod. L. Rev. 24, at pp 25, 33.)

[57] Restatement, Restitution, §112; *Kennedy* v. *MacDonnell* (1901), 1 O.L R. 250

[58] *Langley* v. *Van Allen and Company* (1902), 32 S.C.R. 174. ("Si sciens se non debere solvit, cessat repetitio": Pothier, Pand. 12, 6, 3, 33.) But if a debtor is arranging a composition and tries to purchase a consent by an illegal preference, the parties are not truly *in pari delicto*: *Atkinson* v. *Denby* (1862), 7 H. & N. 934

[59] *Ramsden* v *Dyson* (1866), L.R. 1 H.L. 129; *Easterbrook* v. *The King*, [1931] S C R 210

[60] Modern Equity (5th ed., 1949) pp. 49-50. [61] (1841), 1 Story 478

[62] *Brown and Hodgson* (1811), 4 Taunt. 189; cf. *Bartholomew* v. *Jackson* (1822), 20 Johnson 28 (Sup. Ct. of N.Y.).

[63] Restatement, Restitution, §2.

pany[64] made it clear that there was no doctrine of *negotiorum gestio*, the only exception being the maritime rule that, in the case of salvage, the owner of a ship or cargo must compensate one who saves his property from peril.[65] The law of Quebec includes the doctrine of *negotiorum gestio*,[66] so that there is here a distinct difference of principle between the two systems.

Since the seventeenth century, where goods have been sold or services rendered under a contract which does not fix the amount of the price or compensation, the court will allow recovery of a fair sum on a *quantum meruit*. The "law implieth a promise"[67] on the part of the recipient to pay a reasonable amount. A similar remedy is available where there is an alteration of a contract without a fresh stipulation as to the price to be paid. For example, where x quantity of goods of A quality are ordered, but instead y quantity of goods of B quality are delivered and accepted, a reasonable price is payable.[68] There is a rebuttable presumption that services rendered by one relative to another with whom he or she is living were not intended to be remunerated, thus excluding a *quantum meruit* claim.[69] A variation of the main principle is illustrated by *Craven-Ellis* v. *Canons Limited*.[70] A director did not take up the qualification shares required as a condition of valid appointment under his agreement with the company. However, he performed certain services for the company and was entitled to claim for these on a *quantum meruit* basis. According to Greer L.J., ". . . the obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by a rule of law, and not by an inference of fact arising from the acceptance of services or goods". This would seem to indicate that the claim is for unjust enrichment. In *McKenna* v. *McNamee*,[71] government contractors lost their contract, but, hoping to regain it, employed sub-contractors who incurred some expenditure. The

[64] (1886), 34 Ch. D. 234.
[65] *The Five Steel Barges* (1890), 15 P.D 142
[66] See *infra*, p 868.
[67] Sheppard, Action on the Case (2nd ed) p. 50
[68] *Steven* v. *Bromley & Son*, [1919] 2 K.B. 722, *per* Lord Atkin at p. 728
[69] *Redmond* v. *Redmond* (1868), 27 U.C.Q B. 220; *McGugan* v. *Smith* (1892), 21 S.C.R. 263; *Murdoch* v. *West* (1895), 24 S.C.R. 305; *Mooney* v. *Grout* (1903), 6 O.L.R. 521; *Doan* v. *Canada Tr. Co.* (1904), 3 O.W.R. 655; *Bradley* v. *Bradley* (1909), 19 O.L.R 525; *Mather* v. *Fidlin* (1916), 10 O.W. N. 229. See footnote 115 as to the position in Quebec.
[70] [1936] 2 K.B. 403. There were two shareholders and in (1939), 55 L.Q. Rev. 54, Denning L. J. argues that, had there been a substantial body of shareholders whose consent express or implied had not been obtained to the acceptance of the services, the claim ought to have failed.
[71] (1887), 15 S C.R. 311.

sub-contractors knew that their principals had no contract but were relying on the possibility of its being regained. It was held that there was no *quantum meruit* claim.[72]

Persons under disability, such as infants or lunatics who have not the same liability in contract as ordinary individuals of full age, may be required to pay a fair compensation for necessaries.[73]

There are various circumstances in which one who, without justification, receives property to which another is entitled may be required to make restitution. This is a large subject of which only a short outline is possible. The following broad principles are suggested.[74] (1) Where the plaintiff's property has been transformed into other property and has been acquired by the defendant, who is not lawfully entitled and who has not obtained it for value and without notice. A simple example is where a bailee makes an unauthorized transformation of the subject matter, the bailor being able to claim the asset in its altered form.[75] (2) Where funds are mixed with other funds and can be traced into the mixed resultant, but subject to the qualification that one who takes for value without notice cannot be made to repay.[76] The effect is that equity impresses on the mixed fund a constructive trust in favour of the person entitled, for a just proportion of the whole, such proportion being determined on a tracing order and representing the extent to which the remaining mixed assets are relateable to the original property of the claimant.[77] The common law took a restricted view and its requirement was practically the physical identification of the asset before it could be recovered, but equity will permit tracing and recovery of a just proportion of a mixed fund.[78]

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[72] An officious enrichment made in the hope of a contract.

[73] *Nash* v. *Inman*, [1908] 2 K B. 1; *Re Rhodes* (1890), 44 Ch. D. 94. (An infant may be required to restore a benefit obtained by fraudulently stating he is of full age: *Leslie (R) Ltd* v *Shiell*, [1914] 3 K.B. 607.)

[74] Kerr on Fraud and Mistake (7th. ed., 1952) p. 586.

[75] "If I give a man money to buy a horse for me, and he buys a cow for himself with it, the cow is mine": *R.* v. *Bunkall* (1864), Le. & Ca. 371, *per* Willes J. at p. 376; *Knatchbull* v. *Hallett* (1880), 13 Ch. D 696, at pp. 710, 711; *Phillips* v. *Homfrey* (1883), 24 Ch. D. 439.

[76] *Taylor* v. *Plumer* (1815), 3 M. & S 562; *Knatchbull* v. *Hallett* (1880), 13 Ch. D. 696; *Banque Belge* v. *Hambrouck*, [1921] 1 K.B. 321.

[77] Lord Wright (1938), 6 Camb. L.J 305

[78] At common law once "the money of *B* became mixed with the money of *A*, its identification in a physical sense became impossible. Owing to the fact of mixture there could be no question of ratification of an unauthorised act, and the only remedy of *B*, if any, lay in a claim for damages. Equity adopted a more metaphysical approach. It found no difficulty in regarding a composite fund as an amalgam constituted by the mixture of two or more funds, each of which could be regarded as having, for certain purposes, a continued separate existence." *In re Diplock*, [1948] 1 Ch. 465, *per* Lord Greene M.R at p. 520

These principles do not apply where a person in a fiduciary capacity has mixed trust money with his own. In such a case the beneficiary has priority in a mixed fund and if the person who did the mixing has subsequently made withdrawals, it is presumed that these were in reduction of his private interest in the combined fund.[79] "But there is no principle which allows the beneficiary to claim that subsequent payments in of private moneys are presumed to exhaust earlier withdrawals in breach of trust."[80] Where a person has been mistakenly paid by an executor and has mixed the money received in a bank account with other money, the rule in *Devaynes* v. *Noble* is applied.[81]

The case of *Sinclair* v. *Brougham*[82] illustrates some of the foregoing principles. Certain banking operations carried on by the Birbeck Permanent Benefit Building Society were admittedly *ultra vires*, and there was an insufficiency of assets on a winding up to satisfy the three groups of claimants: (a) the outside creditors, (b) the shareholders, and (c) the depositors in the banking business. It was decided that the depositors failed in an action for money had and received. Viscount Haldane L.C. said that the principle of ultra vires "excludes from the law of England any claim *in personam* based even on the circumstance that the defendant has been improperly enriched at the expense of the plaintiff by a transaction which is *ultra vires*".[83] The speeches in this case (especially Lord Sumner) convey the view (a) that in the action for money had and received the court cannot "raise a promise in law" where an actual existing promise would have been unenforceable, (b) that all common-law actions fall to be classified under either contract or tort.[84] However, the depositors were allowed to recover *in rem*, the quantum being determined on the basis of a "rough tracing order". The effect of this order was not to require payment of a debt, but to

[79] *Knatchbull* v. *Hallett* (1880), 13 Ch. D. 696.

[80] Nathan's Equity through the Cases (2nd ed., 1951) p. 407; *Roscoe* v. *Winder*, [1915] 1 Ch. 62. For example if a trustee mixes $100 of his own money with $100 of trust money, withdraws $150 for his own purposes, and then pays in $50 of his own money, it is not presumed that this last payment in replaces the $50 withdrawn in breach of trust.

[81] (1816), 1 Mer. 529, at p. 572 (the rule being that the first withdrawals are attributed to the first payments in and so on); *In re Diplock*, [1948] Ch. 465, at p 534 (the mixer in this case was an innocent volunteer).

[82] [1914] A.C. 398.

[83] At p. 415. Cf. *Boissevain* v. *Weil*, [1950] 1 All E.R. 728 (referred to in *Pichell Ltd.* v. *Pickford and Black Ltd* (1950), 26 M.P R. 237)

[84] The historical background of (b) has been discussed already at p. 859. Lord Sumner's statements are criticized by Lord Wright (1938), 6 Camb. L.J. 305. In Quebec law the doctrine of *enrichissement sans cause* cannot be used to circumvent imperative rules of law: *Johnson* v. *Channel*, [1937] S.C. R. 275, *per* Rinfret J. at p. 282. See page 870 *infra*.

make the party concerned "surrender what he still has as a superfluity, an enrichment which, but for the original reception of the money, he would have been without".[85] According to Lord Parker of Waddington, "no action or suit lies at law or in equity to recover money lent to a company or association which has no power to borrow", but equity would regard the depositors as having equitable rights of property in the assets, and considered it "unconscionable for anyone who could not plead purchase for value without notice to retain an advantage derived from the misapplication of trust money".[86]

The situation where a person is enriched by a mistaken payment or an overpayment by an executor received from early times the attention of the ecclesiastical courts and then of the courts of chancery in England. The creditors or other legatees (to whose detriment the administration assets had been reduced) could require repayment from the person so enriched.[87] There has been no mistake by these claimants, either of fact or of law, and the distinction between these types of mistake has no application to a legatee who "does not plead his own mistake or his own ignorance but, having exhausted his remedy against the executor who has made the wrongful payment, seeks to recover money from him who has been wrongfully paid. To such a suit the executor was not a necessary party and there was no means by which the plaintiff could find out whether the mistake was of law or fact or even whether his wrongful act was mistaken or deliberate. He could guess and ask the court to guess, but he could prove nothing."[88] The legatee's claim may be described as being based on a principal of unjust enrichment and as having "an ancestry founded in history and in the practice and precedents of the courts administering equity jurisdiction".[89] Thus, apart from any claim *in rem*, a claim *in personam* arises against the enrichee, once the claimant has exhausted his remedy against the executor.

A surety who pays the whole debt has a right of indemnity from the principal debtor and a right of contribution from his co-sureties. Such restitution is based on unjust enrichment and not on contract.[90] Where money has been lent or borrowed for another and

[85] *Per* Lord Dunedin at p. 437 Cf footnote 122, *infra*, as to Quebec law
[86] At p. 440.
[87] *Noel* v. *Robinson* (1682), 1 Vern. 90
[88] *Ministry of Health* v *Simpson et al.*, [1951] A C 251, *per* Lord Simmonds at p. 270 (Court of Appeal, *sub nomine*, *Re Diplock*, [1948] Ch. 465).
[89] *Re Diplock*, [1948] Ch. 465, *per* Lord Greene M.R. at pp. 481-482
[90] *Dering* v. *Winchelsea* (1787), 2 B & P. 270, *per* Lord Mansfield at p 272. The payment of the debt is sufficient consideration to raise a promise

used to pay his lawful debts, a lender or agent without a direct action for indemnity may nevertheless be entitled to stand in the place of the satisfied creditors and be surrogated to their rights. In *Re Cork and Youghal Railway Company*,[91] loan-notes illegal by statute[92] were given to bondholders. It was decided that "so far as the money raised by the issue of the debentures had been applied in paying off debts which would not otherwise have been paid off, those who have advanced moneys ought to stand in the place of those whose debts have been paid off".[93] Where an agent borrows money without his principal's authority (and even in the knowledge of lack of that authority) and the money is used to pay debts of the principal, the agent is entitled to be surrogated to the rights of the paid creditors.[94]

Money may be recovered which has been paid on the basis of a consideration which has wholly failed.[95] But there must be a total failure of consideration and, if the plaintiff receives benefit from the transaction, a claim on this ground will not succeed.[96] However, where a paid seller cannot give a valid title, the use of the subject matter for a period before discovery of the void title will not defeat a claim for recovery of the purchase price.[97] Seemingly the reason for the rule that the failure must be total was that the common law did not contemplate apportionment and it would be unfair to require repayment of the whole price on partial failure of consideration.[98]

The preceding paragraphs indicate a variety of circumstances in which either law or equity will require the making of restitution for some advantage or benefit received and will not permit the enrichee to retain it for himself. The principles are quite numerous and have a respectable antiquity. Although a judge may not be able to "invent" a remedy of this sort when he thinks "the 'justice' of the case requires it",[99] there are many situations in which a remedy

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in law: *Decker* v. *Pope* (1757), 1 Selwyn's Nisi Prius (13th ed.) 91, *per* Lord Mansfield; *Darrell* v. *Tibbets* (1880), 5 Q.B D. 560; *Ramskill* v. *Edwards* (1885), 31 Ch. D 100.

[91] (1869), L.R. 4 Ch. 748. [92] 7 & 8 Vict., c 85, s. 19.

[93] *Per* Lord Hatherley L.C. at p. 760.

[94] *Reid* v. *Rigby*, [1894] 2 Q.B. 40; *Reversion Fund and Insurance Company Ltd.* v. *Maison Cosway Ltd*, [1913] 1 K B 364; *B. Liggett (Liverpool) Ltd.* v. *Barclays Bank Ltd*, [1928] 1 K B 48.

[95] *Wilkinson* v. *Lloyd* (1845), 7 Q B. 27; *Davies & Company* v *Weldon* (1907), 10 O.W.R. 210; *Royal Bank* v. *The King*, [1913] A C. 283; *McCann* v. *Temiskaming Hotel Company Ltd.*, [1943] O.R 337.

[96] *Hunt* v *Silk* (1804), 5 East 449.

[97] *Rowland* v. *Divall*, [1923] 2 K.B. 500

[98] Glanville Williams (1944), 7 Mod. L. Rev 66, at p. 67.

[99] *In re Diplock*, [1948] Ch. 465, *per* Lord Greene M.R. at p. 482.

based on precedent will be available to require a party to disgorge an unjustified gain.

The law of Quebec

The Privy Council have said, recognizing a well-established principle, that for the determination of the law in the province of Quebec the first source of authority is the Civil Code of Quebec. But as the Civil Code is declaratory of previous law (save where the contrary is indicated by the Codifiers), the works of leading French jurists are of help in explaining points of doubt and recent decisions of the French courts are of persuasive value.[100] Naturally, French legal theory and jurisprudence have had considerable influence on the development of the doctrine of *enrichissement sans cause* in Quebec.

"Dans les quasi-contrats il n'intervient aucun consentement, et c'est la loi seule ou l'équité naturelle qui produit l'obligation, en rendant obligatoire le fait d'où elle résulte."[101] *L'équité* is something akin to the Roman *æquitas* and the quoted passage seems to give a force in positive law to "l'equité naturelle" There is, however, a greater tendency on the part of the civil lawyer than the common lawyer to search for and reason deductively from general principles.[102]

The Quebec Civil Code deals specifically with two kinds of quasi-contract. Articles 1041 and 1042 state a general rule exemplified (a) by articles 1043 to 1046, on *negotiorum gestio*, and (b) by articles 1047 to 1052, on the reception of a thing not due. This arrangement suggests the possibility of other types of quasi-contract and the prevailing opinion is that there may be others. The view has been taken that these provisions of the Code on quasi-contract should be regarded as the basis of *enrichissement sans cause* and it is undoubtedly desirable to anchor the theory to the Code.[103] There is no general proposition that no one may enrich himself unjustifiably at the expense of another either in the Code

[100] *Herse* v. *Dufaux L. R.* (1872), 4 P.C. 468; *McArthur* v. *Dominion Cartridge Company*, [1905] A.C. 72.

[101] Pothier, Traité des Obligations, ss. 114-115, cited by Lord Dunedin in *Sinclair* v. *Brougham*, [1914] A.C. 398, at p. 435.

[102] For example, D'Aguesseau, Dissertation on Mistakes of Law (in translation of Pothier's Treatise on Obligations, W D. Evans, 1806): "The law does not consist in particular cases, but in general principles which run through the cases and govern the decision of them" Cf. for the law of Scotland (a system influenced by the civil law) Lord Macmillan (1932), 48 L.Q. Rev 447

[103] Nicholls, The Doctrine of the Quasi-contract in the Province of Quebec, in Livre-souvenir des Journées du Droit civil français (1936) p 271, Challies, *op. cit.*, footnote 2, at pp. 56-57.

Napoléon or in the Quebec Code, but in each code there are numerous articles in close accord with such a principle, and the reader is referred to the literature on the subject.[104] There is a strong body of French opinion favouring inclusion of a general principle in the law and in Quebec it seems to be regarded as implicit. "C'est le pourquoi de la loi qu'il édicte. Je dirais cela de la maxime qu'un ne peut s'enrichir injustement aux dépens d'autrui. Elle est certainement sous-entendue par le Code."[105] Elsewhere it is said that the principle is to be applied unless restricted by positive law.[106] The philosophical force of the maxim is possibly more explicit in the law of Quebec than in the common law.

Space does not permit a detailed consideration of the relevant articles of the Code,[107] but in a comparative essay some reference must be made to the action *de in rem verso*, which has no counterpart in the common-law jurisdictions. In Roman law, by the *actio de peculio et in rem verso*, a *paterfamilias* was liable on contracts of members of the *familia* who were *in potestate* to the extent of the *peculium* and any profit he had received.[108] The action was later extended to other cases of unjust enrichment.[109] Modern civil law has adopted the name to characterize the general action used to recover unjust enrichment. The action was definitely recognized in France in 1892 by the Cour de Cassation[110] and, although it has been said in Quebec that "nos tribunaux supérieurs hesiteraient sans doute à accueillir un système tout fait et de création récent",[111] the action has been accepted, though more cautiously than in France. The following conditions must exist before the action will lie.[112] (1) The impoverishment of one party (which may consist of expense incurred, labour performed or sacrifice). (2) The enrichment of the other party, accrued without consideration or the equivalent having derived from that party. Examples of effective enrichment are increased patrimony, loss avoided, or even moral advantage.[113] (3) A causal connection is necessary between the im-

[104] Challies, *op. cit.*, footnote 2, chap. III. Articles of the codes are cited by Challies, *op. cit.*, pp. 6-8, and Gutteridge and David, *loc. cit.*, footnote 7.
[105] Mignault (1934-35), 13 R. du B. 157, at p. 172.
[106] *La Compagnie de Prêt et de Crédit Foncier* v. *St. Germain* (1881), 26 L.C.J 39, *per* Dorion J. at p. 46.
[107] They are discussed by Nicholls in the article mentioned in footnote 103.
[108] Buckland, *op. cit.*, footnote 8, p. 309.
[109] Challies, *op. cit.*, p. 3.
[110] Rinfret (1937), 15 Can. Bar Rev. 331, at p. 343.
[111] *Orrell* v. *Tkachena*, [1942] K.B. 621, *per* St-Jacques J. at p. 636.
[112] Challies, *op. cit.*, pp 58 *et seq.*; Rinfret, *loc. cit.*; Gutteridge and David, *loc. cit.*
[113] The action is founded where the plaintiff has "exécuté un obligation

poverishment and the enrichment, though not necessarily a direct causality.[114] (4) The enrichment must have been brought about without justification. Although a moral advantage may constitute enrichment, it must be capable of pecuniary quantification. Where services are rendered with the intention that they shall be gratuitous. no action *de in rem verso* lies, and where services are rendered by one near relative to another (such as nursing or housekeeping during illness) there is a presumption that they were meant to be gratuitous.[115] (5) The action cannot be used to produce what amounts to a circumvention of a rule of positive law.[116] In *Orrell* v. *Tkachena*[117] an action for hospitalization and other expenses by a father of an illegitimate child killed by the defendant's automobile failed under article 1056 C.C.[118] The declaration contained an allegation that the defendant had benefited by the expenditure and had so been enriched to the plaintiff's detriment. Since the action under article 1056 C.C. failed, it could not be "transformée en cette action d'équité qu'est l'action *de in rem verso*.[119] "Il s'agit d'empêcher que l'action *de in rem verso* ne bouleverse l'ordre juridique" since the action "doit compléter, pour le rendre plus juste, l'ordre juridique établi, mais non le refaire."[120] Barclay J. and Galipeault J. considered a further essential of the action to be that the plaintiff must have no other ground of action.[121] But the father seems really

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du défendeur, que celui-ci s'est enrichi d'autant et qu'il est tenu au payement pour enrichissement sans cause"· *Algure* v *Leblond*, [1937] S.C. 130 (case of a wife driven from the matrimonial home by her husband's violence and maintained by her father). Cf. Restatement, Restitution, §113.

[114] It is necessary "bien qu'il puisse suffire que l'enrichissement ait eu son origine occasionelle dans l'appauvrissement, pour qu'il serve de base à l'action *de in rem verso*": *Banque Canadienne Nationale* v. *St. Germain*, [1942] K.B. 496, *per* Létourneau C. J A "lien de droit" must be established between the parties by the enrichment and impoverishment: *Harris* v. *Royal Victoria Hospital*, [1948] K.B. 28.

[115] *Brassard* v. *St. Marie* (1922), 33 K.B. 62, *per* Allard J. at p. 64 (cf. footnote 69). The presumption is rebuttable. According to *Robillard* v. *Robillard* (1935), 41 R.L. (N S.) 346, a promise to compensate with a gift or legacy may bar the action, but Taillefer argues that the action should not fail merely on this ground. "L'espérance d'une récompense est le contraire de l'esprit de liberalité" and a naked promise of this kind is not binding: (1941), 1 R. du B. 259, at p. 266.

[116] Cf footnote 84.

[117] [1942] K B. 621

[118] It appeared that none of the expenditure was incurred by the mother

[119] *Per* St-Jacques J. at p. 635.

[120] Planiol et Ripert, Vol. VII (1st ed.), No 763, p. 59.

[121] Perrault (1942), 2 R du B. 481, criticizes the decision because the father, having failed under art 1056 C C., had no other ground of action and the other conditions were satisfied for an action *de in rem verso*. But elsewhere he states the fifth condition to be non-circumvention of positive law: Bulletin Trimestriel de la Société de Législation Comparée (1948) 439, at p. 442.

to have failed because the impoverishment was not unjustified, it having resulted from a natural obligation.

The quantum recoverable by the action is the pecuniary value of the enrichment or the impoverishment, whichever is less.[122] In *Wark* v. *The Peoples' Bank of Halifax*,[123] a man voluntarily assisted in the capture of thieves at the risk of his life, so that $4,000 was retrieved by the bank. He recovered a trifling sum only for his hours of work and loss of time.[124] If the enrichment perish before the action (or a debt paid for another is prescribed) there is no claim, unless the enrichment was money, in which case it seems that the action may still succeed.[125] The plaintiff must at least plead and prove the first four conditions of the action.

The Quebec Code, then, specifically recognizes the doctrine of *negotiorum gestio*.[126] If *A*'s business has been well managed by *B*, *A* must fulfil obligations properly made by *B* on *A*'s behalf and must indemnify *B* for liabilities incurred and reimburse him for necessary and useful expenditure. The doctrine impinges on the theory of *enrichissement sans cause*. The person in whose affairs the *gestor* intervenes may receive benefit, but the *gestor* must be repaid for expenses merely necessary and moreover the *gestor*, having undertaken the work, has certain obligations and a duty to account. It cannot be said that these are directly derived from "nul ne peut s'enrichir aux dépens d'autrui". Further, the quantum of the *gestor's* claim is not the enrichment or impoverishment, whichever is the less.

Conflict of laws

There is a dearth of case law and literature on the conflict of laws in relation to unjust enrichment. In *Batthany* v. *Walford*,[127] the equivalent of a tenant-in-tail of land in Austria died domiciled in England, leaving property there. By Austrian law, the possessor of the land was liable for deterioration. In an action in England against the English executrix, deterioration was admitted, and it was held that the deterioration fell to be classified, not as a tort, but as a breach of an obligation comparable with the English concept of quasi-contract. It has been suggested, therefore, that

[122] Challies, *op. cit.*, pp. 128 *et seq.* Cf. footnote 85.

[123] (1900), 18 S.C. 486.

[124] "La récompense, l'indemnité en pareil cas, c'est la satisfaction d'un noble devoir accompli *pro bono publico* et *ex causa necessitatis*, récompense dont se contentent tous les héros", *per* Lemieux J. (Emerson put it more shortly, "The reward of a thing well done, is to have done it".)

[125] Mignault (1934-5), 13 R. du B. 164, at p. 179.

[126] Arts. 1043-1046 C.C. Cf. Restatement, Restitution § 112.

[127] (1887), 36 Ch. D. 269.

an English court would have no difficulty in assigning to quasi-contract foreign legal obligations not coming under contract or tort.[128]

The determination of the applicable law has given rise to disagreement. Some continental writers classify quasi-contract with contract for this purpose,[129] and consider that the law should be that of the prior transaction from which the quasi-contract derives. But there are other possibilities, namely, (a) the *locus* of the enriching act, (b) the nationality of the defendant, (c) the place where restitution must be made, and (d) the *lex fori*. Rabel favours relation of the applicable law to the "nature of the source from which the enrichment stems",[130] and Morris points out that the place of enrichment may have no more than the most casual connection with the real seat of the obligation.[131] In most cases a claim of unjust enrichment follows from some legal situation conjugate to it (such as a contract, the administration of an estate, and so on) and is normally in the nature of a consequential adjustment, when it would seem an unnecessary complication to have the unjust enrichment claim dealt with under perhaps a different law from the law applicable to the anterior legal situation. It is submitted, therefore, that (in such cases) Rabel's proposal affords a reasonable solution of the problem.

It seems desirable that the law on unjust enrichment should be freed from formal association with contract and the term "quasi-contract" replaced by some such term as "restitution" (though, of course, in Quebec there is the practical difficulty that "quasi-contract" is used in the Code). Both in the common law and the civil law, "quasi-contract" is an uninformative term and unsatisfactory as a description of the various forms of obligation related to unjust enrichment.[132] The instances, in both systems of law, are numerous enough to justify a separate branch of law. Such a classification would not necessarily infer the justification of a general principle of unjust enrichment as a rule of positive law, but the maxim

[128] Gutteridge and Lipstein (1941), 7 Camb. L J. 80. Cf. *Loucks* v. *Standard Oil Company* (1918), 224 N.Y. 99, *per* Cardozo J.: "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home".

[129] For example, Wolff, Internationales Privatrecht, pp. 104-5.

[130] *Op. cit.*, Vol 3, p. 371 (According to the Restatement, §§ 452-453 the choice of law in quasi-contract depends on the place where the benefit was conferred or the enrichment occurred. There is a good deal of opinion in favour of this view: Gutteridge and Lipstein, *loc. cit.*; Glanville Williams (1944), 7 Mod L Rev. 66, at p. 69)

[131] (1946), 62 L Q Rev. 170.

[132] The law of Scotland uses the term "restitution" to describe a general obediential obligation: Stair, I, vii, 7. So does the Restatement

"nul ne peut s'enrichir aux dépens d'autrui" seems a worthy philosophic stimulus.

The separate classification of these various obligations has been hampered in England by the division of law and equity, the relevant case law spreading heterogeneously over both. But in Canada there has not been the same sharp division of law and equity, and so there need not be the same difficulty. Integrated development should be possible, provided the courts (especially the common-law courts) do not play too rigid a game of *chasser les précédents*.[133] There is a difference of mentality between the civil lawyer and the common lawyer, expressed (rather sweepingly) by Tyndale[134] as "celle qui recherche les principes and celle qui s'appuie les précédents". But, with the two systems side by side in Canada and a single Supreme Court, there seems a special opportunity to obtain the best from each in the development of a branch of law related to unjust enrichment.[135] It would be no sign of weakness for one system to imitate or borrow from the other.[136] It is to be hoped that the effect of stare decisis in the common-law provinces and the existence of a codified system in Quebec will not reduce this opportunity to the status of a mere ideal.

Frustration of Contract

Where, without fault of the parties, it becomes impossible to complete a contract which has been partly performed, this would seem an appropriate situation in which to apply a principle of unjust enrichment to prevent a party gaining an unfair advantage by reason of the unexpected obstacle to completion. The common-law jurisdictions have arrived more or less at this position (with the help of statutory changes), but the process has been slow as will be shown. Quebec law has no separate theory of frustration of contract (and the term "frustration" is not used in the Code) but there are articles in the Code bearing on the question and, in a general way, the concept of unjust enrichment seems to stand at the back of these articles.

[133] The Lord President of the Court of Session in Scotland has warned against judges becoming animated indexes to the law reports, and has said that the common law will soon have to face the problem whether "a better cement than rigid precedent cannot be found in more codification and in methodised reasoning from clear principles in accordance with the civil tradition" (1950), 63 Harv. L. Rev. 468.

[134] (1945), 5 R. du B. 97, at p 99.

[135] "No man can be a knowing lawyer in any nation who hath not well pondered and digested in his mind the common law of the world": Stair, I, i.

[136] "All happy families resemble each other, each unhappy family is unhappy in its own way": Tolstoy, Anna Karenina, Pt. 1, chap. 1.

Paradine v. *Jane*[137] decided that if a man contracts absolutely to do something, he cannot escape liability for not doing it whatever the reason for failure. This unyielding rule was mollified by *Taylor* v. *Caldwell*.[138] A room was hired for a specific purpose but was destroyed by fire before the relevant date. It was held that both parties were relieved of their obligations, as it appeared from the nature of the contract that it must have been within their contemplation when the contract was made that it should not be absolute but that its foundation was the continued existence of the subject matter. The decision went no further than release of parties, and made no consequential adjustment in respect of money paid, services rendered, or the like. The report seems to suggest that this simple rule of extinguishment was a following of the Roman law.[139]

If performance of a Roman *obligatio stricti juris* (a unilateral promise) became impossible by destruction of the subject matter (*casus*) without fault of the promisor, he was released.[140] In a bilateral relation the other party was probably still bound.[141] But the *condictiones* were, in general, devised to enable a party who could not enforce a strict obligation to recover what he had given, there being no such right of recovery in the field of *stricti juris* relations. Buckland[142] cites Pothier to the effect that *casus* discharged all liability for a *certum corpus*, but says that Pothier's concept of contract was the *stricti juris* type of the Roman law and fused the idea of discharge by *casus* with the law of sale. Pothier did not include the Roman remedies *bonae fidei*. In classical Roman law, the parties were released on *casus* but the *judex* was directed to allow payment of whatever, *ex fide bona*, should be paid. So the rather rigid rules of the nineteenth century cannot claim ancestry from the law of the Romans.

In *Chandler* v. *Webster*, one of the "coronation cases",[143] it was held that right to payment for the room had accrued before postponement and that the balance must be paid. In the *Cantiare San Rocco* v. *Clyde Shipbuilding Company*[144] the House of Lords laid

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[137] (1647), Aleyn 26.
[138] (1863), 3 B. & S. 826.
[139] Lord Blackburn relied substantially on civil law. (Pothier was cited in *Krell* v. *Henry*, [1903] 2 K.B. 740, where a room was booked for the coronation of Edward VII, which was postponed.)
[140] D. 45, 1, 23, 33, 37.
[141] Buckland (1933), 46 Harv. L. Rev 1281.
[142] *Ibid.*
[143] [1904] 1 K.B. 493 (see footnote 138). The rule of this case has not been followed in the United States: Svenson (1948), 46 Mich. L. Rev. 401, at p. 413.
[144] (1923) S.C. (H.L.) 105, [1924] A.C. 226.

down that the "coronation cases", in so far as they decided that an advance payment on a frustrated contract was irrecoverable, were not authorities in Scotland. The contract was to provide an Austrian firm with marine engines, and an instalment of price had been paid. The outbreak of war made further performance of the contract impossible, and created a failure of consideration. The instalment paid was recoverable on the modern equivalent in the law of Scotland of the Roman *condictio causa data causa non secuta*, the purpose of which was to relieve against unjust enrichment.[145] Lord Shaw criticized the rule of *Chandler* and *Crane* as laying down a principle of *potior est conditio possedentis*, a maxim which would work "well enough among tricksters, gamblers and thieves". It was considered contrary to honesty and fair dealing for the vendor to retain the instalment.

In the *Canadian Government Merchant Marine Ltd.* v. *Canadian Trading Company Ltd.*[146] there was a contract for carriage of freight in ships to be constructed. Delay occurred in completion and delivery of the ships. It was said that if "reasonable persons situated as the parties" must have agreed that the contract should terminate if a certain state of circumstances ceased to exist, the court may imply a term to that effect. But where a reasonable man would have contemplated taking the risk no such term will be implied.[147] However, in *St. Catharines* v. *Hydro-Electric Power Commission*,[148] it was stated that frustration does not depend on intention, opinions or knowledge of the parties, but upon the occurrence of an event inconsistent with the further prosecution of the adventure. The doctrine of the implied term has been much criticized.[149]

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[145] Buckland (*loc. cit.*, Harv. L. Rev.) considered that in Roman categories the case was one of agreement for sale of future goods, in which case the Roman rule was that risk was on the vendor, the purchaser being able to recover instalments paid (see footnote 171, *infra*).

[146] (1922), 64 S.C.R. 106.

[147] Cf. *Samuel* v. *Black Lake Asbestos and Chrome Company Ltd.* (1920), 48 O.L.R. 561, where Hodgins J. A. approved at p. 577 a similar statement by A. T. Lawrence J. in *Scottish Navigation Company Ltd.* v. *W. A. Souter and Company*, [1917] 1 K.B. 222, at p. 249.

[148] (1927), 61 O.L.R. 465; (1928), 62 O.L.R. 301. But the new situation must have arisen without fault and not, for example, have been self-induced: *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd*, [1935] A.C. 524.

[149] It has been called a "pious fiction" in Scotland. "Pious" because seeking "to do homage to a very sacred legal principle, the sanctity of contract" and a "fiction" because it relates "to nothing in the minds of the parties at the time the contract was made": *James Scott and Sons Ltd.* v. *Del Sel*, (1922) S.C. 592, 596, 597. See also Cheshire and Fifoot, Law of Contract (2nd ed., 1949) pp. 416-417; Webber, Effect of War on Contracts (2nd ed., 1946) Ch. XVI; Lord Wright, Legal Essays and Addresses (1939) pp. 225, 258.

It is in the nature of a fiction introduced to save the principle that the function of the court is to deal with the contract the parties have made.[150] But, "nec deus intersit, nisi dignus vindice nodus inciderit".[151] The essential feature is the nature of the occurrence and the fact that the parties are *sine culpa* in relation to it. But the true construction of the contract may be that the parties have expressly provided for the occurrence, and if so the doctrine of frustration will not apply,[152] unless the event is much more drastic than that contemplated.[153] It is not the policy of the law to award damages for failure to perform the impossible or to make a party pay for something which the other cannot give him, and whether the court applies its own commonsense or imputes commonsense to the parties in the form of an implied term, the result is a cessation of the contractual obligations.

Frustration is specially important in commercial cases and in relation to events such as the outbreak of war. "War" receives its business or commercial meaning and is not construed according to the tests of international law.[154] But the frustrating event must be fundamental[155] (a strike will usually be insufficient[156]). Since no court can predict the duration of a war, a contract so rendered impossible is terminated at once.[157] If, before the time fixed for performance, events have arisen making performance impossible, and reasonably likely to be a permanent obstacle, either party may treat the contract as terminated. The test is the situation as it appeared at the time of the occurrence.[158] The doctrine of frustration is inapplicable to insurance, except that in marine insurance, if the insured is deprived of the use of the cargo, without its actual loss, he may claim as for a constructive total loss.[159] In shipping law, if the charter-party fixes a definite number of lay-days, demurrage will

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[150] "No court has an absolving power": *Tamplin* v. *Anglo-American Company*, [1916] 2 A.C. 397, *per* Lord Loreburn L.C. at p. 404.

[151] Horace, Ars Poetica, 191.

[152] *Stanford* v. *Nicolau*, [1943] R.L. 154.

[153] *Metropolitan Water Board* v. *Dick, Kerr and Company*, [1918] A.C. 119.

[154] *Kawasaki Kisen etc.* v. *Bantham S. S. Comapny (No. 2)*, [1939] K.B. 544.

[155] For example, illegality, *Denny, Mott & Dickson, Ltd.* v. *James B. Fraser & Company Ltd.*, [1944] A.C. 265; *Ralli Brothers* v. *Compania Naviera*, [1920] 2 K.B. 287 (foreign law), abolition of statutory office; *Reilly* v. *The King*, [1934] A.C. 176, failure to obtain export permit; *Mayer & Lage, Inc.* v. *Atlantic Sugar Refineries Ltd.* (1926), 58 O.L.R. 531.

[156] *George Eddy Company Ltd.* v. *Corey*, [1951] 4 D L.R 90.

[157] *Geipal* v. *Smith* (1872), L.R 7 Q.B. 404; *Horlock* v. *Beal*, [1916] 1 A.C. 486.

[158] *Embiricos* v. *Reid*, [1914] 3 K.B. 45.

[159] *British and Foreign Insurance Company* v. *Sanday*, [1916] 1 A.C 650.

be due even for causes such as stress of weather, strike of port labour, fault of consignees of the cargo,[160] but legislation making loading within the lay-days impossible may be regarded as a frustrating event.[161]

In *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*[162] a contract was made in July 1939 to deliver machinery c.i.f. Gdynia. On the outbreak of war Gdynia became within enemy territory. The contract provided (1) that if despatch of the goods was hindered by any cause beyond the vendor's reasonable control (including war risk) there would be an extension of time, and (2) that part of the price should be paid at the date of the order. £1,000 was paid. The court decided (a) that the term relating to war referred only to temporary impossibility and did not contemplate the prolonged war which actually happened; (b) the purchasers were entitled to repayment of the £1,000. The £1,000 had been paid to secure performance and so the inducement which gave rise to the payment was not fulfilled. But the failure of performance must be complete. However, the case made no provision for recompense for part performance and the seventh interim report of the Law Reform Committee in England included recommendations in this connection.[163] Following this report there was enacted in England the Law Reform (Frustrated Contracts) Act, 1943, and this act has been followed in some of the common-law provinces of Canada. For example, the main provisions of the Ontario act[164] are as follows: (i) it applies to contracts governed by Ontario law rendered impossible of performance or otherwise frustrated and the obligations of the parties have thus become discharged;[165] (ii) sums paid or payable before the frustrating event are recoverable or, if not paid, cease to be payable;[166] (iii) where one party has obtained a valuable benefit before the contract became discharged by reason of anything done by the other party by way of performance, such sum as the court considers just may be recovered from the party so benefited.[167] The common-law rule was that one who fails to

[160] *U. S. Shipping Board* v. *Strick*, [1926] A.C. 545.
[161] *Ford* v. *Cotesworth* (1870), L R. 5 Q.B. 544.
[162] [1943] A.C. 32.
[163] Cmd. 6009 of 1939.
[164] The Frustrated Contracts Act, R.S.O., 1950, c. 151.
[165] Section 2(1). Glanville Williams considers unfortunate the restriction in the English act to contracts governed by English law and the implication that the adjustment must also be governed by the same law: (1944), 7 Mod. L. Rev. 66, at p. 69. Cf. footnote 130.
[166] Section 3. The law on this head is now the same as in Scotland and the United States
[167] *Ibid.*

complete his obligation under an entire contract can recover nothing even though the failure is due to impossibility.[168] There are certain situations to which the act does not apply: (a) carriage of goods by sea and a charter-party (except a time charter-party or a charter-party by way of demise)[169] where the general common-law rules still apply;[170] (b) a contract of insurance, where, once the risk is assumed, a premium paid is not repayable on ground of frustration; (c) a contract for the sale of specific goods where the goods have perished without fault before passing of the risk, a matter otherwise provided for by legislation. The act applies if the goods are not specific or if they have not perished, as, for example, where they have been seized by an enemy. In the case of unascertained goods, the maxim is *genus numquam perit*.

The situation in the *Cantiare San Rocco* v. *Clyde Shipbuilding Company* has been described as "réellement une vente de chose future".[171] There is no comprehensive article in the Quebec Code dealing with impossibility of performance but (as previously mentioned) there are articles related to the subject. If *A* contracts to furnish materials and deliver completed work at a fixed price to *B*, loss before completion falls on *A*, unless *B*'s fault has caused the loss.[172] But if *A* contracts merely to provide labour and skill then (*sine culpa*) the loss does not fall on him.[173] When a *res certum* perishes or delivery becomes impossible without fault of the vendor, the obligation is extinguished (unless he has contracted to deliver in any event).[174] Where an obligation to do something has become impossible it is extinguished, "mais si l'obligation a été exécutée en partie au profit du créancier, ce dernier est obligé jusqu'à concurrence du profit qu'il en reçoit".[175] A resolutive condition, when fulfilled, dissolves the contract, and obliges each party to restore what he has received.[176] The basis on which a Quebec court should deal with a problem in what the common law would call frustration has been stated thus: "La cause qui rendait l'obligation valide a existé, mais elle est disparue, et avec elle l'obligation est également disparue. . . . Et puisque l'obligation disparaît, la partie qui a payé la dette créée par le contrat, et qui se trouve privée du bénéfice stipulé, a droit au

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[168] *Cutter* v. *Powell* (1795), 6 T.R. 320; *Appleby* v. *Myers* (1867), L.R. 2 C.P. 651.

[169] A charter-party by way of demise is unusual except in wartime.

[170] Freight paid in advance is irrecoverable and, if payable in arrear, the shipowner takes the risk.

[171] Mignault (1942), 2 R. du B. 387, at p. 398.

[172] Art. 1684.

[173] Art. 1685.

[174] Art. 1200.

[175] Art. 1202.

[176] Art. 1088.

remboursement de la somme qu'elle avait déboursée."[177] Lord Macmillan referred to Pufendorf in the *Fibrosa* case to the effect that when one party has done something towards a contract rendered impossible, the other must restore or pay the value. If this cannot be done, he must try to ensure that the other is not a loser by him. It has been said that this represents the substance of the civil-law doctrine of frustration.[178] So there is now a general uniformity in basic principle between civil law and common law on frustration of contract and the fundamental approach of each has become rather similar to that of classical Roman law.

A special problem arises in the common law where *A* takes a lease of land from *B* intending to use the land for a certain purpose and while the lease is current it becomes impossible for *A* to continue with that purpose. In *Grimsdick* v. *Sweetman*,[179] a lease of a beerhouse contained a covenant by the lessee to use the premises only as such. A renewal of licence was refused under the Licensing Act, 1904, and in 1907 compensation was paid for the loss of licence. It was held that the obligation to pay rent continued, and it was indicated that the premises had also been used to some extent as a bakehouse and as living quarters. In *London and Northern Estates Company* v. *Schlesinger*,[180] the lessee of a flat became an alien enemy and as such was prevented from living in the area. A clause prohibited assignment or subletting without consent of the lessor, which was not to be unreasonably refused. The war only prevented personal residence but (subject to the lessor's consent) the lease could still be assigned, and so there was no frustration.[181] Had the subjects demised been "evicted from the tenant, or recovered by a title paramount",[182] the lessee would have been discharged from further rent payment, but there was no eviction. *Matthey* v. *Curling*[183] decided that a partial requisition did not terminate a lease and that the covenants remained effective.

In *The Vancouver Breweries Limited* v. *Dana*[184] a lease of a licensed hotel contained a covenant by the lessor to repair in accord-

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[177] Mignault, *op. cit.*, footnote 171, at p. 399.
[178] *Ibid.*, p. 403.
[179] [1909] 2 K.B. 740.
[180] [1916] 1 K.B. 20.
[181] Cf. Colin et Capitant, Cours Elémentaire de Droit Civil Français (8th ed., 1935) Vol. II, 673: "L'impossibilité de jouir des lieux loués, en effet, n'est pas une cause de résiliation lorsqu'elle résulte, non d'un fait créant pour tour un obstacle absolu, mais d'une situation particulière et personnelle à celui qui prétend s'en prévaloir".
[182] Bacon's Abridgment, Vol. vii, p. 58; referred to by the Earl of Reading C. J. in *Whitehall Court Ltd.* v. *Ettlinger*, [1920] 1 K.B. 680.
[183] [1922] 2 A.C. 180.
[184] (1915), 52 S.C.R. 134.

ance with current municipal regulations. The lessor failed to observe the covenant and the liquor licence was lost. It was held that the obligation to pay rent remained and it was said that ". . . the land and house, and not the licence, were the subject matter of the lease and the right of the tenant to occupy the house for any other purpose continued after the cancellation of the licence".[185] Where the lessee can still derive some benefit from the lease, there is no frustration,[186] but it has been said that the doctrine of frustration is inapplicable to a devise of real property.[187] In England the question is open so far as the House of Lords is concerned, but the Court of Appeal has said that the doctrine does not apply to a lease.[188] In Ontario the view is that "the weight of judicial authority is that the doctrine of frustration does not apply to leases, . . .".[189] The argument for non-application is that an interest in land is transferred for a period of time in exchange for a rent and so long as the interest remains vested in the tenant there is no failure of the lease. Restrictions in user are just variations in the value of the interest. If the doctrine applied, either party could treat the lease as ended on a frustrating event and it seems undesirable that an interest in land should be terminable in this rather indefinite way. At the same time if a lease, say, of factory premises, is taken to carry on a profitable industrial user and that user is indefinitely prevented by war legislation, it does not provide complete justice simply to maintain the obligations of the lease, especially if the rent was fixed with regard to the profitable user. Assignment may be prohibited or may not provide much of a solution. It is submitted that legislation is desirable to the effect that, in suitable

[185] *Sed aliter* in the case of an agreement to grant a lease of premises for a laundry and there was failure to obtain a laundry licence before the lease was granted: *Fong* v. *Kerwin* (1929), 36 O.W.N. 129.

[186] Where lighting restrictions affected a contract for the construction and lease of an electric sign, it was stated that the sign would be "not entirely useless as a daylight sign": *Claude Neon General Advertising Ltd.* v. *Sing*, [1942] 1 D.L.R. 26, *per* Doull J. at p. 34 Cf. *Foster* v. *Caldwell*, [1948] 4 D.L.R. 70.

[187] *Swift* v. *Macbean*, [1942] 1 K.B. 375; *Cricklewood Property and Investment Trust, Ltd.* v. *Leighton's Investment Trust, Ltd.*, [1945] A.C. 221, *per* Lord Russell and Lord Goddard L.C.J. But Lord Simon and Lord Wright took a contrary view. In the United States some courts have applied frustration to leases: *Lloyd* v. *Murphy* (1944), 153 P (2nd) 47. In the law of Scotland, total or substantial destruction of the subjects or sterility in the case of an agricultural or mining lease will be *rei interitus* and determine the lease. Partial destruction may be a ground for abatement of rent: Gloag, *op. cit.*, footnote 49, p. 348.

[188] *Denman* v. *Brise*, [1948] 2 All E.R. 141 (house destroyed by enemy action and rebuilt; tenant entitled to continue tenancy).

[189] *Merkur* v. *H. Shoom and Company, Ltd.*, [1954] O.W.N. 55, *per* Pickup C.J.O. at p. 57.

cases, where unexpected events have rendered the premises indefinitely useless for the lessee's purposes, it should be possible to apply to the court for an order dealing with the lease on such terms as may seem reasonable in the circumstances. The basic principle behind the doctrine of frustration is to make a fair adjustment when the foundation of the parties' obligations has been unexpectedly removed, and the courts should have the power to adjust in relation to real property obligations. However, in the case of real property, the manner of termination and the adjustment should depend on a court order so that these matters can be precisely and fairly fixed. While to some extent it is still true in relation to this problem that "grammatici certant et adhuc sub judice lis est",[190] nevertheless, legislation would be clearly the most satisfactory way in which to bring about the change proposed.

Summary of Conclusions

1. From ancient times, legal systems have provided remedies in suitable cases in respect of benefits unjustly acquired. Such remedies did not originate as mere off-shoots of the law of contract, but stood on their own feet as exemplifications in positive law of the effect on men's minds of philosophical concepts of justice, such as the idea that no one should be permitted to enrich himself unjustly at the expense of another. The Roman law experienced some difficulty in classification and gave the world the term "quasi-contract", not, it is submitted, a very desirable legacy. The Roman remedies were the forerunners of modern law on unjust enrichment, and Roman ideas have influenced both civil law and common law, although, of course, these systems have their own historical background and individuality in this field as in others. In fact, all the main legal systems, ancient and modern, have found it necessary to provide relief, in a greater or lesser degree, in situations of the kind here discussed. Fundamentally, there is nothing new in the idea of unjust enrichment; it is almost as old as justice.

2. As in the case of most things in the common law, the English historical background is important. Even before the law of contract was properly developed, the old common-law action of account manifested a feeling that justice demanded that a man should have no more than his due. Up to the early nineteenth century, and especially under the influence of Lord Mansfield, English law showed a steady interest in this type of remedy, tending to mould

[190] Horace, Ars Poetica, 78.

the action of indebitatus assumpsit to meet the needs of more liberal conceptions of justice. Certain historical events, related to procedure, then affected the outlook of the practising lawyer, and Lord Sumner has suggested that all common-law actions must lie in contract or tort. Such a close policy of classification has no obvious logical value, nor is it really founded in English legal history, provided a fuller span is taken of that history than just the last hundred years. Another and larger obstacle to systemization has been the division of English law into common law and equity, for some remedies related to unjust enrichment lie on the one side and some on the other. But there is no reason for an impediment of similar gravity in Canada and, given good-will, commonsense and a reasonable measure of enlightened vision, there should be some possibility of integrating and developing the law in this field with good results.

3. The common law contains quite a number of established principles of positive law reflecting the idea of unjust enrichment. They are a mixed collection (as in most legal systems). Nevertheless they are animated by ancient and honourable principles of justice and entitled to be accepted as members of a separate branch of law, not merely as the illegitimate brood of the law of contract.

4. The fiction of an "implied contract" has proved useful in the past as a means of liberalizing the law without disrupting its form or necessitating radical legislation. But it must be accorded only its true status: that of a benevolent fiction.

5. There is a distinction between mistakes of law and fact. This distinction is now rooted in precedent, although its roots in logic and commonsense are much harder to discover. Mistakes of law tend to shade imperceptibly into mistakes of fact, and vice versa, and this topic of law would be more satisfying if both were treated in substantially the same way. In making this suggestion, it is fully recognized that *ignorantia juris neminem excusat* is an essential general principle in both criminal and civil law.

6. The important English cases in the present century providing equitable remedies *in rem* and *in personam* are clearly concerned with the prevention of unjust benefit and their influence in the common-law provinces of Canada will be a matter of continuing interest.

7. The modern French law of *enrichissement sans cause*, based on the *actio de in rem verso*, is of fairly recent origin, but it is definitely established in Quebec law, even if its acceptance has been on more conservative lines than in France. Being related to the Code and

to the *actio de in rem verso*, for success in which certain conditions must be satisfied, the Quebec law of *enrichissement sans cause* exhibits a degree of system and uniformity not found in the common-law equivalents. Of course, this uniformity does not reduce the law to a mechanical level, for there is still to be answered the most fundamental question of all—when is an enrichment just and when is it unjust?

8. The doctrine of *negotiorum gestio* is recognized in Quebec (as it is generally in civil-law jurisdictions and in the United States). It is perhaps unfortunate that it is not universally recognized, as it seems to be founded on reason and justice, but there are firm common-law precedents to the contrary.

9. It is sometimes said that the civil lawyer reasons deductively from general principles, rather giving the impression that these general principles lie in the Code or else lie innate in his mind as in a Kantian *a priori*. But the civilian draws heavily on the wisdom of the past and not only from the past of his own country and system. He seeks, however, more after an inner harmony in his law. The common lawyer is said to reason inductively, and he does not show the same concern for systematic classification of principles, and for seeking single strands of elementary justice running through the rules of positive law. But he is no less concerned with fundamental justice. Civilian and common lawyer would each benefit from a study of the other system in relation to unjust enrichment.

10. Frustration of contract has evolved rather painfully in the common law. The latest steps have been the legislation following the English act, the Law Reform (Frustrated Contracts) Act, 1943, changing or modifying the law to give it more flexibility and to make possible more complete justice.

11. Probably a more specific development of the law of what the common lawyer would call frustration of contract is desirable in Quebec. This branch of law has considerable commercial importance and is entitled to an individual set of positive principles on the basis of which the courts can deal with the various situations that arise.

12. The application (or not) of the doctrine of frustration to leases (or other demises of real property) is a controversial subject, but it would seem that the frustration of a commercial contract and the frustration of the purpose of a lease, once the lease has been granted and possession given, are not quite on the same footing. It would not be truly satisfactory for either party to be able

to treat a lease as terminated whenever a frustrating event occurs But it is submitted that the courts should have power to adjust the position of parties in suitable cases, when there is frustration of the purpose for which the lessee is really paying his rent, and that such power should be given to the courts by legislation and defined as to nature and scope. The adjustment need not always involve the termination of the lease, for in some cases justice would be done by an abatement of rent or a variation of covenants.

The Need of Legal Research

The difficulty with legal education and law, and in truth with the development of the social sciences, is that there is practically no research now under way to bring together the law and the relevant social sciences. So far as the universities are concerned, legal research goes mostly unsupported in any event. In the fiscal year ending June 30th, 1951, six law schools in private universities, namely, Harvard, Yale, Columbia, Chicago, Stanford and Tulane, spent approximately three million dollars providing a legal education for some 3560 students. Less than $40,000 was specifically allocated to research. And this is probably an over generous evaluation of the amount spent on research. In one representative institution about one-hundredth of one per cent of the endowment amounts specifically given and designated for research was applicable to law. More than eighty-six per cent was given and designated for biological and medical research. Research of the relational kind must be undertaken within universities, if it is to be undertaken at all, but in any event it is not being attempted elsewhere either It might be thought that some investigations by legislative committees and bar association groups move in this direction, but indeed it is such efforts which suffer most because of the failure to have research institutes in law and the social sciences within universities.

Research of the inter-disciplinary type is not the only kind of research which is required for law. The administration of justice suffers from a lack of scrutiny. Conflicting and unnecessary rules of law bring discredit to the legal system. They provide the basis for the abuse of administrative power In some areas they have made local government impossible, and they have contributed to that cynicism which is the greatest enemy of democracy. We need active research law revision groups which will take seriously the necessity of clarifying statutory law, particularly at the local level. We need to re-examine the pretenses and practice of our own system. . . . (Edward H. Levi, The Future of Legal Education, an address given on February 15th, 1952, before the Cook County Bar Association)