The Self-Serving Intermeddler and the Law of Restitution

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THE SELF-SERVING INTERMEDDLER
AND THE LAW OF RESTITUTION

By JOHN D. McCAMUS

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I. INTRODUCTION

Much of the fascination that the law of restitution holds for its admirers stems from the fact that it is an area of the private law which is in a state of major reformulation and restatement. Restitutionary law is perhaps the last great area of the common law to receive the extensive analytical scrutiny and reshaping that was lavished on the other more well established subjects of the common law during the nineteenth and early twentieth centuries. Lawyers, judges and scholars thus have an opportunity to participate in the task of searching for and refining the basic principles underlying the rules that have developed to govern specific instances and to uncover, more frequently than in more well-ploughed furrows, the seedlings of future growth and development.

The major Canadian impetus for this reassessment has been the decision of the Supreme Court of Canada in Degiman v. Guaranty Trust in which the Court held that the theoretical underpinning of restitutionary law was not, as has been long believed in some quarters, an implied contractual liability, but rather the principle of unjust enrichment, the principle that one ought not be unjustly enriched at the expense of another. In taking this position, the Court wisely departed from a major stream of English restitutionary authority and adopted a theory of liability which, although implicit, one might say, in the earlier case law, was first clearly articulated and subjected to comprehensive analysis by the authors of the American Restatement of Restitution. In rejecting the implied contract fiction, the Court has opened the door to a more straightforward and clear-minded analysis of restitutionary claims than was afforded in the earlier authorities. In particular, it is evidently no longer necessary to pretend to find implied contracts in situations where none could realistically be said to exist. Thus, where the parties have no capacity to contract or have in fact entered into an agreement that is unenforceable at law, a theory of liability is available that does not subject us to the embarrassment of arguing that one party has tacitly agreed to pay for benefits received. So too, where benefits have not been requested by the recipient, such liability as will be imposed by law need not be premised on false contracts.

4 As in Degiman itself: supra note 1.
If we may thus bid farewell to implied contract, we must ask what its replacement is to be. Obviously, it is inadequate to simply assert that a remedy will be available whenever an *unjust enrichment* has occurred. What is needed is a framework of analysis that will assist in explaining the results of earlier cases and will offer guidance in as yet uncharted regions. Here, of course, the *Restatement* has much to offer, for it is precisely this task of restatement and refinement which was undertaken by its authors. It is not surprising, then, that the *Restatement* was relied on by the Court in *Degelman* and further, that it has been of assistance in subsequent Canadian cases.

One of the themes identified in the *Restatement* as a principle of general application rests on the concept of *officiousness*. Article 2 of the *Restatement* says:

> A person who officiously confers a benefit on another is not entitled to restitution therefor.

"Officiousness", the commentary explains, is "interference in the affairs of another not justified by the circumstances under which the interference takes place." This is the thread, then, that the *Restatement* employs to draw together the earlier case law permitting recovery by persons who have conferred benefits while acting under a mistake, under coercion, pursuant to an ineffective agreement, in response to an emergency, and so on. The common feature of such cases, the *Restatement* points out, is that the plaintiff has acted unofficiously. As one might expect, the concept of officiousness had been expressly employed by the courts in some of the earlier cases, but it was in the *Restatement* that its utility as a unifying general principle of restitutionary liability was first articulated.

It is the purpose of this article to explore the operation of the concept of officiousness at its outer limit in the context of claims brought by parties characterized by Professor Dawson as "self-serving intermeddlers". The self-serving intermeddler is one who has acted in pursuit of his own self-

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7 See *Restatement*, supra note 2, s. 2.

8 Id., s. 2, comment a.

9 Consider, for example, the subrogation cases. See, e.g., *Riddell v. McRae*, [1917] 2 W.W.R. 546 at 548, 11 Alta. L.R. 414 at 417 (C.A.).

interest and, in so doing, has incidentally conferred a benefit on another. As illustrations of this phenomenon, consideration will be given to the potential claims of (i) owners of land who make improvements to their land and create incidental benefits for neighbours or part-owners, (ii) parties who simply perform obligations under an agreement and incidentally confer benefits on strangers to the contract, (iii) parties who pay off another's debt in order to protect their own credit position, and (iv) parties who litigate representative claims which enure to the benefit of inactive members of the represented class.

As a general matter, it seems evident that the unjust enrichment claim of a self-serving intermeddler is less attractive than those of the more common categories of restitutionary claimants mentioned above. Conduct undertaken in pursuit of self-interest does not engender the sympathetic response demonstrated in the case law for those acting under mistake or compulsion. Nor, unlike cases of necessitous intervention, is there present here any concern to encourage or provide an incentive for conduct which is socially or economically useful. By definition, the self-serving intermeddler is one who already has sufficient incentive to undertake the conduct that incidentally benefits others.11

It does not necessarily follow, however, that the self-serving intermeddler must be considered officious and therefore denied all restitutionary relief. Indeed, conduct in pursuit of self-interest seldom will be fairly characterized as officious. The officious intermeddler is a meddlesome fellow. He is guilty of an unwarranted invasion of another's affairs. Clear cases of officiousness occur where the intervention is frivolous or malicious or where the intermeddler has opportunistically inserted himself into another's affairs in order to extract a personal advantage or profit. The officious intermeddler might properly be told to "mind his own business". On the other hand, the self-serving intermeddler is someone who, in the course of minding his own business, has incidentally generated a benefit for another. Thus, if the concept of officiousness is intended to preclude relief only where the intervenor has propelled himself into the affairs of another in an intrusive manner, the intermeddler who acts in pursuit of self-interest is not properly characterized as officious. Indeed, since the self-serving intermeddler typically has not acted with the direct or prime object of intervening in another's affairs, he is, it may be argued, most obviously one who has not acted officiously. As will be seen, however, the restitutionary entitlement of the self-interested intermeddler has only received sporadic and precarious recognition.

A second major theme explored in this article relates to the concept of benefit. A central element of a plaintiff's cause of action in restitution is, of course, the conferral of a benefit. Where, as in the present context, the "benefit" is one that the recipient has not requested, problems arise in the application of the benefit concept that do not arise in cases where the benefit has been supplied upon request. The value of an unrequested benefit in the hands of the recipient may be somewhat dubious. Given a free choice, the recipient

might prefer to invest his money in the acquisition of some other benefit more clearly to his taste. Indeed, he might say that the receipt of this unrequested and (perhaps) unwanted benefit is no benefit at all. Where the benefit is one that the recipient would not have freely chosen, this is undeniably a compelling argument. Unlike many other defendants in restitutionary cases, the recipient of the benefit is not seeking to profit from another's error, misfortune or weakness by refusing to compensate for the benefit conferred. He has merely received an unrequested and unwanted benefit for which he wishes not to pay. This is, of course, a complaint that is accorded considerable respect in the case law and that presents a significant obstacle in the path of recovery for the supplier of an unrequested benefit. We shall refer to the recipient's problem as the problem of "free choice" and to the general principle that the defendant will not be forced to invest in unwanted benefits as the "principle of free choice."

It is important to note that the problem of free choice is not invariably present in every case where an unrequested benefit has been conferred. Thus, the receipt of money paid under a mistake of fact, for example, does not give rise to the free choice problem even though the recipient may not have requested the payment. A restitutionary duty to repay the amount received does not impair the defendant's freedom to invest his assets as he sees fit. Similar considerations should apply where an intervener pays another's debt. A responsible debtor would not see a meaningful distinction between the receipt of unexpected cash and the receipt of an unexpected discharge of an overdue debt. In neither case is the defendant being forced to pay for something which he would prefer not to acquire.

The receipt of an unrequested non-liquid benefit such as services rendered, however, presents more intriguing difficulties. Yet, here too, it is not every receipt which creates a free choice problem. Consider, for example, the case of unrequested medical or other necessary services. If the imposition of restitutionary liability merely forces the defendant to incur an expense that he would have incurred in any event, it appears that the defendant's freedom of

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12 See, e.g., Leigh v. Dickeson (1884), 15 Q.B.D. 60, 52 L.T. 790 (C.A.). More generally, this view must be the explanation for the very different treatment accorded claims for money paid under a mistake of fact as against claims for the value of mistakenly made improvements to land or chattels.


15 Subject, of course, to the change of position problem, now covered by a recognized defence in Canadian law. See Rural Municipality of Storthoaks v. Mobil Oil Canada Ltd., supra note 6.

16 See discussion accompanying note 148, infra.

choice has not been severely infringed. True, his freedom has been restricted by the circumstances giving rise to the need for these services, but the imposition of liability does not, it may be argued, constitute an offensive further invasion of his freedom. Assuming that the identity of the supplier cannot be shown by the defendant to be a material consideration, we are unlikely to be moved by the defendant's invocation of the principle of free choice.

A further gloss must be added. Even though the receipt of certain services may, in the first instance, give rise to a free choice problem, subsequent events may eliminate these difficulties and therefore weaken the defendant's ability to rely on the principle of free choice. Thus, though the provision of unrequested legal services may lead us to invoke the principle on the defendant's behalf, this may not be the case where the provision of these services has produced a liquid asset in the defendant's hands. Similarly, it may be that services of some kind will produce a non-liquid asset which has been turned to account by the defendant through sale or through profitable use. Unrequested and unnecessary services may ultimately be capitalized upon by the defendant to effect a saving. In such situations, the argument from freedom of choice has a rather hollow ring.

In sum, then, where an unrequested benefit has been supplied, we must be concerned with the principle of free choice. The free choice problem would not arise if the benefit conferred were money. Spiritual considerations notwithstanding, money is unarguably a benefit in this earthly world. More

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18 The critical authority on point is Craven-Ellis v. Canons Ltd., [1936] 2 K.B. 403, [1936] 2 All E.R. 1066. Though the views of commentators as to the rationale of this decision have differed over the years, the better (and more recent) view is that the case supports the proposition advanced in the text. See Birks, Negotiorum Gestio and the Common Law, supra note 17, at 119-23. See also, Jones, supra note 17, at 286-87.

19 For example, where the recipient had a set-off available against the supplier with whom he normally dealt. Cf. Boulton v. Jones (1857), 2 H. & N. 564, 27 L.J. Exch. 117.

20 This point is adverted to, in part, by Birks in his discussion of the free choice issue, but is put forward as merely a theoretical limitation on the argument from freedom of choice. See Birks, supra note 13, at 18-19. It is here suggested that the point is of more than theoretical interest.

21 See discussion accompanying note 193, infra.

22 Consider, for example, improvements made by co-owners. See discussion accompanying note 41, infra.

23 On such facts, it may be possible to infer an agreement. Consider, for example, Sumpter v. Hedges, [1898] 1 Q.B. 673, 67 L.J. Q.B. 545 (C.A.). More realistically, however, it may be that the recipient expects that he will not have to compensate the supplier when he turns the item to account. If this is so, the implication of an agreement is artificial and liability would be more properly grounded on restitutory considerations. For discussion of a case in the self-serving intermeddler context where this argument should, in my view, have succeeded, see the discussion of Ulmer v. Farnsworth accompanying note 33, infra.

24 Consider, for example, Walsh Advertising Co. v. The Queen, [1962] Ex. C.R. 115 (plaintiff advertising agency submitted proposals for an advertising campaign on the faith of unauthorized representations that it would be retained by the defendant; subsequently, defendant refused to retain plaintiff, but eventually turned some of the defendant's preliminary work to account; held liable in restitution to the extent that savings had been effected through utilization of defendant's work).
importantly, for present purposes, a requirement to pay back money received does not interfere with one's liquidity position. Similar considerations apply, it is suggested, where the intermeddler pays another's debt. Even where the benefit conferred is not liquid, however, the defendant ought not be able to resist the supplier's restitutionary claim on the basis of the principle of free choice where the benefit conferred may properly be characterized as an "incontrovertible benefit." Although a requirement to pay for non-liquid benefits received obviously does interfere with one's liquidity, this may not be perceived to be unjust where the expense is one the recipient would otherwise have had to endure. In such situations, the recipient is incontrovertibly benefited by the plaintiff's conduct. Finally, the free choice problem may disappear where an initially non-liquid benefit becomes liquid, whether as a result of the supplier's conduct or of the recipient's action in turning the benefit to account.

In remembrance of things past, we may observe that implied contract theory would offer solutions to these problems which have the illusion of greater simplicity. Closely allied to the notion that restitutionary liability could be premised only on an implied contract was the notion that one would be liable for the value of services rendered only if they had been requested or if the recipient, having had an opportunity to reject, freely accepted them. On this view, there is little room for concern about the problem of free choice. Recovery would be limited to those cases where request or acceptance of the benefit was a conscious act on the part of the recipient. The simplicity of this approach is illusory, however, in that it cannot explain the results of the reported case law. Moreover, this analysis is unsatisfactory in the broader sense that it precludes relief in cases where one's intuitive sense of the fair result suggests that recovery would be appropriate. The modern restitutionary analysis, because it directs our attention to the issues raised for consideration by the concepts of officiousness and genuine benefit, appears from both of these perspectives to be a more fruitful approach.

In what follows, these themes will be explored in the context of the somewhat difficult case law concerning the restitutionary claims of self-serving intermeddlers. As always, problems at the periphery of the operation of a theory of liability provide interesting analytical difficulties. More than this, however, analysis of the marginal cases may have the effect of illuminating the fundamental notions upon which the theory is premised. Apart from providing an opportunity to consider, with some care, the content of the concepts of officiousness and benefit, a review of the self-serving intermeddler cases suggests that a central element in the sense of injustice that fuels the unjust enrichment principle is a simple moral aversion to the "free ride". It is perceived to be unjust simply to profit at another's expense. In biblical terms, one ought not to reap where one has not sown. As the arguments

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25 The phrase is Professor Jones's. See Jones, supra note 17, at 284 ff.
26 The notion of "free acceptance" is developed by Goff and Jones in their treatise. See Goff and Jones, supra note 14, at 5-6. See also, Jones, supra note 17, at 276-84.
27 See Jones, supra note 17, at 284.
favouring relief for the self-serving intermeddler have little else to rest on but this notion, it is of interest that in some instances the restitutionary interests of the self-serving intermeddler have been accorded a measure of recognition.

One final point of an introductory nature should be made. It is evident that our system of justice would not aspire to charge a tariff for every “free ride” enjoyed in our society. We all enjoy spin-off benefits from the activities of our fellows for which we expect no price to be paid. In many cases, neither the source nor the quantum of the benefit could be easily ascertained. As the source becomes a more easily identifiable one, however, and as the quantum becomes more easily calculated, it becomes more likely that the moral premise that one who shares in the reaping should share the cost of the sowing will become operative and will provide a justification for the granting of some measure of restitutory relief.

II. IMPROVEMENTS TO LAND

A. By a Sole Owner

Improvements to land effected by the owner which redound to the benefit of his neighbours present a weak case for relief. One who substantially renovates his own home and produces an incidental gain in the market value of adjacent properties would not expect that his neighbours were legally obliged to contribute to the costs of renovation. Further illustrations are provided in a dictum of Lord Halsbury in Ruabon Steamship Co. v. London Assurance. His Lordship wondered that it could be seriously suggested:

... if a man were to cut down a wood which obscured his neighbour's prospect and gave him a better view, the neighbour ought ... to be compelled to contribute to cutting down the wood. Or if a man built a wall so as to shield his neighbour's house from undue wet or danger from violent tempests, he ought to be entitled to contribution because the neighbour has got an advantage from what he did.

As the proper result in such cases is presumed to be self-evident, little attention has been paid to the reasons underlying the refusal of relief. It may be, however, that clarification of the rationale for denying relief will suggest outer limits for the rule.

28 There are some discouraging words for the self-serving claimant to be found in the pages of the Restatement. See Restatement, supra note 2, s. 106: “A person who, incidentally to the performance of his own duty or to the protection or the improvement of his own things, has conferred a benefit upon another, is not thereby entitled to contribution.” But see s. 104, “Satisfaction of Lien Upon Another’s Things in Protection of Payor’s Property” and s. 105, “Protection of Things Owned by Payor and Another.”

29 See generally, Dawson, supra note 11, at 1412-18.

30 [1900] A.C. 6, [1895-91 All E.R. Rep. 677. The actual problem posed in this case is quite unrelated to the issues raised in these hypothetical fact situations. See discussion accompanying note 72, infra.

31 Id. at 12 (A.C.), 680 (All E.R. Rep.). See also, Loring v. Bacon, 4 Mass. 575 (1808) (owner of upper part of house denied contribution from owner of lower part to cost of roof repairs); and Walker v. Steison, 162 Mass. 86, 38 N.E. 18 (1884) (improver of party wall unable to obtain contribution from adjacent property owner who utilizes the strengthened wall).
In the first place, it is clear that the granting of relief in such circumstances would offend the principle of free choice. The neighbour would be forced to invest in a benefit — the increase in the value of his land — which he did not freely choose. More importantly, however, there is probably a widely shared consensus, resting only in part on the concern to preserve freedom of choice, that the improver has no moral claim on his neighbour for contribution. It is most unlikely that either party would think it unfair that the improver should carry his own costs of improvement. This would be so even if the benefitted party had, in some sense, turned the benefit to account through sale of his home at an increased market value. Our concern here may be partially administrative — we recognize that it is difficult to calculate the value of the benefit and are therefore reluctant to expose the neighbour to so vague a measure of liability. More than this, however, it may be thought to be inappropriate for the law to intervene in the social relationship of neighbours in the absence of some form of wrongdoing. To leave such matters to be dealt with by mutual agreement will be more conducive to harmonious neighbourly relations.

Situations may arise, however, in which these factors are not present and in which the unjust enrichment principle has a greater claim for attention. The facts of a nineteenth century Maine decision, Ulmer v. Farnsworth\(^3\) offer an illustration. Two neighbouring, though not adjacent, limestone quarries had become filled with water. The owner of one of them, having decided to bring his quarry into production, pumped the water from his quarry. An interconnecting channel ran between the two quarries, and accordingly, the necessary effect of the owner's actions was to drain the neighbour's quarry as well. Though it appears that the neighbour then proceeded to work the quarry face thus exposed, he refused all overtures to contribute to the cost of drainage. The owner then claimed in *assumpsit* for services rendered, relying, *inter alia*, on a local custom under which parties receiving incidental benefits of this kind paid a share of the drainage expenses calculated on the basis of the amount of rock removed from the drained area.

The plaintiff's claim failed. Relief could only be allowed, the trial judge held, on the basis of a contract, express or implied. There was no evidence of the former; custom or usage could not be relied upon as a basis for the latter. Custom, it was said, may clarify or amplify an existing agreement, but cannot of itself create one. In essence, then, the court considered the problem solely in contractual terms. In the absence of facts giving rise to the inference of a contract *in fact*, no recovery could be allowed.

Under modern restitutionary law, of course, inability to imply a contract in this sense is immaterial. Accordingly, it may be useful to speculate on the proper analysis of the *Ulmer* case in restitutionary terms. On reflection, it appears that the factors which would usually support a decision to deny relief

\(^{32}\) Fences would appear to be the exception that proves the rule. "Good fences make good neighbours." Not uncommonly, duties to share the cost of fence erection and maintenance are imposed by statute. See, e.g., *The Lines Fences Act*, R.S.O. 1970, c. 248.

\(^{33}\) 80 Me. 500, 15 A. 65 (S.C. 1888).
are not present here. The “free choice” problem is met in *Ulmer* by the fact that the benefit was subsequently adopted or turned to account by the recipient. The expense which he had been saved was one which he must otherwise have incurred in order to make productive use of this portion of his quarry. There are, however, other considerations to be taken into account. Was the situation one in which it would normally be expected that the owner would bear exclusively the cost of benefitting his neighbour? On this point, the local custom alleged by the plaintiff assumes much significance. It provides evidence to the effect that the local expectation is that a contribution will be made. Further, the customary rate offers some basis for evaluating the service rendered in market terms. Finally, the concerns we might otherwise have about legal intervention in neighbourly relations are substantially reduced in the context of services which enhance the productive use of commercial properties. In short, a strong argument in favour of restitutionary liability can be made.

Professor Dawson has suggested a further situation in which restitutionary principles may have some purchase.\textsuperscript{34} Consider, for example, the position of a developer who, in the course of excavating a building site, provides lateral support to avoid the collapse of buildings on his neighbour’s land. The developer has no duty to provide such support at common law.\textsuperscript{35} The landowner’s right to lateral support from his neighbour’s land extends only to the protection of the land from a withdrawal of support which would cause subsidence to the land in its normal state. There is no obligation on the neighbour to provide support for the owner’s buildings.\textsuperscript{36} If, in order to preserve his own site or to protect his workmen, the developer provides lateral support to prevent subsidence of the neighbouring buildings, has not an unjust enrichment of the neighbour occurred? The developer, acting reasonably in his own self-interest, has conferred a necessary and perhaps substantial benefit on his neighbour. Restitutionary claims in such circumstances have been attempted in the American courts and, but for one lonely instance to the contrary,\textsuperscript{37} have been given a frosty reception.\textsuperscript{38}

\textsuperscript{34} See Dawson, *supra* note 11, at 1419-21.


\textsuperscript{38} See Dawson, *supra* note 11, at 1420 and authorities cited therein. A further illustration considered by Professor Dawson is *Green Tree Estates Inc. v. Furstenberg*, 21 Wis. 2d 193, 124 N.W. 2d 90 (1963). In that case, a developer of a subdivision had, after obtaining approval from the municipality to do so, proceeded to install roadworks in the area. Though the work could have been done by the municipality—the costs thereof then being taxed to the benefitted homeowners—the developer was anxious to proceed quickly with a view to securing his financial arrangements. The developer claimed contribution from three benefitted homeowners on grounds, *inter alia*, of unjust enrichment. The claim was dismissed, the plaintiff being said to have acted voluntarily.
B. Cases of Divided Ownership

To what extent may one who has only a partial title to land seek compensation, for improvements made or for repairs effected, from others who have an interest in the land? A joint tenant in possession who erects a building on the land for his own purposes has probably conferred a benefit on his co-tenant in the form of an enhancement in the value of the land. Incidental benefits might similarly be conferred by life tenants on their remaindermen. An examination of these situations reveals that restitutionary themes have had some influence in forcing benefitted owners to share the costs incurred in making improvements to their land.  

1. Co-Owners

A joint tenant or tenant in common who makes necessary repairs or improvements is not entitled, either by law or in equity, to assert a claim for contribution against his co-tenant. This is not to say, however, that the improver has no avenue of relief. If partition of the property is sought, by either co-tenant, an accounting of expenses incurred by the improver will be made. The following remarks of Cotton L.J. in Leigh v. Dickeson are generally accepted as authoritative:

80 Analogous problems arising in the context of improvements or repairs undertaken by lessees or mortgagees in possession are not considered herein. Although the restitutionary themes explored in the text are, to some extent, visible in these areas, they are sufficiently overlaid with non-restitutionary policy considerations and with statutory provisions that excursions into them yields little of relevance to the subject at hand. As to the former, see generally, F. Rhodes, Williams' Canadian Law of Landlord and Tenant (4th ed. Toronto: Carswell, 1973), ss. 98, 102 and 128; and Ontario Law Reform Commission, Report on Landlord and Tenant Law (Toronto: Ministry of the Attorney General, 1976), cc. 14 and 21. As to the latter, see W. Rayner and R. McLaren, Falconbridge on Mortgages (4th ed. Toronto: Canada Law Book, 1977) at 648-51.

40 Suggestions to the contrary with respect to repairs are to be found in discussions of the ancient common law writ, de reparatione facienda. See A. Fitzherbert, New Natura Brevium, Vol. 1, s. 127; and E. Coke, Commentary on Littleton, Vol. 1 (Philadelphia: R. H. Small, 1853), s. [54.b.]. The correct view, however, appears to be that this writ would lie only where the co-tenants were commonly bound to third persons to effect the repairs in question. See Leigh v. Dickeson, supra note 12, at 66-67 (Q.B.D.), 791-92 (L.T.) (per Cotton L.J.). See also, A. Casner, ed., American Law of Property, Vol. 2 (Boston: Little, Brown, 1952) at 78-79. In the few modern American decisions where such relief has been granted, a public interest in the maintenance of the common property was present. See Dawson, supra note 11, at 1403, n. 32. See Re Curry, Curry v. Curry (1898), 25 O.A.R. 267 at 275 (C.A.) for the suggestion that if a co-owner discharges a mortgage debt on the property and therefore becomes entitled to a charge on the other co-owner's undivided share of the land for that co-owner's share of the debt, the first co-owner is entitled to effect repairs and improvements to the same extent to which a legal mortgagee in possession is entitled. See Re Byrne, supra note 12. See also, Swan v. Swan (1820), 8 Price 518, 146 E.R. 1281; Watson v. Gass (1881), 51 L.J. Ch. 480, 45 L.T. 582; Re Jones, Farrington v. Forrester, [1893] 2 Ch. 461, 69 L.T. 45; Handley v. Archibald (1899), 30 S.C.R. 130; and Ruptash and Lumsden v. Zawick, [1956] S.C.R. 347, 2 D.L.R. (2d) 145. And see, generally, D. Mendes da Costa, Co-Ownership Under Victorian Land Law (1961), 3 Melbourne U. L. Rev. 137 at 143-48. In principle, this rule should apply with equal force to joint tenancies and it has been expressly so held in Australia. See Re Byrne (1906), 6 S.R. (N.S.W.) 532. See also, Mastron v. Cotton (1925), 58 O.L.R. 251, [1926] I D.L.R. 767 (C.A.).
... no remedy exists for money expended in repairs by one tenant in common, so long as the property is enjoyed in common; when it is desired to put an end to that state of things, it is then necessary to consider what has been expended in improvements or repairs: the property held in common has been increased in value by the improvements and repairs; and whether the property is divided or sold by the decree of the Court, one party cannot take the increase in value, without making an allowance for what has been expended in order to obtain that increased value; in fact the execution of the repairs and improvements is adopted and sanctioned by accepting the increased value. There is, therefore, a mode by which money expended by one tenant in common for repairs can be recovered, but the procedure is confined to suits for partition.

If the partition is to be made in kind, an attempt will be made to allot that portion of the land on which the improvements have been made to the improver. Where an allowance is to be ordered, it is settled that the measure of relief is limited to the actual enhancement in value of the land at the time of partition. Thus, recovery is permitted only for actual enrichment conferred at the improver's expense. Further, though Commonwealth authorities conflict on this point, it is established Canadian law that the remedy is in personam in nature.

The improver's equitable right to compensation has been said to be defensive or passive in nature. The explanation for this characterization is that it can be raised only in a suit for partition or for sale in lieu of partition or in analogous proceedings. This characterization is misleading, however, when it is recalled that the improver is normally entitled as of right to partition of the estate. The improver who chooses to do so, then, may actively seek partition and obtain compensation for his expenses to the extent that the value of the land is enhanced. Indeed, since the improver is in the position of seeking an equitable remedy, he must "do equity" and may be held accountable for occupation rent.

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42 Story v. Johnson (1835), 1 Y. & C. Ex. 539, 160 E.R. 220; Wood v. Wood (1869), 16 Gr. 471; Pride v. Rodger (1896), 27 O.R. 320 (Ch.). The division will be made on the basis of the unimproved value of the land. Biehn v. Biehn (1871), 18 Gr. 497; Hovey v. Ferguson (1871), 18 Gr. 498.


44 Ruptash and Lumsden v. Zawick, supra note 41, at 358-61 (S.C.R.), 157-59 (D.L.R.) (per Cartwright J., relying on English authority to the same effect). For a discussion of Australian authorities holding that the remedy is in rem, see Mendes da Costa, supra note 41, at 144.

46 For example, in administration proceedings where the proceeds of the sale are to be divided. See The Partition Act, R.S.O. 1970, c. 338; The Partition Act, R.S.N.S. 1967, c. 223; The Judicature Act, R.S. Nfld. 1970, c. 187, ss. 109-121; The Law of Property Act, R.S.M. 1970, c. L.90; Partition Act, R.S.B.C. 1960, c. 276; Real Property Act, R.S.P.E.I. 1974, c. R-4 (Part III). The Partition Act, 1868, c. 40 (U.K.) is in force in Alberta and Saskatchewan by reception of English law. In New Brunswick, jurisdiction is exercised by the Queen's Bench Division of the Supreme Court under the Rules of Court.

47 Teasdale v. Sanderson (1864), 33 Beav. 534, 55 E.R. 476; Rice v. George (1873), 20 Gr. 221; Re Jones, Farrington v. Forrester, supra note 41; Wychik v.
The equity made available to the co-tenant improver thus differs markedly from the equity afforded one who improves land in the mistaken belief that he is the owner. The mistaken improver’s equity is available in two situations; in both its effect is truly passive. It may, in the first place, be asserted in reply if the true owner himself seeks equitable relief. Secondly, it may be raised as a set-off to a true owner’s claim for mesne profits at common law.\(^4\) Beyond this, the mistaken improver, in the absence of rights secured in some jurisdictions by statute, has no remedy unless some form of equitable wrong-doing on the part of true owner can be shown.\(^4\) The improving co-tenant, on the other hand, may invariably assert his claim for compensation, provided, of course, that he is prepared to endure partition.

What rationale can be put forward for this shift from complete denial of restitution to the improving co-tenant during co-ownership to a rule permitting complete restitution upon partition? The explanations offered by the courts are of considerable interest. The justification for denying relief while the co-ownership endures was explained by Brett M.R. in *Leigh v. Dickeson*.\(^5\) As one would expect, the principle of free choice was invoked.

The cost of the repairs to the house was a voluntary payment by the defendant, partly for the benefit of himself and partly for the benefit of his co-owner; but the co-owner cannot reject the benefit of the repairs, and if she is held liable for a proportionate share of the cost, the defendant will get the advantage of the repairs without allowing his co-owner any liberty to decide whether she will refuse or adopt them.\(^6\)

If these benefits have indeed been forced on the co-owner, how is it that recovery can be justified in the partition context? Cotton L.J. in the passage set out above,\(^6\) answers that the co-tenant has “adopted and sanctioned” the repairs and improvements “by accepting the increased value.”

Neither justification is completely satisfactory. The principle of free choice would account for the denial of relief where the repairs or improvements are unnecessary or of no use to the inactive co-tenant. But where the repairs in question may be viewed as an unavoidable burden of ownership, on what policy basis should recovery be denied? A more comprehensive explanation for the “no liability” rule would be that the relationship of co-owners generates a number of complex cost allocation problems which, for reasons of convenience, ought to be resolved on the basis of mutual agreement.

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\(^6\) An active equitable claim is permitted where the true owner has encouraged or acquiesced in the activities of the mistaken improver. See *Montreuil v. Ontario Asphalt Co.*, supra note 48. In those provinces where “betterment” statutes have been enacted, an active claim has been made available to all mistaken improvers who enhance the value of the true owner’s land. See, e.g., *The Conveyancing and Law of Property Act*, R.S.O. 1970, c. 85, s. 38.

\(^12\) Supra note 12.

\(^6\) Id. at 65 (Q.B.D.).

\(^4\) See discussion accompanying note 41, supra.
the co-tenants cannot agree on such fundamental questions, partition is an appropriate and available solution to their problems. At that point, an accounting will be taken in order to prevent the unjust enrichment of one co-tenant at the expense of the other.\footnote{53}

The more important question for restitutionary theory, however, is the proper explanation for the volte face that occurs in the partition context. Improvements which the other co-tenant may have refused to pay for and, indeed, which he may have strenuously opposed, here become the subject of compensation. Cotton L.J.'s suggestion that the benefits have now been tacitly adopted and sanctioned does not provide an adequate theoretical basis for the remedy. After all, the co-tenant is not now obliged to indemnify the improving co-tenant for his actual costs. Liability only extends to the enhanced value of the land. A more precise explanation for the result, surely, is that the benefit conferred is now, in effect, a liquid asset in the hands of the other co-tenant. This being so, the interests that are protected by the principle of "free choice" are no longer present. The benefitted co-tenant will not be unfairly prejudiced by the imposition of liability and, accordingly, a restitutionary liability to account arises.

2. Life tenants

As a general rule, life tenants who make improvements or repairs with full knowledge of the limitations of their title,\footnote{54} cannot obtain contribution to their cost from the remaindermen.\footnote{55} Though there is little discussion of the rationale for this rule—the life tenant's acts are simply said to be voluntary\footnote{56}—the sentiment underlying the rule is easily discerned. Were the rule otherwise, the remaindermen might be severely prejudiced by the financial burden imposed by a life tenant who effects expensive improvements. The remaindermen may not have wished that the improvements be made and may have no use for them. Further, as the life tenant will normally have the exclusive right of occupation, it may be presumed that the life tenant is primarily motivated by a desire to enhance his own use or enjoyment of the property even if only through "the pleasure which he has in seeing the estate made ornamental or..."
increasing in value under his fostering care." In short, the self-interested conduct of the life tenant ought not to impose burdens — perhaps unmanageable ones — on the remaindermen.

Though it may be that this general rule admits of a few minor exceptions, there seems to be little prospect of success for a life tenant who wishes to recoup from the remaindermen some portion of his expenditures on permanent improvements. Yet, circumstances may be envisaged where such relief seems appropriate. Consider the situation of a life tenant who is forced under local improvements legislation to contribute to the cost of improvements in the form of drainage or sewer facilities, paved sidewalks, roadways and so on. Or, consider the case of a life tenant forced to make substantial necessary repairs, or ordered by a municipality to comply with applicable health or safety standards. The rationale underlying the rule does not reach such situations. The actions of the life tenant are certainly not voluntary. Here, indeed, the potential for hardship may be reversed. The life tenant may be severely prejudiced by his inability to shift to the remaindermen a portion of the cost of what may be a completely unforeseeable burden of ownership. American cases clearly establish a right to contribution in these situations — at least in those cases where the expenditure is required by a governmental authority. It appears that this proposition has not been advanced in the English or Canadian case law. It may be that an apportionment could be effected under English or Canadian settled estates legislation, but this too, seems not to have been tested.

Apportionment of costs between the life tenant and the remaindermen is possible, however, where the property has been settled under a trust.

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57 Rowley v. Ginnever, supra note 55, at 506 (Ch.) (per Kekewich J.).

58 First, there may be a narrow exception with respect to projects commenced by the settlor which the life tenant completes, thereby benefitting the remainderman. See Hibbert v. Cooke (1824), 1 Sim. & Stu. 552, 57 E.R. 218; Dent v. Dent (1862), 30 Beav. 363, 54 E.R. 929; and Re J. T. Smith's Trusts, supra note 55. See also, Annot. (1940), 128 A.L.R. 199 at 271-76. Second, it has been said that an exception obtains where the remainderman seeks relief in equity. He that seeks equity must do equity. See Rowley v. Ginnever, supra note 55 (life tenant of a public-house held to be constructive trustee of adjoining land which he purchased and improved; the interest of the remainderman held subject to a charge for the increase in the value of the land resulting from the life tenant's expenditure). The American rule is the contrary. See Belfield v. Findlay, 389 Ill. 526, 60 N.E. 2d 403 (1945); and Magee v. Holmes, 220 Miss. 49, 70 So. 2d 60 (1954) remaindermen sue in equity to quiet title; held not liable to contribute to the cost of improvements).

59 See, e.g., The Local Improvement Act, R.S.O. 1970, c. 255.

60 See Dawson, supra note 11, at 1428. See also, Annot. (1966), 10 A.L.R. 3d 1309.

61 E. D. Armour, in his treatise on Canadian property law, stated that if a life tenant "pays a tax or rate imposed on the inheritance for a local improvement, he can claim to keep it alive as against the inheritance." See E. D. Armour, The Law of Real Property (2d ed. Toronto: Canada Law Book, 1916) at 96. However, the authority relied on, Re Smith's Settled Estates, [1901] 1 Ch. 689, considers the situation of a life tenant of the beneficial interest where, it may be argued, special considerations obtain.


Apart from cases in which the settlor has given specific directions, the general rule is that the cost of minor repairs is to be borne by the life tenant or paid out of income, whereas permanent improvements may be charged against capital. Because the effect of a charge against capital will be to reduce income, this will effect an indirect apportionment of the costs between the life tenant and the remaindersmen. It must be noted that in Canadian common law jurisdictions, neither the beneficiaries nor the trustee should commence the making of improvements with the intention of so charging them without first obtaining the approval of the court. In appropriate cases — primarily those where the improvement is not permanent in nature — the cost may be directly apportioned between income and capital. Similar principles of allocation may apply to special levies imposed for local improvements or to the cost if improvements required by a governmental agency.

It is not surprising that different results should obtain with respect to equitable life estates. The role of the trustee, bound by duties of careful stewardship to both the life tenant and the remaindersmen, when coupled with the supervisory role of the court, establishes an ample institutional safeguard against subjugation of the interests of either party. American experience indicates, however, that the analysis of these problems of cost apportionment, at least in the context of necessary improvements, are amenable to similar solutions in the context of legal life estates.

III. BENEFITS CONFERRED ON THIRD PARTIES THROUGH PERFORMANCE OF CONTRACT

In this section, we consider situations where one party to a contract incidentally confers a benefit on a stranger to the contract simply by performing his contractual obligations. For example, a subcontractor who supplies labour and material to a building project under contract to the general contractor will necessarily confer a benefit on the owner of the realty. A tradesman who makes repairs to leasehold premises at the behest of the lessee may confer a benefit on the lessor. The question to be considered here is whether it would be appropriate, in such situations, to grant recovery on restitutionary grounds against the stranger for the value of the benefit so conferred. Although there is little in the English or Canadian case law to indicate how claims of this kind would fare in our courts, one may confidently surmise that their prospects for success are insubstantial. In the construction industry, however, it is precisely this type of relief which has achieved recognition under mechanics' lien sta-
stitutes as a desirable mechanism for ensuring that the owners of land are not enriched at the expense of suppliers and tradesmen. After reviewing the position at common law, the treatment of these questions under the lien statutes will be considered.

A. At Common Law

What is envisaged, then, is a case where A contracts with B to perform, let us say, personal services. The effect of providing such services is to produce an incidental benefit for C, a stranger to the contract. A sues C in unjust enrichment.

As a preliminary point, we may note that little sympathy would be aroused for A's claim against C if, in fact, he has received the consideration flowing to him under the agreement from B. Thus a subcontractor on a building project who has been fully paid by his general contractor would have no claim against the owner of the improved land. Although the reasons for this may seem self-evident, this point merits some elaboration, in my view, as it appears to offer the proper explanation for the result in Ruabon Steamship Co. v. London Assurance, a decision of the House of Lords that might otherwise be viewed as authority for a much broader proposition.

In the first place, it is clear that if the effect of A's performance is to create an incidental or unexpected benefit for B, no additional compensation may be sought from B. A is entitled only to the contract price. He thus receives what he had willingly agreed would be a fair return for his labours. No injustice is perceived in limiting him to that reward. B, for his part, should not have his reasonable expectation that the contract price would limit his liability unsettled simply because the agreement has proved to be valuable to him in an unexpected way.

Similar considerations obtain where the incidental benefit accrues to C, a stranger to the contract. If A has been fully paid by B, what appeal to a sense of justice would underlie A's claim for additional compensation from C? C has obtained a "free ride" but, given the delicate balance of the competing interests in these cases, the scales are tipped against A in a case where he has received the return for which he freely bargained with B.

In the Ruabon Steamship case, this issue arose in a slightly disguised form. There, a ship which had sustained damage in the course of a voyage had been placed in dry dock for repairs for which the plaintiff underwriters

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70 Supra note 30.
71 See Wheeler v. Rosedale Manor Apts. Ltd., [1959] O.R. 641 (H.C.). The result may be otherwise, of course, if the unexpected circumstances bring into play a contract doctrine such as mistake or frustration which vitiates the force of the agreement. Indeed, in two recent Ontario cases, plaintiffs have been allowed to seek restitutionary relief over and above the contract price in order to account for unexpected developments with respect to government subsidies and taxes without first establishing that the agreement in each case could be rescinded on the basis of the mistake in question. See McCarthy Milling Co. v. Elder Packing Co., [1973] 2 O.R. 96, 33 D.L.R.(3d) 52 (H.C.); and James More & Sons v. University of Ottawa (1975), 5 O.R.(2d) 162, 49 D.L.R.(3d) 666 (H.C.). Sed quaere.
72 Supra note 70.
were liable. While the ship was in dry dock, the owner seized the opportunity to have the ship surveyed so as to be entitled to reclassification at Lloyd's. The conduct of the survey did not detain the ship in dry dock, nor did it increase the underwriters' costs for the use of the dock. The plaintiff sued the owner for contribution to the dock dues, arguing that as the defendant had derived an advantage at the plaintiff's expense, contribution ought to be awarded.

Though the claim succeeded in the Court of Appeal, this decision was reversed in the House of Lords. Two reasons were advanced for dismissing the action. Lord Halsbury stated very broadly the basis for dismissing the claim. Contribution may arise, it was said, only in cases of agreement or common obligation and not on the basis of "some general principle of justice, that a man ought not to get an advantage unless he pays for it." Lord Brampton, on the other hand, suggested a narrower ground for the result, relying on the fact that the surveying of the ship was not something which the owner had been required to do as a matter of necessity. Although re-classification was required under Lloyd's rules within a certain period of time, the owner of the Ruabon had a further nine months within which to do this. Had the reclassification been necessary, however, contribution would, in Lord Brampton's view, have been appropriate.

A more compelling explanation for the result in the case, I suggest, is that the insurer has simply been required to do that which he had been paid to do under the contract of insurance. The point in dispute does not give rise to restitutionary considerations. The question is, rather, one of construction of the contract of indemnity. If the insurer is obliged to pay the docking charges under the agreement, the incidental gain to the owner will constitute a windfall to the owner for which no compensation should be awarded. The payment of premiums is the full consideration which the insurer has agreed to accept in exchange for his undertaking.

Somewhat similar considerations may arise if a sub-contractor who has done some work has not become entitled to payment under his agreement with the general contractor. Assume, for example, that the sub-contractor has failed to complete his obligations under an entire contract. Should the sub-contractor be permitted to recover on restitutionary grounds the value of the

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73 Id. at 12 (A.C.), 680 (All E.R. Rep.).
74 Lord Brampton's position is thus consistent with the view that where the service rendered is one which the defendant must have acquired in any event, an unequivocal benefit has been conferred and restitutionary liability is therefore imposed. See discussion accompanying note 17, supra.
75 It is not clear from the report of the case whether the ship had been insured by the owner or the charterer. Though presumably the insured was the owner, the same result would obtain in either case.
76 If, as in a previous case, additional repairs were required which were independent of those for which the insurer was liable, it might be argued that the cost of docking should be shared because either (a) the contract of insurance, being one of indemnity, only covers the insured's "losses" and does not extend to expenses which the insured would have incurred in any event, or (b) the "cost" of docking for which the insurer is liable is only that which is attributable to the use of the docks which, on general business principles, should be allocated to the insurer. See Marine Insurance Co. v. China Transpacific Steamship Co. (1886), 11 App. Cas. 573, 55 L.T. 491, semble, adopting the latter ground.
benefit incidentally conferred on the general contractor's employer? It is abundantly clear that the employer could not be liable if he had already paid the general contractor for this work. Even if the employer is to receive a windfall benefit, however, it may be argued that the sub-contractor has received what he has bargained for under the agreement with the general contractor, i.e., no compensation until completion.

To return to our main theme, we assume that A has not received the agreed return from B and has, through performance, conferred an incidental benefit on C, a stranger to the agreement between A and B. The paradigm case is that of a sub-contractor, A, who has performed his agreement with B, the general contractor, with consequent benefit to B's employer, C, the owner of the land. B fails to pay A, perhaps as a result of his insolvency, and A sues C in unjust enrichment.

An important feature of such cases, from a restitutionary perspective, is that one of the major stumbling blocks in the unrequested benefits context, the problem of free choice, is not present in this situation. C, the owner of the land, has received the very benefit which he wished to acquire. Further, C fully anticipated that he would not obtain it without paying for it, though, of course, he expected to pay B rather than A. The work performed by A has probably been very carefully defined by C in his building contract with B. Often, indeed, that agreement may specifically name A as one of the sub-contractors who will supply work of a specific kind to the project. On the face of it, then, as long as we ensure that C is not required to pay for the work twice over, it appears that a strong argument for restitutionary recovery can be asserted.

The case law arising in such situations offers no support for this view. Indeed, it would appear that neither Canadian nor English counsel have had the temerity to plead a restitutionary cause of action on such facts. Although

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A more difficult question arises if it is assumed that the employer has, in some sense, freely accepted the benefit, e.g., by instructing the general contractor to use materials left on site by the defaulting sub-contractor in finishing the building. Recovery could be premised, in such circumstances, upon an extension of the rule in Sumpter v. Hedges, [1898] 1 Q.B. 673, 78 L.T. 378, for discussion of which, see text accompanying note 23, supra. Consider, as well, the position of a second sub-contractor who takes over the work abandoned by the first sub-contractor and seeks credit for (and is paid for) work that had been completed by the first sub-contractor. This problem is suggested by the facts of Tucker v. Puget Sound Bridge and Dredging Co., supra note 77. The problem was not considered in that case, however, as the plaintiff, the first sub-contractor, had brought his claim against the employer rather than the second sub-contractor. Further, it would appear that the payments received by the second sub-contractor in Tucker were fully absorbed in the cost of completing the first sub-contractor's work. In an appropriate case, however, where a windfall benefit has been freely accepted by the second sub-contractor, a strong argument may be made for recovery on grounds of unjust enrichment.

Perhaps Craig v. Matheson (1900), 32 N.S.R. 452 (C.A.) should be counted a near miss. The plaintiff plumber, a sub-contractor, pleaded, inter alia, in money had and received for the value of plumbing now enjoyed by the defendant homeowner. The claim was dismissed, it being said by the court that money had and received could
it may therefore be said that the reported cases do not dispose of the issue, it appears to be an inarticulate premise of the courts' reasoning in these cases that in the absence of direct contractual privity between the sub-contractor and the owner, no recovery should be allowed. Thus, the fulcrum of the dispute in most of these cases has been the question of whether certain circumstances or conduct on the part of the owner have the effect of creating a direct contractual link between the owner and the sub-contractor. For example, it is not uncommon for the owner to stipulate in the prime contract that certain named sub-contractors be employed by the general contractor during the course of the project. In such cases, it may be asked whether the general contractor has been constituted the owner's agent for the purpose of dealing with these sub-contractors with the consequence that the sub-contractor may be held to have direct privity with the owner. Similar questions arise in cases where the prime contract includes "provisional cost" terms that may provide that the general contractor must spend up to a certain amount on a specific item and pass the actual cost on to the owner. Has the owner contracted with the suppliers of such items through the medium of the general contractor?

Although some authorities have adopted an agency theory of this kind as a basis for granting recovery against the owner, this avenue of redress for the sub-contractor was severely constricted by the judgment of the House of Lords in Hampton v. Glamorgan County Council. In that case, the general contractor had agreed to build a school for the defendant council for a lump sum. The prime contract included a number of "provisional cost" items. In particular, the agreement stipulated that the contractor must "provide" £450 for a heating apparatus. The owner's architect, who was to approve all sub-contracting under the agreement, invited a tender from the plaintiff engineer for the supply of the apparatus. Ultimately, the architect directed the general contractor to accept the plaintiff's tender. The plaintiff, having performed his obligations, and having received only partial satisfaction from the now insolvent general contractor, claimed the outstanding balance from the owner, alleging that a contractual relationship with the owner arose out of these deal-

be pleaded only where money had been received from a "third person" to the plaintiff's use. Neither the plea nor the grounds for dismissal exhibit a clear grasp of the situation. As for the former, a plea in quantum meruit would meet the point more squarely. As for the latter, it is often the case that the plaintiff may recover in money had and received moneys which he himself has paid over to the defendant.


ings. Although the contract of supply had been entered into with the general contractor, it was argued that the owner was the principal for whom the general contractor had, as agent, negotiated the agreement. The House of Lords unanimously rejected this argument. The plaintiff had entered into an agreement with the general contractor, not the owner; the general contractor was not, on a proper construction of the prime contract, constituted an agent of the owner for this purpose. Further, the architect had clearly indicated to the plaintiff that he “must deal with the contractor.”

The earlier case law was criticized, though not over-ruled, in the Glamorgan judgments and must now, therefore, be treated with some caution.

Against this background, it would be surprising if owners did not, as a general matter, organize their contractual affairs in such a way as to avoid direct contractual privity with sub-contractors. What then of restitutionary liability? It is realistic to assume that courts would balk at imposing restitutionary liability on the owner in the first instance because of a lack of “privity” in the more general sense of direct contact between the parties. It must be noted, however, that the absence of privity in this sense is not, per se, a defence to a claim in restitution. This is most obviously true in the context of remedies premised on proprietary notions. Indeed, there is at least one reported instance of a sub-contractor obtaining a lien on funds owed by the owner to the general contractor for the value of material supplied by the sub-contractor on the theory that property in the material supplied had not yet passed. It is also true, however, that privity is not a requirement in the context of in personam restitutionary claims. What other objection to relief is, then, to be made?

The most persuasive argument for depriving the sub-contractor of recovery is simply that to allow recovery against the employer might have the effect of giving an undue preference to the successful sub-contractor as against

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83 Supra note 82, at 23 (A.C.), 728 (L.T.).
84 Similar views were expressed in the judgments of the Court of Appeal in Glamorgan. See (1915), 84 L.J. K.B. 1506.
85 This theme has been explored in the American jurisprudence where, with very few exceptions, restitutionary recovery has been denied the sub-contractor. See generally, Dawson, supra note 11, at 1445 ff.
86 Consider, for example, the tracing remedies. See generally, Goff and Jones, supra note 14, c. 2.
87 See Bellamy v. Davey, [1891] 3 Ch. 540 (general contractor sublet his entire contractual obligation to erect two tanks on the owner's premises, general contractor became insolvent, sub-contractor had placed materials on the premises that were too heavy to move. Held by Romer J. that sub-contractor was entitled to a lien on the purchase money payable by the owner to the sub-contractor.).
88 This decision was doubted in a later decision of the Court of Appeal in which it was suggested that Bellamy ought not be extended beyond the case of a complete sub-letting of the work to one sub-contractor. See Pritchett & Gold and Electrical Power Co. v. Currie, [1916] 2 Ch. 515, 115 L.T. 325.
89 Consider, for example, claims brought in the context of benefits conferred on defendants at the plaintiff's expense by persons who, without authority, purport to act as the defendant's agent. See generally, Goff and Jones, supra note 14, c. 17; J. McCamus, Restitutionary Remedies, [1975] LSUC Special Lectures 255 at 272-76. And Hazlewood v. W. Coast Securities Ltd. (1975), 49 D.L.R. (3d) 46, aff'd (1976), 68 D.L.R. (3d) 172 (B.C.C.A.).
other creditors of the general contractor. The sub-contractor's claim against the employer is likely to become an issue only if the general contractor has become insolvent. In this situation, the moneys owed by the employer to the general contractor should be paid into the latter's hands so that they may be shared in the usual fashion by the aggrieved creditors. There is little to commend the granting of what amounts to a secured claim by one creditor through the device of a direct claim over against the employer. This is not an advantage for which the sub-contractor had bargained and obviously, giving effect to such a claim creates hardship for the other creditors. It would be unsound, therefore, to unsettle the pyramidal structure of contractual relationships found in this context by allowing the sub-contractor to bypass his relationship with the general contractor and obtain redress from the employer.

Such considerations are not present in the second group of situations to be considered, those where a supplier has made improvements to land at the request of an occupant of the land — a lessee, for example, or a purchaser under a contract of sale — and, having failed to obtain satisfaction under the agreement with the occupant, seeks restitutionary recovery from the owner. In this situation, other creditors of the occupant would not be prejudiced by a successful direct claim against the owner. The owner owes nothing to the occupant and the latter's estate is obviously not deprived of any potential gain if the supplier succeeds against the owner. The more difficult problem of free choice resurfaces in this context, however. Typically the benefits will not have been requested by the owner and, indeed, may be of no use to him. For this reason, though again there is a dearth of reported case law, one may expect that Canadian and English courts would resist granting recovery against the owner.90 Certainly, this is the result which has prevailed in the American case law.90

Although the outcome of a restitutionary claim thus seems predictable enough, it is evident that situations of this type do have some pull on the sentiments underlying the unjust enrichment principle. The owner has received a windfall gain at the supplier's expense. Even if restitutionary relief in such cases is to be denied, however, we should not be surprised if Anglo-Canadian courts would be prepared on occasion to apply agency doctrines with some ingenuity to create a contractual link between owner and supplier. Such arguments have succeeded in rare instances in American cases91 and indeed, where there has been a close family relationship between the occupant and the owner, direct restitutionary relief has been declared appropriate.92

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90 It may be that the following dictum of Cartwright C.J.C., even though given in a dissenting judgment, reflects a widely held judicial opinion:

... Apart from the provisions of the Mechanics' Lien Act, an owner does not become liable to pay for work done on his premises which he has not ordered and for which he has not agreed to pay.


90 For an account of which, see Dawson, supra note 11, at 1449.

91 Id. at 1450.

The denial of relief seems especially harsh in cases where the supplier has mistakenly assumed that he was dealing with the owner of the land. While we may not be terribly sympathetic to the claim of one who has knowingly taken a credit risk with a mere occupant of the land and lost, the claim of one who mistakenly thought that he would have at his disposal the remedies normally associated with the supply of services to a landowner is a more likely subject for restitutionary relief. The existence of an operative mistake is a familiar basis for characterizing a supplier's conduct as unofficious. Yet, here too, the reported cases indicate a reluctance to grant relief.

A restitutionary claim on such facts recently came before the Ontario Court of Appeal in Nicholson v. St. Denis. The defendant, St. Denis, had entered into an agreement of purchase and sale with one Labelle. The latter took possession of the land and began instalment payments of the purchase price, the vendor having covenanted to convey property once full payment was made. Labelle hired the plaintiff Nicholson to supply and install aluminum siding and rock stone on the occupied premises. Nicholson cautiously made the agreement subject to bank approval and received assurances from Labelle's bank as to his creditworthiness. Further, it may be (though this is not made clear in the reported judgments) that Nicholson drew comfort from his erroneous assumption that Labelle was the owner of the land. The siding and stone were installed and, according to the trial judge, the result of Nicholson's labours was to significantly increase the market value of the property. After making a few payments to Nicholson, Labelle defaulted on his obligation to pay and further, went into default on his purchase agreement with St. Denis. Some months later, St. Denis evicted Labelle from the premises and terminated the purchase agreement. Shortly thereafter, Nicholson brought a claim for the outstanding balance of the current price against Labelle and, having obtained a worthless default judgment against Labelle, pursued St. Denis in restitution on the theory that St. Denis had obtained a benefit in the form of an enhancement in the value of his land at Nicholson's expense.

The claim against St. Denis succeeded at trial. The trial judge sought unsuccessfully to derive assistance from the existing case law and ultimately grounded his decision on the rather vague proposition that it would be "against good conscience" to allow the defendant to retain this benefit without paying for it. The Court of Appeal wisely eschewed this unstructured approach to restitutionary doctrine and commented that if statements of this generality were to be relied on, "the unruly horse of public policy would be joined in the stable by a steed of even more unpredictable propensities." Guidance must be sought, it was said, from the rules that have evolved over

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83 Recovery of the value of benefits conferred under a mistake is, of course, a pervasive theme in the law of restitution. For a statement of the relationship of mistake to the concept of officiousness, see Restatement, supra note 2, s. 2, comment a.
86 Id. at 350.
87 Supra note 94, at 317 (O.R.), 701 (D.L.R.).
the years to determine whether the general doctrine applies in a particular instance. In turning to consider the problem of the case in more specific terms, however, the Court, as has so often happened in the English restitutionary case law, enunciated propositions that went well beyond what was necessary to support a denial of relief and evidenced a somewhat wooden approach to restitutionary doctrine.

The central problem of the case is, again, that of free choice. The effect of granting recovery would be to force St. Denis to invest in improvements to his realty which he certainly did not need and for which he may have no desire. The law of restitution has rarely departed from the general principle that in such circumstances the recipient ought not be required to pay for the benefit received. We would feel very differently if the benefit had been turned to account through sale of the land. And, more generally, in cases where the benefit supplied is one of a necessitous nature or is of commercial value (such as a profit-making fixture of some sort) and has been turned to account (through profitable use), the principle of free choice has less claim on our attention, and has received less support in the restitutionary case law. It would be sufficient, then, on the facts of Nicholson to dismiss the claim simply because the benefit is of a kind that gives rise to the concern with free choice and has not been turned to account by the defendant.

Although the Ontario Court of Appeal did emphasize that the work in question was something which "St. Denis neither sought nor desired," the Court appears to have adopted a broader basis than this for rejecting the claim. The precise rationale for the decision is obscured by the fact that a rather lengthy list of supporting considerations was set forth by the Court with the result that it is unclear which considerations would be considered

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98 Consider, for example, (i) the cases on necessitous intervention, (ii) the disappearance of concern with free choice where the benefit conferred is money and (iii) the claim that arises where non-liquid assets are turned to account by the recipient as in the case of joint tenants, considered supra with note 41 ff. If the benefit had been the discharge of a debt secured by a mortgage on the land, restitutionary recovery would be allowed on the basis of subrogation doctrine. See discussion accompanying note 150, infra.


100 Id. at 320 (O.R.), 704 (D.L.R.). The pertinent passage from the judgment is the following:

In the instant appeal, the plaintiff, as stated, had no agreement or relationship of any kind with St. Denis. Further, the plaintiff had an enforceable contract with Labelle, on which contract he has sued and recovered judgment. The plaintiff did not do the work under any mistaken belief that he held title to the property, nor did he take any steps to ascertain just what Labelle's interest, if any, was in the property. Further, when it became apparent immediately after the work was completed that he was going to have difficulty securing payment from Labelle, he took no steps to secure whatever rights he might have had under the Mechanics' Lien Act, R.S.O. 1970, c. 267, within the limitation period imposed by that Act.

St. Denis neither sought nor desired the work to be carried out on the property, and was given no opportunity to express his position until long after the work was completed. He has been guilty of no wrongdoing, nor of encouraging the plaintiff in his work. I can see no grounds, under the circumstances of this case, for extending the doctrine of unjust enrichment or of restitution to the circumstances of this case.
necessary or sufficient grounds for refusing relief. Nonetheless, the Court did place some reliance on the fact that there was not, in this case, a "special relationship" between the parties of a kind which is typical of restitutionary claims. MacKinnon J.A. said, in part:  

... in almost all of the [restitution] cases the facts established that there was a special relationship between the parties, frequently contractual at the outset, which relationship would have made it unjust for the defendant to retain the benefit conferred on him by the plaintiff—a benefit, be it said, that was not conferred "officiously". This relationship in turn is usually, but not always, marked by two characteristics, firstly, knowledge of the benefit on the part of the defendant, and secondly either an express or implied request by the defendant for the benefit or acquiescence in its performance.

It is, of course, quite true that the unjust enrichment principle is usually applied in cases where there is direct contact or "privity" in this sense between the parties and a free acceptance of the benefit conferred. And it is also true, as is suggested, that this is not exclusively so. The difficult question is to discern the principles upon which recovery will be based outside this central core of case law. On this point, the Court of Appeal offers little guidance and appears to come perilously close to suggesting that in the absence of such a relationship coupled with either a request or acquiescence in receipt of the benefit, no recovery can be allowed. The adoption of such a view would mark a significant retreat from established principles of restitutionary liability.

A second difficulty with the judgment is that it fails to deal squarely with the question of officiousness. The fact that the plaintiff had acted in performance of a binding contractual obligation might, for the reasons suggested earlier, meet the requirement of unofficious conduct. In Nicholson, however, the presence of an apparent mistake adds considerable support to the argument that the plaintiff's conduct was unofficious. Yet, it would appear that the relationship between mistake and officiousness was not clearly grasped. The plaintiff relied on the doctrine that improvements made under a mistake as to title can be the subject of restitutionary relief. The Court appears to dismiss the relevancy of this doctrine on the basis that Nicholson was not suffering from a misapprehension that he had title to the land, but rather that he was mistaken as to Labelle's title. Though it is, of course, unarguable that such a distinction can be drawn, it does not commend itself if the role of mistake in these cases is clearly recognized as nothing more than a basis for establishing that the plaintiff's conduct was unofficious.

Two further points may be noted. The Court suggested as further considerations underlying the denial of relief, (a) that Nicholson had sued and obtained judgment on his agreement with Labelle and (b) that he had not pursued his remedies (presumably against Labelle's interest in the land).

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101 Id. at 317 (O.R.), 701 (D.L.R.).
102 See, supra notes 86, 87 and 98.
102a See discussion, supra at note 7 ff.
under the Mechanics' Lien Act. These do not appear to be telling arguments. It is appropriate, of course, to insist that the plaintiff's first line of recourse is to his contractual remedies against the occupant. That he has done so and found the defendant to be judgment-proof simply establishes that the benefit has been conferred at his expense. It is less evident, however, that it is appropriate to require the plaintiff to pursue the mechanics' lien remedy against the purchaser in possession — a remedy he will likely learn of only in the lawyer's office and which may be, in cases such as Nicholson, of questionable value. We shall return to this point.

In sum, the Nicholson case appears to be correctly decided, although there may be some concern that the list of considerations set forth in the reasons for judgment is cast in terms which may present difficult hurdles for plaintiffs in cases where relief may be warranted. As noted previously, the strong attraction of the unjust enrichment principle in these situations is likely to provoke somewhat artificial application of agency notions in order to secure redress. Interestingly, this appears to have occurred in a decision of the Supreme Court of Canada on facts remarkably similar to those of Nicholson v. St. Denis. In the case in point, Freedman v. D. Thompson Ltd., the plaintiff contractor had been hired to renovate certain premises by the agent of an individual who had taken an assignment of the rights of a purchaser under an agreement to purchase the property in question from its owner, the defendant. In essence the contractor's position was that of having been invited to supply services by a purchaser in possession. Further, as in Nicholson, the plaintiff mistakenly believed that he was dealing with the owner — here, through an agent. The plaintiff completed the work, rendered his account and failed to obtain payment. It appears that the plaintiff's potential remedies for work done against the assignee were worthless. Accordingly, he commenced an action seeking compensation from the defendant. The plaintiff seems to have pleaded his case on restitutionary grounds. It was alleged in the statement of claim that the renovations had contributed to an increase in the market value of the land which had been turned to account through sale of the property by the defendants at increased value. Thus the defendant had "obtained advantage and benefit from the goods, materials and services supplied by the plaintiff." This theory of liability was not mentioned by the majority of the Court. Success was, however, vouchsafed to the plaintiff on the theory that the following circumstances created an agency by estoppel which bound the owner in contract to the plaintiff.

The purchase agreement had stipulated that the purchaser was to be permitted to take immediate possession of the property in order to effect repairs and renovations provided that waivers of liens would be obtained from all sub-trades and material suppliers. Once it became apparent that some suppliers had commenced work, the defendant, relying on this provision, insisted that he be furnished with waivers in satisfactory form. The form of

104 See discussion accompanying note 125, infra.
105 Supra note 89.
106 Id. at 279 (S.C.R.), 466 (D.L.R.).
107 Id. at 282 (S.C.R.), 469 (D.L.R.).
waiver ultimately approved by the defendant's solicitors and signed by the plaintiff indicated that the waiver was being requested by the previous mortgagees and by the defendant and that the defendant was “the registered owner.” The plaintiff alleged that as he had all along believed himself to be dealing through the agent with the owner of the land, the impression created by the waiver form was that he had been hired by the defendant. The defendant had done nothing to disabuse the plaintiff of this notion though, to be fair, it must be added that he would not have perceived that there was any need to do so. On this rather slender basis, the majority found that the defendant’s conduct “constituted not only silence but a representation that he the appellant was the owner of the property and would be responsible for the payment of the account which would become due.”

Ironically, then, the very conduct which had been designed to exclude all possibility of liability was thus held to be the basis of an estoppel which fed the plaintiff’s misunderstanding of the contractual arrangements.

The result in the case appears to be just if we assume that the defendant did in fact turn the benefit to account by enjoying profits on the resale of the land which could be attributed to the improvements. But the estoppel analysis is not without difficulty. As the minority opinion argued, there is some problem in showing detrimental reliance. The plaintiff had already entered into his agreement with the undisclosed principal, the purchaser, when he was presented with the waiver form. The defendant’s representation of ownership would induce reliance only if one accepts the plaintiff’s assumption, not induced by the defendant, that the owner was the undisclosed principal with whom he had entered the agreement. There is no suggestion that the defendant had any reason to believe that the plaintiff had been misled in this way. Further, the remedy imposed might operate very harshly in some circumstances for it has the effect of creating a binding contractual obligation. Thus, even if the true undisclosed principal, the purchaser, moved in and enjoyed the benefit of the renovations or if the defendant had been forced to resell the property at a substantial loss, the defendant would be bound by his contract to compensate the plaintiff. One suspects, however, that in such circumstances, the argument based on agency by estoppel would not have been so eagerly embraced by the Court.

Again, as in Nicholson v. St. Denis, the problem seems amenable to

108 Id. at 285 (S.C.R.), 472 (D.L.R.).
109 This was alleged but not established by the plaintiff.
110 Supra note 89, at 279-80 (S.C.R.), 466 (D.L.R.) (per Cartwright C.J.C., Hall J. concurring).
111 Id. at 285 (S.C.R.), 466 (D.L.R.) (per Spence J.). Martland J., in a concurring opinion, noted further that the waiver form indicated that the waiver was being requested in order to induce the mortgagee to advance moneys and to permit “the owner of the said property to pay the cost of constructing the building or buildings erected or now under construction.” This language was construed to mean, in effect, that the work was being done for the defendant. If this was indeed the interpretation of the form on which the plaintiff relied in giving up those lien rights, if any, which he might otherwise have had against the defendant, this would strengthen the estoppel argument though it is still necessary to assume that the plaintiff laboured under the confusion which the defendant did not create. Id. at 280 (S.C.R.), 468 (D.L.R.).
restitutionary analysis. If, as may be the case in Thompson, the defendant has been unjustly enriched by the receipt of improvements which have been sold at a profit, restitutionary recovery seems appropriate. If the renovations have not been turned to account, the imposition of liability on the basis of an estoppel seems, on the facts of this case, a rather harsh measure.

As a general rule, then, the common law is usually unresponsive to the claim of one who has, through performance of an agreement, incidentally conferred a benefit on a stranger. As we shall see, a somewhat more generous view is taken of the position of suppliers of legal services and, it may be, as suggested above, that in a small range of situations, restitutionary relief may be accorded to self-serving suppliers of other types of goods and services.

B. Relief under Mechanics' Lien Statutes

Provincial mechanics' lien statutes afford some opportunity for relief to a supplier of work and material which is employed in the improvement of land. Although a detailed examination of these statutes would carry our discussion well beyond the limits of restitutionary law, a brief treatment of their general structure will enable consideration of two pertinent questions. First, to what extent are remote suppliers granted a statutory indemnification for benefits incidentally conferred on owners of land? Second, what implications can or should be drawn from the nature of these statutes with respect to the availability of common law restitutionary relief in such cases.

Again, two different situation types merit discussion. First, the application of the statutory schemes to claims arising in the context of a building project undertaken at the instance of the owner of land where the claimant is a sub-contractor who has not received payment is reviewed. As has been suggested, unjust enrichment notions lurk just beneath the surface of these claims. The owner has received a benefit which he had contracted to obtain, albeit from someone else, and he will not be prejudiced by being required to pay the sub-contractor as long as this is not allowed to have the effect of requiring him to pay for the benefit twice over. In such cases, the lien statutes normally provide some measure of relief.

More difficult considerations arise, however, in situations where the benefit has not been requested by the owner, but has been contracted for by a person in possession of the land with a limited interest such as a lessee or a purchaser under a contract of sale. The extent to which relief is afforded by statute to these claimants is more precarious and varies considerably with the nature of the possessor's interest in the land.

112 See discussion accompanying note 197, infra.


114 See discussion accompanying note 78, supra.
The general approach of the statutes is to grant a lien to any person who has supplied work or material to land. The lien is made available both to one who has made direct supply to the owner of the land or to one who has supplied to a contractor (or, indeed, to a sub-contractor thereof) who has been employed in turn by the owner to do work of some kind on the land or to furnish materials for that purpose. The lien will attach to the estate or interest of the owner in each of these cases to secure payment of the price of the work or materials.

In part, then, the mechanics' lien legislation buttresses the contractual remedies of a contractor who has direct privity with the owner of land. More than this, however, the statutes utilize the owner's interest in the land as a device for ensuring payment of those further down in the chain of supply who have indirectly benefitted the owner by performing agreements which they have entered into with a contractor or sub-contractor. The statutory scheme thus typically extends beyond mere contract enforcement, and creates a liability in owners of improved land to compensate remote parties whose efforts have ultimately contributed to the making of the improvement. The relief thus secured to the remote party is, however, not purely restitutionary in character. The measure of relief, for example, is normally the original contract price rather than a restitutionary measure such as the reasonable value of the work or material supplied, or alternatively, the increase in the value of the land attributable to the supplier's contribution. Nonetheless, it is evident that the underlying impulse of this feature of the statutory scheme draws heavily on notions of unjust enrichment.

With regard to the claims of sub-contractors who have supplied work or material to a project initiated by the owner, the legislation creates, in effect, an insurance scheme to secure payment of the contract price to the supplier in the event of default by his immediate contracting party. As a general rule, the statutes impose an obligation on the owner to create a holdback fund by holding in reserve a fixed portion of the moneys otherwise payable to the contractor. If a sub-contractor gives notice of default to the owner, the owner must, if possible, continue to hold back an amount sufficient to cover

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116 The Ontario provisions are typical and form the basis for the discussion in the text. See R.S.O. 1970, c. 267.

117 See Hickey v. Stolker (1923), 53 O.L.R. 414 at 415 (per Meredith C.J.C.P.): "Speaking generally, the object of the Mechanics' Lien Act is to prevent owners of land getting the benefit of buildings erected and work done at their instance on their land without paying for them." See also, Brooks-Sanford Co. v. Theodore Teller Construction Co. (1910), 22 O.L.R. 176 at 180 (per Moss C.J.O.): "... [T]he object and the policy of these Acts is to prevent an owner from obtaining the benefit of the labour and capital of others without compensation..." The same view is expressed by Rand J. in Earl F. Wakefield Co. v. Oil City Petroleum (Leduc) Ltd., [1958] S.C.R. 361. See also, Dawson, supra note 11, at 1451.

118 In Ontario, the holdback fund is 15% of the value of work and materials actually provided. The supplier's lien constitutes a charge on this fund. In most provinces, including Ontario, the holdback must be maintained by all those primarily liable on a contract, and thereby extends down the construction pyramid. See s. 11 of the Ontario Act.
the entire claim. Where there is more than one such claimant and the fund is insufficient, each person entitled to a lien will rank pari passu.

The treatment of claims made by persons who have supplied work or materials to lessees or purchasers is a less straightforward matter. The Ontario statute defines the term "owner" to include any person having an estate or interest in the land involved, and at whose request, and on whose behalf work is done. It is clear that both a tenant and a purchaser without title have interests that enable them to qualify as "owners" in this sense and hence their interests are exposed to the attachment of liens.

The supplier of material or services to the lessee can thus acquire a lien on the lessee's interest and may force a sale of that interest. The position of a supplier to a purchaser without title is more difficult, however, and must be compared to that of a supplier to a purchaser who takes title from the vendor. Where work has been done for a purchaser who has given a mortgage back to the vendor, the mortgage will have priority over any subsequent liens to the extent of the actual value of the land and premises at the time the first lien arose. The supplier's position in this case, then, may not be very secure. Whether or not his work has added value to the property, the lien claimant, in the event of foreclosure, will only have a right to any excess in value over the mortgage. Moreover, even if the suppliers' work has added some value to the property, an over-all depreciation of its value could deprive him of any benefit from the lien.

If the work has been done for a purchaser under a purchase agreement in which title remains in the vendor, the supplier who asserts a lien against the purchaser's interest is usually faced with the same priorities as exist in the sale and mortgage back situation as the result of statutory provisions

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118 Id., s. 11(6).
119 Id., s. 14(2).
120 Id., s. 1(1) (d). The section reads as follows: "owner" includes any person and corporation, including a municipal corporation and a railway company, having any estate or interest in the land upon which or in respect of which work is done or materials are placed or furnished, at whose request, and
(i) upon whose credit, or
(ii) on whose behalf, or
(iii) with whose privity or consent, or
(iv) for whose direct benefit,
work is done or materials are placed or furnished and all persons claiming under him or it whose rights are acquired after the work in respect of which the lien is claimed is commenced or the materials placed or furnished have been commenced to be placed or furnished.
123 In Ontario, the statute protects the leasehold interest from early termination by the landlord except for non-payment of rent, and even in that event the claimant is given an election to pay the rent and add the amount paid to the lien claim. See s. 7(2).
124 Id., s. 7(3).
which have the effect of deeming the vendor in such cases to be a mortgagee with respect to moneys payable under the agreement by the purchaser.\textsuperscript{126} The lien will therefore protect the supplier only to the extent that the value of the land exceeds the amount secured to the vendor. More difficult questions arise if the purchaser has defaulted under the purchase agreement and the vendor has exercised a right to terminate the agreement. At this point, it would appear that the purchaser no longer has an interest to which the lien may attach. It may be that liens filed prior to this development will retain some vitality. This, however, is a matter to be resolved by close analysis of the specific statutory provisions.\textsuperscript{126}

Lien claims against “owners” with limited interests may not, then, afford much protection to the supplier and accordingly, the possibility of a lien

\textsuperscript{126} Id., ss. 7(3) and 7(6).

\textsuperscript{126} In the case of John A. Marshall Brick Co. v. York Farmers (1917), 54 S.C.R. 569, aff’g, (1916), 35 O.L.R. 542, a purchaser of land under an agreement for sale had contracted for work. Ultimately, liens were registered against his interest. Subsequently, he defaulted under the agreement of sale and pursuant to provisions of the agreement was required to forfeit his interest to the vendor who had retained title. In a contest between the vendor and the lien claimants, the court was required to apply two provisions of The Mechanics' and Wage Earners Liens Act, R.S.O. 1914, c. 140. Section 14(2) deemed the purchaser under an agreement of sale to be a mortgagor and the vendor to be a mortgagee. Section 8(3) provided that a lien shall take priority over a prior mortgage to the extent of any increased value to the land resulting from the work. The court interpreted these sections as ensuring that the vendor would have priority as mortgagor for the balance of the purchase price, but that the liens would still prevail with respect to any increased value in the land.

The Ontario Act has, however, since been amended. The relevant provisions now provide: (i) that a prior mortgage has priority to the extent of the actual value of the land at the time the first lien arose and (ii) that the seller under an agreement for sale is deemed a mortgagee and moneys payable to him have the priority of mortgage moneys. It may be wondered whether the fact that the Act no longer specifically deems the purchaser to be a mortgagor affects the position of the lien claimant, claiming through the purchaser’s interest, once that interest is extinguished. Marshall Brick is no doubt authoritative in those provinces—Nova Scotia, Manitoba and Saskatchewan—whose lien statutes contain provisions in the same terms as the old Ontario Act. Under the present Ontario Act, however, and in provinces with similar legislation—Alberta, British Columbia, New Brunswick, Newfoundland and Prince Edward Island—a statutory basis for the continuance of liens which have attached to a purchaser’s interest prior to forfeiture is not clearly established. It may be argued, however, that the vendor must, on general principles, take the equitable interest as forfeited by the purchaser subject to the liens attached and fall back on his own priority for the purchase price. In Flack v. Jeffrey (1895), 10 Man. L.R. 514 (Q.B.D.), for example, the purchaser, subsequent to the filing of a lien claim, released his interest to the vendor for a consideration of fifty dollars. It was held that the previously attached lien survived but was subordinate to the vendor’s claim for the balance of the purchase price. In a similar American case involving a compromise and repurchase of the equitable interest, the same result was obtained. See Thomas v. Soper Lumber Co., 69 Okla. 197, 171 P. 736 (1918). In Blight v. Ray (1893), 23 O.R. 415 (Ch. D.), a case in which the agreement of sale did not contain a forfeiture clause, it was held that the purchaser’s equitable interest could only transfer back to the vendor subject to the lien attached. The extent to which the lien claimant could obtain priority over even the vendor’s interest was doubted, however, in Flack v. Jeffrey, supra. See also, Graham v. Williams (1885), 8 O.R. 478 (Ch. D.) (lessee with an option to purchase decided not to exercise the option; the court was willing to allow the lien against the lessee’s interest to stand as a charge on the land but subordinate to the claim of the lessor as vendor).
against the owner in fee may be contemplated. The supplier’s problems would
be solved if he were able to place a lien against the interest of the owner of
the fee simple. Again, as with the protection afforded sub-contractors, the
justification for providing such a remedy presumably would be the prevention
of the unjust enrichment of the owner.

Where work or material is to be supplied to a tenant, the legislation
normally permits the supplier to bind the interest of the fee simple by serving
notice of the work to be done on the owner. The owner’s interest is so bound
if he does not deny responsibility within a fixed period of time.127 Apart from
special provisions of this sort, however, the general position is that the claim-
ant will succeed only if he is able to bring the owner of the fee within the
statutory definition of owner by demonstrating that the owner is the one who
has requested the work and on whose behalf the work is done. This is a
formidable task for the supplier as the necessary request and privity will
rarely be inferred from circumstantial evidence.

Canadian courts appear to be very reluctant to bind the interest of the
lessor in the absence of direct dealing between the lessor and the supplier.
Thus, in an Ontario case, a supplier to a lessee was denied a lien against the
lessor even though the lessor and lessee had entered into a verbal agreement
that the lessee would undertake the project in question.128 Even more re-
markably, the same result has occurred in cases where the lease itself required
the lessee to erect a building on the leasehold premises or to make certain re-
pairs.129 In these latter situations, American courts adopt the more persuasive
view that the presence of a term obliging the lessee to undertake the work
amounts to an expression of the lessor’s consent.130

A similarly narrow approach to the question of consent is evident in the
context of claims brought by suppliers to purchasers under agreements for
sale. Thus, in a case where the purchaser was expressly authorized under the
agreement to build on the land, the owner’s interest was held to be free from
liens.131 In John A. Marshall Brick Co. v. York Farmers Colonization Co.,132

127 In Ontario, the period is 15 days (s. 7(1)). See also, Beyersbergen Construction
Ltd. v. Edmonton Centre Ltd. (1977), 78 D.L.R.(3d) 122 (Alta. C.A.) (held, under
the analogous Alberta provision, that the notice must indicate either expressly or tacitly
that the supplier proposes to exercise his remedies under the lien statute against the
lessor).
128 Graham v. Williams, supra note 126.
D.L.R. 345 (C.A.) (building); Dalgleish v. Prescott Arena Co. & Woodward, [1951]
O.R. 121 (C.A.). An opinion to the contrary was expressed in an earlier case by
later recanted these views, however, and confined the earlier authority to its special facts.
The obligation to build was contained in a sub-lease. The sublessor had approved the
specific plans and was frequently consulted as the work progressed. See Marshall Brick
Co. v. Irving (1916), 35 O.L.R. 542 at 551-52 (C.A.) (per Riddell J.), aff’d sub nom.
130 See Dawson, supra note 11, at 1455.
1128.
132 Supra note 126.
the Supreme Court of Canada reached the same conclusion despite the fact that the purchase agreement in question required construction by the purchaser and provided for the advancement of funds by the vendor. The court held that the necessary privity and consent did not exist as there had been no direct dealing between the supplier and the vendor. Again, American authority is to the contrary and would find the requisite consent on such facts.133

Finally, mention may be made of similar problems in the context of multiple or divided ownership. Where one of the owners—a co-tenant, for example—has ordered work without consulting the other, is the latter exposed to a lien claim as well? Although the statutes are generally silent on this question, the special case of ownership shared by a husband and wife is covered by statute in all of the provinces except Manitoba and Newfoundland. Most provincial statutes allow the wife's interest to be bound by the husband's acts.134 Only Alberta has adopted the more modern approach of presuming either spouse to be acting as agent for the other.135

In cases of multiple or divided ownership not covered by statute, a strict interpretation of the requirement of request would dictate that work ordered by one owner will not incur the liability of the other. The latter would not fall within the statutory definition of owner even though he may stand to benefit by the improvement.136

The usual requirement that the work be done at the request of the owner is thus likely to bedevil most attempts to lien the owner's interest in situations other than building projects initiated by the owner himself. Exceptionally, however, in British Columbia, the statute establishes much broader protection for the supplier by providing that the owner of any interest will be deemed to have requested the work if it is done with his knowledge, unless he posts a notice to the contrary.137

In sum, then, the mechanics' lien statutes offer some prospect of compensation to remote suppliers in the form of liens against the interest of the owners of property which has been improved at the supplier's expense. The protection is far from complete. The owner's lien liability is normally restricted to the amount of the required holdback.138 Moreover, where the work

134 See, e.g., R.S.O. 1970, c. 267, s. 6.
135 See The Builder's Lien Act, R.S.A. 1970, c. 35, s. 4(2).
136 See Sanderson Pearcy & Co. v. Foster (1923), 53 O.L.R. 519 at 521 (C.A.) (per Middleton J.) (dictum). For reference to American cases to the same effect, see Dawson, supra note 11, at 1455.
137 See the Mechanics' Lien Act, R.S.B.C. 1960, c. 238, s. 14. Protection of a similar kind for persons engaged in recovering minerals has been enacted in Alberta. See The Builders' Lien Act, R.S.A. 1970, c. 35, s. 4.
138 See the Ontario Act, s. 11(6). If the owner has on hand more than the holdback, this amount will be applied to the liens, notwithstanding the fact that it exceeds the required holdback amount. See Piggott v. Drake, [1933] O.W.N. 197 (C.A.); and Horwitz v. Rigaux Bldg. Enterprises Ltd. (1960), 32 W.W.R. 540 (Alta. C.A.). In contrast, a majority of the American states follow the Pennsylvania model in allowing liens for the full contract price without regard to the state of the owner's accounts.
has been requested by one having only a limited or partial interest, the owner
in fee (or the owner of the residuum) may be free of liability altogether.

To what extent would these limitations on the lien remedy be read as evi-
dence of legislative intent to similarly restrict the availability of remedies at
common law? Alternatively, to what extent should a supplier's failure to
pursue whatever remedy might be available under the mechanics' lien statute
operate as a waiver of common law remedies? Although there are isolated
suggestions in the Canadian and American case law to the contrary, it is my
view that neither of these inferences should properly be drawn from the
mechanics' lien legislation.

The first point may be illustrated by reference to Goldberg v. Ford,139
a Maryland decision depriving a plaintiff strip miner of compensation from
a lessor for mining work which the plaintiff had undertaken at the behest of
the lessee. The court suggested that an equitable lien could not be imposed,
for if such a remedy had been available in equity, there would have been no
need to enact mechanics' lien legislation to protect sub-contractors. There is,
of course, some truth in this suggestion, but it is not in itself sufficient reason
for denying all relief dehors the statute. Although, as has been indicated,140
there are substantial reasons for not adopting a general rule allowing recovery
in all cases, there may well be situations—such as the making of necessary re-
pairs on invitation from a purchaser in possession of land—where relief outside
the statute may be appropriate. The statutes do not deal expressly with this
point and, of course, more generally, are designed to co-exist peacefully with
the parties' common law contractual remedies.141 In short, there appears to be
no compelling reason to assume that the non-availability of the statutory lien
should preclude the granting of common law restitutionary relief in appro-
priate cases.

The argument that failure to pursue a lien remedy amounts to a waiver
of common law remedies is advanced in Nicholson v. St. Denis.142 As pre-
viously indicated, one of the reasons put forward by McKinnon, J.A. for
denying the plaintiff supplier a common law restitutionary remedy against
the vendor was that the plaintiff had made no attempt to secure whatever
rights he may have had under the Ontario Mechanics' Lien Act.143 Although
I have argued144 that the result in this case is to be explained on other

139 188 Md. 658, 53 A. 2d 665 (1947). See also, Dawson, supra note 11, at 1446.
140 See discussion accompanying note 88.
141 Thus, for example, in Beaver Lumber Co. v. Burns (1922), 69 D.L.R. 303,
[1922] 3 W.W.R. 383, 16 Sask. L.R. 52 (K.B.), the court examined a provision similar

to s. 26(1) of the Ontario statute (declaring that a prior personal judgment does not
destroy the lien) and said that the statute thereby recognized the existence of two
separate causes of action which may be brought separately or together. See also,
Hamilton Bridge Works Co. v. General Contracting Co. (1909), 14 O.W.R. 646, 1
O.W.N. 34.
142 Supra note 94.
143 Id. at 320 (O.R.), 704 (D.L.R.).
144 See discussion accompanying note 98, supra.
grounds, it must be considered whether failure to assert lien rights should be viewed as a significant factor in such situations. In my view, it should not. Again, the statutory liens are evidently intended to co-exist with common law contractual remedies. Failure to file a lien would not, by itself, be considered a waiver of contractual rights. So too, it is argued, with restitutionary remedies. No doubt, there may be cases where failure to file a lien may be taken as evidence of waiver, but there does not appear to be a sound basis for necessarily treating it as such, especially in a case such as Nicholson where it seems most unlikely that the supplier would have been entitled to a lien in any event.

IV. DISCHARGE OF ANOTHER'S OBLIGATION

In some circumstances, vigorous pursuit of self-interest may dictate that one ought to perform another's legal obligation. Typically, such considerations will arise in a situation where payment of another's debt will have the effect of protecting one's own financial position. A third mortgagee, for example, might well find it in his interest to pay off a first mortgage in order to prevent foreclosure and sale. If the intermeddler has acted under compulsion of law and if it may properly be said that the stranger is primarily liable for the debt, it is clear that a restitutionary claim for the money paid to the creditor will lie against the stranger. The question raised here, however, is whether one who acts merely in self-interest is also entitled to this remedy.

Certainly there is some support, both at law and in equity, for the view that self-serving discharge of another's debt may give rise to a restitutionary claim. At law, a claim for money paid was made available, for example, to a mortgagee of a ship who paid off wages owed by the owner to the crew in order to prevent the ship's seizure. In equity, the payer could call in aid the doctrine of subrogation, which would enable him to step into the shoes of the creditor whom he has paid and seek indemnification from the debtor. Thus, for example, a mortgagee who pays off an encumbrancer who is higher in priority than himself in order to prevent realization of the security will be

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145 Supra note 141.
146 Consider, for example, a case where the owner asks a disaffected subcontractor if he intends to file a lien. The sub-contractor clearly states that he will not do so. The owner may be taken to have reasonably relied on this as a statement that the sub-contractor will not pursue any remedy against him.
147 It is not unlikely that a supplier in Nicholson's shoes would fail to file prior to default and forfeiture of Labelle's interest in the land. Even if the filing does occur prior to this event, the lien remedy may not be fully satisfactory. See discussion accompanying note 138, supra.
148 See generally, Goff and Jones, supra note 14, at c. 12.
150 See generally, Goff and Jones, supra note 14, at c. 28.
entitled to subrogate himself to the payee's position against the debtor.\textsuperscript{161} The availability of the subrogation remedy is of critical importance to the payer, of course, if priority can thus be secured over other claimants or if, for some reason, the remedy in \textit{money paid} is not available at common law.

In such cases, it is evident that the payer is constrained by circumstances to risk further investment in an attempt to preserve the collateral for his loan to the debtor. For this reason, these lines of authority may be viewed as an extension of the evolving doctrine of practical compulsion.\textsuperscript{162} There are, however, difficulties with this explanation. The pressure felt by the intervenor does not emanate from an exercise of coercion on the part of either the payee or the debtor. Practical compulsion, itself an extension of the common law doctrine of duress, is a doctrine aimed at the relief of oppression. In the cases under discussion, this factor is not present. The debtor is having difficulty in meeting his obligations; the payer decides that it is worthwhile to risk a further expenditure in the hope of preserving a secured position of some value. Though it is true that the payer has responded to extraneous pressures, they are, after all, of the kind which lenders would normally foresee, and not of the type that would normally inspire one to describe the payment as \textit{involuntary}. A more realistic appraisal is simply that such payments are made in pursuit of self-interest.

The rationale for allowing recovery of the value of these unrequested benefits is easily discerned. The substitution of one creditor for another is not likely to be a matter of any consequence to the debtor.\textsuperscript{163} It is for this reason, no doubt, that the debt is normally assignuble.\textsuperscript{164} The recipient of a benefit in this form is, then, not prejudiced when he is required to disgorge the value of the benefit received. In this respect, his position is similar to that of one who has received a cash payment which he must disgorge. The pre-existing liquidity position of the recipient is not altered by requiring payment of the value of the benefit received. This is an expense which the debtor would

\textsuperscript{161} Bond v. Hutchinson (1881), R.E.D. 443 (N.S. Eq.); Rosenberg v. Quan, [1958] O.W.N. 154, 14 D.L.R. (2d) 415 (H.C.); Ghana Commercial Bank v. Chandiram, [1960] A.C. 732, [1960] 3 W.L.R. 328, [1960] 2 All E.R. 865 (P.C.); Traders Realty Ltd. v. Huron Heights Shopping Plaza Ltd., [1967] 2 O.R. 522, 64 D.L.R.(2d) 278 (H.C.). And see Annot., Right and remedy of mortgagee who for the protection of his security pays taxes on, or redeems from tax sale of, mortgaged property (1933), 84 A.L.R. 1366, (1939), 123 A.L.R. 1248. The remedy ought not be available, however, where the intervenor's interest arises in a mortgage which the intervenor knew, at the time of intervention, to have been given in fraud of the beneficial owners. This, presumably, is the proper explanation for the result in Graham v. The British Canadian Loan and Investment Co. (1898), 12 Man. R. 244 (C.A.).


\textsuperscript{163} See, e.g., \textit{Butler v. Rice,} [1910] 2 Ch. 277 at 282-83, 79 L.J. Ch. 652 at 654 (per Warrington J.).

necessarily have incurred. It is merely the identity of the person whom he
must pay which has changed.

The contrast between the restitutionary treatment afforded a "near
liquid" benefit such as discharge of another's debt and benefits such as un-
requested improvements to the land may be underscored by considering the
position of partial owners of land who wish to shift part of the cost of a bene-
fit conferred on others having interests in the land. The difficulties which, as
previously indicated, plaque the life tenant who wishes to shift part of the
cost of improvements to the remaindermen evaporate in the case where a
charge on the land has been paid off by the life tenant. It is clearly established
that a life tenant who pays an encumbrancer in order to protect his own in-
terest is presumed to keep the charge alive as against the remaindersmen. So,
too, a co-owner who pays off more than his share of a debt secured by a
mortgage or a tax liability is entitled to a lien on the other co-owner's
interest in the land for that co-owner's share of their common burden.

Similarly, whatever impediments stand in the way of recovery by one
who makes improvements to land in the mistaken belief that he has been
dealing with the owner of the land, restitutionary relief against the owner
will be allowed on subrogation principles to a stranger who, in similar cir-
cumstances, pays off a debt secured by a mortgage on the land.

Indeed, once the nature of the benefit conferred is examined in this way,
it is difficult to envisage situations, absenting cases of gift, in which relief
would not be appropriate. A clear limitation is imposed, however, by the
concept of officiousness, and the unusual facts of an American decision, Norton
v. Haggett, suggest a situation in which recovery would be denied on
this basis. The plaintiff Norton, having had disagreements with the defendant
Haggett, learned that Haggett was indebted to a bank. Evidently relishing the
thought of becoming Haggett's creditor, Norton approached the bank and

155 See discussion accompanying note 54, supra.
156 Shrewsbury (Countess of) v. Shrewsbury (Earl of) (1790), 1 Ves. Jun. 227, 30
E.R. 314; Burrell v. The Earl of Egremont (1884), 7 Beav. 205, 49 E.R. 1043; Morley
v. Morley (1885), 5 De G.M. & G. 610, 43 E.R. 1007; Macklem v. Cummings (1859),
7 Gr. 318; Re Harvey, Harvey v. Hobday, [1896] 1 Ch. 137, 85 L.J. Ch. 370 (C.A.);
Lord Gifford v. Lord Fitzhardinge, [1899] 2 Ch. 32, 68 L.J. Ch. 529; Patten v. Bond
(1889), 37 W.R. 373, 60 L.T. 583 (Ch. D.); Williams v. Williams-Wynn (1915), 84
L.J. Ch. 801; 113 L.T. 849; Re O'Donnell, O'Donnell v. O'Donnell (1908), 12 O.W.R.
623; Currie v. Currie (1910), 20 O.L.R. 375 (H.C.).
157 Re Curry, Curry v. Curry, supra note 40, at 275. Also see, Annot., Contribution,
subrogation, and similar rights, as between cotenants, where one pays the other's share
of sum owing on mortgage or other lien (1956), 48 A.L.R. 2d 1305.

158 Freeburg v. Farmers' Exchange Bankers (1922), 63 D.L.R. 142, [1922] 1
W.W.R. 845, 15 Sask. R. 318 (C.A.) (plaintiff co-owner granted a lien against the land
in priority to the interest of mortgagees and a lien against the co-owner for one-half of
the amount paid in taxes). Also see, Annot., Rights and remedies of tenant in common
who pays his cotenant's share of taxes or assessments (1927), 48 A.L.R. 586.

159 See discussion accompanying note 93 ff., supra.
160 See Butler v. Rice, supra note 153. Also see, Restatement, supra note 2, s. 43.
volunteered to pay off the defendant's note. The bank accepted payment and turned over to him the cancelled note and discharged mortgage. Thereupon Norton, mistakenly assuming that he had purchased the note and mortgage, sought to enforce them against Haggett. The court dismissed his claim on the instruments, holding that his mistaken assumption that he had taken an assignment from the bank was unilateral and hence immaterial. Nor could Norton recover in restitution; Norton's intervention was officious and without justification. "He had no motive of self-interest; he was not protecting any interest which he had or thought he had; nor was he discharging any duty which he owed or thought he owed ... He was not related to, nor even friendly with the Haggetts, nor was he protecting any interest of theirs."\(^{162}\)

If officious conduct thus presents an easy case for limiting the rule, more difficult questions arise when one considers the relationship between the case law from which the propositions set forth above draw their support and the cases which might be advanced to support the general proposition that neither common law nor equity will come to the aid of a mere volunteer. More specifically, ought we to conclude that one who acts in self-interest is not a volunteer in the requisite sense? Or, more radically, may we assume that the principle which discourages restitutionary recovery for volunteers has been superseded in modern restitutionary law by the proposition that if a clear benefit, such as discharge of a liability, has been conferred by a party who has not acted officiously, restitutionary recovery will be allowed? These questions must be considered at some length.

The major impediments to the adoption of a straightforward unjust enrichment analysis of these problems consist of broad dicta in two English decisions, *Falcke v. Scottish Imperial Insurance Co.*\(^{163}\) and *Re Cleadon Trust Ltd.*\(^{164}\) The seeds of the problem were sown in *Falcke*, the earlier of the two cases. In *Falcke*, there was a contest between the mortgagor of an insurance policy and his second mortgagee. The security had been realized and was in-

\(^{162}\) *Id.* at 132-33 (Vt.), 573-74 (A.2d). Consider further the claim of one who, without request or authorization, accepts delivery of and pays for goods supplied to another, thus unwittingly depriving the latter of an opportunity to inspect and (possibly) reject the goods. See *Tappin v. Broster* (1823), 1 Car. & P. 112, 171 E.R. 1124 (recovery denied). The result could be explained on the basis of officiousness. The better view is that the payment of an unmatured debt in such circumstances is not unequivocally a benefit. It may become so, of course, (assuming the goods to be satisfactory) and in that event, recovery would be appropriate (provided that the initial intervention was not, for some other reason, officious). See further, S. Stoljar, *The Law of Quasi-Contract* (Sydney: Law Book Co. of Australasia, 1964) at 142-43, 146-47, suggesting that recovery should be denied in *Tappin v. Broster* simply on the basis that the discharge was premature; recovery should be restricted, in Stoljar's view, to cases of intervention occurring after the debt is complete and overdue. Also see, *Drager v. Allison* (1958), 13 D.L.R. (2d) 204 (Sask. C.A.) (father pays off mortgage debt before due in order to save mortgagor children from interest charges, the house was subsequently resold by the children who refused to reimburse the father; held, at trial, the father recovers in unjust enrichment; the trial judge was reversed by the Court of Appeal but affirmed, on other grounds, by the Supreme Court of Canada; see [1959] S.C.R. 661, 19 D.L.R. (2d) 431.).

\(^{163}\) (1886), 34 Ch. D. 234, 56 L.J. Ch. 707 (C.A.).

sufficient to discharge the debt owed the mortgagee. The mortgagor sought indemnification in priority to the mortgagee for a large premium which he had paid to keep the policy alive. The mortgagor had made the payment on the mistaken assumption—induced by the fraud of a third party—that he had successfully purchased the mortgagee's interest in the policy. The mortgagor's attempt to gain priority failed. Cotton L.J. said:  \[165\]

It would be strange indeed if a mortgagor expending money on the mortgaged property could establish a charge in respect of that expenditure in priority to the mortgage.

No doubt the mortgagee would be most surprised to find that the defaulting debtor who makes payments which preserve the value of the security would rank in priority to him for their value. And, on this basis, the decision seems unexceptionable. Unfortunately, however, Bowen L.J., in an all too memorable passage, enunciated the following proposition:  \[166\]

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. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will.

It must be emphasized, then, that the *Falcke* decision, when restricted to its facts, establishes the quite acceptable proposition that a mortgagor cannot gain a priority over mortgagees for expenditures which he has made on the mortgaged property. Moreover, it should be noted that Bowen L.J.'s *dictum* is cast in sufficiently broad terms as to offer little clear guidance with respect to *in personam* claims. Much would turn on the content to be given the phrase “if standing alone”. The music in this passage has lingered on, however, and in *Re Cleadon Trust Ltd.* may have contributed to a constriction of the rules permitting recovery to strangers who have discharged the liability of another.

The facts of *Re Cleadon Trust Ltd.* were as follows. The claimant was a director of three companies, a parent, Cleadon Trust Ltd., and two wholly-owned subsidiaries. The claimant held a controlling interest in the parent company. The subsidiaries had become indebted in certain sums to third parties and the parent had guaranteed their liability. When the sums became due, neither the subsidiaries nor the parent had sufficient funds to meet their obligations. The claimant, pursuant to arrangements made with officers of the company, neither of whom were in a position to bind the company, advanced sums to discharge the debts. Subsequently, the board of the parent company purported to adopt these transactions, but as the claimant was disqualified by his interest and as he was one of two directors required for a quorum, the board’s action was ineffective. Indeed, it was thus impossible for the board to act on the matter. Ultimately, when all three of the companies had gone

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\[165\] *Supra* note 163, at 243 (Ch. D.), 711 (L.J. Ch.). To the same effect is the remark of Bowen L.J. at 250-51 (Ch. D.), 715 (L.J. Ch.): “Does the mere fact that the owner of the equity of redemption paid premiums to keep alive the policy give him a right against the mortgagees to have the moneys which he so expended paid in priority to their debt?”

\[166\] *Id.* at 248 (Ch. D.), 713 (L.J. Ch.).
into liquidation, the claimant sought compensation from the parent company for the moneys he had advanced. The liquidator's decision to reject his proof of claim was confirmed by the Court of Appeal.

The Court divided on the question. Scott L.J. and Clauson L.J., relying, in part, on Bowen L.J.'s *dictum* in *Falke*, held that the claimant had no right, in law or equity, to recover the benefit that had been conferred on the company. The claimant was a mere volunteer. The company had not requested or acquiesced in the claimant's conduct. The payments were not authorized or adopted by the company as it was, through lack of quorum, incapable of action. Greene M.R. dissented, relying on the “principle of equity under which a person who has advanced money to pay the debts of another may, in certain circumstances, be entitled to claim repayment against that other, notwithstanding that no liability to repay exists at law.”

After reviewing various lines of authority in which this principle is manifest, Greene M.R. suggested that although the precise ground on which this equity is based has not been finally stated, it may be that it is one instance of the acceptance into English law of a “doctrine or unjust enrichment.” The claimant's money had been used to discharge a liability of the company with a consequential and corresponding benefit to the company and it was appropriate, therefore, that recovery be allowed.

To return to our main theme, on what basis can or ought the case law permitting recovery by self-serving intermeddlers be reconciled with *Re Cleadon Trust Ltd.?* One solution would be to simply recognize the existence of a conflict and to maintain that *Re Cleadon Trust Ltd.* has failed to express the true principle. Dr. Stoljar has counselled a frontal assault of this kind. The Court of Appeal, in Stoljar's view, failed to fully appreciate the breadth of the equitable subrogation doctrine. The decision therefore ought to be restricted to its facts and should not be followed on the point of principle.

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107 Supra note 164, at 300 (Ch.), 526 (All E.R.).
108 Id. at 307 (Ch.), 530 (All E.R.).
109 See Stoljar, supra note 162, at 145-47.
110 Especially as manifested in *Butler v. Rice*, supra note 153. The Court of Appeal in *Re Cleadon Trust Ltd.* had restricted its review of the subrogation cases to those in which unauthorized borrowings by agents had been applied by the agents in discharge of the principal's liability. The majority held, Green M.R. dissenting, that these cases supported the view that recovery would be allowed only where the agent was authorized to discharge the principal's debts.
111 Stoljar argues that a better reason for the result is that “the company was in liquidation with insufficient assets to satisfy all creditors, so that to allow subrogation in favour of P [the claimant] would have meant to prefer the one creditor (P) to other creditors who might in fact have had prior claims.” See Stoljar, supra note 162, at 145. This is not compelling, however. The claimant here was not seeking a preferred position. Further, the facts do not suggest that the making of advances had prejudiced the other creditors in any way. If *Re Cleadon Trust Ltd.* is to be limited to its facts, a preferable explanation for the result would be the point taken by Scott L.J. that the claimant had engaged in a course of conduct over a substantial period of time which demonstrated flagrant disregard for applicable law and was therefore disentitled by his misconduct to rely on any principle of law which would allow recovery “because repayment was in 'fairness and justice' due to him.” The case might thus be interpreted as an application, albeit a rather harsh one, of an illegality defence. Supra note 164, at 311 (Ch.), 533 (All E.R.).
Giving due preference to the equitable rules, Stoljar restates the general principle as permitting recovery by one who pays another's debt, whether or not he is technically a volunteer. Indeed, there is much to commend this view, especially if it is coupled with the proviso that the plaintiff will not succeed in cases where he has acted officiously. The defendant has received an un-equivocal benefit and provided that the plaintiff had some legitimate reason for intervention, whether it be compulsion, preservation of self-interest or some other justification, recovery on unjust enrichment principles seems appropriate. From a Canadian perspective, the rejection of the implied contract fiction which underlies the volunteer rule provides an additional argument in support of Stoljar's position.

A more conciliatory approach to the decision in Re Cleadon Trust Ltd. would be to hold that although the volunteer rule must stand, a person who acts to protect his own interest is not a volunteer in the requisite sense. There is some support in the case law for such a distinction. Thus, though it is said that equity does not aid the volunteer, the subrogation cases which grant a remedy to the self-serving intermeddler suggest that such parties are not considered in equity to be mere volunteers. And, with respect to the claim at law for money paid, a similar distinction is indicated in the following dictum of Scarman L.J. in Owen v. Tate:

...the fundamental question is whether in the circumstances it was reasonably necessary in the interest of the volunteer or the person for whom the payment was made, or both, that the payment should be made—whether in the circumstances it was just and reasonable that a right of reimbursement should arise.

In short, it would appear to be consistent with existing authority to suggest that an intervenor who pays the debt of another in order to preserve his own credit position is not a volunteer.

One final line of analysis must be pursued. It has recently been argued

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172 See Stoljar, supra note 162, at 146.
173 Id. at 147. Stoljar argues against the "officiousness" limitation. And see, contra the discussion accompanying note 161, supra.
175 See discussion accompanying note 1, supra.
176 See Falcke v. Scottish Imperial Co., supra note 164. But see, J. Wade, Restitution for Benefits Conferred Without Request (1966), 19 Vand. L. Rev. 1183 at 1184, note 4, pointing out that this notion stems from a misapplication of the maxim: 'Equity will not aid a volunteer'. In the context of the maxim, the volunteer referred to is a donee or one who has not paid consideration. The restitutionary plaintiff, on the other hand, is one who has made a payment and seeks restitution.
177 See discussion accompanying note 151, supra.
178 Supra note 174, at 375 (W.L.R.), 134 (All E.R.). For a contrary dictum, see Fidelity Trust Co. v. Fenwick (1922), 64 D.L.R. 647 at 652, 51 O.R. 23 at 31 (per Orde J.).
179 This is the position adopted in the American cases. See Dawson, supra note 11, at 1437-43.
180 P. Birks and J. Beatson, Unrequested Payment of Another's Debt (1976), 92 L.Q.Rev. 188.
that the English authorities can best be reconciled if one accepts the proposition that voluntary payment of another's debt gives rise to an obligation on the debtor to repay the intervenor only if the debtor has adopted the payment. The proponents of this view suggest that in cases of payment by a volunteer, the debt is not considered discharged until the debtor signifies his assent or otherwise adopts the benefit. The adoption of the benefit does not operate as an agency by ratification, constituting the intervenor as the debtor's agent for purposes of paying the debt; rather, it operates as an acceptance of the benefit by the debtor. And, of course, if it is true that this acceptance is required in order to effect the discharge, any possible question of officiousness disappears. The act of the debtor which is a necessary element in the creation of the benefit—his adoption of the payment—also establishes that the benefit has been freely accepted by the debtor. The major virtue of this approach, from an English perspective, would be that it develops an hypothesis that offers an explanation for much of what might otherwise appear to be a hopelessly chaotic body of case law. The price extracted for consistency is, however, a heavy one. It is part and parcel of this thesis that the result in Re Cleadon Trust Ltd. is sound and that volunteers must suffer in full the sting of the principle that benefits cannot be "forced upon people behind their backs." Moreover, if these views are accepted, we are driven to conclude that the subrogation cases are premised on an erroneous theory and, in some instances, have been wrongly decided. From an unjust enrichment perspective, this seems an excessive price to pay for what, in the Canadian context at least, may be considered to be a somewhat dubious benefit.

Those who support Dr. Stoljar's restatement of the volunteer rule are evidently faced with the necessity of directly controverting this thesis. It would be necessary to affirm that the effect of payment by a volunteer may be to discharge the debt. Some support for this view is to be found in the case law. In Cook v. Lister, Willes J. stated that the suggestion that the debtor's assent to the stranger's payment would be necessary to effect a discharge was "contrary to the well-known principle of law, by which a benefit is presumed to be accepted by him until the contrary is proved. If assent were necessary . . . then I say that, according to familiar authorities . . . the assent  

181 Id. at 188-91. Where payment is made involuntarily, the debt will be automatically discharged, it is argued, unless the factor negating voluntariness gives an immediate right of recovery against the creditor. Id. at 199-202.

182 The authors demonstrate compellingly that the agency explanation is unsound. Id. at 194-99. Cf. J. Gold, Accord and Satisfaction by a Stranger (1941), 19 Can. B. Rev. 165.

183 See Birks and Beatson, supra note 180, at 194, 202-05.

184 Id. at 204-07. The subrogation cases adopt as their theoretical explanation for relief that the debt is kept alive against the debtor for the benefit of the intervenor. This approach avoids the difficulty posed of constructing a theoretical basis for discharging the debt. Birks and Beatson would insist, however, that subrogation should be allowed only where the benefit of the payment has been adopted by the debtor.

185 For example, see id. at 205-06, criticizing Butler v. Rice, supra note 152.

of the debtor ought to be presumed." Though this appears not to be the prevailing view in the English authorities, it was accepted as a sound proposition by the Court of Appeal in Hirachand Punamchand v. Temple. And its virtue, of course, would be to provide a basis for avoiding the harsh result of Re Cleadon Trust Ltd. Again, it is difficult to see why, as Stoljar has argued, the volunteer ought not be subrogated to the creditor's position against the debtor. To refuse relief, it may be argued, results in an unjust enrichment of the debtor at the volunteer's expense and ought, therefore, to be viewed as inconsistent with the modern approach to restitutionary law.

More conservatively, however, it may be maintained that it is only those strangers who have been constrained to act in order to protect self interest who are entitled to relief. In such situations, the intervenor is not a mere volunteer. Payment by the intervenor effects a discharge of the debt and the debtor is rendered liable on restitutionary grounds.

In sum, there is support in the case law for the proposition that payment of another's debt by a stranger acting to protect his own interest may give rise to restitutionary liability in the debtor. This accords with the unjust enrichment principle. The intervenor's conduct is unofficious. The benefit received is unequivocally of value and the concern to preserve one's freedom to avoid payment for unrequested benefits therefore diminishes. However, to adopt the more radical view espoused by Stoljar, though it is sound on its merits, would require an ambitious rejection of principles which have a firm foothold in the English case law. Though this approach is thus likely to remain heterodox in England, it is conceivable that a Canadian court, with the unjust enrichment principle firmly in its grasp, could follow Stoljar's lead in departing from the English position and make a welcome inroad on the volunteer rule.

187 Id. at 595 (C.B. (N.S.)), 236 (E.R.).
188 See Birks and Beatson, supra note 180, at 189.
189 Supra note 174.
190 In such cases, the intervenor would appear to have no avenue of redress. The debtor, who might otherwise happily acknowledge or adopt the intervenor's conduct, has become insolvent. The trustee, astutely, refuses to adopt the payment. The creditor, quite content to retain the intervenor's payment, will perceive no need to prove a claim in the debtor's bankruptcy. The debtor thus receives a clear benefit and is not obliged to pay. Birks and Beatson suggest that the intervenor may be able to recover from the creditor for, the debt not being discharged, there is a total failure of consideration. There is, however, no direct authority for such a claim. See Walter v. James (1871), L.R. 6 Exch. 124, 40 L.J. Ex. 104; and Simpson v. Eggington (1855), 10 Ex. 344, 156 E.R. 683 (supporting such claims per arguendo). Moreover, it seems not unlikely that the creditor's promise to the intervenor will be, or will be construed to be, that he will treat the debt as discharged and will not pursue the debtor. More than this, he cannot himself accomplish. When the creditor does refrain from pursuing the debtor, there is thus no failure of consideration, whether or not the debtor adopts the payment. See Birks and Beatson, supra note 180, at 205.
191 See Stoljar, supra note 162, at 145-47.
192 Birks and Beatson treat such cases, semble, as situations in which the intervenor has acted out of necessity and is therefore categorized as an involuntary intervenor. See Birks and Beatson, supra note 180 at 201, 207.
V. THE LITIGIOUS INTERMEDDLER: DISTRIBUTING THE 
COSTS OF LITIGATION

A. Introduction: the General Rule

The claim of a self-serving intermeddler who has generated benefits 
for a third party through the conduct of litigation has been favourably received 
by the courts. At the risk of oversimplification, one may state as a general 
proposition that where the result of litigation is to create, increase in size, or 
protect a fund in which third parties have an interest, the party carrying the 
litigation (and indeed, in some cases, his counsel) may be able to extract 
the costs of litigation either from the fund itself, or, exceptionally, by way of 
a tariff charged to those third parties who elect to derive advantage from the 
plaintiff’s success. The costs of the litigation may thus be distributed 
amongst all of the parties who have benefitted from the litigation, whether or 
not they have been actively involved in its conduct. Illustrations of this phe-
nomenon are to be found, for example, in the context of creditors’ suits to 
preserve the assets of a debtor. More generally, however, cost indemnification 
of this kind is a recognized feature of representative and class actions, and of 
litigation concerning the administration of trusts and estates.

The granting of cost indemnification in these situations represents a 
clear departure from the usual treatment accorded the self-serving inter-
meddler at common law in two respects. First, to the extent that the success-
ful party is entitled to indemnify himself through this mechanism, an excep-
tion has been made to the general reluctance of the common law to compen-
sate self-serving intermeddlers. Second, to the extent that the lawyer who has 
acted on behalf of the successful party is entitled to direct indemnification, a 
departure is shown from the reluctance of the common law to permit one 
whose performance of a contract with another has produced incidental gains 
to a third party, to seek compensation directly from the latter.

In order to isolate what appear to be restitutionary doctrines operating 
in this context, one must be careful to avoid confusing restitutionary relief 
with other mechanisms of cost indemnification which cannot be linked to the 
unjust enrichment principle. In the first place, restitutionary cost indemnifi-
cation must be distinguished from the cost indemnification that results from 
the general rule concerning litigation costs to the effect that the costs of an 
acton, calculated on a party and party basis, follow the event. Beyond this, 
of course, the courts exercise a discretion, in appropriate cases, to award costs 
on the higher scale of solicitor and client which may amount virtually to a 
complete cost indemnification. In the usual case, the unsuccessful party

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193 For a thorough analysis of the American experience in this area, see Dawson, 
Lawyers and Involuntary Clients: Attorney Fees from Funds, supra note 10; and Lawyers 
and Involuntary Clients in Public Interest Litigation, supra note 10.

194 See Macdonald v. McCall (1887), 12 P.R. 9 (Ont.).

195 See discussion accompanying note 78 ff., supra.

196 See generally, M. Orkin, The Law of Costs (Toronto: Canada Law Book, 
1968) at 1-10; and G. Watson, S. Borins and N. Williams, Canadian Civil Procedure 
(Toronto: Butterworths, 1973) at 71-76.

197 Id. The distinctions between various degrees of solicitor and client costs are 
ignored in order to avoid unduly complicating the discussion in the text.
will be ordered to compensate the successful party for at least a portion of his litigation costs. It is, of course, abundantly clear that this general rule is quite unrelated to notions of unjust enrichment. The unsuccessful party has not received a benefit which he is being forced to disgorge. On the other hand, where the successful party is a plaintiff who has created or preserved a fund, compensation for the difference between the party and party costs (which the defendant must pay) and costs calculated as between solicitor and client may be awarded from the fund on the basis that such an award will prevent other beneficiaries of the fund from profiting at the plaintiff's expense. In a case where there is no personal defendant from whom it would be appropriate to extract party and party costs, the full award of costs may be made from the fund. Resort need only be made to the rules permitting a claim against the fund to the extent that the unsuccessful defendant cannot be made personally liable for costs.

1. Origins of the Rule: Creditors' Suits

Perhaps the clearest indication that a restitutionary rationale underlies this allocation of cost burdens to a fund created or preserved by the litigation is to be found in the context of creditors' actions. It has been established English and Canadian law for more than a century that a creditor who successfully sues to preserve an asset of the debtor may be awarded full indemnification of his legal costs from the fund preserved. In Thompson v. Cooper, the plaintiff was a creditor who has successfully brought a representative action against the debtor's estate. In confirming an arrangement whereby the other creditors had been required to contribute to the plaintiff's costs in proportion to the debts proved and received by them, Bruce V.C. commented:

It cannot be just that in such a suit—a suit instituted for the benefit of all the creditors—one alone should bear the burden, when others have the benefit.

Again, where the action is brought against a defendant against whom an order for personal liability for the plaintiff's costs is appropriate, the need to call upon the fund is diminished. Thus, in an early Canadian case, Macdonald v. McCall, a plaintiff who successfully challenged and set aside a chattel


199 For example, where a creditor's action is brought against an estate. See, e.g., Thompson v. Cooper (1845), 2 Coll. 87, 63 E.R. 649; and Re McRea, Nordon v. McRea (1886), 32 Ch. D. 613, 55 L.J. Ch. 708.


202 Supra note 199. Also see, Re McRea, Nordon v. McRae, supra note 199, at 614-15 per Kay J.

203 Supra note 199, at 90-91 (Coll.), 650 (E.R.).

204 Supra note 194.
It is not only the plaintiff himself who may be indemnified in this way, however. The case law clearly establishes that the plaintiff's lawyer may be awarded payment directly from the fund. Indeed, the lawyer's claim may be protected by a lien which would assert priority over the claims of the creditors. In this context, then, the solicitor's lien, normally a device by which the lawyer obtains a security with respect to his claim for services rendered against his own client, is here employed to assert a position in priority even to those creditors who have not retained him. The theoretical basis for this extension of relief to the lawyer is not examined in the cases. Presumably, the client's right to indemnification out of the fund is merely an efficient means of ensuring that his right of contribution against the other creditors can be enforced. The fact that the fund is, for some reason, within the court's purview provides an occasion for doing substantial justice amongst the potential claimants to the fund and avoiding the need for separate litigation to enforce a right to contribution. The lawyer's ability to place a lien against the fund for his fee may in turn be viewed as a form of subrogation to his client's contribution remedy which would be justified on the basis that the benefit has been created, in some sense, through the efforts of the lawyer. However, not all of the cases can be explained on this derivative view of the lawyer's claim. Moreover, it must be noted that similarly artful applica-

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205 Chancellor Boyd said that "... if the plaintiff is not recouped this outlay, it will absorb a considerable part of the dividend received on his debt, while the other creditors will reap the advantage of the plaintiff's success in intercepting the fund for the common benefit." Id. at 10.

206 See Yemen v. Jonston, supra note 201, at 233; and Oshawa Lands & Investments Ltd., supra note 201.


208 See Dawson, supra note 10, at 1604-05.

209 Though it may be that the plaintiff would not be entitled to bring a separate contribution claim on the theory that by failing to assert a remedy at the time of the order, he has waived his contribution claim. See Shortley v. Selby (1820), 5 Madd. 447, 56 E.R. 966 (sed quaere). On the right to contribution, see generally, Goff and Jones, supra, note 14, c. 11.

210 See Yemen v. Johnston, supra note 201, at 233 (per Boyd C.): "The solicitor by whose exertions a fund has been realized or protected, has a right to be paid out of the fund which has been benefited by his industry."

211 It has thus been held that even in a case where the client is not entitled to solicitor and client costs out of the fund, his solicitor may be. See Harrison v. Cornwall Minerals Ry. Co. (1844), 53 L.I. Ch. 596 and Re W. C. Horne & Sons Ltd., Horne v. W. C. Horne & Sons Ltd., supra note 207. See also, Dawson, supra note 198, at 1607.
tions of these doctrines have not generally enured to the benefit of non-
lawyers who incidentally confer benefits on third parties while performing
services for an employer. Apparently, the fact that the benefit created by
these services is, in some sense, before the court or subject to its control and
is (or is about to become) liquid in form creates a situation in which the
unjust enrichment principle has an irresistible appeal. It may also be of signi-
ficance that the granting of restitution is very conveniently accomplished in
these circumstances. The benefit has been generated by the very litigation
in which the costs award is to be made. In the usual case, no further litigation
will be needed to effect restitution.

As a general rule, then, indemnification of costs on a solicitor and client
basis will be available to one who successfully prosecutes a creditors’ action.
Mention should be made, however, of a rather curious limitation on this rule
which has been suggested in some English authorities. It has been said that
solicitor and client costs are to be awarded only if the fund is insufficient
to meet the claims of the class of creditors in whose interest the plaintiff has
acted. If the fund created or preserved by the plaintiff is more than sufficient
to meet these claims, costs should be awarded, it is suggested, on a party and
party basis only.

The origin of this startling and illogical proposition is to be found in a
dictum of Kindersley V.C. in an 1860 decision, *Thomas v. Jones.* Kinders-
ley V.C. was asked in that case to apply the rule concerning indemnification
established in creditors’ suits to a legatee’s suit. Having done so, Kindersley
V.C. was evidently troubled by the prospect of creditors of an estate attempt-
ing to indemnify themselves at the expense of the residuary legatees where
the fund preserved was more than enough to discharge the debts owing to the
creditors. This they could not do, he said, for if “the fund is sufficient to pay
all the creditors, and there is a surplus, that surplus does not belong to the
creditors, but to the residuary and general legatees.” The plaintiff creditors
would therefore be restricted to the usual award of party and party costs. Thus
far, Kindersley V.C.’s views can be supported. What is being suggested,
in effect, is that the fund available to the creditors is an amount consisting of
the indebtedness of the deceased plus party and party costs. The rationale
for this is that the creditors would not be awarded more than party and party
costs if the deceased had been still alive; they should not have greater success
against the estate. The excess beyond this amount, then, is the property of
the legatees. Unfortunately, Kindersley V.C. went on to assume that he was
driven to conclude that the principle of full indemnification (with which he
would otherwise agree) could not apply.

The obvious solution to this perceived dilemma is, as Stirling L.J. point-
ed out in a later case, to deduct the solicitor and client costs from the fund
thus made available to the creditors. What remains in the fund should then

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212 (1860), 1 Dr. & Sm. 134, 62 E.R. 329.
213 Id. at 136 (Dr. & Sm.), 330 (E.R.).
214 *Re New Zealand Midland Ry. Co., Smith v. Lubbock,* [1901] 2 Ch. 357 at
367-68, 70 L.J. Ch. 595 at 599 (C.A.). This practice had been adopted earlier in
*Stanton v. Hatfield,* supra note 200; and in *Goldsmith v. Russell,* supra note 200.
be paid out on a pro rata basis to the creditors. In this way, full indemnification may be made without further encroaching on the portion of the fund which should be made available to the legatees. The starting point for analysis in these situations is to define the limits of that portion of the fund which is available to the plaintiff class. Thomas v. Jones simply holds that where an estate is to be made available first to creditors and then to residuary legatees, the former should be able to take out of the estate only the amount owed to them plus party and party costs. Once the portion to which the plaintiff class is entitled has been thus defined, it is then a further question whether all members of the class should share on a pro rata basis, what the plaintiff "has properly expended in recovering the fund ... his costs as between solicitor and client." In order to give effect to the policy that they should not benefit from the plaintiff's exertions without sharing its costs, it may be appropriate to reduce each member's recovery to the extent necessary to effect an indemnification of the plaintiff. In short, then, the proper solution to the problem perceived by Kindersley V.C.—the members of one class plundering the fund of another class—is easily achieved without rejecting or modifying the general rule. It is doubtful, therefore, that the limitation on costs indemnification in creditors' actions proposed in Thomas v. Jones will find modern application.

A similar problem arises in the context of claims by debenture-holders or mortgagees to enforce their security. The plaintiff class in such cases is entitled only to recover the indebtedness plus party and party costs whether or not there are subsequent encumbrancers. See Re Queen's Hotel Co., Cardiff, Ltd., Re Vernon Tin Plate Co., [1900] 1 Ch. 792, 69 L.J. Ch. 414. This is not to say, however, that those members of the plaintiff class who have carried the action ought not be able to seek contribution from the other members of the plaintiff class. Re Queen's Hotel Co. is occasionally (and erroneously) assumed to be an authority to the contrary. It does not deal with this point. See Re New Zealand Midland Ry. Co., Smith v. Lubbock, supra note 214. And see, Brodie v. Bolton (1835), 3 My. & K. 168, 40 E.R. 64.


In sum, there does not appear to be clear authority holding that the active members of a plaintiff class cannot seek contribution from the inactive members in these situations. Indeed, there exists authority and strong dicta in support of such compensation. See supra note 214. The reductio ad absurdum of Kindersley V.C.'s dictum is to be found in Re McRea, Mordon v. McRea, supra note 199. In that case, administration of an estate was sought by two classes of creditors: the separate creditors (who would have priority) and the joint creditors. The estate could not fully satisfy both groups of creditors. Kay J. held that since the entire estate would be swallowed by creditors, Kindersley V.C.'s dictum required that the separate creditors should get their entire costs on a solicitor and client basis out of the estate which would otherwise go to the joint creditors.

Thomas v. Jones, supra note 212, at 136 (Dr. & Sm.), 330 (E.R.).

2. Extensions of the Rule

The equitable practice of awarding solicitor and client costs out of funds preserved by litigation was, as noted, extended in *Thomas v. Jones* from its application in creditors' suits to administration actions brought by legatees.218 Some years later, the rule was applied in the context of representative actions brought by debenture-holders.219 In principle, there is no reason why such awards could not be made in any case, whether equitable or legal in nature, where the end result would otherwise be an enrichment of other parties at the plaintiff's expense.220 A recent successful class action221 in the Ontario High Court, *Shabinsky v. Horwitz*,222 provides a useful illustration. The plaintiff, a hotel catering manager, brought an action on behalf of himself and his fellow employees in the catering department for a declaration that the "service charge" which had been added as a matter of course to customers' bills was paid by the customers as a gratuity for the benefit of the employees. Rather than distribute these moneys to the employees as gratuities, the hotel had taken the position that the employees were entitled only to their fixed wage. Fortunately, the hotel did maintain a separate account for the gratuities (against which they charged the wages of the catering department's employees) and the amount paid to the hotel on this basis by customers was thus easily ascertained. These moneys, the trial judge declared, had evidently been paid by customers under the impression that they were contributions into a fund to be distributed to the staff in lieu of individual tips and were, therefore, held on trust by the hotel for the benefit of the plaintiff class. The individual plaintiff, having enjoyed success, was awarded costs on a party and party basis against the defendants. The difference between party and party costs and solicitor and client costs was awarded from the fund itself. The other members of the class would benefit from the fund created through the efforts of the plaintiff and his advisors and ought, therefore, to share that portion of the plaintiff's costs which the defendants would not be required to pay.

The extent to which these rules reach beyond the paradigm case of clear economic gain in the form of a fund which is, in some sense, before the court and subject to its control is less obvious. It is evident that the conception of the type of fund on which these rules can operate is not to be narrowly restricted to cases of funds, such as express trusts, which are, at the time of the award, in existence and in the hands of an individual who is subject to the

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218 Also see *Cross v. Kennington* (1848), 11 Beav. 89, 50 E.R. 750 and *Re Richardson, Richardson v. Richardson* (1880), 14 Ch. D. 611, 49 L.J. Ch. 612 (C.A.).


220 See Dawson, supra note 198, at 1620 ff.

221 On the costs implications of class actions, see generally, N. Williams, *Consumer Class Actions in Canada—Some Proposals for Reform* (1975), 13 Osgoode Hall L.J. 1 at 40-52.

court's direct supervision. Recovery is possible even though the “fund” generated by the litigation is an in personam judgment against the defendant.\textsuperscript{223} Where all parties entitled to the fruit of the litigation are, as in a representative or class action, before the court and subject to its order, control can be asserted over the “fund” even though there are no tangible assets in the hands of a specific individual, such as a trustee, who is responsive to the court’s directions.

B. Testing the Limits of the General Rule

In attempting to determine the outer limit of these doctrines, however, more difficult questions abound. When, if ever, will a party who has successfully challenged a proposed distribution of a fund be held to have “benefitted” the fund and therefore be entitled to an award of costs? In the context of shareholders’ derivative actions, can the assets of the company be considered a fund for the purpose of cost indemnification? Is it a necessary prerequisite that the action is representative and thus brings all potential beneficiaries within the sweep of the litigation? Though questions such as these have received very close consideration in the American case law,\textsuperscript{224} reference to the American experience in this area must be undertaken with considerable caution in the light of the rather different context\textsuperscript{225} obtaining in American jurisdictions as a result of the prevailing rules as to costs. The major difference from the English and Canadian position is that the general rule as to litigation costs in the United States is that each party must bear his own costs, regardless of the outcome of the litigation. The possibility of indemnification from a fund is thus, as the oasis in the desert, sought after with singularity of purpose and, when discovered, highly cherished. Cost compensation from a fund holds an even greater attraction for counsel. A long line of American authority clearly establishes that counsel to the successful party is entitled to extract a contingent fee from the fund calculated as if he had been retained by all of the represented class.\textsuperscript{226} Recovery from a fund has thus become a device whereby the lawyer can extract a fee in excess of that due from his own client. It is not surprising, then, that cost recovery from funds has been the subject of a substantial volume of litigation. And, as one might expect, the underlying rationale for recovery—the unjust enrichment principle—has been subjected to considerable strain. The result of this has been to blur the distinction between cost indemnification which is designed to avoid unjust enrichment, and cost indemnification which is based on other policy considerations.

1. Estate Litigation

This potential for confusion may be illustrated by reference to litigation arising out of the administration of estates. The ultimate effect of litigation

\textsuperscript{223} Id.

\textsuperscript{224} For a discussion of which, see the articles of Professor Dawson cited, supra note 193.

\textsuperscript{225} See materials cited, supra note 198.

\textsuperscript{226} The \textit{locus classicus} is Central Railroad & Banking Co. v. Pettus, 113 U.S. 116, 5 S.Ct. 387 (1885). See Dawson, supra note 198, at 1602 ff. For a discussion of the Canadian position with respect to the contingent fee, see W. Williston, \textit{The Contingent Fee in Canada} (1968), 6 Alta. L. Rev. 184.
contesting a will or seeking a favourable construction of its provisions may be to benefit a particular group of individuals through a reallocation of the assets of the estate in their favour. Normally, the represented parties, the executors of the estate and others whose representation was reasonable, may expect to be awarded costs from the estate.\textsuperscript{227} The executors will usually be indemnified on the solicitor and client scale; the others may be similarly treated\textsuperscript{228} or awarded costs on a party and party basis only.\textsuperscript{229} Where such awards are made in the context of a reallocation of the fund to the benefit of the parties in question, it is tempting to put forward the unjust enrichment principle as an explanation for the costs award. It is trite however, that success of this kind is not a prerequisite to cost indemnification. He who puts forward a reasonable, though ultimately unsuccessful, position may be awarded costs on the same basis if it can be said that the ultimate cause of the dispute is attributable to the actions or the circumstances of the testator.\textsuperscript{230} Litigation costs occasioned by the use of ambiguous language in the will, for example, are to be borne by the estate.\textsuperscript{231} In exercising the discretion to award costs to unsuccessful parties out of the estate, it is evident that a delicate balance must be struck by the courts. An attempt is made to avoid encouraging the dissipation of estates through unnecessary litigation without, on the other hand, discouraging legitimate tests of the testator’s intent through an unwillingness to


award the costs of unsuccessful parties from the estate.\textsuperscript{232} Whatever the appropriate balance might be, however, the important point for present purposes is that the issue before the court in this instance turns primarily on considerations relating to estates administration rather than unjust enrichment. A court attempting to equitably balance these competing considerations cannot simply ask whether some entity, presumably the fund itself, has been unjustly enriched at the expense of the unsuccessful party.

In the American jurisprudence, an unjust enrichment rationale has been suggested as the basis for these claims.\textsuperscript{233} The estate is benefitted, it is said, by all of those who participate in resolving uncertainties which might otherwise hamper its administration.\textsuperscript{234} The estate, thus given a life of its own,\textsuperscript{235} must disgorge the value of the benefits conferred, i.e., the litigation costs of the parties. Though the unjust enrichment principle might, as thus applied, offer a further, if somewhat artificial, theoretical basis for awarding costs from the estate, it is my view that the costs issues are more squarely addressed by examining the problem as one of reducing cost disincentives to dispute resolution in the context of estates administration. This is not to say, however, that restitutionary problems may not surface in this context. There may, indeed, be a narrow range of situations in which resort might be made to a restitutionary award against a fund. Where litigation brought by one legatee has, for example, produced a benefit in the form of an interpretation of the will which increases the portion of the estate allocated to a group of legatees, it may be appropriate to award from the fund so increased the difference between the costs award given to the legatee in the action (assuming it to be made on a party and party basis) and costs calculated as between solicitor and client.

2. Shareholders' Derivative Claims

Similar considerations should be brought to bear in an analysis of shareholders' derivative actions.\textsuperscript{236} Where a fund has been recaptured for the company by such litigation, the plaintiff shareholders are permitted to indemnify

\textsuperscript{232} In \textit{Logan v. Herring} (1900), 19 P.R. 168 at 170, Chancellor Boyd posed the dilemma in the following terms:

\begin{quote}
Parties should not be tempted into a fruitless litigation . . . by the knowledge that their costs will be defrayed by others. On the other hand, there is the contrasted danger of letting doubtful wills pass into probate by making the costs of opposing them depend upon successful opposition. It is only by the careful adjustment of costs that these opposite risks can be guarded against.
\end{quote}

\textsuperscript{233} See Dawson, \textit{supra} note 198, at 1629-32.

\textsuperscript{234} \textit{Id.} And see, e.g., \textit{Re Estate of Sowder}, 185 Kan. 74, 340 P. 2d 907 at 918 (Kan. S.C. 1959).

\textsuperscript{235} It is essential to treat the fund itself as the benefitted entity. The unjust enrichment principle may well have a hollow ring for other beneficiaries who have not derived any material benefit from the intervention in question.

\textsuperscript{236} See generally, S. Beck, \textit{The Shareholders' Derivative Action} (1974), 52 Can. B. Rev. 159; and L. Gower, \textit{The Principles of Modern Company Law} (3d ed. London: Stevens, 1969) at 587 ff. An important, though difficult, distinction is to be drawn, of course, between "derivative" actions brought to enforce duties owed to the company (and in this sense, therefore, brought on behalf of the company) and "personal" actions brought to enforce duties owed to the shareholders. See Beck, \textit{supra} at 169 ff.
themselves from the fund for costs suffered in excess of those awarded from personal defendants. A restitutionary basis for recovery in such cases is easily argued. A more difficult question is raised, however, where the purpose of the litigation is not to produce a material gain of this kind, but rather, to enjoin the directors from acting in excess of their powers or to require them to act in accord with applicable law. Does such litigation confer a benefit upon the corporation so that, upon restitutionary principles, an award of costs in excess of those awarded from the personal defendants is appropriate? Again, the American jurisprudence has extended the benefit concept in this fashion; the costs of successful derivative actions which compel the corporation to adhere to governing law are commonly awarded from the company itself on the theory that these so-called “corporate therapeutics” benefit the corporation and all of its shareholders. In a sense, then, the assets of the corporation can be considered as constituting a fund which has been benefitted by the plaintiff. The better view, however, is that the costs issue here can be usefully addressed as one of reducing financial disincentives to a particular type of litigation, that is, shareholders' litigation which has as its purpose the policing of the affairs of the corporation. The difficult task of developing a rule which achieves an appropriate resolution of the competing considerations is not advanced by simple reliance on unjust enrichment analysis. If, as appears to be the case, it is determined that shareholders derivative actions perform a socially useful function as part of the framework of legal controls which guide the actions of the modern corporation, cost disincentives to the bringing of such litigation by shareholders ought to be reduced. Indeed, in appropriate cases, it may be a sound policy to guarantee costs to the plaintiff shareholder regardless of the outcome of the lawsuit. Otherwise, where the risk of failure may mean financial ruin for the shareholder, legitimate questions concerning the conduct of the corporation's business may not be properly tested. This approach, though perhaps not consistent with a thoroughgoing unjust enrichment analysis, evidently has much to commend it and now seems possible both at common law and under the modern Canadian corporations statutes.

In a recent English case, Wallersteiner v. Moir (No. 2) the Court of Appeal developed a mechanism for indemnification of this kind. Mr. Moir, a minority shareholder in a public company, waged an heroic struggle against the misdeeds of the majority shareholder, Dr. Wallersteiner. Having made allegations of unlawful conduct on the part of Wallersteiner, Moir was then sued by Wallersteiner in libel. Moir delivered a defence, pleading privilege and justification, and a counterclaim alleging fraud, misfeasance and breach of trust. The counterclaim was, in substance, an attempt to seek redress in


damages for breaches of duty owed by Wallersteiner to the company. Ultimately, the libel action was dismissed and the counterclaim enjoyed success in the form of a damage award in excess of £200,000 for the benefit of the company. Though these decisions were, for the most part, confirmed in the Court of Appeal, this did not bring an end to the matter. Further litigation was necessary with respect to some of the heads of damage claimed. Moreover, Wallersteiner made application for leave to appeal to the House of Lords. At this juncture, Moir “exhausted in mind, body and estate,” confronting the possibility of being ordered to pay his opponent’s costs in the event of a successful appeal, brought applications to the Court of Appeal seeking, *inter alia*, an order directing that the company indemnify Moir for his costs in any event of the cause. Although the majority held that an order should not be made which would “fetter judicial discretion in respect of future costs,” the Court—relying, in part, on the usual costs arrangements pertaining to trustees and executors—was unanimously of the view that an award of costs from the company would, in such cases, be appropriate.

Buckley L.J. said:

> It seems to me that in a minority shareholder’s action, properly and reasonably brought and prosecuted, it would normally be right that the company should be ordered to pay the plaintiff’s costs so far as he does not recover them from any other party . . . It is true that ( . . . the analogous) right of a trustee, as well as that of an agent, has been treated as founded in contract. It would, I think, be difficult to imply a contract of indemnity between a company and one of its members. Nevertheless, where a shareholder has in good faith and on reasonable grounds sued as plaintiff in a minority shareholder’s action, the benefit of which, if successful, will accrue to the company and only indirectly to the plaintiff as a member of the company, and which it would have been reasonable for an independent board of directors to bring in the company’s name, it would, I think, be proper exercise of judicial discretion to order the company to pay the plaintiff’s costs. This would extend to the plaintiff’s costs down to judgment, if it would have been reasonable for an independent board exercising the standard of care which a prudent businessman would exercise in his own affairs to continue the action to judgment. If however, an independent board exercising that standard of care would have discontinued the action at an earlier stage, it is probable that the plaintiff should only be awarded his costs against the company down to that stage.

Lord Denning M.R. also found the trust analogy persuasive and drew support from the “well-known maxim of the law that he who would take the benefit of a venture if it succeeds ought also to bear the burden if it fails. *Qui sentit commodum sentire debet et onus.*” As Scarman L.J. explained, however,

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240 The action was referred to by the Court as “derivative” in nature, thus, for the first time perhaps, adopting this “apt American description” of such claims. See *Wallersteiner v. Moir (No. 2)*, supra note 239, at 406 (Q.B.), 410 (W.L.R.), 871 (All E.R.) (*per* Scarman L.J.).


243 *id.* Moir also argued: (i) that he ought to be eligible for legal aid or, alternative, (ii) that he be permitted to retain his solicitor on the basis of a contingency fee. Both suggestions were rejected, Lord Denning M.R. dissenting with respect to the latter.

244 *id.* at 403 (Q.B.), 704 (W.L.R.), 868 (All E.R.) (*per* Buckley L.J.).

245 *id.* at 403-04 (Q.B.), 407-08 (W.L.R.), 868-69 (All E.R.).

246 *id.* at 392 (Q.B.), 397 (W.L.R.), 859 (All E.R.).
the shareholder's right to an "indemnity"247 in these situations is rooted in considerations relating to the interests of the company and its shareholders.248 Were the minority shareholder deprived of the possibility of such an indemnity, litigation of this kind—potentially of great benefit to the company—would be discouraged.249 Of course, as in the estates context, the courts must strike a balance in exercising their discretion as to costs. They must not grant cost indemnities in such a way as to encourage needless depletion of corporate assets and harmful obstruction of corporate management through the bringing of pointless minority claims. On the other hand, the English Court of Appeal is clearly of the view that it must, in this context, deviate from the usual approach to costs in order to decrease the financial impediment which might otherwise discourage shareholders from attempting to force management to respond to a writ.250 The balance suggested by the Court in Wallersteiner appears to be that an indemnity should be available if the shareholders have acted in good faith and on reasonable grounds.

Again, the important point for present purposes is that the unjust enrichment principle does not offer a satisfactory basis on which to explain the solution proposed by the Court of Appeal. An unsuccessful derivative claim can be seen as a benefit to the company only in a very artificial sense. Further, if the Wallersteiner v. Moir (No. 2) indemnity were to be extended to shareholders' direct or personal actions, any link with the notion of benefit to the company would seem even more tenuous. The justification for such an extension would be that, for reasons of public policy, the corporation should carry the cost of shareholders' attempts to enforce what they believe, in good faith, to be their legal rights vis-à-vis the corporation.251 The cost of provid-

247 Although the term "indemnity" was employed by all members of the Court, both Lord Denning M.R. and Buckley L.J. were of the view that costs should be taxed on a common fund basis. Scarman L.J. spoke in terms of a "full indemnity basis" for the costs award. See generally, H. Rainbird, Butterworths Costs in Civil Litigation and Non-Litigious Work (3d ed. London: Butterworths, 1966) at 112 ff.

248 Id. at 871: "...it is a right which springs from a combination of factors: the interest of the company and its shareholders, the relationship between the shareholder and the company and the court's sanction (a better word would be 'permission') for the action to be brought at the company's expense." With respect to the latter factor, see note 249, infra.

249 Both Lord Denning M.R. and Buckley L.J. indicated that a summary proceeding in which the minority shareholder might receive some assurance with respect to future costs would be appropriate. Each suggested a method for achieving court approval for a claim under the existing rules of practice. Supra note 239, at 392 (Q.B.), 397 (W.L.R.), 859 (All E.R.) (per Lord Denning M.R.) and at 404-05 (Q.B.), 408-09 (W.L.R.), 869-870 (All E.R.) (per Buckley L.J.). Scarman L.J. went further and suggested that the securing of such approval would be a factor to be taken into account in making the ultimate determination as to costs. Id. at 406 (Q.B.), 410 (W.L.R.), 871 (All E.R.) (per Scarman L.J.).


251 Prentice suggests that the procedure for costs indemnification might apply at least to shareholders' actions brought to enforce observance of the articles of association on the theory that such litigation injures to the benefit of all shareholders. Supra note 239, at 63-64.
Restitution

ing judicial assessment of good faith shareholders’ grievances would thus be viewed as a cost of doing business—not as an enrichment of the company which it must disgorge under the law of restitution. This is not to say, of course, that restitutionary remedies may not have a role to play in this context. Where, in a derivative or direct representative shareholders’ claim, a fund is created, restitutio

The modern Canadian corporations statutes have addressed these problems. Apart from attempting to remove some of the restrictions imposed on shareholders’ derivative actions by the rule in Foss v. Harbottle, each statute appears to confer a broad discretion on the courts with respect to interim and final orders as to costs. Typically, the legislation attempts to prevent abuse of the new remedial device by providing that actions can be brought only with leave of the Court, such leave to be granted only if the shareholder has exhausted his other remedies and is, in good faith, prosecuting a claim which appears to be in the interests of the company. The courts are given a general discretion to establish appropriate terms on which the litigation is conducted. More specifically, however, the statutes spell out an explicit discretion to impose costs against the company on final disposition of the matter on a solicitor and client basis. Similarly, each statute enables the court to order the company to pay interim costs to the person controlling the conduct of the litigation. Although none of the statutes deals expressly with the question of whether cost awards can be made against the corporation where the claim is unsuccessful, it is quite possible that they will be interpreted to permit such awards. The common law analogy of the Waller-


254 See R.S.O. 1970, c. 53, s. 99(3); S.B.C. 1973, c. 18, s. 222(3); and S.C. 1975, c. 33, s. 233(b). Moreover, the British Columbia and federal statutes provide that the court can give directions for the conduct of the action as it progresses. See S.B.C. 1973, c. 18, s. 222(4)(a); and S.C. 1975, c. 33, s. 233(c).

255 See R.S.O. 1970, c. 53, s. 99(5); S.B.C. 1973, c. 18, s. 222(5); and S.C. 1975, c. 33, s. 233(d).

256 See R.S.O. 1970, c. 53, s. 99(4); S.B.C. 1973, c. 18, s. 222(4)(b); and S.C. 1975, c. 33, s. 235(4).

257 See statutory material referred to, supra note 255. As these provisions are cast in general terms, the statutory language does not preclude such an interpretation at least with respect to final orders as to costs. The situation may be more complex with respect to interim awards under the federal statute. The federal act provides, in section 235(4), that interim orders as to costs may be made but that “the complainant is accountable for such interim costs upon final disposition of the application or action.” Presumably, the section would not be interpreted literally so as to require that such costs be paid
steiner litigation is now available to the courts. Moreover, the close judicial control of the litigation envisaged by the new statutes provides an adequate mechanism for ensuring that such awards will not encourage use of the derivative action by shareholders as a device for harassing management with frivolous lawsuits. It may also be noted that some of the modern statutes expressly provide shareholders with an oppression remedy. Although here too, the courts are given general powers of control over such claims, it is more doubtful that a costs indemnity from the corporation would be awarded in the event of an unsuccessful claim.

3. Beyond Representative Claims

As indicated, the “benefit” and “fund” concepts have been used somewhat artificially in the American jurisprudence to support recovery on restitutionary principles in situations where, in my view, a stronger rationale for recovery can be premised on non-restitutionary considerations. A further issue, which has been mooted in the American authorities on costs indemnification, is the extent to which it is necessary that the action in which the fund is preserved be representative in character so as to bring all of the potential beneficiaries of the fund before the court. The leading American authority, Sprague v. Ticonic, a decision of the United States Supreme Court, strongly suggests that there may be situations where our courts might ignore the fact that an action has not been formally cast in representative form. In Sprague, the plaintiff brought an action against a bank, then in receivership, to establish her entitlement to a portion of a fund constituted by the proceeds of the sale of certain bonds which had been held under the terms of an express trust. Though the plaintiff was one of fourteen beneficiaries entitled to the fund, she sued only on her own behalf. As none of the bonds had been specifically allocated to any beneficiary, the effect of the litigation was simply to establish her right to a share in the fund. Seeking costs indemnification from the fund,

the complainant in any event of the cause. It should be read, it is submitted, so as to provide that the complainant will be accountable only if the action is dismissed with costs against him. This problem does not inhere in the wording of the British Columbia and Ontario statutes. The British Columbia act simply provides in section 222(4)(b) that the person who has benefitted from an interim costs order “may be made accountable... on the final disposition of the action.” The Ontario act states, in section 99(4), that the plaintiff “shall be accountable to the corporation [for such costs] if the action is dismissed with costs on final disposition...”

258 See, e.g., S.B.C. 1973, c. 18, s. 221; and S.C. 1975, c. 33, s. 234. The matter of costs is not expressly dealt with in these provisions and it may therefore be felt that the normal costs rules are to prevail. It is arguable, however, that the sections should be interpreted so as to permit costs awards in the Wallersteiner v. Moir (No. 2) manner for the reasons advanced in the text as a basis for extending this relief in the context of shareholders “personal” actions.


260 In the context of derivative actions, at least, this is all the more likely. If the company is itself before the court, the interests of the wider group of potential “beneficiaries”—the shareholders—are subject to the court’s indirect control. Thus, in Wallersteiner v. Moir (No. 2), the fact that Moir did not sue “on behalf of himself and all the other shareholders” was not considered fatal nor was he required to amend his pleadings. Supra note 239, at 391 (Q.B.), 396 (W.L.R.), 858 (All E.R.) (per Lord Denning M.R.).
the plaintiff argued that by establishing her own claim, she necessarily established, by virtue of stare decisis, the claims of the other beneficiaries. Frankfurter J., writing for the Court, agreed with this submission, even though the plaintiff had not formally brought the litigation on behalf of the other beneficiaries. The following passage from the reasons for judgment offers a very broad view of the court's equitable jurisdiction to award costs in these situations.\(^{201}\)

That the party in a situation like the present neither purported to sue for a class nor formally established by litigation a fund available to the class, does not seem to be a differentiating factor so far as it affects the source of the recognized power of equity to grant reimbursements of the kind for which the petitioner in this case appealed to the chancellor's discretion. Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional costs is part of the original authority of the chancellor to do equity in a particular situation.

Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through stare decisis rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.

One could, of course, give a reading to these remarks which would give a very expansive role to the doctrine. There are, however, practical limitations. Where the size of the "fund" is indeterminate and the identity of the potential beneficiaries is not known, it is most unlikely that the court would dispose of the costs matter in this fashion. Assume, for example, that in \textit{Sprague} the substance of the holding would apply to a vast number of transactions, identical in pattern, in which the bank had been involved. It would be highly artificial to construct a fund out of these potential future liabilities from which to make an award. A more difficult question in such circumstances would be whether a contribution claim would lie against those beneficiaries who ultimately do come forward and, proceeding on the path forged by the plaintiff, obtain a similar benefit from the defendant. Though the case law on contribution offers little support for such a claim,\(^{202}\) it is difficult to see a principled basis for distinguishing such a claim from those inherently recognized in the fund cases. When, for practical purposes, neither the fund nor the parties are subject to the court's control in the plaintiff's initial lawsuit, the will to accomplish perfect restitution may fail. Where the costs can be equitably distributed in the course of the plaintiff's initial litigation of the matter, the courts will seek to prevent the "free ride". If the convenience of the fund is not present, however, thus making subsequent contribution claims a necessity, the "free ride" may seem instinctively less worthy of redress.

\textbf{C. The Officious Litigant}

It is conceivable that problems of officiousness might be mooted in the cost indemnification context. As has been indicated, the fact that the plaintiff

\(^{201}\) \textit{Supra} note 259, at 166-67 (U.S.), 780 (S.Ct).

\(^{202}\) Once the problem is lifted out of the context of distributing a fund, it seems more likely that an argument that the benefit is conferred "voluntarily" or "officiously" would succeed. On contribution generally, see Goff and Jones, \textit{supra} note 14, at c. 11.
has acted out of self-interest ought to be enough to meet an allegation of officiousness. Nonetheless, it is possible to conceive of circumstances where the fact of self-interest may not appear to be a complete answer. Consider, for example, a situation in which one of the potential beneficiaries indicates that he does not wish the claim to proceed. Such were the facts of Felton v. Finley, a decision of the Idaho Supreme Court. The plaintiff Felton was a lawyer who had been retained by two nephews of the deceased, one Coleman, to contest their uncle's will. Felton was retained on the basis of a fifty percent contingent fee. Before prosecuting the claim, Felton attempted to secure agreement from the others who might benefit from a successful attack on the will—a third nephew and three nieces—to act on their behalf on similar terms. All four refused this overture emphatically, one of them, at least, on religious grounds. The action did proceed to a successful conclusion, however, with the result that all six of the beneficiaries received a substantially enlarged share of the uncle's estate. When the increased shares were made available to the four, their "scruples or feelings" had "evidently disappeared" and they felt able to accept the benefits accruing to them from the litigation. Felton then claimed a contingent fee from the four dissentients on the theory that as they had now voluntarily accepted the benefit of the service rendered, they ought to be held bound by an implied contract of employment to pay Felton the reasonable value of the services provided. The issue thus posed is rather nicely balanced. In Felton's favour it may be said that voluntary acceptance of the benefit would normally be sufficient to give rise to an obligation to pay and thus cancel the effect of the earlier reluctance. The four were clearly not obliged, in any sense, to accept an increased share in the estate. On the other hand, Felton had clearly proceeded in the knowledge that they did not wish to employ him. Could it not be said that he had agreed to act on the basis of a contingent fee calculated on two shares only and that vis-à-vis the others, his provision of services must be considered gratuitous? The Idaho Supreme Court divided on the issue, finding in Felton's favour upon the first hearing of the matter. Upon rehearing, however, the Court reversed itself and dismissed his claim.

In considering the position under Canadian law, however, the holding in Felton v. Finley does not offer safe guidance. It must be noted that the contingent fee appears to play a very special role in that case. Felton v. Finley is not a claim brought by the parties who carried the litigation (the two nephews) in order to distribute their costs to those who have enjoyed a "free ride." Rather it is the claim of lawyer Felton who is seeking an additional fee from those very people who had, in the first place, refused to employ him. If, in the Canadian context, a claim were brought in such circumstances by the two nephews for indemnification of their costs from the fund, it is difficult to see what argument could defeat them. The nephews did not act officiously. Their conduct was motivated primarily by a desire to preserve their own interests. The fall-out gains to the others were unavoidable. Having decided to

204 Id. at 385 (Ida.), 901 (P. 2d).
205 See generally, the discussion accompanying note 20, supra.
share in the benefits of the litigation, the other beneficiaries would be obliged, presumably, to share the legal costs of those who brought the claim.

VI. CONCLUSION

It would be surprising if this difficult area of the law could be easily rationalized and reduced to a set of general propositions. This cannot be done. It is possible, however, to suggest the general outline of a framework for analysis of these situations which is consistent with existing case law and which may assist in pointing to the likely directions of future growth and evolution.

First, it must be emphasized that the self-serving intermeddler is not to be considered officious by definition. There are enough instances in which recovery has been allowed to warrant the conclusion that such intermeddlers may, in appropriate cases, successfully call upon the unjust enrichment principle.

The principal reasons for denying relief appear to be threefold. First, there are situations in which the common expectation of the community would be that the self-serving intermeddler must pay his own way. Thus, a homeowner who improves his home and thereby enhances the market value of his neighbour's premises is not entitled to contribution. And, though it is difficult to be precise about the nature of the consensus underlying this expectation, it would appear to be linked with the directness of the source and the quantifiability of the benefit concerned. As the free ride becomes more direct and quantifiable, the expectation shifts in favour of a duty to compensate.

Second, restitutionary relief will not be allowed to distort or subvert binding contractual relationships. Thus, where parties have settled their rights inter se by contract, the agreement will be dispositive of their rights even though one has secured an unexpected boon from the agreement. Further, our consideration of the possibility of restitutionary relief from strangers to the contract indicates that care must be taken to avoid distortion of an existing network of relationships and creating priorities and preferences which may operate unfairly.

Third, relief will be denied in cases where recovery would impair the free choice of the recipient to invest his assets as he sees fit. Thus, recovery will generally be allowed where the benefit conferred is (or has become) a liquid asset, or amounts to an expenditure which the recipient would otherwise have necessarily incurred. Relief will clearly be denied where the benefit consists, for example, in unrequested improvements to land for which the recipient has no use.

It is this third general principle which is of wider significance for the law of restitution inasmuch as the problem of "free choice" may arise in any situation where the benefit is one which the defendant did not request. It is of general interest, then, that the free choice problem may be limited by those cases in which the benefit, though originally not liquid in form, has become
effectively so. Thus one who pursues legal redress on another’s behalf in a representative action is not entitled to contribution unless a fund is created and a liquid asset is thereby conferred on the benefitted party. Similarly, one co-owner cannot seek contribution from another for improvements until the property is partitioned and the enhancement of value is converted into an asset of unequivocal value to the recipient. This conversion from a non-liquid and irrecoverable form may also result from the recipient’s conduct in taking an originally unrequested and unwanted benefit and turning it to account. It may well be that these limiting principles would be useful in resolving conflicts in other areas of restitutionary law, such as mistakenly conferred benefits, where problems of free choice arise. This, however, is a question to be pursued on another occasion.

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266 See generally, the discussion accompanying note 50, supra.

267 Consider, for example, Ulmer v. Farnsworth, discussed supra, accompanying note 33, and further, the case of an inactive co-owner who actively seeks partition and sale, thereby turning the enhanced value of the land to his own account, discussed supra, accompanying note 41.