CASE COMMENTS

CONTRACT—UNJUST ENRICHMENT—PRESENT STATE OF DOCTRINE CONSIDERED AND APPLIED—BRITISH COLUMBIA

The judgment of Mr. Justice Brown in the Supreme Court of British Columbia Trial Division's hearing of *Estok* v. *Heguy*[1] concluded with the following words:

> Though I am far from being free from doubt, I consider that the present judicial trend justifies me in treating this as a case where I may properly follow Lord Wright and Coyne, J.A., and so charge the defendant with the net value of the improvements put on his land by the plaintiff.[2]

The object of this case comment is to determine whether Mr. Justice Brown's doubt was, or was not, justified. In order to do so, it is first necessary to examine the relevant facts.

The plaintiff, Estok, and the defendant, Heguy, entered into an agreement for the sale and purchase of certain land. A dispute later arose between the parties and an action was commenced by the plaintiff. In the words of Mr. Justice Brown:

> At the end of the short trial I felt constrained to find that the plaintiff and the defendant were never *ad idem* on the purported sale of land by the defendant to the plaintiff. Each was careless, but there are no circumstances to preclude either of the parties from denying that he had agreed to the terms of the other. *Consequently there is no contract.*
>
> The plaintiff, honestly thinking there was a contract, performed certain services which I find must have enhanced the value of the land. One of the things the plaintiff did was to deposit a substantial amount of manure on the land; with other husbandry this changed it from pasture to crop bearing land. The defendant says he was satisfied with the previous tilth. I find that the defendant has benefitted to the net extent of $350. The defendant, also thinking there was a contract, of course allowed the work to proceed. I impute no blame to either, or, if blame must be found, I hold that they were equally careless.
>
> In view of my findings, the plaintiff wants to amend, to claim for the value of the improvements by which the defendant has been *unjustly enriched.*[3]

Mr. Justice Brown commenced his judgment with the retrospective analysis of the law of quasi-contract or unjust enrichment, and prefaced that analysis with this statement:

> . . . the difficulty is that I am not in a position to say decisively that the doctrine of unjust enrichment, at least in a form that would help the plaintiff, is part of our law.[4]

The learned Judge had no doubt that the doctrine existed in some form. It is submitted that no issue should be taken with him on this point since the many judicial references to and treatises on the doctrine make a mockery of the isolated occasions on which the complete rejection of the same has been voiced. The true status, it is submitted, is set out by Friedmann, who states:

> The principle of unjust enrichment . . . is not unknown to English law, but contained in a number of different principles of legal liability spread over the whole of English law.[5]

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1 (1963) 43 W.W.R. 167.
2 *id.* at 173.
3 *id.* at 167-68.
4 *ibid.*
5 Friedman, *The Principle of Unjust Enrichment in English Law* (1938) 16 Can. Bar Rev. 365, 383.

The actual problem to be faced in this area is the determination of the basis upon which the doctrine, and consequently its application, rests. The conflict which has marked the development of the doctrine is best stated by Hanbury:

> There are two views of the basis of liability in quasi-contract.
> (a) The first which may be styled the orthodox view, is that the scope of the liability in quasi-contract is co-extensive with the range of contract that can be implied by law.
> (b) The other view is that the liability is based on the theory of unjust enrichment, that is to say, that whenever A. is unjustifiably enriched at the expense of B., B. can compel his ill-gotten gains out of him.[6]

Mr. Justice Brown relied heavily on the judgment of Mr. Justice Coyne of the Manitoba Court of Appeal in *Morrison* v. *Can. Surety Co.*,[7] and cited segments of the opinion at some length. Mr. Justice Coyne gave a relatively comprehensive dissertation on the true basis of quasi-contractual liability, referring to a series of decided authorities and legal essays which led him to ultimately conclude that unjust enrichment and not implied contract was the correct view to be followed. This view was adopted by Mr. Justice Brown and it is therefore imperative that Mr. Justice Coyne's reasoning and the authorities he relied on be examined here.

The starting point in the progression was the opinion of Lord Mansfield in *Moses* v. *Macferlan*:

> It [the action for restitution] lies only for money which, *ex aequo et bono*, the defendant ought to refund. . .[8]

Lord Wright relied on these words and declared that the equity to which Lord Mansfield referred was not that which is administered by Chancery, but the Roman concept of equity, which we know as natural justice. In his judgment in *Fibrosa Spolka Akcyjna* v. *Fairbairn, Lawson, Combe, Barbour Ltd.*,[9] Lord Wright states:

> It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep.[10]

This approach has achieved a high degree of popularity with the majority of the leading legal essayists.

Winfield defines quasi-contract as:

> Liability, not exclusively referrable to any other head of law, imposed upon a particular person on the ground that non-payment of it would confer on the former an unjust benefit.[11]

but qualifies this definition by adding:

> With respect to my own definition . . . it will soon be perceived that quasi-contractual remedies have also been applied to relations which by no amount of ingenuity can be reckoned as quasi-contractual.[12]

The prominent legal commentator, A. L. Goodhart, holds a similar opinion:

> The branch of the law which was formerly called quasi-contract has recently tended to change its name to unjust enrichment. Its new name is useful because it emphasises the moral origin of the various rules comprised under this heading. It is based on the principle that a man who has acquired a benefit at the expense of another ought not to retain it.[13]

6 Hanbury, *Modern Equity*, 669-70 (8th ed. 1962).
7 (1954) 12 W.W.R. (N.S.) 57.
8 (K. B. 1760) 2 Burr. 1005, 1012; 97 E.R. 676, 680.
9 (H.L.(E)) [1943] A.C. 32.
10 *id.* at 61.
11 Winfield, *Quasi-Contract*, 127 (1952).
12 *id.* at 3.
13 Goodhart, *English Law and Moral Law*, 127 (1956).

The unjust benefit theory has been attacked on the ground that quasi-contractual remedies can only issue where there is privity of contract between the parties in the sense that a contract might be implied by law. Yet the reported cases do not bear this criticism out and the prevalent contemporary attitude is exemplified by the words of Paton: "The theory of implied contract still has supporters but it really only pushes the difficulty a stage further back",[14] and of Brierly: "The proof of unjust benefit is at least as simple and intelligible as the pursuit of a fictitious contract."[15]

The majority viewpoint and the position adopted by Mr. Justice Coyne and subsequently by Mr. Justice Brown is summed up by Winfield:

> . . . though we realize that the implied contract theory is still prevalent, we venture to adhere to the view that it is not the true basis of quasi-contractual obligations. That basis might be described as *'aequum et bonum'* or 'natural justice' or 'what is reasonable'[16]

In view of these persuasive excerpts and the increasing number of decided authorities which tend to invoke them and thereby render them more authoritative, it is submitted that in so far as he adopted the unjust benefit theory, Mr. Justice Coyne was correct and Mr. Justice Brown can be lauded for following his lead. It is at this point, however, that the learned Justice's decision begins, it is submitted, to weaken.

Having thus satisfied himself that the doctrine of unjust enrichment is accepted in Canada, and that the true basis of the doctrine is unjust benefit, Mr. Justice Brown narrows his pursuit by stating that

> The aspect of quasi-contract that comes nearest to the situation in the case is the law that money paid under mistake of fact is generally recoverable.[17]

But rather than develop the analogy which he draws between money paid under mistake and manure spread under mistake, the learned Justice refers to the *Morrison* case,[18] and an Alberta case, *Reeve* v. *Abraham*.[19] The latter case is a decision by Chief Judge Buchanan sitting as a Justice of the Supreme Court and, in stating his judgment the Chief Judge relied almost solely upon a *dictum* from Mr. Justice Coyne in the above-mentioned *Morrison* case. It is here submitted that this *obiter* excerpt has no basis in English law and has not been introduced into Canadian law by way of legislation. The following analysis will bear out this opinion, and indicate the failure of Mr. Justice Brown to truly substantiate his decision in the case which forms the topic of this comment.

The statement from the *Morrison* case quoted by Chief Judge Buchanan is:

> In the lengthy series of situations where in the opinion of Coyne, J.A. *quasi*-contract applies falls 'improvement of land under mistake.'[20]

A reference to the source of this excerpt reveals a list of quasi-contract situations set out by Mr. Justice Coyne. Improvements to land under mistake are listed along with *quantum meruit*, surety's right to indemnity, and other classic restitution cases. Directly following this para-

14 Paton, *Jurisprudence*, ss. 106-107, p. 951 (2d ed. 1946).
15 *Anson on Contract*, 379 (20th ed. Brierly 1952).
16 Winfield, *op. cit. supra*, at 20.
17 *Estok* v. *Heguy*, *supra*, n. 1, per Brown J., at 171.
18 *Supra*, n. 7.
19 (1957) 22 W.W.R. 429.
20 *Id.* at 431.

graph is the direction "see Munkman, p. 20".[21] An examination of that reference text reveals a classification table which the author has developed in order to simplify his study of the doctrine of quasi-contract. At the nether end of this table is the main heading "Recompense" under which are three sub-headings, the last of which is "Improvements to land". Further reference, this time to the index of the volume, reveals the subject title "Improvements to land, 95-6". On those pages the following statements are set out:

> Improvements to land carried out by a limited owner or tenant are benefits conferred on others interested in the land, and any right to recover their value, in the absence of an agreement, is quasi-contractual.[22]

Munkman defines a limited owner as a tenant for life and also states that "at common law any right to claim for the value of the improvements was excluded."[23] The only right to claim for the value in such cases is given, in England, by the Settled Land Act[23a] and the Agricultural Holdings Act,[23b] and these rights require that notice be given to the landlord. Such rights, it is submitted, arise from notice and acceptance by the person to benefit under a revision of the land at some future time. They do not apply to cases of improvement to land under mistake.

From what source, then did Mr. Justice Coyne derive his *dictum*? Other authorities on the subject of quasi-contract also operate to point up the error of the *dictum*. Neither Winfield nor Cheshire and Fifoot mention improvements to land, either as a subject to which quasi-contractual principles apply *per se*, or as an example of the doctrine at work under any other heading. The *coup de grace* is supplied by Friedmann:

> Improvements made on another's land constitutes in German law, an instance of a claim for unjust enrichment. In English law it appears that such claims must be based on special statutory legislation.[24]

Even in the United States, where restitution is highly developed, the position of the mistaken improver is not an enviable one. Dawson indicates that American law on the matter offers "various kinds of defensive relief but no affirmative recovery".[25] This is borne out by the pertinent sections of the American *Restatement on Restitution*:

> s. 42 . . . Except to the extent that the rule is changed by statute, a person who, in the mistaken belief that he . . . is the owner, has caused improvements to be made upon the land of another, is not thereby entitled to restitution from the owner for the value of such improvements; but if his mistake was reasonable, the owner is entitled to obtain judgment in an equitable proceeding or in an action of trespass . . . only on condition that he makes restitution to the extent that the land has been increased in value by such improvements . . .[26]

It is evident that the section operates in cases where the rightful owner brings an action to recover the land, but might not aid a party commencing the action, as is the case in *Estok* v. *Heguy*.

If the foregoing analysis is accepted as correct, then the *obiter dictum* of Mr. Justice Coyne, is incorrect and therefore the decisions in *Reeve* v. *Abraham* and *Estok* v. *Heguy* cannot rely upon it as their basis. Chief Judge Buchanan, in the *Reeve* case, relied upon the *Morrison* case as his sole authority. He did not attempt to draw the analogy between

21 *Supra*, n. 7, at 81.
22 Munkman, *Quasi-Contracts*, 95-96 (1950).
23 *ibid.*
23a (Imp.) 15 & 16 Geo. 5 c. 18 s. 87.
23b (Imp.) 13 & 14 Geo. 5 c. 9 s. 1, repealed 10 & 11 Geo. 6 c. 48 ss. 22(3), 110, 13th Sched.
24 Friedman, *loc. cit. supra*, at 379.
25 Dawson, *Unjust Enrichment*, 133 (1951).
26 American Law Institute, *Restatement on Restitution*, 167. (1937).

the situation of improvements and money paid under mistake as did Mr. Justice Brown in *Estok* v. *Heguy,* but it is submitted that the facts in the *Reeve* case lend themselves to the statutory land improvements cases in England and the "he who seeks Equity must do equity" situations which arise under the latter portion of s. 42 of the Restatement as set out above. Chief Judge Buchanan, found that the parties in the *Reeve* case were parties to a lessee-lessor arrangement. In *Estok* v. *Heguy,* the court found no agreement of any kind. In the *Reeve* case the plaintiff was the true owner of the land and was seeking to recover the land despite the fact the he had notice that the improvements were being made and actively encouraged the defendant to make them. This in effect, should operate as a form of estoppel against the plaintiff. In *Estok* v. *Heguy* the defendant did nothing to encourage the plaintiff in altering the land since he was as innocently mistaken as to the effect of the contract as was the plaintiff. The two cases are distinguishable, in that the *Reeve* case contained an element of inducement by the plaintiff to deceive the defendant into believing he held a lease option on the land. Nothing of this nature existed in the *Estok* case.

How then should Mr. Justice Brown's decision have been developed in order that the end result might be justified in law? It was not a case of *quantum meruit,* which requires an understanding on the part of the improver that he is benefitting the owner and that he will be compensated for his efforts and expenditures. Nor is it a claim for money paid in pursuance of a void contract, since that would only lie for the recovery by Estok of the purchase price of the land, which recovery was not disputed before the bar. But might not the form of recovery in the latter action be extended to envelop the present dispute? Might it not be said that Estok, in expending the money on the land because be believed it was his land, is in no different position than if he had paid the money to Heguy believing him to be someone else and Heguy had spent the money on improvements to his own land? That Estok is not making a voluntary payment is obvious for he had no intention of benefitting Heguy, and had what the American cases refer to as a "color of title". The foregoing analogy is supported by statements from two English cases. In *Continental Caoutchouc Co.* v. *Kleinwort,* the Master of the Rolls said:

> It is clear law that *prima facie* the person to whom money has been paid under a mistake of fact is liable to refund it, even though he may have paid it away to third parties in ignorance of the mistake.[27]

The decision in *Kelly* v. *Solari*[28] supports the view that money paid under circumstances such as existed in the *Estok* case is recoverable.

Mr. Justice Brown failed to follow through on his analogy because he was eager to base his decision on what appeared to be an accepted theory, that is, that recovery will lie for improvements made to land under mistake. As it now stands, the judgment is weak because it does not truly justify its own findings. If Mr. Justice Brown, it is submitted with respect, had shown a measure of judicial valor, rather than attempting to anchor his opinion to that of Chief Judge Buchanan and Mr. Justice Coyne, he would have avoided the vague and unconvincing continuity which detracts from the value of his judgment.

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27 (1904) 90 L.T. 474, 476.
28 (1841) 9 M. & W. 54, 152 E.R. 24.

The case does, however, serve to add to the ever growing list of authorities which support the unjust enrichment theory as a basis for awarding compensation and recompense in such circumstances. It seems ridiculous to seek privity of contract or at least situations in which a fiction of contract might be implied when a great many of the cases in which the relief of unjust enrichment is sought cannot lend themselves to such legal contortions but merit relief of some kind. The best approach is that which requires only one step, with two components. The criterion should be: is there an enrichment; and is it unjust that the defendant retain it without making restitution?

In *Estok* v. *Heguy* it was found that the improvements did enhance the value of the land. While it is difficult to criticize the court in that case because of the meager facts presented in the report, in the abstract it might be argued that this is not enough to warrant a decision for the plaintiff. The increase in value must enrich the defendant. If in the *Estok* case the defendant had pursued dairy farming prior to the abortive sale, it could not be said that the now arable land was an enrichment to him even though its general market value had been increased, since he would be required to reseed it to pasture in order to benefit from it. the claim of Heguy that he was "satisfied with the previous tilth"[29] may well have had some merit. The fact that the plaintiff improves the land for his purpose does not necessarily mean that it is an improvement which enriches the defendant, and it is submitted that if this enrichment to the defendant cannot be shown, no relief should be granted. Even if it may be shown to be an enrichment to the defendant, the second test of whether or not it is unjust must be met. There is, it is submitted, some merit to the argument that as between the two innocently mistaken parties in the *Estok* case, the plaintiff should bear the loss since he made the improvement in order that he might benefit from the improved produce to be taken from the land and did benefit from that produce. Why should the defendant, who sold the land to obtain capital, now be faced with an expenditure which he himself would not have made? As the notes in the American Restatement explain it:

> The reason for the rule . . . which is harsh to the one making the improvements by mistake, is that in many cases it would be still more harsh to require the one receiving the benefits to pay therefor.[30]

Unjust enrichment is a doctrine which fills a need in the common law. It is the essence of justice, but like all precious things it must be used with great care lest its value be diminished by abuse.

Mr. Justice Brown's doubts were, it is submitted, not entirely justified, and it is unfortunate that his failure to remove them has rendered his decision in *Estok* v. *Heguy* of less legal import than might otherwise have been the case.

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[29] *Supra*, n. 1, at 168.
[30] *Supra*, n. 26.