Reasons for Unjust Enrichment

Rajiv Shah

Downing College

Faculty of Law

University of Cambridge

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Summary

Birks' unjust enrichment formula was intended to provide a common descriptive structure to all the instances where there was recovery. He did not, however, engage in an analysis of the various reasons why courts awarded restitution. My thesis seeks to fill this gap. I argue that without such an account Birks work is incomplete. According to Birks, for example, money and services both amounted to enrichments and so should be considered together. But there are some differences and similarities between money and services. In order to be able to group them together Birks needs to be able to say that the reasons for giving recovery in money and service cases are similar enough that they can be grouped together. The same goes for all the unjust factors. The point is, the generalisation that Birks sought to do, can only properly be done if one is attuned to the reasons why recovery is granted in each of those cases. If the reasons are similar then the generalisation makes sense. But if they are not then it does not make sense to so generalise.

The argument of the thesis is that there three relevant principles to justifying unjust enrichment: the Property Principle, the Benefit-Burden Principle and the Autonomy Principle. The Property Principle states that one should not have property belonging to another. The Benefit-Burden Principle states that if one takes a benefit then one must bear the associated burdens; to put it more colloquially: you have to take the rough with the smooth. These first two principles provide reasons for considering a situation to be defective and the last principle provides a constraint for the operation of the first two. It is there to ensure that the imposition of liability will not unduly affect the autonomy of the defendant. Based on that the thesis proposes that the scope of the unjust enrichment formula be trimmed down to only cover defective transfers of money and other assets. For the other cases, a different analytical structure is needed. This is because the reasons for recovery in those cases are different.

Declaration

Except where specifically indicated in the text, this dissertation is the result of my own work and includes nothing which is the outcome of collaboration.

It is not substantially the same as any that I have submitted, or is being concurrently submitted, for a degree or diploma or other qualification at the University of Cambridge or any other university.

I further state that no substantial part of my dissertation has already been submitted, or is being concurrently submitted, for any such degree, diploma or other qualification at the University of Cambridge or any other university or similar institution.

This dissertation does not exceed the word limit of 100,000, set by the Degree Committee of the Faculty of Law. It contains 92,116 words, including footnotes, but exclusive of bibliography, table of contents and other preliminary matter. The numbers of words without footnotes is 79,902.

Rajiv Shah

Cambridge

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I. ABSTRACT

When Peter Birks wrote his *Introduction to the Law of Restitution* (1985) he distinguished between two different conceptions of 'unjust enrichment'. There was what he called 'the generic conception of all events giving rise to restitution' and there was the 'principle against unjust enrichment'. The former was descriptive generalisation of all of the set of facts where the law would award restitution. In order to get it to he started from the core case of a mistaken payment of money. He generalised money to 'enrichment', payment to 'at the expense of', and mistake to 'unjust'. According to Birks all of restitution fitted within this model. The model, however, was amoral. So, for Birks 'unjust' was a term of art which meant nothing more than 'the circumstances where the law grants restitution'. It did not important any moral or political concepts. It was descriptive, not prescriptive.

Birks contrasted this 'generic conception' with the moral principle against unjust enrichment. Such a principle appealed to moral notions and was prescriptive. It said that that law must reverse unjust enrichments. Birks was critical of this concept and thought it ought to be abandoned in favour of the 'generic conception'. Birks's criticism was that either unjust enrichment meant 'enrichments that are morally unjust' or it meant 'enrichments which the law considers to be unjust'. If it is the former then the principle was invitation to do Palm Tree justice. It is the latter then this prescriptive principle simply amounts to saying 'the law must be respected' and hence is a useless truism.

Birks's rejection of the principle against unjust enrichment creates two problems for his generic conception. The first is that it threatens the unity thereof. According to Birks, for example, money and services both amounted to enrichments and so should be considered together. But there are some differences and similarities between money and services. In order to be able to group them together Birks needs to be able to say that the reasons for giving recovery in money and service cases are similar enough that they can be grouped together. The same goes for all the unjust factors. The point is, the generalisation that Birks sought to do, can only properly be done if one is attuned to the reasons why recovery is granted in each of those cases. If the reasons are similar then the generalisation makes sense. But if they are not then it does not make sense to so generalise.

The second problem for Birks is that this makes the 'generic conception' useless is new cases which do not fit within any of the existing categories. How is the judge to decide such a case using Birks's 'generic conception' if it is merely descriptive and not prescriptive. Birks's answer was to reason by analogy. But analogies cannot be made simply on the basis of facts alone. Some facts are relevant whilst others are irrelevant. And in order to pick out what the relevant and irrelevant

facts are one must consider the reasons why restitution is granted in the established cases and see whether those reasons apply in the new case.

Notwithstanding those two theoretical defects, Birks's theory was quite successful. This was because, implicitly, Birks's theory traded on the intuitive plausibility of the principle against unjust enrichment. It was appropriate to classify a mistaken payment of money, the payment of unlawful taxes, and the ability of a surety to recoup the sum he paid to discharge a debt, under the 'generic conception of unjust enrichment' because all such situations involve what a layperson would recognise as 'unjust enrichments'. But the question that needs to be asked, and which Birks did not want to ask, was why we recognise that all those situations are 'unjust enrichments' which the law ought to correct.

It is this question which this thesis seeks to answer: what are the reasons for considering that these situations are unjust enrichments? There are three possible ways of answering this question. The first is a complete tabula rasa, we would seek to ask two questions: (i) in what circumstances ought there to be recovery and (ii) why. The second approach would take as given the instances where the law accords recovery but would seek to answer the second question without reference to reasoning given in the cases. The final approach would also take as given the instances where there is recovery and would seek to identify the reasons for recovery from within the cases and contemporaneous commentaries. In a recent case Lord Reed gave a strong endorsement of the third approach, saying that 'wisdom of our predecessors is a valuable resource'. It is this approach that this thesis takes.

The general argument of this thesis is that, contra Birks, the principle against unjust enrichment is not an invitation to Palm Tree justice because it is mediated by other more specific principles. It is those principles which allow us to characterise certain situations as defective. Although the reasons for those defects are different, all such situations share a similarity: namely that the defect consists of someone having a benefit that they ought not to have had. Hence, all such defective situations are properly be grouped within the rubric of 'unjust enrichment'. The principle against unjust enrichment then prescribes that the law ought to do something to remedy those situations. However, the response that the law takes will vary from each situation. This will depend on what the reasons for the defect were.

The argument of thesis is that there three relevant principles: the Property Principle, the Benefit-Burden Principle and the Autonomy Principle. The Property Principle states that one should not have property belonging to another. The Benefit-Burden Principle states that if one takes a benefit then one must bear the associated burdens; to put it more colloquially: you have to take the rough with the smooth. These first two principles provide reasons for considering a situation to be defective and the last principle provides a constraint for the operation of the first

two. It is there to ensure that the imposition of liability will not unduly affect the autonomy of the defendant.

Those principles are identified by looking at the cases and associated commentaries from the 18th century onwards. The thesis argues that it is the Property Principle which was the explanation given in the cases and commentaries for recovery of money and goods from the late 18th century until the 1960s. It argues that cases of recoupment, contribution, unrequested rescue of lives and property were explained by the Benefit-Burden Principle. Finally, it argues that cases of quantum meruit were explained by a mediation between the Benefit-Burden Principle and the Autonomy Principle (specifically in the need to respect the contract arrangements of the parties).

Because of the methodology adopted the thesis does not aim to mount a full-blown defence of those principles. Instead, it notes that these are the principles that have shaped the law and understanding them is necessary to properly understand the law as it is today. Nonetheless, the thesis does attempt to flesh them out in a manner consistent with the historical sources. The thesis then concludes by looking at the implications of this for the law of unjust enrichment. It argues that the Birksian model is premised on identifying normatively defective transactions (and not merely defective situations), this fits well with the Property Principle but not with the others. Hence, it argues that the Birksian analytical framework is best suited to the money and goods cases but not for services or non-returnable unrequested benefits. Those cases are best served with having a different analytical framework. Fortunately, there is no need to reinvent the wheel because such different analytical frameworks already exist. The temptation that needs to be resisted is to consider that, because in the wide sense such cases are all about unjust enrichment, the Birksian analytical framework ought to apply to them.

II. ACKNOWLEDGEMENT

I would like to thank Graham Virgo for having been an excellent supervisor. He probably disagrees with much of this thesis but it is a far better project than it would have been had it not been for his constructive criticisms of the work. I would also like to thank Jonathan Morgan for having been my PhD Advisor. Stephen Watterson and Nick McBride examined my first-year dissertation and helped me realise that I had to go down a different path. It is thanks to them that this thesis has taken the more historical orientation it has.

I have, in developing the argument in this thesis, benefitted from numerous conversations with Nick McBride, Peter Turner, Niamh Connolly, Astron Douglas, David Ibbetson, Amy Goymour, Lorenzo Maniscalco, Liron Shmilovits, Rachel Leow, Simon Allison, Philip Moller and many others. I am grateful to all of them. I am also grateful to all the students on the LLM Restitution course from 2014 to 2017 that I have had the privilege of teaching.

Various elements of the thesis have been presented at the Cambridge Private Law Centre, the Cambridge Centre for English Legal History, the Cambridge Forum for Legal and Political Philosophy, the Cambridge PhD Seminar Series, and the Restitution section at the Society for Legal Scholars conference. I am grateful to the conveners and the participants for their help, feedback and comments.

The genesis of my thinking on this issue can be traced back to my undergraduate admissions interview in December 2009. Amy Goymour asked me to apply the unjust enrichment formula to various hypothetical situations. One of those involved the provision of an unrequested service. I said that the formula should be inapplicable such cases. This, I was told, was the wrong answer. I am grateful to her for having admitted me nonetheless and for planting the seed that would later on become this thesis.

Most of the work on this thesis was done in the PhD Room in the Third Floor of the Law Faculty. I am grateful to its occupants especially Darragh Coffey and Michael Dafel for many entertaining and stimulating conversations. I also worked in the Maitland Room. I am grateful to the Cambridge legal history community for having adopted me. It has been an absolute pleasure working and socialising with Lorenzo Maniscalco, Emily Gordon, Astron Douglas, Julia Kelsoe, Andreas Televantos and Ashley Hannay.

The work on this thesis was funded by a PhD Studentship in Private Law funded by Travers Smith. I am very grateful for it and for their interest in my work. My parents also financially supported me, for which I am infinitely grateful. This thesis is dedicated to them.

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IV. TABLES OF STATUTES

CHAPTER 1: INTRODUCTION AND OVERVIEW

At least since 1998, with the House of Lords' decision in *Banque Financière de la Cité SA v Parc (Battersea) Ltd,*[1] a common assumption in unjust enrichment scholarship and case law is that every instance of unjust enrichment can fit within the four-stage formula:

(i) enrichment of D,

(ii) at the expense of C,

(iii) an unjust factor,

(iv) any defences.

In other words, the four-stage formula *defines* unjust enrichment. That is not to say that unjust enrichment itself is a cause of action. Rather, the formula represents a class of causes of actions with the variable being the unjust factor. Hence, there is, for example, a cause of action to recover taxes unlawfully levied and another to recover money paid under a mistake.[2] But the essential point remains: there is a common structure and the whole of unjust enrichment must fit within that structure. This is why all the leading textbooks order the material by following that structure.[3] Of course there are debates over what falls within unjust enrichment,[4] and indeed debates over what the formula should be (should it be unjust factors or absence of basis?).[5] There have also been wholesale critiques of unjust enrichment.[6] But, crucially, none of those debates have questioned the definition of all instances of unjust enrichment in terms of the formula.

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[1] [1999] 1 AC 221 (UKHL).

[2] *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioner* [2014] EWHC 4302 (Ch) [248] (Henderson J).

[3] G Virgo, *The Principles of the Law of Restitution* (3rd edn, Oxford University Press 2015); A Burrows, *The Law of Restitution* (3rd edn, Oxford Universtiy Press 2011); A Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press 2012); C Mitchell, P Mitchell and S Watterson, *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016).

[4] See e.g. Virgo arguing that maritime salvage is not part of unjust enrichment because it does not fit within the 'enrichment' limb: (n 3) 295, 305.

[5] P Birks, *Unjust Enrichment* (2nd edn, Oxford University Press 2005) ch 6; Burrows, *The Law of Restitution* (n 3) ch 5; Virgo (n 3) 127–132.

[6] S Stoljar, *The Law of Quasi-Contract* (2nd edn, The Law Book Company of Australia 1989); P Jaffey, *The Nature and Scope of Restitution: Vitiated Transfers, Imputed Contracts and Disgorgement* (Hart Publishing 2000); P Jaffey, 'The Unjust

The aim of this thesis is to challenge that assumption. It will be argued that there are two senses of 'unjust enrichment' which need to be distinguished. The first is the formulaic, which is narrowly defined and technical. It is primarily intended to be *descriptive* of what the law does ('if the following elements are met then the law will award recovery'). That conception of unjust enrichment is relatively new, having been invented by Birks in 1985.

The second sense is wider. It is unjust enrichment as lay people might understand it. It is a fuzzier concept and is intended to *prescribe* what the law should do ('a just legal system ought to correct unjust enrichments'). It is an old concept, which can be traced back to the Roman Law. It first appeared in English language legal scholarship in 1888 when Ames argued that it underpinned what used to be called 'Quasi-Contract'.[7] The vagueness of that principle combined with its prescriptive formulation led to accusations that it was a sloppy concept which was an invitation to 'palm tree justice'. Indeed, as will be seen in Chapter 2, it was in response to those criticisms that Birks created the formulaic conception.

In this thesis it will be argued that both concepts are important. The wide sense is indeed too abstract to be used directly by the courts. It must be mediated by more specific rules, which is what the formula does. But the formulaic concept also needs the abstract conception of unjust enrichment. This is because, if the formulaic conception operates alone, it is purely descriptive. It cannot help resolve new cases nor can it serve as a justification for the existence of this body of law. So, the concepts must complement and support each other. However, and this is a key claim of the thesis, it is not the case that one of the concepts must be defined in terms of the other. In particular, it will be argued that the normative concept of unjust enrichment is wider than the formulaic one. So, the thesis argues that not much of unjust enrichment in the normative/moral sense should actually be captured by the formula. This is not to say that there should be no recovery. Indeed, the point of saying that they are unjust enrichments in the normative/moral sense is that the law *should* give recovery. Rather, the point is that only some of those circumstances are best accounted for by the formula. For the others it is preferable to use a different analytical structure to consider when a court ought to give recovery. The following table represents the conclusion of the thesis about which instances fall within each of the two types of unjust enrichment.

Enrichment Fallacy and Private Law' (2013) 26 Canadian Journal of Law & Jurisprudence 115; S Hedley, *Restitution: Its Division and Ordering* (Sweet & Maxwell 2001); S Hedley, 'Implied Contract and Restitution' (2004) 63 Cambridge Law Journal 435; P Watts, 'Restitution - A Property Principle and A Services Principle' [1995] Restitution Law Review 49; P Watts, '"Unjust Enrichment"—the Potion That Induces Well-Meaning Sloppiness of Thought' (2016) 69 Current Legal Problems 289.

[7] JB Ames, 'The History of Assumpsit II. Implied Assumpsit' (1888) 2 Harvard Law Review 53.

Normative/Moral Unjust Enrichment	Descriptive/Formulaic Unjust Enrichment
• Reversal of defective transfers of money/goods/other returnable things/rights • Recoupment/Contribution • Reimbursement for the performance of another's obligation • General average • Agency of necessity • *Berkeley Applegate*[8] orders • Supply of necessaries to an incapax • Quantum meruit • In some cases, use of subrogation/rectification to fix transactions (e.g. *Menelaou v Bank of Cyprus*)[9]	• Reversal of defective transfers of money/goods/other returnable things/rights

Why is this? As it is argued in Chapter 2, the unjust enrichment formula has two main flaws. The first flaw, one might call it Birks's original sin, is that it was intentionally designed without any reference to the reasons why recovery was awarded in each of the cases. But a unified formulaic structure only makes sense if the reasons for recovery in each case that it covers are the same (or, at least, similar enough). The second flaw is caused by the first. In order to make everything fit within the formula the elements of the formula had to be extended to their breaking point. So much so that it is now recognised that 'enrichment' and 'unjust' are just 'terms of art' which mean nothing more than 'what the law considers to be an enrichment' and 'circumstances where the law will reverse a transfer a value'.[10] This, however, is simply circular. It empties the formula of any real content and it means that there is no internal coherence to it. The consequence of this has been a great deal of confusion as to how the formula should be applied.

[8] *Re Berkeley Applegate (Investment Consultants) No 1* [1989] Ch 32 (Ch).

[9] *Menelaou v Bank of Cyprus Plc* [2015] UKSC 66, [2016] AC 176.

[10] P Birks, *An Introduction to the Law of Restitution* (Oxford University Press 1985) 19; Mitchell, Mitchell and Watterson (n 3) paras 4–04; *Crown Prosecution Service v Eastenders Group* [2014] UKSC 26, [2015] AC 1 [100] (Lord Toulson).

Having conducted the autopsy of the formula, the thesis then sets out to fix the problem by addressing the original sin. There has to be an investigation of the reasons why, prior to Birks's formula being adopted, the law considered that certain situations amounted to unjust enrichments that had to be remedied. The method employed in this thesis is not to reinvent the wheel but to look at the cases and associated commentary since the 18th century and to extract from them what the reasons for recovery were. This investigation reveals that the reasons why recovery was awarded was to do with the interplay between three principles: The Property Principle, The Benefit-Burden Principle and The Autonomy Principle. The first two play a positive role by identifying prima facie reasons why there should be recovery in certain situations. The final one has a limiting role; it ensured that the first two principles did not lead to a situation where the autonomy of the defendant was unduly infringed.

The Property Principle broadly states that someone should not have the benefit of assets belonging to another. But, crucially, the notion of belonging is not merely legal but can also be moral. As will be shown in Chapter 3, this principle explained the recovery of defective transfers of money and of other goods. For (good) reasons not to do with the parties, the law considered that there had been a legally valid transfer of title notwithstanding a defect in the intention of the claimant. This created a situation where the defendant was now the legal owner of assets which the claimant did not really intend for him to have. In this situation the law considered that the claimant was 'ex aequo et bono' still the owner of such assets and so awarded a remedy to the claimant to reflect that. This way the 'ex aequo et bono' ownership could be protected whilst not undermining the reasons why legal title actually passed in the first place.

The Benefit-Burden Principle reflects adages that we learn at our mother's knee: 'you cannot blow hot and cold'; 'you cannot have your cake and eat it too'; 'you have to take the rough with the smooth'. Slightly more formally it requires that if one has the benefit of something then one has to bear the associated burdens. In Roman Law the principle was used to justify General Average. As argued in Chapter 4, such justification was subsequently adopted in English Law and spread to justifying contribution, for example, between co-sureties, recoupment, recovery for the discharge of another's obligations, recovery by the agent of necessity, recovery for unlocking or improving another's asset. Broadly, all cases of the recovery of unrequested non-returnable benefits fall within this principle. The idea is that the defendant has received a benefit (for example, the discharge of his debt) but the claimant has involuntarily borne the burden. This breach of the Benefit-Burden Principle leads to a situation of unjust enrichment which the law, therefore, has to cure. But the law does not do so by reversing the benefit: if my surety discharges my debt to X, the law does not make me owe money to X again. Rather, the law acts by shifting the burden from the surety who bore it to me, who had enjoyed the benefit without the burden.

Chapter 5 considers non-returnable benefits (typically, services) that have been requested (or freely accepted). Here it is argued that recovery for such services in the absence of an explicit contract is justified by the Benefit-Burden Principle and is not due to the parties promising to pay for it. This is because it is not true that a request for services (knowing that they are not provided gratuitously) necessarily implies a promise to pay for them. No doubt, most honest people actually do make that promise (if only implicitly), but this is not necessarily the case. Yet, in the absence of an obligation to pay for the services, we would have a breach of the Benefit-Burden Principle and, since there was an opportunity to reject or agree to other terms of remuneration, the imposition by law of an obligation to pay a reasonable sum does not contravene the Autonomy Principle. This is not to say that, in cases where there is no other agreement between the parties, such an obligation is inappropriately considered contractual. It is indeed contractual, but this does not mean that it was positively willed by the parties.

Matters, however, get more complicated where the parties have reached an agreement concerning the provision of services. This can lead to a situation, for example where the obligation is an entire one or where the contract is unenforceable, where services have been provided but there is no contractual obligation on the other party to pay for them. This will, for example, be the case if there has only been part performance of an entire obligation. In such a situation the law will not normally award a reasonable sum for the work done so far; the bargain has to be respected because of the Autonomy Principle. But there are some instances where this will not be the case. Suppose that the reason the claimant could not complete the work was because the defendant has, in breach of contract, prevented him from doing so. If the claimant brings a quantum meruit action to recover the value of the work done so far, can the defendant seek to defeat the claim by pointing out that the contract created an entire obligation? The courts have held that he could not plead that.[11] This was because, having so breached the contract, the defendant could not then seek to invoke the protection of that same contract. So, again, the Benefit-Burden Principle intervened. Services, then, are an area where recovery is determined by a fine-tuned mediation between the Benefit-Burden Principle and the Autonomy Principle.

Chapter 6 concludes by bringing all the threads together. It explains how the principles operate together to generate reasons explaining why certain situations are considered defective, how such defects can broadly be characterised as unjust enrichment, and how the law responds to such defects. It argues that there are three responses that the law takes: (i) returning the benefit, (ii) shifting the burden and, (iii) fixing the transaction.

The first applies in cases underpinned by the Property Principle and to the few cases underpinned by the Benefit-Burden Principle where the benefit is returnable. Such cases are well

[11] See the discussion in Chapter 5 Section II.A.4 'Making Sense of it all'.

suited to the unjust enrichment formula. They seek the reversal of a transaction and the touchstone of liability is the enrichment of the defendant.

The second applies where the Benefit-Burden Principle does the work but where the benefit cannot be returned. In such a case the law responds to the injustice by shifting the burden so that both the benefit and the burden are borne by the same person. Here the formula is not appropriate. There is no reversal or return to the status quo ante. The focus of the liability is not actually the gain of the defendant but the loss of the claimant. This does not mean that the reason for recovery is loss based; it is because of unjust enrichment. But the way the law cures this unjust enrichment is by shifting the loss from the claimant to the defendant, because shifting the loss will mean that there will no longer be a breach of the Benefit-Burden Principle (and hence there will no longer be an unjust enrichment).

The final response arises in situations where the transaction does not go as planned in a way that results in an unjust enrichment because, for example, someone receives a benefit without the associated burdens they were also meant to received. So, for example, in *Menelaou v Bank of Cyprus*, the defendant was meant to receive a house with a charge by the bank on it. Due to the negligence of the solicitors she received the house without the charge. The law can respond to such situations by reversing the whole transaction, but it has an alternative course of action: it can fix the transaction so that it operates as originally intended. This is what the law did in *Menelaou v Bank of Cyprus* by giving the bank a charge over the house. Again, in such cases the use of the formula is not appropriate as the law is not actually seeking to reverse the transaction or getting the defendant to return the benefit.

The thesis concludes by restating the elements needed to be established for recovery in the other cases not covered by the formula. In all such cases the law already has (or at least had) distinct analytical structures to apply. So, there is no need to reinvent the wheel by artificial expansion of unjust enrichment.

CHAPTER 2: THE PROBLEMS WITH BIRKS'S CONCEPTION OF UNJUST ENRICHMENT

I. TWO CONCEPTS OF UNJUST ENRICHMENT: MORAL AND DESCRIPTIVE

Peter Birks defined unjust enrichment as the 'generic conception of all events which give rise to restitution'.[1] By that he meant the set of facts on which the law will award restitution. Birks would go on to give a very clear structure for organising such events: a benefit had to be received by the defendant at the expense of the claimant and such receipt had to be unjust. Such a structure was subsequently accepted by the courts.[2] But the evaluation of whether the receipt is 'unjust' does not 'invite appeals to abstract conceptions of justice derived from whatever moral and political values might best suit a party's case'.[3] Instead, the meaning of 'unjust' was 'downward-looking to the cases',[4] so '[n]o enrichment can be regarded as unjust, disapproved or reversible unless it happens in circumstances in which the law provides for restitution.'[5] Such an account is purely descriptive. It does not tell us the reason, other than deference to authority, why restitution should be awarded. That Birks defined unjust enrichment in this way amounted to a complete reversal of the role unjust enrichment had previously played in the legal literature. There, unjust enrichment was understood as a principle of justice which explained why the courts were awarding recovery.

This understanding of unjust enrichment is the one which Robert Goff and Gareth Jones followed in their seminal *Law of Restitution* in 1966; "'Unjust Enrichment" is, simply, the name which is commonly given to the principle of justice which the law recognises and gives effect to in a wide variety of claims of this kind.'[6] This understanding predated *Goff and Jones*. The first time the phrase 'Unjust Enrichment' was mentioned in Anglophone legal scholarship was in 1887 in an article by William Keener concerning recovery of money paid under a mistake of fact. He wrote that:

> The equitable principle which enables A to recover in this case, as in quasi-contractual obligations generally, is the principle of enrichment: "One shall not be allowed to unjustly enrich himself at the expense of another;" or, as it is usually stated in the common law, "One shall not unjustly profit at the expense of another."[7]

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[1] P Birks, *An Introduction to the Law of Restitution* (Oxford University Press 1985) 17.

[2] *Banque Financière de la Cité SA v Parc (Battersea) Ltd* [1999] 1 AC 221 (UKHL) 227 (Lord Steyn).

[3] Birks, *An Introduction to the Law of Restitution* (n 1) 19.

[4] ibid.

[5] ibid.

[6] R Goff and G Jones, *The Law of Restitution* (1st edn, Sweet & Maxwell 1966) 11.

[7] W Keener, 'Recovery of Money Paid Under Mistake of Fact' (1887) 1 Harvard Law Review 211, 211.

A year later, James Barr Ames also explained that the equitable principle of unjust enrichment was the foundation of quasi-contracts.[8] Both Keener and Ames used 'equitable' in the sense of moral, rather than in the sense of that which concerns the Chancery jurisdiction. Neither of them suggested that courts, when deciding cases, should directly use 'unjust enrichment'. This meant that for them unjust enrichment had a much wider scope than it does under the Birksian structure. So, unjust enrichment was used to explain cases of waiver of tort[9] (what we would now call restitution for wrongs), and constructive trusts were said to arise to prevent unjust enrichment.[10] The first treatises published on quasi-contract confirmed that approach. Keener[11] (published in 1893), Woodward[12] (published in 1913), and Seavey and Scott's *Restatement*[13] (published in 1937) all identify unjust enrichment as the founding principle of the subject, but do not attempt to use it to organise the cases. Instead the organisation is by type of situations: money paid by mistake, services provided without request, informal contracts, supply of necessaries, discharge of debts, etc. There was no suggestion that there was a common analytical structure, let alone that such a structure would be in terms of (i) enrichment, (ii) at the expense of, (iii) unjust factors, and (iv) defences.

The first non-American texts published – Winfield,[14] Kersley,[15] Munkman[16] and Stoljar[17] – also followed a similar structure. Admittedly, Munkman's account was slightly different in that it organised the subject in terms of the common counts used – money had and received, quantum valebat, quantum meruit, money paid. But still, there was no suggestion that unjust enrichment provided a common analytical structure. Unjust enrichment was the moral foundation of the subject, but it had no role in structuring the subject, let alone in guiding the decision of judges.

The perception that unjust enrichment might have an adjudicatory role was the principle ground of opposition to it. Hamilton LJ (as Lord Sumner then was) famously said that 'we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes

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[8] JB Ames, 'The History of Assumpsit II. Implied Assumpsit' (1888) 2 Harvard Law Review 53.

[9] W Keener, 'Waiver Of Tort' (1892) 6 Harvard Law Review 223; GH Wald, 'The Law of Quasi-Contract' (1898) 14 Law Quarterly Review 253.

[10] Ames, 'The History of Assumpsit II. Implied Assumpsit' (n 8) 64; JB Ames, 'The Failure of the "Tilden Trust"' (1892) 5 Harvard Law Review 389; JB Ames, 'Can A Murderer Acquire Title By His Crime and Keep It?' (1897) 36 The American Law Register and Review 225.

[11] W Keener, *The Law of Quasi-Contracts* (Baker, Voorhis and Company 1893).

[12] F Woodward, *The Law of Quasi-Contracts* (Little, Brown, and Company 1913).

[13] Seavey and Scott, *Restatement of the Law of Restitution, Quasi-Contracts and Constructive Trusts* (American Law Institute 1937).

[14] PH Winfield, *The Law of Quasi-Contracts* (Sweet & Maxwell 1952).

[15] RH Kersley, *Quasi-Contract* (The Law Notes Publishing Offices 1932).

[16] J Munkman, *The Law of Quasi-Contracts* (Sir Isaac Pitman & Sons 1950).

[17] S Stoljar, *The Law of Quasi-Contract* (1st edn, The Law Book Company of Australia 1964).

attractively styled "justice as between man and man.'"[18] His concerns were shared by a number of academics during a dispute in the 1920s and 1930s concerning unjust enrichment and implied contract. The defenders of the implied contract were Hanbury, Landon and Holdsworth ('the traditionalists'). On the other side, defending unjust enrichment, were Winfield, Lord Wright, David, Gutteridge and Friedman ('the modernists'). A detailed examination of this debate is beyond the scope of this thesis[19] but a short account is in order. The traditionalists argued against the recognition of unjust enrichment as a separate legal category. Their concern was that the courts would have too much discretion if their decisions were based on what 'aequo et bono' required. The modernists countered by arguing that implied contract was based on a fiction and that the courts would not be deciding cases based on what they felt was fair but rather based on precedent, although some concept of fairness was still necessary to develop the law. The traditionalists' rejoinder was to accept this, but they argued that this was already happening within implied contract; changing to unjust enrichment would bring the risk of too much uncertainty, so 'if it ain't broke, why fix it?' Holdsworth put the dividing line between the two camps in terms of what question they wanted to ask: 'Is it fair that the Court should imply a contract between the plaintiff and defendant?' and not 'Is it fair that the defendant should make a repayment?'[20]

One can sympathise with Lord Simonds in calling the dispute 'arid'.[21] In this whole dispute RM Jackson made what was probably the most illuminating comment:

> The *aequum et bonum* theory was not the basis of the action but the basis for deciding when the law will imply a contract. Adopting the language used by Salmon for describing sources of law we can say that *aequum et bonum* was the material source of the obligation, but that the formal source was a contract implied in law.[22]

In other words, the modernisers argued that:

(i) Unjust enrichment was the normative/moral foundation of quasi-contracts,
(ii) it was fictional of the judges to talk in terms of whether they should be implying a contract, so
(iii) judges should explicitly acknowledge that what they were doing is reversing unjust enrichments, but

[18] *Baylis v Bishop of London* [1913] 1 Ch 127 (EWCA) 140 (Hamilton LJ).

[19] For a summary, along with the references, see S Stoljar, *The Law of Quasi-Contract* (2nd edn, The Law Book Company of Australia 1989) 2–5.

[20] WS Holdsworth, 'Unjustifiable Enrichment' (1939) 55 Law Quarterly Review 37, 48.

[21] *Ministry of Health v Simpson* [1951] AC 251 (UKHL) 275 (Lord Simonds).

[22] RM Jackson, *A History of Quasi-Contract* (Cambridge University Press 1936) 119.

(iv) in doing so, they should follow established precedents, and
(v) they should not make decisions based on whether, intuitively, something is an unjust enrichment (and so should be reversed).

The traditionalists agreed with the modernisers on (i), (ii), (iv) and (v), but rejected (iii). They did so because (a) they did not see the use of the implied contract fiction as being inherently bad (and so 'if it ain't broke, don't fix it') and (b) they feared that the use by courts of unjust enrichment would lead the courts to ignore constraints (iv) and (v). Looking at some of the recent cases decided by the English courts[23] one can see that the traditionalists were by no means being unreasonable in having those fears. For example, in *TFL Management Ltd v Lloyds*[24] the Court of Appeal used unjust enrichment as a justification for ignoring precedent decided before 1991, when the House of Lords first recognised the unjust enrichment principle.[25]

This debate between traditionalists and modernisers explains the significance of what Birks did. When Birks was looking at the Law of Restitution in the 1980s it appeared that the traditionalists had won. True, implied contract had been rejected by the mid 20th Century, but unjust enrichment was not recognised as a legal principle either. In 1978 Lord Diplock had said that:

> There is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based on the civil law.[26]

It is of course true that there were more favourable statements regarding unjust enrichment. Lord Wright, for example, had said that:

> It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.[27]

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[23] Collected in P Watts, '"Unjust Enrichment"—the Potion That Induces Well-Meaning Sloppiness of Thought' (2016) 69 Current Legal Problems 289.

[24] *TFL Management Services Ltd v Lloyds TSB Bank Plc* [2013] EWCA Civ 1415, [2014] 1 WLR 2006.

[25] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (UKHL).

[26] *Orakpo v Manson Investments Ltd* [1978] AC 95 (UKHL) 104 (Lord Diplock).

[27] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (UKHL) 61 (Lord Wright).

But there was no suggestion that unjust enrichment would or should have any adjudicatory relevance. Yes, unjust enrichment could be used to describe and delineate doctrinal categories and as a moral principle it could explain why recovery was granted in certain cases. But it was not a cause of action or a class of causes of action, and, when deciding cases, courts did not need to pay any attention to it. In that sense it was similar to the principle that 'loss wrongfully caused should be compensated'. Almost all the torts can be grouped under that principle; it serves to delineate tort from other obligations and as a general moral principle it explains why the law does what it does. But there is no suggestion that this can be pleaded in court or that courts should decide a case by asking whether there was a loss which was caused by a wrong.[28] Unjust enrichment was just like that.

The traditionalists had succeeded in their main objective. The challenge for Birks was, therefore, to construct a theory of unjust enrichment (as an adjudicatory tool for courts) which would accommodate the concerns of the traditionalists. He did so by inverting the problem. He rejected any moral principle of unjust enrichment and set out for unjust enrichment to be descriptive of the set of situations where recovery was awarded.

Part II of this Chapter sets out the reasons why he did so and criticises him for it on the ground that it is not possible to adopt a descriptive analytical structure without considering the various moral reasons why restitution is awarded. Part III considers the practical problems to which this Birksian analytical structure leads. In particular, it is argued that the four-part formula had to be greatly modified in order to accommodate the inclusion of services and of discharge of legal obligations.

II. THEORETICAL PROBLEMS WITH DESCRIPTIVE UNJUST ENRICHMENT

A. Birks's Project

For Birks the Law of Restitution 'lack[ed] any agreed framework and [stood] in danger of being unintelligible'.[29] What it needed was 'description rather than criticism'.[30] His complaint was that

[28] Compare with the situation in France where the courts do just that: Article 1382 and 1383 Code Civile (Fr).

[29] Birks, *An Introduction to the Law of Restitution* (n 1) 1.

[30] ibid.

even the 'skeleton of principle' of the subject had not been established.[31] Therefore he set out to find the 'simplest structure on which the material in *Goff and Jones* can hang.'[32] Such an analytical scheme could not be found in the cases, but rather had to be 'forced on to cases'.[33]

Birks defined Restitution as '*the response which consists in causing one person to give up to another an enrichment received at his expense or its value in money.*'[34] He further specified that Restitution was not concerned with cases where the claimant gets back something which he had always owned. In such cases the law is merely passive; nothing changes. But Restitution is the active or creative response of the law. It creates new rights at the moment of enrichment, in order to undo that enrichment.[35] This limitation was justified on practical and conceptual grounds. Practically it was needed, for otherwise it would have meant that the entirety of the law of real property, via the action of ejectment, would come into Restitution, and such an action cannot be understood without a full account of land law. But this would mean that the subject would be too big.[36] Conceptually, he considered that this this would prevent us from distinguishing (the few) restitutionary rights *in rem* from other proprietary rights.[37]

This,[38] then, was Restitution. But Restitution, unlike tort or contract, is a response to an event (i.e. it is remedial), for example recovery of a mistaken payment of money. Unjust enrichment is the 'generic conception of all such events'.[39] By 'generic conception' Birks meant, at a high level of generality, 'the common quality of a number of apparently different events.'[40] For example, 'the generic conception of sale, hire, agency, partnership, loan is "contract".'[41] 'Unjust enrichment at the plaintiff's expense' is the generic conception of all the events giving rise to restitution. How did Birks find that this is the generic conception of such events? Not by induction from the events, Birks warns us. But rather by 'deduct[ion] from the definition of restitution itself.'[42] How so?

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[31] ibid.

[32] ibid 3.

[33] ibid 4.

[34] ibid 13 (emphasis in original).

[35] ibid 14–15.

[36] ibid 15.

[37] ibid 16.

[38] 'the response which consists in causing one person to give up to another an enrichment received at his expense or its value in money': see footnote 34 above.

[39] Birks, *An Introduction to the Law of Restitution* (n 1) 16.

[40] ibid 17.

[41] ibid.

[42] ibid.

Fortunately, 'the particular nature of the response allows a generic conception of the event to be easily formulated.'[43] The argument goes as follows:

> If the restitutionary response happens when the law causes one person to give up to another an enrichment obtained at that other's expense or its value in money, it follows that, as a matter of observation at the highest level of generality, the event triggering that response must be enrichment at that other's expense. This is a tautology.[44]

But the law will not undo every enrichment at the expense of another. For example, mistaken payments are certainly recoverable, but gifts, for example, are not undone simply on the ground that one has changed their mind. Hence:

> Some word is needed to express the distinction. In the former cases the obvious inference is that the enrichment which generates the active response ought not to have happened. It is possible, therefore, to add an adjective signifying disapproval. 'Unjust' is the one which has stuck.[45]

Hence, 'unjust' is actually amoral and those judges and commentators who feared that 'the word "unjust" would invite appeals to abstract conceptions of justice derived from whatever moral and political values might best suit a party's case',[46] have nothing to fear. There is nothing moral about 'unjust'. It is used purely descriptively to mean 'those circumstances in which the law provides for restitution.'[47] Indeed, Birks accepts that using words such as 'disapproved' or 'reversible' 'might have been better in being more obviously downward-looking to the cases.'[48] It seems that the only reason he went for 'unjust' is because it is the one 'which has stuck.'[49]

But, if this is all that unjust enrichment means, is it not 'inert and useless'?[50] 'No', says Birks, there are three 'evils' in the state of the law which can be overcome by 'habitual and disciplined use of the words of the generic conception.'[51] First, there is uncertainty due to the lack of 'shared and stable pattern[s] of reasoning.'[52] With the various torts and contract there is a shared understanding

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[43] ibid 18.

[44] ibid.

[45] ibid.

[46] ibid 19.

[47] ibid.

[48] ibid.

[49] ibid 18.

[50] ibid 19.

[51] ibid.

[52] ibid.

of the steps that have to be established before the claim can succeed, but not so with restitution.[53] Second, the absence of the generic conception means that the subject is fragmented and that one is not 'able to detect important structural similarities between fact situations which are only superficially dissimilar.'[54] Birks then went on to illustrate the point by drawing analogies between recovery of mistaken payments and the compulsory discharge of another's liability.[55] Third, the reluctance to talk in terms of unjust enrichment meant that 'uninformative' or 'misleading' terms (such as implied or quasi contract) are instead used by the courts. This 'displaces the truth [and] introduces a lie.'[56] It means that we 'lose the benefit of calling the event by its proper name … [and] are obliged to suppose instead that it has some affinity with events to which it is wholly unrelated.'[57] For these reasons, the generic conception of unjust enrichment as the event giving rise to restitution was considered by Birks to be valuable even though it is, in a sense, circular.

Birks is then careful to distinguish this 'generic conception of unjust enrichment' from what he calls 'the principle against unjust enrichment'.[58] This is the principle which originated in Roman law. It is the moral principle which all the authors from Ames and Keener to Goff and Jones had seen as being the foundation of the law of quasi-contract. Birks observed that it 'restates the conception of the event in a dynamic or normative form.'[59] It is *prescriptive* rather than *descriptive*. But Birks warns us that this 'transition from event to principle can play some odd tricks',[60] of which we need to be aware. The first is really quite startling and is worth quoting in full:

> The principle threatens to undo the effort taken to make 'unjust' look downwards to the cases. To the extent that it does so it is to be regarded with suspicion. Indeed it may be that the principle can never be other than a moral aspiration. For as soon as steps are taken to bring it down to earth it begins to say nothing other than the law ought not to be ignored. Thus 'unjustly enriched' (once 'unjustly' is made to look downwards to the cases) must mean: 'enriched in circumstances in which the law says that there should be restitution'. Hence, 'no-one ought to be unjustly enriched at the expense of another', only means

[53] ibid 20. For what it is worth, Birks is here vastly overstating his case. At the time he was writing what needed to be shown to succeed in, say, money had and received was very well established. It had to be shown that there was a transfer of money from the claimant to the defendant in circumstances where the defendant did not have the right to retain it. Those circumstances were the ones specified in *Moses v Macferlan* (1760) 2 Burrow 1005, 97 ER 676 and subsequent cases.

[54] Birks, *An Introduction to the Law of Restitution* (n 1) 20.

[55] This is true, but without an account of the reason why restitution is awarded (something which Birks's amoral generic conception is incapable of providing) we cannot know whether the two situations are indeed similar.

[56] Birks, *An Introduction to the Law of Restitution* (n 1) 22.

[57] ibid.

[58] ibid.

[59] ibid 23.

[60] ibid.

> 'no-one ought to be enriched at the expense of another in circumstances in which the law says he should make restitution'. In other words, the law should be respected. The other formulation boils down to a similarly unambitious statement: 'There are circumstances in which the law does not permit one person to be enriched at the expense of another.'[61]

Birks seems to assume that there are only two ways of understanding the principle. Either 'unjust' simply means 'against an abstract conception of justice', in which case it cannot do any (legal) work and so is merely a 'moral aspiration'. Or, 'unjust' is understood purely positively as meaning, 'when the law says there should be restitution', in which case it just means the truism that the law should be respected. That objection to the principle is not new. It was first made against Keener by a reviewer of his, Everett Abbott,[62] in 1896, although it was retracted by Abbott in 1898.[63] That objection failed when Birks made it in 1985 for the same reason it failed back in 1898, namely that the inference from a moral understanding of 'unjust' to a legal one is illegitimate. But, before considering this point in more detail, let us consider Birks's second objection.

This concerns the phrase 'at the expense of'. Birks pointed out that it could be understood in two different ways, 'by subtraction from' or 'by doing wrong to.'[64] The case of a mistaken payment falls within the former category, but receiving a sum of money in exchange for beating up someone falls within the latter category. Applying the same inference from 'unjust' to 'what the law recognises', it follows that there are two forms of 'at the expense of': 'the law will not permit one person to be unjustly enriched by subtraction from another' and 'the law will not permit one person to be unjustly enriched by doing a wrong to another.'[65] But, Birks points out, the second of these is false. The law does not always require that the profits of wrongdoing be given up.[66] Without the distinction made between the two forms of 'at the expense of', the ambiguity remains in the formulation of the 'principle against unjust enrichment'. 'It remains a latent defect whose presence, sensed but not identified, has contributed to the suspicion in which the language of unjust enrichment has been held.'[67] For these two reasons Birks recommends rejecting the 'principle against unjust enrichment':

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[61] ibid.

[62] E Abbot, 'Keener on Quasi-Contract I' (1896) 10 Harvard Law Review 209.

[63] E Abbot, 'A Retraction' (1898) 11 Harvard Law Review 402.

[64] Birks, *An Introduction to the Law of Restitution* (n 1) 24.

[65] ibid.

[66] ibid.

[67] ibid 25.

> The best policy is to make no use of the so-called principle against unjust enrichment. The neutral, and seemingly less interesting, generic conception has in fact the more important work to do.[68]

There is a contradiction at the heart of Birks's argument. He criticises the principle of unjust enrichment for either being a truism or being so vague that it leads to suspicion. He criticises those – such as *Goff and Jones* – who propound unjust enrichment thinking, of 'leaving "unjust" up in the sky, where it cannot do [the] necessary work'.[69] He accepts that this suspicion comes from the term 'unjust' itself, which is ambiguous as between an abstract conception of justice and simply 'what the law says'.[70] He recognises that 'disapproved' or 'reversible' better conveys the meaning of the generic conception that he defends.[71] And yet, despite all of that, he uses 'unjust' and gives no reason for doing so other than the fact that '[u]njust is [the adjective signifying disapproval] which has stuck.'[72]

There are a number of problems with this approach. The first is that it is ambiguous. If one hears the phrase 'unjust enrichment', how is one to know if what is meant is the 'generic conception' or the moral principle? This ambiguity can prevent us from seeing that the generic conception alone cannot actually be allowed to develop the law. Suppose a court is faced with a new situation where the case law does not specify whether there should be recovery or not, and the judge decides that recovery should be allowed on the ground that this is an 'unjust enrichment'. Let us look at this situation from the point of view of an observer and then from the point of view of the judge.

If 'unjust enrichment' means 'reversible enrichment' (i.e. the generic conception) then all the judge has said is that 'this should be reversed because the law says it should', but, since – we have assumed – this is a new case, the judge is unable to point to a previous decision where this was held. Hence, for the observer, the judge really is just begging the question. If, instead, the judge meant the moral principle against unjust enrichment then we know that he has ordered recovery because he thought that it was unjust (in the moral sense)[73] for the defendant to retain the benefit. Now, admittedly, this reasoning by the judge is incomplete. It does not tell us why it is unjust. But the fault is that one of the premises is suppressed, not that the reasoning begs the question. Besides, the reason why it is unjust might, intuitively, be obvious to all and so the failure to spell it out might not be such a significant flaw. But the fact that unjust enrichment is used in these two different

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[68] ibid.

[69] ibid 20.

[70] ibid 19.

[71] ibid.

[72] ibid 18.

[73] Or, against conscience, as the old cases put it.

senses does not allow us to distinguish between them and each of them has their flaws. 'Reversible enrichment' is just question-begging and 'moral unjust enrichment' re-introduces the spectre of judges deciding cases on nothing other than their conception of fairness. But the ambiguity in the term 'unjust enrichment' allows the judge to have his cake and eat it. If someone charges him with deciding cases based on his own moral principles he can respond by saying that he just meant 'reversible enrichment'. And if someone else tells him he is just begging the question, he can say that he was not because he was deciding based on higher principles. These two possible meanings of unjust enrichment do not, therefore, produce clarity of thought. It makes it very hard for the observer (and anyone reading a judgment), in a new case, to properly understand the true basis of the judge's decision.

But, from the perspective of the judge, how is he to decide this case? 'Reversible enrichment' provides no guidance for him. However, he is able to use his moral sense to consider whether that benefit ought to be retained or given up. Indeed, this is what appears to have happened in some cases. In *Woolwich v Inland Revenue Commissioners*[74] the House of Lords recognised a new unjust factor: money paid pursuant to an unlawful tax demand could be recovered without having to show a mistake or compulsion. This was because such an instance was 'the paradigm of a case of unjust enrichment' and 'the concept of unjust enrichment suggests the plaintiffs should have a remedy.'[75]

So, the problem with using 'unjust enrichment' only in the sense of the 'generic conception' is that it provides no guidance for judges in how to decide cases and it makes it difficult for anyone reading the judgement to understand the true basis of the judge's decision. Perhaps a middle solution would be to look for analogies with the decided cases. This is the approach the courts have taken,[76] and it appears to have been Birks's suggestion too. Indeed, he said that the adoption of the generic conception would allow us 'to detect important structural similarities between fact situations which are only superficially similar'.[77] But the problem, as Webb has pointed out, is that reasoning by analogy requires being able to identify the reasons behind recovery in one case in order to see if they apply in another case.[78] Is this something Birks was willing to do? Here again Birks's reasoning appears to be contradictory. On the one hand he completely rejects any role for the moral principle against unjust enrichment.[79] He does so whilst accepting the relevance of open-textured principles in tort ('a man must pay for the harm which he negligently causes') and contract

[74] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (UKHL).

[75] ibid 197 (Lord Browne-Wilkinson).

[76] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (UKHL) 697 (Lord Goff).

[77] Birks, *An Introduction to the Law of Restitution* (n 1) 20.

[78] C Webb, *Reasons and Restitution* (Oxford University Press 2016) 43–50.

[79] See passage cited at footnote 68 above.

('*pacta sunt servanda*') because 'in these areas the open-textured principles are mediated by well-defined concepts whereas, in restitution, unjust enrichment has to do the work both of high-level [moral] principle and low-level concept.'[80] So the lack of such mediating principles explains why he considered that we must do away with the moral principle against unjust enrichment altogether.

On the other hand, when dealing with more detailed aspects of the law Birks seems willing to entertain moral arguments about the reasons for restitution. For example he asks:

> Could the moral force exerted by the perception of danger to another's property be regarded as having an effect on the intervenor's mind equivalent to mistake or legal compulsion so as to qualify by analogy as another factor calling for restitution? It would be an affirmative answer to this question which would attract the adjective 'unjust'.[81]

Later on he states that the main category of 'unjust' is 'non-voluntary transfer'.[82] He does warn that this phrase is an 'ugly' one. He adds that it is subject to the same warning as the word 'unjust' itself: 'you cannot conclude in favour of restitution just by looking at the story of a transfer from P to D and deciding, as though it were only a question of fact, that P did not mean D to have the given item of his wealth.'[83] However, unlike 'unjust', he acknowledges that the 'layman's commonsensical version' of 'non-voluntariness' is a 'starting point.'[84] Whilst one must be guided by the cases and by what the philosophers think, this does not mean that '"non-voluntariness" is an inert or useless notion. On the contrary it is the **basis of much restitution**."[85]

The fact is Birks's theory amounts to a Motte and Bailey Doctrine:

> A Motte and Bailey castle is a medieval system of defence in which a stone tower on a mound (the Motte) is surrounded by an area of pleasantly habitable land (the Bailey), which in turn is encompassed by some sort of a barrier, such as a ditch. Being dark and dank, the Motte is not a habitation of choice. The only reason for its existence is the desirability of the Bailey, which the combination of the Motte and ditch makes relatively easy to retain despite attack by marauders. When only lightly pressed, the ditch makes small numbers of attackers easy to defeat as they struggle across it: when heavily pressed the ditch is not defensible, and so neither is the Bailey. Rather, one retreats to the insalubrious but defensible, perhaps impregnable, Motte. Eventually the marauders give up, when one is well placed to reoccupy desirable land. For my original purposes the desirable but only lightly defensible territory of the Motte and Bailey castle, that is to say, the Bailey, represents philosophical propositions with similar properties: desirable to their

[80] Birks, *An Introduction to the Law of Restitution* (n 1) 20.

[81] ibid 21.

[82] ibid 99.

[83] ibid 100.

[84] ibid 101.

[85] ibid (emphasis added).

> proponents but only lightly defensible. The Motte represents the defensible but undesired propositions to which one retreats when hard pressed.[86]

In Birks's theory the Bailey is the moral principle against unjust enrichment. This is what makes his classification of events interesting and attractive, because, intuitively in all the circumstances where the law gives restitution it makes sense to say – in layman's terms – that the enrichment was unjust. The Motte is his reversible enrichment doctrine, according to which 'unjust' just means 'what the cases say is reversible'. When Birks is actually using unjust enrichment he appeals to the Bailey, but when pressed with objections that this is just palm tree justice, he retreats to the Motte and claims that there is nothing moral with 'unjust'.

In one sense, however, the above comparison is unfair on Birks. I do not think that he intentionally meant to appeal to such a fallacy and, given the scepticism about unjust enrichment at the time, I can understand why he did so. The problem with Birks was not so much the construction of the Motte, but rather it was his failure to defend the Bailey. The moral principle against unjust enrichment is not indefensible. Birks's fault is that he did not even try to defend it. In this thesis I do not mean to attack the Motte, rather I aim to defend the Bailey that Birks claimed to have abandoned.

B. The principle against unjust enrichment

As we saw above, Birks's case against the unjust enrichment principle was that 'unjust' could mean one of two things: (i) an undefined/abstract conception of justice or (ii) the circumstances in which the law says an enrichment should be reversed. The trouble with the former is that it would lead to palm tree justice. The trouble with the latter is that it reduces the principle to a mere truism.[87]

1. Not a question-begging truism

The second interpretation cannot be right. To see this, consider a simple thought experiment. Suppose that Parliament passed the Restitution (Abolition) Act which provides that there will be no recovery in the situations where restitution is now commonly available. So there would be no recovery for mistaken payments, for work done under an unenforceable contract or for having discharged another's debts. It seems quite clear that a philosopher, or indeed anyone, could criticise

[86] N Shackel, 'The Vacuity of Postmodernist Methodology' (2005) 36 Metaphilosophy 295, 298.

[87] Birks, *An Introduction to the Law of Restitution* (n 1) 22–25.

such a law by saying that it allows unjust enrichments to go unreversed. Such a criticism does not beg the question. Rather it appeals to moral principles which are outside of the law and which the law can fail to reflect. And it is the law's failure to reflect those principles which is criticised. The principle against unjust enrichment is used as a yardstick with which to measure the law: does the law give recovery for unjust enrichments? If yes, the law passes the test. If not, the law fails and so, if the unjust enrichment principle is accepted as true, the law should change to reflect it. Indeed, this seems to have been what Lord Browne-Wilkinson was saying in *Woolwich* when he described that case as 'the paradigm of unjust enrichment.'[88]

To see this point in more detail it is useful to consider the work of Everett Abbot, the first critique of unjust enrichment.[89] Abbott took as his starting point Keener's definition of unjust enrichment: (1) *'No one shall be allowed to enrich himself unjustly at the expense of another.'*[90] Abbot then adds that, because we are talking of a proposition of law, the words 'by law' need to be added after 'allowed'. This, Abbot says, 'is necessary to redeem the proposition from the charge of being ethical merely and not juridical.'[91] Hence the proposition now reads: (2) '*No one shall be allowed by law to enrich himself unjustly at the expense of another.*'[92] He then states that the proposition is still subject to another 'fundamental objection', namely:

> If it is true that no one shall be allowed to enrich himself unjustly at the expense of another, it is also true that no acts whereby one does so unjustly enrich himself at the expense of another are allowed by law, or to state the proposition conversely, all such acts are by law forbidden.[93]

Hence the proposition is modified to read: (3) *'Acts whereby one unjustly enriches himself at the expense of another are forbidden by law.'*[94] Abbot then makes a number of other modifications which do not change the meaning, the final version is then: (4) *'The unjust enrichment of one at the expense of another is illegal.'*[95] Abbot then moves to flesh out what 'unjust' could mean. He points out that 'the forum of the law is not of equal jurisdiction with the forum of conscience, and that some acts may be ethically

[88] *Woolwich v IRC* (n 74) 197 (Lord Browne-Wilkinson).

[89] Abbot, 'Keener on Quasi-Contract I' (n 62); E Abbot, 'Keener on Quasi-Contract II' (1897) 10 Harvard Law Review 479.

[90] Abbot, 'Keener on Quasi-Contract I' (n 62) 221.

[91] ibid.

[92] ibid.

[93] ibid 222.

[94] ibid.

[95] ibid.

unjust which are yet permissible in law.'[96] Hence unjust acts may be unjust and legal, or unjust and illegal. This, therefore, gives us two possible formulations:[97]

(4)(a) The unjust and *legal* enrichment of one at the expense of another is illegal.

(4)(b) The unjust and *illegal* enrichment of one at the expense of another is illegal.

Abbot correctly points out that the first of these proposition is a contradiction in terms; a legal enrichment cannot be illegal. As for the second, it is 'obviously true', but it is a truth which serves no purpose. Like the mathematical equation A = A, no deduction can be drawn from it.[98] Hence it cannot, in either sense, be used as a reason to award recovery in a case. This is so even if it is used as a middle term:

> Thus to say to the defeated party, when the decision of the controversy is against him, that he is unjustly enriched at the other's expense because (to take an example) he has obtained money from the other by a false statement of fact, is merely to import an unnecessary term. It is in effect to say, you ought to be defeated because you obtained money by false pretences. Resorting again to the simile of an equation, it is like saying, A = A = B. The middle term in both cases is unnecessary and should be neglected as not actually used.[99]

Hence, any attempted use of the principle 'results either in begging the question or else in a more or less conscious resort to some other and extrinsic principle.'[100] For an example of reliance on an extrinsic principle, Abbot cites Keener's explanation for the basis of restitution of money paid under a contract which is subsequently discharged for breach. Keener states, 'If this right [to recover money paid] is to be given to a plaintiff it would seem to be for the reason that the defendant should not be allowed to blow hot and cold, and to profit by a contract the burdens of which he refused to perform.'[101] Abbot agrees with this basis, but says that; 'The obligation is explained, however, not by the doctrine of unjust enrichment, but rather by the proposition that the defendant cannot occupy two inconsistent positions at one and the same time.'[102]

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[96] ibid 223.

[97] ibid.

[98] ibid.

[99] ibid 224.

[100] ibid 225.

[101] Keener, *The Law of Quasi-Contracts* (n 11) 299.

[102] Abbot, 'Keener on Quasi-Contract I' (n 62) 226.

To recap, Abbot's argument is as follows:

a) Proposition (1) (*No one shall be allowed to enrich himself unjustly at the expense of another*) needs to be modified to proposition (2) (*No one shall be allowed by law to enrich himself unjustly at the expense of another*) because it is a juridical proposition and not a merely ethical one.
b) The converse of proposition (2) is proposition (3) (*Acts whereby one unjustly enriches himself at the expense of another are forbidden by law*) which can be modified, without change of meaning, to proposition (4) (*The unjust enrichment of one at the expense of another is illegal*).
c) Unjust acts can be unjust and legal or unjust and illegal, so proposition (4) can be mean either:
    a. The unjust and *legal* enrichment of one at the expense of another is illegal.
    b. The unjust and *illegal* enrichment of one at the expense of another is illegal.
d) Proposition (4)(a) is contradictory.
e) Proposition (4)(b) is a truism, which cannot be used in reasoning.
f) So any attempt to use proposition (4) results in either begging the question or is actually motivated by extrinsic principles (and proposition (4) is unnecessary for such reasoning).
g) So proposition (4) should be rejected.
h) Since proposition (4) is just a reformulation of proposition (1), it should also be rejected.

This argument is undoubtedly logically valid and the charge against proposition (4) is undoubtedly true. But the move from proposition (1) to proposition (4) is illegitimate. To his credit, Abbot recognised the illegitimacy of that move a year later and retracted his criticism of Keener's theory.[103] The argument from (b) to (g) is true but (a) is false and so this means that (h) is false. The reason premise (a) is false is because Abbot wrongly assumed that proposition (1) was a juridical proposition and not an ethical one. But, in fact, it was an ethical one, making a statement about what the law should be and not merely about what the law is. As such the appropriate transformation of proposition (1) should have been: (5) *The unjust enrichment of one at the expense of another* ***should be*** *illegal.* This can then further be divided into:

(5)(a) The unjust and *legal* enrichment of one at the expense of another **should be** illegal.

(5)(b) The unjust and *illegal* enrichment of one at the expense of another **should be** illegal.

[103] Abbot, 'A Retraction' (n 63).

Proposition (5)(b) is a truism and will always be reflected in the law, as such it does not tell us anything.[104] In that sense it is no different from (4)(b). But unlike proposition (4)(a), proposition (5)(a) is not a contradiction. Nor is it the case that appeal to proposition (5) either begs the question or appeals to an extrinsic principle. Faced with a new situation, as the House of Lords was in *Woolwich*, the court can appeal to proposition (5) to justify why the law should be changed in order to award restitution.

2. Not palm tree justice

Fair enough, the objector might say, the principle against unjust enrichment is neither incoherent nor is it question begging. But, what about the other objection, that it just amounts to palm tree justice? With respect, that objection is bizarre. Take any high level moral norm and it will have open-ended terms, but this does not mean that lower level norms that give it greater content do not exist. For example, Christ instructs us to 'love thy neighbour as thyself', but it remains the case that this is fleshed out by the 4th to the 10th Commandments.[105] For matters not covered by these Commandments, the 'love thy neighbour as thyself' commandment retains residual value.[106] The point is the same with the principle against unjust enrichment. There are other moral principles and rules to flesh out the meaning of it. It is not meant to do the work on its own. Problems of restitution are not new. The Western tradition has been considering such issues for at least 2,500 years. The problem is dealt with in the Bible in the *Book of Exodus*,[107] in Aristotle's *Nicomachean Ethics*,[108] in Roman Law,[109] in medieval Canon Law, in St Thomas Aquinas's *Summae Theologia*,[110] in

[104] There is one interpretation of (5)(b) (and indeed of (4)(b)) which is not a truism: *if one illegally enriches himself at the expense of another, he has to give up that enrichment to the other* [or the law ought to make him do that]. It is obvious that, even as descriptive matter, such a proposition is not a truism (indeed it does not accurately reflect the law). Therefore, the more charitable interpretation of Abbot is that he did not mean that when he stated (4)(b). Hence, when doing my normative turn to (5)(b) I am not interpreting it that way either.

[105] 'Matthew' vv 19:16-19.

[106] 'For this, Thou shalt not commit adultery, Thou shalt not kill, Thou shalt not steal, Thou shalt not bear false witness, Thou shalt not covet; and if *there be* any other commandment, it is briefly comprehended in this saying, namely, Thou shalt love thy neighbour as thyself.': 'Romans' v 13:9 (KJV).

[107] 'Exodus' ch 22.

[108] Aristotle, *The Nicomachean Ethics* (D Ross and H Fielding eds, Oxford University Press 2009) bk V.

[109] M Radin, 'The Roman Law of Quasi-Contract' (1937) 23 Virginia Law Review 241.

[110] T Aquinas, *The Summa Theologiae of St Thomas Aquinas* (Second Rev, Fathers of the English Dominican Province 1920) pts II-II Q62; D Reid, 'Thomas Aquinas and Viscount Stair: The Influence of Scholastic Moral Theology on Stair's Account of Restitution and Recompense' (2008) 29 The Journal of Legal History 189.

the writings of the Scholastics of Salamanca,[111] in Hugo Grotius,[112] in Pothier, and in common law since *Moses v Macferlan.*[113] We are not here starting from first principles, but standing on the shoulders of giants. Before condemning unjust enrichment as just being palm tree justice we at least have to try and see what clear rules and principles can be extracted from that tradition.

The objection of palm tree justice rests on the misunderstanding that the principle against unjust enrichment would do all the work on its own. Insofar as legal adjudication is concerned, this is not the case and no one has ever seriously suggested that this be the case. Legal precedents matter and they should not be ignored. But even seen through a purely moral lens the objection is mistaken. The principle against unjust enrichment will be just one premise in a moral reasoning justifying restitution. This is best seen by comparison with the tortious principle that *wrongfully caused loss should be compensated.* If we are faced with a situation where A negligently damaged B's property, the award of compensation is not morally justified[114] simply by appealing to that principle. Rather the reasoning would be along those lines:

1. A acted wrongly because
    a. B's property rights require that others take sufficient care not to damage his property
    b. So A had a duty to take sufficient care
    c. A failed in that duty.
2. A's wrong caused the damage to B's property.
3. Wrongfully caused loss should be compensated.
4. Therefore, A should be made to compensate B for the loss he suffered.

The point is that premise (3) alone does not do the work to justify the award of recovery. It needs to be combined with other moral principles in order to do so. These moral principles will address the issue of what is a wrong, what amounts to a loss, and when a wrong can be linked to a loss. In practice, these principles are likely to be much more controversial: does economic loss count?[115] If one is a learner and does one's best, is one negligent?[116] If one contributes to the risk of something,

[111] J Hallebeek, *The Concept of Unjust Enrichment in Late Scholasticism* (Gerard Noodt Instituut 1996).

[112] R Feenstra, 'Grotius' Doctrine of Unjust Enrichment as Source of Obligation' in EJH Scharge (ed), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (2nd edn, Duncker & Humblot 1999).

[113] *Moses v Macferlan* (n 53).

[114] By this I do not mean the reasoning that the court will use. Rather I mean the moral or political justification for the state using its coercive power to award compensation to one party.

[115] *Spartan Steel & Alloys Ltd v Martin and Co (Contractors) Ltd* [1973] QB 27 (EWCA).

[116] *Nettleship v Weston* [1971] 2 QB 691 (EWCA).

is one responsible if that risk eventuates?[117] So the focus of a normative (and sometimes doctrinal) argument about recovery will be on those issues rather than on the third premise. Indeed, the third premise itself is seen as so obviously true that often it is just a supressed premise of the argument. But this does not mean that it is not significant. On the contrary, it is crucially important, without it recovery could not be justified. So, whilst it is true it is not a truism (unlike A = A).

The principle against unjust enrichment operates in a similar manner. What it says is that unjust enrichments should be reversed. But it is not the job of the principle itself to identify what counts as an unjust enrichment. So, a moral argument for restitution might go as follows:

1. A has received a benefit from B.
2. This receipt is unjust because [insert reason].
3. Unjust enrichments should be returned.
4. Therefore, A has to return the enrichment to B.

The principle against unjust enrichment does not tell us, nor is it meant to tell us, why the enrichment is unjust. But once we have, using other moral principles, established that it is unjust, the principle against unjust enrichment takes over and tells us that this needs to be reversed.

The difference between the wrongful loss principle and the unjust enrichment principle is that with the former the other principles that are part of the reasoning are well established. We have fairly well settled and established principles telling us what the various wrongs are, what counts as causation, and what counts as loss for those purposes. But, for unjust enrichment, that work does not appear to have been done. Hence Birks rejected the comparison with the wrongful loss principle by saying that it was 'mediated by well-defined high level concept',[118] whereas this was not the case for restitution where unjust enrichment has to do all the work. The expectation that unjust enrichment had to do the work on its own is what leads to it being viewed suspiciously as palm tree justice. Birks sought to solve that problem by defining it in a purely downward-looking manner. This classification of the events giving rise to restitution is valuable, but it is not complete. Instead the quest for the reasons for restitution also has to happen. The set of principles which tell us what are unjust enrichments must be found.

C. The quest for principles

There are broadly three ways of proceeding to identify such principles. The first involves a complete tabula rasa. It asks: if we were designing a legal system from scratch in what circumstances

[117] *Fairchild v Glenhaven Funeral Services Ltd (t/a GH Dovener & Son)* [2002] UKHL 22, [2003] 1 AC 32.

[118] Birks, *An Introduction to the Law of Restitution* (n 1) 20.

would we have restitution and why? In other words, this involves figuring out from first principles both the events and the reasons giving rise to restitution. This has, broadly, been the approach of a number of political philosophers who have sought to argue that those who benefited from historical injustices should be required to give up those benefits.[119] The second approach takes as given the events where the law awards restitution and tries to reason from first principles what the reasons for that might be. Webb is the most recent exponent of that approach.[120] This thesis will follow neither of these two methodologies but instead will take a third approach. Like Webb it will take as given the events where the law awards restitution and will seek to identify the reasons for that. But, unlike Webb, it will not do so from first principles. Instead, it will seek to identify the reasons that have been given by courts and commentators in the common law world, with a focus on England, since *Moses v Macferlan*. As Lord Reed said in a recent Supreme Court decision, 'the wisdom of our predecessors is a valuable resource',[121] and so there is no need to reinvent the wheel. This approach has the advantage that the moral principles it identifies have been received and accepted by the courts and this makes their future use by the courts more legitimate.

This thesis is only concerned with what has been termed unjust enrichment by subtraction and is not concerned with restitution for wrongs, except in the few instances where the two overlap. As such we would typically not be concerned with cases where the benefit derives from a wrong that the defendant has committed. Instead, the focus is on those cases where the act of obtaining the benefit was not in itself wrongful. The reason for the exclusion of restitution for wrongs is because such cases are not considered to be part of the Birksian structure of unjust enrichment. Since that structure is the target of the thesis, restitution for wrongs falls outside the scope of the thesis.

The conclusion of the thesis is that there are two principles which explain why an enrichment is unjust (and so has to be given up). These are the Property Principle and the Benefit-Burden Principle. The Property Principle asserts that the enrichment is unjust because the benefit in question still belongs – either morally or legally – to the claimant. The word 'morally' is important

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[119] D Butt, 'On Benefiting from Injustice' (2007) 37 Canadian Journal of Philosophy 129; D Butt, '"A Doctrine Quite New and Altogether Untenable": Defending the Beneficiary Pays Principle' (2014) 31 Journal of Applied Philosophy 336; B Haydar and G Øverland, 'The Normative Implications of Benefiting from Injustice' (2014) 31 Journal of Applied Philosophy 349; R Goodin and C Barry, 'Benefiting from the Wrongdoing of Others' (2014) 31 Journal of Applied Philosophy 363; H Lawford-Smith, 'Benefiting from Failures to Address Climate Change' (2014) 31 Journal of Applied Philosophy 392; T Parr, 'The Moral Taintedness of Benefiting from Injustice' (2016) 19 Ethical Theory and Moral Practice 985.

[120] Webb (n 78).

[121] *The Commissioners for Her Majesty's Revenue and Customs v The Investment Trust Companies (in liquidation)* [2017] UKSC 29, [2017] 2 WLR 1200 [40] (Lord Reed).

because, often, legal title in the asset would actually have passed. Yet, there remains a sense in which, as between the claimant and the defendant, the defendant was not meant to have the asset. This has been expressed by the courts by saying that the asset morally still belongs to the claimant and so ought to be returned. Such an expression can be found in the cases as early as *Moses v Macferlan* where Lord Mansfield said:

> One great benefit, which arises to suitors from the nature of this action, is, that the plaintiff needs not state the special circumstances from which he concludes "that, ex æquo & bono, the money received by the defendant, ought to be deemed as belonging to him:" he may declare generally, "that the money was received to his use;" and make out his case, at the trial.[122]

As will be shown in Chapter 3, until the 1950s this remained – albeit with a greater sophistication – the dominant explanation for the recovery of mistaken payments. After that it became less fashionable but has still had quite a number of defenders,[123] the latest being Webb.[124] The theory has also had its fair share of criticisms,[125] but it remains the fact that it was the reason why, for about 200 years, the judges thought they were awarding restitution in those cases.

The second principle is the Benefit and Burden Principle. It is sometimes expressed by the Latin maxim *qui sentit commodum, sentire debet et onus* (He who gets the benefit of something also ought to bear the burden).[126] The idea is that if a benefit and a burden are tied together then one must take both or nothing. If D takes the benefit whilst C bears the burden then D has been enriched at C's expense and such an enrichment is unjust because it violates the principle. So, it must be returned. A simple illustration of this is the ability of co-guarantors to get contribution from each other. If A and B are both liable for the same debt and A pays the whole sum, then this discharges the obligations of both. But A has borne the entirety of the burden whereas B has not. B got the benefit (the discharge) without bearing any of the burden. This violates the Benefit and Burden Principle. That this principle is the foundation for recovery between co-guarantors has been recognised by the courts since 1787 in *Deering v Earl of Winchelsea*:

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[122] *Moses v Macferlan* (n 53) [1010] (Lord Mansfield).

[123] Stoljar (n 17); P Watts, 'Restitution - A Property Principle and A Services Principle' [1995] Restitution Law Review 49; P Jaffey, *The Nature and Scope of Restitution: Vitiated Transfers, Imputed Contracts and Disgorgement* (Hart Publishing 2000).

[124] Webb (n 78).

[125] J Wade, 'Review' (1966) 16 University of Toronto Law Journal 473; F Wilmot-Smith, 'Reasons? For Restitution ?' (2016) 79 The Modern Law Review 1116.

[126] C Davis, 'The Principle of Benefit and Burden' (1998) 57 Cambridge Law Journal 522.

> The maxim applied is *qui sentit commodum sentire debet et onus*. In the case of average there is no contract express or implied, nor any privity in an ordinary sense. This shews that contribution is founded on equality, and established by the law of all nations.[127]

The principle has also been used to justify recoupment,[128] remuneration in cases where there was an ineffective contract,[129] and in other seminal unjust enrichment cases.[130] More generally the principle operates as follows:

1. If a benefit and a burden are linked and the defendant voluntarily takes the benefit, then he must bear the burden.

2. If the benefit and burden are linked and the benefit is of such a nature that the defendant cannot reject it, then the defendant will only be liable if the claimant did not act officiously in conferring the benefit on the defendant and if imposing liability would not make the defendant worse off than if he had never received the benefit.

These two principles – the Property Principle and the Benefit-Burden Principle – explain why particular situations are unjust. The moral principle against unjust enrichment then states that the remedy for such situations is to reverse them.

III. PRACTICAL PROBLEMS FOR THE BIRKSIAN STRUCTURE

In light of the above, should Birks's generic conception of unjust enrichment be modified? If so, how? Recall that Birks took his core case to be the mistaken payment of a debt that was not due. From there he generalised to other types of enrichments – including services and discharge of liabilities – and other unjust factors such as legal compulsion. This generalisation was based on the similarity between these instances. However, if the argument made above is correct, the recovery

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[127] *Deering v Earl of Winchelsea* (1787) 2 Bos & Pul 270, 126 ER 1276 [272] (Lord Chief Baron Eyre).

[128] *Craythorne v Swinburne* (1807) 14 Ves 160, 33 ER 482 [162] (Sir Samuel Romilly); *Brook's Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534 (EWCA) 544–5 (Lord Wright).

[129] *Clarke v Cuckfield Union* (1852) 21 LJ (QB) 349; *Lawford v The Billericay Rural District Council* [1903] 1 KB 772 (EWCA); *Craven-Ellis v Canons Ltd* [1936] 2 KB 403 (EWCA); *Deglman v The Garanty Trust Company of Canada and Constantineau* [1954] SCR 725 (SC Canada); *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 (HC Aus).

[130] *Re Berkeley Applegate (Investment Consultants) No 1* [1989] Ch 32 (Ch) 50–51 (Nugee QC); *Greenwood v Bennett* [1973] QB 195 (EWCA) 202 (Lord Denning MR).

of money and goods is governed by a different principle from the recovery of services and discharge of liabilities. This is because the recovery of money and goods is based on the Property Principle whilst the last two are based on the Benefit-Burden Principle. Hence, the analogy that Birks made with mistaken payments might not be appropriate.

The result, as this Part will argue, is that the four-part formula simply does not fit services and legal enrichments. Its application to such cases is due to Birks mistakenly thinking that such cases were analogous. Birksian unjust enrichment should be narrowed down to money and goods cases. This Part will consider in more detail, the difficulties for the four-part formula outlined above. As the Supreme Court pointed out in *Investment Trust Companies*,[131] the purpose of unjust enrichment is to 'correct normatively defective transfers of value'.[132] The claim of this thesis is that this is only what goes on in cases where the enrichment consists of money or (returnable) goods. In cases of services and discharge of legal obligations what goes on is not the correction of a normatively defective transfer. This claim will be developed further in the next chapters. This chapter is concerned with showing how a number of artificial definitions and ad hoc exceptions are used in order to fit such cases within the four-part structure.

A. Enrichment

Following *Benedetti v Sawiris*[133] the test for identifying an enrichment is a three-stage enquiry:

1. The defendant must have received something of objective value ('the receipt test').
2. This benefit should be valued based on what a person in the position of the defendant would have had to pay for it in the market ('the objective valuation test').
    a. This consists in first identifying the ordinary market value of the benefit, and
    b. Second, considering whether the position of the defendant is such that he would have to pay more or less for the benefit ('objective revaluation').
3. This benefit can be subjectively devalued by the defendant ('subjective devaluation').

1. Subjective devaluation

There is some uncertainty about what exactly subjective devaluation requires. There are broadly three possible views. The first is that 'subjective devaluation' is just a shorthand for the fact that

[131] *Investment Trust Companies* (n 121).

[132] ibid [42] (Lord Reed). See also paras [43], [46], [49], [60].

[133] *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938.

non-money benefits will not automatically satisfy the enrichment test and that for such benefits the claimant additionally has to show the presence of a request, or free acceptance, or that the benefit was realised in money or that it is readily returnable. Under the second view, 'subjective devaluation' protects the autonomy of the defendant by allowing him to claim that he did not want the benefit in question. Once the defendant has done that the claimant can seek to show that one of the above factors is present and, if he succeeds, the subjective devaluation will be overridden, and the defendant will be treated as enriched. The third view requires the defendant to show that, according to his personal system of value, the benefit was worthless. If he succeeds in doing so the claimant can override this by showing the presence of one of the factors above.

My preference, which is also that of Andrew Lodder,[134] is for the first understanding, but this is inconsistent with the decision of the Supreme Court in *Benedetti v Sawiris* which recognised that there was a substantive doctrine of subjective devaluation and that it required the defendant to show something.[135] *Benedetti* is, however, ambiguous as between the second and third understanding of subjective devaluation. On the one hand, the majority endorsed statements in *Goff and Jones* that the defendant had to show how the benefit was valued according to his 'personal value system'.[136] On the other hand, the majority agreed with Lord Reed that the doctrine was really about protecting freedom of choice and that 'the expression "subjective devaluation" is certainly misleading.'[137] Lord Reed had carefully examined the case law and found that there was no authority which supported the conclusion that 'a restitutionary award for unjust enrichment resulting from the receipt of a service should be based on the defendant's personal valuation of the service.'[138] The majority then stated that there was little practical difference between their approach and Lord Reed's.[139]

It certainly follows from *Benedetti* that there is a doctrine of subjective devaluation and that it does require the defendant to show something. But *Benedetti* is unclear on what that is. Must the defendant simply show that he did not want the benefit, or must the defendant show that according to his 'personal value system' the benefit was worthless?

The Court of Appeal in *Littlewoods v Revenue and Customs Commissioners* addressed this.[140] The issue was that the Government had received overpaid taxes from *Littlewoods*, the principal sum had

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134 A Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Oxford University Press 2012).

135 *Benedetti v Sawiris* (n 133) [21] (Lord Clarke, Lord Kerr, and Lord Wilson).

136 ibid [18], [23] (Lord Clarke, Lord Kerr, and Lord Wilson).

137 ibid [26] (Lord Clarke, Lord Kerr, and Lord Wilson).

138 ibid [124] (Lord Reed).

139 ibid [26] (Lord Clarke, Lord Kerr, and Lord Wilson).

140 *Littlewoods Retail Ltd v Revenue and Customs Commissioners* [2015] EWCA Civ 515, [2016] Ch 373; reversed on other grounds: [2017] UKSC 70, [2017] 3 WLR 1401.

been repaid but the question was whether interest should be paid at the simple rate or if it should be compounded. This basically turned on whether the Government could subjectively devalue the 'use value of the money'. The Government had already succeeded in showing that the relevant interest rate at which the use value should be assessed was the rate at which the Government could borrow money and not the higher rate available to commercial parties. This was an application of the objective revaluation rule and was completely orthodox. But the Government then sought to argue that the use value should be subjectively devalued by reference to whatever the Government actually used the money for ('the actual use value'). This required the Court of Appeal to decide how to approach the subjective devaluation exercise. The Court of Appeal rejected any relevance for the expression 'personal value system.'[141] It decided that the 'actual use value' should be awarded 'unless he freely accepted the benefit of having an overpayment and the obligation to pay for it at market rates.'[142] This means that a benefit will amount to an enrichment only if one of the factors overriding subjective devaluation is present. In the specific context of the use value of money, there are four possible awards as listed below.

Situation	Award on top of the principal sum	Legal basis
D freely accepted the money	Objective use value of money (i.e. compound interest at the rate at which D would have been able to borrow had this been a loan)	Subjective devaluation of use value defeated by free acceptance
The money generated x% interest	Compound interest at x% interest	Subjective devaluation of use value defeated by incontrovertible nature of benefit (benefit realised in money)
The availability of the money meant that D did not have to borrow money which he otherwise would have had to borrow	Compound interest at the rate D would have had to borrow at (this should be the same as objective use value)	Subjective devaluation of use value defeated by incontrovertible nature of benefit (saved necessary expense saved)

[141] *Littlewoods (CA)* (n 140) [165].

[142] ibid [193].

None of the above (e.g. money kept in a non-interest bearing account)	Nil	Use value of money not considered enriching because of successful subjective devaluation

More generally, subjective devaluation does not require the defendant to show anything substantive. It certainly does not require the defendant to show how he valued the benefit according to his 'personal value system'. The upshot of this is that for non-money claims it is a necessary condition for success of the claim that it be established – whether by direct proof or on the basis of a rebuttable presumption – that there was one of:[143]

1. request knowing that the benefit was not provided gratuitously;
2. free acceptance knowing that the benefit was not provided gratuitously;
3. the benefit is incontrovertible:
    a. benefit realised in money
    b. benefit easily realisable in money
    c. benefit legally/factually necessary
    d. benefit is readily returnable + refusal to return.

This is unnecessarily complex. The phrase 'subjective devaluation' is misleading and has wrongly suggested that the 'personal value system' of the recipient should be relevant. Indeed, as Lord Reed said, the reason for these requirements has nothing to do with the enrichment question but instead serves to protect the autonomy of the defendant. Such autonomy would be threatened if the defendant were required to pay for a benefit that he did not want. But this risk does not arise if the benefit is money or goods because in such a case it is returnable. It only arises when non-returnable benefits such as services are considered. So, a great degree of complexity was introduced in the formula by the inclusion of services under the rubric of unjust enrichment.

2. The problem with receipt

In the case of tangible things and of legal rights the meaning of receipt will be pretty clear. True, there might be some borderline cases: do I 'receive' goods if they are left on my front porch? But these pose no real difficulties. The test to be used is clear: do I acquire possession of the goods?

[143] I have, as will be argued in Chapters 4 and 5, some concerns about some of these. But the point here is to state what the current law is according to the orthodox position.

However, with services matters are much less clear. What does it mean to receive a service? The point is especially unclear insofar as 'pure services' are concerned. Take a concert for example. If I pay to attend the concert it seems clear that I have received the service of the performers. But what if I live next door to the venue and can hear it perfectly well? Have I received a benefit then? Is receipt to be equated with the sound waves reaching my ears? Conversely, suppose I hire a band to play at a venue for my friends, but unfortunately, I am unable to attend. I have not heard them play, so have I received anything?

Matters get even more complicated when there is not anything which can on any view be said to have been received. In *Planché v Colbourn*[144] the plaintiff had been engaged by the defendant to produce a book for inclusion in a series published by the defendant. Before completion of the work the defendant, in breach of contract, discontinued the publication of the series. The plaintiff sued under a quantum meruit to recover the value of his labour. That claim succeeded. It did not matter that the defendant had not actually received anything. This has caused some problems for unjust enrichment lawyers. Broadly, two views have emerged. On the one hand, Birks[145] and the original authors of *Goff and Jones*, took the view that where a service is requested it is deemed to have been received even if there is no actual receipt.[146] On the other hand Burrows,[147] Virgo,[148] and the new editors of *Goff and Jones*[149] take the view that there is no receipt in such a case and that it therefore falls outside the law of unjust enrichment. They claim that *Planché v Colbourn* was really a case about damages for anticipatory breach of contract.

The difficulty with the second view is that it is inconsistent with what the case says. The court explicitly decided that the action on the express contract failed but that the action for quantum meruit succeeded. Furthermore, such a claim, based on the so-called 'prevention principle'[150] is also available in cases where the contract is unenforceable. So, for example, in *James*

144 *Planché v Colbourn* (1831) 8 Bing 14, 131 ER 305.

145 Peter Birks, 'In Defence of Free Acceptance' in Andrew Burrows (ed), *Essays on the Law of Restitution* (OUP 1991) 141.

146 G Jones, *Goff and Jones: The Law of Restitution* (7th edn, Sweet & Maxwell 2007) 23.

147 A Burrows, *The Law of Restitution* (3rd edn, Oxford Universtiy Press 2011) 46, 346.

148 G Virgo, *The Principles of the Law of Restitution* (3rd edn, Oxford University Press 2015) 68.

149 C Mitchell, P Mitchell and S Watterson, *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) paras 5–40.

150 S Magintharan, 'The Prevention Principle and the Contractor's Remedies' (2017) 33 Construction Law Journal 455; D Ibbetson, 'Implied Contract and Restitution: History in the High Court of Australia' (1988) 2 Oxford Journal of Legal Studies 312.

v Thomas H Kent,[151] *Deglman v Guaranty Trust Co*,[152] and *Pavey and Matthews Pty Ltd v Paul*[153] the plaintiff had provided services to the defendant under an unenforceable contract which was wrongly terminated by the defendant before the plaintiff could complete the work. In all three cases the plaintiff recovered based on *Planché v Colbourn*. So it cannot be the case that *Planché v Colbourn* is a breach of contract claim.

The problem is this. It is straightforward that such a claim is available on the basis of a non-contractual quantum meruit. Quantum meruit did not require that the work be received by the defendant; it simply required that work be done at the 'special instance and request' of the defendant.[154] Artificial rules about what constitutes 'receipt' and, in three party situations, who the recipient is are only needed if one insists that all non-contractual quantum meruit claims require the receipt of a service. This only arises if one insists, as Birks did, that such claims are analogous to money claims (where receipt was indeed required).

3. A critique of enrichment

What then does 'enrichment' mean? Since Birks introduced the four-part structure in 1985 no consensus has emerged either in the literature or in the case law about the meaning of enrichment. Some say enrichment is about the receipt of rights,[155] others say it is value,[156] yet others say it is wealth.[157] Alternatively, or perhaps additionally, there is deemed to be an enrichment whenever something is requested.[158] Finally, a physical definition might be used: one is enriched by music if one hears it. The problem is that none of those definitions is able to cover all cases. To see the point, consider the following situations:

- *Band playing.* Alice hires Bob to play at an event that she organised. Charlie buys a ticket to the event from Alice. David who lives nearby hears the music and quite likes it. Alice does

[151] *James v Thomas H Kent* [1951] 1 KB 551 (EWCA); [1950] 2 All ER 1099 (EWCA).

[152] *Deglman v The Garanty Trust Company of Canada and Constantineau* (n 129).

[153] *Pavey & Matthews Pty Ltd v Paul* (n 129).

[154] Lodder (n 134) 78.

[155] R Chambers, 'Two Kinds of Enrichment' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press 2009); B McFarlane, 'Unjust Enrichment, Rights and Value' in D Nolan and A Robertson (eds), *Rights and Private Law* (Hart Publishing UK 2012).

[156] Lodder (n 134).

[157] J Beatson, *The Use and Abuse of Unjust Enrichment* (Oxford University Press 1991) ch 2.

[158] Birks, 'In Defence of Free Acceptance' (n 145) 141; Jones (n 146) 23.

not attend the party. According to the law, in such a case, only Alice – the person who did not actually hear the music – is enriched by Bob.[159]

- *Swimming Pool*. Alice hires Bob to build a swimming pool on her property. This has the result of reducing the value of Alice's property. In such a case, the law considers Alice to have been enriched by Bob because the benefit was requested by her.
- *New Kitchen*. Bob by mistake installs a new kitchen in Alice's house which she has no intention to sell. This increases the value of Alice's property. Yet, Alice is deemed not to have been enriched.[160]
- *Improved Car*. Bob by mistake repairs Alice's car. Alice recovers the car and sells it. Alice is enriched up to the value of the repair services or the surplus value of the car, whichever is lowest.[161]

Enrichment as wealth does not work. It cannot explain the absence of enrichment in *New Kitchen* and the presence of enrichment in *Swimming Pool*. Enrichment as rights cannot work either. In none of the above situations have rights been transferred. The physical definition of enrichment does not work either. In *Band Playing* Alice is enriched despite the physical aspect not being satisfied. Leaving aside the fact that seeing an enrichment whenever there is a request makes the definition of enrichment fictional in the extreme, it also cannot be fully exhaustive as it cannot explain *Improved Car*. Enrichment as value is also problematic: is the *New Kitchen* not valuable?

There is no single definition of enrichment which is capable of covering all those cases. In light of that it is not surprising that the editors of *Goff and Jones* write that:

> It is tempting, but wrong, to think that a defendant can always show that he has relevantly been "enriched" whenever something happens that makes him financially better off. Often the law does allow claims in these circumstances, but in this context "enrichment" is a term of art, i.e. it is a technical legal question whether a defendant has received an "enrichment" that is capable of forming the subject matter of a claim.[162]

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[159] Alice is enriched because she requested the service. As will be seen in the 'at the expense of' section (section III.B below). Charlie is deemed not to be enriched by Bob, but by Alice. David is able to resist a claim by Bob by saying that he did not want the benefit and there are no factors which can override 'subjective devaluation'. In addition, David can also rely on the incidental benefit rule, considered below, to say that he was not enriched.

[160] None of the factors overriding subjective devaluation apply. So, Alice is able to say that she did not want to pay for the kitchen.

[161] *Greenwood v Bennett* (n 130).

[162] Mitchell, Mitchell and Watterson (n 149) paras 4–04.

They also cite a judgement of the Supreme Court where it is said that 'the words "unjust" and "enrichment" are both in some respects terms of art.'[163] So, just as 'unjust' simply means 'those circumstances in which the law provides for restitution,'[164] 'enrichment' simply means 'the instances where the law considers that there is something the value of which may be returned if other conditions are met'. This is hardly satisfactory. Yet, all of these problems stem from the desire to impose on all non-contractual quantum meruit claims the same analytical structure as that which applies to the action for money had and received. As explained in Chapter 1, and as will be developed further in this thesis, such a desire was not justifiable.

Additionally, even if one wanted to impose the same analytical structure, it is unclear why the concerns regarding services should have been accommodated at the enrichment stage. As *Goff and Jones* identified from the beginning, liability for services received should be narrower than for money because by 'their very nature services cannot be restored; and the defendant may never have wished to receive them or, at least, to receive them if he had to pay for them.'[165] But this did not mean that one had to say that services that had not been requested or freely accepted should not be enriching. According to a lay person's understanding of enrichment the defendant in *New Kitchen* has been enriched but the point is that he should not be liable because the service was unrequested, and it would be unreasonable to require him to sell his house to realise the value of the kitchen. There was no need to conflate that with enrichment.

B. At the expense of

Whilst the difficulties with enrichment are mostly concerned with services, when it comes to 'at the expense of' the main problem is to do with discharge of legal obligations. There is a somewhat artificial rule concerning other forms of benefits. The rule is identified in section 8(3) of Burrow's *Restatement:*

> In a contract for the benefit of a third party, the third party's benefit is to be treated as obtained directly from the contracting party who required the benefit to be supplied rather than from the contracting party who supplied it.[166]

This means that if A under a contract with B does work for C then (i) C will be deemed to have received the benefit at the expense of B and (ii) not at the expense of A. The rule, therefore, has

[163] *Crown Prosecution Service v Eastenders Group* [2014] UKSC 26, [2015] AC 1 [100] (Lord Toulson).

[164] Birks, *An Introduction to the Law of Restitution* (n 1) 19.

[165] R Goff and G Jones, *The Law of Restitution* (3rd edn, Sweet & Maxwell 1986) 18.

[166] A Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press 2012) 44, 52–54.

two components; the first one says that B is considered to have enriched C and the second one says that A drops out of the picture completely. This is so even in cases where B is insolvent and has not paid A. The first aspect of the rule makes much sense. Suppose that B contracts with A to deliver a gift to a friend but accidentally provides A with the wrong address; it would seem odd if B could not recover against the recipient on the ground that it is A who has really provided the benefit. But the second aspect makes less sense; the reality is that C has received a benefit from A. It is one thing to add to that to reflect the fact that B commissioned it. It is quite another to deny that A did benefit C.

This is not a complaint against the policy reasons behind the rule: that giving A the ability to recover against C would undermine the contractual allocation of risk between A and B (A takes the risk of B's insolvency).[167] These reasons make sense, though one might quibble with them.[168] Rather the complaint is that this had nothing to do with 'at the expense of'; it more appropriately goes to the question of whether the enrichment is unjust. Adding it here (in 'at the expense of') suggests that the analytical structure of unjust enrichment is being asked to do work which is too complex for it.

To be fair, the cases dealing with such issues have not actually adopted that rule, but their judgements have been consistent with it.[169] The complaint is that commentators, in their zeal to explain the case law in terms of the unjust enrichment formula, have had to create artificial rules in order to make it all fit within that formula.

This brings us to the second ad hoc rule, the incidental benefit exception. Burrows states this rule as follows:

> Even if the benefit obtained by the defendant is directly from the claimant, the enrichment is generally not at the claimant's expense if the benefit is merely incidental to the furtherance by the claimant of an objective unconnected with the defendant's enrichment.[170]

Until recently the status of that rule was uncertain. The Court of Appeal in *TFL Management Services Ltd v Lloyds TSB Bank plc*[171] stated that there was no such rule in English law. However, the Supreme Court in *Investment Trust Companies (In Liquidation) v Revenue and Customs Commissioners*[172] explicitly

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[167] ibid 53.

[168] In the case where B is insolvent and where C has not paid B would it really be so unfair to require C to pay A on the basis of his agreement with B?

[169] *Brown and Davis Ltd v Galbraith* [1972] 1 WLR 997 (EWCA); *Lumbers v W Cook Builders Pty Ltd* [2008] HCA 27, (2008) 232 CLR 635; *MacDonald Dickens & Macklin v Costello* [2011] EWCA Civ 930, [2011] 3 WLR 1341.

[170] Burrows (n 166) 44, 54, 55.

[171] *TFL v Lloyds* (n 24).

[172] *Investment Trust Companies* (n 121) [52] (Lord Reed).

reaffirmed the rule. This means that if C carries out a certain activity for his own purposes and a side effect of such activity is that D benefits, then D is not considered to have been enriched at the expense of C; hence C cannot recover against D. So, for example, if C cuts down trees on his land and this has the effect of providing a nice view to D's land, hence increasing the value of D's property (which he then sells), C cannot bring a claim against D.

The reasons given for the rule are that (i) the claimant 'may have received the consideration for which he bargained as the counterpart of his own expenditure, and in that event will not usually have suffered any loss'[173] and (ii) even if there is a loss, it would not have arisen through 'the provision of something for the benefit of the defendant, since the benefit received by the defendant will have been merely incidental or collateral to the reason why the expenditure was incurred.'[174]

The first reason will not always be applicable and is best seen as going to the unjust question; if the claimant got what he bargained for then there is no unjust factor. With respect to Lord Reed, the second reason appears to be a mere restatement of the rule rather than an explanation of it. But perhaps one can defend the rule as follows. The purpose of the law of unjust enrichment is to correct defective transfers of value. A transfer of value is defective if it did not go as intended by the claimant. Hence, only intentional transfers of value to the defendant fall within the scope of unjust enrichment. Therefore, where the benefit is a mere side effect it does not fall within the scope of the law because there was no intentional transfer.

This is best illustrated with an example. C is hired by X to cut trees on his property, but the contract is actually invalid because of a misrepresentation. C does the work and the result is that D's neighbouring property has increased in value (because of the nicer view). When C was doing the work, his intention was to discharge his obligation towards X, the benefit D got was a mere side-effect (in other words, the effect on D was not part of C's reasons for acting). C's intention to benefit X was vitiated by the misrepresentation and so he ought to obtain redress from X. But, since the effect on D was no part of C's reasons for acting, it is not possible that there is a defective intention to benefit D. Hence, there can be no recovery. Put another way, if things had gone according to C's plan, his action would have discharged an obligation he owed to X and the value of D's property would still have been increased. Hence it cannot be said that the fact that D benefited was in any way defective.

There is, however, one instance where the law of unjust enrichment does give recovery for incidental benefits: the discharge of debts. Take the facts of *Exall v Partridge*.[175] The plaintiff paid the landlord the sum that the defendant owed the landlord. He did not do so because he intended

[173] ibid (Lord Reed).

[174] ibid (Lord Reed).

[175] *Exall v Partridge* (1799) 8 Term Rep 308, 101 ER 1405.

to benefit the defendant. He did so because he wanted to get his goods back. Hence the benefit the defendant got – the discharge of his debt – was incidental. Furthermore, the plaintiff got what he bargained for – the release of his goods – so there is no real loss. In addition, it cannot be said that the transaction between the plaintiff and the landlord is defective; indeed, the law does not reverse it.

Yet, according to the Supreme Court in *Investment Trust Companies*, such a claim does fall within the scope of unjust enrichment. This is accommodated by saying that the discharge of a debt is an exception to the direct dealing rule.[176] This is the only true exception to that rule. All the others (agency, assignment, tracing, shams, and co-ordinated transactions) are not real exceptions but simply applications of general rules of law: 'the agent slips out of a transaction, the assignee stands in the shoes of the assignor, traceable assets are treated as if they were the original asset, the law ignores shams and treats co-ordinated transactions as one.'[177] This exception is only required if one wants to treat recovery for having discharged someone else's debt as akin to an undue payment of money. But, as will be explored in Chapter 4, there is no reason to do so. So once again we have a position whereby an ad hoc exception is required because we have tried to put too much inside unjust enrichment.

C. Unjust factors

The inclusion of services and the discharge of legal obligations in unjust enrichment have also caused difficulties at the unjust factors stage. If, as Lord Reed said in *Investment Trust Companies*, the point of unjust enrichment is to correct 'normatively defective transfers of value',[178] then the task of unjust factors is to provide a reason why a particular transaction is defective. Mistake, the most common unjust factor, does so by showing that the intention to transfer the benefit was defective. Other unjust factors, such as illegality, point to a defect in the transaction which is unrelated to intention. However, it will be argued that the unjust factors relevant to recovery for services and discharge of legal obligations have nothing to do with defective transactions.

1. What is defective about discharging someone's debt?

[176] *Investment Trust Companies* (n 121) [49] (Lord Reed).

[177] R Shah, 'Indirect Enrichment in the Supreme Court' (2017) 76 Cambridge Law Journal 490, 490.

[178] *Investment Trust Companies* (n 121) [42], [43], [46], [49], [60] (Lord Reed).

The unjust factors suggested to explain such cases will be considered in this section and they will all be found to fail. Importantly, it will be shown that recovery in such a case has nothing to do with either impaired intention or defective transactions. There is some disagreement amongst unjust enrichment scholars about what type of unjust factor is at play in cases of discharge of debts and performance of another's duty. On the one hand, Birks, prior to him adopting absence of basis, and Virgo think it is about vitiation of intention; they think legal compulsion is the relevant unjust factor.[179] On the other hand, Burrows and the editors of *Goff and Jones* think it is a policy based unjust factor.[180]

The difficulty with legal compulsion is that it is not clear why this in itself makes the transfer unjust. One can readily understand why duress or undue influence unjustly vitiate the intention to make a transfer, but with legal compulsion the pressure exercised is perfectly lawful. If one pays a sum under the threat of contempt of court to another, one is undoubtedly under great pressure to do so and one does not act voluntarily. But it is quite clear that in such an instance there cannot be recovery and quite rightly so. Why should this be any different in a three-party case?

Birks's explanation is that all payments made under threat of legal process are non-voluntary and so prima facie recoverable, but for policy reasons they are not recoverable: 'such transfers are made in response to a type of pressure which is exempted from restitution as a normal and necessary incident of social life.'[181] However, in the three-party cases such a policy reason does not apply and so there is no bar to restitution. The reason the policy does not apply is that in such cases the claimant was not meant to be liable vis-a-vis the defendant, but the reason he was required to pay was to give the creditor another avenue for recovery. So, the claimant's claim 'does not seek to reverse the remedial force applied with the approval of the legal system (as would a claim against the creditor) but only to ensure that its effect is passed on to the right person.'[182] Virgo makes the point by saying

> The claimant benefits the defendant as a result of pressure being imposed, which is most certainly on a par with the pressure imposed in cases involving duress of property or economic duress. But that ground of restitution is not available to the claimant because the threat is lawful. It is for that reason that a distinct ground of legal compulsion must be recognized in its own right.[183]

[179] Birks, *An Introduction to the Law of Restitution* (n 1) 185–193; Virgo (n 148) 121, 233–253.

[180] Burrows (n 147) 437; Mitchell, Mitchell and Watterson (n 149) paras 1–25.

[181] Birks, *An Introduction to the Law of Restitution* (n 1) 185.

[182] ibid 186.

[183] Virgo (n 148) 252.

The Birks/Virgo argument has three steps: (1) the claimant does not act voluntarily when compelled by the law, (2) the law of restitution cannot stultify the law by undoing transfers which the law compels, but (3) in such cases recovery would not stultify the law because, as between the claimant and the defendant, it was not the defendant, who was meant to bear the burden of the debt.

There are two issues with that argument. First, the first premise is false; recovery can be given even when no pressure is applied or threatened. An example of that is *Stimpson v Smith*,[184] where a surety paid the creditor even before a demand had been made; it was held that the surety was entitled to recovery against the co-sureties and the debtor. *Pace* Birks/Virgo, this is not comparable to a duress case, where the pressure must actually have been applied. In any event, it seems odd to describe the surety cases as being about compulsion. After all, the surety agreed to put himself in that position. The second problem is that there is no involuntariness that does the work in explaining why there is recovery. Rather it is the policy factors that have been identified. Burrows is, therefore, right when he says:

> Given that the pressure on C cannot be regarded as illegitimate, it is misleading to regard 'legal compulsion' as a factor impairing consent alongside duress, undue influence, and exploitation of weakness. Instead legal compulsion is better viewed as a policy-motivated unjust factor designed to ensure that liability is ultimately borne by the appropriate party in the appropriate amount.[185]

The policy-based reasoning is as follows. For the benefit of the creditor the law allows the creditor to claim against either the claimant or defendant, but as between them it is the defendant that ought to be liable. So, the law allows the claimant to recover against the defendant. I think that reasoning is essentially correct, but I dispute the relevance of unjust enrichment to the whole matter. It is not clear what, if anything, this has in common with an action to recover an undue payment. Take the other policy-motivated unjust factor: unlawful levies and taxes paid to public authorities. In such cases there is typically, though not necessarily, a measure of involuntariness; the matter is not that different from the core case of a mistaken payment. More generally, every ground of restitution serves to identify something defective in the transaction. This might be the lack of voluntariness, a qualification that failed, breach of a constitutional principle, or illegality. But with the cases of recoupment or contribution there is nothing defective about the transaction itself. The putative policy-motivated unjust factor seeks to address the consequences of the transaction, but it does not impugn it at all. It is normal and expected that the claimant's payment to the creditor discharges the liability of the defendant to the creditor. Therefore, the addition of

[184] *Stimpson v Smith* [1999] Ch 340 (EWCA).

[185] Burrows (n 147) 437.

this putative policy-motivated unjust factor to the unjust enrichment scheme is ad hoc and unprincipled. Such an exception is only needed if we want to apply the same analytical structure to discharge of debts as we do to undue payments. But, as will be argued in Chapter 4, there is no need for that.

2. Quantum meruit and the lack of defect

In the typical situation where there is restitution in respect of a service provided, the claimant would have done work for the defendant under a contract, but the contract is terminated before the work is completed. In some circumstances, the claimant will be able to recover for the reasonable value of the services he has provided so far. So, for example, C enters into a contract with D under which C agrees to build a house on D's land. The contract provides that payment is only due on full completion of the house. Consider the following three alternative situations:

- *Prevention:* Before C completes the work, D wrongfully evicts C from the property. In such a case C can recover on a non-contractual quantum meruit for the value of the work he has done so far.[186]
- *Frustration:* Before C completes the work, the partially built house burns down. In such a case C cannot recover anything.[187]
- *Abandonment:* Before completion, C abandons the work. In such a case C cannot recover anything.[188]

We might say that the unjust factor is total failure of consideration: the claimant received nothing in exchange for his performance. But this is true in all three cases. An unjust factor analysis cannot explain why there is recovery in the first case but not in the other two. Indeed, Birks accepted that conclusion and argued that there should be recovery in all three cases, i.e. he argued that *Sumpter v Hedges* is wrong.[189] This might very well be true, but it does not account for what the law is.

More generally, there is a difficulty in saying that there is a defective transaction in all those cases. In none of those cases was there any defect with the provision of the services. The claimant when doing so was not labouring under any mistake nor was he acting under any duress nor was

[186] *Planché v Colbourn* (n 144).

[187] This is the position at common law under *Appleby v Myers* (1866-67) LR 2 CP 651 (Exch). There is now recovery under the Law Reform (Frustrated Contracts) Act 1943 but here we will only consider the position at common law.

[188] *Sumpter v Hedges* [1898] 1 QB 673 (EWCA).

[189] P Birks, 'Negotiorum Gestio and the Common Law' [1971] Current Legal Problems 110, 128–129.

the provision of such services illegal or against public policy. The only way one might be able to argue that there is a defective transaction is to say that, when the claimant was providing the services, he did so under the agreed condition that the defendant would allow the claimant to complete the work. If that condition is broken, then the provision of the service is defective because the condition on which the transaction happened failed. It might very well be the case that in some cases the parties have indeed reached such an understanding. But this will not necessarily be the case; in most cases such an analysis is artificial. So, in fact, recovery cannot be explained under a defective transaction model. This, of course, does not mean that there is no basis for recovery in such cases. As will be argued in Chapter 5, recovery is granted on the ground that the recipient unduly gets the benefit of the claimant's labour without bearing the burden thereof. This is true in all three instances and, in the second and third, there should be no recovery because the parties have agreed that this should be the case in the contract. But in the first instance, the defendant is, due to his conduct, disabled from invoking the contract; hence, there is no obstacle to awarding recovery based on the Benefit-Burden Principle.

IV. CONCLUSION

The claim made in this Chapter is that in order to include all the non-contractual assumpsit claims under a common analytical framework, this framework has had to be stretched to include ad hoc exceptions. As a result, terms such as 'enrichment' and 'unjust' just mean 'what the law considers them to be'. It follows that there is no coherence in unjust enrichment. In order for services to be accommodated a set of ad hoc rules concerning enrichment had to be adopted, furthermore the entire notion of 'subjective devaluation' has led to much confusion in the case law. And it remains the case that there is no single test for what amounts to an enrichment. If we did not try to make services fit within the structure, it would have been much easier to come up with a test for enrichment.

It is not just services that have caused problems. The inclusion of cases concerning the discharge of a debt of another have also lead to problems. They have required an ad hoc exception to the rule that an enrichment must be provided directly and not incidentally. Furthermore, the reason why there is recovery cannot be explained either in terms of impaired intention or defective transactions. This would not be a problem if such cases were removed from the scope of unjust enrichment. Then, there would be no ad hoc exception to the direct dealing rule and all the unjust factors would be about identifying a defect in the transaction.

The reason for such over-inclusion was Birks's quest for the 'simplest structure on which the material in *Goff and Jones* can hang.'[190] But the material *Goff and Jones* had collected (which included services and discharge of debts) all belonged together only in a loose way. They were all instances where recovery was justified by the moral principle against unjust enrichment. But that principle does not operate alone, and it needs other principles to tell us why something is unjust. This was a question with which Birks did not want to engage. As such he proceeded on the assumption that there could be a common analytical structure for all those cases. Such an analytical scheme could not be found in the cases but rather had to be 'forced on to cases'.[191] Yet, because of the key differences in the reasons for restitution between those cases, such forcing is artificial and has led to the incoherent analytical structure that we now have. In order to be able to properly provide one (or several) analytical schemes for the law, we must answer the question which Birks refused to engage in: what are the various reasons why there is restitution in the different cases where it is available? It is this question which this thesis will endeavour to answer.

[190] Birks, *An Introduction to the Law of Restitution* (n 1) 3.

[191] ibid 4.

CHAPTER 3: THE PROPERTY PRINCIPLE - MONEY AND GOODS

I. INTRODUCTION

Birks took the mistaken payment of a non-existent liability to be the core case of unjust enrichment. Everything else is a generalisation from that instance.[1] Birks took it as given that there must be liability in such a case and he called 'unjust enrichment' the event that results in that liability. There is, however, a normative question that was not asked: why is there liability in such a case?

Webb recently provided an explanation for recovery in terms of property: the money should be returned because it belongs to the claimant.[2] That view has in various forms been defended by amongst others Stoljar, Watts and Jaffey.[3] The standard objection to such views is that title has in fact passed and so property cannot provide the explanation for recovery.[4] Defenders of the proprietary theories of course know that title has passed. Rather, their point is that a normative moral entitlement remains.[5] Another way of reading the objections to the proprietary theory might be that the law does not recognise mere moral entitlements. Whilst the point of this Chapter is not to engage in this debate, with those objections being addressed in Chapter 6, it will be argued in this Chapter that this proprietary theory is how lawyers in the 18th, 19th and early 20th centuries thought the law was justified.

At this juncture it is important to distinguish between normative issues and analytical ones. The normative questions are whether and why there should be recovery. The analytical ones are which tools did the courts use to give recovery in the cases where they felt such recovery was normatively justified. The older cases are peppered with references to implied contract. At first glance an observer might be forgiven for thinking that this was the normative justification for

[1] P Birks, *Unjust Enrichment* (2nd edn, Oxford University Press 2005) 2–19.

[2] C Webb, *Reasons and Restitution* (Oxford University Press 2016) 75–76.

[3] S Stoljar, *The Law of Quasi-Contract* (2nd edn, The Law Book Company of Australia 1989) 7–10; P Jaffey, 'The Unjust Enrichment Fallacy and Private Law' (2013) 26 Canadian Journal of Law & Jurisprudence 115; P Watts, 'Restitution - A Property Principle and A Services Principle' [1995] Restitution Law Review 49.

[4] G Virgo, *The Principles of the Law of Restitution* (3rd edn, Oxford University Press 2015) 52; A Burrows, *The Law of Restitution* (3rd edn, Oxford Universtiy Press 2011) 30.

[5] Webb (n 2) 66–70.

recovery. However, the term 'contract' was used both as a source of rights and as a method of classification.[6] Only the former understanding goes to the normative question, whilst the latter goes to the analytical one. This Chapter will consider both the normative question ('why did the courts award recovery?') and the analytical one ('which tools did the court use to award recovery?') It will be argued that, whilst the answer to the first question remained constant (it was always the proprietary theory), the answer to the second question varied and the courts first adopted a tortious structure before adopting a contractual one. The focus of this Chapter is historical. It only seeks to identify how lawyers in the past reasoned. An evaluation of the theories and concepts they used is beyond the scope of the chapter.

Part II considers the normative basis and Part III considers the analytical structure. Part IV completes the analysis by arguing that claims for goods are also based on the proprietary basis. Part V will consider the implications of that analysis. In particular it will be argued that the proprietary background against which unjust enrichment first appeared means that the concept of unjust enrichment had a different meaning then than it has now. Unjust enrichment was seen as derivative from property and the rights created by unjust enrichment derived from property rights. This is different from the current conception of unjust enrichment according to which it is an event – not triggered by property rights – and which can, on some views, lead to the recognition of property rights. To put the point another way: unjust enrichment and property had precisely the opposite relationship than they do now. So, understood, it will also be shown that there was no real conflict between the implied contract theory and unjust enrichment. Unjust enrichment was the normative basis for recovery and implied contract was the analytical tool used to award recovery. Some brief conclusions are offered in Part VI.

II. WHAT WAS THE NORMATIVE JUSTIFICATION FOR RECOVERY OF MONEY?

The action for money had and received ('MHR') is a response to a problem. The problem in question is the peculiar nature of money. Title to it passes very easily and when it does not pass it is extinguished by mixture.[7] It was, therefore, much harder to give a legal remedy for mistaken transfers of money than it was for other chattels. In an essay in 1856 Lindley stated the problem thus:

[6] T Baloch, *Unjust Enrichment and Contract* (Hart Publishing UK 2009) 10–13.

[7] For more about this see Chapter 6 Section I.A.2.

> Take, for example, the case of money paid by mistake in satisfaction of a debt erroneously supposed to be due. The money paid ought clearly to be returned, but the means by which its return could be compelled were by no means obvious or satisfactory. Covenant was out of the question, trespass equally so, trover or detinue would not lie, inasmuch as the ownership in the particular coins paid had been transferred, account was doubtful and tedious, debt presupposed a contract.[8]

And so, in order to give that remedy the courts had to employ a fiction:

> In this difficulty, a promise to return the money was imputed by a fiction, and by means of this fiction the remedy by assumpsit was made available. The fictitious promise was called a promise in law, an implied promise. A denial by the defendant that he made any promise in point of fact, was wholly useless, he ought to return the money, and the fiction was necessary as a means whereby to compel him so to do.[9]

It is, therefore, clear that Lindley understood that implied contract was not the basis of the action but rather was just the technical mechanism used to give effect to the obligation. The basis of the action was that 'the plainest principles of morality give rise to an obligation which, in the opinion of Common Law Judges, ought to be enforceable at law'.[10] It is important to distinguish two claims that Lindley makes: (1) there is a moral obligation to return the money and (2) that moral obligation ought to be enforceable at law. The second point is very important for it clearly is not the case that every moral obligation must be enforced at law. A sound normative explanation must be able to answer those two questions: (1) why is there a moral obligation to return the money? (2) why should the law enforce that moral obligation?

The thesis of this Chapter is that from the 18th Century until the 1950s the received view amongst judges, lawyers and commentators was that the answers to those questions were as follows: (1) because morally the money belongs to the claimant ('the property theory') and (2) the lack of legal remedy is due to law having special rules governing the passing of title to money and so the law must provide a functionally equivalent remedy to the claimant to ensure that he does not lose out ('the mess explanation'[11]).

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[8] N Lindley, 'On the Theory of Implied Contracts' (1856) 24 The Law Magazine: Quarterly Review of Jurisprudence 27, 36.

[9] ibid.

[10] ibid 37.

[11] A term coined by McBride for explanations of the law according to which 'C is allowed to sue D not because anyone has done anything wrong, but because something has gone wrong, and allowing C to sue D is the only (or best) way to clear up the mess that has been created': N Mcbride, 'Restitution and Unjust Enrichment: The Coming Counter-Revolution', *8th Biennial Obligations Conference, University of Cambridge* (2016).

A. The money belongs to the defendant

In a recent article, Michael Lobban surveys quite a few sources which use the language of ownership of money.[12] Whilst I have included additional sources I am indebted to him for his survey. There are several cases dealing with MHR which explicitly state that the money belongs to the plaintiff. In *Attorney-General v Perry* the court said:

> whenever a man receives money belonging to another without any reason, authority or consideration, an action lies against the receiver as for money received to the other's use; and this, as well where the money is received through mistake under colour, and upon an apprehension, though a mistaken apprehension of having a good authority to receive it, as where it is received by imposition, fraud or deceit in the receiver (for there is always an imposition and deceit upon him that pays, where it is paid) by colour of a void warrant or authority, although the receiver be innocent of it.[13]

In *Moses v Macferlan* Lord Mansfield unified the categories in which the action for money and received would be granted under the principle that 'ex aequo et bono' the money ought to be refunded. What did he mean by that phrase? The first time he uses it in the judgement he expresses the point in the language of ownership:

> One great benefit, which arises to suitors from the nature of this action, is, that the plaintiff needs not state the special circumstances from which he concludes 'that, ex æquo & bono, the money received by the defendant, ought to be deemed as belonging to him:' he may declare generally, 'that the money was received to his use;' and make out his case, at the trial.[14]

Lord Mansfield, in saying that money is 'deemed to belong', recognises that the actual legal title is not retained.[15] This is why, if he wants to say that the money belongs, to the plaintiff he must appeal to an extra-legal notion of 'ex aequo et bono'. Similarly, in *Clarke v Shee and Johnson* Lord Mansfield spoke of the action lying by the 'true owner.'[16] Before considering the meaning of ownership 'ex aequo et bono' and what lawyers understood by it, let us look at other instances of proprietary language in the cases.

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[12] M Lobban, 'Mapping the Common Law: Some Lessons From History' [2014] New Zealand Law Review 21. I am grateful to C Webb for pointing me in the direction of that article.

[13] *Attorney-General v Perry* (1733) 2 Comyns 481, 92 ER 1169 [491].

[14] *Moses v Macferlan* (1760) 2 Burrow 1005, 97 ER 676 [1010].

[15] Lord Mansfield was, of course, very familiar with the rules governing the passing of title in money having decided *Miller v Race* (1758) 1 Burrow 452, 97 ER 398 just two years before.

[16] *Clarke v Shee and Johnson* (1774) 1 Cowp 197, 98 ER 1041 [200].

In *Hudson v Robinson* Lord Ellenborough explained that the 'action for money had and received is maintainable wherever the money of one man has, without consideration, got into the pocket of another.'[17] In *Stephen v Badcock* counsel for the plaintiff said that the action was 'properly applicable where money has been paid into the hands of one person which, ex æquo et bono, belongs to another'. Counsel for the defendant agreed and so did Lord Tenderden CJ who said, 'the money being received for the plaintiff and belonging to him'.[18] In *Edwards v Bates* Tindal CJ explained that '[t]he ground and principle upon which this form of action is maintainable is, that the defendant has received money which, ex æquo et bono, belongs to the plaintiff… it has always rested upon that ground.'[19] Such language continues in the 20th Century. In *Baker v Courage* Hamilton J (later Lord Sumner) said that

> [i]t was said that the cause of action is in the nature of a breach by the payee of a duty to hand over money which ex æquo et bono does not belong to him, but belongs to the payor, and that there can be no breach of that duty where the facts which give rise to the duty have not been brought to the payee's attention.[20]

He then went on to deny the implication made[21] but he never challenged the proprietary explanation. Four years later in *R Leslie v Sheil* A. T. Lawrence J explained that MHR 'arises wherever money has been received which ex æquo et bono belongs to the plaintiff'.[22] In *United Australia v Barclays Bank* Lord Porter said that '[t]he fiction forming the basis of the action of assumpsit may be an implied promise but the substance is the right of the plaintiff to recover property or its proceeds from one who has wrongfully received them.'[23] So it would appear that the cases put the normative basis of MHR firmly on a proprietary basis.

In addition to these English authorities we can also cite a number of US cases where the notion of 'ex aequo et bono' ownership was used.[24] In *Claflin v Godfrey* the Supreme Judicial Court

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[17] *Hudson v Robinson* (1816) 4 M & S 475, 105 ER 910 [478].

[18] *Stephen v Badcock* (1832) 3 B & Ad 354, 110 ER 133, [356] (counsel for plaintiff), [359] (counsel for defendant), [360] (Lord Tenderden).

[19] *Edwards v Bates* (1844) 7 M & G 590, 135 ER 238 [597].

[20] *Baker v Courage* [1910] 1 KB 56 (CA) 65.

[21] That there cannot be a duty to return the money until the defendant knows of the relevant facts.

[22] *R Leslie Ltd v Sheill* [1914] 3 KB 607 (EWCA) 626.

[23] *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 (HL) 54. This passage was cited by Stoljar in support of the proprietary theory: S Stoljar, *The Law of Quasi-Contract* (1st edn, The Law Book Company of Australia 1964) 7. In his review Wade says the passage in context does not give as much support to Stoljar as he thinks: J Wade, 'Review' (1966) 16 University of Toronto Law Journal 473, 474 fn 4. I disagree. It is true that the passage does not provide a knockout blow in favour of the proprietary theory, but it does show that proprietary thinking was present then.

[24] A search on all US Federal and State cases in Westlaw reveals that there are just under 300 cases where 'ex aequo et bono' was used in the same sentence as 'belongs'.

of Massuchesetts explained that the action 'aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which *ex æquo et bono* belongs to the plaintiff.'[25] In *Wells v American Export Company* a court in Wisconsin cited approvingly Lord Ellenborough in *Hudson v Robinson*[26] and added, 'an obligation is implied, in law, on the part of the defendant to pay it over to the rightful owner.'[27] One year later another court explained that the action 'proceeds upon the theory that the defendant has in his possession money which ex aequo et bono belongs to the plaintiff.'[28] In 1885 a court in Oregon added that '[w]henever one person obtains possession of money which, ex aequo et bono, belongs to another, the latter may maintain an action to recover it.'[29] Five years later a court in New York said that 'the plaintiff's case depended upon the question to which party, plaintiff or defendant, does the money, *ex aequo et bono*, belong?'[30] Such language by US courts continued throughout the 20th Century. Indeed, one can even find a case decided in 2009 that uses such language.[31] The Australian courts also used the language of ownership. In 1912 Griffiths CJ said in the High Court that: 'the action for money had and received lay whenever the defendant had received money which in justice and equity belonged to the plaintiff.'[32]

That this was the understanding of the law in England is confirmed when one looks at the writings of commentators. Michael Nolan wrote in 1795 that '[t]he substance and principle of the action for money had and received is, that the defendant have received a sum of Money belonging to the plaintiff, which he ought, by the ties of justice and equity, to refund…'[33] Similarly William Evans in his leading essay on the action said 'the foundation of it being a retention by one man of the property which he had unduly received from another, or received for a purpose, the failure of which rendered it improper that he should retain it.'[34] Samuel Comyn in his Law of Contract explained that:

> If a person received money, or something which has been converted into money, belonging to another, and has no legal or equitable right to retain it, the law deems this to be so much money had and received to the use of the proprietor thereof, and raises a promise by implication, on the part of the receiver, to pay it over;

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[25] *Claflin v Godfrey* (1838) 38 Mass 1, 6. This was approved by the US Supreme Court in *United States v Jefferson Electric Mfg Co* (1934) 291 US 386 (USSC) 402–3.

[26] *Hudson v Robinson* (n 17).

[27] *Wells v American Export Company* (1880) 49 Wis 224, 5 NW 333, 335.

[28] *Howard v Donahue* (1881) 7 Pacific Coast Law Journal 332 (California).

[29] *Peterson v Foss* (1885) 12 Or 81, 6 P 397, 398.

[30] *Chapman v Forbes* (1890) 123 NY 532, 26 NE 3, 3.

[31] *Haugabook v Crisler* (2009) 297 Ga App 428, 677 SE2d 355, 358.

[32] *R v Brown* (1912) 14 CLR 17 (HC Aus) 25.

[33] M Nolan, 'Notes to *Dutch v Warren* (1720)' in Strange Reports (3rd Edition, 1795) cited in Lobban (n 12) 52.

[34] W Evans, 'An Essay on the Action for Money Had and Received' [1998] Restitution Law Review 1, 4.

> and upon his refusal to do so, an action of indebitatus assumpsit will lie against him at the suit of the rightful owner, as for money had and received.[35]

In 1868 the third edition of Bullen and Leake said that the action was applicable 'wherever the defendant has received money, which, in justice and equity, belongs to the plaintiff, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff.'[36] Writing in 1936, Fifoot took the view that this had been the settled understanding until *Sinclair v Brougham*.[37]

Further support can be drawn from the fact that judges and commentators drew analogies between the property torts of trover and detinue and MHR. In *Hambly v Trott*[38] the court was considering the applicability of the maxim *actio personalis moritur cum persona*[39] to actions in trover when the defendant executor was still in possession of the goods which the testator had converted. Lord Mansfield said that, whilst trover was in the form of a tort, it was founded on property.[40] He drew an analogy with money had and received when he said that if the goods had been sold then it would be clear that MHR would lie.[41] Similarly, Ashton J stated that '[t]here seems to be but little difference between actions of trover, and actions for money had and received.'[42]

The converse analogy was made in *Freeman v Jeffries*,[43] where the issue was whether in order to establish the cause of action for MHR it was necessary for the plaintiff to give notice of the mistake and for the defendant to refuse to give the money back. Bramwell B held that the action was based on an analogy with trover and detinue:

> Let me suppose the case that the plaintiff had brought against the defendant an action of trover or detinue for the promissory note. It is admitted that the plaintiff could not have established his cause of action without some demand; for how could there be a wrongful detention until some claim was made? If this is so, how can money paid be demanded back by an action without previous notice?[44]

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[35] S Comyn, *The Law of Contracts and Promises upon Various Subjects and with Particular Persons as Settled in the Action of Assumpsit* (2nd edn, Joseph Butterworth and Son 1824) 266.

[36] Bullen and Leake, *Precedents of Pleadings* (3rd Edition, 1868), 44. Cited in C Fifoot, *Lord Mansfield* (Clarendon Press 1936) 246.

[37] ibid 246–245.

[38] *Hambly v Trott* (1776) 1 Cowp 371, 98 ER 1136.

[39] According to which a suit could not be brought against the executor of a dead person for wrongs he had committed.

[40] *Hambly v Trott* (n 38) [374].

[41] ibid [373].

[42] ibid.

[43] *Freeman v Jeffries* (1868-69) LR 4 Ex 189 (Exch).

[44] ibid 201 (Bramwell B).

Martin B agreed with Bramwell B but without relying on the analogy with trover and detinue. Pigott B was sympathetic but decided the case on different grounds. So did Kelly CB. The similarities between trover and money had and received was also noted by some commentators. In 1898 Ames noted the parallels between trover and assumpsit and said:

> if the res so acquired [by fraud or duress] is money, the plaintiff may have an action of assumpsit for money had and received to his use; and if the res is a chattel other than money, the plaintiff is allowed, at least in this country, to sue the defendant in trover.[45]

B. Two objections to the moral ownership theory

There are two possible alternative interpretations of the sources considered in the previous cases. The first is that in those cases the money did legally belong to the plaintiff. The second is that as a matter of equity it did. The point of those alternative interpretations is that the judges and commentators were not suggesting that the money belonged to the plaintiff merely on the moral plane.

According to some writers, MHR exists in two modes: proprietary and unjust enrichment. In the former cases, the claimant, at the time of receipt, retains title to the money.[46] Hence all the action does is vindicate legal property rights and there is nothing exceptional about it at all. According to such writers *Lipkin Gorman v Karpnale*[47] is an example of the action operating in such fashion. However, in the latter category of cases title has passed at the time of receipt and so the rationale for recovery cannot be proprietary. Instead, those authors claim that the basis of the action is unjust enrichment, which, in their understanding, is something distinct from a property claim.[48] Hence, the objection goes, insofar as I show that there are some cases which are based on the vindication of property rights, this does not undermine the view of these commentators that something other than property is the explanation in cases where title has passed.

To this objection I make two points. First, in the cases cited it was clear that title had passed. This is why the judges qualified the language of ownership with 'ex aequo et bono'. Second, the commentators at the time did not draw a distinction between cases where the action would

[45] JB Ames, 'The History of Trover II. Replevin' (1898) 11 Harvard Law Review 374, 386.

[46] Virgo (n 4) 642.

[47] [1991] 2 AC 548.

[48] Virgo (n 4) 8, 12–13, 58. In section V.A below, I will address the relationship between unjust enrichment and property.

arise because legal title had not passed and those where it had passed. For them it was all about property.

The second objection has more strength.[49] It argues that when the courts spoke of ownership 'ex aequo et bono' all they meant was that in equity title was retained, i.e. that a trust was formed whenever there was a mistaken payment. Support for this view can be gleaned from the name of the action itself: 'money had and received to the plaintiff's use'. The reference to 'plaintiff's use' suggests that the plaintiff retains beneficial ownership of the money. Indeed, the formula was borrowed from the action of account against a receiver.[50] As Lobban remarks, the idea of seeing 'quasi-contractual' obligations as involving some kind of trust was present in the 17th and early 18th Century.[51] Furthermore, the 5th edition of Ballow's *Treatise of Equity* states:

> And no man can be deprived of his estate and property, but with his consent or by order of law; as by some contract and conveyance, or by a forfeiture for some crime, or want of claim in due time, or for some other default or negligence in him; *and therefore if a man pays money upon a mistake, it not being intended as a gift, the receiver shall take it only in trust for him that paid it;* and he may recover it back even at law.[52]

The reasoning of the passage seems to be: since there was no proper consent for title passing, the beneficial ownership is retained. This is very similar to the Birks-Chambers view.[53] However, the accuracy of that statement can be questioned. The marginal annotation refers to Buller's Ni. Pri. Page 131. It is unclear which edition this refers to. The editions consulted did not, at this page, include any support for that view. No additional authorities are cited for the proposition that the money is held on trust, nor have any been identified. There are additional reasons to reject the view that 'ex aequo et bono' referred to ownership in equity. In *Edwards v Bates* the court held that MHR could not be used to recover money paid upon trust, unless the trust had been closed and a surplus remained.[54] It was in that very same case that Tindal CJ said that the basis of the action was that the money belonged ex aequo et bono to the plaintiff. Hence, it is clear that for Tindal CJ ownership ex aequo et bono must have meant something different to ownership in equity. The point is not that money had and received was unavailable to recover trust property, it occasionally

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[49] I am grateful to David Ibbetson for pressing the point.

[50] JH Baker, *An Introduction to English Legal History* (4th edn, Oxford University Press 2002) 370.

[51] Lobban (n 12) 52.

[52] H Ballow, A Treatise of Equity : With the Addition of Marginal References and Notes / by John Fonblanque., Vol 2/2 (5th edn, J & WT Clarke 1820) 4. The footnote adds: 'The receiving of money, which consistently with conscience cannot be retained, is in equity sufficient to raise a trust from whom, or on whose account it was received.' It then goes on to draw the distinction between mistakes of fact and mistakes of law.

[53] R Chambers, *Resulting Trusts* (Clarendon Press 1997).

[54] *Edwards v Bates* (n 19).

was.[55] Rather, the point is that the judges and commentators did not equate 'ex aequo et bono' with ownership in equity.[56] This is confirmed when one looks at the meaning of that phrase as it was used in the 18th and 19th Centuries.

C. What does 'ex aequo et bono' mean?

'Ex aequo et bono' and its companion phrase 'secundum aequum et bonum' mean 'according to what is just and good.' A search in the English Reports indicates that the first use of the phrase 'ex aequo et bono' in English law was by Lord Mansfield in *Moses v Macferlan*.

The term is now better known in the context of international dispute settlement. The *Oxford Dictionary of Law* 8th Ed says, 'The phrase refers to the way in which an international tribunal can base its decision not upon conventional law but on what is just and fair to the parties before it.'[57] Under Article 38 of the Statute of the International Court of Justice that court has the power to decide the case on that basis if the parties so request. Such adjudication has its origin in the medieval law merchant. The merchant judges provided a quick way of resolving disputes for itinerant merchants, which was separate from the local laws. According to Trakman, decisions did not rely on an abstract conception of 'the good' and

> were not to be guided by the naked discretion of merchant judges nor by their personal sense of fair play, decency, or expediency. They were to be grounded in the tenets of mercantile fairness, developed according to the manner in which merchants conducted trade, and responsive to trading relations among merchant parties.[58]

Whilst Lord Mansfield was intimately familiar with the Law Merchant, this does not seem to be what he had in mind. 'Ex aequo et bono' in the Law Merchant was a form of adjudication that involved ignoring the local law. This is not what Lord Mansfield, as one of Her Majesty's Justices,

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[55] L Smith, 'Simplifying Claims to Traceable Proceeds' (2009) 125 Law Quarterly Review 338.

[56] See for a review of the US cases coming to the conclusion that 'equity' did not means equity in the legal sense: E Bishop, 'Money Had and Received, an Equitable Action at Law' (1933) 7 Southern California Law Review 41.

[57] J Law (ed), *Oxford Dictionary of Law* (8th edn, Oxford University Press 2015).

[58] L Trakman, 'Ex Aequo et Bono - Demystifying an Ancient Concept' (2008) 8 Chicago Journal of International Law 621, 630.

was doing. Aequum et bonum was also the Latin translation of 'epikia'[59] in Aristotle's *Nichomachean Ethics*. According to Aristotle, situations would arise where the application of general laws to a particular case would not do justice as it is not the typical instance the legislator legislated for. In such a context Aristotle said that epikia/aequum et bonum had to be used as a corrective 'to say what the legislator himself would have said had he been present, and would have put into his law had he known.'[60] In essence, Aristotle's point is that a concept is needed to do justice in cases where there are unjust unintended consequences of the application of certain laws. Finally, the term also appears in Roman Law where it is linked with natural law with Paulus saying that 'what always is just and fair (aequum et bonum) is called ius, as is the case with ius naturale.'[61]

Pollock wrote a two-part article on natural law at the turn of the 20th Century. In the first part he drew a common thread between Aristotle, the Roman law concept of ius naturale and the Law Merchant.[62] In the second part he talked about the reception of such ideas into the Common Law. He lamented the fact that such ideas had less influence in England than they did on the Continent, whilst they continued to have some influence on Scotland which was 'in closer touch with Continental thought than England'. Hence it was 'no accident that our two great rational law reforms of the second half of the 18th Century were carried out by Lord Mansfield, a Scotsman by birth.'[63] Those two great reforms were the incorporation of the Law Merchant and the development of quasi-contract. Of the latter Pollock said it 'rests on a bold and timely application, quite conscious and avowed, of principles derived from the Law of Nature.'[64]

Farwell LJ in *Baylis v Bishop of London* agreed. He said: 'Lord Mansfield was referring to the jus naturale of Roman law … which has had a considerable influence in moulding our common law.'[65] He referred to his judgement in *Bradford Corporation v Ferrand*[66] where he talked about how the jus naturale was a source of rights for English law. He was there concerned with a number of English cases which held that the rights to enjoy a stream of water belonged, 'ex jure naturae', to the proprietor of the adjoining lands. After analysing those cases he said:

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[59] I am grateful to Lorenzo Maniscalco for pointing out to me since the 1450s all Latin translations of Aristotle used the term aequo et bono for ekitas.

[60] Aristotle, *The Nicomachean Ethics* (D Ross and H Fielding eds, Oxford University Press 2009) bk V.10.

[61] D.1.1.11 pr.

[62] F Pollock, 'The History of the Law of Nature: A Preliminary Study' (1900) 2 Journal of the Society for Comparative Legislation 418.

[63] F Pollock, 'The History of the Law of Nature: A Preliminary Study' (1901) 3 Journal of the Society for Comparative Legislation 204, 207.

[64] ibid.

[65] *Baylis v Bishop of London* [1913] 1 Ch 127 (EWCA) 137 (Farwell LJ).

[66] *Bradford Corporation v Ferrand* [1902] 2 Ch 655.

> I have come to the conclusion, therefore, that jus naturae is used in these cases as expressing that principle in English law which is akin to, if not derived from, the jus naturae of Roman law. English law is, of course, quite independent of Roman law, but the conception of æquum et bonum and the rights flowing therefrom which are included in jus naturae underlie a great part of English common law.[67]

He refers, *inter alia*, to Lord Mansfield's judgement in *Moses v Macferlan* as such an example and concludes that he is 'not, therefore, introducing any novel principle if I regard jus naturae on which the right to running water rests, as meaning that which is æquum et bonum between the upper and lower proprietors.'[68] He concluded that the matter before him was 'one to be decided on the general consideration of æquum et bonum.'[69] The idea that the courts could give a remedy for a right which was not legal was also found in Lindley's article[70] and was also articulated, in the context of MHR, in a case from Wisconsin:

> The right is the creation of equity; but having come into existence, the right to recover is a legal right, enforceable by legal remedies. I would not speak of the right to money had and received as an equitable right, nor of the remedy to enforce it, as in its nature equitable, nor the form of the action as legal; but that the primary right is a creation of equity, the right to enforce it is a legal right the same as in case of any other legal obligation; and the remedy to enforce it is the civil action of the Code.[71]

So, we have three related concepts of aequo et bono: (1) a source of rights, (2) a corrective on the application of general legal norms, (3) a method of adjudication where the goal is to do justice. The following is somewhat speculative, but we can see Lord Mansfield saying that as a matter of ius naturale the money belonged to the claimant,[72] that the rules about the passing of title to money unjustly and unintentionally deprived the plaintiff of his legal right and so, in order to do justice, the common law would afford a remedy in order to recover the money. It is plausible that this second aspect (the mess explanation) is what Lord Mansfield had in mind, but he did not explicitly articulate it. The first such articulation happened in the early 20th Century.

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[67] ibid 661–2 (Farwell LJ).

[68] ibid 662 (Farwell LJ).

[69] ibid 665 (Farwell LJ).

[70] Lindley (n 8).

[71] *Steuerwald v Richter* (1914) 158 Wis 597, 149 NW 692, 695.

[72] On this point he is fairly explicit when he says that ex aequo et bono the money is deemed to belong to the plaintiff.

D. Enter the mess explanation

Most commentators see *Sinclair v Brougham*[73] as the case which attempted to kill off unjust enrichment and replace it with the implied contract theory. As I will argue below, and as R. M. Jackson pointed out in 1936, such a reading confuses the normative basis of the law and its analytical structure. For now, I wish to focus on the mess explanation. It seems that the first time it was judicially stated was in *Sinclair v Brougham* in particular in the speech of Lord Dunedin.

He first identifies the proprietary principle as the underlying basis for the recovery of money: 'it is clear that all ideas of natural justice are against allowing A. to keep the property of B., which has somehow got into A.'s possession without any intention on the part of B. to make a gift to A.'[74] He explains that, when dealing with chattels, the matter is easy because there is a jus in re and so an action founded on the retained property right would do the trick. But for fungibles, especially money, the jus in re disappears. How to go about solving that problem?[75] One possible argument is that there is no problem at all and that the plaintiff should not recover. This relies on the maxim that 'when there is a jus in re an action will lie, and when there is not such a jus it will not.'[76] But Lord Dunedin thinks this is obviously hopeless:

> This comes to this, that having got hold of property which does not belong to you, if only you are wise or lucky enough to change its form you may enjoy the proceeds unmolested. Such a plea on the face of it seems only worthy of the Pharisee who shook himself free of his natural obligations by saying Corban. In the words of technical equity it is unconscionable.[77]

The Biblical example Lord Dunedin used is worth unpacking. The passage is found in Mark's Gospel[78] where Jesus is debating the Pharisees. A Corban was an offering to the God (more precisely to the Temple). Jesus is criticising the Pharisees for failing to obey the fourth commandment ('honour thy father and thy mother') - which requires them to support their parents in old age – by saying something is Corban (i.e. an offering to God) instead of using it to fulfil their

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[73] *Sinclair v Brougham* [1914] AC 398 (UKHL).

[74] ibid 431 (Lord Dunedin).

[75] ibid (Lord Dunedin).

[76] ibid 432 (Lord Dunedin).

[77] ibid 435 (Lord Dunedin).

[78] 'For Moses said, "Honor your father and your mother"; and, "Whoever reviles father or mother must surely die." **11** But you say, "If a man tells his father or his mother, 'Whatever you would have gained from me is Corban'" (that is, given to God)— **12** then you no longer permit him to do anything for his father or mother, **13** thus making void the word of God by your tradition that you have handed down. And many such things you do.' : 'Mark' vv 7:10-13 (ESV).

duty towards their parents. So, Jesus is critical of the reliance on a technical rule in order to avoids one's natural obligations.[79] Similarly, Lord Dunedin thinks it would be wrong for someone to rely on the special rules governing the passing of title to money in order to avoid having to give someone their money back.

He then addresses the problem with the argument based on the fact that title has passed:

> the whole strength of this argument lies in the idea that the jus in re represents the depositors' only right: that there can be no obligation on the other side at all. It is here that I think the importance of the action for money had and received comes in. That cannot be founded on a jus in re, for you cannot have a jus in re in currency. It shews that both an action founded on a jus in re, such as an action to get back a specific chattel, and an action for money had and received are just different forms of working out the higher equity that no one has a right to keep either property or the proceeds of property which does not belong to him.[80]

By 'higher equity' he does not mean equity in the technical sense but in the sense of 'inherent ideas of justice',[81] and he thought Lord Mansfield meant it in the same way. Here he links the mess explanation with the proprietary theory. The point is this: even though the technical rules concerning money mean that the defendant has legal title in the money, morally the money still belongs to the plaintiff. It would be unjust to allow the defendant to take advantage of those technical rules (it would be acting like the Pharisees) and so the common law will grant a remedy that gets around the problem of legal title having passed. But the basis of the award of that remedy remains the moral ownership of the money by the plaintiff.

We see further articulation of the proprietary mess explanation by Lord Sumner – apparently the great enemy of unjust enrichment – in *Jones v Waring*.[82] Here again he confronts the fallacious argument that the defendant should be allowed to retain the money because title has passed:

> *It is the peculiar character of coin or currency that gives rise to this idea.* If a tradesman misdelivers goods, so that the wrong person gets them, many laymen and all lawyers recognize at once that they do not thereby become the property of the receiver, *for passing of property is a question of intention*, and obviously the tradesman never meant in such circumstances to make his goods the property of the wrong man. When goods are found, the maxim that finding is keeping attracts many people, but not without a strong subconsciousness of guilt. In the case

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[79] See the Pulpit Commentary (http://biblehub.com/commentaries/pulpit/mark/7.htm , accessed 8/22/16) and St Thomas's Aquinas's *Exposio in Marcum* (http://dhspriory.org/thomas/CAMark.htm#7 , accessed 8/22/16). See 'Pulpit Commentary - Mark 7' (*Bible Hub*) <http://biblehub.com/commentaries/pulpit/mark/7.htm>; St Thomas Aquinas, *Exposio in Marcum* (JH Newman tr, 1842) 130–4 <http://dhspriory.org/thomas/CAMark.htm#7>.

[80] *Sinclair v Brougham* (n 73) 436 (Lord Dunedin).

[81] ibid 432 (Lord Dunedin).

[82] *Jones v Waring* [1926] AC 670 (UKHL).

> of payments of money, however, the notion is common that, if some one pays me money when he need not do so, it is my windfall, for I am not bound to keep his accounts for him. This is where the fallacy comes in. I may not be bound to know the payer's accounts but I ought to know my own. The executrix of Solari ought to have known, and probably did, that the company had cancelled the policy, and was making a mistake in paying again. *If so, there was no real intention on the company's part to enrich her.*[83]

In *Norwich Union v Price* Lord Wright applied the mess explanation to expand the grounds of recovery from liability to all fundamental mistakes. He relied on Lord Sumner's speech in *Jones v Waring* to establish that the matter was a question of whether there was an intention to pass title, notwithstanding the special rules concerning money. So, if a mistake was such that it would prevent title in a chattel from passing, MHR should be available if money was paid under the same mistake.[84] Lord Wright further expanded on this proprietary mess explanation in a 1937 lecture at Cambridge on *Sinclair v Brougham*.[85] In his 1950 work on quasi-contract Munkman went for the same explanation of recovery:

> Now if property is transferred under some fundamental error (at least, property other than land) the transfer will be void, and the transferor can bring an action in tort (either detinue or conversion) for the return of the identical property property or for damages. *But no such remedy is available where money is paid by one person to another.* The property in the coins passes by delivery, and unless they are in a sealed bag, or the identical coins can be traced (in which case detinue would lie) there is no right in rem, and therefore the law creates a right in personam against the wrongdoer. *Thus, where specific property has passed under an ineffective transfer, the right of ownership continues to subsist and the remedies for its infringement continues; whereas if money is paid under the same circumstances, it is impractical to vindicate the right of ownership, and the remedy is given by the creation of a quasi-contractual obligation.* This explains why the law of quasi-contract is so exclusively concerned with money claims, a feature which at first sight appears peculiar.[86]

[83] ibid 695 (Lord Sumner, emphasis added).

[84] *Norwich Union Fire Insurance Society Ltd v WMH Price Ltd* [1934] AC 455 (UKHL) 462–3 (Lord Wright).

[85] Lord Wright, 'Sinclair v Brougham' (1938) 6 Cambridge Law Journal 305.

[86] J Munkman, *The Law of Quasi-Contracts* (Sir Isaac Pitman & Sons 1950) 27.

III. THE CHANGING ANALYTICAL STRUCTURE

For the reasons given above, the courts felt that they had to give a remedy in cases of mistaken payment (and other such cases). As Lindley had stated, they did so using the fiction of an implied promise. This was a procedural fiction used to make assumpsit available. However, the judges knew that this was a fiction.[87] This raises an interesting question: how did the judges understand and classify MHR? It seems that until the end of the 19th Century they understood it as a tort, i.e. a form of wrong, and it was only in the early 20th Century that the action came to be understood as being akin to a contract. However, whilst the analytical structure changed, the normative foundation did not. The position is similar to that of detinue, which was sometimes conceived as a tort and sometimes conceived as a contract, but which did not completely fit either.[88]

A. A tortious structure

1. The focus on retention

Ben Kremer[89] has carried out an impressive survey of decisions prior to the 20th Century where he shows that the notion of unconscionability played a very important role in the law. The role conscience played was not as an adjudicative tool. The courts did not directly ask whether retention was against conscience. 'Rather, "conscience" is used as a concept to underlie and structure the operation of an area of the law; it provides a generative, basal principle which is in turn used to construct rules'[90] which the courts will apply. His survey reveals two important points for our purposes: (1) the focus of the court's enquiry was whether the defendant had the right to retain the money, and (2) the enquiry was not claimant focused at all, there was no need to establish anything like an unjust factor.

As Kremer shows from his analysis of the cases, the rule was that 'the plaintiff had to [show] that the defendant had no "right to retain" that which he had received.'[91] For example, in *Price v Neal* Lord Mansfield says that 'the plaintiff can not recover the money, unless it be against

[87] Baloch (n 6) 42.

[88] Lobban (n 12) 46, 47.

[89] B Kremer, 'The Action for Money Had and Received' (2001) 17 Journal of Contract Law 93.

[90] ibid 107.

[91] ibid 109.

conscience in the defendant to retain it."[92] Indeed that right to retain need not be legal or equitable but can be moral. This is why Lord Mansfield said there would be no recovery for debts that were not enforceable, for example gaming debts or debts which were time barred. This is another role which conscience plays; it allows the right to retain to be moral and not just legal or equitable.[93]

There was no unjust factor analysis. The claimant did not have to plead one particular ground, such as mistake or failure of consideration. As Lord Mansfield said, the plaintiff 'may declare generally that "the money was received to his use".'[94] This meant that the plaintiff 'never was bound to pick among a number of discrete instances in which the defendant's retention of the monies had previously been held to be against conscience due to the lack of any right to retain them.'[95] The relevance of the established categories was that these were instances where as a matter of precedent it was found that there was no right to retain. So, practically, it made recovery easier in those cases, but it was by no means the case that if one did not fall within one of those instances one would not recover.[96] Instead, the enquiry would be about whether the defendant had a legal, equitable or moral right to retain.

The importance of Kremer's work for these purposes is the focus on retention. The language of retention presupposes that there is something that is retained. It also suggests that the duty is to return in kind and not merely in value. Of course, in the case of fungibles, and especially money, the difference between returning the thing itself and returning the value is a purely theoretical one.

[92] *Price v Neal* (1762) 3 Burr 1354, 97 ER 871 [1357].

[93] Kremer (n 89) 110.

[94] *Moses v Macferlan* (n 14) [1010] (Lord Mansfield).

[95] Kremer (n 89) 115.

[96] ibid 116.

2. A wrong as the trigger of the cause of action

In *Kelly v Solari* Parke B suggested that in order to recover the plaintiff must give notice of the mistake and demand the money back.[97] Whilst this was a mere obiter dictum it became established as the law in *Freeman v Jeffries*, where it was established that the cause of action is triggered by the commission of a wrong, namely failing to return the money, and that since retention must be unconscionable there should be no duty to return until the defendant knows of the circumstances which make his retention problematic. The case must be dealt with in some detail.

Jeffries had agreed to sell a farm to Freeman, the value of which was to be determined by two valuers. After payment was made Freeman found out that the valuers had made a mistake and that he should have been charged less than he paid. However, he did not bring the matter to Jeffries' attention and Freeman sold the farm to a third party. He then brought two claims against Jeffries. The first alleged that the valuers' mistake rendered the whole transaction a nullity and so he was entitled to his entire money back. The second alleged that he should get the overpayment back. He lost and appealed unsuccessfully to the Court of Exchequer.[98] There were four different reasons for dismissing the appeal. One of which, shared by Martin B, Bramwell B and – obiter – Pigott B was that the claim for the overpayment could be brought but that it would fail for lack of notice:

> it would be an action for the return of a portion of the money paid, on the ground that the consideration had failed, and after notice given that it had failed. But unless some communication has been made by the plaintiff, he is not entitled to recover either the whole or any part of this sum.[99]

Furthermore, as was seen in the previous section, Bramwell B also ruled against Freeman on the basis of analogy with claims in trover and detinue. If the plaintiff wanted to sue for a promissory note on the basis of trover or detinue he would need to have made a demand. Why should it be different for an action for money had and received?[100]

What were the rationes of the judges? It is not the case, as Burrows suggests,[101] that if a judge decides a case on multiple grounds only one of them is ratio. Rather, each of the grounds is

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[97] 'though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake' *Kelly v Solari* (1841) 9 M&W 54, 152 ER 24 [58] (Parke B).

[98] *Freeman v Jeffries* (n 43).

[99] ibid 200 (Martin B).

[100] ibid 201 (Bramwell B).

[101] Burrows (n 4) 608.

ratio.[102] It can, of course, be the case that a judge treats one of the grounds as ratio and the other as dictum. This is the case for Pigott B's agreement on the need for notice. To summarise, the various grounds for deciding the case were as follows:

The various rationes of the judges	(1) the valuation is final	(2) it is impossible to rescind so the whole value cannot be recovered	(3) it is not inequitable for the defendant to retain surplus because it is impossible to return the parties in their original position	(4) it not inequitable to retain because no notice was given
Kelly CB	Ratio	Ratio	Ratio	
Martin B[103]		Ratio		Ratio
Bramwell B				Ratio
Pigott B	Ratio			Obiter dictum

Given the above it is not possible to extract a ratio common to at least three of the judges. (4) gets the closest given that it has the support of three judges but falls short of being a common ratio because Pigott B explicitly expressed agreement only obiter. Nevertheless, various subsequent cases and commentators read *Freeman v Jeffries* as deciding (4). In England, *Leake on Contracts*, *Addison on Contracts*, *Chitty on Contracts* and the *Encyclopedia of the Laws of England* all said that a notice and a demand was necessary to complete the cause of action.[104] This was also the interpretation of English law which the New Zealand courts adopted.[105] The Courts in the United States also followed that interpretation of the law.[106] Both Professors Keener[107] and Woodward[108] – who wrote the first two textbooks on quasi-contracts – also defended that view of the law. This view of the law made it into the First US Restatement:

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[102] *Commissioner of Taxation for New South Wales v Palmer* [1907] AC 179 (PC) 184 (Lord Macnaghten); R Cross and J Harris, *Precedent in English Law* (4th edn, Oxford University Press 1991) 82.

[103] The headnote states that Martin also held against the plaintiff on ground (1): this is not true.

[104] Cited in *Assets Company v R* (1901) 21 NZLR 222 (NZHC) 226 (Williams J).

[105] *Assets Company v R* (n 104); (1902) 22 NZLR 459 (NZCA); *Smith v Cunningham* (1915) 34 NZLR 385 (NZHC); *Merenea People v Anderson* [1936] NZLR 47 (NZHC).

[106] E.g. *Scholey v Halsey* (1878) 72 NY 578; *Southwick v First National Bank of Memphis* (1881) 84 NY 420. But see *Leather Manufacturer's Bank v Merchant's Bank* (1888) 128 US 26 (SCOTUS) (cause of action complete on receipt); but not followed: *Bedell v The Oliver H Blair Co* (1931) 15 Pa D&C 405.

[107] W Keener, *The Law of Quasi-Contracts* (Baker, Voorhis and Company 1893) 141.

[108] F Woodward, *The Law of Quasi-Contracts* (Little, Brown, and Company 1913) 9, 49.

> There is no breach of duty to make restitution because of a transfer made by mistake until the transferee or beneficiary has notice of the facts upon which the transferor's right depends and has had a reasonable opportunity for making restitution.[109]

In addition to Keener and Woodward, Austin also provided a theoretical defence of wrongdoing as the trigger for the law's intervention. Only fragments of the lectures Austin gave on quasi-contracts and delicts remain. These lectures had taken place at University College, London in the late 1820s and early 1830s but were only published in the 1860s.[110] Although only fragments remain, they do give us a very good picture of what people thought about quasi-contracts in the 19th Century. Austin said:

> But quasi-contract seems to have a larger importer; - denoting any incident by which one party obtains an *advantage* he ought not to retain, because the retention would damage another; or by reason of which he ought to indemnify the other. The prominent idea in quasi-contract seems to be an *undue* advantage which would be acquired by the obligor, if he were not compelled to relinquish it or to indemnify.[111]

In the notes for his students he put the matter as follows:

> The erroneous payment and receipt is *a source or cause of obligation*, although the transaction is not a convention, and although there is nothing in the fact savouring of injury or wrong. There is no convention, inasmuch as the *performance* of an obligation is the only design of the payment. There is no wrong, inasmuch as the party who receives the money believes the money is due. But inasmuch as the money is not *given*, an obligation to return it attaches upon the party who receives it from the moment at which it is paid.[112]

Austin rejected the distinction between quasi-contract and quasi-delict. For him it sufficed 'to look at the incident as begetting an obligation; and to treat the refusal to make satisfaction, or to withhold the advantage, as a delict; i.e. as a breach of that obligation.'[113] He applied that analysis to the mistaken payment case and reached a conclusion similar to that in *Freeman v Jeffries*:

> The refusal to pay money received under a mistake, appears to be, not a quasi-contract, nor a quasi-delict, but a delict; there being intentionality…

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[109] Seavey and Scott, *Restatement of the Law of Restitution, Quasi-Contracts and Constructive Trusts* (American Law Institute 1937) s 63.

[110] Baloch (n 6) 43 fn 185.

[111] J Austin, *Lectures on Jurisprudence, or the Philosophy of Positive Law* (John Murray 1885) 911.

[112] ibid 983.

[113] ibid 912.

> If there be no delict without intention or negligence, quasi-delicts (like quasi-contracts) are merely sources of obligations, the *refusal to fulfill which* is properly the cause of action. Thus, the fact of my having received money through a mistake, is not a delict; but begets an obligation to repay that money or equivalent. And the refusal (express or indicated by conduct) to repay, is the immediate cause of action: i.e. is a delict.[114]

In other words, Austin's thought seems to be as follows. The receipt of money by mistake would, if not given back, amount to an undue advantage and so the law imposes an obligation on the recipient to repay that money. Failure to fulfill that obligation would be a wrong, which the law will respond to using MHR. That is exactly the structure of the law following *Freeman v Jeffries*.

3. No money retained and change of position

The position concerning what we would now call change of position is less clear. Most contemporary textbooks cite *Durrant v The Ecclesiastical Commissioners for England and Wales*[115] and *Baylis v Bishop of London*[116] as having decided that, aside from the cases of payment over by an agent, change of position was not a defence to money had and received. In *Lipkin Gorman v Karpnale* Lord Goff also took the view that those two cases made recognition of the defence impossible.[117]

However, there were a number of earlier cases which did seem to recognise something like the defence of change of position. For example, in *Dale v Sollet* Lord Mansfield held that the plaintiff could only recover 'what remains after deducting all just allowances which the defendant has a right to retain out of the very sum demanded.'[118]

In *Skyring v Greenwood* an officer had been overpaid by mistake. The Paymaster sought to recover the overpayment from his estate. The claim failed. Abbott CJ said:

> It is of great importance to any man, and certainly not less to military men than others, that they should not be led to suppose that their annual income is greater than it really is. Every prudent man accommodates his mode of living to what he supposes to be his income; it therefore works a great prejudice to any man, if after having had credit given him in account for certain sums, and having been allowed to draw on his agent on the faith that those sums belonged to him, he may be called upon to pay them back.[119]

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[114] ibid.

[115] (1880) 6 QBD 234 (Exch).

[116] (n 65).

[117] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (UKHL) 579 (Lord Goff).

[118] *Dale v Sollet* (1767) 4 Burr 2133, 98 ER 112 [2134] (Lord Mansfield).

[119] *Skyring v Greenwood* (1825) 4 B & C 281, 107 ER 1064 [289] (Abbott CJ).

And in *Brisbane v Dacres* (better known as being one of the cases that established the mistake of law bar) Sir James Mansfield CJ[120] said:

> So far from its being contrary to æquum et bonum, I think it would be most contrary to æquum et bonum, if he were obliged to repay it back. For see how it is! If the sum be large, it probably alters the habits of his life, he increases his expences, he has spent it over and over again; perhaps he cannot repay it at all, or not without great distress: is he then, five years and eleven months after, to be called on to repay it?[121]

The similarity between those cases and a modern case such as *Phillip Collins v Davis*[122] are striking. In that case the defendants had been overpaid and they sought to argue that they had the defence of change of position on the ground that they had upgraded their lifestyle. That defence was successful. Neither *Skyring v Greenwood* nor *Brisbane v Dacres* were cited in *Phillip Collins v Davis*. It is striking that in *Philip Collins v Davis* the court thought it was being innovative by applying the only nine years old defence of change of position, when in fact Mansfield CJ had come up with the same solution almost 200 years before. One could be forgiven for thinking that all we have done in recent times is re-invent the wheel. There are a number of other cases in which change of position was recognised as a defence, which are collated in Kremer's article.[123] The question then is why the defence was apparently rejected in *Durrant* and *Baylis*. This will be addressed in the next section dealing with the implied contract analysis.

To summarise, in the 19th Century and until the beginning of the 20th Century the law relating to MHR was remedial. It responded to the commission of a wrong. That wrong was the unconscionable retention of money. It was wrong to retain it because that money belonged ex aequo et bono to the plaintiff. What made the retention unconscionable was that the defendant knowingly acted in a way that was inconsistent with the fact the money belonged to someone else. Since the law was triggered by unconscionable retention, if there was nothing to retain because the money had been spent then there was no wrong. Hence, whilst there was no change of position defence, the requirement of unconscionable retention allowed for the same outcomes to be reached as would have been the case had change of position been recognised. To conclude, MHR was functionally equivalent to the tort of trover, albeit without strict liability.

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[120] No relation to Lord Mansfield.

[121] *Brisbane v Dacres* (1813) 5 Taunt 143, 128 ER 641 [162–3] (Mansfield CJ).

[122] *Philip Collins Ltd v Davis and Satterfield* [2000] 3 All ER 808 (Ch).

[123] Kremer (n 89) 116–9.

B. The move to implied contract

Given that the form of MHR required an implied promise (albeit a fictional one), it was always going to have some affinities with contract. Indeed, even in the cases laying down a wrong based structure, there were references to contract. For example, in the New Zealand case of *Assets Company v R* Denniston J said:

> the action for money had and received is founded on a contract implied by law to pay on request money which it would be unconscientious, as against the plaintiff, to retain. That implies that the right of action does not arise till a request to pay is made. That does not seem to me unreasonable. One can hardly be said to retain money unconscientiously until he knows of the facts which make it unconscientious for him to retain it, and, notwithstanding such knowledge, retains it. If the contract is a contract to pay on request, the breach of the contract is a refusal after request to pay. *Freeman v Jeffries* is a distinct authority to the same effect.[124]

However, the reasoning based on contract is superfluous. The same conclusion could have been arrived at using the idea of unconscionable retention. The law still had that remedial structure even though it was occasionally packaged as a contract. But in the early 20th Century that remedial structure was shattered in three cases decided in just four years. The common denominator of those cases was John Hamilton (later Lord Sumner).

Baker v Courage[125] was the first such case. The facts were simple. A mistaken payment had been made and the question was whether the claim was time barred. If the cause of action was complete at the time of payment, then the claim would be time-barred. However, if it were complete when the plaintiff made the demand then it would not be. Counsel for the plaintiff argued that, following *Freeman v Jeffries*, it was the latter. Hamilton J treated the case as binding but distinguished it on the ground that the mistake in that case was a unilateral one and not, as in *Baker v Courage,* a mutual one.[126] This is unconvincing. In both *Freeman* and *Baker,* the parties had entrusted a third party to work out how much each party owed to the other. In both cases the third party made a mistake. They are, quite clearly, both cases of mutual mistake. Normatively it is unclear why characterising the mistake as mutual or unilateral should matter. Bramwell B's reasoning was based on the fact that a defendant could not be under a duty to repay if he did not know of the mistake. This applies equally in the case of a mutual and unilateral mistake. Whilst there might be grounds for distinguishing *Freeman* from a case where the defendant knew of the mistake, *Baker* is no such case. Prior to the litigation beginning the defendant had no idea about the mistake.

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[124] *Assets Company v R* (n 105) 471 (Denniston J).

[125] *Baker v Courage* (n 20).

[126] ibid 66 (Hamilton J).

Those sympathetic to the decision recognise that the attempt to distinguish *Freeman v Jeffries* was unconvincing.[127] Burrows also recognises it is unconvincing but sees that as evidence of how 'determined Hamilton J was not to follow the unsatisfactory earlier decision'.[128] *Baker v Courage* was followed in *Anglo-Scottish Beer Sugar Corporation v Spalding UDC.*[129] In *Re Mason*[130] and *Re Blake*[131] Hamilton J's judgement was read as saying that liability arose on payment. A final attempt was made in 2001 to reinstate *Freeman v Jeffries*, but it failed.[132]

From a policy point of view, it must be said that the outcome of *Freeman v Jeffries* was not ideal. As Hamilton J pointed out, this would allow the plaintiff to delay his demand for an unlimited time and not have the time run against him.[133] Later on, as Lord Sumner, he did express concerns as to the effect of long limitation periods in actions to recover mistaken payments.[134] Notwithstanding the difficulties in his reasoning the decision 'particularly impressed the judiciary.'[135] In 1912, only less than four years after having been appointed to the High Court, he was appointed to the Court of Appeal. It is there that he would inflict his second strike on the remedial view of the law.

As was mentioned above, *Baylis v Bishop of London*[136] is seen as having rejected the defence of change of position. The outcome of the case was a product of the way it was argued. At first instance the Bishop sought to defend himself against a claim for repayment by placing himself within the scope of the payment over rule. For that he had to argue that he was an agent. In a short *ex tempore* judgement Neville J held that that the Bishop was not an agent but the principal.[137] On appeal the agency argument was renewed and still failed. In addition, counsel for the Bishop sought to argue that from first principles the Bishop should not be liable. He argued that, since the nature of the action was based on the fact that ex aequo et bono the defendant ought to refund the money,

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[127] E.g. C Mitchell, P Mitchell and S Watterson, *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) paras 33–14.

[128] Burrows (n 4) 609.

[129] *Anglo-Scottish Beer Sugar Corporation v Spalding Urban DC* [1937] 2 KB 607 (KBD) 628–630 (Atkinson J).

[130] *Re Mason* [1928] Ch 385 (Ch) 392 (Romer J).

[131] *Re Blake* [1932] 1 Ch 54 (Ch) 60 (Maughan J).

[132] *Fuller v Happy Shopper Markets Ltd* [2001] 1 WLR 1681 (Ch) (Lightman J).

[133] *Baker v Courage* (n 20) 65 (Hamilton J).

[134] 'It might be a good thing if the Statutes of Limitation were amended, so as to cut down to a very short period the time within which actions such as *Kelly v. Solari* and others may be brought': *Jones v Waring* (n 82) 695 (Lord Sumner).

[135] A Lentin, 'Hamilton, John Andrew, Viscount Sumner (1859–1934)', *The Oxford Dictionary of National Biography* (online edn, Oxford University Press) <http://www.oxforddnb.com/view/article/33670>.

[136] (n 65).

[137] *Baylis v Bishop of London* [1912] 2 Ch 318 (Ch).

the Bishop should not be liable if the court found that it was inequitable for him to refund it. He then argued that it would be inequitable because the Bishop no longer had the money.

All three judges declined the invitation to decide from first principles. Instead they pointed out that there were cases which had limited the import of Lord Mansfield's words; for example, Cozens-Hardy MR cited the mistake of law bar.[138] Farwell LJ referred back to his judgement in *Bradford Corporation v Ferrand*[139] where he defended Lord Mansfield's appeal to the jus naturale, but added that it was now impossible to create any new doctrine of common law.[140] After reviewing the cases following *Moses v Macferlan*, Hamilton LJ said:

> In effect, therefore, both the equitable and the legal considerations applicable to the recovery of money paid under a mistake of fact have been crystallized in the reported common law cases. The question is whether it is conscientious for the defendant to keep the money, not whether it is fair for the plaintiff to ask to have it back. To ask what course would be ex æquo et bono to both sides never was a very precise guide, and as a working rule it has long since been buried in *Standish v. Ross* and *Kelly v. Solari*. Whatever may have been the case 146 years ago, we are not now free in the twentieth Century to administer that vague jurisprudence which is sometimes attractively styled 'justice as between 'man and man.'[141]

Modern writers see this passage, especially the last sentence, as a rejection of unjust enrichment, but it was nothing of the sort. Counsel for the Bishop had, in effect, asked the Court 'to administer that vague jurisprudence' and the Court declined that invitation. The principles had now been crystallised in the cases and the Court would decide based on those cases rather than going back to first principles. Looking at the cases the Court felt that the only exception was payment over by an agent. One might quibble with that judgement, especially since *Skyring v Greenwood* was not cited, but the refusal to rule on first principles is defensible.

The rejection of change of position was not surprising. Under the tortious analytical structure liability was based on unconscionable retention. If there was nothing to retain or if the retention would not be unconscionable then there would be no liability. As such, change of position was not a defence per se. Rather it was a denial that would prevent liability from occurring. The change of the basis of liability from retention to receipt meant that there was no scope for change of position to reduce liability. The only way it could be brought back is if the courts recognised it by judicial fiat. As Kremer put it, the defence's 'legitimacy could be attacked in that it appears to be the product of academia and not of the incrementalist approach of the common law, forged out

[138] *Baylis v Bishop of London* (n 65) 133 (Cozens-Hardy MR).

[139] *Bradford Corporation v Ferrand* (n 66).

[140] *Baylis v Bishop of London* (n 65) 137 (Farwell LJ).

[141] ibid 140 (Hamilton LJ).

on the anvil of real disputes on a case-by-case basis.'[142] The Court of Appeal in *Baylis* thought it would indeed be illegitimate to follow the invitation of counsel to do so. The House of Lords in *Lipkin Gorman* had fewer scruples.

The final case to contribute to the development of the implied contract theory is *Sinclair v Brougham*. In that case it was said that recovery was founded on a contract implied in law; no remedy could be given in cases where it was impossible to imply such a contract. This would be the case, as occurred in the case, where the defendant did not have the capacity to enter into such a contract; as such, MHR was not available. Whereas previously the fiction was used to get past a procedural hurdle (namely, allowing reliance on MHR); here it was given substantive effect.

The use of the language of implied contract can be explained by use of the fictional promise under the forms of action and also because of the influence of Roman law. Under Roman Law real contracts arose based on agreement and the delivery of a thing. In the case of loan of a specific asset the contract was called commodatum. If, however, the asset was a fungible one the contract was called mutuum. So, a loan of money was called a mutuum. Whilst commodatum required the return of the actual thing that was not the case under a mutuum (as the assets are fungible). The mutuum required both the delivery of the thing and an agreement. What if the latter was lacking? This was the case if the thing was delivered by mistake or without the consent of the owner. In such a case a relationship known as promutuum arose. This was a quasi-contract and one would recover under it using the condictio indebiti. Seen through the lens of Roman Law, that a mistaken payment of money was said to give rise to a quasi-contract or a contract implied in law makes perfect sense. Lord Dunedin's reference to pro-mutuum in *Sinclair v Brougham*[143] suggests that this was part of the explanation for the revival of implied contract.[144]

Having said that, it would be unfair to say that the House of Lords simply denied recovery because it was impossible to imply a contract. Rather, that decision is more likely to reflect certain policy reasons against awarding restitution. The point is this. If the depositors were allowed to recover using MHR, they could claim back the entire amount they had deposited. There being no change of position the building society would have been liable for the whole amount rather than

[142] Kremer (n 89) 116.

[143] 'And coming to the case of money, while mutuum was proper loan, pro-mutuum covered the cases where money was had and received without contract, and a special form of action for the common case of the payment of a supposed but non-existing debt was known as condictio indebiti. Now, the English law, having no quasi contracts, got over the difficulty in such cases as the action for money had and received by the fiction of a contract': *Sinclair v Brougham* (n 73) 432 (Lord Dunedin).

[144] See also 'the obligation arises *re* and not *consensu*': *Nash v Inman* [1908] 2 KB 1 (EWCA) 8 (Fletcher Moulton LJ).

what remained in its hands.[145] So their obligation under MHR would have been the same as it would have been under the loan contract between them and the depositors. As such, giving recovery under the action would amount to de facto enforcement of the loan contract which they had no capacity to enter into. In those circumstances it is understandable that the House of Lords did not want to give recovery. Indeed, this concern appears to have been the reasoning of their Lordships. For example, Lord Sumner said giving recovery would 'indirectly sanction ultra vires borrowing',[146] and Lord Parker added that it would 'in effect validate the transaction so far as it embodied a contract to repay the money lent.'[147] The point is not that their policy judgement was correct; one might very well disagree with it.[148] Rather, it is that their Lordships reached their decision on policy grounds[149] but used the language of implied contract to express it. Given Lord Sumner's remarks about palm tree justice in *Baylis v Bishop of London* it is not surprising that he did not want to explicitly deny recovery on policy grounds. A doctrinal concept was needed to express that conclusion. Fortunately for them, the use of contractual concepts in circumstances where there clearly was not a contract was a common device to control liability at the time. For example, in negligence claims courts used the notion of privity to deny recovery.[150] What was going on was a policy concern about excessive liability and the courts used 'privity' as a means of expressing that concern. It is quite telling that Lord Wright criticises contractual language in tort and unjust enrichment in the same breath.[151]

C. Conclusion

As was seen in Part II above, the normative basis for the recovery of money remained the same – it was proprietary – from the 18th Century until the mid 20th Century. The proprietary theory did

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145 On the authority of *Haugesund Kommune v Depfa ACS Bank* [2012] QB 549 (EWCA) even if the change of position defence were available it might not have been applicanle on those facts.

146 *Sinclair v Brougham* (n 73) 452 (Lord Sumner).

147 ibid 440 (Lord Parker).

148 E.g. E O'Dell, 'The Case That Fell to Earth: Sinclair v Brougham (1914)' in E O'Dell (ed), *Leading Cases of the Twentieth Century* (Sweet & Maxwell 2000) 44.

149 Lord Goff in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (UKHL) 688 thought that the decision came down to policy. See also Lobban's discussion of the infant lending cases decided around the same time as *Sinclair* for further evidence of policy based reasoning: Lobban (n 12) 61–66.

150 V Palmer, 'Why Privity Entered Tort-An Historical Reexamination of Winterbottom v. Wright' (1983) 27 The American Journal of Legal History 85.

151 Wright, 'Sinclair v Brougham' (n 85) 321; Lord Wright, 'The Study of Law' (1938) 54 Law Quarterly Review 185, 195–6.

become more refined through time. It started out with the judges saying that morally the money still belonged to the plaintiff and by the 20th Century was refined into a view that the plaintiff should have a remedy against the defendant which would put the plaintiff in the same position (vis-à-vis the defendant) that he would have been in had he still retained title (which he would have were it not for the special rules governing the passing of title to money).

This refinement in the normative basis coincided with a change in the analytical structure employed by the courts to decide cases. When the basis was articulated as the plaintiff still owns the money, it made sense that the courts used analytical structures equivalent to those that they used for the recovery of chattels where the plaintiff still retained title. The fact that with money the judges were concerned with moral ownership whereas with other chattels it was legal ownership, explains why the former was a fault-based claim whilst the latter was strict liability.

But when the normative basis was refined – from treating the plaintiff as if he still was the owner to putting the plaintiff in the position he would have been in had he still been the owner – then the tortious analytical structure would not work anymore. Hence, the courts, borrowing from Roman law learning, adopted a contractual analytical structure; one which treated the defendant not as someone wrongfully retaining the plaintiff's property but as the plaintiff's debtor. This contractual analytical structure was also used by the courts to deny recovery where it would be contrary to public policy to allow it.

IV. THE PROPRIETARY NATURE OF GOODS CLAIMS

If the normative basis for the recovery of money was a proprietary basis then one would expect it to be the case as well for goods. This hypothesis is defended in this Part. The only difference with money claims is that, once one scratches beneath the surface, claims for goods still retain a tortious analytical structure. Indeed, the requirements for a successful unjust enrichment claim for goods amount to a form of fault-based conversion claim, where it had to be shown that the defendant knew of the circumstances not entitling him to retain the goods.

A. From quantum valebant to unjust enrichment for goods

There are fewer historical cases dealing with goods than with money. The reason for that is simple: title to goods passes less easily than title to money. Hence, in cases of goods delivered due to a fundamental mistake, title would not pass and so recovery would be through trover or detinue rather than through quantum valebant. A search on Westlaw for 'quantum valebant' reveals 40 cases and 32 for 'quantum valebat'.

Rather, restitutionary claims for goods more typically happened within a contractual context. Before we begin, an important point must be made concerning quantum valebat. Like quantum meruit, it was an implied and not a special contract. As will be seen in Chapter 5, if the plaintiff pleaded quantum meruit or quantum valebat, the defendant could defeat the claim by showing that there was an express contract between the parties. This is because, 'no new contract can be implied from acts done under an express contract.'[152]

So, for example, in *Grousnell v Lamb*[153] the plaintiff had sold a machine to the defendant and was not paid for it. The contract provided that if the machine was defective the defendant would not be liable. The plaintiff was never paid nor was the machine returned. The plaintiff sued for quantum valebat. The court found that the machine was indeed defective but also found that it had not been returned to the plaintiff. Yet, the claim failed. There were two short judgements:

> Lord Abinger , C. B. Here the defendant shewed a special contract, on which the plaintiff had not declared, and having a condition annexed to it, which prevented the implied contract declared upon from arising.
>
> Parke , B. To entitle the plaintiff to any damages on the quantum valebat, he ought to have shewn some new implied contract, resulting from the defendant's conduct or dealing with the goods.[154]

As Lord Abinger put it, the failure of the suit was essentially procedural. The express contract prevented the plaintiff from relying on the fact he had sold and delivered the machine to imply a contract. This is because 'no new contract can be implied from acts done under an express contract.'[155] This does not mean that the plaintiff would have no remedy on such facts, but instead he had to plead different facts (i.e. the defendant's conduct or his dealing with the goods) in order to imply a new contract. However, he did not do so and so the claim failed.

Let us now consider the situations where quantum valebat was available. This will allow us to see what conduct of the defendant and what form of dealing with the goods is required for liability to be established.

Where the seller supplies a different quantity of goods the Sale of Goods Act 1893 section 30 provides that the buyer may reject it, but if he accepts the different quantity he must pay for it at the contract rate. The position at common law was the same. So, in *Shipton v Casson*[156] it was held that if the seller delivered a smaller quantity of goods than required and the buyer elected to retain

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[152] *Britain v Rossiter* (1879) 11 QBD 123 (EWCA) 127 (Brett LJ).

[153] *Grousnell v Lamb* (1836) 1 M & W 352, 150 ER 469.

[154] ibid.

[155] *Britain v Rossiter* (n 152) 127 (Brett LJ). For the precise meaning of this dictum see Chapter 5 Section II.A.4

[156] (1826) 5 B & C 378, 108 ER 141.

it, then he was bound to pay for those goods on a pro-rata basis. Similarly, in *Oxendale v Wetherell*[157] there was an entire contract to deliver 250 bushels of wheat, but the seller only delivered 130. After the expiration of the date on which the seller was meant to have transferred the whole 250, the seller sued for the price of the 130. The defendant pleaded that there was an express contract for 250 and that the obligation was entire. The court accepted that, but held that by retaining the 130 he was bound to pay for them.

This is consistent with *Grounsell v Lamb* because the act of not returning the goods amounts to a new dealing with them from which a new contract could be implied. As such, unlike in *Grounsell v Lamb*, the plaintiff was not relying on 'acts done under an express contract' to imply a new obligation to pay. Instead he is simply saying: 'I delivered 130 bushels of wheat for 8s a bushel to the defendant and he accepted them, so he has to pay that price'.

The position was the same where the buyer of the goods terminated the contract for breach. In such a case, the seller had the right 'to sue for the fair value of the goods which had been delivered and kept.'[158]

Where the contract was illegal the position appears somewhat less clear. At the time trading on Sunday was illegal.[159] So, if a sale was conducted on Sunday the contract was void, although title did pass by delivery.[160] Could the buyer sue for a quantum valebant by showing that the defendant retained the goods? The position appears to be no. In *Williams v Paul*[161] the defendant had not only retained the goods but made a subsequent explicit promise, not on the Sunday, to pay for them. It was held that the seller could recover a quantum valebant. Parke J was concerned that 'it may have a tendency to defeat the statute', but allowed the claim because of the subsequent promise of the defendant and, as such, his present refusal [to pay for them] 'is not consistent with the practice of a very sincere Christian.'[162] This was subsequently doubted in *Simpson v Nichols*.[163] Even if *Williams v Paul* is correct it is clear that there will not be recovery based on retention of the goods alone. The reason for this is obvious: it would have stultified the operation of the statute. This, however, does not detract from the point that retention of the goods will found a non-contractual quantum valebant claim. As Parke J put it:

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[157] (1829) 9 B & C 386, 109 ER 143.

[158] *Bartholomew v Markwick* (1864) 15 CBR 711, 143 ER 964 [716] (Erie CJ).

[159] 29 Car. 2, c. 7.

[160] *Note to the case of Simpson v Nichols* (1840) 5 M & W 702, 151 ER 298; see also *Singh v Ali* [1960] AC 167 (PC).

[161] (1830) 6 Bing 653, 130 ER 1433.

[162] ibid 655 (Parke B).

[163] (1838) 3 M & W 240, 150 ER 1132; see also *Note to the case of Simpson v Nichols* (n 160).

> In some cases, a special contract, not executed, may give rise to a claim in the nature of a quantum meruit, ex. gr., where a special contract has been made for goods, and goods sent, not according to the contract, are retained by the party, there a claim for the value on a quantum valebant may be supported, but then, from the circumstances, a new contract may be implied.[164]

Similarly, in *Weatherby v Bonham*[165] the deceased had subscribed to magazines from the plaintiff. After the deceased died the plaintiff, unaware of the death, continued to send the magazines to his address which was now occupied by the defendant. The defendant used the magazines and never offered to return them. It was held that the plaintiff could recover the value of the magazines.

Importantly, it would appear that if the goods have been consumed in good faith there would be no liability. So, in *Boulton v Jones*[166] the defendant ordered goods from a company with whom they had a right to set off. Unfortunately, the business had been transferred to the plaintiff with whom the defendant did not have the right to set off. So, there was no contract between the parties. The goods had been consumed before the defendant found out about the different identity of the supplier and so was not liable. This is confirmed by the 1863 edition of Bullen and Leake.[167]

My thesis is that a non-contractual claim to recover the value of goods provided is available where the defendant retains the goods knowing that he was not meant to have had them. In that sense it operated as a form of fault-based conversion. This is consistent with the 19th Century case law and the contemporary case law, to which we now turn, confirms this.

There have not been many cases since 1999 dealing with unjust enrichment where the benefit consists of goods. From the few cases we have it seems that, unlike money, goods can be 'subjectively devalued' and that such 'subjective devaluation' can be overridden by showing one of the familiar factors, namely: request, free acceptance, benefit realised in money, and perhaps benefit realisable in money. In addition, in one of the few cases dealing with goods, the Court of Appeal discovered an additional factor overriding subjective devaluation. In *Cressman v Coys of Kensington*[168]

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[164] *Read v Rann* (1830) 10 B & C 438, 109 ER 513.

[165] (1832) 5 C & P 228, 172 ER 950.

[166] (1857) 2 H & N 564, 157 ER 232.

[167] 'Contracts of sale sometimes arise from the mere acceptance by the defendant of goods delivered by the plaintiff for the purpose of sale, and the value may be recovered by this count. (See *Hart v Mills*, 15 M &W 87). In such a case the defendant must have some option in accepting or returning the goods and becoming bound to the plaintiff to pay for them, otherwise he cannot be held liable, as no contract or privity can be implied. Thus, where the defendant ordered goods of one person, and the plaintiff a different person, sent the goods, and the defendant consumed the goods before he had notice that they belonged to the plaintiff, it was held that he was not liable to the plaintiff for the price, because not having any option of returning the goods to the plaintiff he did not enter into any contract with him.': E Bullen and SM Leake, *Precedents of Pleadings* (2nd edn, V & R Stevens, Sons, and Haynes 1863) 31.

[168] *Cressman and another v Coys of Kensington (Sales) Ltd (McDonald, Part 20 defendant)* [2004] EWCA Civ 47, [2004] 1 WLR 2775.

Mance LJ said that the recipient of a benefit would be treated as enriched 'if [the benefit] is readily returnable without substantial difficulty or detriment and he chooses to retain it (or give it away to a third party) rather than to retransfer it on request.'[169] In a typical case of a mistaken transfer of goods there would be no request or free acceptance, nor would the benefit have been realised in money. As such this 'readily returnable benefit' ground will be the most common one. As was argued in the section on subjective devaluation in Chapter 2,[170] this, in effect, means that it will be necessary to show the good is readily returnable and that the defendant refused to return it in order to get a claim in unjust enrichment. Hence, the position is the same as it was in the 19th century. To illuminate this proprietary basis a comparison with conversion is required.

B. A comparison with conversion

1. Two lessons from conversion

To start with, consider a case where title has not passed but possession has. C remains the legal owner. When will D be liable for the tort of conversion? It is not sufficient for C to show that he is the owner of the chattel or that he has an immediate right to possession. Instead, C must show that D has committed a converting act. That is an act relating to the chattel which amounts to a usurpation of the owner's rights.[171] In some cases this will be use or sale of the chattel, but not always. There might be cases where D has not actually done anything with the chattels. For example, in *Miller v Jackson* if the homeowner had merely left the cricket balls in his garden there would be no conversion.[172] In such cases, for C to recover he must make a demand and D must unreasonably refuse the demand.[173] That there had been no demand is the reason why the claim failed in *Clayton v Le Roy*.[174]

Furthermore, the refusal must be unreasonable. This is an important point. If C demands his property back and asks D to deliver it to him and D refuses to do so, there will be no liability since D's refusal is not unreasonable.[175] However, D is bound to let C come collect his goods.[176] In

[169] ibid [37].

[170] Chapter 2 section III.A.1.

[171] *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883 [39] (Lord Nicholls).

[172] *Miller v Jackson* [1977] QB 966 (EWCA) 978 (Lord Denning).

[173] *Barclays Mercantile Business Finance Ltd v Sibec Developments Ltd* [1992] 1 WLR 1253 (Ch) 1258 (Millet J).

[174] [1911] 2 KB 1031 (EWCA).

[175] *Capital Finance Co Ltd v Bray* [1964] 1 WLR 323 (EWCA).

[176] *Howard E Perry & Co Ltd v British Railways Board* [1980] 1 WLR 1375 (Ch).

addition, for the purposes of the Limitation Act time only starts to run from the moment of the refusal.[177]

As Robin Hickey[178] has argued, this shows that property rights are not a sufficient basis for creating liability: 'Property is not a causative event.'[179] Rather, what is required is a wrong. This is a beneficial conclusion. As Hickey argues, requiring a wrong provides a single point at which the cause of action will accrue. It also accounts for the fact that it would be unfair for the defendant to bear the costs of reuniting the good to its owner. Finally, there might be uncertainty about who the actual owner is and a recipient might want to make enquiries. This is a good thing and by making liability based on wrongdoing rather than mere receipt, the law preserves the possibility that this will be done.[180] If, in the tort of conversion, receipt of goods which C has title to is not a causative event, it is difficult to see why it should be the case in unjust enrichment (where C no longer has title). This point will be further developed in Section 2.a) below.

There is another lesson worth drawing out from the conversion story. If after receiving a demand and refusing it, D decides to pay the market value of the goods to C. he would have discharged his liability, i.e. he was liable but following his payment he is no longer. If, however, on receiving the demand D decides to hand the goods over, this is not a discharge of his liability. Rather, it is an action which precludes his liability from ever arising. This is an important difference and I will argue that the position is – notwithstanding the orthodoxy – the same in unjust enrichment.

2. A look at unjust enrichment

a) Similarity with conversion – request required

As in the case of conversion, unjust enrichment also requires showing a request coupled with an unreasonable refusal. Suppose C mistakenly transfers his car to D. Title passes. What should C do to recover in unjust enrichment?

There has been an objective enrichment. D can try to subjectively devalue the enrichment. What does C have to do to override the subjective devaluation? There was no request or free

[177] *Schwarzschild v Harrods Ltd* [2008] EWHC 521. Technically this was a case brought under a statutory form of conversion (conversion by bailee) under Torts (Interference with Goods) Act 1977 s 2(2). But as R Hickey, 'Wrongs and the Protection of Personal Property' [2011] Conveyancer and Property Lawyer 48 argues, there is no reason why it should not apply to conversion in general.

[178] Hickey (n 177).

[179] ibid 56.

[180] ibid 56–57.

acceptance. The benefit has not been realised in money nor was it necessary. The only overriding factor C can rely on is the so called 'readily returnable benefit' ground. Assuming this can be shown, the enrichment was at the expense of C and there is an unjust factor. So, C has a claim.

Now, what does 'readily returnable' require? The ground was 'discovered' in *Cressman v Coys of Kensington*[181] by Mance LJ. He said that D would be treated as enriched 'if [the benefit] is readily returnable without substantial difficulty or detriment and he chooses to retain it (or give it away to a third party) rather than to retransfer it on request'.[182] It is clear from this that a request is required as it is in the case of conversion. Furthermore, not every refusal will lead to liability. In conversion, only unreasonable refusals will lead to liability. In practice this means, as we have seen above, that the defendant is not required to incur any substantial costs (e.g. by delivering) in giving the benefit back. The position is the same in unjust enrichment. If D refuses to retransfer on the ground that this would raise substantial difficulty or detriment, then he is not liable. So, in this case if Mr McDonald had refused to give back the mark on account of the fact he did not want to pay the transfer fee he would probably have won. Mance LJ almost suggested as much when he said that 'Coys would no doubt have been only too pleased to resolve the matter by meeting any retransfer costs, and Mr McDonald would have received instead from the DVLA the age-related mark which he had expected.'[183]

b) Delivery of the good prevents liability from arising – same as in conversion

One might think that tendering the good back would discharge the liability in unjust enrichment, but that view is incorrect. I will argue that in unjust enrichment, delivery of the good does not *discharge* liability but instead *prevents* liability from arising. I will do so in three steps. First, I will show that, bar exceptional circumstances, D is only ever liable for the value of the good at the time of trial (i.e liability fully crystallises at the time of trial). Secondly, since such liability is a duty to pay money, tendering the actual good will not extinguish the liability (unless the claimant accepts the good in lieu of money). But thirdly, if prior to liability having crystallised the defendant tenders the goods back then liability does not actually arise.

Suppose C mistakenly transfers his car to D. At the time of transfer the car is worth £10k. At the time of trial, the value of the car has gone down to £8k. The decrease in value is simply due to the fact it is no longer brand new. Analysing this claim according to the orthodox approach, there is an objective enrichment of £10k. Since the benefit is readily returnable it cannot be

[181] *Cressman v Coys* (n 168).

[182] ibid [37].

[183] ibid [25].

subjectively devalued. The enrichment was at C's expense and it was unjust since C was mistaken. Since (says the orthodoxy) the cause of action arises on receipt, D is liable for £10k. However, he has a defence of change of position; more precisely the loss of benefit version of change of position. Since the value has gone down by £2k, D has changed his position to the extent of £2k and so he is only liable for £8k. So, if D was to give the car back he would not be liable any further.

Note that on those facts it does not matter when D became aware of the mistake. Even if he knew straight away the defence is still available to him. As Elise Bant has argued, there is no reason why bad faith has anything to do with independent change of position.[184] This is because the reduction of value of the property (the change of position) was not done in bad faith. Rather, it happened independently of him. To put it another way, even if D had returned the car three months earlier when it was worth £10k it would still now be only worth £8k. So, C is not at a disadvantage if D has the defence, even when he knew of the defect. Of course, it might be the case that (knowing it was not his) D did not take good care of it. In such a case the issue is whether D's fault bars the defence of change of position.[185]

So, the point is, under the orthodox approach to unjust enrichment, D is only ever liable for the value of the good at the time of trial. However, this means that D cannot discharge his liability by giving the good back because what he is liable for is money and not return of the good. When one has a duty to pay cash and instead one wants to pay in kind the creditor is perfectly entitled to insist on payment in cash.

So, if we can show that by offering to give the good back D can ensure that he is not liable this would mean that the offer to give the good back would prevent liability from arising (since the alternative, that it discharges liability, is false). I will show this now. Consider *Cressman v Coys of Kensington* again. What would have happened if D had offered to give the mark back?

Let us analyse the claim according to orthodoxy. There is an objective enrichment. D would try to subjectively devalue by saying he does not want it and offers to give it back. This would be successful in defeating enrichment. Could C override the subjective devaluation by arguing that the good is readily returnable? Not so, since D has offered to give it back. 'Readily returnable' requires that D refused C's request by retaining the good. This is not the case here. So, C cannot override subjective devaluation. This means that D is not enriched, and so C's claim would fail. So, it follows from this that D's offer to make available (or to return) the good would prevent liability from occurring, because in such a case the offer means that the test for enrichment is not met. Similarly, to the case of conversion, this action does not discharge liability but rather prevents it from ever arising.

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[184] E Bant, *The Change of Position Defence* (Hart Publishing UK 2009) 147.

[185] ibid 187–191.

c) A hard case

Let us now consider the harder case alluded to above. C transfers his car to D by mistake. Later on, D discovers the mistake. D fails to take reasonable care of the car (after finding out the mistake) and as a result the car is damaged. At the time of transfer, it was worth £10k. When the mistake was discovered it was worth £9k, and after the damage it is worth £5k.

First, assume title did not pass (it was a fundamental mistake). How would liability in conversion work? If the demand and refusal happened before the incident, then D is liable for the value of the car at that date. He bears the risk of any subsequent fall in value whether it arose naturally or was caused by his negligence.

But, instead, suppose that the demand and refusal happened after the incident. Here it seems that his liability in conversion will be the value of the car at the time of the refusal: i.e. £5k. However, it might be the case that the incident in question itself amounts to a converting act. Conversion requires a deliberate act,[186] so negligence will not do. Even then damage to the good will only amount to conversion if it was done with intent to exercise dominium.[187] However, in cases of deliberate damage falling short of conversion D will still be liable in trespass to goods.

In cases where there is mere negligence by D he will still be liable on the basis that he is a bailee. For him to become a bailee he has to know of the true owner[188] and must have accepted the goods.[189] If this were the case then he would be liable for £5k in conversion and for the remaining £4k in bailment.

How would unjust enrichment deal with such a case? If demand and refusal happen before the incident, what is the situation? The starting point is the objective value at the moment of receipt. D would seek to subjectively devalue it but this would fail because of the demand and refusal. The value therefore remains £9k. The enrichment was at C's expense and was unjust. D would then seek to rely on the defence of change of position. For the reduction of value from £10k to £9k there is no difficulty. Can he succeed for the reduction of value to £5k? There is no English authority on this point but according to Birks[190] and Bant[191] a New Zealand and an Australian case support the proposition that D cannot rely on the defence if, knowing he was not entitled to the

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[186] *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* (n 171) [39] (Lord Nicholls).

[187] *Simmons v Lillystone* (1853) 8 Ex 431, 155 ER 1417– cutting logs in two is not conversion unless it is shown that it was done with intent to exercise dominium.

[188] *Marcq v Christie Manson & Woods Ltd (Trading As Christie's)* [2003] EWCA Civ 731, [2004] QB 286.

[189] *Lethbridge v Phillips* (1819) 2 Stark 544, 171 ER 731.

[190] P Birks, 'A Bank's Mistaken Payments: Two Recent Cases and Their Implications' (2000) 6 New Zealand Business Law Quarterly 155.

[191] Bant (n 184) 189.

receipt, he fails to take reasonable care. Bant does add one caveat: this will only be the case if D has accepted the receipt.[192] If this is true then the position is exactly the same as for bailment. If it is true that D's negligence bars his reliance on the change of position defence, then the position is very similar to that in conversion with one difference: in conversion D takes the risk of natural falls in value, whereas in unjust enrichment it is borne by C.

Now, consider the case where the demand and refusal happened after the incident. Again, the starting point is the value at the moment of receipt: £10k. Subjective devaluation fails because of the refusal to return. D will want to rely on the change of position defence. He can do so for the natural fall in value to £9k but not for the change due to the incident because of his negligence. The position is the same as in tort (where the same result is achieved by combining conversion and bailment).[193]

C. Conclusion

We saw that both in the old law and in the new there are a lot of similarities between unjust enrichment and claims to recover property (conversion). In a case of a mistaken transfer of a chattel, C will be able to recover the value of the chattel. Whether C still has title will make little difference to his claim. In both cases:

- He will need to make a demand and D must unreasonably refuse to make it available for him.
- The amount he will recover will typically be the value of the chattel at the time of refusal.

[192] ibid.

[193] There is, however, an even harder case. The demand happens also after the incident, but this times D acquiesces to it and returns the car. Now in the tort case this means that there is no liability in conversion. However, C gets his car back which is now worth £5k and he has a claim in bailment for the £4k loss suffered due to D's negligence. Overall his position is the same as in the case where D would not have returned the property. However, the position in unjust enrichment is more complicated. Again, the starting point is a £10k valuation. However, I said above that by offering to return the good D can prevent a claim in unjust enrichment from arising. If this is true here, then C only gets back £5k. He is £4k worse off than if he sued in tort or if D had refused to return the car (and C sued in unjust enrichment). Could C make up the difference by suing for negligence or bailment? No: bailment can arise on those facts since C does not have legal title. As for negligence, the duty of care in question would be one to prevent pure economic loss (since C does not have legal title) and this case is far removed from the limited range of cases where such a duty will be found. Is this a defensible outcome? I think so. It makes sense that C is in a slightly worse off position in this case. He, after all, no longer has legal title and so we would expect him to have less legal protection.

- D can prevent liability from occurring by making the chattel available to C.

The only difference is that:

- Where C retains title, D is liable even though he does not know that he is not the true owner, whereas where D acquires title he must be informed that he is not the true owner before he can be liable

Such similarities between the conversion and the unjust enrichment claims cannot be a coincidence. Yet, according to the orthodox interpretation of the law, the claim where title has not passed is considered to be radically different from the claim where title has passed. The former is based on the commission of a wrong and arises when that wrong is committed. The latter is a strict liability claim not based on wrongdoing and the duty arises on receipt. The orthodox interpretation makes the two claims seem as if they were miles apart.

Yet there is very little difference in the fact pattern leading to the two claims. In the former the mistake was fundamental and in the latter it was not. Furthermore, the same facts need to be shown for the claim to succeed and the remedies are very similar. An interpretation of the law that took account of those similarities would better fit the law. Can a common principle explaining recovery in both of those instances be found? I believe so.

Both when the title passes and when it does not, the wrongful event is the refusal to give it back. In the case where C has title, the refusal is wrongful because it fails to respect the property rights of C. Can the refusal also be a wrongful act in cases where title has passed? I believe so. What makes it wrongful in such a case? It is the fact that D retains something which he is not meant to have. If things had gone according to plan the chattel would not be with D but with C (or with someone else). In other words, the property principle explains in both cases why the defendant must not retain the asset in question. This provides further support for the view that it is the property principle which underpins the recovery of money and goods in unjust enrichment.

V. TAKING STOCK: IMPLIED CONTRACT, UNJUST ENRICHMENT AND PROPERTY

A. Unjust enrichment, aequo et bono and property

There has been a tendency to equate Lord Mansfield's invocation of 'ex aequo et bono' as being 'unjust enrichment' in embryonic form.[194] Unless, we take 'unjust enrichment' to mean no more than that which 'in equity and good conscience the defendant ought to do' (in which case the label is so vague that it is uninformative), this is not the case.[195] All that Lord Mansfield says is that ties of natural justice oblige one to return the money. He does not articulate an idea that this is based on unjustly receiving or retaining the benefit.

Instead, the first formulation of the idea by Lord Mansfield is probably found in *Hambly v Trott*. Lord Mansfield saw trover not merely as an action to compensate for the losses due to interference with chattels, but also as an action to prevent unjust enrichment:

> In substance, trover is an action of property. If a man receives the property of another, his fortune ought to answer it…. if no other action could be brought against the executor, it seems unjust and inconvenient, that the testator's assets should not be liable for the value of what belonged to another man, which the testator had reaped the benefit of.[196]

He confined the reach of the maxim to instances where the 'offender acquires no gain to himself at the expence of the sufferer'[197] but where

> besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall.[198]

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[194] E.g. Fifoot (n 36) 245; Virgo (n 4) 45; Burrows (n 4) 3; R Goff and G Jones, *The Law of Restitution* (1st edn, Sweet & Maxwell 1966) 12.

[195] W Swain, 'Moses v Macferlan (1760)' in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart Publishing 2006) 36.

[196] *Hambly v Trott* (n 38) [371] (Lord Mansfield).

[197] ibid [376] (Lord Mansfield).

[198] ibid (Lord Mansfield).

Over 100 years later this was reaffirmed by the Court of Appeal in *Phillips v Homfray*.[199] However, Bowen and Cotton LLJ confined the principle to instances where the benefit consisted of the property or the proceeds thereof wrongfully appropriated by the deceased. By contrast Pearson J in the High Court and Baggallay LJ dissenting in the Court of Appeal thought that the principle should cover all instances where there was a benefit arising out of the wrongful act. So Baggallay LJ held that savings of expenditure would also fall within the unjust enrichment exception to the *actio personalis moritur cum persona* maxim.[200]

One point that is telling is that unjust enrichment is seen as flowing from property. That is, unjust enrichment is not in itself a source of rights. It is the property that gives the right to recover. The sole role of unjust enrichment is providing an exception to the rule that action dies with the defendant. Hence, unjust enrichment is derivative. This is different from unjust enrichment under the Birksian formula, where it is the source of the rights to get the value back.

In his 1802 essay, William Evans, after having explained that the basis of MHR was the retention of property, quoted the maxim from the Digest that 'it is naturally just that one man shall not be enriched to the detriment of the other.'[201] That statement alone is ambiguous as to which form of UE it refers to. As it is, in Roman law, it was not a source of obligation and there was no general enrichment action.[202] However, given his statement about the proprietary foundation of the action, it is likely that he had a derivative idea of unjust enrichment in mind. It is the property rights in the money which makes it unjust not to return the money. If the law did not afford a remedy, then the defendant would be able to unjustly enrich himself. The injustice coming from the fact that the money was not his.

This derivative idea of unjust enrichment founded on property appears to be what Lord Dunedin had in mind in *Sinclair v Brougham* where he referred to 'the higher equity that no one has a right to keep either property or the proceeds of property which does not belong to him.'[203] At several points in his lecture on *Sinclair v Brougham*, Lord Wright refers to unjust enrichment as being based on property.[204] He refers to the traceable possession of the plaintiff's property or proceeds thereof as 'in other words, simply unjust enrichment.'[205] As he put it, 'the basis of the doctrine of

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[199] *Phillips v Homfray (No 2)* (1883) 24 Ch D 439 (CA).

[200] ibid 471.

[201] D.50.17.206 (Pomponius).

[202] J Hallebeek, *The Concept of Unjust Enrichment in Late Scholasticism* (Gerard Noodt Instituut 1996) 1.

[203] *Sinclair v Brougham* (n 73) 436 (Lord Dunedin), see also 'Now I think it is clear that all ideas of natural justice are against allowing A. to keep the property of B., which has somehow got into A.'s possession without any intention on the part of B. to make a gift to A': ibid 431.

[204] Wright, 'Sinclair v Brougham' (n 85) 309, 320, 324.

[205] ibid 312.

unjust enrichment is, as has been so often stated here, that the defendant has received some property of the plaintiff or received some benefit from the plaintiff, for which it is just (as shown in the precedents) that he would make restitution.'[206] It is true that Lord Wright suspected that not all of unjust enrichment was reducible to property:

> The property concept obviously would apply to the great mass of cases of restitution, but would not cover that important category of cases where a defendant is enriched (or advantaged) because the plaintiff under legal compulsion has paid in money or chattels or other property a debt, or has discharged a liability, which is properly the debt or liability of the defendant. The defendant has thus been enriched because his liabilities have been decreased and it would be unjust that the burdens should be left on the plaintiff.[207]

However, he then wavered and wondered whether it could all be explained by the property concept on the basis that when a debt was discharged the proceeds of the money used to discharge it is the debt.[208] That question is largely irrelevant here, but it supports the view of this Thesis that there are two principles – Property and Benefit-Burden – which work with a derivative conception of unjust enrichment. The point is that Lord Wright did not conceive unjust enrichment as a standalone source of rights. Rather, the enrichment was unjust because it was the property of another. In the case of discharge of debts what would make the enrichment unjust would be something else (which he did not address).

That Lord Wright had the derivative concept of unjust enrichment in mind can be confirmed by looking at his review of Seavey and Scott's Restatement, where he states: 'Restitution [is concerned with] remedies for what, if not remedied would constitute an unjust benefit or advantage to the defendant at the expense of the plaintiff' and 'It is the unjust retention of what should be restored to the plaintiff which constitutes the relationship on which the remedy is based.'[209] In that second sentence, Lord Wright makes it clear that the duty to restore arises prior to the unjust retention; the retention is unjust because there is a duty to restore. By contrast, with Birk's conception of unjust enrichment it would be the unjust enrichment/retention which give rise to the duty to return. Therefore, the conception of unjust enrichment that Lord Wright had in mind is a derivative one and not the standalone one defended by Birks.

If unjust enrichment is seen as derivative of property, then the role played by Lord Mansfield's ex aequo et bono is to expand the types of ownership which count for the purposes of derivative unjust enrichment. So, there will be an unjust enrichment not just when the defendant

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[206] ibid 321.

[207] ibid 313.

[208] ibid see also 320.

[209] Lord Wright, 'Review' (1937) 51 Harvard Law Review 369, 370.

retains property legally belonging to the plaintiff, but also where he retains property which morally (ex aequo et bono) belongs to the plaintiff. That moral ownership right means that there is a moral duty to return the property. Keeping it (i.e. unjustly enriching oneself) would be a moral wrong. When in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour* Lord Wright says that:

> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep.[210]

He means that any civilised legal system must give a remedy for that wrong, although the underlying right (the ownership in the money) is one which the law itself does not recognise.[211] If the law did not do that it would be '[allowing] a fragrant moral injustice to be committed with impunity'[212] and be like allowing the Pharisee to say Corban.[213]

Lord Denning also shared the view that unjust enrichment was derivative from property rights, including moral ones. In an essay on the recovery of money he explained that 'the action at law for money had and received was in fact a remedy for unjust enrichment. Its basis was the fact that the defendant received money which in justice and equity belonged to the plaintiff.'[214]

The civilian and theological learning on unjust enrichment also supports that view. The concept fully came to life under the impulse of the late scholastics of the School of Salamanca. Unjust enrichment was linked to Aquinas' idea of *restitutio ratione rei* – that is the duty to restore based on having something that belongs (not just in a legal sense) to someone else.[215] Theologians did not particularly care whether the legal ownership in the thing remained, but for the lawyers this was absolutely crucial. So, the matter was resolved as follows. When the thing itself was still in the possession of the defendant (and the plaintiff still had legal title to it) then restitutio ratione rei would be effected via the real actions, such as the vindicatio. But when the thing had disappeared or where legal title no longer existed, it was the enrichment actions that did the work for securing recovery.[216] Hence, unjust enrichment was derivative from property. This can be seen clearly in Grotius, who was heavily influenced by the late scholastics, where he said that: 'Obligation from

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[210] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (UKHL) 61 (Lord Wright).

[211] C.f. *Steuerwald v Richter* (n 71) ('the primary right is a creation of equity, the right to enforce it is a legal right the same as in case of any other legal obligation') .

[212] Lindley (n 8) 33.

[213] See above Section II.D.

[214] AT Denning, 'The Recovery of Money' (1949) 65 Law Quarterly Review 37, 48.

[215] Hallebeek (n 202) 48.

[216] ibid 84.

enrichment arises when someone without legal title derives or may derive advantage from another person's property.'[217]

This manner of looking at the relationship between unjust enrichment and property is quite different from the modern approach. Under that approach, unjust enrichment and property are either two separate events triggering restitution,[218] or the property rights are a remedy for unjust enrichment.[219] Neither of the two modern approaches gives a satisfactory analysis of *Lipkin Gorman*. In that case the House of Lords carried out a tracing exercise to show that the plaintiff's money ended up in the defendant's hand and so awarded MHR. This is also the case where the principle of unjust enrichment was first recognised in English law. According to Virgo's view the case was all about the vindication of property rights and the judges were just confused when talking about unjust enrichment.[220] According to Burrows this was a case where a personal proprietary remedy was awarded because of the rights created by unjust enrichment,[221] notwithstanding the fact that the court did not engage in any unjust enrichment analysis. However, under the historical analysis of unjust enrichment there is no difficulty. The defendant was liable because he had received property belonging to the plaintiff and because of this property right the enrichment of the defendant would be unjust and, hence, the law affords a remedy to the plaintiff.

B. Implied contract and unjust enrichment: talking past each other?

Most modern authors treat the implied contract theory as being opposed to unjust enrichment (or more specifically opposed to *aequo et bono*).[222] But this is not the case. As Jackson put it:

> The *aequum et bonum* theory was not the basis of the action but the basis for deciding when the law will imply a contract. Adopting the language used by Salmon for describing sources of law we can say that *aequum et bonum* was the material source of the obligation, but that the formal source was a contract implied in law.[223]

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[217] Grotius, *Inleydinge tot de Hollandsche Rechtsgeleertheid* III.30.1-2 cited in H Scott, "'South Africa" in "Reflections on the Restitution Revolution"' in S Worthington, A Robertson and G Virgo (eds), *Revolution and Evolution in Private Law* (Hart Publishing 2018) 211.

[218] Virgo (n 4) 7–17.

[219] Burrows (n 4) 169–73.

[220] Virgo (n 4) 13–14.

[221] Burrows (n 4) 128–31, 185–9.

[222] Virgo (n 4) 38–45; Burrows (n 4) 28; Mitchell, Mitchell and Watterson (n 127) paras 1–06.

[223] RM Jackson, *A History of Quasi-Contract* (Cambridge University Press 1936) 119.

It is this distinction I have tried to track with the difference between the normative basis of the law and the analytical structure used to give effect to it.[224] When Lord Sumner started his 'attack' on *Moses v Macferlan* in *Baylis v Bishop of London*, he was concerned with the suggestion of deciding the case based on first principles. It is likely that Lord Sumner's reaction was a backlash against the wide use of equitable weighing up by courts in deciding such matters.[225] But nowhere in *Baylis*, *Sinclair* or subsequent cases was there any attempt to deny that Lord Mansfield's theory was the normative basis for the action. Indeed, Lord Dunedin in *Sinclair* explicitly said that the fiction of a contract was English law's way of working out 'the higher equity that no one has a right to keep either property or the proceeds of property which does not belong to him.'[226] Furthermore, as we have seen above, in *Sinclair*, *Jones v Warring* and *Norwich Union v Price* their Lordships, including Lord Sumner, tried to give further content to Lord Mansfield's proprietary theory. And in *Norwich Union* the theory was used, along with the precedents, to expend recovery from liability mistakes to all fundamental mistakes. Lord Wright was correct when he concluded that there was no real conflict between *Sinclair v Brougham* and *Moses v Macferlan*.[227] It is true that Lord Wright went further and argued for the recognition of unjust enrichment, not just as a normative principle, but also as a separate doctrinal concept. He opposed *Sinclair v Brougham* and faced the wrath of the traditionalists, especially Holdsworth,[228] but he eventually prevailed. But none of the defenders of the implied contract theory actually criticised the use of unjust enrichment as the normative basis of the action. The apparent opposition between unjust enrichment and implied contract comes from the failure to distinguish between the normative and the analytical.

VI. CONCLUSION

This Chapter set out to answer two questions: historically (1) what was the normative basis for recovery of a mistaken payment and (2) what analytical tools were used to obtain such recovery? A review of the cases and commentary in England and in other common law jurisdictions reveals

[224] See also Baloch's distinction between contract as a source of rights and as a method of classification. As he points out lawyers reasoning in terms of implied contract meant contract in the latter sense. This is why Lord Mansfield in *Moses v Macferlan* could give ex aequo et bono as the foundation whilst still using the language of implied contract: Baloch (n 6) 10–13.

[225] See the cases collected by Lobban (n 12) 54–58.

[226] *Sinclair v Brougham* (n 73) 436 (Lord Dunedin), see also ibid 432–3 (Lord Dunedin).

[227] Wright, 'Sinclair v Brougham' (n 85).

[228] WS Holdsworth, 'Unjustifiable Enrichment' (1939) 55 Law Quarterly Review 37.

that at least since *Moses v Macferlan* the normative basis was that the money belongs ex aequo et bono to the plaintiff, meaning that morally the money belonged to the plaintiff even though legal title had passed. Hence, the defendant was under a moral duty to return the money and courts would compel the defendant to fulfil that duty. The reason the courts had to use this basis rather than simply saying that legal title was retained was because this would affect the free flow of money. Legal title had to pass but as between the plaintiff and defendant there was no reason not to treat the plaintiff as still being the owner, as would have been the case had it been chattels rather than money.

We see this understanding of the normative basis of the law from Lord Mansfield's judgement in *Moses v Macferlan* and from commentators in the 1950s such as Munkman and Denning. That view was shared both by those seen as the greatest opponents of unjust enrichment, such as Lord Sumner, and its greatest defenders, such as Lord Wright. It is undoubtedly true that the law changed a lot during that time, but it is not the normative basis that changed. Instead it is the concepts used by the courts to secure recovery. Once the law started moving away from classification based on the forms of actions, the proprietary notions which formed the basis of the action lead to the law taking a more wrong-based, remedial turn. There was a duty to return the money and failing to do so would be a wrong which the law would sanction.

However, the wide moral language used in the cases lead to some courts deciding cases based on what the judges perceived as being fair. There was a backlash against this in the early 20th Century. This consisted in removing the moral language from the adjudicatory principles used by the courts and contractual concepts would be used to control the scope of the action. However, this was not a rejection of the proprietary normative basis of the action. It was refined and re-affirmed.

Unjust enrichment initially appeared as a principle to differentiate property claims that were based on loss from those that were based on gain. Lord Dunedin and Lord Wright then used it as an additional premise in the justification for imposing liability. Since it is unjust for a man to enrich himself from the property of someone else, the law will give a remedy when someone is enriched from the money which, morally, belongs to someone else. Unjust enrichment was part of the normative justification and did not operate as a standalone principle. As was seen in Chapter 2, Birks in 1985 introduced a different notion of unjust enrichment. It would operate as a standalone source of legal rights and it would not have any moral foundations.[229] Unjust enrichment moved from being a normative principle to become an analytical tool. This was a wrong turning.

[229] P Birks, *An Introduction to the Law of Restitution* (Oxford University Press 1985) 99.

CHAPTER 4: UNREQUESTED NON-RETURNABLE BENEFITS

I. INTRODUCTION

This chapter concerns the recovery of non-returnable benefits which have not been requested or freely accepted. This means that money and goods are not within the scope of this chapter, nor are services which have been requested or freely accepted. As was explained in previous chapters, recovery of money and goods (insofar as they are returnable) can be explained by reference to the Property Principle. Where the benefit had been requested or freely accepted, it was argued in the previous chapter that this could be explained in terms of not letting the defendant have two things which he accepted were mutually exclusive. This now leaves us with non-money/goods benefits that have not been requested or freely accepted. This mostly concerns the performance of the legal obligations of another, the unrequested provision of necessary services and instances where work done has the consequence of unlocking value.

II. WHAT IS THE LAW?

A. Unjust Enrichment Orthodoxies and Generalisations

Under the Birksian Unjust Enrichment structure there are three (and potentially four, if we count benefits realisable in money) situations where an unrequested non-returnable benefit would amount to an enrichment: (i) if it had the effect of discharging D's legal obligation, (ii) if it spared D an expense which D would have had to incur, (iii) if the benefit D received was realised (or easily realisable) in money. What unjust factors would apply in these circumstances? There are two main ones at play here. One would be 'necessity'[1] and the other is characterised by some commentators

[1] A Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press 2012) s 19; A Burrows, *The Law of Restitution* (3rd edn, Oxford Universtiy Press 2011) ch 18; G Virgo, *The Principles of the Law of Restitution* (3rd edn, Oxford University Press 2015) ch 19; C Mitchell, P Mitchell and S Watterson, *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) ch 19.

as 'legal compulsion'[2] but by others as a policy-based factor called 'secondary liability'.[3] Legal compulsion/secondary liability will be the most common unjust factor where the enrichment consists of the discharge of an obligation. Necessity will have a residual role in such cases, but would play its main role where the enrichment is a factually necessary expense. Finally, other unjust factors, most importantly mistake, also have a role to play (especially where the enrichment is a benefit that has been realised in money). In Chapter 2 it was argued that the application of the Unjust Enrichment formula to such cases is incoherent and leads to ad hoc exceptions to the formula having to be recognised. There were two objections. The first is that such cases required the creation of an exception to the 'at the expense of' test. The second is that the unjust factor failed to identify anything defective with the transaction at issue.

Notwithstanding these objections, the Unjust Enrichment formula implies that recovery is generally available when the conditions laid down are met. This Part argues that the case-law reveals that in cases of performance of another's duty and avoidance of a factually necessary expense, recovery is not generally available. Hence, the formula is wrong in suggesting that it would be.

B. Performance of another's duty

The formula implies that if C discharges D's duty then C can recover if: (i) C was legally compelled to do so, (ii) C's performance was necessary, or (iii) C performed by mistake. That position is stated too widely to be consistent with the case-law.

1. C was legally compelled to discharge the obligation

If a public authority serves notice on an occupier of premises (C) requiring a nuisance to be abated on pain of penalty, and C discharges that obligation when actually D should have done so, then C may recover his payment from D. This rule came to be established in a trickle of cases in the late 19th and early 20th century. The first such case was *Gebhardt v Saunders*,[4] where the Public Health (London) Act 1891 empowered a local authority to direct the owner or the occupier of a building

[2] Burrows, *Restatement* (n 1) s 18; Virgo (n 1) 252.

[3] C Mitchell, *The Law of Contribution and Reimbursement* (OUP 2003); Mitchell, Mitchell and Watterson (n 1) chs 20–22.

[4] [1892] 2 QB 452 (EWCA).

to abate a nuisance. If the nuisance arose out of a defect from a structural character then the owner was to be served with a notice requiring him to abate the nuisance, otherwise the occupier would be served. In this case the authority did not realise that the defect was of a structural character and so the occupier was served (rather than the owner). In the course of doing the work it was discovered that the defect was structural. The occupier sought to recoup his costs from the owner under the statute and he succeeded. But both judges of the Divisional Court also held that the occupier could have succeeded at common law under money paid:

> If two people are required to do certain work under a penalty in case of disobedience, and one does the work, and it turns out afterwards that the other ought to have done it, the expenses are properly money paid at the request of the person who was primarily liable, but who neglected to do the work.[5]

> In my opinion the ordinary principle of law is applicable to this case apart from the statute, the principle applicable to cases where one man has been legally compelled to expend money on what another man ought to have done, and, without having recourse to s. 11, the plaintiff is entitled to recover from the defendants as having been legally compelled to incur expense in abating a nuisance which the defendants themselves ought to have abated.[6]

This was followed in a number of other cases under this and similar Acts.[7] What is important to note is that the notice to abate creates a legal obligation even if it turns out to be addressed to the wrong person. In other words, the fact that the occupier is not actually responsible for abating the nuisance does not have the effect of avoiding the notice.[8] The corollary is that if the work was done before the notice was served then it would be deemed to be voluntary and so there would be no recovery. In *Harris v Hickman*[9] there was a nuisance which was a threat to public health under the Public Health (London) Act 1891, but the plaintiff's action failed because only an 'intimation', and not a formal notice, had been served on them under the Act. As such they were not legally compelled to do the work and so were 'volunteers' and so could not recover.

As far as I am aware these are the only cases where both parties were legally compelled to do the work, so it cannot be determined conclusively whether this is evidence of a general principle

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[5] ibid 456 (Day J).

[6] ibid 458 (Charles J).

[7] *Andrew v St Olave's Board of Works* [1898] 1 QB 775 (QB); *North v Walthamstow UDC* (1898) 67 LJQB 972; *Rhymney Iron Co v Gelligaer District Council* [1917] 1 KB 589 (KB).

[8] 'I look upon the section as putting upon the person served, not for all time, but prima facie and for the time being, the liability to do what it is necessary should promptly be done, leaving the question of his ultimate liability to be dealt with subsequently': *Andrew v St Olave's Board of Works* (n 7) 781 (Lord Russell of Killowen CJ).

[9] [1904] 1 KB 13 (KB).

or if it is just ad hoc. However, the reasoning of the courts in these cases strongly points to the view that recovery would be generally available in such cases. Indeed, the judges thought it was just a standard application of the rules on money paid. If, under a contract, C and D are both under a duty to do something and C does it, there seems to be no principled reason why C could not recover a share of the costs from D. So, it would seem that the unjust enrichment theory is correctly applicable here.

2. C was not legally compelled but acted out of necessity

Here the general rule seems to be no recovery, with very limited exceptions. The decision of the plaintiffs to act in *Harris v Hickman* was no more voluntary than was the one of Mr Exall in *Exall v Partridge* or of the plaintiffs in the *The Zuhal K*, yet there was no recovery because they had not (yet) been legally compelled to do the work. Nor does this seem to be an anomaly confined to the operation of the Victorian Public Health Acts. In *Macclesfield Corp v Great Central Railway*[10] the respondent was under a statutory duty to repair a bridge. The plaintiff highway authority served notice on the respondent requiring them to do the work but they refused. So, the bridge being unsafe, the highway authority did the work themselves and sought reimbursement from the respondent. The Court of Appeal held that the action failed because the highway authority was not legally compelled so to act. Once again, the reality was that this was not, in the proper sense of the term, a voluntary decision by the plaintiff. Yet there was no recovery.

However, in some cases there has been recovery where another person's duty was performed even though C was not legally compelled to do so. So if the plaintiff were to bury someone the person who was ultimately liable to carry out the burial shall be liable to reimburse the plaintiff for the costs of doing so (provided the plaintiff did not act officiously). In one of the leading cases, Lord Loughborough said that 'common decency'[11] required that the plaintiff organise the funeral. And he drew an analogy with the cases where someone paid another's debt to secure the release of distrained goods.

Some of the burial cases dealt with instances where deceased wives had been abandoned by their husbands, which is why someone else buried them, even though the husbands were still subject to a legal duty to do so. Was the position regarding those who cared for deserted wives different during their lives? Until the late 19th century married women did not have contractual capacity of their own. They entered into contracts on the basis that they were their husband's

[10] [1911] 2 KB 528 (EWCA).

[11] *Jenkins v Tucker* (1788) 1 H Bl 90, 126 ER 55 [93] (Lord Loughborough).

agents. In straightforward cases this agency relationship was a real one. However, this was not so in the case of wives who had been wrongfully deserted by their husbands. The husbands very much wanted to end the agency relationship. Yet in such cases the courts held that tradesmen who provided necessaries to the wrongfully deserted wives could recover for them against the husband.[12] But such liability ended if the wife did something wrong, e.g. committed adultery.[13]

What was the basis for such liability? In 1878 Lush J characterised it as an agency of necessity.[14] This is not particularly satisfactory. It is one thing to say, in maritime contexts, that in an emergency situation the scope of an agent's authority can be extended due to necessity. At least in such cases this does not go directly against the will of the principal. But with the deserted wives cases such an agency does go directly against the will of the principal. Furthermore, an agency of necessity doctrine does not explain why adultery terminates this relationship (even in cases where the husband might be quite unaware of the adultery). A further difficulty with the agency explanation is that a husband who was a lunatic was still liable for necessaries supplied to his wife;[15] but if the principal has no capacity to contract, how can an agent bind him?

The better explanation is the one taken in the United States. In *Cunningham v Reardon*[16] Hoar J links the obligation to provide for the wife whilst she is living with the obligation on the husband

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[12] *Bolton v Prentice* (1744) 2 Strange 1214, 93 ER 1136. See also the cases discussed in J Kortmann, *Altruism in Private Law: Liability for Nonfeasance and Negotiorum Gestio* (Oxford University Press 2005) 128–130.

[13] *Govier v Hancock* (1796) 6 TR 603, 101 ER 726.

[14] *Eastland v Burchell* (1878) 3 QBD 432, 436 (Lush J).

[15] *Read v Legard* (1851) 6 Ex 636, 155 ER 698.

[16] *Cunningham v Reardon* (1868) 98 Mass 538 (SJC Mass) (Hoar J). 'The husband who by his cruelty compels his wife to leave him is considered by the law as giving her thereby a credit to procure necessaries on his account; and is responsible to any person who may furnish her with them. This responsibility extends not only to **supplies furnished her while living, but to decent burial when dead.** Its origin is not merely and strictly from the law making her his agent to procure the articles of which she stands in need. If it were so, the consequence would follow for which the defendant contends, that the agency would end with the life of the agent. But it is rather an **authority to do for him what law and duty require him to do**, and which he neglects or refuses to do for himself; and is applicable as well to supplies furnished to the wife when she is sick, insensible or insane, and to the care of her lifeless remains, as to contracts expressly made by her.

Nor is any notice to him requisite, in order to charge him for her funeral expenses, any more than for necessaries to sustain life. The burden is on the plaintiff in either case to prove the existence of the necessity, and that the husband has failed to make provision for it. But when this is established, nothing more is needed to create the liability; and it would seem to be an idle ceremony to give notice of his wife's death to a man who had refused her the means of sustaining life. **The responsibility for funeral expenses is not a new and distinct cause of action, differing in kind, or in the rules by which it is created; but an incident to the obligation to furnish bodily support.'** Emphasis added

to provide a funeral. In wrongfully abandoning the wife the husband is no longer meeting the obligation to provide for her and so if a third party who acts non-officiously discharges the husband's obligation, that third party can recover against the husband. But that obligation stops if the wife commits a wrong. This explains why, after adultery, the husband is no longer liable. Although it was not fleshed out by English commentators, this explanation is to be preferred as it provides a more coherent and unified explanation of the law.

What about children? It is clear that the necessaries for the deserted wife also included provisions for her children. But what about instances where the wife was absent and the father had declined to fulfil his duty to support his child? Can a third party who provided necessaries to the child recover their cost against the father? The position does not appear to have been settled in English law,[17] but in the United States it would appear that recovery was available.[18] The United States did not, however, appear to extend that position to abandoned slaves.[19]

It has been suggested that the 'poor laws' cases can also be explained on the basis of discharge of another's liability. Under the poor laws a parish was responsible for the care of paupers under its jurisdiction. There arose a trickle[20] of cases where someone else provided medical care to the poor and sought to recover the cost from the responsible parish. Day argues that these cases are best seen as ones where, as in *Exall v Partridge*, the discharge of another's duty entitles one to recovery.[21] However, Kortmann persuasively questions whether these are actually cases of unrequested benefits.[22] In *Simmons v Willmott*[23] and *Lamb v Bruce*[24] the person ultimately responsible knew that the plaintiff was providing the care and did not stop it; these are facts from which a request can be inferred.[25] Furthermore, in *Paynter v Williams*[26] the possibility that a third party might recover for having discharged the duty without request seems to be excluded:

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[17] See the discussion in Kortmann (n 12) 129.

[18] W Keener, *The Law of Quasi-Contracts* (Baker, Voorhis and Company 1893) 23.

[19] It was possible to recover in the case of necessaries provided to abandoned slaves but it was much harder than for supplies to deserted wives/children. See the discussion in William A Keener, *A Treatise on the Law of Quasi-Contracts* (Baker, Voorhis 1893) 344–49.

[20] *Simmons v Willmott* (1800) 3 Esp 91, 170 ER 549; *Lamb v Bruce* (1815) 4 M & S 275, 105 ER 836; *Tomlinson v Bentall* (1826) 5 B & C 738, 108 ER 274; *Paynter v Williams* (1833) 1 C & M 810, 149 ER 626.

[21] W Day, 'Against Necessity as a Ground For Restitution' [2016] Restitution Law Review 27, 42–43.

[22] Kortmann (n 12) 120–122.

[23] (n 20).

[24] (n 20).

[25] Indeed, this was the argument of counsel for the defendant in *Paynter v Williams* (n 20).

[26] (n 20).

> The legal liability is not alone sufficient to enable the party to maintain the action, without a retainer or adoption of the plaintiff on the part of the parish. The legal liability of the parish does not give anyone who chooses to attend a pauper and supply him with medicines a right to call on them for payment. It is their duty to see that a proper person is employed, and they are to have an option who the medical man shall be.[27]

This leaves us with *Tomlinson v Bentall*,[28] where a woman had an accident in the parish of Heybridge. Heybridge Parish Council refused to do its duty and treat her; she was ferried back and forth and eventually made it back to her home parish where she was treated by the plaintiff surgeon. He sought to recover his fee from the parish of Heybridge and succeeded even though there was no request for the treatment to be provided. Kortmann suggests that the best explanation for the case was that Heybridge could not be allowed to rely on its own dereliction of duty to avoid liability.[29] So, to conclude, it seems doubtful that, without more, the unrequested performance of the duty of the parish by a third person lead to recovery. Rather, it seems to be that there would only be recovery if the third party cares for the pauper when the parish has refused to do its duty.

So, in the end, the non-legally compelled unrequested performance of another's duty will only lead to recovery in the burial, the deserted wives cases and some pauper cases. So, whilst it seems that there is a general principle that the discharge of another's debt in situations of necessity would lead to recovery, this is not the case where one performs another's (non-monetary) duty. The most general principle that can be laid down is that the only duties whose performance by another will lead to recovery are duties to provide basic necessities to a dependant, whether they are wives, children, or, perhaps, paupers. In such cases recovery would only be available where the primary duty holder has refused to perform his duty. The cases do not, however, support the view (implied by the unjust enrichment theory) that there would be recovery whenever one discharges the duty of another out of necessity. This is unlike the discharge of debts where, as argued above, there is recovery under a general test of necessity. So, the formula does not reflect the cases as it implies that there is recovery in all necessity situations where the duty is discharged, but the cases limit recovery to particularly narrow sets of situations.

3. C's performance was voluntary

[27] ibid [819] (Lord Lyndhurst CB).

[28] (n 20).

[29] Kortmann (n 12) 122.

In *J S Bloor v Pavillion Developments*[30] the claimant mistakenly built a road which the defendant was under a duty to build. The claimant tried to recover the cost of building that road. Without considering the authorities the court approved of *Goff and Jones's* statement that if a legal duty was discharged there could be recovery.[31] As indicated above, there is no authority for this beyond the cases where both parties are liable or the deserted wives/pauper cases. In the end the court held that special rules applied to case of improvement to land (which this was), that these required acquiescence and that there was no acquiescence on those facts.[32] But the court still considered, obiter, the argument based on discharge of liability. It held that the defendant had not actually been incontrovertibly benefited because it had lost the opportunity to design and commission the road, and that this constituted a 'disadvantage'.[33]

The loss of the opportunity to commission the work was not an issue in the abatement of public nuisance cases considered above (which were not considered by the court). Perhaps a way of distinguishing these cases is that in the nuisance cases the prime benefit of having the work done was to avoid liability for the nuisance, so it does not matter how exactly the work is done. However, in *Bloor* the road in itself would have been beneficial to Pavillion and so it was important that they had the freedom to decide how, and by whom, it should be built. This might be why it is easier to recover for having discharged another's debt than it is for discharging a non-monetary obligation. There is only one way to do the former but there are many ways to do the latter, and the defendant would often have a strong interest in deciding exactly how it is done.

Indeed, this seems to be the common thread linking the three instances where recovery is allowed: in such cases imposition of liability does not unduly infringe the autonomy of the defendant. In the nuisance cases this is because the primary interest is in avoiding the liability for nuisance and in the work itself. In the burial cases the executor/husband/father is absent and so the fact a funeral happens in a certain way does not affect him. Finally, in the case of deserted wives, the husband clearly does not care what the wife purchases. The same goes for the pauper cases where the parish has refused to provide the care.

The most, therefore, that can be said is that there would be recovery for the performance of the duty of another only in cases where the duty-holder did not have a legitimate interest in the manner of the performance of the duty or if, by their actions, they disclaimed any such interest. To be fair to the Unjust Enrichment defenders, such a view could be accommodated within the formula by saying that the performance of the duties of another, where they had a legitimate interest

[30] *JS Bloor Ltd v Pavillion Developments Ltd* [2008] EWHC 724 (TCC).

[31] ibid [7]-[10] (HH Kirkham).

[32] ibid [48] (HH Kirkham).

[33] ibid [44], [52] (HH Kirkham).

in deciding the manner of performance, is not an enrichment on the basis that this deprived them of the freedom to decide how the work should be done. However, the objections to such types of reasoning that have been given in Chapter 2 remain.

C. Factually necessary expenses

Once again, the restitution textbooks state the rule too widely when they suggest that the provision of a necessary service can, if coupled with an unjust factor (which might be necessity), lead to recovery. This generalisation first appeared in the 1970s in an article by Birks[34] and another by Jones.[35] Following these articles, the second edition of *Goff and Jones* stated that someone could be liable even though the benefit was not freely accepted provided that the benefit was incontrovertible; this would be satisfied in cases, for example, where the benefit was factually necessary.[36]

There was virtually no authority in the common law world to support that conclusion. Whilst it is true that the North American case law was more generous in awarding recovery in cases of legal necessity, recovery in cases of factual necessity was confined to cases where doctors saved the life of unconscious people. The First Restatement stated a general rule according to which such recovery was available when done to preserve property or credit but, as the Reporters' Note acknowledges, this is an over-generalisation and such cases were confined to agency of necessity.[37] This accords with the English position which rejected recovery when it was done to preserve someone's credit[38] or property.[39] There was no English case on whether there could be recovery where the intervention was to save someone's life. Even if the North American case law was right on this point, this is such an exceptional case that it is hard to generalise it to all instances where the benefit was factually necessary. The only arguments given were that it was the best explanation for *Craven-Ellis v Canons*[40] and that since legal necessity (in the sense of discharge of legal obligation) was recognised, so should factual necessity.[41] In regard to *Craven-Ellis*, as will be argued in Chapter

[34] P Birks, 'Negotiorum Gestio and the Common Law' [1971] Current Legal Problems 110.

[35] G Jones, 'Restitutionary Claims for Services Rendered' (1977) 93 Law Quarterly Review 273.

[36] R Goff and G Jones, *The Law of Restitution* (2nd edn, Sweet & Maxwell 1978) 16.

[37] Seavey and Scott, *Restatement of the Law of Restitution, Quasi-Contracts and Constructive Trusts* (American Law Institute 1937) s 117 Reporters' Notes 171-174.

[38] *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234.

[39] *Nicholson v Chapman* (1793) 2 H Bl 254, 126 ER 536.

[40] Jones (n 35) 286–287.

[41] Birks (n 34).

5 Section II.C.3, this is not the best explanation of the case. Rather, the best explanation is the one that the court actually gave: the work was freely accepted, and the company could freely accept because of the knowledge and consent of its shareholders. As for the analogy with discharge of legal obligations, as was argued above, there is no general principle insofar as non-monetary legal obligations are concerned. Indeed, much the same concerns raised above could be raised here: there are many different ways of doing the work and the defendant should have the freedom to decide whether he wants the work to be done in the way that it was done.

Nonetheless, following the publication of *Goff and Jones*, the principle – that the provision of factually necessary services could lead to recovery – started to be used by courts. It is therefore necessary to consider whether those cases actually support that principle.

R (on the application of Rowe) v Vale of the White Horse[42] was the first English case to explicitly make use of the principle. In many respects this was an unsatisfactory decision. The case started as administrative law proceedings and during trial it was realised that this it really involved a private law claim. The facts were that the Council had been providing sewage services to Mr Rowe since 1982 but never charged for them due to an administrative oversight. In 2001 the Council wrote to Mr Rowe informing him of that oversight and that it sought to recover the past six years' worth of payments. Mr Rowe sought a declaration that he was not liable. Lightman J adopted Goff and Jones's structure and said that the old requirement of a request could be satisfied either by (i) free acceptance or (ii) incontrovertible benefit (i.e. the service was factually necessary).[43] That second requirement was common ground between the parties,[44] so it cannot be said that this case is a binding authority for the incontrovertible benefit principle as an alternative to free acceptance. In any event, the claim failed because the Council had no intention of charging for the service at the time it was provided.[45] This meant that there could not be any unjust factor, whether this was free acceptance or failure of consideration. This case illustrates the general redundancy of 'incontrovertible benefit' where the putative unjust factor is failure of consideration or, if it is an unjust factor, free acceptance.[46] In such cases, the fact there is failure of consideration ipso facto means that there is free acceptance[47] and so 'incontrovertible benefit' is not needed at the enrichment stage. Incontrovertible benefit can only make a difference where the unjust factor is mistake or, if it is an unjust factor, necessity. In such cases the fact of the mistake or the necessity

[42] [2003] EWHC 388, [2003] Lloyd's Rep 418.

[43] ibid [12] (Lightman J).

[44] ibid (Lightman J).

[45] ibid [14] (Lightman J).

[46] Which Lightman J said it was: ibid 13.

[47] This is so because failure of consideration requires that the basis for the transfer was shared by both parties. Hence, the recipient must know that the benefit was not provided gratuitously.

will generally mean that there has been no free acceptance of the work by the defendant,[48] hence 'incontrovertible benefit' is needed at the enrichment stage in order for the claim to succeed.

Chief Constable of Greater Manchester Police v Wigan Athletic[49] was the other case where the incontrovertible benefit principle was invoked. The defendant was entitled to normal levels of police protection for football matches for free. However, if they wanted an extra level of protection they would have to pay it. They did not want the extra level of protection, but the police supplied it nonetheless. The High Court had held that the police could recover the cost of this additional protection in restitution. However, it seems clear that Mann J did not understand the concept of incontrovertible benefit. He cited counsel as saying that 'the club had received an incontrovertible benefit in freely accepting services from the GMP.'[50] This confuses the fact that incontrovertible benefit and free acceptance are two different ways of establishing the enrichment requirement. In the end Mann J held that this requirement was met because:

> The club has incontrovertibly received a benefit from the policing. As well as having the match properly policed on the ground, it was able to fulfil the requirements of the safety certificate and thus play its matches; thus the first requirement is fulfilled.[51]

But this is not what incontrovertible benefit means. All it shows is that the Club received a benefit. To show that it is incontrovertible one has to show that it anticipated a necessary expense or was a benefit that could be realised in money. Furthermore, Mann J also misunderstood what the 'unjust' requirement was. Instead of establishing whether there was an unjust factor, he simply held that 'it would in my view be unjust if the club could retain the benefit of that without some payment.'[52] One should not be excessively harsh on Mann J. Instead of having the case before him argued on the basis of the previous authorities on quantum meruit, it was put on the basis of this new Birksian unjust enrichment structure. Reading his judgment, one might conclude that Lord Sumner's warning in *Sinclair v Brougham* about the vagueness of unjust enrichment was right.

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[48] When the work is provided because it is necessary, it will typically be the case that the defendant did not know that it was being provided. Hence there is no opportunity to reject it and so free acceptance is not established. Similarly, in a typical situation where the work is provided by mistake, the defendant would not know about it and so it would not be free acceptance. This is not to deny that, in some cases of mistake or necessity, the defendant did have the opportunity to reject. Instead the claim is that this will rarely be the case. So, in the typical instances of work provided by mistake or due to necessity, the claimant would have to rely on 'incontrovertible benefit' in order to establish the enrichment.

[49] [2008] EWCA 1449, [2009] 1 WLR 1580.

[50] *Chief Constable of Greater Manchester Police v Wigan Athletic* [2007] EWHC 3095 [125] (Mann J).

[51] ibid [126] (Mann J).

[52] ibid (Mann J).

In the Court of Appeal, the analysis was still somewhat problematic. The majority (Sir Andrew Morritt C and Smith LJ) held that there was no free acceptance and so denied recovery.[53] They also rejected the incontrovertible benefit analysis on the basis that the real question was whether the club had benefited from the extra level of policing and not the policing *tout court*. They criticised Mann J for not having recognised that distinction.[54] Maurice Kay LJ, dissenting, accepted that there was no free acceptance but said that there should be recovery on the basis that Mann J had found that there had been an incontrovertible benefit.[55] He did not explain how the benefit was incontrovertible. Insofar as the unjust factor analysis is concerned, he made the same mistake as Mann J in holding that 'in those circumstances, it would be unjust for the club to take the benefit of the extra officers without paying for it.'[56] So like *Rowe*, *Wigan Athletic* is not much of an authority for the proposition that the anticipation of a factually necessary expense can be a substitute for free acceptance. The majority in the Court of Appeal did not rely on factual necessity and the dissent adopts the analysis of the High Court judge, which analysis is so muddled that it does not actually support the view that factual necessity will be an alternative to free acceptance. So, it would appear that in the general case this principle is wrong. Let us consider particular situations where the courts have granted recovery to determine whether the principle has been applied.

1. Agency of necessity. If there is a pre-existing relationship between the parties under which the claimant has a duty to look after the defendant's interests or property, an unforeseen situation occurs, and the claimant expends extraordinary efforts in doing his duty, then the claimant is entitled to relief for that effort above and beyond the remuneration provided under that relationship.[57] Importantly, this applies only if there is a pre-existing relationship between the parties.[58]

2. Supply of necessaries to an incapax. This concerns instances where the claimant provided necessaries to someone lacking contractual capacity. In such instances the claimant can recover, but only if the supply actually happened, if they were necessaries (and not luxuries), and recovery is capped at the reasonable value of the necessaries supplied. This, however, does not establish a general principle of recovery. It would appear that those necessaries must actually have been requested/accepted by the incapax in question. This makes those cases different from instances

[53] *Chief Constable of Greater Manchester Police v Wigan Athletic* (n 49) [47], [59].

[54] ibid [46], [58].

[55] ibid [69].

[56] ibid.

[57] *China-Pacific SA v Food Corp of India (The Winson)* [1982] AC 939 (UKHL); *ENE Kos 1 Ltd v Petroleo Brasileiro SA (No 2)* [2012] UKSC 17, [2012] 2 AC 164.

[58] *Binstead v Buck* (1776) 2 Blackstone W 117, 96 ER 660; *Nicholson v Chapman* (n 39).

where the service is provided without the defendant's knowledge or consent. As such they do not assist the necessity principle in unjust enrichment.

3. Salvage. If someone salvages a ship on the high seas, even if it is done without the owner's knowledge or consent, the salvor may recover a salvage award for his services. Again, this cannot be of any general assistance. The law of salvage does not apply in non-tidal waters.[59] In any event it is doubtful whether the law of salvage itself can be explained in terms of unjust enrichment. This is because of the way the salvage award is calculated. A number of factors will be considered such as the claimant's loss, the value of the cargo saved, the saving to the environment and a measure of reward to incentivise salvage. For those reasons salvage is wider than merely recovery of what the defendant gained and so cannot be solely about unjust enrichment.

4. General Average. If the Captain of a ship is required to incur extraordinary expense (this can include jettisoning cargo) in order to save the cargo and the ship, the owners of the surviving cargo will be required to pay a pro rata share to compensate those who suffered loss as a result. This ensures that the loss is equally shared amongst all the parties to the adventure. We will come back to General Average in the next section, where it will be argued that the principles from it can be generalised and this can explain recovery in all the instances where it is currently granted.

5. Berkeley Applegate type orders. A case often cited in favour of the saved necessary expense rule is *Re Berkeley Applegate*.[60] A company was in liquidation; some of the assets that it owned were held on trust for others. The non-trust assets would have been insufficient to pay the liquidator's fees and so the liquidator sought a court order saying that he could be paid back from the trust assets. The Deputy High Court judge granted that order. However, this does not support general recovery for necessitous interventions. The crucial point about the case is that the benefit was in a sense solicited. It is true that it was not solicited in the same way as in a typical free acceptance case, but there was still an element of voluntariness. The beneficiaries could have decided to reject the services of the liquidator. But their assets were bundled together as one package with the liquidator's service. It was one package that they could take or decline. If they declined it completely they could still have sought to recover their assets, but this would require the appointment of an administrator for which they would have had to pay. So, either way, their assets were bundled together with a package that included the cost of administration. All *Berkeley Applegate* said was that in such a situation they had to take the whole package. More will be said about *Berkeley Applegate* below, but for now it must be simply pointed out that it does not support the existence of a general rule for recovery for unrequested necessaries.

[59] *The Goring* [1988] AC 831 (UKHL); see also *Nicholson v Chapman* (n 39).

[60] *Re Berkeley Applegate (Investment Consultants) No 1* [1989] Ch 32 (Ch).

To conclude, except in specifically delineated situations, the unrequested provision of necessaries combined with an unjust factor will not lead to recovery. The most that can be said is that there will be recovery where the claimant was under a duty to protect the defendant's interest or property and where the fulfilment of that duty leads to a disproportionate burden on the claimant. It is, however, clear that there is no recovery where the claimant acts to protect the defendant's interest or property where he is not under a duty to do so.

D. Conclusion

The formula does not fit the law insofar as the performance of another's duty and the anticipation of a factually necessary expense is concerned. In those cases, the unjust enrichment principle implies that recovery is generally available, but this is not reflected in the case law. Instead, recovery is confined to a narrower set of circumstances. In addition to that, there are the problems with using the unjust enrichment formula for such cases that we considered in Chapter 2 Section III. As was seen then, the problem with such cases is that they are not based on reversing a defective transaction. Instead, there is another principle at play: The Benefit-Burden Principle.

III. THE BENEFIT-BURDEN PRINCIPLE: QUI SENTIT COMMODUM, SENTIRE DEBET ET ONUS.

A. The maxim in English Law

The maxim has ancient origins in the civilian world. It was taken to be the gist of the *Lex Rhodia* (which laid down the rules for General Average) and it appeared in Pope Boniface VIII's 1298 promulgation *De Regulae Juris*. These rules were taken to be basic principles of the Church's Canon Law.

The first mention of the maxim that I have been able to identify in English law was in 1560 in *Willion v Berkley*.[61] This was a land dispute concerning whether a particular estate was entailed or not. Anthony Brown J said:

> And if the King would say that his remainder is a fee-simple, he cannot say otherwise but that the estate precedent is also a fee-simple, for both the estates were made by one same fine at one same time, and both

[61] (1560) 1 Plow 223, 75 ER 339.

> the estates are by the donor limited to be in tail. And the King cannot say that the one is in tail and the other in fee, for thereby he affirms and disaffirms at the same time, that is, he affirms that in the first estate the statute divided the estate and made it in tail, and then in his own estate he disaffirms it, viz. that the statute did not divide the estate, but that it remains a fee-simple conditional; and by this means he would be within the purview and out of the purview in one same matter and at one same time, which he cannot be, but he shall be estopped to say so, *nam qui sentit commodum, sentire debet et onus*.

The maxim was used to prevent the King from setting up inconsistent circumstances. More generally, if one took land which had certain conditions attached to it then one was under an obligation to perform those obligations. This is an ancient rule which can be found in Littleton's 1482 *Treatise on Land Tenure*.[62] In Coke's commentaries on Littleton he sees this rule as implying 'an ancient maxime of the law, *viz. Qui sentit commodum sentire debet et onus, et transit terra cum onere*.'[63] (He who derives a benefit ought also to bear the burden, and the land passes with its burden). Later on in his Institutes Coke also cites the maxim to support the view that the owners of private chapels should repair them.[64]

William Whewell in his 1845 *Elements of Morality* lists this principle as one of the maxims of Equity. He explains the role of the maxims as follows:

> The administration of Equity has led to the currency of many Maxims which may be considered Maxims of Moral as well as Jurisprudential Equity since their acceptance in the Courts of Law has been due to their presumed agreement with Justice. We may notice some of these Maxims not as being always universally true or free from doubt and difficulty in their application but as bringing forwards some of the points on which Equity must principally depend and as showing by examples the kind of Equality in which it consists. Among such maxims are the following.[65]

Of the maxim itself he said:

> *Qui sentit onus sentire debet et commodum qui sentit commodum sentire debet et onus;* "He who bears the burthen ought to receive the profit; he who reaps the profit ought to bear the burthen." Thus, if a man dying leaves his wife pregnant, so that it is uncertain who will be heir to his lands; if the next presumptive heir, in the mean time, sow the land, it is equitable that the harvest also shall be his And on the other hand, they who enjoy the

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[62] T Littleton, *Treatise on Land Tenure* (E Wambaugh ed, John Byrne & Co 1903) bk III Chapter 5 <https://archive.org/details/littletonstenure00littiala>.

[63] E Coke, *A Readable Edition of Coke Upon Littleton* (T Coventry ed, Saunders and Benning 1830) [231a] <https://archive.org/details/areadableeditio00cokegoog>.

[64] E Coke, *The Second Part of the Institutes of the Laws of England* (E and R Brooke 1797) 489 <https://archive.org/details/secondpartinsti01cokegoog>. See also TE Scrutton, *The Influence of the Roman Law on the Law of England* (Cambridge University Press 1885) 130.

[65] W Whewell, *The Elements of Morality, Including Polity*, vol 1 (John W Parker 1845) Article 503.

> benefit of any improvement of land arising from public works; as, for instance from a general drainage; ought to contribute to the expense of the works.[66]

The maxim is also cited in *Broome's Legal Maxims*, the 10th Edition of which uses it to explain why covenants run with land, tenants are responsible for repairs, a principal must adopt a contract done for him in its entirety, that an assignee takes subject to all the equities to which it was subject in the hands of the assignor, grants of certain monopolies are subject to conditions, and why the burdens of partnership debts fall on the partnership estate.[67]

The maxim was also used in exposing the law of general average, recoupment and contribution. These will be addressed in the next section, but for now we will consider the maxim's other applications in English law. The maxim has generated a principle of English law, the benefit and burden principle, which states that 'a person who takes the benefit of an arrangement will be bound by any associated burden contained in it despite the fact that he was not a party to the original arrangement.'[68] There is also, potentially, a wider principle according to which, 'a person may, in appropriate circumstances, be bound by an obligation which is imposed by the same transaction that grants a benefit of which he wishes to take advantage but is not a condition of that benefit.'[69] Davis has helpfully compiled the cases supporting these principles.[70] Based on her survey it would seem that the principle of benefit and burden is well established in English law. It would appear that the conditions for the principle are that (i) the burden is a condition of the benefit, and (ii) the recipient freely accepts the benefit knowing or with notice of the burden. If these are met, then the intended beneficiaries of the burden can enforce it against the recipient. This is so even if they were not a party to the initial transaction. This principle transcends privity of contract.

In *Tito v Waddell (No 2)*[71] Megarry V-C held that there was a more general principle of benefit and burden. The 'pure principle', as he called it, applied whenever a benefit and a burden were part of the same transaction. It was therefore, not necessary to show that the benefit and the burden were intrinsically connected. Of course, they still had to be linked such that it was intended that one could not have the benefit without the burden. But, by contrast with the narrower principle, they did not have to be linked by their nature.[72] Finally, the use of the doctrine of benefit

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[66] ibid Article 506.

[67] H Broom, *A Selection of Legal Maxims: Classified and Illustrated* (RH Kersley ed, 10th edn, Sweet & Maxwell 1939) 482–486.

[68] C Davis, 'The Principle of Benefit and Burden' (1998) 57 Cambridge Law Journal 522, 522.

[69] ibid.

[70] Davis (n 68).

[71] [1977] Ch 106 (EWCA) 289–306 (Megarry VC).

[72] Davis (n 68) 539.

and burden to circumvent the *Austberry* rule in land – that freehold positive covenants are impossible – has been reaffirmed recently in three decisions of the Court of Appeal.[73] We will return in more detail to the requirements of that principle in the final section where this principle will be used to explain the law concerning the restitution of unrequested benefits.

B. Use of the maxim in the unrequested benefit cases

In this subsection I will provide historical evidence that the courts decided cases of restitution for unrequested benefits by reference to the maxim and the Benefit-Burden Principle.

The first such mention was in 1787 in *Deering v The Earl of Winchelsea*,[74] where the court was concerned with the proper basis for contribution between co-sureties. Having rejected contract, the court invoked the maxim to explain the nature of liability:

> If a view is taken of the cases, it will appear that the bottom of contribution is a fixed principle of justice, and is not founded in contract.[75]

> The maxim applied is *qui sentit commodum sentire debet et onus*. In the case of average there is no contract express or implied, nor any privity in an ordinary sense. This shews that contribution is founded on equality, and established by the law of all nations.[76]

As quoted above, *Deering* relied on the rules on General Average and quoted the maxim. The rationale seems to be as follows: if A and B are liable for the same debt to C and A discharges the whole of that debt then both A and B benefit equally (they are both no longer under a legal obligation to pay that debt). However, A bore the whole of the burden of obtaining that benefit whilst B got the whole benefit without bearing the burden. B's position is in violation of the maxim. A contribution order means that they would bear the burden equally and so puts them in a position where the maxim is respected (as they both benefited and were burdened equally).

Recoupment is superficially slightly different because A would get a 100% contribution from B. Does that not violate the maxim? No, because an additional element in recoupment is that B must have been primarily liable for the debt, i.e. it should have been B's burden to bear entirely.

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[73] *Davies v Jones* [2009] EWCA Civ 1164, [2009] All ER (D) 104; *Wilkinson v Kerdene* [2013] EWCA Civ 44, [2013] EGLR 163; *Elwood v Goodman* [2013] EWCA Civ 1103, [2013] 4 All ER 1077.

[74] *Deering v Earl of Winchelsea* (1787) 2 Bos & Pul 270, 126 ER 1276.

[75] ibid 272 (Eyre CB).

[76] ibid 274 (Eyre CB).

The reason A is made liable is to make things easier for a third party, but it was never really A's proper burden (in the ordinary course of things A should have been called to pay it). So, it is B who derives the entirety of the benefit from the discharge of the debt. But since B did not bear the burden of obtaining that benefit the maxim is breached. A recoupment order restores equilibrium.

That a similar principle operates for recoupment and contribution was noticed early on. In *Craythorne v Swinburne,*[77] Sir Samuel Romilly (a counsel in the case) made submissions about both the rights of co-sureties and the rights of the sureties against the debtor. He said that the 'right of a surety [against the debtor] also stands, not upon contract, but upon a principle of natural justice: the same principle, upon which one surety is entitled to contribution from another.'[78] The court agreed with him. That they were thought of as deriving from the same principle, which was first stated in 1787 in *Deering*, might explain why in 1799 Lord Kenyon thought it obvious[79] that recovery should be granted in *Exall v Partridge*. Indeed, in *Exall v Partridge*, Lawrence J explained that the 'justice of the case indeed is, that the one who must ultimately pay this money, should alone be answerable here.'[80]

Indeed, the cases generalising *Exall v Partridge* also seem to be based on that rationale. In *Bonner v Tottenham and Edmonton Permanent Investment Building Society*[81] Vaughan Williams LJ said that there could be recovery in

> cases in which there is community of interest in the subject-matter to which the burden is attached, which has been enforced against the plaintiff alone, coupled with benefit to the defendant, even though there is no common liability to be sued.[82]

Again, the idea seems to be that the parties are all in this together, that the payment benefits them all but that since one party bore the whole burden, he ought to be able to recover from the others.

Other cases of recoupment also invoked a benefit and burden rationale. For example, in *Brook's Wharf and Bull Wharf Ltd v Goodman Bros*[83] the owners of a bonded warehouse were compelled to pay customs duty on goods stolen from the warehouse, and successfully claimed recoupment from the owners of the goods. The outcome and reasoning of the case was

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[77] (1807) 14 Ves 160, 33 ER 482.

[78] ibid 162 (Sir Samuel Romilly, counsel).

[79] R M Jackson points out that the principle in *Exall* was stated 'without discussion or precedent': RM Jackson, *A History of Quasi-Contract* (Cambridge University Press 1936) 51.

[80] *Exall v Partridge* (1799) 8 Term Rep 308, 101 ER 1405 [311] (Lawrence J).

[81] [1899] 1 QB 161 (EWCA).

[82] ibid 174 (Vaughan Williams LJ).

[83] [1937] 1 KB 534 (EWCA).

unexceptional and the main matter in dispute was whether the company which owned the warehouse had been negligent. Lord Wright MR explained the basis for recovery as follows:

> (1) The essence of the rule is that there is a liability for the same debt resting on the plaintiff and the defendant and the plaintiff has been legally compelled to pay, **but the defendant gets the benefit of the payment**, because his debt is discharged either entirely or pro tanto, **whereas the defendant is primarily liable to pay as between himself and the plaintiff.**
>
> (2) These statements of the principle do not put the obligation on any ground of implied contract or of constructive or notional contract. The obligation is imposed by the Court simply under the circumstances of the case and on what the Court decides is just and reasonable, having regard to the relationship of the parties. It is a debt or obligation constituted by the act of the law, apart from any consent or intention of the parties or any privity of contract.
>
> (3) The defendants would be **unjustly benefited at the cost of the plaintiffs** if the latter, who had received no extra consideration and made no express bargain, should be left out of pocket by having to discharge what was the defendants' debt.[84]

The argument seems to be that the defendant gets the benefit of the payment, without bearing the burden of it (which he was meant to bear).

It is true that there is no explicit reference to the benefit and burden principle in the burial cases, but lawyers in the 19th century certainly considered them to be analogous to *Exall v Partridge*. So, for example, the annotations to *Jenkins v Tucker* in the fourth edition of Blackstone's report reference *Exall v Partridge* as the foundation of that principle.[85] The same goes for the abatement of nuisance cases under the Public Health (London) Act 1891.[86] Again, the defendant receives a benefit but without having had to bear the connected burden.

The contribution cases under the Civil Liability (Contribution) Act 1977 also appear to make use of the principle. The general approach of the statute is to assess the sum each party ought to pay based on their responsibility.[87] That is their burden and the benefit is the discharge of the liability. If a party paid more than their proper burden, then they can get contribution from the others in order to even things out. But what about cases where the defendant also retains some of the proceeds of the wrongful act committed? For example, A and B stole £1000 from C and B remains in possession of the money. C ends up suing A and recovers £1000 from A. In such a case the approach of the courts is not to award a 50% contribution order to A against B, rather A will

[84] ibid 544–5 (Lord Wright). Numbering and emphasis added.

[85] *Jenkins v Tucker* (n 11) Notes 2, 6.

[86] *Gebhardt v Saunders* (n 4) 458 (Charles J).

[87]. Civil Liability (Contribution) Act 1978 s 2.

be able to recover the whole £1000 from B.[88] The reasoning of the courts in such cases fits with the benefit and burden principle.

	A	B	C
Before theft	0	0	£1000
After theft	0	£1000	0
After C sues A	-£1000	£1000	£1000
Court makes 50% contribution order	-£500	£500	£1000
Court makes 100% contribution order	0	0	£1000

As can be seen from the table, a 50% contribution order would require B to pay £500 to A but this would not leave A and B in the same position; A would be £500 worse off than before the theft and B would still retain half of the benefit of the theft. So, instead the court makes a 100% contribution order and this ensures that neither A nor B keeps any of the benefit of the theft. This also means that the benefit and burdens of the theft have been shared equally between A and B.

Similarly, in the bundling cases the benefit burden principle also seems to be at work. Recall the reasoning of the court in *Re Berkeley Applegate*:

> where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property. It is a discretion which will be sparingly exercised; but factors which will operate in favour of its being exercised include the fact that, if the work had not been done by the person to whom the allowance is sought to be made, it would have had to be done either by the person entitled to the equitable interest (as in *In re Marine Mansions Co.,* L.R. 4 Eq. 601 and similar cases) or by a receiver appointed by the court whose fees would have been borne by the trust property (as in *Scott v. Nesbitt,* 14 Ves. Jun. 438); and the fact that the work has been of substantial benefit to the trust property and to the persons interested in it in equity (as in *Phipps v. Boardman* [1964] 1 W.L.R. 993).[89]

The idea seems to be that the burden needed to be incurred in order to receive the benefit and that if the benefit is taken then so must the burden. The principle can also be seen in the improvement cases. In *Greenwood v Bennett* Lord Denning said that, 'It would be most unjust if the company could not only take the car from him, but also the value of the improvements he had done to it, without

[88] *City Index Ltd v Gawler* [2007] EWCA Civ 1382, [2008] Ch 313.

[89] *Re Berkeley Applegate* (n 60) 50–51 (Edward Nugee QC).

paying for them.'[90] Again the objection is that the company would take the benefit (i.e. the surplus value) without bearing the associated burden (i.e. the cost of the repairs).

To conclude, one can see that in deciding such cases the courts have relied on the principle that if one takes a benefit then one must take the associated burden. The focus of the courts was remedial. It was to intervene in cases where for one reason or another this principle was departed from because someone got the benefit of something without bearing the burden, and the courts intervened by redistributing the burdens.

IV. RECONCEPTUALISING THE LAW ON UNREQUESTED BENEFITS USING THE BENEFIT-BURDEN PRINCIPLE

The following terminology will be adopted in this section. The **performance** is what the party seeking to recover actually did. This could be paying a debt, rescuing property or improving property. The **benefit** will refer to any benefit consequential on the performance. The **burden** will be the cost of the performance. In some cases, for example a payment to discharge a debt, all three are actually the same. But in others, for example mistakenly repairing property, they are not. A will refer to the provider of the performance. B will refer to the recipient of the benefit. Note that B is not necessarily the recipient of the performance. In cases, such as *Exall v Partridge*, it is a third party who receives the performance.

There are three key categories where there will be recovery:

1. B has requested or freely accepted the performance -> there will be recovery in such cases subject to not undermining the contract. This will be dealt with in Chapter 5.
2. The benefit is readily returnable and was not provided officiously by the claimant.
3. The benefit is incontrovertibly benefiting to the recipient and was not provided voluntarily by the claimant.

In this Chapter we are concerned with the second and third categories. There remains one miscellaneous exception which concerns recovery to save someone's life. Whether there is actually recovery in English law in such circumstances is unclear but let us assume for the sake of argument

[90] *Greenwood v Bennett* [1973] QB 195 (EWCA) 202 (Lord Denning).

that there is and that such recovery is not confined to those who have a duty to look after that person. As with Salvage it is unclear whether it is the Benefit-Burden Principle which does the work in this area. Instead, recovery is best seen as being a reflection of the importance which the law assigns to the sanctity of life. Since it does not fall under the Benefit-Burden Principle it will not be considered further.

A. Benefit is readily returnable

Here we are concerned with situations where the benefit provided can readily be returned by the defendant. The clearest example is a *Greenwood v Bennett*[91] type of situation: the defendant owns an asset which the claimant improves or repairs (this is the performance) and as a result a benefit accrues to the defendant, namely the increase in the value of the asset. However, if the defendant is in possession of the asset and has not sold it, the benefit cannot be separated from the asset. In such an instance there would be no recovery. This is because, as Pollock CB put it, if the claimant 'cleans another's shoes, what can the other do but put them on?'[92] The point is that the defendant as owner of the asset is allowed to do what he wants with it and he cannot be required to sell the asset, nor can he be required to pay a sum to the claimant to have unencumbered use of the asset. Prior to the intervention of the claimant he had the full right to use the asset and so the intervention of a stranger without consent should not burden him.

But the matter is different if the asset is sold. Suppose the asset in question was a car which, prior to the repairs, was worth £10k. The repairs cost £1k and following the repairs the value of the car increased by £2k. It was then sold for £12k. The performance cost is therefore £1k but the benefit is the surplus value, i.e. £2k. In such an instance, if the defendant were to keep the £2k he would have obtained the benefit of it without the burden. Prior to the sale he could claim that his having the benefit was an unavoidable side-effect of his exercise of property rights in the asset. But, after the sale, that is no longer the case. Although he was not free to reject the performance, he is free to reject the benefit thereof. As such, holding him liable on the basis of the Benefit-Burden Principle would not infringe his autonomy.

So, if the defendant does decide to keep the benefit then he must bear the burden thereof. In other words, he must pay for the burden, i.e. the performance cost of £1k. Alternatively, the defendant is also free to reject the benefit. This means returning it to the claimant. In such a case he would not be liable for anything. This will be advantageous if the cost of the performance

[91] (n 90).

[92] *Taylor v Laird* (1856) 25 LJ Ex 320, 332 (Pollock CB).

exceeds the benefit. So, if the repairs had cost £2k but only lead to a surplus of £1k then it would not make sense for the defendant to elect to keep the surplus and pay the cost thereof. Instead, he would reject the benefit and not be liable for anything.

This is why, under *Greenwood v Bennett,* the liability of the defendant is the lesser sum of the cost of the repairs/improvements and the surplus. A corollary of that is that if the surplus is nil or negative then the defendant will not be liable for anything. In the case where the repairs have reduced the value of the asset the defendant may have a remedy against the claimant in the tort of trespass.

The same principle can be seen to be at play in *Phipps v Boardman,*[93] *Re Berkeley Applegate*,[94] and *Foster v Spencer*.[95] In *Phipps v Boardman* fiduciaries realised for themselves a corporate opportunity that 'belonged' to the beneficiaries. This was in breach of fiduciary duty, but the fiduciaries had acted in good faith in the genuine but mistaken belief that they were entitled to exploit it. The House of Lords ordered them to hand over their profits to the beneficiaries, but one of them was allowed to deduct their expenses and reasonable remuneration for the work they had done exploiting that opportunity. This is different from *Greenwood v Bennett* in the sense that in that case there was no asset belonging to the defendant which was improved by the claimant. But the basic principle is the same. The actions of the claimant led to the defendant having a benefit (the profit from the exploitation of the corporate opportunity) which they would not otherwise have. That benefit was one which they could reject and so their acceptance of it triggers the Benefit-Burden Principle and so the claimant is allowed to recover in respect of their burden.

Berkeley Applegate and *Foster v Spence* are also slightly different from *Greenwood v Bennett* because there the work of the claimant did not repair or improve an asset of the defendant. Neither did it, as in *Phipps v Boardman*, lead to the creation of a completely new benefit for the defendant. Rather, in those two cases, the defendant had an equitable but not legal entitlement to some assets, but certain work was necessary to obtain a legal entitlement to it. In that sense the position is different from *Taylor v Laird* where the defendant already had an unconditional legal entitlement to the asset. So here the benefit is obtaining the legal entitlement to proceeds of the trust property. This is again a benefit which they could have rejected. And so, the Benefit-Burden Principle kicks in and so they are liable for the burden if they accept the benefit.

At this juncture it is necessary to contrast these cases with *Nicholson v Chapman*.[96] In that case the claimant rescued timber belonging (legally) to the defendant. The claimant sought to

[93] [1967] 2 AC 46 (UKHL).

[94] *Re Berkeley Applegate* (n 60).

[95] [1996] 2 All ER 672 (Ch).

[96] (n 39).

recover their costs in doing so but the claim failed. There are three possible objections to recovery: (i) no benefit was actually provided, (ii) non-realisability of the benefit, (iii) the claimant acted voluntarily. The first explanation is that actually no benefit was provided. Unlike with repairs or improvements, there was no physical change in the asset. And, unlike *Berkeley Applegate* and *Foster v Spence*, the defendant already had legal title to the assets. This, however, seems to take a too narrow a definition of benefit. In the context of General Average the law accepts that rescuing the property counts as a benefit. Why should it be different here? It is true that the law recognises differences between the maritime and the non-maritime context, but these are best accounted for using the requirement of voluntariness by characterising non-maritime rescuers as volunteers whilst characterising maritime rescuers as acting out of necessity.[97] Furthermore, the performance provided does affect the overall market value of the asset. There is a difference in the price of timber somewhere in the bottom of the Thames and dry timber on land. Hence, it should be accepted that, if the asset is realised then a benefit has been provided.

The second explanation is that the asset had not been realised and so the benefit itself (the increase in value of the timber due to it having been saved) was not readily returnable. But it is implausible that this was the basis of the decision. This is because this was an action for trover to recover the timber. In such a case the remedy is given in money rather than by an order to deliver up. So, the case already works on the assumption that the asset will be sold. Hence, no issue of lack of returnability of the benefit arises.

The third explanation, which is the one the court actually gave, is the correct one. The rescuer had acted voluntarily and so he could not recover. This is unlike *Berkeley Applegate* and *Foster v Spence* where the claimants were under a duty to do the work in question. Nor was the rescuer acting under a mistake, as in *Phipps v Boardman* and *Greenwood v Bennett*. The position is also unlike that where a bailee of goods is allowed to recover for the rescue of the property because in such a case he is under a duty to safeguard the property.[98] Similarly, in General Average the captain of the ship is under a duty to safeguard the cargo. The law of Salvage is the only area where one can recover for having rescued the property of another, in the absence of a duty to do so. It is an ad hoc exception justified by special policy considerations.

So, we can now see our final limitation to the operation of the Benefit-Burden Principle. The claimant cannot recover if he was acting voluntarily. In this context – where the benefit is readily returnable – a claimant will not be deemed to be acting voluntarily if he is under a duty to

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[97] There are principled policy reasons for this. In the maritime context there is no central body which has a duty to rescue people, but emergency services do exist in the non-maritime context. So, there is a gap in maritime cases and the law encourages the filling of it by characterising maritime rescuers as acting out of necessity so that they may recover.

[98] *Great Northern Railway Co v Swaffield* (1873-74) LR 9 Ex 132 (Exch); *The Winson* (n 57); *The Kos* (n 57).

act or if he is labouring under a mistake. In particular, acting in an emergency to rescue a stranger's property will still count as acting voluntarily.

B. Incontrovertible benefit

In such instances the benefit provided is not readily returnable. The most typical example would be the discharge of a debt in a recoupment/contribution type situation. It is not possible for the defendant to reject the discharge. It happens without his consent and indeed can happen without his knowledge. The challenge in such a case is how to ensure that the operation of the Benefit-Burden Principle does not infringe the defendant's autonomy. One possible suggestion is that the law should ensure that the defendant is not worse off. But that is stated too widely. Suppose the defendant receives a benefit with a market value of £1k. If he is required to pay £1k he is no worse off, but his autonomy has still been infringed by the fact that he is put in a position of forced exchange by being required to exchange £1k for something else. So, the imposition of liability must not make the defendant worse off and it must do so without requiring any exchange. But, of course, there will be a change, in the typical example the defendant will owe a debt to the claimant instead of a third party. So, rather the defendant must be put in a position which the law considers to be equivalent. We already dealt with a similar principle in Chapter 3 Section III where we saw that the law treated a duty to return a particular note as being equivalent to a duty to pay a debt corresponding to the face value of that note. Exactly the same principle operates here. Take *Exall v Partidge*. Prior to the claimant's intervention the defendant owed money to a third party. The operation of the law means that the defendant now owes that same sum to the claimant. This means that the imposition of liability does not make the defendant worse off and this conclusion does not necessitate any conversion of one benefit into money using market value. Instead, here the value is expressed on the face of the obligation and so can be compared without reference to market values.

In general, the position concerning the performance of a non-monetary obligation is also not a problem. In the typical case, non-monetary obligations would be enforced by an order to pay damages, and if the claimant performs the obligation for the defendant after the deadline for performance has passed then the position is exactly the same as with monetary obligations: instead of having a monetary obligation to the right-holder the defendant has the same obligation towards the claimant. But matters are more complicated in cases where such a conversion to a monetary obligation would not have happened. This can arise in three situations: (i) the beneficiary of the duty cannot sue to enforce it, (ii) a suit is possible but the duty would be specifically enforced, or

(iii) the claimant performs the duty before the deadline for performance and at a time where the defendant is ready, able and willing to perform it.

The burial and deserted wives cases are an example of the first category.[99] There the beneficiary of the duty could not sue either because they were dead or because married women (and children and slaves) had no standing to sue. As such the failure to perform would not have led to the possibility of a suit for damages. Hence, the argument goes, the above reasoning cannot apply to such cases. A difficulty with this reasoning is that it assumes that it is the suit which transforms the primary duty into a secondary duty to pay damages. But that is ordinarily not the case; it is the breach of the duty which has that effect. So, the inability of the beneficiary of the duty to sue is neither here nor there.

For the same reason, the objection to the second type of case also fails. At the point of breach, a secondary duty to pay damages arises. In a suit brought by the beneficiary of the duty against the defendant it would be for the beneficiary to decide whether they would elect for specific performance or damages. It is not for the defendant to make that choice. Hence the defendant is not put in any worse position by the claimant's performance of that duty and, following from that, the law's imposition of a duty for the defendant to reimburse the claimant.

The final objection is much stronger and, subject to one exception, succeeds. Indeed, in all cases bar perhaps *Gebhardt v Saunders*,[100] the deadline for performance had either passed or it was clear that the defendant was not ready, able or willing to perform the obligation. So, in *Jenkins v Tucker*[101] the husband, being far away and unaware of the death of his wife, would not have been able to perform the obligation to bury his wife. In the deserted wives (and other dependents) cases it is clear by his conduct of desertion that the husband/father/master is unwilling to perform his duty. In *Tomlinson v Bentall*[102] the parish council had refused to perform its duty to care for the pauper. Conversely, it would appear that if the claimant intervenes before the deadline for performance when the defendant is still ready, able and willing to perform, there would be no recovery. So, in *Paynter v Williams*,[103] Bayley B said:

> The legal liability of the parish does not give anyone who chooses to attend a pauper and supply him with medicines a right to call on them for payment. It is their duty to see that a proper person is employed, and they are to have an option who the medical man shall be.[104]

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[99] *Bolton v Prentice* (n 12); *Jenkins v Tucker* (n 11).

[100] (n 4).

[101] (n 11).

[102] (n 20).

[103] (n 20).

[104] ibid 819 (Bayley B).

The same principle seems to have been at play in *J S Bloor v Pavillion Developments*[105] where recovery was denied on the ground that the defendant had the right to choose how to perform the obligation. The point is, until the defendant is in breach they have the right to choose how to perform the obligation and an intervention by the claimant would deprive them of that choice.

So, to sum up, because in the case of non-monetary obligations the claimant can only recover for the performance of the defendant's duty when the defendant was in breach (either by failing to perform by the deadline or by having refused to perform or by being unable to perform) such cases are just like the discharge of debt cases: an obligation to pay money to X is replaced by an obligation to pay money to the claimant. The sum due to the claimant cannot exceed what the liability to X would have been. This limitation can be gleaned from the burial cases where it was said that recovery was limited to what the cost of the funeral for a person of that standing would have been. That limitation ensures that the imposition of the liability to benefit the claimant does not make the defendant worse off. The constraint is then respected.

There is, however, one exception. This concerns cases where both the claimant and defendant are under a joint duty to perform the non-monetary obligation for X. An example of such a case is *Gebhardt v Saunders*,[106] where the claimant, under threat of legal proceedings, abated a nuisance which the defendant ought to have abated. Both the claimant and the defendant were under a duty to do so and, as between them, the defendant was primarily liable. But, because of the threat of legal proceedings, the claimant ended up performing first. Strictly, this is a case where performance happened after breach (this is why a notice requiring performance on threat of contempt was issued) and so the case itself is not an exception to the principles developed above. However, the court stated its reasoning in terms which would be applicable in a case where the claimant performed prior to breach:

> If two people are required to do certain work under a penalty in case of disobedience, and one does the work, and it turns out afterwards that the other ought to have done it, the expenses are properly money paid at the request of the person who was primarily liable, but who neglected to do the work.[107]

> In my opinion the ordinary principle of law is applicable to this case apart from the statute, the principle applicable to cases where one man has been legally compelled to expend money on what another man ought to have done, and, without having recourse to s. 11, the plaintiff is entitled to recover from the defendants

[105] (n 30).

[106] (n 4).

[107] ibid 456 (Day J).

> as having been legally compelled to incur expense in abating a nuisance which the defendants themselves ought to have abated.[108]

Recall that the objection to recovery by the claimant prior to the defendant being in breach was that this deprived the defendant of the freedom to decide how to perform the obligation. However, such an objection does not have much strength where both the claimant and the defendant are under a joint duty to do the work. Here both parties are free to decide how to do it. So, the claimant, by performing first, does not deprive the defendant of anything. Hence, there is no objection to recovery.

To conclude, in cases where the defendant does not have the freedom to reject the performance or the benefit, the operation of the Benefit-Burden Principle must not infringe the defendant's autonomy. The law ensures that this is the case by requiring that recovery does not make the defendant worse off. Furthermore, it does so without requiring any exchange or reliance on market valuation of benefits. This means that it must ensure that the duty to reimburse the claimant only replaces another monetary obligation and that the sum due to the claimant does not exceed the sum due to the original beneficiary of the duty.

This covers one limitation on recovery. But, as discussed above, there is another. Not everyone can perform another's duty and gain recovery. In particular, 'volunteers' cannot recover. The claimant can only recover if he had a duty to act or if it was necessary for him to act. The particular forms of necessity which will suffice are somewhat unclear and depend on the particular context. But it is clear that outside of such situations there would be no recovery. Why is that? One response is that, if the claimant acted voluntarily, he wanted to make a gift of the benefit to the defendant and so he should not be able to recover. This is true as far as it goes. It is not necessarily the case that the claimant wants to make a gift. Instead the position is that if someone acts voluntarily but for non-gratuitious purposes the law expects him to bargain for his remuneration. If he does not, then the law will not help him. However, the law will help him if he was not acting voluntarily in providing the performance and the benefit was an inevitable side-effect of providing the performance. In such a case it would have been impossible for him to bargain with the defendant because the defendant would have obtained the benefit anyway and indeed would not have been able to reject it. Whether the parties want it or not, the defendant would have obtained the benefit because the claimant had to perform; the claimant could not prevent the defendant from getting the benefit and even if he wanted to do so the defendant could not reject the benefit.

This also explains why there is recovery in mistake cases when the benefit is readily returnable but not in cases where the benefit is not. In cases of returnable benefit, the defendant

[108] ibid 458 (Charles J).

retains a choice to accept it or not. But why then not extend recovery in returnable cases to instances where the claimant knows full well what is going on but does not intend to act gratuitously? The difference is that in such cases the claimant is intentionally trying to get around the bargaining process. So, it makes sense for the law not to assist him in that. But that is not the case where he is mistaken and since the defendant retains the freedom to reject the benefit there is no infringement of the defendant's autonomy at all.

C. Conclusion

The task of the law is to seek harmony between the Benefit-Burden Principle and the Autonomy Principle. The law does so by confining recovery to three instances. First, where the performance was requested or freely accepted. Second, where the benefit is readily returnable. Third, where the law replaces one obligation to pay money with another obligation to pay money, provided the sum is not greater. In the first and second instances the Autonomy Principle is not violated because the defendant retains the choice to receive or keep the performance/benefit. In the third instance there is no breach because the law replaces an obligation to pay a sum of money with another such obligation. This does not make the defendant worse off nor does it amount to a forced exchange.

Another concern of the law is to disincentivise attempts to avoid the bargaining process. This is why the law denies recovery for volunteers. It is only those who had no choice but to provide the benefit to the defendant who will recover. Of course, how this principle is to be applied will vary depending on the context. In some instances, acting for the benefit of the defendant in emergency situations will qualify but not in others. Similarly, in some instances acting under a mistake will qualify but not in others. Therefore, when applying the 'no recovery for volunteers' rule it is very important to look at the context in question. Ultimately the judgement of who counts as a volunteer will come down to a range of factors including, in particular, whether the law wants to encourage the behaviour in question (for example, salvage on the high seas).

The question we now need to consider is how, given those normative foundations, should the law be organised. From the above analysis, it can be seen that the way the principles operate varies depending on each situation. Furthermore, the circumstances where there is recovery are not the same in each situation. For example, in some cases recovery where the claimant was mistaken is possible whereas in others it is not. This should strongly point against imposing a common structure on this area of the law. This is on top of the concerns identified in Chapter 2. Put simply, none of the above cases are about reversing defective transactions.

So, how should the law be organised? The better approach to take is simply to follow the existing structures. Cases of discharge of debts or performance of non-monetary obligations are currently analysed in terms of recoupment and contribution. We should keep using those analytical structures rather than wanting to subsume the whole thing under Birksian Unjust Enrichment.

Cases concerning the preservation of property already fall within three well established areas of law: bailment, General Average and Salvage. As the Supreme Court pointed out in *The Kos* – in the context of bailment – there is no need to analyse such cases in terms of Birksian Unjust Enrichment.

Cases of improvement/unlocking of benefit seem to be an orphan category which formally exist as a component of the ability of the court to impose certain conditions on the making of an order. So, for example, in *Phipps v Boardman* the award was an allowance which the court made when ordering the defendant to hand over profits to the claimants. I believe that those cases can be analysed in a more coherent manner. This would also make it clear that such claims are not merely defensive but can also be brought against the other party. The best structure for such cases is, I believe, Birksian Unjust Enrichment. This is because the availability of the remedy turns on the returnability of the benefit that was received. In that sense, it is very similar to the Unjust Enrichment cases explained under the proprietary theory: the reason why there is recovery is because there is something which can be returned. Furthermore, with such cases recovery is available for mistake: another similarity with Unjust Enrichment. As such, even though the normative basis for recovery is different, the similarities are strong enough that such cases can be analysed under Birksian Unjust Enrichment. The requirements needed for recovery would be the same ones as for the goods cases. The claimant will have to show that, as a result of his actions, the defendant has a benefit which is readily returnable and that the action which lead to that benefit was not done voluntarily.

This, finally, leaves us with the case of the preservation of life. This is an ad hoc category on which we do not actually have any case in English law and which we are unlikely to have a case in the future. In terms of analytical structure, it is entirely sui generis.

CHAPTER 5: SERVICES

I. INTRODUCTION

We are here concerned with services, and other things that are not returnable, which have been provided at the request of – or been freely accepted by – the defendant. For the sake of simplicity these will be referred to as 'requested services'. This Chapter considers the historical basis for recovery in such instances and argues that the principle underpinning recovery is the Benefit-Burden Principle.

A necessary requirement for recovery in such cases is the presence of a mutual understanding that the services are provided non-gratuitously. This is typically shown by means of a request or using free acceptance. Identifying such a mutual understanding enables the law to imply an obligation to pay a reasonable sum for the services. However, the law will not do so when there is an express agreement governing the provision of the services, since the enforcement of such an obligation to pay a reasonable sum would contradict what the parties had agreed to. The contract must give way before the obligation to pay the reasonable sum can be enforced.

This raises two questions. First, what is the basis of the obligation to pay a reasonable sum? Second, in what circumstances and on what basis may the express agreement between the parties be discarded so that the obligation to pay the reasonable sum will be enforced? This Chapter will seek to provide the answer to those two questions.

Part II will consider the historically dominant *quasi-contractual* model. It was quasi-contractual because recovery happened by imputing a contract to pay the reasonable value of the services. But such imputation was only a partial fiction. In other words, it happened because there were certain facts taken in isolation, from which one could legitimately infer a promise to pay the reasonable sum. The main exponent of the theory was Denning, as he then was,[1] but the theory finds wide support in the historical literature. This model answers the first question by recognising that an obligation to pay the reasonable sum is an inference that can legitimately be drawn from the mutual understanding alone. However, if we add the fact that there is an actual agreement between the parties, then such an inference can no longer be drawn; the express contract blocks it. This bring us to the second question. In what circumstances and why, according to the *quasi-contractual* model, can the express agreement be prevented from blocking the inference of the promise to pay the reasonable sum? The answer to this question, given by the quasi-contractual model, is that this will be the case where the defendant has repudiated or seriously breached the express agreement. It will also be shown that cases concerning unenforceable and void contracts are explicable under this reasoning; there is no special rule for such contracts; their unenforceability or voidness is analytically irrelevant. Why did the law allow recovery when the defendant repudiated or seriously breached the express agreement? The formal reasoning of the courts was grounded on

[1] AT Denning, 'Quantum Meruit and the Statute of Frauds' (1925) 41 Law Quarterly Review 79; AT Denning, 'Quantum Meruit: The Case of Craven-Ellis v Canons Ltd' (1939) 55 Law Quarterly Review 54.

peculiarities of the pleading system but the normative reason was that the defendant could not be allowed to take the benefit of an agreement that he was unwilling to bear the burden thereof (by performing his side of the bargain). Hence, it is actually the Benefit-Burden Principle which does the analytical work to justify recovery.

Part III will argue that the answer the *quasi-contractual* model gives to the first question – what is the basis of the obligation to pay the reasonable sum – is not the correct one. Such an obligation, *pace* the *quasi-contractual* model, does not arise due to the consent or agreement of the parties. But instead it arises due to the Benefit-Burden Principle. Someone who freely accepts a service knowing that it is not gratuitous would, if he did not have to pay for it, have the benefit of the services without bearing the burden thereof. Hence, to avoid a breach of the Benefit-Burden Principle, the law imposes an obligation to pay the reasonable sum. This scenario will, therefore, be explained as an attempt by the law to mediate between the Benefit-Burden Principle and respect for the contractual autonomy of the parties. Ordinarily, contract will win, but, in some cases where the defendant has not respected the contract, the contract will give way to the Benefit-Burden Principle.

Finally, Part IV will consider alternative explanations of the law and argue that they all fail. The first set of theories are Birksian unjust enrichment accounts. They were first propounded by Birks[2] and then Jones,[3] but it is Baloch[4] who has provided the greatest theoretical defence thereof. Under such accounts recovery happens because the transfer of the service was conditional and that condition failed. Hence the transaction is defective and has to be reversed. In Chapter 2 Section III the application of the unjust enrichment formula to service cases was critiqued and this will not be repeated here. One important point to note is that under the Birksian model recovery for services provided under a contract which is void for incapacity was justified on the ground that the service was necessary. This is an aspect of the theory which will be criticised in this chapter Baloch's model of conditional transfer will also be criticised. It will be argued that his theory can only apply to things that are returnable and, hence, it cannot apply to services. It will follow that the benefit-burden explanation is the correct one to adopt in respect of all restitutionary claims relating to services.

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[2] P Birks, 'Negotiorum Gestio and the Common Law' [1971] Current Legal Problems 110; P Birks, 'Restitution for Services' [1974] Current Legal Problems 13; P Birks, *An Introduction to the Law of Restitution* (Oxford University Press 1985); P Birks, *Unjust Enrichment* (2nd edn, Oxford University Press 2005).

[3] G Jones, 'Restitutionary Claims for Services Rendered' (1977) 93 Law Quarterly Review 273.

[4] T Baloch, *Unjust Enrichment and Contract* (Hart Publishing UK 2009).

II. HISTORICAL POSITION: QUASI-CONTRACT

A. Incomplete performance

We are here concerned with a case where C and D agree that C will do certain work for D in exchange for something else (typically payment of a certain fee). In order for D's duty to provide the counter-performance to be triggered, C must have substantially completed his task. What if C has not finished the agreed task? Can C recover for the services provided under a *quantum meruit* ('*QM*')? The position is that C cannot recover unless C failed to complete the task because D prevented C from doing so. In order to properly appreciate what is going on here, it is necessary to examine the nature of linked promises and how the pleadings worked.

1. Linked promises

In the 21st Century, it is second nature to think of contractual promises as being linked. This means that if A promises to do x in exchange for B doing y, then if A wants to sue B for having failed to do y, A must have done x or must state that he is willing and able to do x. If A fails to do so, then A will not be able to recover. But this was not always the position; prior to the middle of the 18th century the presumption was that promises were independent.[5] So, for example, in *Nichols v Raynbred*[6] the claimant could sue for the price of a cow without offering to deliver it. In such a case, if the cow was not actually delivered, the defendant's remedy would be a cross action for failure to deliver. However, with the judgments of Lord Mansfield in *Kingston v Preston*[7] and *Boone v Eyre*[8] the principle of dependency of promises was recognized. The details of such cases need not detain us,[9] but what is of interest is the impact that these decisions have had on cases of incomplete performance.

[5] ibid 98–100.

[6] (1615) Hob 88, 80 ER 238.

[7] (1772) cited in argument in *Jones v Barkley* (1781) 2 Doug 684, 99 ER 434 [689].

[8] (1778) cited in argument in *Duke of St Alban's v Shore* (1789) 1 H Bl 270, 126 ER 158 [273].

[9] For a discussion of such cases see JL Barton, 'Contract and Quantum Meruit: The Antecedents of Cutter v. Powell' (1987) 8 The Journal of Legal History 48.

How would a case such as *Sumpter v Hedges*[10] have been decided if the promises were independent? The builder started to build a house for the owner, but abandoned the work before completion. The builder had promised to build a house and the owner had promised to pay a certain sum for it. If the promises were independent, then the builder would sue for the whole contractual sum (and not just for the value of the work he did) and the owner would countersue for the failure to complete the house. Presumably those damages would amount to the cost of completing the house. The end result would be that the builder would pocket the contractually agreed sum minus the cost of completion.

By contrast, if the promises are dependent, the builder is unable to sue for the contractually agreed sum because the duty to pay such sum only arises on completion of the builder's promise to do the work. The owner is able to sue for damages for non-completion but only if he undertakes to pay the contractually agreed sum. In all likelihood that total sum would exceed the damages he could recover; hence, the owner would not do that. The result, therefore, is that the owner keeps the partially built house gratis.

Hence the dependent promise situation can be seen as giving a windfall to the owner. This might seem particularly unfair if there was only a minor shortfall in the work done by the builder; in such a case it seems preferable to allow the builder to recover the contractually agreed sum subject to a cross action by the owner for the shortfall. This was a problem that did not arise with independent promises.

Having recognised the principle of dependency of promises in *Kingston v Preston*, Lord Mansfield then partially qualified it in *Boone v Eyre* by holding, that where one party had substantially performed his obligation, then, even if there were minor shortfalls, the promises would be treated as independent (i.e. the claimant could get the contractually agreed sum subject to payment of damages for the shortfall). Tellingly, Saunders, in his notes on the case, justified such an outcome on the basis that:

> Hence it appears that the reason of the decision in these and other similar cases, besides the inequality of the damages, seems to be, that where a person has received a *part* of the consideration for which he entered into the agreement, it would be unjust that because he has not had the *whole*, he should therefore be permitted to enjoy that part without either paying or doing any thing for it. Therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration.[11]

[10] [1898] 1 QB 673 (EWCA).

[11] *Pordage v Cole* (1669) 1 Wms Saund 319, 85 ER 449 [320 n 4] (at p. 453 in ER).

Saunders appears to be saying that if there was no recovery in such a case there would be an unjust enrichment (in the abstract moral sense and not the factual Birksian sense) of the defendant.

Yet the principle recognised in *Boone*'s case only goes so far. In cases where the promises are dependent and the claimant's performance was not substantial, there was no recovery. So, for example, in *Cutter v Powell*[12] a man was hired to be a seaman on a ship but died before completing the journey, dying intestate. His widow sued to recover either the whole sum or a pro-rata sum but the action failed. The court held that the promises were dependent, he had not substantially completed his performance and so he was not entitled to be paid the whole sum. What about a pro-rata sum on a *QM* basis? Such a claim was dismissed on the basis that the principle that 'where the parties have come to an express contract none can be implied has prevailed so long as to be reduced to an axiom in the law.'[13] As Barton has demonstrated, the case was not exceptional and the judges were applying settled principles.[14] But to properly understand these principles it is necessary to understand the way the pleadings worked.

[12] (1795) 6 TR 320, 101 ER 573.

[13] ibid 324 (Lord Kenyon CJ).

[14] Barton (n 9).

2. Pleadings

There were three ways one could bring an action for services provided: (i) suing for damages under a special contract, (ii) suing for debt under *indebitatus*, (iii) suing for a *QM*. The first of these required alleging the existence of a special contract (i.e. an express agreement) under which the defendant was required to do something which the defendant had not done. This requires proving the agreement pleaded. If no agreement was proved the action would fail but it would also fail if the actual agreement turned out to be different, even in a minor way, from the one pleaded.[15]

By contrast, both the second and the third actions did not require one to plead that there was a special agreement, but only a general declaration was required. So, for example, the claimant would merely plead that he had done work at the request of the defendant; there was no need to plead a particular agreement. But, conversely, the proof of a special agreement would defeat the claim. In other words, if the claimant alleged that he did the work at the request of the defendant and the defendant showed that they had made a contract governing this, the claim would fail.[16]

The difference between (ii) and (iii) was that the former was for certain sums whereas the latter was for indefinite sums. So, for example, under (ii) the claimant would plead that the defendant requested him to do work in exchange for £20, but in (iii) the pleading would not allege a particular sum and it would be up to the jury to award whatever they thought the work was worth. However, the difference between *indebitatus* and *QM* was eclipsed during the 19th century because it was held that an *indebitatus* would not be defeated by a failure to prove an agreement for a certain sum; in such a case the jury could award a reasonable sum as if it was a *QM*.[17] As such, for the sake of the discussion, we can just consider them as one mechanism.

So, in *Cutter v Powell* the reason why the *QM* claim failed was that there was a special contract governing the issue. As such what was required for the claim to succeed was not proven. However, it would be a mistake to see this merely as a procedural hurdle, for three reasons. First, the law had already been willing to show some flexibility; as indicated above, an *indebitatus* claim would not be defeated by the absence of a promise to pay a certain sum. Second, by the late 19th century it had been accepted that, if the claimant had tried to prove a special contract and failed, he could still, if it had been pleaded, recover under a general issue (i.e. *QM*). Third, there were a number of cases where the defendant could not rely on the special contract (to defeat the *QM*) on the basis that the contract had been 'rescinded.'

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[15] *Weaver v Boroughs* (1725) 1 Strangr 648, 93 ER 757.

[16] Barton (n 9) 54.

[17] ibid 52; D Ibbetson, 'Implied Contract and Restitution: History in the High Court of Australia' (1988) 2 Oxford Journal of Legal Studies 312, 316; Baloch (n 4) 130.

3. 'Rescinded' contracts[18]

Just before *Cutter v Powell* was decided, it was held that the action for money had and received could not be brought whilst the contract was still open:

> The distinction between those cases where the contract is open, and where it is not, is this; if the contract be rescinded, either, as in this case, by the original terms of the contract, where no act remains to be done by the defendant himself, or by a subsequent assent by the defendant, the plaintiff is entitled to recover back his whole money; and then the action for money had and received will lie. But if the contract be open, the plaintiffs demand is not for the whole sum, but for damages arising out of that contract.[19]

Cutter v Powell essentially applied the same rule to claims for *QM*. When would a contract count as being 'rescinded'? In *Giles v Edwards*[20] it was held that the claimant could rescind the contract and bring money had and received if the defendant's default left him unable to perform his side of the bargain. The position was the same insofar as *QM* was concerned.[21] So, for example, in *Withers v Reynolds*[22] the parties had an agreement whereby Reynolds would deliver straw to Withers with payment due at the time of each delivery. Withers insisted in paying in arrears rather than on delivery and so he kept one bundle of straw which had not been paid for. Reynolds, therefore, refused to deliver anymore. Withers sued him for failing to deliver. The court held, that because of Withers' refusal to pay, Reynolds was relieved from further performance. The contract was terminated. What did this mean for the bringing of *QM*?

In *Planché v Colbourn*[23] it was held that if the defendant had abandoned the contract with the claimant, then the claimant could sue on a *QM* for the value of the work he had done. If the contract was still open no such claim could be brought, but it was held that the abandonment by the defendant meant that the claimant could treat the contract as rescinded. Another illustration can be found in *Philips v Jones*,[24] where the claimant (a minor) agreed to work for free for some two

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[18] It should be noted that rescinded was used at the time to mean terminated. Today, rescission refers to the process of setting aside a voidable contract.

[19] *Towers v Barrett* (1786) 1 TR 133, 99 ER 1014 [136] (Buller J).

[20] (1797) 7 TR 181, 101 ER 920.

[21] Ibbetson (n 17) 318.

[22] (1831) 2 B & Ad 882, 109 ER 1370. See also *Franklin v Miller* (1836) 4 Ad & El 599, 111 ER 912 (accepting the principle but distinguishing Withers v Reynolds: non-payment is different from express refusal to pay).

[23] (1831) 8 Bing 14, 131 ER 305.

[24] ((1834) 1 Ad & El 333, 131 ER 305.

years with the defendant and, in consideration for £10 (paid by the claimant's father), the defendant agreed to take him as an apprentice after that period of time. Before that time elapsed the defendant sent the claimant home. The claimant sued to recover remuneration for the work he had done. It was held that if the conduct of the defendant would have warranted the father taking his son away then the father was entitled to treat the contract as rescinded and so the son was entitled to recover for the work he had done on a *QM*. The rule was pithily restated by Alderson B in 1853:

> Where one party has absolutely refused to perform, or has rendered himself incapable of performing, his part of the contract, he puts it in the power of the other party either to sue for a breach of it, or to rescind the contract, and sue on a quantum meruit for the work actually done.[25]

4. Making sense of it all

Why is it that if the contract was still open a claim for *QM* could not be brought, but that it could be brought if the defendant had seriously breached his side so that the contract could be treated as terminated? In a 1939 article Denning sought to provide a rationalisation of the law. We must first understand why the presence of a special contract meant that a contract to pay the reasonable sum could not be implied.

To see the point let us consider the case of *Britain v Rossiter*,[26] which illustrates a common fact pattern at the time. The claimant was employed as a worker by the defendant for a period exceeding one year, with payment to be provided at the end of the year. According to the Statute of Frauds 1677 such agreements were valid but unenforceable if they were not in writing;[27] the agreement was not in writing. The claimant left the employment before the year was complete. He could not sue under the special contract because he had not performed for the entire agreed duration and, in any event, that contract was unenforceable. So, he sought to get around this by claiming under an implied contract. The facts were that the express contract was concluded on a Saturday, but the work started on a Monday and the contract was meant to run for one year from that Monday. As such, if the implied contract was actually deemed to begin on Monday the agreement would comply with the Statute of Frauds and so would be enforceable. Hence, the claimant sought to argue on the basis of a 'fresh contract of service […] implied from the acts of the parties'[28] and since such contract would be based on the acts of the parties it would begin when

[25] *De Bernardy v Harding* (1853) 8 Ex 822, 155 ER 1586 [824] (Alderson B).

[26] (1879) 11 QBD 123 (EWCA).

[27] Statute of Frauds 1677 s 4.

[28] (1879) 11 QBD 123, 126. *Britain v Rossiter* (n 26) 126 (Brett LJ).

the work actually began (i.e. on Monday) and so would not need to be in writing because it would not last more than a year.[29] Brett LJ did not think much of that argument:

> (1) It seems to me impossible that a new contract can be implied from the doing of acts which were clearly done in performance of the first contract only, and (2) to infer from them a fresh contract would be to draw an inference contrary to the fact. It is a proposition which cannot be disputed that no new contract can be implied from acts done under an express contract, which is still subsisting; all that can be said is that no one can be charged upon the original contract because it is not in writing.[30]

Where there is an express contract there are two problems with inferring, from the mutual understanding that the services will be paid for, a promise to pay the reasonable sum. The first difficulty is that, according to the doctrine of *Stilk v Myrick*,[31] doing an act which one is already contractually required to do is not valid consideration. So, when the claimant argued that his performance on Monday formed a new contract, he was arguing that a new contract should be formed based on the fact that he was doing his duty under the original contract. But such a putative new contract would not be supported by consideration and so would not be valid.[32] Hence, as Brett LJ pointed out, no new contract can be implied from doing work which was done in performance of the first contract.

The second difficulty, as Brett LJ pointed out, is that it is simply contrary to the facts to say that the defendant promised to pay for the reasonable value of the services. The defendant did not promise to pay a reasonable sum for whatever work was done, instead the defendant promised something else: payment of a fixed sum and only when all the work was done.

To sum up, the move from (A) 'mutual understanding between the parties that the work should be paid for' to (B) 'defendant promised to pay the reasonable value of any work done' can only be made in the absence of an express contract. The presence of an express contract blocks that inference. That is why proving the existence of a contract could defeat actions for *QM*.

So why did things change if the express contract was terminated? Here the language of rescission is misleading. It suggests that the contract – once rescinded – had actually never existed. As Baloch has shown, the courts did not actually think that this was rescission *ab initio*, they knew

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[29] Ibbetson (n 17) 324 fn 65.

[30] *Britain v Rossiter* (n 26) 127 (Brett LJ). Numbering added.

[31] (1809) 2 Camp 317, 170 ER 1168.

[32] Following the decisions of the Court of Appeal in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (EWCA); *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2006] EWCA Civ 553, [2017] QB 604, the position is a bit more complicated. But the better view is that the type of claim made in *Britain v Rossiter* would still fail, as the labourer provided no 'practical benefit' to the employer by simply performing his contractual duties in such circumstances.

that it was only prospective.[33] And in *Heymans v Darwins Ltd* Lord Porter confirmed that termination was prospective and that *QM* was still available.[34] It is inaccurate to see the availability of *QM* as grounded on a 'rescission fallacy.'[35] So why is it that, if the defendant has refused to perform his side of the bargain, the claimant can sue under a *QM*? Denning explained this as follows, using estoppel-like reasoning:

> the defendant cannot set up the express contract as an answer because he has by his own conduct disentitled himself from relying on it. The obligation to pay in such a case is not truly consensual. The circumstances are inconsistent with a promise in fact to pay a reasonable remuneration, but the law imputes it, because the defendant cannot set up the inconsistent circumstances.[36]

As Denning stresses we are only concerned with cases where, in the absence of an express contract, one could infer (B) a promise to pay the reasonable sum,[37] i.e. this might be a case where there is (A) 'a mutual understanding of the parties at the time that the services should be paid for'.[38] In the ordinary instance the defendant would seek to defeat the move from (A) to (B) by invoking the express contract. But, because he has broken the express contract, the defendant cannot rely on it. Indeed, by attempting to rely on it the defendant would be saying 'No, I did not promise to pay you the reasonable sum because instead I promised to do X under the contract, which I have now refused to do'. This would indeed be, as Denning says, 'setting up inconsistent circumstances'.

We see a similar reasoning in Keener. When explaining why, in such circumstances, the claimant can bring an action for money had and received, he says that 'it would seem to be for the reason that the defendant should not be allowed to blow hot and cold, and to profit by a contract the burdens of which he refuses to perform.'[39] Abbot, who was writing a scathing review of Keener, expressed agreement with this point, calling it 'an excellent statement of the obligation of restitution upon a breach of contract'.[40] He says that the obligation is explained by

> the proposition that the defendant cannot occupy two inconsistent positions at one and the same time, that is, that having by his refusal to perform denied his obligation, and the plaintiff having accepted the situation

[33] Baloch (n 4) 124–128.

[34] *Heymans v Darwins Ltd* [1942] AC 356 (UKHL) 397–398 (Lord Porter).

[35] C.f. *Sopov & Anor v Kane Constructions Pty Ltd* [2009] VSCA 141 [10].

[36] Denning, 'Quantum Meruit: The Case of Craven-Ellis v Canons Ltd' (n 1) 61.

[37] ibid.

[38] ibid 57.

[39] W Keener, *The Law of Quasi-Contracts* (Baker, Voorhis and Company 1893) 299.

[40] E Abbot, 'Keener on Quasi-Contract I' (1896) 10 Harvard Law Review 209, 226.

> by demanding back the consideration paid, by the act of both parties the contract is rescinded, and the defendant cannot alone, without the plaintiff's consent, reinstate it.[41]

Such language is also found in the cases. In *Philips v Jones* counsel for the claimant – whose submissions were accepted – said that the defendant 'could not set up in defence the contract which he had abandoned.'[42] In *Prickett v Badger* Crowder J cites with approval the following passage from *Smith's Leading Cases* which gives the rationale for the recovery under *QM*:

> it is clear that the defendant cannot be allowed to take advantage of his own wrong, and screen himself from payment for what has been done, by his own tortious refusal to perform his part of the contract, which refusal alone has enabled the plaintiff to rescind it. He cannot, however, recover on the special contract, and must therefore be entitled to sue upon a quantum meruit, founded on a promise implied by law on the part of the defendant to remunerate him for what he has done at his request; and, as an action on a quantum meruit is founded on a promise to pay on request, and there is no ground for implying any other sort of promise, he may of course bring his action immediately. This point is decided by *Planché* v. *Colburn*.[43]

What then is the nature of the obligation to pay the reasonable sum? Such a promise is a fiction which is based on a germ of truth. It is a fiction because this is not actually what the defendant promised. The fiction arises because the law prevents the defendant from raising the express contract. As such, the decision of the court is made simply on the basis – which is true but incomplete – that there was a mutual understanding that the services would be paid for. Hence, Denning was correct in saying that it was *quasi ex contractu*.[44] The term 'quasicontract' to describe that theory is appropriate. '*Contract'* is appropriate because that is the conceptual tool the law uses: it implies a contract. It is also appropriate because there is a germ of truth in the contract: if we ignore certain facts, a contract to pay the reasonable sum can legitimately be implied.[45] But '*Quasi*' because such an implied contract does not fully reflect the reality.

To conclude, where there had been incomplete performance of an entire obligation there could be no recovery under the contract because the promises were linked. Hence, the right to be paid under the contract only arose on completion of the obligation and if, for whatever reason, performance was not substantially completed then there would be no recovery. In addition, there could be no recovery under a contract implied from the mutual understanding that the work would

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[41] ibid.

[42] *Philips v Jones* (n 24) [336] (counsel for plaintiff).

[43] *Prickett v Badger* (1856) 1 CB NS 296, 140 ER 123 [306] (Crowder J).

[44] Denning, 'Quantum Meruit: The Case of Craven-Ellis v Canons Ltd' (n 1) 61.

[45] The use of the word 'implied' as opposed to 'impute' or 'infer' is deliberate for reasons that will become clear in Section III.A below.

be paid for. Ordinarily, such a mutual understanding would lead to an obligation to pay the reasonable sum being implied. However, such a contract could not be implied where there was already an express contract governing the work. This is because implying such a contract would be to draw an inference contrary to fact and that, in any event, such a putative implied contract would not be supported by consideration because of the rule in *Stilk v Myrick*. Hence, an incomplete performer was in a very difficult position; he could not recover under the contract but nor could he recover the reasonable value of the work he had done so far.

This, however, lead to unfair outcomes, especially in cases where the defendant had repudiated or breached the contract in a serious way or prevented the claimant from performing. To avoid this unfair outcome the courts used an estoppel-like device to prevent the defendant from invoking the express contract as a means of blocking the implication of a contract to pay the reasonable value of the work done. The judges held that if the defendant had breached the express contract to such a level as would entitle the claimant to treat it as terminated then the defendant could not, when the claimant alleged there was an implied contract, rely on the express contract to block the implied contract. Hence, the claimant managed to prove the existence of the implied contract and so could recover under it despite the express contract.

B. Unenforceable contract

1. Two modes of recovery

We are here concerned with cases where the claimant has provided services to the defendant under a contract which is unenforceable. There were two ways the claimant could recover. The first way was a technical one and the second one was actually the rescission solution considered above.

The leading case for the technical solution was *Souch v Strawbridge*.[46] It distinguished between executed and executory contracts. When the contract was executed it created a debt which could be recovered under the common count of *indibitatus assumptit* for work done (*QM*). The effect of the Statute of Frauds was to make the contract unenforceable and not void. Since the contract still existed, this meant that a debt was indeed created when it was executed. The courts further held that the Statute of Frauds barred enforcement of the contract but not enforcement of the debt it created. It followed that, when the contract was executed, there was no bar to recovery. As Ibbetson put it, this had:

> nothing to do with quasi-contractual or restitutionary obligations: the claimant obtains the remuneration due to him as specified under the contract, rather than recovering back sums already laid out by him or the reasonable value of his services.[47]

The 'rescission' solution is simply the one considered in section II.A above. The failure by the defendant to perform his side of the bargain means that the claimant is entitled to treat the contract as terminated and so can sue under a *QM* to obtain the reasonable value of the services done. As Ibbetson put it, there was no special rule for unenforceable contracts.[48] Where the contract was executed the claimant recovered on the basis of the debt that arose from completion of the contract and the Statute of Frauds did not bar this action.[49] And where the claimant is entitled to 'rescind' the contract on account of the defendant's refusal to perform, he can sue for a *QM* based on the implied contract which arises from the defendant's acceptance of the services. In that instance the fact that the contract was unenforceable 'is analytically irrelevant.'[50]

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[46] (1846) 2 CB 808, 135 ER 1161.

[47] Ibbetson (n 17) 320.

[48] ibid 322.

[49] ibid 320.

[50] ibid 322.

This means that if the unenforceable contract was not executed or 'rescinded' (i.e. terminated for breach) there could be no recovery. As seen above in *Britain v Rossiter*, the claimant sought to recover for services provided under a valid but unenforceable contract. The claimant could not recover under *Souch v Strawbridge* because the contract was not fully executed. Instead he sought to argue that an implied in fact contract had arisen from the conduct of the parties. Since this contract would have arisen a few days after the express contract, it would be performed within less than one year and so would not be caught by the Statute of Frauds.[51] This argument was rejected on the basis of *Cutter v Powell*. An implied contract could not be inferred where there was a valid express contract.

Nonetheless, courts were still able to grant recovery. In *Scott v Pattison*[52] the claimant was able to recover under a *QM* notwithstanding the fact that there was an unenforceable express contract between the parties. The court had wrongly rejected the *Souch v Strawbridge* rule and so the judge had to find another solution. In *Scott v Pattison* it was said:

> If a party to a contract, which is unenforceable under the Statute of Frauds, has rendered services under that contract to the other party, and the other party has accepted and benefited by those services, then I think that the party who has rendered the services can sue the other party in debt on an implied contract to pay him according to his deserts. That is not enforcing the unenforceable contract but a different contract which is quite enforceable.[53]

This appears to be plainly inconsistent with *Britain v Rossiter,* which was cited to the court by counsel.[54] The presence of the unenforceable contract should prevent the court from implying a contract from the acceptance of the services. On this basis Denning argued that *Scott v Pattison* was wrongly decided but the correct outcome could have been reached based on *Souch v Strawbridge* which had been wrongly rejected by the court.[55] Alternatively, as Ibbetson points out, the case could have been decided with reference to the *Planché v Colburn* principle. The defendant's refusal to perform his side of the bargain allows the claimant to recover under an implied contract.[56] This is something which Denning had failed to consider. This lead him in his taxonomy to create a special category for unenforceable contracts when, actually, there was no need.

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[51] ibid 324 fn 65.

[52] [1923] 2 KB 723 (KB).

[53] ibid 727 (Salter J).

[54] ibid 725.

[55] Denning, 'Quantum Meruit and the Statute of Frauds' (n 1).

[56] Ibbetson (n 17) 323.

2. Contractual conceptual tools replaced with unjust enrichment

Deglman v Guaranty Trust Company of Canada[57] was the first case in the common law world to analyse the recovery of services in terms of unjust enrichment. A nephew had done some work around the house for his aunt. In exchange for such work she promised him that he would get some land in her will. This agreement was not in writing and the aunt died intestate. The nephew sought to enforce the agreement, but this claim was unenforceable because the agreement was not in writing. However, the nephew could recover a *QM* for the work he had done. Rand J said:

> On the findings of both courts below the services were not given gratuitously but on the footing of a contractual relation: they were to be paid for. The statute in such a case does not touch the principle of restitution against what would otherwise be an unjust enrichment of the defendant at the expense of the plaintiff. This is exemplified in the simple case of part or full payment in money as the price under an oral contract; it would be inequitable to allow the promissor to keep both the land and the money and the other party to the bargain is entitled to recover what he has paid. Similarly is it in the case of services given.[58]

Cartwright J agreed with Rand J. He cited Lord Wright's speech in *Fibrosa* where he said that liability in unjust enrichment is different from liability in tort and contract.[59] He then agreed with Denning's criticism of the reasoning in *Scott v Pattison* (although he did not cite it) to the effect that a second contract could not be implied when there was a valid but unenforceable contract. The court did not, however, rely on the technical solution under *Souch v Strawbridge*. This makes sense. Here the agreement was that the aunt would convey property if the nephew did the work, as such the agreement did not actually create a debt of money. Hence the *Souch v Strawbridge* technical solution was unavailable.

What about giving recovery on the basis of implying a duty to pay the reasonable sum as in *Planché v Colbourn*? The Court did not directly consider this reasoning, but it did hold that a contract could not be implied because of the presence of an express contract. As Cartwright J put it:

> all the acts for which the respondent asks to be paid under his alternative claim were clearly done in performance of the existing but unenforceable contract with the deceased that she would devise 548 Besserer Street to him, and to infer from them a fresh contract to pay the value of the services in money would be, in the words of Brett L.J. [in *Britain v Rossiter*] quoted above, to draw an inference contrary to the fact.[60]

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[57] [1954] SCR 725 (SC Canada).

[58] ibid 728 (Rand J).

[59] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (UKHL) 61 (Lord Wright).

[60] *Deglman v The Garanty Trust Company of Canada and Constantineau* (n 57) 735 (Cartwright J).

This is of course true, but the point of *Planché v Colbourn* is that where the contract is terminated because the defendant does not want to perform their side of the bargain, then the claimant is able to rely on such an implied contract because the defendant is unable to rely on the contract to block the move from the mutual understanding that the services will be paid for to the implied promise to pay the reasonable sum. It seems clear that on those facts the defendant did refuse to perform her side of the bargain and that therefore the claimant was entitled to treat the contract as terminated. But the Court did not consider this point. Instead, the Court held that there would be recovery on another basis:

> In my opinion when the Statute of Frauds was pleaded the express contract was thereby rendered unenforceable, but, the deceased having received the benefits of the full performance of the contract by the respondent, the law imposed upon her, and so on her estate, the obligation to pay the fair value of the services rendered to her.[61]

The substantive reasoning seems to be similar as that of the *Planché v Colbourn* rule: that the defendant having invoked the unenforceability of the contract could not then rely on it to block the obligation to pay for the reasonable value of the services. But what the Court seems to have done is to free this reasoning from its contractual language and replaced it with unjust enrichment. To strengthen the reasoning based on unjust enrichment, Rand J drew an analogy with cases where money was paid to purchase land under an oral contract. In such a case it would be inequitable for the defendant to be allowed to retain both the land and the money. Similarly, Keener put the matter as follows:

> The defendant in pleading the statute of frauds simply avails himself of his statutory right and does nothing inequitable, that is, nothing that a court can say is inequitable. His inequitable conduct consists in his attempting to enrich himself at the plaintiff's expense, not simply in pleading the statute of frauds.[62]

The final nail for the use of contractual language came from the discussion of whether the claim was time-barred. After all, if there was an implied contract under which the services should be paid for then this duty would arise on the completion of the work and so the claim would be time-barred. But that was not the basis of the claim:

> I have already indicated my reasons for holding that, in the case at bar, no such promise can be implied. In my opinion the obligation which the law imposes upon the respondent administrator did not arise until the

[61] ibid (Cartwright J).

[62] Keener (n 39) 287–288.

> deceased died intestate. It may well be that throughout her life it was her intention to make a will in fulfilment of the existing although unenforceable contract and until her death the respondent had no reason to doubt that she would do so. The statutory period of limitation does not commence to run until the plaintiff's cause of action has accrued; and on the facts of the case at bar the cause of action upon which the respondent is entitled to succeed did not accrue until the death of the deceased intestate.[63]

So, the duty imposed by law to pay for reasonable value of the services only arises when the defendant failed to perform the agreement under which the services were provided.

To summarise, whilst the normative basis for recovery seems to have remained the same – the defendant cannot invoke the benefit of the contract (to prevent the duty to pay the reasonable sum) whilst having disavowed the contract by failing to perform it or by pleading its unenforceability – the conceptual tools to realise that normative basis have changed. The contractual solution in *Planché v Colbourn* made sense given the pleading system at the time (the defendant is prevented from pleading the express contract as a means of defeating a claim for a contractual *QM*) but once this had gone it was no longer necessary and it made more sense to use a scheme which more directly reflected the reasons for recovery.

The High Court of Australia in *Pavey & Matthews v Paul*[64] confirmed such rejection of the contractual tools where it was said that it was more honest to say that unjust enrichment did the work of explaining why there was recovery.[65] In addition, the High Court also rejected the *Souch v Strawbridge* solution on the ground that there was no real distinction between suing on the debt and suing on the agreement. It was also doubted whether it was a correct interpretation of the Statute of Frauds.[66]

Must the unenforceable contract be terminated before there is recovery? This was a point which was not explicitly addressed in *Deglman* and *James v Thomas H Kent*. Deane J suggests that the restitutionary obligation will only arise where there is 'no applicable genuine agreement or where such an agreement is frustrated, avoided or unenforceable.'[67] Based on that, Virgo argues that termination is not required with unenforceable contracts, instead all that is required is that the *Thomas v Brown*[68] requirement (that the defendant is not ready, willing or able to comply with the contract) is met. But it is almost impossible to think of one situation where the fact that this

[63] *Deglman v The Garanty Trust Company of Canada and Constantineau* (n 57) 736 (Cartwright J).

[64] (1987) 162 CLR 221 (HC Aus).

[65] ibid 255 (Deane J).

[66] ibid 254 (Deane J).

[67] ibid 256 (Deane J).

[68] (1876) 1 QBD 714 (QB).

requirement is satisfied will not constitute a repudiatory breach. This is consistent with Williams's[69] analysis of when a contract which does not comply with the Statute of Frauds can be used as a defence. His analysis is that a contract can be used as a defence to a claim to recover money paid or property transferred under the contract. It does not matter for those purposes whether such a contract complies with the Statute of Frauds or not.[70] It follows that for the claim to succeed the contract must be set aside and this is the case regardless of whether the contract is enforceable or not. Hence, notwithstanding that dictum by Deane J, *Pavey & Matthews* did have the effect of putting the *Planché v Colbourn* line of cases upon a restitutionary footing. There is, therefore, no special rule for unenforceable contracts.[71]

A drawback of both the *Souch v Strawbridge* and *Planché v Colbourn* approaches is that they do not consider whether awarding recovery would be inconsistent with the policy of the statute which makes the contract unenforceable. Although *Pavey & Matthews v Paul* moves to an unjust enrichment analysis, the High Court nonetheless considered that awarding a *QM* must not pervert the policy of the statute. As I argued in Chapter 3 Section III.B this was what the courts were actually doing in *Sinclair v Brougham*[72] and *R Leslie v Sheill*.[73]

We finish the story with a recent case, *Cobbe v Yeoman's Row Management*.[74] This decision falls into the same category as *Deglman* and, much before it, *Gray v Hill*[75] where work is done in the expectation of land being sold under an oral contract. The claimant had obtained planning permission on some land belonging to the defendant. The oral agreement was that the two parties would own and develop that land together. The defendant did not follow through on her agreement and kept the land for herself. She used the claimant's work in obtaining planning permission to develop the land as envisaged. The claimant's claim for breach of contract failed, as the agreement was unenforceable for lack of writing.[76] However, the *QM* succeeded on the basis that the defendant had been unjustly enriched and that it was established that the defendant accepted the services of the claimant knowing that they were not provided gratuitously.[77] Unfortunately, the

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[69] Williams was one of the first persons to be awarded a PhD in Law in Cambridge. His thesis was on section 4 of the Statute of Frauds. It was published by CUP in 1932: *The Statute of Frauds, Section Four, in the Light of Its Judicial Interpretation.* (Cambridge University Press 1932).

[70] J Williams, 'Availability by Way of Defence of Contracts Not Complying with the Statute of Frauds' (1934) 50 Law Quarterly Review 532.

[71] Ibbetson (n 17) 325.

[72] [1914] AC 398 (UKHL).

[73] [1914] 3 KB 607 (EWCA).

[74] [2008] UKHL 55, [2008] 1 WLR 1752.

[75] (1826) Ry & M 420, 171 ER 1070.

[76] Law of Property Act 1925 s 53.

[77] *Cobbe v Yeoman's Row Management Ltd* (n 74) [40]-[44] (Lord Scott).

House of Lords did not consider whether granting this remedy was compatible with the statute making the transaction unenforceable.

To conclude, as Ibbetson argued, unenforceable contracts were not at all special and difficulties raised by their lack of enforceability were dealt with using contractual tools applicable to all contracts; the most common one being the *Planché v Colburn* solution of preventing the defendant from using the unenforceable but valid express contract to block the implication of an obligation to pay the reasonable value of the work done. However, such reasoning had developed very much as a product of the 18th and 19th Century pleading system. So, from the middle of the 20th Century we see courts in the common law world disentangling this mode of recovery from its contractual trappings. The normative basis remains the same – the defendant cannot be allowed to rely on the contract which he has breached/repudiated as a means of preventing the obligation to pay a reasonable sum – but the tools of contract are no longer used to give recovery.

C. Void Contracts

1. Introduction

A contract can be void for two reasons: because there is properly speaking no agreement between the parties or because there is an agreement but the law considers that such an agreement has no legal effect. The second category includes cases where the agreement is illegal or where the law requires a formality for validity (and not merely for enforceability). One might be tempted to think that contracts void for incapacity fall within the first category, but this is not universally true. In *R v Oldham MBC Ex p. Garlick*[78] the Court of Appeal recognised that lack of capacity cases fall into one of two categories. There were cases where it could be said that there was an agreement between the parties, but the law holds that such an agreement is void because of lack of capacity; and other cases where the party in question is so unable to understand the nature of what is happening that there can be said to be no agreement. Under the law contracts are not binding on minors unless they are beneficial to them.[79] The cases often involved older children and the question was whether the contracts were beneficial or not. In other words, there was no doubt that all the other requirements for a valid contract were met, but validity depended on the agreement being beneficial. But the position is different for very young children, who might not even understand the basic nature of the transaction (unlike older children who might understand it but still act imprudently). In such cases, even if the agreement is found to be beneficial, there would be no valid contract because there was no agreement in the first place. As Scott LJ put it in *Garlick*:

> If a minor is to enter into a contract with the limited efficacy that the law allows, the minor must at least be old enough to understand the nature of the transaction and, if the transaction involves obligations on the minor of a continuing nature, the nature of those obligations.[80]

In *Garlick* the issue was whether children aged four could enter into valid contracts for their accommodation.[81] The Court of Appeal held that that they could not because they were unable to understand the basic nature of a lease, though they might be able to enter into a simpler contract such as one for buying sweets.

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[78] (1992) 24 HLR 726 (EWCA). Subsequently affirmed by the House of Lords [1993] AC 509.

[79] Minors' Contracts Act 1987.

[80] *R v Oldham MBC Ex p Garlick* (n 78) 741–2 (Scott LJ).

[81] In the context of deciding whether they could apply for housing under the Housing Act 1985 s 62.

So, under incapacity cases there are two categories: (i) those where there is a factual agreement and (ii) those where there is not. In this discussion we are only concerned with cases where it is possible to say that there is a factual agreement but this amounts to a void contract for a number of possible reason.

Birks was the main challenger of Denning's view. He argued that there is no need to show that the services were freely accepted. This is because he thought that contract has nothing to do with it, but rather this is about unjust enrichment (as he understood it, not in the moral sense). So Birks argued that it is sufficient to show that the services saved a necessary expense in order to get recovery.[82]

2. Corporate Formalities in the 19th Century

Having set the scene, let us first consider corporate contracts which were void for lack of formalities. In the 19th century companies had to enter into contracts via deed (so that the corporate seal could be affixed). If this was not done the contract would be void. However, the courts still gave recovery to the suppliers of those companies. *Lawford v The Billericay Rural District Council*[83] illustrates a long line of cases where the courts held companies liable for contracts within their purpose which were not under the seal of the company. If the following conditions were met then the company would be liable even though there was no seal: (i) the goods/services were supplied, (ii) they were accepted by the defendant and (iii) their supply fell within the purpose of the company. The position appears to be that if the goods/services were not actually supplied and accepted then there would be no liability. Furthermore, the amount to be recovered was the contract price. It is important to note that the request or acceptance of the goods or services had to be done by a duly authorized agent of the company.[84]

Contrast that with the position where the agreement substantively exceeded the powers of the company. This is what happened in *Sinclair v Brougham*.[85] In such a case there was no recovery

[82] Birks, 'Negotiorum Gestio and the Common Law' (n 2) 120–122. See also Jones (n 3) 286–287.

[83] [1903] 1 KB 772 (EWCA).

[84] *Clarke v Cuckfield Union* (1852) 21 LJ (QB) 349, 354 (Wightman J): 'the corporation cannot keep the goods or the benefit, and refuse to pay on the ground that though the members of the corporation who ordered the goods or work were competent to make a contract and bind the rest, the formality of a deed or of affixing the seal were wanting, and then say, no action lies, we are not competent to make a parol contract, and we avail ourselves of our own disability.' (emphasis added) See also *Lawford v The Billericay Rural District Council* (n 83) 781–2 (Vaughan Williams LJ), 785 (Stirling J), 786 (Matthew J).

[85] (n 72).

in contract and, furthermore, there was no recovery in the action for money had and received. The reason for this was that granting such a remedy would be tantamount to enforcing the agreement. The case law on companies seems to reveal that the courts take a different approach depending on the seriousness of the defect. When it is an intra vires act which fails for merely technical reasons the courts will still seek a way of enforcing the agreement. However, if the defect is substantive then courts will deny recovery both in contract and quasi-contract. This is best rationalized by saying that when the act is intra vires but the defect is one of form (e.g. the seal is wanting) this is a case where there is a factual agreement. But in cases where the act was ultra vires it is not possible to say that there was a factual agreement and so recovery is denied even under an imputed contract.

Denning explained the corporate formality cases using his theory. He said that, since the agents of the company have authority to accept the services (and this is not ultra vires of the company), then, in the absence of the void contract, there would be an implied contract to pay for the services. So, the law imputes such a contract.[86] Why is it acceptable for the court to impute such a contract given the presence of the void contract?[87] Denning did not say. But it would appear to be some form of unconscionability in freely accepting the benefit and then pleading one's own disability to avoid having to pay for it. As Whitman J put it:

> the corporation cannot keep the goods or the benefit, and *refuse to pay on the ground* that though the members of the corporation who ordered the goods or work were competent to make a contract and bind the rest, *the formality of a deed or of affixing the seal were wanting*, and then say, no action lies, we are not competent to make a parol contract, *and we avail ourselves of our own disability.*[88]

Such language is similar to the one used by the courts in cases where the contract is unenforceable. The reasoning again appears to be that the defendant cannot take the benefit of the contract whilst also disavowing their duties under it.

As for Birks's explanation in terms of necessity, the court rejected this. Vaughan Williams LJ explained that in *Nicholson v Bradford Union* there was recovery, but it could not be said to be on the basis that 'there was any necessity for giving the order, or contracting for the supply, without

[86] The uses of 'infer', 'imply', and 'impute' will be explained in Section III.A below. But, very briefly, the appropriate word to use is 'impute' because the contract to pay a reasonable sum would indeed be a fiction. It would be a fiction because, due to the existence of the void contract, this is not actually what the parties agreed.

[87] Recall that, in the case of valid contracts, such an imputation was only legitimate if the defendant had behaved in such a way as to entitle the other party to treat the contract as terminated.

[88] *Clarke v Cuckfield Union* (n 84) (Whigtman J). Emphasis added. This passage was approved of by Vaughan Williams LJ in *Lawford v The Billericay Rural District Council* (n 83) 782.

waiting to put a seal on the contract."[89] Hence, he did not 'understand that the case was decided upon the recognised exception arising from necessity.'[90]

3. Craven-Ellis v Canons

Craven-Ellis v Canons Ltd[91] is a case where there was recovery for services provided to a company under a void contract. Ever since it was decided, a number of commentators have sought to argue that it supports their theory for why there is recovery. So Denning argued that the Court was simply applying the quasi-contractual approach and Birks thinks there is liability because the services were necessary.

The claimant worked as the managing director of a company. Due to some corporate formalities not being met there was no actual contract between the claimant and the company. The claimant sued in *QM* and failed at first instance but recovered on appeal. At first instance the claimant failed because the court would not imply a contract when there already was an express contract, albeit void.[92] As we saw above, this is because the presence of an express agreement blocks the implication from a mutual understanding that the services be paid for to a promise to pay the reasonable sum.

On appeal it was said that the obligation to pay the reasonable value of the services was an obligation 'imposed by a rule of law, and not by an inference of fact arising from the acceptance of services or goods'.[93] Nonetheless such an obligation would only be imposed when the services were freely accepted. In addition, the court characterised the company's defence as being purely technical. It was said that the company and its shareholders 'would be in the position of having received and accepted valuable services and refusing, for purely technical reasons, to pay for them."[94] This is similar to the language in *Clarke v Cuckfield Union*.

There is a puzzle about *Craven-Ellis*. How could it be that the company accepted the services? The failure to meet the corporate technicalities would presumably also mean that the company could not have accepted the services. Denning explained that the shareholders'

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[89] *Lawford v The Billericay Rural District Council* (n 83) 781 (Vaughan Williams LJ).

[90] ibid (Vaughan Williams LJ).

[91] [1936] 2 KB 403 (EWCA).

[92] 'but in his Lordship's opinion such a cause of action [i.e. quantum meruit] depended on an implied request, and an express request negative an implied request' ibid 405 (Goddard J).

[93] ibid 412 (Greer LJ).

[94] ibid 409 (Greer LJ).

acquiescence cured the technical defect.[95] Although the judgment does not say so explicitly, it comes close to acknowledging that this is what happened: 'Messrs. du Cros as the principal shareholders in the company, and the company, would be in the position of having received and accepted valuable services.'[96] But if that is the case this raises another question: why did this acquiescence (which is said to cure the technical defect) not ratify the contract between the claimant and the company? Denning's explanation is that the contract was void due to a shared fundamental mistake: the parties both assumed that the claimant was a director when he was not.[97] Once again, this is supported in the judgment.[98]

In the 1970s Birks[99] and Jones[100] sought to explain the case on the basis of unjust enrichment, the enrichment being established because the services were necessary. They both argued that there could not have been any free acceptance by the company because the corporate formalities were not met; hence there was no capacity to freely accept the services. Instead they argued that the real basis of the decision was that the provision of the services was an 'incontrovertible benefit' because it was factually necessary for the company to have the services of a general manager. They accused Denning's rationalisation based on the shareholder's acquiescence of not being the true basis of the judgment. However, Denning was certainly much more faithful to the reasoning of the court than were Birks and Jones.

One thing Birks, Jones, and Denning all seemed to agree on was that for free acceptance to create an obligation to pay the reasonable sum, the acceptance had the same capacity requirements as the making of a contract by the company. So, for Denning, there would not have been liability had there not been ratification by the shareholders. Birks and Jones agree that ratification by the shareholders would have meant the free acceptance was valid, but they deny – somewhat implausibly – that this was a material fact in *Craven-Ellis*.

Who is right? Denning's explanation is certainly the most faithful to the judgment. The rationale that there needed to be informal unanimous approval from the shareholders in order to ratify the invalid appointment or remuneration of a director was reaffirmed in *Re Duomatic*,[101] and the rule was more widely stated that informal unanimous approval of the shareholders would cure

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[95] Denning, 'Quantum Meruit: The Case of Craven-Ellis v Canons Ltd' (n 1).

[96] *Craven-Ellis v Canons Ltd* (n 91) 409 (Greer LJ).

[97] Denning, 'Quantum Meruit: The Case of Craven-Ellis v Canons Ltd' (n 1) 55.

[98] 'This belief that the plaintiff was a director was essential to the making of the agreement and formed the basis upon which the parties purported to contract. The agreement was accordingly void ab initio': *Craven-Ellis v Canons Ltd* (n 91) 413 (Greer LJ).

[99] Birks, 'Negotiorum Gestio and the Common Law' (n 2) 120–122.

[100] Jones (n 3) 286–287.

[101] [1969] 2 Ch 365 (Ch).

any deficiencies. The House of Lords in *Guinness Plc v Saunders*[102] confirmed this. A *QM* was denied in that case because many members of the company did not know about the activities of the rogue director, and there was a breach of fiduciary duty. Furthermore, Lord Templeman (*pace* Birks) approved of Denning's explanation of *Craven-Ellis*.[103] In addition there was no suggestion by their Lordships, including Lord Goff, that a *QM* could be awarded on the basis of anything other than a valid free acceptance.

On the other hand, the necessity explanation of Birks and Jones has very little support in the judgment and is also explicitly rebuked by the 19th century case law. Furthermore, as was seen in Chapter 4 Section II.C the number of cases where recovery has been granted on the ground of factual necessity – without valid free acceptance – is almost nil.

Hence, it appears that *Craven-Ellis* supports Denning's quasi-contractual view. As for the possible inconsistency between Denning's requirement of ratification by the shareholders and the lack of such requirement in the 19th century corporate seal cases, perhaps the explanation is that with the corporate seal cases the defect was merely procedural – the company had the power to hire those services, but it needed to follow a certain procedure to do so – whereas in *Craven-Ellis* it was substantive. And so ratification is needed in the latter case but not the former.

One puzzle remains. On Denning's view the claimant alleges that there is a promise to pay the reasonable sum based on the 'mutual understanding that the services will be paid for'. The defendant seeks to block that inference by invoking the express contract but in certain cases – for example, where he has fundamentally failed to do his bit under the contract – he is disabled from pleading the express contract as a defence. Why is he under such a disability where the contract is void? Denning merely says, 'the defendant cannot set up the express contract as an answer because it is void.'[104] But that does not seem to explain it. Recall that *Britain v Rossiter* identified two reasons why an express contract blocks the inference of an implied contract to pay the reasonable sum.[105] First, because acts done by the claimant in the performance of a contract cannot be valid consideration for another contract. Second, because saying that the defendant promised to pay the reasonable sum is inconsistent with the fact that he promised something else. The first of these reasons does not apply to a void contract, but the second one does. So, it cannot be that the mere fact that the contract is void entitles the claimant to sue on a *QM*. If the defendant had been ready, willing and able to perform his side it is unthinkable that claimant could instead sue on a *QM*. The better view, therefore, is that as with unenforceable contracts there is no special rule governing

[102] [1990] 2 AC 663 (UKHL).

[103] ibid 693 (Lord Templeman).

[104] Denning, 'Quantum Meruit: The Case of Craven-Ellis v Canons Ltd' (n 1) 61.

[105] See Section II.A.4 above.

void contracts. Rather, it is the fact that the defendant is unwilling to comply with the agreement which prevents the defendant from raising it to block the implication of the obligation to pay the reasonable sum. This is supported by various statements from the courts that it would be unconscionable for the defendant, having taken the benefit of the contract, to seek to avoid its burdens:

> the corporation cannot keep the goods or the benefit, and *refuse to pay on the ground* that though the members of the corporation who ordered the goods or work were competent to make a contract and bind the rest, *the formality of a deed or of affixing the seal were wanting*, and then say, no action lies, we are not competent to make a parol contract, *and we avail ourselves of our own disability*[106]

and 'the company would be in the position of having received and accepted valuable services and refusing, for purely technical reasons, to pay for them.'[107]

D. Conclusion

In the 18th and 19th Century the position adopted was a quasi-contractual one grounded in the pleading system. The claimant would bring an action for a *QM*. This, on its face, was a genuine contract as it required proof of a mutual understanding that the services would be paid for, from which a promise to pay the reasonable sum was inferred. The defendant could defeat that inference by showing that there was an express contract between the parties. This would defeat the inference for both a legal and a factual reason. Legally, it would mean that the act of supplying services was done under a contractual duty and hence it cannot be valid consideration for a promise to pay the reasonable sum. Factually, because the undertaking made under the express contract is inconsistent with a promise to pay the reasonable sum. However, the law prevented the defendant from raising the express contract as defence if the defendant had so fundamentally broken his side that the claimant was entitled to treat the contract as 'rescinded'. The lawyers at the time understood that this was not genuine rescission ab initio but instead was merely prospective termination. Since the defendant was unable to rely on the express contract there was then nothing to block the implication of a promise to pay the reasonable sum. Whilst it appears that there were also rules which provided that the express contract could not be relied on if it was unenforceable or void, it appears that on closer inspection both of those instances could be explained in terms of the

[106] *Clarke v Cuckfield Union* (n 84) (Whigtman J). Emphasis added. This passage was approved of by Vaughan Williams LJ in *Lawford v The Billericay Rural District Council* (n 83) 782.

[107] *Craven-Ellis v Canons Ltd* (n 91) 409 (Greer LJ).

termination rule. Hence, the unenforceability or voidness[108] of the contract was 'analytically irrelevant.'[109] It is important to note that, for there to be liability, there must actually have been a mutual understanding that the services would be paid for. If that was not present, then there would be no liability.

Is it possible to identify a principle at play in this scheme which can be isolated from the pleading context in which it arose? The answer is 'yes', since what seems to be at play is the Benefit and Burden Principle. The defendant, having refused to perform his side of the express agreement (i.e. the burden) cannot invoke the benefit of the agreement to block the implication of a promise to pay a reasonable term.[110] Seen this way, the Benefit and Burden Principle's role is negative. It does not explain why there is liability, but it merely explains why a defence cannot be invoked. What does the positive work seems to be a contractual principle: the inference that the defendant promised to pay the reasonable sum. However, it will be argued in Section III.A that this is not the case and, actually, the Benefit and Burden Principle also does the positive work.

[108] Recall that the void contracts under discussion were all instances where there was an actual agreement but which the law treated as not creating any legal obligations. Nonetheless, there was an agreement and so it can be said that such an agreement could be terminated for breach/repudiation.

[109] Ibbetson (n 17) 322.

[110] This reasoning which applies whether the agreement in question creates legal obligations or not. Hence, it applies also to the void contract cases.

III. THE BENEFIT BURDEN PRINCIPLE AS THE GROUND FOR RECOVERY

The argument of this section is that the law of restitution for services is best explained as the mediation of two principles: (i) the Benefit-Burden Principle and (ii) the need to respect the contractual arrangements of the parties. The Benefit-Burden Principle itself is relevant at two points. First, it will be argued that it is the Benefit-Burden Principle and not the consent of the parties which explains why there is an obligation to pay a reasonable sum for services requested or freely accepted. The parties with their contractual arrangements can agree to a specific scheme for payment of the services. Ordinarily this scheme should be followed even if it would leave the supplier of the services without any payment for the work. This clashes with the Benefit-Burden Principle, but the contractual arrangements must prevail. However, sometimes the contractual arrangements will give way. This is the second way in which the Benefit-Burden Principle is relevant. It prevents the party who has committed a fundamental breach of the contract from invoking it to prevent liability for the value of the services.

A. The true basis of the duty to pay the reasonable sum

Above in Part II, I often referred to the 'implication' of a promise to pay a reasonable sum. But this is pregnant with an ambiguity. Does 'imply' mean 'infer' or does it mean 'impute'? If it is the former, then the parties did actually agree to pay a reasonable sum but they just did not say so explicitly. If it is the latter, they did not actually promise that but the law imposes such an obligation on them as if they had. Which is it? It would appear to be 'impute'. For example, in *Craven-Ellis* the obligation was said to be 'imposed by a rule of law, and not by an inference of fact arising from the acceptance of services or goods'.[111] This makes a difference. But to see the point we need to go back to the basics.

If A requests or freely accepts services from B, knowing that such services are not being provided gratuitously, then A comes under a duty to pay for the reasonable value of the services. This is the most common instance of *QM*. The declaration pleaded alleged 'that in consideration that the plaintiff had at the like special instance and request of the defendant performed work and labour the defendant promised to pay the plaintiff so much as he deserved.'[112] Virtually all

[111] *Craven-Ellis v Canons Ltd* (n 91) 412 (Greer LJ).

[112] W Swain, 'Cutter v Powell and the Pleading of Claims in Unjust Enrichment' (2003) 11 Restitution Law Review 46, 49.

commentators classify such a claim as being an instance of a genuine contract.[113] This is on the basis that the term will only arise if there is 'a mutual understanding of the parties at the time that the services should be paid for'[114] and so, the argument goes, a promise to pay a reasonable sum can be inferred from that understanding.

There are, however, a number of problems with such reasoning. The first is that this promise does not follow as a matter of logical necessity from the mutual understanding. It is perfectly logical and conceivable to have a legal system which does not imply such a promise; indeed, that was the position in Roman law.[115] It was also the position in English law until the seventeenth century.[116] The first recorded instance of such liability can be seen in Lord Coke's report of the *Six Carpenters' Case*.[117] The second difficulty is that English law itself did not say that the promise was inferred from the conduct or that it was implied in fact. Instead, as Denning recorded, the position was that '[o]nce a request was proved, the law ordinarily implied the promise to pay a reasonable remuneration. *Note that it was the law which made the implication*.'[118] This is confirmed by the cases. In *Prickett v Badger* the court rejected a submission that the decision to imply the obligation should have been left to the jury. Crowder J said 'that is a question of law, and not a question for the jury. It would be idle to put it to the jury to imply what of necessity they must imply.'[119]

Does this, therefore, mean that the obligation is not actually contractual? Not so according to Denning:

> But the fact that the implication is one of law does not mean that the obligation arises quasi ex contractu. In regard to every contract, the question whether a term is to be implied is a question of law which the Court decides. *In making such implications the Court* ***is in theory*** *only declaring the* ***presumed*** *common intention of the parties*.[120]

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[113] RH Kersley, *Quasi-Contract* (The Law Notes Publishing Offices 1932) 43; Denning, 'Quantum Meruit: The Case of Craven-Ellis v Canons Ltd' (n 1) 56; PH Winfield, *The Law of Quasi-Contracts* (Sweet & Maxwell 1952) 53; Birks, 'Restitution for Services' (n 2) 15; Jones (n 3); Ibbetson (n 17) 315; Swain (n 112) 49.

[114] Denning, 'Quantum Meruit: The Case of Craven-Ellis v Canons Ltd' (n 1) 57.

[115] H Roby, *Roman Private Law in the Time of Cicero and the Antonines*, vol 2 (Cambridge University Press 1902) 142.

[116] Denning, 'Quantum Meruit: The Case of Craven-Ellis v Canons Ltd' (n 1) 56.

[117] (1610) 8 Co Rep 146a, 77 ER 695 [147a].

[118] Denning, 'Quantum Meruit: The Case of Craven-Ellis v Canons Ltd' (n 1) 56.

[119] *Prickett v Badger* (n 43) [306] (Crowder J). See also the passages of *Smith's Leading Cases* approvingly cited ('[plaintiff] must therefore be entitled to sue upon a quantum meruit, founded on a **promise implied by law** on the part of the defendant to remunerate him for what he has done at his request; and, as an action on a quantum meruit is founded on a promise to pay on request, and there is no ground for implying any other sort of promise, he may of course bring his action immediately.')

[120] Denning, 'Quantum Meruit: The Case of Craven-Ellis v Canons Ltd' (n 1) 57.

> The truth is that the circumstances from which a genuine contract can be established by inference are infinitely various, and it is unwise to lay down any special formula. And it must be remembered that the *inference is one of law just as it is the law which implies terms in an express contract, declaring in each case the presumed common intention of the parties*.[121]

So, according to Denning, the fact that the law implies the term does not make it quasi-contractual because such a term is giving effect to the 'presumed common intention of the parties'. In addition, Denning also seems to acknowledge, by using 'in theory', that the implied term might not actually reflect the common intention (presumed or actual) of the parties.

But why might one think that the promise to pay a reasonable sum does not reflect the intention of the parties? It is undoubtedly the case that in the vast majority of cases this is indeed what the parties intend, but this is not necessarily the case. Writing in 1950 Munkman is, as far as I can identify, the only commentator who does not think that the promise necessarily arises from the intention of the parties. After stressing that the services had to be accepted, Munkman says

> It is this cardinal fact which gives rise to a quasi-contractual obligation; not, let it be noted, the acceptance of a *contract* – which was excluded by the circumstances – but the acceptance of *benefits*.[122]

But does acceptance of the benefit – knowing that they are not provided gratuitously – not entail a contract? Accepting a benefit is not the same as accepting an offer, after all 'a man may receive a benefit with every intention of refusing to pay for it.'[123] He criticizes Denning for not having seen that distinction in his 1939 article. Instead, Munkman thinks that the basis of recovery is that 'a man cannot voluntarily take a thing and refuse to pay for it, and the law imposes an obligation of recompense as soon as the thing is voluntarily accepted.'[124]

One might object to Munkman that the point he makes – that one could intend never to pay for it – could apply to all sorts of contracts. After all, if I sign a contract to buy goods and privately think 'I have no intention for paying for these' I am still contractually bound. Does Munkman not make the mistake of looking at the subjective intentions of the parties rather than at the intentions objectively ascertained? I do not think he does. The cases we are dealing with are unlike cases where there is ascertainable conduct of the parties; we only have silence and silence is inherently ambiguous. The reality is that the situation looked at objectively does not actually reveal

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[121] ibid 58.

[122] Emphasis in original: J Munkman, *The Law of Quasi-Contracts* (Sir Isaac Pitman & Sons 1950) 89.

[123] ibid 97.

[124] ibid.

an intention to pay the reasonable value of the services. So Munkman is right in saying that it is perfectly possible for one to accept such services intending never to pay for them.

What then is the basis of the obligation to pay? As Munkman puts it, 'a man cannot voluntarily take a thing and refuse to pay for it'[125] This is an instance of the Benefit and Burden Principle defended in Chapter 4; in the same way that if one takes land with notice of a restrictive covenant, the basis of liability is the Benefit and Burden Principle and not an intention to obey the covenant (which might not be present). If, as argued in Chapter 4, a situation of unjust enrichment arises when the Benefit and Burden Principle is not followed, then the obligation to pay a reasonable sum seeks to prevent unjust enrichment.

How does this then fit in with the contractual analysis of such types of *QM*? This only threatens the analysis if one thinks that every contractual term must be intended by the parties. Whilst this might have been the position in 1939 when Denning was writing[126] we now know that this is not true. As Peden has argued, terms are implied in law on the basis of policy and fairness considerations.[127] Such a view has also been judicially approved.[128] So the better view is that the obligation to pay a reasonable sum arises to prevent the recipient from unjustly enriching himself but that it can be implied in a contract because (i) implication in law can be based on fairness requirements and, (ii) in any event, it probably does reflect the intention of the parties in the majority of cases.

Such an account can be confirmed when one considers cases where there was no capacity to contract but *QM* was nevertheless awarded on the basis that the services were freely accepted. As seen in Section II.C.2 above, in the 19th Century corporate seal cases the corporate seal was lacking and so there was no capacity to contract. Yet it was held that there was liability based on the acceptance of the services. What is really going on here is that the acceptance of the services creates a situation of imbalance which must be remedied. But it would not be consistent with the lack of corporate capacity to say that the duty to pay the reasonable sum was assumed by the company: it was not, because of the lack of seal. Instead, it suffices to say that there was capacity to accept the services, that such acceptance creates a situation of imbalance which must be remedied by a duty to pay the reasonable sum but without any suggestion that this duty was assumed by the company. This is why it is a duty imposed by law.

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[125] ibid.

[126] The use of 'in theory' and 'presumed' by Denning suggests that he was aware that it was fictional to think that all implied in law terms reflected the intention of the parties.

[127] E Peden, 'Policy Concerns behind the Implication of Terms in Law' (2001) 117 Law Quarterly Review 459.

[128] *Liverpool City Council v Irwin* [1977] AC 239 (UKHL) 258 (Lord Cross); *Crossley v Faithful & Gould Holdings Ltd* [2004] EWCA Civ 293, [2004] 4 All ER 447 [34], [36] (Mance LJ).

B. Respecting contracts

So the request or free acceptance of the services creates a duty to pay the reasonable sum. This is because otherwise one would have the benefit of something without bearing the associated burden. However, the parties can agree between themselves that, for example, the services should only be paid for when the work is completed. This is an entire obligation.

We can imagine various types of contracts for services between the parties. Suppose we are concerned with the building of a house. These are the possible contractual arrangements between the parties:[129]

- *Contract for work actually done* - The parties reach no agreement on the price to be paid: in such a case the law implies an obligation to pay the reasonable value of the work actually done in accordance with the Benefit-Burden Principle
- *Infinitely severable contract* - The parties agree that a consideration for the work but there is an express or implied agreement for payment pro-rata
- *Milestone contract* – The parties agree to divide the whole performance into various tranches for which a payment is due when completed but completion of that part is required for payment and no further subdivision is possible. A *Milestone contract* is basically a series of entire obligations combined together.
- *Entire contract* – The parties agree that full completion of the work is necessary before the payment is due.

In the first two instances the provider of the services will always be paid for every unit of work that he has done. As such there will never be a situation where part of the work he has done has not been paid for. This is not the case in the last two instances. There it is possible for the defendant to have done quite a bit of work but, because he failed to reach the milestone or the completion, he has not earned the right to be paid. The end result is that he has provided valuable work for which he has not been paid.

A pair of cases illustrate the differences between those two types. We are here concerned with a scenario where the claimant is hired to do some work, for example building or repairs, but before completion the thing he worked on is destroyed; this frustrates the contract. In *Menetone v Athawes*[130] the court held that the contract was an infinitely severable one and so the claimant could recover on a pro rata basis for the work he had done repairing the defendant's ship, even though

[129] This division is helpfully provided in Glanville Williams, 'Partial Performance of Entire Contracts I' (1941) 57 Law Quarterly Review 373, 371.

[130] (1764) 3 Burr 1592, 97 ER 998.

the ship had been destroyed by fire. By contrast, in *Appleby v Myers*[131] it was held that the contract was entire. Hence, the claimant, who built machinery for the defendant which was destroyed before completion, recovered nothing.

The result therefore is that with contracts in the first two categories the Benefit-Burden Principle will always be complied with but this is not the case in the last two categories. The breach of this principle is why many people see something prima facie unfair with the outcomes in cases such as *Appleby v Myers* and *Sumpter v Hedges*. It is why complaints that recovery should be allowed in *Sumpter v Hedges* on the basis of unjust enrichment (provided we understand unjust enrichment in a manner derivative from the Benefit-Burden Principle) have a lot of strength. However, there is ultimately no recovery because this is what the parties have agreed. As the Exchequer Chamber put it in *Appleby v Myers*, 'there is nothing to render it either illegal or absurd in the workman to agree to complete the whole, and be paid when the whole is complete, and not till then'.[132] There are two competing principles: benefit-burden and freedom of contract; and the latter wins. There are, however, two exceptions where the Benefit-Burden Principle wins. These are when there has been substantial performance and where the other party has repudiated the contract.

A detailed treatment of the substantial performance exception is beyond the scope of this thesis. But, very briefly, according to this exception – which finds its origin in Lord Mansfield's judgment in *Boone v Eyre,*[133] was stated in *Dakin v Lee*[134] and was reaffirmed in *Bolton v Mahadeva*[135] - if an entire obligation is substantially but not entirely performed then the claimant can still sue for the price subject to a cross action in damages by the defendant. This, therefore, appears to be a slight modification of the entire obligation doctrine. This exception is based on the Benefit-Burden Principle overriding contractual freedom. A strict application of the contract would mean that the defendant would get the benefit of a substantially complete performance without having had to pay anything for it. Such an outcome is a gross breach of the Benefit-Burden Principle. But, on the other hand, the infringement of contractual freedom which would happen if the claimant could claim the price subject to a cross action in damages is almost de minimis. So, we have a situation where there is a gross infringement of the Benefit-Burden Principle but which can be cured by a very minor departure from what the parties agreed. Hence, the scales of justice point very strongly to giving the claimant a remedy and so the law does so.

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131 (1866-67) LR 2 CP 651 (Exch).

132 ibid 660 (Blackburn J).

133 (n 8).

134 *H Dakin & Co v Lee* [1916] 1 KB 566 (EWCA).

135 [1972] 1 WLR 1009 (EWCA).

C. Repudiated contracts

The other instance where one may recover for part performance of an entire obligation is if the defendant has prevented completion of the work or if the defendant has committed a repudiatory breach of the contract. As was seen in II.A above, this was the main ground of recovery in *QM*.[136] This doctrine has sometimes been called the 'prevention principle'[137] but the name is misleading. It applies not just to cases where the defendant has prevented the claimant from performing but to all cases where the defendant's refusal to perform his side of the bargain entitles the claimant to terminate the contract. As such, recovery in *Planché v Colbourn* (where there was prevention) and *Pavey & Matthews v Paul* (where there was not) are both based on that principle.[138]

Rather, the relevant distinction is whether the claimant has performed or substantially performed his obligation or not. If he has then he has acquired the contractual right to be paid (or receive the counter-performance) but otherwise he has not. In cases where the claimant has not performed, the fact that the contract might or might not be valid and enforceable is analytically irrelevant; the claimant is entitled to treat the contract as terminated and to sue for a *QM*. So, for example, the analysis in *Planché v Colbourn* is exactly the same as in *James v Thomas H Kent*.

But where the claimant has acquired a contractual right to be paid (or to receive the counter-performance) the position is different. Where the claimant is unable to sue on the contract, because it is void or unenforceable, then it is clear that he is able to sue for a *QM*.[139] This can be seen from the outcomes in *Gray v Hill,*[140] *Deglman v Guaranty Trust Company of Canada,*[141] *Pavey &*

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[136] The rationale for which is as follows 'it is clear that the defendant cannot be allowed to take advantage of his own wrong, and screen himself from payment for what has been done, by his own tortious refusal to perform his part of the contract, which refusal alone has enabled the plaintiff to rescind it. He cannot, however, recover on the special contract, and must therefore be entitled to sue upon a quantum meruit, founded on a promise implied by law on the part of the defendant to remunerate him for what he has done at his request; and, as an action on a quantum meruit is founded on a promise to pay on request, and there is no ground for implying any other sort of promise, he may of course bring his action immediately. This point is decided by *Planché* v. *Colburn*.' : *Prickett v Badger* (n 43) [306] (Crowder J).

[137] J Bailey, 'Repudiation, Termination and Quantum Meruit' (2006) 22 Construction Law Journal 217; Baloch (n 4) 164–166; S Magintharan, 'The Prevention Principle and the Contractor's Remedies' (2017) 33 Construction Law Journal 455.

[138] Ibbetson (n 17) 322.

[139] This is, of course, subject to the proviso that recovery should not be granted if it would undermine the policy behind the invalidity of the contract.

[140] (n 75).

[141] (n 57).

Matthews v Paul,[142] and *Cobbe v Yeoman's Row Management*.[143] Note, in the case of valid but unenforceable contracts, that this would only apply in cases where the defendant has repudiated the contract by being unwilling or unable to perform it.[144] As for where the contract is void, it is now the position, though it was not historically so, that the fact that there was full counter-performance does not prevent restitution.[145]

But what about the position where the claimant has done everything he needed to earn the contractual counter-performance, that the contract is valid and enforceable but that the defendant refuses to perform it (in a way that allows the claimant to treat the contract as discharged for breach). The claimant is plainly able to sue for expectation damages for the failure to perform but can he alternatively sue on a *QM*?

The point is unclear. On the one hand there does not seem to be any English authority directly on this point; all the cases where the claimant had completed the work are cases where the contract was unenforceable. On the other hand, all the statements in the cases about the right of the innocent party to sue for *QM* are not qualified by any proposition about the unavailability of contractual damages.

Courts in the Commonwealth have responded differently to this doctrinal uncertainty. In Canada, the Court of Appeal of British Columbia confined *QM* to cases where the claimant had partially performed and excluded it from cases where there was full performance.[146] The decision was reached on the basis that none of the authorities positively supported such a conclusion and that 'justice does not require that a *QM* be available' because the party has an adequate remedy, which he bargained for, under the contract.[147]

In England, the High Court in *Taylor v Motability Finance*[148] adopted the same position; *QM* was not available where there had been full performance.[149] The Court did, however, add that in a similar fact pattern if the claim was for money, rather than services, then it could be recovered

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[142] (n 64).

[143] (n 74).

[144] *Thomas v Brown* (n 68).

[145] The old case law, *Linz v Electric Wire Co of Palestine* [1948] AC 371 (PC); was not followed in *Guinness Mahon & Co Ltd v Kensington and Chelsea RLBC* [1999] QB 215 (EWCA).

[146] *Morrison-Knudsen Co Ltd v British Columbia Hydro & Power Authority* (1978) 85 DLR (3d) 186 (CA BC Can) 230–4 (Noted 7 Const LJ 227).

[147] ibid 234.

[148] *Taylor v Motability Finance Ltd* [2004] EWHC 2619 (Comm) [23]-[26] (Cooke J).

[149] See also *Elek v Bar-Tur* [2013] EWHC 207 (Ch), [2013] 2 EGLR 159; *Howes Percival LLP v Page* [2013] EWHC 4104 (Ch).

notwithstanding the availability of contractual damages. This has been criticised as illogical by some commentators.[150]

However, in Australia, the Court of Appeal of Victoria expressed considerable sympathy with the view that *QM* should not be available to the fully performing party but declined to follow it on the basis that the right to sue on a *QM* following repudiation of a contract 'has been part of the common law of Australia for more than a century.'[151]

With this background in mind, there are six types of situations to consider. Can the approach taken in such cases be justified?

[150] G Virgo, *The Principles of the Law of Restitution* (3rd edn, Oxford University Press 2015) 334.

[151] *Sopov & Anor v Kane Constructions Pty Ltd* (n 35) [12].

	A: Partial performance, Not D's fault	B: Partial Performance, D's fault	C: Full Performance
1: Contract Enforceable	QM not available: *Sumpter v Hedges*	QM available: *Planché v Colbourn*	QM available in some jurisdictions but not others: *Taylor v Motability Finance*; *Sopov v Kane Constructions*
2: Contract Unenforceable	QM not available: *Britain v Rossiter*	QM available: *James v Thomas H Kent*	QM available*: Cobbe v Yeoman's Row Management*

To simplify, let us imagine that the contract in all these fact patterns provide that the builder will build a house for the owner and that the owner will pay the builder £1m. The contract is an entire contract and there are no milestones.

It is important to distinguish two different benefit-burden bundles.[152] The general position is that the burden associated with a benefit is either (i) the counter-performance agreed by the parties, or, if there is no agreement between them, (ii) the reasonable value of the work done. So, the first bundle has as its benefit the full performance (i.e. the house) and the burden is the contract price (i.e. £1m). The second bundle has as its benefit the partial performance (i.e. the work done so far) and the burden is the value of this partial performance. Since there is no agreement between the parties the burden is the reasonable value of the work done so far. In situations A and B the full performance has not been done so the Benefit-Burden Principle will not require any remedy for the first bundle because it simply has not been provided.

Situations A1 and A2 can be considered together. Whilst the first bundle has not been provided, the second bundle has. So why is there no recovery? Recall that according to the Benefit-Burden Principle the recipient of a bundle will only be liable to bear the burden if he requested or freely accepted the benefit, knowing of the burden. But it is not the case that the owner requested or freely accepted the second bundle (i.e. the work done so far). Put bluntly, what the owner

[152] By 'bundle' I mean a benefit which comes with an associated burden. So, for example, if a plot of land has a right of way over it the bundle consists of the land (the benefit) and the fact that it is subject to a right of way (the burden).

requested was the finished product, not a half house nor the labour in building the house. If he had requested half the house or the labour, then the contract would have been a *milestone contract* or an *infinitely severable contract*. So, the fact of the matter is that the owner has not requested the second bundle. It is important to note that this argument does not say that the second bundle was wholly unrequested. Rather it was requested on the basis that the owner would get the final product and not the work for its own sake. So, the request was conditional. If a bundle is requested on a condition and some benefit is provided but the condition is not met, is there an obligation under the Benefit-Burden Principle to pay for it? There is not. This can be seen from *Boulton v Jones*,[153] where the request for the pipes was on the condition that Brocklehurst would supply them.[154] That condition was not complied with and so there was no liability. Hence if a bundle is conditionally requested there will only be liability to bear the burden if the condition of the request was met. If the condition is not met then this is no different from a case of unrequested benefit. Here, the work was requested on the condition that the house would be finished, that condition was not met, so there could be no liability.

Has the claimant freely accepted the benefit if he finishes the house himself? This is not free acceptance; he had no choice but to do it; as Pollock CB put it, '[if the claimant] cleans another's shoes, what can the other do but put them on?'[155] Of course, it would be otherwise if the claimant uses some materials which are returnable. In such a case there is free acceptance and so under the Benefit-Burden Principle the owner would be liable.[156] But otherwise there is no recovery on *QM* for the reasonable value of the work done so far

Why then is there such recovery in B1 and B2? The first reason against recovery – that the parties agreed that there would not be recovery for partial performance – cannot be invoked by the owner because he has so breached the contract that it has now been terminated; the owner cannot simultaneously refuse to follow the contract whilst also invoking the protection of the contract to avoid having to pay. As Denning put it, the owner cannot set up inconsistent circumstances.[157] What about the second argument, that the second bundle was not requested/freely accepted? This depended on showing that the condition for the request – that the house be completely built – was not met. But in the case where the reason the condition was

[153] *Boulton v Jones* (1857) 2 H & N 564, 157 ER 232.

[154] Because the defendant had a credit with Brocklehurst.

[155] *Taylor v Laird* (1856) 25 LJ Ex 320, 332 (Pollock CB).

[156] *Sumpter v Hedges* (n 10).

[157] Denning, 'Quantum Meruit: The Case of Craven-Ellis v Canons Ltd' (n 1) 61.

not fulfilled was because the owner prevented the builder from finishing, the owner is not entitled to rely on that condition. This is, properly speaking, the 'prevention principle'.[158]

What about cases where there was a repudiatory breach by the owner but there was no prevention? Here the reasoning is the same as with the first argument. The owner would at once be saying, 'I have no intention of paying you for the house once built but you must build it in order to earn the price.' This is contradictory and, once again, is setting up inconsistent circumstances. The duty to pay is the flipside of the condition for the request (i.e. completion of the house). If the owner abandons his duty to pay, then the condition is also abandoned. By doing so he has in effect waived the condition. Hence, the work done so far can be treated as having been requested by the owner. Therefore, the Benefit-Burden Principle bites and so the owner is required to pay for the second bundle (i.e. the work done so far).

One might object that there is no need for recovery based on the Benefit-Burden Principle. Why not confine the builder to an action for breach of contract?[159] In situation B2 this would not be possible, because the contract is unenforceable, and so we would be left with an un-remedied breach of the Benefit-Burden Principle, so recovery must be given in such a case. But what about in situation B1, where the contract is enforceable? There are two problems with this argument. The first is it that it wrongly assumes that a condition for the award of *QM* is the unavailability or inadequacy of contractual damages; therefore, so the argument goes, if damages are adequate then there should not be a *QM*. But this assumption is wrong. *QM* is awarded because there is a breach of the Benefit-Burden Principle not because contractual damages are inadequate. This brings us to the second problem; this argument assumes that an award of damages is sufficient to remedy a breach of the Benefit-Burden Principle. But, again, this is not necessarily the case. There are two ways to remedy the breach: give back the benefit or make the recipient pay for the burden and only the last one is possible. Ordinarily the burden would be whatever amount the parties agreed but here there was no agreement on partial performance, so the burden is the reasonable value of the services. And this is different from an award of damages. A final objection might be: why should the claimant recover when he made a bad bargain? People should indeed not be entitled to escape a bad bargain. This is why in situations A1 and A2 there is no recovery. But here, having announced his intention not to comply with the contract, why should the owner be entitled to say that the builder should not be able to recover more than under the contract?

There is another, more practical point. Suppose the builder made a bad bargain so that his recovery for expectation damages would only be nominal. If this were the only remedy available to

[158] S Stoljar, 'Prevention and Co-Operation in the Law of Contract' (1953) 31 Canadian Bar Review 231; Magintharan (n 137).

[159] Bailey (n 137) 235.

him the owner could take advantage of that situation by telling the builder, 'reduce the price of the contract or I will not pay you on completion'. If the builder's only remedy is to sue for expectation damages, then the builder would not be able to resist such a demand. But if the builder is able to sue for a *QM* he is in a stronger position. In other words, the availability of *QM* helps prevent the owner from seeking to escape the bargain he made.

This brings us to C1, where the contract is enforceable and there has been full performance. Here the Benefit-Burden Principle favours the Canadian and English approaches. The builder has built the house according the contract but the owner refuses to pay. The solution to any breach of the Benefit-Burden Principle is to order the defendant to bear the burden. But here we are concerned with the first bundle and so the burden is the contractually agreed price. So the solution under the Benefit-Burden Principle is the same as under the contract. This is why it can be the only solution and why there is no scope for a *QM* action.

What about C2, where the contract is unenforceable? The difficulty is that ordering the defendant to bear the burden involves enforcing the contract and so it cannot be done. But not giving a remedy would be a breach of the Benefit-Burden Principle. So an award for the reasonable sum is made. The defendant is not entitled to complain that this was not the contractually agreed remuneration because he has refused to comply with his obligations under the contract. If the defendant insists on ignoring the contract by invoking its unenforceability he cannot complain if the law ignores the contract by awarding the reasonable sum instead the contract price.

D. Conclusion

To sum up, the true basis of the obligation to pay a reasonable sum for the work done is not an inferred consent or promise (although this will often be present) but is the Benefit-Burden Principle. By requesting or freely accepting the work (the benefit) the defendant comes under a duty to bear the burden of that work (the reasonable value thereof). This, however, only operates in the absence of a specific agreement between the parties about how the work should be paid; the law will respect such an agreement. So, if the parties decide that the obligation is an entire one then there will not be a duty to pay for the reasonable value of uncompleted work. This is because, in such a case, the request for the work is a conditional one; the condition being that the work be completed. So, properly speaking, the partial performance was not requested and, therefore, there is no liability under the Benefit-Burden Principle.

But this might lead to a harsh outcome in cases where the defendant has repudiated the contract. Here the law prevents the defendant from setting up inconsistent circumstances. He cannot, on the one hand, say that the contract overrides the Benefit-Burden Principle whilst, on

the other hand, treat the contract as breached fundamentally. So, in such a case the law prevents the defendant from relying on the contract. It follows, that the defendant is no longer able to say that the request for the work was conditional on full completion. In the absence of that qualification, the work was indeed requested and so the Benefit-Burden Principle creates an obligation to pay for the reasonable value of the work done.

As for cases where there has been full performance, there is a contractual entitlement to be paid. But the Benefit-Burden Principle also gives the same answer. This is because the agreed burden associated with the benefit of full performance is the contractually agreed sum. So either way the only remedy should be the contractually agreed sum.

IV. THE FAILURE OF ALTERNATIVE THEORIES

We must now consider the alternative explanations for recovery of services and we will see that they all fail.

A. Birks, Jones and the defective transaction model

As explained above,[160] the problem for Birks's unjust enrichment theory is that, for void contracts, it requires the 'incontrovertible benefit' principle to do more work than it actually can by proving that the services were factually necessary. But instances where the law has awarded recovery on that basis have been extremely rare.[161] In addition, as explained in Chapter 2 Sections III.A and III.B the difficulty for the Birksian model in incorporating services is that it requires artificial definitions of 'enrichment' and 'at the expense of'. There are also difficulties at the unjust factor stage. Take a *Planché v Colbourn* type situation; how has there been a total failure of consideration? True the claimant received nothing in return for his work but that is also the case in *Appleby v Myers* and *Sumpter v Hedges*. As explained in Chapter 2 Section III.C.2, an unjust factor analysis cannot explain why there is recovery in one type of case but not in the other. Indeed, Birks accepted that conclusion and argued that *Sumpter v Hedges* is wrong.[162]

[160] II.C.3 *Craven-Ellis v Canons* above.

[161] W Day, 'Against Necessity as a Ground For Restitution' [2016] Restitution Law Review 27.

[162] Birks, 'Negotiorum Gestio and the Common Law' (n 2) 128–129; Birks, *An Introduction to the Law of Restitution* (n 2) 239.

More generally, there is a difficulty in saying that there is a defective transaction in such cases. One might have been tempted to say that, for the void and unenforceable contract cases, the defect of the transaction is the defect that makes the contract invalid or unenforceable. But, as we saw in Sections II.B and II.C above, the fact the contract is void or unenforceable is analytically irrelevant. Instead, there is recovery solely on the basis that the defendant has fundamentally broken the contract by refusing to perform his side of the bargain. But this does not mean that there is a defective transaction in providing the service. Recovery in such cases simply does not fit the defective transaction model.

B. Baloch and the conditional transfer theory

Baloch argues that restitution in a contractual context is explained on the basis of a conditional transfer theory; the benefit was transferred on a condition, there was a qualifying breach of that condition and so the benefit ought to be returned.[163] He argues that this applies equally to money and non-money benefits such as services, though he recognises that the special nature of services raises some complications.[164] *Pace* Baloch, I argue that the conditional transfer theory cannot apply to non-returnable benefits such as services.

We first start with the historical observation that, whilst failure of consideration was recognised from early on as a ground of recovery for money,[165] it was never part of the equation for services. Almost all commentators argue that this is illogical and that symmetry requires that it be available for service claims. But this argument makes two mistakes: (i) it assumes, without argument, that money and services should be treated in the same manner, and (ii) it fails to note that the law managed perfectly well without needing failure of consideration for services, so, why attempt to extend it to services? Matters would be different if there was a gap in the law to be filled, but there was no gap.

This brings us to the normative argument. We need to ask why failure of consideration lead to recovery of money and whether such a reason is applicable to services. As we saw in Chapter 3 the recovery of money was based on a proprietary rationale. The claim was that the money 'belonged ex aequo et bono' to the claimant and the grounds of restitution, of which failure of consideration was one, were simply instances where the law recognised that 'ex aequo et bono' the

[163] Baloch (n 4) 93–94.

[164] ibid 167–174.

[165] *Moses v Macferlan* (1760) 2 Burrow 1005, 97 ER 676.

money belonged to the claimant. So, for example, in case such as *Martin v Andrew*[166] where money is paid on the condition that an event will occur, the rationale is that if the event does not occur the money belongs 'ex aequo et bono' to the claimant. Such a proprietary rationale is available for goods[167] but is not available for services; it is not possible to talk of a service as conditionally belonging to a party.

An alternative explanation is that the parties have agreed that the money will be returned if the condition fails. Consider a situation where C agrees to buy 100 widgets from D for £100. In such a case the parties agree that the payment of the £100 is conditional on the transfer of the 100 widgets. Suppose that the defendant is not under a duty to return the £100 if he fails to transfer the widgets. If that were true then the transfer of the £100 would not have been conditional. To see the point consider the following pair of statements:

(a) the transfer is conditional on x,
(b) If x fails, D does not have a duty to give the thing back to C.

Those two statements are contradictory. So, the argument goes, it follows that the negation of (b) is true. But the negation of (b) (call it (c)) is that

(c) D is under a duty to give the thing back to C when x fails.

Hence, the argument goes, whenever the parties agree that a transfer is conditional it follows as a matter of logical necessity that they agree that D is under a duty to give it back if the condition fails. So we can conceive of a conditional transfer as an agreement under which C gives something to D and D agrees to give it back if x does not happen. To put the point another way, if there was not a duty to return the thing if x does not happen, the transfer of the thing would actually have been an unconditional one and not a conditional one. In other words, the conditionality of a transfer implies, as a matter of logical necessity, that there must be a duty to return the thing if the condition fails. Hence, the argument goes, by agreeing that the transfer is conditional the parties have agreed that the recipient is under a duty to give the thing back if the condition fails.

The above reasoning is elegant but is not quite true. In particular, there is another pair of statements which is not contradictory:

(a) the transfer of the thing is conditional on x,

[166] (1856) 7 E&B 1, 119 ER 1148.

[167] Indeed, it seems to underline retention of title clauses: *Aluminium Industrie Vaassen BV v Romalpa Aluminium* [1976] 1 WLR 676 (EWCA).

(d) if D receives the thing, D is under a duty to do x.

So, the move from (a) to (c) (i.e. the logical implication of a duty to give the thing transferred back) only works in the absence of a duty (d). Hence, for the above argument – that the conditionality of the transfer necessarily implies a duty to give the thing back if the condition fails – to work, one would have to show that there is actually no duty on the part of the recipient to make the condition happen. To put the point another way, the above argument wrongly assumes that a duty to give the thing back was the only way of ensuring that the transfer would indeed be conditional. But this is false. Another way of protecting the conditionality of the transfer would be to have a duty on the recipient to ensure that the condition happens. So, the above argument only works in the absence of a duty to perform the condition.

But this actually makes perfect sense of the case law. Recall that the action for money had and received could not be brought to recover a conditional payment if the contract it was made under was 'open'[168], i.e. duty (d) is present. In such a case the conditionality of the payment is protected by the fact that the recipient is under a duty to perform the condition. But if that duty ceases to exist then another means of protecting the conditionality of the payment is required, and the only other means is (c). So, in other words, there are two ways of protecting the fact that a payment was conditional:

(c) requiring the return of the payment if the condition fails, and
(d) requiring the defendant to perform the condition.

When the contract is still in existence (d) does the work of protecting the conditionality but when it is terminated duty (c) comes into existence as a means of protecting the conditionality. But it is not the case, as said above, that the parties agreed on duty (c). Rather duty (c) follows from

(i) the parties' agreement that the transfer is conditional and
(ii) the failure of the primary/agreed mode of protecting the conditionality.

So, it is wrong to say that the parties – when they agreed that the transfer would be conditional – also agreed that the recipient would be under a duty to return the thing if the condition failed (i.e. duty (c)). Of course, this will not always be the case. Sometimes the payment is made on the condition that an event will happen, and the recipient is not under a duty to procure the happening of this event. In such a case the matter is straightforward: the parties agreed that the money will be returned if the event does not happen. But the point remains: in the vast majority of instances, it

[168] *Weston v Downes* (1778) 1 Doug 23, 99 ER 19; *Towers v Barrett* (n 19).

is wrong to say that the parties have impliedly (let alone explicitly) agreed that if the condition fails there would be a duty to return the thing. Therefore, it cannot be said that the duty to return the thing is one which is consensual (i.e. one to which the parties actually agreed).[169]

Be that as it may, the duty to return the thing arises to protect the conditionality of the transfer when the primary means of protecting such conditionality (i.e. the duty to perform the condition) no longer exists (or can no longer be enforced). Whilst such a reasoning can apply to goods[170] it is not applicable to services. This is because services are not returnable and as such there can be no duty to return them. Of course, it is possible to return the value of the service, but this is quite different from an obligation to return money or goods. This is because this puts the defendant in the position of having purchased the service when this might not have been what he wanted. Consider the following example. D is about to get married. As a wedding present A gives her £1000, B gives her a ring and C paints her house. The wedding is called off. A and B are clearly able to recover the money and the ring,[171] because the transfer was understood by all the parties to be conditional on the wedding happening. Hence there is an agreement between the parties that the money/ring will be returned if the wedding is called off.[172]

Whilst we are presumably all comfortable with A and B recovering, many people are likely to conclude that C ought not to recover. Why is that? The legal reason C's claim would fail is that D did not freely accept the services. As far as D was concerned this was provided gratuitously. D did not freely accept A and B's gifts either but that does not matter. The fact that they are returnable means that there can be an obligation to return them if the condition fails. To see that C cannot recover, consider E's gift. On hearing of D's engagement, E decided to give a bottle of wine to D and encouraged her to consume it straight away. When the wedding is later cancelled it seems E cannot recover the value of the bottle. Why is that? It would seem that the fact that the bottle was intended to be consumed straight away meant that there was no obligation to return it if the condition failed. In other words, whilst the wedding was a motive for the gift, it was not conditional upon it. Services are in many respects analogous to goods meant to be consumed straight away. So it could be said that in C's case the service was not actually given conditionally on the wedding, rather the wedding was just a motive.

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[169] This is not to say that such a duty goes *against* the intention of the parties. Had they been asked by the officious bystander, 'if the condition is not performed will D have to return the thing?', they would both answer 'of course.' But the point is that this is, typically, not something to which they would have addressed their minds.

[170] See e.g. engagement rings are given on the condition that they be returned if the engagement is called off without good cause: *Cohen v Sellar* [1926] 1 KB 536 (KBD).

[171] See ibid.

[172] This is a case where it is possible to say that this is what the parties actually agreed. This is because there clearly was not a promise to A, B and C that D would get married.

As Goff and Jones put it

> In the majority of cases the nature of the gift is likely to be the conclusive feature. Thus, it is unlikely that the court will order restitution in respect of services provided by one engaged person to another, even though the marriage fails to come about by reason of the fault of the recipient; and small gifts, and gifts which may be consumed before the marriage or may otherwise be not necessarily intended for use after the marriage, will tend to be construed as out and out gifts.[173]

In any event, it seems that for services conditionality of transfer is not sufficient to get recovery. Instead, what is required is a mutual understanding that the service is provided non-gratuitously (which can be established by free acceptance). Therefore, it is free acceptance that is doing the work in explaining recovery, whereas with money and goods free acceptance is not necessary and the conditionality of transfer alone is sufficient to ground recovery.

Finally, for further confirmation of this point, consider the different treatment of money and services under partially performed entire contracts. We know that, outside the prevention doctrine, there is no recovery for services provided. But there is no such entire contract bar insofar as money is concerned. The point can be illustrated by this modification of the facts of *Dies v British and International Mining and Finance Corp*[174] proposed by Baloch:

> A agrees to buy 1,000 rifles from B for £10,000, to be paid in advance in five equal instalments. Only when the instalments are fully paid will the obligation to deliver the rifles arise. After paying one instalment of £2,000, A fails to pay the balance, and B accepts this repudiatory breach and terminates the contract. A can then bring a claim for the return of the £2,000, even though payment was a condition precedent to the delivery of the rifles. [175]

If instead of money this was services, then the situation would be analogous to *Sumpter v Hedges* and there would be no recovery. Baloch correctly points out that the reason for the difference is the non-returnability of the benefit. As he puts it, when the benefit is returnable the 'effect is not, as in the *quantum meruit* claim, to partially enforce the contract (as it would be if rifles were claimed) but to reverse the transfer.'[176] And the trouble with partial enforcement is that the defendant, by making the contract entire, intended not to pay for a partially built house. Holding him liable would fail to respect his autonomy but there is no such risk if one is merely reversing the transfer.

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[173] R Goff and G Jones, *The Law of Restitution* (1st edn, Sweet & Maxwell 1966) 365.

[174] [1939] 1 KB 724 (KB).

[175] Baloch (n 4) 170.

[176] ibid 171.

The difficulty is that Baloch does not take this insight far enough. With services what does the work is not that the service is conditional but that the defendant requested or freely accepted the service on the basis that it was not gratuitous. The relevance of any condition or *quid pro quo* is only negative, it serves to ensure that any *QM* does not undermine the contractual bargain.

To sum up, there are three possible reasons why money paid on a condition that fails should be recoverable: (i) the money morally belongs to the claimant in the event that the condition fails, (ii) the parties actually agreed that the money will be returned if the condition fails, (iii) an obligation to return the money must be implied in order to preserve the conditionality of the payment. However, none of those reasons apply to services because services cannot be owned nor can they be returned. With services the only possible remedy is a duty to pay their reasonable value, but to avoid a forced exchange/purchase such a duty can only be found if there is a mutual understanding that the services are not provided gratuitously. But this is different from a conditionally provided service. Hence, the conditional transfer theory cannot apply to services.

V. CONCLUSION

The problem with the Birksian model of unjust enrichment is that it saw services through the same lens as it saw the recovery of money. But there are a number of important differences. Cases concerning services did not involve defective transactions and the remedy was not restoring the *status quo ante* but was a form of enforcement: it requires the defendant to engage in an exchange. This is in addition to the difficulties of identifying an 'enrichment' in service cases. Further, a conditional transfer analysis, like the one proposed by Baloch, cannot apply to services as it depends on the returnability of the thing transferred. But services, by their nature, are not returnable.

Furthermore, alternative explanations which saw *QM* as either the enforcement of a non-contractual promise or adopted a wider definition of contract have also been found to be wanting. In most cases the defendant did not promise to pay the reasonable sum for the work actually done. And the adoption of a wider definition of contract would be a significant departure from precedent and would not account for recovery in cases where the contract is unenforceable.

Not being satisfied with those explanations, this chapter went back to the history and sought to identify the basis for recovery. It was found that the basis for it was quasi-contractual and grounded in the forms of action. Part of the facts (i.e. the presence of a mutual understanding to pay for the services) supported an action for *QM*, but the defendant was able to defeat this action by invoking the express contract between the parties. However, the courts prevented the defendant from invoking the contract where he had repudiated it.

Part III sought to extricate this reasoning from the no longer existent procedural background it emerged from. It was first argued that, in the absence of an express agreement, the real basis for the duty to pay a reasonable sum was not consent but rather was the Benefit-Burden Principle. The benefit to the recipient, namely the claimant's labour, was tied to a burden, namely the cost of that labour, and by requesting or accepting the benefit the recipient came under an obligation to bear that burden. If there was no such obligation there would be a breach of the Benefit-Burden Principle and so a situation of unjust enrichment. By enforcing the obligation, the law avoided unjust enrichment.

But where there is an agreement between the parties, this has to take precedence over the Benefit-Burden Principle. There are, however, two exceptions to that. The first is the substantial performance exception. It arises because in such cases there would be a very strong breach of the Benefit-Burden Principle and giving recovery does not subvert the contractual agreement between the parties. The second exception concerns repudiated contracts. Here the defendant, having repudiated the contract, cannot rely on the agreement between them as a means of blocking or overriding the Benefit-Burden Principle. So, the contract gives way and recovery is awarded.

CHAPTER 6: CONCLUSION

In Chapter 2 Section I we distinguished between two meanings of unjust enrichment. There was what Birks called the 'generic conception'. By 'generic conception' Birks meant, at a high level of generality, 'the common quality of a number of apparently different events [giving rise to restitution].'[1] For example, 'the generic conception of sale, hire, agency, partnership, loan is "contract".'[2] 'Unjust enrichment at the claimant's expense' is the generic conception of all the events giving rise to restitution. For Birks there is nothing moral about 'unjust'. It is used purely descriptively to mean 'those circumstances in which the law provides for restitution.'[3] So, this was a purely descriptive account of the commonalities between all the situations where the law awards restitution. There is nothing normative about it.

[1] P Birks, *An Introduction to the Law of Restitution* (Oxford University Press 1985) 17.

[2] ibid.

[3] ibid 19.

However, the second meaning of unjust enrichment was moral: it is 'the principle against unjust enrichment'.[4] This is the principle which originated in Roman law. It is the moral principle which all the authors from Ames and Keener to Goff and Jones had seen as being the foundation of the law of quasi-contract. Birks observed that it 'restates the conception of the event in a dynamic or normative form."[5] It is prescriptive rather than descriptive.

In Chapter 2 Section II.A we saw that Birks rejected the prescriptive principle because he considered it to be either too vague or was a truism. If 'unjust' was understood to embody important moral and political values then it would be too vague and could not be applied by the courts. But if 'unjust' was defined by reference to the law then the prescriptive statement would amount to no more than saying that the law should be respected.[6] This argument fails for the reasons given in Chapter 2 Section II.B. It is possible to give content to the principle against unjust enrichment whilst avoiding either pure vagueness or positivism.

Indeed, it was argued that Birks' argument for the descriptive principle was a Motte and Bailey fallacy.[7] The Bailey is the moral principle against unjust enrichment. This is what makes his classification of events interesting and attractive, because, intuitively in all the circumstances where the law gives restitution it makes sense to say – in layman's terms – that the enrichment was unjust. The Motte is his descriptive reversible enrichment doctrine, according to which 'unjust' just means 'what the cases say is reversible'. When Birks is actually using unjust enrichment he appeals to the Bailey, but when pressed with objections that this is just palm tree justice, he retreats to the Motte and claims that there is nothing moral with 'unjust'. It would be unfair to accuse Birks of having intentionally relied on a fallacy. Rather, his fault is that he was unwilling to defend the Bailey (i.e. the moral principle against unjust enrichment). This is the task which this Thesis has sought to do.

As explained in Chapter 2 Section III.C, a defence of the moral principle against unjust enrichment requires identifying the reasons why a particular situation amounts to an unjust enrichment. This requires identifying the principles which tell us what are unjust enrichments. The methodology adopted in this Thesis has been not to seek to reinvent the wheel but instead, as Lord Reed said in a recent Supreme Court decision, to learn from 'the wisdom of our predecessors."[8]

The previous Chapters of this thesis have identified two such principles: the property principle and the benefit and burden principle. Bearing in mind that the methodology of this Thesis is to identify the principles that have been used to justify restitution, a full-blown defence of those

[4] ibid 22.

[5] ibid 23.

[6] ibid.

[7] See Chapter 2 Section II.A.

[8] *The Commissioners for Her Majesty's Revenue and Customs v The Investment Trust Companies (in liquidation)* [2017] UKSC 29, [2017] 2 WLR 1200 [40].

principles is beyond the scope of this Thesis. However, it is not enough to simply report that they were historically relied upon. One must also defend the internal coherence of those principles and consider whether they can be applied to new situations which did not exist at the time they were first developed. It is this task that this Chapter will undertake.

I. THE PROPERTY PRINCIPLE

The Property Principle, as applied to money claims, was stated by Charlie Webb as follows:

> (1) the claimant, as legal title holder of the relevant asset prior to its transfer, was authorized to determine who may receive and use that asset; (2) though the asset is now in the defendant's possession, it came into his hands only by virtue of a decision of the claimant's which was qualified or, in some way, impaired; (3) there is then good reason to treat the claimant as still the person authorized to determine the asset's use and disposition; but (4a) if we were to allow the claimant to assert a continuing title to that asset, this may create problems for third parties who have dealt with the defendant on the reasonable assumption that the asset now in his hands is his to dispose of; and (4b) if we were to allow the claimant to reclaim that asset ahead of the defendant's other creditors in the event of the defendant's insolvency, this would unreasonably prejudice those other creditors; so (5) it is reasonable, all things considered, to limit the claimant to recovery of a sum of money of equal value, leaving the asset in the defendant's hands and his to dispose of.[9]

Webb has provided a substantive defence of this principle in his book, so there is no need to repeat it here. However, there are two points that will be expanded on. The first is why it is that the law considers title to have passed even when the intention to pass title is impaired. The second is whether the Property Principle can apply to bank transfers.

A. Why is a normative interest retained even though legal title passes?

1. Nothing incoherent with the law protecting non-legal property rights

According to Webb the claimant retains a normative interest in the asset even though title has passed. This normative interest is what the old cases referred to when they said that the asset 'belonged ex aequo et bonuum' to the claimant. There is nothing incoherent in saying that one can retain a normative interest in something in which legal title has passed. As Wilmot-Smith, a critic of Webb's thesis, put it:

[9] C Webb, *Reasons and Restitution* (Oxford University Press 2016) 75–76.

> I can still have a normative interest in a thing belonging to another even if I have no legal interest: if your father killed my father and stole his art, I might be thought to have a moral entitlement to the art even if the legal system recognises it as yours. That seems obviously right.[10]

Nor is there anything incoherent with saying that, in some circumstances, the law will protect that 'moral entitlement'. Indeed, this is precisely what the Theft Act 1968 does in cases where title passes due to a mistaken transfer. It provides:

> Where a person gets property by another's mistake, and is under an obligation to make restoration (in whole or in part) of the property or its proceeds or of the value thereof, then to the extent of that obligation the property or proceeds shall be regarded (as against him) as belonging to the person entitled to restoration, and an intention not to make restoration shall be regarded accordingly as an intention to deprive that person of the property or proceeds. [11]

So, for the purposes of the Theft Act, property or money mistakenly transferred to the recipient is deemed to be 'property belonging to another' even though legal title has passed. This was not the case prior to the Theft Act,[12] but it shows that there is no incoherence in talking of the asset as 'belonging' to the transferor. Such a 'belonging' is not a legal one – I cannot bring an action in conversion to recover it – but a moral one which the law protects by the action for money had and received and by extending the provisions of the Theft Act to it.[13]

But the question still remains: why does the law consider that there is a moral entitlement which it will protect via a personal action? To see we need to look at derivative transfers of title.

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[10] F Wilmot-Smith, 'Reasons? For Restitution ?' (2016) 79 The Modern Law Review 1116, 1130.

[11] Theft Act 1968 s 5(4).

[12] *R v Gilkes* [1972] 1 WLR 1341 (EWCA) 1344–45 (Cairns LJ). Explaining how section 5(4) filled a gap which existed at common law and under Larceny Act 1916 s 1(2)(i).

[13] The fact that the asset is protected by the Theft Act does not mean that the ownership is now a 'deemed legal' one. If that were the case then the tort of conversion would be available. But the Theft Act clearly does not have that effect.

2. Derivative transfers of title to chattels and money

There is a wide variety of approaches which any legal system can take to regulating the passing of title to property. At one extreme we could have a purely subjectivist system under which title passes simply based on the unexpressed intention of the owner. At the other extreme the law could require registration for a transfer of property and it could provide that the register shall be conclusive. The former system affords maximal freedom to owners to transfer property whilst the latter imposes substantial bureaucratic burdens. However, under the former system it is very hard to know who owns what, but the matter is very easy under the latter system. So, in choosing which sort of rule to adopt the legal system has to balance party autonomy against the interest of third parties (by having certainty of title). There is no right answer as to how to do it and it is for each legal system to decide.

English law adopts a variety of different rules depending on the type of property, whether it is legal or equitable title which is transferred and whether the original owner will still be alive after the disposition. With land, an asset of considerable value which people rarely exchange, English law has adopted an objective system of registration which is virtually conclusive. When it comes to equitable interests, English law has adopted a more subjectivist approach, which again makes sense because such interests do not bind bona fide purchasers and so there is less of a need to protect third parties. And when the transfer is set to take place after the death of the original owner, the law imposes certain formalities on the transfer; this is because it would no longer be possible to check with the transferor if there were doubts about his intention.

What about the passing of chattels at law? The law does not take a purely subjectivist approach. I cannot pass title to my laptop by simply saying 'I transfer this to Johnny'. Instead, I need to deliver the laptop (the position is different, due to statute, under a sale of goods contract). We need not be detained by the precise rules of what counts as 'delivery', but it is sufficient to say that delivery is needed. There is, however, another issue; the relative conclusiveness of delivery. If an act of delivery has been done, how conclusive is it that the title has passed? In other words, what facts, if any, would mean that what looked like a delivery actually failed to pass title? What if, for example, the transferor was acting under duress (of the sort which would not be obvious to a third party)? Or if the transaction under which the transfer was done was defective? Or if there was a condition attached to the transfer which was not met? Again, the law has a choice to make. At one extreme it could say that any defect or qualification of the intent of the transferor would make the delivery ineffective. At the other extreme it could say that the delivery will always be effective. The law has to make a trade off.

The approach taken by English law is that only a complete absence of intention to transfer title will make the transfer ineffective. The illegality of the transaction,[14] fraud,[15] misrepresentation,[16] duress[17] and undue influence[18] do not affect the validity of the transfer, though might make it voidable (i.e. the transferor will have the power to rescind the transaction). However, fundamental mistakes will prevent title from passing. A mistake will be fundamental if it is a mistake as to the identity of the recipient,[19] as to the identity of the subject matter[20] and, especially in the case of fungibles, as to the amount to be transferred.[21] But this is best seen not as an exception but as a consequence of the rule that there must be intention to transfer title. One must intend to transfer the *chattel* to the *recipient*.[22] If there is a mistake about the thing being transferred, or, in the case of fungibles, the quantity of the thing transferred then there was no intention to transfer the chattel that was delivered. Similarly, if there is a mistake as to the identity of the recipient, the transferor then did not intend to transfer title to the person who got delivery. In other words, there must be a coincidence between the thing actually delivered and the thing intended to be delivered and between the actual recipient and the intended recipient. If there is not then the title is not passed. But, otherwise, legal title will always pass regardless of any other defects.[23]

It would appear that conditional transfers are possible in English law. Certainly where conveyance by contract – rather than by delivery – is available the parties have full autonomy to decide when title will pass,[24] and so there should be no difficulties with either of those arrangements. Indeed, clauses providing that title be retained until payment are commercially very common.[25] But in cases where – as with gifts – title must pass on delivery (or by delivery of a deed), what is the position?

There is no direct authority on this point, but it would appear that it is possible to make a conditional transfer of a chattel outside of a contractual context. The better view is that such transfers operate as follows: at delivery, title remains with the original owner and a bailment

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[14] *Singh v Ali* [1960] AC 167 (PC).

[15] *Car & Universal Finance Co v Caldwell* [1965] 1 QB 525 (EWCA).

[16] *Re Glubb* [1900] Ch 354 (EWCA).

[17] *Dimskal Shipping Co SA v International Transport Workers Federation (The Evia Luck) (No2)* [1992] 2 AC 152 (UKHL).

[18] *Allcard v Skinner* (1887) 36 Ch D 145 (EWCA).

[19] *Cundy v Lindsay* (1878) 3 App Cas 459 (UKHL).

[20] *R v Ashwell* (1885) 16 QBD 190 (CCR).

[21] *Ilich v R* (1987) 162 CLR 110 (HC Aus).

[22] D Fox, *Property Rights in Money* (Oxford University Press 2008) para 3.100; D Sheehan, *The Principles of Personal Property Law* (2nd edn, Hart Publishing 2017) 154.

[23] Fox (n 22) paras 3.53-3.57.

[24] Sale of Goods Act 1979 s 17.

[25] *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676.

relationship is created; after the appointed condition is fulfilled title passes and the bailee becomes the owner.[26]

Therefore, the law concerning the passing of title to chattels, outside of sale of goods contexts, is as follows:

1. Title will pass on delivery if there is intention to transfer the thing actually transferred to the person who is actually the recipient (i.e. provided there is no fundamental mistake).
2. No (non-fundamental) mistake, defect or qualification of the intention will prevent legal title from passing; neither will any defect in the transaction by which the transfer is done.
3. Title will pass on delivery subject to only one exception: where the parties have agreed that title be retained after delivery and will only pass when a condition is met. In such a case, title passes when the condition is met.
4. The parties cannot provide that legal title passes on delivery but reverts back if the condition is not met.

These rules make sense. They promote certainty of ownership whilst not exposing the parties to an overly great bureaucratic burden. However, the conclusiveness of delivery means that title will pass in circumstances where the parties did not properly intend for it to pass. So, for example, if the owner transfers a chattel because he mistakenly thinks he is under a legal duty to do so then there will be an effective transfer of title.

The position with money is the same. The rules concerning acquisition of derivative title to money are the same as for chattels. In addition, there are two other rules by which the recipient of money can acquire a clean title. These are the 'no earmark rule' and the 'currency rule'. The 'no earmark rule' provides that when money is mixed the owner of the money loses his title to it. The 'currency rule' provides that where money is tendered as currency, the recipient will acquire a good title to the money provided he was in good faith. As such this provides an exception to the nemo dat rule for money. As David Fox has shown, the purpose of the no earmark rule was to ensure the free circulation of money as currency.[27] It, was, however, superseded by the currency rule.[28] But the purpose of both rules is the same; namely to ensure that there was no need to query whether a person tendering any form of money was the true owner thereof. As Viscount Haldane LC put it in *Sinclair v Brougham*: '[i]f a sovereign or banknote be offered in payment it is, under ordinary

[26] R Chambers, 'Conditional Gifts' in N Palmer and E McKendrick (eds), *Interests in Goods* (LLP 1998) 430–432.

[27] Fox (n 22) paras 8.10-8.19.

[28] ibid 8.20-8.26.

circumstances, no part of the duty of the person receiving it to inquire into title.'[29] The reason for that is to ensure the free circulation of money. If that were not the case, then commercial exchanges would be much less efficient.[30]

The purpose of these rules concerning the passing of title to money and other chattels is to protect third parties by reducing transaction costs (so that the third party can, in general, reasonably assume that the person in possession has valid title). Although they have the effect of also making life easier for the recipient, they are not intended to act for the benefit of the recipient. Yet they are unfair to the original owner; his freedom to decide what will happen to his asset has not been respected. This unfairness to the original owner is acknowledged by the law when it recognises that, because the original owner did not properly intend to part with the asset, he retains a normative interest in the asset – which normative interest the old cases referred to as 'belonging ex aequo et bonuum'.

3. Why legally protect a non-legal interest in the asset?

There are plenty of moral rights and duties that we do have but which the law does not enforce. For example, the law does not enforce our moral duty to keep gratuitous promises. Nor does it enforce our moral duty not to cheat on our partners. So, one needs to explain why the law should enforce this moral ownership especially when it has decided that it would not amount to legal ownership anymore.

The explanation for this is the 'mess explanation'[31] which, as we saw in Chapter 3 Section II.D, the courts started to outline in *Sinclair v Brougham*. According to that explanation, the law created a mess by adopting the no earmark rule, the currency rule, the abstraction principle and not looking at defects in the intention to transfer title, and giving a personal action is the law's way of clearing up that mess. As Zimmerman puts it:

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[29] *Sinclair v Brougham* [1914] AC 398 (UKHL) 418 (Viscount Haldane LC).

[30] Fox (n 22) paras 2.11-2.27.

[31] A term coined by McBride for explanations of the law according to which 'C is allowed to sue D not because anyone has done anything wrong, but because something has gone wrong, and allowing C to sue D is the only (or best) way to clear up the mess that has been created': N Mcbride, 'Restitution and Unjust Enrichment: The Coming Counter-Revolution', *8th Biennial Obligations Conference, University of Cambridge* (2016) 19.

> in the words of the great pandectist Heinrich Dernburg, it is by means of an enrichment action that the law attempts to heal the wounds that it itself inflicts (by virtue of the abstract transfer of ownership).[32]

But what exactly is this mess or wound? It is the fact that the transferor has lost legal title when he still has moral ownership. Importantly, therefore, the mess explanation requires the moral ownership theory in order to work. Without it the situation which the law creates is not a mess and so there is nothing to fix.

There is an additional explanation for recovery and this is what McBride has termed the 'confidence explanation'. According to this explanation, first put forward by Lord Kames in 1760, if there was no recovery for mistaken payments then people would spend a very long time making sure that the debts they paid were actually due. This would be greatly inefficient. So, in order to facilitate commerce, the law provides that a personal claim is available to recover mistaken payments.[33] This is why the law decides to protect the moral ownership of the owner.

B. Bank payments

In a transfer of corporeal property, including money, it is straightforward to see how the Property Principle applies; the note that you now have in your possession was previously mine and so it is easy to say that I retain my normative interest in it. But this is not the case for bank transfers. When I transfer you £10, a chose in action I had against my bank is extinguished and you acquire a new chose in action against your bank. Indeed, it is not even an assignment of the chose in action that I previously had, but is instead a new one. So, it would seem that the Property Principle cannot apply in this context as there is no asset or right being transferred. Wilmot-Smith argues that this leaves defenders of the Property Principle with two options. They can either accept this consequence and argue that it only applies to tangible assets. Or they can seek an expanded definition of property which would cover bank transfers, but this runs the risk that this would implausibly stretch the notion of property, so that the Property Principle cannot do the normative work that it needs. And there might then not be coherent reasons for such an account not to apply to services.[34] Webb has sought to take the second option and to argue that this does not then cover

[32] Zimmerman, *The Law of Obligations: Roman Foundations of a Civilian Tradition* (Oxford University Press 1996) 867.

[33] Mcbride (n 31) 21–22.

[34] Wilmot-Smith (n 10) 1131–1132.

services.[35] Wilmot-Smith is not persuaded by Webb's reasons.[36] An examination of this debate is beyond the scope of this Chapter, but there is an alternative response. The trouble with Wilmot-Smith's objection is that it assumes that the law of unjust enrichment must internally have requirements for what counts as property. This, however, is not true. These could be external to it. So unjust enrichment could simply say that 'the value of property transferred by mistake should be returned', whilst leaving it to other areas of the law to decide what counts as 'property'.

For better or for worse we treat a debt in a bank account as being equivalent to corporeal money. There are good reasons for that. A bank account can be reduced to corporeal money on demand and at par value. True, other assets or services can be exchanged for corporeal money but this does not happen on demand (the counterparty can refuse the exchange) and the value is set by the market rather than being visible on its face. As Fox puts it:

> The difference, for example, between a book which is sold for £100 cash and a bank balance of £100 is that the bank balance is expressed in monetary units of value, while the book has no fixed monetary value already inhering in it. Its value can only be assessed by looking to a market.[37]

This is what justifies treating bank accounts as money. It is important to note that what amounts to money is not a pure question of law but is partly decided by social facts. As Fox puts it, 'the question where the law should treat a certain kind of assets as money (and so, for example, apply a characteristic proprietary regime to it) can only be answered by observing whether the community where it circulates treats it as such.'[38] A key feature of money is that, when used as a unit of value and medium of exchange, it does not matter what form the money takes; five £1 coins should be treated as exactly the same as one £5 note which should be treated the same as £5 in a bank account.[39] Hence, the same proprietary scheme should apply to all. It is true that there are instances where we are interested in money as specific and not fungible property but these are quite rare and in such cases it is proper to apply a different analysis.[40] Importantly, all such cases do not involve bank transfers of money from one person to another. Where there is a bank transfer of money, it is being treated as a medium of exchange or a unit of value and so is treated as a fungible which is

[35] Webb (n 9) 97–98.

[36] Wilmot-Smith (n 10) 1132–1134.

[37] Fox (n 22) para 1.55.

[38] ibid 1.23.

[39] ibid 1.80-1.81.

[40] ibid 1.82-1.86.

no different from physical cash.[41] In such cases, therefore, the bank transfer is appropriately treated as a notional cash transfer. The argument can therefore be expressed as follows:

1. A bank transfer is treated as a notional cash transfer
2. The Property Principle applies to cash transfers
3. Where money is treated as fungible the same proprietary rules should apply to all forms of money
4. Bank transfers always involve seeing money as fungible
5. Hence, the same proprietary scheme should be seen as applying to bank transfer as with cash transfers
6. Therefore, the Property Principle can apply to bank transfers.

In any event, the objection that a bank transfer cannot be seen as involving derivative transfer of title because it creates a new chose in action is overstated. As Fox puts it:

> First, the creation of the recipient's title depends on the expression of the payer's will at the outset. It is the payer who initiates the payment instruction. Secondly, it will be seen that the recipient generally holds his or her debt claim against the bank subject to the same defects in title as affected the payer's debt claim against his or her bank before the transfer. The fact that the recipient's claim against his or her bank is newly created does not necessarily entail that he or she takes it free from competing titles.[42]

It must be noted that the notion of 'derivative' means of acquiring title for tangibles is to an extent a fiction. The distinction between original and derivative means of acquiring property was not found in the Roman Law texts but was instead created by commentators later on.[43] As Schulz puts it, it was just a metaphor. The better view was that there was abandonment followed by a new title coming into being.[44] The point is this: from a strict jural relations point of view there is no real distinction between derivative and original modes of acquiring ownership. Instead, these are analytical tools which we use to categorise what is going on. So it is perfectly legitimate, as we currently do, to treat bank transfers as involving derivative modes of acquiring title. The objection

[41] This is also typically the case for physical transfers but not necessarily. So, for example, I might give a particular £5 note to you because it has a serial number which we find funny. Here the specific character of the note matters and is therefore not fungible with another £5 note or with £5 in a bank account. But this is never the case for bank transfers as there is nothing to distinguish one unit of money in a bank from another.

[42] Fox (n 22) para 1.106.

[43] WW Buckland, A Textbook of Roman Law : From Augustus to Justinian (P Stein ed, 3rd ed, Cambridge University Press 1963) 204.

[44] F Schulz, *Classical Roman Law* (Oxford University Press 1951) para 595.

that, from a strict jural point of view, it is a new title that is created, and this can apply to a wide range of situations including some which we would consider to be focal cases of derivative modes of acquiring title.

What about the concern that treating bank transfers like cash transfers would open up Pandora's box and that, therefore, services could also be treated like cash transfers? If this were the case then it would mean that the Property Principle would also cover services and that, therefore, Birks was right in considering that the recovery for services could be analysed using the same framework as the one used for cash transfer. However, this objection fails. Treating bank transfers like cash transfers does not open up Pandora's box. There are a number of highly significant differences between bank transfers and services. With a service there is nothing that can be returned. Now the objection is that neither can a bank transfer.[45] But with bank transfers those differences are insignificant because of the nature of money. Consider these four examples:

1. *Widget*: A transfers widget to B by mistake. B transfers widget back to A.
2. *Cash*: A transfers a £10 note to B by mistake. B transfers two £5 notes to A.
3. *Bank*: A transfers £10 from his bank account to B's account by mistake. B transfers £10 back to A.
4. *Service*: A provides a service the market value of which is £10 to B by mistake. B transfers £10 to A (it does not matter the form of the £10).

The first case is the *par excellence* instance of the Property Principle. From there we can infer that a condition for the Property Principle to apply is that it must be possible to return to the status quo ante by transferring back the thing in question. The argument goes that in the *Service* case it is not possible to do so (B cannot transfer the service back and if he gives £10 then he is £10 worse off than he was compared to the initial position), and so the Property Principle does not apply. But Wilmot-Smith's objection is that it is also not possible to do so in the *Bank* case. Now one might respond that in *Bank* the status quo ante is possible because, although they might not have the same chose in action as before, the parties have the same value as they did before. But to that objection Wilmot-Smith would reply that this is also true in the *Service* case. However, there is a big difference. In both *Cash* and *Bank* the thing or chose in action transferred (or newly created) has inherent value and the society and the law treat it as being equivalent to another form of money of the same value. Hence, in *Cash* A cannot complain that he got two £5 notes instead of one £10 note, the two are simply inherently equivalent. The same goes in *Bank*; whilst technically the new £10 chose in action that A gets back is different from the one that he lost, the two are treated as

[45] Wilmot-Smith (n 10) 1133.

being fungible equivalents and so he cannot complain. From B's point of view matters are even clearer. What he loses is precisely the chose in action that he gained due to A's actions. But in *Service* all of this is different. What B loses (£10) is different from what he gained from A (the service) and what A gets back (£10) is not a fungible equivalent to the service he provided.

So, the constraint for the Property Principle to apply can be formulated as follows: it must be possible to return the parties to the literal status quo ante or to a situation where the entitlements they get are fungible equivalents to what they had in the status quo ante. This, therefore, provides a coherent and principled basis for excluding services from the ambit of the Property Principle, whilst including choses in action and bank transfers. It follows that the Pandora's box objection fails. It is perfectly possible for the Property Principle to apply to both cash transfer and bank transfers whilst not applying to services.

C. Conclusion

The application of the Property Principle to instances where legal title has passed is not incoherent. It is perfectly possible to have non-legal normative interests which the law nonetheless chooses to protect. This is what was meant when the old cases talked of *ex aequo et bono* ownership. In cases where there is no full intention to pass title to money and chattels but where title passes nonetheless because of rules that are in place for the benefit of third parties dealing with the recipient, it is proper for the law to treat the original owner vis-à-vis the recipient as if he were still the owner. Hence, the Property Principle will allow the original owner to recover the thing so transferred. Furthermore, the Property Principle can perfectly coherently be extended to situations where it is not a tangible thing that is transferred but a chose in action or a bank balance. Nor does such an extension open up Pandora's box to incorporating services as part of the Property Principle.

II. THE BENEFIT-BURDEN PRINCIPLE

D. One Principle Not Two

The Benefit-Burden Principle was covered in Chapter 4 Section III. As was seen in Chapters 4 and 5 it operates in two different ways. In certain circumstances it is triggered by voluntary acceptance of the benefit, but in others it is sufficient that the benefit be incontrovertibly at least equal to the burden. This might lead one to think that there are two different Benefit-Burden Principles. This, however, would be incorrect. There is only one principle but, in order to operate, it must not threaten other principles, including the Autonomy Principle. But it is only in those two situations that the Benefit-Burden Principle will not infringe the Autonomy Principle. So the point is that merely receiving a benefit creates a moral duty to bear the associated burdens but the law will not enforce that moral duty in those situation because to do so would be contrary to the respect for autonomy which English Law has. The following anecdote illustrates the point.

For the first five James Bond novels, Mr Bond carried a .25 Beretta gun. In 1956, Ian Fleming, the author of the Bond novels, received an unsolicited letter from one Geoffrey Boothroyd advising him that Bond ought to carry a different gun. Fleming took the advice and when *Dr No* was published in 1958, Bond had switched to using a Walther PPK. Fleming wrote back to Boothroyd thanking him for the advice and said the following, 'Since I am not in the habit of stealing another man's expertise, I shall ask you in due course to accept remuneration for your most valuable technical aid.'[46] In addition, Fleming also named one of the characters – Major Boothroyd – after his correspondent.

Legally, it is quite clear that Fleming owed nothing to Boothroyd. Yet Fleming considered himself to be morally bound to remunerate Boothroyd. The Benefit-Burden Principle explains it. Fleming took the benefit of Boothroyd's advice and so was under a moral obligation to pay for it. However, legally enforcing this obligation would have breached Fleming's autonomy as he had no possibility to reject the advice (it was unsolicited).

[46] The correspondence is reproduced at 'May I Suggest That Mr. Bond Be Armed with a Revolver?' (*Letters of Note*) <http://www.lettersofnote.com/2011/06/may-i-suggest-that-mr-bond-be-armed.html> accessed 26 April 2018.

Similarly, in *Nicholson v Chapman*[47] the owners of the timber were certainly under a moral obligation to pay those who had rescued it.[48] But, the enforcement of such an obligation would violate their autonomy, because the intervention was unrequested, and so the law does not do so. Therefore, it is only when the Benefit-Burden Principle does not clash with other principles, in particular the Autonomy Principle, that the law will grant recovery. There is no clash where the recipient has the opportunity to reject the benefit knowing that it is not provided gratuitously. Nor is there a clash if the imposition of liability under the Benefit-Burden Principle would incontrovertibly not make the recipient worse off. This is because, in such a case, there is no detrimental change to the position of the recipient and hence that change does not need to be subject to the approval of the recipient.

E. In Defence of Benefit-Burden

In a recently published article Bevan is critical of the 'doctrine of Benefit and Burden.'[49] His criticisms should not be cause for concern. First, it is important to distinguish the '*doctrine* of Benefit and Burden' from the 'Benefit-Burden *principle.'* The doctrine is a rule of land law which provides an exception to the rule that positive burdens in freehold covenants do not bind successors in title. According to the doctrine, recently re-affirmed in three Court of Appeal judgments,[50] the successor in title to the freehold will be bound by the positive burden if the following three conditions are met:

1. The benefit and burden must be conferred in or by the same transaction and this transaction must have been in writing;

[47] *Nicholson v Chapman* (1793) 2 H Bl 254, 126 ER 536. In that case Nicholson owned timber which which was docked on the Thames. Unfortunately, the ropes broke and the timber was released. It was collected by Chapman. who sought to argue that he was entitled to remuneration for having rescued the timber. This was rejected by the Court of Common Pleas.

[48] 'perhaps it is better for the public that these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should depend altogether for their reward upon the moral duty of gratitude': ibid [259] (Eyre CJ).

[49] C Bevan, 'The Doctrine of Benefit and Burden: Reforming the Law of Covenants and the Numerus Clausus "Problem"' (2018) 77 Cambridge Law Journal 72.

[50] *Davies v Jones* [2009] EWCA Civ 1164, [2009] All ER (D) 104; *Wilkinson v Kerdene* [2013] EWCA Civ 44, [2013] EGLR 163; *Elwood v Goodman* [2013] EWCA Civ 1103, [2013] 4 All ER 1077.

2. The receipt or enjoyment of the benefit must be relevant to the imposition of the burden, in the sense that the former must be conditional on or reciprocal to the latter: this is a matter of construction of any deed or document in the case;

3. The person on whom the burden is alleged to have been imposed must have or have had the opportunity of rejecting or disclaiming the benefit, not merely the right to receive the benefit.[51]

The doctrine undoubtedly reflects the Benefit-Burden Principle but, unlike the other cases considered in Chapters 4 and 5 where the Principle underpins recovery, in the case of freehold covenants it is applied directly in the other cases the Principle is mediated via other legal rules.

Bevan criticises the doctrine for resting on 'unsteady doctrinal foundations.'[52] He notes much of the same sources for the doctrine as were noted in Chapter 4 Section III.A. After citing Megarry V-C's statement that the doctrine hails from, 'The simple principle of ordinary fairness and consistency that from the earliest days most of us heard in the form "You can't have it both ways," or "You can't eat your cake and have it too," or "You can't blow hot and cold".'[53] Bevan adds:

> It is striking perhaps that a doctrine sitting in such clear conflict with the long-standing and celebrated *Austerberry* rule is justified on such slender and colloquial materials and according not to legal doctrine but by reference to non-scholastic cliché. Striking also that the potency and enforceability of property rights should fall to be determined by reference to a broad construct of "ordinary" fairness and consistency; notions which, whilst doubtless central to any functioning legal system and to the interests of natural justice, are not the primary drivers of property law.[54]

Bevan then adds that maxims provide an 'unstable and unreliable foundation for the construction of secure legal doctrine'[55] and makes more specific criticisms about the way the doctrine has been applied. For example, he criticises the way the test for opportunity to reject has been applied.[56]

Bevan's point about maxims is certainly true and his criticisms of the manner of the operation of the doctrine are well taken. But they do not trouble the argument made in this thesis: that the cases considered in Chapters 5 and 6 are underpinned by the *principle* of Benefit and Burden.

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[51] Bevan (n 49) 80; *Davies v Jones* (n 50) [27].

[52] Bevan (n 49) 83.

[53] *Tito v Waddell (No 2)* [1977] Ch 106 (EWCA) 289 (Megarry V-C).

[54] Bevan (n 49) 84.

[55] ibid 86.

[56] ibid 88.

This is for two reasons. First, the point about the use of maxims does not apply here. This is because, in the cases with which we are concerned there is no suggestion of applying the principle or the latin maxim – *qui sentit commodum sentire debet et onus* – directly. Rather, each case is to be decided in accordance with a well-established set of rules which are different for each situation. What they have in common is that they all find the rationale for them in the above maxim and the Benefit-Burden Principle but there is no suggestion, as with the freehold covenant cases, of the Principle being applied directly by the courts. For the same reason, Bevan's criticism that the doctrine is uncertain also does not apply here.

Secondly, Bevan criticises the legitimacy of using 'slender and colloquial materials' to avoid a well-established legal rule (that positive freehold covenants do not bind successors in title). But here the Principle is not used to overturn or avoid any such well-established rules. The core instances of recovery – recoupment, contribution, general average, quantum meruit – have been well established for over 200 years. True, there has been incremental development but the legitimacy of those instances of recovery is certainly not in doubt. A possible illegitimate use of the Principle (when applied directly) in the freehold covenant cases does not put in any doubt the legitimacy of other well-established rules which happen also to be underpinned by the Principle.

F. Conclusion

Whilst it might be inappropriate for judges to seek explicitly to apply the Benefit-Burden Principle to a case before them, this does not threaten the role of the Benefit-Burden Principle in recoupment, contribution, general average, *quantum meruit*, and other such cases. This is because in those cases the Benefit-Burden Principle operates in harmony with the Autonomy Principle and because there are well established rules which the courts apply, hence there is no need for judges to directly apply the Benefit-Burden Principle. Instead, they apply rules which are underpinned by that Principle.

III. THE AUTONOMY PRINCIPLE

Party autonomy is one of the foundational principles of the common law. Indeed, it can be described as being one of the law's ideologies.[57] It has long been recognised that this principle plays a key part in the law of unjust enrichment by acting as a limit to recovery. Since the role of this principle is well-established this section will just be a brief overview of the role the principle plays. The principle explains why, in general, there is no recovery for unrequested benefits. So as Bowen LJ recognised in *Falke v Scottish Imperial Insurance*:[58] 'Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit on a man against his will.' Hence, subject to exceptions discussed below, one can only be liable if the benefit was requested or chosen, but the mere fact that one made use of a benefit which one received does not mean that one freely chose it because, '[if the claimant] cleans another's shoes, what can the other do but put them on?'[59] This is what underpins what the law now, unhelpfully, refers to as 'subjective devaluation'.[60]

So, this means, that where the benefit is not requested or freely accepted there can, subject to three exceptions, be no recovery. This is because imposing liability would force the defendant to pay for something which they did not want. This offends the autonomy principle. The Third US *Restatement of the Law: Restitutiion and Unjust Enrichment*, helpfully calls this aspect of autonomy the 'no forced exchange principle':

> Liability in restitution may not subject an innocent recipient to a forced exchange: in other words, an obligation to pay a benefit that the recipient should have been free to refuse.[61]

This principle is, however, not engaged where the benefit received is money or is otherwise readily returnable. This is because in such a case the imposition of liability does not require a forced exchange as the recipient can simply return what he received. Similarly, where the benefit has, for one reason or another, already been converted into money, then the exchange has already happened and so requiring the recipient to return the sum in question does not amount to a forced exchange. Finally, if the benefit received spares the recipient a legally necessary expense then making him pay for it will not require a forced exchange because the recipient would always have been required to expend resources discharging that duty.[62]

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[57] S Worthington, 'Common Law Values: The Role of Party Autonomy in Private Law', *The Common Law of Obligations: Divergence and Unity* (Hart Publishing 2016).

[58] *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234, 248 (Bowen LJ).

[59] *Taylor v Laird* (1856) 25 LJ Ex 320, 332 (Pollock CB).

[60] *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938 [26] (Lord Clarke, Lord Kerr and Lord Wilson).

[61] *Restatement Third, Restitution and Unjust Enrichment* (American Law Institute 2011) s 2(4) (Rule at p 16, Commentary at p 19, Notes at p 21).

[62] ibid 9(a) Rule at p 99, Commentary at pp 99-108, Notes at pp 109-110.

The principle also underlies the primacy of contract. As was seen in Chapter 5, there will be no recovery in unjust enrichment (and especially in quantum meruit) so long as the contract between the parties has not been terminated. This is because restitution for benefits provided or the payment of a reasonable sum for the work done was not what the parties agreed. This might very well lead to instances of unjust enrichment as the recipient had the benefit of performance he did not pay for. But ordinarily, this will not be enough for the law to intervene in a manner contrary to what the parties agreed. Hence it is only where the contract ceases to operate that there will be such recovery.[63]

Finally, autonomy also plays a role in the defence of change of position. Elise Bant has argued that the defence has two aims, one of which is autonomy:

> The first (and very specific) aim is to protect the defendant from the harm he would suffer where an order to make restitution in part or in full would leave him in a worse (including entirely different) position than he was in prior to his receipt. This harm-orientated limb serves to protect the defendant's autonomy, for example by preventing him from being placed in an entirely different position from that which he occupied prior to the receipt.[64]

In other words, this protects the defendant from a situation where the transaction would be irreversible.[65] In that sense, the defence is another embodiment of the 'no forced exchange' principle. To see the point, consider two situations:

> (1) A by mistake provides B with a free meal in a restaurant. B consumes the meal in good faith thinking that he was entitled to it. The meal is worth £100.
>
> (2) A by mistake transfers £100 to B. B in good faith thinks he is entitled to the money and decides to treat himself to a nice meal in a restaurant. He spends all £100 on the meal. Had he not received the money, he would not have gone to the restaurant.

In both cases imposing liability to repay £100 on B would amount to a forced exchange as it would require B to pay, from his own money, for a meal that he did not think he would have to pay for from his own funds.

The second aspect of the defence, for Bant, is that it tames the irreversibility protection that it gives by reference to the defendant's fault.[66] So it is only if the defendant is in good faith

[63] ibid 2(2) (Rule at p 15, Commentary at p 17, Notes at p 20).

[64] E Bant, *The Change of Position Defence* (Hart Publishing UK 2009) 217.

[65] ibid.

[66] ibid.

that he will have the protection of the defence if the transaction turns out to have become irreversible.

To conclude, we can see that the Autonomy Principle plays a very important role in limiting liability in unjust enrichment. In particular, bar exceptional circumstances, liability cannot be imposed where doing so would violate the Autonomy Principle. Therefore, whilst the Property and Benefit-Burden Principles provide positive reasons for recovery the Autonomy Principle operates to place limits on recovery.

IV. EVENTS, REASONS AND RESPONSE

An unjust enrichment is a situation, or – to use Birks's terminology – an event, whereby someone has acquired an advantage which it is unjust for them to have. The principle against unjust enrichment assumes that the law should seek to avoid such situations from occurring and, if they do occur, to remedy them. It is the three principles above, and not the principle against unjust enrichment, which point out what the unjust enrichments are. There are, however, various different ways in which the law can then respond to such situations. In this section we will consider each of the main situations of unjust enrichments and consider what makes them unjust enrichments and how the law responds to this.

G. Category A: Returning the benefit

1. Category A1: Defective intention to transfer money/goods

Here money or goods have been transferred to the defendant recipient in circumstances where the claimant did not fully intend to make the transfer. Nonetheless, the law considers that he had sufficient intention to pass legal title. In such a case, the property principle explains why the situation is one of unjust enrichment. This is because the recipient has something which, morally, does not belong to him. Hence, he is enriched and this enrichment is unjust. The property principle itself does not provide the explanation for recovery. It has to be combined with an account of why the asset still morally belongs to the claimant. Such an account was sketched in Section I.A above.

According to this account, from a moral point of view the asset still belongs to the claimant because the claimant's intention to pass title was defective. Furthermore, the legal rules which say that title passes notwithstanding the defect operate for the benefit of third parties and, between the claimant and defendant, are not intended to benefit the defendant (though, of course, the defendant does benefit as a side-effect from the fact he can pass title to third parties). Hence, the asset still morally belongs to the claimant. In addition, this is a moral entitlement which the law ought to care about and protect because the lack of protection (by way of retaining the legal title) was of the law's own doing and because giving such protection would encourage people to transfer assets and hence reduce transaction costs. It is only at this stage that the property principle bites to say that the situation so created – that the defendant has legal title to an asset which does not morally belong

to him – is an unjust enrichment. The principle against unjust enrichment then kicks in to say that the law must remedy this situation. The final question is how should the law respond to this situation? There are three possible approaches.

First, the law could give the claimant a personal wrong-based action for an unreasonable failure to return the asset, i.e. wrongful or unconscionable retention. This, in effect, amounts to what a fault-based conversion claim would be like if one existed. As we saw in Chapter 3 this was the initial approach which the law took to money claims but it is no longer the approach taken. However, as argued in Chapter 3, this remains the position for goods (i.e. returnable non-money assets/rights); the defendant is liable (in money) for wrongfully refusing to return the asset.

Second, the law could give the claimant a personal claim against the defendant which would have the effect of putting the claimant and the defendant vis-à-vis each other in the same position they would have been in had the first type of claim been available. This is what the law now does with money. This is because, due to the nature of money, there is no difference between a duty to return a £10 note and a debt for £10. So, the claimant is not disadvantaged by the shift to a debt. As for the defendant, under the wrongful retention model considered in the previous paragraph, he would not have been liable if he had spent that money in good faith because his dealing with the money would then not have been wrongful and, once he had spent it, there would be nothing for him to wrongfully retain. Hence, in order not to disadvantage the defendant, the law gives him a defence under this second model in cases where he spent the money is good faith. This is the change of position defence.

The above, solution, however, is only available for money claims; is not available for non-money claims. This is because, for goods claims, if a debt for the value of the goods was imposed on the innocent recipient of the goods this would put the defendant in a position of having to pay for something which he did not want. This would be a forced exchange and would violate the autonomy principle. Hence, the defendant must have the option of simply returning the goods. This is why the law adopts the fault-based conversion model for non-money returnable assets/rights.

The final model consists of the award of a proprietary rather than a personal remedy. It could, for example, be the imposition of a trust on the assets so transferred. Instances where the law adopts that solution are rarer and primarily fault-based. This makes sense as such a solution will affect third parties. It is, therefore, important to ensure that the imposition of a trust does not contradict the reasons why the law said title passed in the first place. Otherwise, the law would be contradicting itself. It is therefore right that proprietary remedies to unjust enrichment situations arising from defective transfer be the exception.

2. Category A2: Conditional transfer of money/goods

C transfers an asset to D on the condition that event E occurs. E does not happen. To analyse this situation we must again ask the two questions: (i) why is it a situation of unjust enrichment and (ii) how should the law respond to it?

To the first question one might be tempted to give the same answer as above: the intention to transfer is defective because it was qualified and the qualification failed,[67] so morally the asset still belongs to the claimant and so the situation is one of unjust enrichment. However, this reasoning does not account for the fact that the condition for the transfer must be shared by both parties in order to establish a total failure of basis.[68] With mistake, there is no requirement that the factual understanding of the claimant be communicated to the recipient before one can say that the transfer is defective. Since, the Property Principle underpins recovery for mistaken transfers of things, this means that the Property Principle does not require that the basis of the transfer be joint. Furthermore, even if it were said that moral ownership was retained even when the condition was uncommunicated, the case for the law's protection of that moral entitlement would be much weaker. This is because the claimant could have protected himself – by just communicating the condition – much more easily than in the mistake cases. In addition, the reduction of transaction costs does not require that claimants should be able make conditional transfer without communicating the condition. So, if ihe principle underpinning recovery for conditional transfers is not the property principle, then what is it?

In Chapter 5 Section IV.B, the 'agreement to return' explanation for the recovery of conditional transfers was considered. According to that explanation, by agreeing that the transfer of the asset was conditional, the parties actually, if implicitly, agreed to return it should the condition fail. It was argued that this was only a plausible explanation in cases where there was no duty on the defendant to the event which is the condition of the transfer ('Event E'). But in cases where the defendant was himself under a duty to bring about event E, such reasoning was considered to be fictitious. Instead, it was argued that the better explanation was that a duty to return the asset only arises if the duty to bring about event E was no longer present. This is because, where there is no longer a duty to bring about event E, a duty to return the asset becomes necessary to protect the fact that the transfer was conditional.[69] The need for a duty to return to arise can be explained in terms of the Benefit-Burden Principle. By virtue of the fact that the basis was joint the

[67] Peter Birks, *An Introduction to the Law of Restitution* (Oxford University Press 1985) 219–21.

[68] *Spaul v Spaul* [2014] EWCA 679 [46]; *Burgess v Rawnsley* [1975] Ch 429 (CA) 442 (Brown LJ); C Mitchell, P Mitchell and S Watterson, *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) paras 13–02.

[69] Chapter 5 Section IV.B.

defendant accepted that the benefit (i.e. the asset being transferred) was his but with an attached burden (his duty to procure event E). If he were allowed to keep the benefit without bearing the burden, this would breach the Benefit-Burden Principle. Hence, when the condition is not met we have a situation of unjust enrichment. It is a situation of unjust enrichment because the defendant obtained a benefit in breach of the benefit-burden principle.

How does the law respond to this situation? The primary response is the one which the parties agreed: putting the defendant under a duty to perform E. But if this is no longer possible (for example, because the contract under which the duty arose has been terminated) then another response is to require the defendant to give back the benefit in question. For money, this can simply be done by creating a debt for that sum, and, at least in commercial contexts, that remedy is not proprietary.[70] For goods, it would be a duty to return the asset in question or perhaps a duty to pay the value thereof. The former would be more consistent with the principle underpinning recovery but, at least in commercial contexts or where the good is not unique, the court might prefer a duty to pay the value. The cases are not explicit on this point but in the cases concerning the return of presents in anticipation of marriage, there was a duty to return the actual presents rather than merely the value thereof. The cases, did not, however, address whether there was legal or equitable title in the presents.[71] However, given the rejection of proprietary relief in money cases it would generally be inappropriate to give proprietary relief.

3. Category A3: Improvements/unlocking assets

In this scenario we are concerned with a claimant involuntarily improving or unlocking an asset belonging to the defendant in circumstances where the surplus caused by the improvement/unlocking becomes separable from the asset in question. For example, in a *Greenwood v Bennett* type of case, the defendant has the option to retain the surplus or give it up. If the defendant chooses to retain the surplus then the benefit-burden principle becomes engaged. This is because the defendant would then choose to keep the benefit of something without bearing the burden thereof. This makes it a situation of unjust enrichment. The law responds to such a situation by giving the defendant an option. The defendant can either return the surplus value or the defendant can opt to keep the surplus value but must then bear the burden thereof (i.e. reimbursing the cost of the improvements/unlocking). In that way the law responds to such a situation in a manner very similar to that concerning defective transfer of goods (where the defendant has the

[70] *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 WLR 3179 [30] (Lord Sumption).

[71] See, on engagement rings, *Jacobs v Davis* [1917] 2 KB 532 (KBD); *Cohen v Sellar* [1926] 1 KB 536 (KBD).

option of returning the goods or paying up the value thereof). It, therefore, makes sense to put such cases in the same analytical category as goods, even though the reason why the situation is an unjust enrichment is slightly different.

H. Category B: Shifting the burden

In the category of cases that we will consider in this section, the situation of unjust enrichment arises because the party enjoying the benefit is not bearing the burden. But the nature of the benefit is such that it cannot be returned. So, the law responds by shifting the burden so that it is borne by the one who had the benefit. This way the Benefit -Burden Principle is respected and so there is no unjust enrichment.

Within this category there are two types of situations. In the first one the burden consists of cash that has already been spent. Here shifting the burden can be achieved by reimbursing the party who spent the money. In the second category, the burden consists not of cash being spent but of work being done. In such a case the law shifts the burden by remunerating the one who did the work. It is possible to have situations that are hybrids of those two.

1. Category B1: Reimbursement of costs

In those cases the law operates by shifting a loss from one party to another. It does so to correct an imbalance whereby a benefit is enjoyed by one but the associated burden is borne by another. The most typical situation is the discharge of the debt of another. So, if D owes £10k to X and C non-officiously discharges that debt, then D receives the benefit of the discharge but C bears the burden. This breaches the benefit-burden principle and so there is a situation of unjust enrichment. The law remedies that situation by creating a debt between C and D. This ensures that the burden is shifted from C to D. This way D has both the benefit and the associated burden and so, there is no breach of the benefit-burden principle and therefore no situation of unjust enrichment. The same reasoning applies in situations where the non-monetary obligations of another are discharged. As was argued in Chapter 4 Section II.B, with the exception of joint obligations, recovery is only granted when D's duty to perform is converted into a secondary duty to pay damages. C, by avoiding this liability for D, ensures that D gets the benefit (of not being liable) whilst C bears the burden thereof.

The same thing is going on in cases where the bailee is able to recover for the expenses of the bailor. Here the bailee bore a burden which the bailor benefitted from. By implying a duty to

reimburse, the law shifts the burden to the bailee and, therefore, restores the equilibrium. The same occurs with General Average. The General Average act results in an uneven distribution of benefits and burdens. Some cargo owners have all the benefit (in the form of their cargo being saved) whilst others have all the burdens (in the form of having lost all their cargo). With General Average the law shifts the burdens to ensure an even distribution of benefits and burdens.

2. Category B2: Remunerating the work

If C does work for D under an entire obligation and, before completion, D commits a repudiatory breach then C is entitled to treat the contract as terminated and to sue for a quantum meruit. However, if C was unable to complete the work due to his own fault then C cannot recover anything. How is such a type of case explicable in terms of unjust enrichment? As we saw in Chapter 5 Section III.A, the reasoning of the courts in such cases is that, by requesting that the work be done, the Benefit-Burden Principle (the benefit being the work) is engaged. However, the contract between the parties – which provides that the work must be completed before remuneration is due – should be respected and so in the case where C abandons the work there is no recovery. But where D breaches the contract the law prevents him from relying on the contract in order to avoid liability under the benefit-burden principle.

So, in the end, we reach a position whereby D has received a benefit but not borne the burden thereof. This is a situation of unjust enrichment. The benefit being of a nature that cannot be returned, the only way of curing the situation is by making D bear the burden thereof. So, the law requires D to pay C for the reasonable value of the work done.

In Chapter 2 Section III.A it was argued that the Birksian unjust enrichment framework should not apply to services because accommodating services requires an implausibly wide definition of 'enrichment'. Does that objection not also apply here? After all, if, as was argued in Chapter 2 Section III.A, it is implausible to say that there was an enrichment in *Planché v Colbourn*[72] then why is it not the case here as well?

There are two responses to this objection. First, under the Birksian unjust enrichment scheme, the response that the law takes is to award restitution of the value of the enrichment. Hence, it is important to have a well-defined account of what an enrichment is and how it should be valued. But, under the scheme proposed here, the enrichment does not establish what the law's response should be. Instead, all it serves to say is that the situation is one which is defective and

[72] *Planché v Colbourn* (1831) 8 Bing 14, 131 ER 305.

which the law should correct. Indeed, the response taken by the law in services cases (unlike money and goods) is not to award restitution of the enrichment. Rather, the response is to make the defendant bear the burden of the provision of the service. Hence, there is no need for a concrete definition of enrichment. To put it another way, the classification of something as 'enrichment' does not do any normative work. It serves to put various situations within a category of scenarios which are defective. But the normative work about why they are defective and how the law should cure the defect is not done by the classification in terms of 'unjust enrichment'. By contrast, under Birks's generic conception, whether something amounts to an enrichment or not will determine whether the courts will grant recovery. So, given that 'enrichment' has normative importance, it is vital to have a concrete definition of 'enrichment'. But that is not the case here.

Nor is the need to show 'receipt' important in service cases. Showing 'receipt' is important in cases where the Property Principle does the work. This is because the Property Principle requires that something be received before the Principle can bite. But here it is the Benefit-Burden principle which does the work. For such a principle to be triggered all that is needed is that D requested or freely accepted something; not that he received it. Hence, the criticism of Birks's theory – that it needs an implausibly wide definition of 'receipt' and 'enrichment' – do not apply here.

I. Category C: Fixing the transaction

In these cases a transaction does not go as planned so that someone ends up with a benefit without bearing the associated burdens when, in fact, the plan was for the burdens to also go with the benefit. Here the law intervenes by fixing the transaction so that the person who has the benefit ends up bearing the burden.

This is illustrated by *Menelaou v Bank of Cyprus*.[73] The parents of Melissa Menelaou intended to purchase a house for their daughter. To do so they would sell their house on which the Bank of Cyprus had a charge. They would then use the money to purchase the house and the Bank of Cyprus would acquire a new charge on the new flat. Due to the negligence of the solicitors the new charge was not executed. Hence, Melissa got the flat without the encumbrance of the charge. A majority of the Supreme Court held that this was unjust enrichment (in the Birksian sense) and that, as a remedy, the Bank of Cyprus would acquire a charge over the property.[74]

[73] *Menelaou v Bank of Cyprus Plc* [2015] UKSC 66, [2016] AC 176.

[74] The precise mechanism by which it did so was that the Bank would be subrogated to the unpaid vendor's lien.

As Cutts points out, this amount to '*fixing* a transaction, not undoing one.'[75] But why was this situation one of unjust enrichment? In *Menelaou*, Melissa received a benefit – the house – without the burden – the charge – that was meant to come with it. This, therefore, is a situation of unjust enrichment. In this case the law cures the unjust enrichment not by reversing the transaction, nor by shifting the financial loss from the Bank to Melissa, but rather by fixing the transaction so that the intended burden is imposed on Melissa. There is, however, one difficulty. The benefit and the burden were not intrinsically tied to each other. They were tied because the parties wanted them to be tied. This is perfectly legitimate, but the difficulty is that there is no evidence that Melissa was a party to this transaction: it was between the bank and her parents. So, why should her burden be considered tied to the benefit? It should not have been. This is not to say that the case is wrongly decided. If, as Lord Carnwarth – in the minority – held, the bank had an equitable interest in the purchase money, then one can say that the benefit did have a burden tied to it. But, if that is the case, the doctrinal reasoning is then a simple exercising of tracing and there is no need to invoke unjust enrichment: it becomes superfluous. Be that as it may, one can see how the case is explicable in terms of benefit-burden.

[75] T Cutts, 'Modern Money Had and Received' (2018) 38 Oxford Journal of Legal Studies 1, 23.

V. WHAT ANALYTICAL FRAMEWORK SHOULD THE LAW ADOPT?

If the above argument is correct, Birks was mistaken when he considered that all instances of unjust enrichment could be analysed under a scheme based on generalising from the recovery of mistaken payments. There is, contrary to what Birks thought, not much in common between the recovery of mistaken payment and quantum meruit. The law must adopt an analytical scheme which reflects that.

J. Cutting down the scope of the formula

The Birksian structure is perfectly acceptable for cases falling with in category A above. That is cases where the law responds to the fact that the defendant received a benefit which they ought not to have received. In such a case the response of the law is either to reverse the transaction or to make the defendant pay for having failed to do so (as it does with the goods and improvements cases). Such cases can properly be analysed under the Birksian framework. Indeed, the scheme was primarily formulated with those cases in mind.

For the other cases, using the Birksian formula is unhelpful and leads to more confusion. This is because the focus of the law in category B is not actually to reverse a transaction. Nor is it about making the defendant give back a benefit. Rather it consists of shifting a burden from one party to another so as to reach an equilibrium between them. The focus is not on the defendant's gain, but it is on the claimant's loss.

For the final category of cases, the Birksian framework is also inappropriate because there the law does not seek to reverse a transaction but instead seeks to fix it. So, again there is no question of returning a benefit. Nor does the law seek to make the defendant pay. Rather it seeks to fix the transaction so that it operates as was intended. This is quite different from what the Birksian structure seeks to do.

So, if the Birksian formula cannot be used in categories B and C, what should we use instead? As argued in Chapter 4, category B1 does not pose much of a problem. This is because, the law already recognises that such cases are governed by a distinct analytical structure (as with, for example, recoupment and contribution) or are subsumed within other legal relationships (for example, the ability of the bailee to recover his expenses forms part of the law of bailment). It is true that many unjust enrichment scholars argue that such cases should be subsumed within the

Birksian formula,[76] but, whilst the courts have acknowledged that such cases are based on unjust enrichment, they have not said that the Birksian formula should be applied to such cases.[77] Nonetheless, in *ITC* Lord Reed's inclusion of discharge of the debts of another within the scope of the 'at the expense of' requirement, suggests that in future cases of recoupment and contribution might be analysed within the Birksian formula. This must be resisted. Whilst it is undoubtedly true that recovery in those cases seeks to cure a situation of unjust enrichment (to use the term in the wide, moral sense), it is not appropriate to apply the Birksian formula to such cases. Instead, they must retain their distinct analytical structure.

Category B2, that is services, is unfortunately more complicated. Here it has been accepted by the courts that such service cases must be analysed using the Birksian formula.[78] It is, therefore, necessary to return to the pre-Birksian analytical structure relating to services. As argued in Chapter 5 this requires showing that work has been done by the claimant at the request[79] of the defendant. If there is no agreement governing the relationship already, the law will infer one from the claimant's conduct and so there will be an obligation to pay the reasonable value of the service. If there is already an agreement, the law will not award the reasonable sum unless the agreement has been terminated or frustrated. This is a very simple scheme; one that is far simpler than applying the unjust enrichment formula to such situations.

The main remedy in Category C cases is proprietary subrogation. This forms a more general part of Equity's role in fixing transactions that do not go as planned. There are already quite detailed equitable rules governing such cases. There is no need to attempt to analyse them in terms of the unjust enrichment formula. Indeed, *Menelaou* is a good illustration of why the unjust enrichment analysis is redundant and unhelpful. It is redundant because equitable subrogation was able to do the work. But it is also not helpful because unjust enrichment had to be stretched in order to accommodate this case. A wide reading of 'at the expense of' was required.[80] Furthermore, the analysis at the unjust factors stage was also unpersuasive. The bank thought that it would be granted a charge over the new flat, but this related to a future fact and so could not be a mistake.[81] Nor

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[76] E.g. in the case of recoupment but not contribution: G Virgo, *The Principles of the Law of Restitution* (3rd edn, Oxford University Press 2015) 252.

[77] With recoupment: *Brook's Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534 (EWCA) 545 (Lord Wright MR). With contribution: *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366, 76 (Lord Hobhouse). With agency of necessity/bailment: *ENE Kos 1 Ltd v Petroleo Brasileiro SA (No 2)* [2012] UKSC 17, [2012] 2 AC 164.

[78] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752; *Benedetti v Sawiris* (n 60).

[79] The request has to be real, but it can be inferred rather than express. So, cases of free acceptance would count.

[80] With respect to Lord Reed, his attempt to explain *Menelaou* within the narrow rule laid down in *Investment Trust Companies* was not very persuasive: *Investment Trust Companies* (n 8) [63]-[66].

[81] There is no recovery in mistake if the false belief relates to something in the future; in such a case it is a misprediction: *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 [109] (Lord Walker). Notice also the similarities between

would failure of consideration have helped as there was no evidence that Melissa had accepted that a condition of her obtaining the new flat was that the bank would have a charge on it. So, in order to analyse this case under the rubric of unjust enrichment, the formula had to be artificially stretched. By contrast, Lord Carnwath's analysis in terms of subrogation to the unpaid vendor's lien did not require such stretching. So, as with Category B1, with Category C it is best to let Equity do its thing rather than seek to analyse this area in terms of the unjust enrichment formula.[82]

K. Simplifying the unjust enrichment formula

Given that the unjust enrichment formula will have to be stretched to incorporate many cases which do not belong in it, if the above argument is accepted it follows that there is scope for simplifying the formula.

The cases to which the formula would properly apply, Category A, are all instances where the defendant has received something which he should not have had and which he ought to return. It follows that the test of enrichment should therefore focus on identifying this. Hence, enrichment will be established in the following instances: (i) D has received money, (ii) D has received a benefit which has now been realised in money (or which can very easily be realised in money), (iii) D has received an asset/right/chose in action which is readily returnable coupled with an unreasonable refusal to make it available for return. 'At the expense of' is established using the 'direct dealing'[83] test which Lord Reed adopted in *Investment Trust Companies* but without the exception he created for discharge of debts. Hence, this means that D must have obtained the benefit following a direct transaction with C or following C having dealt directly with D's assets (for example by improving one of D's assets). The 'unjust factor' stage will remain focused on identifying a defect in the transaction and there is no need to rely on 'special' policy based unjust factors which do not identify a defect (such as secondary liability). No change is required at the defences stage.

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the 'mistake' in *Menelaou* and that in *Dextra Bank*, which was rightly classified as a misprediction: 'The difficulty with this proposition is that this does not appear to have been a mistake as to a specific fact, like for example a mistake as to the identity of the defendant, but rather a misprediction as to the nature of the transaction which would come into existence when the Dextra cheque was delivered to the BOJ': *Dextra Bank & Trust Company Limited v Bank of Jamaica* [2002] 1 All ER (Comm) 193 (PC) [29] (Lords Bingham and Goff).

[82] G Virgo, 'Restitution and Unjust Enrichment in the Supreme Court: Reflections on Bank of Cyprus UK Ltd v Menelaou', *University of Cambridge Faculty of Law Research Paper No 10/2016* (2016) <http://www.ssrn.com/abstract=2724024> accessed 31 May 2018.

[83] *Investment Trust Companies* (n 8) [46] (Lord Reed).

VI. CONCLUSION

Given the belief that 'unjust enrichment' was just an excuse for 'palm tree justice' it is understandable that Birks opted for a descriptive 'generic conception' rather than a prescriptive 'principle against unjust enrichment.' This, however, amounted to a change of direction from the way the law and its understanding had been developing. Whilst this change undoubtedly had some benefits it also had a number of drawbacks, chief of which was the failure to enquire into the reasons why certain situations were considered to be unjust enrichments. This lead Birks and his followers to think that the unjust formula could be used to analyse all cases of unjust enrichment (in the non-technical sense). But this was not true. Each situation amounted to an unjust enrichment for different reasons and the response of the law to each varied. Birks's formula was designed for transfers of benefit that had gone wrong because they were not fully intended. But such cases are quite different from the ability of a contractor to recover the reasonable value of his work when the employer has prevented him from completing the work. Yet, Birks and his followers insisted that all such cases could just fit within the single formula. This has required stretching that formula to the point that some of its terms became meaningless. It did not provide the clarity of analysis that it was intended to provide.

A different approach is needed. But taking that approach requires doing that which Birks had not been willing to do: to identify the reasons why the law considered certain situations to be unjust enrichments. It is only then that a proper structure for the subject can be identified. This Thesis has identified two key principles – the Property and Benefit-Burden Principles – which. When combined with a limiting principle, the Autonomy Principle, provide reasons why certain situations are considered to be defective. Those defects have a common genus and can therefore all be characterised as situations of unjust enrichment. But this, crucially, does not mean that the reasons why they are unjust enrichments are the same. Nor does it mean that the responses the law takes to such situations are the same. There are variations and it is therefore not appropriate to apply the Birksian formula to all of them. Instead the type of structure, based on broad groupings in terms of situations and responses, that was developing prior to Birks's intervention is the better one. That is not to say that Birks's work was entirely wrong. For the cases concerning the return of a benefit (i.e. money or assets) which D obtained as a result of a defective transaction, the Birksian structure is very helpful and should be retained. But what must be avoided is the temptation to explain all the other areas in those terms.

Therefore, unjust enrichment is more complex and wider than Birks had suggested in 1985. This breadth and complexity means that not everything can be analysed within the formula which Birks developed. This does not mean that unjust enrichment is not a useful concept. Recovery is

awarded in a wide array of cases because of the principle against unjust enrichment. But this does not mean that every such case can be analysed using Birks's conception. Conversely, this does not mean that the formula is not useful. On the contrary it is an important analytical tool. But it must not be stretched. Otherwise, it will lose its utility.

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