

REVIEW ARTICLE

“QUASI-CONTRACT”: LOST CAUSE OR CURRENT ISSUE?

THE LAW OF QUASI-CONTRACT (Second Edition), by SJ Stoljar, LL.M., PhD, LL.D., Emeritus Professor of Law and Visiting Fellow, Australian National University. Sydney. Law Book Co, 1989. xxv+261pp. Price \$Aus49.50 (no NZ price).

This first edition of this book was published in 1964, and was a pioneering work in its time. The second edition has taken into account more important examples of recent authority on the law of quasi-contract, where there has been considerable movement in recent years. The author has nevertheless, with one important exception which will be dealt with at some length later in this review, retained the direction and layout of the original work. The result is a discussion of Quasi-Contracts which retains and strengthens the many original insights the author offered in the first edition, while making little concession to other contemporary theorising in this troubled area of law. It constitutes a distinctive and valuable addition to the resources now available to practitioners and students of what, since the author first wrote, Commonwealth lawyers have come to know by its American name, the “law of restitution”.

The first edition was received by the academic community with mixed feelings. While admiring the erudition and originality of Professor Stoljar's contribution to the subject, commentators sought from the book things which (as can now be seen in retrospect) it plainly did not and could not provide. There was no attempt to state the law in the form of clear and distinct rules of law, as one might expect of a work intended as an authoritative secondary source of the law of quasi-contract. Nor did the work describe a framework for the future development of law, based on well thought out policy considerations and a coherent legal theory. It was too questioning in tone, and discursive in approach, to serve either of these purposes. Such theory as it offered looked as much to the past as it did to the future, and led Professor John Wade to suggest that the adoption of Stoljar's thesis would restrict legal theory in a way which was “distinctly retrogressive and essentially unsound” (in (1966) 16 Toronto LJ 473, 474).

That last assessment would appear to have been premature. Not infrequently, in the second edition, Stoljar offers us a more extensive view of the law than is supported by contemporary restitutionary theory. And while the book has its limitations, these are of much lesser significance now that the material which was once lacking has been provided from other sources. The leading textbook on the subject in the Commonwealth, Lord Goff and Professor Jones' *Law of Restitution* (1966) (now in its third edition), comprehensively meets the need for a reliable account of the received law, as well as making suggestions for its improvement. The underlying theory is further discussed in depth by Professor Birks in his *Introduction to the Law of Restitution* (1985). Both of these texts are given

over to the idea that the future development of the law of quasi-contract (and related equitable doctrines) lies in the increasingly precise elaboration of the concepts central to the notion of "unjust enrichment". What requires analysis, in their view, is (a) the concept of "benefit"; (b) the circumstances in which a benefit will be regarded as having been acquired "at the expense of" the plaintiff; and (c) what must be established in order to show that any such acquisition is "unjust". Professor Birks accomplishes this analysis with considerable sophistication and refinement.

So successful have these efforts been that the term "restitution" has now come to be associated with the approach these authors have adopted. But it is only one possible view of the law of quasi-contract. By offering a second edition of his book, Stoljar invites us to return to the very different ideas which fascinated him in the 1960s, to see what role, if any, they should play in contemporary thinking. Even if the book had remained substantially unchanged (which it has not), a return to these ideas would be timely, and would serve a quite different function in the 1990s, than it did when the book was first written. Nowadays, far from suffering an insufficiency of theoretical treatment, we have a steady stream of writing and thinking about restitution, to which not only academics, but courts too, are turning for guidance. If it becomes the new orthodoxy, it will need independent critics like Stoljar, who are determined to put these new, and seemingly overwhelming, ideas in the wider perspective that distance, and a deep study of legal history, have afforded him.

The author accepts neither the broad generalisations of the modern theorists, nor the precise formulations of the law found in those judgments which are frequently quoted in texts and other judicial opinions. He seems to regard present day law, when it is taken as a whole, as being largely in an unsettled state, and avoids any assumption that it can be presented as a series of concrete rules. He offers instead what are in effect a series of colloquies with the subject, looking at the facts of particularly critical cases, as well as their conclusions and implications, and then gently probing the resulting principle, in the light of other relevant authorities and general good sense. He is still less inclined in this edition, than he was in the first, to mould his subject matter so as to conform with the plan of the subject he sets out to follow in Chapter 1, let alone to fit it in to some pre-conceived pattern for decision. The emphasis is much more upon the way in which each case is set in the context of the historical development of legal doctrine.

As with any conversation with a stimulating colleague, there are both high points, which lend themselves to this form of discussion, and low points where the topic never really seems to get off the ground. This reviewer particularly enjoyed Stoljar's account of the law of money paid under official constraint, in Chapter 3, the clear-eyed view he gives of the defence of "voluntariness" in cases of money paid under mistake (ch 2), and his treatment of mistakes of law and constraint of legal proceedings (chs 2, 3). These give a telling picture of some of the inherent contradictions to be found in this area of law, and are perfectly consistent with Goff and Jones' preference (at pp 36-38 of the third edition of their book) for solving such problems by reference to the particular circumstances of each case,

rather than by abstract rules as to what does, and what does not, constitute a "mistake", for the purpose of obtaining recovery of money so paid.

One may not agree with the conclusions reached in passages such as these; for example, the explanation given of the much-discussed case on money paid under mistake, *Aiken v Short* (1856) 1 H & N 210, seems deeply mysterious (pp 32-34). One may also think that many other factors ought also to be taken into account in determining what the law is or should be. But Stoljar generally succeeds in presenting the salient case law in succinct form, and in showing what a distance the law has yet to go before the problems it raises are satisfactorily resolved.

The reader will encounter some difficulties of style in the book. The ideas advanced in the first edition of this work proved, for reasons not altogether attributable to their novelty and inherent complexity, difficult to grasp, even for readers with some familiarity with the subject. The author has re-worked a number of key passages. As a result, it now seems (at least to this reviewer) considerably easier to follow the general direction the work is taking. If some of the points advanced are refined and puzzling, they are at least inherent in the author's thesis. A new system of headings has also helped. Yet stylistic blemishes remain, sometimes accidental and sometimes persistent. Who, for example, wishes to be reminded that they stand in constant peril of "misunderstanding" or being "misled", or (still worse) that "everyone knows" the very thing they have consulted the book to find out? In general, however, the challenge of the substance of the book is well worth the suffering of such minor and infrequent irritations.

Occasionally, too, one meets points where exception may be taken to matters of detail. In Chapter 2, for instance, when he deals with *In re Diplock* [1948] Ch 465 (p 44), Stoljar hails the case as an example of the development, in an equitable proprietary claim, of a rudimentary change of circumstance defence. He omits to point out that all the wrongly paid charities in that case were forced, by reason of the claimants' alternative in *personam* claim, to pay back precisely the sum they had received, and that on appeal to the House of Lords (*Ministry of Health v Simpson* [1951] AC 251, 276) Lord Simonds specifically rejected any suggestion that there might be a change of circumstance defence to that claim.

In Chapter 3, dealing with compulsion, the facts of the difficult case of *Kendal v Wood* (1871) LR 6 Ex 243 seem to be fundamentally mis-stated (p 83). And, in Chapter 7, where Stoljar deals with agency of necessity, no reference is made to the important decision of *China Pacific SA v Food Corporation of India (The Winson)* [1982] AC 939. But these are not points which reflect on the validity of Stoljar's underlying thesis.

That thesis is well worth describing in some detail, at the risk of prolonging this commentary beyond customary limits. Hence the decision to offer readers of this journal not a paltry "book review", but a "review article". If they wish, they need see in this change of style little more than confirmation of the existence of unbounded academic pretension. Be that as it may, there is much that needs to be said about Stoljar's thesis and its implications.

At the centre of Stoljar's reasoning is his claim that restitutionary

theorising is altogether too grand for the purpose at hand (as to which, see also his article "Unjust Enrichment and Unjust Sacrifice" (1987) 50 *Mod L Rev* 603). He says in his preface that "far from called upon to unfurl a restitution flag wherever possible, quasi-contract is a relatively 'small' subject, essentially pre-occupied with two central ideas: restitution of things, primarily money, and restitution for services, particularly unsolicited services". The reader who can cope with, and see beyond, the not altogether happy image of a quasi-contract unfurling a flag (instances of the "pathetic fallacy" are not uncommon in the book) will find in this alternative theory a useful counterbalance to the restitutionary approach.

The author has, indeed, pursued his independent line so uncompromisingly that current restitutionary theorising has been virtually excluded from consideration, apart from the occasional footnote reference. There is little evidence that the author has struggled with the modern theory and found it wanting. He simply prefers his own view of things, and that is all. When dealing with the general theory of the subject in Chapter 1, for example, he restates the basic position adopted in the first edition. Then, after acknowledging restitutionary theory and pointing out briefly his general objections to it, he appears to dismiss the principal arguments in its favour to a brief footnote, in which the reader is referred "for more recent views" to the books referred to above, and to the American text by Professor Palmer (p 3, f/n 4). Nor is reference made in Chapter 1 to any law journal articles appearing since the first edition (except those of the author), despite the wealth of challenging periodical literature which has emerged during the intervening time.

In this fundamental way, Stoljar invites us to part company right from the outset with contemporary theorising, without pausing to consider for one moment what it is that we may be missing. There is, in his view, simply no need to posit any grand theory of unjust enrichment, which only serves to confuse matters (pp 1-2). His first reason for eschewing restitutionary theorising is that it covers far too much, for example, all cases where property has got into the hands of another person and ought to be returned. There is some substance in this claim; the reader may find it interesting to compare the attempts made by Goff & Jones (3rd ed at pp 60-62) and Birks (at pp 15-16, 49-73) to distinguish property law from the law of restitution.

But on this point the rejoinder will no doubt be that to limit enquiry (as Stoljar does) to those cases where the primary remedy lies for the recovery of money, or the value of services rendered, in quasi-contract (and is therefore within the common law inheritance), is likely to prove an even less satisfactory alternative. It is then difficult to deal thoroughly with comparable doctrines (both in equity, and at common law) relating to the avoidance of contracts. An example is Stoljar's own treatment of duress by threatened breach of contract (ch 3), where he is obliged to bring in cases on the setting aside of contracts. He does not seem convinced that they really belong there and the whole treatment of this topic is less than complete (there is no discussion, for example, of what constitutes a "wrongful" threat for the purpose of economic duress). It is also difficult to do full justice to equitable doctrines which existed alongside the common

law when the jurisdictions were separate, such as breach of fiduciary duty; Stoljar's own treatment of that topic in Chapter 4 is virtually confined to the recovery of bribes.

Stoljar's second reason for rejecting restitutionary theory is more interesting, because it opens up an entirely unexpected perspective in the debate (or rather, stand-off) between himself and the restitutionary theorists. He claims that they are unable to bring quasi-contractual recovery for unsolicited services within the ambit of their theory, since (as seems to be generally agreed upon in England, though perhaps prematurely) services which the defendant has neither asked for nor elected to accept cannot be regarded as a "benefit" in the law of restitution. Stoljar, on the other hand, because he does not believe that the law of quasi-contract is constrained by any such fetter, maintains that when it is properly understood, it may well offer remedies for unsolicited services. So strangers who improve another's land under a mistake (pp 52-58), or who intervene to protect another's property in case of emergency (pp 208-213) could have a remedy. And in dealing with those who, without solicitation, pay off another's debt (ch 6) he clearly has no time for refinements of theoretical reasoning based on the view that, unless the debtor authorises the payment, the debt remains unpaid and so the debtor is not enriched (compare, eg, Birks, pp 288-290).

This assertion turns the tables on the restitutionary theorists in a particularly piquant way. At least on an unsophisticated view, if I, without your knowledge and approval, put a house on your land, or provide services which improve your financial position, or pay off one of your debts so the creditor is no longer at your door, then you are "enriched". Whether you should have to pay me for what has been done is, perhaps, another matter, although if the benefit is conferred by mistake or compulsion, and the benefit can be restored without your suffering practical hardship, there is a lot going for the argument that you should. However, the different historical origins of the causes of action I must rely on here make it much more difficult for me to recover than if, for example, if I had paid you money under a similar mistake or compulsion.

Those who are developing restitutionary theory are very sensitive to these limitations of case law, and try to adapt their theory accordingly. This is the source of a paradox. The restitutionary theorists, despite their "grand" theory, appear reluctant to acknowledge that such cases come within it, whereas Stoljar, who is sometimes accused of taking a narrowly historical focus on these matters, thinks that recovery should be allowed. At first sight, he seems on these issues to be more restitutionary than the restitutionalists.

The reason for this new and surprising boldness lies in an important change in Stoljar's theoretical stance. In the first edition of the work, he took the view that all quasi-contracts fell basically into two categories. In the first, the court is giving effect to *property* rights of the plaintiff, who (having not fully consented to parting with money) remains the owner of it in the eye of the law, even though it has come into the hands of the defendant. It includes such common examples as money paid under mistake, money paid under duress, and money acquired as a result of a

wrongful act. The second arises where money has been transferred, or services rendered, under a void or ineffective contract, the basis for liability in these cases being consensual or *transactional*. No other categories were considered.

This left without a home, the cases to which reference has been made (improvements of another's property, unsolicited services, and payments of another's debt). Stoljar at that time argued that there was no general right of recovery for the first (p 183); recovery in the second was confined to a few anomalous exceptions (p 187); and in third class of case recovery was allowed on the basis of a proprietary theory (p 126). This last argument was not unjustly criticised with some severity when the first edition appeared; no reference is made to it in Chapter 6 of the present edition.

Stoljar's new position is that there is indeed a third category, comprising all of the cases mentioned (see p 18, and compare that with p 17-18 of the first edition). To find the underlying theory on which this third category depends requires, unfortunately, rather closer attention than certainly the casual reader, and even perhaps the reasonable one, will be prepared to lavish on the work. Reference is occasionally made in the book to the words *unjust sacrifice* (a term which is imperfectly indexed), but these are nowhere comprehensively defined. Nor, if the items mentioned do belong to a single coherent group, has the author structured the work so as best to take advantage of that coherence.

Stoljar adopts the following layout for this category of quasi-contract. *Improvement of another's property* is put ("for the sake of convenience and contrast" — p 19) into Chapter 2, which deals with money paid under mistake. Although the two classes of case are said to be "very different" (p 52), when one reaches the end of that chapter, if any rationale emerges at all, it seems to be the same for both. *Payments of another's debt* have their own chapter (ch 6); but we are told from the outset that this is only a "beginning", and the principles will be "principally developed" (see p 18) in Chapter 7. Chapter 7, however, is largely concerned to draw the distinction between contractual remedies and recovery for *totally unsolicited services*; having not been much re-written since the first edition, it hardly bears the weight of the principal development it is supposed to support.

But a picture can be pieced together. At first, one suspects that Stoljar may, despite his protestations, be a restitutionalist after all. In Chapter 6, he argues that money used by P to pay off a debt owed by D is recoverable because it "bestows upon D a clear financial benefit" on that person (p 152), or, as he says later (p 161) "[t]he reason is that P's payment does discharge a debt owed by D, so that unless there is a reimbursement via money paid, D would gain a benefit, while P would suffer a sacrifice, without any real justification why either should".

But already clouds are beginning to form over this idyllic restitutionary landscape, in the form of a much wider rationale; that "the one who must ultimately pay this money, should alone be answerable here" (p 153), a principle enunciated in one of the early cases which, according to Stoljar, if it had "been followed ever since . . . would have provided a far simpler and more coherent basis for the whole development of money paid" (p

174). Although, admittedly, he follows this last statement up with reference to the fact of *both* P's non-officious action and "sacrifice", *and* D's enrichment, ground has already been laid for the argument that what is really important is not D's *enrichment*, but D's *obligation*.

This latter is then emphasised (and reference to enrichment avoided) when the author goes on to deal, in the same chapter, with the right of contribution. And indeed, we may well conclude that the mere fact that D is enriched is insufficient to justify cases such as these, as is evident from cases where P saves D an expense which D is under no *legal* obligation to incur: see at 180, where Stoljar refers to the case of *Ruabon SS Co v London Assee* [1900] AC 6, 12. The implication is that "unjust enrichment" is an incomplete explanation for the answers which the law of quasi-contract gives in these cases.

This point is made explicitly in the next chapter, when considering the supply of necessities to lunatics, minors and deserted wives. Here, liability "cannot . . . be predicated on unjust enrichment or benefit . . . [but] can only be seen as resting on . . . unjust sacrifice" (p 201; cf at pp 212-213). The sacrifice lies in the plaintiff's application of money or labour in the defendant's interests, coupled with the plaintiff's intent to charge for what is done; but there is no corresponding enrichment, since it constitutes a service which the person receiving has not asked for (or cannot ask for in law) (p 197). The critical thing here seems to be the defendant's duty (in a broad sense) to recompense the plaintiff for the particular expenses that have been incurred. As Stoljar goes on to say of the provision of essential services to a bank which went into liquidation, "P's right to recompense should not depend upon whether the bank is actually enriched but whether P's efforts, if unrewarded, become an unjust sacrifice". This, in Stoljar's view, brings the whole of English law very much closer to the civilian doctrine of *negotiorum gestio* than has hitherto been recognised (p 221).

In other words, the decisive factor, and the one common to all these cases, is the fact of the plaintiff's sacrifice or loss. This will sometimes, but not invariably, be coupled with an enrichment on the defendant's part (though even here, the defendant's duty to pay the money or carry out the work is an equally important consideration). But a category of quasi-contractual obligations which includes cases where there is admittedly no enrichment, cannot be described as restitutionary; the amorphous concept of "sacrifice" is therefore the more appropriate one.

This view poses a more serious challenge to restitutionary theorists than they, perhaps, are prepared to admit. Maybe we will see them moving to re-capture territory which appears to have gone by default; it is perfectly possible to argue that a thorough-going restitutionary theory can (and, whatever the cases say, should) extend to these situations, and that a remedy should be given. Here are cases where restitutionary theorising can have the clearest impact on existing law. If this troublesome class of case can be explained without reference to the concept of unjust enrichment, then it may be possible to deal with other categories of quasi-contract in a manner which renders that concept of only marginal significance. This, indeed, is the task which Stoljar sets himself in the remainder of the work.

Whether he has in fact succeeded in this latter part of his task, however, is in doubt. There are two broad categories remaining, as has been mentioned: those relating to *contracts*, and those where the "*proprietary theory*" can be invoked.

The quasi-contracts which arise out of *contractual* settings are quickly (but, in the reviewer's opinion, not very satisfactorily) disposed of in Chapter 8. In this context, "quasi-contract" is said to be merely "another name for certain remedies in contract", which are "furnished for the protection of contractual rights" (p 222), and having nothing much to do with unjust enrichment, or indeed with other quasi-contracts, at all. At first blush, this seems a rather implausible claim. Can it really be said that, in ordering the return of money paid under a contract which is void for mistake, the courts are protecting contractual rights? What rights can they be, since the holding that vitiating mistake has occurred surely carries with it the implication that contractual rights are not to be relied upon?

There might have been better ways of separating off this class of quasi-contract from the others, without advancing such an extreme opinion. Elsewhere in the book (when he deals with economic duress), the author claims that "[i]n this particular situation, admittedly, it may not much matter whether this right of recovery is regarded as contractual or quasi-contractual, for the differing nomenclature cannot effect [*sic*] the actual grounds of recovery, which lie entirely in economic duress or practical compulsion being found against the payee" (p 81).

Similarly here, might it not be preferable to refrain from lumping all these quasi-contracts together in a simple category, and look instead at the grounds on which relief is sought — mistake, illegality, uncertainty, want of proper form — as forming the determinative basis for any decision to allow recovery? The fact that there is, or was supposed to be, a contract between the parties will have an important bearing on the relief to be given in all of these cases, but the weight to be given to that consideration may well vary from one to the other. It would then be possible to maintain that (as in the case of payment of another's debt) the law owes some of its content to principles of unjust enrichment, or the protection of proprietary interests, but that it is primarily concerned with the proper adjustment of parties rights under real or supposed contracts in each of these different situations. This is a view which could well find favour in New Zealand, since it appears to be the basis on which much of our recent contract legislation depends.

By far the larger part of the work (chapters 2-5) is given to those quasi-contracts which, according to Stoljar, are based upon the *propriatorship* of the claimant. These include the relief given to a plaintiff who has paid money paid under a mistake, or under duress, or whose property is wrongfully taken and either sold or used by the defendant, and who seeks to recover a sum representing the benefits acquired by the defendant as a result. Here, while Stoljar goes some distance towards making his case out, there may be doubts about just how far such a case can take him.

He begins with a rather half-hearted attempt (pp 5-6) to show *a priori* that in theory these cases must turn on the plaintiff retaining some kind

of continuing property right in the money or other asset which has apparently been acquired by the defendant. This reviewer did not find the logic particularly compelling. Stoljar then, however, takes up much stronger ground when he puts his thesis forward as historical fact, and as a matter of theoretical importance if the continuity of the law is to be maintained. At p 5 he says:

In case law . . . our typical concern is not with neatly distinguishable old and new cases, but overwhelmingly with cases that are, so to speak, *old-new*. In other words, what is needed is some broad principle or basis or theory that as well as revealing a sensible continuity between the cases, also identifies what it is that commonly denominates or connects at least the principal results generally classified as quasi-contractual.

All that is necessary to sustain this less ambitious thesis is to examine the history of legal doctrine, and find in it an explanation for important doctrinal aspects of the existing law of quasi-contract, which mark off certain types of quasi-contract which are inspired by proprietary considerations from those involving contracts or "unjust sacrifice".

It would be a brave commentator who took issue with the historical viability of Stoljar's thesis, if it is understood to take this limited form, and the inconvenient group of cases dealing with payment of another's debt is removed from consideration. Anyone who has delved into the early authorities in the area will have become conscious of the strong proprietary flavour of the action for money had and received to the plaintiff's "use", the precursor of the modern law of money paid under mistake and duress, and money acquired by the defendant's wrongful actions.

Nor is there much difficulty in discerning the inheritance of that tradition when we consider such cases as *Chase Manhattan Bank NA v Israel-British Bank Ltd* [1981] Ch 105 and *Neste Oy v Lloyds Bank plc* [1983] 2 Lloyd's, Rep 658, where proprietary, "tracing" claims were permitted in respect of money paid under mistake. It is immaterial, of course, whether such cases depend principally upon some form of proprietary right recognised by the common law (as is maintained by Stoljar in chapter 5) or whether the proprietary right is enforceable primarily through the "auxiliary" jurisdiction of courts of equity (as seems implicit in the above cases). Whatever the law may be elsewhere, in New Zealand it is not necessary to accept Stoljar's suggestion (at p 126) that there may have to be a "recognised fiduciary relationship" before equitable tracing can be invoked: see *Elder's Pastoral Finance Ltd v Bank of New Zealand* [1989] 2 NZLR 180; *Tauranga Borough v Tauranga Electric-Power Board* [1944] NZLR 155.

This limited version of the "proprietary theory" will not, however, provide a justification for everything which is sought to be done in its name. Since the law of quasi-contract was in its formative stages, the concept of property has assumed a different standing in social and legal thought. We no longer think of ourselves as having legal rights *over* property; we have rights and powers *in respect of* property. Our "ownership" is expressed only through our legal relationships with other people (for a recent and helpful discussion, see Vandervelde, "The New Property of the Nineteenth Century" (1980) 20 Buffalo L Rev 325). It is but a short step from the *Restatement*

of the *Law of Property* (which built upon this new understanding of property rights and powers) to the *Restatement of Restitution*, in which a concept of appropriation of value (unjust enrichment) was substituted for appropriation of property, as a guiding principle for the law of quasi-contracts in the USA.

And we are not infrequently reminded that those who invoke "property" reasoning may in fact be deflecting our attention from much more significant policy matters; see, for a sophisticated analysis along these lines, Stevens, "Restitution, Property and the Cause of Action in Unjust Enrichment" (1989) 39 U Toronto LJ 258.

While, then, the law of quasi-contract may seem to depend upon "property-type" assumptions because of its history, the role of these assumptions in modern law may have to be re-assessed. Care must be taken in deciding what consequences should flow from the acknowledgement of a "proprietary" basis for certain parts of the modern law of quasi-contracts. At one important point in his book, Stoljar goes beyond an historical thesis, and uses the proprietary theory to deduce conclusions about the form the law of quasi-contract should now take, conclusions which, it is respectfully suggested, cannot be justified by these means.

This occurs when he considers the doctrine of "tracing", or following, money which has been paid under mistake. He is concerned to argue (at pp 131-132, also 138) that, because here the action for money had and received has proprietary origins, this is a strong (perhaps conclusive) indication that the payer acquires not a mere personal right of action, but a property right which, in the event of insolvency, may, in the particular circumstances of the case, confer a priority over all the recipient's ordinary creditors. The historical argument alone does not seem sufficient to sustain his case. He does make some effort, indeed, to put forward an argument of policy, with his observation (at p 132) that "P takes no credit risks whatever, not even those one to some extent incurs when entrusting money to an agent or fiduciary, let alone the risks one takes in relation to ordinary debts". But this begs the question, whether P's lack of voluntary intention to assume a risk of insolvency (an intent which may equally be absent in some cases of extension of credit, eg, where a security arrangement is mistakenly believed to be valid) is the decisive factor in determining priority. The whole thing requires a much more rounded consideration, and it is small wonder, as Stoljar himself goes on to say, that given the present state of legal knowledge "P's inherent priority in this situation is still not fully understood". Perhaps he should add, "or accepted".

Yet, as long as its limitations are recognised, there is a great deal of value in Stoljar's emphasis on the historical importance of notions of account and proprietorship in the law of quasi-contract. While such notions may not be determinative of policy issues today, they are significant when dealing with jurisdictional arguments, which seek to limit the courts' powers in restitutionary cases by reference to some real or supposed limitation found in the law of the eighteenth, nineteenth or early twentieth centuries. A proper understanding of the legal foundations of the subject, and the ways in which they were built upon by cases in the nineteenth century, may well help dispose of supposed limitations on the modern law of restitution, when

they are based not on principle but on unduly restrictive precedent, or upon difficulties which were once associated with the separation of the common law and equity jurisdiction of the courts, but no longer apply in fused jurisdictions.

Imaginative re-assessments of what is now thought to be the law abound in the four chapters dealing with "proprietary" quasi-contracts, and Stoljar demonstrates once more his preference for a wide view the law, conforming with a simple, rather than a technical, view of its limits. For example, he argues (as he did in the first edition) for a "change of circumstance defence" at common law (ch 2), though admittedly he accepts several limitations upon the defence which now seem to be unduly restrictive and unnecessary. He also maintains strongly that the person who pays money under mistake of law in response to an official demand (ch 3) should have a quasi-contractual remedy (ch 2). So too (as has already been mentioned) should the mistaken improver of property, he says. It is comforting to the New Zealand reader, who has become well accustomed to these developments by reason of statutory reform (respectively, the Judicature Amendment Act 1958, s 2, introducing a new s 94B to the principal Act; s 94A of the same Act, introduced at the same time; and the Property Law Amendment Act 1963, s 3, introducing a new s 129A to the Property Law Act 1952), to know that our law has not totally parted company with common law theory.

It will be for the reader to consider whether the author's overall thesis is made out, and whether in the course of his journey through the law of quasi-contract, Stoljar has pursued it with that single-minded vigour for which certain academic writers are well known and respected. Perhaps the latter is not important. One is seldom disappointed when Professor Stoljar allows himself to be deflected from his main line of approach so as to explore the many fascinating intricacies and by-ways of the subject. One can only admire the freshness and vitality he brings to this task. Regardless of the theory of restitution or quasi-contract one may prefer, it is a particularly useful work to go to when one is looking for a reasonable answer to a problem, and one suspects that legal reasoning has parted company with its original historical base. The special insights which abound in the book make Stoljar's return to this arena a welcome and timely one.

R J SUTTON*

* Professor of Law, University of Otago