

THE LAW OF --- RESTITUTION



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The Law of Restitution

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Argentina	LexisNexis Argentina, BUENOS AIRES
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Austria	LexisNexis Verlag ARD Orac GmbH & Co KG, VIENNA
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Hong Kong	LexisNexis Butterworths, HONG KONG
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Ireland	Butterworths (Ireland) Ltd, DUBLIN
Italy	Guiffre Editore, MILAN
Malaysia	Malayan Law Journal Sdn Bhd, KUALA LUMPUR
New Zealand	LexisNexis Butterworths, WELLINGTON
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A CIP Catalogue record for this book is available from the British Library.

ISBN 0-406-98261-9



9 780406 982612

Typeset by Columns Design Ltd, Reading, England
Printed and bound in Great Britain by Clays Ltd, St Ives Plc

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Series Preface

The common law is justifiably seen as a jewel in the crown of English Law. The common law has travelled far afield to many other countries where it has been adopted and developed by the local courts. No longer the sole preserve of the judges in London (or Edinburgh and Cardiff), its durability and richness has been due in no small way to the diversity of approach that exists between the common law countries throughout the world. Many of the great judges in England, such as Mansfield, Blackburn, Atkin, Devlin, Reid and Denning, and those from overseas such as Oliver Wendell Holmes, Benjamin Cardozo and Owen Dixon, have been masters of the common law. As we enter the new Millenium, the common law continues to influence the development of law elsewhere. It will remain a major export, but now also an import, of this country.

Butterworths Common Law Series conceives of the common law in broad terms, providing analysis of the principles informing the frameworks of the law derived from judicial decisions and legislation. The *Series* seeks to provide authoritative accounts of the common law for legal practitioners, judges and academics. While providing a clear and authoritative exposition of the existing law, the *Series* also aims to identify and examine potential developments in the common law drawing on important and significant jurisprudence from other common law jurisdictions. Judges have increasingly looked to academic works for guidance on the accepted view of the law but also when contemplating a reformulation or change of direction in the law. The *Series* may, it is hoped, provide some assistance such that the law is less likely to be left undeveloped 'marching... in the rear limping a little', to quote a famous judicial aphorism (*Mount Isa Mines v Pusey* (1970) per Windeyer J).

Andrew Grubb

Foreword

For some of us restitution has emerged as a structured subject only during our professional lifetime. With the guidance and assistance of Lord Goff and Professor Gareth Jones, it has been developed from disparate sources in the common law and equity. These sources included both strict liabilities and ones which were based upon more flexible principles. The common law action for money had and received has become largely obsolete and been replaced by innominate causes of action which are open to essentially equitable defences based on such considerations as whether there has been unjust enrichment or change of position. However, the proprietary remedies still govern in equity and, it may be thought, have handicapped the same beneficial developments there and the desired assimilation of law and equity. The most critical development in the last few years has been the recognition of mistake as a ground for recovery. Welcome as it is, there has not yet been the examination of its character and implications which will provide satisfactory rules for its use.

The law of restitution, therefore, continues to be a subject where the authors of texts have a special contribution to make. The judge is at the mercy of the cases which happen to come before him or her. The authors can create their own structures, pose their own questions and, even, provide their own answers in accordance with what they opine the law should be. Thus, this addition to Butterworths' Common Law Series will be of value to both academics and practitioners. It is a pleasure to see that this volume does not shrink from asking some awkward questions and discussing frankly the merits of some of the decisions of the courts. One of the valuable messages of this volume is that, without attempting to conquer the territory of others or extend the subject beyond what is properly within the scope of the restitutionary remedy, the subject is still a frontier subject requiring the rigorous and accurate identification and refinement of the underlying principles.

This volume completes the trilogy of volumes covering contract, tort, and now restitution. Butterworths are to be congratulated and one can express the hope that this will be the first of a number of editions.

Lord Hobhouse of Woodborough
July 2002

Preface

Restitution is now a well-established, if occasionally baffling, member of the legal family. The topics it covers are diverse, though with an overall distinctly commercial flavour. The cases on which it is based are sometimes disconcertingly ancient, as we come across shards and splinters from the old forms of action; but also sometimes shockingly up-to-date, as it deals with novel situations and arguments in public law, in intellectual property, in the consequences of high-tech fraud, and in the contemporary conflict of laws. Its importance to modern business law is now undoubted.

Yet it is also mysterious, for the subject is surrounded by a dense cloud of academic theory, which repels many, and sows confusion amongst the rest. Indeed, simply to keep track of which theories are on offer would be a full-time pursuit. However, while the writers of this book have derived much inspiration and illumination from these academic sources (and, indeed, most are academics themselves), the goal of the book is much more oriented towards legal practice. Its aim is no more and no less than to give an account of the English law as it currently is, invoking theory as a tool whenever it seems useful. How well we have succeeded in that goal, we leave it to our readers to judge.

The production of this book, which was the brainchild of Steve Hedley, has been delayed due to unforeseen personal circumstances affecting several of the contributors. Whilst Margaret Halliwell has kept the ship afloat during turbulent times, Steve Hedley has undertaken the substantial editorial work. Heartfelt thanks go to all the contributors, who have all made substantial sacrifices to bring it to completion. Thanks also to the staff at Butterworths, for their hard work, competence, and, on occasion, patience.

Steve Hedley & Margaret Halliwell

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