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Translocations and Inertia

W.F. Young*

The first word of my title comes from the Reporter's Note to Section 66 of Restatement (Third) of Restitution & Unjust Enrichment—hereafter "the Restatement."¹ The word represents one of two thoughts I have about modifying the Restatement. My first thought is to situate Sections 66 and 67 near the beginning of the Restatement rather than in Part IV, "Defenses to Restitution." For reasons that will appear later, I entertain no hope that many readers can be persuaded of the merit of those translocations. I do hope, however, that some number will be attracted by my second thought—amendments to Comments to Sections 66 and 67. Anyone attracted by that idea might be attracted also by the thought of translocation, for the two are intimately related. But my expectations are low. Given that, this Article is short; anything but brevity would be witless.

Sections 66 and 67 are titled, respectively, "Bona Fide Purchaser" and "Bona Fide Payee." Before the Restatement was finalized, these sections were titled "Purchase for Value" and "Payment for Value," respectively. It makes sense *not* to situate these topics among the elements of a restitution claim—as if to say "[a]bsence of purchase for value and of payment for value"—and to designate purchase and payment "defenses." To treat these two matters as defenses indicates that a party relying on one of them must come forward with supporting evidence, on pain of making restitution otherwise owed. It cannot be fair, in any ordinary circumstances, to place on a restitution claimant the burden of producing evidence of what is not only a negative, but also of a transaction to which the claimant was not a party. It is possible for the claimant to have been a party to the decisive transaction, of course. That was the situation in a leading case about payment for value, *Merchants' Insurance Co. v. Abbott*.² Even so,

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1. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 66 (2011) ("Equity watches its translocations, and when the property rebounds to the despoiler, equity obliges him *in personam* to make restitution by returning the property."). "Translocation" was not in my vocabulary earlier. It is a useful word, not to be confused with "transposition," and a bit more emphatic than "relocation." Oddly, it occurs only as an echo in the Oxford English Dictionary.

2. *Merchants' Ins. Co. v. Abbott*, 131 Mass. 397 (1881).

however, the other contestant will usually have better access to evidence of the character of that transaction. As for the burden of producing evidence, let all that be conceded. As for the burden of persuasion, the fairer placement is not so clear.

Whatever one concludes about burdens of proof, one's conclusion does not necessitate the Restatement label "Defenses" for either purchase or payment. That is, rules about those burdens could be stated so as to conform to common sense and fairness, even if the "Defenses" label were dropped and the absence of large classes of purchases and payments were made a component of a restitution claim.

Consult certain other Restatements, relatively recent, and one will find a gulf between the uses of "defense" therein. In the Restatement (Second) of Contracts,³ the conception hardly appears, being subsumed largely in that of *discharge*. Burdens of proof are mentioned dismissively and otherwise rarely. On the other hand, the Restatement (Third) of Suretyship & Guaranty is rife with matters of "defense," including that of performance of the underlying obligation by the principal obligor.⁴ The "defense" gulf is hard to explain. Say, however, that its infusion is appropriate, and that discharge is a mere circumlocution. It does not follow that defenses merit a large place in a Restatement about restitution. The difference is that claims in restitution depend, more largely than claims in contracts—and in its affiliates suretyship and guaranties—on judicial largesse. By and large, contract liabilities depend on the advertent activity of promise making, whereas restitutionary entitlements depend commonly on inadvertent activity by the claimants. (The best instance of a claimant's inadvertence is the making of a payment by mistake. Yielding to coercion is at the other end of the scale.)

Generally, then, a person making a claim in restitution might well be expected to circumvent obstacles that are not in the path of a contract claim. As expressions of that principle, one might well say that "purchase for value" and "payment for value" are not obstacles to be surmounted—defenses—but are to be circumvented as elements in stating the claim.

To understand how sharp a turnabout that would be requires one to take samples from cases, treatises, law reviews, and the initial Restatement of Restitution. Having done a modest amount of that,⁵ I have concluded

3. See generally RESTATEMENT (SECOND) OF CONTRACTS (1981).

4. See generally RESTATEMENT (THIRD) OF SURETYSHIP & GUAR. § 19(a).

5. The samples include *T.D. Bank v. JP Morgan Chase Bank*, 2010 U.S. Dist. LEXIS 109471 (E.D.N.Y. 2010); GEORGE E. PALMER, THE LAW OF RESTITUTION (1978); and Andrew Kull, *Defenses to Restitution: The Bona Fide Creditor*, 81 B.U. L. REV. 919 (2001).

that the effect would be a turnabout of at least 160°, and maybe as much as 175°.

As witness the Restatement, Professor Kull is committed to the "defense" characterization for both purchase for value and creditor for value. Entries in the Palmer treatise include "The defense of bona fide purchase" (§ 16.5), "The defense of discharge for value" (§§ 16.6 and 16.7), and "Change of position as a defense" (§ 16.8). On the other hand, what the Restatement designates as a defense, Professor Palmer described as "Denial of Restitution Because Retention of the Benefit Is Not Inequitable." See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 62 (categorizing as a defense); PALMER, *supra*, § 14.28.

In *T.D. Bank*, the court referred to the contention of one "Kahan," saying that its "alleged status as bona fide purchaser is an affirmative defense, which Kahan bears the burden of alleging and proving." *T.D. Bank*, 2010 U.S. Dist. LEXIS 109471, at *22. But it also said this about Chase Bank, as the restitution claimant: "If, at the summary judgment or trial phase, Kahan makes a prima facie showing that it was a good faith purchaser for fair value, Chase will have to disprove the defense in order to prevail on its claims." As for the "'discharge for value' rule," although the court did not make a ruling about it, it said:

The rule is applied in the New York courts and the Second Circuit as a defense to a plaintiff's claim that it is entitled to recover funds transferred in error. . . . Chase does not bear the burden of raising and refuting this defense in its opening pleadings, and its failure to do so cannot be grounds for granting Kahan's present motion.

T.D. Bank, 2010 U.S. Dist. LEXIS 109471, at *25 (citations omitted). To some extent, it seems, the court was willing to untie the burdens of pleading, of producing evidence, and of persuasion from the characterization "defense."

In *Merchants' Insurance Co.*, the court said, simply, that the defendants "hold no money which *ex aequo et bono* they are bound to return . . . to the plaintiffs." *Merchants' Ins. Co.*, 131 Mass. at 402.

Aside from expressions like that, curiously, the initial Restatement of Restitution is about as good a support for the translocation I suggest as anything else I have found. It is rife, to be sure, with mentions of "defense." There is, for example, in Part 2 (Constructive Trusts and Analogous Equitable Remedies), a topic titled "The Defense of Bona Fide Purchase." That defense, as stated in Section 172, comprises payment for value. See RESTATEMENT OF RESTITUTION § 173(2) cmt. 1 (1937) ("Where, however, property is held upon an express trust, such a transfer is a transfer for value only under the circumstances stated in the Restatement of Trusts, §§ 304 (2, 3) and 305 (2, 3)."). What counts as a defense in Part 2 appears to be an event that terminates a right to restitution, such as the running of a statute of limitations. See *generally id.* § 179.

The tenor of Part 1 (The Right to Restitution (Quasi Contractual and Kindred Equitable Relief)) is rather different, however, possibly signifying some difference of view between Professors Seavey and Scott, the Reporters for the two parts, respectively. There, in Chapter 2 (Mistake, Including Fraud), Topic 1 (Definitions and General Rules), one finds Section 13 on bona fide purchasers. That Section declares that, in a standard bona-fide-purchaser case, a claimant "is not entitled to restitution." That is not the language of defense. Similarly, in Section 14 (Discharge for Value), one sees that although various parties—a creditor, a lienholder, an assignee—have received benefits by reason of a mistake, they are, in circumstances stated there, "under no duty to make restitution therefor."

Turning now to the Comments to Sections 66 and 67, I offer a compliment to the Reporter, Professor Kull. In Comment b to Section 67, he writes that the rule of the Section "is supported by considerations of judicial economy" That is well said. The enconium must be qualified, however, in some respects. For one thing, this is said in a preceding sentence: "The usual modern justification of such a rule refers to the special interests of finality in payment transactions"⁶

To that, I believe, it would be well to add: "Although that justification serves well enough in some settings, withholding restitution in cases of payment for value has a better justification."

What better justification? Here I offer a sketch of how the Comment might proceed:

The machinery of the law is a heavy charge on the public. It is not well applied to shift an entitlement from one person to another who does not have markedly better deserts. The rule of this Section acknowledges the deserts of payees. For the present purpose, intrinsic deserts are not ascribed to individuals, whether payees or restitution claimants. Rather, their deserts are calculated by reference to the source of the entitlement in question and to the dealings of the contestants in that entitlement.

In short, the proper judicial response in a case of payment for value is inertia.

Not only so, but inertia is also the proper response in a case of purchase for value. The justification sketched above is appropriate also (with slight adjustments) for a Comment to Section 66, on that subject. What appears there as a justification⁷ is not superficial, certainly, but is in my view less profound and less apropos the subject of restitution.

As quoted above, Comment b to Section 67 makes reference to "considerations of judicial economy." This phrase loses some of its appeal when read in context. It is used in comparing "Payment for Value" with the "affirmative defense of change of position (Section 65)."

The most salient feature of Section 67 is that it protects a payee without the need to demonstrate any change of position on receipt.

The rule about payment for value is credited with judicial economy only in that it dispenses, in many cases, with the need of a demonstration

6. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 67 cmt. b (2011).

7. *See id.* § 66 cmt. a ("There is a significant conceptual overlap between the rules protecting a purchaser or payee for value (§§ 66–67) and the defense of change of position (§ 65). The three affirmative defenses share a common overall objective, in that they facilitate commercial exchange by favoring the security of receipt.").

that might otherwise be forthcoming.⁸ There is nothing profound in that credit.

Professor Kull might object to my suggestions by saying that they smack too much of a comparison of "equities" as between the contestants in a restitution case. So to infer is not entirely presumptuous on my part, for some expressions in the Restatement are dismissive of "considerations of equity between the parties."⁹ It is well to avoid using so loose an expression when possible, at least in black letter. And that is not required in order to effect a transposition of Sections 66 and 67. What is required are two moves: (a) to remove these Sections from a Part titled "Defenses," and (b) to refer to them in a general statement of accountability for restitution, in the qualification "except as provided in Sections xx and yy." An alternate pattern is suggested by Section 23 of Draft No. 2 (Self-Interested Intervention: General Rule). There we see that designated persons who have conferred unrequested benefits on others "may have a claim in restitution."

There are sections other than 66 and 67 that are designated as statements of defenses. Would it be well to translocate one or more of those? Six of them appear in the Restatement (laying aside definitions). To use abbreviated labels, they are: a statute of limitations, laches, the passing on of a benefit, change of position, unclean hands, and overall fairness. Of these, I regard two as patently defensive in character, and two as patently otherwise. I am in doubt as to the others.¹⁰ I leave it to readers to divine the best classification; and on that inconclusive note, I conclude.

8. The quoted phrase, "considerations of judicial economy," is followed with "since the reliance that might ultimately be demonstrated may simply be presumed."

9. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 67 cmt. b (2011).

10. The Restatement declares a link between payment for value and change of position and, by inference, between change of position and laches. I am not persuaded that, if one of these counts as a defense, so must one or both of the others.

