
Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 36
Number 2 *Symposia—Honor thy Mother & Father: Symposium on the Legal Aspects of Elder Abuse and Second Remedies Forum: Restitution*

Article 8

1-1-2003

Unjust Enrichment, Pursuance of Self-Interest, and the Limits of Free Riding

Daniel Friedmann

Follow this and additional works at: https://digitalcommons.lmu.edu/llr

 Part of the Law Commons

Recommended Citation

Daniel Friedmann, *Unjust Enrichment, Pursuance of Self-Interest, and the Limits of Free Riding*, 36 Loy. L.A. L. Rev. 831 (2003).
Available at: https://digitalcommons.lmu.edu/llr/vol36/iss2/8

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

UNJUST ENRICHMENT, PURSUANCE OF SELF-INTEREST, AND THE LIMITS OF FREE RIDING

*Daniel Friedmann**

I. THE INDEFINITENESS OF THE CONCEPT OF UNJUST ENRICHMENT

The notion of unjust enrichment has, almost since its inception some two thousands years ago, caused innumerable difficulties and has led on numerous occasions to unsatisfactory results. In the words of Lord Dennnig: "This conception is too indefinite to be stated as a principle of law."[1] Professor Dawson stated, "[I]t is obvious that the adoption of this principle as a 'rule' of law would carry us far afield," and that "once the idea [of prohibiting enrichment through another's loss] has been formulated as a generalization, it has the peculiar faculty of inducing quite sober citizens to jump right off the dock."[2]

Nevertheless, the *Restatement of the Law of Restitution* adopted this principle and stated broadly that "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other."[3]

The tentative draft of the *Restatement (Second) of Restitution* opted for a more concrete statement of the law by providing that the duty to make restitution arises where a benefit was received either through "an infringement of another person's interest, or of loss

---

* Danielle Rubinstein Professor of Comparative Private Law, Tel-Aviv University; Visiting Professor, Fordham University School of Law. This Article was originally included in a Festschrift in honor of Professor Arthur von Mehren. The Festschrift was edited by Symeon C. Symeonides and James Nafziger and published by Transnational Publishers. A number of changes were introduced. I am grateful to Doug Rendleman for his comments.

1. SIR ALFRED DENNING, THE CHANGING LAW 65 (1953).
2. JOHN P. DAWSON, UNJUST ENRICHMENT 7–8 (1951).
3. RESTATEMENT OF THE LAW OF RESTITUTION § 1 (1937).

suffered by the other . . . ."[4] This definition apparently replaces the very term, "unjust enrichment," used by the first *Restatement* to explain the basis of recovery. The words "unjust enrichment," omitted from the first part of the new section one, only appear at the end of that section. It states that where the conditions enumerated in the first part have been fulfilled, restitution is owed "in the manner and amount necessary to prevent unjust enrichment."[5] It is thus a modern attempt to grapple with the ancient dilemma inherent in the concept of unjust enrichment. However, this provision was not adopted and the new *Restatement (Third) of Restitution and Unjust Enrichment, Discussion Draft* section one, reverts, with slight modifications, to the language of the *Restatement of the Law of Restitution* and provides that "[a] person who is unjustly enriched at the expense of another is liable in restitution to the other."[6]

The purpose of this Article is to examine some of the difficulties raised by the broad concept of unjust enrichment and the attempt to limit its application via the rule that denies liability for benefits that the plaintiff conferred upon others when acting in pursuance of his own interests.

II. THE DIFFICULTIES IN THE EARLY APPLICATION OF THE UNJUST ENRICHMENT PRINCIPLE

The present Section is devoted to a comparative discussion of some of the difficulties, which were confronted by Anglo-American law and French law shortly after the adoption of the general principle of unjust enrichment. The issues involved are of continuous interest since they highlight some of the basic problems inherent in the unjust enrichment principle. In Anglo-American law, the adoption of the general principle of unjust enrichment is attributed to Lord Mansfield's celebrated decision in *Moses v. Macferlan.*[7] The plaintiff Moses endorsed to the defendant Macferlan four promissory notes for thirty shillings each.[8] The parties expressly agreed that

4. RESTATEMENT (SECOND) OF RESTITUTION § 1 (Tentative Draft No. 1, 1983).

5. *Id.*

6. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (Discussion Draft 2000).

7. 97 Eng. Rep. 676 (K.B. 1760).

8. *See id.*.

Moses would not be liable for the payment of the notes nor suffer in any way by reason of his endorsement.[9] But Macferlan, in breach of the agreement, sued Moses in the Court of Conscience upon these notes.[10] In the first action, an attempt was made on Moses' behalf to rely upon the agreement.[11] This defense was rejected however, as the court held that it had no power to decide upon it.[12] Following this decision, Moses paid the four notes and brought an action to recover the money that he was compelled to pay.[13]

In allowing the claim, Lord Mansfield used very broad language.[14] In fact, his judgment represents an attempt to turn the form of action of *indebitatus assumpsit*, already well established in his days, into a gate through which any claim based on unjust enrichment could pass.[15] Lord Mansfield stated in essence that it suffices if the plaintiff states in his claim "that ex aequo & bono, the money received by the defendant, ought to be deemed as belonging to [the plaintiff]," and that the gist of the action is that "the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."[16]

It is perhaps one of the paradoxes of legal history that the decision, often regarded as the cornerstone of the law of restitution, has generally been regarded—at least in its country of origin—as wrong on the merits, on the ground that it is inconsistent with the doctrine of res judicata and has, in fact, been overruled.[17] The judgment which Macferlan won was never reversed and *Moses v. Macferlan* was said to be "a *de facto* reversal of, the judgment of a

---

9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.* at 676–77.
14. *See id.* at 678–81.
15. *See* DAWSON, *supra* note 2, at 11–12.
16. *Moses*, 97 Eng. Rep. at 679, 681.
17. *See* Marriot v. Hampton, 101 Eng. Rep. 969 (K.B. 1797). It has, however, been pointed out that *Marriot* is distinguishable. In *Marriot*, the plaintiff failed to prove his defense in the first trial because he lost his receipt. But in *Moses*, the plaintiff was not given the opportunity to raise his defense because the court considered that it had no power to decide upon it. In this respect he did not have his day in court. *See* KENNETH H. YORK ET AL., REMEDIES: CASES AND MATERIALS 185 (4th ed. 1985); Comment, Moses v. Macferlan—*Is it Sound Law?*, 24 YALE L.J. 246 (1914–15).

competent court . . . ."[18] Still, Lord Mansfield's statements continue to exert their influence, although the decision itself has been dissented from.

The reaction against Lord Mansfield's approach is well known. Some of England's greatest judges commented: "[W]e are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled 'justice between man and man.'"[19] The whole development of this branch of the law was described as a "history of well-meaning sloppiness of thought."[20] Indeed, the doctrine enunciated by Lord Mansfield was said to be discarded. In a case decided as late as 1977, Lord Diplock still maintained that English law merely provides "specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based upon the civil law,"[21] but it does not recognize a general principle that allows recovery on the basis of unjust enrichment.[22] A recent decision of the House of Lords[23] indicates that England has at long last embraced the principle of unjust enrichment after having for some time moved in this direction. Lord Mansfield was thus vindicated. But the severe resistance to his approach and the fact that it took about two hundred years of fierce reaction until its acceptance reflect the difficulties inherent in this general principle. Indeed, those who strive to restrict Lord Mansfield's generalization can always point out the very decision in *Moses v. Macferlan* as an example of how reliance upon a vague notion of justice can lead the court astray.

It is interesting to compare this development to that which occurred in French law. The French civil code (the Code Napoleon)

---

18. LORD GOFF OF CHIEVELEY & GARETH JONES, THE LAW OF RESTITUTION 864 (Gareth Jones ed., 5th ed. 1998).

19. Baylis v. Bishop of London, [1913] 1 Ch. 127, 140 (C.A. 1912) (per Hamilton, L.J.).

20. Holt v. Markham, [1923] 1 K.B. 504, 513 (C.A. 1922).

21. Orakpo v. Manson Investment Ltd., [1978] A.C. 95, 104 (H.L. 1977).

22. *See id.*; Woolwich Bldg. Soc'y v. Inland Revenue Commissions [1993] A.C. 70, 196–97 (H.L. 1992) (per Lord Browne-Wilkinson); GOFF & JONES, *supra* note 18, at 11–15.

23. Lipkin Gorman (a firm) v. Karpnale Ltd., [1991] 2 A.C. 548 (H.L.); *see also* Banque Financière de la Cité v. Parc (Battersea) Ltd., [1998] 2 W.L.R. 475, 479–80 (H.L.) (per Lord Steyn); GRAHAM VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 49 (1999).

contains a chapter on quasi contracts which deals with two basic situations.[24] One is the management of another's affairs without mandate (*negotiorum gestio*) and the other relates to the recovery of payments made under mistake.[25] There is, however, no provision in the code that adopts the general principle enjoining enrichment at another's expense. A narrow approach to the interpretation of the code hindered the French courts for nearly a century from adopting a principle unsupported by legislative text. It was only in 1892, some 130 years after *Moses v. Macferlan*, that the Cour de Cassation rendered its revolutionary decision in the case of *Patureau-Miran v. Boudier*.[26] In that case, the plaintiffs supplied fertilizers to the defendant's lessee.[27] The lessee used the fertilizer to improve the crop but failed to pay for it.[28] He also failed to pay the rent and was evicted by the landlord (the defendant), who thus acquired possession of the crop improved by the use of the fertilizer supplied by the unpaid plaintiffs.[29] The plaintiffs' claim against the landowner was based upon his enrichment from the crop improved by the fertilizer.[30] In allowing the claim the court overcame the difficulty, which stemmed from the absence of a legislative provision in the code, by stating:

> This action derives from the principle of equity (equité) that enjoins the enrichment at another's expense, and as it has not been ordered by any legislative text, its application is not subject to any specific condition; it suffices . . . that the plaintiff . . . proves that he conferred a benefit by a sacrifice or personal act . . . to the person whom he sues . . . .[31]

---

24. *See* CODE CIVIL [C. CIV.] art. 1371–77 (Fr.).

25. *See id.*

26. Cass. req., June 15, 1892, S. Jur I 1893, 1, 281, note M. Labbé. For a detailed discussion of this case, see DAWSON, *supra* note 2, at 100–05; Barry Nicholas, *Unjustified Enrichment in the Civil Law and Louisiana Law*, 36 TUL. L. REV. 605, 622–46 (1962).

27. *See* Nicholas, *supra* note 26, at 622.

28. *See id.*

29. *See id.*

30. *See id.*

31. *Boudier*, S. Jur I. 281 (translation by the author); *see* DAWSON, *supra* note 2, at 102; *see also* Nicholas, *supra* note 26, at 622 (quoting from the text of the case).

The *Boudier* case raised considerable difficulties. The plaintiffs had a contract with a third party (the lessee) against whom they obviously had a claim for the price of what they supplied him. The unjust enrichment claim was predicated on the ground that while the plaintiffs remained unpaid, the defendant was incidentally enriched by the plaintiffs' performance.[32] The problem of recovering for such incidental or indirect enrichment is discussed later.[33] In the present case, however, there was an additional obstacle to recovery. The source of the defendant's enrichment was his contract with his lessee. How then can his enrichment be unjust? Indeed, the decision is not in line with modern French law, under which such enrichment is not without legal cause. The source of the enrichment is the contract with another party, and this contract provides adequate "cause" (or ground) justifying the enrichment.[34] The only possible explanation of *Boudier* lies in the fact, not mentioned in the judgment itself, that in the account drawn between the landlord (the defendant) and the evicted tenant, the tenant was credited with the value of the crop from which the cost of the fertilizer had been deducted (possibly because the parties assumed that the defendant would have to pay for it).[35]

Despite the large differences in French and English law on the subject, it is interesting to note the similarities in the development of this branch of the law. French law is codified. English law is not. In both legal systems, however, this branch of the law has its origin in a landmark court's decision, not in a legislative provision. The leading decision, which in each of these legal systems laid the foundation of the law of unjust enrichment, is highly problematic on the merits. *Moses v. Macferlan* is regarded in England as having been wrongly decided, while *Pantureu-Miran v. Boudier* is at best explicable on the basis of a fact that the decision failed to mention. In both instances, the importance of the decision does not lie in the specific application of the rule, but in the general doctrine pronounced in the broadest possible terms. Common to both

32. *See* Nicholas, *supra* note 26, at 622.

33. *See infra* Section V.G.

34. *See* FRANÇOIS TERRÉ ET AL., DROIT CIVIL—LES OBLIGATIONS 899–900 (7th ed. 1999); Nicholas, *supra* note 26, at 622–33.

35. *See* Nicholas, *supra* note 26, at 622–33.

decisions is the emphasis upon the term justice or its synonyms ("natural justice" and "equity" in *Moses v. Macferlan* and "equité" in *Boudier*) as the basis of recovery.[36]

There is also considerable similarity in the reaction to these two leading cases. The English reaction to *Moses v. Macferlan* was already mentioned.[37] In France, there were also serious misgivings regarding the adoption of a nebulous principle that might undermine legal stability.[38] The incorporation of a vague concept of justice as part of a legal principle seemed particularly frightening.[39] While the general principle enjoining unjust enrichment became part of French law,[40] doubts regarding the adoption of such an abstract concept of justice are manifested in the severe restrictions developed by the French courts for the application of the doctrine of unjust enrichment. The unjust enrichment claim is "subsidiary"—it is conditional upon the absence of another cause of action (in torts, contracts or quasi contracts as defined by the code), and the enrichment must be "without legal ground" ("*sans cause*").[41] Another requirement is a loss or an "impoverishment" ("*appauvrissement*") of the plaintiff as against the defendant's enrichment.[42] In addition, the claim is excluded where the plaintiff acted at his risk for his own benefit.[43] These limitations have generally been adopted by other legal systems that follow the French legal tradition.[44]

The principle of unjust enrichment was adopted in section 812 of the German Civil Code (BGB), which avoided the use of the term "unjust" enrichment and speaks instead of enrichment "without legal

---

36. *Moses*, 97 Eng. Rep. at 678; *Boudier*, S. Jur I. 281.

37. *See supra* notes 17–23 and accompanying text.

38. *See* Nicholas, *supra* note 26, at 622–46.

39. *See id.*

40. *See id.*

41. *See* TERRÉ ET AL., *supra* note 34, at 898–902.

42. *See id.*

43. *See id.* For a long time it has also been considered that the claim is only available if there has been no fault on the plaintiff's part. However, this limitation upon the right of recovery has been recently watered down by the Cour de Cassation. It now seems that only fraud or severe fault (*faute lourde*) would preclude recovery. *See* TERRÉ ET AL., *supra* note 34, at 900–01.

44. *See e.g.*, REVISED STATUES OF QUEBEC [R.S.Q.] (Can.) (following French law tradition as foundation).

ground" ("*ohne rechtlichen grund*").[45] This terminology shifts the emphasis from morality (just or unjust) to the seemingly safer realm of the law, with which lawyers are expected to be better acquainted. The term is similar to the one used in modern French law that speaks of "enrichment without legal cause" ("*enrichissment sans cause*"). Nevertheless, article 812 of the BGB is worded in broad terms, and German law imposes a number of restrictions upon its application. One restriction, which has little basis in the language of the code, is that the enrichment must be "direct."[46] Another restriction relates to the priority of the "performance restitution," the *Leistungskondiktion* (the claim to recover the value of performance rendered by one party to the other without legal ground or on the basis of a legal ground that subsequently failed).[47] When this claim is available, it excludes other potential restitutionary claims. I do not propose to discuss the position of German law in any great detail. For our purposes, it suffices to point out that it also developed rules that led to the containment of the general principle. Thus, under German law, the claim in a case like that of *Boudier* would be denied. The plaintiffs, the fertilizer suppliers, performed vis-à-vis the tenant who was the other party to their contract. The enrichment of the defendant (the landowner) was therefore "indirect" and a claim in restitution against him would be excluded.[48]

In this respect, American law is unique. Section one of the *Restatement of the Law of Restitution* adopted the general principle in the broadest possible terms.[49] No doubt its application is subject to limitations such as denial of recovery to a "volunteer." Nevertheless, in its American version, the principle is extremely broad, flexible, and open-ended. Indeed, American law never experienced the struggle which other legal systems evidenced to confine the general principle, if not to eliminate it altogether. Still,

45. BÜRGERLICHES GESETZBUCH (Civil Code) [BGB] § 812 (F.R.G.).

46. *See* John P. Dawson, *Indirect Enrichment*, *in* 2 IUS PRIVATUM GENTIUM 789 (Ernst von Caemmerer et al. eds., 1969); Nicholas, *supra* note 26, at 611; Niall R. Whitty, *Indirect Enrichment in Scots Law*, 1994 JURID. REV. pt. 1, at 200, pt. 2, at 239.

47. *See* BGB § 812 (F.R.G.).

48. *See* Gerhard Dannemann, *Unjust Enrichment by Transfer: Some Comparative Remarks*, 79 TEX. L. REV. 1837, 1845–46 (2001).

49. *See supra* note 3 and accompanying text.

the difficulties encountered in other legal systems demonstrate the problem inherent in this attractive, though often illusive, concept of unjust enrichment.

The English legal system, which for many years confined recovery in restitution to specific categories, was not required to contend with this issue.[50] However, it is hardly surprising that the recent adoption of the general principle brought in its wake misgivings regarding its seemingly unlimited potential and calls for rules to restrict its application.[51] In the Sections that follow, I examine some aspects of this issue.

III. THE INHERENT LIMITATIONS ON THE PRINCIPLE OF UNJUST ENRICHMENT

The principle of unjust enrichment is first and foremost limited by the notion that many benefits are to be attributed to the very existence of society, rather than to the individual who facilitated their gain. It is our understanding that living in society entails obligations and produces benefits. Many of these benefits are free because of our expectations regarding the advantages that follow from the existing social order and human activity in organized societies. These expectations relate not merely to benefits that stem from governmental activity, but also to benefits deriving from the activities of individual parties. In legal terms, the denial of recognition to some interest and the limitation imposed upon the ambit of others reflect these expectations.

Justice Brandeis once stated that "the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use."[52] The creator of a novel idea, unprotected by a patent or a copyright, who publicizes it, has no remedy against those who benefit from its use. Moreover, even where the idea or the invention is legally protected, such protection will be limited in its ambit. The person who first wrote a detective story may be protected against the copying of his plot. However, he has no claim against

50. *See* Dannemann, *supra* note 48, at 1843.

51. *See* Ross Grantham & Charles Rickett, *On the Subsidiarity of Unjust Enrichment*, 117 LAW Q. REV. 273, 273–75 (2001).

52. Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918).

those who follow his trail and write stories in the same genre, just as Columbus would have no claim against the multitudes who benefited from the discovery of America.

The limitations on the ambit of protection granted to recognized interests are not confined to intellectual property. The protection of traditional tangible property is also subject to severe limitations. These limitations upon the interest of individuals derive from the need to maintain a sphere of freedom to others and also from the notion that some of the benefits are to be attributed to the very existence of society, rather than to the individual owner. They are, therefore, free for every member of society to enjoy. Hence, where one person derives a benefit from a protected interest of another, no restitution is allowed if the benefit is derived in a manner that is beyond the ambit of protection granted to that interest. For example, suppose that customers going to watch a show in *X*'s building buy on their way ice cream in *Y*'s shop that is located nearby. Although *Y* benefits from the activity that *X* conducts on his property, X has no right of action against *Y*. The protection granted to *X*'s ownership does not extend to the business done by *Y* outside the border of *X*'s property.

Broadly speaking, there is no unjust enrichment where property increases in value as a result of market fluctuation. This rule applies irrespective of whether the increase in value results from natural causes, from lawful transactions in property belonging to others, or from some other activity of market participants. This rule of the law of restitution is the counterpart of the tort rule under which, in the opposite case, the owner has no cause of action for adverse market fluctuations leading to a decline in the value of his property. It is a mere *damnum sine injuria.*

Thus, suppose that as a result of a prolonged drought, the price of water goes up, and consequently, the value of land with wells having sufficient water increases, while the value of other lands decreases. The change in relative price does not amount to a "transfer" of property from one person to another. There is no unjust enrichment. The same rule applies even where there is a strong causal connection between the loss to one and the gain to another. A possible example is a fire that destroys many houses leading to a greater demand for building materials and builders. While house owners lost, builders have gained. Yet, the mere fact that one person

benefits from the misfortune of another does not render the enrichment "unjust," although in a very loose sense it can be described as an enrichment at the other's expense.

In fact, the builders in the above example merely supplied a service that alleviated the predicament of the victims. This is usually how lawyers and doctors make their living. A major calamity may lead to a huge increase in the income of lawyers handling tort litigation. Needless to say, the "windfall" is not regarded as "unjust." The enrichment is not made through the "appropriation" of another's protected interest; it is merely caused by the need of one person (or one group) for goods or services possessed by another person (or another group). A similar result usually ensues even where the change in the market conditions was brought about by a deliberate human act, assuming it was not improper. There are innumerable situations in which this occurs. Possible examples are:

(1) The building of a new highway between two cities—as a result, there is an increase in the value of properties close to the new highway and a decline in the value of properties along the old road.

(2) An invention that enables large scale use of an inexpensive source of energy—as a result, owners of other sources of energy experience a decline in the value of their property while the value of other properties (such as factories with high energy demands) increases.

In both of these situations, the law does not intervene in order to correct the shift in wealth. This actually reflects a broader and more general feature of the legal system—it provides a high degree of protection to legal rights. Typically, the owner is shielded against unauthorized appropriation of his property, and he will also be entitled to redress if it is negligently damaged by another. In the field of restitution, the law ordinarily prevents the enrichment resulting from a transfer of property from one person to another against the owner's will.[53] However, the law usually abstains from

53. *See* Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504 (1980). The owner will also usually be protected in cases in which he agreed to the transfer of his property, but his consent was vitiated by mistake, duress, or undue influence. *See* Dannemann, *supra* note 48.

intervention where the loss to one or the gain to another is not a result of the involuntary transfer of the protected interest (or in the case of a mere damage, an injury to the interest itself) or breach of duty owed to him, but merely reflects a change in its relative value.[54] In other words, legal protection granted to ownership is limited, and the interest in maintaining the market value of the property normally falls outside its scope. The value of property to the owner is not merely dependent upon its possession or its being physically undamaged, but also upon its price on the market; and a loss in market value may be no less severe than physical loss or damage. If an event such as the building of a road causes a decline in the value of *X*'s property and a corresponding increase in the value of *Y*'s property, then *Y* is enriched at *X*'s expense just as he would have been had a piece of *X*'s property been transferred to *Y* without *X*'s consent. In the former case, however, the law is unlikely to intervene; while in the latter case, the involuntary shift of property from *X* to *Y* will be viewed as an imbalance that the law must correct.

Hence, the legal system is committed to protecting existent ownership against unauthorized appropriation or damage. It is not committed to maintaining the present distribution of wealth which may be disrupted in various other ways, such as fluctuation in market values and changes in the conditions under which the market operates.

This analysis is confined to what may be termed unjust enrichment in the legal sense. Yet, many of the above-described situations may give rise to unjust enrichment arguments in an ordinary, non-technical sense,[55] which may eventually have legal

54. There were, of course, social movements and social theories relating to the justice or injustice resulting from the change in the market value of property. A conspicuous example is the single tax movement, based on the theories of Henry George, that advocated the confiscation, by taxation, of the "unearned increment" in the value of land, namely the increase in the value of land that does not derive from the owner's investment, but results from social and economic development. *See* HENRY GEORGE, PROGRESS AND POVERTY 406–10, 432–40 (Walter J. Black, Inc. ed., 1958) (1879).

55. Thus, the supporters of the single tax theory view the unearned increment in the value of land as an unjust enrichment of the owner. On the distinction between unjust enrichment in the legal and the loose, non-legal sense, see Daniel Friedmann, *Valid, Voidable, Qualified, and Non-Existing*

repercussions. Thus, where an event completely upsets the existing market conditions, and the price of property or services supplied by one group is immensely increased while others suffer a loss or a diminution in the relative value of their wealth, one can expect an outcry against profiteering (or unjust enrichment). In extreme situations, such complaints may carry the day and lead to legal intervention in one form or another (e.g., price control, tax on excessive profits or upon the increase in value of certain properties, etc.). These occasional consequences are not within the ambit of this Article. It suffices to say that the adoption of means to alleviate such an upset in market conditions is the exception and is usually beyond the ambit of private law.[56] There is also no general theory, at least not one that I am aware of—other than the vague feeling that in extreme situations something must be done—that explains at what point the legal system does (or ought to) intervene, and the nature and extent of the intervention.

Modern developments have, however, tended both to increase the range of interests that are accorded legal protection as well as extend the zone of protection granted to traditional rights.[57] For example, the traditional approach is reflected by rules under which tangible property is generally protected against physical damage to the property itself.[58] But the effect on the value or use of such property resulting from dealing or interfering with property belonging to others is usually disregarded. Thus, the destruction of a

---

Obligations: An Alternative Perspective on the Law of Restitution, *in* ESSAYS ON THE LAW OF RESTITUTION 247, 251 (Andrew Burrows ed., 1991).

56. When change in the value of property results from the use of governmental powers, payment of compensation may be justified, at least in some situations. A conspicuous example is that of diminution in the value of land resulting from decisions by planning authorities. *See generally* Daphna Lewinsohn-Zamir, *Compensation for Injuries to Land Caused by Planning Authorities: Towards a Comprehensive Theory*, 46 U. TORONTO L.J. 47 (1996) (discussing the debate about the "takings" doctrine). But arguably, under the same reasoning, a tax should be imposed in order to deprive the owner of at least part of the increase in the value of the land resulting from the activities of the planning authorities. Obviously, public law regulates the payment of compensation in these circumstances as well as the tax, if it is imposed.

57. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 1–7, at 1–32 (5th ed. 1984) (discussing background and history of tort law) [hereinafter PROSSER & KEETON].

58. *See id.* at 85.

bridge or a road does not ordinarily confer a right of action upon car owners who are unable to use it or upon owners of a shopping center whose businesses are detrimentally affected. The road and the bridge are beyond the ambit of protection enjoyed by car owners and owners of neighboring property.[59]

The modern tendency is to somewhat extend the traditional ambit of protection. There are instances in which a remedy is granted to a property owner on the ground that the market has been illegally interfered with. The field of securities provides some of the most conspicuous examples.[60] The development of economic torts has similarly expanded the ambit of protection granted to trade interests and goodwill.[61] Even a mere expectancy may gain a measure of protection via the tort of interference with prospective advantage.[62]

These developments have their counterpart in the law of unjust enrichment. In some situations, restitution may be had for the appropriation of something to which another person had a mere expectancy.[63] It is also conceivable that in some instances an act that merely leads to the appreciation of one's property would provide a basis for restitution. However, the protection of an expectancy is much narrower than that granted to a legal right, and legal intervention to correct changes in market value are no less exceptional. The liability for unjust enrichment occasionally imposed in this category has recently been explained as founded upon breach of competition rules.[64] A detailed discussion will not be attempted here.

---

59. In tort law, this topic is usually described as pure economic loss. *See generally* JOHN G. FLEMING, THE LAW OF TORTS 193–203 (9th ed. 1998) (analyzing the possible liability for loss of value or use of property resulting from dealing with another's property).

60. *See, e.g.*, LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION § 10 (4th ed. 2001) (discussing the rules against market manipulation).

61. *See* PROSSER & KEETON, *supra* note 57, § 130, at 1005.

62. *See id.*

63. *See* Friedmann, *supra* note 53, at 535–36.

64. *See* Ofer Grosskopf, *Protection of Competition Rules Via the Law of Restitution*, 79 TEX. L. REV. 1981 (2001).

IV. INCIDENTAL BENEFITS

The above discussion offers an explanation for many situations coming within the well-known rule under which no restitution can be had for so-called "incidental benefits."[65] A person, who in pursuance of his own interests or in performing his own duty "incidentally" confers a benefit upon another, is usually not entitled to restitution. This rule is discussed later in this Article.[66] For the present purpose, it suffices to point out that in typical examples, recovery is denied simply because the nature of the benefit consists of an increase in value without a transfer of property or labor. Thus, where a person builds a house or plants a garden on his own property, it is generally stated that he is not entitled to restitution of the "incidental benefit" to his neighbors. The above discussion suggests another ground for the absence of a right of recovery, i.e., that the benefit, which merely consists of the increase in value of the neighbor's property, is not of a type that the law usually corrects.

This point can be demonstrated by the case in which a person mistakenly builds a structure on another's land and thereby also (or "incidentally") increases the value of a neighboring property. Even if he has a cause of action in restitution, either by virtue of a statute or in a jurisdiction that adopts a liberal approach to the mistaken improver,[67] it is likely to be only against the owner of the land upon which he built. No liability will be imposed upon the neighbor.

V. PURSUANCE OF SELF-INTEREST AND THE PROBLEM OF FREE RIDERS

A. Self-Interest and Freedom of Contract—General Considerations

A general principle common to both Anglo-American and continental law is that a person who voluntarily acts in pursuance of his own interest is not entitled to restitution from those who incidentally benefited from his action. In French law it is stated that

---

65. RESTATEMENT OF THE LAW OF RESTITUTION § 106 (1937).

66. *See infra* Section V.A.

67. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 10 (Tentative Draft No. 1, 2001). This *Restatement* adopts a very liberal position towards the mistaken improver subject only to the provision that the remedy given to the improver will not unduly prejudice the owner.

a person who acts at his own risk with a view of obtaining a personal advantage (*agi à ses risque et périls en vue d'un avantage personnel*)[68] is not entitled to restitution. A similar rule is provided under section 106 of the first *Restatement*.[69]

Consequently, the recipients of benefits that are derived from an act done by another in pursuance of his own interest may keep their enrichment although initially they were not entitled to the benefits. An analysis of this principle provides insight into the limits of restitution as well as to some of the pressures towards its expansion. Let us consider the following examples:

(1) *X* plans to build an entertainment park that is likely to increase the value of the land in the vicinity.

(2) A mine owned by *X* has been flooded. Pumping the water will also drain an adjoining mine owned by *Y*.

(3) *X* owns property on a riverbank. In order to prevent flooding, *X* intends to build a dike that will inevitably protect the property of his neighbor *Y*.

In all of these examples, *X* can negotiate with those who are likely to benefit from his intended activity. No difficulty arises if they agree to remunerate *X* or contribute towards his expenses. However, if they decline to participate, *X* is faced with a choice; *X* may give up his plan or proceed with the knowledge that it will benefit others, who are, in a sense, free riders. This element is common to all the above examples and indeed, as we have seen, to all human activities that have this "spill over."

Another relevant consideration is concerned with the principle of freedom of contract. This principle has two aspects. The positive aspect relates to the power of the parties to create rights and

---

68. *See* TERRÉ ET AL., *supra* note 34, at 901.

69. RESTATEMENT OF THE LAW OF RESTITUTION § 106 (1937); *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 23 (Tentative Draft No. 2, 2002); GOFF & JONES, *supra* note 18, at 58–61; PETER D. MADDAUGH & JOHN D. MCCAMUS, THE LAW OF RESTITUTION 741–73 (1990); John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds*, 87 HARV. L. REV. 1597 (1974); John P. Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849 (1975); John P. Dawson, *The Self-Serving Intermeddler*, 87 HARV. L. REV. 1409 (1974); John D. McCamus, *The Self-Serving Intermeddler and the Law of Restitution*, 16 OSGOODE HALL L.J. 517, 518–19 (1978).

obligations binding upon themselves. The negative aspect relates to the party's freedom from obligation for benefits conferred upon him without his consent.[70] The negative aspect of freedom of contract is essential for the maintenance of its positive aspect and for the operation of the whole market economy. Resources are limited. The negative aspect of freedom of contract means that a person will not be required to spend resources on goods and services that he did not agree to acquire. A person's resources are at his disposal and he is free to use them to make the contracts he is interested in with those parties with whom he wishes to transact. According to this reasoning, if *X* demands payment from *Y* for a service that he provided without *Y*'s request, *X* infringes *Y*'s negative freedom of contract. In Anglo-American law, the protection granted against such infringement is reflected in the rule against unsolicited benefits, the provider of which is usually termed "volunteer."[71] Thus, a recent decision stated that "restitution should not be granted to create a liability which the plaintiff could not achieve by bargaining."[72]

There is considerable overlap between the pursuance of the self-interest rule and the rule relating to unsolicited benefits; but they are not identical. The pursuance of self-interest emphasizes the plaintiff's position. The fact that he acted in his own interest suffices to compensate him and he should not be allowed to get additional benefits by taxing others. The unsolicited benefits rule considers the situation from the defendant's point of view, and concludes that he should not be liable for benefits conferred upon him without his consent. French law emphasizes the self-interest rule even though it recognizes the institution of *negotiorum gestio*, which allows recovery for unsolicited benefits.[73] Anglo-American law, which did not adopt the institution of *negotiorum gestio*, stresses the unsolicited

70. *See* Jack Beatson & Daniel Friedmann, *From "Classical" to Modern Contract Law*, *in* GOOD FAITH AND FAULT IN CONTRACT LAW 3, 11–12 (Jack Beatson & Daniel Friedmann eds., 1995); Nili Cohen, *Pre-Contractual Duties: Two Freedoms and the Contract to Negotiate*, *in* GOOD FAITH AND FAULT IN CONTRACT LAW 25 (Jack Beatson & Daniel Friedmann eds., 1995).

71. *See* GEORGE E. PALMER, 2 THE LAW OF RESTITUTION ch. 10, at 358 (1978).

72. Berry & Gould v. Berry, 757 A.2d 108, 118 (Md. 2000).

73. *See* Samuel J. Stoljar, *Negotiorum Gestio*, *in* 10 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 17, 17–21 (Ernst von Caemmerer & Peter Schlechtriem eds., 1984).

benefits rule, though the fact that the plaintiff acted in his own interest is sometimes referred to as an additional ground for denying recovery.[74] For our purpose, it suffices to point out that the rule which denies recovery for unsolicited benefits is broader than the one relating to the pursuance of the self-interest, since it is conceivable that a person who does not act in pursuance of the self-interest would confer an unsolicited benefit on someone else. In Anglo-American law, his claim for restitution may be denied by virtue of the unsolicited benefits rule. Under French law recovery may be allowed if the conditions for *negotiorum gestio* are met.[75] But in many other situations, in which the two rules overlap, they would lead to the same result, namely, denial of the right of recovery.

We may now address the examples given above. Example (1), in which an entrepreneur plans to build an entertainment park, is easy. It is concerned with a new project, an attempt to augment one's wealth. Surely there is nothing harsh in having the entrepreneur face the choice of either making the investment or giving it up. If according to his calculation the enterprise is attractive and profitable, he is likely to proceed with it. His expected gains are sufficient to compensate him, and there is no need to grant him an additional return on his investment, nor is there sufficient justification to allow him to impose a tax upon others. Indeed, as already pointed out, the benefit is not of a type for which restitution is normally granted. It merely consists of a change in market value of the neighbor's property, and this benefit may usually be enjoyed free of charge.

A related idea, sometimes pursued, is that recovery based on unjust enrichment should be conditional not only upon the defendant's enrichment but also upon the plaintiff's loss. In the self-interest situations the plaintiff arguably suffered no loss. He got what he paid for, and he ought to have no ground for complaint. It should, however, be emphasized that the denial of recovery is not based on the absence of a loss. Even if the entertainment park project ends in a loss to *X*, he has no claim against the landowners who "incidentally" benefited through *X*'s venture.

---

74. *See id.* at 17–36.
75. *See id.* at 17–21.

This analysis can be applied to the mines and the dike examples. The mines example is based upon *Ulmer v. Farnsworth*,[76] in which recovery was denied. The first *Restatement of Restitution* adopted this result and reached the same conclusion in the case of the dike.[77] A similar conclusion was reached under French law.[78] The person who drained the mine or built the dike must have considered the expense to be worth it to him. Such a result was indeed reached in the more recent case of *Knaus v. Dennler*,[79] in which the plaintiffs purchased a lakefront plot of land that included more than half of the earthen dam that contained the lake. They discovered holes in the dam and were advised that the whole dam should be reconstructed.[80] The plaintiffs met with other property owners abutting the lake in order to agree on what should be done.[81] No agreement was reached and the defendants objected to the reconstruction.[82] Nevertheless, the plaintiffs hired a contractor to do the work, but he could only reconstruct the portion of the dam owned by the plaintiff as the defendants objected to the reconstruction of their portion of the dam.[83] The plaintiffs' claim for proportionate sharing of the expenses was dismissed on the ground that they instructed the work to be done notwithstanding the defendants' opposition.[84] The plaintiffs' act therefore "fall[s] into the category of 'officiously' or 'gratuitously' conferred benefit for which quasi-contractual relief is not available in Illinois."[85] It should be noted, however, that the case can be explained on the ground that the part of the dam that was reconstructed was on the plaintiffs' property, and was in fact owned

76. 15 A. 65 (Me. 1888); *see also Berry & Gould*, 757 A.2d at 116 (stating that plaintiff's restitution claim would be denied where the benefit to the defendant was intentionally conferred and the parties were in a position to bargain about compensation).

77. *See* RESTATEMENT OF THE LAW OF RESTITUTION § 106 (1937).

78. *See* FRANÇOIS GORÉ, L'ENRICHISSEMENT AUX DEPENS D'AUTRUI 71 (1949).

79. 525 N.E.2d 207 (Ill. App. 1988). For notes on this case, see KENNETH H. YORK ET AL., REMEDIES—CASES AND MATERIALS 323–26 (6th ed. 1999).

80. *See Knaus*, 525 N.E.2d at 208.

81. *See id.*

82. *See id.*

83. *See id.*

84. *See id.* at 210.

85. *Id.*

by the plaintiffs,[86] while the part of the dam on the defendants' property was not reconstructed, and finally it is not clear whether the need for reconstruction was crucial or whether it actually prevented flooding that would have damaged the defendants' property.

Still, it is always possible to point out in this type of situation that the plaintiff got what he wanted. Why, then, should his neighbors contribute when the person who incurred the expense has sufficient incentive to proceed on his own?

But this line of reasoning has its limits. It may be convincing in the context of a new investment (e.g., the building of an entertainment park). However, it loses much of its force in the case of salvage of existing property (the mines example)[87] or the attempt to prevent the loss of existing property (the dike example). A person who considers a new investment usually has a number of alternatives each with different prospects of gains and risks. Such a choice has always been considered "free." The question of salvage or the protection of an existing interest is distinguishable. It presents a choice between watching the loss of existing property or conferring an undeserved benefit on another.

The situation is not within the ambit of economic duress. But the issue is close and modern developments in the area of duress are relevant since they indicate the increasing tendency of the law to take these types of pressures into account.[88]

---

86. The question may thus arise whether an owner of a dam or part of it does owe a duty to keep it in good repair. *Cf.* VI-A AMERICAN LAW OF PROPERTY, A TREATISE OF THE LAW OF PROPERTY IN THE UNITED STATES §§ 28.36-.44 (1954 & Supp. 1962) [hereinafter AMERICAN LAW OF PROPERTY] (explaining the duty of support which a landowner may owe to neighboring land, particularly section 28.42). If this is the case, then the claim against the defendants should not have been for the proportionate share of the cost, but to order them to reconstruct the part of the dam on their land if reconstruction was indeed necessary.

87. Arguably, this is not a case of salvage but of improvement of existing property. The distinction between improvement and salvage, while in some cases clear, is occasionally difficult to draw. Thus, the rescuing of valuable property that fell into a lake and lies at its bottom can be seen as an improvement (the property existed and is more valuable outside the water than lying inside it). Yet, there can be little doubt that this is actually a case of salvage. *See also infra* note 156.

88. *See* GOFF & JONES, *supra* note 18, at 327–47. Another term that is occasionally used to describe economic pressure is "business compulsion."

Also relevant is the increasing emphasis upon the idea of good faith. It may be asked whether there is a stage in which declining to participate in a salvage operation while taking advantage of its fruits will be regarded as an unfair use of one's freedom. Had *Y* (in the dike example) been the sole person whose property was jeopardized, *X* would have had no business to protect it against *Y*'s will. But *X* is not an indifferent bystander. His own property is at stake and *Y* may take advantage of the situation notably if the value of *X*'s property is much higher than his own. Hence, if only *Y*'s property was at risk he might have built the dike himself. But under the circumstances he declines to share the expenses since the prospect of a free ride is too difficult to resist. In fact, the end result in this type of situation (if restitution is not allowed) may well be that the dike will not be built at all. The building expenses may exceed the value of the property of a single owner, and even if they do not, an owner of one piece of property may be unwilling to incur a large expense without being assured that others, who equally benefit from it, will share the burden.[89]

Extreme situations of this type are often within the province of public law. The defense of a country cannot be left to negotiations among those who benefit from it, and government machinery is employed to recruit an army and to impose taxes to shoulder the burden and prevent free riding. Indeed, public law is often better suited to deal with such issues, notably where a great variety of interests are likely to benefit and where a large number of people are involved. But public law cannot deal with everything. The issues are likely to remain in the sphere of private law when the interests are specific and not widely dispersed.

See JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 319 (4th ed. 1998). The situations discussed are not usually within the category of economic duress because the pressure exerted upon the actor does not ordinarily stem from the defendants (the parties who enjoy the benefit of actor's act). However, the category of payment of a common debt, discussed *infra*, is actually classified in Anglo-American law as "legal compulsion." *See infra* Section V.C.

89. *But see* AMERICAN LAW OF PROPERTY, *supra* note 86, § 28.36-.46 (regarding the question of ownership of the dike and whether the owner is under a duty to maintain it).

In the Sections that follow I shall examine, with a view of searching the underlying principles, a number of situations, in which private law offers a solution.

B. General Average

Under maritime law, the rules as to general average apply where in the course of a voyage the ship and its cargo face a common danger and, in order to contend with it, part of the property is sacrificed in order to save the rest.[90] If these conditions are met, the interests saved must contribute towards the loss of the interests sacrificed. These rules recognized by maritime nations for thousands of years can be viewed as a peculiarity of maritime law. They are, however, based on a just and reasonable policy. The law of general average contains the two elements that combine to create exceptions to the rule denying recovery for unsolicited benefits or acts made in pursuance of self-interest. There is an expenditure or sacrifice by one person to protect against a common danger. In addition, the interests involved are very close. They participate in a common venture. There is a kind of community of interests in which the sacrifice of one benefits all others.

C. Indemnity and Contribution Between Personal and "Real" Co-obligors

Where a number of persons are under a common obligation to the same creditor, so that each is liable for the whole amount and payment by one discharges the others, the debtor who pays more than his share is entitled to indemnity or contribution from the others. This rule is common both to Anglo-American and to continental law.[91]

The debtor who discharges the debt acts in his own interest. In French terminology, he acts *dans sa propre cause et intérêt*. But this does not exclude his right to contribution. On the contrary, the fact that he was legally bound to make the payment is often referred to as the very reason that justifies restitution.

---

90. *See* GOFF & JONES, *supra* note 18, at 427–29.

91. *See* Daniel Friedmann & Nili Cohen, *Adjustment Among Multiple Debtors*, *in* 10 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW §§ 11-5 to -13 (1991).

The elements already mentioned in the context of general average are present in this case as well. The plaintiff, being legally liable, acts under great pressure. It is inevitable that the act would simultaneously benefit the other debtors who are released from their obligation towards the creditor. The additional element relates to the "closeness" of the interests. It is, thus, not surprising that the law of contribution developed from the situation in which the debtors acted in concert; for example where two sureties signed the same bond. But in a leading case decided in England as early as 1787, the court held that the right of contribution is to be extended to sureties who guaranteed the same debt by signing separate documents.[92] Indeed, the requirement of pre-existing relations between the debtors has been whittled down and very little remains from the idea that in order to allow restitution there should be some kind of "community" between the debtors or that they should at least be subject to a "common demand."[93] The fact that the debtors are liable for the same debt suffices in order to create the necessary community of interest, even in the absence of pre-existing relations between them.

In addition, restitution is ordinarily granted to a person who pays another's debt in order to prevent the seizure of his property or to discharge a lien upon it.[94] The position of a person whose property is subject to a charge or a lien, which secures the debt of another, is similar to that of a surety.[95] Though he is not personally liable, his property (or property in which he has an interest) may be taken in satisfaction of the debt.[96] Where such a "real" surety discharges the obligation, he is entitled to contribution from other "real" and personal sureties (he is obviously entitled to indemnity from the principal debtors).[97] Again, the "real" surety acts in pursuance of his own interest, namely to protect his property which is mortgaged as a security for another's debt. His act inevitably benefits the other

92. *See* Dering v. Winchelsea, 126 Eng. Rep. 1276 (Ex. 1787).

93. *See generally* Friedmann & Cohen, *supra* note 91, §§ 11.10–.20 (explaining the strong tendency to diminish the importance of the distinction between various categories of common obligations and the blurring of the line between them).

94. *See* Richard Sutton, *Payment of Debts Charged upon Property*, *in* ESSAYS ON THE LAW OF RESTITUTION 71 (Andrew Burrows ed., 1991).

95. *See id.*

96. *See id.*

97. *See id.*

debtors, and in this type of situation pursuance of self-interest does not defeat restitution but on the contrary, it provides the very justification for allowing it.

D. Other Instances of Payment of Another's Debt in Pursuance of Self-Interest

There are a variety of situations in which a person, who is not liable for the debt of another, has nevertheless an interest in discharging the debt.[98] A possible example is that in which a number of persons are involved in an accident and each denies liability, or the case of a number of insurance companies that insured the same interest but each claims that its policy does not cover the loss. One of the parties involved decides to settle the claim in order to avoid the risk of paying a higher amount. It then transpires that he was not liable at all. Under the traditional English law, such a payor is regarded as a mere "volunteer" who has no claim against the real debtors.[99] He had a choice. He could have negotiated with the real debtors and if they declined to pay, he could have allowed the issue to be determined in court. If he found it more advantageous to pay, he had no claim against the real debtors who "incidentally" benefited from his payment. This approach disregards the pressure to which the payor is sometimes exposed and the unfairness in permitting the real debtors to get a free ride and reap the benefit of the payor's predicament. English law still maintains this position,[100] and legislative intervention was required in order to remedy the situation, at least in certain cases.[101] The modern approach in American law is more liberal and tends to relax the traditional rule and allow the payor, who has an interest in discharging the debt or a moral duty to do so, to recover from the real debtors.[102] This is in line with

98. *See* Daniel Friedmann & Nili Cohen, *Payment of Another's Debt*, *in* 10 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW § 11.1 (1991).

99. *See id.* § 11.44.

100. *See* Stott v. W. Yorkshire Rd. Car Co., [1971] 2 Q.B. 651 (C.A.) (modified by statute, *see infra* note 101); Legal & Gen. Assurance Soc. v. Drake Ins. Co., [1992] 2 W.L.R. 51 (C.A.).

101. *See* The Civil Liability (Contribution) Act, 1978, c. 47 (Eng.); *see also* Friedmann & Cohen, *supra* note 91, §§ 11-21 to -22 (discussing the developments in English law).

102. *See* Republic Underwriters Ins. Co. v. Fire Ins. Exch., 655 P.2d 544 (Okla. 1982); 2 GEORGE E. PALMER, THE LAW OF RESTITUTION § 10.6, at

continental law, which generally recognizes the right of restitution of one who pays another's debt.[103]

There are a number of factors that support this approach. The enrichment of the debtor is obvious. There is also no interference with his choice as to the allocation of his resources since he was in any event liable to pay his debt. The only difference, from the debtor's point of view, lies in the personality of the creditor. But with the almost free assignability of debts, a change of creditors is a possibility that the debtor must reckon with.

E. Co-Ownership, Joint Interests, Common Funds, Derivative and Class Actions

This category includes a number of broad exceptions to the rule, embodied in section 106 of the *Restatement of the Law of Restitution*, under which a person who acts in order to protect his own property and thereby "incidentally" protects the property of others is not entitled to restitution.[104] Under section 105 of the *Restatement*, a co-owner who takes a reasonably necessary action for the preservation or protection of the co-owned subject matter is entitled to contribution, enforced by a lien, upon the share of the other co-owner.[105] A similar approach ought, in principle, to apply in other instances of limited interest, like expenditure by a mortgagee for the protection of the mortgaged property.[106] In England, a co-tenant's claim of contribution for necessary expenditure was dismissed in *Leigh v. Dickeson*,[107] though the court stated that the repairs and improvements would be taken into account in a suit for partition. The result is unjustified.

It is of course necessary to distinguish between improvements and reasonable expenditures that are essential for the preservation of

---

405–06 (1978); *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 26 (Tentative Draft No. 2, 2002).

103. *See* Friedmann & Cohen, *supra* note 98, § 10-9, at 10.

104. RESTATEMENT OF THE LAW OF RESTITUTION § 106 (1937).

105. *See id.* § 105(1).

106. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 24 (Tentative Draft No. 2, 2002). Complex issues arise where the interests differ in nature, as in the case of a life tenant and a remainderman. *See* MADDAUGH & MCCAMUS, *supra* note 69, at 246–48.

107. [1884–1885] 15 Q.B. 60 (C.A.).

the joint interest. In the latter category contribution should be available.[108]

In order to recover, the co-owner who made the expenditure ought not to have acted officiously. Furthermore, except in the case of an emergency, which makes consultation with the other parties involved impractical, the co-owner is expected to request their participation.[109] However, in this category, as well as in other situations in which the plaintiff's right is founded upon self-interest, objection by the defendant is not necessarily fatal to restitution. This means that the plaintiff is relieved of the choice of either making an expenditure that would inevitably benefit a person who will not share the burden or suffering a loss. It also means that the defendant is deprived of the prospect of a free ride.

This approach has been extended to a considerable number of situations, some of which are very important. They include derivative action by a stockholder, class actions, and a number of other situations of common interest. The typical model upon which recovery is predicated is the existence of a plaintiff's interest and a reasonable expenditure he made in order to protect his interest in circumstances where the expenditure must also necessarily protect the interest of others. An additional element that may be required is a lack of any practical possibility of getting others' cooperation. There must also be a sufficient proximity between the interests involved. It is this "community of interests" which justifies the recovery and enjoins free riding. Admittedly, a precise definition of such a community of interests is lacking and marking the line between the situations, in which the interests are regarded as

108. With regard to the difficulty of distinguishing between improvement and preservation, compare *supra* note 87 and *infra* note 156. In the case of co-ownership, the enrichment of one co-owner at the expense of another may be prevented even where the benefit is in the form of improvements. The improver can sue for partition in which case many courts take the improvement into account. Where the property is physically divided, the improver will have the part of the property on which the improvement was made. If the property is sold, the investment (to the extent that it increased the value of the property) is taken into account when dividing the proceeds. *See* MADDAUGH & MCCAMUS, *supra* note 69, at 744–47.

109. *See* RESTATEMENT OF THE LAW OF RESTITUTION § 105(1)(a).

sufficiently close to permit restitution and those in which they are not, is often extremely difficult to draw.[110]

The derivative action can be regarded as an extension of the co-ownership rule adapted to the corporate environment. The corporation is owned by its shareholders. If the machinery designed to protect the common interest fails, an action by an individual shareholder may be appropriate. The act may be undertaken without the consent and often against the wishes of the other shareholders; but it is for the benefit of the common interest. The shareholder, who in pursuance of his own interest ultimately protects the interests of the whole group, is entitled to reimbursement from their "common property," i.e., the corporation.[111]

Such a "community of interests" was also recognized where a bondholder succeeded in a claim to set aside a fraudulent transfer of property out of which he as well as other bondholders could satisfy their claim.[112] The analogy to co-ownership, or more precisely to the limited proprietary interest situations, is strongest where the bondholders (or for that matter, any group of creditors) have a proprietary right in the property to be salvaged. Arguably though, the same approach might apply to unsecured creditors, where one of them makes an expenditure that salvages property out of which the other creditors will eventually be paid. This idea has been further extended to a great variety of situations in which the expenditure created a "common fund," as in the case of class actions. The "common fund," which is to be distributed among a certain group, indicates the existence of a community of interests. Those who benefit from the fund are therefore required to participate in the costs of its creation, which are deducted from the fund. These costs were sometimes awarded to the party who initiated the litigation but often they inure to the benefit of the lawyers who conducted the proceedings.[113]

Recovery has been allowed in other situations where, though a common fund barely existed, the interests were regarded as

110. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 30 cmts. (Preliminary Draft No. 4, 2002).

111. *See* Wallersteiner v. Moir, [1975] 1 All E.R. 849 (C.A.); MADDAUGH & MCCAMUS, *supra* note 69, at 770.

112. *See* Trustees v. Greenough, 105 U.S. 527 (1881).

113. See the articles by Dawson, *supra* note 69.

sufficiently close to warrant restitution. Some of the decisions went too far and were rightly criticized, notably where the real beneficiary of the liberal approach was the lawyer hired by one of the parties.[114] A detailed discussion of these developments will not be attempted here. For our purposes it suffices to point out that the basic idea is sound. Where one person in order to preserve his own property makes an expenditure, which necessarily protects other interests that are sufficiently proximate, recovery to prevent the unjust enrichment of the free riders should be allowed. This idea, which originated in the maritime law of general average, is manifested in quite a number of modern rules some of which were discussed above.[115] The main difficulty lies in defining the proximity of interests, which makes us view the enrichment of one through the loss or sacrifice of the other as "unjust." As is often the case, it is easy to identify extreme situations.

A litigant whose effort and expenditure secured a leading decision which modified the law has obviously no claim against those who benefit from the new ruling. On the other hand, the co-owner who incurs expenses to successfully defend the co-owned property[116] should clearly be entitled to contribution from the other co-owner. Between these two extremes there is a whole gamut of possibilities, some of which are likely to present borderline situations.

F. Co-Heirs

Ordinarily, we may expect that expenses relating to the protection of the decedent's estate would be paid by the administrator out of the estate. In this way the expenditure, which actually benefits the heirs, is in fact distributed among them. However, examples can be found in which some of the heirs who acted in pursuance of their interest in preserving the estate or obtaining a share in it incurred expenses that also benefited the others. In *Felton v. Finely*,[117] a lawyer was hired by two heirs to

114. *See id.*

115. *See supra* Section V.C-E.

116. *See* RESTATEMENT OF THE LAW OF RESTITUTION § 105(2).

117. 209 P.2d 899 (Idaho 1949); *see also* PALMER, *supra* note 102, at 420–21. The claim of a lawyer who represented one of the heirs in a successful litigation, to be paid by the heirs who did not hire his services, was also denied

contest a will and was promised fifty percent of the recovery. The contest was successful and as a result the estate passed by intestacy to the heirs, including those who refused to participate in the litigation.[118] The lawyer's claim against the heirs who did not retain him was rightly dismissed.[119] A person who provides goods or services under a contract and who receives the contractual consideration is not entitled to additional payment from third parties that benefited from his performance. In fact, the person who provided this benefit is not the one who was paid to supply the goods or the services but the one who bought them. Thus, in the *Felton v. Finely* type of situation the question that arises is whether the heirs who retained the lawyer should be entitled to contribution from the other heirs who got part of that which would have otherwise been given to the legatee under the will. In my view, the reasoning of the co-ownership situation ought to apply.[120] The interests of the parties are sufficiently close to justify contribution from those heirs who have objected to contesting the will, yet after the contest proved successful, took advantage of the result.[121]

A different conclusion was reached in *Feick v. Fleener*[122] in somewhat different circumstances. There the decedent, who died in

---

in *Domenella v. Domenella*, 513 N.E.2d 17 (Ill. App. Ct. 1987). *But see* Estate of Pfoertner, 700 N.E.2d 438 (Ill. App. Ct. 1998) (allowing the lawyer's claim). Under the *Restatement*, such a claim should be denied. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 30, at 98–99 (Preliminary Draft No. 4, 2002).

118. *See Felton*, 209 P.2d at 899.

119. *See id.*

120. If the heirs who hired the lawyer are entitled to contribution from the other heirs, the lawyer may try to reach these heirs via his agreement with those who hired him. For example, if the lawyer's contingent fee is normally thirty percent, he may ask the heir who hires him for sixty percent on the ground that this heir will get contribution from the others. There are, however, limits to such possibilities. The contracting heir may not agree to a percentage that is too high, even if he is likely to get contribution. In addition, the right of contribution is in any event limited to the reasonable expenditure. The court may therefore disallow contribution for the excessive part of the lawyer's fees.

121. The heirs acquired their share of the inheritance upon the will being held invalid. There was no need for an act of acceptance on their part. Consequently, taking their share did not amount to "acceptance," in the technical sense, of the services provided in contesting the will.

122. 653 F.2d 69 (2d Cir. 1981).

1976, had been adjudicated incompetent in 1969.[123] While incompetent, the decedent married S.R. After his death, S.R. and her daughter asserted claims superior to the interests of the legatees.[124] In 1971, two of the legatees retained a lawyer to annul the marriage and promised to pay him twenty-five percent of all monies inherited by them as well as by other nieces and nephews of the testator and their descendants.[125] In 1972, the lawyer succeeded in obtaining annulment of the marriage and the New York State Supreme Court awarded him substantial fees for his services in connection with the litigation.[126] The daughter's claim was settled in 1978, and the Supreme Court awarded the lawyer a fee of $37,500 from the estate.[127] The estate was distributed, and the appellants paid the lawyer twenty-five percent of the whole amount distributed—in accordance with their agreement.[128] Their claim for contribution was dismissed.[129] The court applied the New York rule under which parties are not obligated to pay the fees of attorneys whom they have not retained, and a party who retains a lawyer's services is not entitled to contribution from others who benefit from those services.[130] The court also held that no "fund" was created by the lawyer's efforts.[131] He played no role in creating the estate nor did he have any role in creating the defendant's status as beneficiaries.[132] He merely helped to eliminate competing claims (of S.R. and her daughter).[133]

The distinction between creating a fund and protecting it is somewhat tenuous. An heir who acts inofficiously and reasonably in order to preserve the inheritance and succeeds in doing so, should, in principle, be reimbursed out of the estate, so that his reasonable expenses will in fact be borne by the heirs who benefited from his act.

---

123. *See id.* at 71.
124. *See id.*
125. *See id.* at 72.
126. *See id.* at 73.
127. *See id.* at 74.
128. *See id.*
129. *See id.* at 77.
130. *See id.*
131. *See id.* at 78.
132. *See id.*
133. *See id.*

The denial of restitution in *Feick v. Fleener* can be explained on the ground that the main service (annulment of the marriage) was rendered when the testator was still alive.[134] At this stage, an act by an individual heir to eliminate competing claims may seem as benefiting merely the testator and in any event too early to involve the other heirs. The court also pointed out that had S.R. predeceased the testator, the parties would have received the same distributions even without the annulment.[135] This point is not convincing, however, as she did not predecease the testator.[136] In addition, where services (legal or others) are to be paid—and are actually paid—out of the estate, it is doubtful whether an heir who promises a lawyer an additional remuneration can require that those who opposed it will share the additional burden.

G. Performance of Contractual Obligation That Benefits Third Parties

Suppose that *X* contracts with *Y* for the performance of work or the supply of goods. *X* performs his part of the bargain, and it transpires that *X*'s performance inured to the benefit of *Z* because *Y* gave the goods to *Z* or because the work was performed on *Z*'s property and improved it. Can *X* recover from *Z*? The obvious answer is that if *Y* paid *X* in accordance with their contract, *X* cannot have an additional right against *Z*. In fact, it is *Y* rather than *X* who provided the benefit to *Z*. *Y* acquired the goods or the services from *X* and delivered them to *Z*. *Z* may be liable for the goods or services under a contract with *Y*. In the absence of a contract, or if the contract failed, *Z* may be liable in restitution. In any event, *Z*'s liability is to *Y*, who supplied the goods or the service, even though *Y* did it via *X*.

But suppose that *Y* breached his contract with *X* and failed to pay him. Can the unpaid *X* recover from *Z* on the ground of the

134. *See id.* at 72.

135. *See id.* at 78.

136. Indeed, this argument can be raised with regard to any precautionary measure. After the event it may transpire that the precaution was unnecessary. In such a case it is arguable that the other party derived no benefit and was thus not "enriched." But if subsequently it becomes clear that the precautionary measure did avert a loss, the benefit received by the other party becomes evident.

latter's enrichment? The problem is an old one and has an interesting history. In Roman law, it arose where a slave or a son of a head of a family carried a business or entered into legal transactions.[137] The obligations were usually discharged out of a fund (*peculium*) that the son or slave had at his disposal.[138] The master was not liable under Roman law for these transactions, so no claim could be had against him if the fund was insufficient.[139] Where, however, the master benefited from the transaction while the other party remained unpaid, liability was imposed via *actio de in rem verso*, to the extent of the master's enrichment.[140] This was the action, which was resurrected by the French Cour de Cassation in the case of *Boudier*, to support the claim of the unpaid vendor (who contracted with the tenant) against the landlord.[141] While French law adopted the *in rem verso* claim, subject to certain limitations, other continental legal systems, notably the German and the Swiss, rejected it.[142] Anglo-American law has traditionally sided with those who deny the claim.[143] The general rule in Anglo-American law is that a person, who in performing his contractual obligation conferred a benefit upon a third person, has no right of recovery against the third party.[144] The result is often described as resting upon the broader principle under which a person who acts in pursuance of his own interest is not entitled to restitution for the "incidental" benefits

137. *See* AARON KIRSCHENBAUM, SONS, SLAVES, AND FREEDMEN IN ROMAN COMMERCE 31–39 (1987).

138. *See id.*

139. *See id.* at 49.

140. *See id.* at 66–88 (discussing the *peculium* arrangement and the *actio de in rem verso*).

141. *See supra* note 31 and accompanying text; *see also* Nicholas, *supra* note 26, at 622–23.

142. This follows from the requirement that enrichment be direct and restitution must follow performance lines. *See supra* note 46 and accompanying text; *see also* Dannemann, *supra* note 48, at 1859–60.

143. *See* Pan Ocean Shipping Co. v. Creditcorp Ltd., [1994] 1 W.L.R. 161 (H.L.); Jack Beatson, *Restitution and Contract: Non-Cumul?*, *in* 1 THEORETICAL INQUIRIES IN LAW 83, 108–13 (2000); Friedmann, *supra* note 55, at 273–75; *see also* Doug Rendleman, *Quantum Meruit for the Subcontractor: Has Restitution Jumped Off Dawson's Dock?*, 79 TEX. L. REV. 2055 (2001). Professor Rendleman supports a direct claim by the unpaid subcontractor against the owner, subject to a number of restrictions.

144. *See* RESTATEMENT OF THE LAW OF RESTITUTION §§ 106, 110 (1937).

conferred thereby upon others. An additional explanation is that a person has a choice either to enter into a contract or decline to do so. In making his decision, he can weigh all the advantages (usually the promises made by the other party) against the cost and the risks. If he voluntarily chooses to enter into the contract, there is no reason to offer him additional remuneration by taxing a third party who did not agree to assume any obligation towards him. Under this reasoning, the claim of the party who supplied the goods or services (*X*) should be against his contracting partner (*Y*). *X* should not be given preference over *Y*'s other creditors by being allowed to sue *Z*. The claim against *Z* is part of *Y*'s assets, and if *Y* is insolvent *Y*'s assets should be divided among his creditors in accordance with the rules pertaining to insolvency.

I shall not discuss this issue in detail. For our purpose, it is sufficient to point out that this situation differs from the other instances of pursuance of self-interest I previously discussed,[145] in that in the present case there is usually no free ride and no unjust enrichment. Normally *Z* pays *Y* for whatever *Y* supplied via *X*. The argument that *Z* is unjustly enriched arises if *Z* is trying to avoid payment to *Y* and *Y* does not sue him, while *X* remains unpaid. Even in such circumstances, most cases reject a direct claim by *X* against *Z*.[146] Yet some cases allow recovery[147] and many states adopted mechanic's lien statutes that do in fact enable the subcontractor to recover from the owner.[148]

I would still argue that in the absence of a statute, the position of *X* should not differ from that of any other creditor of *Y*. Most legal systems enable the garnishment or attachment of debts.[149] *X* should

145. *See supra* Section V.B-E.

146. *See, e.g.*, Pendleton v. Sard, 297 A.2d 889 (Me. 1972); Berry & Gould v. Berry, 757 A.2d 108, 116 (Md. 2000); *see also* J.R. Kemper, *Building and Construction Contracts*, 62 A.L.R.3d 288 (1975); Palmer, *supra* note 102, at 423; Rendleman, *supra* note 143, at 2065–66.

147. *See, e.g.*, Andy's Glass Shops Inc. v. Leelenau Realty, 363 N.E.2d 601 (Ohio 1977); *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 29 (Preliminary Draft No. 4, 2002); Rendleman, *supra* note 143, at 2070–72.

148. However, under these statutes certain formal requirements must usually be met in order for the lien to apply. *See* Rendleman, *supra* note 143, at 2068–73.

149. *See* 6 AM. JUR. 2D *Attachment and Garnishment* § 110 (1999).

therefore be allowed to attach the debt owed by Z to Y.[150] But this possibility is open to all other creditors of Y, and in this respect X does not enjoy any special advantage.

There is also a group of agency cases, reminiscent of the old *in rem verso* action, in which recovery against the principal is based upon his enrichment from an invalid contract that the agent purported to make in his name.[151] The typical situation is that in which an agent, a director, or an official, in exceeding his authority, contracts with another party in the name of the principal. The contract is not binding upon the principal (unless ratified). Yet, if the principal is enriched by the other party's performance, he is usually liable in restitution. The claim has often been allowed not only when the principal received money or goods (which can be returned), but also when he received services that were of value to him.[152] Nevertheless, the typical case is more akin to mistake. The other party rendered performance believing that the contract is valid.[153] Indeed, had the party known that the agent acted without authority, he may well be treated as a volunteer.

H. Other Situations

A major issue is whether the categories discussed above such as co-ownership, co-debtors, and common funds, in which contribution is allowed, are preclusive. I would argue that they are not. The categories are founded on basic concepts of fairness and when

---

150. The garnishment or attachment of debts may depend on formal requirements, which may differ from one legal system to another. Issues relating to their liberalization is beyond the scope of this Article.

151. *See, e.g.*, Boston Athletic Ass'n v. Int'l Marathons, Inc., 467 N.E.2d 58 (Mass. 1984); Midland Diesel Serv. v. Sivertson, 307 N.W.2d 555 (N.D. 1981) (concluding that the defendant was unjustly enriched by retaining a truck at the expense of the seller).

152. *See Boston Athletic Ass'n*, 462 N.E.2d at 58; GRAHAM DOUTHWAITE, ATTORNEY'S GUIDE TO RESTITUTION ch.7 (1977); *see also* RESTATEMENT OF THE LAW OF RESTITUTION § 111(2). *Cf. Midland Diesel Serv.*, 307 N.W.2d at 555; Craven-Ellis v. Canons Ltd., [1936] 2 K.B. 403 (C.A.); Rover Int'l v. Cannon Film Sales, [1989] 1 W.L.R. 912 (C.A.).

153. The rule that precludes a direct claim by one party to a contract (the subcontractor X in the situation discussed in *supra* Section V.G) against a third party (the owner Z) does not apply where the contract between X and Y (the main contractor) is vitiated on such grounds as duress, misrepresentation, or mistake. *See* Friedmann, *supra* note 55, at 268–70.

similar conditions can be found in other situations, which call for a similar result, a remedy should be available. The issue arises whenever a person must act in order to protect or salvage his own interest and thereby inevitably preserves the property of others whose interest are closely interlocked with his own. A simple example will illustrate this point: Suppose *X* and *Y* deposit valuables in a safe that is carried by a boat. The safe falls into the water. *X*, whose valuables are worth more than those of *Y*, is interested in salvaging the property; but *Y* declines to share the cost. *X* pays for the salvage, and after the safe is pulled out of the water, *Y* takes his property. Strictly speaking, this example is not within any of the categories discussed above. Yet, I submit that *X* should be entitled to contribution from *Y*.[154] He would have clearly been so entitled had the property been co-owned by both. It is assumed, however, that each owned separate valuables. Nevertheless, the analogy to the co-owners situation is compelling. Although ownership was separate, there was a community of interest that justifies contribution.

VI. CONCLUSION

The principle that a person who acts in pursuance of his own interests is not entitled to restitution from those who benefited from his act has been extensively applied in order to restrict the application of the broad principle of unjust enrichment. Professor Dawson described the actor as a self-serving intermeddler, presumably to strengthen his criticism of those decisions, which nonetheless allowed him to recover.[155] The term "self-serving intermeddler" may be appropriate when a person acts with a view of creating new wealth or acquiring new interests. It is less appropriate when the actor tries to avoid a common loss or salvage something from a disaster that befell upon him and others.

There are a number of considerations that operate to restrict the pursuance of the self-interest principle, in particular:

(1) Was the act necessary in order to salvage an interest or avert a loss, or was it an attempt to create new wealth? This is an essential element. Ordinarily there is no room for

154. The amount of contribution should be in proportion to the relative value of the properties of *X* and *Y*.

155. See Dawson's position as reflected in his articles cited *supra* note 69.

> contribution for acts done for the purpose of creating new wealth. Admittedly, the distinction between the two categories is not always clear and borderline cases are conceivable.[156] But in many instances it is obvious that the act was done under great pressure to protect an existing interest in circumstances that are close to economic duress.[157]
>
> (2) How close are the actor and the parties who seek a free ride and wish to enjoy the actor's expenditure free of charge?
>
> (3) How clear and incontrovertible is the benefit that these parties received?

It is obvious that the case for restitution is the strongest where the act was done under great pressure, the parties that enjoyed the benefit are closely related to the act, and the benefit they derived is substantial and incontrovertible. In such a situation, the law is likely to impose a limit upon the possibility of free riding.

We may conclude by reverting to the cases of draining of adjoining mines[158] and building of the dike.[159] In the adjoining mines case, it seems to me that the plaintiff should be entitled to contribution, though he may be required to postpone collection of the amount due until the defendant takes advantage of the benefit of his act by operating the mine or by selling it at a value reflecting the fact that it can be operated. In the case of the dike, the benefit to the defendant is not necessarily clear. The plaintiff's fear of inundation might have been reasonable. But it is open to the defendant to argue that he was willing to take the risk and save the expenditure. If eventually it transpires that there would have been no inundation, the defendant's gamble succeeded, and he ought to be free from liability. But if it becomes evident that but for the plaintiff's dike a flood

---

156. For example, an expenditure made in order to provide water for irrigation might be required to save an existing crop; however, it can also lead to better a harvest, which may be seen as creating additional wealth. *See also supra* note 87.

157. *See supra* note 88 and accompanying text.

158. *See* Ulmer v. Farnworh, 15 A. 65 (Me. 1888); Berry & Gould v. Berry, 757 A.2d 108, 116 (Md. 2000); *see also supra* Section V.A.

159. *See supra* note 23 and accompanying text.

would have occurred, the case for contribution becomes stronger.[160] There arises, however, the question of the group that enjoys the protection of the dike and the extent of the benefit to each member. If there is only one additional landowner who benefited from the dike, it seems to me that he ought to contribute. But if the benefit inures to a wide group, then in the absence of a fund, the matter becomes too complex for private law. Free riding can then be avoided only through public law machinery. The dike has to be built by a public authority that will spread the cost by taxation.

160. This is subject to the reservation regarding the situation in which the plaintiff was under an obligation to maintain the dike. *See* AMERICAN LAW OF PROPERTY, *supra* note 86.