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Restitution is a broad concept encompassing remedies that are intended to restore or return something to the rightful owner. Restitution may be specific or substitutionary in nature; it is both a judicial remedy and an extra-judicial technique; it may reach real or personal property, tangible or intangible; it may be decreed by a court of law or a court of chancery; the relief may rest upon a variety of substantive causes of action; or the relief may be strictly limited by historical or statutory guidelines, or be as flexible as the imagination of the court.

Although some restitutionary devices, such as ejectment or replevin, have their foundations in the early centuries of the common law, and chancery courts had developed rudimentary forms for the rescission of contracts, modern restitutionary developments can be traced to May 19, 1760. On that Monday, Lord Mansfield of the King's Bench, building upon the doctrine of *indebitatus assumpsit*, first proclaimed the action of quasi-contract. He wrote in *Moses v. MacFerlan:* "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 . . . ."[1] The judge pointed out that the great benefit of the action of *quasi ex contractu*, resting as it does on "the ties of natural justice," is that "the plaintiff need not state the special circumstances from which he concludes that *ex aequo et bono* the money received by the defendant ought to be deemed as belonging to him, but instead may generally declare that the money was received to his use and establish his case at trial." Finally, recognizing the liberality with which this action should be encouraged, Lord Mansfield offered a partial list of the operative factors that would support such an action, including mistake, extortion, duress, and the inadequacy of existing remedies. His great accomplishment was, through the means of a prior but limited form of action, a Latin phrase, and continental development, to create a universal remedy to prevent unjust enrichment.[2]

This quasi-contract action is also commonly described as a contract implied in law or as a constructive contract. Regardless of the terminology, the cause of action does not arise directly out of the relationship of the parties, but is created by the court *sua sponte* to do justice between the parties and prevent a windfall to the less deserving party.

Simultaneously a parallel development was occurring in the courts of equity. To provide restitutionary relief when the law courts were not able to do so, the chancery courts developed equitable remedies, such as the constructive trust, and equitable techniques, such as tracing. The publication of the Restatement of Restitution in 1937 spotlighted the recognition that underneath the legal restitutionary remedies and the equitable restitutionary remedies lies the principle of unjust enrichment.

An action in unjust enrichment is "maintainable in all cases where one person has received money or its equivalent under such circumstances that, in equity and good conscience, he ought not to retain it,"[3] and "*ex aequo et bono*, it belongs to another."[4] Regardless of whether monetary restitution or equitable restitution is sought, the elements of the underlying cause of action are the same. Unjust enrichment rests upon three elements: a) the enrichment of the defendant; b) an operative factor that makes the enrichment "unjust"; and c) a judicial determination that the plaintiff is more deserving of the benefit or enrichment than the defendant.[5] Cutting across principles of tort and contract law, the claim is best understood as an independent substantive basis of recovery.

The plaintiff need not show that the defendant was at fault or "guilty." Likewise, the plaintiff need not establish that the enrichment was a loss to him that should be returned. Although the enrichment is to the defendant and at the expense of the plaintiff, the enrichment need not come from the plaintiff, but may come from another source.[6] It is irrelevant whether the defendant knowingly retained the item or property or accepted the benefit. Similarly, the plaintiff's expectation of the property is certainly not essential to establishing the claim.

Unjust enrichment actions may be maintained in either courts of law or equity, depending on whether simple monetary restitution or equitable restitutionary remedies are sought.[7] Jury trials are available in the circuit court.[8] As recognized in Arkansas, the doctrine of unjust enrichment is liberally construed.[9]

A. Constructive Trust.

A trust is a creation of equity jurisprudence that separates the legal ownership of property from its beneficial ownership. A trust may be expressly created by the settlor to reduce taxes, avoid probate, provide for prudent stewardship, prevent waste, alter control, or accomplish other purposes. The trustee, holding legal title, owes a fiduciary duty to the owner of the beneficial interest. The trustee must account for his management of the trust and must, in most instances, eventually turn the trust assets over to the beneficiaries.[10]

In the first half of the eighteenth century, courts of chancery, acting independently of the quasi-contract theory of Lord Mansfield, permitted a beneficiary to recover property from an express trustee, and even to recover newly acquired property, provided it had been traced from the original property.[11] The trust mechanism offered a convenient device for equity when confronted with a defendant who had acquired assets through a process viewed as unjust. Equity first implied a trust when the express trust proved defective. The trust concept was then applied to situations where the relationship was viewed as fiduciary or confidential. Next the constructive trust was expanded to actions of fraud or quasi-fraud. Ultimately, the trust was extended to any restitutionary claim where a res existed and the remedy at law (usually a money judgment) was wholly inadequate, or more likely, not as adequate.[12]

This expansive history permitted Justice Cardozo to write that the "constructive trust is the formula through which the conscience of equity finds expression."[13] It is a remedy whose judicial limits are circumscribed only by "the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them."[14]

To begin with a simple example, assume Defendant Dan misappropriates $5000 from Plaintiff Paula on January 1. On February 1 he purchases Blackacre with the $5000. On July 1 Paula discovers the misappropriation and the purchase of Blackacre. Plaintiff's substantive theory is unjust enrichment. Her restitutionary remedy may be either legal or equitable, but the preferred remedy is the constructive trust. Equity would decree that the defendant hold legal title for the benefit of Paula, the beneficial owner.

A constructive trust is the equitable equivalent of a contract implied in law. It is not based upon a written agreement between the parties; rather, the trust is created and imposed by a court of equity to prevent unjust enrichment.[15] The trust is decreed when equity demands that in light of all the circumstances, in equity and good conscience, the beneficial title be separated from the legal title and expressly rested in the beneficiary.[16] Clear, cogent, and convincing evidence is required to support a constructive trust.[17] Additionally, parol evidence is admissible to demonstrate the grounds for the imposition of a constructive trust.[18]

Five grounds will support the existence and creation of a constructive trust: 1) abuse of a confidential or fiduciary relationship; 2) an unlawful act, such as fraud, conversion, or theft; 3) overreaching, duress, undue influence, double recovery, or similar "unconscionable" acts; 4) mistake; and 5) "pure" unjust enrichment.[19]

1) The existence of a confidential or fiduciary relationship is the most traditional ground. Such a relationship exists between two persons when one has gained the confidence of the other and purports to act with the other's interest in mind.[20] The confidential relationship does not exist merely because the parties are related or live in the same household, although such a connection usually creates a confidential relationship.[21] Likewise, the relationship may exist even though the parties are not related by blood or marriage.[22] The presence of a confidential relationship does not automatically result in a constructive trust. Instead, the confidence must have been abused to such an extent that one party acquired or retained property to the disadvantage or loss of the other.[23] A constructive trust is appropriate to prevent that unfair enrichment.

For example, Bramlett and Selman entered into a homosexual relationship, and Selman advanced money to purchase a residence for them with title placed in Bramlett's name (in order to conceal the purchase from Selman's then wife during pending divorce proceedings). When the relationship broke up, Selman sued in chancery court, seeking a constructive trust on the residence. Finding a confidential relationship between the men, the court imposed a trust to enforce Bramlett's promise to hold title to the land for the grantor.[24] To do otherwise would permit the grantee to be unjustly enriched. In the 4-3 decision, the majority rejected arguments that (1) the plaintiff should be barred from equity because of his unclean hands in trying to defraud his wife in the pending divorce action, (2) the plaintiff should be barred from relief because he was a homosexual, (3) the evidence did not demonstrate a confidential relationship in the sense of one party being dominant and influential as to the other or occupying a superior position over the other, and (4) the presumption of a gift was not rebutted.

2) A constructive trust will be imposed against a party who commits an unlawful act, including an intentionally false oral promise.[25] For example, a grantee's oral promise that he will hold property for the benefit of the grantor will support a constructive trust when the promise has been fraudulently made and he claims the property as his own.[26] Likewise, a constructive trust may be imposed upon land held by a grantee who has orally promised to hold land for a third party and later refuses to perform.[27]

As a "classic case for imposition of a constructive trust," consider *Horton v. Koner*.[28] In 1972, Diana Rivers purchased land in Newton County and established a community resting on a "back to the land" philosophy. Six years later all the men left the community, and Rivers deeded the tract to herself, Darian Horton, and six other women as joint tenants with rights of survivorship. In 1980, Darian Horton left the community and subsequently brought a partition action in equity, seeking a 1/8 share of the 360 acres. Because all the women, including the plaintiff, Horton, agreed that private land ownership was contrary to their sense of community, partition was not appropriate. Instead, the court found that when the land was deeded, the grantees accepted the land with an oral promise to preserve it for the community. To permit Horton to receive title to a portion would defeat the oral promise that she and the others had made and would unjustly enrich her. In addition, the relationship of the women indicated the existence of a confidential relationship among them. Accordingly, the court imposed a constructive trust on the entire tract in favor of all the named women.

Typically, a constructive trust ends when the beneficiary insists upon, and receives judicial assistance for, having legal title transferred into his or her hands and out of the trustee's. However, in *Horton*, the women might leave the community, but the land would apparently remain subject to the trust. One of the eight named grantees might transfer her share, but the successor grantee would remain subject to the judicially created trust.

3) Cases involving overreaching, duress, or other inequitable conduct are not as common. *Savage v. McCain*[29] is an example of a case that fits several categories. Upon the decedent's death, his bank accounts were separately claimed by his wife and his adult daughter by a prior marriage whose

names appeared on the accounts with his as joint tenants with right of survivorship. The wife withdrew all the funds, and the daughter sued the wife, seeking to recover half of the funds through a constructive trust. The evidence demonstrated that the decedent wanted his daughter to have half of the funds, even though she contributed nothing. While finding "a peculiar relationship of mutual trust and confidence" between the wife and daughter, the court also found that the wife had "overreached" in withdrawing the funds and therefore imposed a constructive trust on one-half of the funds held by her. The decree might have been supported as well on the basis of constructive fraud or other unconscionable conduct.

4) The law of mistake was virtually created by equity. Assume a bank credits a customer's account with $1000 by mistake. The bank's action was not intentional, but a result of its own negligence or fault.[30] The bank's claim against the customer is unjust enrichment. The court should impose a constructive trust on the $1000 for the benefit of either the bank or the intended recipient, even if it is commingled with other funds of the customer.[31]

5) The law has come to recognize some instances, while not falling within prescribed categories, as constituting a case for "pure" unjust enrichment. "A constructive trust is imposed upon a person in order to prevent his unjust enrichment. To prevent such unjust enrichment an equitable duty to convey the property to another is imposed upon him."[32]

A 1974 divorce decree required Ron Orsini to maintain life insurance in the amount of $50,000 with the proceeds to be paid to his minor daughter. Despite that obligation, he changed the beneficiary on the policy to his new wife. Upon his death, a dispute arose over the funds. In light of the maxim that "equity regards as done that which ought to have been done," equity imposed a constructive trust on the proceeds for the benefit of the daughter.[33] Even if the new wife were completely innocent and ignorant of the change or the terms of the decree, the principle of unjust enrichment prevents her from benefitting. Although arguably this case might not be categorized as pure unjust enrichment, since the acts of the father were intentional and perhaps amounted to constructive fraud, the language of the court, although brief, focuses on unjust enrichment. Suppose, however, he had canceled the policy and taken out a new policy payable to the second wife. Certainly no tracing is present, but the second policy could be viewed as a replacement policy, subject to a constructive trust.[34] Finally, suppose he had not taken out a policy at all, but his estate had sufficient assets. Would equity then impose a trust on the estate directly? Although the second wife has been unjustly enriched and a res is present, the daughter is likely to be limited to a legal restitutionary claim against the estate.

Not all mistakes that lead to unjust enrichment are as easily resolved. For example, suppose a contractor agrees to build a house for Owner #1 on Lot #1, but by mistake builds it on Lot #2. The owner of Lot #2 is delighted. He has been enriched, and under traditional property law, the house is his. Owner #1 does not really mind because he does not have to pay for a house built on the wrong lot. The contractor is dismayed, disappointed, and frustrated. Since the house is not removable,[35] his only plausible theory is unjust enrichment. To compel Owner #2 to pay for the house, even if limited to the actual cost of labor and materials, would deny him the right to say "no," would deprive him of the choice of a contractor or house design, and might place him in an unfavorable or at least an undesirable financial situation. To give any relief to the contractor might encourage him to take future risks, realizing that any mistake would not lead to an absolute loss. While some courts have granted unjust enrichment relief to contractors who mistakenly violate a bidding statute but still enrich a government entity,[36] courts have been less willing to apply those principles in the private sector. Certainly a constructive trust is not appropriate because title was not acquired through the contractor's work. Even a creative chancellor is unlikely to compel Owner #1 and Owner #2 to swap parcels. The contractor's only hope is for a court of equity to have mercy, use the broad language of unjust enrichment, and decree some type of monetary restitution against Owner #2.

Although older cases may seem to limit the constructive trust to instances involving a confidential relationship or elements of fraud, such restrictions are not consistent with the principle of unjust enrichment. Rather, the constructive trust is available when unjust enrichment demands relief and the legal relief in the form of monetary restitution is not adequate, or more precisely not as adequate, as the constructive trust remedy. As seen above, operative factors—including criminal acts,[37] duress, a confidential relationship, a double recovery, mistake, imposition, undue influence—will suffice for a judicial declaration of "unjustness."

Earlier cases required that the enrichment to the defendant come from the plaintiff; that is, that the plaintiff have suffered a loss. But the more recent view is that the source of the enrichment is irrelevant. The essence of unjust enrichment is that the defendant has received something to which the plaintiff has a better claim. Similarly, the sweep of unjust enrichment is broad enough so that a constructive trust may also be imposed against an innocent party, provided that the innocent party would be unjustly enriched vis-à-vis the plaintiff.[38]

Likewise, a constructive trust is not denied merely because the plaintiff is at fault. For example, if by mistake a bank deposits money into the wrong account, it may assert unjust enrichment and seek a constructive trust over the funds now in the hands of the recipient. Equity, in its moral conscience, will not deny relief to a party whose only fault is an honest mistake.

The mechanics of the constructive trust are rarely challenged. The chancery court decrees that the defendant is holding property for the beneficial interest of the plaintiff. Since the trust is "dry" or "passive," it is implemented by an equitable decree ordering the trustee to transfer legal title to the beneficial owner, the plaintiff. Such equitable decrees may be enforced by contempt or other equitable powers. Indeed, even such a use of the contempt power may be unnecessary. The chancellor has power, if the defendant refuses to sign a deed or transfer title, to direct the act to be done by a commissioner or master.[39] Further, if the property is within the jurisdiction of the court, the court may divest the defendant of title and directly vest it in the plaintiff.[40]

In addition to the primary objective of allowing the plaintiff to recover property even in the absence of a legal title, the constructive trust has other advantages, the most attractive of which is the increase in value.[41] Suppose that by July 1 the value of Blackacre had increased from $5000 to $6000. A constructive trust would give Paula Blackacre at its current market value. The increase rightfully belongs to Paula. It was her money, when properly traced, that in reality acquired Blackacre. Full restitution calls for the transfer of the increase to her as well.

The trust incorporates the equitable technique of tracing. If Defendant Dan, who acquired Blackacre, later exchanges it for Greenacre, the constructive trust will reach Greenacre. The principle is that equity will follow property through all of its stages or forms, provided that the property, its proceeds, or its product is capable of identification.[42] While the degree of identification depends on each case, less precise identification and tracing are acceptable when the dispute is between the trustee and the beneficiary than when the dispute involves the rights of third parties.[43] Provided that tracing can be demonstrated, the constructive trust mechanism can be applied to all substantive areas of the law and all types of property. For example, the technique of tracing as applied to the distribution of marital and non-marital property in divorce proceedings will frequently support constructive trusts or equitable liens.[44]

Another attraction is the priority advantage. Suppose while Defendant Dan was holding Blackacre, before discovery of the misappropriation and before tracing of the assets, Dan incurred two additional financial burdens: 1) a general creditor obtained a judgment against him for $1000; and 2) Dan bought a car and gave the seller a security interest for $2000 in Blackacre. When Dan's financial structure collapses and all the claimants come after him, they find he has only Blackacre. As to both the unsecured and the secured creditor, Plaintiff Paula should have priority. The funds were hers at the time of the wrong; except for the wrong, they would have remained hers; the property is the result of the wrongdoer's action; and the property can be identified. An ancient maxim of equity states: "Where there are equal equities, the first in time shall prevail."

While there is some case law that the priority given to the trustee commences only from the time the trust is decreed by the chancellor,[45] the more logically consistent approach is that the priority relates back from the time of the decree to the time of the misappropriation. Provided the funds can be traced, the priority remains with the victim, Paula. While the creditors may be innocent and acting in good faith, and the automobile dealer did give value for its security interest, the interest of Paula is prior in time and preferred in significance.

The victim's funds may not provide the sole support for the acquisition of property. Suppose that Dan takes the $5000 and combines it with $5000 of his own funds to purchase Blackacre. Because the entire purchase price did not come from the victim, some authority[46] would deny a constructive trust, unless Dan was a conscious wrongdoer. However, the better view is that the court of equity, in its discretion, may decree a constructive trust of partial ownership. For example, in *Waller v. Waller*,[47] a divorced couple took title to land as husband and wife. She paid the entire purchase price, but his name was included on the documents, and he promised to convey his share to her. The court found that he obtained his interest by falsely promising to reconvey a one-half interest, or that he violated a confidential relationship in not reconveying that interest. Therefore, a constructive trust was properly imposed on his one-half interest.[48]

A more difficult problem arises if the value of the property acquired by the wrongdoer decreases. Suppose Dan used the $5000 to purchase Blackacre, which subsequently declined in value to $3000. The obvious remedies are for equity to impose a constructive trust on the stock and, under its clean-up power, to grant a deficiency judgment for $2000. However, traditional law provides that a constructive trust may not be accompanied by a deficiency judgment.[49] The plaintiff should instead seek the alternative remedy of an equitable lien.

The constructive trust may reach third parties. If Dan had given Blackacre to his friendly cousin, equity would impose a trust on the land without hesitation. Cousin Carl does not qualify as a bona fide purchaser.[50] The more difficult question arises when Dan sells Blackacre to Innocent Ivan for $10,000. If Dan leaves the state and loses the money at the tables in Las Vegas, Paula has no meaningful recourse against him. She may assert a cause of action and seek a restitutionary remedy, but, in the absence of a res, a constructive trust is not appropriate. The remedy is legal restitution in the form of a money judgment. Does she have recourse against Innocent Ivan? Unlike some transfer situations (such as with outright theft), Dan did acquire legal title to Blackacre and was able to transfer it. Ivan is probably protected. He purchased it in good faith, without notice of Paula's claim, and therefore acquires an interest above, and free of, the constructive trust claim.[51]

The issue of constructive trusts arises frequently in bankruptcy proceedings. Creditors seeking priority over assets falling within the scope of the bankruptcy estate assert an equitable interest. Although the debtor may have legal title, the creditor alleges that the surrounding circumstances require the declaration of a constructive trust to prevent unjust enrichment and to give the creditor priority as to the asset.[52] Although the 1978 Bankruptcy Code is silent as to the relationship between constructive trust claims and the bankruptcy estate, the cases offer a variety of analytical approaches, contain inconsistent statutory analysis, and exhibit confusion as to basic restitutionary doctrine.[53] Professor Jeffrey Davis concludes that the court's ultimate decision on whether to decree a constructive trust on property within the estate of the debtor is likely to be based on underlying factual patterns: whether the claimant is a high-sympathy or low-sympathy claimant, whether particular enmity exists toward the debtor, whether tracing of the asset in question is difficult, whether the claimant attempted to protect his own interest, whether the property is real or personal, and whether the claim rests upon a cause of action such as fraud or breach of fiduciary duty.[54]

While such factors are not specifically set forth in the bankruptcy code, their utilization is within the clear scope of traditional equitable discretion. For example, in *In re N.S. Garrott & Sons*,[55] the debtor had borrowed money from the bank in a transaction of questioned legality and undisputed fraud and turned the funds over to a third party to make payments on a debt to a prior secured creditor. In its turnover complaint the debtor persuaded the bankruptcy court that the statutory definition of the bankruptcy estate encompassed the funds within the possession of the third party. But in its intervention proceeding, the prior creditor convinced the court that its equitable claim, based on unjust enrichment, supported the imposition on the funds of a constructive trust under Arkansas law. Although the case did not present a classic fact pattern, the clear wrongfulness of the debtor's conduct undoubtedly swayed the court to exercise its equitable discretion to impose a trust.

B. Equitable Lien.

Liens may be created by statute,[56] by contract,[57] by implication,[58] or by legal fiction. In the latter situation unjust enrichment is the guiding principle. Like a constructive trust, the equitable lien is a remedy created by a court of chancery for the sole purpose of preventing unjust enrichment.

The Arkansas law of equitable liens is not well developed. Some equitable liens have traditionally existed, even prior to the modern development of unjust enrichment. For example, the vendor of land has an equitable lien on the land for the unpaid purchase price which is valid against both the purchaser and subsequent purchasers with notice.[59] Similarly, in real property matters the mortgagor will take out an insurance policy to protect the interest of the mortgagee. Typically, the policy will provide that any proceeds from the policy (as in the case of fire damage) are to be paid to the mortgagee. However, even in the absence of such a provision, chancery will decree an equitable lien on the proceeds that are held by the mortgagor so that the interest of the mortgagee will be satisfied.[60] Further, equity will create an equitable lien as a substitute for an unsuccessful attempt to create a consensual lien. For example, if the parties fail to sign or record documents, the lien created will be comparable to the consensual lien that failed.[61] Likewise, equity will recreate a lien that has been mistakenly released.[62]

Building upon such implied-in-fact liens, equity recognized that liens may be judicially decreed to prevent unjust enrichment. An old Arkansas case[63] provides a simple example. Ward, an employee of the Atkinson Company, converted sums of money from the business and used the $1350 to construct a storehouse on his land. Equity has the power "to follow them in whatever change of form they may have taken, so long as it is possible to identify them, unless they have passed into the hands of a bona fide purchaser without notice." Accordingly, Atkinson was entitled to a lien declared upon Ward's land in the amount of $1350, and, if necessary, a judicial sale to satisfy the judgment. The remedy was not a constructive trust, because title had not been acquired; the remedy was an equitable lien, limited to the amount of the conversion and subject to the requirement of tracing. Of course, the employer did have another option. It could have sued in a court of law, asserting conversion (instead of unjust enrichment) as a cause of action, and sought both compensatory and punitive damages. Subject to the dictates of the election of remedies doctrine,[64] it might have sued in the alternative, asserting both theories and seeking both remedies in the pleadings, but recovering only one.

A central difference between the two equitable remedies, and perhaps the focus of a plaintiff's thinking, is that the constructive trust gives to the plaintiff the increase in value or the fruits of the misappropriated funds, while the equitable lien does not. The equitable lien does not vest title in the plaintiff, nor does it give specific restitution.

This distinction leads to the expression that an equitable lien may be granted when a constructive trust might constitute "overkill." Some defendants, even though they may be unjustly enriched, do not deserve to suffer a loss of the entire increase in value. A thief who breaks into an artist's supply store and steals paints, easels, canvas, and brushes and then paints a masterpiece is surely liable for the value of the goods stolen. But should the store owner recover the value of the masterpiece?[65] Such a recovery, whether in legal restitution or through the equitable constructive trust, might constitute overkill and wrongly deprive even the thief of the fruits of his lawful labors.

Other defendants may have their knowledge or labor protected because their misappropriation of the plaintiff's funds was in good faith. Suppose Ward had taken $5000 from Atkinson's account, believing he had the right to do so, and invested it in stock that rose to $8000. The employer is entitled to a lien for $5000, but not a trust on the $8000.[66] Ward was only an innocent converter.

Further, some plaintiffs may be less deserving of the increase. Consider, for example, an innocent trespasser who enters upon another's land, takes possession, and improves the land and its value through his efforts. When he is evicted from the land, he has a cause of action for the value of the improvements he contributed to the land. His theory may be based upon the Arkansas betterment statute[67] or upon pure unjust enrichment. The mistaken improver recovers only his dollar loss, perhaps only to the extent the fair market value of the land has objectively increased, but certainly not an increase over and above his mistaken investment.[68] The rationale behind that rule is that the improver was at fault, and only the free grace that is embodied in unjust enrichment permits the mistaken improver to recover at all. Certainly such a fortunate plaintiff should not be so greedy as to demand the increase above his out-of-pocket expenses.

A constructive trust is more desirable in that it gives the plaintiff the increase in value. On the other hand, in one aspect an equitable lien has a significant advantage. The conventional wisdom is that a plaintiff may be entitled to a deficiency judgment to supplement an equitable lien, but not to supplement a constructive trust. For example, if the storehouse of Ward has deteriorated and now has a fair market value of $3000, the plaintiff asserting unjust enrichment and tracing his lost funds of $5000 may seek an equitable lien on the storehouse in the amount of $3000. To complete his recovery of his lost funds, he would assert a deficiency judgment for $2000.[69] The lien would not extend to the land itself, for his funds were not employed to acquire title to the land.

As with the constructive trust, the lien can be imposed only if the funds can be traced into a particular res. Because an equitable lien does not give the increase in value, and the nature of the priority that an equitable lien gives may not be as comprehensive or as preferred as a constructive trust, a less precise degree of tracing is sometimes tolerated for an equitable lien.

An equitable lien cannot be imposed against a party who is not liable for the unjust enrichment claim itself. In *Dews v. Halliburton Industries, Inc.*,[70] companies that had supplied labor and materials for drilling an oil well recovered on an unjust enrichment basis from the owner of the land, who by his silence permitted the services to be provided and thus benefitted. But the companies were not entitled to an equitable lien on the oil and gas profits produced by the well because the owner was contractually entitled to only a percentage of the profits, with the remainder going to an innocent party. In the absence of that third party, an equitable lien would have been appropriate.

Too often courts adopt a restrictive approach to equitable liens, rather than using the flexibility of unjust enrichment and the creativity of chancery courts. Consider, for example, *Mitchell v. Mitchell*.[71] The older Mitchells (Ivory and Zella) owned a six-acre tract of land in Sebastian County. They permitted their son and his wife (Jimmy and Anna) to build a house on the tract. Subsequent to the completion of the house and its occupancy by the younger Mitchells, they experienced marital difficulties, which required that title to the house be resolved. The younger Mitchells contended that the house was built on the condition that title to the improved six acres would be conveyed to them. The older Mitchells responded that they never promised title, but only rent-free possession of the premises for a period of time sufficient to off-set the labor and materials expended to construct the house.

Both the trial court and the court of appeals found the younger Mitchells' claim supported by unjust enrichment. In simple terms, the older Mitchells received a benefit, namely the house; the benefit was provided by the younger Mitchells; and the older Mitchells would be unjustly enriched by keeping improvements that they had not built and that the other couple had constructed in apparent good faith. Through the legal fiction of unjust enrichment, the law would decree restitution. Likewise, the courts agreed that a constructive trust was not appropriate. Title to the land had not been acquired by the older Mitchells out of funds or the efforts of the younger Mitchells. So far, so good.

To enforce the judgment, the chancellor granted an equitable lien on the house and part of the tract on which it was located. But the court of appeals reversed the equitable lien. It did not rest upon an express or implied agreement to create a lien; a mere advance of money does not create a lien. The court of appeals did recognize that an equitable lien may arise, even in the absence of an express or implied agreement, "out of general considerations of right and justice where . . . there is some obligation or duty to be enforced." But it elected to limit, rather than to extend, such constructive or equitable liens. In the absence of fraud, a mere money judgment would be an adequate remedy.

The decision of the court of appeals is unnecessarily narrow and begrudging. First, the support for its statements is a general encyclopedia,[72] whose support is a solitary New Jersey case from 1941.[73] Second, the expansion of unjust enrichment and the equitable lien remedy dates from the Restatement of Restitution in 1937. Third, the other general encyclopedia concludes that liens are looked upon with favor and their applicability has been liberally extended.[74] A more appropriate approach for the court of appeals would have been to impose an equitable lien upon the improvements, but not upon the land. Those improvements were a direct result of the efforts and funds of the younger Mitchells and directly enriched the older Mitchells. The relationship of the families would call for particular equitable discretion, flexibility, and tactfulness in crafting the terms of the lien.

As with the constructive trust, the equitable lien may give the holder priority as to some third parties. But since title was not acquired with the funds, the scope of priority will not be as sweeping. For example, a constructive trust on Blackacre would take priority over a subsequent mortgage or security interest on the land. But if Blackacre is only improved, the more formal instrument creating the security interest may outweigh the judicially created lien.

Such a weighing of interests is particularly appropriate if the equitable lien is decreed to compensate for a mistake made by the claiming or asserting party. To give a mistaken party a lien versus the other party is far less objectionable or troubling than to give the mistaken party priority versus a third party who was not involved in the mistaken transaction and is likewise innocent.[75] For example, if Alice loans money to Bob and receives a purported, but defective, security interest in his automobile, equity might decree an equitable lien to substitute for the failed agreement. But, if prior to any judicial involvement and relying on the absence of a recorded document, Third Party Tom loans money to Bob and receives a valid security interest, he should be entitled to priority. Alice had the opportunity to perfect her interest and be protected, and she failed to do so. In contrast, Tom did protect his interest. To deny him priority would be to undermine his reliance on a recording statute requirement.

Unlike the dictates of a statutory lien, the equitable lien permits the chancellor to tailor the terms to the particular fact pattern. For example, while a statutory lien might permit the creditor to foreclose on the property in thirty or sixty days if the judgment were not satisfied, the court of equity may extend the period of redemption for an equitable lien. In the case of a defendant who is innocent or would suffer a hardship, the court might even delay foreclosure of the lien until the property is sold or the defendant dies. Further, the court might direct that the property be mortgaged and the plaintiff be reimbursed out of the loan proceeds.[76] A plaintiff who desired his recovery sooner would, of course, retain the enforcement techniques of execution and garnishment provided to a holder of a money judgment.

Currently, formalistic distinctions determine whether the more preferred constructive trust or the slightly less desirable equitable lien is granted. A more equitable approach would evaluate a variety of factors, none of which by itself would be determinative. Those factors would include: 1) the responsibility, fault, culpability, or guilt of the defendant; 2) the innocence or blamelessness of the plaintiff; 3) the windfall to the plaintiff; 4) the claims of third parties;[77] 5) the acquisition of title; 6) the commingling of funds;[78] 7) the increase in value of the acquired property; 8) the need for a deficiency judgment; 9) the appropriateness of a partial constructive trust; 10) the precision of the tracing; and 11) the manifest inadequacy of legal remedies.

C. Subrogation.

Subrogation grants to a party who has been obliged to pay the debt of another the right to succeed to all the securities and property held by the creditor for the payment of the debt. The payor steps into the shoes of the creditor and obtains whatever rights and remedies the creditor had against the debtor. In effect, the payor has purchased the creditor's rights against the debtor. Conventional subrogation asserts this right for the payor through an express agreement. For example, typically an insurer who pays an insured for claims caused by a tort-feasor has a contractual right of subrogation and asserts the insured's claim against the tort-feasor.

The doctrine of subrogation is an equitable remedy which rests upon unjust enrichment[79] and attempts to accomplish complete and perfect justice between the parties.[80] The doctrine may be invoked whenever justice and good conscience, or in the Latin phrase "*ex aequo et bono,*" demand its application, but no legal right for subrogation exists.[81] Subrogation applies when one party pays a debt for which another party is primarily liable and which that party should, in equity, pay.[82] The doctrine is not governed by a rule of universal application, but rather falls within the scope of the familiar maxim, "He who seeks equity must do equity."[83]

The elements of subrogation are: 1) a party pays in full a debt or an obligation of another or removes an incumbrance of another, 2) for which the other is primarily liable, 3) although the party is not technically bound to do so, 4) in order to protect his own secondary rights, to fulfill a contractual obligation, or to comply with the request of the original debtor, 5) without acting as a volunteer or an intermeddler.[84] Provided the equities of the party seeking subrogation, the subrogee, are superior to those of other claimants, the subrogee succeeds to the rights, securities, and remedies of the subrogor, whose debt was paid.[85] By virtue of this judicial substitution the subrogee (who paid the debt) is now in the same position vis-a-vis the debtor-obligor (who should have paid the debt) as the original creditor-subrogor was. Whether subrogation is based upon a contract,[86] a statute,[87] or a relationship between the parties, subrogation is a doctrine of equity governed by equitable principles.[88]

In the absence of an agreement between the parties, equity can decree subrogation to prevent unjust enrichment.[89] For example, suppose that Wrongdoer Willie misappropriated $4000 from his employer, went to the Fourth National Bank, and paid off his outstanding note. The employer could obtain a legal restitutionary judgment for $4000, but such a judgment might not be collectible. On the equitable side of restitution, the victim could not seek a constructive trust because no res is now available. Likewise, an equitable lien would be unavailing because the property is no longer identifiable. Further, the funds are in the hands of an innocent third party who has given value, the release of the debt. But Wrongdoer Willie has been enriched by becoming free of the debt owed to the Fourth National Bank. To prevent that benefit, equity may re-create the debt through the fiction of subrogation. As with any equitable remedy, subrogation is entrusted to the discretion of the chancellor.[90] The new debt would be paid to the employer, not to Fourth National.

The benefit of subrogation to the victim is twofold. 1) Whatever security for the debt was held by the bank is now held by the victim, whether it is title to real property, a lien on personal property, or set-off rights against bank accounts. To the extent that the bank had priority vis-à-vis third parties, so does the victim. 2) Whatever special advantages the bank had against the debtor, so does the victim. For example, the bank may have benefitted from a higher than normal interest rate, special collection privileges, expedited procedures such as a confession of judgment provision, or a longer statute of limitation.

Although the doctrine is expansive in its scope and applicability, the subrogee asserting the right has several hurdles to pass. First, for subrogation to be applicable, the debt or claim under which the subrogee asserts his rights must have been paid in full. In our example, the wrongdoer used the victim's funds to pay off the claim that the wrongdoer owed to the Fourth National Bank.

Second, the subrogee must have paid off (or his funds must have been used to pay off) a debt for which the third party was primarily liable. Here, the subrogee's misappropriated funds were employed to pay off the debt the wrongdoer owed to the Fourth National Bank.

Third, the subrogor must have possessed a right that it could have enforced against the third party. Any rights the subrogee seeks to obtain must derive from and be dependent upon the rights of the subrogor. The bank had rights that it could assert against Wrongdoer Willie.

Fourth, the subrogee must not have acted as a "volunteer" in paying a claim of the subrogor that lay against the obligor. A volunteer is one who, without any right or interest of his own to protect, and without any moral or legal obligation, and without being requested to do so by one who is liable on the obligation, pays a debt or removes an incumbrance of another.[91] For example, a person who pays a debt of another in order to gain economic power over that person is an officious meddler and thus is not granted the equitable rights of subrogation.[92] On the other hand, a party who has an interest in real property and pays the taxes due on that property in order to protect his interest is subrogated to the liens and rights of the taxing authority against the taxpayer.[93] In the absence of a protectible interest, the person who pays the taxes of another is only a volunteer and is not entitled to subrogation.[94] Likewise, a party who pays the taxes of another in a misleading manner, thus gaining an advantage, is not entitled to the equitable, and thus discretionary, remedy of subrogation.[95]

Apart from the rare case in which a person intentionally pays off the debt of another, the defense of volunteer arises in instances where the payment was made out of mistake or disputed liability. Suppose, by innocent, though unilateral, mistake, the employer pays off a debt that Willie owes to a bank. The employer should seek the assistance of equity and re-create the debt that Willie owed to the bank, but substitute the employer instead of the bank. The application of the volunteer defense to the mistaken payor is foolish. This doctrine of equitable subrogation is broad enough to include every instance in which one party pays the debt for which another is primarily responsible, and which in equity and good conscience should have been discharged by the other. The employer had no legal obligation to pay the debt; he was merely mistaken. But the scope of unjust enrichment and the flexibility of equity should permit subrogation.

A different situation is presented when a junior lien holder pays off a more senior lien. Professor Laycock offers this example: suppose real estate with a value of $90,000 is subject to a first mortgage of $40,000, a second mortgage of $20,000, and a third mortgage of $10,000.[96] Suppose the first mortgage is in default. The third mortgagee is certainly under no legal duty to pay it. However, as he evaluates the situation, he realizes that a foreclosure sale may barely pay the first mortgagee and almost certainly none of the sale proceeds will trickle down to him. Therefore, to prevent foreclosure and to thereby protect his own interest, he voluntarily pays the first mortgage himself. Is he a volunteer? Yes. Should he be denied subrogation? No. He did not pay the debt out of mistake; he has not caused injury to the second mortgagee, whose status has not been altered; he is not attempting to re-create a failed financial instrument. Accordingly, the third mortgagee should be subrogated to the rights of the first mortgagee against the obligor.

Like its companion remedies of the constructive trust and the equitable lien, subrogation has an element of tracing. The subrogee traces or follows the rights the subrogor had against the debtor and then persuades equity to transfer those rights to the subrogee. What is traced is not money, but rather a claim or right that the subrogor has against the debtor.

Conclusion

The first Arkansas appellate decision to rely upon the Restatement of Restitution offers a comprehensive example of the restitutionary remedies and principles: for eighteen years the Rock Island Improvement Company (Rock Island) innocently paid the real property taxes on a tract of land, believing itself to hold title. The owner of the land, Brookfield, knew of the mistaken tax payments but remained silent and did nothing. Neither the facts nor the underlying cause of action was disputed. The defendant was unjustly enriched, and restitution was the appropriate relief.[97] A constructive trust was not appropriate because title to the land had not been acquired with the funds of Rock Island. Therefore, to protect the plaintiff's restitutionary relief, equity granted a lien on the tract.

The basic dispute was whether the lien should be a newly created lien or the tax lien that the county government could have asserted against the property, in other words, whether equity would merely decree an equitable lien or whether it would subrogate Rock Island to the remedies and rights of the taxing authority against Brookfield. The advantage of subrogation, in addition to enforcement techniques such as a tax sale, is that the tax lien of the government has no statute of limitation. The majority concluded that the lien of the government was to protect the public, whereas the lien of the plaintiff was a technique to prevent unjust enrichment between private litigants. Consequently, the plaintiff could not succeed to the unlimited statute of limitation of the government, but was instead limited to only three years of mistaken tax payments.[98] The remedy was a new lien, not a tax lien, an equitable lien, but not equitable subrogation.

The dissent argued that a mortgagee who paid taxes to protect its interests is entitled to subrogation to the rights of the government, and that an innocent, but mistaken, payor should be treated likewise. Regardless of whether the payor is protected by the principles of property law or the principles of unjust enrichment, the remedy of subrogation should be available to both. The actions of the payor Rock Island released Brookfield from the lien on the property held by the government. Equity demands that a new lien be created to give Rock Island the same rights that the government had.

Five decades ago, this opinion blazed new trails in the development of restitution.[99] While the dissenting opinion comports better with the principles and flexibility of equity, the case was, and continues to be, a foundation upon which comfortably rest equity and its restitutionary remedies.

NOTES

1. 97 ENG. REPORTS 676, 680. The reader should note that the adjective "equitable" does not refer to a court of chancery, but is used to connote the generic sense of fairness, justice, and right dealing. Further, Lord Mansfield, sitting in the highest law court, would not be creating an equitable remedy. *See* Gitelman, *An Observation on the Revision of Legal History by the Arkansas Court of Appeals*, 34 ARK. L. REV. 437 (1980).

2. DAWSON, UNJUST ENRICHMENT (1951) 11-14.

3. Frigillana v. Frigillana, 266 Ark. 296, 307, 584 S.W.2d 30, 35 (1979).

4. Patton v. Brown-Moore Lumber Co., 173 Ark. 128, 133, 292 S.W. 383, 385 (1927).

5. Brookfield v. Rock Island Improvement Co., 205 Ark. 573, 169 S.W.2d 662 (1943). *See* Brill, *Unjust Enrichment: An Arkansas Outline*, 1985 ARK. L. NOTES 1.

6. Patton v. Brown-Moore Lumber Co., 173 Ark. 128, 292 S.W. 383 (1927).

7. Fite v. Fite, 233 Ark. 469, 345 S.W.2d 362 (1961).

8. *Id.*

9. Little Rock Mun. Airport Comm. v. Arkansas Valley Comp. & Ware. Co., 224 Ark. 1018, 277 S.W.2d 836 (1955).

10. *See* LAYCOCK, MODERN AMERICAN REMEDIES (1985) 487-88; JACOBSON, ARKANSAS CHANCERY PRACTICE, § 109 (1940).

11. DAWSON, UNJUST ENRICHMENT (1951) 26-28.

12. *See* LAYCOCK, MODERN AMERICAN REMEDIES, (1985) 487-88.

13. Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 386, 122 N.E. 378, 380 (1919).

14. Latham v. Father Divine, 299 N.Y. 22, 27, 85 N.E.2d 168, 170 (1949). Although the linchpin of equity jurisdiction is the inadequacy of a legal remedy, *see* BRILL, ARKANSAS LAW OF DAMAGES (2d ed. 1990), § 2-1, the flexibility in that requirement allows wide freedom for equity to operate. For example, in Scroggins v. Bowen, 249 Ark. 1155, 464 S.W.2d 79 (1971), the court held that a constructive trust and an equitable lien would be more "adequate" than an action at law for damages.

15. Two other trusts are also implied by the court. First, a resulting trust arises when property is bought by one person with the assets of another and taken in the name of the purchaser, rather than the person supplying the funds. Andres v. Andres, 1 Ark. App. 75, 613 S.W.2d 404 (1981). The funds must be supplied at the same time as the purchase or prior to the purchase, and must be a part of the original transaction. Walker v. Hooker, 282 Ark. 61, 667 S.W.2d 637 (1984). The party seeking to persuade the chancery court to declare a resulting trust must establish with clear and convincing evidence the definite amount provided by each to the purchase of the property. Second, when actual fraud is employed to acquire legal title, the court implies a trust *ex maleficio*. Andres v. Andres, 1 Ark. App. 75, 613 S.W.2d 404 (1981).

16. Andres v. Andres, 1 Ark. App. 75, 613 S.W.2d 404 (1981).

17. Bottenfield v. Wood, 264 Ark. 505, 573 S.W.2d 307 (1978); Beeson v. Beeson, 11 Ark. App. 79, 667 S.W.2d 368 (1984).

18. Bramlett v. Selman, 268 Ark. 457, 597 S.W.2d 80 (1980).

19. Admittedly, the Arkansas case law only expressly recognizes the first three grounds. "The equitable remedy of a constructive trust, however, is not imposed absent a legal wrong, such as fraud, as suggested in Jackson v. Jackson, 298 Ark. 60, 765 S.W.2d 561 (1989), or overreaching, as in Savage v. McCain, 21 Ark. App. 728 S.W.2d 203 (1987)." Guinn v. Guinn, 35 Ark. App. 199, 202, 816 S.W.2d 629, 631 (1991) (in the absence of any evidence of fraud or overreaching, court denied a constructive trust against a husband who had taken funds out of a joint account). Constructive trusts are imposed against a party "who secured legal title either by an intentional false oral promise . . . , or who violates a confidential or fiduciary duty or is guilty of

any other unconscionable conduct which amounts to constructive fraud." Andres v. Andres, 1 Ark. App. 75, 81, 613 S.W.2d 404, 407 (1981). Nevertheless, all five grounds are logical extensions of the underlying doctrine of unjust enrichment.

20. Henry v. Goodwin, 266 Ark. 95, 583 S.W.2d 29 (1979).

21. McIntire v. McIntire, 270 Ark. 381, 605 S.W.2d 474 (Ark. App. 1980) (husband and wife); Savage v. McCain, 21 Ark. App. 50, 728 S.W.2d 203 (1987) (mother and stepdaughter); Beeson v. Beeson, 11 Ark. App. 79, 667 S.W.2d 368 (1984) (mother and child). Compare Wright v. Union National Bank of Ark., 307 Ark. 301, 819 S.W.2d 698 (1991) (quarrels between sisters showed that no confidential relationship between them existed and that basis for constructive trust was absent).

22. Bramlett v. Selman, 268 Ark. 457, 597 S.W.2d 80 (1980)(homosexual relationship); Horton v. Koner, 12 Ark. App. 38, 671 S.W.2d 235 (1984)(members of a women's commune).

23. Hall v. Superior Federal Bank, 303 Ark. 125, 794 S.W.2d 611 (1990) (appellant's name was put on stock account to help decedent manage her money; constructive trust imposed to prevent her appellant from using the funds for herself).

24. Bramlett v. Selman, 268 Ark. 457, 597 S.W.2d 80 (1980).

25. Andres v. Andres, 1 Ark. App. 75, 613 S.W.2d 404 (1981).

26. Beeson v. Beeson, 11 Ark. App. 79, 667 S.W.2d 368 (1984); Edmondson v. Edmondson, 269 Ark. 664, 599 S.W.2d 765 (1980).

27. Henry v. Goodwin, 266 Ark. 95, 583 S.W.2d 29 (1979).

28. Horton v. Koner, 12 Ark. App. 38, 44, 671 S.W.2d 235, 239 (1984).

29. Savage v. McCain, 21 Ark. App. 50, 52, 728 S.W.2d 203, 204 (1987).

30. "A person who has paid money to or for the account of another not intended by him, is entitled to restitution from the payee or from the beneficiary of the payment . . . ." RESTATEMENT OF RESTITUTION, § 22 (1937).

31. "Where the owner of property by mistake transfers it to one person under such circumstances that a third person is entitled to restitution from the transferee, the transferee holds the property upon a constructive trust for the third person." RESTATEMENT OF RESTITUTION, § 165 (1937).

32. RESTATEMENT OF RESTITUTION, § 160, comment (c) (1937).

33. Orsini v. Commercial National Bank, 6 Ark. App. 166, 639 S.W.2d 516 (1982). Equity has power to direct an ex-husband, who has allowed a policy to lapse, to procure an equivalent policy with his ex-wife named as irrevocable beneficiary. *See* Dodson v. Dodson, 37 Ark. App. 86, ___ S.W.2d ___ (1992).

34. Rogers v. Rogers, 63 N.Y.2d 582, 483 N.Y.S.2d 976, 473 N.E.2d 226 (1984). "In general, it is necessary to trace one's equitable interest to identifiable property in the hands of the purported constructive trustee . . . . But in view of equity's goal of softening where appropriate the harsh consequences of legal formalisms, in limited situations the tracing requirement may be relaxed." *Id.* at 586. 483 N.Y.S.2d at 977, 473 N.E.2d at 227.

35. ARK. CODE ANN. § 18-60-105; Young v. Mobley Constr. Co., 266 Ark. 935, 587 S.W.2d 837 (1979); Shick v. Dearmore, 246 Ark. 1209, 442 S.W.2d 198 (1969), noted at 24 ARK. L. REV. 127 (1970).

36. McCuistion v. City of Siloam Springs, 268 Ark. 148, 594 S.W.2d 233 (1980).

37. The principle of unjust enrichment bars a party who wrongfully kills another from profiting from the crime. Estate of Sargent v. Benton State Bank, 279 Ark. 402, 652 S.W.2d 10 (1983), noted as "Judicial Limitations on a Slayer's Right to Inherit from the Decedent," 38 ARK. L. REV. 653 (1985). *See* ARK. CODE ANN. § 28-11-204. The constructive trust can be appropriately employed to determine whether any insurance proceeds diverted from the beneficiary/murderer should go to a contingent beneficiary or to the decedent's estate. *See* Bennett, Case Note, *Distribution of Life Insurance Proceeds When the Primary Beneficiary is Disqualified*, 45 ARK. L. REV. 213, 231-233 & 240-241 (1991).

However, that deterrent rule does not apply where the wrongdoer would gain nothing by the act. In Luecke v. Mercantile Bank of Jonesboro, 286 Ark. 304, 691 S.W.2d 843 (1985), the husband killed his wife and then committed suicide. The wife's heirs were not entitled to inherit his personally owned property under his will, because she had pre-deceased him. Her heirs argued that his heirs were being unjustly enriched because they were receiving what she would have received if he had not killed her, but only committed suicide. But the court rejected that argument, concluding that by his act of murder, he gained nothing. Since he was not enriched, unjust enrichment could not be asserted against his heirs. As to her separately owned property, obviously neither he nor his estate could benefit under her will, in light of the long-standing rule that one who wrongfully kills another cannot profit from the crime. Property held as tenants by the entirety was treated as held as tenants in common.

38. Orsini v. Commercial National Bank, 6 Ark. App. 166, 639 S.W.2d 516 (1982). *See also* Malone v. Hines, 36 Ark. App. 254, 822 S.W.2d 394 (1992).

39. ARK. R. CIV. PRO. 70. *See also* ARK. CODE ANN. § 16-66-116.

40. ARK. R. CIV. PRO. 70.

41. RESTATEMENT OF RESTITUTION, § 202, comment (c) (1937).

42. Malone v. Hines, 36 Ark. App. 254, 822 S.W.2d 394 (1992); RESTATEMENT OF RESTITUTION, § 202 (1937). For other examples of tracing, *see* Murry v. Hale, 203 F. Supp. 583 (E.D. Ark. 1962) (investment funds); Potter v. Potter, 280 Ark. 38, 655 S.W.2d 382 (1983) (divorce); Jennings v. National Bank of Commerce of Pine Bluff, 270 Ark. 735, 606 S.W.2d 130 (Ark. App. 1980) (ademption of a specific legacy).

43. Malone v. Hines, 36 Ark. App. 254, 822 S.W.2d 394 (1992) (trust imposed upon cattle and sale proceeds).

44. ARK. CODE ANN. § 9-12-315(b) defines non-marital property as that property owned before marriage or acquired by gift, bequest, or descent during marriage, or that "acquired in exchange" for the property. If tracing is unable to distinguish marital from non-marital property, the property ultimately acquired will be declared to be marital property. *See* Boggs v. Boggs, 26 Ark. App. 188, 761 S.W.2d 956 (1988).

45. Palmland Villas I Condominium v. Taylor, 390 So. 2d 123 (Fla. App. 1980).

46. RESTATEMENT OF RESTITUTION, § 210 (1937).

47. Waller v. Waller, 15 Ark. App. 336, 693 S.W.2d 61 (1985).

48. Savage v. McCain, 21 Ark. App. 50, 728 S.W.2d 203 (1987). In Penn v. Penn, 284 Ark. 562, 683 S.W.2d 930 (1985), the trial court imposed a constructive trust on five-sixths of the proceeds of a savings account, but the decree was reversed on the merits. In Savage v. McCain the court affirmed a constructive trust on a partial interest of personal property held by the trustee.

49. RESTATEMENT OF RESTITUTION, § 161, comment (a); § 210, comment (d) (1937).

50. *See* Corporation of President of Church of Jesus Christ of Latter-Day Saints v. Jolley, 24 Utah 2d 187, 467 P.2d 984 (1970) (plaintiff church obtained a constructive trust on two sports cars purchased by an embezzling church employee with church funds and given to his girl friend).

51. Malone v. Hines, 36 Ark. App. 254, 822 S.W.2d 394 (1992).

52. A related question is raised, but not answered, by Chrysler Corp. v. Fedders Corp., 670 F.2d 1316 (3rd Cir. 1982): Can a party seek a constructive trust over property held by the defendant when the underlying cause of action is breach of contract? Ordinarily equitable remedies are available only when the legal remedy is inadequate, and damages would be presumed adequate. Chrysler sold a subsidiary to Fedders, which then converted the assets into cash and used the cash to discharge mortgages and liens on its property. When Fedders failed to pay the remainder of the purchase price, Chrysler sued for breach of contract and sought a constructive trust on the property. Apparently, Chrysler's argument was that Fedders, if not bankrupt, was impoverished and thus any monetary judgment would be uncollectible in reality.

53. Davis, *Equitable Liens and Constructive Trusts in Bankruptcy: Judicial Values and the Limits of Bankruptcy Distribution Policy*, 41 U. FLA. L. REV. 1, 15-19 (1989).

54. *Id.* at 68-71. Davis offers a proposed amendment to the bankruptcy code which would define "equitable claims" and give the trustee power to avoid any equitable claim to the property of the debtor, unless the claim is based on the unjust enrichment to the debtor arising out of specified factual patterns. *Id.* at 75-76.

55. *In re* N.S. Garrott & Sons, 772 F.2d 462 (8th Cir. 1985).

56. As examples of statutory liens, *see* ARK. CODE ANN. § 16-22-301 (attorney's lien); ARK. CODE ANN. § 18-41-101 (landlord's lien); ARK. CODE ANN. § 18-43-101 (laborer's lien); ARK. CODE ANN. § 18-44-101 (mechanic's lien); ARK. CODE ANN. § 18-45-201 (lien of automobile repairman); ARK. CODE ANN. § 18-45-401 (lien of dry cleaners); ARK. CODE ANN. § 18-46-104 (hospital liens). *See* PASVOGEL, ARKANSAS CONSTRUCTION MECHANICS' AND MATERIALMEN'S LIENS (1982); Gunter, *Mechanics' and Materialmen's Liens: A Practitioner's Checklist for Filing a Lien*, ARK. LAWYER (July 1991), p. 33.

57. *E.g.*, Ward v. Stark, 91 Ark. 268, 121 S.W. 382 (1909). The Arkansas farmers purchased 1300 fruit trees from the Stark Brothers Nursery of Missouri, and the purchase order provided that "this agreement shall be a lien upon the farm upon which the trees are planted. . . ." In upholding the lien, the court relied on a maxim of equity: "Equity requires no particular words to be used in creating a lien. It looks through the form to the substance of an agreement; and if . . . the intent appear(s) . . . to pledge property . . . as a security for an obligation, . . . the lien follows." *Id.* at 273, 121 S.W. at 383.

58. *E.g.*, Gordon v. Claridy, 142 Ark. 184, 218 S.W. 195 (1920). While chancery would not decree a resulting trust because the plaintiff had not advanced the entire purchase price, it would decree a lien on the land to the extent of the funds provided. "A common-law lien is the right in one person to retain that which he possesses, belonging to another, until certain demands are satisfied." JACOBSON, ARKANSAS CHANCERY PRACTICE, § 73 (1940).

59. Back v. Union Life Insurance Co., 5 Ark. App. 176, 634 S.W.2d 150 (1982). A similar equitable lien is

created in favor of the seller of personal property on the property. Borengasser v. Chatwell, 207 Ark. 608, 182 S.W.2d 389 (1944). However, merely lending money for the purchase of property does not create an equitable lien in favor of the lender. Lowrey v. Lowrey, 251 Ark. 613, 473 S.W.2d 431 (1971). An intent to give a lien or fraud in obtaining the loan would support an equitable lien as security on the property. Hunter v. Johnston, 226 Ark. 792, 294 S.W.2d 49 (1956).

60. Arkansas Teacher Retirement Systems v. Coronado Properties, Ltd., 33 Ark. App. 17, 801 S.W.2d 50 (1990).

61. LAYCOCK, MODERN AMERICAN REMEDIES 567 (1985).

62. Security Trust Co. of Freeport v. Martin, 178 Ark. 518, 12 S.W.2d 870 (1928).

63. R.G. Atkinson & Co. v. Ward, 47 Ark. 533, 538, 2 S.W. 77, 79 (1886).

64. *See* Brill, *The Election of Remedies Doctrine in Arkansas*, 37 ARK. L. REV. 385 (1983).

65. This example comes from Janigan v. Taylor, 344 F.2d 781 (1st Cir. 1965).

66. RESTATEMENT OF RESTITUTION, § 203 (1937).

67. ARK. CODE ANN. § 18-60-213(a). *See* BRILL, ARKANSAS LAW OF DAMAGES (2nd Ed. 1990), § 32-16.

68. RESTATEMENT OF RESTITUTION, § 170 (1937).

69. In Smith v. Whitmire, 273 Ark. 120, 617 S.W.2d 845 (1981), the court imposed an equitable lien on corporate stock, directed a public sale of the stock and ordered a deficiency judgment if the sale proceeds were inadequate to satisfy the judgment. Despite the argument that the action was only to enforce a promissory note and the legal remedy was adequate, the court found that chancery properly heard the case because it was not "wholly without jurisdiction under all circumstances."

70. Dews v. Halliburton Industries, Inc., 288 Ark. 532, 708 S.W.2d 67 (1986).

71. Mitchell v. Mitchell, 28 Ark. App. 295, 773 S.W.2d 853 (1989). For other instances of equitable liens in divorce litigation, *see* Flucht v. Villareal, 28 Ark. App. 1, 770 S.W.2d 187 (1989); Warren v. Warren, 11 Ark. App. 58, 665 S.W.2d 909 (1984) (equitable lien reversed, because the spouse had made a gift).

72. C.J.S., Liens § 8.

73. Schmid v. First Camden Nat. Bank & Trust Co., 130 N.J. Eq. 254, 22 A.2d 246 (1941).

74. AM. JUR. 2d, Liens § 23.

75. LAYCOCK, MODERN AMERICAN REMEDIES (1985) 567.

76. RESTATEMENT OF RESTITUTION, § 161, comment (b) (1937). The Restatement also suggests that if the improvements generate rental income, the plaintiff's judgment might be satisfied through that source.

77. Professor Palmer suggests that if other creditors remain unpaid, only an equitable lien is appropriate. PALMER, THE LAW OF RESTITUTION, 2.14(c) (1978).

78. In applying equitable tracing principles to commingled funds, Arkansas follows the lowest intermediate balance rule. Suppose the wrongdoer combines his own funds in an account with the victim's funds and subsequently makes periodic withdrawals and deposits. The victim is entitled to an equitable lien or a constructive trust on the lowest balance during the time the funds were commingled in a common account. In determining the lowest balance, the court presumed that the wrongdoer withdrew his own funds and left the victim's funds in the safety of the account. Powell v. Missouri & Arkansas Land & Mining Co., 99 Ark. 553, 139 S.W. 299 (1911).

79. *In Re* Russell, 101 B.R. 62 (Bank. W.D. Ark. 1989). *See* JACOBSON, ARKANSAS CHANCERY PRACTICE, § 106 (1940).

80. Blackford v. Dickey, 302 Ark. 261, 789 S.W.2d 445 (1990).

81. Baker v. Leigh, 238 Ark. 918, 385 S.W.2d 790 (1965); Federal Land Bank of St. Louis v. Richland Farming Co., 180 Ark. 442, 21 S.W.2d 954 (1929).

82. *In Re* Russell, 101 B.R. 62 (Bankr. W.D. Ark. 1989).

83. Baker v. Leigh, 238 Ark. 918, 385 S.W.2d 790 (1965).

84. Blackford v. Dickey, 302 Ark. 261, 789 S.W.2d 445 (1990); Moon Realty Co. v. Arkansas Real Estate Co., 262 Ark. 703, 560 S.W.2d 800 (1978). A party who is himself primarily liable cannot claim subrogation rights. Whitley v. Irwin, 250 Ark. 543, 465 S.W.2d 906 (1971).

85. Blackford v. Dickey, 302 Ark. 261, 789 S.W.2d 445 (1990); Davis v. Southern Farm Bur. Cas. Ins. Co., 231 Ark. 211, 330 S.W.2d 276 (1959).

86. Rights of subrogation are typically granted by contract to guarantors, sureties and endorsers. *In Re* Russell, 101 B.R. 62 (Bankr. W.D. Ark. 1989). But even in the absence of an express provision, the principle of equitable subrogation may be applicable. For example, a surety who takes over and completes the contract of a defaulting contractor is subrogated to the rights and remedies of the contractor with respect to funds due the contractor from the owner. Equilease Corp. v. USF&G Co., 262 Ark. 689, 565 S.W.2d 125 (1978). Likewise in the absence of an express contract, the basis for a right to indemnity rests upon a contract implied in law. A person who is compelled to pay money that another should have paid is entitled to recover that amount. *See* BRILL, ARKANSAS LAW OF DAMAGES (2nd Ed. 1990), § 19-7; Coleman v. Texaco, Inc., 286 Ark. 14, 688 S.W.2d 741 (1985).

87. *See, e.g.*, ARK. CODE. ANN. § 16-90-714 (payments under Crime Victims Reparation Act); ARK. CODE ANN. § 18-46-109 (hospital liens); ARK. CODE ANN. § 23-89-207 (insurance payments); ARK. CODE ANN. § 11-9-410 (worker's compensation). *See also* 11 U.S.C. § 509 (rights of subrogation in a bankruptcy case).

88. Cooper Tire & Rubber Co. v. Northwestern National Cas. Co., 268 Ark. 334, 595 S.W.2d 938 (1980).

89. Fairness requires mention of American Pioneer Life Ins. Co. v. Rogers, 296 Ark. 254, 753 S.W.2d 530 (1988), where the court held that equitable subrogation was not available in medical payment insurance policy cases where the policy lacked an express subrogation clause. (The insurer who paid its insured for her injuries had no subrogation rights against the tortfeasor). The dissenting opinion more correctly noted prior Arkansas law and refused to limit equitable subrogation to property interest cases.

90. For example, subrogation is not available to a party with unclean hands. Hill v. Kavanaugh, 118 Ark. 134, 176 S.W. 336 (1915).

91. Blackford v. Dickey, 302 Ark. 261, 789 S.W.2d 445 (1990).

92. RESTATEMENT OF RESTITUTION, § 2 (1937): "A person who officiously confers a benefit upon another is not entitled to restitution therefor." *See, e.g.*, Norton v. Haggett, 117 Vt. 130, 85 A.2d 571 (1952) (plaintiff had a quarrel with defendants and paid off a note they owed to a bank; because of his lack of good faith, the absence of any responsibility on his part for the debt, and his meddling, the court denied his request for subrogation and any other unjust enrichment remedy).

93. Moon Realty Co. v. Arkansas Real Estate Co., 262 Ark. 703, 560 S.W.2d 800 (1978).

94. Gosnell v. Garner, 198 Ark. 989, 132 S.W.2d 187 (1939).

95. Federal Land Bank of St. Louis v. Richland Farming Company, 180 Ark. 442, 21 S.W.2d 954 (1929).

96. LAYCOCK, MODERN AMERICAN REMEDIES (1985) 576.

97. Brookfield v. Rock Island Improvement Co., 205 Ark. 573, 169 S.W.2d 662 (1943).

98. *See* ARK. CODE ANN. § 16-56-105: "The following actions shall be commenced within three (3) years after the cause of action accrues: (1) All actions founded upon any contract, obligation, or liability not under seal and not in writing . . . ." The section has been applied to both contracts implied in fact and implied in law. Scroggin Farms Corp. v. Howell, 216 Ark. 569, 226 S.W.2d 562 (1950). Unjust enrichment claims, resting on an implied contract, are subject to the three-year limitation. *See* Carroll County v. Eureka Springs School Dist. #21, 292 Ark. 151, 729 S.W.2d 1 (1987).

99. *See* the discussion in PALMER, THE LAW OF RESTITUTION § 14.19(a) (1978).