THE DOCTRINE OF UNJUSTIFIED ENRICHMENT IN THE LAW OF QUEBEC *

Last summer, during the court vacation, I left Ottawa and went to Europe with my family. I do not begin in this way to give you a chapter of my biography, but because it has a bearing on the subject of my address this evening. I had verbally agreed with a contractor that during our absence he would put in order and redecorate, for a fixed price, some of the rooms in our house. The rooms where the work was to be done had been specified. Our servants were left in charge of the house, but without authority to modify in any way the agreement we had made with the contractor. When we returned, we found that, in addition to the rooms covered by the agreement, the employees of the contractor had also redecorated another room not mentioned by us and not included in the arrangement. We were told that as soon as our servants discovered that the contractor's employees had started work on that room, they reminded the contractor that, so far as they were aware, the particular room was not to be made part of the improvements. Although not disputing the fact, but without admitting it, he made up his mind that, some work having already been done in the room, it ought to be continued until completion. Note that we were abroad and the contractor could not get in touch with me.

Upon our return, all the work having been completed, the question of settlement, of course, came up; and the contractor, though acknowledging that the work done in the extra room had not been contracted for, claimed for that work a certain amount in addition to the price agreed upon before we left. I positively refused to admit the claim, and the whole matter was finally adjusted between us.

But then the question occurred to me whether that was not a case of unjustified enrichment, since, after all, my house was improved by all the work that had been done in that room and the contractor, who had supplied the materials and furnished the labour of his employees, was getting no compensation for it.

Now, I do not intend to make any admission, for fear that it might be used against me, if the contractor saw this paper. It seems to me, however, that we have in this incident all the

* An address delivered by the Hon. Mr. Justice Rinfret, of the Supreme Court of Canada, to The Lawyers' Club of Toronto, on Thursday, January 28th, 1937.—ED.

necessary data of the legal problem which, in recent years probably more than ever before, has been agitated and discussed by so many commentators and legal writers of high distinction — a problem which is more and more active before the courts, which is of great practical importance, and of which it may be said, if I am not mistaken, that, although it has received some recognition in particular instances, it has not yet been given a solution based on any generally accepted principle.

I was still thinking of this problem when your President reminded me that, last year, I had promised to address the Lawyers' Club. It occurred to me that this would be a proper subject to discuss with you on this occasion. I was further confirmed in that view when I read the report of the recent decision of the Court of Appeal of England in *Craven-Ellis* v. *Cannons, Limited*,[1] and the most interesting comment made upon it and upon the questions raised by that decision in one of the last numbers of THE CANADIAN BAR REVIEW.[2]

I do not intend to ask whether the question is an open one under the system of English law as it stands at present. I have been brought up in the atmosphere of a different system of law; I have been trained in the principles of the Quebec Civil Code and its relationship to another venerable code (to which I will refer as the Code Napoleon, in order to distinguish it from the Quebec code) with all the traditions which, through the doctrine and the jurisprudence of France, came to us from the legal precepts of ancient Rome. I fear that, in the circumstances, it would be presumptuous for me to undertake to discuss the question from the viewpoint of the English law before jurists much better versed than myself in the rules of law prevailing outside of Quebec in the other provinces of the Dominion. I thought my endeavour should be confined to a brief review of the treatment the problem has received in the legal literature and in the judicial pronouncements under what I may call the French law. In that way, I might try to help you to compare the two points of view, and to ascertain how far your law has proceeded in the same direction, thus enabling you to adopt your own attitude in regard to the question.

As one would imagine, the champions of this comparatively new doctrine — new at least in its more recent applications — are wont to trace it back to a maxim of the Roman law; and I am free to admit that, in the French system, it would not be

[1] [1936] 2 K.B. 403.
[2] (1936), 14 Can. Bar Rev. 758.

easy to find a more comfortable foundation. On the other hand, I would not be disposed to detract entirely from the opinion of Lord Esher when he said :

> I detest the attempt to fetter the law by maxims. They are almost invariably misleading; they are, for the most part, so large and general in their language that they always include something which really is not intended to be included in them.[3]

Now, as you all know, the Roman dictum on which the theory of unjustified enrichment has been gradually erected comes from Pomponius,[4] and it reads : *Jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem.*

Pothier, the French commentator who, without exaggeration, may be styled the polar light of the Quebec Civil Code, transscribed it in a slightly different language : *Neminem aequum est cum alterius damno locupletari*;[5] *Neminem aequum est cum alterius detrimento locupletari.*[6] In French, it has been translated : *Nul ne doit s'enrichir injustement aux dépens d'autrui.* That is the formula most generally adopted in the French doctrine; and in a more abridged way, it is called : *enrichissement sans cause.* But Messrs. Ripert and Tesseire suggest as a better term : *enrichissement sans droit.*[7] Others prefer *enrichissement illégitime.*

I am not, as you may think, indulging in a pure dispute of words. We are dealing with a rather delicate theory which has grown up gradually outside the text of the codes without statutory enactments, and progressively defined in the jurisprudence of the courts — a process of evolution with which you are familiar in English law but which is strikingly unusual under the French system of *lex scripta.* For that reason, the formula must be couched in careful and precise language, first, so as not to be "misleading", for fear that it may fall under the condemnation in respect to maxims in general, expressed in the language of Lord Esher just referred to; and, second, so as to prevent too broad an interpretation or too large a judicial application. For it has been said of the doctrine of unjustified enrichment that it might open the way to an attempt at redress of all inequalities — even those resulting from contracts which might appear too one-sided, and that, as a consequence, if the doctrine were given free scope, if it should be carried to its extreme consequences, it might lead to the overthrow of the

[3] *Yarmouth* v. *France* (1887), 17 Q.B.D. 647 at p. 653.
[4] Dig. 50.17 (*De diversis regulis juris antiqui*) 206.
[5] POTHIER, OBLIGATIONS (ed. BUGNET) Vol. 2, p. 276.
[6] *Ibid.*, Vol. 9, p. 447.
[7] 3 Revue Trimestrielle de Droit Civil, pp. 788, 789.

institutions founded on positive law and of social order as hitherto understood.[8]

Given the proper limitations, the doctrine has been accepted by the modern French writers as one of high morality and of the most solid "équité", within the meaning of that word in French legal parlance and not to be confused with *equity* as it is known in the English system of jurisprudence. The "équité" of the French is more approximately expressed in your idea of "natural justice". Indeed, by some commentators, the doctrine was hailed as coming in direct descent from natural justice itself, whose fundamental aim was defined by Justinian as the duty of awarding to each man what is due to him — *cuique suum tribuere.*

What I have already said shows that an attempt at an accurate definition of the doctrine of unjustified enrichment, as applied in France, is an extremely difficult operation. In truth, to confine ourselves to law, definitions always constitute a very delicate task. The Commissioners entrusted with the drafting of the Quebec Codes have inserted into them remarkably few definitions. In their Report, they explained that definitions were dangerous. And, of course, definitions must never be understood and applied without remembering that there may be exceptions to any general rule.

Without endeavouring to submit a definition of unjustified enrichment which would pretend to embrace all its varied and multifarious aspects, I would think that it is probably better first to get a general idea of what the doctrine involves, and then to enumerate what are the necessary elements and the essential ingredients which must be found to exist so that the principle may receive its application under an existing state of circumstances.

In a general way, the doctrine may be stated as follows : A man ought not to be allowed to retain money, or money's worth, which he has obtained in circumstances which render it unreasonable and unfair that he should be allowed to keep it. I have borrowed this statement from an article by Mr. H. C. Gutteridge in the *Cambridge Law Journal* entitled : "Does English Law recognize a doctrine of unjustified enrichment?"[9] I think it gives a clear and comprehensive idea of the principle.

Further, the idea will be more completely grasped if we analyze the essential elements which go to create the situation

[8] PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS, Vol. VII, p. 47.

[9] 5 Camb. L.J. 223.

which the doctrine undertakes to remedy. When considering these essential elements, one must bear in mind that, under the Civil Code, "obligations arise from contracts, quasi-contracts, offences (often called delicts and quasi-delicts) and from the operation of the law solely."[10]

Of course, contracts, delicts and quasi-delicts (or torts) need not be defined here. But when it comes to quasi-contracts within the meaning of the Code, it must not be forgotten that we are dealing with written law and that what is intended to be conveyed by the word quasi-contract, in the Code, is that particular source of obligations which is dealt with in the Code itself. Under the chapter of quasi-contract, the Code begins by declaring :

> A person capable of contracting may, by his lawful and voluntary act, oblige himself toward another, and sometimes oblige another toward him, without the intervention of any contract between them.[11]

Or:

> A person incapable of contracting may, by the quasi-contract which results from the act of another, be obliged toward him.[12]

And if one pursues the inquiry, one finds that the quasi-contracts which are recognized by the Civil Code are those of *negotiorum gestio* and that resulting from the reception of a thing not due. A number of articles [13] are devoted to those two quasi-contracts and it is not suggested that there are others. This is not the time to go into details with regard to the circumstances under which the Code implies such quasi-contractual relationship and liability. Obligations, as we have seen, may also, in certain cases, result from the special and direct operation of law, without the intervention of any act and independently of the will of the person obliged or of him in whose favour the obligation is imposed.[14] Such are the obligations of tutors and other administrators who cannot refuse the charge cast upon them, the obligations of children to furnish the necessaries of life to their indigent parents, certain obligations of owners of adjoining properties, the obligations which in certain cases arise from fortuitous events; and others of a like nature.

It will be well to keep in mind these well defined sources of obligations when we come to consider the elements of unjusti-

[10] C.C. art. 983.
[11] C.C. 1041.
[12] C.C. 1042.
[13] 1043 to 1052 inc.
[14] C.C. 1057.

fied enrichment as they have been elaborated by the legal writers and by the courts.

First, there must be the impoverishment of one party, who may conveniently be called the plaintiff. The impoverishment may be brought about either by an expense incurred or a sacrifice made or by the labour of the plaintiff (those are the words of Honourable Mr. Mignault, in the article which he published on the same subject in THE CANADIAN BAR REVIEW).[15] Further, it must have been brought about without cause, that is to say, outside the sphere of the sources of obligations recognized by the Code. The situation must not result from a contract, or from a delict, or from a quasi-delict, or from one of the quasi-contracts accepted in the Code, or from an obligation imposed by the Code.

Second, there must be an enrichment to the advantage of another person (who in this case would be the defendant), and that enrichment must have accrued to the defendant without any consideration or equivalent proceeding from him. (Again, these last words are those used by Mr. Mignault.) The enrichment may have taken the form of an increased value in the defendant's patrimony, or of a loss avoided, or even of a mere moral advantage.[16]

Of course, the enrichment of the defendant must be connected with the impoverishment of the plaintiff. A relation of causality must exist between the two. So much so that, in the practical application of the principle, the courts will award to the plaintiff only an amount corresponding to the extent of the enrichment of the defendant; and, even then, the plaintiff gets the minimum amount representing the impoverishment on the one side and the enrichment on the other. Further, the alleged enrichment may only be envisaged as of the date when the action is brought by the plaintiff. For example, suppose that at the time when the plaintiff seeks to recover compensation for the enrichment accrued to the defendant, the latter had lost all the benefit which he had at first derived therefrom. The plaintiff's demand is held to have come too late, and his right of recovery is denied.

We had an instance of a situation of that kind in the Supreme Court of Canada, in the Quebec case of *Regent Taxi & Transport Company* v. *La Congregation des Frères Maristes*.[17]

[15] (1927), 5 Can. Bar Rev. at p. 15.
[16] Rouast, *L'Enrichissement sans cause* (1922), Revue Trimestrielle de Droit Civil, p. 35.
[17] [1929] S.C.R. 650 at p. 692.

In that case, the Congregation des Frères Maristes brought action against the Regent Taxi & Transport Company as a result of an accident to one of the members of the Congregation and for which the Congregation was seeking to have the Transport Company held responsible. The Congregation was claiming damages under two principal heads, one of them being the payment made by it of all the medical fees and hospital expenses incurred on account of the bodily injuries suffered by the member of the Congregation. Under the other head, the Congregation claimed for the loss of services of the brother, who was a professor in the Congregation's educational establishment, and the obligation to support him up to the date of his death, with no corresponding return from him, on account of the fact that, through his injuries, he had become unable to do any kind of work. We need not discuss this last claim, in regard to which both Mr. Justice Mignault and myself expressed the view that, under Quebec law, the Congregation was not entitled to recover. But in respect to the first head of damages, to wit, the recovery for medical fees and hospital expenses paid by the Congregation, our view was that there might have existed a right of recovery on behalf of the Congregation, on the principle of unjustified enrichment. The idea was that the Congregation, in paying those expenses, had really paid a debt which the Regent Taxi & Transport Company could have been condemned to pay in the form of damages, as a result of the accident for which it was responsible.

Perhaps it may be said here that, under the Quebec Code,[18] payment may be made by any person, although he may be a stranger to the obligation, and the creditor may be put in default by the offer of the stranger to perform the obligation on the part of the debtor without the knowledge of the latter; but it must be for the advantage of the debtor and not merely to change the creditor that the performance of the obligation is so offered. And if the payment be so made, the person who has paid will later, under certain conditions,[19] be entitled to reimbursement from the real and original debtor.

But, by force of art. 2262 of the Quebec Code, the action in damages for bodily injuries is prescribed by one year. So that the victim of the accident caused by the Regent Taxi Company, the brother himself, was bound to bring his action and to serve the Company within one year from the date of

[18] Art. 1141.
[19] C.C. articles 1154 to 1157 inc.

the accident. The action brought by the Congregation was served upon the Taxi Company more than a year after the accident. It was the view of Mr. Justice Mignault and of myself[20] that, though the Regent Taxi Company might be held to have been enriched at the expense of the Congregation through the fact that the latter had paid medical and hospital expenses which the Company could have been condemned to pay, yet the effect of the enrichment had completely disappeared at the time when the action was brought, since as against the Company, the claim was then prescribed; and we were for disallowing the claim. This happened to be the view of the minority; and in the Supreme Court of Canada the action of the Congregation was maintained.

The case was then carried to the Judicial Committee of the Privy Council, where the point based on prescription was held good, and it was decided that the action ought to have been dismissed.[21] Having come to the conclusion that, at all events, the claim was prescribed, the action of the Congregation was disposed of on that ground by the Privy Council, who accordingly found it unnecessary to pass on the question whether there was any legal foundation for the claim. Thus we were deprived of a golden opportunity to obtain from the Judicial Committee a pronouncement and a final direction on the doctrine of unjustified enrichment and on its applicability in the province of Quebec.

We have it so far that there must be an enrichment of the defendant having a connection with the impoverishment of the plaintiff and that it must be without cause (*sans cause*), or, as I have called it since the beginning of this address, it must be an unjustified enrichment. If the situation was the result of a contract, it would not fall under the application of the doctrine: the contract itself would be the justification for the reciprocal impoverishment and enrichment. It is not the extent of the respective loss and advantage which the doctrine intends to equalize; it seeks to prevent the loss of the plaintiff (expense, sacrifice or labour) out of which a benefit results in favour of the defendant, without any consideration whatever having proceeded from the defendant to the plaintiff. If there be some cause or consideration — and the French system goes extremely far in admitting the existence of a cause[22] — that would be sufficient to take the situation out of the application

[20] [1929] S.C.R. at pp. 690, 691, 692, 694.
[21] [1932] A.C. 295.
[22] C.C. art. 1140 is one instance.

of the doctrine. This cause may be a material consideration, but it may also be merely moral; and, in fact, it may be solely the personal satisfaction which the plaintiff derives from his action, as in the case of a gift. If you carried the doctrine to its fullest limit, there does not seem to be a doubt that it would mean that the donor, if he was so advised, might claim the benefit of the doctrine to revendicate what he has given to the donee. Such revendication, of course, will be admitted, under the French law, only upon the happening of well defined resolutory conditions. Except in such cases, the personal satisfaction which prompts a donor in making a gift to a donee is regarded as a cause or consideration sufficient to deprive him of the right to recover, which an extreme recognition of the doctrine of unjustified enrichment might otherwise have given him.

Then, there is an additional and final element necessary to bring the principle into operation; and that is that there must be no other remedy open to the plaintiff. If, for the purpose of obtaining compensation from the defendant who has been unjustly enriched to his detriment, he can rely upon any of the remedies already provided by the written law, he may not have recourse to the action provided in the case of unjustified enrichment. The existence of another remedy based upon the written law would be sufficient to defeat his claim for unjustified enrichment. He would be told that he ought to have resorted to the rules and actions already admitted in the codes and that his grievances could not be relieved through the expediency of the doctrine of unjustified enrichment.

But if all the elements essentially required happen to co-exist in a given situation, then unlike (as I venture to think) what might occur under the English system, the claim could not possibly be embarrassed by the preoccupation of presenting it to the courts in one of the accepted forms of action. There are no rigid formulas; there are no necessary forms, fictitious or otherwise, with which to bring an action before the courts in France or in Quebec. The legislator has devised a certain number of them; but he has also decreed that whenever the codes are silent and do not contain any provision for enforcing or maintaining any right or claim, any proceeding adopted which is not inconsistent with law or the provisions of the codes, is received and held to be valid.[23]

Although too much importance should not, in my view, be given to that feature of the question, the action taken for the

[23] Code of Civil Procedure, art. 3.

purpose of enforcing a claim resulting from unjustified enrichment is generally known as the action *de in rem verso*. The real scholars venture the opinion that it is wrongly named and that the proceeding has very little in common with the *actio* of the same name in the Roman law. They suggest that by its true nature it is much closer to the other Roman *actio* known as *condictio sine causa*. This academic controversy has only an historical interest. I repeat that the name given to it is of no practical importance, so long as we know what remedy is to be sought through it and that it will be received by the courts. Incidentally, the purport of this form of action was discussed by my then colleague, Mr. Justice Mignault, in the case of *Regent Taxi & Transport Company* v. *La Congregation des Frères Maristes*.[24]

May I come now to some applications of the principle in concrete cases; for, after all, that is the practical way of showing how it works.

Perhaps it might be well to begin by the cases for which the Civil Code already provides. They will furnish examples of particular instances accepted in the written law where the principle is embodied. Take the series of articles of the Code dealing with the right of accession over what becomes united and incorporated with a thing. The Code provides that the fruits produced by a thing only belong to the proprietor subject to the obligation of restoring the cost of the ploughing, tilling and sowing done by third persons.[25] The proprietor of the soil who has constructed a building or works with materials which do not belong to him must pay the value thereof; he may also be condemned to pay damages, if there be any; but the proprietor of the materials has no right to take them away.[26]

Let us now take the reverse situation : when improvements have been made by a possessor with his own materials upon the land of another. Under the Code, the right of the proprietor of the soil to such improvements depends upon their nature and the good or bad faith of the possessor. If they were necessary, the proprietor of the land cannot have them taken away. He must, in all cases, pay what they cost, even when they no longer exist; saving in the cases of bad faith, the compensation of rent, issues and profits. If they were not necessary, but were made by a possessor in good faith, the proprietor is obliged to keep them, if they still exist, and to pay either the amount they

[24] [1929] S.C.R. 650 at pp. 690, 691, 692.
[25] Art. 410.
[26] C.C. 416.

cost, or that to which the value of the land has been augmented. It is easy to see in this instance the influence of the principle of unjust enrichment.

But the Code goes still further, even to the extent of protecting the possessor in bad faith. If such a possessor has made the improvements, "the proprietor has the option either of keeping them, upon paying what they cost or their actual value, or of permitting such possessor, if the latter can do so with advantage to himself and without deteriorating the land, to remove them at his own expense." If, however, this cannot be done, then the improvements belong to the owner of the land without indemnification. Moreover, in every case, the owner of the land may always compel the possessor in bad faith to remove the improvements he has made.[27] In case the party in possession is forced to give up the land upon which he has made the improvements for which he is entitled to be reimbursed, he has a right to retain the property until such reimbursement is made, without prejudice to his personal recourse to obtain repayment.[28] There are other provisions of the same type in the same book of the Code.[29] The Quebec law of substitution gives rise to rules of a similar character.[30]

And now here is in the Code a very typical example of the adoption of the principle we have been discussing. Under the Code, minors (infants), interdicted persons and married women (except in the cases specified by law) are legally incapable of contracting. In this quality, they are admitted to be relieved from their contracts and the reimbursement of that which has been paid to them in consequence of these contracts during the minority, interdiction, or marriage, cannot be exacted from them unless — and note the embodiment of the doctrine of unjustified enrichment — "unless it is proved that what has been so paid has turned to their profit".[31] A payment is never valid if made to a creditor who is incapable by law of receiving it, "unless the debtor proves that the thing paid has turned to the benefit of such creditor."[32]

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[27] C.C. 417.

[28] C.C. 419.

[29] C.C. 430, 434, 435, 438, 473, 474 and 582, to which may be added arts. 729, 731 and 740.

[30] C.C. 947, 958 and 965.

[31] C.C. 1011.

[32] C.C. 1146. Several other instances could be given where the principle evidently underlies the articles of the Code governing the dealings of the married woman in respect of the community of property existing between her and her husband. C.C. 1279, 1296, 1303, 1304, 1308, 1376, 1382, 1397 and 1461.

Then, of course, we come to the chapter of quasi-contracts on the *negotiorum gestio*, where one, of his own accord, assumes the management of the business of another without the knowledge of the latter. The prescription of the Code is that he whose business has been well managed is bound to fulfil the obligations that the person acting for him has contracted in his name, to indemnify him for all the personal liabilities which he has assumed, and to reimburse him all necessary or useful expenses.[33] Under Quebec law, he who receives what is not due to him through error of law or of fact, is bound to restore it; or if it cannot be restored in kind, to give the value of it.[34] The application of this principle gives rise to a fasciculus of articles.[35] And see how the doctrine of unjust enrichment clearly underlies the concluding one of them :

> He to whom the thing (unduly received) is restored is bound to repay the possessor, although he were in bad faith, the expenses which have been incurred for its preservation.[36]

It is unnecessary further to pursue the enumeration. Traces of the same influence may be found in many other provisions of the Code, particularly those dealing with special contracts, such as lease,[37] deposit,[38] partnership,[39] and the case of the holder against whom the hypothecary action is brought. Under certain circumstances, he may be ordered to surrender the property which he holds "subject to his privilege of being paid what has been expended upon the immoveable, either by himself or by such of the persons from whom he derives his claim as are not personally bound to the payment of the hypothecary debt, ... with interest from the day when such expenditures were liquidated."[40]

But all the above examples are taken from the Code. In those cases, the source of the obligations therein prescribed is derived from what the Code acknowledges as a quasi-contract or from the operation of the law. They are embodiments in the written law of the principle of unjustified enrichment. They are not illustrations of the application of the doctrine which is the subject of this address and which, we must never forget, enters into play only when the situation of unfair enrichment

[33] C.C. 1046.
[34] C.C. 1047 and 1140.
[35] Arts. 1047 to 1052.
[36] C.C. 1052.
[37] C.C. 1040-1654.
[38] C.C. 1801.
[39] C.C. 1855-1867.
[40] C.C. 2072.

is created neither by contract, nor by delict or quasi-delict, or cannot be said to be the result of a quasi-contract recognized by the Code, or of an obligation arising from the operation of the law solely, and that is to say, of the written law.

It seems to be common ground that the general theory in respect to unjustified enrichment was accepted for the first time by the Cour de Cassation, in Paris (which is the equivalent of our Privy Council) in a celebrated *arrêt* rendered on the 15th of June 1892.[41] The facts were briefly these:[42] A tradesman had sold and delivered manure to a farmer on credit : and the farmer had dug it into the land. The farmer was only a tenant. He became insolvent and his tenancy of the farm was determined. The seller of the manure claimed the price of it from the landlord, on the ground that the value of the land had been increased thereby. The landlord disputed the claim, on the ground that the enrichment was not unjustified because the farmer had contracted to maintain and to improve the quality of the land. The Court of Cassation nevertheless held that the seller was entitled to recover.

In that instance, the court laid down the rule in the broadest way and gave as a reason for applying it the very fact that the situation was not covered by any article of the Code. One would have thought that the latter might have been a rather good ground why the action should have been dismissed, for the reason that, no obligation arising out of the written law, the court ought not to have recognized any on the part of the landlord towards the seller of the manure. Yet the court found that the whole matter involved a question of *équité*, or of natural justice, which should not be defeated by the sole fact that there appeared to be what was called elsewhere "a gap in the law". The court filled the gap.

From then on, the principle has been more and more recognized by the French legal writers and applied in the French courts. The formula expressed in the *arrêt* of 1892 was promptly found to be too wide; and it was gradually ironed out (if I may say), it was limited until it assumed the form which I have endeavoured to define in an earlier part of this address.

Let us pass to further illustrations :

Suppose the case of parents contracting with a teacher for the education of their children, and suppose the case where,

[41] S. 1893-1-281.—Note Labbé.

[42] I borrow the *resumé* of them from the article of R. J. A. David, *Unjustified Enrichment in French Law*, 5 Camb. L.J. 216.

when the time comes to pay the teacher, the parents have become insolvent. The French courts have decided that the teacher had the right to recover directly from the children.

Take another case. A woman works gratuitously for a man who has promised to marry her. Later on, marriage does not take place and the woman sues the man for the value of her services. She succeeded.

Then, here is another case : A genealogist, through researches which he carried out with reference to the estate of a domiciled Frenchman, and of which distant relatives of the deceased had taken possession, discovered that there were nearer relatives in the United States. He wrote to them about the estate without, of course, giving them any precise details, and he proposed to them an agreement whereby he should be given a share of the estate if he succeeded in having their rights recognized. The American heirs failed to reply to his letter; but, having themselves made researches through the intermediary of the French Consul, they found out all about the estate and, in the end, they were given the possession of it. The genealogist claimed indemnification from them, on the ground that they had unjustly enriched themselves at the expense of his labour. He was awarded 5000 francs, upon the ground that if it had not been for the fact that he had notified the heirs in the United States, they would not have come into the inheritance. The indemnity of 5000 francs covered not only the expenses of the genealogist, but a remuneration for his services.

Here is an instance which, I must say, I found rather extraordinary. A contractor took upon himself to install a lighting system in a certain town (*bourg*); and then he claimed an indemnity from the town for having done so. He was granted the indemnity, on the ground that he had thus spared an expense to the town community. I can imagine that there are a number of things which you and I might say about the wisdom of such a decision. How it was that the contractor was allowed to proceed with his work without anybody's interference, and why the town was not heard, when it said that the services of the contractor or his installation had never been requested and the town was just as happy without it. Nevertheless the claim was allowed, the motive being that the improvement was a necessary one which the town would have had to make and that it ought to indemnify the contractor who had carried it out and had thus avoided the expense to the municipality.

I may also recall the case of that firm of musical publishers who had a contract with the great composer Donizetti for the

publication of his works. After his death, they continued to publish them. The heirs of Donizetti, having become aware of the fact, recovered the profits made by the publishers in an action based upon the principle of unjust enrichment.

Now, in none of the above cases could an article of the Code be relied on for the actions brought and the claims recovered. It was purely and simply the application of the doctrine, independently of the written law. Of course, it need not be said that the doctrine will not be applied in opposition to an article of the Code. The doctrine does not provide a remedy against the hardships of a contract, or contrary to the prohibitions of the law. For example, as already mentioned, it could not be invoked and it would not be recognized to allow a creditor to recover a debt which is extinct by prescription. There is no doubt that a debtor who is relieved by prescription of the obligation to pay a debt probably enriches himself at the expense of the creditor; and in a certain sense he enriches himself unjustly, if that means without consideration. Yet, in the eye of the law, the debtor does not enrich himself without cause, for his justification is that his enrichment is the consequence of the prescriptions of the law.

I do not think I should multiply illustrations. I might have given instances where the doctrine was invoked before the courts and the right to recover was denied because one of the essential elements of the principle was not present in the case. But this would not advance our knowledge of this new doctrine. To appreciate the extent of its present stage of development, it is sufficient to state that, in France, at least, the courts will apply it when the facts embrace all the elements which I have mentioned, and will refuse to apply it when one of these essential elements is found wanting.

Perhaps I may add that the rule has now been adopted in several parts of Europe : Belgium, Luxemburg, Switzerland, Germany and Russia. It is expressed in an article of the German Civil Code and of the Swiss Federal Code, as well as in the law of the Soviet Republic. It is also to be found in the civil codes of Japan, Tunisia and Morocco. So that the latter countries have even gone further than France, where the principle is still a matter of pure jurisprudential development. It forms part of the draft of the Franco-Italian Code of Obligations.[43]

And as the general theory of unjustified enrichment is not incorporated in the Code Napoleon, neither is it embodied as a

[43] Art. 73.

principle of general application in the Civil Code of the Province of Quebec. Indeed, it cannot be said that it has yet been accepted by the courts of Quebec, although now and then one judge is likely to be inclined to support his reasons or *considérants* by a reference to the doctrine.

It has not yet received recognition from the higher courts, either the Court of Appeal of the province or the Supreme Court of Canada. These courts, so far, appear to have taken the position that if the principle is to be adopted, it should be inserted in the law by Parliament; and that it is not their function to legislate, at least when they are called upon to administer the Quebec civil law. There is, however, an example of a case where the principle evidently underlies the decision rendered by the court. This is the case of *Paquin* v. *Grand Trunk Ry. Co.*,[44] where, after an accident on the lines of the defendant railway company, the plaintiff, with other doctors, had given treatment to some of the injured, on the day of the accident. The services of some of the doctors had been retained, but not those of the plaintiff. It was, however, found as a fact that the doctors whose services had been retained were too few and that the plaintiff's intervention was such that if he had not been there, the railway company would have been compelled to call other doctors. It was held that the company had derived benefit from the plaintiff's services and that it ought to be ordered to compensate him for the treatments he had given. This seems to be a clear application of the doctrine of unjust enrishment, for no contract could be invoked by the plaintiff against the defendant; and the case was not covered by any text of the Code.

In conclusion, I would venture the opinion that the doctrine is undoubtedly attractive. It savours of the old praetorian jurisdiction. It is based upon a principle of natural justice. At a time when the tendency of the legislation is directed towards social conceptions, the doctrine may find its justification in its highly social character.

I have read somewhere that, in the English system, "it is dangerous to talk about natural justice or *aequum et bonum*, unless we are quite clear as to what we mean by those terms".[45] But we must agree that natural justice (*le droit naturel*) is indispensable to the juridical life. It stands at the basis of all judicial decisions, whether it has been introduced in the written

[44] (1896), Q.R. 9 S.C. 336.
[45] 5 Camb. L.J. at p. 227.

law or whether it is only regarded as a body of moral precepts which dominates the positive law. It is for me, less than anybody else, to suggest the idea that courts should advance ahead of parliament in accepting as sources of obligations principles which have not yet been incorporated in the codes or in the statutes. But *lex fit consensu populi*. The duty of legislative action is to meet new needs as they manifest themselves. To paraphrase a famous dictum : The logic of the law must yield to the logic of realities. And perhaps we should say that the broad rule against the retention of unjustified enrichment, surrounded by proper safeguards such as I have tried to outline before you, might be found a move in the right direction.

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