

ENRIQUECIMIENTO INJUSTIFICADO

MATERIALES I

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UNJUST ENRICHMENT

SECOND EDITION

PETER BIRKS

OXFORD
UNIVERSITY PRESS

2005

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Part I

Introduction

A Core Case

Of the subjects which form the indispensable foundation of private law, unjust enrichment is the only one to have evaded the great rationalization achieved since the middle of the 19th century in both England and America by the writers of textbooks. Its fragments, obscurely named, were instead tucked under the edges of contract and trusts.¹ The consequence is that even at the beginning of the 21st century unjust enrichment is still unfamiliar to most common lawyers. It will have played no independent part in their intellectual formation. Its modern name, adapted from civilian equivalents, is slightly disconcerting. Suspicion of the unfamiliar is therefore compounded by instinctive aversion to the hint of revolutionary doctrine. In fact it has no tendencies of that kind. Neglect has certainly left it difficult and untidy, but the example of the civilian jurisdictions shows that it is not by nature disruptive.² In this chapter it is introduced through one core case. The law of unjust enrichment is the law of all events materially identical to the mistaken payment of a non-existent debt.

Such a payment gives rise to a right to restitution. The law of restitution is the law of gain-based recovery, just as the law of compensation is the law of loss-based recovery. Thus a right to restitution is a right to a gain received by the defendant, while a right to compensation is a right that the defendant make good a loss suffered by the claimant. The word 'restitution' is not entirely happy in this partnership with 'compensation'. It has had to be manoeuvred into that role. 'Disgorgement', which has no

¹ The old language of imaginary contracts and trusts is as much as possible avoided in this book. It is examined in the last two chapters.

² Since 'civilian' recurs it may be helpful to recall at the outset that it identifies the Roman-based systems of, and exported from, continental Europe. The Latin for 'citizen' is '*civis*'. The Romans called their law the *ius civile*, which means 'the law (*ius*) pertaining to a citizen'. As they dispensed with 'Roman', so 'common law' makes no mention of England. Anglo-American law is the common law only because in post-Conquest England the royal judges insisted that the King's law was the law common to the whole realm. Some systems are 'mixed'. Scots law, for instance, has borrowed from both the civil and the common law.

legal pedigree, might be said to fit the job more easily and more exactly. This awkwardness is encountered again later in this chapter, and it and related terminological problems are more fully discussed in Part VI.³ At the end of this chapter we will return to the difficult question whether the right which arises from an unjust enrichment not only is, but can only be, a right to restitution. In English law it always is.

The law of restitution is better known than the law of unjust enrichment because it was under that name, starting in America in the 1930s, that the first serious attempts were made to overcome the problems of misdescription and misclassification which deprived unjust enrichment of its own place on the map of the law. The outcome was the American Law Institute's *Restatement of the Law of Restitution*.⁴

In England the law of restitution has attracted an enormous amount of attention since 1966. That year saw the publication of the first edition of the path-breaking textbook by Goff and Jones.⁵ As one edition has succeeded another, that great book has grown bigger. For the practitioner it is the standard work of reference. Meanwhile, the subject has been made more accessible by a number of shorter works, of which the most widely used is the brilliant and lucid account by Professor Andrew Burrows.⁶

However, the very success of the law of restitution is now itself impeding the recognition of the law of unjust enrichment. The reason is simply stated. The law of gain-based recovery is larger than the law of unjust enrichment. Every unjust enrichment gives rise to a right to restitution and therefore belongs in the law of restitution. But that proposition cannot be turned around, because, quite often, a right to gain-based recovery is the law's response to some other causative event.

It is a grave but all too tempting error to suppose that every instance of gain-based recovery is also an instance of unjust enrichment. Restitution is not mono-causal. This chapter's final task will be to underline its multi-causality. Unjust enrichment is a distinct causative event, while restitution is a multi-causal response. To be properly understood unjust

enrichment needs books to itself. That is not to deny that it will always occupy a large part of any book on the law of restitution, but only to assert that its distinct nature as an independent causative event cannot be securely made apparent unless and until it is also treated in isolation from other instances of gain-based recovery.

A. TERTIUM QUID

The classical English illustration of mistaken payment of a non-existent debt is the 19th-century case of *Kelly v Solari*.⁷ Mr Solari died. He had insured his life. His widow, as his executrix, claimed under the policy and was paid. The insurers later discovered they had not been liable to pay. The policy had lapsed before Mr Solari's death. He had omitted to pay a premium. The policy had indeed been marked 'lapsed', but when the claim was made the office never checked. The Court of Exchequer held that, unless at a retrial the jury were to find that the insurers had not after all been mistaken or, even if they had been mistaken, had been indifferent to the seemingly crucial fact, the widow was bound to repay.

It was not relevant that she had not been at fault at all, nor that they had been careless. On the latter point Parke B observed:

[If the money] is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it.⁸

Mrs Solari's counsel had also pressed her innocence. The widow's conscience was clean. As to this Rolfe B said:

With respect to the argument, that money cannot be recovered back except where it is unconscientious to retain it, it seems to me, that wherever it is paid under a mistake of fact, and the party would not have paid it if the fact had been known to him it cannot be otherwise than unconscientious to retain it.⁹

This shows the danger of using the word 'unconscientious' in this context. It and other adjectives in the same family easily suggest bad behaviour at the time of the receipt. That is misleading, for there is nothing resembling a requirement of fault on the part of the defendant. Mrs Solari was indeed a totally honest and innocent claimant, but it made no difference.

³ Below, 281-3.

⁴ A Scott and W Seavey (reporters), *Restatement of the Law of Restitution* [3] *Quasi Contracts and Constructive Trusts* (American Law Institute St Paul 1937).

⁵ R Goff and G Jones, *The Law of Restitution* (Sweet & Maxwell London 1966), now G Jones (ed), Lord Goff of Chieveley and G Jones, *The Law of Restitution* (6th edn Sweet & Maxwell London 2002).

⁶ A Burrows, *The Law of Restitution* (Butterworths London 1993), now (2nd edn Butterworths London 2002); see also A Burrows and E McKendrick, *Cases and Materials on the Law of Restitution* (OUP Oxford 1997).

⁷ (1841) 9 M & W 54, 152 ER 24.

⁸ Ibid 59, 27.
⁹ Ibid. The language reflects that of Lord Mansfield in *Moses v Macferlan* (1760) 2 Burr 1005, 1012, 97 ER 676, 681.

The only unconscientiousness in play is unconscientiousness *ex post*, which is no more than a reflection of the prior determination that other facts require restitution to be made. It is the obligation to make restitution which renders retention unconscientious. The reason for that obligation cannot be found in any meaning of 'unconscientious'. The reason, in Parke B's words, is that 'the receiver was not entitled to it, nor intended to have it'. It is unconscientious to retain what you ought to repay. Unconscientiousness *ex post* clearly has no explanatory weight.¹⁰

The notion of a careless insurance company recovering from a totally innocent widow is initially shocking. But the shock induces reflection, and reflection reveals that this is indeed the essential nature of liability in unjust enrichment. Any other regime would be intolerable. This is perhaps the most important proposition in this book. If it were false, unjust enrichment would lose its claim to independence. Having been laboriously extracted from contract and trusts, the law of unjust enrichment could then be emptied into the law of wrongs. But it is not false, and unjust enrichment cannot be decanted into the law of wrongs or into any other more familiar category. A simple example will show that *Kelly v Solari* is right, although its correctness must in the end also be qualified in one important respect.

Suppose a situation in which change is overpaid. You go shopping with a friend. As you are leaving a department store an assistant comes running up to tell you that he has accidentally given you change for £50 when you had in fact paid with a £20 note. He gave you £30 more than he owed. You may be tempted to insist that you were entirely innocent. It is no doubt true that you were chatting to your friend and did not even notice how much change you were being given. But you will immediately see that a retort of that kind will not strengthen your case to keep the £30. Your innocence is irrelevant. Nor would it do you any good to make a show of anger at the shop assistant's want of care. He himself will admit to having been careless. The fact remains that, so long as you still have the mistaken money, there is no answer to the shop's demand to have it back.

It is important to notice that this does not depend entirely on your having those three £10 notes in your purse. The same conclusion can follow even if you no longer have the actual money received. Suppose that you went to the shop to buy five items and that the transaction involving

the overpayment was your first purchase. By the time you were stopped you had bought the other things. Your purse is now empty. You no longer have the money which you received. But your wealth, abstractly regarded as a single fund, is still swollen by £30. You paid cash from your purse for things you were going to buy anyhow. You would otherwise have gone to the cash machine or paid by credit card.

It is evident that in these situations the strict liability from which we recoil is actually the only acceptable regime. The reason is that the shop assistant's demand does not aim to make you bear a loss or to inflict a deterrent punishment on you. Strong facts are needed to justify unpleasant outcomes of that kind which will leave you worse off. The shop assistant is not trying to make you worse off. He seeks only that you should give up the gain obtained at the shop's expense. He asks that you return to the position you would all along have been in had you not received from the shop money to which you were not entitled. The strict liability reflects this difference between a defendant who is being asked to bear a loss and a defendant who is only being required to surrender a gain. It takes very slight facts to justify the relocation of an extant gain, and fault on the part of the recipient is not one of them. The liability is both strict and not affected by the carelessness of the claimant.

It is an important feature of the example just given that you spent the money on things that you were going to buy anyway. The outcome would be different nowadays if, still honestly believing that you had somehow underestimated your short-term liquidity, you were led into inviting your friend to lunch. Let it be that you would have spent £5 on a snack. The overpayment leads you into buying lunch for two, with a glass of wine each. The bill is £30. Having used up most of the money in an expenditure which you would not otherwise have incurred, you can now reasonably say that the shop is attempting to shift its whole loss to you. Your assets are no longer swollen beyond the £5 difference between what you would have spent and what you did spend. Repaying the mistaken £30 in full will take your wealth below the level at which it would have been had you not received the overpayment.

The strict liability becomes repugnant when the recipient's assets are no longer swollen. Nowadays this is prevented by the defence of change of position, which is discussed in Part V.¹¹ It takes very slight facts to generate a strict right to restitution of an extant gain at another's expense, but the fierce strict liability has to be fragile. The emphasis is on the word

¹⁰ To the contrary B Kremer, 'Restitution and Unconscientiousness: Another View' (2003) 119 LQR 188 commenting on *Rothborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68, (2002) 76 ALJR 203. Compare *National Australia Bank v Garcia* (1998) 155 ALR 614, 624.

¹¹ Below, 208–19.

'extant'. Once the enrichment has disappeared the question is transformed. The new question is about allocating a loss. One or other party must now bear the loss. The law's answer, where the defence is available, is that the loss lies with the claimant.

We do not know whether or not Mrs Solari had honestly changed her position. In those days it would have been irrelevant. A mistaken payment was treated like a loan. A borrower has to repay the sum borrowed whatever happens to the money. Suppose him nugged five minutes after receiving the borrowed money. He never gets to use any of the money, but he still has to repay the lender.

The harshness of carrying that approach over to mistaken payments was partly concealed by the fact that the incidence of restitutionary claims for mistake was heavily reduced by restrictions put on the cause of action itself. The mistake would not count unless it gave the impression of liability. Even then the maxim '*ignorantia iuris neminem excusat*' was applied, so that, if you thought that you were liable to make the payment because you had made a mistake of law, you would not be able to recover. These restrictions meant that when it came to the point there were relatively few restitution-yielding mistakes, and the analogy with loan unobtrusively prevailed. In the search for a just solution, the law thus chose a horribly blunt hammer. It now uses the sharper instrument of a sensitive defence. It is easier now to make out the cause of action, but the strict restitutionary right is fragile. It expires with the enrichment.

The previous paragraphs have shown that a striking feature of the liability to make restitution of mistaken payments is that the liability is strict, at least so long as the defendant's assets, taken as whole, remain swollen. This strictness stands out all the more sharply when juxtaposed with the irrelevance of negligence on the part of the claimant. However, the really remarkable aspect is that the 'very slight facts' which suffice to provoke the liability reveal no trace of either of the two causative events which usually explain why defendants have to pay up. In short, there is no contract and there is no wrong. This is crucial to the independence of the law of unjust enrichment. Where there is an unjust enrichment, the reason why restitution is obligatory is never a contract and never a wrong. The absence of both is evident in *Kelly v Solari*.

First, the case shows that the right to restitution of a mistaken payment is not referable to any manifestation of consent on the part of the recipient. It does not depend on the recipient's promising or in any sense agreeing to give up the enrichment. The law, endorsed as it would seem to be by the moral judgment of most of its subjects, imposes the

obligation to give it up. Far from agreeing, the recipient often resists. It makes no difference. The mistaken payer's restitutionary right is not founded on contract. Mrs Solari did not promise to repay. We might say that a decent person would immediately agree to pay, but that adds nothing. A decent person would always agree to honour all obligations, but not all obligations arise from contract.

Secondly, there is no wrong. Rights do often arise independently of consent, but then they mostly arise from wrongs. Mrs Solari was not a wrongdoer. If we were to say that she committed a wrong in retaining the money which she ought to have given back, we would look ourselves in to the same circle as those who wish to ascribe her liability to bad conscience. That is to say, we would evade the question why, without wrong or contract, she was in the first place under a duty to repay. In receiving a mistaken payment the recipient need have committed no breach of duty at all—no tort, no equitable wrong, no breach of contract.

It is therefore apparent that the remarkable strict liability illustrated in *Kelly v Solari* arises from slight facts which amount to neither contract nor wrong. If there were a contract or a wrong, the case would excite no special interest. Contracts and wrongs are familiar causative events. But this strict liability arises in the absence of these familiar events. It arises, if we confine ourselves to our core case, simply from the receipt of a mistaken payment. Beyond contracts and wrongs, there is clearly *tertium quid*, something of a third kind. The causative event of the third kind is unjust enrichment.

B. AS LABRADOR TO DOG.

Although a cyclist compelled to dismount might refer to it as a canine, emphasizing with or without the addition of a coarse epithet the animal's evolutionary proximity to the wolf and dingy, in common parlance the neighbour's Labrador is a dog. It is a dog, canine, mammal, and animal. As surely as a neighbour with a Labrador is a neighbour with a dog, a list of causative events which includes receipt of a mistaken payment includes unjust enrichment at the expense of another. At approximately the level of generality at which a Labrador is an animal, the receipt of a mistaken payment is a causative event, as is a contract of sale or the tort of defamation. These are all events which are 'causative' in the sense that they cause to come into existence rights which can be realized in court. At a slightly lower level of generality, much as a Labrador is a dog, receipt of such a payment is an unjust enrichment at the expense of another. Unjust

enrichment at the expense of another—unjust enrichment for short—is no more than a generic name for the receipt of a mistaken payment.

The elements of the generalization are as follows. Receipt of a payment supposes a receipt of money, and receipt of money generalizes to enrichment. 'Enrichment', like 'payment', is a verbal noun. Most such nouns hover between process and outcome. It is important to emphasize the element of process, because, no less than payment, enrichment is an event. It is something which happens in the world. Payment also supposes that the enrichment happens by transfer from another. Enrichment by transfer from another generalizes to enrichment at the expense of another. The mistake is or reflects the existence of the reason, not being a contract or a wrong, why the payment has to be given up. The generic reason why an enrichment at the expense of another has to be given up is that it is unjust.

The utility of this generic restatement is that it enables us to look for and to recognize other examples which are materially identical to the core case, if any there be. In the same way 'dog' gathers to the Labrador all the rottweilers, alsatians, spaniels, pointers, terriers, dalmatians, and so on. At a certain point we inevitably approach a boundary. Boundaries are nearly always troublesome. Near the boundary of 'dog' correct usage requires to be debated, and people begin to disagree. Except in the special usage denoting the male, 'dog' is not used of foxes. It is not used of wolves. Dingos raise difficulties, for they are regularly referred to as wild dogs, whence wildness cannot be the key.

When we look for other examples of unjust enrichment the purpose is to find all the events, in whatever language they have historically been discussed, which generate a right to restitution by the same logic as explains the right to restitution in the core case. The boundary cannot but be troublesome. The noise on the boundary will immediately be taken by some people as indicating that the exercise is doomed from the outset. That is not right. Categories do not become incoherent or otherwise unsound merely because argument breaks out on their edges. Few would otherwise survive.

By generalizing from money received to enrichment we can ask whether that logic can extend to other benefits received, and, if yes, under what conditions other benefits will be treated in the same way as money. Again, by generalizing from transfer by the claimant to at the expense of the claimant, we can ask what other connections might suffice, beyond simple transfer, sufficiently to connect a would-be claimant to the enrichment which he wants the defendant to give up. Finally, by

generalizing from mistake to unjust we can ask whether there are any other reasons of the same non-contract, non-wrong kind which have the effect of requiring the enricher to give up an enrichment at the claimant's expense.

If we were to take the generalization of mistake to unjust as inviting us to search for any and every reason why an enrichment should be given up, we would gather in cases of contracts to give up gains and wrongs for which gain-based recovery is available. The most important feature of mistaken payments is the absence of contract and wrong. That shows that there really is something of a third kind, a distinct cause of action requiring explanation and exposition. Contracts and wrongs are well-trodden territory. Within the common law, the territory of mistaken payment and its congeners has never been mapped.

In recent years good maps of the response-based category of restitution have been made. But, precisely because restitution is a response, and multi-causal, those maps fall short of isolating unjust enrichment. They have gathered together each and every reason why a gain should be given up, but they have not drawn a careful line around the sub-set of those reasons which are not contracts and not wrongs or, slightly more accurately, which are not manifestations of consent and are not wrongs.

C. RESTITUTION OUTSIDE UNJUST ENRICHMENT

'Restitution' and 'compensation' are partners. Compensation is loss-based recovery. Restitution is gain-based recovery. 'Restitution' is by nature more comfortable with a slightly narrower brief but it has been compelled to become a synonym for 'disgorgement'. It will be helpful at this point to give one or two examples of restitution in which the causative event is not an unjust enrichment.

One obvious case is contractual restitution. We are clearly not in our third area when the reason why a gain must be given up is that parties have validly agreed that in given events it must be. This happens in all sorts of contexts. If I lose my wallet and ask you to lend me £30 to tide me over the weekend, my obligation is to make restitution. There is a contract for restitution. In other words a simple loan, what Roman law called *mutuum*, generates a restitutionary debt. Again, one party sometimes pays another's demand in exchange for the other's promise to repay if it should turn out that the money was not due. Again the source of the obligation to make restitution is contract.

Less obviously distinct are cases of gain-based recovery for wrongs. In *Boardman v Phipps*,¹² for example, a solicitor who acted for a trust which held a minority shareholding became aware that the company was seriously under-performing. Using the information which he had gathered as solicitor to the trustees, he pulled off a brilliant coup. With his own money he bought out the majority holding. This yielded not only a better long-term prospect for the company but an immediate profit for all shareholders. The trust and its minority shareholding, and hence the beneficiaries of the trust too, did very well indeed. However, despite his honesty and his success, it remained true that the solicitor had acted in breach of the fiduciary duty to avoid conflicts of interest, and he had not obtained the fully informed consent of the trustees to that breach.

This breach of equitable duty put the solicitor under a restitutionary liability—a liability to give up to the trustees on behalf of the beneficiaries the gain which he had made, subject to an allowance for the work and skill he had put in. This case shows that gain-based recovery is one response to the wrong which consists in breach of fiduciary duty. The facts can easily be dressed up in the language of unjust enrichment. Boardman can be said to have been unjustly enriched at the expense of the trustees. But that language turns out on closer analysis not to be talking about a cause of action distinct from the wrong.

The proof is that it is impossible to dispense with the wrong and come up with a different not-wrong explanation of his duty to give up his profit. The words 'unjust enrichment at the expense of the claimant' succeed in concealing this. The language applies easily enough but it does not identify a cause of action materially identical to mistaken payment of a non-existent debt. In what sense was the gain obtained at the trustees' expense? It was obtained by committing a breach of fiduciary duty. In short, it was obtained by a wrong. There was no connection between claimant and enrichment other than the wrong. The facts are thus beyond the range of the logic which explains the recovery of a mistaken payment where there is a reason for restitution notwithstanding the absence of contract and wrong. An unjust enrichment is something different. It is never a wrong. In whatever language is used, the fact remains that the liability in *Boardman v Phipps* arose from a wrong.

*Attorney-General v Blake*¹³ concerned the autobiography of a traitor. Blake had been a secret agent whose treachery cost the lives of many of

¹² [1967] 2 AC 46 (HL).

¹³ [2001] 1 AC 268 (HL).

his colleagues. Imprisoned in England, he had escaped to the safety of Moscow. The memoirs from which he hoped to become rich were written in breach of contract. Like all agents he had promised the Crown that he would never write an unauthorized book. The Attorney-General successfully obtained an injunction preventing the payment to him of royalties. The premiss of the injunction was that, if he were actually to receive the money, he would immediately be liable to give it up to the Crown. The House of Lords, breaking new ground, held that this was a rare case in which gain-based recovery was available for the wrong of breach of contract.

This too is restitution for a wrong. It belongs to the law of breach of contract. It has nothing at all to do with unjust enrichment. All lawyers know that dual analysis is sometimes possible. You can sometimes find two causative events in one story. A payment obtained by fraud can be presented either as the tort of deceit or, dispensing with the allegation of fraud, as a simple payment by mistake. But no such alternative analysis is possible in the *Blake* case. Just as in *Boardman v Phipps*, the Crown, without relying on the facts in their character as a wrong of breach of contract, could not have created any connection at all between it and the gain in question. Clearly, therefore, the only question at issue was whether this breach of contract gave rise to a right to restitution in place of the normal right to compensation.

The mono-causal notion of restitution easily reaches cases of this kind and, erroneously, dresses them up in the language of unjust enrichment. It infers from the defendant's liability to give up a gain that he was unjustly enriched at the claimant's expense. But that wide usage conceals the lines between different causative events. Unjust enrichment, within the logic underlying mistaken payments, requires a connection between claimant and enrichment which is independent of wrongdoing and a reason for restitution which is likewise not a wrong. These conditions cannot be satisfied in the *Blake* or *Boardman* facts. The liability there flows unequivocally from the wrong. These cases involve gain-based recovery but have nothing to do with the *tertium quid* that is unjust enrichment. In unjust enrichment 'unjust' always denotes a reason for restitution which is not a manifestation of consent and not a wrong.

*Moses v Macferlan*¹⁴ is a more subtle example of the same kind. It seems at first sight to be susceptible to the alternative analysis which was manifestly impossible in the *Blake* case, but it is not. Macferlan promised

¹⁴ (1760) 2 Burr 1005, 97 ER 676.

Moses that if Moses endorsed certain promissory notes over to him he would never seek to enforce Moses' liability on the endorsements. Moses did endorse the notes. In breach of his promise, Macferlan sued him. The first court thought it could not take notice of the contract not to sue. Having paid up, Moses began a new action in the King's Bench. This was not an appeal of any kind but simply a new action claiming, as we would now say, restitution of the sum he had had to pay. He was successful.

Macferlan was enriched by transfer from Moses. The transfer clearly suffices in itself to establish a sufficient connection between claimant and enrichment without relying on wrongdoing. There also seems at first sight to be an available unjust factor analogous to mistake, in that the money was obtained through pressure. But there is a fatal snag. The only pressure was due process of law. Macferlan had sued for this money and had obtained a judgment. Lord Mansfield's conclusion in favour of Moses has been strongly condemned for its failure to accept that due process of law cannot be a restitution-yielding pressure.¹⁵ Another way of coming to the same conclusion is to say that the judgment provides a thoroughly sound explanation of the enrichment. It cannot be seen as an enrichment lacking any legal basis. Where a judgment has been given there can be no right to restitution unless the judgment is set aside. Capitulaton after an action has begun is likewise brought within the doctrine of *res judicata*.¹⁶ Therefore, the unjust enrichment analysis of *Moses v Macferlan* just will not work.

However, as an instance of restitution for a wrong the case appears in a different light. The difference between unjust enrichment and restitution for wrongs was not articulated in the 18th century, but Lord Mansfield's decision can be defended in retrospect on the ground that it was only the analysis in unjust enrichment, not the action for breach of contract, which encountered objections. Lord Mansfield's premiss was that Moses was indubitably entitled to an action for breach of contract.¹⁷ Such an action was perfectly compatible with respect for the other court's judgment, which, valid as it was, had indeed been obtained in breach of

¹⁵ *Phillips v Hunter* (1795) 2 H Bl 402, 414-16, 126 ER 618, 624-6; *Marriot v Hampton*, (1797) 7 TR 269, 101 ER 969. Cf Goff and Jones 6th edn (n 5 above) [44-001].

¹⁶ *Res judicata* means 'a matter adjudicated' or, slightly expanded, 'a matter on which judgment has already been given'; the family of 'finality' defences is considered below, 232-40.

¹⁷ JH Baker, 'The History of Quasi-Contract in English Law' in WR Cornish and others (eds), *Restitution Past, Present, and Future* (Hart Oxford 1998) 37, 55.

contract. If the action for breach of contract remained intact, it remained intact without regard to the measure of recovery which was sought.

By 1760 it was not uncommon for claimants to seek restitution of the proceeds of wrongs under the cover of the phrase 'waiver of tort'.¹⁸ The interpretation in the previous paragraph understands *Moses v Macferlan* as having allowed the same kind of claim for breach of contract. The history of waiver of tort was ultimately examined by the House of Lords in *United Australia Ltd v Barclays Bank Ltd*.¹⁹ Their Lordships there exposed 'waiver' as a fiction. They had before them the case of conversion of a cheque. The defendant bank argued that it could not be sued for converting the claimant's cheque because, earlier in the same story, the claimant had once and for all waived the tort by bringing against another party an action, almost immediately discontinued, for restitution. The fallacy in that argument was that the 'waiver' on which the restitutionary action had been based was a fiction. It had been introduced to ensure that there was no question of coming back with a second claim for compensation and as a sop to the contractual form of the action in which the restitutionary claim originally had to be made.

Their Lordships held that the true reason why it was possible to seek restitution of money received by conversion was not that the tort could be genuinely waived but, much more simply, because conversion was a tort which generated two remedial rights. Without switching to another cause of action, the claimant could elect to realize either the right to compensation or the right to restitution.

The *United Australia* case shows that a claimant can have restitution for the tort of conversion. As envisaged by the House of Lords, that is restitution for the wrong as such and has nothing whatever to do with unjust enrichment. However, differently from the three preceding examples, here it seems likely that dual analysis is possible. That is to say, it may be that the victim of the tort of conversion can reach the proceeds either on the basis that the tort itself generates a restitutionary right or, in the alternative, in unjust enrichment properly so-called, not waiving the wrong but simply dispensing with that characterization of the facts. The House of Lords did not address that possibility, although it would no less effectively have answered the argument based on waiver. If you sell my car for £5,000, the question whether I can reach

¹⁸ This practice was reluctantly approved in *Lamine v Dorrell* (1701) 2 Ld Raym 1216, 92 ER 393.

¹⁹ [1941] AC 1 (HL).

that £5,000 without relying on the wrong of conversion or any other wrong turns out to be as important as it is difficult. It deeply affects the range of the law of unjust enrichment. It is further discussed in Chapter 2.²⁰

D. CONCLUSION

Analysis of the receipt of a mistaken payment of a non-existent debt reveals a causative event of a third kind. It is not a manifestation of consent such as a contract, and it is not a wrong. The consequent liability, surprisingly at first, is strict, albeit subject to defences. The generic conception of that causative event is unjust enrichment at the expense of another. That generalization enables us to look for other examples materially identical to the core case. It does not tell us how many, if any, are to be found. Those other cases may differ as to the form in which the enrichment is received. It may not be money. They may also differ as to the nature of the connection between the enrichment and the claimant. It may not have been transferred by him. Above all, it may be unjust for a different reason. The task of the word 'unjust', which seems at first sight to be so ominously unstable, is to understand the reasons, however few or many they may be, which are neither contracts nor wrongs but are nevertheless sufficient in law to generate a right to restitution of an enrichment obtained at the claimant's expense.

The study of the core case not only does not tell us whether the *tertium quid* is large or small, it also gives no indication whether, if it be not an isolated case, the category which forms around it will be a loose confederacy, like the law of tort, or a closely knit family, like the law of contract. The law of tort, in the common law, is of the former kind, a long list of particular wrongs which are difficult to integrate one with another. In the law of contract, by contrast, the particular contracts acknowledge their subjection to the general principles of a single law of contract. To such an extent is this true that books and courses on contract for the most part treat the particular contracts, such as sale, partnership and agency, as detail to be left to specialist books which are written with a smaller compass but on a larger scale. Until a decade ago, one could predict that in the common law the mature law of unjust enrichment would look more like the law of tort—a list of unjust enrichments. Massive litigation concerning value passing under void contracts has meanwhile forced a change in

²⁰ Below, 78–86.

direction. Unjust enrichment now begins to look more like the law of contract in that it has acquired a tighter unity.

A second theme of this introductory chapter has been the strong differentiation of unjust enrichment from restitution. Restitution, like compensation, is a category of response, not a category of causative event. The causative event is not always unjust enrichment. It follows that the law of unjust enrichment is a sub-set of the law of restitution, when rights to restitution are divided according to their causative events. The absolute truth of that proposition supposes, as was indeed accepted above, that unjust enrichment properly so-called always gives rise to a restitutionary right and never to any other.

That proposition is sound in English law, but it is not an invariable and necessary truth. That is, in England unjust enrichment does, as it happens, give rise only to restitutionary rights; but, in our core case it would be possible to understand the mistaken payer's right as compensatory, in that it makes good the loss caused to him by the gain to the other. Some systems do take that compensatory view, adding immediately that the loss which is recoverable is capped by the gain to the other. For example, the new Dutch Civil Code says the enriched must 'make reparation for the damage suffered by [the claimant] . . . up to the amount of his enrichment'.²¹ This means that the claimant recovers his loss up to the maximum of the other's enrichment, which in turn is but one way of saying that he recovers the other's gain so far as it constitutes a loss to himself. There are two crucial comments which require to be made on this approach.

The first comment is that the premiss of this capped-compensation analysis is one which in German law is robustly rejected. It assumes that there is a good cause of action only where and to the extent that the claimant in unjust enrichment has suffered a loss. Once a given jurisdiction has decided that the claimant in unjust enrichment is definitively and exclusively a person who has suffered a loss corresponding to the enrichment of the defendant, then, and only then, can it choose to describe his right as a right to have that loss made good. This is a very difficult and sensitive issue. We will see that such evidence as there is indicates that English law shares with German law the view that the claimant need not be identified as a person who has suffered a loss.

²¹ Book 6 article 212.1: 'is verplicht . . . diens schade te vergoeden tot het bedrag van zijn verlies'. The translation is taken from PPC Haanappel and E. Mackaay, *New Netherlands Civil Code, Patrimonial Law* (Kluwer Deventer 1990) 324.

This will be discussed in Chapter 4, because it goes to the meaning of the phrase 'at the expense of' or, more accurately since that phrase takes its meaning from its function, to the nature of the required connection between the claimant and the enrichment which he wishes to recover.²² To adopt the capped-compensation approach simply because it happens to fit the core case would illegitimately close down the discussion of that issue and create insuperable difficulties for the cases which indicate, albeit intuitively rather than after full and open argument, that the English choice has already fallen in line with that of the German law.

The second comment is no less important. If claims in unjust enrichment are regarded as recovering loss—compensation—it has to be loss capped by the defendant's gain. Even the systems which do use the capped-compensation approach insist on the cap. That tautology has to be emphasized, because the very words 'loss' and 'compensation' are inimical to the *raison d'être* of the law of unjust enrichment, and at their mention the cap is therefore instantly indispensable. This third kind of causative event has to be recognized as distinct from others precisely because very slight facts raise a strict liability to surrender an extant enrichment. Their very slightness means that they cannot support any claim that the enriched should answer for consequential loss suffered by the claimant. It may well be that, because I paid you £50,000 which I thought I owed and did not, I could not save my business from receiver-ship, or could not feed my cattle, or could not take shares in what turned out to be an immensely successful goldmine. Such losses are totally beyond the range of the slight facts which will entitle me to recover the £50,000. The strict liability in unjust enrichment is tied, as we have seen, to extant enrichment. The very slight facts not amounting to wrongs or contracts go no further than to require the relocation of extant gains.

If Dr Kremer is a reliable witness, not only Gummow J but the whole High Court of Australia is embarking on an experiment in which there will be no law of unjust enrichment.²³ If so, of all jurisdictions Australia will pay the highest price for the common law's predilection for hiding its law of unjust enrichment in unsuitable places. This time the intention seems to be to bury it on the edge of the law of civil wrongs. There it will accede to the law of equitable compensation for unconscionable conduct.

²² Below, 77–83.

²³ Kremer (n to above) 188. At 189 a residual role is envisaged for it 'at a visceral level'. Such language is inappropriate, indeed inapplicable to this causative event.

But unjust enrichment does not require unconscionable conduct, except, meaninglessly, *ex post*.²⁴ And the slight facts which create rights to restitution of unjust enrichment make no case at all for compensation of loss save so far as the loss is capped by gain. Hence any system which attempts to do without a law of unjust enrichment is bound sooner or later to have to reverse out of the cul-de-sac in which it has placed itself.

The third kind of causative event beyond contract and wrongs, exemplified in the mistaken payment of a non-existent debt, really is both foundational and distinct. It cannot be done without. And its strict restitutionary liability is unequivocally tied to the relocation of gains. It would be a painful and expensive irony if, just as English law is finally managing to retrieve the disruptive error of hiding unjust enrichment in contract and trusts, another great common law jurisdiction were deliberately to conceal it in the law of civil wrongs.

²⁴ Above, 5–6.

an alien question, as where 'herbivorous' appears in the division by habitat. Equally bad is the flaw which occurs when, even though all the terms answer the same question, one of them is or may be a sub-set of another, as where 'arboreal' is included in the classification by habitat without any limit being imposed on 'terrestrial'.

A. THE FIRST MAP: EVENT-BASED CLASSIFICATION

From what events do rights arise? All rights which can be realized in court arise from some event which happens in the world. In the previous chapter we identified unjust enrichment as the generic conception of one causative event from which restitutionary rights arise. We bumped from time to time into other causative events such as contracts and wrongs, which form the two best known categories. This section briefly gives a more complete picture of the classification of rights by reference to their causative event.

I. FOUR COLUMNS

Rights always arise either from manifestations of consent or from events which operate independently of consent. Manifestations of consent include, above all, contracts, declarations of trust, conveyances, and wills. Events which operate independently of consent are wrongs, unjust enrichments, and miscellaneous others. Every wrong is a breach of duty, but in our legal system the event-based category of wrongs has rarely been visible in its entirety because it has traditionally been broken up into sub-sets according to a different criterion, namely the source of law which recognized the duty broken by the wrongdoer.

Instead of one category of civil wrongs we have therefore had four, and those four have not lived in close proximity to each other. The four are torts, equitable wrongs, breaches of statutory duty not amounting to a tort, and breaches of contract. Torts are breaches of duties directly imposed by the common law. In the other cases the primary duty is imposed by equity (meaning by the law descended from the Court of Chancery), by statute, or by the parties' own contract. The primary rights and duties arising from contract are not to be confused with the secondary rights arising from the wrong of breach of contract.

After manifestations of consent and wrongs come unjust enrichments. These have already been introduced as including all events materially identical to the receipt of a mistaken payment of a non-existent debt.

2

Three Maps

The mapping metaphor was used by Blackstone. In 1756, in his inaugural lecture, he said that the duty of the 'academic expounder of the laws' was to make clear how the various parts of the law fitted together:

He should consider his course as a general map of the law, marking out the shape of the country, its connexions and boundaries, its greater divisions and principal cities: it is not his business to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet.¹

This chapter is concerned with three maps which together show where unjust enrichment belongs and how it is itself divided. Unjust enrichment is a causative event. That is, it is an event from which rights arise. The first of the three maps fixes its relation to other categories of the same kind. The second relates those event-based categories, and unjust enrichment in particular, to the law of obligations and the law of property. These are not categories of causative event but of responses to events. The third map raises the level of magnification so as to expose the layout of unjust enrichment itself.

To require a good map of the law is by metaphor to insist on sound classification. Classifications answer questions. Where do animals live? Some are aquatic, some terrestrial, some amphibious, others (like tapeworms) live in other habitats. What do animals eat? Some are omnivorous, some carnivorous, some herbivorous, and others eat other things. When different classifications are combined, a complex hierarchy results, each level dividing according to its own criterion. The hierarchical combination can be undone. That is to say, one can revert to a series of single-question classifications.

Flawed classification is a source and symptom of intellectual disorder, and there are common flaws of many different kinds. Most obviously, a classification is flawed if any term at any one level is part of an answer to

¹ Sir William Blackstone, *Commentaries on the Laws of England* vol. 1 (1765) 35 [facsimile of the first edition (University of Chicago Press Chicago and London 1979)].

The defendant is enriched at the expense of the claimant and there is in addition a reason, not being a manifestation of consent or a wrong, why that enrichment should be given up to the claimant. There are acquisitive wrongs and hence there are cases of wrongful enrichment, but an unjust enrichment is never a wrong. If the claimant relies on the facts in their character as a wrong, his cause of action arises in the law of wrongs.

Finally, there is a residual miscellany of events which fall outside the previous three categories. When a ship is holed and in danger, the obligation to pay a salvor a reward for saving it or its cargo arises from successful rescue. *Negotiorum gestio* (uninvited intervention in the affairs of another) also belongs in the residual miscellany. It has a paragraph to itself below. Liability to pay tax arises from a range of taxable events. The list of miscellaneous events beyond the three nominate heads need not be further investigated here. This is just as well since to enumerate all its members requires encyclopaedic erudition. Awareness of the existence of the residual miscellany is nonetheless important, to keep at bay a troublesome and incorrect supposition that every causative event must fit into one or other of the three nominate categories.

That error can do a number of different kinds of damage. The worst is its tendency to undermine attempts to describe the law of unjust enrichment. Gummow J, for instance, has attacked those who think it worthwhile to work in the field of restitution of unjust enrichment. He says that they encourage a futile search for a single explanation of 'all obligations which are neither contractual nor tortious in nature'.²

Here he hits out at an imaginary enemy. The law of restitution was indeed slow to recognize its multi-causality, but even the books on restitution did not claim to have hit upon a single explanation of every liability beyond contract and tort. That is all the more evident in the case of the law of unjust enrichment, which deals with only one of the generic events which gives rise to restitution. It claims only to reduce the size of the residual miscellany beyond contract and tort by taking out of it one more nominate event-based category. The remaining miscellany is miscellaneous. Gummow J is obviously right to insist that no single generic description can capture all the causative events within it.

Of the borderline cases which in the end need to be confined to the miscellany, one important example is *negotiorum gestio* which, translated

² The Hon Justice WMC Gummow AC, foreword to ID Jackman, *The Varieties of Restitution* (Federation Press Sydney 1998) iv.

literally, means management (*gestio*) of the affairs (*negotiorum*) of another (understood). It is convenient to use a looser translation and to speak of uninvited intervention in another's affairs. In the parable of the Good Samaritan, the Samaritan was prompted to intervene simply from his sense of neighbourly duty to the unconscious victim of the robbers.³ Roman law, followed in this by its modern civilian successors, took the view that there should be a legal regime for such interventions, in part in order to avoid discouraging the giving of useful help to people not in a position to help themselves: 'because nobody would look after their affairs if there were no action to recoup his expenses'.⁴

Negotiorum gestio is not properly regarded as a species of unjust enrichment. There is no doubt that the intervenor's right to reimbursement turns on the utility of the intervention, not on its success. There is no inquiry at all into the enrichment of the beneficiary and hence no tie between enrichment of the beneficiary and the amount he must pay. The measure of recovery is not gain-based. Moreover, the event has wider consequences. It binds the intervenor to execute his intervention with due care and skill and to surrender anything he obtains in the course of his intervention.

For more than a hundred years the orthodox doctrine has been that English law does not recognize these liabilities other than in a few exceptional situations. That view always rested on an unsound foundation.⁵ It has also been eroded by the multiplication of exceptions. It may be that the exceptions have now overwhelmed the supposed rule.

The interesting condition of the modern law cannot be explored here because it does not belong within unjust enrichment. Even in relation to the intervenor's right to reimbursement, *negotiorum gestio* belongs in the fourth column of causative events, miscellaneous other events, not in the third, unjust enrichment. Moreover, in the grid which is discussed immediately below, the intervenor's right is not even a right to restitution. It should appear in the compensation stripe, not in the restitution stripe. That being so, *negotiorum gestio* belongs neither in the law of unjust enrichment (an event-based category) nor in the law of restitution (a response-based category).

It is nonetheless true that, if English law really had no *negotiorum gestio*, some particular instances of uninvited intervention would be found

³ Luke 25-37.

⁵ The classic statement is to be found in the judgment of Bowen LJ in *Palke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234, 248, but the facts of the case were not appropriate to test the wide negative which he declared.

⁴ Justinian, *Institutes* 3.27.1.

to conform to analysis as unjust enrichments, and those few cases would then form the kernel of a much narrower doctrine of necessitous intervention within the law of unjust enrichment. That is another story. It cannot be pursued here. It may never be pursued, because, as has been said, the old proposition denying the intervener any general right to reimbursement has probably been swallowed up by its numerous so-called exceptions.

Negotiorum gestio makes a brief appearance at this point only to illustrate the need to keep the fourth column of the grid in mind and to avoid overloading the third event-based column (unjust enrichment) under the illusion that non-contractual, non-tortious causative events can find no other home. Uninvited intervention is not a contract, a wrong, or an unjust enrichment. It belongs in the miscellaneous fourth column. In addition, the intervener's right is not a right to restitution.

2. THE GRID: STRIPES ACROSS THE COLUMNS

	Manifestations of Consent	Wrongs	Unjust Enrichments	Other Causative Events
Restitution	1	5	9	13
Compensation	2	6	10	14
Punishment	3	7	11	15
Other Goals	4	8	12	16

(a) Four Stripes

The short version of the classification of rights by causative events is that every right which courts will realize arises from consent, from a wrong, from an unjust enrichment, or from some other event. These four categories include no mention of restitution. The reason is obvious. They are categories which only appear when the question is, From what events do rights arise? Restitution and compensation, by contrast, are categories which appear when a different question about rights is asked, What goal are rights intended to achieve when, with or without litigation, they are realized? Compensation is loss-based recovery: a right to compensation is a right to have a loss made good. Restitution is gain-based recovery: a right to restitution is a right to obtain a gain made by the defendant.

Different questions provoke different classifications, which cut across each other. If we represent the four categories of causative event as four vertical columns, the goal-based categories—let us settle for restitution, compensation, punishment, and other goals—must appear as horizontal stripes. The boxes formed as the stripes cut across the columns do not necessarily have any content. Sometimes they definitely have none. The box at the intersection of punishment and unjust enrichment has no content. The boxes should be regarded as asking questions. This box asks whether the event unjust enrichment ever generates a right to punitive awards. The answer is an emphatic 'no'.

(b) The Restitution Stripe: Multi-Causality

The grid depicts the multi-causality of restitution or, more accurately, its potential multi-causality. As the restitution stripe cuts across the four event-based columns it makes four boxes, each of which asks whether restitutionary rights are ever generated by that particular causative event. In the consent box the answer is yes. If, having lost my purse, I ask you to lend me £50, the loan gives you a restitutionary right which is by origin contractual. The contract of loan obliges me to give up value received. Again, in response to my demands you hand over money which I promise to pay back if it should turn out that you were not bound to pay, you have, arising from contract, a conditional entitlement to restitution.⁶ Again a publisher generally promises an author a percentage of the profits from the book, thus incurring a gain-based liability from contract. Where contractual rights to restitution exactly mirror the operation of the law of unjust enrichment, there can be no recourse to the law of unjust enrichment.⁷

As we saw in the last chapter when examples were given of rights to restitution arising other than from unjust enrichment, the box formed by the intersection of wrongs and restitution also has content. Instances were given of restitution for breach of fiduciary duty, for breach of contract, and for the tort of conversion.⁸ The next box, at the intersection of restitution and unjust enrichment, needs no discussion here. It is the business of the rest of the book. It contains the receipt of the mistaken

⁶ *Sobel Products Ltd v Commissioners of Customs & Excise* [1990] Ch 409.

⁷ *Pan Ocean Shipping Ltd v Creditcorp Ltd (The Trident Beauty)* [1994] 1 W.L.R. 161 (HL.) where the point is made more difficult by the use of 'restitution' to identify the cause of action in unjust enrichment.

⁸ Above, 12–16.

payment of a non-existent debt and, with that core case, every event materially identical to that central figure.

The fourth box, made by the intersection of the restitution stripe and the miscellaneous column, also has content. In *negotium gestio* we saw a fourth column event outside the restitution stripe. But there are also instances of a right to recover a gain—hence within the restitution stripe—where the relevant event is not a contract, wrong, or unjust enrichment. This is quite difficult and must take more than a line or two. The fact that this box has content means that, even, after having eliminated all cases of contractual restitution or restitution for wrongs as such, you cannot jump from gain-based recovery to the conclusion that you are looking at a case of unjust enrichment.

One who earns £1,000 usually owes the Inland Revenue a percentage of that gain, say £400. The Inland Revenue has a gain-based right—a restitutionary right according to the stretched meaning which that word is made to bear in its role as a respectable synonym for disgorgement.⁹ This is restitution, but it is not restitution triggered by unjust enrichment. The taxable event, income received, is not an enrichment of the taxpayer at the expense of the Inland Revenue. Since the taxpayer makes no promise to pay and commits no wrong in earning income, the causative event belongs in none of the first three columns.

Another restitution-yielding event which belongs in the fourth column is the judgment of a court. All the four boxes made by the restitution stripe as it crosses the event-based columns are boxes of rights which, until they are realized, remain birds in the bush. If it comes to litigation, the judgment will generally order the defendant to comply with the right which the claimant has asked to be realized. Thus, where a claimant establishes a right to restitution arising from a wrong or from an unjust enrichment at his expense, the court will generally order the defendant to give up the money value of that gain.

If the defendant remains recalcitrant, the process of execution of judgment will finally turn the bird in the bush into a bird in the hand. The right exists before the judgment which replicates it, but technically the judgment novates the original right. That is to say, it extinguishes the right brought into court and replaces it with another born of the judgment itself. Although its content may be identical to that of the right brought into court, the right which goes to execution is the right created by the order of the court.

⁹ Below, 281–3.

A more difficult example which also belongs in the fourth column is the receipt of a thing owned by another. Suppose that your car is stolen and comes into my possession. Your interest in the car may have arisen from consent, or from a wrong, or from an unjust enrichment, or from some other event. Whatever its origin, your property interest in the car gives you a right to possession, and my coming into possession puts me under an obligation to surrender possession to you. This is true even if I have committed no wrong. Hence, my coming into possession is not a second column event, for it may not initially be a wrong, although it will rapidly become one if I fail to comply with my obligation to surrender possession.

An honest finder commits no wrong while intending to honour his obligation to surrender possession to the owner.¹⁰ It is not a third column event either. That is, it is not an unjust enrichment. When you assert your title you are asserting that the car is not my asset but yours or, in other words, that it is part of your wealth, not mine. To base your claim on unjust enrichment, which you can do, you have to renounce your title. You have an election. You can either insist on your title and thus deny my enrichment or forego your title and treat me as unjustly enriched at your expense.¹¹

This relatively straightforward picture of a column four event within the restitution stripe is complicated by the fact that, if and when it comes to litigation, a claimant rarely stands directly on his proprietary interest. The common law knows no claim of that kind in relation to chattels. In the case of the car, therefore, it is probable that you will sue me for the wrong of conversion, in the second column. Conversion, as we have seen, is a wrong which entitles you to either compensation or restitution. Alternatively, you may sue me in unjust enrichment for the value added to my wealth. If you do that, you will be renouncing your title, for you cannot say that I am enriched while at the same time insisting that the car forms no part of my wealth. In effect you are driven into the law of obligations in order obliquely to protect your proprietary interest. You have to appeal either to an obligation arising from a wrong or to an obligation arising from unjust enrichment.¹²

On the chancery side matters proceed differently. There the claimant can directly assert his entitlement under a trust and, so long as he is entitled to the entire beneficial interest, he can demand that the defendant

¹⁰ Compare *Costello v Chief Constable of Derbyshire* [2001] EWCA Civ 381, [2001] 1 W.L.R. 1437 (police lawfully in possession for forensic purposes).

¹¹ Below, 64–8.

¹² Below, 66–8.

be ordered to transfer the legal title. The column in which his claim arises depends on the event which created the trust which he alleges. Most trusts arise from declarations of trust accepted by the trustee. The assertion of an interest under a trust created in that way will clearly belong in the first column, which contains all rights arising from manifestations of consent. The different modes, direct and indirect, of protecting property in litigation will be discussed in more detail later in this book.¹³ The matter has crept in here only because we have been discussing the different causative events from which rights arise and one such event on which we paused was the defendant's coming into possession of something belonging to the claimant.

B. THE SECOND MAP: PROPERTY AND OBLIGATIONS

Rights realizable in court are responses to events. We have seen how they can be divided according to their different causative events. They can be divided by many other criteria. If a question is asked as to their goals, the answer is that they aim at restitution, compensation, punishment and other goals. If a question is asked about the source of law responsible for their recognition, the answer is that some were recognized by the courts of common law, some in the chancery, some in admiralty, some by Parliament, and others by other sources. However, their causative events aside, the most important division arises from the question about their exigibility. Exigibility is demandability. Against whom can rights be demanded?

I. RIGHTS IN PERSONAM (OBLIGATIONS) AND RIGHTS IN REM (PROPERTY)

The answer is that some are rights in *personam* and some are rights in *rem*. Rights in *personam* are in principle demandable only from the person against whom they originally arose or someone representing that person, while rights in *rem* are in principle demandable wherever the *res* (the thing) is found and hence against anyone who has it or is interfering with it. The phrase 'in principle' leaves room for contrived departures from these starting points. Thus a right in *rem* can be cut off in the interests of the security of transactions in some or all cases of bona fide purchase. And under particular conditions a right in *personam* can be made to

¹³ Below, 54-8, Chapter 8.

simulate the behaviour of a right in *rem* so as to be demandable against a third party.

Rights in *personam* are rights that a person make some performance, exigible against that person. A right that a person should do something is, when looked at from the other end, an obligation incumbent on that person to do it. That perspective has always dominated our choice of vocabulary. Hence the law of rights in *personam* is better known as the law of obligations. Obligations are not events. They are responses to events. All rights which can be realized in court are responses to events. What holds for the set, holds for the sub-set of rights in *personam*, rights exigible against the person under the correlative obligation.

The law of obligations coordinates with the law of property. Obligations and property are the two pillars of private law. Just as the law of obligations is the law of rights in *personam*, the law of property is the law of rights in *rem*. Ownership of a thing, for example, follows the thing owned. My wedding ring when stolen remains mine even when, later, you buy it from a shop. A lease of land is likewise a property right. The land does not move, but whoever comes to the land must recognize the interest of the lessee. A charge by way of legal mortgage behaves in the same way. A right of way created as an easement likewise binds all those who subsequently come to the servient land. There is a finite number of rights which can take effect in *rem*. Synonymously, there is a *numerus clausus* of property rights.

We use 'property' in more than one sense. It frequently operates as a synonym for wealth. In that usage property includes obligations. A right in *personam* to be paid £1,000 is an asset. It is property when property is wealth. In the stricter sense in which there is always a tacit contrast between property and obligations the law of property is the law of rights in *rem*. In this book references to property rights or proprietary rights and every use of the language of property should be understood in that narrower sense. The same assumption underlies every law school syllabus which offers a course in property and separate courses in the event-based sub-sets of the law of obligations. Thus, if there is a course in contract and a course in property, 'property' is being used in the narrower sense, as the law of rights in *rem* as opposed to the law of rights in *personam*.¹⁴

¹⁴ The tendency to blur this distinction and the danger of doing so form the theme of A. Preto, *The Boundaries of Personal Property: Shares and Sub-Shares* (Oxford D Phil Thesis 2002). Dr Preto was my supervisee. The supervisor, as often happens, learned much more than he taught.

Property and obligations are thus sub-sets of rights realizable in court which emerge in answer to the question against whom rights are demandable. Prudence might suggest the need for a residual third category, but the words 'realizable in court' probably render that unnecessary. There are indeed other rights good against everyone, such as the right to reputation or to bodily integrity, which are neither *in rem* nor *in personam*, but they are never directly realized in court. They form the superstructure above wrongs, and it is the wrong consisting in their infringement which immediately generates rights which are realizable in court. I have a primary right to bodily integrity, which you infringe when you hit me or carelessly drive over my foot. It is the secondary right arising from the wrong that is brought into court. So, when you have run over my foot, I assert my right *in personam* that you pay me compensation for the infringement of my primary and solely superstructural right to bodily integrity.

2. UNJUST ENRICHMENT AND THE LAW OF OBLIGATIONS

When we combine classification of rights by exibility (rights *in rem* and rights *in personam*) and classification of rights by causative event (consent, wrongs, unjust enrichments, other events) we have to create a hierarchy. The question is which to start with. Should the first level divide by events or by exibility? There is no logically correct answer. It is merely a matter of convenience. Throughout the European tradition, the practice is to make exibility dominant. So, at the first and highest level the *summa divisio* is between property and obligations.

(a) The second level: obligations and their causative events

One level down, within obligations, we turn to the division by causative events. As a matter of history it proved relatively easy to see that every obligation arose from a manifestation of consent, from a wrong, or from one of a jumble of other events.¹⁵ Unjust enrichment ultimately emerged much later in the long struggle to reduce the residual jumble.¹⁶ In the common law it is only emerging now. Its identification adds one more

¹⁵ Already clear in Gaius in the second century AD: Digest 44.7.1 pr (Gaius, *Res Cottinaneae*) amplifying Gaius, *Institutes* 3.88-91. For further discussion see below, 268-70.

¹⁶ On the role of Grotius (1583-1645) in this: R. Feenstra, 'Grotius' Doctrine of Unjust Enrichment as a Source of Obligation: Its Origin and Its Influence in Roman-Dutch Law' in E. Schrage (ed), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (Duncker and Humblot Berlin 1995) 197. For the earlier period J. Halbeek in the same volume 59-121.

nominate generic category of causative event and reduces the size of the residual fourth category. Every obligation arises from consent, from a wrong, from an unjust enrichment, or from some other event. A person who receives a mistaken payment of a non-existent debt is unjustly enriched, and from that unjust enrichment he comes under an obligation to make restitution.

This is as yet lopsided. We have made no second level statement for property rights. That is matter for the next sub-section. Otherwise there is no mystery here. It is only necessary not to be distracted by the switch between obligations and rights *in personam*. We have taken precautions against confusion. The law of obligations is synonymous with the law of rights *in personam*. A right *in personam* held by one person correlates with an obligation in another. Although the category is predominantly named from the latter perspective, it remains a sub-set of rights. What is true of the set is true of the sub-set. We have already established that all rights realizable in court can be classified by these causative events. The same is true of rights *in personam* or, synonymously, obligations.

(b) The English Curriculum in the 21st Century

Our hierarchical map looks like this: rights realizable in-court are either personal, forming the subject-matter of the law of obligations, or proprietary, forming the subject-matter of the law of property; personal rights arise from consent or independently of consent, and, when independently of consent, from wrongs, from unjust enrichment, or from miscellaneous other events. To what extent is this reflected in the law school curriculum? There are courses on property, in practice often confined to one *res*, namely land. There are also always courses on two of the sub-sets of obligations, namely contract and tort, those being slightly restricted versions of consent and wrongs. There are as yet no courses at all on unjust enrichment.

Unjust enrichment has to be found, if at all, in the books and courses on restitution. Unjust enrichment is one of the events which triggers rights to restitution. Although restitution has for some years been required by the professions as part of a qualifying law degree, it makes no more than an interstitial appearance in most undergraduate curricula. There are a few full courses on that response-based subject, but they are mostly found only at the postgraduate level. Within them, some do and some do not distinguish clearly between unjust enrichment and other events giving rise to restitutionary rights.

The gap in the curriculum is reflected in the law library. The first paragraph of this book remarked that unjust enrichment, however necessary, was an unfamiliar category of the law. Its work has been done after a fashion, but incoherently under obscure names and illegitimately borrowed explanations. At this end of the law of obligations, the process of rationalization has fallen a century behind schedule.

This end of the law of obligations includes the residual fourth category of causative events. They do not lend themselves to either books or courses. Judgments are discussed in works on civil procedure and on *res judicata*, also to a certain extent under the slippery title of 'remedies'. Tax lawyers deal with one substantial sub-set, namely all those obligations arising from taxable events. The miscellany could indeed be substantially narrowed if we used a five-term classification: consent, wrongs, unjust enrichment, taxable events, and miscellaneous others. A book on uninvited intervention in the affairs of another, covering both *negotiorum gestio* and salvage, would create a sixth head. It is in the nature of a residual miscellany to yield up ever smaller nominate categories. Tidying up the non-contractual, non-tortious end of the law of obligations means being aware of the residual miscellany; it cannot mean looking for some unifying theory. The miscellany is miscellaneous.

3. UNJUST ENRICHMENT AND THE LAW OF PROPERTY

It is possible to confine the operation of unjust enrichment to the law of obligations. Civilian systems make that choice. They say it generates only rights *in personam*. One effect is that claimants in unjust enrichment, having only personal claims, all become unsecured creditors. As against an insolvent enricher, they have to join the miserable crowd waiting to share *pro rata* the scraps left over after the secured creditors have been satisfied. One scholar has argued that English law ought to make the same choice and move as quickly as possible to the position in which unjust enrichment generates only personal claims.¹⁷ The form of the argument shows that that is not the present law. In English law unjust enrichments do currently also give rise to property rights in some, but not all, cases.

(a) The Shape of a Categorical Error

A system which confines unjust enrichment to the law of obligations, allowing it to trigger only rights *in personam*, creates a monopoly of

¹⁷ WJ Swadling, 'Property and Unjust Enrichment' in JW Harris (ed), *Property Problems from Gains to Pension Funds* (Kluwer London 1997) 130.

choice, not a monopoly determined by logic. Unfortunately, in recent years just as the need for a rational law of unjust enrichment has begun to assert itself, a contrary view has begun to take root. In some quarters property and unjust enrichment have been presented as categories which are mutually exclusive as a matter of logic. That is an error, which confounds the true relationship between unjust enrichment and property. A little time must be taken to weed the error out.

Once one combines different classifications in a hierarchy, one must not forget that each level divides according to its own criterion. This means that it is almost invariably unsafe to suppose an exclusive logical opposition between categories at different levels. Nobody would dream of saying of a given case that it belonged to the law of obligations and therefore not in the law of unjust enrichment. That would contradict the empirical facts. It would also be logical nonsense. One could not say of a given animal that it was terrestrial and therefore not carnivorous.

Categorical errors of that kind are in fact never seen in relation to unjust enrichment and obligations. But it is exactly this kind of error which has for the moment taken a firm but flawed grip on orthodox doctrine as to the relationship between unjust enrichment and property. Very distinguished lawyers have begun to allow themselves to assert that a given case or question belongs in the law of property as opposed to the law of unjust enrichment. Yet property and obligations are coordinate categories: rights divided by exigibility. What is obvious about the relationship between unjust enrichment and obligations (rights *in personam*) should be equally obvious of unjust enrichment and property (rights *in rem*). Unjust enrichment is the generic description of an event from which rights arise. Commonly those rights are *in personam* and hence obligations. Sometimes, however, the rights generated by unjust enrichment are *in rem*, property rights.

The relationship between unjust enrichment and the law of property is formally the same as the relationship between unjust enrichment and the law of obligations. Property rights, like obligations, are a sub-set of rights realizable in court. What holds for the set holds for the sub-set. As every right, so every property right must arise from consent, from a wrong, from an unjust enrichment, or from some other event. Although every property right must arise from one of these events, it does not follow that every one of these events must generate one or more property rights. We have just accepted that some systems choose not to allow unjust enrichment to generate any property rights and that one scholar thinks that English law should follow suit.

(b) Non-Consensual Property Rights

Non-consensual property rights arise from wrongs, unjust enrichment and other events. If I paint my car with your paint, the paint accedes to the car and becomes mine. Similarly, if I make wine from your grapes, the wine is mine. These are fourth category events. They belong in the residual miscellany. We know from *Attorney-General of Hong Kong v Reid*,¹⁸ if we did not know it before, that there is at least one acquisitive wrong, namely breach of fiduciary duty, which generates a proprietary right.¹⁹ There the Hong Kong government acquired an equitable beneficial interest in bribes taken by a corrupt prosecutor in breach of his fiduciary duty. Having a property interest in the bribes, it was then able to claim such an interest in their traceable product, the farms in New Zealand in which the bribes had been invested.

The proprietary response to wrongs is rare. An opponent might condemn it on all sorts of grounds but not on the ground that it was a logical impossibility. In *Chase Manhattan Bank NA Ltd v Israel-British Bank (London) Ltd*,²⁰ Goulding J held that a mistaken payment, the central example of an unjust enrichment, generated both personal rights and equitable proprietary rights. Again, all sorts of criticisms might legitimately be made of that decision, except that it was *a priori* impossible for a mistaken payment to cause the second of these different responses. As with wrongs, whether an unjust enrichment generates proprietary rights is a matter of choice, not logic. A system may or may not reverse unjust enrichment by means of allowing the event to generate a proprietary right.

(c) *Foskett v McKeown*

The House of Lords appears nonetheless to have endorsed just such a logical exclusivity between property and unjust enrichment. In *Foskett v McKeown*,²¹ the question was whether beneficiaries of a trust could claim a proprietary interest in assets obtained with money stolen from the trust. To simplify the complexities of the case itself, suppose a trustee steals £100,000 from the trust, puts it into his bank account at a time when the

¹⁸ [1994] 1 AC 324 (PCNZ). The question whether this case, departing from *Lister & Co v Stubbs* (1890) 45 Ch D 1 (CA), represented English law applicable at the level of the High Court was answered in the affirmative by Lawrence Collins J in *Darbydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch) [78]–[87].

¹⁹ [1981] Ch 105 (Ch). The outcome is reinterpreted in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 714 (Lord Browne-Wilkinson). Fortnight extra-judicial criticism by Lord Millett: *The Rt Hon Sir Peter Millett 'Restitution and Constructive Trust'* (1998) 114 LQR 399, 412–13.

²⁰ [2001] 1 AC 102 (HL).

account stands £50,000 in credit, then empties the account and uses the £150,000 to buy himself a Rolls Royce. Can the beneficiaries take a proprietary interest in the Rolls Royce? The House of Lords held that they can but insisted that that answer belonged to the law of property, not the law of unjust enrichment. With the support of Lord Browne-Wilkinson and Lord Hoffmann, Lord Millett said, 'The transmission of a claimant's property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment.'²²

One reason for this unfortunate opposition²³ was reliance on what can conveniently be called the fiction of persistence. Their Lordships thought that it was correct to say that the claimants' original right in the original asset simply persisted in, or was transmitted to, the substitute. The same idea lurks in the civilian phrase 'real subrogation', which means 'thing substitution'. Real subrogation rests on an image²⁴ in which a property right resembles a single fishing line which can hook one fish after another. The Rolls Royce which replaces the trust money is then just the pike which is hooked after the perch. The right, which is the fishing line, remains the same throughout.

The effect of the fiction of persistence is to assert that the right in the substitute, the Rolls Royce, is the very same right as the right in the pilfered money. Hence the event from which the right in the Rolls Royce arose was the original declaration of the express trust from which the money was stolen. The fiction conceals the need to find and reflect upon any other causative event and, in particular, upon the event which consists in the non-consensual substitution.

In contrasting the categories of property—a category of response—and unjust enrichment—a category of causative event—their Lordships, in the grip of the fiction, must really have intended to contrast causative events. They must have intended to say that the property right in the substitute arose from the original declaration of trust, not from any other event and in particular not from unjust enrichment.

The element of fiction is evident. It is odd to say that a right in a car about which at the time nobody knew anything arose from a declaration of trust of money. It is even more odd when the right itself mutates. The claimant has a choice in relation to the substitute whether to take a beneficial interest proportionate to his involuntary contribution or a security interest for the amount of that contribution.

²¹ [2001] 1 AC 102, 127, 132. Lord Browne-Wilkinson and Lord Hoffmann used similar language: 108–9, 132.

Fictions express faith in the existence of a true but presently elusive explanation. The elusive explanation has to be found.²² For the moment, however, all that matters is the proposition, seemingly denied by their Lordships, that the law of property is a category of response of the same nature as, and coordinate with, the law of obligations. There can be no logical opposition between such categories and their causative events. A right *in rem* can arise from unjust enrichment, just as can a right *in personam*. When it does, it belongs equally to the law of property and to the law of unjust enrichment, no less than a right *in personam* to recover a mistaken payment belongs equally in both the law of obligations and the law of unjust enrichment, and a lion is both terrestrial and carnivorous.

(d) Academic Support: the Virgo Position

There is no doubt that their Lordships were deeply influenced by the work of Mr Virgo of Cambridge University. His important book does indeed contend that property rights can never arise from unjust enrichment. It is definitionally impossible for them to do so. For him, therefore, it makes perfect sense to talk of 'property, therefore not unjust enrichment'.²³ Mr Virgo's position reflects complex and not fully resolved problems in this area, but in the extreme form in which he presents the proposition it must certainly be incorrect.

If my wedding ring is stolen and passes to you in circumstances in which title remains in me, it is indeed impossible to say that my title arises from your unjust enrichment. It arose before you came into the story. The ring became mine when my wife gave it to me. The consensual causative event which explains why my ring is mine remains unchanged even though the ring is now in your hands. The passive survival of my title prevents your enrichment. There is no new right, no active response to unjust enrichment. Suppose, however, that the circumstances are such that title passes. I make a gift to you of an antique silver spoon. Let it be that there was a mistake induced by an innocent misrepresentation on your part, with the consequence that property passed at law while the

mistake nonetheless rendered the gift invalid and left you unjustly enriched at my expense.

Nothing prevents a system which chooses to do it from reversing this enrichment by means of a proprietary right. If it purported to confer on me exactly the same kind of right as I had before, it would be merely contradicting the proposition that property had passed. That is the case of the ring, and to that extent Mr Virgo is right: it is impossible to respond to an unjust enrichment by re-creating the same proprietary right as was previously held by the claimant. But if the law confers a new and different proprietary right, as by giving me a new equitable interest which I never had before or by conferring on me a power *in rem* to vest the ring in me, that new right *in rem* indisputably arises from your unjust enrichment and in order to reverse it. We will see in Part IV that English law does respond to unjust enrichment in this manner. If it is true that a tide is running against that kind of proprietary response, it is a tide of policy, not logic, and so far it is a tide of policy which is insufficiently informed.

(e) Preventing and Reversing Unjust Enrichment

It is tempting to say that the law of property prevents unjust enrichment and the law of unjust enrichment reverses it. That attractively elegant proposition is seriously inaccurate. It falls back into the error of seeing the categories of property and unjust enrichment as being mutually exclusive. All property rights belong in the law of property. They are what the law of property is about. A property right brought into existence by an unjust enrichment, to reverse that unjust enrichment, belongs both to the law of property and to the law of unjust enrichment. The relevant contrast is not between the law of property and the law of unjust enrichment but between the survival of old proprietary rights and the creation of new rights, whether *in rem* or *in personam*, for the purpose of reversing an enrichment. The passive survival of old rights *in rem* is preventative. The active creation of new rights to undo enrichment is the business of the law of unjust enrichment. It is business done through both the law of property and the law of obligations.

Professor Stoljar saw the law of unjust enrichment, which he preferred to call the law of quasi-contract,²⁴ as an extension of the law of property. There are a number of ways in which that proposition can be defended.

²² A Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 LQR 412. The article (i) rejects the fiction and (ii) insists, rightly in the present author's view, that the truth is that the relevant event is unjust enrichment. Not everyone who accepts (i) also accepts (ii). Mr Swadling would place non-consensual substitution in the fourth category which is 'miscellaneous other events': W Swadling in P Birks (ed), *English Private Law* (OUP Oxford 2000 with annual supplements) [4-439]–[4-481].

²³ G Virgo, *The Principles of the Law of Restitution* (OUP Oxford 1999) 15–17, 592–601.

²⁴ SJ Stoljar, *The Law of Quasi-Contract* (2nd edn Law Book Company Sydney 1989) 18, 250.

The strict liability in unjust enrichment does find its parallel in the irrelevance of fault in the assertion of proprietary rights against defendants in possession. But he went further. He constantly described quasi-contractual claims as having a proprietary flavour or a proprietary explanation. That language plays with fire. The relationship between property and unjust enrichment is complex and has been made more tense by persistent error. But the discussion in the preceding pages shows that it can be pinned down in terms of causative events and responses to those events. To speak of the law of unjust enrichment as 'proprietary' in any looser sense can only blur the picture. Unjust enrichment is an independent causative event which straddles the analytical distinction between property and obligations. Some rights arising from that causative event belong to the law of property and some to the law of obligations.

This section has said, in the teeth of high authority, that unjust enrichment is an event which can and does generate proprietary rights—rights *in rem* as opposed to rights *in personam*. Structurally the relationship between property and unjust enrichment is the same as that between obligations and enrichment. The really difficult question is when. That question belongs to Chapter 8. Unsurprisingly, given the confusions introduced here, that Chapter will reveal some very unsettled case law.

C. THE THIRD MAP: INSIDE UNJUST ENRICHMENT

We have been relating unjust enrichment to other better-known categories. At this point we pass inside it. We are now concerned with the layout of the law of unjust enrichment itself. Every case of unjust enrichment is materially identical to mistaken payment of a non-existent debt. The word 'materially' carries a heavy burden. On the surface all the other examples look different. The principal differences relate to the nature of the enrichment, the nature of the claimant's relationship to that enrichment, or the nature of the reason why the enrichment is unjust.

A category which is formed around a core case will inevitably have untidy boundaries. It is necessary to keep in mind the fact that the unity and necessity of the law of unjust enrichment was long denied and is only now being recognized. Even now it is still often more difficult than one would expect to identify a member of the family, disguised as it is likely to be in the deceptive language of the past. Individual figures have grown up in isolation, as for instance money had and received, subrogation, and

rescission. It will be some time before there is agreement among lawyers as to all the borderline cases.

The view taken here is that the terrain is not best mapped by trying to achieve an overview of every known liability which, in whatever language it was developed, might now be said to arise from unjust enrichment. On the contrary, the better course is to emancipate the law from the welter of earliest language and to insist that unjust enrichment be more abstractly mapped in terms of the analysis to which every figure which really is materially identical to mistaken payment of a non-existent debt will in fact conform.

Every liability in unjust enrichment answers to a five-question analysis derived, with two necessary additions, from the full name of the event, unjust enrichment at the expense of another. The map of the modern law of unjust enrichment will be directly determined by that analysis. The old names of the individual figures will be transcended and replaced by this analysis. They do not make the map. They obscure it.²⁵

I. THE FIVE-QUESTION ANALYSIS

Every problem in unjust enrichment can be unlocked by asking these five questions: (i) Was the defendant enriched? (ii) Was it at the expense of this claimant? (iii) Was it unjust? (iv) What kind of right did the claimant acquire? (v) Does the defendant have a defence? These questions provide the structure of the law of unjust enrichment and of the rest of this book.

The first three questions show that an unjust enrichment has happened and they thus establish a *prima facie* cause of action. The fourth (rights) principally seeks to determine whether the claimant's restitutionary right is *in personam* or *in rem* and, if the latter, whether it is immediately vested or merely a power to vest and whether, when vested, it is a beneficial interest or a security interest. The answers to that question have been rendered less than coherent by the long difficulty of seeing the subject as a whole. In the days before they began to be pulled together by the language of unjust enrichment, each centrifugal fragment became a

²⁵ The two chapters of Part VI, below, review the old, pre-unjust enrichment world. They seek to explain a dozen or so difficult words and phrases which have hitherto both done the work and impeded it. In the judgments that vocabulary still competes with the language of unjust enrichment. But much of it is now little understood. Money had and received, for instance, is commonly invoked, as a formula with a function but no meaning. The five-question inquiry will displace most of the old vocabulary. Some is still needed but has to be more precisely understood. Part VI discusses the old terminology. Some readers may prefer to read that discussion first. It doubles as a species of historical introduction to the modern law.

law unto itself. The aim, in relation to the fourth question, must now be to come as near to a single regime as genuine differences between groups of cases will allow. There is a long way to go.

It has become apparent in recent years that the fine tuning of the law of unjust enrichment will fall increasingly to the fifth question (defences). Restrictive interpretations of the cause of action have been relaxed as the defences have begun to take the strain. Provided the trade-off between liberal grounds for restitution and vigorous defences is kept in mind, the new strategy will do more sensitive justice. Here as elsewhere the *sine qua non* of rational development is the capacity to grasp the unity of unjust enrichment. Unless and until a contrary case is made the same defences must apply to every variety of the event and to every kind of right arising from the event.

The first three questions disentangle the three principal elements of the causative event. Question one (enrichment) and question two (at the expense of the claimant) are dealt with in Part II. In the great majority of cases neither is problematic, although when problems do arise they are rather difficult, largely because they have not often been directly confronted in the cases. Their importance could not be recognized other than intuitively so long as unjust enrichment was not acknowledged to exist as an independent causative event.

Part III is the heart of the law of unjust enrichment. It deals with the third question (unjust). Its business is to explore the reasons why an enrichment at the expense of the claimant has to be given up despite the absence of any wrong or manifestation of consent to that effect. Again the reader may prefer to take things out of order. Part III is accessible even if Part II is postponed. Whether read in or out of order, it is not easy going. The reason is that the last decade has twisted the kaleidoscope. The pattern is not as it was ten years ago. The process of understanding what has happened is only just beginning. It is exciting, but difficult. The final function of this introduction is to give a preliminary account of the way in which the picture has changed.

2. UNJUST FACTORS AND ENRICHMENT WITH NO BASIS

Nearly two hundred and fifty years ago, in *Moses v Macferlan*,²⁶ Lord Mansfield turned to Roman law to sort out one large sector at the non-contractual end of the English law of debt. Debt is a category of response, not a category of event. It is the sub-set of the law of obligations in which

²⁶ (1760) 2 Burr 1005, 97 ER 676.

the obligation is to pay a fixed sum of money or a fixed quantity of fungible goods. There are contractual debts and non-contractual debts. The spectrum of debt-creating events stretches from, at the contractual end, deeds, loans, sales, and leases to, at the non-contractual end, mistaken payments, judgments, and taxable events.

In Lord Mansfield's time it was common ground, built into the English forms of action, that one person became indebted to another when he received money for the benefit of that other. Some answer needed to be given to the question under what circumstances the law would regard a receipt as having been of that kind, 'to the use of the plaintiff'—as the old law expressed it. The answer which Lord Mansfield borrowed was immediately copied by Blackstone in his *Commentaries*, albeit embedded in a matrix of implied contract with an enthusiasm absent from the original. This is the part which Blackstone took from Lord Mansfield's judgment.²⁷

This is a very extensive and beneficial remedy, applicable to almost every case where the defendant has received money which *ex aequo et bono* he ought to refund. It lies for money paid by mistake, or on a consideration which happens to fail, or through imposition, extortion, or oppression, or where undue advantage is taken of the plaintiff's situation.

A generation later Sir William Evans identified the Roman and more recent civilian sources behind this clarification.²⁸ On that civilian foundation and hedged in by the form of action which Moses had used, the common law appeared to have constructed a building of its own, which was to be its law of unjust enrichment. The receipt of 'money which *ex aequo et bono* he ought to refund' needs minimal adjustment to become 'unjust enrichment'. Sadly, by the beginning of the 20th century this promising building had been completely overgrown by the ivy of implied contract. But it was not beyond reconstruction.

(a) Groups of Unjust Factors

The key to the English approach appeared to be the identification of specific non-contract, non-wrong reasons for restitution. Thus the Mansfield/Blackstone presentation already enumerated mistake, failure

²⁷ Blackstone (n 1 above) 3 *Commentaries* 162.

²⁸ Sir William Evans (19), *Pothier's Law of Obligations* (Joseph Butcherworth London 1806) vol 2, 378-81, cf his *Essays On the Action for Money Had and Received, on the Law of Insurance, and on the Law of Bills of Exchange and Promissory Notes* (Liverpool 1802) 48-9, repr [1998] *Restitution L Rev* 1, 7-8, 25.

of consideration, shades of fraud and pressure, and taking advantage of vulnerable people. Developed over the years, this list of 'unjust factors' could be seen to fall into groups.

(i) *Intent-Based Unjust Factors*

Most were variations on the nursery theme 'I didn't mean him to have it!'. The full range divided in two, between imperfect intent and qualified intent. Imperfect intent in turn broke down between no intent at all and impaired intent. An intent to transfer might be relevantly impaired by mistake, by illegitimate pressure or by reduced autonomy caused by a relationship or by some personal disadvantage or from some other cause. Qualified intent covered all those situations in which the claimant did intend to make the transfer but only on a specified basis. If that underlying conditionality was not purged, the claimant could say, as in the cases of impaired intent, that, in the events which had happened, he never meant the defendant to be enriched.

(ii) *Defendant-Sided Unjust Factors*

At one time it seemed that it was essential to make room, alongside the intent-based unjust factors, for a fault-based and defendant-sided category called something like 'unconscientious receipt' or simply 'free acceptance'. That proved to be the result of muddled thinking. Professor Burrows was chiefly responsible for eliminating the defendant-sided category.²⁹

Every supposed case turned out to be one in which, a *prima facie* unjust enrichment having already been established on other grounds, an element of culpable knowledge was additionally required on the particular facts and for a particular reason. It might be, for instance, that on some facts the defendant could not be said to have been enriched unless he knew that he was receiving a benefit offered in the expectation of payment. Or, again, it might be that an element of culpable knowledge was invoked to restrict restitution in a particular area to protect a countervailing interest, as for instance the need not to infantilize the aged. All elderly people would find it difficult to deal with their property if it were easy to obtain restitution for dementia.³⁰ There is no doubt that Professor Burrows was right to eliminate this defendant-sided category.

²⁹ A Burrows, 'Free Acceptance and the Law of Restitution' (1988) 104 LQR 576. See now A Burrows, *The Law of Restitution* (2nd edn Butterworths London 2002) 402-7.

³⁰ More detail in P Birks, 'The Role of Fault in the Law of Unjust Enrichment' in W Swadling and G Jones, *In Search of Principle: Essays in Honour of Lord Goff of Chicheley* (OUP Oxford 1999) 235.

One regrettable consequence of the error of creating this false category was the belief that an unconscientious receipt could operate as an indication of both enrichment and unjust. That is no longer accepted in the academic literature, but it has not yet been altogether cut out of the cases.³¹

(iii) *Policy-Based Unjust Factors*

The fault-based unjust factors being redundant, there remained cases inexplicable in terms of defective or qualified intent. It seemed possible to attribute all of them to the operation of specific policies which required enrichments to be given up without regard to the quality of the claimant's decision to make the payment or confer the benefit in question. Thus the reason why an enrichment had to be given up might be the need to reinforce governmental respect for the rule of law or the desirability of incentives encouraging withdrawal from illegal contracts.

Although somewhat untidy, the two lists of intent-based and policy-based unjust factors seemed to work, and they had the merit of keeping more or less in step with the way lay people thought.

(b) *Sine causa*, No Explanatory Basis

Despite its 18th-century foundation in Lord Mansfield's learning in Roman law, the down-to-earth, pragmatic and in some respects backward English law thus emerged from the heresy of implied contract in the second half of the 20th century looking very different from its civilian equivalent. Although civilian jurisdictions differ as between themselves in many ways, they all use the same basic approach to the question which asks when an enrichment must be given up even in the absence of contract or wrong. They divide enrichments between the explicable and the inexplicable. An enrichment which has no explanation must be given up. There is a limited range of recognized explanations. If the putative explanation is invalid or if there never was even a putative explanation, the enrichment is *sine causa*, it lacks the required explanatory basis and must be given up.

The last decade has seen the most important series of unjust enrichment cases ever to run through the English courts. They concerned the consequences of void contracts and, in particular, of void interest swaps.

³¹ It recurs in *Rowe v Vale of White Horse DC* [2003] EWHC 388, [2003] 1 Lloyd's Rep 418. However the error did no harm, because in that case the Council seeking restitution had knowingly accepted the risk that the recipients of their services would not agree to pay. No system would have allowed recovery, so that it was not necessary to ascribe the conclusion against liability to the absence of any free acceptance.

They are explained and considered in Part III.³² There is no escape from the conclusion that they adopted the 'no basis' approach. They do not fit in the list of unjust factors. This cannot be shuffled off or absorbed as though insignificant. It compels a radical re-orientation.

(c) Incompatible Bedfellows

Disorder in the law of torts is largely due to mixing incompatible approaches. We have torts which are degrees of fault, like negligence and deceit, and we have torts which are infringements of protected interests, like defamation, nuisance, interference with contractual relations, and interference with goods. These cannot but cut across each other. History brought us to that confusion. Nobody could voluntarily have chosen it. The law of unjust enrichment is young enough to haul itself out of a similar mess. The list of unjust factors and the inquiry into the existence of an explanatory basis are two entirely different methods of determining that an enrichment at the expense of another must be given up. Although in the vast majority of cases they reach the same destination, the two methods cannot be mixed or merged. Lord Hope of Craighead has already encouraged an assimilation.³³ But assimilation cannot mean anything like the blind co-existence of fault-based and interest-based torts, and it cannot happen without marginally changed outcomes.

Comparatists have seen this crisis coming. Dr Meier has repeatedly made a powerful case for the necessity of an English reorientation towards the *sine causa* approach.³⁴ Dr Krebs's timely comparative study placed English law 'at the crossroads' but came narrowly down in favour of persisting with the intent-based and policy-based unjust factors.³⁵ Canada, under French influence, has already become the first common law country to embrace the civilian terminology but appears to be in danger of falling incoherently between two stools, since it uses the language of absence of cause without regard to the technicalities of its operation.³⁶ The comparative dimension now exercises a potent and

³² Below, 108-13.

³³ *Kleinwort Benson v Lincoln CC* [1999] 2 AC 349 (HL), 408-9.

³⁴ This was the theme of her book: S. Meier, *Irrtum und Zwangserfüllung* (Mohr Siebeck Tübingen 1999) which was the subject of a review article by T. Krebs, 'A German Contribution to English Enrichment Law' [1999] *Restitution L. Rev.* 270. For her more recent contributions, below, 113 nn 20-1.

³⁵ Krebs, *Restitution at the Crossroads* (Carverish Press London 2000). This book is really about unjust enrichment, not restitution.

³⁶ Shortcomings and uncertainties: LD Smith, 'The Mystery of Juristic Reason' (2000) 12 *Supreme Court L. Rev.* 211.

practical influence on the interpretation of the swaps cases, which were not themselves overtly aware that they were walking a watershed.

One might muster the courage to say that they were incorrectly decided, or at best incorrectly reasoned, and that the judges should have made more effort to understand the approach to which English law appeared to be committed. That is a cul-de-sac, and a dangerous one. It leads over a cliff. Anyone bold enough to go down it will find himself dashed to pieces on the sharp rocks of Dr Meier's arguments. Over many years her case has been that the lists of unjust factors must in the end collapse into the 'no basis' approach. Between the lines of Dr Krebs's defence of unjust factors it is evident that he was constantly on the verge of capitulation.

Partly therefore by the force of precedent and partly because of the power of the Meier comparative analysis, Part III now accepts that in the recent cases English law paused at the crossroads and took a new direction. There can be no half measures. This is not the kind of issue which is susceptible of fudge or deliberate compromise. After the swaps cases English law now has to work through absence of basis across the board. It is a question of method, not substance, but methods have their own message. On the margin different methods produce different outcomes. The best prescription in the short term will be to use both approaches, in full awareness that they cannot be mixed.

D. CONCLUSION

One great advantage of pulling the law of unjust enrichment out of categories to which it does not belong, and even out of restitution to which it does belong but in which it has tended to lose its identity, is that it allows us to get a better picture of the classification of private law as a whole.

The first two sections of this chapter located our *tertium quid* in what turns out to be a fourfold series of causative events and then related that series to the different division between property and obligations. These are coordinate categories of response to the series of causative events. When rights are classified the first level is usually occupied by the division between *in rem* (property) and *in personam* (obligations). The division according to causative events is placed on the second level. All the rights which we seek to realize in court arise from are either *in rem* or *in personam*, and, one step down, all arise from distinct causative events—consent, wrongs, unjust enrichment, and others. Like the events in the

other three, unjust enrichment is a causative event capable of generating both rights *in personam*, in the law of obligations, and rights *in rem*, in the law of property.

The third section then took us inside the law of unjust enrichment itself. As it happens we have opened that door at a time when the common law is rejoining the tradition from which it borrowed heavily in the 18th century. Having recovered from an age wasted in the wilderness of implied contract, it had been evolving an approach of its own to 'unjust', but a series of important cases has moved it back into the mainstream. Like all the civilian systems, it will now ask whether the enrichment does or does not rest on a recognized explanatory basis. Wealth is transferred with a purpose in mind. Generally, though not invariably, the purpose is the basis. An unjust enrichment at the expense of another is an enrichment which, in those terms, is inexplicable. It fulfils no purpose and has no other basis.

Part II

Enrichment at the Expense of the Claimant

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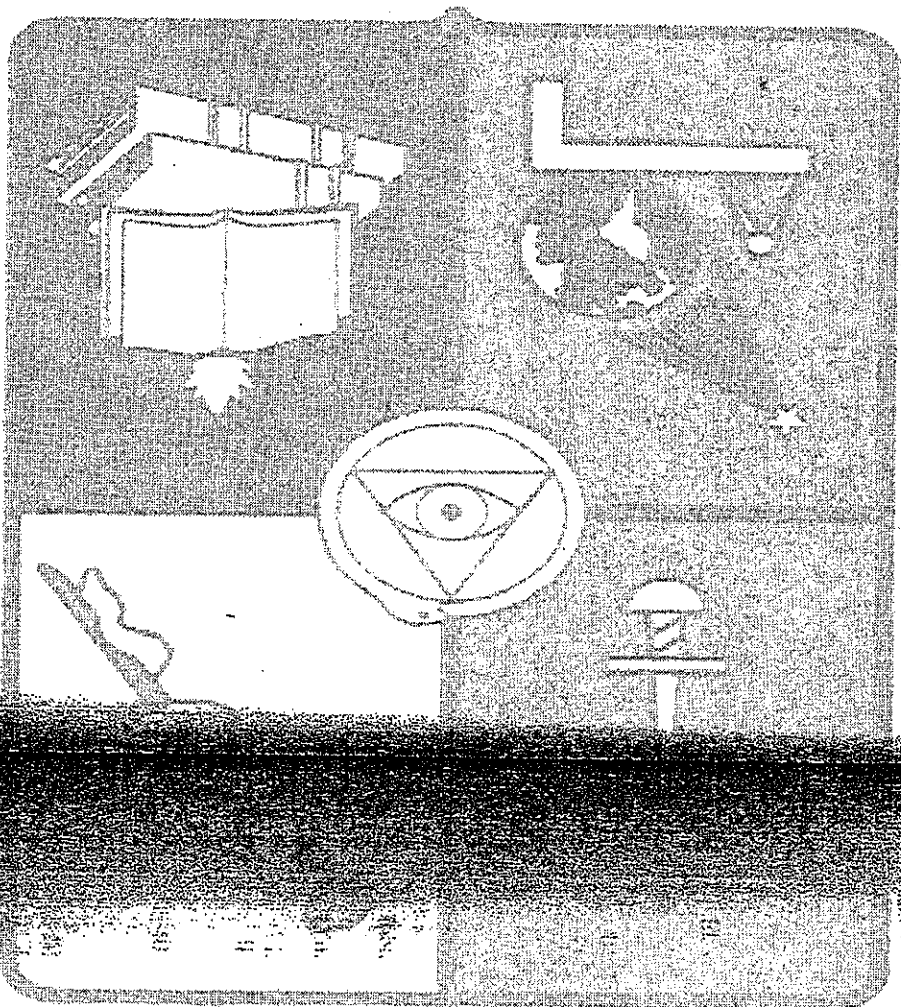
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SISTEMA DE DERECHO CIVIL

VOL. I MEN II

EL CONTRATO EN GENERAL
LA RELACIÓN OBLIGATORIA
CONTRATOS EN ESPECIAL
CUASI CONTRATOS
ENRIQUECIMIENTO SIN CAUSA
RESPONSABILIDAD EXTRA CONTRACTUAL

NOVENA EDICIÓN



2004

tecno

BIBLIOGRAFÍA SUMARIA

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39. EL ENRIQUECIMIENTO SIN CAUSA

1. LA CAUSA EN LAS ATRIBUCIONES PATRIMONIALES

El concepto de causa no es propia solamente del negocio jurídico: se utiliza tam-
 bién en relación con las atribuciones patrimoniales. Se expresa con esta idea la nece-
 sidad de que toda atribución y todo desplazamiento entre patrimonios se justifique
 merced a una situación previa que el ordenamiento jurídico considera bastante para
 llevarlo a cabo (un contrato, la ley, una sentencia). Se sigue de ello que todo despla-
 zamiento patrimonial, todo enriquecimiento y, en general, toda atribución, para ser
 lícita, debe fundarse en una causa o razón de ser que el ordenamiento jurídico consi-
 dera justa. Cuando una atribución patrimonial no está fundada en una justa causa, el
 que ha recibido la atribución debe restituir. Correlativamente surge una acción en favor
 del empobrecido para obtener o reclamar dicha restitución.

II. ANTECEDENTES HISTÓRICOS DE LA DOCTRINA DEL ENRIQUECIMIENTO SIN CAUSA

Está fuera de toda duda que la categoría moderna del enriquecimiento injustifi-
 cado o sin causa tiene su origen remoto en la legislación romana de las *condictiones*.
 La *condictio* fue un remedio legal, de origen, de contornos y de función en algu-
 na medida inciertos. ORTOLAN dice que la quinta y última de las acciones de la ley
 (*legis actio per conditionem*) apareció en el año 510 a.C. para suplir las deficiencias
 de las otras cuatro. En ella, el recurso a la acción de la ley se producía mediante la
 denuncia o emplazamiento del demandado (*condicere* = citar o emplazar para un jui-
 cio), y mediante esta acción se llevaba a cabo algunas singulares reclamaciones, ante
 todo, la restitución de una *datio* cuando el demandado no poseía título o razón sufi-
 ciente para retener.

Sea de todo ello lo que fuere, lo cierto es que en el Digesto Justiniano aparecen
 especialmente mencionadas varias *condictiones*:

- a) La llamada *condictio causa data causa non secuta* o *condictio causa dato-
rum*, que era una atribución patrimonial que una persona había hecho en vista de un
 resultado futuro que no se produce.
- b) La *condictio ob turpem causam*, cuando el resultado buscado es inmoral o
 deshonesto.
- c) La *condictio indebiti*, cuando alguien paga por error una deuda inexistente o
 lo que no se debía.

A estas tres centrales *condiciones* se añaden algunas otras en el Digesto Justiniano: 1.ª, la *condictio sine causa*, cuando alguien hace una promesa sin causa, que se diferencia de las anteriores en que en lugar de una *datio* se produce una simple *promissio*; 2.ª, la *condictio furtiva*, que permite reclamar la cosa hurtada o su valor, y obliga no sólo al autor del hurto sino a sus herederos; 3.ª, la *condictio ex lege*, de la cual se dice, en un texto de PAULO, que, cuando una nueva ley introduce una nueva obligación y no se ha prevenido en ella el tipo de acción que se da, se entiende que es la *condictio*.

Al lado de las *condiciones* el Derecho romano conocía las *acciones in rem verso*. La regla general es que cuando las personas sometidas a potestad ajena no tienen peculio, o lo tienen insuficiente, responden de sus deudas aquellos bajo cuya potestad se encuentran, siempre que estos últimos hubieran obtenido algún provecho de la acción de los primeros, de manera que lo que han hecho puede considerarse como si ellos mismos hubieran contratado. Esta *actio* se funda centralmente en la obtención del provecho por el actuar de otro.

También es sumamente importante para el desarrollo de la doctrina del enriquecimiento sin causa (c.f.) un texto de POMPEYO, recogido en el Digesto entre las reglas de Derecho, según el cual es justo por Derecho natural que nadie se enriquezca con perjuicios y lesión de otro (50, 17, 206).

La Glosa y la doctrina del Derecho Natural racionalista comentaron los textos sobre la *condictio* y la regla de POMPEYO, fundamentando la prohibición del enriquecimiento injusto, tradición que es recogida en la recopilación del Derecho general prusiano (1794) y en el Código civil austriaco (1811), que la admitieron y reglamentaron supuestos legales inspirados en ella.

En la literatura jurídica del siglo XIX recibe un nuevo impulso. Tras haber estado la doctrina de las *condiciones* se preguntaba SAVIGNY qué es lo que todas ellas tienen o pueden tener en común, y dice: «Todos estos casos tienen entre sí, en común, el aumento de un patrimonio por disminución de otro que o se ha producido sin causa, o ha perdido su causa originaria». Inmediatamente añade que se puede utilizar la idea del enriquecimiento falso de causa de uno a costa del patrimonio del otro.

Estas ideas, junto con la entera doctrina de las *condiciones*, fueron objeto de ulteriores desarrollos en la doctrina alemana del siglo XIX, y cristalizaron, finalmente, en los tratados y manuales de los más conocidos pandectistas.

III. EL ENRIQUECIMIENTO SIN CAUSA EN LA ÉPOCA DE LA CODIFICACIÓN

Las elaboraciones de los pandectistas (sobre todo la de WINDSCHEID) influyeron decisivamente en la codificación alemana. El parágrafo 812 del Código civil contiene una cláusula general: quien por prestación de otro, o de otro modo a costa de éste, se enriquece sin causa, está obligado a la restitución. La casuística empieza después, cuando se dice, v. gr., que la obligación restitutoria existe también si la causa ha desaparecido posteriormente o si no se ha producido el resultado perseguido con la prestación, según el contenido del negocio (descripción muy clara de la *condictio causa data causa non secuta*); y cuando se señala que la finalidad de la prestación puede encontrarse determinada de modo que al aceptarla el *accipiens* contravenga una dis-

posición legal o las buenas costumbres (parágrafo 817), recogiendo la *condictio ob turpem vel iniustam causam*.

Muy distinta de la germánica fue la tradición francesa. Subraya GORE que los antiguos autores franceses no consagraron nunca el principio de que nadie debe enriquecerse a cargo de otro como fuente general de obligaciones, y que sólo hacen a ello raras alturas. También destaca el autor citado que, si bien la teoría romana de las *condiciones* se introdujo y mantuvo en Francia, al exigirse la causa como un elemento estructural de los contratos (DOMAT), su falta lo hacía nulo y, en consecuencia, las acciones fundadas en la ausencia de causa sirven al mismo tiempo para repetir las prestaciones realizadas en ejecución del mismo. El desarrollo de las teorías de las nulidades por falta de causa priva de fundamento a la figura de las *condiciones*.

En POTHIER la noción del enriquecimiento injusto se liga con la gestión de negocios ajenos. Además de ello, recoge la idea de que el que paga un *indebitum* se asemeja al que presta, habla de un cuasi contrato llamado *pro mutuum*, que asimila a la acción que nace de la *condictio indebiti*, haciendo de esta última una regulación que los codificadores reducirían a nada.

Nada tiene de extraño que, con estos antecedentes, el Código de Napoleón no regule el enriquecimiento injusto. Hay en él una regulación de la acción de repetición que se encuentra en la disciplina de las obligaciones y contratos (restitución por causa de nulidad del contrato, etc.) y una configuración de la repetición del pago de lo indebido (la clásica *condictio indebiti*) con un sentido en algún modo residual. Esta orientación se sigue en nuestro Derecho. La formación de la teoría del enriquecimiento injusto o sin causa en el Derecho francés es tardía y jurisprudencial.

IV. CONSTRUCCIONES DOCTRINALES

En un determinado momento se generalizó la idea de que la prohibición de los enriquecimientos injustificados constituye un principio general del Derecho. Se buscaría de este modo, según expresión de RUPERT, la implantación de una regla moral en la vida jurídica civil, llevando a cabo una valoración ética de los resultados de las operaciones jurídicas para proceder en consecuencia.

Comentando esta línea de pensamiento, dice GORE que una noción teñida de criterios morales no es susceptible de una automática definición, de manera que se trata de que el juez decida según el sentido general de la justicia.

En realidad, con ella se cae en la casuística más heterogénea y en el arbitrio propio de un Derecho judicial, sistema éste que entre nosotros no es admisible por impedido el principio de seguridad jurídica y la vinculación de los jueces al Derecho (arts. 9 y 120.3 de la Constitución). Por otra parte, no se puede hablar de un principio general del Derecho que imponga la revisión de todos los juicios obtenidos, de todos los enriquecimientos recibidos. La revisión o reexamen sólo se produce en algunos casos en que se valora como digno de tutela el interés del demandante de la restitución y se desprotege el interés del demandado. La repetición tiene un acusadísimo carácter excepcional, cuando exista para ello una prescripción jurídica concreta (p. ej., el contrato que se ejecutó era nulo; la cosa que se entregó en pago no correspondía a ninguna obligación del tradente, etc.).

Otra línea de pensamiento coloca al enriquecimiento sin causa entre las fuentes de las obligaciones, lo que es decir muy poca cosa, es quedarse en la superficie: si se quiere aludir a su efecto (la creación de una obligación restitutoria), se trata de una verdad indiscutible, pero nada más.

En relación con los contratos, puede decirse que en su normativa justifica las valoraciones de justicia y de injusticia de los resultados contractuales quedan subordinados al postulado de que sean obra de la iniciativa y de la autonomía de las partes. Lo justo, lo exigido por la dignidad personal, es un mundo de contratos libres, por lo que los enriquecimientos conseguidos a través de ellos no son nunca injustos.

La idea del enriquecimiento aparece en los contratos precisamente cuando se decreta su ineficacia y surge la obligación de restituir, que el Código civil atiende entonces con normas más o menos completas.

Se ha querido fundamentar la doctrina del enriquecimiento en la noción de cuasi contrato, ensanchándola. Pero la crisis de la noción del cuasi contrato convierte en inútil todo este empeño teórico.

Por último, queda la relación del enriquecimiento injusto con el Derecho de daños, que debe matizarse. Este Derecho trata de resolver el problema del resarcimiento debido por quien culpa o negligentemente causa daño a otro. En el genuino Derecho de daños hay daño y no necesariamente enriquecimiento. A la inversa, podemos encontrar fenómenos de enriquecimiento injustificado en los que no puede hablarse de daño en sentido técnico. Si alguien paga algo que no se debe, el *accipiens* se ha enriquecido, pero el empobrecimiento del *solvens* no es un daño en el sentido del artículo 1.902 C.c.

Hay, sin embargo, casos en que el cruce existe. Se trata fundamentalmente de los supuestos de intromisión o de invasión en el ejercicio de un derecho que es ajeno. Por ejemplo, el titular de una concesión minera excava y extrae mineral de terrenos pertenecientes a un concesionario limítrofe, se utiliza sin autorización la propiedad intelectual o industrial ajena. El Derecho del enriquecimiento funciona además aunque el daño no se haya producido. Piénsese en el ejemplo de CAEMMERER: un importante medio de difusión utiliza la propiedad intelectual de un autor de un libro escasamente conocido sin su licencia y sin pagarle ninguna retribución; pero la curiosidad despertada produce un notable incremento de las ventas y enriquece al autor.

V. EL ENRIQUECIMIENTO SIN CAUSA Y EL CONTROL CAUSAL-FUNCIONAL DE LOS DESPLAZAMIENTOS DE VALOR Y LA TEORÍA DE LA CAUSA

Aproximadamente alrededor de los años veinte, en la doctrina de los países situados en la órbita de la tradición de la codificación francesa comienza a producirse la sustitución de la antigua idea del «enriquecimiento injusto» por otra más moderna, que habla de «enriquecimiento sin causa», seguramente por influjo de la legislación y literatura alemanas. Aunque el Código civil alemán no hable de «enriquecimiento sin causa», sino de «enriquecimiento injustificado», el parágrafo 812 define la regla que nos ocupa diciendo que quien obtiene algo por prestación de otro o de otro modo sin *causa jurídica* está obligado a la restitución.

El problema central de este encuadre es la noción de «causa». En los Derechos pertenecientes a la tradición de la codificación francesa, por obra de una línea doctrinal que, procedente de DOMAT y de POTHIER, llegó al Código civil francés, la causa se articula como «causa de las obligaciones» o «causa de los contratos». En cambio, en el Código civil alemán la idea de causa no se menciona para nada en la regulación del contrato y solo aparece cuando se refiere al «enriquecimiento injustificado».

El Derecho alemán se ha caracterizado siempre por el triunfo del principio de abstracción, en especial por lo que se refiere a las transmisiones de la propiedad: es la concorde voluntad de las partes de transmitir y adquirir, respectivamente, lo primordial y fundamental, sin que importe a estos efectos la razón de ese desplazamiento patrimonial. Por eso, la regla sobre el enriquecimiento injustificado es necesaria como mecanismo de corrección de las consecuencias producidas por la abstracción. Como el funcionamiento en aras de la abstracción exige la transmisión de la propiedad, sin embargo, la inexistencia y los vicios y defectos del negocio subyacente en las simples declaraciones de voluntad de transmitir y adquirir pueden obligar a una restitución, a un reajuste.

En la tradición francesa, en cambio, los contratos necesitan una causa (vid. art. 1.274 de nuestro Código civil) como elemento esencial, y los que no la tienen o la tienen ilícita obligan a restituciones de los desplazamientos realizados, como consecuencia de la nulidad del contrato y sin que sea necesario construir, como en el Derecho alemán, una pretensión restitutoria o de resarcimiento independiente. Además, problemas relativos a la resolución de los contratos por incumplimiento o por onerosidad excesiva —con los consiguientes efectos restitutorios— se consideran que tienen un fundamento causal y que obedecen a una falta sobrevenida de causa. El Derecho alemán, en cambio, ha permanecido ajeno, como se sabe, a la tradición de la idea de causa procedente de DOMAT y POTHIER, lo que provocó la supervivencia de la doctrina de las *condiciones* y un desarrollo de las mismas extraordinariamente elaborado, porque los problemas de causa, falta de causa, causa lícita, causa torpe, etc., tienen que recibir solución por esa vía.

De acuerdo con estas líneas legislativas, para nuestro Derecho, que sigue la tradición francesa, por justa causa de una atribución patrimonial debe entenderse aquella situación jurídica que autoriza, de conformidad con el ordenamiento jurídico, al beneficiario de la misma para recibirla y conservarla, lo cual puede ocurrir porque exista un negocio jurídico válido y eficaz o una disposición legal que autorice aquella consecuencia.

Este negocio jurídico válido y eficaz debe encontrarse construido y regulado de acuerdo con una noción causal o causalista.

VI. EL ENRIQUECIMIENTO SIN CAUSA EN EL DERECHO ESPAÑOL

La doctrina del enriquecimiento injustificado o sin causa es, en el Derecho español, una construcción jurisprudencial y doctrinal, que sólo muy modernamente ha tenido algún reflejo en el ordenamiento legislativo [curiosamente para establecer la regla de conflicto, en el Derecho Internacional Privado (cfr. art. 10.9 C.c.), y en la Ley Cambiaria y del Cheque (art. 65)]. Tomando como base un texto de las Partidas (7, 34,17)

en el que se dice que ninguno debe enriquecerse torticeramente con daño de otro, una jurisprudencia ya antigua, que se remonta por lo menos a la mitad del siglo XIX, considera que es un principio general del derecho el de que nadie puede enriquecerse con daño o detrimento de otro y que si ello ocurre el enriquecido debe restituir. La jurisprudencia posterior a 1945 ha tratado de perfilar la construcción señalando los requisitos que la pretensión de enriquecimiento debe reunir para ser viable.

La doctrina jurisprudencial ha declarado reiteradamente que toda pretensión de enriquecimiento exige, como requisitos esenciales: a) la adquisición de una ventaja patrimonial por parte del demandado con el correlativo empobrecimiento del actor; b) conexión entre enriquecimiento y empobrecimiento; c) falta de causa que justifique el enriquecimiento (Ss. de 28 de enero de 1956, 5 de diciembre de 1980 y 16 de marzo de 1995, entre otras muchas).

A) PRESUPUESTOS DEL ENRIQUECIMIENTO SIN CAUSA

a) *El enriquecimiento*.—Se puede producir tanto por un aumento del patrimonio como por una disminución del mismo (Ss. de 12 de enero de 1943 y 28 de enero de 1956).

El aumento del patrimonio puede deberse a un incremento del activo (adquisición de cosas corporales, adquisición de derechos reales o de crédito, de la posesión de las cosas, de cualquier otra ventaja como aumento del valor de las cosas o derechos ya existentes en el patrimonio por mejoras, edificaciones, etc.), o a una disminución del pasivo (extinción de una deuda, de un gravamen, etc.).

El enriquecimiento negativo se da cuando es evitada una disminución del patrimonio. En este sentido, un no gasto es equivalente a un ingreso. Se comprenden aquí todos los casos en que hay consumo de cosas pertenecientes a otro o servicios recibidos o expensas hechas por un tercero, si el enriquecimiento ha evitado de esta forma un gasto.

b) *El empobrecimiento del actor*.—La existencia de un enriquecimiento de una persona por otra no sería suficiente para fundar la pretensión de enriquecimiento. Es necesario que el enriquecimiento se produzca a costa de otro. El que no sufre este empobrecimiento no tiene interés, por lo que nada ha perdido. El empobrecimiento es una pérdida pecuniariamente apreciable, puede consistir en un valor salido del patrimonio del reclamante, en una prestación de servicios, en un trabajo efectuado o en la pérdida de un lucro cierto y positivo (Ss. de 30 de septiembre de 1993 y las que cita).

A pesar de la existencia material del empobrecimiento, la acción está excluida en ciertos casos en que es imputable al demandante mismo o proviene de una iniciativa que no parece poder concederle un justo título. Así ocurre cuando el empobrecimiento proviene de un acto ilícito; la abuela que conserva a los niños contra una decisión judicial ordenando entregarlos al padre divorciado, no puede demandar el reembolso de los gastos de manutención bajo el pretexto de que éste los ha ahorrado.

c) *La relación entre el enriquecimiento y el empobrecimiento*.—Debe existir un lazo causal entre el enriquecimiento del demandado y el empobrecimiento del actor. Es preciso que el empobrecimiento de uno sea la causa del enriquecimiento del otro. A veces el enriquecimiento del demandado no proviene directamente del empobrecimiento del demandante, sino a través del desplazamiento patrimonial que este último

ha realizado para el patrimonio de un tercero, del que ha pasado al del demandado. La causa del enriquecimiento previo del tercero es una relación jurídica ajena al demandado enriquecido, pero de cuyos efectos se beneficia en último término. Por ejemplo, un contratista construye para un comitente que había comprado el terreno. La compraventa se resuelve, el vendedor recupera el terreno lógicamente con el edificio, y el contratista, ante la insolvencia del comitente, pretende que le pague el importe de las obras el vendedor.

Una generalización total y absoluta de la legitimación para entablar la acción de enriquecimiento tiene el peligro de ignorar la regla de la relatividad de los contratos, por lo que será necesario tener en cuenta las circunstancias concurrentes y valorar si debe ser entonces sacrificado este principio.

d) *La falta de causa del desplazamiento patrimonial*.—Finalmente, es necesario, para que la acción proceda, que falte la causa de la atribución, entendida en el sentido que hemos dejado indicado al comienzo de este capítulo. Nuestra jurisprudencia lo ha repetido constantemente: La aplicación del principio que veda enriquecerse injustamente —dice— exige que se demuestre, en cada caso, además del hecho del enriquecimiento, su falta de causa o justificación, no enriqueciéndose torticeramente el que adquiere una utilidad en virtud de un derecho legítimo que se ejercita sin abuso; en virtud de una sentencia que lo estima procedente en Derecho, o cuando el beneficio del demandado se halla fundado en preceptos legales (Ss. de 27 de marzo de 1958, 19 de abril de 1961 y 8 de enero de 1980, entre otras).

Como se ve, la jurisprudencia restringe de este modo la posibilidad de ejercitar la acción de enriquecimiento, evitando que se convierta de hecho en una causa de inseguridad jurídica bajo pretexto de examinar la acomodación de las adquisiciones a la idea subjetiva de justicia del aplicador del Derecho.

Por lo que respecta a los contrarios hay que subrayar que la existencia de un contrato válido excluye la acción, pero la nulidad absoluta o relativa del mismo o su resolución o rescisión posterior se gobiernan por las propias normas que el Código dedica a estas materias.

e) *No es necesaria mala fe del enriquecido*.—Aunque en un principio la jurisprudencia exigió para la viabilidad de la acción que el enriquecimiento fuera «torticeo», hoy es doctrina que no se exige mala fe ni conducta ilícita por parte del enriquecido, que hasta puede ser ignorante o de buena fe (Ss. de 27 de marzo de 1958 y de 5 de octubre de 1985, entre otras).

B). CONTENIDO

Dice la sentencia de 5 de octubre de 1985, que «si la acción de enriquecimiento tiene por ámbito el efectivamente obtenido por el deudor, sin que pueda exce-

¹ Las sentencias de 22 de diciembre de 1962 y 12 de noviembre de 1969 abordaron casos que teóricamente pudieran caber en los enriquecimientos indirectos. En la primera, sin embargo, no se apreció, sino el derecho del propio demandado. En la segunda se negó acción al consuntor. También se denegó la acción de enriquecimiento en la de 20 de noviembre de 1989 (basada en las que cita) y en la de 26 de mayo de 1995. La de 12 de julio de 2000 la admite sin ninguna reserva ni condicionamiento.

derlo, tiene también otro límite infranqueable [...] que es el constituido por el correlativo empobrecimiento del actor, de suerte que, aun cuando el demandado se haya enriquecido sin causa no podrá aquél reclamar sino hasta el límite de su propio empobrecimiento).

Debe de resaltarse que la acción tiende a la reclamación de aquello con lo que se haya enriquecido el demandado, no a indemnizar perjuicios sufridos por el actor. La acción de enriquecimiento no es una acción rescindicatoria de daños y perjuicios (S. de 25 de abril de 2000).

C) NATURALEZA Y PRESERCIÓN DE LA ACCIÓN DE ENRIQUECIMIENTO SIN CAUSA. LA CUESTIÓN DE LA SUBSIDIARIEDAD

La acción de enriquecimiento es *personal*, no tiene por objeto la restitución o recuperación de las cosas salidas del patrimonio del demandante, sino que es una acción dirigida a la reintegración del equivalente. Es, pues, una acción de reembolso que busca una condena pecuniaria. Su plazo de prescripción será el general de quince años (art. 1.964) (S. de 5 de mayo de 1964).

La doctrina y jurisprudencia francesas se inclinan por la subsidiariedad de la acción de enriquecimiento: en el sentido de que cuando el empobrecido pudo accionar con una acción nacida de un contrato, cuasi contrato, responsabilidad civil o de la propia ley, no le cabe el recurso a aquella acción. El Código italiano de 1942 opta también por la subsidiariedad de modo expreso (art. 2.042). También la jurisprudencia española ha seguido este criterio cuando ha sido *ratio decidendi* de sus fallos, si bien otras sentencias manifiestan que la acción no es subsidiaria, aunque nada tenga que ver esa afirmación con el fallo, son unos meros *obiter dicta* que no crean doctrina jurisprudencial (S. de 19 de febrero de 1999 y las que cita).

Una excepción cabría hacer, sin embargo, referida a la concurrencia en una misma hipótesis de normas sobre responsabilidad civil por daño aquiliano (art. 1.902) y las del enriquecimiento.

La acción que al dañado corresponde, como vio acertadamente la sentencia de 12 de abril de 1953¹, concurre con la del enriquecimiento injusto, pudiendo aquél ejercitar la que estime más adecuada.

En efecto, un mismo hecho puede originar el enriquecimiento de su autor y el empobrecimiento del demandado sin causa, y puede verse también como un daño que sufre por una acción de aquél en su patrimonio. En la hipótesis de la sentencia acabada de citar, el que el concesionario de una mina invada los terrenos del concesionario límite, extrayendo mineral de su concesión. En cambio, no todo daño lleva consigo un

aumento patrimonial para el que lo causa, en cuyo caso no habrá más acción que la de la responsabilidad civil.

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¹ Esta importante y bien construida sentencia ha sido seguida por la de 10 de marzo de 1958, 22 de diciembre de 1962, 5 de mayo de 1964 y 5 de octubre de 1985. Hay que anotar, no obstante, que esta última contiene un *obiter incoherente* con la tesis que *acoge*. El *obiter* declara que «es cuestionable» que puedan acumularse la acción ex artículo 1.902 C.c. y la de enriquecimiento, por ser ésta subsidiaria. La doctrina jurisprudencial es taxativa, por contra, en cuanto a la concurrencia de las acciones y la libertad de elección entre ellas.