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# RESTITUTION-UNJUST ENRICHMENT

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RESTITUTION—UNJUST ENRICHMENT—Plaintiff brought an action of assumpsit against defendant national bank on a theory of unjust enrichment. Plaintiff and plaintiff's father were two of the nine directors of defendant bank when the bank holiday was declared in 1933. As a condition to reopening, the Comptroller of the Currency required that unconditional contributions be made to undivided profits in the amount of $32,000. Each director agreed to advance a one-ninth part, with the understanding among themselves that repayment would be made when the bank was able to do so. With the knowledge of the other directors, plaintiff advanced his own share and the major part of his father's. Permission was secured from the Comptroller in 1947 to refund the sums advanced in 1933. Plaintiff was not a member of the board when the repayment was approved, and his father had died years earlier. Plaintiff received his aliquot contribution, but the bank refused to repay the sum paid toward the father's share, claiming a right to apply it against a note allegedly guaranteed by the father, though no such agreement existed with the plaintiff. On appeal from a judgment for plaintiff, *held,* affirmed. A cause of action grounded on unjust enrichment arose upon the repayment to the other directors, and obtained in spite of the absence of any contract, express or implied, that repayment would be made. *Binns v. First National Bank of California,* 367 Pa. 359, 80 A. (2d) 768 (1951).

The court in the principal case has found unjust enrichment in a failure to repay an unconditional contribution by a party who seemingly acted as a "volunteer." As further showing of the voluntary nature of the directors' action, a search of the United States Code reveals no duty existing upon directors of national banks to contribute to the undivided profits account, unless it is fairly implied that their interest was a self-serving one as substantial stockholders of the bank. The directors may well have been looking apprehensively toward the double liability imposed on stockholders in the event of failure of the bank,[1] but since their contributions were not in proportion to shares held by them, and no special assessment had been declared, such a conclusion is merely conjectural. If it is assumed that the payments were made under a duty as stockholders, the case for unjust enrichment would be greatly weakened. From the facts, therefore, there is good reason for holding that the directors were simply "volunteers." The *Restitution Restatement* concludes that persons who have been unjustly enriched at the expense of another are required to make restitution to the other; further that such persons are enriched if they have received a benefit, liability for which attaches only if the retention would be unjust as between the parties.[2] Although the *Restatement* implies that unjust enrichment alone will ground restitution, the cases cited by the Permanent Edition[3] and the decisions of courts generally[4] would require unjust enrichment "plus." Even though enrichment may be clear and its retention unexplainable by valid contract or other legal transaction or by any overriding social policy,

[1] 12 U.S.C. (1946) §§63, 64 and 64(a). Sec. 64(a) repealed double liability as to shares issued after a certain specified date and as to all others by advertising for six months, but this provision took effect after the present case arose.

[2] RESTITUTION RESTATEMENT, c. I, §§1a, b, and c (1936).

[3] RESTATEMENT IN THE COURTS, Perm. Ed., 578 (1945).

[4] See 10 PERMANENT A.L.R. DIGEST, Restitution; unjust enrichment §6(3) (1950); 12 AM. JUR., Quasi Contracts or Contracts Implied in Law §6 (1938); 12 AM. JUR., Contracts, Acceptance of Performance as Basis for Implied Promise §352 (1938).

remedy will be denied where the required "plus" is absent, the courts declaring that the plaintiff is a "volunteer" or "officious intermeddler." The "plus" element is usually found in public interest or self interest adequate to justify the action of the plaintiff. Situations where this additional factor will be found are not limitless.[5] The enrichment which occurred in the principal case was held to be sufficient to support recovery even though there existed no implied contract or any convincing reason beyond the pure definition of the *Restatement*.[6] A possible analogy is that of gifts made in contemplation of marriage. Although the theories of recovery range from mistake of fact,[7] rescission and restitution, and quasi-contract[8] to conditional gift, the last is the most commonly applied.[9] Since the principal case found no contract, express or implied, the conditional gift theory warrants analysis. Certainly in the marriage cases the condition of the gift is an imaginary "plus" read in to found an action for unjust enrichment. It might in a like manner be interpreted that the directors in the principal case made such a condition inherent in their contribution. The gift in contemplation of marriage by a third person not a party to the marriage is particularly[10] similar to our present situation if we eliminate the element of the directors being stockholders. This third party feature makes the argument of rescission and restitution and quasi-contract impossible, for the plaintiffs are not involved in any contract presently or to be made, leaving the conditional gift as the final alternative. The principal case might, therefore, have found the additional "plus" in an implied condition, were it not for the single factor, however, that the Comptroller required unconditional contributions. A fair conclusion seems to be that the principal case stands alone as an anomaly, all

[5] 46 AM. JUR., Restitution and Unjust Enrichment, p. 99 (1943).

[6] RESTITUTION RESTATEMENT, c. I, §1a. (1936). The court confided in the principal case that there were no comparable cases to support their conclusion, and certainly they could find little help from Gordon v. Trimble, 318 Mo. 341, 300 S.W. 475 (1927), and First National Bank of Arthur, (7th Cir. 1938) 100 F. (2d) 623, which they cited at 371-372. The first involved an express agreement to repay sums advanced by notes of the directors to prevent the closing of the bank, where such express condition was absolute and in the form of a loan. In the second a special assessment had been made on all stockholders prior to liquidation, and an amount remained over to be returned to the contributors. It was held that those who had contributed more than others should be paid this excess amount before any others were paid, rather than in proportion to contributions. The duty to return the surplus to the stockholders arose from the United States Code and only the distributory scheme was in the hands of the court, though it described its decision as "just and equitable." Therefore, neither case turned on unjust enrichment per se, and even if they had, the required "plus" would seem to be present.

[7] 38 CALIF. L. REV. 529 at 534 (1950), where the author said, "Were it not that courts have traditionally declined to consider a future relationship as a 'fact,' a sounder theory for third party donors would be mistake of fact."

[8] 29 CORN. L. Q. 401 at 404 (1944), in which the author summarized, "In the last analysis, recovery of an engagement ring or other property transferred in contemplation of marriage rests upon a quasi-contractual basis, even though the court chooses to rationalize its holding in terms of conditional gift or of rescission of the contract to marry."

[9] 18 MINN. L. REV. 478-479 (1934).

[10] Harry Grossman v. Garrison S. Greenstein, 161 Md. 71, 155 A. 190 (1931).

the established grounds for recovery having failed of analysis and leaving unjust enrichment as the sole basis for remedy.[11]

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[11] 37 KY. L. J. 113 (1948).