Unjust Enrichment by Transfer: Some Comparative Remarks

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The fundamental issues in the classification of unjust enrichment claims arise from enrichment's core, *i.e.*, subtractive enrichment (or enrichment by impoverishment) by transfer from the plaintiff to the defendant. Excluding most situations of three-party enrichment, issues of *negotiorum gestio* and restitution for wrongs, this Article sketches and compares in Part I the attempts of English and German law to develop a systematic approach toward the law of unjust enrichment. It can be shown that English and German law, in spite of having taken different paths, have often employed very similar techniques to shape their laws of unjust enrichment and will often arrive at similar results. Part II deals with what may be the most fundamental remaining difference between common- and civil-law systems in this context, which relates to the Roman-law-based concept of *causa*, or legal ground, which justifies an enrichment. This has been employed by German law, rejected by English law, embraced by Canadian law for the last twenty years, and recently mooted in the United States by the draft of the American Law Institute's *Restatement (Third) of Restitution and Unjust Enrichment* (*Draft Restatement*).[1] This Article seeks to distinguish three functions within the concept of legal ground and compare the degree to which these functions are served by those three legal systems and the *Draft Restatement*.

I. The Path from *Moses v. Macferlan*

It is not particularly original to begin an essay on unjust enrichment with *Moses v. Macferlan*.[2] My pretext is that I will attempt to add a continental perspective to this leading case, in which Lord Mansfield summed up his taxonomy of the English law of unjust enrichment (for the action for money had and received) in a mere two sentences:

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1. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (Discussion Draft 2000) [hereinafter DRAFT RESTATEMENT].

2. 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760).

> It lies only for money which, ex aequo et bono, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or, for money fairly lost at play: because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express, or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.[3]

The first sentence contains a negative list of situations in which the defendant had no enforceable claim to the enrichment he had received from the plaintiff, but was still allowed to keep the benefit. This negative list includes, *inter alia*, debts which were time-barred and gambling and betting debts. The second sentence contains a positive list of situations in which an unjust enrichment action will lie. They include, in modern terminology, mistake, failure of consideration, fraud, duress, and undue influence.

Both sentences and both lists are concerned with the return of benefits for which the defendant could not have sued the plaintiff successfully.[4] This raises the question of how to find out whether a case not clearly covered by one of the lists will fall within the first list or within the second. According to Lord Mansfield, those cases will make the positive list in which "the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money"[5] or, as is stated at the outset, ought to refund *ex aequo et bono*.

In modern language, the rule in *Moses v. Macferlan* can therefore be summed up as follows: the law of unjust enrichment is concerned with the surrender of benefits that the defendant received, but could not have claimed, from the plaintiff. It is established that in some situations, but not others, the plaintiff can claim surrender of the benefit. In deciding whether such a claim is allowed, courts will be guided by equity and natural justice.

The following subparts attempt to demonstrate that we have witnessed a remarkable convergence between English and German approaches to-

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3. *Id.* at 1012, 97 Eng. Rep. at 680-81.

4. The first sentence, which includes the negative list, makes two references to the fact that Lord Mansfield is talking about a benefit that was not due. The second sentence does not repeat that requirement.

5. *Moses*, 2 Burr. at 1012, 97 Eng. Rep. at 681.

wards unjust enrichment. Somewhat surprisingly, much of what English and German law have in common today marks a departure from *Moses v. Macferlan*.[6]

A. *Introduction of a General Rule*

Both English and German law have chosen to combine one general rule with a list rather than using the two-list approach as formulated in *Moses v. Macferlan*. The departure by English law from the two-list approach was a gradual one. In 1802, Sir William Evans based his treatment of the action for money had and received on *Moses v. Macferlan*.[7] His essay also makes it clear at the outset that this action concerns payments that were not due.[8] He then turns around the sequence in *Moses v. Macferlan* by beginning with the positive list, which receives a fuller treatment than the subsequent negative list. For the latter, he concentrates in particular on settlements and the effects of judicial proceedings.[9] Modern English textbooks have dropped the negative list. For what is now called either subtractive enrichment,[10] or benefits that the defendant has acquired from or by the act of the plaintiff,[11] the general rule is that there is no recovery unless the claim falls within one of the established items on the positive list.[12] Some elements within the negative list survive as defenses to claims that fall within the positive list category.[13] English courts follow the same approach, although it should be added that judgments today do not normally try to wrap up the English notion of unjust enrichment in one sentence or two, and where they do, they do not speak with one tongue.[14]

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6. *See* DAVID IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 263-93 (2000) (providing a historic account of the English law of unjust enrichment).

7. Sir William Evans, *An Essay on the Action for Money Had and Received* (1802), *reprinted in* 6 RESTITUTION L. REV., 1 (1998).

8. *Id.* at 5.

9. *Id.* at 23-28. One more general item on the negative list is mentioned, namely money "paid in pursuance of a moral obligation." *Id.* at 24.

10. PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 99 (1989).

11. LORD GOFF OF CHIEVELEY & GARETH JONES, THE LAW OF RESTITUTION 175-76 (Gareth Jones ed., 5th ed. 1998).

12. *Id.* at 41-46; BIRKS, *supra* note 10, at 99-108; ANDREW BURROWS, THE LAW OF RESTITUTION 21-27 (1993); *see* ANDREW TETTENBORN, LAW OF RESTITUTION IN ENGLAND AND IRELAND 14-17, 19-30 (2d ed. 1996) (distinguishing between "unjust factors" and "factors justifying retention," treating the latter as factors defeating a prima facie case for restitution); GRAHAM VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 119-25 (1999).

13. *See* BIRKS, *supra* note 10, at 402; BURROWS, *supra* note 12, at 27-28; GOFF & JONES, *supra* note 11, at 46-72.

14. *Compare* Orakpo v. Manson Invs. Ltd., [1978] A.C. 95, 104 (H.L.) (appeal taken from Eng.) ("My Lords, 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 upon the civil law."), *with* Kleinwort Benson Ltd. v. Lincoln City Council,

So whenever an enrichment has occurred that falls within the categories embraced by Lord Mansfield's two lists, the general rule is that there will be no recovery unless the case can be placed within the positive list. The negative list has been dissolved into a negative general rule, and what remains is a positive list of what we now consider unjust factors.

Let us now turn to the German legal system. Unjust enrichment was codified just over a century ago in sections 812 through 822 of the *Bürgerliches Gesetzbuch* (*German Civil Code* or *BGB*).[15] It is unlikely that those who drafted the *Code* were aware of *Moses v. Macferlan*. They were mostly influenced by Roman law as reformulated by the German pandectist scholars during the nineteenth century.[16] In one way, though, their approach towards restitution resembles modern English law. They dissolved one of the two lists into a general rule and kept the other list. It just happened that those who drafted the *BGB* dissolved the positive, rather than the negative list. In all situations covered by Lord Mansfield's lists—namely shifts of wealth from one party to another that are not supported by a legal claim—the general rule is that the recipient must give up the enrichment. Thus, an enrichment is unjustified (*ungerechtfertigt*) rather than unjust (*ungerecht*) unless there is a specific legal reason why it should be kept.[17] Naturally, in itself this general rule is the exact opposite of the English general rule that the enrichment need not be given up.

B. Rejection of the Principles of Equity and Natural Justice

Dissolving one of the lists into a general rule has enabled both English and German law to discard what is perhaps the most important rule in *Moses v. Macferlan*: considerations of equity and natural justice (or good faith, as German courts would feel inclined to say) should ultimately decide whether or not a claim for restitution lies. Such a guiding principle was needed for an approach that required the decision whether to join the negative or the positive list for each new case. On the other hand, once it is known that a case falls within a general rule, all one need do is find whether one of the recognized exceptions applies.

[1999] 2 A.C. 349, 408 (H.L. 1998) (appeal taken from Eng.) ("The essence of this principle is that it is unjust for a person to retain a benefit which he has received at the expense of another, without any legal ground to justify its retention, which that other person did not intend him to receive.").

15. §§ 812-822 BGB.

16. *See* 1 B.S. MARKESINIS, W. LORENZ & G. DANNEMANN, THE GERMAN LAW OF OBLIGATIONS: THE LAW OF CONTRACTS AND RESTITUTION 711-12 (1997) (describing German jurists' role in extracting a general unjustified-enrichment principle from Roman law); Reinhard Zimmermann & Jacques Du Plessis, *Basic Features of the German Law of Unjustified Enrichment*, 2 RESTITUTION L. REV. 14, 15-20 (1994).

17. § 812 Nr. 1 Sent. 1 BGB ("A person who obtains something by performance by another person or in another way at the expense of this person without legal cause is bound to give it up to him."). An English translation of this and other excerpts from the *German Civil Code* is available at http://www.iuscomp.org/gla/statutes/BGBrest.htm.

To say that equitable considerations have no place in the law of unjust enrichment as practiced in England and Germany today would be an overstatement. English law makes some use of constructive trusts for this purpose, even if it may not go quite as far as the dictum by Cardozo according to which "[a] constructive trust is the formula through which the conscience of equity finds expression."[18] And German courts have occasionally stated quite openly in difficult cases that their solution is guided by considerations of good faith.[19] On the other hand, it is largely accepted in both English and German law today that the law of unjust (or unjustified) enrichment is a system of legal rules rather than a compilation of general considerations as to what is just and fair. So while it can be said that equitable considerations have played a historical part in formulating those rules,[20] it nevertheless appears that neither English nor German law has followed the main proposition made by Lord Mansfield in *Moses v. Macferlan*.[21] This marks a clear contrast to Scandinavian laws of unjust enrichment, which Schlechtriem in his recent work on unjust enrichment and restitution in Europe has described as desisting from formulating rules that make claims dependent on the fulfillment of certain requirements. Instead, the Scandinavian laws favor compiling various factors of assessment into a flexible system that allows balancing of these factors on a case-by-case basis.[22]

C. *Elaboration and Expansion of Lists*

Both English and German law have invested considerable efforts in the formulation and refinement of the list they have kept. And both English and German law were under some pressure to hedge the main danger which general rules tend to have: they usually catch more than was intended in the first place. This danger has been frequently noted in the civil-law approach of a positive general clause,[23] but exists equally for

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18. Beatty v. Guggenheim Exploration Co., 122 N.E. 378, 386 (N.Y. 1919); *see also* BIRKS, *supra* note 10, at 64 (affirming Cardozo's statement but reminding that "there are many justices to be righted besides unjust enrichment").

19. *See, e.g.*, BGH, 31.5.1990, BGHZ 111, 308 (312), NJW 1990, 2524 (F.R.G.); BGH, 15.5.1986, NJW 1986, 2700 (F.R.G.). For an English translation of these German Supreme Court cases, see MARKESINIS ET AL., *supra* note 16, at 799, 810.

20. *See, e.g.*, Lionel Smith, *Property, Subsidiarity, and Unjust Enrichment*, 2000 OXFORD U. COMP. L.F. 6, text accompanying notes 88-91, *at* http://ouclf.iuscomp.org.

21. *See, e.g.*, BIRKS, *supra* note 10, at 19 (arguing that judges should not carry out a balancing test of equities and stating "it should be obvious . . . that 'unjust' can never be made to draw on an unknowable justice in the sky").

22. 1 PETER SCHLECHTRIEM, RESTITUTION UND BEREICHERUNGSAUSGLEICH IN EUROPA. EINE RECHTSVERGLEICHENDE DARSTELLUNG 49-63, 71 (2000) (describing Swedish, Danish, Norwegian, and Finnish law).

23. *See* JOHN P. DAWSON, UNJUST ENRICHMENT, A COMPARATIVE ANALYSIS 8 (1951) (noting this as the main danger of the civil-law approach and a general principle of unjust enrichment); *see also*

negative general rules. There are two main ways of reducing this danger: restricting the general rule and elaborating the exceptions. I will start with the latter in German law, which put most limitations of the general principle in place when the *BGB* was enacted.

By stating quite generally that benefits acquired at the expense of another person need to be returned unless this shift of wealth is supported by a legal ground, German law has removed nearly all questions addressed in Lord Mansfield's positive list from the ambit of the law of unjustified enrichment and left those issues to be decided by other areas of law, including contract, tort, family, and inheritance law.[24] For it is those other areas of law that provide a defendant with a legal ground, which is generally understood to be a claim that entitles the defendant to keep the benefit. This, however, requires all those rules to be written with the possibility of restitution in mind. For a rule which prevents a contract from becoming enforceable will not necessarily be best served by allowing restitution after the unenforceable contract has been fulfilled.

Lord Mansfield's negative list is thus mostly relocated. Section 222 of the *BGB* generally prevents restitution if somebody has performed on a claim that was barred by prescription.[25] Section 762 turns gaming and betting into so-called "natural obligations" which cannot be enforced, but under which no restitution is allowed once debts have been paid,[26] covering Lord Mansfield's "money fairly lost at play." Form provisions cover a considerable number of essential negative list items. The failure to observe a requirement that an agreement must be made in writing, or recorded in a notarized document, will make such an agreement void.[27] This affects contracts for the sale of real property, noncommercial offers of guarantee, and even the promise to pay a lawyer a fee in excess of the official fee scale; however, once these promises are fulfilled, the lack of form is healed in all those cases.[28] The very purpose of those provisions that heal this lack of form is to prevent claims of unjust enrichment. The rationale that makes these promises unenforceable does not extend to reverting benefits that have been exchanged under a fully performed agreement.

MARKESINIS ET AL., *supra* note 16, at 21-23, 717-20 (providing examples and an overview of the balance between generality and precision in the German law of restitution).

24. In the present context of subtractive enrichment, property law plays a marginal role compared to what English law calls restitution for wrongs and what German law covers by its *Eingriffskondiktion*. *See* MARKESINIS ET AL., *supra* note 16, at 743-47 (explaining that, in general, the recovery available to a plaintiff hinges on the degree of fault of the defendant).

25. § 222 Nr. 2 BGB.

26. § 762 Nr. 1 Sent. 2 BGB.

27. § 125 BGB.

28. § 313 BGB (concerning real property transactions); § 766 BGB (concerning guarantees); § 3 Nr. 1 Bundesgebührenordnung für Rechtsanwälte (concerning lawyers' fees). In the latter case, the payment must also have been made voluntarily and without reservation.

Another important feature of German law will even prevent certain situations from figuring in the negative list. German law provides for a large range of gratuitous contracts. They include donation; gratuitous loan of an object, real property, or money; and gratuitous provision of services and works.[29] Because all of these contracts provide legal grounds for the transfer (or use) of property, or the provision of services and works, a person who agrees to perform gratuitously has no claim in unjustified enrichment after performance has been made, unless the gratuitous contract can be set aside as a matter of contract law.[30]

Finally, one general consideration within Lord Mansfield's negative list was turned into a general defense against a claim for the return of a benefit transferred by performance. Even if there is no legal ground to support this shift of wealth, it may be retained if the enrichment is supported by a moral duty or considerations of decency.[31]

While in Germany most negative reasons were drafted and elaborated at the same time that the general rule was introduced, the gradual introduction of the negative general rule in England was not initially accompanied by a similarly thorough elaboration of the positive grounds for unjust enrichments. Dawson noted in 1951:

> [T]he English law of restitution as a whole gives a remarkable example of the effects of freezing doctrine—still more of freezing minds—in an area still incompletely explored at the time the freeze set in.[32]

Today, the situation is somewhat reversed. While there has been comparatively little movement in the German law of unjustified enrichment over the last years, English law has undergone dramatic developments. Preceded and helped by scholarly work,[33] English courts have unfrozen the law of restitution and have, particularly over the last ten years, achieved a rapid development which might have taken a century in other areas of the law.[34] Some major expansions did take place within the

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29. *See* MARKESINIS ET AL., *supra* note 16, at 35-43, 726 (categorizing types of contracts under German law and highlighting the absence of a consideration doctrine). A promise of donation is also void unless made in notarized form, whereas a performed donation agreement is valid without observation of this form. §§ 516, 518 BGB.

30. But see *infra* subpart II(C) for the *condictio causa data causa non secuta*.

31. § 814 BGB.

32. DAWSON, *supra* note 23, at 21.

33. Many have contributed to this debate. Three milestones are worth mentioning: RESTATEMENT OF RESTITUTION (1937) [hereinafter RESTATEMENT]; ROBERT GOFF & GARETH JONES, THE LAW OF RESTITUTION (1st ed. 1966); BIRKS, *supra* note 10.

34. *See, e.g.*, Kleinwort Benson Ltd. v. Lincoln City Council, [1999] 2 A.C. 349 (H.L. 1998) (appeal taken from Eng.) (recognizing the general right to recover money paid under mistake of fact or law on a fully performed contract); Westdeutsche Landesbank Girozentrale v. Islington London Borough Council, [1996] A.C. 669 (H.L.) (appeal taken from Eng.) (affirming that a party which transfers money under an *ultra vires* transaction is allowed to recover for failure of consideration, but

grounds of restitution. In the present context, I will only mention some of those that occurred within Lord Mansfield's positive list. Over the last years, English courts have been increasingly generous in setting aside (and providing restitutionary relief for) guarantees or mortgages provided by individuals to secure loans taken out by their relatives or other persons to whom they feel attached.[35] The previous requirement that restitution for failure of consideration is granted only if the failure was total has been gradually eroded.[36] And, most significantly, the recent decision by the House of Lords in *Kleinwort Benson v. Lincoln City Council* has closed what was perhaps the biggest single gap in the English law of unjust enrichment: whereas previously plaintiffs relying on mistake had to show that they had labored under a mistake of fact, plaintiffs are now equally entitled to recover on the ground that they had mistaken the law.[37]

Ironically, the closure of this gap will leave English law no other option but drawing up once again a negative list, which would recite those reasons for keeping an enrichment that trump a mistake of law. Every item on Lord Mansfield's negative list can now be reshaped into a mistake

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rejecting a claim for compound interest); Barclays Bank Plc. v. O'Brien, [1994] 1 A.C. 180 (1993) (appeal taken from Eng.) (ruling that a wife's standing surety for her husband's debt in a transaction not to her financial advantage puts the other party on constructive notice that her husband made a wrongful misrepresentation to his wife, so she is entitled to set aside her obligation to that party); Woolwich Equitable Bldg. Soc'y v. Inland Revenue Comm'rs, [1993] A.C. 70 (H.L. 1992) (appeal taken from Eng.) (ruling that taxes paid under an *ultra vires* tax regulation can be claimed back in restitution, including interest from the date of the disputed tax payment); Lipkin Gorman v. Karpnale Ltd., [1991] 2 A.C. 548 (H.L.) (appeal taken from Eng.) (allowing a law firm to recover money which one of its partners had taken out of the client's account and lost through gambling at the defendant's casino, on the ground that the casino had provided no true consideration for the money).

35. *See* Cheese v. Thomas, [1994] 1 W.L.R. 129 (Eng. C.A.) (holding that in a forced sale at a loss of property that was jointly acquired, partly through payment by Mr. Cheese, and partly through a mortgage provided by his great-nephew, but held solely in the nephew's name, the plaintiff could recover on the ground of undue influence a quantum of the proceeds of the sale that represented the proportion of the plaintiff's contribution to the purchase price); *Barclays Bank*, [1994] 1 A.C. at 195 ("A wife who has been induced to stand as a surety for her husband's debts by his undue influence, misrepresentation or some other legal wrong has an equity as against him to set aside that transaction."); Bank of Credit and Commerce Int'l S.A. v. Aboody, [1990] 1 Q.B. 923 (Eng. C.A. 1988) (holding that a wife who was completely under the influence of her husband and had thus pledged her house as a security for the couple's business could have this agreement set aside on the ground of undue influence, provided that the transaction was manifestly disadvantageous for the wife, a requirement which was lacking in the given case); C.I.B.C. Mortgages Plc. v. Pitt, [1994] 1 A.C. 2000 (H.L. 1993) (appeal taken from Eng.) (holding that in cases of actual undue influence, no manifest disadvantage need be shown).

36. Goss v. Chilcott, [1996] A.C. 788, 798 (P.C.) (appeal taken from N.Z.) (holding that restitution was not precluded even though failure of consideration was not total); *Westdeutsche Landesbank Girozentrale*, [1996] A.C. at 683 (noting that some courts were no longer "troubled by the question whether there had been a total failure of consideration"); Rover Int'l Ltd. v. Cannon Film Sales Ltd. [1989] 1 W.L.R. 912, 925 (Eng. C.A.).

37. *Kleinwort Benson*, [1999] 2 A.C. at 354 (reasoning that the "principle . . . that a person who has paid money to another under mistake of fact is prima facie entitled to recover it, should equally apply where the money is paid under a mistake of law").

of law. For example, a plaintiff may have mistakenly believed that gambling does create enforceable claims. Likewise, a plaintiff may have paid an old debt in the mistaken belief that the limitation period was longer than it actually was. Unless these claims are to succeed, Lord Mansfield's negative list will have to be resurrected for mistake-of-law cases.[38]

D. Restrictions of the General Rule

In spite of the efforts of both English and German law to limit the scope of their general rule by expanding the scope of the exceptions, pressure remained on both to further reduce the impact. This was achieved to some degree by way of taxonomy and to some degree by a policy-based approach. German law has concentrated more on the former, and English law more on the latter.

One reduction of the scope of the German general clause was achieved by giving the "legal ground" a wide meaning. So far, we have only mentioned its principal meaning, namely a claim that entitles the defendant to the benefit he or she has received at the expense of the plaintiff. In terms of secondary meaning, one does not need too much of an extension to cover the two items on the negative list that were the chief concerns of Sir William Evans in 1802.[39] The first concerns are settlements, which are contracts in their own right under section 779 of the *BGB*, and therefore cause no further problem, as they are capable of modifying the legal relationship between the parties. The second concerns are judgments and enforceable administrative decisions, which, once they have become final, provide for a legal ground even if they are wrong as a matter of substantive law. And in one further extension, "legal ground" in the context of the recognition of a debt does not refer to the validity of the recognition agreement itself but to the existence of a debt that was recognized.[40]

However, the most significant reduction of the German general clause was achieved by way of a new interpretation which was first advocated thirty-four years after the *BGB* had been enacted,[41] supported, and made popular in 1954,[42] and finally accepted by the *Bundesgerichtshof*, Germany's highest court in civil and criminal matters, in 1961.[43] For the

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38. *See* RESTATEMENT, *supra* note 33, § 61 (containing a negative list for liability mistakes).

39. Evans, *supra* note 7, at 24-28.

40. Section 812 of the *BGB* treats the recognition of the existence or nonexistence of an obligation as a performance, which can be claimed back if not supported by a legal ground. § 812 Nr. 2 BGB; MARKESINIS ET AL., *supra* note 16, at 727. *See also infra* subpart II(C) (discussing the *condictio causa data causa non secuta*).

41. WALTER WILBURG, DIE LEHRE VON DER UNGERECHTFERTIGTEN BEREICHERUNG NACH ÖSTERREICHISCHEM UND DEUTSCHEM RECHT (1934).

42. Ernst von Cæmmerer, *Bereicherungsrecht und unerlaubte Handlung*, *in* 1 FESTSCHRIFT FÜR ERNST RABEL 333-401 (1954).

43. *See* BGH 31.10.1963, BGHZ 40, 272 (F.R.G.) (holding that the defendant did not have to pay the plaintiff on commission for delivery of appliances when defendant legitimately viewed the

most important part of the German general clause to operate, it is not enough that the defendant's gain was at the expense of the plaintiff and unsupported by a legal ground. In addition, the defendant must have received the benefit as the result of a performance by the plaintiff, which is understood as a conscious shift of assets to the defendant with a particular obligation in mind. And while it is the plaintiff's view which determines whether a shift of wealth was an act of performance, it is the recipient's view which determines whether this was performance by the plaintiff or by another party. Effectively, this serves to keep restitutionary claims within the legal relationships from which they arise and prevents leapfrogging in a search for a solvent defendant.

In the 1961 case, this new taxonomy prevented a subcontractor who had supplied electrical appliances to a building site from recovering the value of the appliances from the owner of the building.[44] Furthermore, performance-based restitution takes precedence over non-performance-based restitution, which includes what, under English law, would be considered as restitution for wrongs, most of restitution based on ignorance, and some of restitution for mistaken improvements. This is not the place to go into a detailed evaluation of the performance/nonperformance taxonomy.[45] Suffice it to say that it has been rather efficient in preventing the German general rule from catching more than was bargained for. It has also created some other problems, one of which will be discussed below.[46]

In part, English law has also resorted to taxonomy in order to limit the effects of its general rule—namely by placing some enrichment claims in the area of trusts, in particular constructive trusts. Occasionally, such trusts have been employed for claims that were based on the defendant's enrichment even when there was no apparent unjust factor involved.[47]

Mostly, however, English law has resorted to policy considerations in order to curb its general rule of nonrecovery. Some of these would be clear-cut restitution cases under the German legal system. One example is the policy-based rule in *Woolwich Equitable Building Society v. Inland Revenue Commissioners*,[48] which allows taxpayers to recover generally for taxes they were wrongly charged by tax authorities, regardless of whether

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performance as having been provided by a third party). For an English translation of this case, see MARKESINIS ET AL., *supra* note 16, at 793.

44. BGHZ 40 at 278.

45. Treatment of this taxonomy can be found in MARKESINIS ET AL., *supra* note 16, at 717-55, 769-70, and Zimmermann & Du Plessis, *supra* note 16, at 24-30.

46. *See infra* subpart I(E).

47. A case in point is *Hussey v. Palmer*, [1972] 1 W.L.R. 1286 (Eng. C.A.), which awarded recovery through a constructive trust for an elderly widow, who had paid £607 to add a bedroom to the house of her son-in-law so that she could live there, but subsequently moved after fifteen months. In this case, the widow plaintiff's claim for £607 could hardly have succeeded under failure of consideration at the time, but was allowed with the help of a constructive trust. *Id.* at 1289-90.

48. [1993] A.C. 70 (H.L. 1992) (appeal taken from Eng.).

their payment was affected by a mistake, by compulsion, or otherwise. In effect, English law has not only limited but also reversed the general rule of nonrecovery for an entire area of law. English law can thus be said to operate a small positive general clause that functions the same way performance-based restitution functions in German law.

There is another, somewhat disputed, ground for restitution in English law that is based on policy considerations, namely illegality.[49] One case in which recovery was allowed on the ground of illegality is *Kiriri Cotton Co. v. Dewani*,[50] which concerned an illegal premium that a tenant had been charged for obtaining the premises. This is a rather complicated area of law because, in both German and English law, illegality can figure not only as a reason for but also as a defense against a restitutionary claim.[51] It is nevertheless important to mention illegality in this context because both English and German courts will frequently make their decisions dependent on whether the policy that prohibits a certain transaction will ultimately be best served by allowing or disallowing restitution. These considerations also accounted for the decision in *Tribe v. Tribe*,[52] in which a father transferred his assets to his son as the father's creditors were closing in, but was allowed to recover his assets from his meanwhile uncooperative son after the father had managed to pay off the creditors. Perhaps this is the area where, in spirit if not in letter, the two lists plus the general guiding-principle approach of Lord Mansfield are partially applied by both English and German courts.

There are known situations in which a party cannot recover what was transferred under an illegal contract. There are others in which recovery is allowed. Policy considerations will ultimately decide which of those lists

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49. *See* BURROWS, *supra* note 12, at 333-44 (examining two illegality grounds for restitution); William Swadling, *The Role of Illegality in the English Law of Unjust Enrichment*, 2000 OXFORD U. COMP. L.F. 5, *at* http://ouclf.iuscomp.org (concluding that in English law illegality operates only as a defense to claims for restitution of unjust enrichment and never as a cause of action); *see also* GOFF & JONES, *supra* note 11, at 607 (recognizing a limited role of illegality as a ground for restitution).

50. [1960] A.C. 192 (P.C. 1959) (appeal taken from E. Afr.). Other explanations for this award would have been difficult to find, as at that time mistake of law was not a ground of restitution. *But see* Kleinwort Benson Ltd. v. Lincoln City Council, [1999] 2 A.C. 349, 359 (H.L. 1998) (appeal taken from Eng.) (abolishing the rule that "money paid under a mistake of law cannot be recovered").

51. English law recognizes the defenses both of *nemo auditor turpitudinem suam allegans* (no one will be heard pleading his own wrongdoing) and *in pari delicto potior est conditio defendentis* (where parties have wronged equally, the position of the defendant is better). *See* Holman v. Johnson, 98 Eng. Rep. 1120, 1121 (K.B. 1775) (embracing these principles); Tinsley v. Milligan, [1994] 1 A.C. 340, 354 (H.L. 1993) (appeal taken from Eng.) (noting that these principles, established in *Holman*, are now settled law, having "been applied again and again, for over 200 years"). German law has incorporated the similar rule of *in pari turpitudine melior est causa possidentis* (where parties are equally to blame, the position of the possessor is better) into § 817, sentence 2 of the *BGB*. *See generally* Gerhard Dannemann, *Illegality as Defence Against Unjust Enrichment Claims*, 2000 OXFORD U. COMP. L.F. 4, *at* http://ouclf.iuscomp.org.

52. [1996] Ch. 107 (Eng. C.A. 1995).

a case should join.[53] It should be noted that in Germany, England, and generally in Europe, it is increasingly recognized that the policy reasons that make a certain contract void are sometimes better served by allowing recovery, and sometimes better by disallowing it. Therefore, policy considerations have an important role in defining whether and to what measure restitution should be allowed.[54] Interestingly, the recent swaps-litigation cases have shown that the very same questions can surface within claims based on failure of consideration rather than on illegality.[55]

E. Partial Oblivion

The previous subparts have been largely positive in setting out how German and English law, going different, yet, at the same time, similar ways, have both managed to build a modern law of unjust enrichment, which, today, can often be said to reach similar results in similar cases. There are, however, also a few less positive ways in which English and German law, going their different ways, have both left behind something that appeared obvious at the time of *Moses v. Macferlan*. This subpart will deal with partial oblivion, and the next subpart considers rationalizations of the general rule.

Partial oblivion relates to the features of the Roman *condictio indebiti* that have influenced both *Moses v. Macferlan* and the German law of unjust enrichment. German law relies heavily on the *condictio indebiti*, which served as a model for the German general clause.[56] In English law, mistake as a ground for unjust enrichment owes much to the *condictio indebiti*.[57]

This most general among the Roman law *condictiones* allows recovery of a benefit that the defendant has received from the plaintiff, provided two additional conditions are met: first, that this benefit was not due to the

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53. While this tendency can be observed in both English and German law, it is more noticeable in German law. *See* Dannemann, *supra* note 51, at text accompanying notes 50-52 (noting willingness of German courts to employ principles of equity and good faith).

54. *See* SCHLECHTRIEM, *supra* note 22, at 751 (noting an overall trend in Europe to define both the effect and the scope of the illegality defense with a view towards the purpose of the prohibitory norm which has been violated).

55. The speech by Lord Justice Waller in the recent case of *Guinness Mahon & Co. v. Council of the Royal Borough of Kensington & Chelsea*, [1999] Q.B. 215, 230 (Eng. C.A. 1998), discusses in detail whether the purpose of the statute that prohibits local authorities from entering into swaps transactions can be served only by allowing council to keep the profit from closed transactions. The question is answered in the negative. In this case, restitution was based on failure of consideration rather than on illegality.

56. Zimmermann & Du Plessis, *supra* note 16, at 17.

57. This is perhaps most evident in the article by Evans, whose writing on the action for money had and received in general, and on mistake in particular, is heavily based on the *condictio indebiti*. Evans, *supra* note 7, at 4-8; *see also* BIRKS, *supra* note 10, at 153 (noting the origin and meaning of *condictio indebiti*).

defendant, and second, that the plaintiff was laboring under an error when providing the benefit.[58] Both German and English law have chosen to concentrate heavily on one of the requirements and to move the other to the backwaters where it will occasionally be forgotten. Once again, though, German and English law differ in their choices. The entire German law of unjustified enrichment builds on the notion of legal ground. German law has thus concentrated on the *indebitum* aspect of this *condictio*, while mistake receives only the most fleeting mention in the statute, judgments, and scholarly writing. English law focuses heavily on the second requirement, the mistake, whereas the question whether the benefit was due receives little attention in textbooks and judgments alike.[59]

One exception is the speech of Lord Hope (unsurprisingly, a Scottish judge) in *Kleinwort Benson*, in which he made the following comparative *obiter dictum*:

> The approach of the common law is to look for an unjust factor, something which makes it unjust to allow the payee to retain the benefit: Birks, *An Introduction to the Law of Restitution*, 2nd ed. (1989), pp. 140 et seq. It is the mistake by the payer which, as in the case of failure of consideration and compulsion, renders the enrichment of the payee unjust. The common law accepts that the payee is enriched where the sum was not due to be paid to him, but it requires the payer to show that this was unjust. Whereas in civilian systems proof of knowledge that there was no legal obligation to pay is a defence which may be invoked by the payee, under the common law it is for the payer to show that he paid under a mistake. My impression is that the common law tends to place more emphasis on the need for proof of a mistake. But the underlying principle in both systems is that of unjust enrichment. The purpose of the principle is to provide a remedy for recovery of the enrichment where no legal ground exists to justify its retention.[60]

What Lord Hope calls a different emphasis has led to some undesirable side effects in both German and English law.

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58. *See* REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 848-51 (1990) (discussing the requirements and functions of *condictio indebiti*).

59. Sonja Meier and Reinhard Zimmermann have provided detailed discussions of the use of a legal ground analysis (or its failure) in English cases of mistake. SONJA MEIER, IRRTUM UND ZWECKVERFEHLUNG (1999); Sonja Meier & Reinhard Zimmermann, *Judicial Development of the Law,* Error Iuris, *and the Law of Unjustified Enrichment—a View from Germany*, 115 LAW Q. REV. 556-65 (1999). The authors believe that a distinction between mistakes that do and mistakes that do not give rise to an action in unjust enrichment is not possible without a legal-ground-based analysis and conclude that *Kleinwort Benson Ltd. v. Lincoln City Council*, [1999] 2 A.C. 349 (H.L. 1998) (appeal taken from Eng.), has reintroduced the *condictio indebiti* through the back door. Meier & Zimmermann, *supra*, at 563, 565.

60. *Kleinwort Benson*, [1999] 2 A.C. at 409.

German law has turned the mistake requirement into a defense under section 814, sentence 1 of the *BGB*, namely that there is no claim in restitution for performance if the claimant had positive knowledge that he or she did not owe the benefit to the enriched party. Mere doubts do not suffice, but a reservation—unless made as standard procedure[61]—will prevent the defense of section 814, sentence 1 of the *BGB*.[62] Perhaps more significantly, if one looks at most German judgments and legal writing, German law seems to have lost sight of the role that mistake plays in bringing about situations of unjustified enrichment.[63] Together with the restrictions imposed by the performance/nonperformance taxonomy, this implies that cases of mistaken performance are somewhat artificially dissected. Situations in which the plaintiff performed an obligation that the defendant owed to a third party are considered to be outside the realm of performance-based restitution and are tucked away under the second alternative of section 812, number 1, sentence 1 of the *BGB*—"enrichment in another way"—to which the "no mistake" defense in section 814 of the *BGB* is held not to apply.[64] Thus, mistake is lost as a factor which might help to separate the deserving from the less deserving cases where somebody pays another party's debt.

English law, on the other hand, has to some degree neglected the requirement which gave the *condictio indebiti* its name (*i.e.*, that the benefit was not due to the defendant, and which, as indicated above, Lord Mansfield mentioned twice when setting out his view on the action for money had and received in *Moses v. Macferlan*). The 1856 case of *Aiken v. Short*[65] turned out to be a watershed. Platt, B. denied a bank recovery for having paid off the first mortgagee in the mistaken belief that the bank had bought the property. He argued that the payment "was actually due to her, and there can be no obligation to refund it."[66] This is an argument that any German court would be happy to entertain. In English law, however, the judgment is mostly remembered for Bramwell, B., who denied the claim on the ground that "the mistake must be as to a fact which, if true, would make the person paying liable to pay the money."[67] This relegated the legal ground to a subcategory within mistake, namely the

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61. OLG Koblenz, 20.9.1983, NJW 1984, 135 (F.R.G.) (concerning insurance companies that had added standard reservation clauses to their payout forms).

62. BGHZ 83, 278. For an English translation of this case, see MARKESINIS ET AL., *supra* note 16, at 736-37.

63. MARKESINIS ET AL., *supra* note 16, at 753.

64. *Cf.* BGH 22.10.1975, WM 1975, 1235 (F.R.G.).

65. 156 Eng. Rep. 1180 (Ex. 1856). *See also* Daniel Friedmann & Nili Cohen, *Payment of Another's Debt*, *in* 10 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW §§ 60-61 (P. Schlechtriem ed., 1991) (noting the importance of *Aiken*).

66. *Aiken*, 156 Eng. Rep. at 1182.

67. *Id.*

requirement of a liability mistake. This requirement in turn was given up in *Barclays Bank v. Simms*, in which a bank had overlooked an instruction by its client to stop a check to a recipient who had gone into receivership.[68] The question whether the payment was due was considered as a defense against the establishment of an enrichment: the discharge of an existing obligation was held to be a consideration that would prevent an enrichment claim. But, because the bank had no authority to discharge this debt, the defense was held not to apply. The question whether the benefit was due to the defendant has thus been turned into the question whether the defendant lost something (a claim) by accepting the benefit.

As with mistake in German law, moving the issue whether a benefit was due to the defendant to the backwaters carries some risks which, although manageable in most cases, can cause confusion and uncertainty. Because it is not quite certain whether the consideration and ratification rationale employed for the discharge of an existing debt applies outside contract law, the following simple case can cause problems for English law.

A keeps a dog that one day comes home with a piece of cloth in his mouth which looks as if it had just been torn from a dress. The next day, *A* receives a note from Mrs. Smith down the road, which confirms this suspicion and demands payment for the dress. *A* immediately sends a check for the amount with an apologetic note to the address indicated. When attempting to apologize in person to the nice Mrs. Smith whom he has known for years, *A* finds out that the note came from, and that he has paid, another neighbor with the same name—a neighbor whom he loathes and whom he never would have paid. *A* sues for return of the money. There is no doubt that *A* paid under a causative mistake. Can the law of unjust enrichment prevent this claim, as I think it should? Or do we have to resort to set-off or other non-enrichment-based defenses, which would place the burden of proof again on Mrs. Smith?

F. Rationalization of the General Rule

General rules not only tend to catch more than was intended by those who drafted them, but they also have a dangerous tendency to justify themselves in situations in which neither the expansion of exceptions nor any hedging through taxonomy or by policy considerations will be sufficient to counteract this effect. Dawson warned about the dangers of what he called a general principle of unjust enrichment as he observed it in France and in Germany:

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68. Barclays Bank Ltd. v. W.J. Simms Ltd., [1980] Q.B. 677 (1979). Judge Goff (as he then was), noted the difference between those views in his argument about why Bramwell, B.'s remark was *obiter dictum*. *Id.* at 688.

> Yet once the idea has been formulated as a generalization, it has the peculiar faculty of inducing quite sober citizens to jump right off the dock. This temporary intoxication is seldom produced by other general ideas, such as "equity," "good faith," or "justice," for these ideals themselves suggest their own relativity and the complexity of the factors that must enter into judgment. The ideal of preventing enrichment through another's loss has a strong appeal to the sense of equal justice but it also has the delusive appearance of mathematical simplicity. It suggests not merely the need for a remedy but a measure of recovery. It constantly tends to become a "rule," to dictate solutions, to impose itself on the mind.[69]

Dawson was proven right. Some ten years after he wrote those lines, German courts gave up what Dawson considered to be the best attempt of the German legal system to counteract and control this danger, namely the limitation of unjust enrichment to cases of "direct enrichment." Dawson at the time noted that it was "ingenious," but also that it was "fairly clear that we cannot use it."[70] It turned out that even German law could no longer use it and that it had to be replaced with a tighter reading of the general clause, based on the performance/nonperformance taxonomy.

What Dawson did not note was that the general negative rule adopted by English law carries the same dangers. While it may not exactly "induce quite sober citizens to jump right off the dock," it does tend to dictate solutions, impose itself on the mind, and serve to rationalize a deficiency in the law rather than resolving it. The rationalization of the English general rule is called "security of receipts."[71] This is not to say that there is no value in keeping receipts secure, just as it would be wrong to deny any role to considerations of equity, corrective justice, or promoting legality. But these considerations are often not in themselves sufficient to justify a general rule, regardless of whether it is a negative or a positive one. And a continental observer would feel inclined to think that the consideration of security of receipts has been somewhat overstretched in English law. Just as it previously was used to rationalize rules that have since been discarded (such as the mistake of law rule), it is currently employed on the new frontiers of restitution.

A case in point is *Nurdin & Peacock v. DB Ramsden & Co.*,[72] which extended mistake-of-law-based restitution. In a fairly complicated lease arrangement, the plaintiff tenants discovered that they had for some time been overcharged by their landlords and had thus paid too much rent. While this was disputed by the defendant landlords, the plaintiffs made one

69. DAWSON, *supra* note 23, at 8.
70. *Id.* at 121 (referring to U.S. lawyers as "we").
71. *See* PETER BIRKS, RESTITUTION—THE FUTURE 123 (1992); VIRGO, *supra* note 12, at 684.
72. [1999] 1 W.L.R. 1249 (Ch.).

more payment of rent at the higher rate, which later was indeed found to have included an overcharge. They then initiated proceedings against defendants and made four more payments at the higher rate while the action was pending. Plaintiffs were motivated to pay first and discuss later by two factors. One factor was that underpayment could lead to forfeiture and repossession of the property by the landlords. The other was their belief that they could recover the overpayment. The High Court ruled that nothing could be done about the first motive because it did not fit into the established category of duress. But it expanded the new mistake-of-law rule in *Kleinwort Benson* and allowed recovery on the second motive.[73] I will come back to the merits of the case later. In the present context, it is worth noting that this judgment attracted instant criticism on the ground that it led to an intolerable inroad on the security of receipts.[74]

Plaintiffs could always have recovered their initial overpayments for a mistake in fact. No security-of-receipts argument would have rushed to the aid of the then-entirely-unsuspecting defendants. But when defendants, with knowledge of a serious dispute between the parties as to their entitlement, receive an additional overpayment together with a note that clearly states that the plaintiffs will attempt to recover any overpayment, security of receipts becomes an issue. Security of receipts remains an issue after the defendants have been sued for all overpayments and receive four more of them. And for all five overpayments, the rules on change of position—a defense to a claim of unjust enrichment—tell us that the defendants were not entitled to rely on keeping them.

To a person trained in the common law, security of receipts probably looks like a natural argument against any expansion of the grounds of restitution. To a continental observer, the same argument may present itself as a rationalization of a general rule that has been overstretched. But it is also reassuring to see that both English and German courts have, although frequently with some delay, often decided to resist the temptation that Dawson described.

II. A Transatlantic Outlook

The above intends to illustrate how both English and German law have found their ways to modern and largely well-functioning laws of unjust enrichment. While they have walked down different paths, the methods which they have employed and the results which they have achieved have more in common than first meets the eye. The following is an attempt to outline some of the challenges that lie ahead of both legal systems and to

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73. *Id.* at 1274.

74. *See* Graham Virgo, *Recent Developments in Restitution of Mistaken Payments*, 58 CAMBRIDGE L.J. 478, 480 (1999).

place them into the context of some changes on the other side of the Atlantic, in particular the developments in Canada over the last twenty years and the current process of drafting a third edition of the American Law Institute's *Restatement of Restitution*. The focus will lie on the issue of *causa*, its appearances as legal ground in German law, as juristic reason in Canadian law, and as legal basis in the *Draft Restatement*, as well as its near absence in English law. Before dealing with these four different approaches in turn, it may be helpful to clarify three different functions that legal ground can have.

A. Three Functions of "Legal Ground"

The first function is negative: no claim in unjust enrichment will lie for a benefit that the defendant is entitled to obtain from the plaintiff. The second function is positive, by turning legal ground into a main controlling element in a claim for unjust enrichment: an enrichment which the defendant has received at the plaintiff's expense must be given up if there was no legal ground that entitled the defendant to keep it. Here, the legal ground is not just a bar to recovery, but the device through which most considerations must be ultimately channeled in order to decide whether or not a claim in unjust enrichment lies. The third function is the most subtle: transfers of benefits for which there never was a legal ground are treated differently from transfers of benefits made for a legal ground in the form of an agreement which is surrounded by circumstances that may render this agreement void, voidable, or subject to termination by one party.

The first and the third functions are essential for any law of unjust enrichment. This is not to say that it is necessary to cover these functions by an explicit use of "legal ground" in the formulation of requirements to be met for a claim in unjust enrichment or in defense against such a claim. What is essential, though, is that these functions are covered in one way or another. The second function, on the other hand, is only one among several available options for setting up a law of unjust enrichment.

B. English Law

It appears that the first function has been practiced in English law but is not recognized as such beyond what has been outlined above. I know of no judgment that has given back in restitution a benefit that the defendant was entitled to obtain from the plaintiff. There are some judgments that required defendants to return to the plaintiff a benefit that was owed to them not by the plaintiff but by a third party,[75] but that is a different matter altogether. Considering that the English law of restitution

75. *See* Barclays Bank Ltd. v. W.J. Simms Ltd., [1980] Q.B. 677 (1979).

attaches so much importance to the security of receipts, an open recognition of this first principle might provide much more support for this worthy cause than keeping some historic limitations, such as the old mistake-of-law rule, would have done.

The second function is now accepted in English law in the area of demands by public authorities[76] but not elsewhere.

The third function is recognized to some degree, although not always openly. It is generally understood that most unjust factors (duress, fraud, undue influence, incapacity, illegality) are concerned with setting aside transactions that would otherwise entitle the defendant to the benefit. In consequence, the contract rules on what constitutes duress, fraud, undue influence, incapacity, and illegality are identical to the unjust enrichment rules. However, there is a clear distinction between contract-law notions of mistake and misrepresentation on the one hand, and mistake in the law of unjust enrichment on the other. The latter is much more generous than the former. It is sufficient for the purpose of unjust enrichment if the transfer of benefit was caused by a mistake, whereas contract law applies the two much more narrow doctrines of common mistake and misrepresentation. But then, this simple version of mistake cannot counteract in unjust enrichment an agreement which remains valid in spite of this mistake according to the rules of contract law (*e.g.*, because the mistake was neither common nor induced by the other party).[77] In summary, it is much easier to recover an enrichment conferred under mistake if the claimant does not have to rely on the same mistake to have a contract set aside which would otherwise entitle the defendant to the enrichment.

The same point can be made about failure of consideration. In unjust enrichment terms, it is sufficient if the transfer of the benefit in question failed to achieve a purpose that the plaintiff had in mind and that was made known to the defendant. The plaintiff may have paid money to the defendant in the expectation of the defendant's marriage, which then is called off.[78] Or, the plaintiff may have transferred wealth to the defendant in expectation of a contract that parties eventually fail to agree upon.[79] In both situations, the plaintiff is entitled to recover, and there is no need to show that any conduct of the parties would have made any agreement between them voidable or would have entitled one of the parties to terminate

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76. Woolwich Equitable Bldg. Soc'y v. Inland Revenue Comm'rs, [1993] A.C. 70 (H.L. 1992) (appeal taken from Eng.).

77. *See, e.g.*, Bell v. Lever Bros., [1932] A.C. 161, 162 (H.L. 1931) (appeal taken from Eng.) (rejecting mutual- and unilateral-mistake arguments for contract rescission).

78. BURROWS, *supra* note 12, at 252; *see also In re* Ames' Settlement, [1946] Ch. 217 (finding a failure of consideration where a trust was set up for a marriage that was later declared void *ab initio*).

79. *See* Chillingworth v. Esche, [1924] 1 Ch. 97 (Eng. C.A. 1923) (permitting recovery of an advance payment where the parties eventually failed to agree on a contract).

the agreement. On the other hand, this simple version of failure of consideration cannot counteract in unjust enrichment an agreement that remains valid in spite of the fact that the performance of a contract has failed to achieve the purpose that the plaintiff had in mind. A plaintiff seeking to recover an advance payment made to the defendant for the purchase of a gift for a wedding that is then called off will not be able to rely on failure of consideration. Nor can a plaintiff claim restitution for failure of consideration if the defendant's breach of contract is not serious enough to entitle the plaintiff to termination.[80] As before, it is much easier to recover an enrichment for failure of consideration if the claimant does not have to rely on the same failure of consideration in order to terminate a contract which would otherwise entitle the defendant to the enrichment.

In my view, one of the main challenges that English law faces is within the ambit of this third function. If somebody transfers a benefit without being obliged to do so, there are usually four possible explanations. First, the transfer was mistaken. Second, it was involuntary. Third, it was given in order to achieve a purpose beyond the shift of wealth. Fourth, it was intended to be kept by the recipient regardless of any obligation or other purpose.

The first situation is covered fairly generously, as any mistake will suffice to reverse the enrichment. So is the third situation, as the failure of a purpose communicated to the defendant will be sufficient as an unjust factor. There is general agreement that the fourth situation will not give rise to a claim in unjust enrichment.

However, English law can become quite parsimonious in the second situation. Involuntariness will only suffice as an unjust factor if the predicament had a force that would allow the plaintiff to have a contract set aside, regardless of whether there really is such a contract or whether there is no contract to set aside in the first place. Unlike mistake and failure of consideration, it is not easier to recover an enrichment that was conferred involuntarily if the claimant does not have to rely on the same involuntariness in order to have a contract set aside (on the grounds of duress or undue influence) that would otherwise entitle the defendant to the enrichment.

It is not quite clear whether this difference in treatment of mistake and failure of consideration on the one hand, and involuntariness on the other, is intentional or accidental, but at least one can state that this difference does not seem to have been justified, or even noted much, by either courts or academics. One explanation is that this may be the last leftover of the

80. It should also be mentioned that two other important unjust factors—legal compulsion and necessity—have little or nothing to do with making agreements void or voidable.

now-discarded view that based restitution on an implied contract.[81] But if this difference is accidental and cannot be justified, then involuntariness is the missing unjust factor in English law.

There is no lack of cases in which this failure to distinguish between setting a contract aside on the one hand, and recovering a benefit that never was due in the first place on the other, has the capacity to produce harsh results. I have already mentioned two such cases. The first is *Woolwich v. Inland Revenue*, in which the plaintiffs had always maintained that the request for tax was *ultra vires* (so there was no mistake), but really had no realistic alternative to paying up if they were not to be branded as tax cheats and ultimately exposed to the enforcement mechanisms of Inland Revenue.[82] Here, a shining knight came to the rescue of the plaintiff in the form of the new general unjust enrichment clause for demands by public authorities.[83]

But similar pressures can exist where both parties belong to the private sector. One such case is *Nurdin & Peacock*.[84] The potential consequences plaintiffs were facing for failing to pay the whole requested sum, namely forfeiture of the lease and repossession, left them little choice. Had they decided to settle this dispute by an agreement with the defendants whereby they would pay the higher rent, this pressure would not have entitled them to have set such an agreement aside.[85] But, if they never entered into any such agreement, is it fair to treat them the same? Again, a shining knight arrived, this time in the form of an ingenious mistake of law. They were allowed to recover because they had mistakenly believed they could recover—with the effect that they were not mistaken at all. Neuberger, J. noticed this circularity but preferred this to the alternative solution, which would have resulted in a mistake of law without recovery.[86]

While this technique of interrupting logic ping-pong after the first return is not entirely new to lawyers,[87] the expansion of recovery for

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81. The high water mark of the implied-contract theory was *Sinclair v. Brougham*, [1914] A.C. 398 (H.L.) (appeal taken from Eng.), which concerned the repayment of deposits made to a building society under an *ultra vires* contract. The House of Lords held that an implied promise to pay back would also have been *ultra vires*, so that there could be no action for money had and received. *Id.* at 460.

82. Woolwich Equitable Bldg. Soc'y v. Inland Revenue Comm'rs, [1993] A.C. 70 (H.L. 1992) (appeal taken from Eng.).

83. *Id.* at 177.

84. Nurdin & Peacock v. DB Ramsden & Co., [1999] 1 W.L.R. 1249 (Ch.).

85. A separate question arises whether such an agreement would be void for lack of consideration.

86. *Nurdin & Peacock*, [1999] 1 W.L.R. at 1272-74; *see also* SCHLECTRIEM, *supra* note 22, at 141 n.429 (disapproving of this method but approving of the result).

87. Conflict lawyers might feel reminded of the question of *renvoi*: if conflict-law rules point to a foreign law that has a conflict rule that points back to the forum, such a reference back will be

mistake will not always rush to the aid of parties whose hands were forced into paying a sum they never owed. One such case is *CTN Cash & Carry v. Gallaher*.[88] In this case, a consignment of cigarettes, which plaintiffs, who operated a chain of warehouses, had bought from defendants, was stolen before the risk had passed. The defendants, who believed themselves to be within their rights, threatened no more than to withdraw a voluntary credit facility for future sales contracts if plaintiffs failed to pay this sum. However, as defendants were the sole suppliers of some leading cigarette brands, and as plaintiffs at the time could not operate without this credit facility, they again had no choice but to pay under protest. When plaintiffs later discontinued their business, they deducted the same amount from their last installment.[89] Gallaher's action for this same amount was successful. Again, CTN Cash & Carry was treated exactly as if it had entered—after the dispute arose—into an additional agreement with Gallaher to pay the disputed amount and continue to benefit from the credit agreement. The predicament under which CTN Cash & Carry was operating would naturally not have been strong enough to set aside such a fictitious agreement. So this was not a case of duress. Consequently, the Court of Appeal held that the plaintiffs were not entitled to recover their payment, while at the same time expressing regret about the result and surprise that a reputable company such as the defendant should insist on this payment even after they had learned that it was not due.[90]

A contributing factor to the difficulties that these cases of involuntary payments of nonexisting debts create is the fact that English law does not attach any effect to an express reservation that the payor makes in protest to the unjustified demand. Only the payee's acceptance of such a reservation would be sufficient to allow recovery on the ground that the payment was not due.[91] This leaves the party that is making unjustified

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accepted as final by both English and German law, even though the conflict law of the forum would then again point to the foreign law. *See* GERHARD KEGEL & KLAUS SCHURIG, INTERNATIONALES PRIVATRECHT § 10 (8th ed. 2000); P.M. NORTH & J.J. FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW ch. 5 (13th ed. 2000) (both discussing *renvoi*). In *Nurdin & Peacock*, the question of whether plaintiffs were ultimately mistaken about the recoverability was cut off after the first reference back; under *renvoi* rules, the first reference back is accepted and no further *renvoi* is permitted.

88. [1994] 4 All E.R. 714 (Eng. C.A.). Another case of involuntary payments that were not due and made under protest, and in which no shining knight rescued the plaintiff, is *Twyford v. Manchester Corp.*, [1946] Ch. 236.

89. CTN Cash & Carry Ltd. v. Gallaher Ltd., [1994] 4 All E.R. 714, 720 (Eng. C.A.).

90. *Id.*

91. For a full discussion, including the reservations made in the *Woolwich* case, see the fine distinctions made in *Nurdin & Peacock*, [1999] 1 W.L.R. at 1269, according to which the correspondence between the parties should be construed as an express reservation regarding the four overpayments made while the action was already pending, but not for the one previous payment made under protest.

demands without any incentive to negotiate a solution. The above three cases also show that it will usually make sense from an economic viewpoint to pay first and keep the company (and, in the private law cases, the business between the parties) running, and sort out the legal questions later. The present law is likely to force a party to cut all ties to the other party as soon as possible, even where this makes no sense economically for either party.

C. *German Law*

If we look again at the three functions of "legal ground," it is, surprisingly, the first one that is somewhat dented by one troublesome aspect of German law. It appears from both the *BGB* and the jurisprudence of the courts that the legal ground can be overridden by another meaning that the Latin word *causa* can take, which has also found its way into the *BGB* in the form of "failure to achieve the intended result."[92] This relates in particular, but not exclusively, to one-sided transactions such as donations and occasionally the acceptance of a debt. Rather than referring to the obligation that may be created by a contract of donation, or the acceptance of a debt, *causa* in this context may denounce an underlying reason or expectation which caused a party to make a gift or to accept a debt. This is more of a legacy from Roman law (the *condictio causa data causa non secuta*) than careful design by those who drafted the *German Civil Code*. Within German law, it has caused unnecessary friction with contract law.[93] In a law of unjustified enrichment that has been carefully dovetailed with contract law in order to ensure that contract and unjustified enrichment run in tandem, this *condictio* will allow a plaintiff to recover in restitution a benefit that contract law tells us the defendant was and remains entitled to receive.

This is entirely unnecessary, as German law has developed a contractual doctrine of frustration, which would allow German law to handle the issue of failure to achieve an intended result through contract law, and to allow restitution through the general clause if the rules on frustration will set the contract aside. From a comparative viewpoint, it has made German and French law (which use "cause" in a similar, ambiguous way) less attractive, as this ambiguity is a major cause of

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92. § 812 Nr. 1 Sent. 2 BGB ("The same obligation exists if . . . the result does not occur which the performance had been aimed at to produce according to the content of the legal transaction.").

93. *See* MARKESINIS ET AL., *supra* note 16, at 729-31 ("It seems that whenever *condictio causa data non secuta* raises its head, it causes more problems than it solves."). Note that as a matter of terminology § 812 distinguishes between the "*rechtlicher Grund*" (legal ground) and the failure of a "*bezweckter Erfolg*" (intended result) to materialize.

uncertainty.[94] All this could be avoided if it were generally accepted that this *condictio* could not be used to undo a transfer that was made under what remains a valid legal cause.

The second function of "legal cause" has been fully accepted by German law, with the limitations imposed by the performance/nonperformance taxonomy. The same can be said about the third function. Some explanation may be appropriate as to how precisely German law achieves the distinction between recovery of a benefit that never was due and recovery of a benefit conferred under an agreement that is afflicted by a factor that may render the agreement void, voidable, or subject to termination by one party.

The restitutionary approach is indeed identical: both are benefits that were transferred without legal ground. As mentioned above, the German law of unjust enrichment refers the questions of potential legal grounds being void or voidable, or having lapsed, entirely to other areas of the law, in particular contract law. But because of the stricter requirements that exist in contract law, this leads to a differentiated treatment. If there is an agreement, any "unjust factor" under which a plaintiff was laboring must be strong enough to set aside, or terminate, this agreement under contract law rules. However, for transfers made where no legal cause in the form of an agreement is in sight, more generous rules apply.

Looking again at the four most likely explanations why benefits are transferred although they are not due (mistake, involuntariness, expectation to achieve another result, and intention that the benefit be kept regardless of an obligation or other expectation), we first note that—as in English law—any mistake will be sufficient to claim a benefit that the plaintiff transferred to the defendant without being obliged to do so.[95] The same is also true for a transfer that failed to achieve an intended additional result that had been made known to the recipient.[96] If the plaintiff intended that the benefit be kept regardless of any obligation, the result is again the same as in English law—no claim will lie in unjustified enrichment.[97] For the remaining situation, an involuntary transfer, it is interesting to note that a literal application of the *BGB* would also have led to plaintiffs having difficulty in recovering benefits, because the defense in section 814 of the *BGB* (*i.e.*, that the plaintiff was aware of lack of legal ground) would have

94. *See* SCHLECHTRIEM, *supra* note 22, at 80.

95. German law is even more generous, as it is only positive knowledge of his lack of liability that prevents a plaintiff from recovering. *See supra* subpart I(E). Otherwise, the same reservation as above for English law must be made regarding situations involving three parties.

96. This is the less troublesome aspect of the *condictio causa data causa non secuta* in § 812 of the *BGB*. *See* § 812 Nr. 1 Sent. 2 BGB.

97. Either the defense of § 814 of the *BGB* will operate, or, more likely, this will be construed as a gratuitous contract between the parties.

applied to these claims as well. But the courts have consistently exempted involuntary transfers from this defense so that involuntary transfers of benefits that were not due are recoverable regardless of whether this involuntariness would qualify as duress, undue influence, or another factor capable of vitiating contracts.[98] As a result, the third function of legal cause is completely covered by German law.

D. Canadian Law

I should confess at the outset that my knowledge of Canadian law is so limited that I should probably not comment on it at all. If I nevertheless venture into this dangerous territory, it is because the Canadian law of unjust enrichment over the last twenty years has given the appearance of having shifted to a continental-style, legal-ground-based general principle of unjust enrichment.

The Canadian version of *causa* is called "juristic reason," established in the 1980 case *Pettkus v. Becker*,[99] in which unjust enrichment was employed to sort out disputes about the property that an unmarried couple had built up together over a period of nearly twenty years but which had always been held in the name of the defendant. Dickson, J., in delivering the majority judgment, held that three requirements must be fulfilled in order for an unjust enrichment to exist, namely "an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment."[100] He added that this approach was supported by general principles of equity.

Unlikely as it seems, this sentence looks like an abridged transplant from article 62 of the *Swiss Federal Code of Obligations*.[101] However, the same judgment should be sufficient to destroy any illusion that Canadian law has thus adopted a continental-style, "lack of legal cause"-based general clause approach. All Dickson, J. had to say about the "juristic reason" in *Pettkus v. Becker* was the following:

> As for the third requirement, I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable

98. *See* MARKESINIS ET AL., *supra* note 16, at 736 (arguing that the defense of knowledge "only applies to performance which was made voluntarily, i.e. without pressure having been applied" and will not defeat restitution).

99. [1980] 2 S.C.R. 834 (Can.); *see also* Peter v. Beblow [1993] 1 S.C.R. 980 (Can.) (following the reasoning in *Pettkus*). *See generally* Lionel Smith, *The Mystery of "Juristic Reason,"* 12 SUP. CT. L. REV. 2D 211 (2000).

100. *Pettkus*, [1980] 2 S.C.R. at 848.

101. *See* Art. 62 Obligationenrecht. This provision can be translated as follows: "Any person who has in an unjustifiable manner received a gain out of the property of another is bound to return it. The gain must in particular be returned, where it was received without any valid ground . . . ." THE SWISS FEDERAL CODE OF OBLIGATIONS 12 (Simon L. Goren trans., 1987).

> expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.[102]

It appears to me that this discussion of existence of a juristic reason is an exercise in equity (with a lower case "e"). Here is a reasonable expectation that the other party at least ought to have known, and with this actual or constructed knowledge the other party freely accepts those benefits. It would be unjust if the defendant were allowed to keep those benefits for himself.

It is not that German courts would refuse to go into considerations of good faith and equity. But the analysis of the existence or nonexistence of a legal ground would have looked very different indeed. It would have involved the question of whether there was a performance, whether there was any obligation of the plaintiff to transfer benefits to the defendant, and, lacking such an obligation, whether those transfers were undertaken on a voluntary basis in full knowledge that there was no obligation. In result, it would have been difficult to find a claim based on unjustified enrichment under German law. It is no coincidence that German courts do not use unjustified enrichment to sort out property disputes between ex-partners. Instead, they use contracts, particularly provisions on the revocation of presents and a good-faith-based doctrine of frustration of contract.[103]

This is not a criticism of Canadian courts, but it serves to show that from the very outset, the "juristic reason" was something quite different from a German "legal cause." Another more recent case may help to illustrate this point.

In *Hill Estate v. Chevron Standard Ltd.*,[104] a lease of the mineral interest in land was void because it was based on a power of attorney granted by a mentally incompetent owner. The plaintiff estate sued for the return of the mineral rights. The defendant oil company claimed restitution (in the form of a constructive trust) for its considerable investment in the site, which had accordingly increased the value of the land. The Manitoba Court of Appeal held that the estate had been enriched at the expense of the defendant. Concerning the juristic reason, the Court said:

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102. *Pettkus*, [1980] 2 S.C.R. at 849.

103. *See* BGH, 28.9.1990, BGHZ 112, 259 (261) (F.R.G.). It should be noted that for a limited period, German courts used the *condictio causa data causa non secuta* (rather than the "legal ground"-based general clause in § 812, number 1, sentence 1 of the *BGB*) to sort out marital property disputes, but soon abandoned this in favor of the much more flexible frustration of contract doctrine. *See* J. VON STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 812 Nr. 100 (W. Lorenz ed., 13th ed. 1994).

104. [1993] 2 W.W.R. 545, *appeal denied*, Chevron Standard Ltd. v. Demars, [1993] 2 S.C.R. vi (Can.).

> Where the Chevron case fails is that there is indeed a "juristic reason" for the enrichment, namely, that, functioning without a valid lease, Chevron was a trespasser in drilling for and extracting oil belonging to the William Jennings Hill estate.[105]

A German court would have consulted property law to establish that the estate is enriched, as it owns the land with all installations without being limited by any property right of the oil company. But a rule that establishes the existence of an enrichment is, under German law, not normally sufficient to justify the enrichment.[106] A German court would have examined whether there was any legal ground that justified this shift of wealth that made up the estate's enrichment.[107]

If the reading of the "juristic reason" adopted in *Hill Estate v. Chevron* becomes generally accepted in Canada, that would, in my view, come close to reestablishing the negative general rule of English law and, as the case illustrates, could be used to allow less restitution than English law permits. The rule could be extended to all enrichments in which the recipient has under property law become the owner of the enrichment, as is very frequently the case. Lionel Smith's analysis of Canadian judgments suggests, however, that besides creating uncertainty and providing a new cloak for much of the unjust factors of English law, "juristic reasons" have mostly been used to allow policy reasons, legitimate expectations, and equitable considerations to influence the outcome of an action in unjust enrichment.[108] This would indicate a very surprising result. By what appears to be a shift to a continental-style positive, legal-cause-based general principle of unjust enrichment, Canadian law may in effect have taken its law of unjust enrichment back to *Moses v. Macferlan* with its two lists and a general, overarching principle of equitable considerations that can decide in which category a case should properly belong. At the same time, this approach makes it difficult to comment on the extent to which the Canadian approach serves the three functions of "legal cause" which have been outlined above. It appears that the first function has been maintained, the second function has been taken on in appearance only, and the third function may have been channeled through equitable considerations.

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105. *Id.* at 560.

106. *See* Smith, *supra* note 99, at 221-22 (discussing a similar trait of Canadian restitution law).

107. Hill (or his estate) would have acquired property under § 946 of the *BGB*. Section 951 of the *BGB* would have referred back to unjustified-enrichment rules to resolve whether Chevron could claim restitution of the value transferred. The void agreement could not have provided any legal cause for this shift, and the action would have succeeded.

108. Smith, *supra* note 99, at 224-27, 232.

E. The Draft Restatement

Andrew Kull's partial *Draft Restatement* dealing with restitution and unjust enrichment is so full of interesting propositions that it is regrettable that I have no more to offer than a short discussion of the concept of "legal basis" of enrichment that it employs. Right at the outset, the introductory chapter deliberately departs from unjust enrichment in the sense of an equitable or moral judgment as in *Moses v. Macferlan* and propagates the following understanding:

> The concern of restitution is not, in fact, with unjust enrichment in this broad sense, but with a narrower set of circumstances giving rise to what is more appropriately called *unjustified enrichment*. . . . Unjustified enrichment is enrichment that lacks an adequate legal basis: it results from a transfer that the law treats as ineffective to work a conclusive alteration in ownership rights. Because the legal basis that makes a transfer effective is ordinarily a consensual exchange, a valid gift, or a legal duty (such as a liability in tort or an obligation to pay taxes), the concern of restitution is predictably with those anomalous transfers that cannot be justified by the terms of a valid and enforceable exchange transaction; by the intention of the transferor to make a gift; or by the existence of a legal duty to the transferee.[109]

This could have been taken straight out of a German textbook if it were not for the fact that German law has already adopted the term "unjustified enrichment," which Kull suggests to be more appropriate, and which he does indeed trace back to German and French law.[110]

However, the major difference remains that there is no general clause that states that such unjustified enrichments are to be given up. It appears that claims are not to be established under section 1 of the *Draft Restatement*, but rather under the rules in Part II, "Liability in Restitution," which lists individual grounds of restitution.[111] Not surprisingly, these grounds of restitution are largely based on the established common-law grounds for unjust enrichment or unjust factors. So where stands the *Draft Restatement* as far as the three functions of "legal ground" which have been outlined above are concerned?

The first function, namely that no claim in unjust enrichment will lie for a benefit which the defendant is entitled to have obtained from the

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109. DRAFT RESTATEMENT, *supra* note 1, § 1 cmt. b.

110. *See id.* § 1 cmt. b, reporter's note (noting that the term "unjustified enrichment" is technically more accurate and "makes an approximate translation of both the German *ungerechtfertigte Bereicherung* . . . and the French *enrichissement sans cause*").

111. Chapters in the *Draft Restatement* entitled "Transfers Subject to Avoidance," "Intentional Transfers," and "Benefits Wrongly Obtained" all list individual grounds for restitution. *Id.* at chs. 2-4.

plaintiff, is fully recognized in the above quote from section 1, comment b. It is not mentioned expressly in any of the rules in the first part of the *Draft Restatement* but might well become a central plank within the future draft of section 65, "Transfer Not Resulting in Unjust Enrichment."[112] At the present stage, some part of this function surfaces in section 6 on "Payment of Money Not Due."[113] However, it is not entirely clear which solution section 6 suggests for the fictitious case mentioned at the end of subpart I(E), where *A* pays compensation to Mrs. Smith for the dress his dog has torn, in the mistaken belief that the victim is a Mrs. Smith whom he likes whereas in fact she is another Mrs. Smith whom he loathes. The heading suggests that *A* cannot claim under section 6, whereas the wording of subsection (1) suggests that he can: "Payment of money to one who is not the intended recipient . . . gives the payor a claim in restitution against the recipient."[114] It is not entirely clear how the recipient should argue that *A*'s payment was due to her. Similar questions can surface when the payment was not caused by mistake but was due to another unjust factor that has not affected the obligation.

As far as the third function is concerned, it appears that the *Draft Restatement* adopts the same unexplained discrepancy between mistake and failure of consideration on the one hand, and involuntariness on the other, for which English law has been criticized above. The Comments to section 14 state:

> Duress may be the basis of a claim in restitution, a defense to an asserted liability in contract, or the basis for asserting the invalidity of a will or other instrument. The substantive law of duress—the problem, often difficult, of determining which coercive influences should be treated as wrongful—is the same in all of these settings.[115]

The same is stated in the comments to section 15 regarding undue influence.[116]

It therefore appears that sections 14 and 15 will also treat a plaintiff who had little choice but to pay an unjustified demand just as if this plaintiff had promised the payment in a contract that he or she now seeks to have set aside. Thus, section 14 could not have provided any relief in the three English cases mentioned above in the same context, namely *Woolwich*,[117] *Nurdin & Peacock*,[118] and *CTN Cash & Carry*.[119] A

112. *See* RESTATEMENT, *supra* note 33, § 60 (containing such a defense).
113. DRAFT RESTATEMENT, *supra* note 1, § 6.
114. *Id.* § 6(1).
115. *Id.* § 14 cmt. a.
116. *Id.* § 15 cmt. a.
117. *See supra* text accompanying note 82.
118. *See supra* text accompanying note 72.

shining knight is likely to arrive for *Woolwich* under section 18 on "Recovery of Tax Payments."[120] As concerns *Nurdin & Peacock*, it looks as if the *Draft Restatement*'s subsection 6(2) would not allow a similarly liberal interpretation of what amounts to a mistake in law. This provision requires "a mistake as to the existence or extent of the payor's obligation,"[121] and *Nurdin & Peacock* was not laboring under any such mistake once it had discovered that the rent calculations were wrong. Finally, the *CTN Cash & Carry* plaintiff would also be out of luck because the threat which the defendant made in that case—withdrawal of a voluntary credit facility—would also fall short of the hurdles which the *Draft Restatement* erects for duress, namely "a threat or refusal, express or implied, that is wrongful as a matter of law."[122] The hurdle could be cleared only if it could be said that the last five words of the definition allow for the very same distinction between benefits for which no obligation existed in the first place and benefits transferred under an agreement that is then challenged on the ground of duress.

The above may, of course, be a proper reflection of restitution law as practiced by the U.S. courts in cases such as *Still v. Equitable Life Assurance Society*.[123] In this case, an insured party was not allowed to recover the payment of premiums he had made under protest after the insurer wrongly, although in good faith, had refused a contractually stipulated waiver of premiums on the ground of the insured's total disability.[124] Again, this plaintiff had little choice but to pay this unjustified demand or risk the loss of his entire insurance, and again, this plaintiff was treated as if he had reached an agreement with the insurance company that he would pay the disputed premiums. In fact the parties had settled on all other questions, leaving the restitution issue to be resolved by the courts. And again, one can doubt whether the outcome is right as a matter of policy, and whether it is right to treat those laboring under mistakes and those expecting a consideration that failed so much more generously than those acting involuntarily.

The comments to section 1 of the *Draft Restatement* come close to embracing the second function of legal ground—an enrichment that the defendant has received at the plaintiff's expense must be given up if there was no legal ground that entitled the defendant to keep it—but stops short

119. *See supra* text accompanying note 88.
120. *See* DRAFT RESTATEMENT, *supra* note 1, illus. 10-11.
121. *Id.* § 6.
122. *Id.* § 14.
123. 54 S.W.2d 947 (Tenn. 1932).
124. *Id.* at 950.

of adopting this as a general ground of liability.[125] Thus, the second function exists in a somewhat limited form, as a guiding principle for doubtful cases under one of the provisions that establish liability.

This looks like a very useful approach. It does not entail the need to go into the detailed drafting of a negative list of exceptions which would be necessary as soon as a general liability clause were adopted. And, at the same time, it helps to develop the law where the unjust-factor approach proves to have gaps between those factors and to resolve other uncertainties, in particular through the frequent limitation of enrichment liability to what is necessary to prevent unjust enrichment.[126] So the *Draft Restatement* comes quite close to what Lord Hope recently suggested for English law when arguing why recovery should also be allowed on the basis of a mistake of law. His statement can also serve as a closing remark:

> In my opinion the proper starting point for an examination of this issue is the principle on which the claim for restitution of these payments is founded, which is that of unjust enrichment. The essence of this principle is that it is unjust for a person to retain a benefit which he has received at the expense of another, without any legal ground to justify its retention, which that other person did not intend him to receive. This has been the basis for the law of unjust enrichment as it has developed both in the civilian systems and in Scotland, which has a mixed system—partly civilian and partly common law. On the whole, now that the common law systems see their law of restitution as being based upon this principle, one would expect them to apply it, broadly speaking, in the same way and to reach results which, broadly speaking were similar . . . .[127]

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125. DRAFT RESTATEMENT, *supra* note 1, § 1 cmt. b.

126. *See, e.g., id.* §§ 8-12.

127. Kleinwort Benson Ltd. v. Lincoln City Council, [1999] 2 A.C. 349, 408 (H.L. 1998) (appeal taken from Eng.).