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UNJUST ENRICHMENT

SECOND EDITION

PETER BIRKS

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2

Three Maps

The mapping metaphor was used by Blackstone. In 1756, in his inaugural lecture, he said that the duty of the 'academical 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)].

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.

1. 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 and duties 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.

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 intervener'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 intervener 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 intervener'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 intervener'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.

[4] Justinian, *Institutes* 3.27.1.

[5] The classic statement is to be found in the judgment of Bowen LJ in *Falcke 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.

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, if 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] *Sebel Products Ltd v Commissioners of Customs & Excise* [1949] Ch 409.

[7] *Pan Ocean Shipping Ltd v Creditcorp Ltd (The Trident Beauty)* [1994] 1 WLR 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 *negotiorum 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 WLR 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?

1. 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 Pretto, *The Boundaries of Personal Property: Shares and Sub-Shares* (Oxford D Phil Thesis 2002). Dr Pretto 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 exigibility (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 exigibility? There is no logically correct answer. It is merely a matter of convenience. Throughout the European tradition, the practice is to make exigibility 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 Cottidianae*) 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 Hallebeek 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 enrichee, 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 Genes 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*, 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.[18] 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*[19] 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*[20] 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 (PC NZ). 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 *Daraydan 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). Forthright 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.'[21]

One reason for this unfortunate opposition 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 image 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

[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.

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.

[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 earlier 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]

1. 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 (tr), *Pothier's Law of Obligations* (Joseph Butterworth London 1806) vol 2, 378–81, cf his *Essays On the Action for Money Had and Received, on the Law of Insurances, 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 Chieveley* (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 *Rome 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 Zweckverfehlung* (Moher 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* (Cavendish 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