

*Historical Synopsis of the Change-Of-Position Doctrine in Southern Africa,  
American and Continental European Laws*

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**Abstract**

Both common-law and civil-law recognize unjust enrichment in their legal systems. Historically however the concept developed along different lines, especially since the European sixteenth Century. These different development paths were influenced by the social thoughts of their times, particularly by the theological and natural law schools then prevalent in Europe, and the societal context in which the notion of justice operated. For English common-law, historically, a claimant could have recourse to the courts of equity for a remedy, and courts of equity applied ‘natural law’ principles. This is the version of enrichment liability that American law inherited. For that reason the defendant could resist an equitable claim with an equitable defence, although in some instances with reservation. In Continental Europe when a general principle against enrichment was formulated, it required adequate defences to protect the interest of defendants. The most important defence accepted in Civil-law jurisdictions is loss of enrichment. This paper looks at the historical development of this defence in comparative basis and argues that despite lingering differences, all legal systems analysed here have now converged in this regard. The convergence means that these systems concluded that the easier it is made to claim restitution, the more vulnerable members of society become in securing their own wealth and investments. Therefore loss-of-enrichment as defence is applied as a safeguard to such vulnerability.

Keywords: Comparative law, enrichment liability, disenrichment, loss of enrichment

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## Introduction

When X (the plaintiff) claims that Y (the defendant) has something which he is not entitled to keep as his, there are instances in which Y, though acknowledging the validity of the claim, that is to say, that he has been enriched at the plaintiff's expense and in all probability without 'justification'<sup>1</sup> and the retention of such enrichment in the circumstance would be inequitable, he may nevertheless still be able to plead that he is no longer enriched. This is the change-of-position defence. Generally, this defence balances the plaintiff's interest in recovering the wealth transferred against the defendant's interest in being able to deal with what he honestly believes to be his. The balancing of the plaintiff's and defendant's interests are a clear manifestation of the equitable principles in which an enrichment claim itself is rooted, and such balancing is only possible because of the underlying idea that, where the equities are held to be equal, the loss should lie where it falls. Obviously, if the equities favour the defendant, he should also be able to prevail because the claim itself asserts that the plaintiff is to recover when it is equitable to do so. The need of comparison overwhelmingly (though not exclusively) arises in regard to mistaken payments of money, where the likelihood of 'inevitable loss' to any one of the litigants figures prominently. It will be seen later in detail that some early interpretations of the defence have indeed held that if the right to recover money paid under mistake, for example, is to be measured by an 'equitable' principle, it is logical that an 'equitable' defence should also adhere to this principle,<sup>2</sup> and change-of-position is exactly such defence. However, the notion of an 'equitable' defence has always been a concern since 'equity' has tendency to introduce uncertainty in the law.

### I. Development of Loss of Enrichment in the European Civil-Law Systems.

#### A. *Historical notions in the Civil-Law Systems.*

In civil-law systems the defence of change-of-position is ordinarily known either as disenrichment or as loss-of-enrichment. Although some commentators contend that it is a novelty invented by the Pandectists,<sup>3</sup> its embryonic origin seems to go back to the ancient times in the interplay between the notions of distributive justice, commutative justice and corrective justice according to the Aristotelian *Nicomachean Ethics*.<sup>4</sup>

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<sup>1</sup> This element is one of the aspects that divide common-law from civil-law in unjustified enrichment claims. 'Sine cause' is the position in civil-law jurisdictions, while common-law jurisdictions adhere to the 'unjust factor' approach. Canadian common-law now expresses it as absence of 'juristic reason'. These issues will be alluded to in more detail later in this paper.

<sup>2</sup> Vinius, for example, discussing the question whether the *condictio indebiti* would lie for error of law as well as error of fact, says: 'Movet me premium haec ratio, quod condictio indebiti ex bono et aequo datur, qui omnino consequens est, eam non nisi exceptione aequitatis ex adverso excludi posse' [The first consideration which moves me is that the *condictio indebiti* is given on the basis of what is decent and fair, from which the main consequence is that, from the other side, it can only be cut off by a defence based on fairness]. See Birks P 1984 *Current Legal Problems* 1, 21).

<sup>3</sup> For example Zimmermann R and Du Plessis J E ((1994) *Restitution Law Review* 38-39 and Zimmermann R, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996) 899ff) implicitly support this view when they, inter alia, say of BGB t 818 (III): 'Such a general rule limiting the defendant's liability to the actual enrichment at the time of *litispendent* was unknown in Roman law and the *ius commune*.

<sup>4</sup> *Nicomachean Ethics*, v 9, 1130b-1131a. According to Aristotle, while distributive justice gives each citizen a fair share of whatever resources a community has to divide, commutative justice preserves each person's share. In involuntary transactions, one who took or destroyed another's resources has to give back an equivalent amount. In voluntary transactions, the parties have to exchange resources of equivalent value. This distinction between involuntary and voluntary transactions which resembles the one drawn today between delict and contract, seems also to have been the linear ancestor of such distinction, that goes back to Gaius (*Gaius* 3.88), who according to

Academics are not exactly sure, though, when the concept first surfaced in its modern form. They offer differing accounts of its origin though such accounts are not necessarily mutually irreconcilable. Some offer a more historical-philosophical approach to its origin, while others see to it as the necessary culmination of the assertion of a general principle of unjustified enrichment. If the effort of the late scholastics gave rise to the modern idea of unjustified enrichment as a separate body of law at the same level with contract and tort,<sup>5</sup> such an idea needed to be supplemented with a strong defence of change of position / loss of enrichment as a logical consequence. Although some jurisdictions (for example Italy, Brazil, etc.) have opted to limit the ambit of such general principle by making the whole law of unjustified enrichment subsidiary to the other fields of obligations, the defence of change of position certainly plays a major limiting role in many systems. In any event, the concept of disenrichment (or change-of-position) appears prominently in the German BGB and several German authors<sup>6</sup> have devoted efforts to its clarification. Gordley,<sup>7</sup> analysing comparatively such notion in the BGB, expresses the view that the drafters of the BGB took it from the nineteenth-century Pandectists, especially Windscheid and Savigny, both of whom seem, in turn, to have taken it from members of the seventeenth-century and eighteenth-century natural-law school such as Grotius and Pufendorf. They, again, took it from a group centred in Spain in the sixteenth century and known to the historians as the late scholastics. The late scholastics came to the notion of loss of enrichment as a defence while discussing the implications of Aristotle's concept of commutative justice as it had been interpreted by Saint Thomas Aquinas. The latter was of the view that 'if the transaction was purely for the benefit of the person who received the property – for example a gratuitous loan - then compensation is due even if the property has been lost; if it was purely for the benefit of the owner - for example, a deposit, - then compensation is not due except if the loss was caused by grave fault'.<sup>8</sup>

Secondly, the recipient might be liable merely because he had another's property, regardless of how he had come by it (*ipsa res accepta*). According to Aquinas, commutative justice required that he gives it back.<sup>9</sup> In this last case, according to the late scholastics, and then Grotius<sup>10</sup> and Pufendorf,<sup>11</sup> a person who no longer has another's property should still be liable if he has become richer by having once had it. Such a person is liable only to the extent he is still enriched. Thus he is not liable if he consumed another's property or gave it away, except to the extent that he saved money he would otherwise have spent. He is also not liable if he bought and then

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many legal historians and scholars took it from Aristotle. See Zimmermann R, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996) 10-11.

<sup>5</sup> Feenstra R, 'Grotius' Doctrine of Unjust Enrichment as a Source of Obligation: Its Influence in Roman-Dutch Law' in Schrage E (ed.) *Unjust Enrichment* (1997) 197; and see especially Hugo Grotius H, *Indeilinge tot de hollandse rechts-geleerheid* 3.30.13. Some authors doubt that Grotius in this paragraph is discussing a formulation of a general principle, and hold that he was merely discussing the *condictio sine causa specialis*. For the different opinions see on the issue see Hallebeek J, *The Concept of Unjust Enrichment in Late Scholasticism* (1996) 87-103.

<sup>6</sup> For a summary of old authorities on whether non-enrichment is a defence to the *condictio indebiti*, especially in German law, see *King v Cohen, Benjamin and Co.* (1953) 4 SA 641 (W); Staudinger-Lorenz § 818 No. 12; Zimmermann R *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 887-890. For the *condictio* in general see also Malan F R 1992 *Acta Juridica* 131-147.

<sup>7</sup> Godley J, 'Restitution Without Enrichment? Change-of-Position and *Wegfall der Bereicherung*' in Jonhston D & Zimmermann R (eds) *Unjustified Enrichment: Key Issues* (2002) 229-228.

<sup>8</sup> *Summa Theologiae* II-II, Quaest. LXII, art.6. (1974 Walsh G Translation).

<sup>9</sup> *Ibid.*

<sup>10</sup> *De Jure Belli ac Pacis, Libro tres* (1646), II, X, 2.1 (1909 edition by Molhuysen P C).

<sup>11</sup> *De Jure Naturae ac Gentium Libri Octo* (1688), IV, XIII, 6. (1909 edition by Molhuysen P C).

resold another's property except if he made a profit.<sup>12</sup> Finally, James Gordley thinks that the late scholastics as well as Grotius and Puffendorf reached their conclusions by an exercise of setting some reasons aside. They first started by setting aside every other reason that the plaintiff might recover until all that is left is the defendant's enrichment by means of the plaintiff's resources. It is then a defence that the defendant is no longer enriched, but only if he no longer had the plaintiff's property and is not liable because of the way he had initially acquired it, whether wrongfully or with the plaintiff's consent.<sup>13</sup>

Daniel Visser,<sup>14</sup> following a slightly different route by analysing the orientation of various *condictiones* throughout their history, begins by reaffirming that the orientation of 'Roman law was towards the recovery of that which had been given and not towards restoring the balance of enrichment remaining with the enrichment debtor'. However, Visser continues, 'this view that endured tyrannically for centuries caused a discrepancy in the substantive law, because the loss of a *species* was considered a good defence in an enrichment action, but not the loss of a *quantitas*, of a class'.<sup>15</sup> Although some of the medieval jurists apparently realised the logical fallacy of allowing loss of enrichment to be pleaded where a slave was killed by accident, but not where the mice ate a sack of corn, they nevertheless never summonsed the intellectual courage to develop this understanding into a rational solution. It was only with the Pandectists, argues Visser, that it came generally to be accepted that loss of enrichment could be pleaded both in the case of a *species* and of *quantitas*.<sup>16</sup>

Visser arrived at such a conclusion after a detailed examination and interpretation of selected passages of the *Corpus Iuris Civilis* (the Digest) in the European *ius commune* culminating with Flume's<sup>17</sup> analysis of D 12.6.26.12,<sup>18</sup> the central text around which Flume had concluded that the 'loss of enrichment could ward off the *condictio* in all cases'. This text, states the following:

'He also points out that it does happen on occasion that we can bring a *condictio* for something different from what we handed over. For instance, I give land not owed and bring a *condictio* for its fruits; or I give a slave not owed, and you sell him honestly for a small sum ('*modico*') in which case you certainly need only give back what you have left from the price ('*quod ex pretio habes*'); or again, if I have made the slave more valuable by expenditure upon him, must not this too be valued?'.<sup>19</sup>

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<sup>12</sup> Gordley J in Johnston D & Zimmermann R (ed) *Unjustified Enrichment: Key Issues* (2002) 229.

<sup>13</sup> *Ibid.* 229.

<sup>14</sup> Visser D P 1992 *Acta Juridica* 175; Visser DP, *Unjustified Enrichment* (2008) 703ff.

<sup>15</sup> Visser DP 1992 *Acta Juridica* 175, 180-186.

<sup>16</sup> *Ibid.* 186.

<sup>17</sup> Flume W 'Der Wegfall der Bereicherung in der Entwicklung vom römischen zum geltenden Recht' in *Festschrift für Hans Niedermeyer* (1953) 103ff as cited respectively in Visser D P 1992 *Acta Juridica* 175.

<sup>18</sup> '*...et interdum licet aliud praestamus, inquit, aliud condicimus: ut puta fundum indebitum dedi et fructus condico: vel hominem indebitum, et hunc sine fraude modico distraxisti, nempe hoc solum refundere debes, quod ex pretio habes; vel meis sumptibus pretiosorem hominem feci, nonne aestimari haec debent?*' [...he also points out that it does happen on occasion that we can bring a *condictio* for something different from what we handed over. For instance, I give land not owed and bring a *condictio* for its fruits; or I give a slave not owed, and you sell him honestly for a small sum ['*modico*'] in which case you certainly need only give back what you have left from the price ['*quod ex pretio habes*']; or again, if I have made a slave more valuable by expenditure upon him, must not this too be valued?]. (Visser's translation at Visser D P 1992 *Acta Juridica* 175).

<sup>19</sup> Visser D P 1992 *Acta Juridica* 175, and Visser D P, *Unjustified Enrichment* (2008) 706.

The gist of the matter, according to Visser, is what is meant by ‘*quod ex pretio habes*’ for some translate it as meaning ‘what you have left from the price’<sup>20</sup> while others as meaning ‘what you have received as price’.<sup>21</sup> Noting that both translations are grammatically possible, Visser argues that the true meaning of those words could only be arrived at by analysing the full context in which they are used coupled with evidence elsewhere in the Digest. Hence, a reading of D 12.6.65.5-8 and the interpretation given to it by certain glossators,<sup>22</sup> and Commentators,<sup>23</sup> as well as by some Roman-Dutch jurists<sup>24</sup> and some German members of the *ius modernus pandectarum*,<sup>25</sup> and after reconciling some differences between glossators and commentators, led Visser to conclude that there was a degree of consensus in the *ius commune* that ‘*quod ex pretio habes*’ had to be read as meaning ‘that which was received as price’.<sup>26</sup>

This meant that the position in the *ius commune* (until the time of the Pandectists) was as it was in Roman law, namely:

‘If you lost a *species* you need not restore it, because loss of a *species* can be pleaded. However, if you have received money in the place of the *species*, you had to restore the money that you received – whether you still have it or not – because money is a *genus* and loss of a *genus* cannot be pleaded’.<sup>27</sup>

Given that the loss of *species* until then could be pleaded, as a defence, but not the loss of a *genus*<sup>28</sup> and the law still considered the calculation of exactly what had to be restored where a *species* had been lost, as being firmly based on the defendant’s surviving enrichment, it follows that ‘if the price received from the *res* was lost, the enrichment-debtor would remain liable, because money is a fungible, a *genus*’.<sup>29</sup> That finally conforms with the original *condictio* according to which a *genus* could never be considered lost, and that only the loss of a *species* could be contemplated.<sup>30</sup> Furthermore, Visser explains the reason why the price, and not the true value, of a *species* which had been disposed of, must be restored. That is so because it represents the defendant’s remaining enrichment.

Finally, Visser opines that it was Glück<sup>31</sup> that took the next step by allowing a loss of enrichment as a defence even where a *genus* was concerned.<sup>32</sup> Glück’s views were

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<sup>20</sup> Cf. Kruger, Mommsen & Watson edition of the *Corpus Iuris Civilis* (1985) and Zimmermann R, *The Law of Obligations. Roman Foundations of the Civil Tradition* (1990) 899.

<sup>21</sup> Flume W, ‘Der Wegfall der Bereicherung in der Entwicklung vom Römischen zum geltenden Recht’ in *Festschrift für Hans Niedermeyer* (1953) 103, 104-6.

<sup>22</sup> E.g. the Acursian gloss ‘*Non Tenebris*’ to D 12.6.65.8; The gloss ‘*Soluto*’ to D 12.6.65.6; The gloss ‘*Habes*’ to D 12.6.26.12; the Cannon law gloss ‘*Ad pretium*’ to D 12.6.65.8.

<sup>23</sup> Bartolus *Opera Omnia* (Venetiis 1596) ad D 12.6.7; Jason de Mayo *In Secundum Digesti Veteris Partem Commentaria* (Venetiis 16 29) ad D 12.6.7.

<sup>24</sup> Hugo Grotius, *Inleidinge...* (1952 Edition by Dovring F, Fischer HFWD & Meijers EM ); DG van der Keessel, *Praelectiones iuris ad Hugonis Grotii Introductionem at Iurisprudentiam Hollandicam* (1738-1816); Pauw W *Observationes Tumultuariarum Novarum* (1712-1787).

<sup>25</sup> Lauterbach W A, *Collegii Theoretico-Practici* (Tubingen 1726) 12.6.29; Claudius A, *De Condictione Indebiti Commentarius* (Francofurti 1605) Ch.7); and Glück C F, *Ausführliche Erläuterung der Pandekten* (1798-1896) vol d ad D.12.6 (§835); Faber A, *Rationalia ad Pandectas* (Genevae 1626-1631) and D 12.6.7 and D 12.6.65.6.

<sup>26</sup> Visser DP 1992 *Acta Juridica* 181-183.

<sup>27</sup> Visser D P, *Unjustified Enrichment* (2008) 704 and 714.

<sup>28</sup> Visser cites here a 1745 Dutch case reported by Pauw W in *Observationes Tumultuariarum Novarum* (Fischer WD et al) vol. 1 (1964) 103 (case no. 148).

<sup>29</sup> Visser D P *Unjustified Enrichment* (2008) 703ff.

<sup>30</sup> Visser D P 1992 *Acta Juridica* 185.

<sup>31</sup> Visser sustains this contention by referring directly to Glück C F, *Ausführliche Erläuterung der Pandekten* (1791-1896).

partially in contrast with what the French Humanist Donnelus held in reading the same Roman texts, namely, that a recipient of an undue payment, like a debtor in the case of a loan, bears the risk of the *indebitum* perishing where such *indebitum* is a fungible. Visser indicates that Glück countered this view by arguing that there was a great difference between an obligation based on loan and that based on *indebitum*, since the first rests on contract and persists even though the recipient no longer draws benefit from the loan, while the latter persists only in so far as the recipient has been enriched'.<sup>33</sup>

#### B. *The Current Civilian-Law Approach to Loss of enrichment (Change of Position).*

The defence of change of position/loss of enrichment is generally held to be available where the loss suffered by the defendant is causally connected to his enrichment. *Mala fide* defendants are generally excluded from the defence. Where the defendant has incurred expenses for up-keeping or improvements of the enrichment object, these expenses can be deducted under change of position defence to the extent that such expenses cannot be deducted from secondary sources.<sup>34</sup> For example, in German law where the defence is prominent, the cardinal principle of enrichment law is that 'the recipient must under no circumstance end up worse off than before the enrichment'.<sup>35</sup> This notion permeates both the jurisprudence of the courts<sup>36</sup> and academic writings. The principle is further given full effect by interpreting BGB § 818 (I) narrowly, so as to make the defence available even to a defendant who has been grossly negligent in failing to appreciate the fact that he was not entitled to keep the enrichment.

The diverse manifestations of the defence appear generally in the following factual scenarios, though in some jurisdictions some of them will not be entertained: (i) where there is loss of the benefit itself; (ii) where there is an uneconomic use of the benefit; (iii) where there is an expenditure incurred in connection with the benefit;<sup>37</sup> (iv) where there are other expenditures causally connected to the enrichment, and (v) controversially, where mutual performances have been exchanged and the situation creates an interface between the transfers and the application of BGB § 818 III provisions. In this last situation German law, for example, usually employs its famous *Saldotheorie*<sup>38</sup> (the difference in value between performances). In other words, in the case of bilateral contracts which have been avoided *ab initio*, if performances have passed both ways, the measure of the enrichment claim is the difference in value between the performances. But there are occasions where the *Zweikonktionenlehre* is applied in cases of return of counter-performance impossible, particularly where the contract has been rescinded on ground of deceit, or is void for a minor's lack of

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<sup>32</sup> Visser D P 1992 *Acta Juridica* 185. Visser here bases his view on Vol. 5 ad 12.6 (§ 835) of Glück *Ausführliche Erläuterung der Pandekten*.

<sup>33</sup> Visser D P 1992 *Acta Juridica* 185.

<sup>34</sup> BGH 11 January 1980, NJW 1980, 1970; Markesinis BS, Lorenz W & Dannemann G, *The German Law of Obligations* (1997) 764.

<sup>35</sup> Zimmermann R (2005) 15 *OJLS* 403 at 413.

<sup>36</sup> For a collection of German cases on this issue and incidental matters translated into English see Markesinis B S, Lorenz W and Dannemann G, *The German law of Obligations*, Vol. I (1997) 770-816 (Gerhard Dannemann's translation).

<sup>37</sup> See for example Case No. 131 BGHZ 118, 383 (Bundesgerichtshof 12<sup>th</sup> Civil Senate 17 June 1992 (English Version by Dannemann G in Markesinis B S, Lorenz W & Dannemann G, *The German law of Obligations* (1997) 777-778).

<sup>38</sup> The other competing theories to the *Saldotheorie* are the *Zweikonktionenlehre* and the *Lehre vom faktischen Synallagma*.

capacity to contract.<sup>39</sup> Because the provisions of § 818 III BGB limit the duty to make restitution in *species* or in money to the surviving enrichment, the ‘something’ which has to be returned under the general provision in § 812 BGB is generally considered that it ‘cannot be any single value which has passed from the claimant to the defendant, but only the totality of what has passed taking account of the values which were given in exchange and the encumbrances resting on what has been received’.<sup>40</sup>

## II. Developments in the Common-Law Systems.

The history of change-of-position in common-law jurisdictions is closely associated with the development of *indebitus assumpsit*. One of the landmark cases in that development is *Moses v MacFerlan* in which Lord Mansfield among other things, said the following:

‘This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which *ex aequo et bono*, the defendant ought to refund; it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty ... In one word, the gist of this action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity to refund the money*’ (emphasis added).<sup>41</sup>

From that proposition, as a matter of logical conclusion, Lord Mansfield adds:

‘It is the most favourable way in which one can be sued: he can be liable no further than the money he has received; and against that, may go into every equitable defence, upon the general issue; he may claim every equitable allowance; etc; in short, he may defend himself of everything which shows that the plaintiff, *ex aequo et bono*, is not entitled to the whole of his demand, or to any part of it’.<sup>42</sup>

These texts clearly manifest that ‘unjust enrichment’ is rooted in equitable principles in the common-law world, and as such if recovery by the plaintiff is a matter of equity, and the plaintiff may always recover whenever it is equitable to do so, it also follows that the defendant must prevail when the equities are in his favour. Said differently, where the equities are equal, the loss lies where it falls. Early interpretations of the right to recover money paid under mistake, especially in American law<sup>43</sup> were to the effect that if the right to recover money paid under mistake was held to be measured by equitable principles, equitable defences would also adhere to it. Given the fact that change-of-position was a defence in equity, it also followed that change-of-position was a defence in quasi-contracts.<sup>44</sup> In a detailed

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<sup>39</sup> Example that fall on the application of the *Zweikonditionenlehre* would be where A is deceived into buying a car with serious safety defects, and these very defects cause an accident in which the car is destroyed. In this case, it is argued, A can rely on change of position and still claim back the purchase price. (See generally Markesinis & Dannemann, *The German Law of Obligations* (1997) 765).

<sup>40</sup> Staudinger/Lorenz § 818 No. 50 (as cited in Krebs T, in Schrage E J H (ed) *Unjust Enrichment* (2001) 311).

<sup>41</sup> *Moses v MacFerlan* 2 Burr 1005, 1012 (1760).

<sup>42</sup> *Moses v MacFerlan* 2 Burr 1005, 1012 (1760).

<sup>43</sup> Costigan G (1907) 20 *Harvard Law Review* 205; Cohen H (1932) *Harvard Law Review* 1333, 1344 n 33.

<sup>44</sup> Cohen H (1932) *Harvard Law Review* 1333, 1345 n. 35. For the opposite view see Costigan G (1907) 20 *Harvard Law Review* 205.

analysis of the defence, George Costigan,<sup>45</sup> back in 1906 discussing the various circumstances in which the defence arose, especially where neither party was negligent, held that ‘the principle which forbids the defendant enriching himself at the expense of the plaintiff should clearly forbid the plaintiff indemnifying himself at the expense of an innocent and blameless defendant’. In a modernised philosophical language, one would say with Lionel Smith<sup>46</sup> that ‘the plaintiff’s claim being based on the Kantian right, i.e, on his status as a self-determining agent, he must respect equally the defendant’s Kantian right’ – i.e, recognise the autonomy of the defendant as self-determining agent. That is so because in any circumstances in which the defendant, before he has any reason to suspect he is liable to a claim in unjust enrichment, he cannot be faulted for behaving as a self-determining agent, including through consuming that which he reasonably believes to be his own wealth. Therefore, in a common-law system, the defence of change-of-position is primarily aimed at protecting the security of the receipt. That notion also accords with the liberal and individualistic approaches of the common-law towards restitution in general and its ordinary system of risk allocation. The defence is concerned with protecting the security of receipt because it is reckoned that where the defendant believes in good faith that he is the owner, ‘no moral issue’ is involved, because ownership is the ultimate right ‘in property’. Where such defendant has changed his position, to deny him a defence would be tantamount to subjecting him to liability without fault and without corresponding benefit. Furthermore, if it is also assumed that the plaintiff is equally without fault, then, the only question that indeed arises in such circumstances is which of the two innocent persons shall bear the loss that has been incurred.<sup>47</sup> The equities being then equal, as already mentioned in the introduction to this article, common-law in general sees no reason why the plaintiff’s loss should be shifted to the defendant who neither made a mistake nor reaped a benefit. Consequently, the logical conclusion is that in such cases the loss should indeed lie where it now falls.

## Conclusion

The common-law and civil law of unjustified enrichment developed along different lines, especially from the sixteenth Century. Both, however, had been influenced by the social thoughts of their times and particularly by the theological and natural law schools prevalent at the time. The notions of justice that prevailed at any given time and the social context in which they operated cannot be dissociated from the legal reasoning of that period. For English law, during the time where justice could not be obtained from the common-law courts due to the rigidity of the rules applied there, a claimant could have recourse to the courts of equity for a remedy, and courts of equity basically applied ‘natural law’ principles. We have seen that the very notion that no one should be enriched at the expense of another without justification, was a notion founded in equity and the defences that could be advanced by a defendant were also seen as equitable, although with some reservation in many instances. The extension of the Roman remedies in civil-law jurisdictions has some equitable elements as well, and when a general principle against unjustified enrichment was finally formulated, it became inevitable that its application should also be complemented with adequate defences to protect the interest of defendants. The most important defence has

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<sup>45</sup> Costigan G (1906) 20 *Harvard Law Review* 205, 214.

<sup>46</sup> Smith L D (2001) 79 *Texas Law Review* 2115, 2148-2149.

<sup>47</sup> The notion of fault is more prevalent in some United States jurisdictions than in Commonwealth jurisdictions.

generally been accepted to be change of position or loss of enrichment. Although some jurisdictions do not directly have such a defence, or give it that name, they do have subtle mechanisms that in effect amount to applying a defence of change-of-position.

Given that whenever there is a claim in unjustified enrichment a tension will inevitably arise between the demand for restitution of what was acquired without legal ground and the general interest of the receiver to protect his own assets, those jurisdictions that recognised a general principle against unjustified enrichment realised early on that the easier it is made to claim restitution, the more vulnerable members of society becomes in securing their own wealth and investments. Therefore to protect both interests, any generally liberalised system of unjustified enrichment had to afford honest and bona fide receivers a general tool to resist such claims whenever a receiver, inter alia, disposed of a wealth that appeared to be his own as a self-determining agent.

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