CONTRACT, GIFT AND QUASI-CONTRACT

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Much too little has been done to explore the deeper connections between the laws of contract, gift and quasi-contract. For attending to their interrelation will bring out a most interesting and important truth, namely, that the three categories, often thought so different from each other, are on the contrary closely connected, indeed systematically connected by way of (as it were) a triple function. More simply put, contract, gift and quasi-contract are not just fortuitous, they are necessary and inevitable neighbours. Though concentrating on essentials, we shall need to pick and put together many pieces from many parts. But the purpose of this paper is to sketch a major theme or groundplan in our private law; its purpose decidedly is not to raise merely another plea *de aequo et bono*.[1]

I.

As we are here concerned with executed as distinct from future or executory transactions, our original problem is this; A has given B some thing or money, but A now claims the return of these things. Obviously, we can say nothing about this claim unless we know more fully how or why these assets came into B's possession. This question admits of many possible answers, though only three need presently to be specified: (1) A may have misdirected his delivery mistaking B for C, or may have lost his property whereupon B found it; or (ii) A may merely have transferred to B the thing or money, without B however giving his prior consent to this; or (iii) both A and B may have agreed and consented to a transfer: e.g. where A delivers goods to B or sends him money in pursuance of a previous bargain, or where A willingly gives and B readily accepts a gift of things or money. Of these three, only the last situation represents what could properly be called a transaction. Situations (i) and (ii), by contrast, lack this element of consent, and however we define "transaction," any definition must include a voluntary "give and take" by the transferor and transferee respectively. Thus in situation (i) A's transfer is accidental or fortuitous, while in (ii) B is only an involuntary bailee, even if A is a willing bailor. Of course, in both these cases A and B may subsequently ratify or acquiesce in the transfer; yet the

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[1] There is, of course, a voluminous and controversial literature dealing with restitution, unjust enrichment and so on. But the reader may be quite content with a concise, yet very adequate, review of the various pleas and counter-pleas in G. C. Cheshire and C. H. S. Fifoot, *The Law of Contracts* (4 ed. 1956) 548. But more fully, see J. P. Dawson, *Unjust Enrichment* (1951) 111 ff.

transfer would then become, though only *ex post facto*, a fully consensual transaction. Apart from this, however, it still is true that what distinguishes these situations is the fact that while situations (i) and (ii) do not, situation (iii) does, represent an agreed or consensual transfer of assets.

This tripartite division has a further significance. For the central assumption underlying all three situations is that the only way of validly transferring property from one person to another is by way of a consensual transaction. In more practical language, this simply means that one cannot keep or acquire another person's things or money unless that person gives his consent or permission. So translated, moreover, the notion of a consensual transfer necessitates a notion of "property", since the two notions are now complementary: to the extent that A may regain his assets, his property is affirmed, and to the extent that B may retain these assets in his possession, A's property-rights are denied. Thus, the test of a valid acquisition by B is to ask whether the transfer was consensual (that is, was by bargain or gift), since without this transfer the acquisition would have no proprietary effect. In short, without there being a proper transaction, property or title does not pass as between A and B, our immediate transferor and transferee.[2] Indeed, the notion of transaction also makes it easier to comprehend a basic unity where otherwise there would seem two divergent legal purposes and results. It is obvious that the law must intervene to protect transactions once it recognises voluntary property-exchanges, that is, exchanges which are neither forced nor forcible acquisitions, nor acquisitions which are entirely government-controlled. Otherwise put, "transaction" becomes but another expression of the legally protected freedom which enables private transfers of wealth. Yet seen from the view-point of specific legal relations, the freedom ramifies into two kinds of rules. For one thing, a genuine or consensual transaction will not only be a valid mode of acquiring property, it will also have to be an irrevocable one, as without this irrevocability the very notion of consensual or valid transfer would be as useless as it would be irrelevant. For another thing, just as a mutually consented transfer is irrevocable, so a non-consensual transfer will entail opposite results. For example, where goods are sent to an involuntary bailee, he remains free to return the goods, simply because he is free to decide whether or not he wants to buy or accept A's property. In such a case, the only practical question therefore is what duty (if any) a bailee has towards the things in his unwilling custody. Clearly, this duty cannot be that of a warehouseman, though he remains under some duty of care, for (as has been said) though the involuntary bailee is not bound to warehouse the goods, he nevertheless cannot turn them into the street.[3]

On the other hand, where B acquires or keeps possession without any consent from A, B is not only entitled but is under a stringent duty to make return. If B also happens to be a forcible or fraudulent possessor, he will face a whole catalogue of crimes, especially larceny and false pretences, and even finding may become a theft.[4] But it is with the non-criminal and civil

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[2] All this is not meant to be an exhaustive definition of "property". Many other notions such as "special property", *jus tertii*, possessory rights, treasure trove and more considerably extend and complicate the full meaning of "property". However, from (and confined to) the viewpoint of the immediate parties (transferor and transferee), the notion of transaction gives a functionally correct picture of what rights to property here essentially mean.

[3] See on this *Hiort* v. *Bott* (1874) L.R. 9 Ex. 86, 90; and for fuller discussion, see J. G. Fleming, *The Law of Torts* (1957) 65.

[4] Cp. *Hibbert* v. *McKiernan* (1948) 2 K.B. 142; *Walters* v. *Lunt* (1951) 2 All E.R. 645; Larceny Act, 1916, s. 1(2)(i)(d).

aspects that we are concerned, simply because criminal law stresses mainly the wrongfulness of B's possession and the punishment for it, while private law emphasises the restitutive rather than the punitive side of things. Now of private-legal remedies there are two kinds. There are the actions in tort, i.e. trespass, detinue and trover;[5] and there is the action in money had and received, the classical remedy in quasi-contract.[6] These actions have their appropriate spheres. The tort-actions, normally, only apply to the recovery of physical objects or to recovering their pecuniary value in damages. In other words, tort-actions will not apply to the recovery of money, there being two broad reasons for this. In the first place, one cannot commit a tort in respect of money as one can commit a tort to a specific chattel or thing — for since money is a negotiable commodity with title passing from one holder to the next, such torts as detinue and conversion seem here entirely out of place.[7] In the second place, where one seeks to recover a sum of money instead of a specific thing, and since, furthermore even a wrongful detention of money does not in English law carry a liability in damages, claim for an amount of money becomes quite akin to any other claim in debt. It follows that the recovery-action will be "tort" in the case of chattels, but will be "quasi-contract" where a fixed pecuniary sum is claimed. Yet this classification must not conceal their essential similarity: the action in quasi-contract is as revendicatory as are trover and detinue.

Unfortunately, this purely revendicatory aspect of quasi-contract has become much obscured. For it is now fashionable to talk of quasi-contract as an entirely separate source of obligation based on "unjust enrichment" and "equity". These matters do not concern us here, except to mention that as proof of these peculiarly "just" or "equitable" considerations pertaining to quasi-contract one is (amongst other things) often referred to "change of position", the well-known defence to restitutionary claims.[8] For is not this defence (so the argument runs) explicable only through a balancing of equities? In particular, does not the defendant's change of position make his enrichment "just" where before it was "unjust"?[9] Even admitting this, the equitable "separateness" of quasi-contract remains quite unproved. Indeed, the peculiarities of this quasi-contractual defence spring simply from the fact that what is claimed is money, that money consists of interchangeable coins or notes, that the defendant has spent this money in complete innocence having received it from persons (such as bankers or paymasters) who might well be expected never to overpay. Even more importantly, the idea of change of position extends far beyond quasi-contract and it has much in common with other defences such as laches or long user or prescription, i.e. doctrines which provide certain (non-consensual) ways of acquiring rights to property; for, surely, one reason why possession is said to be nine points of the law, is the hardship that a change of position would involve. Yet these acquisitive defences do not alter the *initial* nature of an owner's right to recover his property. Indeed, this initial right of recovery does not depend on "equities",

[5] W. A. Seavey and A. W. Scott, "Restitution" (1938) 54 *L.Q.R.* 29 at 38; and *Restatement of Restitution* (1937) paras. 128 *et seq.* (and Introductory Note thereto).

[6] See R. M. Jackson, *History of Quasi-Contract* (1936) 42 ff., 58 ff. The expression "money had and received" seems to have originated in relation to claims for money received by defendant for transmission to the plaintiff: see *id.* at 93. Later the expression became a blanket term, including the recovery of money in cases of failure of consideration and payment by mistake.

[7] See on this J. Walter Jones, *Bona Fide Purchase of Goods* (1921) 9 ff.

[8] H. Jones, "Change of Circumstances in Quasi-Contract" (1957) 73 *L.Q.R.* 48.

[9] These "equitable" (and "just" or "unjust") considerations appear much more forcefully in the American cases than in the English ones. The latter have relied more on the estoppel-theory: see G. H. Jones, *loc. cit.* 54-56.

"unjust enrichment" and so on, but depends on the basic proposition (already explained) that property cannot change hands without a transaction or transfer by mutual consent: the transferee must either have bought the things in question or have acquired them by gift from a willing donor. The corollary is that unless there is such a valid transfer by bargain or gift, the transferee must disgorge the things which came into his custody. In short, we can say that the restitutionary remedies come into operation where neither bargain nor gift give title to the transferee. Moreover, confining ourselves to the recovery of money from persons who are not thieves, the typical instance in which title is denied will be the situation where money is erroneously transferred. And we can now see why money paid under mistake has been so prominent a rubric of quasi-contractual recovery.

II.

The problem of payment under mistake also throws light on a more intricate connection between contract and quasi-contract and gift. When dealing with the nature of the mistake which opens the door to recovery, it is often said that the same principles of mistake apply both to the law of contract and to that of quasi-contract[10] But such a statement only shows how confused the basic issues still are. For the relevant question does not concern the distinction between contract and quasi-contract, but concerns the possible differences in the law of mistake as applied either to contract or to gift. Because (as the previous explanations must have clarified) quasi- contractual recovery does not arise (so to speak) of its own strength, but results from a denial of title in the defendant in view of the non-existence of a bargain or gift. The only question therefore is how mistake affects these transactions; and we may first consider the matter from the point of view of a gift.

Suppose, then, that A makes a gift of a sum of money to B: can A recover it on the ground of mistake? Broadly, two main principles obtain. The first (which applies to bargains as well) is that A can recover his money from B, provided he shows that there was a mistake of identity, that is, C and not B was to be paid. The second and more fundamental principle is that where the gift is executed and complete, the donor can no longer revoke it on the ground of mistake except mistake induced by the donee by some misrepresentation or fraud.[11] This latter principle obviously confines legal intervention to very narrow range. This is not surprising, since any wider operation of legal mistake would give the donor far too much scope to repent and rescind his previous generosity. And this would not only undermine the (assumed) irrevocability of an executed gift, it would leave it quite uncertain, at least for some time to come, whether the money donated was to remain in the donee's absolute or merely temporary custody. In the case of contracts, too, legal mistake must never be the means of rescinding bargains which prove merely unprofitable. But contracts possess this special feature that they are two-sided exchanges (usually money for things), and furthermore, if B pays money for goods which prove of worthless quality, B can recover his money as on a consideration which has failed.[12] Thus the

[10] For details of this controversy, see G. C. Cheshire and C. H. S. Fifoot, *op. cit.*, 535.

[11] More generally S. J. Stoljar, "A Rationale of Gifts and Favours" (1956) 19 *Mod. L.R.* 237, 250.

[12] For failure of consideration, see P. H. Winfield, *The Law of Quasi-Contracts* (1952) 35 ff. The doctrine will be more fully discussed in a forthcoming article in the *L.Q.R.*

fact of exchange provides an external standard by which the parties' intention can be objectively judged. So a person claiming the return of his price would be able to say that he paid money for nothing, not having received anything in return, having mistakenly expected that the defendant had something to sell. Precisely this is what the plaintiff can never say in the case of a gift; indeed, in gift the donative intention is so much more subjective and changeable that it obviously requires a more limited operation of mistake. For our present purpose we can now state the relevant principles in fairly concise form. Putting aside mistake of identity, a plaintiff can recover money paid under mistake of fact either because of the defendant's false inducements or because of failure of consideration or exchange.[13]

This simple summary, however, does not entirely accord with our conventional book-law relating to payment under mistake. The whole picture here has been marred by an old difficulty originating in Baron Bramwell's well-known *dictum* in *Aiken* v. *Short*.[14] "In order (he said) to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money." What do these words mean? Baron Bramwell seems to have been groping for the right distinction between gratuitous payments and payments in pursuance of a contract or debt. But, then, his manner of expressing it was both misleading and unclear. For one thing, the word "desirable" suggested a payment not quite gratuitous but made according to some duty that remained undefined; for another, the word "liable" though suggesting a duty to repay a debt seemed to exclude the return of money in case of failure of consideration which(as we have just seen) made the whole difference between mistake in bargain and mistake in gift. Nor was this difference really perceived during the chequered history of Bramwell's *dictum*;[15] nor was it completely understood even in a more recent case. In *Morgan* v. *Ashcroft*,[16] a bookmaker overpaid one of his customers by some £24 owing to a clerical mistake. This money he now claimed back, and was upheld by the county court. But this was overruled on appeal. One quite sufficient ground was that the court could take no account (nor take an account) of the overpayment because of the Gaming Acts, so as to avoid giving any enforceable effect to a transaction made void by statute. But the court also proceeded to consider the quasi-contractual aspects of the claim. The nature of this

[13] Needless to say, this analysis completely excludes payment under mistake of law. But mistake of law creates its own special difficulties which can be disregarded since they are neither illuminating nor relevant here.

[14] (1956) 1 H. & N. 210, 215. The *dictum* was not really necessary for the decision in this peculiar case. For a better report see 25 L.J. Ex. 324. A lent B £200, the loan being secured by an equitable charge on property which B afterwards mortgaged to a bank. When A asked for his money, he was referred to the bank who paid B's debt to get rid of the charge affecting their interest. Later it was discovered that A's charge was invalid, so that the bank had paid off A for something that was valueless. In an action by the bankers, it was held that the money was irrecoverable from A. Several reasons were advanced: that A being entitled to the money from B, the bankers had in fact paid A as agents for B; that there had been laches and change of position; then, that A should not now be in a worse position as if the money had not been paid. Then it was said that, "If I apply to a man for payment of a debt, and some third person pays me, can he recover back the money because he has paid it under some misapprehension?" (1 H. & N. at 213-14). This and other statements leave little doubt that both Bramwell and Martin BB. much misunderstood the principles of failure of consideration which even at that time already enabled the recovery of payments for worthless things. The only thing not yet decided was how to treat payment by a stranger; but since it was eventually settled that such payment discharged the debt, the payment was commercial and non-gratuitous to which furthermore the test of failure of consideration ought to have applied.

[15] P. H. Winfield, *op. cit.* 44; and see *Morgan* v. *Ashcroft* (1938) 1 K.B. 49, 64-66, 72-74 where the *dictum* was found not to be exhaustive.

[16] (1938) 1 K.B. 49.

claim and its limits, said Greene, M.R., have been the subject of much controversy without a comprehensive solution having been found.[17] Yet the court also seemed to think that perhaps the most satisfactory approach lay in a test of intention: just as a tradesman delivering goods to the wrong person means absence of any intention and prevents title in the goods from passing, so similarly money paid under a mistake of fact ought to be recoverable if payment is made without any real intention.[18] But what is such real intention? The answer, the court thought, was to ask whether the payor's mistake was fundamental or basic regarding the underlying assumption of the contract. For example, there is fundamental error where the payor's mistake concerns the identity of the payee or where it concerns the question whether the payor is actually under a legal obligation to pay.[19] On the other hand, there is no fundamental error, if the payor only thinks that he is making one kind of voluntary statement, while in fact he is making another. Thus where a father believing his son to have suffered financial loss, gives him a sum of money, he surely cannot re-claim his money if afterwards he discovers that no such loss has occurred: "In that case the payment is intended to be a voluntary one and a voluntary payment it is whether the supposed facts be true or not."[20] Now how did this theory of fundamental mistake apply to the bookmaker? It is true that since the betting transaction was void, his payment, though no doubt "desirable", became merely gratuitous; and being such, the bookmaker could not subsequently complain that his gift was meant to be of a smaller sum than he actually paid over. However, the only reason why the bookmaker's payment became voluntary in this sense, was that any other result would in fact have amounted to practically enforcing a claim that was unenforceable by statute; in short, the reason why the bookmaker's claim was unsuccessful had nothing at all to do with fundamental mistake. Be this as it may, the court certainly moved in the right direction by indicating the distinction between payments by way of gift and payments by way of debt or exchange: this is the most relevant and basic distinction concerning the recovery of money paid under a mistake of fact.

III.

We pass to a second set of problems where A does not seek the repayment of money, but claims payment for a service done. It is important to see the differences in these claims. Whereas, for example, one may lose an object or have it taken by a thief, one cannot lose a service nor become the finder of one. Whereas, again, a physical (except perishable) thing is always susceptible of being returned, a service once done and finished cannot be similarly restored; it can at best only be paid for in money or in kind. Thus a claim for recompensing a service will occasion a very different dispute from a claim for the return of a physical thing. In particular, a claim for recompense would not be concerned with the problem of mistake. Of course,

[17] At 62. The same judge also rejected "unjust enrichment" as the basis for the claim, preferring the theory of implied or imputed promise to repay as approved by Lord Sumner in *Sinclair* v. *Brougham* (1914) A.C. 398, 452.

[18] For the "intention" test, see Parke, B. in *Kelly* v. *Solari* (1841) 9 M. & W. 54, 58; Lord Dunedin in *Sinclair* v. *Brougham* (1914) A.C. 398, 431; Lord Sumner in *Jones* v. *Waring & Gillow* (1926) A.C. 670, 696.

[19] Lord Wright in *Norwich Union Fire Ins. Soc.* v. *W. H. Price, Ltd.* (1934) A.C. 455, 463.

[20] (1938) 1 K.B. 49 at 66. Scott, L.J.'s judgment was to the same effect, and see also his discussion of implied contracts at 74-77.

a person can misdirect his service by polishing B's shoes instead of C's; but in such a case B would merely become the involuntary recipient of another's work. Nor, indeed, can it matter to B whether this work is a kindly gesture or is due to a mistake. For quite unlike the involuntary bailee of goods who has the choice between returning the article and keeping it (and so "adopting" the sale), the involuntary recipient of work cannot similarly choose to reject what has been done for him. Hence, in the well-known words of Bowen, L.J., the "general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure."[21] Or, as Pollock, C.B. said in another place "One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning?"[22] To express the same principle in a different way. If A confers unasked benefits upon B, A is an officious meddler with whom B did not desire nor can be required to deal.[23] Not that this principle transforms what may seem *unjust* enrichment into a *just* benefit; the principle against meddling rather re-affirms the very *raison d'être* of the law of contract as a whole: its purpose (speaking briefly) is to enable exchanges of property or service based on the parties' mutual consent or, at least, on their autonomy of choice.

Still the respective limits of "contract" and "meddling" seem only crudely understood. There are several situations where work is done by enthusiasts without a specific or express bargain, yet work which shows no trace of officiousness. But the usual assertion is that, as far as English law is concerned, every volunteer is a meddler, since English law does not recognise the *negotiorum gestor* apart from a very few exceptions, the principal one being salvage at sea. More precisely, the assertion is that while the common law has refused recompense for unrequested though beneficial service, the law of admiralty has openly steered a more quasi-contractual course.[24] It has, however, remained somewhat unnoticed that salvage possesses features making it far less of a voluntary service than it may appear superficially. For one thing, the salvor can only intervene if a vessel hoists the signal of alarm, requesting help because of the danger she is in; the salvor, in brief, may not intervene unless intervention is both invited and accepted by the captain in distress.[25] For another, the salvor answering the call of distress, will (as every sailor knows) give assistance on a pecuniary basis; indeed, the salvor is not a volunteer in the strictly benevolent sense, but is

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[21] *Falcke* v. *Scottish Imperial Insurance Co.* (1886) 34 Ch. D. 234, 248. Nor does the plaintiff obtain a lien on the property benefited by him: see Cotton, L.J., *id.* at 241. Yet it is perhaps doubtful whether this case was rightly decided: see text at n. 59 *infra.*

[22] *Taylor* v. *Laird* (1856) 25 L.J. Ex. 329 at 332.

[23] See *Restatement of Restitution* (1937) paras. 2, 112 and Comments thereto.

[24] This divergence between the common and maritime law was much insisted on in the nineteenth century: "With regard to salvage, general average, and contribution, the maritime law differs from the common law. That has been so from the time of the Roman law downwards. The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea" *per* Bowen, L.J. in *Falcke* v. *Scottish Imperial Ins. Co.* (1886) 34 Ch. D. 234 at 248. See also Bruce, J. in *The Hestia* (1895) p. 193.

[25] *The Bomarsund* (1860) 1 Lush. 77. The best evidence of distress is the acceptance of services from strange hands, though the owners or their agents can of course refuse assistance: *The Samuel* (1851) 17 L.T.O.S. 204. For a brief account of salvage, see 1 Halsbury, *Laws of England* (3 ed. 1952) 65.

much better described as a "volunteer adventurer".[26] The peculiarity of salvage, then, is not that services are recompensed in the complete absence of any agreement; the peculiarity rather is that, because of the urgency of the case, the parties cannot even begin to negotiate performance or price: as yet, they do not even know how long, how hard and how dangerous the salvor's work would be. Thus salvage constitutes work which, far from gratuitous, is meant to be paid; only that the emergency requires emergency-contracts, which like other contracts initiate an economic exchange (work for pay), but which unlike other contracts must leave their major terms incomplete until the whole work is done. Not surprisingly, the parties often found it difficult to agree on the appropriate recompense even after the salvage was complete and would therefore turn to the courts to determine a salvor's claims. But the judges were faced with the same difficulty, for even they had to evaluate a reward where "the one party (was) hardly guessing what is proper for him to ask, and the other equally ignorant what he ought to refuse; and the Court having to find the proper liquidation, often on evidence sworn on both sides with equal intrepidity."[27] For this reason there began talk of principles of natural equity, of merits bestowed and benefits received.[28] These principles though obviously indeterminate, provided some justification for generous rewards, in order not only to recompense hazardous work ("danger-money" we would call it now), but also for the sake of a public policy which was to encourage mutual help on the high seas so as to make shipping a safer trade.[29] A court, however, would grant no reward unless the salvage was at least partially successful: the salvor had no claim if his salvage failed.[30]

Despite several differences, the law of salvage may then be seen as but the nautical counterpart of a more terrestrial line of cases which we may call the request-cases. The technical significance of these is that they resolved a difficulty created by the rule against past consideration as well as prepared the ground for the notion of "implied contract". Concerning the former rule, the law has long been that if B performs a service at A's request and A subsequently promises to reimburse or recompense B for his expenses or work, the latter promise is enforceable, even though that promise looks more like a belated gratitude for a past service than the making of a bargain.[31] Two early cases established this principle and fully illustrate its ambit. In

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[26] For this expression, see Lord Stowell in *The Neptune* (1824) 1 Hagg. 227, 236. Moreover as Dr. Lushington said in *The Albion* (1861) Lush. 282 at 284: "it is of the utmost importance to the safety of shipping, that the owners of steamships and other salvors should know that this Court is inclined to reward liberally unusual efforts to assist vessels in distress, wherever those efforts are successful."

[27] See Lord Stowell in *The Neptune* (1824) 1 Hagg. 227 at 237.

[28] These ideas run very clearly through the early decisions of salvage law. For example, in *The Thetis* (1833) 3 Hagg. 14, the *quantum* of recovery was seen to depend on the merit of the service, and Sir Christopher Robinson specified the meritorious considerations as the danger, trouble, expense of saving as well as the value saved. In one sense, these were "the principles of equity", but in another merely a way of "presuming the agreement of the parties": *id.* at 48, 63. The same judge had, a few years earlier, similarly referred to the principle of natural equity "of rewarding spontaneous services, rendered in the protection of the lives and property of others". *The Calypso* (1828) 2 Hagg. 209 at 217-18.

[29] For this element of public policy as well as seeing the reward "but in lieu of all the damages sustained", see *The Calypso* (1828) 2 Hagg. 209, 212, 217-18; *The Albion* (1861) 1 Lush. 282, 284. It ought to be remembered that not only rescue from danger, but "recaptors" from pirates were salvors too: 2 Hagg. at 212-14. Public policy, in short, regarded the salvors both as naval police and fire-brigade. Again, even an ordinary towage contract can transform into salvage if the services become of a higher degree than originally contemplated. See *The Fire Steel Barges* (1890) 15 P.D. 142.

[30] See 1 *Halsbury, op. cit.* 65.

[31] See on this generally G. C. Cheshire and C. H. S. Fifoot, *op.cit.* 58.

Hunt v. *Bate*[32] A's servant was imprisoned for debt, but bailed out by the plaintiff apparently out of friendship for A. Afterwards, but before judgment, "the master upon the said friendly consideration promised and undertook to one of the mainpernors to save him harmless from all damages and costs if any should be adjudged as happened afterwards in reality, whereupon the surety was compelled to pay the condemnation." On this promise the plaintiff then brought action yet lost; not only "because there is no consideration wherefore the defendant should be charged for the debt of his servant", but (more importantly) because A had never made a request to the plaintiff "to do so much, but he did it of his own head."[33] There was however such a prior request in *Lampleigh* v. *Brathwait*,[34] where A invited B to obtain a royal pardon for him and later promised him £100 for his trouble. The court agreed that though a mere voluntary courtesy or a past favour cannot support an assumpsit, yet a courtesy moved by a preceding request is sufficient consideration to uphold the subsequent promise, "for the promise, though it follows, yet is not naked, but couples itself with the suit before, and the merits of the party procured by that suit."[35] These cases require two comments. In the first place, the decisions push towards a clear distinction between a favour and service, between acts done in a friendly way and acts done by way of bargain or business. In the second place, both cases still insist on the dual requirements of prior request and subsequent promise. The reason for this was very clear. Without a prior request, the later promise to pay a certain sum was no more than a quantified "thank you". On the other hand, the prior request alone could not ground an action, since a claim for payment had to rest on an express promise or assumpsit to pay; the request by itself made no such promise, even though it apparently asked for a payable rather than a gratuitous service.[36]

Still the rationale of these cases made two further steps almost inevitable. One step lay in the idea that where A requested a service, he could be expected to pay for it, even if he had never expressly promised any payment. But since the request would show whether or not the services were invited by way of business, the request became ample basis for implying a promise to pay for those services. The next step introduced the implication even of the prior request where work was done without any verbal arrangement. The precise history of this process is not important now. Suffice it to say that after it had been held, for more than two centuries, that no assumpsit would lie without at least an express request by the defendant,[37] this request was later dispensed with (or was implied) where it appeared "to be unnecessary to allege request, if the act stated as the consideration cannot, from its nature, have been a gratuitous kindness, but imports a consideration *per se*."[38] The

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[32] (1568) 3 Dyer 272a.

[33] At 272b.

[34] (1615) Hob. 105; 1 *Smith L.C.* 148.

[35] This result was foreshadowed in several decisions since *Hunt* v. *Bate* (1568) 3 Dyer 272a. See *Sydenham and Worlington's Case* (1584) Godb. 31; *Anon.* (1586) Godb. 89; *Bosden* v. *Thinne* (1603) Yelv. 40. And for later cases: *Hardres* v. *Prowd* (1655) Sty. 465; *Best* v. *Jolly* (1661) 1 Sid. 38.

[36] These ideas, it is perhaps needless to add, underlie the two modern cases of *Kennedy* v. *Broun* (1863) 13 C.B.N.S. 677 and *Re Casey's Patents, Stewart* v. *Casey* (1892) 1 Ch. 104. But it is difficult to see why this so-called "modern settlement" should be regarded as a modern discovery: see G. C. Cheshire and C. H. S. Fifoot, *op. cit.*, 60-61.

[37] Examples are *Hayes* v. *Warren* (1732) 2 Str. 933, 2 Barn. K.B. 140; *Durnford* v. *Messiter* (1816) 5 M. & S. 446.

[38] *Victors* v. *Davis* (1844) 12 H. & W. 758, 1 Dow. & L. 984.

first manifestation of this occurred in the common courts for money lent or goods sold and delivered; indeed, the very word "lent" and "sold and delivered" implied a request on behalf of borrowers or buyers who were clearly not intended to get things gratuitously. Then, in the nineteenth century, contracts began to be implied in the case of work done or services rendered. The implication depended on the work being business-like or commercial rather than friendly or even amorous. In one instance,[39] a woman declared against a man that he had seduced her, induced her to cohabit with him, but that later they had agreed to cease cohabitation when the man promised her an annual allowance for maintenance. The man's promise was held unenforceable, though he had both requested the services and even expressly promised to pay a certain sum for them. "The result (said Lord Denman, C.J.) is that an express promise cannot be supported by a consideration from which the law would not imply a promise."[40] So what finally mattered was not whether the defendant had or had not promised to pay, but what kind of transaction it was: whether in the given relationship between the parties either a bargain or a gift ought to be presumed. In the case of money lent or goods supplied, the parties' commercial relationship was usually obvious enough. In the case of services, on the other hand, their relationship was often much harder to determine. Some of these cases require a little more scrutiny.

IV.

Where A has done work for B, at B's request, but both have mentioned nothing concerning pay, how do we know whether A should get reasonable remuneration or not? Though A's work may be considerable or important, it may still be done as a favour to B: there are many kinds of work which can easily be either "contract" or "gift". What, then, are the principles on which a contract to pay may be implied? Much will here depend on the customary and conventional elements of the situation; but one principle, at least, seems clear. If the work is done in a professional capacity, remuneration will certainly be due. Thus, in *Poucher* v. *Norman*[41] a certified conveyancer sued for his fees, and the court twice said that where a man bestows his labour to the benefit of another, he has a right to recover compensation for it.[42] Similarly in *Higgins* v. *Hopkins*[43] a surveyor made extensive valuations for the defendant. In an action for payment, Baron Parke said that when "a party merely speculates on the chance of being paid, taking the risk, . . . there is no contract", but if "he does work on the order of another, under such circumstances as that it must be presumed, that he looks to be paid as a matter of right to him, then a contract would be implied with that person."[44] Finally in *Way* v. *Latilla*,[45] W agreed to negotiate for and to

[39] *Beaumont* v. *Reeve* (1846) 8 Q.B. 483.

[40] At 487. It need hardly be pointed out that the modern solution no longer rests on "(non-) implication" in such cases, but on the ground of public policy or illegality.

[41] (1825) 2 B. & C. 744.

[42] It seemed important that the conveyancer had taken out a certificate under 44 Geo. 3, c. 98, s. 14. For in *Jenkins* v. *Slade* (1824) 1 C. & P. 170, the conveyancer, like the barrister, was not held entitled to recover for services rendered by him. But now a distinction was made between barristers and physicians on the one hand and "the other degrees of those professions", e.g. conveyancers and surgeons.

[43] (1848) 3 Ex. 163.

[44] At 166. Where such duty to pay for work is made conditional on the receipt of funds, the duty nevertheless becomes absolute when the funds are received: see *ibid.*

[45] (1937) 3 All E.R. 759.

obtain West African gold-mining concessions for L. The latter's objection that there was no definite contract of employment was easily disposed of by the House of Lords. It is plain, said Lord Atkin, "that there existed between the parties a contract of employment", in view of "circumstances which clearly indicated that (W's) work was not to be gratuitous."[46] These cases clearly illustrate the strength of the pecuniary presumption if and where the given services are expert or skilled. English law, unlike Roman law,[47] assumes that professional men do not usually give their services for free.

But apart from skilled or professional service, the picture is far less clear. Especially is this true where services are rendered between members of a family. In *Davies* v. *Davies*[48] the litigants were brothers; the plaintiff and his wife had been living with defendant for four months, assisting him in his business and (the wife) also keeping house. The plaintiff then sued for remuneration, and the defendant pleaded set-off for board and lodging. It was held that their life together was a gratuitous arrangement, so that "no *ex post facto* charge can be made on either side."[49] On the other hand, in *Hulse* v. *Hulse*[50] the plaintiff had from early age been working for his uncle "quite as faithfully, if not more so, than Jacob served his father-in-law fourteen years, — seven years for one wife, and seven for another."[51] This biblical analogy, perhaps more than the actual facts of the case, persuaded the court that the nephew's (like Jacob's) purpose had been frankly acquisitive. Understandably, there is less difficulty where remuneration is claimed by domestic servants or housekeepers. They are presumed to be in gainful employment earning reasonable wages though none is specified.[52] The only exception is cases where some payment has been made in kind. Thus in *Foord* v. *Morley*[53] the plaintiff worked for six years keeping house, receiving board and shelter and allowed to keep fowls and bees for her own profit. Nothing was ever said about wages, and later she claimed £15 per annum, but the decision was that no such bargain could be implied. Again in *Bradshaw* v. *Haywood*[54] a girl claimed wages for service as a waitress. The defendant, an innkeeper, proposed to give evidence that she had lived with him as his mistress; and even if hardly the evidence of a gentleman, this was thought sufficient to negative a contract against him.

Yet what is the nature of these implied contracts of which we now speak? It is clear, in the first place, that this is not an ordinary contract between master and servant, simply because either party can "dismiss" the other without there being any relief at law or in equity.[55] This is to say that the contract is not implied with regard to the future, but is implied to re-adjust a past relationship; indeed, "contract" becomes just another way of saying that the plaintiff not having given his services free, is entitled to remuneration or recompense. But, secondly, what amount of remuneration

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[46] At 763. Lord Wright (at 765) made the same point by saying that it was clear that the work was done by W. and accepted by L. on the basis that some remuneration was to be paid by L. to W.

[47] For the Roman law on this, see F. Schulz, *Classical Roman Law* (1951) 556.

[48] (1839) 9 C. & P. 87, 252.

[49] At 88.

[50] (1856) 17 C.B. 711.

[51] At 717.

[52] For a full account of the American decisions, see H. C. Havighurst, "Services in the Home" (1932) 41 *Yale L.J.* 386.

[53] (1859) 1 F. & F. 496.

[54] (1842) Car. & M. 591.

[55] See on this point the remarks of Lord Selbourne, L.C. in *Maddison* v. *Alderson* (1883) 8 App. Cas. 467, 472.

can we "imply"? In the absence of the parties' own reference to payment, we have nothing but the "reasonable" or "conventional" or "normally" or "equitable" expectations a given type of work seems to represent. This the courts do not appear to have understood. They have been misled into thinking that they are implying genuine contracts according to the given evidence, when all that the evidence permits is an inference that the work is non-gratuitous without even faintly suggesting the right amount. For example, in *Reeve* v. *Reeve*,[56] the plaintiff served for five years, managing a farm, receiving board and lodging and clothing. On a claim for an additional 4s. a week, Baron Martin said that the action could not be maintained only because the amount claimed seemed reasonable. In fact, the jury had already given a verdict for plaintiff, yet a new trial was immediately granted because of the insufficiency of the evidence as to the bargain for wages. As though further inquiry could elicit more reliable data when *ex hypothesi* there were none.

And so it can really not matter what the duty of remuneration is called. For the names "implied contract" and "quasi-contract" come to the same thing. Both impose the duty to pay in the absence of an express promise to that effect; and both make that imposition on the analogy of a regular contract, as though a true contract had existed from the start. Because what this analogy means is simply that the relationship between the parties is like a work or wage bargain, that is, a contract as distinct from a favour or gift. And this again is the very circumstance which would lead to the defendant's unjust enrichment if the plaintiff remained unpaid. The recipient of a favour or gratuitous service could never be regarded as unjustly enriched.

V.

Our inquiry has so far yielded two lessons in the main. First, that quasi-contract represents a right to the return of money where thtat money is received without a valid (i.e. non-mistaken) transaction or consent, in brief without either bargain or gift. Second, that there is a quasi-contractual duty to recompense work that may be presumed not to be gratuitous. The basic difference between these two principles merely stems from the fact that while the former has to do with the return of money or things, the other deals with the remuneration of services. This thing-service distinction will generally keep these two principles within their own functional spheres. In one instance, however, these principles create an antinomy, and the way this happens is this. One basic rule, as we have seen, is that a person need not pay for the services from an officious meddler, that is, services for which there has been neither an express nor an implied request. Thus in *Falcke's Case*[57] it was said that work done to benefit or to preserve another's property does not create a duty to reimburse the volunteer. On the other hand, there is a further rule according to which a person is entitled to claim reasonable reimbursement where he has been put in possession of a thing and where it is his duty as bailee to keep it reasonably safe. Only little reflection shows that these two principles will sometimes appear to clash, particularly where a keeper's attempts to protect or preserve property may on the surface seem indistinguishable from the officious interference or meddling by a volunteer.

[56] (1858) 1 F. & F. 280.
[57] *Falcke* v. *Scottish Imperial Insurance Co.* (1886) 34 Ch. D. 234, 248.

Thus in the *Falcke Case* itself the mortgagor of an insurance policy continued to pay the premiums, but was held not entitled to be reimbursed by the mortgagee.[58] Indeed, Cotton, L.J. thought that it would be utterly wrong to give the mortgagor such a claim. "Suppose the mortgaged property is a mine, and the owner of the equity of redemption were to spend large sums of money in order to prevent the mine being flooded or otherwise destroyed, could he have in respect of that expenditure a lien on the estate as against the persons having charges and mortgages of that estate?"[59] But why not? Why should the mortgagor not be treated as some kind of agent of necessity. As the person in possession, he is in fact the only one in a position to take the appropriate measures in an emergency. Again, why should not the mortgagor have the right to preserve his residuary interest, his equity of redemption, the more so since this would also help the incumbrances who would lose their investments if the mine were destroyed. Nor would this right of intervention given to the bailee or mortgagor violate our previous principle against the officious meddler or volunteer. The simple reason is that a person entrusted with the possession or safe-keeping of a thing, is not at all like the meddlesome stranger who admittedly should have no right to recompense.[60]

We finally come to a type of quasi-contractual recovery that raises issues of a different kind. Suppose that A and B have expressly agreed that A is to do work for B, that B is to pay for it, that A has done that work, but that B then refuses to pay. B can no longer argue that A's work was to be gratuitous, and his only possible defence is to attack the contract itself. Thus B can say that the contract is not actionable against him either because of legal incapacity, or because of illegality, or because certain required formalities are not satisfied. For the sake of brevity we shall consider only the last ground. Regarding this, the discussion began in *Britain* v. *Rossiter*[61] where the plaintiff after being at work for some months was wrongfully dismissed. Not only was his contract regarded as unenforceable by reason of the Statute of Frauds,[62] it was also held that, though unenforceable, it remained "an express contract which is still subsisting",[63] so that now no new contract could be implied. Now it will be noticed that this decision had to do with an executory rather than an executed contract, the result being that the plaintiff failed to recover for his loss of future earnings as distinct from payment for past services. Yet in *Scott* v. *Pattison*[64] the view was that the Statute of Frauds applies to both executory and executed contracts. At the same time, the court however also upheld a claim for work done, but this on the theory

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[58] This right to reimbursement is, however, often disguised as an agency of necessity. See generally R. Powell, *The Law of Agency* (1952) 329 ff.

[59] 34 Ch. D. 234 at 244.

[60] These points have a larger relevance. For precisely this sort of distinction (between on the one hand, a stranger or meddler strictly speaking and, on the other, persons whose position is not similarly officious or meddlesome) may explain such rights of recovery as contribution or general average. For example, if you hand over things to a ship for carriage in circumstances where loss from act of God or other emergencies are easily foreseen, the losers become in a sense partners in the same adventure and the ship's master a sort of agent of necessity for all. Indeed, the great peculiarity of admiralty law is that this idea of implicit partnership was so consistently carried through (at one time even affecting a sailor's right to wages where no freight was earned). It is this notion of partnership rather than unjust enrichment which explains admiralty's restitutionary rules.

[61] (1879) 11 Q.B.D. 123.

[62] The contract was to last for 366 days, and thus for more than one year. However, the only reason for this excess was that the contract was made on Sunday to begin on Monday. Again, the doctrine of part performance was now held inapplicable, being regarded as an equitable doctrine solely confined to interests in land; see *id.* at 129.

[63] *Id.* at 127 per Brett, L.J. See further *Snelling* v. *Huntingfield* (1834) 1 C.M. & R. 20, 25; J. Williams, *The Statute of Frauds* (1932) 212.

[64] (1923) 2 K.B. 723.

that in doing so they were not enforcing the unenforceable contract, but were implying a different one. More precisely, the plaintiff was held entitled to claim an amount equivalent to the weekly wages, though he could not claim the weekly wages as such, since this latter claim would not be based on the executed consideration but on an agreement which was statutorily unenforceable.[65] In brief, even though there was no remedy on the original contract, the court allowed recovery on the basis of quasi-contract or on a contract implied-by-law.[66] We thus obtain two legal explanations for one practical result. One explanation (in line with *Britain* v. *Rossiter*) would hold that the Statute of Frauds does not apply to executed contracts, so limiting the Statute's negative range. A second explanation (following *Scott* v. *Pattison*) would put the right of recovery on seemingly independent grounds. But this second or quasi-contractual explanation is clearly unsatisfactory. Unlike the first explanation, which at least meets openly the statutory impediment by frankly establishing an exception to it, the latter theory merely circumvents the statutory bar. Even more importantly, the second explanation now strongly conveys the idea that quasi-contract constitutes a separate source of obligation which can operate not only distinct from, but in opposition to strictly contractual claims. And this, in turn, insinuates the notion that quasi-contract must derive from such special grounds as "equity" or "unjust enrichment", grounds which radically separate quasi-contract from contract or gift. It is this misconception which these pages have attempted to dispel. For the truth, to speak very briefly, is that the quasi-contractual right to recover (by way of the repayment of money or as recompense for work done) is a right which depends directly on whether there has been a transaction as well as on the differences between contracts and gifts. Indeed, it is just this interdependence which gives to quasi-contract a systematic basis which notions such as "equity" or "unjust enrichment" certainly do not and cannot provide.

[65] *Id.* at 726-28, *per* Darling and Slater, JJ.

[66] See G. L. Williams, "Partial Performance of Entire Contracts" (1941) 57 *L.Q.R.* 373, 394 and *passim.*