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in Continental and Anglo-American Legal History

Vergleichende Untersuchungen zur kontinentaleuropäischen
und anglo-amerikanischen Rechtsgeschichte

Band 15

Unjust Enrichment

The Comparative Legal History of the Law of Restitution

Edited by

Eltjo J. H. Schrage

2nd Edition

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Herausgegeben von

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und Reinhard Zimmermann

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Preface

This volume is concerned with the history of the concept of, or of the remedies for, unjust enrichment in the Civil law and the Common law. But this history is radically different in the two systems — different both in the starting point of each system and in the methods by which progress from that starting point was made.

What for the Civil law is the starting point is for the Common law the ultimate outcome. The Civil law from its earliest medieval beginnings had before its eyes, at least as a potential unifying principle, the concept of unjust enrichment which it found in the *Corpus Iuris,* whereas it is only very recently (and outside the chronological scope of this volume) that the Common law has come to accept such a principle.

The methods by which the Civil lawyers progressed from their starting point towards the well articulated concepts of the modern law were those of the interpreter and elaborator of texts which had their own unquestioned authority. And their discussions, which were those of the scholar and the school-room, are well documented.

For the Common lawyers, on the other hand, the starting point was nothing but the practice of the courts and their methods were those appropriate to that practice. The plaintiff's remedy in a particular case was everything. Moreover, since the practice of the courts until very recent times is very imperfectly evidenced, the course of the development of the Common law is often difficult to trace. The researches contained in this volume show that it is only with benefit of hindsight, and then only to very limited extent, that one can see that development as leading to the recent acceptance of a doctrine of unjust enrichment.

Barry Nicholas

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I am very grateful to Herr Rechtsreferendar Dieter Waibel of Tübingen University for his skill and care in seeing this volume through the press.

E. J. H. S.

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ELTJO SCHRAGE and BARRY NICHOLAS

Unjust Enrichment and the Law of Restitution: A Comparison

In their inauguration of this series of publications the general editors Prof. H. Coing and Prof. K. W. Nörr stated that their intention was to give rise to a continuation of that tradition of learned scholarship which from a historical point of view had an open eye for the common features that linked the Common law and the Civil law — notwithstanding the obvious distinctions — and in that context they referred to H. Brunner and to F. W. Maitland, who worked on different sides of the Channel. A few pages later H. Coing clarifies his desired concept of a historical approach for comparative studies between English and Civil law. These studies should — according to Coing — compare the legal solutions found in both legal systems against the background of European civilization.

The key-word of this statement might be the expression 'European civilization'. In this introduction we are of course unable to deal with the question what in this context this expression 'European civilization' substantially means. We have to restrict ourselves to just a few remarks, which might seem appropriate, especially since such a clarification explains (at least partly) the framework and the limitations of this volume.

The concept of Europe dates in its essence not further back than the Carolingian Renaissance — if we may leave aside the story of the unfortunate girl who was taken away from the beach by a bull — and from the 11th and 12th century onwards European civilization has evolved. All European nations have gone through more or less similar political, religious and social stages, one country somewhat earlier than another. This led — according to Coing — to a restriction as to which periods are to be compared in the volumes of this series. Since the Conquest of William of Normandy in 1066 was 'a catastrophe which determined the whole future of English law' (Maitland), the time that is to be taken into consideration would be the centuries from that period up to our own century. Therefore it would be inappropriate to give pre-Justinianic Roman law a dominant place in this volume. In fact Roman law in the classical sense of the word is only dealt with in as far as it is indispensable for the understanding of later developments.

Dr. Hallebeek and Prof. Kupisch give the necessary survey. As a consequence — by contrast with the famous book of Buckland and McNair, Roman Law and

Common Law — this volume does not provide the reader with a comparison between the Roman law as it developed in antiquity on the one hand and modern English Common law on the other. It aims at a dynamic comparison of the solutions given by the different legal systems in the subsequent periods of European civilization. As a consequence the contributions by Hallebeek and Dr. Ibbetson belong organically together; we will shortly deal with the interrelations between the other contributions, but we have first to face one other problem. Are the English law of restitution and the continental law of unjustified enrichment indeed a fruitful topic of investigation for comparative legal history, and if so, what is it exactly that we are to compare? As the various contributions will show, from early times onwards such problems as mistaken payments, benefits conferred under illegal contracts, benefits obtained by duress or in breach of fiduciary duty occur in any law system, but it has been argued that Common lawyers have been inclined to assume that the law of unjust enrichment in the civilian tradition has enjoyed a longer history and a more developed jurisprudence[1] and also shows a much more profound tendency to acknowledge one general, unifying substantive principle as a ground of relief. From a historical point of view it would even be wrong to state that the Common lawyers have been in search of such a principle. 'In England it has been withered by judicial scorn', wrote Nicholas some thirty years ago[2] and he gave a number of significantly illustrating quotations, which could be enlarged with Lord Diplock's statement in *Orakpo v. Manson Investments Ltd,*[3] that 'there is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based upon the Civil law'. After *Lipkin Gorman v. Karpnale Ltd.*[4] and *Woolwich Equitable Building Society v. Inland Revenue Commissioners,*[5] however, it may be true that the respectability of unjust enrichment as an independent ground of relief has at last been established, irrevocably as far as can be foreseen,[6] but the previous sentences throw a sidelight on the major problem we are now bound to face: what exactly is the subject matter that is to be compared? The question is even more difficult to answer for Common lawyers than it is for continental lawyers. Hallebeek starts right away by describing the medieval interpretations of the different actions that come into account, whereas Ibbetson goes so far as to call his paper: 'perhaps a paper without a subject'.

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1 *W. M. C. Gummow* (1991) LQR 107, 509.

2 *Barry Nicholas,* Unjust enrichment in the civil law and Louisiana Law (1962) Tulane Law Review 36, p. 605-646, at p. 605.

3 *Orakpo v. Manson Investments Ltd* [1978] A. C. 95 (at p. 104).

4 *Lipkin Gorman v. Karpnale Ltd* [1991] A. C. 348.

5 *Woolwich Equitable Building Society v. Inland Revenue Commissioners* [1992] 2 WLR 366.

6 *R. Cooke* (1992) LQR 108, 334.

In his preface to volume 5 of this series Prof. Baker gave in his unrivalled wording a sketch of one of the major distinctions between the methodology of the English lawyer and that of his Continental counterpart, the former working largely from decided cases, the latter from codes and doctrinal literature. This means — writes Baker — that the Common lawyer reasons from particular instances towards a general principle capable of application to the matter in hand, whereas the Continental lawyer is supposed to reason from general principles towards the particular. Another consequence is — we still quote Baker — that the Common lawyer attaches greater significance to forensic decision-making, to the doings and sayings of courts, than do lawyers bred on doctrine.

Baker continues however by qualifying this supposition as an 'over-simplification', which 'as a guide to legal history is demonstrably misleading'. And indeed, as Ibbetson, Baker and Prof. Jones have shown in their contributions to this volume, though English medieval (and later) lawyers seem to have been working largely from decided cases, they certainly[7] did dispose of a body of doctrine (although the borrowings from Justinian's Institutes by the early institutional writers seem to have been of a rather limited influence in early English practice, as Ibbetson states; they therefore hardly play a part in his paper). Already from the bare fact of the existing structure of remedies it follows that cases could not always be treated in the light of completely fresh principles and fresh minds. It is likely that judges were inclined to take into consideration decisions of their predecessors and it is probable that these precedents had some binding force in so far as they could, if discovered, be considered as good arguments in the case at hand.[8] And on the other hand, lawyers on the Continent made widespread use of decisions in particular cases, as Feenstra shows in his contribution, referring to Holland in the 18th century.

There is however some truth in the statement that Baker qualified as an 'over-simplification'. The differences between the starting points and methods of development of the two traditions emerge clearly from a comparison between the paper of Hallebeek on the one hand and those of Ibbetson and Baker on the other. The starting point for the Glossators and their successors is the great deposit of materials in the *Corpus Iuris Civilis,* a deposit which is itself the product of a long development. Their methods are those of the interpreter and elaborator of a text which has its own unquestioned authority. And their discussions, which are those of the scholar and the school-room, are well documented.

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[7] *J. H. Baker,* The Inns of Court and Legal Doctrine, in T. M. Charks-Edwards a. o. (eds), Lawyers and Laymen. Studies in the History of Law presented to D. Jenkins, Cardiff 1986, 274-286.

[8] *Baker,* Introduction p. 225 however draws attention to the fact that the medieval notion of precedent was considerably different from that of the present day for procedural and other reasons. The strict meaning of the word precedent was a judgment entered on the roll.