

UNJUST ENRICHMENT AND ROMAN LAW

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RESUMO

O princípio da ilicitude do enriquecimento indevido encontra nas fontes romanas a sua expressão mais antiga. O desenvolvimento da regra, porém, alcança no sistema do Common Law uma evolução absolutamente diferente da que teve nos países de direito codificado.

A importância que o princípio tem alcançado nos países do Common Law nos últimos tempos é impressionante. As mais prestigiadas universidades da Inglaterra, do Canadá, da Austrália e da Nova Zelândia, entre outras, já possuem uma disciplina específica só para cuidar desta temática. Depois dos trabalhos pioneiros de Peter Birks, Lord Goff of Chieveley, Gareth Jones e George Palmer, por citar alguns, o Unjust enrichment tem-se constituído numa das áreas intelectualmente mais vitais do direito privado. A presente pesquisa destina-se a comparar o desenvolvimento do instituto nas fontes romanas e no Common Law, no ensejo de trazer alguma notícia desses aspectos pouco conhecidos nos países de direito codificado.

Palavras-chave

Enriquecimento indevido. Direito romano. Common Law

ABSTRACT

The principle of unjust enrichment finds its oldest roots in Roman law. The evolution of the principle in Common Law, however, is completely different than the one that took place in continental systems.

The importance that the rule has acquired in the last times is impressive. The most prestigious universities of England, Canada, Australia and New Zeland, among aothers, already have a specific course to study the subject. After the leading works of Peter Birks, Lord Goff of Chieveley, Gareth Jones and George Palmer, Unjust enrichment became one of the areas intellectually more vital in private law. This paper compares the evolution of the principle in both, Roman law and Common Law, intending to bring some notice about these aspects not well known in countries with codified systems.

Keywords

Unjust enrichment. Roman law. Common Law

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1. ENRICHMENT AND ROMAN LAW.

The principle that nobody can enrich at the expense of another is very old. In Rome, it is proved that at least at the time of Quintus Mucius Scaevola it was an idea already developed. The bases upon which it rested were the Greek philosophical ideas, especially the ones contained in The Moral to Nichomaquean. Also according to the Myth of Nemesis it is necessary that the equilibrium between the people is not compromised.¹

Through centuries generations kept reproducing the ideas that Pomponius had consecrated for the humanity. "*Naturae aequum est neminem cum alterius detrimento et injuria, fieri locupletiores*".

In spite of the fact that the principle of unjust enrichment represents the consolidation of a rule of high moral content, it took a very long time until it could be consecrated by the law as a general autonomous source of obligations. Some scholars found the explanation in the fact that the nature of this moral rule was too vague. It has been said that it is applicable in so many ways and in so different circumstances that it is hard to give it a sufficient juridical shape. For some others, it is a concept that comes out more from juridical instinct than from juridical concepts. It has also been compared to an underground river following a precise route that reveals its existence but that never came to the open air.

In Roman law the unjust enrichment has never been a general source of obligations. Roman lawyers proceeded more on the basis of the individual case, extending the *condictio* to an increasing number of well-defined situations with the common element that the defendant had no adequate grounds for retaining. It appeared, not as a unified block, but as a kind of mosaic of multiple applications without a definite method.

At classic times, Roman law offered several devices to avoid unjust enrichment. *In integrum restitutio* was the judge's order to go back to the previous situation when he considered that an unjust damage existed. In all cases, the juridical act was deemed as if it did not exist. It applied in cases of mistake (*ob errorem*); fraud (*ob dolum*); duress (*ob metum*); in favor of the minor of 25 years against the acts of their tutors or curators (*ob aetatem*); for those who, being absent, had lost a right (*ob absentiam*); for the creditors of those who had suffered a *capitis deminutio minima* to pursue them as if they never had suffered it (*ob capitis deminutionem*).

However, the two actions that better represent the procedural means to sanction the unjust enrichment were the *condictio sine causa* and the *actio in rem verso*.

The *condictio sine causa* arises where the possessor of anything has no

¹ Nemesis was the goddess of indignation and retribution for evil deeds or undeserved good fortune. To execute her commands she had three attendants, Dike (justice), Poena (punishment) and Erinyes (vengeance).

valid possessory title, and where it is not competent to the rightful owner to recur to either of the *condictiones* mentioned further on, or even where there is another remedy. The *condictio*, and all its applications were founded on the principle that anyone who, acquired or retained in an unjustified way things of others, was obligated by equity to give them back. Savigny supports the thesis that the *condictio* was a restitutionary personal action that replaced the revindicatory action when the latter was stopped by a juridical obstacle. It was abstract in the sense that the formula made no mention of the basis of the defendant's obligation.²

The idea that what is unjustly retained must be restituted appeared in both realms contractual and extra-contractual. Girard says that it is an action founded more than on the idea of contract, on the idea of retention without a cause.

The *condictio sine causa* has suffered a peculiar evolution. It has ceased being an abstract action. By the time of the Code, the actions for restitution of the enrichment had several different names that established the case in which it applied: *condictio causa data*, *causa non secuta*, *condictio ob turpem vel injustam causam*, *condictio sine causa stricto sensu*.

The *condictio indebiti* was available to those who had fulfilled a performance wrongly believing that they were obligated. Where a man had made a payment by mistake, in discharge of an obligation which did not in fact exist, to one who accepted the payment in good faith, he had the *condictio* to recover what he had paid. If the recipient was not in good faith, he would be guilty of theft and a different set of remedies was available.³ This was deemed as an irregular *condictio*, the *condictio furtiva*.⁴ The obligation born was *re*, that is, because of the fact of having received the thing.⁵ The principal object of the *condictio indebiti* was restitution of like description and quality. All their fruits and accessions could also be reclaimed.⁶

The *condictio causa data causa non secuta* was used where a person transferred ownership for a purpose which did not result. This is, when something was given to obtain something in exchange.⁷ Originally, only applied to innominated contracts *do ut des* and *do ut facias*, but later it was extended to cases of *facio ut des* and *facio ut facias*. This action was *personalis, stricti juris*, competent to whom has given something for a future cause, and to his heirs, against whom has not performed his part of the agreement, and his heirs for the delivery of a thing given, and all its rights, fruits and accessions, without interest or the value of such.

² ZWEIGERT, Konrad. KÖTZ, Hein. *An introduction to Comparative Law*. London: Oxford University Press, 1977, p. 209.

³ STEIN, Peter. *The character and influence of the Roman Civil Law*. London: Hambledon, 1988, p. 31.

⁴ SCHULTZ, Fritz. *Classical Roman Law*. Oxford: Clarendon, 1951, p. 618.

⁵ SANFILIPPO, Cesare. *Istituzioni di Diritto Romano*. Catania: Torre, 1992, p. 31.

⁶ Mc CHOMBAICH, Patrick. *A summary of the Roman Civil Law*. London: Stevencz and Nortons, 1988, p. 128.

⁷ THOMAS, J. *Introduction to Roman Law*. New York: Kluwer Law, 1986, p. 114.

The *condictio ob turpem causam* applied in cases when a performance was fulfilled in order to obtain a fact or the abstention of an action that contained an immoral motive (e.g. to induce the recipient not to commit a crime, or to return what he had borrowed and was wrongfully refusing to return). But the plaintiff must not be equally tainted by the turpitude, as he would be, for example, if the payment had been made to induce the recipient to commit a crime.⁸ The *condictio ob turpem causa* has sometimes been confused with the *condictio indebiti*, which is based on contract and error, whereas the former is founded on fraud and design.

The *condictio ob injustam causam* was used when there was an enrichment prohibited by law. For example, in case of loans the interest of which exceed the amount legally permitted.

In fact, the remedy of *condictiones sine causa* was a device to repair some unjust consequences that resulted from the formalism of the roman system. In roman law, it was enough to fulfill the formalities required, without any consideration to the aim pursued by the parties. The cause, at that time, was not an essential element for the validity of the juridical act. The obligations were valid even if they had been fulfilled without a cause. The *condictio sine causa* includes all those cases in which neither come under the category of *condictio indebiti* or *ob turpem causa*, for a man may be in possession of his neighbor's property without payment, or who may have received money for some future cause which has not been realized in the sequel.

The strictness of the formation of the obligatory link was endurable while the city was a restrained circle where the parties were well known and the fairness in the execution of the obligation was guaranteed by the pressure of the public opinion. But, when business started to grow in geographical extension and number of operations, the necessity to alleviate the inconveniences resulting from formalism became evident.

The *condictiones sine causa* were not established against the juridical basis of the acquisition that rested upon an abstract act; they respected the validity of the juridical act but, at the same time, they permitted to correct the injustice of the result, obliging the one who unjustly acquired to restitute the thing received. Thus, "with the *condictiones*, the notion of aim or goal is introduced in the roman juridical technique, not as a necessary element for the formation of the act, but as a corrective instrument imposed by equity to prevent that an act produced effects contrary to the parties will, to the law, or to moral principles". In Roman law, the unjust enrichment was sanctioned by the *condictiones sine causa* only when a juridical act had been performed between the enriched and the impoverished one. This explains why, in Roman law the enrichment at the expense of another was not sanctioned in the case of expenses done on the thing of another by the possessor in good-faith.

⁸ NICHOLAS, Barry M. *An introduction to roman law*. London: Clarendon, 1962, p. 231.

Girard says that the Romans had admitted the general principle of unjust enrichment since primitive times, but the jurisprudence and the practice had determined the number of cases to which it applied. Thus, the case of the possessor in good faith was not comprehended in the *causa data, causa non secuta*, nor in payment by mistake therefore, it could not be sanctioned by the *condictiones sine causa*.

The *condictiones sine causa* presupposed a *negotium* and a direct enrichment between the patrimonies of plaintiff and defendant. In other words, it did not apply when the enrichment was due to the intervention of a third party. In this case, the proper action was the *actio in rem verso*. In primitive times, the idea of representation did not exist. The obligation only produced effects between the parties. This system, in a society, based on agriculture and with very restricted business activity, was good enough, but when the commerce began to expand, the impossibility of the *paterfamilias* to materially accomplish by himself all juridical acts demanded by his activities started to show. Thus, the law recognized the power to become creditor through the people submitted to his power and to take advantage of their acquisitions, but they could not become debtors through their sons or slaves. Soon it was created several procedural mechanism to sanction the obligations taken though the intervention of agents. Thus, the *actio exercitoria* or *institoria* was based on the idea that the *paterfamilias* or the master of the slave had given a mandate to contract, therefore, the creditors could sue the former on the basis of the presupposed will of assuming the obligations contracted by the persons in *potestate*.

The *actio de peculio* and *in rem verso* applied when the *paterfamilias* or the master enriched directly or indirectly through the patrimony of a person under his authority. In other words, the father could be reached by an *actio de in rem verso*, if the creditor be in a position to prove that the son concluded the business directly for the benefit of the father, or have applied that which he may have received to his purposes.

It was a requisite that the son should have acted directly for the benefit of the father, consequently, this action would not lie if advantages resulted to the father indirectly by that which he did for himself, but an *actio de peculio* had to be brought. In these cases, it was not necessary that the latter had acted under orders of the former. It was enough that the unjust enrichment resulted as a consequence of an act accomplished by a son or slave.

The restitution could be up to the amount of the patrimony of the son or slave, or to the enrichment of the *paterfamilias* or master. Where the dealings brought advantage they were liable satisfy debts arising out of the transactions to the amount of the advantage obtained, even though they had been engaged in without his cognizance (*actio de in rem verso*). If the transactions brought no advantage to the father or master, they were liable to make good any loss at least up to the amount of the *peculium* (*actio de peculio*)⁹

⁹ AMOS, Sheldon. *The history and principles of the Civil Law of Rome*. London: Kegan Paul, 1883, p. 156.

Later the action was extended to contracts between *sui juris*. Papinian (D. 17, 2 fr. 82) illustrates the case where the partners are enriched by the act of one of the partners. In principle, the act of a partner do not compromise the society, so the third party can only sue the one who contracted. However, if any enrichment resulted for the society, the third party could pursue the restitution from the society. (*Jure societatis per socium aere alieno non obligatur, nisi in communem arcam pecuniae versae sunt*) This new *actio in rem verso* applicable between *sui juris*, was also known as *actio utilis*.

There is also a text by Ulpiano (D.L., 12) referring to the administrators of a condominium, establishing that when an administrator contracts a loan he is personally liable, but if the condominium is enriched as a result of the agency of the administrator an *actio in rem verso* applies.

2. UNJUST ENRICHMENT AND THE EARLY COMMON LAW.

The early common law did not enforce ordinary contracts. Like Roman law, it distinguished in its early stages between formal and informal agreements, but the distinction was between written (later under seal) and unwritten (called *parol*) agreements. Only formal contracts under seal could be pursued through the action of covenant. *Parol* agreements, on the contrary, had to fit into procedural complexities in order to be actionable.¹⁰ Originally, also the distinction between contractual and quasi-contractual claims did not exist. The system was based on remedies. Lawyers had to find a writ to suit the facts.

a) Account. One of the actions that would be, today, recognizable as restitutionary was the action of account, the purpose of which was to recover from a fiduciary, such as a bailiff or agent, money that had been received but not accounted for. When it made its first appearance is not clear (although is almost certain that it was later than debt or covenant), but there is reference of an early case in 1232 and from that date on it appears with greater frequency.

The action was not to obtain an order for payment of any sum in particular. On the contrary, what was pursued was compelling the defendant to enter into an account in order to discover what, if anything, was owing. He could not plead "not accountable", like a defendant on a debt action could plead *non debet*, because the duty to account was distinct from the duty to pay the balance, so, even if he did not owe anything to the plaintiff, he still had to discharge his duty to account.

The plaintiff had to get two judgments, what made the procedure cumbersome and slow. The first one, to declare the failure on the obligation to account; the other one, if the first one succeeded, was taken before auditors (generally three) and if they found that money was due he then would get a

¹⁰ PARVIZ, Owsia. *Formation of contract. A comparative study under English, French, Islamic and Iranian law*. London: Graham and Trotman, 1994., p. 124.

second judgment to recover this by writ of debt.¹¹ In other words, liability arose not from the pre-existing claims, nor from any promise, but from the accounting itself. The action of debt based upon an account was one of the exceptional cases in which wager of law was not available.

The plaintiff's count set out the relationship upon which he relied, and then followed the writ in demanding just an account. The defendant would generally either deny the relationship or assert that he had already accounted; and if the defendant then failed in his proof, judgment for the plaintiff would order the account.¹²

If a defendant admitted that he became bailiff, or factor, then he was accountable, without the plaintiff having to prove that the defendant ever received anything.¹³ The defendant could be sent to prison and to remain there until the account was settled.¹⁴ The judgment was that the defendant do account, and if he would not, then "il demeura in prison, and demeura tanque qu'il ait accompt."

Vinogradoff enumerates four essentials, without the concurrence of which the action did not lie:

(I) The person on whom the obligation is to be imposed must have received property not his own, of which the person imposing the obligation is owner.

(II) The receipt of the property must not amount to a bailment.

(III) The receiver must have possession, as distinguished from custody.

(IV) There must be privity between the parties.¹⁵

In Tudor times the actions of account was superseded by the action of debt, not without a previous enlargement of its boundaries through the elimination of the requirement of special relationship. Many authors attribute the decline to the fact that the defendant could wage his law. Baker thinks that the incidence was very restricted since wager of law was not permitted where the defendant received money from a third party to the use of the plaintiff and most actions of account were of this kind.¹⁶ Jackson affirms that there was only one reason why a plaintiff would want to bring debt instead of account, namely because it was a shorter procedure. It would not help him to evade wager of law, he says, or sue executors, or simplify pleading. He would, however, get

¹¹ AMES, James Barr. *Lectures on legal history*. Cambridge: Harvard University Press, 1913, p. 116.

¹² MILSOM, S.F.C. *Historical foundations of the Common Law*. Butterworths: Toronto, 1981, p. 275.

¹³ JACKSON, R.M. *The history of quasi-contract in English law*. Cambridge: University Press, 1936, p. 33.

¹⁴ BAKER, J.H. *An introduction to English History*. London: Butterworths, 1979, p. 301.

¹⁵ VINOGRADOFF, Paul. *Oxford studies in social and legal history*. Vol. IV, New York: Octagon Books, 1974, p. 13.

¹⁶ Op. cit., p. 302.

the proceedings finished in one hearing instead of two.¹⁷

In spite of its decline, the action of account is considered the father of the count for money had and received.

b) Debt. Unlike the writ of covenant, the writ of debt was available on both formal and informal transactions, as long as they referred to specific sums, such as a loan of money, which had been received by the defendant. The nature of the action of debt excluded all possibilities of claiming an uncertain sum by way of quantum meruit or quantum valebant.

Pollock notices that in the thirteenth century a prudent creditor was seldom compelled to bring an action for the recovery of money that he had lent. He had not trusted his debtor's bare word nor even his written bond, but had obtained either a judgment or a recognizance before the loan was made...numerous actions of debt brought merely in order that they may not be defended, and we may be pretty sure that in many cases no money has been advanced until a judgment has been given for its repayment.¹⁸

The action also applied if the plaintiff could prove that goods have been received, which shows that, at this point, the concept of restitution was closely tied to the idea of property. The creditor's claim, it is said, was conceived to be proprietary in character, for early common law lacked the concept of a personal obligation. Pollock and Maitland outline this idea saying that

the bold crudity of archaic thought equates the repayment of an equivalent sum of money to the restitution of specific land or goods. To all appearance our ancestors could not conceive credit under any other form. The claimant of a debt asks for what is his own.¹⁹

As in the case of real actions, the defendant was conceived as having in his possession something that belonged to the plaintiff and that he did not have right to keep. This strong influence of property's idea is shown by the fact that the creditor had to prove the precise amount that he was claiming. If he proved only £5 when he demanded £6 he failed, exactly the same way as he would in detinue for the recovery of a horse if he could only prove the detention of a cow.²⁰

As Plucknett notices, in all the real contracts which are actionable by debt the defendant has received something -money, goods, a lease- from the plaintiff; in the language of the fifteenth century, there has been a quid pro quo, which is in fact a generalization from those real contracts which were

¹⁷ Op. cit. p. 34.

¹⁸ POLLOCK, Frederick. MAITLAND, Frederic W. *The History of English Law*. Vol. II, Cambridge: University Press, 1923, p. 203.

¹⁹ Op. cit., p. 125.

²⁰ "The essential distinction between detinue and debt for chattels seems to be this, -detinue was the proper remedy for the recovery of a specific chattel, debt, on the other hand, for the recovery of a specific amount of unascertained chattels." AMES, op. cit., p. 89.

actionable by a writ of debt.²¹

Stoljar finds remarkable the fact that creditors opted for debt despite the debtor's right to wage his law instead of going to a jury.²² As it is known, this strange device allowed the debtor, on oath, a general denial that he owed any money, provided he was supported by a certain number of other persons (usually eleven, twelve included the defendant), all swearing that what the debtor was saying was true.

If we think that defendant's oath-helpers came either from the streets or from the menial staff of the courts, the uncertainty of plaintiff's fate is clear. In local courts, because of the social relationships, a debtor who was not believed could have certain difficulties in finding oath-helpers, but in royal courts this constriction did not exist at all. However, the huge number of oath-helpers required made it difficult for defendants to resist to an action in such a way, so, many times they opted for trial by jury.

If the debtor perjured, he fell into mortal sin, but no temporal penalty resulted, the common law courts would not entertain indictments for the spiritual offence of perjury.

c) *Indebitatus assumpsit*. In the sixteenth century the action of *indebitatus assumpsit* superseded debt, probably due to some economic interests. Apparently, the King's Bench judges, were eager to smooth the path to restitution because an increase in the number of claims represented an increase in the judge's income. Since *assumpsit* was a form of trespass, it fell under either King's Bench or Common Pleas' jurisdiction, whereas debt, could only be brought in the Common Pleas. The temptation to treat *indebitatus assumpsit* and debt as equivalent was huge and the King's Bench did not resist. The maneuver to favor the plaintiffs was simple, if the debt existed, the subsequent *assumpsit* was presumed and did not need to be proved. Baker suggests that the motives of the King's Bench attitude in favor of plaintiffs were partly mercenary. The attraction was strong, since in *indebitatus assumpsit*, the risk of wager of law (existing indebt) could be avoided, as a result of which plaintiff preferred the benefit of the action of *assumpsit*.

Another formality required by debt was that the plaintiff had to prove the existence of a debt and the existence of an express promise of the defendant to repay.

In *indebitatus assumpsit* the promise to repay was implied, therefore, the plaintiff only had to prove the existence of a debt. The law implied that whenever a person was indebted to another there was a promise to pay such a debt so, in this action, the plaintiff declares that the defendant, being already

²¹ PLUCKNETT, Theodore FT. *A Concise History of the Common Law*. London: Butterworth, 1948, p. 598.

²² STOLJAR, S.J. *A history of Contract at Common Law*. Canberra: Australian National University Press, 1975, p. 8.

indebted (*indebitatus*), undertook (*assumpsit*) to pay a certain sum. The *indebitatus* was the simple declaration of the existence of an antecedent debt, and the *assumpsit* was the subsequent promise.

The practice still suffered the opposition of the Exchequer Chamber. However, in the early seventeenth century, in Slade's case all the judges of all three courts assembled to discuss the question.

The facts of the case were quite simple. Slade had sold a standing crop of wheat to Morley who, according to the pleadings, promised to pay the price of £16 at midsummer, but then did not pay. Slade brought *assumpsit* for the non-payment, Morley denied the promise. Upon the general issue, the jury found the bargain and sale, but said that there was no subsequent *assumpsit*.

The view of the King's Bench was finally upheld: a separate promise to repay did not have to be proved since this could be implied subsequent to the debt arising.

Every contract executory imports in itself an *assumpsit*, for when one agrees to pay money or to deliver anything, thereby he assumes or promises to pay or deliver it; and therefore when one sells any goods to another and agrees to deliver them at a day to come, and the other in consideration thereof agrees to pay so much money at such a day, both parties may have an action of debt or an action of the case on *assumpsit*, for the mutual executory agreement of both parties imports in itself actions upon the case as well as actions of debt.²³

Dobbs believes that "what was finally developed by the beginning of the seventeenth century was thus a form of action capable of enforcing simple, but express contracts"²⁴.

Plucknett considers the decision, on principle, indefensible,

for it obliterates the distinction between debt and deceit, between contract and tort. It therefore introduced much confusion into the scheme of forms of action. In doing this, it infringed the procedural rights of defendants in a way which seemed almost alarming. Defendants might henceforth find themselves charged with debts merely because a jury thought that such debts existed, and could no longer relieve themselves by compurgatory oaths.²⁵

The result was that

debt as a remedy upon simple contracts practically disappeared, its place being taken by *indebitatus assumpsit*. It practically disappeared, because, from the point of view of the creditor, this new form of action had manifold advantages. Not only was wager of

²³ (1602) 4 Coke Reports 92 b.

²⁴ DOBBS, Dan. *The law of Remedies*. St. Paul: West Publishing, 1973, p. 87.

²⁵ *Op.cit.*, p. 610.

law not possible, but the same preciseness of pleading was not required...²⁶

The plaintiff needed to indicate, in general terms, why the defendant was indebted to him. It was not necessary to set forth all the details of the transaction from which it arose.²⁷ It was enough to allege the general nature of the indebtedness, for example, for “work done”, or “goods sold” or “money had and received” to this use, etc. Thus, a number of standard forms were developed, the so-called “common counts”, which told the defendant what kind of claim he was to answer without tying the plaintiff to more particularity than was often practicable when action was being initiated.²⁸

The most significant “common counts” were: I) money had and received to the defendant’s use; II) money paid to the defendant’s use; III) quantum meruit; IV) quantum valebat.

The action for money had and received was available to recover money paid under mistake or compulsion, or for a consideration which had failed.²⁹ The first known case of payment by mistake occurred in 1657. The plaintiff, a coalmeter of London, paid a year’s rent for his office to the lord mayor, when it should have been paid to the city chamberlains, and he was subsequently required to pay again. The plaintiff recovered from the mayor.³⁰

Under the influence of Lord Mansfield, the action was encouraged to the point that it became almost the universal remedy where a defendant had received money which he was “obliged by the ties of natural justice and equity to refund.”³¹

The action for money paid was appropriated when the plaintiff paid to a third party, by mistake or otherwise, a defendant’s debt. Traditionally, the plaintiff had to prove the existence of a previous request.³² This circumstance prevented for a long time the use of this count in the case of quasi-contracts. A decision, early in the seventeenth century appears to deny liability without actual request.³³ However, the difficulty was overcome by the convenient fiction that the law would imply a request whenever the plaintiff paid, under legal compulsion, what the defendant was legally compellable to pay.³⁴

The first occasion where it was suggested that the request might be implied was in situations discussed by Civilians, when the plaintiff spent money

²⁶ HOLDSWORTH, WS. *A History of English Law*. Vol. III, London: Methuen, 1923, p. 444.

²⁷ AMES. Op. cit. p. 153.

²⁸ LÜCKE, H.K. “*Slades’ case and the origin of the common counts*”(1965) 81 *Law Quarterly Review*, pp. 422, 539.

²⁹ DIETRICH, Joachim. *Restitution. A new perspective*. New South Wales: Federation Press, p. 23.

³⁰ *Bonnell v. Fowke* (1657) 2 sid. 4.

³¹ *Moses v. MacFerlan*, 2 Burr. 1005, 1012.

³² GOFF & JONES. *The Law of Restitution*. London: Sweet & Maxwell, 1986, p. 52.

³³ *West v. West* (1613), Rolle Abr. i. 11. Line 17.

³⁴ *Turner v. Davis* (1796), 2 Esp. 476; *Cowell v. Edwards* (1800), 2 B.& P. 268.

in advancing some family obligation of the defendant, such as the maintenance or burial of his defendants. The question arose, for the first time, in 1628 with an uncertain resolution.³⁵ Nevertheless, the question of unauthorized funeral expenses had to wait until *Jenkins v. Tucker*³⁶ (a burial of a woman while her husband was in Jamaica) to be clearly established. In such case, the request was implied or fictitious, not that it was not a requirement, but it had not to be proved.

The fact that the request was always a pre-requisite led Dobbs to affirm that "the money paid count was really a count that applied mostly to implied in fact contracts, and did not do much service to enforce quasi-contract or purely restitutionary claims"³⁷.

In fact, the request was only necessary for money paid claims, not for money had and received. The reason could be that in the latter, the enrichment was undeniable whereas in the former the advantage could be submitted to doubts.

The action applied also, when the money was paid under legal compulsion. In cases of collective debts, for instance, the party who was forced to pay the whole debt could bring an *assumpsit* against the other for a contribution. The fiction was probably established by Lord Mansfield, perhaps in an attempt to introduce the principle of contribution from Scots law.

In actions for money had and received or for money paid, only liquidated sums were recoverable (debts counts). A debt was, by definition, a certain sum due, therefore, in medieval law there was no room for any form of declaration in the action of debt which involved claiming a *quantum meruit* or *quantum valebat*. "Youn g v. Ashburnham shows us that in 1587 there was no remedy, lack of express promise excluding *assumpsit* and lack of a sum certain excluding debt." ³⁸ Ames refers that

the lawyer of today, familiar with the ethical character of the law as now administered, can hardly fail to be startled when he discovers how slowly the conception of a promise implied in fact, as the equivalent of an express promise, made its way in our law.³⁹

An expansion of the scope was possible through the so-called value counts, allowing unliquidated sums to be pursued, in other words, the claim was, not for a fixed but for a reasonable amount: what the work merited or was worth.

Of this kind, two major counts stand out: *quantum meruit* and *quantum valebat*. The former applied to recover reasonable remuneration for services

³⁵ *Bespiche v. Cognill* (1628) KB 27/1561, m. 369.

³⁶ (1788) 1 Hy Bla. 90

³⁷ *Op. cit.* p. 93.

³⁸ JACKSON, R.M., *op. cit.*, p. 42.

³⁹ *Op. cit.*, p. 155.

rendered under a contract in which the remuneration had not been agreed.⁴⁰ The action was based on an implied promise to pay an unquantified reasonable sum. The evolution and the influence of Slade's case is clear: if the subsequent *assumpsit* could become a legal presumption where there had been in fact a pre-existing contract, could not the contract itself be sometimes presumed?

The oldest indication in this sense seems to be *Warbrooke v. Griffin*⁴¹, in which it was said *obiter* "it is an implied promise of every part, that is, of the part of the innkeeper that he will preserve the goods of his guest, and of the part of the guest that he will pay all duties and charges which he caused in the house".

This principle was easily extended later to tailors, carriers, factors or bailiffs and vendors of goods. In the six *Carpenters' Case*, it was declared that

if I bring a piece of cloth to a tailor to have a gown made, and the price is not agreed for certain before hand ...the putting of the cloth with the tailor to be made into a gown is sufficient evidence to prove the special contract [to paid what he deserves], for the law implies it, and if the tailor overvalues the making or the necessaries there of the jurors may mitigate it...⁴²

In such cases, though, the contribution to the history of restitution is doubtful because the base is a contract implied in fact. No attempt was made to ascertain whether the parties had made a genuine contract between themselves, but the law, by a fiction, imputed a contract to them.⁴³ Originally, the promise sued upon in quantum meruit actions appears to have been implied from conduct, rather than to have been fictional.⁴⁴ The idea that is present in the mentioned circumstances seems to be an integrative or completive function of the court, determining an element, not expressly agreed by the parties, but that can be revealed through custom or good faith. It is possible also, that the implication of a promise was a matter of law when the plaintiff was bound to provide the service, as in the case of a common carrier or innkeeper.

The contribution to the history of restitution truly appears only when the specific contract for some reason failed or was unenforceable since in such cases, the implication of the contract or the contractual request, could not be allowed to provide a basis for relief.

The action for quantum valebat lay where a plaintiff wished to recover a reasonable price for goods supplied by the plaintiff at the defendant's request.⁴⁵

⁴⁰ MADDAUGH, Peter D. Mc CAMUS, John. *The Law of Restitution*. Toronto: Canada Law Book, 1990, p. 71.

⁴¹ (1609) 2 Brown. 254.

⁴² (1610) 8 Co. Rep. 146.

⁴³ WINFIELD, P.H. *The law of quasi-contracts*. London: Sweet & Maxwell, 1952, p. 7.

⁴⁴ SIMPSON, A.W.B., *A history of the Common Law of contract. The rise of the action of assumpsit*. Oxford: Clarendon, 1987, p. 498.

⁴⁵ KLIPPERT, George. *Unjust enrichment*. Toronto: Butterworths, 1983, p. 9.

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