ARTICLES

Equity in the Modern Law: An Exercise in Taxonomy

★

PETER BIRKS†

'It is essential in modern society that the law be closely and cogently reasoned. Access to the courts is hugely expensive. An expensive palm tree is no use to the people. The law must be so stated as to facilitate prediction and advice. It is impossible otherwise to plan with confidence. And it is impossible to know when to litigate. In the context of litigation, law which is intellectually disorderly plays into the hands of the rich and powerful, whether the power and wealth be private or public. Power goes hand in hand with uncertainty. The more uncertain the law the better it can be used in terrorem and the easier to force the weaker party into a settlement. It is said to be in the interest of society that quarrels be ended and litigation minimised. In Latin this seems to be put beyond doubt: interest reipublicae ut sit finis litium. The proposition should not escape examination. It is equally true that members of society have entitlements, and that the courts are there to ensure that they are not elbowed out of them.... Justice takes no pleasure in settlements compelled by needlessly uncertain outcomes. These are the routine ends which legal certainty has to serve, and legal certainty is impossible if and so long as taxonomy is neglected.'

† Regius Professor of Civil Law, All Souls College, Oxford. This is the revised text of 4 lectures given for the UWA Law School (Perth, June 1996). I am extremely grateful to the Dean and Faculty of Law for all the kindness shown me and help given.

CONTENTS

NO 12th century Englishman is known to have taken the risk of addressing any one of the four doctors on the subject of Justinian's Digest, nor to have dared to open his mouth in the universities of northern Italy before those who had the advantage of being able to hear for themselves the teaching of Bulgarus, Martinus, Jacobus or Hugo. Had one been able to contemplate such an attempt, his trepidation would hardly have been less than mine in coming to the land of Justices Meagher, Gummow, Lehane and Finn — four judges widely acknowledged to be among the greatest masters of equity in the modern world, coming, moreover, with a script which is not only about equity but which is almost bound to be read as hostile to the subject which they defend with a jealousy matched only by their mastery of it. From the relative safety of the House of Lords one of the greatest of our modern judges knew what it was to provoke Australian scorn.[1] However, I take the precaution of insisting at the outset, not only that I approach the subject with humility, but also that my paper is first and foremost concerned with taxonomy or, more accurately, with defective or neglected taxonomy. In that it focuses on equity, it does so because the bi-partition between law and equity exacerbates the problems caused by the more general neglect of the essential exercise of classification, and also because some of the forms of equitable thought seem to pose insuperable obstacles to the would-be taxonomist. The fusion of law and equity is a related but different issue. I shall say nothing about it.

PART I: A FOUNDATION OF RATIONALITY

1. Taxonomy

Taxonomy is classification. In relation to any particular science, taxonomy is the branch of that science which deals with the accurate classification of the subject-matter of that science. It is not too much to say that taxonomy is the foundation of most of the science which late 20th century homo sapiens takes for granted. Had he been averse to taxonomy or a bad taxonomist, Darwin would have observed but would not have understood. Taxonomy changes nothing, but it promotes understanding. Without it there is only a chaos of unsorted information, what Thomas Wood, writing on the condition of English law in 1722, called 'a heap of

---

1. RP Meagher, WMC Gummow & JRF Lehane *Equity Doctrines and Remedies* 2nd edn (Sydney: Butterworths, 1984) Preface, adverting to the views expressed by Lord Diplock in *United Scientific Holdings Ltd v Burnley BC* [1978] AC 904, 924. See also 3rd edn (Sydney: Butterworths, 1992) 125, 126; also WMC Gummow 'Forfeiture and Certainty: The High Court and the House of Lords' in PD Finn (ed) *Essays in Equity* (Sydney: Law Book Co, 1985) 30, 41, 44.

good learning'.[2] The realists and post-realists have done a good job of debunking legal science. In the United States where Jerome Frank and his intellectual successors did their most serious damage, it has never recovered and now lets in floods of law and economics in the hope of filling the broken vessel. However, if we were to adapt Chesterton's famous dictum upon the Christian way of life,[3] we might say that a rational science of the law has not been tried and found wanting but has merely been found difficult and left untried. A sound taxonomy, together with a keen sense of its importance, constant suspicion of its possible inaccuracy and vigorous debate on its improvement, is an essential precondition of rationality. All these are wanting in common law systems. Until that is put right, the realists and the fundamentalists of the school of critical legal studies will continue to play from a winning hand.

The early paragraphs which follow are preparatory and may tax the reader's patience. The later sections are intended to show that neglect of taxonomy leads to errors and confusion. In particular it makes it virtually impossible to control the tendency to contradiction inherent in the duality of law and equity. But in order to do that it is essential both to make some case for the necessity of careful classification and to set out the bare bones of the classification on which the later parts will rely.

2. Neglect of taxonomy

'The life of the law has not been logic, it has been experience'.[4] Holmes's dictum reminds us of the need for flexibility and adaptability, for constant change in the pursuit of justice. It is important to remember that we do live in a legal world where continual and rapid change is an inescapable reality. It is that reality which provides the background for Lord Goff's very important Maccabaean Lecture.[5] However, we need to hear more often that the life of the law, if not wholly dependent on logic, certainly cannot consist in fallacy and contradiction. We need that warning against intellectual disorder, against change which outstrips the intellect and loses touch with the demand for stability and consistency, essential ingredients of justice. Blackstone described law as the highest branch of the study of ethics.[6] That is right. But law has additional burdens. A principal difference

2. T Wood *An Institute of the Laws of England* (London, 1722) Preface: 'I entertained hopes that now it might not be impossible to sort, or put in some order, this heap of good learning; and that a general and methodical distribution, preparatory to a more large and accurate study of our laws, might now be made.'
3. GK Chesterton 'The Unfinished Temple' in *What's Wrong With the World* (London: Cassell, 1912) 5.
4. OW Holmes *The Common Law* (Boston: Little, Brown, 1881) 1.
5. R Goff 'The Search for Principle' (1983) 69 Proc Brit Acad 169.
6. W Blackstone 'On the Study of the Law' in *Commentaries on the Law of England*

between law and moral philosophy is that, while philosophers can debate and disagree, law must make up its mind. For law supposes judges deciding cases day by day, deeply affecting the lives of ordinary citizens. And like cases have to be decided alike. Sensitivity and flexibility have to be reconciled with stability and consistency.

In the course of its long development the common law has been protected against instability and inconsistency by a variety of somewhat crude mechanisms which history has now largely disabled or withdrawn. The list of forms of action has gone. The doctrine of precedent has lost much of its rigour. The one hope now is to tighten up its reasoning, founding stability on a sophisticated rationality. There is as yet no crisis, only a cloud on the horizon. The shape and nature of the cloud can just be detected. If the common law cannot install new mechanisms against intellectual disorder, it will come under increasing criticism and, if it then manages to escape a radical politicisation, it will not be able to resist the next wave of enthusiasm for codification. More attention must be urgently paid to the rational strength of the law. The search for principle must be conducted more vigorously.[7] That means more logic and less experience, more system and less empiricism.

Improved taxonomy is essential. Dependence on the alphabet has encouraged disorderly and conflicting categories. The common law has failed to organise the categories of its thought. That is what is meant by the absence of system. Cutting free from Roman law has made things worse. Whether we knew it or not, we used to lean heavily on Justinian's Institutes, the scheme of which underlies all the civilian codifications. This kind of weakness makes trouble at every level. At the highest level, the level of the whole law, common lawyers have no shared overview, just lists of more or less familiar topics. At the lowest level, where individual liabilities are determined, contradictory angles of approach not infrequently co-exist. This is a problem on both sides of the line between law and equity, aggravated by the existence of the duality entailed by that line. One example may be given which is wholly internal to the law, without equitable complications.

The House of Lords recently decided *Spring v Guardian Assurance.*[8] An employer wrote a reference which made incorrect assertions of fact about a former employee and thus caused that employee pure economic loss. Was the employer liable in negligence? The answer was yes. This is somewhat surprising. The reference was a communication which was subject to qualified privilege having been written as a matter of duty to a person with an interest to receive it. In defamation the employer could not therefore have been liable without proof of malice. One commentator asks whether,

(London: Sweet & Maxwell, 1829) 27. Used as the preface to the *Commentaries* this was Blackstone's Inaugural as first Vinerian professor, 25 Oct 1758.

7. Lord Goff's message more than a decade ago: supra n 5.

8. [1994] 3 WLR 354.

if the case had been argued in defamation, the House of Lords would have changed the law applicable to that tort.[9] Since the law seemingly was that such a defendant could not be liable except for malice, and since the law now is that he can be liable for negligence, one might equally put the question differently. Has not the decision in negligence changed the law of defamation?

This is a conundrum of disorderly categories. It is a species of problem which disfigures the law. It is discreditably elementary. Two categories intersect. Defamation is a wrong, like inducing breach of contract or interference with chattels, which is manifestly named by reference to the interest infringed. Defamation is an infringement of the interest in reputation. Negligence is a wrong named by reference to a kind of fault. It follows that the two categories must intersect. In other words infringement of the interest in reputation will often be negligent. Is there then one wrong or two? My canary is yellow and eats seeds. If all birds are seed-eaters, yellow, or others, my canary counts twice. Are there two birds or one? If there come to be two birds, the double-vision is due to the bent classification. There is only one bird.

The question about negligence and defamation is slightly more difficult than the question about yellow birds and seed-eaters. There is at least an argument that the two categories might be so constructed, or reconstructed, as not to intersect. We need not pursue it. It is enough that we see the makings of an intellectual disaster. The whole law of tort is bedevilled by the same essentially trivial problem. The law cannot tolerate, or should not be able to tolerate, torts named so as to intersect. It is symptomatic of the common law's worrying indifference to system that academic literature has not eliminated this kind of intellectual trap. But the same problem which bedevils tort bedevils the whole law. In a small way, this paper hopes to stir its taxonomic conscience.

3. Finding your way about

There is no department of human knowledge which can manage without taxonomy and, equally important, a continuing taxonomic debate. A whale is otherwise easily taken for a fish. Two seahorses come together and one injects matter into the other, which other later gives birth to hundreds of baby seahorses. It would be easy to assume that the seahorse which gives birth is the female and mother. But that is wrong. The female seahorse impregnates the male. You need to know just what defines the sexes, just as you need to know, if you want to get things right with whales, just what differentiates fish and mammals.

9. T Allen 'Liability for References: The House of Lords and *Spring v Guardian Assurance*' (1995) 58 Mod L Rev 553, 560.

At the annual conference of the Society of Public Teachers of Law held in Cardiff in September 1995, some speakers advocated an abolition of categories as a means of escaping what was referred to as 'stove-pipe mentality' — a Pavlovian syndrome rendering it impossible for the lawyer to think beyond the first category which a particular problem brings to mind. The speakers' prescription was on the level of blood-letting, calculated to make the condition immediately worse. Abolition of categories would entail abolition of thought. If it is true that young lawyers are getting stuck in single categories, the cause is the complete neglect of taxonomy by the law schools. They are not teaching how the categories of the syllabus fit together. Only those who have discussed the relation between categories can move confidently from one to another. There has to be a map of the law, and every lawyer must have thought about that map and must have discussed its possible inaccuracies.

The technique which is used in this paper is to propose a certain map of the law and to use it to explore the relations between law and equity. Obviously in a short space only a few examples can be given, and even they cannot but be treated superficially. And it is important to remember that the map may not be the best that can be had. That is the subject-matter of the taxonomic debate. However, by the end it should have proved itself good enough to convince the reader of the necessity of overcoming our taxonomic indifference.

Without a map one easily gets lost. Suppose a jurisdiction develops something called 'estoppel'. A vigorous case law emerges. It is essential to know where that development belongs. The obscure name may otherwise conceal the fact that the work is already being done elsewhere, in other language. It is not always easy to recognise duplication, no more than one can be sure not to walk in circles if one sets out without compass and map. Is an estoppel an event in the world or the legal response to such an event? If it is an event, is it a wrong or another kind of event? What other kinds of event are there thought to be? If it is a response, what other responses are there to which it might be likened and from which it might be differentiated? If it is neither event nor response, with what entities might it be aligned?

Again, suppose a jurisdiction generates a vigorous case law under the heading 'resulting trusts,' frequently shooting wealth back to a person from whom it has been acquired. The law of unjust enrichment does the same. It shoots back wealth whence it came. The language of resulting trusts and of unjust enrichment is so different that, without a map and a will to use it, the lawyers might never even notice that they ought to check whether they were attacking one and the same problem with two armies. Ignorant armies clash by night: the two forces might indeed wipe each other out before anyone recognised the disaster which soldiers call friendly fire.

4. A map of the law

The map which underlies this paper is derived from the scheme of Justinian's Institutes. The sixth century lawyers on whom the emperor relied had a particular view of how legal education should be conducted in the great law schools of Constantinople and Beirut. They thought beginners should first absorb an overview of the law.[10] It was for that purpose that they made the Institutes, borrowing the scheme which, so far as we can see, was invented by the second century jurist whom we know only as Gaius. Thereafter, however thick the forest of detail that the law students would have to encounter, they would never be completely disoriented. We overlook the necessity of that preparation.

My map is merely derivative.[11] That needs to be emphasised. Its main outlines are as follows. The law is either public or private. Private law concerns the persons who bear rights, the rights which they bear, and the actions by which they protect those rights. The rights which people bear, whether in personam or in rem, derive from the following events: wrongs, consent, unjust enrichment, and others.

Our main concern is with the last sentence, which is more complex than it seems. Rights in rem are those rights whose exigibility is determined by the location of a thing. 'That is my cake'. My ownership of the cake can be asserted where, and only where, the cake is found. Rights in rem are property rights, and the law of property is all the law which relates to them. Rights in personam are rights exigible against a particular person. They correlate with obligations. 'You ought to transfer to me your car, registration number XYZ 123'. My claim that you transfer the car and your correlative obligation to do so are independent of the location of the car. The claim relates to the car but it is against you and you alone. The law relating to rights in personam is usually called the law of obligations, looking from the burdensome end of the relationship. The sentence with which we are concerned asserts that there are two and only two categories of rights and that these two categories can be classified according to the events from which they arise. Hence there are two categories of response to four categories of causative event. These categories are generic. Beneath the genera there are, of course, sub-classifications of species and sub-species.

In the background there are two categories of jurisdictional origin, namely equity and law. In England the courts of law and equity were

10. Their educational regime is described in the *Constitutio Omnem* : see CH Munro (ed) *The Digest of Justinian* vol 1 (Cambridge: CUP, 1904) xviii.
11. The original is discussed in P Birks & G McLeod *Justinian's Institutes* (London:Butterworths, 1987) 12-26. The history of attempts to improve upon it is reviewed in PG Stein 'The Quest for a Systematic Civil Law' *The Maccabaean Lecture for 1995* (London: Brit Academy, 1995).

institutionally separate until the Judicature Acts of 1873-1875 made the courts into courts concurrently of both law and equity. The same step was taken in Western Australia in 1880.[12] In New South Wales the separation was maintained for 100 years longer, until 1972, at least in the sense that till then the Supreme Court administered law and equity in separate sittings.[13] 'Law', in this narrow sense, in contrast with equity, means that part of the whole modern law descended from the royal courts of common law, and equity means that part of the whole law descended from the courts of equity. With more precision, which can be applied mutatis mutandis to the common law, Maitland described equity as 'that body of rules administered by our English courts of justice which, were it not for the operation of the Judicature Acts, would be administered only by those courts which would be known as Courts of Equity'.[14]

Incorporating the division by jurisdictional origin, the proposition becomes: all rights are either (by jurisdictional origin) legal or equitable and (by the nature of their exigibility) proprietary or personal; and all such rights arise from wrongs, from consent, from unjust enrichment or from other causative events.

Even this short statement departs very considerably from the Roman original. The most dramatic departure, and the most risky, is that the fourfold classification by causative events was confined in Roman law to personal rights (ie, obligations), whereas, with some trepidation, I have made them the sources of *all* rights, whether personal or proprietary. Moreover, the list of causative events was differently expressed. The second century jurist Gaius said that all obligations arose from contract, wrongs or other events.[15] The Emperor Justinian, in the sixth century, pretended to have resolved the residual miscellany, asserting that all obligations arose from contract, wrongs, quasi from contracts and quasi from wrongs.[16] Rejecting this elegant but useless resolution of the miscellany, most modern jurists take another approach to it, first extracting the generic event 'unjust enrichment' and then leaving the rest of the miscellany unresolved: contract, wrongs, unjust enrichment and other events.[17] The category 'others' is a sort of cheat. It

12. The Supreme Court Act 1880 (WA).
13. The Supreme Court Act 1970 (NSW) came into force in 1972. For the relations between law and equity in the other States of Australia, see Meagher et al supra n 1, 132-138.
14. FW Maitland, revs'd by J Brunyate, *Equity* (Cambridge: CUP, 1936) 1.
15. Gaius *Everyday Law* (*Res Cottidianae*) also called *Nuggets (Aurea).* In Gaius *Institutes* (Paris: Les Belles Lettres, 1950) ¶¶ 3.88, 3.91 the author tried to make do with a twofold classification: 'Every obligation arises either from a contract or a tort'. But that quickly ran into trouble.
16. Birks & McLeod supra n 11, A3.13.
17. This development is reviewed in P Birks & G McLeod 'The Implied Contract Theory of Quasi-Contract: Civilian Opinion Current in the Century before Blackstone' (1986) 6 Oxford Journ Legal Stud 46. For the identification of unjust enrichment as an independent

virtually ensures the correctness of the classification, but perhaps only because a huge and various assortment of rights find their origin in that open-ended category. However, for present purposes, we need not face the question what to do about that open-endedness. The reason is that we grant ourselves the luxury of looking only at the three nominate causative events. In fact, we will not even cover all of these three categories. In particular, consent properly includes not only contracts but also, for example, conveyances, and even wills. But from that generic category we will deal only with contracts.

It follows that, from the simple map which I traced, I shall not discuss, unless tangentially, public law; nor, within private law, the law relating to the persons who bear rights or the actions by which rights are protected; nor, within the category of consent, legally relevant manifestations of consent other than contract (not, for example, conveyances or transfers upon express trusts, or wills); nor the miscellaneous category of 'other right-creating events.'

5. Primary and secondary

There is one feature of this series — wrongs, contracts, unjust enrichment, other events — of which it is essential to be forewarned. It conceals the distinction between primary and secondary rights or, looking from the other end, primary and secondary duties. A wrong is an infringement of a right or, which is ultimately synonymous, a breach of duty. Every wrong therefore supposes a prior right infringed and duty broken.[18] In relation to that prior right, the rights born of the wrong are secondary and remedial. So, in the familiar language of negligence, the duty of care is primary and arises in category four, 'other events'. The breach of that duty by the infliction of careless damage is the wrong in category one. The right to claim compensatory damages is a secondary and remedial right arising from the wrong. The obligation to pay such compensatory damages is the same thing, looked at from the other end. The same structure is found in connection with contract. The primary obligation and correlative primary

---

category: see R Feenstra 'Grotius' Doctrine of Unjust Enrichment as a Source of Obligation: Its Origin and Its Influence in Roman-Dutch Law' in EJH Schrage (ed) *Unjust Enrichment: The Comparative History of the Law of Restitution* (Berlin, 1995) 197.

18. This distinction between primary and secondary rights or obligations is now commonly associated with Lord Diplock's analysis of contract: see B Dickson 'The Contribution of Lord Diplock to the General Law of Contract' (1989) 9 Oxford Journ Legal Stud 441, 446-447, 453 et seq. John Austin relied heavily on the distinction: see J Austin in R Campbell (ed) *Lectures in Jurisprudence* 3rd edn (London, 1869) 44-47, 795-800. B Rudden (1990) 10 Oxford Journ Legal Stud 288, responding to Dickson, identifies the ultimate source as Pothier: see RJ Pothier translated by WD Evans *A Treatise on the Law of Obligations* (London: RH Smell, 1826) 183-186.

right arises from the contract. Breach of contract is a wrong which in turn gives rise to a secondary obligation and right in category one. We ought not to ignore the slippery nature of the word 'remedy'. The secondary rights are also remedies for the wrong. Here there is no contrast between 'remedy' and 'right', except that the two words take different positions in relation to the same phenomenon. A right is described as a remedy when the speaker thinks of it as the means of curing a grievance.

6. Either primary or secondary?

The question arises, why not concentrate solely on wrongs? Or, in the alternative, why not concentrate solely on the other three categories, leaving it to be assumed that infringement of the rights identified as arising from those events will be a wrong and, as such, give rise to a liability? The temptation implicit in these questions has to be resisted.[19] It invites the commission of a serious taxonomic error. It is false to suppose that liability attaches only to wrongs. The law not infrequently enforces primary obligations directly. Such directly enforced primary obligations have their own special characteristics. For example, in relation to contract, the law can and sometimes does enforce the primary obligation born of contract directly, as is illustrated by the issue of an order for specific performance and by the availability of the seller's action for the price of goods sold. There are instances of the same kind in the category 'other events', as for example the direct enforceability of a judgment debt. Also, there are obligations to account which are primary. The mere being an agent and the mere being a trustee generates an obligation to account, where 'to account' does not mean simply 'to pay' but, literally, 'to render an account'. Again, in the category of unjust enrichment or, more fully, unjust enrichment at the expense of another, the obligation to make restitution is primary. I receive a mistaken payment. I must repay a like sum. I receive money for a consideration which subsequently fails. I must repay the money. My obligation does not arise from any breach of duty but from the mere fact of the receipt in circumstances in which the law says that there must be restitution. It would be futile to say that the obligation to repay a mistaken payment arose from the breach of the obligation to repay a mistaken payment. The primary obligation is directly enforced.

The distinction between wrongs and other liability-creating events can be obscured by a usage which treats 'grievance' and 'wrong' as synonyms. A grievance and a legal wrong are not the same. Almost every plaintiff who comes to court has a grievance and therefore feels himself in some

19. The integrity of this classification has been defended at greater length, with special reference to the nature of wrongs: see P Birks 'The Concept of a Civil Wrong' in DG Owen (ed) *Philosophical Foundations of the Tort Law* (Oxford: OUP, 1995) 31-51.

degree 'wronged', but not all of them are complaining of wrongs. I take two distant examples because they are so clear and far removed from distracting controversy. A Roman creditor bringing an action for debt (the condictio) would take to the judge a programme like this: 'If it appears that the defendant ought to give the plaintiff $100, condemn the defendant to the plaintiff for that sum; if it does not so appear, absolve him.' One fact which would serve to show that the defendant did indeed owe $100 was a formal promise to that effect (a stipulatio). A plaintiff forced to claim the $100 by going to law would feel himself wronged but, if he proved his debt by a formal promise to pay, he would not technically be relying on a wrong. He would be relying directly on the stipulatio. The relevant event causing the defendant to owe the $100 was his formal promise, nothing else.

Again, the Romans had an action (the vindicatio) which was a direct assertion of ownership of a thing, say, a cow, in the defendant's possession. One way to prove ownership was to show a year's possession, originating in a bona fide transaction calculated to confer title, such as a sale. A plaintiff who had to go to law to claim his own cow might well feel wronged. After all, the defendant, in his view, ought to have surrendered the cow without a contest. However, if this plaintiff substantiated his assertion of ownership in this way, by usucapio, he would not be alleging any wrong on the part of the defendant. One complains of a wrong only when complaining of a breach of duty.

7. Remedial potential

It is, however, essential to notice that a practical question of great importance turns on the distinction between, on the one hand, primary obligations arising from consent, unjust enrichment and other events and, on the other, secondary obligations arising from wrongs. Wrongs have a wide-open remedial potential. In other words, although for policy reasons systems tend strongly to favour a response to wrongs which consists in one or other sub-species of compensatory damages, there is as a matter of logic no such restriction. A victim of a wrong can be given such remedial rights as the system thinks good. The victim of the wrong of battery or, for that matter, of the wrong of breach of contract, could be given the right both to be compensated in money and to be satisfied further by having the wrongdoer's ears cut off. The system has a choice.

Quite differently, at the primary level, the causative event, in itself, has a much more limited remedial potential. The reason is that it is only the characterisation of the defendant's conduct as a breach of duty which makes it possible to contemplate pursuing a policy of deterrence or retribution. Those ideas cannot be brought to bear on the primary causative events.

Apart from any other consideration, the primary events are often composed of facts which are not within the control of the defendant at all. The remedial logic of a mistaken payment is restitution of the enrichment, no more. The remedial logic of a judgment is payment of the sum due. In short, if I show that you have committed a wrong, a brand new system with all its choices still before it might think of attaching all sorts of dire remedial consequences. But if I show that I have recovered a judgment against you for $100, my allegation suggests nothing but that you ought to pay me $100.

Although it is futile to say that the obligation to pay a judgment debt flows from the wrong of not paying a judgment debt or that the obligation to repay a mistaken payment flows from breach of the obligation to repay a mistaken payment, there is one circumstance in which that futility disappears. Suppose the system wishes to escape the restricted remedial logic of the primary event, as for instance by making the non-payer pay double. If it wanted to say that a judgment debtor who failed to pay up within a month must pay double, it would have to attribute the obligation to make the double payment to the wrong of not paying, to the secondary event consisting in the breach of the primary duty, not to the primary duty born of the judgment itself. The wrong thus invented might be designed, as a matter of choice and not by any necessary logic, so as not to be committed without some element of fault, such as recklessness or dishonesty. So, for example, a system might want to say that one who knowingly retained a mistaken payment after learning of the mistake should pay back double the sum received. If it wanted to do that, it would have to create a wrong in category one, consisting in a knowing breach of the primary obligation in category three.

These paragraphs are designed to drive home a very easily overlooked and very important fact. Facts which justify claims are not thereby identified as wrongs. For example, facts giving rise to restitution of unjust enrichment are not thereby identified as wrongs. In other words, it cannot be inferred from a particular fact's efficacy as an unjust factor in category three that the same fact is necessarily a wrong.[20] On the other hand, it must not be assumed that they are not wrongs. It is merely a separate question whether they are or not. The question whether they are wrongs is the same as the question whether the law regards them as triggering wider remedial consequences by reason of their character as a breach of duty. Purely innocent misrepresentation is a good example. The mistaken belief induced by a misrepresentation gives rise in equity to restitution under category three

20. Extra-judicially McLachlin J appears to take a contrary stance in including unjust enrichment under wrongs. But, semble, she is using 'wrong' in the sense of 'grievance': B McLachlin 'A Canadian Perspective' in DWM Waters (ed) *Equity, Fiduciaries and Trusts* (Toronto: Law Book Co, 1993) 37, 40, 47-49.

but, statutory intervention apart, there is no breach of duty capable of supporting a claim to damages.[21] The court's statutory discretion to award damages in lieu is not wholly unambiguous.[22] It could be construed as turning innocent misrepresentation into a wrong of strict liability, a breach of the duty not to make misrepresentations, but the statute may merely have used inappropriate language to confer a discretion to turn specific restitution into money.

8. Recapitulation

To recapitulate: a primary event implies a very narrowly defined response. A judgment dictates that the judgment be obeyed, nothing more. An unjust enrichment implies nothing but restitution of that enrichment, and a contractual obligation implies, if the court is willing to do even this, nothing but specific enforcement of the contract or, possibly, the money equivalent of specific performance. It is different if the law creates a wrong, as for instance the wrong of breach of contract or, in the speculation above, the wrong of knowingly breaking the obligation to repay a mistaken payment. The law then has a choice. It might decide, as we saw, to make the defendant pay double. Or it might choose to let the plaintiff give the defendant a good beating. Or both. This remedial freedom is concealed by the false doctrine that the only natural response to a civil wrong is compensation for loss.[23] Compensation for loss is a choice which has been made. Restitutionary damages and punitive damages, where they survive, remind us that other choices can be made.

---

21. S 2(2) of the Misrepresentation Act 1967 (UK); GH Treitel *The Law of Contract* 9th edn (London: Stevens & Sons, 1995) 331. On rescission as restitution of unjust enrichment within category 3: see infra chapter 33.

22. Treitel supra n 21, 337: 'There is no reason ... for regarding these damages as being either tortious or contractual. They are really sui generis.' The question whether the statutory damages indicate that innocent misrepresentation is to be treated as a wrong is paralleled, without statutory complication, in the question whether non-disclosure before a contract uberrimae fidei gives only rescission (ie, restitution of unjust enrichment) or will in addition support an award of damages (scil, as a wrong). In *Banque Financière de la Cité v Westgate Insurance Co* [1991] 2 AC 249, 280 Lord Templeman said that he inclined to agree with the Court of Appeal [1990] 1 QB 665 that it would not; though, at first instance, Steyn J's decision was to the contrary.

23. English law unfortunately embraced this dogma in *Rookes v Barnard* [1964] AC 1129 and *Cassell & Co v Broome* [1972] AC 1027, in which, however, the speech of Lord Wilbeforce kept alive the better view that the nature of the response to wrongs was a matter of choice, not logic — a view which is further revived by a brilliant consultation paper: see Law Commission (Eng) *Aggravated, Exemplary and Restitutionary Damages* CP No 132 (London: HMSO, 1993), in relation to which see A Burrows 'Reforming Exemplary Damages' and N McBride 'Punitive Damages' in P Birks (ed) *Wrongs and Remedies in the 21st Century* (Oxford: OUP, 1996) 153, 175.

A double error is never very far away. If you believe, in error, that causes of action are always wrongs, and if you believe, again in error, that wrongs must always be met with awards of compensatory damages measured to make good the victim's loss, you will before long lose sight of all the directly enforced primary obligations. So, for example, you will turn the cause of action to recover a mistaken payment into a cause of action for the wrong of not repaying a mistaken payment and, on top of that, you will be tempted to limit the plaintiff's remedy to the amount of loss which he proves that he has suffered. A number of recent cases have narrowly saved themselves from that double error.[24] However, one case, of immense importance and difficulty, may have fallen into it.[25]

Civilian systems have their codes. The codes give them their map, but the nature of a code is such that, if the map turns out to need correcting, it is difficult to do. Common law systems might be grateful to be free from that rigidity. But they go too far in the other direction. The uncodified mixed system of Scotland, built on a civilian foundation but much influenced by the method and content of the common law, has the best solution, in the form of a long tradition of overview literature.[26] A tradition of that kind necessarily embodies a continuing taxonomic debate. All the same, a map of the law is at once the most important and the most difficult prerequisite of rationality. There is no agreed map. This does not exonerate each jurist from saying what map he has in mind and where he thinks his subject-matter fits into it.

The long tradition of map-making on the civilian side can, with care, be borrowed. Common lawyers have borrowed it, some without knowing it. Law school syllabuses reflect that borrowing, though in an increasingly cracked mirror. The map underlying this paper is so borrowed. It is a

---

24. *Kleinwort Benson Ltd v South Tyneside MBC* [1994] 4 All ER 972, Hobhouse J 987; *Kleinwort Benson Ltd v Birmingham CC* (unreported) Ct App 9 May 1996 (*The Times* 20 May 1996); *Commissioner of State Revenue v Royal Insurance* (1995) 126 ALR 1, Mason CJ. Cf *Mason v NSW* (1959) 102 CLR 108, Windeyer J.

25. *Target Holdings Ltd v Redferns* [1996] 1 AC 421; noted R Nolan [1996] Lloyd's MCL Quart 161; J Ulph (1995) 9 Trust Law Int 86, discussed infra chapters 20-21.

26. Either adopting or reacting against the system of Justinian's *Institutes* supra n 11, the principal contributors to this tradition were: G Mackenzie (ed) *Institutions of the Laws of Scotland* (Glasgow: GUP, 1981); J Dalrymple *Insitututions of the Law of Scotland* (1681-1693); A McDougall & Lord Bankton *An Institute of the Laws of Scotland in Civil Rights: with Observations upon the Agreement or Diversity between them and the Laws of England* (1751-3); J Erskine *An Institute of the Law of Scotland* (1773) — published posthumously. The principal vehicle of Erskine's influence was his shorter work: see J Erskine *Principles of the Law of Scotland in the Order of Sir George Mackenzie's Institutions of that Law* (1754) which in successive editions was the way into Scots law for nearly 2 centuries. The principle modern vehicles of the tradition are: TB Smith *A Short Commentary on the Law of Scotland* (Edinburgh, 1962); DM Walker *Principles of Scottish Private Law* 3rd edn (Oxford: Clarendon Press, 1982) 4 vols.

modified version of the scheme descended from Gaius and Justinian. The section of the map within which the paper operates says that rights arise from wrongs, consent, unjust enrichment and other events. The first category, wrongs, is different from the others. The rest are all events giving rise to primary rights, which are sometimes directly realised by the courts. Wrongs are infringements of primary rights. It is rather easy to assume that the law only protects primary rights through the wrongs which infringe them and the secondary or remedial rights which those wrongs engender in their turn. It is correspondingly easy to loose sight of those primary rights which are directly enforced. It is vital not to fall into that error.

9. Anti-analytical mentality

One advantage of a good classification is that it keeps all relevant possibilities in view and reduces the risk that one might be overlooked. Another is that it militates against the tricks that complex language can play in concealing similarities and unnecessarily proliferating entities. However, a classification can do nothing for an observer who lacks the exacting taxonomic mentality. The observer must be willing to deal in differences which really matter. A category of 'small brown bird' is useless. A person who is satisfied with such a category will learn nothing about birds. Equally, the observer must be determined not to be taken in. An albino spotted woodpecker is still a spotted woodpecker. A pregnant seahorse is not female.

The lawyer who deals in 'unconscionable behaviour' is rather like the ornithologist who is content with 'small brown bird'. 'Equitable fraud' is just as bad. There are hundreds of kinds of equitable fraud and there are hundreds of kinds of unconscionable behaviour. It is unconscionable not to keep one's promise. It is unconscionable not to take to the police station money which one finds in the street. It is unconscionable not take care while driving. It is unconscionable to take advantage of a vulnerable person. It is unconscionable to charge tourists real money for worthless trinkets. The list can be lengthened indefinitely. Worse still, it becomes entangled in interminable debate, for different people subscribe to different moral codes. It may, or may not, be unconscionable for the first person who relieves a famine to charge a high price for the bread which he brings, and it may, or may not, be worse if he knows that a fleet of ships laden with corn is only half a day's sailing behind him.[27] Like 'fair' or 'just', the word

27. 'Suppose, for example, a time of dearth and famine at Rhodes, with provisions at fabulous prices; and suppose that an honest man has imported a large cargo of grain from Alexandria and that to his certain knowledge several other importers have also set sail from Alexandria, and that on the voyage he has sighted vessels laden with grain and bound for Rhodes; is he to report the fact to the Rhodians or is he to keep his own counsel and sell his stock at the highest market price?' MT Cicero translated by W Miller *De Officiis* Book III (London: Heinmann, 1908) ¶ 50.

'unconscionable' is so unspecific that it simply conceals a private and intuitive evaluation. The unreliability of conscience is captured in a grisly dictum of Heydrich, the chief of the Gestapo, which was recorded by Professor Archie Campbell immediately after the war: ' For the fulfilment of my task I do fundamentally that for which I can answer to my conscience.... I am completely indifferent whether others gabble about breaking the law'.[28] The forum internum is too evidently fallible, and at all times and places.

Playing with words like these offends three principles intrinsic to the nature of law as we know it. One is that like cases must be decided alike. Only by careful categorisation can we hope to do that. Another is that the law cannot, and in a plural society it is doubly and trebly true that it must not attempt to, respond to every grievance for the reality of which some argument can be constructed: 'Sed aliter leges, aliter philosophi tollunt astutias, leges quatenus manu tenere possunt, philosophi quatenus ratione et intellegentia' (laws and philosophers condemn sharp practices in different ways; laws can do it so far as they can get a firm grip on them, philosophers so far as they can get at them by reason and understanding).[29] The third is that it is not in the end the business of interpreters to take the big decisions of social policy which draw the lines between that which the law shall insist upon and that which shall be left to private morality.[30]

There are other words, central to equity, which, in their different ways, pose real problems for a stable taxonomy. I shall briefly consider three, namely 'fiduciary', 'trust' and 'estoppel'. The last of these is not peculiarly the property of equity, but it has been thrown into the equitable limelight during the last 50 years.

The difficulty with 'fiduciary' is that its meaning has been allowed to become completely uncertain. It is no longer possible to say what it denotes, so that we probably now need other words to divide up the field which it purports to cover. The word 'fiducia' is one of two Latin words equivalent to the legal sense of 'trust'. The other is 'fideicommissum'. 'Fiduciarius', which is rare in Latin, is a person subjected to a trust, in other words a trustee. 'Fiduciary' as a noun thus means 'trustee'; as an adjective with 'relationship' it means 'trust relationship'. We use the word to soften the technical limits of trusteeship, to produce something more on the lines of 'trustee-like' or 'trust-like', so that a fiduciary relationship is a 'trust-like relationship' and a fiduciary is a person whose position is 'trustee-like'. A fiduciary relationship is, or ought to be, a continuing event, like a marriage. It has a beginning, and a continuation; and a fiduciary is, or ought to be, a

28. AH Campbell 'Fascism and Legality' (1946) 62 LQ Rev 141, 147.
29. Cicero supra n 27, ¶ 68.
30. See further on the democratic bargain, infra chapter 52.

party to that relationship, just as a spouse is a party to a marriage. We know how to determine which relationships are marriages. But the same cannot be said of fiduciary relationships. It is manifestly impossible to predict whether a relationship will or will not be accounted fiduciary when a case comes to court. In many of the leading cases distinguished judges have been almost equally divided as to whether or not a relationship was fiduciary.[31] The necessary elements can be spelled out: a fiduciary is one who has discretion, and therefore power, in the management of another's affairs, in circumstances in which that other cannot reasonably be expected to monitor him or take other precautions to protect his own interests.[32] But it turns out that this has a very low predictive yield.

In such circumstances the remedy is sometimes to break the word open and see what it entails. If it entails a stable package of consequences, the nature of that package may make more clear its proper application. There is an obstacle to this technique. It consists in the oft-repeated warning issued by Fletcher Moulton LJ in *Re Coomber* that fiduciary relationships are fiduciary in different degrees and trigger different elements of equity's total response.[33] But at this point, where neither the event nor its consequences appear to be capable of being stabilised, we ought to recognise that the language of fiduciary relationships and obligations is wholly unsatisfactory. It will be essential in the end to find other words to denote with precision the different things which in different contexts the overworked fiduciary language has been trying to denote. Meanwhile, the instability of 'fiduciary' will continue to be a blot on our law, and a taxonomic nightmare.

The word 'trust' lies at the very centre of equity. The trust is the distinctive creation of English law. Nevertheless, it poses enormous difficulties of legal classification and, especially, for the classification

---

31. Contrast *Hospital Products Ltd v US Surgical Corp* (1984) 156 CLR 41 (and the judicial disagreements within it) with *Warman Int'l Ltd v Dwyer* (1995) 182 CLR 544. Cf infra chapter 26; also in Canada: *Lac Minerals Ltd v Int'l Corona Resources Ltd* [1989] 2 SCR 574 and *Hodgkinson v Simms* [1994] 3 SCR 377; noted LD Smith [1995] Can Bar Rev 714. See also the judgment of Meagher JA in *Breen v Williams* (1995) 35 NSWLR 522, 570, where there is strong condemnation of the over-extension of 'fiduciary'.

32. On the many attempts to combine these elements effectively: A Scott 'The Fiduciary Principle' (1949) 37 Cal L Rev 539; LS Sealy 'Fiduciary Relationships' [1962] CLJ 69; EJ Weinrib 'The Fiduciary Obligation' (1975) 25 UTLJ 1; JC Shepherd 'Towards a Unified Concept of Fiduciary Relationships' (1981) 97 LQ Rev 51; JRM Gautreau 'Demystifying the Fiduciary Mystique' (1989) 68 Can Bar Rev 1. Cf Wilson J's much cited analysis in *Frame v Smith* [1987] 2 SCR 99, 136.

33. *Re Coomber* [1911] 1 Ch 723, 728-729. Cf 'The phrase "fiduciary duties" is a dangerous one, giving rise to the mistaken assumption that all fiduciaries owe the same duties in all circumstances. That is not the case': *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, Lord Browne-Wilkinson 206. The same point is made by PD Finn *Fiduciary Obligations* (Sydney: Law Book Co, 1977) 2.

outlined above. That classification combines three differently based categories: (i) categories of jurisdictional origin (law and equity); (ii) categories of legal responses to events (proprietary and personal rights); and (iii) categories of causative event (wrongs, consent, unjust enrichment and other events). It is in fact dominated, and intends to be dominated, by the causative events. Can trusts be fitted into a classification of this kind?

It may be that a trust was once conceived of as an event, the act of reposing trust in a person. But nowadays a trust is regarded as a response to a variety of events, only one of which is such an act (a transfer expressly upon trust). Where there is an express trust, the trustee holds the assets in such a way that the beneficiaries have equitable proprietary interests in them and, at the same time, the trustee has personal obligations, to invest, account, manage, and so on. In *Westdeutsche Landesbank Girozentrale v Islington LBC*[34] Lord Browne-Wilkinson says that the word 'trust' should not be thought of as denoting any situation other than that in which there is a concurrence of these proprietary and personal incidents associated with that word. The mere fact that equitable title is in B and legal title in T does not make a trust. Only if T is, in addition, personally liable to account for the trust property and incurs other personal liabilities associated with breach of trust is there a trust. Trusts thus described (a concurrence of personal and property rights) and property (property rights viewed on their own) are legal responses to events. So also are rights in personam (or, synonymously from an opposite perspective, obligations). If you start from an event, you must find out what it causes. Does it raise obligations, property rights and trusts? If you start from a response, you must find what causes it. What brings property rights into existence? What brings trusts into existence? What brings obligations into existence?

However, it is obvious from this that trusts sit uneasily beside property rights and obligations. As defined above, a trust is a combination of proprietary rights and obligations. Hence trusts could, logically, be divided between those two. We ought to ask very carefully whether it is wise to resist that distribution. There are legal property rights and equitable property rights, and there are legal obligations and equitable obligations. There is not really anything else. This does not mean, in itself, that there may not be a fixed package of both which deserves a special name and finds it in the word 'trust'. However, it is rather unlikely that a fixed package of that kind will turn out to be anything other than an embarrassment. We can expect to be able to ask when property rights arise and when obligations arise, but we may be setting ourselves an impossible task if we ask when a particular bundle of proprietary-cum-personal rights arises. A priori it is extremely unlikely that a diverse series of events will give rise to an identical bundle

34. [1996] 2 WLR 802, 830H.

of both. Our catalogue of possible causative events is wrongs, consent, unjust enrichment and others. It is relatively straightforward to ask whether equitable proprietary or equitable personal rights arise from any facts within these four generic descriptions. We shall have to ask those separate questions. But if we insist on asking where a fixed combination of those rights arises we will get at best a patchy answer or, which may be what we see happening in *Westdeutsche*, we will have to distort all pre-existing doctrine in order to formulate a category of facts which needs that package. Lord Browne-Wilkinson thinks that such a category can be found in the receipt which is caught by a guilty conscience.[35]

Although it would run counter to Lord Browne-Wilkinson's understanding of the matter, one way out of this problem would be to treat 'trust' as indicative only of an equitable proprietary interest (ie, of a situation in which legal title was in one person and equitable title in another) and not to assume any linkage with any specific personal obligations. This would be another way of ensuring that there is always a separate inquiry into proprietary and personal rights, with the advantage of not having dramatically to reduce the hitherto familiar incidence of the word 'trust'. Following this path would also tend to tame the constructive trust. If people understood that an inquiry whether there was a constructive trust was no more than an inquiry as to whether a person had acquired equitable title to an asset by operation of law, the whole business would be more straightforward. Very few people nowadays have any insight into the word 'constructive', no more than they know that 'resulting' comes from the Latin 'resalire' and means 'jumping back'. Knowing what 'resulting' means does not help a great deal, but talking about resulting trusts without knowing what it means merely celebrates mystification for its own sake. 'Constructive' is related to the verb 'construe' which means 'to understand' or 'to interpret'. In the law it means 'understood by the law' or 'inferred by law' and implies 'contrary to the natural facts'. 'Constructive delivery' and 'constructive knowledge' are deemed delivery and knowledge, contrary to the actual facts. Explaining the words does not take things very far, but it does work a kind of demystification. We could take that demystification one step further. Our classification offers three generic events which elicit legal responses by operation of law (as opposed to by consent of the parties), namely wrongs, unjust enrichment and others. We could say that the question raised by all the complex language of constructive and resulting trusts is only whether any facts within any of those three generic categories raise equitable proprietary interests. However, this great simplification (towards which the work of Dr Elias points)[36] cannot be achieved so long as the authoritative

35. See further infra chapter 49.
36. G Elias *Explaining Constructive Trusts* (Oxford: OUP, 1990).

orthodoxy is that 'trust' always signifies a fixed package of personal and proprietary rights.

We have been looking at equitable language which is inimical to taxonomy. 'Estoppel' is by origin a common law word. But ever since, in imitation of American law, the *High Trees* case[37] set equity on the path of supplementing the doctrine of consideration by extending the common law notion of estoppel, 'equitable estoppel' has been more prominent in the books than its common law original. The law is at its worst when it refuses to name things in a straightforward way. It is impossible to understand or place something that is obscurely named. For example, the reason why the tort in *Rylands v Fletcher*[38] is so puzzling is that it is called just that, *Rylands v Fletcher*. 'Subrogation' plays the same vanishing trick. Never used in the world and never paraphrased by lawyers, it hides its subject-matter in a cloud of unknowing, tinged with fear. 'Estoppel' is much the same. Out in the shops and restaurants of the city, the word is never heard. Generations of law students have somehow let their teachers escape without making them say how exactly the word works and what exactly it denotes. From the taxonomist's point of view, the consequence is that this entity is difficult to place. A huge case law has developed, and all the time we have never, in a sense, known what we were talking about.

The word 'stop' in the middle gives a clue. The French original means 'bung' or 'stopper'.[39] It was when it came to bottling wine that estoppels had their natural home. The law makes liberal use of the metaphor of binding and being bound. It is in 'obligation' and in 'liable',[40] more obviously in 'bond'. 'Estoppel' is another version of the same metaphor. As a wine bottle is corked, so one is restricted or shut up. In short, one is bound. The phrase 'in pais' is often added. This is evidently thought to give extra dignity. 'In pais' means 'in the country'. In English law the jury was 'the country', and trial by jury was trial 'by the country'. It may be that the phrase 'in pais' originally meant 'before the jury' and referred to the evidential effect of estoppel. However that may be, we see that estoppel names something obliquely, telling us that something binds. The thing or things we need to classify is named by a consequence, the consequence being that, at least for some purposes, one is bound. In most estoppels the thing in question is an undertaking, and in equitable estoppel it is an undertaking as to the future or, in short, a promise. Demystifying the

37. *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.
38. (1866) LR 1 Ex 265.
39. *OED*, under this word.
40. In Latin 'ligare' is 'to tie' (French 'lier'). Cf 'ligament' and 'ligature'. Justinian's definition of an obligation is, 'An obligation is a legal tie which binds us to the necessity of making some performance in accordance with the laws of our state': see Birks & McLeod supra n 11, 3.13.

word does not take us very far, but, subject to more refined argument, it does allow the taxonomist committed to a classification of causative events to see what event he has to classify.

10. Equity's mission

Without good taxonomy and a vigorous taxonomic debate the law loses its rational integrity. The previous section considered some forms of thought and language which make legal taxonomy almost impossible and thus undermine the law's rationality. All forms of appeal to very broad ideas tend to allow intuition to operate unrestrained by an analysis anchored in authority. Every fundamentalist believes his values make for the public good, and the more zealous he is the less he will be able to bear in mind the possibility that he may be mistaken. Hence Heydrich and his contempt for law.[41] It is essential to come to the law armed with a belief in the fallibility of intuition and a consequent aversion to all forms of thought and expression which are no more than vehicles of the gut reaction. Interpreters must consent to be prisoners of their own expertise.

One large-scale danger to the rationality of our law lies in the exaggeration of the historical mission of equity to do justice, as though it had some special licence to ignore the requirements of legal certainty. In *Hussey v Palmer* (1972), a mother-in-law had contributed a substantial sum towards the extension a her son-in-law's home, so that she could have a home for her old age. Things did not work out. She had to leave. She would have been happy merely to have her money back, but one question was whether she had an equitable interest in the home extended with her money. Lord Denning MR said:

> Although the plaintiff alleged that there was a resulting trust, I should have thought that the trust in this case, if there was one, was more in the nature of a constructive trust: but this is more a matter of words than anything else. The two run together. By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process founded on large principles of equity, to be applied in cases where the defendant cannot properly keep the property for himself alone, but ought to allow another to have the property or a share in it.[42]

It takes nothing from the greatness of Lord Denning's contribution to

41. See supra n 28.

42. *Hussey v Palmer* [1972] 1 WLR 1286,1289-1290. On these same lines, extra-judicially, is the Rt Hon Sir Robin Cooke, now Lord Cooke of Thorndon: 'I will come to the concrete and traverse a handful of illustrations of our application of equity or equitable doctrines to contemporary problems.... Each case, however, I am disposed to see as an attempt to engage in the twofold process already mentioned — thorough analysis of the facts, followed by application of the broad principles of conscience, fairness and reason'. See 'A New Zealand Perspective' in Waters supra n 20, 25, 29.

observe that a sophisticated modern legal system should in general regard direct appeals to 'justice and good conscience' and 'large principles of equity' with deep suspicion. Justice is impeded and endangered by unrestrained intuition. Lord Nottingham, one of the fathers of modern equity, would not have approved. In *Cook v Fountain* (1676) he was already counselling the utmost caution:

> There is one good, general and infallible rule;... it is such a general rule as never deceives; a general rule to which there is no exception, and that is this; the law never implies, the Court never presumes, a trust but in case of absolute necessity. The reason of this rule is sacred; for if the Chancery do once take liberty to construe a trust by implication of law, or to presume a trust, unnecessarily, a way is opened to the Lord Chancellor to construe or presume any man in England out of his estate; and so at last every case in Court will be casus pro amico.[43]

In the same year as *Hussey* v *Palmer* was decided, Bagnall J happened to decide another case, not very dissimilar. The two judgments are in the same volume of the reports. In *Cowcher v Cowcher* he had to decide whether a wife had an interest in the matrimonial home standing in her husband's name. He set out a number of propositions which he thought secure. His fifth proposition was this: 'Rights of property are not to be determined according to what is reasonable and fair or just in all the circumstances.' He then added, fully in the spirit of Lord Nottingham, this more general comment:

> In any individual case the application of these propositions may produce a result which appears unfair. So be it; in my view that is not an injustice. I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals, who are fallible and are not omniscient, is justice according to law; the justice which flows from sure and settled principles to proved or admitted facts. So in the field of equity the length of the Chancellor's foot has been measured or is capable of measurement. This does not mean that equity is past childbearing; simply that its progeny must be legitimate — by precedent, out of principle. It is well that this should be so; otherwise no lawyer could safely advise on his client's title and every quarrel would lead to a law suit.[44]

This is the only way it can safely be. Whatever the historical truth, there would be no possibility now of giving equity a special mission to pursue justice and purify consciences. But, as Sir Frank Kitto rightly pointed out in the foreword to the first edition of Meagher, Gummow and Lehane,[45]

---

43. *Cook v Fountain* (1676) 3 Swan App 585, 586; discussed by DEC Yale (1961) 79 Seldon Soc 100-107.
44. *Cowcher v Cowcher* [1972] 1 WLR 425, 430.
45. Meagher et al supra n 1, v, pointing out that swelling business, 'together no doubt with a lively appreciation of the advantages of consistency', encouraged adherence to precedent. Sir Frank continued: 'When, in the 17th century, Selden enlivened his table talk with a cynical likening of the measure of Equity to the length of the Chancellor's foot he was much behind the times, for the metamorphosis of the Chancellor's power unrestrained

history offers no support for the opposed images of the common law as characterised by inflexible simplicities and equity as subtle discrimination from case to case. Already in the 16th century St German was playing down the differences. Law was not deaf to reason, and equity had to be orderly. He saw no occasion for conflict. He might well have included equity as an integral part of the law.[46]

As the story comes down through the centuries, past Nottingham in the 17th century and Eldon in the first quarter of the 19th, it offers no support for the view that the chancery judges thought themselves peculiarly free to pursue a refined justice tailored to the particular case. Equity's principal concern was for the security of property through the vicissitudes of death, marriage and taxation. Stability was its first priority.

None of this means that there can be no development. It is part of the lawyer's interpretative expertise to be creative. An inert interpreter is a bad interpreter. There is and always will be a pragmatic flexibility in the law, but it is not due to any 'sea change' in the nature of equity,[47] much less to equity's special concern with justice. On the contrary the developmental flexibility of the law is a property of the whole law and in particular of the fact that it is a law which remains predominantly uncodified and depends on the juristic interpretation of cases. If we are not to lose ground in the development of the sophisticated rationality which is essential to the role of law in modern society, it will be essential not to exaggerate either the mission of equity to do unanalysed justice or a mysterious peculiarity in the quality of equitable rights and duties.[48] As Beatson wrote in his challenging essay on the integration of law and equity in the law of restitution:

> Overall, it is respectfully submitted that it is not entirely accurate to suggest that all common law rights are absolute and to be contrasted with equitable rights which are more qualified in character. Both types of rights are qualified, but are qualified in different ways and at different stages. At common law the qualification and the flexibility tends to come at the time of ascription of responsibility and to determine the extent of such responsibility. One should not, however, allow the form to mask the substance for ultimately it is the court which ascribes and determines the extent of responsibility.[49]

---

by objective rules into a jurisdiction applying a body of positive law had made great progress already.'

46. J Barton (ed) 'Doctor and Student' (1974) 91 Selden Soc 105.
47. Despite her supervening caution (see infra n 48) McLachlin J uses Ariel's metaphor to express approval and to legitimate equity's pursuit of a special mission, which would imply a transformation of the very nature of the judicial function: Waters supra n 20, 39. Cf JD Davies 'The Re-Awakening of Equity's Conscience: Achievements and Problems' in S Goldstein (ed) *Equity and Contemporary Legal Developments* (Jerusalem: Institute for Legislative Research and Comparative Law, 1992) 46.
48. The new caution of McLachlin J in this regard is much to be welcomed: Waters supra n 20, 49, 59.
49. J Beatson 'Unfinished Business: Integrating Equity' in J Beatson (ed) *Use and Abuse of Unjust Enrichment* (Oxford: OUP, 1991) 250-251.

This is right. Sensitivity and flexibility are properties of the whole law. These are the qualities which make for the gradual development of the law to match changing circumstances. But it must be development on the margins of a stable system, the stability of which depends in large measure on careful analytical method within a sound taxonomy kept continually under review.

In this introductory part I have attempted to set out the need for and the obstacles to better taxonomy and I have laid out a version of the Roman map to help us on our way. Much of what I have said, and shall say, is elegantly implicit in a brief paper written a few years ago by Bernard Rudden, 'Equity as Alibi.' One short passage supplies my conclusion. It recalls Thomas Wood's hopes for 'the heap of good learning':[50]

> The effect of the split on our perception of the law seems to go wide and deep. In some cases it may prevent us from seeing a legal relation in its totality or from taking the step necessary to think afresh about what the law is doing. It may also exemplify the proposition of Sir Fitzjames Stephen that 'the only thing which prevents English people from seeing that law is really one of the most interesting and instructive studies is that English lawyers have thrown it into a shape which can only be described as studiously repulsive'.[51]

PART II: WRONGS AND EQUITY

If the French word 'tort' had been taken into general English usage, it would simply mean 'wrong'. In that we have books and courses on torts, we therefore seem to have a full commitment to the first of the categories in our event-based classification, wrongs, consent, unjust enrichment, and other causative events. Despite the use of the French word, torts, one might think, must surely include all actionable wrongs and all the consequences triggered by every such species of the genus. If that were true, torts would constitute a perfect event-based category, gathering together all civil wrongs.

11. The shadowland beyond torts

But 'torts' is a narrower category than 'wrongs' or even 'actionable wrongs.' In the language of our law the French word has been appropriated by the common law: a tort is a wrong at common law; an equitable wrong is not generally called a tort. Thus breaches of duty sanctioned in equity such as breach of trust, knowing assistance in such a breach, abuse of

50. See Wood supra n 2 and text thereto.
51. BA Rudden 'Equity as Alibi' in Goldstein (ed) supra n 47, 30, 36, quoting Stephen as reported by F Pollock *A Digest of the Law of Partnership* (London: Sweet & Maxwell, 1887) xxiv.

confidence and breach of a duty to avoid conflicts of interest, belong in different books and courses. Salmond treated breaches of equitable obligations as excluded simply by history. Tort was common law, and that was that.[52] Winfield framed his definition so as to be able to relate the exclusion of equitable wrongs directly to it terms:

> Tortious liability arises from the breach of a duty primarily fixed by the law: such duty is towards persons generally and its breach is redressible by an action for unliquidated damages.[53]

The remedy in unliquidated damages sufficed to explain the restriction to the common law for, in his view, equity never dealt in 'unliquidated damages'. But, unsurprisingly, Winfield was uneasy about letting the exclusion rest on a doubtful technicality relating to the response to the event which he was trying to define. He felt compelled to support the exclusion of breach of trust with other arguments. None really satisfied him, for in the end he had to resort to assertions similar to Salmond's, appealing to tradition and the intellectual habits of practitioners as justifying the view that the law of trusts should be regarded as a separate department of the law.[54] He cannot have been satisfied with his argument. For he was committed to accurate classification and, within the common law in the narrower sense, did more than anyone to promote a vigorous taxonomic debate.

The fact that the great writers of the earlier 20th century acquiesced in the exclusion of breach of trust and other equitable wrongs from the law of tort has allowed the old duality between law and equity to persist in the law of civil wrongs to the present day. It ensures that beyond the law of torts traditionally so-called there is a shadowland where different wrongs are met, and wrongs meet different responses. The law of wrongs is concerned with both these things, the list of wrongs which are the species of the genus and the available responses to wrongs. Some prefer to contrast substance and remedy. The wrongs, their definition and their differentiation from other causative events are then substance; the rights born of the wrongs are remedies. In our law of wrongs both pictures are fractured by the inherited duality.

12. A text-writer's neurosis?

JD Davies has recently argued that matters should be left as they are. He says that equitable wrongs should not be allowed to get lost inside tort,

---

52. This has survived since the first edition in 1907: see RFV Heuston & RA Buckley *Salmond and Heuston on the Law of Torts* 20th edn (London: Sweet & Maxwell, 1992) 14.
53. PH Winfield *The Province of the Law of Tort* (Cambridge: CUP, 1931) 32.
54. Id, 113-115.

because they have their own individual characteristics. He goes on:

> Classification can so easily produce artificiality. Equitable wrongs may best be left as what they are, namely wrongs which have not originated in the common law, and allowed to develop in their own way. It is unnecessary to classify them further. A picture that is so diffuse may alarm, and indeed cause problems for, text-writers and those who teach. But it will neither surprise nor trouble practitioners.[55]

The convenience of text-writers is of no importance. The reason why bad classification matters is that it leads to decisions which are at worst wrong or at best inexplicable. If French law reaches different conclusions from those which are reached by English law, the difference is interesting and may be instructive. But if within English law (or within any one system) decisions are reached which contradict each other, the law should be ashamed.[56] The purpose of good classification is to prevent that happening, by making it possible to apply like rules to like cases. If equity precedents are producing one result and common law precedents are producing another, for no other reason than their jurisdictional origin, something is wrong, not in the classroom or the study, but in the courts. The paragraphs which follow seek to substantiate this.

13. Terminological chaos

We distinguished above between the list of wrongs and the rights and duties which the wrongs generate. We noted that those rights and duties can be called remedies, so long as in this context it is not thought that that word identifies anything different. Our immediate concern will be with the latter aspect, the law's response to the wrongs. Here the ancient duality still causes many problems. They begin with a chaos of terminology, and they end with inexplicably different positions taken by the courts. At common law claims for unliquidated sums in respect of wrongs are called claims for damages. Damages are awarded in various measures. If we treat aggravated awards as a special department of compensatory damages, there are four such measures: compensatory, restitutionary, exemplary and nominal. Compensatory damages are measured by, and designed to make

---

55. JD Davies 'Restitution and Equitable Wrongs' in FD Rose (ed) *Consensus ad Idem, Essays on Contract in Honour of Guenter Treitel* (London, 1996) 158, 176. Though it is true that the convenience of text-writers is not the goal, their role in making the law intelligible and hence reliable should not be trivialised. From Gaius to Blackstone, and nearer our own time, there are many witnesses, and all wince in their graves against the innuendo.

56. Cf the words of JJ Doyle QC, as he then was, quoted in infra chapter 23: 'If it is so, there should be some sensible reason why it should be so.' There is also the fundamental matter of the democratic bargain: infra chapter 53.

good, the plaintiff's loss. Restitutionary damages are designed to take from the wrongdoer the gain which he made by committing the wrong. The objection is sometimes made that a word other than 'restitutionary' should be used, because very frequently there is no element of giving back, the gain having been received from a third party. 'Disgorgement damages' has been suggested.[57] There are also those who think that the word 'damages' should not be used other than of compensatory damages.[58] Actions at common law for a wrongdoer's gains were formerly kept in a separate box by language which very few people now understand and which was anyhow finally repudiated more than 50 years ago: the plaintiff was said to bring indebitatus assumpsit on the basis of 'waiver of tort'.[59]

Equity meanwhile has been hesitant to admit to awarding 'damages'. Finally exposed as willing to make good losses, it still generally avoids the actual word 'damages' and prefers to calls its awards 'equitable compensation':[60] 'The head of power in the exclusive jurisdiction now under discussion is therefore more properly called "equitable compensation" than "equitable damages"'.[61] When equity gives the victim the wrongdoer's

---

57. LD Smith 'The Province of the Law of Restitution' (1992) 71 Can Bar Rev 672-699; see also (1994) 73 Can Bar Rev 259-273. I adhere to 'restitutionary' because the underlying Latin 'restituere/restitutio' indicates that the word can include both 'give up' and 'give back': see H Heumann & E Seckel *Handlexikon zu Römischen Rechts* 11th edn (Graz, 1971) 515.

58. This is indeed the opinion of the greatest authority on damages: H McGregor 'Restitutionary Damages' in P Birks (ed) *Wrongs and Remedies in the 21st Century* (Oxford: OUP, 1996) 203-216. However, the Law Commission (Eng) has sanctioned the use of the phrase 'restitutionary damages': see Law Commission supra n 23. Professor Burrows uses the phrase 'restitutionary damages' but continues to exclude from it the equitable account of profits: AS Burrows *Remedies for Torts and Breach of Contract* 2nd edn (London: Butterworths, 1994) 288-293, 299-300.

59. *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1. The nature of 'waiver of tort' remains the subject of debate: see J Beatson 'The Nature of Waiver of Tort' (1979) 17 UW Ontario L Rev 1, revised in Beatson supra n 49, 206-243; P Birks 'Restitution and Wrongs' (1982) 35 CLP 52.

60. I Davidson 'The Equitable Remedy of Compensation' (1982) 13 Melb Uni L Rev 349-397; WMC Gummow 'Compensation for Breach of Fiduciary Duty' in TG Youdan (ed) *Equity, Fiduciaries and Trusts* (Toronto: Law Book Co, 1989) 57-92.

61. RP Meagher et al 3rd edn supra n 1, 636. However, it is to be noted that this occurs in a chapter called 'Damages in Equity'. And 'damages' is gradually slipping into use: see *Tang Man Sit v Capacious Investments Ltd* [1996] 1 All ER 193 (Privy Council from Hong Kong); PM McDermott *Equitable Damages* (Sydney: Butterworths, 1994) 1 notes that usage wobbles: 'The jurisdiction to award equitable damages is quite distinct from the jurisdiction to grant equitable compensation. The term "equitable damages" is also sometimes used in the context of the compensatory jurisdiction of a court of equity to grant restitution, or relief in respect of a fiduciary duty.' McDermott's study is of damages awarded in equity under Lord Cairns' Act, the Chancery Amendment Act 1858, and its equivalent in other jurisdictions, and it is to that statutory jurisdiction that he would confine the term 'equitable damages'.

gains it speaks of an 'account of profits', and accounts of profits have been expressly held not to be awards of damages.[62] On top of this, very confusingly, equity uses 'restitution' as a synonym for compensation, but never appears to apply that word specifically to accounts of profits. Equitable compensation is often said to involve and aim at 'restitution'.[63]

Only confusion can be engendered by this diverse vocabulary. We are talking about only one thing, namely money awards for wrongs. Such money awards differ in the principle by which they are measured. Exemplary awards are set by a determination to punish; nominal awards, by a desire to do no more than mark a technical victory. Beyond these exceptional instances, wrongs are met by loss-based or gain-based assessments. That is, the money awards are measured either by the loss suffered by the plaintiff or by the gain obtained by the wrongdoer. The proliferation of language will not alter that very basic fact.

We should therefore speak of damages in every case, making 'damages' mean 'a money award for a wrong'. There is no reason why accounts of profits should be excluded from the word 'damages'. In *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd,* Windeyer J drew this contrast: 'The distinction between an account of profits and damages is that by the former the infringer is required to give up his ill-gotten gains to the party whose rights he has infringed: by the latter he is required to compensate the party wronged for the loss he has suffered'.[64] But this is a contrast of measures only. The courts order inquiries as to the amount of loss which a plaintiff has suffered, just as they order the taking of accounts of profits. The object, either way, is only to quantify the amount of money to be paid. All money awards for wrongs are the same except as to measure, and that singularity should be respected by a single name. All such awards ought to be called 'damages'.

14. Compensation and restitution

If all money awards for wrongs were called 'damages', we would still face the confusion in the language which describes the different measures. We have seen that equity uses 'restitution' to denote the compensation of

---

62. *Watson v Holliday* (1882) 20 Ch D 780, affm'd after consideration of other matters (1882) 52 LJ Ch 543. Cf H McGregor *McGregor on Damages* 15th edn (London: Sweet & Maxwell, 1988) 5-6.
63. Meagher et al 3rd edn supra n 1, 634-638. Among many examples: *Re Dawson* [1966] 2 NSWR 211; *Bartlett v Barclays Bank Trust Co Ltd* infra n 104; *Target Holdings Ltd v Redferns* supra n 25, on which see [1996] Restitution L Rev 182-183; WJ Swadling [1995] All ER Annual Rev 438-9.
64. *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, 32.

loss.[65] There is no doubt that the word 'restitution' can, according to its ordinary usage outside the law, be used in relation to compensation for loss. 'Restitution' can mean putting a thing or a person back into an original position, just as well as it can mean restoration of, or surrender of, a thing to a person. Suppose 'restitution payments' are made to people who suffered some atrocity. Calling them 'restitution payments' raises no implication that the people paying received anything which they now need to 'give back'; these restitution payments are merely payments to make good, so far as money can do it, past suffering. The point is not that 'restitution' is incapable of meaning 'compensation'. It is so capable. But the law needs specialised and stable terminology to draw the contrast between loss-based and gain-based remedies for wrongs.

The law has 'compensation' and 'compensatory damages' to indicate loss-based awards. It does not need the language of restitution to do that job. On the other hand, the 60 years since the American *Restatement of Restitution*[66] have seen the word 'restitution' become widely used in the sense of 'giving back' or 'giving up' enrichment received at the expense of another. Mason and Carter's admirable new book, *Restitution Law in Australia,*[67] uses 'restitution' in that sense and is not concerned in any way with compensation. Given the tradition which has built up between the *Restatement* and *Mason & Carter*, it will be perverse to persist, in one sector of the system, in using 'restitution' as a synonym for 'compensation' or in a sense which, by concentrating on the idea of returning the plaintiff to his original position, covers both the compensation of losses and the restoration of at least some instances of unjust enrichment. What the law needs is a clear terminological distinction between making good the plaintiff's loss and transferring to the plaintiff a gain received by the defendant. It accords with the post-*Restatement* usage to express that contrast as being between compensation and restitution. If 'damages' covers all money awards for wrongs, then loss-based damages can and should be called 'compensatory damages' and gain-based damages should be called 'restitutionary damages'. No possible good can come from equity's sticking out for different vocabulary.

---

65. Supra n 63 and text thereto.
66. American Law Institute *The Restatement of Restitution* (Philadelphia: ALI, 1937). Sadly the ALI has not seen fit to update the work of the reporters, A Scott and W Seavey, to whom belongs the ultimate credit for the worldwide development of the law of restitution since the second world war, curiously weaker in the USA itself than in any other common law jurisdiction: A Kull [1995] Restitution L Rev 222, introducing a digest of selected US cases.
67. K Mason & J Carter *Restitution Law in Australia* (Sydney: Butterworths, 1996).

15. Restitution for wrongs

That is not to say that the word 'restitution' is not without its own problems. We have already noticed that, on one view, 'restitution' must mean 'giving *back*', so that, since gain-based damages generally involve only 'giving *up*' (the wrongdoer's gain having been obtained from third parties), a word such as 'disgorgement' should be used instead.[68] That suggestion has a certain attraction. If I do not follow it, the reason is that the useful distinction between restitutionary and compensatory damages, in the sense advocated above, is only now beginning to take root,[69] and, in my judgment, the pressure put by 'giving up' on the natural meaning of 'restitution' and 'restitutionary' is not so great as to justify destroying it.

There is a deeper problem. Ever since the *Restatement*, 'restitution' has been used to identify a subject the greater part of which entails an inquiry into causative events, not into the nature of the response to those events. It is possible to organise the law in categories which begin from response and proceed to events. Scots law in that branch of its tradition taken from Stair proceeds in that direction, so that the category of 'reparation' leads, by looking for its causative events, back to wrongs, and 'restitution', 'repetition' and 'recompense' lead back by the same route to, inter alia, species of the generic event 'unjust enrichment'.[70] The law of trusts behaves in the same way, albeit less coherently. A trust, however precisely it is to be defined,[71] is not now the event of reposing trust in another but a consequence of a variety of events. The classification of trusts between express, implied, resulting and constructive points in the most unhelpful manner towards those causative events, asserting that, when you look for the events, you will find that one is express consent and that in relation to all the others consent has either a limited role or no role at all.

However, although it is possible to organise the law in this way, starting from responses and proceeding to events, it is very dangerous to mix in one series categories which are response-based and categories which are event-

68. See supra n 57 and text thereto.

69. As in Law Commission supra n 23.

70. J Dalrymple in DM Walker (ed) *The Institutions of the Law of Scotland* (Glasgow: GUP, 1981) 1.7-1.9.

71. *Westdeutches Landesbank* supra n 34, Lord Browne-Wilkinson 828-829, with the support of the majority of the House of Lords, urges that a trust be understood as a combination of (i) a proprietary relation such that legal title is in one person and equitable title in another, and (ii) personal obligations upon the former to account for the subject-matter. However, such a definition in terms of a fixed combination of rights in rem and rights in personam will encounter many difficulties and leads directly to the difficulties arising from the cumulation of consequences described by Professor Burrows: see AS Burrows 'Swaps and the Friction between Law and Equity' [1995] Restitution L Rev 15, 25-26. It will be safer to define a trust in terms of (i) and to make (ii) a matter of separate inquiry according to the nature of the event from which the trust arises.

based. The primary classification used in this paper is event-based: wrongs, consent, unjust enrichment and other events. In that series, the word 'restitution' has no place. Its subject matter therefore has to be distributed to the categories of event which trigger the response which it denotes, which, according to the discussion we have just concluded, is the giving back or giving up of gain received by a defendant.

If we say, generally, that the response 'restitution' is triggered by the event 'unjust enrichment at the expense of another' we find that we have to divide that generic description of the event according to the sense of the phrase 'at the expense of'. A plaintiff who is forced to, or in some cases chooses to, rely on that phrase in the sense 'by doing wrong to' actually connects himself to the gain in respect of which he seeks restitution through the wrong which he identifies. Thus, if the wrong were infringement of patent, he would be saying in effect that the defendant has enriched himself by infringing his patent. In other cases the plaintiff relies only on the subtraction sense of 'at the expense of', so that all he is saying is that the enrichment of the defendant came from him. A plaintiff who has paid the defendant by mistake relies on that sense: the defendant has been enriched at his expense and there is a reason for restitution in that the enrichment was transferred by mistake.

Events of the latter kind belong under the heading 'unjust enrichment', to which is sometimes added the word 'autonomous', to emphasise that the plaintiff is then relying on an event wholly independent of all others in the series of event-based categories.[72] But in the other case, where the plaintiff relies on the 'wrong' sense of 'at the expense of', he is basing himself on that wrong. Hence, however much one may use the language of unjust enrichment, the event in question is not 'autonomous unjust enrichment' but the wrong, the infringement of patent, trespass to land or abuse of confidence, as the case may be. The causative event then belongs in the category of wrongs, and the restitutionary inquiry becomes a purely remedial inquiry into the nature of the law's response to wrongs and in particular to the wrong on which the plaintiff relies. In terms of the earlier discussion the question is simply whether the wrong is one for which restitutionary damages lie.

16. Poison for the gander

The previous section aimed to show, first, that restitution has no place in an event-based classification and, secondly, that unjust enrichment by a

72. See infra chapter 35. The distribution of restitution between the 2 events, wrongs and (autonomous) unjust enrichment finds support in the judgments of Mason ACJ in *Commissioner of State Revenue v Royal Insurance Aust Ltd* (1994) 182 CLR 51, and Gibson LJ in *Halifax Building Soc v Thomas* [1996] 2 WLR 63.

wrong to the plaintiff belongs in category one, wrongs, not in category three, unjust enrichment. The only question raised by unjust enrichment by a wrong is whether a gain-based award can be made against the wrongdoer, or, in other words, whether restitutionary damages lie. Prediction and theory are here shamefully defeated by the continuing duality, for in this matter equity and common law seem to start on different feet.

The common law is reluctant to give gain-based awards. It looks on them as abnormal. Equity, quite to the contrary, sees them as perfectly natural and proper. This reflects a historical fact. The action of account at common law was displaced by the chancery's modernised equivalent. The account of profits does not appear in books on damages but in books on equity. The legacy of that history is an attitude of mind. Even now, while inquiries as to loss are everyday common law fare, a litigant who wants an account of profits is still conceived of as asking for something novel, even anomalous. In the result what we seem to see is simple inconsistency, depending on whether the facts of a case happen to lead counsel into equitable precedents or not. Once the case is swept into a current of chancery authority, the probability is that the court will endorse the practice of relieving a wrongdoer of his profits as desirable and useful.[73] But if the case is caught in an eddy of the common law the court will perceive the same idea as novel and dangerous.[74] Commitment to a monopoly or near-monopoly for compensatory damages can be defended. But when, within a single system, such a commitment is confined to one sector and competes with the contradictory practice in the other, one faces an indefensible contradiction, with plaintiffs winning and losing according to theories of liability which can be falsified within the one system. Unless and until a sensible reason can be found to the contrary, the presumption must be that what is sauce for the goose cannot be poison for the gander.

17. Property in the proceeds of torts?

In recent years this contradiction has taken a new twist. Counsel have successfully argued that equity's commitment to stripping wrongdoers of their profits goes further than simple restitutionary damages. That is, it is

73. *Reading v A-G* [1951] AC 507; *Boardman v Phipps* [1967] 2 AC 46; *English v Dedham Vale Properties Ltd* [1978] 1 WLR 93; *Mahesan v Malaysia Govt Officers' Co-op Housing Soc Ltd* [1979] AC 374; *A-G v Guardian Newspapers* (No 2) [1990] 1 AC 109; *A-G v Blake* [1996] 3 All ER 903, 912. Many intellectual property cases giving accounts of profits could be added to this list, eg *My Kinda Town Ltd v Soll* [1983] RPC 15, Slade J, reversed on other grounds [1983] RPC 407.

74. *Stoke-on-Trent CC v W&J Wass Ltd* [1988] 3 All ER 394; *Halifax Building Soc v Thomas* supra n 72. Contra *Ministry of Defence v Ashman* [1993] 2 EGLR 102; *Ministry of Defence v Thompson* [1993] 2 EGLR102, Hoffmann LJ, 107; and in WA: *Norilya Minerals Pty Ltd v Commissioner of State Taxation* (1995) ATC 4559.

not merely a matter of a personal obligation to pay whatever is found due on the taking of an account. On the contrary, the argument is that, if the plaintiff can trace the profits of the wrong into some asset still held by the wrongdoing defendant, the plaintiff is entitled to an equitable proprietary interest in that asset under a constructive trust.[75] At the same time an attempt to play the same trick in the heart of the common law of tort, as for instance in respect of the profits of a spectacular defamation, would probably be struck out before trial. A notable feature of the cases in which the argument for a constructive trust responding to a wrong has prevailed is their failure to consider the matter from the standpoint of the whole event-based category. That is to say, they never contemplate the general question whether wrongs do or should trigger this kind of proprietary right. In consequence they avoid the need to explain why one equitable wrong does and another common law wrong does not. The mere difference between equity and law explains nothing.

Where a plaintiff is recognised as having acquired a proprietary interest in the gain obtained through the wrong, and in its traceable proceeds, that proprietary interest arises from the acquisitive wrong itself. There is no other relevant event. This serves to bring out the relationship between property and the causative events which dominate the taxonomy which we are using. A property right, no less than a personal claim (otherwise, an obligation), is a response to an event. Hence a statement on the lines, 'This figure belongs in the law of property, not in the law of torts' is taxonomically, and logically, unsound. For, in that property rights are created by causative events, to the extent that wrongs trigger property rights a figure can belong in both property and wrongs. The proper contrast is between causative events: 'This property right is born of consent, not of a wrong.' Such a statement is sound. This is very important. It reflects our earlier decision to classify all rights by reference to the same set of generic causative events. The temptation to contrast property and causative events, which, curiously, has no parallel in a temptation to contrast obligations and causative events, will be encountered again below, when we come to the third category of causative events.[76]

Since our concern is with taxonomy, and the dangers of bad or neglected taxonomy, it will not be proper to pursue further the twin questions when restitutionary damages ought to be given,[77] and when that personal

75. *Lac Minerals Ltd v Int'l Corona Resources Ltd* (1989) 61 DLR 4th 14: *A-G for Hong Kong v Reid* [1994] 1 AC 324; *Arab Monetary Fund v Hashim* [1996] Lloyd's Rep 589 varying [1993] 1 Lloyd's Rep 543. Cf *Warman v Dwyer* (1995) 182 CLR 544, noted by P Jaffey 'Accounting for Wrongful Profits' [1995] Lloyd's MCL Quart 462, on which see infra chapter 49.

76. Infra chapter 43.

77. This subject has recently engendered much literature: see J Beatson 'The Nature of Waiver

claim will (subject to a successful tracing exercise to locate the assets into which the value wrongfully obtained has passed) in addition be given proprietary effect.[78] The answer must be worked out with the whole picture in view, legal and equitable. It will not help to invoke extremely malleable concepts such as abuse of fiduciary relationship or even misuse of property, since the impossibility of defining those terms makes them mere vehicles for subjective intuition. We have to do better than allow the law to be developed through inarticulate judicial discretion. At bottom the reason for awarding restitutionary damages is the desire to deter the acquisitive conduct in question, and the reason for not making such an award is that the desire to deter is not absolute. A rational disposition of this problem must begin from there.

18. Compensation and causation

Compensatory damages are not without similar problems. The question here is whether it is possible to come up with any sensible reason why the basis of calculation should differ in law and in equity. Once again the starting point must be that there is only one set of issues and that, although those issues must necessarily ramify, their ramifications are unlikely to be different according to the jurisdictional pedigree of the wrong in question. In other words, different wrongs may require different treatment, but the presumption must be that that those differences will not coincide with the line between law and equity. The common law of tort makes the student immediately familiar with the problems of causation and remoteness, and with the inescapable artificiality of the law's resolution of those problems. The artificiality is inescapable because the questions are intensely difficult and because the law, with the double responsibility of making decisions day after day and of deciding like cases alike, cannot engage in the endless disputes which are the luxury of philosophers. Hence, at a certain point, reason is controlled by authority, and the law makes its artificial choices.

Compensatory damages cannot escape the problems of causation. The reason is that the very idea of compensation as an appropriate response to wrongs supposes a causal connection between conduct for which the

---

of Tort' (1979) 17 UW Ontario L Rev 1, revised in Beatson supra n 49, 206; D Friedmann 'Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong' (1980) 80 Columbia L Rev 504; IM Jackman 'Restitution for Wrongs' (1989) 48 CLJ 302; P Jaffey 'Restitutionary Damages and Disgorgement' [1995] Restitution LR 30. See further P Birks & R Chambers *Restitution Research Resource* (Oxford: Mansfield Press, 1994) 29-33.

78. D Crilley 'A Case of Proprietary Overkill' [1994] Restitution L Rev 57, responding both to *A-G for Hong Kong v Reid* supra n 75 and P Millett 'Bribes and Secret Commissions' [1993] Restitution L Rev 7. Cf P Birks 'Property in the Profits of Wrongdoing' (1994) 24 UWAL Rev 8.

defendant is responsible and the harm to the plaintiff. Without any such connection, a system, even if it spoke the language of compensation, would be engaging in a curious form of penality or atonement. Suppose a law which said, 'Anyone who hits another shall pay all loss suffered by that other through illness in the succeeding year.' We would have to say that the legislator was either imposing a fierce presumption about the effects of hitting or was remedying hitting in a manner unrelated to compensation.

Just as causation is integral to every compensatory regime, so also is the cut-off which the common law achieves through principles of remoteness. The reason is that there is no end to the effects of effects, no more than to the causes of causes, so that in the end the chain of causation outruns even the wildest and most extreme notion of responsibility. Thus the common law does not formulate rules for dealing with causation and remoteness because it is simple-minded, or because it has ulterior motives (though these may influence the rules it chooses) but by virtue of the very nature of things, here the very nature of responsibility and compensation. It will be the same with restitutionary damages. So far, we have heard little of principles of 'remoteness of gain', but in the calculation of restitutionary damages for wrongs such principles will have to be forged. The cone of gain which can be said to have been caused by the wrong likewise extends infinitely.

Yet, by its isolation and in particular by isolating itself from a classification dominated by causative events, equity has been willing to entertain the possibility that a plaintiff seeking equitable compensation might be free from these inconvenient restraints.[79] This argument has, very properly, been rejected, at least in its extreme form, but in England it has been rejected with too little firmness. In *Target Holdings Ltd v Redferns,*[80] to another aspect of which we will return below, the House of Lords, as it perceived the matter in issue, had to deal with the detailed working out of compensation for the wrong of breach of trust. Their Lordships were not, of

79. 'The second [feature of equitable compensation] is that the obligation imposed by equity is not fettered by the usual common law notions which serve to diminish the quantum of an award of damages at common law. As Tadgell J said in *Hill v Rose* [1990] VLR 129, 144: "The obligation imposed by courts of equity upon defaulting trustees and other fiduciaries is of a more absolute nature than the common law obligation to pay damages for tort or breach of contract. It follows that the obligation is not limited or influenced by common law principles governing remoteness of damage, foreseeability or causation." *Canson Enterprises v Boughton* (1991) 85 DLR (4th) 129.' Cf Meagher et al supra n 1, 637; *Cth Bank of Aust v Smith* infra n 108, 480. To similar effect, extra-judicially, is A Mason 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 LQ Rev 238, 243. Tadgell J's dictum can indeed be defended but not within a theory of liability to compensate losses arising from wrongs. His proposition can be derived from a liability of an entirely different kind: see infra chapters 20-21.

80. Supra n 25.

course, anxious to give currency to the view that the the victim of a breach of trust or fiduciary duty could simply cut free from the general restrictions upon liabilities to compensate for loss. They nevertheless came close to doing so. Lord Browne-Wilkinson found that assistance could be derived from the Supreme Court of Canada's decision in *Canson Enterprises Ltd v Broughton.*[81]

In *Canson* the plaintiffs had bought land. They then had a warehouse built on it. The negligence of their contractors meant that the warehouse turned out to be unsound. Looking for a deep pocket, the plaintiffs turned against their lawyers. They had broken their fiduciary duty in not disclosing misbehaviour by the vendor of the land in 'flipping up' the price,[82] knowledge of which might have caused the plaintiffs to withdaw from the deal. Had they withdrawn they would never have been in a position to be let down by their contractors. The Supreme Court very properly held that the lawyers were not liable. Even a fiduciary in breach could not be liable, on the principle 'post ergo propter', for everything that happened after their breach. The majority looked to the common law rules for guidance. However, the minority, agreeing in the result, thought that equity could take a broader and softer approach. Inexplicably, it was to the minority's position that Lord Browne-Wilkinson, delivering the leading speech in *Target*, was attracted. He cited a substantial passage from McLachlin J's judgment, including these words:[83]

> In summary, compensation is an equitable monetary remedy which is available when the equitable remedies of restitution [the wider context appears to show that the learned judge here means by this to indicate restoration of assets in specie] and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach, ie, the plaintiff's lost opportunity. The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach.[84]

Lord Browne-Wilkinson endorsed this:

> In my view this is good law. Equitable compensation for breach of trust is designed to achieve exactly what the word 'compensation' suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach.[85]

Can this be good law? Causal problems are notoriously difficult. To commit them to common sense is to entrust them to intuition and abandon

81. Supra n 79.
82. For 'flipping up' see the facts of *Target v Redferns*, infra chapter 22.
83. *Target v Redferns* supra n 25, 438-439.
84. *Canson Enterprises v Broughton* supra n 79, 163.
85. *Target v Redferns* supra n 25, 439.

the hope of treating like cases alike. Something approaching stability can only be achieved through the combination of analysis and precedent. Even with the assistance of precedent there will be some variation. To take just one example, suppose the case of an event the probable outcome of which is interrupted or overtaken by a subsequent cause. Ship A negligently collides with ship B. It can be seen at once that the loss caused by the damage to B is the cost of repair and the earnings lost in the time taken for the repair. Even before the repair begins those losses can be quantified, prospectively. In principle A is immediately liable for the prospective losses. Limping back to port, ship B hits a mine and sinks. What is the effect of the disaster on A's liability? Common sense is not much help.

By the light of nature it is arguable that the supervening event is irrelevant. A has already caused and become liable for the cost of repair and loss of earnings, though prospective. But it can equally be argued that owing to the intervention of the mine those losses were not in the result incurred and, not having happened, cannot have been caused by the collision. A multiplication of examples with variations on the theme will quickly defeat the hope of some common sense solution to the conundrum which is so obviously right as to be able to see all others off. The principle to be found in the cases on the common law side is that the defendant must be held not to have caused, and is not liable for, the prospective loss for which he would have been liable but for the supervening disaster which prevented that loss from materialising.[86] The point is not that the common law's choices are above criticism or have achieved perfect stability, only that it cannot be right for one jurisdictionally determined category of the law to throw over the analysis of a difficult and recurrent problem. Of course, if both jurisdictional categories decided to take the same anti-analytical path, there would be no objection on the score of internal contradiction within the one legal system. The objection would then be to a fundamental change to the nature of our law, turning the courts into expensive palm trees and obliging judges to assume a kind of power which no sophisticated, plural, democratic society should ever delegate.[87]

19. Discretionary responses?

This paper earlier emphasised and will shortly return to the point that a wrong, even a civil wrong, has no logically prescribed response.

86. *The Kingsway* [1918] P 344; *The Glenfinlas* [1918] P 363; *The York* [1929] P 178; *Carslogie Steamship Co Ltd v Royal Norwegian Govt* [1952] AC 292. Contra *Baker v Willoughby* [1970] AC 467, criticised in *Jobling v Assoc Dairies Ltd* [1981] 2 All ER 752. Cf HLA Hart & A Honoré *Causation in the Law* 2nd edn (Oxford: Clarendon Press, 1985) 245-248.

87. On the dangers of such politicisation of the judiciary: see infra chapter 53.

Compensatory damages dominate, but by virtue of a choice, not by a logic derived from the nature of either wrongs or the civil law. The documented availability of other measures confirms this, although some describe it as anomalous. By contrast the primary events in the other three categories, or perhaps more accurately the duties triggered by them, do entail enforcement with a particular goal. Unless the system switches its attention to the wrong which consists in the breach, all it can do is to compel the performance of the primary duty: perform your promise, repay your mistaken payment, honour the judgment against you, and so on. This lends some credence to the view that, in relation to wrongs though certainly not in relation to directly enforced primary duties where the question cannot arise, legal certainty requires only the crisp identification of the wrong, leaving the response in the discretion of the court. Thus JD Davies has congratulated the Canadian courts for distinguishing in relation to equitable wrongs between 'liability' and 'remedy': liability, he says, must be clearly predictable while remedy is best determined by judicial discretion. For example, a particular equitable wrong such as abuse of confidential information might present all three remedial responses which we have reviewed, compensatory damages, restitutionary damages and an equitable proprietary interest in the assets into which wrongful gains have been traceably invested. The choice of response would then belong to the court.[88]

This seems a dangerous doctrine. Bearing in mind that on different facts the different responses may have wildly different values, it is not clear on what principles a court could possibly choose between them. It would be an embarrassing discretion, inimical to legal certainty. On the common law side there is no trace of any such general discretion and, notwithstanding the fact that all equitable remedies are technically discretionary, in England at any rate equity has in this so far followed the law, although Lord Browne-Wilkinson has recently spoken, obiter, of tailoring remedies to fit the justice of particular facts.[89] The first question has hitherto been whether or not the facts do engender more than one response. If they do, the plaintiff has a choice which he will insist upon, that choice being regulated, not by the court in its discretion, but according to settled rules.[90]

88. JD Davies supra n 55, 158, 174-175; also JD Davies 'Duties of Confidence and Loyalty' [1990] Lloyd's MCL Quart 4, commending *Lac Minerals v Int'l Corona Services* supra n 75.

89. *Westdeutsche Landesbank* supra n 34, 839.

90. *Mahesan v Malaysia Govt Officers' Co-op Housing* supra n 73; *Island Records Ltd v Tring Int'l plc* [1995] 3 All ER 444; *Tang Man Sit v Capacious Investments* infra n 99. Whether the harsh election demanded by these cases needs to be re-thought is another question. It may turn out that law controls the plaintiff's choice only so far as is necessary to avoid double recovery: GH Treitel *Remedies for Breach of Contract* (Oxford: Clarendon Press, 1988) 98-100, citing *Millar's Machinery Co Ltd v David Way & Son* (1934) 40 Comm Cases 204. Cf *Ebrahim Dawood Ltd v Heath Ltd* [1961] 2 Lloyd's Rep 512.

20. Wrongs and 'not-wrongs'

At this point we turn towards the list of wrongs. But the first point requires us to return in more detail to the observation that the taxonomy of causative events warns us not to suppose that liability attaches only to wrongs. All the three other categories are, whatever else they are, not wrongs. For shorthand I shall call them 'not-wrongs'. We habitually associate wrongs with harm and with fault but the only definitively essential feature of a wrong is that it is conduct which attracts its legal consequences by virtue of its character as a breach of a primary duty.[91] The response to breaches of duty is a matter of choice, not logic. The victim might be given the right to beat the defendant or to cut off his ears. For good and sufficient reasons we have chosen to make damages the primary response, generally compensatory or restitutionary. There are primary rights and duties and there are secondary rights and duties born of breaches of those which are primary. Those breaches constitute our list of wrongs, and the secondary rights and duties born of the wrongs are for the most part the right to receive and the duty to pay compensatory or restitutionary damages.

There are many primary rights and duties which the law recognises and enforces only through the wrong consisting in their breach. For example, the primary duty not to hit people arises over in category four, other events. The event from which it arises is simply being or becoming a person within the jurisdiction, not being a person lacking the capacity to bear the duty. But that primary duty is not enforced except in category one, wrongs. Even quia timet injunctions probably have to be seen as focused on a wrong about to be committed. The primary duty not to hit is enforced through the wrong of battery. However, some primary duties are enforced directly. In category two, contracts are sometimes specifically enforced. In category three the duty to make restitution of mistaken payments and other subtractive unjust enrichments is directly compelled. In category four, there are many instances. One must pay one's income tax. One must pay one's judgment debts. One must sometimes render one's reasonable account. The obligation to account is related to status, not consent, even though one may acquire the status itself by consent. For example, under the old common law, before the writ of account became obsolete, a bailiff was accountable. A man might become another's bailiff by consent, but a bailiff was accountable because he was a bailiff.[92]

Baltic Shipping Co v Dillon ('The Mikhail Lermontov') (1993) 176 CLR 344 has to be handled carefully in this respect, since the special feature was that D had already been given back a proportionate part of her fare.

91. On 'primary' and 'secondary' see supra chapters 5-6.

92. JH Baker *An Introduction to English Legal History* 3rd edn (London: Butterworths, 1990) 410-412; SJ Stoljar 'The Transformations of Account' (1964) 80 LQ Rev 203-224. You did not, indeed could not, become accountable merely by agreement, only by status,

The events which create directly enforceable primary rights and duties are not wrongs. To call them wrongs, or even to think of them as such, is to court a further error. Though wrongs can in principle give rise to any measure of recovery which the system chooses, the dominant measure is compensation for loss. There is always a danger that thinking in terms of wrongdoing will lead to thoughts of compensation and the limits which compensation implies. For example, if S sells his car to B for $5 000, the property passes to B at once. If B now refuses to take delivery and does not pay, S can have his action for the price of goods sold. It is the same, whether or not property has passed, if a fixed day is set for payment and the buyer does not pay.[93]

In these circumstances the seller is entitled to his $5 000, and it is of no use to B to show that he, S, suffered very slight loss because, say, he could have sold it to another buyer without delay for almost as much. B has no doubt committed a breach of contract, and one for which he could be made liable in damages, but S's action is not for breach of contract but for the direct enforcement of the primary obligation born of the sale. S's right to have recourse to that 'specific performance' of the obligation to pay the price is strictly controlled, but where the necessary conditions are fulfilled it would be quite mistaken to cut his claim down to that which he could have obtained had he sued out his secondary right to compensatory damages arising from B's breach of contract. In the same way the courts have recently repelled attempts by the defendant to reduce his liability to restore unjust enrichment by pointing out that the plaintiff had diminished his loss by taking steps to ensure that he recouped in other ways the amount which he had unjustly transferred to the defendant. The restitutionary obligation, a primary obligation, arising from the receipt in the circumstances which required the enrichment to be reversed, was not to be confused with an obligation to make good a loss.[94]

The enforcement of a primary right arising directly from a not-wrong is peculiar to its own nature as derived from the event which gives it birth. It is not limited by the remedial regime for wrongs. However, and for the same reason, it also does not give access to that regime. Thus an insurer will be entitled to rescind a policy entered into because of wholly innocent

---

which is as much as to say by the nature of your activity as a bailiff, guardian in socage or receiver. Nowadays, although an express trustee becomes a trustee as a result of agreement, it ought to be true that agreeing to be a trustee or fiduciary cannot in itself make you one, unless the activity undertaken is truly that of a trustee, but the vast *Romalpa* case law (from *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676 onwards) seems to assume the contrary.

93. S 49(1)-(2) of the Sale of Goods Act 1979 (UK).

94. *Kleinwort Benson v South Tyneside* supra n 24, Hobhouse J; *Kleinwort Benson v Birmingham CC* supra n 24; *Commissioner of State Revenue v Royal Insurance* supra n 24, Mason CJ.

misrepresentiations or non-disclosure of material facts by the insured. But that is his only right. If he wants compensatory damages in addition, he must show that the non-disclosure or misrepresentation was indeed a wrong, a breach of duty in category one.[95] The use of the word 'wrong' is not in itself a sure guide, precisely because we have not always been careful in the use of this important word. In *Barclays Bank plc v O'Brien*,[96] for example, undue influence and misrepresentation are repeatedly referred to as wrongs, despite the fact that there is no case which suggests that undue influence must be characterised as a breach of duty or gives rise to actions for damages or indeed to any liability beyond the primary duty to surrender whatever is so acquired.[97] As for misrepresentation, it undoubtedly is both a category three and, except when entirely innocent, a category one event.[98]

21. Liability of a trustee

The previous paragraphs aim to establish the reality of primary liability for not-wrongs. The question to which they were leading is whether misapplication of the fund by a trustee is only a wrong or also entails a not-wrong, primary liability. There is no doubt at all that breach of trust is a wrong which does give access to the remedial regime of compensatory and restitutionary damages. A recent appeal to the Privy Council from Hong Kong illustrates that elementary fact, raising at the same time a very difficult question as to the precise relation between the two. In *Tang Man Sit (dec'd) v Capacious Investments Ltd*[99] the plaintiff, Capacious Investments, had entered into a joint venture with Mr Tang to build housing in the New Territories. Mr Tang had agreed to assign 16 houses to Capacious. Instead of doing so he had let them. The use to which they were put was unsuitable.

---

95. See supra chapter 7.
96. [1994] 1 AC 180.
97. The question whether undue influence is a breach of duty in category one is to be distinguished from the further question whether it requires dependence on the part of the weaker party or, in addition, fault on the part of the stronger party. Even if it required fault as a condition giving rise to the primary duty to surrender benefits received, it would not follow that it was a wrong within category one: see P Birks & NY Chin 'On the Nature of Undue Influence' in J Beatson & D Friedmann (eds) *Good Faith and Fault in Contract* (Oxford: OUP, 1995) 57. JD Davies aligns 'unconscionable conduct' with equitable wrongs such as breach of trust and abuse of confidence, but that merely assumes an equation between fault and civil wrongs, which on closer analysis cannot be sustained: Davies supra n 55, 168.
98. The availability of damages in lieu of rescission, as under s 2(2) of the Misrepresentation Act 1967 (UK), probably does not falsify this, so long as the damages are simply a monetary substitute for the rescission.
99. [1996] 2 WLR 192.

The houses degenerated. Capacious Investments, disabled by the death of its controlling shareholder, remained unaware of what was going on. It finally sought, and obtained, against Mr Tang's estate: (i) an order for the assignment; (ii) a declaration that it had all along been equitable owner of the houses; (iii) an account of Mr Tang's secret profits through his wrongful lettings; (iv) compensatory damages for breach of trust. After the judgment the plaintiff set about working out its remedies: (i) and (ii) are primary, from the specifically enforceable contract; (iii) and (iv) are secondary, from the wrong of breach of trust.

Capacious ascertained that Mr Tang had received some $7 000 000 in rents, and it actually obtained payment of nearly $2 000 000 under that head. The assessment of compensatory damages also proceeded. The Master found that the plaintiff had lost (i) from not being able to rent out its houses some $8 000 000, and (ii) from damage to the properties through the inappropriate user, and from their being encumbered with continuing tenancies, $11 000 000. The Master deducted what the plaintiff had received under the account and assessed its final entitlement at $16 937 197. The defendant resisted that award on the ground that in accepting $2 000 000 under the account the plaintiff had finally elected for the restitutionary rather than the compensatory measure. The Privy Council agreed that the plaintiff had to choose between the two, a point which must be regarded as open to further debate, but held that it had never made any election until it had finally insisted on the Master's compensatory award.

Suppose, however, that a trustee pays away trust money in breach of trust. Does he only commit the wrong of breach of trust? Or is his position structurally similar to that of the buyer of goods who has not paid their price? It will be recalled that the buyer is not only liable for the wrong of breach of contract but has also incurred a primary liability directly under the contract itself. The crucial point of the analogy is that the latter liability to pay the price lies outside the remedial regime for wrongs and, so far as that regime is restrictive, is not restricted by it.

Suppose a dishonest trustee sells trust shares for $100 000 and donates the money to his mistress who, let it be given, knows where the money came from. Almost immediately a scientific inquiry destroys the reputation of the company in question and the shares plummet. For a few dollars the trustee buys back the same number of shares as he sold. The misappropriation by the trustee can be said to have caused no loss. The trust has exactly what it always had. But we know that the trustee is liable. In the traditional language, the trustee is accountable as a trustee and the mistress is accountable for the full $100 000. The question is whether that conclusion is only right because it has to meet, and can meet, the objection that the trust suffered no loss. It can defeat that objection, because it is a fact that the trust was saved the loss by the trustee's selling out, so that it never suffered from the collapse

of the market. It only suffered by the wrongful disposition to the mistress. But that is not the reason why the trustee is liable, certainly not the only reason. The reason why he is liable is that he, and his mistress, are accountable.

It is possible to rest that accountability on the wrong of breach of trust. In breach of trust the trustee paid himself $100 000 and is now liable in that sum by way of restitutionary damages for the wrong. Taking this line, the objection to the absence of loss can be overridden simply by saying that restitutionary damages (here in the form of an account of profits) are not interested in the plaintiff's loss but only in the defendant's gain. It is just possible that the same line could be taken against the mistress.

However, there is a third route. It is that each of them must render an account of the money received without regard to any question of wrongdoing. A trustee is accountable for property received upon trust. That is a primary liability inhering in the status of trustee and, in the traditional language, equally in that of constructive trustee, though it is transparent that the mistress is called a constructive trustee only to attract the accountability which inheres in the express trustee, so that in truth it is the receipt of the money that makes her accountable, a category three event. To take a painful example which caused at least one suicide, the reason why the executors of Caleb Diplock were liable to the next of kin was not that they had committed a wrong and thus caused loss but that they remained accountable for the Diplock money and could not be given credit for payments to strangers; and the same in the end for the charities who received. The next of kin, to whom payment should have been made, had equitable interests in the traceable proceeds of the receipts, and, by virtue simply of the receipt, the recipients were also liable, in personam, to pay over the amount received. Their liability was primary, not the secondary consequence of any wrong.[100]

We have marked out three lines of attack. First, claim compensatory damages for the wrong of breach of trust and meet head on the argument that the trust suffered no loss. Secondly, claim restitutionary damages in the form of an account of the profits of the wrong, arguing that restitutionary damages are concerned with gain obtained from the wrong, not with loss to the plaintiff. Thirdly, dispense altogether with the wrong and insist on the obligation to account which is inherent in the receipt of trust property. It will be noticed that the second technique will not work unless the defendant made a gain. In the case about to be considered the defendant trustee had not done so.

---

100. *Re Diplock* [1948] Ch 465, affm'd as *Ministry of Health v Simpson* [1951] AC 251.

22. Accountability in Target

In *Target Holdings Ltd v Redferns*[101] the second possibility was excluded and the third was not explored at all. In this context we must limit ourselves to the observation that the reason why it was not explored seems to have been that counsel evidently had no map to alert them to it and acquiesced in the view that the only possible liability attached to a wrong and that a wrong must subject itself to the limits implied by a compensatory regime. A system which is indifferent to taxonomy will frequently fail to review all the possibilities, for it is the taxonomy which holds out the map upon which they can all be seen.

The *Target* facts were as follows. The defendant solicitors, Redferns, acted for both the purchaser of land and the mortgagee who had agreed to finance the purchase. The solicitors knew that their clients were not intending to buy directly from the true vendors. Two puppet purchasers would intervene to 'flip up' the price. The vendors would sell to the first puppet for £750 000, who would sell to the second puppet for £1 250 000, who would sell to the true purchasers for £2 000 000. The solicitors never revealed this scheme to Target, the mortgagees, who thought all along that they were lending some £1 525 000 on a mortgage of land worth £2 000 000. Soon after the completion of the transaction, the mortgagors defaulted. Target exercised their power of sale. The property fetched only £500 000, so that Target sustained a huge loss. They sought to make good that loss by action against Redferns.

As the transaction had moved towards completion, Target had sent their £1 525 000 loan to Redferns. It was common ground that it had been received on the usual basis, essentially a *Quistclose* trust for the money to be held until completion of the conveyancing and released upon completion to discharge the obligation to pay the price. In fact, Redferns had released the money early and to the wrong persons. They had paid out the money to the puppet companies in the chain of purchasers. However, at the end of the chain there had been a conveyance to the true purchaser at the price which Target believed it to be paying, and the very mortgage which Target had expected by way of security was executed. Hence Target got exactly what it paid for, despite the misdirection of the fund by Redferns. Nevertheless, Target maintained that Redferns had to answer for their breach of trust.

Target maintained that Redferns had to make good to them the disbursement to an unauthorised recipient. Alternatively, if that was not enough in itself, they must pay the loss caused to Target by Target's entering a transaction which would not have gone through if Target had not, in breach

101. Supra n 25.

of trust, put the puppet company in funds. We need say no more about this second formulation. The House of Lords held that if on inquiry it turned out that the transaction would not have gone through but for the breach of trust then the solicitors were indeed liable for the loss which Target had sustained. If the first of these two formulations is approached as a matter of compensation for loss caused by a wrong, the obvious difficulty is that Target would have suffered exactly the same loss if there had been no breach of trust at all. They got what they wanted, but what they wanted turned out to be distinctly sub-standard.

In the Court of Appeal, Gibson and Hirst LJJ came firmly to the conclusion that the solicitors were liable. Gibson LJ said:

> In my judgment the cause of action is constituted simply by the payment away of Target's moneys in breach of trust and the loss is quantified in the amount of those moneys, subject to Target giving credit for the realisation of the security it received. It was for Redferns to justify their action or otherwise to show why Target was not entitled to compensation in the sum claimed.[102]

Even here the words 'loss' and 'compensation' appear. In the House of Lords these words were underlined: 'The basic equitable principle applicable to breach of trust is that the beneficiary is entitled to be compensated for any loss he would not have suffered but for the breach'.[103] The matter therefore reduced to the question whether Redferns' breach of trust had caused Target's loss. The House of Lords took the view that the breach could not be said to have caused any loss, unless with the addition of the extra fact, namely that, had Redferns not made Target money available to the wrong persons, the transaction would not have gone through.

The question is where this leaves the primary liability of the trustee, the liability to account which stems from receiving a fund as a trustee. That accountability is the backbone of the trustee's liability, and all breaches of trust have to be analysed on that basis. Breaches of trust are essentially of two kinds, being either ultra vires dispositions of trust property or failures in the management of the trust. Both these kinds of breach bear on the trustee's account. But there is a great difference between them in the way in which they impact upon the taking of the account. The difference is that in relation to failures in management, the account will stand as the trustee renders it unless the beneficiaries can establish that the management failure caused a loss. Without proof of that loss there is no adjustment to be made. This generally comes down to proof that the trustees were negligent in the management of the trust, as for instance in *Bartlett v Barclays' Bank Trust Co Ltd.*[104] However, if the trustees fail to conform to the requirements

102. *Target v Redferns* [1994] 1 WLR 1089, 1106 (CA).
103. *Target v Redferns* supra n 25.
104. [1980] Ch 515.

of the trust deed in respect of management activities, as for example in not compiling an inventory, it will only be necessary to show non-compliance, not negligence. In all these cases it is possible to forget altogether about the formal relationship of the breach to the trustee's accountability. The only substantial question is whether the trustee has committed a breach of trust.

In relation to ultra vires dispositions the matter is different. The beneficiaries can simply disavow the outlay in question. If a trustee of $100 000 renders his account showing that the fund stands at $90 000 because he has paid $10 000 to his mistress, the payment to her must simply be disallowed. He remains accountable for $100 000. It is the same with an unauthorised investment. He claims to hold mining shares bought for $4 000. Those shares are unauthorised. The item can be disavowed, at the option of the beneficiary. There is a double obligation born of the receipt of property on trust, to account and to honour the account. That is not to say that the ultra vires dispositions are not wrongs. They are. But their character as breaches of duty is not relevant to the state of the account. In other words, the trustee is not liable under this head for the wrong but liable because he received the given sum as a trustee and, in the taking of the account, he may not take credit for an ultra vires disbursement or an ultra vires investment. That seems to be the doctrine which the Court of Appeal was applying, except that the words 'loss' and 'compensation' were allowed to creep in.

It should be noticed that neither the moral quality of the trustee's payment out, nor of the recipient's receipt from the trustee, is for this purpose material. The trustee's innocence will only become material if and when he seeks to be excused on the ground of having acted honestly and reasonably.[105] The cases indicate that the quality of the recipient's receipt will matter when the question is in turn raised against him whether he is also accountable as a recipient of trust property: for it must be a 'knowing receipt.'[106]

It is very difficult to know whether the House of Lords meant to override all this and positively to insist that the liability must be regarded as a wrong remedied by compensatory damages. The taxonomic point remains. If their Lordships did so intend, they should have run through the other possibility, if only to reject it. Be that as it may, in England the premise seems to be that *Target* is right. That means that liability even in cases of wrongful disposition has to be decided without relying on the non-wrong dimension. It has to be decided on the basis of the wrong of breach of trust and within the remedial regime available for wrongs. In the absence of gains made, that means that the liability is restricted to compensatory damages. However,

105. In England, under s 61 of the Trustee Act 1925 (UK).
106. See infra chapters 37-38.

accepting *Target* on these terms, there is a strong will to narrow its effect. This is evident from Chadwick J's important judgment in *Bristol and West Building Society v May May and Merrimans*.[107] One vehicle of the narrow construction is to invoke *Commonwealth Bank of Australia v Smith*,[108] which itself endorsed *Brickenden v London Loan and Savings Co.*[109] The effect is to make it impossible for a solicitor to deny the loss caused in such a situation, since, as Lord Thankerton said:

> When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts ... he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would have been determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged.[110]

23. Domesticating equitable torts

We have been talking about the danger of confusing wrongs and non-wrongs. It seems obvious that, once we know that we are in category one, wrongs, there should just be one list. In principle that should be easy enough, merely a matter of carefully collecting all breaches of equitable duties — breach of trust, breach of fiduciary duty, breach of mortgagee's duties to mortgagor, abuse of confidence, assistance in a breach of trust, and so on. But even collecting equitable wrongs is difficult. One quickly encounters the syndrome familiar within the list of common law torts, of names with different bases and pitched at different levels of generality. Breach of fiduciary duty, for example, merely masquerades as a single wrong.

With one eye on the ultimate coherence and intelligibility of the whole list, it might for example be better to ensure that the equitable torts all focused on protected interests, as does abuse of confidence. Breach of trust and breach of fiduciary duty would then have to be broken up, to produce inter alia interference with equitable property and pursuit of conflicting or possibly conflicting advantage. Merely to begin to play this game is to see how difficult it is. It doubles the difficulty of ordering the list of common law torts. However, there will ultimately be a heavy penalty in inconsistency and incoherence if courts and jurists do not engage in it in earnest.

A relatively easy example is provided by the present situation of 'knowing assistance.' Since *Royal Brunei Airlines Sdn Bhd v Tan*[111] equity can claim to have a coherent approach to the liability of accessories to

107. [1996] 2 All ER 801.
108. (1991) 102 ALR 453.
109. [1934] 3 DLR 465.
110. Id, 469.
111. [1995] 3 WLR 64; C Harpum 'Accessory Liability for Procuring or Assisting a Breach of Trust' (1995) 111 LQ Rev 545.

breach of trust and one which, being confined to intentional assistance or procurement, sits perfectly well with whatever the common law may have to say about liability in negligence for the wrongful acts of others. However, this leaves the law as a whole in a mess, because there is no clear picture of the law of intentionally assisting other wrongs.[112] One result is that, in order to put themselves in a position to reach an accessory, counsel and courts are driven to perform intellectual acrobatics to persuade themselves that the principal wrong in view is indeed a breach of trust.[113] The separate development of legal and equitable wrongs has brought it about that we have no coherent doctrine to apply, across the board, to accessories who intentionally assist or procure the commission of wrongs.

24. Second-guessing negligence

Suppose the highest court in the land reflected on the question whether local authorities could be liable in negligence in respect of damage to buildings arising from carelessly inspected foundations. Suppose further that the court decided that the authority ought in that matter to owe no duty of care to those who subsequently bought the houses. Would it be possible for equity to repeat the inquiry and to come up with a contrary conclusion? Could the court decide, for instance, that the authority owed fiduciary duties to the purchasers and could be liable for breach of those duties? There would have to be some very compelling arguments very carefully set out. The reason is that all the relevant policy considerations will have been weighed in the negligence case. If they were not, the right thing to do would be to confront the earlier case, not evade it. So, to be defensible, the later equity case would have to show what peculiarity of the facts justified a different conclusion. The label 'fiduciary' would not suffice. French courts and English courts weighing the same basket of factors can strike different balances. But a single system must not strike the balance differently on different days merely by varying the language in which it speaks. If the contents of the basket really remain unchanged, the balance cannot be differently struck merely because the language of equity is allowed to displace the language of the law. The system might just as well pursue one policy on Tuesdays and Thursdays while repudiating it on Wednesdays and Fridays.

It used to be thought that knowing assistance might be based on mere carelessness, not on dishonesty as *Royal Brunei Airlines Sdn Bhd v Tan*

112. The neglected condition of the common law is reviewed in P Sales 'The Tort of Conspiracy and Civil Secondary Liability' (1990) 49 CLJ 491.

113. Eg *Bank Tejarat v Hong Kong and Shanghai Banking Corp Ltd* [1995] 1 Lloyd's Rep 239, Tuckey J. For more detailed consideration: see P Birks 'Tracing Misused' (1995) 9 Trust Law Int'l 32.

now insists.[114] So long as that remained possible, there was always the danger of second-guessing the ordinary law of negligence, concealing the conflict under different language.[115] There is no room for two carelessness liabilities side by side. That specific danger has passed, but it remains a model for a recurrence of the same threat of contradiction in other areas. Only careful taxonomy can guarantee that the left hand will not do what the right hand has been told cannot be done. There is, for example, the worldwide fashion for turning to breach of fiduciary duty to achieve results which the common law of tort would say cannot be achieved.[116] It must be more than doubtful whether the addition of the volatile fiduciary label is in every case adding a factor which creates a genuine and compelling distinction justifying the contradiction of the common law of tort. Great damage will be done to the rational integrity of the law by semantic tricks of that kind.

The ordinary law of negligence explores and purports to fix the frontiers of liability. As in other fields, it sets standards for professionals. In *Mortgage Express Ltd v Bowerman and Partners*[117] the facts have the look of another 'flip up' mortgage fraud, but the solicitor defendants were not involved and nothing was at any time alleged or proved regarding any fraud. The defendant solicitors were retained by the plaintiff mortgagees and by H, the prospective purchaser of a flat. The price was £220 000 and the mortgage loan was to be £180 150, against a valuation of £199 000. The solicitors became aware that the vendor was on-selling the flat immediately upon his own purchase and that he was paying only £150 000. The solicitors warned H that he might be paying too much, but he shrugged it off. They did not tell the mortgagees. H defaulted, and the mortgagees' sale realised only £96 000. The solicitors were held liable to the mortgagees in negligence.

The defendant solicitors argued that the valuation on which the mortgagees had relied had been obtained by the mortgagees themselves from another valuer and that it was no concern of solicitors to verify it or give any advice in relation to it. It was not part of their duty to give general commercial advice. Nevertheless, the Court of Appeal took the view that, given the size of the discrepancy and the high degree of probability that the mortgagees would have regarded that discrepancy as casting doubt on their valuation, any solicitor of reasonable competence

114. This view survives as late as the judgment of the Court of Appeal in *Agip (Africa) Ltd v Jackson* [1991] Ch 547.

115. L Hoffmann 'The Redundancy of Knowing Assistance' in P Birks (ed) *Frontiers of Liability* vol 1 (Oxford: OUP, 1994) 27.

116. As to overcome a limitation bar: see *KM v HM* [1992] 3 SCR 6; *S v G* [1995] 3 NZLR 681; see also *Nocton v Lord Ashburton* [1914] AC 932, 957; or to overcome apparent consent: *Norberg v Wynrib* [1992] 2 SCR 226.

117. [1996] 2 All ER 836.

should have appreciated that fact and communicated the information to them. Counsel for the solicitors told the court that liability in such circumstances was a cause of widespread concern in the profession. The Master of the Rolls felt bound to indicate that the facts were very strong. Clearly he did not think that it would be tolerable to make solicitors liable where they were less striking.

If the Court of Appeal thought that in this case it was at or very near an ultimate frontier of liability, in this case for professional negligence, there would have to be a most compelling justification for any stricter liability, involving a lesser degree of liability, or more far-reaching liability, based on laxer tests of causation and remoteness. The fiduciary label cannot in itself provide that justification. Justifications for more stringent liabilities do exist. For example, proven dishonesty justifies a liability with a longer reach. And the receipt of money and its misapplication justify the quite different account-based primary liability which was discussed above. The pursuit of gains in breach of a duty to avoid possible conflicts of interest is a distinct wrong, for which, without regard to the moral quality of the breach, the characteristic response is restitutionary damages in the form of an account of profits. But it must be much more doubtful whether any satisfying explanation can be given as to why *Nocton v Lord Ashburton*[118] should be allowed to threaten professional advisers with an equitable burden greater than the law of negligence would allow. And that answer will certainly be no, if the liability breaks away from its dependence on conflict of interest. So long as the *Nocton v Lord Ashburton* liability turns on non-disclosure of conflicts of interest it will be an explicable extension of liability for negligence. But if it were to slide towards being strict liability for loss arising from non-disclosure of other adverse facts[119] it would simply contradict the limits of professional liability carefully considered in cases such as *Mortgage Express Ltd v Bowerman and Partners.*[120]

Nocton v Lord Ashburton exploited the duality of equity and law. *Hedley Byrne Ltd v Heller and Partners*[121] later mounted a more direct attack, to shift a frontier of liability inconveniently fixed by *Derry v Peek.*[122] In the days when the doctrine of precedent was more rigid than it now is, tricks of that kind were sometimes unavoidable. But evasive tactics exploiting duality are very dangerous. They carry the risk that the left hand and the

118. [1914] AC 932.
119. The trend appears to be in that direction: *Cth Bank of Aust v Smith* supra n 108; *Canson Enterprises v Boughton* supra n 79; *Hodgkinson v Simms* [1994] 3 SCR 377.
120. Supra n 117.
121. [1964] AC 465.
122. (1889) 14 App Cas 337. That the evasion is exactly what was intended is made clear by Gummow supra n 60, 57-58.

right hand will each have an agenda of its own. One precaution will be always to spell out the common law answer before proceeding to ask whether equity will go further and, if so, on what precise grounds. If the common law precedents indicate that there should on given facts be no liability, a court which reaches that conclusion should regard itself as bound to say exactly why equitable precedents might justifiably reach a different conclusion. As the then JJ Doyle QC put it some years ago, 'That is not to say that it should not be so. Simply, that if it is so there should be some sensible reason why it should be so, and if there is none then the fact that there is none is likely to produce pressures for the spread of equitable principles and the more beneficial equitable remedies which they attract to areas in which they are inappropriate, or a restriction in the scope of the equitable remedies'.[123] These are not problems of the classroom. If the law does not attend to its rationality, unintended and unwanted consequences follow, and the sufferers are real litigants who lose cases they should have won. If the law starts contradicting itself, without attending to the need to explain, society as a whole will be the victim, because those who would like radically to change the nature of our law will get the upper hand, for it will be relatively easy for them to show that the much-vaunted rationality of the law is a sham and that judges merely hide an exercise of pure power behind a semantic smoke-screen.

III. CONTRACT AND EQUITY

25. The model of an event-based category

Contract forms an event-based category, as do, on a smaller scale, all the specific contracts within it — sale of goods, carriage of goods, hire, agency, and so on. As compared with the other two principal categories under consideration, namely wrongs and unjust enrichment, contract stands out for having come to terms with the duality of law and equity. All lawyers, law books and law teachers take it for granted that both equity and common law must be taken into account in addressing issues arising in contract. Where equitable remedies, such as specific performance, are available, they have to be considered alongside the common law. Where equitable doctrines supplement common law doctrines, they are taken into account, as, for example, where the question is always asked to what extent equitable estoppel extends the class of binding promises beyond those made by deed or supported by good consideration, or where the rather limited grounds upon which a valid contract can be rescinded are extended by a larger range of factors which render a contract voidable in equity.

123. JJ Doyle 'Commentary' in PD Finn (ed) *Equity and Commercial Relations* (Sydney: Law Book Co, 1987) 211, 213-214.

As we shall see, it does not follow that every puzzle which has its roots in the old duality has been ironed out. But at least all the relevant law from both jurisdictional sources is expected to be considered, and there are no obvious obstacles to its being found and brought to bear when it ought to be brought to bear. There is no shadowland beyond contract, but replicating the work of contract, of which the books allow the reader to become only dimly aware, and in which parallel and contradictory doctrines can thrive. We have seen that this is not true in tort. Authors writing on tort deliberately omit equitable wrongs from their list of torts because they have accepted that, though they are wrongs, they are not torts in the proper sense of that word. The half-hidden shadowland over which equity rules is deliberately created. And the shadows turn out to have enough weight and substance to mount successful sorties into the real world of litigation.

With unjust enrichment, as we shall see, the difficulties are rather different. Venerable as it is in civilian systems, on our side of the western tradition the subject is still relatively young. As it draws on the common law and on equity as every event-based category must, the parvenu is bound to arouse the resentment of the good old learning of money counts, quantum meruit, implied contracts, implied and constructive trusts, subrogation, equitable liens, and so on. However, on the common law side the common counts and implied contracts can now be seen to have put up small resistance. They have few friends.[124] Their subject matter has been rearranged in event-based categories. In the universities nobody teaches them. Some works of reference continue to rely on them. As a brilliant article by the Solicitor-General for New South Wales recently showed, the effect is then to put almost insuperable barriers in the way of research.[125] However, it is different with equity. It is more resistant to the event-based classification. In England in 1995 the professions redefined what used to be called the 'core' subjects, re-naming them the 'Foundations of Legal Knowledge'. Equity still appears as a separate Foundation, called 'Foundations of Equity and Trusts.'[126] Fiduciaries, constructive trusts and

124. But see the views attributed to Meagher J in Birks & Chambers supra n 77, v.

125. K Mason 'Searching for Restitution in Australia' in M McInnes *Restitution: Developments in Unjust Enrichment* (Sydney: Law Book Co, 1996) 1.

126. Law Society and Council of Legal Education *Notice to Law Schools Regarding Full-Time Qualifying Law Degrees* (London, 1995). The seven 'foundations' of this document use a mixed classification. It tacitly assumes the distinction between public and private law, making 'public law' eo nomine one foundation and criminal law another. It retains two jurisdictional heads, making equity and European Union law two further foundations. For the rest it divides private law between obligations and property, making property one foundation (in the small print confined to land law) and obligations two further foundations. Obligations I is then contract, with restitution tacked on to the end of the small print, and Obligations II is tort. The fact that some of these seven categories intersect with others seems not to have aroused any comment.

tracing are all expressly listed under that head. Unjust enrichment contests none of that. It merely seeks to draw on it so far as it has to do with reversing unjust enrichment. This rearrangement, abandoned or rejected by tort, is exactly the same as that achieved by contract. However, the age and weight of scholarship in contract means that, despite the continued existence of equity as a separate foundation of legal knowledge, contract experiences no difficulty in drawing on equity wherever equity has something to say about it. Unjust enrichment, younger and less secure, attempting precisely the same exercise, has to fight an uphill battle.

In short, although Grant Gilmore declared it dead[127] and other radical jurists have enjoyed shaking up its more egregious intellectual complacencies, the fundamental truth is that contract is secure. It does not reject matter which it ought to accept, and it is not perceived as threatening any field on which it draws. Writing on contract one has the luxury of being able to take it for granted that 99 out of 100 readers will accept that the subject exists, is alive and kicking, and does draw on both law and equity. That is why contract most nearly represents the world for which this essay is arguing, a world in which categories based on causative events dominate. It follows that in this particular series there is less to say about contract than about other more troublesome heads. Nevertheless there are some tensions.

26. Money remedies for breach of contract

In dealing with wrongs, we started with the law's response to wrongs. We will do the same here. It is necessary to say very little about specific performance and nothing at all about injunctions or declarations. These are all equitable remedies. It is occasionally necessary to recall that fact. But for most of the time we treat them as fully assimilated. There is not the same tranquillity in the area of money remedies and, in particular, in relation to the equitable remedy of account of profits. We argued earlier that where an account of profits is given for a wrong we should not hesitate to call it damages. If and when it is fully assimilated that is what it will be called.

We should immediately notice an infringement of the taxonomic scheme. Damages for breach of contract is, strictly speaking, part of the law of wrongs. Contract creates the primary obligations, some of which are directly enforced, as where an order for specific performance is made or, to use outdated language, where debt lies for a fixed sum, as for instance for the price due under a contract of sale or for a sum of money lent. Breach of contract is a wrong — breach of a primary obligation under the contract. The wrong triggers a secondary obligation to pay damages. The question

127. G Gilmore *The Death of Contract* (Ohio: Columbus, 1974).

then is as to the measure of those damages or, in other words, as to the content of the remedial obligation. 'Remedy' here cannot be used in any kind of opposition to 'right'. If you break your contract with me, I have a right to damages. It is a remedial right. Analytically this discussion therefore belongs under wrongs and parallels the earlier discussion about gain-based remedies for wrongs.

In *Warman International Ltd v Dwyer*[128] the defendant was a senior manager of the plaintiff company. He managed its Queensland operation, which in turn operated an agency for Italian gearboxes made by Bonfiglioli. Dissatisfied with the company's lethargy, the defendant decided to set up his own companies to take the Bonfiglioli business. This was held to have been a breach of fiduciary duty, to which the companies were knowing accessories. The companies were therefore liable to account for the profits. This severe liability was slightly softened in two ways. It was restricted to the first two years' trading, reflecting the fact that relations between Warman and Bonfiglioli would probably have broken down anyhow. In addition the account was to be taken with full allowances for their input of skill and resources. The High Court felt no sympathy with some sentences in the Court of Appeal's judgment expressing anxiety that so heavy a remedy should depend on the invisible line between the fiduciary and the non-fiduciary. The Court said:

> This passage overlooks the strict and rigorous standards which the courts have applied to fiduciaries and the critical and essentially undisputed fact that Dwyer was a fiduciary in breach of his obligations to Warman. As it happened, Dwyer was almost certainly also in breach of a confidentiality agreement between himself and Warman, which inter alia imposed on him express obligations to refrain from using confidential information in a manner that might cause loss to Warman. For his contractual breaches, the usual compensatory remedies would lie. But, because Dwyer was also a fiduciary, and therefore in a position of trust, the consequences of his action are, rightly, more severe. Any other result misapprehends the fiduciary relationship and the consequences in equity of a breach of fiduciary obligations.[129]

However, we might think that the anxiety of the Court of Appeal was not misplaced. While it may be true that fiduciaries should be disciplined, it is intolerable that very different remedies should attach solely to a label the incidence of which has become unpredictable in modern usage. One has only to recall the story 10 years earlier of *Hospital Products Ltd v United States Surgical Corporation*.[130] There the American company had sent a senior executive to Australia to develop its Australian business. He found a hole in the protection of its patents and set out to develop a competing business, copying its products, sometimes even cannibalising

128. (1994) 182 CLR 544.
129. Id, 563.
130. (1984) 156 CLR 41.

them. The High Court finally held that the disloyal executive had not occupied a fiduciary position. He was in breach of contract, but the American plaintiff was confined to compensatory damages and could not reach the wrongdoer's profits.

These cases sit awkwardly together. The law of contract, having reflected upon the proper measure of recovery, has concluded in favour of compensatory damages, generally measuring the loss from the expectation base, the position to which the contract would have taken the victim of the breach. A case comes along in which the plaintiff would much prefer to take the contract-breaker's profits. Apparently it cannot be done for the wrong of breach of contract. But it can be done by reaching over to the equitable wrong of breach of fiduciary duty. And it is easy to reach over. What makes it so easy is the emptiness of the now over-used word 'fiduciary'.

Under these conditions the word 'fiduciary' is not really doing the work. What is doing the work is the judge's intuition that the case is an appropriate one for the award of an account of profits or, in other words, gain-based damages. In *Hospital Products,* Deane J was the only member of the court willing to cut through the word 'fiduciary'. He thought that the untrustworthy executive was not a fiduciary but did not hold that that was the end of the plaintiff's claim to profits. For this kind of cynical breach of contract it was possible to make the award of damages from within the law of contract, not by pretending to have gone outside it.

Deane J's technique — we shall later see something very similar in another context, namely the award of compound interest[131] — is more rational. It does not hide what is being done behind long but empty words. It must be the way of the future. Instead of outflanking the conclusions of the law of contract as to the proper measure of damages it meets those conclusions head on, as they should be met, reviewing them where reason so dictates. There are competing arguments which the courts must weigh, not avoid on the back of the word 'fiduciary'.

One argument maintains that people ought to be allowed, even encouraged, to break their contracts if, fully compensating the victim of the breach, they can still make more for themselves and indirectly for society as a whole. This is how it is put by Richard Posner:

> But in some cases a party is tempted to break his contract simply because his profit would exceed his profit from completion of the contract. If it would also exceed the expected profit to the other party from the completion of the contract, and if damages are limited to the loss of that profit, there will be an incentive to commit a breach. But there should be. The opportunity cost of completion to the breaching party is the profit he would make from breach, and, if this is greater than his profit from completion, then completion will involve a loss to him. If that

131. See text to infra nn 229-231.

> loss is greater than the gain to the other party from completion, breach would be value maximising and should be encouraged. Provided the victim of the breach is compensated for his loss, he is indifferent and hence encouraging breaches in these circumstances will not deter people from entering into contracts in the future.[132]

On the other side, the Supreme Court of Israel in *Adras v Harlow and Jones GmbH*, the judgment in which is now available in English, has held, essentially, that the keeping of promises is more important to society than the pursuit of wealth in breach of contract. That court therefore did not hesitate to award the profits of an opportunistic breach to the victim of that breach. Bach J said of Posner's doctrine:

> It seems to me that the economic approach does not give enough weight to considerations which cannot be measured in economic terms. The law of contract is not only meant to increase economic efficiency but also to enable society to lead a proper life. Conracts are there to be performed, whether or not damages will be payable on breach, an approach by which we will encourage people to keep their promises. Promise keeping is the basis of our life, as a society and as a nation.[133]

At some time in the not too distant future counsel will compel our courts to face the same question. If the result is confirmation of the orthodoxy that only compensatory damages are available for breach of contract, in effect a choice in favour of the doctrine of efficient breach, there must be no more circumvention of the reaffirmed rule by casual findings of a fiduciary relationship. If the only sanction for breach of contract is to be compensatory damages, the reason for that restriction will hold good unless and until the wrong in question is genuinely different from a breach of contract.

27. Urgent cases

Long before the general question finally arises whether cynical breaches in pursuit of profit should give rise to gain-based damages the law will have to deal with more special cases in which commitment to a purely compensatory regime of damages threatens to allow one party to a contract to snap his fingers at his undertaking. There is such a thing as legitimate sterilisation of an opportunity. Suppose that I employ you as a gardner and I make it a term of the contract that you do not sell stories to the newspapers about me or my preferences. If you make $50 000 by selling such a story about me and my garden, I will very likely suffer no loss. Will we have to say that a gardner is a fiduciary in order to relieve

132. RA Posner *Economic Analysis of Law* 3rd edn (Boston: Little, Brown & Co,1986) 106-108.

133. *Adras v Harlow and Jones GmbH* (1995) Restitution L Rev 235, 272.

you of the profit made through your breach? It should be possible rather to take Deane J's line, on the specific ground, internal to the law of contract, that no other money remedy would be adequate.

Surrey County Council v Bredero Homes Ltd[134] has divided commentators. Selling land to developers, the County Council made it a term of the contract that they should not build more than a given number of houses, the object being, in the event of their getting planning permission to build more, to compel them to share their profit by buying a release from the inconvenient term. The developers did get permission for more, but they did not come back. They decided to ignore the contractual restriction put upon them, which in the end the courts said that they could do with impunity. The breach had caused no loss. Again, it might be said, so long as the promise was legitimate (which it was), a profit-based remedy would have saved the law from the impotent failure to which it was condemned by the present poverty of its remedial armoury. In another court the developers might have found that they were, pro hac vice, fiduciaries.

There are two equitable figures involved in this scenario. One is the fiduciary relationship and the other is restitutionary damages in the form of an account of profits. Deane J has shown that it would be possible to cut through the former. When that is done, it will become possible to ask when it should be permissible to invoke the other. However, the substance of the argument is not about equity's account of profits but simply about the measures used in calculating damages. We have expectation damages and reliance damages. The question is whether we should have, at least in some special cases, restitutionary damages.

28. Failure of consideration

It is important to take precautions against another error. Sometimes a plaintiff who has paid in advance and suffers a failure of consideration prefers to recover his payment rather than sue for damages. Where the plaintiff is in a position to recover reliance damages instead of expectation damages he can achieve that end in his action for breach of contract. However, the cause of action for money received for a consideration which has failed lies in unjust enrichment, not in breach of contract. Sometimes it lies where there is no breach, sometimes where there is no contract and never was one.[135] We are not at the moment talking about that different cause of action,

134. [1993] 1 WLR 1361, on which see W Goodhart 'Restitutionary Damages for Breach of Contract' [1995] Restitution L Rev 3; also P Birks 'Profits of Breach of Contract' (1993) 109 LQ Rev 518; AS Burrows 'No Restitutionary Damages for Beach of Contract' [1993] Lloyd's MCL Quart 453; R O'Dair 'Damages for Breach of Contract: A Wrong Turn' [1993] Restitution L Rev 31; S Smith (1994) 47 CLP 14.

135. See text to infra nn 182-190.

restricted to the recovery of the money which passed from the plaintiff to the defendant and available only when relations between the parties are not, or no longer, regulated by a contract between them. When we speak of an account of profits, or restitutionary damages, for breach of contract, we mean that the cause of action remains the breach and the measure of recovery becomes the profits made by virtue of the breach. In *Adras*[136] the sellers had disabled themselves from supplying steel to the buyers in order to take immediate advantage of a short-term rise in the market. By selling to others in breach of contract they had made nearly DM500 000. That was the measure of the buyers' restitutionary damages. Restitutionary damages for breach of contract is a controversial issue. It is not at all clear how it should be decided, but it cannot be decided by hiding the problems in the language of superimposed fiduciary relations. And it has nothing to do with the cause of action in unjust enrichment for value transferred for a consideration which happens to fail.

29. More specific performance?

I turn at this point, very briefly, to specific performance. The equitable remedy of specific performance has been integrated into the law of contract, but it has a very small role, and the question is why. As is well-known the common law jurisdictions differ from the civilian jurisdictions in being very reluctant to order people to perform their contracts. Land is the great exception. The exceptional character of sales of interests in land is now not much more than a historical reminiscence. We have simply grown used to the availability of specific performance there, and not much elsewhere. Similarly we accept, unquestioningly, that a volunteer promisee by deed must be excluded from this remedy. After all, equity will not assist a volunteer. That is scripture, not open to doubt. To a certain extent the answer is just that that is how English law has settled down, and, if it is to change, the change must come by legislation. But even where the legislation is already in place, something prevents its being used.

It comes almost as a shock to remember the existence of section 52(1) of the Sale of Goods Act 1979 (UK). The section says: 'In any action for breach of contract to deliver specific or ascertained goods the court may , if it thinks fit, on the plaintiff's application, by its judgment or decree direct that the contract be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.'

This section is not a new insertion. It has been in place since 1893. Atiyah comments on the unwillingness of the courts to make anything of

136. Supra n 133. Cf *Hickey & Co v Roches Stores (Dublin) Ltd* [1993] Restitution L Rev 196.

it.[137] He cites the refusal of the Court of Appeal to order specific delivery of a 220 ton machine bought by the plaintiffs from the defendants and available elsewhere only with nearly a year's delivery date.[138]

The reasons why the courts will not use section 52(1) more often are probably complex. But one factor may be the supposition that it is impossible to have specific perfomance without also inviting in *Walsh v Lonsdale*[139] and all the consequences of the maxim, 'equity regards that as done which ought to be done.' In a sale of goods legal title passes early, normally when the contract is made. There is no room in such a case for the creation of an equitable interest in the purchaser. However, one important implication of specific performance is that in the case of a wrongful second sale the profits of the wrongful sale are held on trust for the buyer, as in *Lake v Bayliss*.[140] It may be that fears of importing that kind of baggage dampen all enthusiam for more free use of specific performance. In the particular context of the sale of goods, however, it should be conspicuously easy to cut away all the unwanted baggage, not only because the legal title passes early but because the statutory basis of the extended jurisdiction justifies a clean start.

30. What is a contract?

There is of course one huge area in which the statement that contract has mastered the old duality between law and equity has a distinctly hollow ring. Nobody in his right mind could say that the relations between the doctrine of consideration and equitable estoppel, and between the latter and common law estoppel, have been mastered.[141] The complacent statement makes a narrower point. Promissory estoppel has not been left outside the books on contract but has been gathered in, and everyone who thinks about it knows to what question it is directed and to what position its presence tends. To that extent there is no taxonomic battle to be fought.

We do not yet say that a contract is an undertaking by deed or supported by either consideration or detrimental reliance. The third limb of this proposition comes out in a very different form. We say that a contract is an undertaking by deed or supported by consideration but that there is also something else which which needs to be looked out for. A negative answer under the first two heads must be followed by a separate inquiry whether

137. PS Atiyah *The Sale of Goods* 9th edn (J Adams, ed) (London: Pitman, 1995) 507.

138. *Société des Industries Metallurgiques SA v The Bronx Engineering Co Ltd* [1975] Lloyd's Rep 465. See also Parker J's denial that the buyer of a ship had a prima facie right to restitution: *CN Marine Inc v Stena Line* [1982] 2 Lloyd's Rep 336, 435.

139. (1882) 21 Ch D 9.

140. [1974] 1 WLR 1073.

141. That this distinction exists is in fact disputed: see AK Turner *Spencer, Bower and Turner on Estoppel by Representation* 3rd edn (London: Butterworths, 1977) 12.

the facts might not disclose an estoppel. In the conduct of that inquiry, further questions have to be asked, the chief of which are whether the estoppel can be used as a sword, or only as a shield, and what consequences follow, especially what, if any, money consequences. In Australia, mercifully, the sword and shield argument has passed into history. An estoppel can be used as sword.[142] The discussion of the nature of the response still has all too much energy left in it.[143]

This is not a story in which the common law family can take any pride. The theological complexity of the learning which has had to be inflicted on young lawyers and carried in the intellectual baggage of older lawyers pays no dividend. On the one hand, we have known for 50 years that the doctrine of consideration was so manipulable and had been so manipulated that in its old age its real message was that almost any undertaking seriously intended to be binding was binding. On the other, we have developed a huge learning on the subject of estoppel which, although it is more than able to close the gap left by that inescapable 'almost', we have insisted on keeping distinct — multiplying technicalities. Even in Australia the complexity of parallel learning and parallel remedial regimes is maintained. However, at least in Australia we are now approaching the end-game. There will surely be, sooner or later, a full integration of the law of estoppel, so far as it is relevant, into the law of contract. In this post-*Walton Stores* and post-*Verwayen* world, better taxonomic practice can accelerate the tidying up. The section which follows attempts to locate estoppel in the map of the law which we are using, with a view to identifying the options. The discussion is necessarily much compressed.

31. Identifying and locating an 'estoppel'

A statement can be a category one event (a wrong, with an open remedial potential) or a category two event (a contract or, more widely, a right-engendering manifestation of consent). It can also be a constituent in a category three event (an unjust enrichment), but it is not necessary here to go beyond the first two categories. A statement which is true when

142. This is my reading of the effect of recent cases, which however show a degree of variation between different speeches sufficient, should a reaction set in, to allow the proposition in the text to be denied. Subject to that caveat, the proposition appears to be warranted by: *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Foran v Wight* (1989) 168 CLR 398; *Cth v Verwayen* (1990) 170 CLR 398; see also the very useful discussion in *Cth v Clark* [1994] 2 VR 333.

143. I must thank Andrew Beech of the WA Bar for a stimulating discussion of this matter and sight of the typescript of his paper on the subject, favouring reliance damages as the peculiarly appropriate response. As will be seen below, my own view inclines towards a closer symmetry with normal contract remedies.

uttered will hardly ever be a category one event, although in exceptional circumstances it can indeed be a breach of duty to reveal a true fact, as where it would breach a duty to respect privacy.

Generally, therefore, the statement the very making of which is a breach of duty, is a false statement, a misrepresentation. Hence, for our purposes, a statement true when made will take effect if at all in category two, not in category one. A false statement may take effect in category one or category two. 'This cloth is suitable for making shirts'. This statement, if false, may be a wrong, in breach of the duty not to make false statements. It may equally bid for entry to category two as a promise; in effect: 'You may look to me to answer for the suitability of this cloth for making shirts'. If the verb 'to promise' seems somewhat strained when applied to such a statement, we could substitute the special words which we have for this kind of promising, viz, 'to warrant' or (same word) 'to guarantee' — what the Romans called 'praestare' (literally, 'stand surety for'). If the statement is false and is placed in category one,[144] it is already a breach of duty and the obligation to which it gives rise is a secondary obligation: for breaking a duty not to make false statements, we inflict such and such consequences upon you. If the statement is placed in category two, it generates a primary obligation, to honour the promise (warranty), and the falsity of the statement will trigger that obligation, though it is not clear that the falsity is in itself yet a breach of the primary duty as opposed to an event enlivening that duty.

Where a statement is made as to the future, it cannot be immediately false, and is highly unlikely, in itself, to be capable of being placed in category one (wrongs).[145] 'I will pay you $1 000 000 next week'. This is an undertaking or promise and is almost certainly to be classified, if in the circumstances it has any legal effect at all, in category two. It then creates a primary obligation, to honour the promise, breach of which will support secondary obligations. It follows that, where statements trigger legal responses, rather exceptional circumstances aside, only a false representation as to the present or past can be a breach of duty or wrong; true representations as to the present and past and representations as to the future take effect, so far as they take effect at all, as promises in category two.

---

144. In our law, semble, there is no duty broken by a purely innocent misrepresentation. There must be some degree of fault. A purely innocent misrepresentation is a constituent of a category 3 event and may be a category 2 event if so construed and properly supported.

145. It might be that a class of persons was put under a duty not to make a class of promises. It is a separate question whether there may be an adjacent wrong consisting in falsely misrepresenting present intentions, as in *Edgington v Fitzmaurice* (1885) 29 Ch D 459.

32. Implications

If this is sound, it bears on our problem in this way. The word 'estoppel' is indicative only of binding effect. It is a metaphor not far removed from 'bond' and 'tie' and 'obligation'. In estoppel by representation it is the representation which is the event, and calling it an estoppel merely indicates that the representation is binding.[146] 'The debt has been paid'. 'I shall not insist on the full rent'. The former statement could be a wrong (fraudulent or negligent misrepresentation). Otherwise both are promises if they are binding; and if they create an estoppel they *are* binding, and that is what the word tells us. Since estoppels are perfected by detrimental reliance, these promises are 'detrimental reliance promises'. An estoppel by representation must therefore be classified in any taxonomy as a promise binding after detrimental reliance or, which is actually the same, as an undertaking binding after detrimental reliance.

The rare word 'estoppel' conceals that very simple fact. Estoppels have all along been binding promises. But, until recently, the rare word has also been useful for something else, namely to identify their peculiarity in being binding only for one purpose, for the purpose of being used as a shield in litigation: 'ex nudo pacto non oritur actio sed oritur exceptio' (an agreement without the formal attributes of contract (a 'nudum pactum') does not give rise to an action but does give rise to a defence). What we have been doing in the last 50 years is, first, recognising that promises as to past, present and future are all binding in that defensive role;[147] and, secondly, accepting that they can also be binding in an aggressive role, to support an action as well as a defence. Detrimental reliance promises, binding with limited effect, have become or are becoming binding with general effect. But, if that is right, there is no point at all in continuing to call them estoppels. In a jurisdiction where detrimental reliance promises are binding with general effect it has become true that promises are contracts when made by deed, supported by consideration or relied on to the detriment of the promisee.

There remains the rough end-game. First, formalities. Estoppels by representation escape formal requirements which attach to contracts. But that is a superable problem, since it requires it only to be asserted that, since an estoppel by representation *is* a detrimental reliance contract, a detrimental reliance contract must have all the attributes and privileges of an estoppel by representation. Secondly, unconscionable behaviour. This is a fifth wheel on the coach. We know that it is unconscionable not to

146. See text to supra nn 39-40.

147. In England the role of *High Trees* was to outflank the ruling at common law that only promises as to facts had even this limited binding effect: see *Jorden v Money* (1854) 1 HLC 185; *High Trees* supra n 37.

honour one's promises. There is another type of unconscionability sometimes in the offing, namely the unconscionability of making statements false when made (at worst, the category one event of deceit). However, that should not distract. It is an analytically distinct event in the law of wrongs, whereas a representation intended to be relied upon and in fact relied upon is a category two event. We are dealing and have been dealing all along with promises. There is no other kind of unconscionable behaviour involved other than that which consists in failing to honour one's promises.[148] Thirdly, response. So far as these promises have in any jurisdiction become binding with general effect, there are two response questions. First, will the law enforce the promise itself, the primary obligation? Secondly, what measures of damages will it award for breach? In answer to the first, we have to note that in litigation the enforcement of these promises was always specific: the promisor could not deny the fact warranted, nor sue in the teeth of a promise not to. That continues to be the case in every instance where estoppel is invoked as a shield. There seems no reason why specific performance should not be awarded on the usual principles, as indeed it is when the detrimental reliance promise relates to interests in land.[149] As for the wrong of breach, there is, as with all wrongs, a choice to be made. It is currently being said, in effect, that only reliance damages should normally be given,[150] but this will surely give way in due course to the familiar model for breach of contract in which compensatory damages are measured from the expectation base unless the special conditions for a reliance-based award are satisfied.

---

148. In *Cth v Verwayen* supra n 142, 445, Deane J allows himself to say: 'Ultimately, however, the question whether departure from the assumption would be unconscionable must be resolved not by reference to some preconceived formula framed to serve as a universal yardstick but by reference to all the circumstances of the case.' With unfeigned respect to a great judge, this seems a counsel of despair. We do not throw open the response to contract and breach of contract, and it cannot be either good or necessary to do so when the promise is disguised under the name 'estoppel'. The danger is in crossing unawares from a contract unconscionability to a tort unconscionability. We have shown in the text that representations often cannot and qua estoppels do not entail a wrong in their making, although as promises they can of course entail a wrong in their breaking.

149. Specific performance of a detimental reliance promise: see eg *Salavation Army Trustee Co v West Yorks Metropolitan CC* (1981) 41 P&CR 179.

150. *Cth v Verwayen* supra n 142, Mason CJ 415, Brennan J 429, McHugh J 500. However, these statements appear to be located in a discretion to do whatever seems best. Some judges start on the other foot, assuming that the representation must be made good unless something else seems better: see Gaudron J 487. However, *Silovi v Barbaro* (1988) 13 NSWLR 466 appears to interpret the High Court as favouring only reliance damages: see Priestley JA 472, holding that the court will do whatever will 'prevent the detriment resulting from the unconscionable conduct.'

33. A different kind of taxonomic problem

One of the most comfortable relations between law and equity is that between different vitiating factors which render a contract voidable. It is clear that equity has added to the number of such factors, as by offering relief for innocent misrepresentation, some cases of non-disclosure, some cases of mistake ignored by the common law, undue influence, and the discreditable exploitation of specially vulnerable people. The reason why this kind of intervention is unproblematic is partly because the grounds for relief align in an intelligible manner with fraud and duress at common law and partly because there is, for the most part, no troubling overlap with the common law, equity making a straightforward addition to the menu available at common law, so that the two jurisdictional sources do not seem to be attacking the same phenomenon in different ways.[151]

Factors making a contract voidable give rise to a difficult question which, however, turns out to have nothing to do with the line between law and equity. There is no doubt that such factors relate to contract and must, as such, be the subject of discussion in any treatment of contract. However, there is an analytical question whether the right to rescind the contract should be attributed to the event 'contract' or to the event 'unjust enrichment'. If money is obtained by duress or undue influence, the right to recover it appears to derive from unjust enrichment. If a contract is obtained as a result of the same factors, the right to set the contract aside (which, in other words, appears to be nothing other than the right to recover the claim one has conceded against oneself) must be attributable to the same generic event. This is all the more apparent when the contract obliges one to pay money and one has paid over that money. The causative event cannot be transformed at the moment that the contract ceases to be executory. The better view therefore must be that these factors should all be grouped under the head of unjust enrichment. The benefit in respect of which they entitle the plaintiff to restitution varies but the causative event is always the same. If this is right, when we study these factors in relation to contract we are studying the operation of unjust enrichment upon contract. It needs to be emphasised that this taxonomic point in no way suggests that these matters should be considered only in treatises on unjust enrichment. It would be foolish to suppose that in discussing any causative event one

151. This is not always true, and there are some quite intractable problems. Undue influence has a troubling but limited overlap with duress, and equitable relief for mistake is not altogether easy to reconcile with the common law. Thus, if the common law avoids a contract for a mistake as to matters right outside the risks implicit in the contract, the equitable jurisdiction in *Grist v Bailey* [1967] Ch 532 and *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507 cannot be understood other than as relief against risks which are implicit in the contract and therefore as relief against bad bargains, which, under the label of mistake, it does not purport to be.

must always consider solely those rights which are triggered by that event. It is often convenient to bring in other matter. However, it is desirable to remain aware of the difference between matter brought in for convenience and matter which defines the event and its proper consequences.

PART IV: UNJUST ENRICHMENT AND EQUITY

34. Event and response

The judges were formerly suspicious of the language of unjust enrichment. That fact probably explains the American Law Institute's choice of 'restitution' instead. But a taxonomy dominated by causative events cannot make that choice. Professor Burrows's well-known article on the classification of obligations bears the title, 'Contract, Tort and Restitution — A Satisfactory Division or Not?'[152] He would be the first to recognise that, but for the normative power of the legacy of the American Law Institute to endow a word with a meaning and orientation which it does not have, the division would be unsatisfactory on its face. 'Restitution' cannot align with 'Contract' and 'Tort', since restitution is a legal response to events (like compensation and punishment) and they are events to which the law responds. There is of course something else missing, merely reflecting his intended subject-matter. There is no mention of the fourth category, 'other causative events'.

In this series based on events, unjust enrichment is the generic description of a category of causative event giving rise to primary rights which are directly enforced. Mistaken payment is a specific example. When someone pays another by mistake, then, subject to asking some questions about the nature of the mistake, the law requires the recipient to make restitution of a like sum. The reason is not that the recipient has committed a wrong but simply that in those circumstances that sum of money ought to be repaid. Mistakes occur. There would be widespread anger if the law refused to recognise the obligation to make restitution. The law of unjust enrichment seeks to collect and understand all cases of this kind — that is to say, all cases in which the law requires a recipient to make restitution of an enrichment to the person at whose expense he received it. To achieve this task, it must draw on both law and equity. As the law of contract gathers all the law together about the rights generated by contracts, so the law of unjust enichment must gather all the law about the rights generated by unjust enrichments.

152. (1983) 99 LQ Rev 217.

35. Autonomous unjust enrichment

'Unjust enrichment' is short for 'unjust enrichment at another's expense'. We have already noticed that when that phrase denotes a causative event independent of wrongs the phrase 'at the expense of' must bear its subtractive sense, indicating enrichment from the plaintiff. Where the plaintiff relies on 'at the expense of' in the sense of 'by doing wrong to' his cause of action is the wrong on which he relies to establish the connection between him and the enrichment in question. That use of the language of unjust enrichment merely initiates an inquiry into the law's response to the wrong in question. The inquiry thus belongs in category one, under wrongs.[153] Category three is concerned with unjust enrichment as an independent causative event or, as it is sometimes called in order to make this point, autonomous unjust enrichment. In autonomous unjust enrichment the plaintiff always identifies himself as the person from whom the defendant received the enrichment in question.

36. No competition with equity

In view of the fact that there are occasional signs of competition or even resentment between 'trusts lawyers' and 'restitution lawyers',[154] it is especially important to emphasise the logical impossibility of any friction between equity and unjust enrichment. Unjust enrichment is an event. The law of unjust enrichment, just like the law of contract, draws from both jurisdictional streams. Under what circumstances, and how, does the common law effect restitution? And, under what circumstances, and how, does equity achieve the same end? Restitution of unjust enrichment is effected by rights in personam (obligations) and, sometimes, by rights in rem (property rights). Those rights can be equitable or legal. Unjust enrichment merely gathers together the legal and the equitable responses to that event. In doing so it is more or less bound to expose some inconsistencies. Similar inconsistencies are found even within the contributions of each jurisdictional stream. Weak taxonomy will inevitably have allowed such inconsistencies to develop.

37. A central tension

The principal inconsistency between law and equity in this field is found in the role given to fault. Cases which are argued on the basis of chancery precedents tend to insist that the defendant can only be liable if he has been in one degree or another at fault, whereas the common law takes the view that liability in unjust enrichment is in general strict, subject to

153. Text to supra n 91.

154. As in *Westdeutsche Landesbank* supra n 34, Lord Goff 810 A-B, Lord Browne-Wilkinson 839 C.

defences. The fact which turns this into a taxonomic problem is that the different language in which the two streams of cases approach the issues still deprives them of the capacity to notice each other's existence. For the common law it has usually been a question of money had and received (though it is at last coming to be a question of unjust enrichment) while for equity it has been a problem in the law of trusts and the liabilities associated with trusteeship. Such is the power of language that these different labels have led to the making of different choices in solving one problem. There should be one tunnel through one hill; but, starting from different sides, we are in danger of failing to meet in the middle.

Fault can be relevant in more ways than one to liability in unjust enrichment, but it bears above all on the tension at the very heart of the subject. This tension can be compared to the competition between the sanctity of ownership and the security of transactions.[155] The interest in obtaining restitution of unjust enrichment comes into conflict with the interest in the security of receipts. Honest and reasonable people ought to be able to dispose as they please of such wealth as appears to be at their disposition. If claims in unjust enrichment proliferated uncontrolled everyone would have to set aside a contingency fund or take out special insurance against the possibility of unsuspected restitutionary liability. One way of giving effect to the interest in security of receipts is to make claims in unjust enrichment very difficult to bring — for example, by cutting down the kinds of mistake which will trigger restitution (no restitution for mistakes of law, and none for mistakes of fact unless the mistake gives the impression of legal liability to pay) or by insisting that a failure of consideration counts for nothing unless the failure be total. Another version of the same strategy is to insist that the defendant cannot be liable unless he has been at fault. As we shall see, equity appears to have settled intuitively on that approach but, partly no doubt because the process has been merely intuitive, it has not been wholly consistent in doing so.

Another quite different strategy, more sensitive in its operation, is to allow a defence of change of position. The effect of that defence is to make claims in unjust enrichment not so much difficult to bring, as fragile and short-lived. For the broad effect of the defence, as against honest and reasonable defendants, is to cut down the measure of recovery to the amount by which the defendant's wealth remains enhanced at the time when the action is brought.[156] Honest and reasonable people then suffer no interference

155. 'In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a better title': *Bishopsgate Motor Finance Corp v Transport Brakes Ltd* [1949] 1 KB 322, Denning J 336-337.

156. Compare the 'falling away of enrichment (Wegfall der Bereicherung)' in German law,

in disposing from time to time of such wealth as appears to be at their command.

The second of these strategies has been put in place, at least in the cases in which common law precedents have predominated.[157] The defence of change of position, backed up by the defence of bona fide purchase, now protects the interest in the security of receipts.[158] It is desirable to say, not that this strategy has been put in place in the common law, but rather that it has been put in place in the modern law of unjust enrichment. The effect of putting the matter in that way is substantially to alter the nature of the discussion. What might otherwise appear to be a case of different choices made by law and equity for the law of unjust enrichment then becomes a choice made by the law of unjust enrichment, leaving open only the question of which equitable claims are generated by that causative event.

38. One legal system, two rules

It is beyond doubt that the common law allows restitution without proof of fault on the part of the defendant. Cases of payment for a consideration which subsequently fails and payments by mistake suffice to demonstrate this.[160] *Lipkin Gorman v Karpnale Ltd,*[161] with all its

made relevant by the words of ¶ 818(3): 'Die Verpflichtung zur Herausgabe oder zum Ersatze des Wertes ist ausgeschlossen, soweit der Empfänger nicht mehr bereichert ist' (the obligation to make restitution of a thing or its value is excluded to the extent that the recipient is no longer enriched). Further discussion see: P Birks 'Change of Position: The Nature of the Defence and its Relationship to Other Restitutionary Defences' in M McInnes (ed) *Restitution: Developments in Unjust Enrichment* (Sydney: Law Book Co, 1996) 49.

157. In England the recognition of the defence came in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, Lord Goff 577-578. Cf *David Securities Pty Ltd v Cth Bank of Aust* infra n 187 (though in WA and NZ this development was anticipated by statute: s 125(1) of the Property Law Act 1969 (WA); s 94(B) of the Judicature Act 1908 (NZ)). The rise of the new strategy can be traced to Goff J's judgment in *Barclays Bank Ltd v Simms Son & Cooke (Southern) Ltd* [1980] QB 677. Cf '[I]ts existence (scil, that of the defence) will protect the innocent defendant ... and should encourage the courts to affirm the wide principle that any mistake is a ground for restitution, provided the person can prove that he would not have made the payment but for the mistake' R Goff & GH Jones (eds) *The Law of Restitution* 4th edn (London: Sweet & Maxwell, 1993) 133. See also AS Burrows in Goff & Jones 27, 427-428.

158. Its introduction perfectly exemplifies the fact that there is no special need to look to equity for principled innovation, see text to supra nn 47-50. In *David Securities Pty Ltd v Cth Bank of Aust* infra n 187, the High Court made two such developments, recognising the defence and removing the long-standing bar against restitution for mistakes of law. Cf in Scotland: *Morgan Guaranty v Lothian RC* [1995] SLT 299.

159. *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32.

160. The defendants in such cases frequently share the mistake of the payer, as in *Kelly v Solari* (1841) 9 M&W 54; *Barclays Bank v Simms* supra n 157.

161. [1991] 2 AC 548.

difficulties, seems to confirm that what is true of cases of mistake is also true of cases of ignorance:[162] the recipient is liable strictly, without proof of fault. There one of the Lipkin partners had raided the client account to fund his gambling addiction. The casino which received the money was innocent. It thought the gambler was gambling from his own resources. The firm obtained restitution from the casino. The same case reminds us that strict liability is a good deal softened, for the honest and reasonable, by the defence of change of position and, in appropriate cases, by the more peremptory defence of bona fide purchase. If the gambling solicitor had been addicted instead to very expensive eating, the Ritz which served him and was paid out of the Lipkin client account would have had an absolute defence, because it would have given value in good faith for the money. The casino was able to reduce its liability by its changes of position (consisting in money paid to the solicitor when he occasionally won) but it could not plead bona fide purchase for a technical reason: its gambling contracts being lawful but void, there was no legal nexus between its receipts and the value which it gave in return, namely the whole gambling facility and experience.

It is equally clear that equity on similar facts requires fault in the recipient. If Lipkin Gorman had been the equitable, rather than the legal owner of the account which the gambling partner pilfered, the casino would not have been liable unless it had in some degree known that it was receiving money which it ought not to have been accepting. The degree of knowledge has been differently stated, and the different statements have been greatly complicated by the use of different formulations of 'knowledge' and 'notice'.[163] Those which require a high degree of fault are for the moment in a minority,[164] most recent cases favouring a liability based on carelessness rather than dishonesty.[165] For present purposes we need not enter further into the disagreements as to the precise shade of fault required. It is enough that equity appears to insist on fault where the common law imposes strict

162. This word is used of haemorrhages of wealth from P without his knowledge, though it has no support in any judgment and its use is rejected by Goff & Jones supra n 157, 107. 'Ignorance' is used to indicate that P does not know his wealth is passing to D, not that P lacks education. There can be parallel cases of 'helplessness', where P knows but can do nothing about the haemorrhage, as where P is conscious but paralysed or the event is taking place within sight but out of reach.

163. Very carefully reviewed by S Gardner 'Knowing Assistance and Knowing Receipt: Taking Stock' (1996) 112 LQ Rev 56, 68-70.

164. *Re Montagu's Settlement Trusts* [1987] Ch 264, Megarry V-C, followed by Alliott J at first instance in *Lipkin Gorman v Karpnale* supra n 161 and Steyn J in *Barclays Bank plc v Quinecare Ltd* [1992] 4 All ER 363.

165. *Agip (Africa) Ltd v Jackson* [1990] Ch 265; *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 (both Millett J, both appealed on other grounds); *Eagle Trust plc v SBC Securities Ltd* [1993] 1 WLR 484, Vinelott J; *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700, Knox J.

liability subject to defences. Although personal restitutionary liability was not in issue the recent case of *Westdeutsche Landesbank Girozentrale v Islington LBC*[166] tends to reinforce this commitment to fault-based restitution, in that it makes guilty conscience the key even to the incidence of proprietary interests in traceable proceeds. At the same time we have to note that in some cases equity takes the same line as the common law. The personal claim in *Re Diplock* is strict.[167] The next of kin there recovered from the charities to whom the Diplock money had been wrongly distributed despite the absolute innocence of those recipients. This claim has not been confined rigorously to the administration of estates.[168] It is also true that it was equity which pioneered relief for innocent misrepresentation which by definition is available against a defendant who is not at fault.

This difference of approach cannot be rationalised. That is, we cannot formulate any satisfying explanation as to why a person entitled in equity should have to prove fault to obtain restitution but a person entitled at law should not.[169] It is simply an inconsistency which has crept into the law because the law and equity, using different language and lacking any common taxonomy which might have overcome the tricks which language plays on reason, made different choices.

39. Two explanations of equity's requirement of fault

There are two ways in which equity's choices can be explained. The first assumes that the fault-based liability for knowing receipt is the direct equitable equivalent of the *Lipkin Gorman* action for money had and received but that, instead of relying on change of position and other defences, equity prefers to make its compromise with the general interest in security of receipts by making restitution more difficult. In other words it uses fault as a way of making claims in unjust enrichment more difficult to win, thus cutting down the incidence of restitutionary claims. In this analysis the

166. Supra n 34.

167. Supra n 100.

168. *GL Baker Ltd v Medway Building and Supplies Ltd* [1958] 2 All ER 532, Danckwerts J, revs'd on a pleading point [1958] 3 All ER 540.

169. Harpum, the leading scholar in this field, accepts that equity must fall into line with the law: see C Harpum 'Knowing Assistance and Knowing Receipt: The Basis of Liability' in Birks supra n 115, 9. Burrows argues that heavier probanda can be explained as imposed in exchange for more liberal tracing rules: Burrows supra n 157. However, non constat that there are distinctively equitable tracing rules (as to which see further text to infra n 197), and the heavier probanda are currently required even where the plaintiff does not need to trace, as in *Re Montagu* [1987] Ch 264. But, it may be that Burrows's approach is right in the sense that there should be additional probanda wherever the defendant has received assets over which the plaintiff had no more than an unexercised power contingent on tracing, but that would then be common to law and equity and, if *Lipkin Gorman* supra n 161 had no more than such a power, it would almost certainly entail deciding differently.

Diplock claim has to be seen as anomalous, a stray legacy from the ecclesiastical jurisdiction over the administration of the estates of the deceased.

The other way is more complex. It would say that knowing receipt is not a liability in category three, arising from unjust enrichment, but actually a liability for a wrong in category one. The wrong of knowing receipt is equity's equivalent of the tort of interference with chattels, which, unlike conversion, was never stripped of its requirement of fault. The reason for that difference would on this view be that common law, having no vindicatio, had to overwork the tort of conversion in order to fill that gap but that equity, which did and does allow the direct assertion of proprietary rights, had no need to 'denature' its equivalent wrong.[170] On this view, equity has simply overlooked the possibility of a *Lipkin Gorman* claim in category three or, more accurately, has only alerted itself to the availability of that kind of claim in unjust enrichment in *Re Diplock.*

It needs to be emphasised that in practice the inconsistency between law and equity is narrower than might appear at first sight. Where funds are misdirected and their owner makes a claim against someone who has received them, that recipient will often have given value. Even the law will then allow a defence of bona fide purchase to a money claim, and fault will then become relevant by the terms of the defence. In fact many equity cases of this pattern could be explained as dealing in fault only in relation to the defence of bona fide purchase. Hence in practice the difference chiefly concerns the volunteer recipient. Even there the difference is further narrowed by the defence of change of position. According to the approach of the common law and *Re Diplock*, the volunteer recipient will incur a strict personal liability to make restitution, but the volunteer who honestly and reasonably changes his position after receipt will now to that extent cease to be liable. According to equity (leaving *Re Diplock* aside) the volunteer will incur no personal liability unless at fault, subject only to the proprietary liability so long as the assets received remain traceable. There is not much in it. But the confusion of approaches is a discredit to the law. And there are differences of incidental detail which, for all their unobtrusive character, can win and lose cases. Onus of proof is one such. The onus lies on the defendant to establish a defence. The onus lies on the plaintiff to establish the condition of the liability for which he contends. It can matter.

---

170. So in *Re Montagu* supra n 164, Megarry V-C accepted that had the assets still been identifiable in the old Duke's estate a proprietary claim could have been asserted without proof of fault (a vindicatio). It is a question whether the House of Lords would now say that there is fault in such a case and that it is to be found in mala fides superveniens, knowledge of non-entitlement supervening while the subject-matter or its traceable proceeds are still in hand: see infra n 172.

40. The role of knowing receipt

Even if both halves of our law were agreed in their basic commitment to strict liability subject to defences, there would be cases in which the character of an enrichment as an unjust enrichment, requiring restitution, would depend on fault on the part of the recipient. The internal map of unjust enrichment in the common law divides the 'unjust factors' into three families. If we put these in simple terms, in the mouth of the plaintiff they are as follows. First, 'I did not mean you to have it'. Secondly, 'you knew it was discreditable to receive it'. Thirdly, 'Irrespective of the quality of my intent to transfer or of your conduct in receiving it, there is a very good reason why you should give it back'. These can equally be called (i) non-voluntary transfer, (ii) unconscientious receipt or simply knowing receipt, and (iii) policy-motivated restitution. It is important to notice that the first family itself sub-divides into three, where the plaintiff had no intent to transfer, where he had such an intent but it was impaired in some way, as by a mistake or by illegitimate pressure, and where he had such an intent but that intent was qualified and the qualification was never purified.[171] The slippery nature of the word 'unconscientious' would make 'knowing receipt' preferable for the second head, but for the fact that that phrase is already occupied by the specific equitable liability discussed immediately above. In the title of this section I take the risk of using it in the wider sense.

Non-voluntary transfer gives rise to a strict liability, subject to defences. If contradiction is to be avoided, it is crucial when turning to the second group (knowing, or unconscientious, receipt) to make explicit the reason why the plaintiff is being expected to prove fault in the form of knowledge that he should not have taken the benefit in question. The chief problem with the equitable 'knowing receipt' cases which we have just discussed is, not that knowing receipt is not a sufficient unjust factor (for it is sufficient), but rather that not one of the judgments notices the generally strict nature of restitutionary liability or offers any explanation why the plaintiff was expected to prove fault.

At an uncomfortably high level of generality the reason will usually be that a liability which would for some reason be unacceptable as a strict liability, restricted only by defences such as change of position, will sometimes be acceptable when restricted by a requirement of fault. However, that reason cannot be used in the *Re Montagu /El Ajou* line of cases[172] because *Lipkin Gorman* and *Re Diplock* show that strict liability

171. This is drawn out in the form of a diagram in Birks & Chambers supra n 77 (2nd edn forthcoming, 1997) vi-viii.

172. *Re Montagu* supra n 164.

for the receipt of another's money without that other's knowledge is perfectly acceptable. Unless the discipline is accepted of spelling out the reason against the strict liability, the fault-based liability is all too likely to crop up on facts in which the plaintiff ought not to be put to that additional proof. There are bound to be cases in which the plaintiff voluntarily chooses to rely on fault. Virtually all cases can be litigated in this category if the plaintiff is prepared to take on the extra burden of proving guilty knowledge. A mistaken payer is entitled to plaintiff-sided restitution, by proof of the mistake alone, but if he cares to prove that the defendant knew of his mistake he can switch his claim to unconscientious receipt. In such cases the same discipline which normally requires it to be spelled out exactly why the plaintiff is compelled to prove fault, now requires the court expressly to notice that there is no such compulsion and that the plaintiff has freely chosen to assume the additional burden. This matters, because otherwise the system will lose its grip on the fact that restitutionary liability is in principle strict.

If the view takes hold that proprietary relief or specific relief under a 'remedial' constructive trust requires proof of the recipient's guilty conscience,[173] that will provide a powerful motive for what would otherwise be a pointless choice of a heavier burden. Again, though this will always be picked up in the normal working out of the defences, one factor which will now drive a plaintiff to prove fault will be the desire to defeat the defences of change of position and bona fide purchase. However, the real interest of this category centres on those who would have no claim at all in 'non-voluntary transfer'. Thus, in a jurisdiction with a bar on recovery for mistake of law (as is still formally the case in England) one who receives a transfer knowing that it is made under a mistake of law will nevertheless incur a restitutionary liability.[174] One who pays under a settlement or judgment is usually barred from recovering even for mistake, but the bar weakens if the other knows of the mistake.[175]

More controversial is the case of a risk-taker such as one who pays another's debt knowing that the other has not authorised the payment and may not agree to repay. He has no vestige of a claim if that is all there is to it, as is shown by *Re Cleadon Trust Ltd.*[176] But suppose that the other secretly knows that the debt is being paid and hangs back, aware that the payor does not intend a gift and would not pay if he knew of the other's secret intention not to repay. *Re Cleadon* assumes that in that case the payer

173. Foreshadowed in *Westdeutsche Landesbank* supra n 34.
174. Cf Brennan J in *David Securities Pty Ltd v Cth Bank of Aust* infra n 187; not dissimilar is Lord Brougham LC in *Dixon v Monkland Canal* (1831) 5 Wilson & Shaw 445.
175. *Moss v Chin* (1994) 99 BCLR (2d) 332. Cf *Cth v McCormack* (1984) 155 CLR 273.
176. [1939] Ch 286.

could recover. This has aroused a good deal of controversy.[177]

In none of these cases is it necessary to have recourse to equity. The doctrine of free acceptance, derived from the old claims for quantum meruit and money paid to the defendant's use, suffices. However, the next group of cases is derived from equity. They are usually found under the heading of 'unconscionability' or 'unconscionable bargains'. Here the vague word stands for the kind of discreditable behaviour which consists in knowingly taking advantage of vulnerability. The vulnerability need not be such as would, standing alone, base a claim within the category of vitiated intent. That is, it would not achieve plaintiff-sided restitution within the first of the the three groups of unjust factors.

Louth v Diprose[178] exemplifies. A solicitor was in love with a woman and obsessed by her to an exceptional degree. Knowing this, she chose to raise the temperature. She played on his feelings by exaggerating her anxiety and desperation about her need for accommodation, so that in the end he bought her a house with virtually his last penny. When the scales fell from his eyes, he managed to obtain restitution on the basis of her unconscientious behaviour. It is tolerably clear that this was not a case in which the plaintiff could have recovered simply on the basis of the impairment of his capacity to make decisions. The element of unscrupulous exploitation of his vulnerable condition was evidently essential to the success of his claim.

The borderline between impairments justifying plaintiff-sided restitution and weaknesses which will yield restitution only on the defendant-sided basis of unconscientious receipt has been allowed to grow untidy for want of sharp analysis.[179] Relational undue influence is a plaintiff-sided factor: the plaintiff gets restitution because his autonomy is crippled by his morbid dependence on the other person. But in many cases a plaintiff under undue influence can also show that the other knowingly exploited his weakness. In this way the line between the two has been obscured, so that even some judges overlook the existence of the plaintiff-sided analysis. It is certain, however, that if the undue influence causing the plaintiff to benefit the defendant emanates from a relationship with a third party or is caused by a misrepresentation made by a third party, the plaintiff has to rely on a defendant-sided analysis. That is to say, the claim based on the impairment of the plaintiff's autonomy is barred, and

177. AS Burrows 'Free Acceptance and the Law of Restitution' (1988) 104 LQ Rev 576; G Mead 'Free Acceptance: Some Further Considerations' (1989) 105 LQ Rev 460. Further literature in Birks & Chambers supra n 77, 36, to which add D Byrne 'Benefits — For Services Rendered' in M McInnes *Restitution:Developments in Unjust Enrichment* (Sydney: Law Book Co, 1996) 87; M Bryan 'The Acceptance World' [1996] Lloyd's MCL Quart 337, discussing *Angelopoulos v Sabatino* (1995) 65 SASR 1.

178. *Louth v Diprose* (1992) 175 CLR 621.

179. Birks & Chin supra n 97, 57.

only a claim based on the defendant's knowing receipt will work. Even this is not properly explained in the cases, partly no doubt because the courts had lost sight of the plaintiff-sided nature of relief for innocent misrepresentation and undue influence and could not therefore spot the exceptional nature of the requirement that the defendant must know of the vitiated quality of the plaintiff's decision to confer the benefit upon him.[180]

The same story is played out in other cases of disadvantage. Minority is purely plaintiff-sided: the minor is relieved because of his minority, not because the other knowingly took advantage. The English judges have taken the view that relief for mental disadvantage short of certification — the cases usually concern the mental weakness which accompanies old age — is not plaintiff-sided but requires the plaintiff to show that the defendant knew of his inability to understand what he was doing.[181] No reason being given by the judges for blocking the plaintiff-sided relief, we are forced to guess that it has been blocked in order to preserve the credit and the dignity of the old, to allow them to continue to deal with their property without being driven to getting the consent of those who might later be tempted to challenge dispositions on the ground of mental frailty. The credit of minors by contrast needs no preservation. Just as restitution on the ground of dementia requires proof that the other knew he was dealing with someone who did not understand what he was doing. The general jurisdiction to relieve the 'ignorant, weak and poor' is fairly clearly of that kind. It is not based on the view that socio-educational disadvantage in itself constitutes an impairment of the ability to make decisions, so as to justify plaintiff-sided relief. Rather, the relief is given on a defendant-sided basis where advantage has knowingly been taken of that weakness. Here it is tolerably clear that the courts block the purely plaintiff-sided route to relief because of the fear of too much restitution. That is to say, the defence of change of position would not adequately protect the interest in security of receipts, the impairment of the party seeking relief being too common and too ill-defined.

41. Total failure of consideration

An important sub-species of the first kind of reason for restitution is the transfer which is made on a particular basis known to both the transferor and the transferee. The commonest example is an advance payment made in respect of a contractual reciprocation. The $10 000 which I pay over

180. *Barclays Bank v O'Brien* supra n 96, discussed by JRF Lehane (1994) 110 LQ Rev 167; SM Cretney [1994] Restitution L Rev 3.

181. *Hart v O'Connor* [1985] AC 1000. On the disagreement with the NZ courts on the doctrine in *Archer v Cutler* [1980] 1 NZLR 386: see AH Hudson [1984] Conv 32; [1986] Conv 178. Cf Birks & Chin supra n 97, 89-90.

ahead of your beginning to build the extension to my house is paid under a contract but also upon a particular basis. If the contract goes off and the extension is not built, I have a claim in unjust enrichment to obtain restitution of the $10 000. If the contract has gone off because of your breach I also have a claim for breach of contract. One important question will then be as to the relationship between those two separate causes of action.[182] That is a distinct question. I am concerned here only with the cause of action in unjust enrichment, which happens to illustrate another contradiction between the posture of equity and common law but, in this instance, one which is being resolved so as to give preference to the approach of the former.

A payment on a basis which fails sits beside, say, a mistaken payment in this way. A mistaken payment is a transfer imperfectly intended, while a payment on a basis is a transfer which is indeed intended but in which that intent is subject to a qualification or condition: I only mean you to have my prepayment on the understanding that you are going to build my extension. If the extension is not built, I can say that, in the event which has happened, I never meant you to have the money. 'I did not mean you to have it!' can be substantiated by evidence of an impaired intent or a conditional intent, the condition not having been met. *Pavey & Matthews Pty Ltd v Paul*[183] provides an example which does not involve payment, albeit one in which the High Court did not identify failure of consideration as the relevant reason for restitution. The builders did work on the basis that they would be paid the going rate. They were not paid. The basis of their transfer of value therefore failed. The question was whether a statutory obstacle to their suing in contract also barred their suit in unjust enrichment. It did not.

When the common law talks of this cause of action it speaks very misleadingly in terms of failure of consideration, thus courting all sorts of confusions between consideration in contract and in unjust enrichment. One danger is then that 'failure of consideration' will be thought of as tied to the common case of contractual non-reciprocation. Failure of consideration, in the sense of failure of basis, is much wider. The common law also fell into a rigidly restrictive attitude to this cause of action, expressed in the use of the word 'total': the consideration must fail totally, money could only be recovered upon a total failure of consideration. The common law seemed to have set its face against allowing restitution if the plaintiff seeking restitution had received anything at all of what he had paid for. For example, where a premium had been paid for an apprenticeship but the contract was terminated early by the death of the master, the common

182. Text to supra n 134.
183. (1987) 162 CLR 221.

law refused to allow recovery of any part of the what had been paid, because the consideration had not totally failed.[184] However, equity took the opposite line with contracts of partnership. In *Atwood v Maude*[185] the plaintiff wanted to recover the price he had paid for a partnership with the defendant which had been dissolved on the ground of incompatibility between them. The court had no hesitation in making an apportionment, so that the defendant kept a sum fairly attributable to the period for which the relationship had subsisted.

The common law's requirement of total failure of consideration has become an embarrassment. It has on occasion reduced the courts to an underhand species of resourcefulness. For example, where builders left a site in breach of contract having been paid for more work than they had done, their having done some work did not bar the claim in unjust enrichment. It was obvious that the customer had received something of what he had paid for. The Court of Appeal was driven to saying that he had suffered a total failure of consideration in respect of that part of his payment which was not matched by work done.[186]

In *David Securities Pty Ltd v Commonwealth Bank of Australia* the High Court cut through this problem by asserting that, if it could be done, there was no objection to apportioning the consideration: 'In cases where the consideration can be apportioned or where counter-restitution is relatively simple, insistence on total failure of consideration can be misleading or confusing'. And a little later: 'In circumstances where both parties have impliedly acknowledged that the consideration can be "broken up" or apportioned in this way, any rationale for adhering to the traditional rule requiring *total* failure of consideration disappears'.[187] In *Goss v Chilcott,* an appeal from New Zealand, the Privy Council expressly approved of this approach.[188] 'Total' will now fade away, and the question will be whether the plaintiff who has received some benefit can, to the satisfaction of the court, make counter-restitution, in kind or in money. In other words, the issue will not be total failure but the possibility of counter-restitution.

---

184. *Whincup v Hughes* (1871) LR 6 CP 78.
185. (1868) LR 3 Ch App 369. Cf *Wilson v Johnstone* (1873) LR 16 Eq 606, and later s 40 of the the Partnership Act 1890 (UK).
186. *DO Ferguson & Associates v Sohl* (1992) 62 Build L Rev 95; [1994] Restitution L Rev 147; noted (1994) 10 Construction L Journ 100.
187. (1992) 175 CLR 353, 383.
188. *Goss v Chilcott* [1996] 3 WLR 180. This position is also confirmed, though the matter was not directly in point by the time the case reached the House of Lords, by *Westdeutsche Landesbank* supra n 34. For recent juristic support see: E McKendrick 'Total Failure of Consideration and Counter-Restitution: Two Issues or One?' in P Birks (ed) *Laundering and Tracing* (Oxford: OUP, 1995) 217; P Birks 'Failure of Consideration' in Rose supra n 55, 179.

Just as equity was never committed to the notion of total failure, so it has also been willing to approve counter-restitution in money.[189] There ought not therefore to be many cases in which counter-restitution is found to be impossible.[190] The relevant questions will be whether the basis for the transfer has failed and, if it has, whether the plaintiff seeking restitution can make adequate counter-restitution, in money if necessary. Where a claim in unjust enrichment on the ground of failure of basis is available on the same facts as a claim for breach of contract, it will be an entirely separate question whether a plaintiff can pursue both, subject only to avoiding double recovery, or must elect between them. And it will be another question again whether, when both claims do in principle lie on the same facts, the claim in unjust enrichment must be made subject to some kind of contract ceiling. These last questions are not in issue here. They are mentioned only so that it can be said that they have nothing to do with the definition of the cause of action in unjust enrichment and nothing to do, in particular, with the word 'total' in that definition.

Within the law of unjust enrichment the question what should be done about benefits received in exchange for the enrichment in respect of which the plaintiff seeks restitution is a general one, not confined to any species of unjust enrichment. It is characteristic of the history of the subject that it should have been given different answers by law and equity and different answers in relation to different causes of action. However, it is also an indication of the progress which has recently been made that those inconsistencies have now almost been eliminated, so that we begin to have a single view of the requirements of counter-restitution. The developments in relation to the requirement of 'total' failure of consideration thus form an encouraging chapter in the story of bringing all the case law to bear on the causative events which give rise to restitution.

42. Proprietary restitution

The common or garden means of effecting restitution of unjust enrichment is to put the defendant under a personal obligation to repay the value received, correlating with a right in personam in the plaintiff. Civilian jurisdictions treat unjust enrichment as triggering only such personal claims. However, it is possible to achieve the same end by raising a proprietary right in the plaintiff over money in the defendant's hands, and the common law, in both its jurisdictional streams, does so. The preservation of proprietary rights pre-existing the event in question has nothing to do with reversing

189. As in *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428.

190. A position strongly advocated in Burrows supra n 157, 134. Cf JJ Edelman 'Total Failure of Consideration: When a Total Failure is Not a Total Failure' (1996) Newcastle L Rev (forthcoming).

unjust enrichment, but the creation of new proprietary rights is sometimes restitutionary in effect, in that it returns wealth to the person at whose expense it was received, and can only be explained as a response to unjust enrichment.[191] If a thief steals my money, the fact that in his hands it remains my money is not a response to unjust enrichment. The classification by causative events looks for the event which brought the right into existence. By what event did that money become mine? In most cases the answer is that it will have become mine in category two, consent, as where it was given to me as a gift or as the remuneration due under a contract with the person who paid it. Category three, unjust enrichment, thus has nothing to do with it. The fact that my proprietary right in the money survives the theft, so that the money remains mine in the thief's hands, can at most be seen as a measure against unjust enrichment, anticipating or preventing unjust enrichment. The right is not brought into existence by unjust enrichment. Suppose, however, that the thief uses the money to buy some shares and then sells those shares for $10 000. If the law gives me a proprietary right in that $10 000, that right is a new right which I never held before this story began. It definitely does not arise in category two, consent. This new right is generated by unjust enrichment. There is some room for an argument, which we cannot here pursue. Some people might wish to maintain, incorrectly in my view, that this right is generated by one of the other two categories of event which operate independently of the consent of any party, namely category one, wrongs, or category four, others. The argument, so far as there is room for it, must be as between those three events. Although the events can and must be contrasted one with another, it is essential to avoid drawing contrasts between property

191. This distinction between passive preservation of pre-existing rights and active creation of rights in response to unjust enrichment is discussed more fully in P Birks *Introduction to the Law of Restitution* revs'd edn (Oxford: OUP, 1989) 49-55. Cf P Birks 'Establishing a Proprietary Base' [1995] Restitution L Rev 83, 92 et seq. It is important to notice that there is nothing in what is said above which contradicts the very acute note on *Macmillan v Bishopsgate (No 3)* [1996] 1 All ER 585 by WJ Swadling [1996] Lloyd's MCL Quart 63, though he takes the civilian view (with which I cannot agree) that in English law, so long as the plaintiff's pre-existing title subsists, there is no room for a concurrent *personal* claim arising from unjust enrichment. Macmillan's entitlement to the Berlitz shares did not arise in unjust enrichment, but the crucial question was whether receipt of those shares made Bishopsgate personally liable in unjust enrichment (under the traditional head of 'knowing receipt'). These possibilities were never properly separated in the pleadings or in the judgments. See also G Virgo 'Reconstructing the Law of Restitution' (1996) 10 Trust Law Int'l 20. It is certain that the common law does allow concurrent proprietary and personal claims. Eg, in *Re Diplock* supra n 100, the plaintiffs were held to be entitled both in rem and in personam, and in *Chase Manhattan Bank v Israel-British Bank* infra n 233 the recognition of the plaintiff's right in rem assumed and took for granted the availability of a personal claim, albeit one valueless in the defendant bank's insolvency.

and unjust enrichment. That is one of those false antitheses against which this study is directed.

43. Property and unjust enrichment

It is essential to underline the error of drawing a contrast between property and unjust enrichment. In the *Westdeutsche Landesbank* case Lord Browne-Wilkinson at one point says, 'I do not think it right to make an unprincipled alteration in the law of property (ie, the law of trusts) so as to produce in the law of unjust enrichment the injustices to third parties which I have mentioned'.[192] And in his comment on *Macmillan v Bishopsgate Investment Trust (No 3)*[193] Virgo says, 'The plaintiff's claim had nothing to do with the reversing of unjust enrichment and everything to do with the vindication of property rights'.[194] Statements of this kind are traps for the unwary. It is not that their authors have themselves fallen into any error, only that they have chosen forms of words which encourage the habit of thought which supposes that there is a clear opposition between property and unjust enrichment.

Nobody would ever draw a distinction between the law of obligations and the law of unjust enrichment, because it is so obvious that unjust enrichment is a sub-set of the law of obligations when obligations are classified according to the events which bring them into being. Rights in rem (property rights) are, in the same way, the creatures of events. At the beginning of this study we took the step of adopting a taxonomy dominated by a series of events, wrongs, consent, unjust enrichment and other events. That taxonomy, whether it proves best in the long run or not, warns us not to switch carelessly from categories of response to categories of event. 'Property' (shorthand for 'proprietary rights' or 'rights in rem') can, in principle, arise from all and any of the categories of event. When we spoke of wrongs, we encountered the property right brought into being by the receipt of a bribe, and we asked whether other wrongs could be expected to have the same proprietary consequences.[195] If wrongs can create property rights, drawing a contrast between wrongs and property is obviously to state a false antithesis. In exactly the same way it is an error to contrast unjust enrichment and property. The correct question about any given proprietary right is whether it arose from unjust enrichment or from one of the other categories of event.

Our books and the courses in our law schools suggest that, in common with all civilian jurisdictions, we currently prefer to make a primary division

192. *Westdeutsche Landesbank* supra n 34, 832 H.
193. [1996] 1 All ER 585.
194. Virgo supra n 191, 20, 21, col 2.
195. Text to supra n 78, discussing *A-G for Hong Kong v Reid* supra n 75.

between property and obligations. Even if it be supposed that that division is likely to persist, it does not in the least affect the reality of the danger of any antithesis between matter which belongs in a category of response and matter which belongs in a category of causative event. For it remains true, absolutely, that courses in property must ultimately refer proprietary rights to the events which bring them into being, just as must courses in obligations. If it be true that wrongs, for instance, and unjust enrichment do sometimes engender proprietary rights, no amount of teaching and writing focused on 'property' can alter the fact that there is no antithesis between those events and proprietary rights, but only a relationship of cause and effect.

44. Tracing

To assert a proprietary right in assets actually received by a defendant, a plaintiff merely has to identify those assets and show that on the facts which have happened he has a proprietary right in them. However, a plaintiff may wish instead to assert a proprietary right in different assets on the basis that they represent the original assets because the value of the original assets went into their acquisition. Suppose P paid D $100 000 by mistake. P may want to assert a proprietary interest in a house to the purchase of which the $100 000 contributed. In such a case, the plaintiff must trace. The question whether and to what extent the money went into the house depends on the application of the rules of tracing.

Tracing tracks value through substitutions. Claiming is a distinct matter. If the money is traceable to the house, the fact of its traceability does not in itself indicate that P has any kind of claim in respect of the house. A successful tracing exercise is a necessary but not a sufficient condition of the assertion of proprietary rights in the substitute assets. We will later consider what additional facts justify a proprietary claim. We must first notice the taxonomic advance which now allows us to see clearly the crucial distinction between tracing and claiming.

This advance is due in large measure to Millett LJ. In *Boscawen v Bajwa*[196] he put the matter in this way:

> Equity lawyers habitually use the expressions 'the tracing claim' and 'the tracing remedy' to describe the proprietary claim and the proprietary remedy which equity makes available to the beneficial owner who seeks to recover his property in specie from those into whose hands it has come. Tracing properly so called, however, is neither a claim nor a remedy but a process. Moreover, it is not confined to the case where the plaintiff seeks a proprietary remedy; it is equally necessary where he seeks a personal remedy against a knowing recipient or knowing assistant. It is the process by which the plaintiff traces what has happened to his property,

196. [1995] 4 All ER 769.

> identifies the persons who have handled or received it, and justifies his claim that the money which they handled or received (and if necessary which they still retain) can properly be regarded as representing his property.[197]

This accurate perception of tracing as a process distinct from claiming and neutral as to rights has profound implications for the duality of the tracing rules. Two aspects, in particular, come under suspicion. First, it is supposed to be the case that recourse can only be had to the equitable rules of tracing if the subject-matter has passed through a fiduciary relationship. Secondly, the equitable rules of tracing are assumed to be different from and much more resourceful that the common law rules.

If tracing is not a right or remedy but a process preliminary to the assertion of rights, a fiduciary relationship can only be a precondition of the assertion of equitable rights after a successful tracing exercise. The reason is that, quoad the identification rules themselves, the quality of the relationship at the head of the tracing chain is irrelevant, save, where a plaintiff wants to invoke the fierce tracing rules available against a wrongdoer, as one possible basis for discovering the necessary wrong. Suppose, however, that a thief takes my money and pays it into his bank and then makes investments from the account or I pay money by mistake and the recipient buys shares with it and then sells the shares, pays the proceeds into his bank and later buys a car from the account. In these cases the question whether the value inherent in my money can be traced to the assets at the end of the chain in no way depends on the fiduciary nature of the relationship at the beginning. In *Westdeutsche Landesbank* the House of Lords, using the example of stolen money, appears to accept that the tracing exercise can be conducted independently of the irrelevant precondition.[198]

More radically, the very notion of there being two different sets of rules for tracing is now shown up as rationally indefensible. It cannot be

197. Id, 776. In the background credit must be given to vigorous writing on the subject of tracing by LD Smith 'Tracing in *Taylor v Plumer:* Equity in the Court of King's Bench' [1995] Lloyd's MCL Quart 240; 'The Stockbroker and the Solicitor-General: The Story behind *Taylor v Plumer*' (1994) 15 Journ Leg History 1; 'Tracing, "Swollen Assets" and the Lowest Intermediate Balance' (1994) 8 Trust Law Int 102; 'Tracing the Proceeds of Collateral under the Personal Property Security Act' (1995) 25 Can Bus LJ 460; 'Tracing into the Payment of a Debt' (1995) 54 CLJ 290. At the time of writing, a book is also in the pipeline: *The Law of Tracing* (Oxford: OUP, forthcoming).

198. In view of the background of criticism, the fiduciary requirement is unlikely to survive the assertion by Lord Browne-Wilkinson, in a speech commanding majority support, that one may trace in equity against a thief: *Westdeutsche Landesbank* supra n 34, 838H-839A. It is important to appreciate that in the sentences which run up to the crucial statement that one may trace in equity against a thief, Lord Browne-Wilkinson is rehearsing an argument which he rejects. Otherwise he can be understood as requiring at least lip-service to the requirement of a fiduciary relationship. Cf *Black v S Freedman & Co* (1910) 12 CLR 105; *Spedding v Spedding*(1913) 30 WN (NSW) 81.

that a mere process of identification may be conducted on different bases in different cases, as though the law might choose in such business to use its good or its bad eye. Sooner or later a court will be bold enough to assert that there is only one set of tracing rules and that they belong to the whole law.

45. A historical error

As a matter of history there never were supposed to be two sets of rules anyhow. Dr Lionel Smith, following up a line originally taken by Khurshid and Matthews,[199] has recently demonstrated that the leading case on tracing at common law does not in fact support the existence of the practice of tracing in the common law courts.[200] *Taylor v Plumer*[201] was indeed decided in the King's Bench but, so far as the court engaged in tracing, it was applying the rules of equity and, so far as those rules were expressed more restrictively than we have come to expect of the rules of equitable tracing, it was not because the common law was less resourceful but because the resourceful modern tracing rules of equity had not yet been fully worked out.[202]

Under Plumer's instructions to apply the money for a particular purpose, Walsh, Plumer's stockbroker, withdrew a very large sum from Plumer's bank account. Walsh had already conceived the plan of absconding to America. He used the money drawn from Plumer's account to buy gold and American securities. He then set off to take a ship from Falmouth. Plumer's men caught up with him and took possession of the gold and securities. Later, Taylor, acting as Walsh's assignee in bankruptcy, maintained that the creditors' fund was entitled to those assets, tortiously taken and withheld by Plumer. He sued Plumer for conversion. In order to win that action he had to show that he had a legal right to possession.

Taylor, the assignee in bankruptcy, lost the action because the court found that he had no such right to possession. The reason was that assets which a bankrupt held upon trust did not vest, even at law, in his trustee.[203] The common law court had to ask itself whether Walsh held the gold and the securities obtained with money from Plumer's account upon trust for Plumer. It was in answering that question that it had to use the equitable process of tracing. Taylor had obtained no legal right to those assets because the absconding fiduciary held them on trust for Plumer as the traceable

199. S Khurshid & P Matthews 'Tracing Confusion' (1979) 95 LQ Rev 78.
200. LD Smith 'Tracing in *Taylor v Plumer*' supra n 197.
201. (1815) 3 M&S 562.
202. Or, less charitably, in the words of Sir G Jessel MR, 'because Lord Ellenborough's knowledge of the rules of Equity was not commnensurate with his knowledge of the rules of Common Law' *Re Hallett's Estate* infra n 209, 717.
203. LD Smith supra n 15, 241-248.

proceeds of the money which had been entrusted to him. There was never any attempt to argue that Plumer became the owner at law of the gold and the securities.[204] The only question at issue was whether the legal right to possession had vested in Taylor. It had not.

However, in *Trustees of the Property of FC Jones v Anne Jones,* which is the only case which has so far taken note of Dr Smith's research, the Court of Appeal felt unable to use the historical record as a basis for eliminating the old duality.[205] In *Jones* Millett LJ, giving the judgment of the Court of Appeal, said that Dr Smith had convincingly demonstrated that *Taylor v Plumer* had in fact applied the rules of equitable tracing. He went on to hold that common law tracing nonetheless remained intact:

> But this is no reason for concluding that the common law does not recognise claims to substitute assets. Such claims were upheld by this court in *Banque Belge Pour L'Etranger v Hambrouck*[206] and by the House of Lords in *Lipkin Gorman v Karpnale Ltd.*[207] It has been suggested by commentators that these cases are undermined by their misunderstanding of *Taylor v Plumer*, but that is not how the English doctrine of stare decisis operates. It would be more consistent with that doctrine to say that in recognising claims to substituted assets, equity must be taken to have followed the law, even though the law was not declared until later. Lord Ellenborough CJ gave no indication that, in following assets into their exchange products, equity had adopted a rule which was peculiar to itself or which went further than the common law.[208]

46. Unifying tracing by a different route

If the sheer reason of the case for eliminating the duality from the mechanical process of identifying the location of value cannot prevail either unaided or with the aid of a demonstrable historical error, a different approach may yet achieve the same result. This involves showing that the alleged differences between legal and equitable tracing are illusions because they rest on common approaches to evidential impasses. Tracing is basically a matter of proving a particular fact or, very often, a chain of such facts. The relevant fact is that the value of one asset was used in whole or part to acquire another. It is on the basis of that fact that the second asset is put into the place of the first. The substitution can be proved in the ordinary way, by evidence on the balance of probabilities. However, the proof of a substitution or a chain of substitutions almost invariably encounters difficulties with which ordinary proof by evidence cannot cope. When money has been paid into an account (or, for that matter, into a bucket, if

204. Id, 258-260.
205. *The Times* 13 May 1996, transcript 14.
206. [1921] 1 KB 321.
207. Supra n 161.
208. *Jones* supra n 205.

money were often so kept) and there are subsequent drawings out, it is usually not possible to show by evidence exactly when those particular units of value were withdrawn. A bank account which receives multiple credits is, metaphorically, an incorporeal mixture. A payment into such an account is a substitution by which money or a claim to money is given up to the bank in exchange for personal rights against the bank which are measured by the enhancement of that incorporeal mixture. One may later be able to see that from that account, by a further substitution, money was withdrawn which was used to buy a luxury yacht. But there is very unlikely to be any natural answer to the question whether one particular payment into the account ultimately went towards paying the price of the yacht. There are rare counter-examples, as where, after the payment in, the account was immediately emptied and the entire balance was used to buy the yacht.

It follows that either the tracing exercise must be regarded as generally foiled by payment into a bank account or it must be supported by artificial presumptions. It has been found possible to support it by presumptions. The single probandum is that the units of value in question, stored at one moment in a given asset, were in whole or part used to acquire another asset. That probandum is sometimes satisfied by evidence but more often by the application of artificial presumptions. The crucial question thus becomes whether equity has a monopoly upon the presumptions which are used to overcome the various evidential difficulties. The answer is that it manifestly does not.

The most powerful presumption, or family of presumptions, is used against a wrongdoer. In this matter common law and equity behave in exactly the same way. The presumption used in *Re Hallett's Estate*[209] and *Re Oatway*[210] is of this kind, but its true nature is somewhat obscured by the words in which Sir George Jessel MR originally formulated it. He spoke in terms adapted to the specific facts before him in *Re Hallett's Estate*. Hallett had sold out his client's Russian bonds and had paid the proceeds into his own bank account. He had then dissipated much of the money in the account. If the presumption 'first in, first out' had applied, the trust money would have to have been regarded as almost completely exhausted. The question was whether what was left could nonetheless be said to belong to the client. The answer was yes, on the ground that a trustee must be deemed to use his own money first: 'It seems to me perfectly plain that he cannot be heard to say that he took away the trust money when he had a right to take away his own money'.[211] However, that formulation, suitable for the facts of that particular case, had to be sharply

209. [1879] 13 Ch D 696.
210. [1903] 2 Ch 356.
211. *Re Hallett's Estate* supra n 209, 727.

modified when, in *Re Oatway*, it encountered a situation in which the misbehaving fiduciary had invested the first tranche of the mixed fund and dissipated the rest. It then became necessary to say, in effect, that the *Hallett* presumption was that the trustee intended at all events to preserve the trust money.[212]

In fact the truth lies deeper still. The underlying idea, in more general terms, is that where a wrongdoer creates an evidential difficulty, that difficulty will be resolved against his interest, save so far as he can himself discharge the onus of proving the contrary. Where a wrongdoer mixes, thus creating the evidential difficulty which consists in the impossibility of identifying the quantum and subsequent fate of the contributions to the mixture, the facts will be presumed against the wrongdoer. When the doubt is as to quantum, the whole will be assumed to belong to the other save so far as the wrongdoer can prove that some part belongs to him. When the evidential difficulty relates to the disappearance of part of the mixture, the presumption will be that the part which survives is attributable to the contribution of the other. In *Lupton v White*, where lead ore from different mines had been mixed together, Lord Eldon LC, citing both common law and equity cases, rightly described this approach as a principle common to both.[213]

This presumption is not only shared by both law and equity. It also reaches beyond the specific context of mixtures to other situations in which a wrongdoer has created an evidential difficulty burdensome to the victim of the wrong. Among the authorities relied upon by Lord Eldon LC in *Lupton v White* was *Armory v Delamirie*.[214] In that famous case a chimney-sweep's boy who had found a ring took it to a goldsmith to be valued and the goldsmith's apprentice prized out the stone before handing it back. The boy brought an action for conversion. The court held that since the goldsmith had wrongfully caused the evidential difficulty the jury must presume the stone to have been of the first water:

> And [Pratt] CJ directed the jury that, unless the defendant did produce the jewel and show it not to be of the finest water, they should presume the strongest against him and make the value of the best jewels the measure of their damages: which they accordingly did.[215]

---

212. *Re Oatway* supra n 210, Joyce J 360.
213. *Lupton v White* (1808) 15 Ves 432, 436, 439-441. Cf the discussion of the common law rules by Staughton J in *Indian Oil Corp v Greenstone Shipping Co SA ('The Ypatianna')* [1987] 3 All ER 893, noted P Stein (1987) 46 CLJ 269; I Brown 'Admixture of Goods in English Law' [1988] Lloyd's MCL Quart 286.
214. (1722) 1 Str 505.
215. Ibid.

It is the same with the rule in *Clayton's* case.[216] Much criticised[217] but not easily dispensable, this provides the basic presumption in relation to bank accounts. The presumption is that money goes out in the chronological order in which it comes in: 'first in, first out.' This presumption cannot be appropriated by common law or equity, no more than can the presumption against wrongdoers. It originated as a supplement to the bundle of common law rules for the appropropriation of payments to debts.[218] If I owe you two debts, one of $100 and another of $200, and I pay you $100, it is up to me to say whether I am paying the one or partly paying the other. If, as is very likely, I make no appropriation, you as creditor have the right to allot the payment to the one or the other. If you in your turn make no appropriation, there was originally no allocation by default. But *Clayton's* case introduced the rule of chronology, which allocates each payment to the earliest debt.

This has nothing specially to do with bank accounts but, applied to bank accounts, it produces the result summed up in the phrase 'first in, first out.' The bank is the debtor. Every time it pays out on its customer's instruction, it is repaying money which it owes to its customer. It is deemed to be repaying the money which was earliest lent. It would be absurd to suggest that that this default rule is or was the peculiar property of the Court of Chancery. It is simply a rule of convenience used in the world of banking and finance. In *The Mecca* it was expressly recognised as being in use 'on both sides of Westminster Hall'.[219] Lord Halsbury LC there supported that observation by citing Park J in *Field v Carr*, where he said: 'The rule in *Clayton's* case has been adopted by all the courts in Westminster Hall, and the only question is whether the facts here come within it'.[220]

The third great presumption provides the ground-rule for all mixed funds other than active bank accounts which, prima facie, are governed by *Clayton's* case. As between innocent volunteers a mixed fund other than such an account will abate pari passu for each contributor or all contributors. That is to say, any loss will be borne by the contributors in proportion to the size of their contributions. The substance of *Sinclair v Brougham*[221] is no longer good law,[222] but it remains the leading example of the use of the pari passu rule to distribute a mixed fund between innocent contributors. However, equity can claim no monopoly of the pari passu rule. It is the

216. (1815) 1 Mer 572.
217. Cf *Barlow Clowes Int'l Ltd v Vaughan* [1992] 4 All ER 22, which shows that the courts will sometimes struggle to avoid the abruptness of the chronological presumption.
218. *Cory Bros v The Mecca* [1897] AC 286; *Deeley v Lloyds Bank Ltd* [1912] AC 756. DA McConville 'Tracing and the Rule in *Clayton*'s Case' (1963) 79 LQ Rev 388-391; EP Ellinger & E Lomnicka *Modern Banking Law* (Oxford: OUP, 1994) 586-589.
219. *The Mecca* id, 290.
220. *Field v Carr* (1829) 5 Bing 13, 17.
221. [1914] AC 398.
222. *Westdeutsche Landesbank* supra n 34, 833-837, 841, 859.

plainest common sense as well as common law. The common law uses the same rule when there is a physical mixture of indistinguishable goods belonging to innocent contributors. That is, if such a mixture is partly lost or destroyed, as for example if bales of cotton are mixed together and some are lost at sea, the common law shares the losses between the contributors in proportion to their contributions.[223]

In the light of these shared approaches to the evidential problems which are encountered in identifying the location of value, it seems to be both wrong and pointless to argue that the tracing process is differently conducted in law and equity. It is false to assert that the common law is handicapped. It can make presumptions against a wrongdoer who has created an evidential impasse, it can apply 'first in, first out' to mixtures, real and metaphorical, which are constantly drawn off and topped up, and it is as well able as equity to say that, as between innocent contributors, an undifferentiated mass must abate in proportion to the size of their contributions. The truth therefore is that tracing, regarded as the process of locating value by the application of evidence supplemented by presumptions, is neither equity nor law. It is a process which both equity and law conduct in the same way or, more shortly, it is a process which the modern law can conduct without regard to the historical division between law and equity. But this long excursus will be thought superfluous by some, and rightly. It ought not to be necessary, on the brink of the 21st century, to conduct an involved argument to show that in tracking the passage of value from one investment to another the law ought always to use the same set of rules.

47. Powers or vested rights

We revert at this point to the claims contingent on successful tracing. Pausing only to note that plaintiffs do not invariably trace in order to make proprietary claims,[224] we will from now on concentrate on the making of claims of that kind. It is important to notice immediately one question which remains unresolved, though it colours the whole vital question of priorities. The doubt concerns the precise moment at which a plaintiff can say that he acquires the right in the asset into which he successfully traces. When Victim has traced his $10 000 to the car in Thief's garage, and supposing that the facts are indeed right for him to have a proprietary claim to the car, does he have a power to vest the car in himself or was the car, independently of any action by him, already vested in him at the moment when, as the rules of tracing show, the value proceeding from him

223. *Spence v Union Marine Insurance Co Ltd* (1868) LR 3 CP 427.

224. Cf text to supra n 169; *Lipkin Gorman* supra n 161 which exemplifies tracing to the moment of the defendant's receipt, with a view to making a personal claim.

was invested in the car?[225] The reason why this is so important is that one fear which represses proprietary claims is, very properly, the danger which they pose to third parties. If the power analysis were right, the danger to third parties would be much reduced, since any dealing before the power was exercised would be free of the right which might have been, but had not been, crystallised. The correct analogy would then be with voidable title, where anyone taking in good faith and for value before the voidable title is avoided is immune from claims by the party who might have avoided.[226]

Cave v Cave[227] says that the power analysis is not right: a party whose claim is contingent on successful tracing acquires vested rights as each substitution is made. A thief traceably buys a house with stolen money. The thief then raises money on an equitable mortgage of the house. We now know that it does not matter whether the thief is a trustee stealing from his trust or an out and out stranger.[228] Either way, the victim can trace in equity and claim an equitable interest in the house. The House of Lords looks to be set on making the existence and character of that interest depend on the labels 'constructive' and 'resulting'. Before one step more is taken in that direction, there must be a re-analysis of what exactly happens when a claimant has to rely on a tracing exercise. If the claim contingent on tracing were a power and that power had not been exercised by the time of the equitable mortgage, the equitable mortgagee would take priority. *Cave v Cave*, though decided by Fry J, one of the great masters of equity, was a case of first impression. Almost immediately, warnings were issued that it had created a danger against which almost no precautions could be taken.

48. Simple and compound interest

When do proprietary interests arise in response to unjust enrichment? This question has recently received a radically novel answer in a case in which it arose only obliquely. In *Westdeutsche Landesbank*[229] the House had to consider whether a payment made to the local authority, Islington LBC, under a contract which was void as being beyond its statutory powers was held on trust so as to confer a proprietary interest on the payer. The parties had entered into an interest swap which was front-loaded. During the currency of the contract, it was held in other litigation that interest swaps were beyond the powers of local authorities. Islington LBC having

225. See the difference between *Cave v Cave* infra n 227 and *Re Ffrench's Estate* (1887) 21 LR (Ir) 283, discussed in (1992) 45 CLP 69, 90-93.
226. *Scholefield v Templer* (1859) 4 D&J 429; *Clough v LNWR* (1871) LR 7, 26.
227. (1880) 15 Ch D 639.
228. *Westdeutsche Landesbank* supra n 34, 838-839.
229. Supra n 34, noted P Birks 'Trusts Raised to Reverse Unjust Enrichment: The *Westdeutsche* Case' [1996] Restitution L Rev (forthcoming).

received more than it had paid out, Westdeutsche Landesbank sought restitution. Its personal claim was upheld at common law. The ground was variously described, but the House of Lords appears to say that the true ground was failure of consideration.[230] In the courts below the plaintiff bank had been awarded compound interest on the basis that it had more than a mere personal claim. It was the beneficiary under a trust, and Islington LBC, the trustee, had used the trust money to save itself having to borrow at commercial rates. The appeal to the House of Lords was on the single issue of the rate of interest payable by Islington.

One possibility was that compound interest was payable whether or not in these circumstances the bank had a proprietary claim. That possibility gave rise to a notable but in the end vain attempt to rationalise what appears to be an accidentally fossilised equitable jurisdiction. Lords Goff and Woolf thought that it was time to make some larger sense of equity's exceptional awards of compound interest. The essence of their argument was that such awards must be attributable to some rational principle; authority appeared to say that they could only be made where it could be proved that a trustee had been guilty of fraud or, even in the absence of fraud, had taken commercial advantage of his beneficiary's money. Looking for a wider principle, they found it in the need in some cases to make sure that the defendant surrendered the whole benefit that he had received from the plaintiff. If that was the right principle, it followed in their view that compound interest must be available in all claims to restitution of unjust enrichment, since it was precisely in that class of claim that the objective illustrated in the two exceptional cases was routinely manifested. But this argument for rationalising past intuition failed to convince the majority. A principled application of compound interest, as opposed to one resting solely on authority, will have to wait on another day.[231]

49. New theory on proprietary interests

The decision meant that the bank could hold on to its award of compound interest only if it did indeed have an equitable proprietary interest. Their Lordships were unanimous in holding that it had no such interest. A majority found it necessary to overrule *Sinclair v Brougham*[232] in which it was held that customers of the ultra vires banking business run by the Birkbeck Building Society did have a proprietary interest in the funds into which their money could be traced. Within that majority Lord

230. See text to supra n 34.

231. One reason for the reticence of the majority was that the point was never fully argued because the appellants withdrew from the late stages of the argument for want of funds: see *Westdeutsche Landesbank* supra n 34, 816, 840, 842, 859.

232. Supra n 221.

Browne-Wilkinson gave the leading speech. If *Westdeutsche Landesbank* takes root, the key to equitable proprietary interests in response to unjust enrichment will be guilty conscience on the part of the recipient. This mirrors the insistence on fault which was discussed above in relation to personal restitutionary claims. The proprietary interest is said to arise when the recipient acquires knowledge of the facts which entitle the other to restitution. In all non-express trusts it is evidently acceptable for this knowledge, whatever its precise content must be, to accrue after the receipt of the assets in question, but it must accrue while there is still an identifiable fund, not necessarily the assets originally received but at all events before those assets cease to traceable. If, for example, an aunt puts shares in the name of her nephew and the nephew knows nothing of what she has done, there will be no resulting trust until the nephew acquires the necessary knowledge. Again, if a bank pays a sum and then mistakenly pays it again, as happened in *Chase Manhattan Bank NA Ltd v Israel-British Bank (London) Ltd*,[233] there will be a trust when the recipient becomes aware of the mistake, so long as and to the extent that at that moment the recipient is still traceably in possession of the proceeds.

50. Resulting and constructive trusts

This is not the place to consider the substantive implications of this new doctrine, for our only concern is with the need for a well considered taxonomy to discipline the mixed categories of our law. From that perspective, there is one other aspect of Lord Browne-Wilkinson's speech which is important. While on the one hand he seeks to restrict equitable proprietary interests to cases of bad faith, on the other he clearly looks forward to the day on which it may be possible to say that constructive trusts have no proprietary consequences at all. Thus he says:

> Although the resulting trust is an unsuitable basis for developing proprietary restitutionary remedies, the remedial constructive trust, if introduced into English law, may provide a more satisfactory road forward. The court by way of remedy might impose a constructive trust on a defendant who knowingly retains property of which the plaintiff has been unjustly deprived. Since the remedy can be tailored to the circumstances of the particular case, innocent third parties would not be prejudiced and restitutionary defences, such as change of position, are capable of being given effect. However, whether English law should follow the United States and Canada by adopting the remedial constructive trust will have to be decided in some future case when the point is directly in issue.[234]

233. [1981] Ch 105, discussed by Lord Brown-Wilkinson in *Westdeutsche Landesbank* supra n 34, 837-838. *Neste Oy v Lloyds Bank plc* [1983] 2 Lloyd's Rep 658 might be the nearest parallel, for there Bingham J held that a proprietary interest arose in favour of the payers where the recipients knew when they received the money that the expected contractual reciprocation would not be forthcoming. Curiously, that case is not mentioned.

234. *Westdeutsche Landesbank* supra n 34, 839. This passage appears to be strongly influenced

As this passage affirms, the remedial nature of the constructive trust has not yet been recognised, and not surprisingly since it has no historical warrant. Until this changes, it does not matter whether a trust is labelled constructive or resulting. All equally affect third parties. If and when constructive trusts are emasculated, litigants anxious to secure proprietary advantages are going to put up a fight. The question will then be whether it is possible to draw a clear line between resulting and constructive trusts. In *Westdeutsche Landesbank* the House of Lords, comforted by a recent article by WJ Swadling,[235] takes the view that there is something identifiable as the classical resulting trust around which a strong fence can be erected. The prediction must be that the fence will not withstand the attack which is bound to be launched against it by claimants dissatisfied with the emasculated constructive trust.[236]

The House of Lords in *Westdeutsche Landesbank* identifies the classical resulting trust as arising on facts which trigger the well-known presumptions. Those facts are, very shortly, (i) apparent gift, and (ii) incomplete disposition of equitable interest. It has to be remembered that in both categories, in the House of Lords' view, the equitable interest does not arise unless and until the conscience of the transferee is affected. In the first category there is a transfer which has the externality of gift (direct gratuitous transfer of a res or gratuitous contribution of the resources wherewith a res is purchased) and either the parties stand in a relationship in which equity expects gifts to be made or in a relationship in which equity does not expect gifts to be made. In the former case, the presumption is that a gift was indeed intended and a resulting trust arises where that presumption, called the presumption of advancement, is rebutted. In the latter case a resulting trust arises unless the presumption against gift-giving, called the presumption of resulting trust, is rebutted. In the second category there is a transfer of the legal title in circumstances in which the transferee does not take the beneficial interest but the beneficial interest is not itself disposed of, or not fully disposed of. A resulting trust arises of the undisposed beneficial interest if the presumption of resulting trust is not rebutted. The second category is chiefly occupied by express trusts which fail to dispose of the whole equitable cake but it is also taken to include

---

by the thoughts of Professor Waters, as for instance in: DWM Waters 'The Constructive Trust in Evolution: Substantive and Remedial' in Goldstein supra n 47, 457-516; 'The Nature of the Remedial Constructive Trust' in P Birks (ed) *Frontiers of Liability* vol 2 (Oxford: OUP, 1994) 165-185. Cf *Rawluk v Rawluk* [1990] 1 SCR 70, McLachlin J (dissenting).

235. WJ Swadling 'A New Role for Resulting Trusts?' [1996] 16 Legal Studies 110.

236. All the more so since they will be armed with R Chambers *Resulting Trusts* (Oxford: OUP, 1997), which makes is very difficult to accept the analysis of resulting trusts proposed by Swadling, ibid.

Quistclose trusts,[237] where a fund is transferred at law to be applied to a particular purpose. In fact a Quistclose transfer does not create a trust but only a fiduciary relation sufficient to support the resulting trust when the purpose fails — 'fiduciary' here meaning precisely that (ie, sufficiently trust-like to attract that particular trust consequence).

It will be impossible to defend a stockade around those cases. For example, Lord Browne-Wilkinson says that if a robber traceably uses P's money towards buying a house the trust will be a constructive trust. He rejects the argument that it would be a resulting trust.[238] However, the difference between this and a classical contributions resulting trust consists in the fact that in the classical case the contributor decides to contribute and needs the help of the presumption to show that he did not intend a gift, while here the contribution is taken without the contributor's knowledge so that, on the evidence and without the help of any presumption, it is obvious that the contributor did not intend to benefit the other. In other words, the stolen contribution seems to make the stronger case, calling more plainly for a proprietary response. Alfred, cut off by his father, steals from Violet and buys the house in which they live together. Violet has, one would have thought, a stronger case for a proprietary interest than if, besotted, she had voluntarily supplied him with the money to buy the house, to be saved only by the presumption.

Suppose, again, a transfer of funds from P to D under a mistake so fundamental as to prevent the property passing. D traceably applies the money towards buying a car. P has contributed willy nilly to that purchase. In this case the trust is again indisputably resulting in pattern and effect. That is, the interest 'jumps back' to the person from whom the wealth proceeded, with the effect of depriving the thief or mistaken payee of the enrichment. The only question is whether it is resulting in origin — in the manner of its creation. The House of Lords wants to draw the line between an apparently willing and a manifestly unwilling contribution, favouring the former. Their Lordships' line cuts across the underlying rationale. The underlying rationale is that the trust arises where the contributor does not intend to benefit the recipient, and the stronger the indication that he did not so intend the more likely must be the proprietary response.

A similar example is provided by a comparison of the facts of *Hussey v Palmer*[239] and a typical *Quistclose* trust. Under a *Quistclose* trust the fund is to be applied in a particular way, and the original owner of the money becomes entitled under a resulting trust if that application fails. In the eponymous case, Quistclose were lenders of money to a company, the

237. *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567.
238. *Westdeutsche Landesbank* supra n 34, 839A.
239. Supra n 42.

fund to be applied solely to the payment of a dividend. The company's going into liquidation prevented that application. The money resulted to Quistclose. If we stand back, we can see that that was simply one species of failure of consideration. Money was transferred on a particular basis, that basis failing. In *Hussey v Palmer* the old lady only wanted her money back. She did not want a proprietary claim. She too had suffered a failure of consideration, though neither court nor counsel ever quite hit on that way of formulating her claim. She had given up her money to her son-in-law on the basis that he would enlarge his house and she would have a home there for her old age. That arrangement broke down, just as a commercial partnership can break down. In that failure of the basis of the transfer, she had a perfectly good ground for personal restitution. The Court of Appeal said she was also entitled to an equitable interest in the house. Her counsel put it under the heading of resulting trust. Lord Denning MR thought, although it was 'more a matter of words than anything else,' that it was a constructive trust.

We are assuming that it is no longer going to be a mere matter of words. A constructive trust is going to be very different from a resulting trust. Once again, given that the *Hussey* trust is resulting in pattern and effect, it is hard to see that large differences can be sustained on the basis of the fine distinction between the *Hussey* failure of consideration and the *Quistclose* failure of consideration. In the latter the failure of consideration was the failure of an application of the fund, in the former the failure of a continuing state of affairs collateral to, but nevertheless the basis of, the transfer. If there is a trust in both cases, it seems likely that it must be the same kind of trust.[240]

These are merely examples. In more general terms the methodological confusion consists in allowing categories of response to cut across, or confuse, unities of event. Within the generic event-based category of unjust enrichment there are different levels of unity. The largest consists in all cases of unjust enrichment. The smallest is each specific ground for unjust enrichment, such as mistake, duress, failure of consideration, and so on. At the intermediate level, there are the three families of 'unjust factors', namely 'I did not mean him to have it', 'He knew he ought not to have received it' and 'Independently of what I meant or what he knew, there is a very good reason for restitution.' These unities cannot be ignored. Like cases must after all be treated alike. But a consequence of working with categories of response such as resulting and constructive trusts is that, unless they are carefully related to those unities of event, they completely lose touch with them. The examples discussed above are all examples of 'I did not mean him to have it'. *Westdeutsche Landesbank* belongs in the same family. A determined taxonomic consciousness would have made its

240. Cf *Muschinski v Dodds* (1985) 160 CLR 583.

starting point the proposition that the law of trusts must in principle respond in the same way to all the cases of 'I did not mean him to have it'. Within that commitment, there would have been room for well reasoned exceptions. As it is, working from responses without studying the classifications of the relevant causative events, the law has become incoherent, cutting across unities of event and, unawares, preparing to attach the stronger response to the weaker event, and vice versa. What we witness in these problems is above all the great difficulty of thinking simultaneously in categories of entirely different shapes.

51. Unjust enrichment trusts

So far as any question should have been put in terms of trusts rather than, separately, in terms of personal and proprietary rights, the real question which needed to be answered in relation to non-express trusts was when trusts arose from wrongs, when from unjust enrichment and when from other events. By taking its eyes off the categories of event the law has allowed itself to get bogged down in differences between constructive and resulting trusts and between institutional trusts and remedial trusts. This is the price paid for organising our learning in categories of obscurely named responses and not bearing in mind the relation between responses and causative events.

The time-wasting diversion into differences unrelated to anything that happens in the world is one kind of damage done by inattention to taxonomy. There is another — if anything worse. We noticed earlier that the law of unjust enrichment has adopted a particular strategy for reconciling the interest in restitution with the interest in the security of receipts.[241] That strategy, primarily mediated by the defence of change of position, can be summed up by saying that inessential restrictions which formerly protected the interest in security of receipts, albeit insensitively, have been removed from the cause of action in unjust enrichment but that claims arising from that cause of action have been made more fragile, to ensure that honest and reasonable recipients can safely rely on the security of their receipts. The law of trusts, working in different language and organising its thought in categories of response rather than categories of event, has failed to understand that strategy and, even when in fact responding to unjust enrichment, has stuck to the old habit of restricting the cause of the cause of action, using, as its chosen restrictor, the guilty conscience. Only the guilty will answer. We cannot accommodate two strategies. Even a relatively small difference in something so fundamental will give rise to all sorts of unexplained cracks above ground, where equity and law come for no apparent reason to different conclusions. It is essential that all claims

241. See text to supra n 158.

arising from unjust enrichment, personal and proprietary, be made subject to the defence of change of position.[242] If they are, the recurrent equitable emphasis on fault as an ingredient of the cause of action will become superfluous.

CONCLUSION: THE DEMOCRATIC BARGAIN

52. Legal certainty

This conclusion tries to identify, with extreme brevity, the deeper reasons why all this matters. It matters a lot. It is essential in modern society that the law be closely and cogently reasoned. Access to the courts is hugely expensive. An expensive palm tree is no use to the people. The law must be so stated as to facilitate prediction and advice. It is impossible otherwise to plan with confidence. And it is impossible to know when to litigate. In the context of litigation, law which is intellectually disorderly plays into the hands of the rich and powerful, whether the power and wealth be private or public. Power goes hand in hand with uncertainty. The more uncertain the law the better it can be used in terrorem and the easier to force the weaker party into a settlement. It is said to be in the interest of society that quarrels be ended and litigation minimised. In Latin this seems to be put beyond doubt: 'interest reipublicae ut sit finis litium'. The proposition should not escape examination. It is equally true that members of society have entitlements, and that the courts are there to ensure that they are not elbowed out of them: 'ius suum cuique tribuere'. Justice takes no pleasure in settlements compelled by needlessly uncertain outcomes. These are the routine ends which legal certainty has to serve, and legal certainty is impossible if and so long as taxonomy is neglected.

53. Politicisation or codification?

Equally important is the need to honour the democratic bargain. The terms of that bargain are, on the part of the demos, that some of its power shall be ceded to unrepresentative experts whose expertise consists in the interpretation of the law, and on the part of those experts that they will not

242. It is true that in *Westdeutsche Landesbank* supra n 34, 815A even Lord Goff appeared to assume that Professor Burrows had been right to suggest, in 'Swaps and the Friction between Law and Equity' [1995] Restitution L Rev 15, 27, that a claim to an equitable proprietary interest would carry immunity to the defence of change of position. But that is only true if the proprietary interest arose other than in response to unjust enrichment. For the beginnings of judicial recognition of the range and resourcefulness of the defence of change of position: see *Boscawen v Bajwa* supra n 196, Millett LJ 783. Cf R Nolan 'Change of Position' in P Birks (ed) *Laundering and Tracing* (Oxford: OUP, 1995) 175-85 and Birks, id, 326-7.

usurp the functions of the representative legislature. The difficulty of drawing the line is certainly great,[243] but not so great as to render the bargain void for uncertainty. And just as well, for if, as some think, the bargain is and always will be at best an illusion and at worst a sham, our law and legal institutions are destined to change for the worse.

The legitimacy of expert law-making in a sophisticated democracy depends on the truth of the assertion that the interpreters are and must be both the masters and the servants of a complex system of reasoning. Why are they not elected? The answer must be that they are doing something different from the legislator and something that cannot be done by just any commuter on the Clapham bus. They are restrained in their creativity by the system of reasoning which they serve, and they are qualified for the work which they do, not as chosen representatives, but by hard-won mastery of that specialised rationality.

These propositions cannot be complacently asserted. There is a watchful opposition. The realists and post-realists and all the intellectual inheritance of Jerome Frank quite rightly maintain a constant critical watch. They challenge the unelected expert interpreter to make good these claims. And they have a strong hand. If the law is a chaos of mixed categories, the network of reason which is supposed to imprison the judge is an illusion. If it is an illusion what it is trying to conceal is simply power. If that is the underlying truth, that power can be taken back. We can have people's judges and people's courts, and persecutions and pogroms every time the community's conscience is set on fire by some passing demagogue. The critics field a nightmare of unrestrained empowerment.

In the United States realist and post-realist jurisprudence has partly broken up the settlement on which England and Australia still rely. Interpretation has already been heavily politicised. Consequently, political legitimation matters in the United States, whether by election or, in the case of the very highest judges, by their televised exposure to the whole people. The people has retaken a measure of control over the power which it is asked to confide in the incompletely trusted experts.

The English and Australian model is different. We have not yet succumbed to the realist destruction of legal science. Whatever the emergent reality, our law is still not widely conceived of as immediately moved by the ebbs and flows of the politico-moral debate. The judges consequently remain anonymous, removed from the people and the political fray. They owe this to the democratic bargain, to the people's continuing trust in their being prisoners of their science. Law schools and judges who behave as though rationality were a confidence trick make a case for

243. *Woolwich Equitable Building Society v IRC* [1993] 1 AC 70, Lord Goff 173: 'I feel bound, however, to say that, although I am well aware of the existence of the boundary, I am never quite sure where to find it.'

politicisation and, at the same time, embrace the worst failures of the past as though they were incurable diseases against which hope and a blind eye are the only preparation. Law failed to restrain national socialism. In some societies it is failing now to restrain fundamentalist zeal for reversing the emancipation of women. To the critics and enemies of legal rationality, these failures evidence surrender. The rationalists' noble dream is thereby shown up as a discredited illusion. But a failure is not a good reason for surrender, much less for courting the very dangers which history teaches us to fear.

In one scenario renunciation of legal science leads towards unrestrainedly empowered communities, people's courts, elected judges, and, long before these, to a thousand creeping changes which will invisibly politicise the law. But there are other ways of clipping the wings of expert interpreters who turn out not to be restrained by the limits of their own expertise. One is codification. I shall not engage in a demonstration of the demerits of codification. Interpreters who, whether overtly or covertly, free themselves from the restraints of close reasoning and continuity cannot but engender uncertainty as their thought acquires a legislative tinge. They have no answer to the codifiers. Codifiers believe that codification both cures uncertainty and repels pseudo-interpretative trespass upon legislative territory.

The challenge is therefore to defend the common law against the politicising post-realists and the insufficiently humble codifiers. The reason for trying does not lie in irrational worship of a personified legal tradition. It is more down to earth. With all its present shortcomings, the common law in its English and Australian manifestation offers the best hope of controlling power and balancing interests in the complex, plural and secular civil society of the 21st century. The raw materials are all in place in the law library, nowadays continually renewed through the work of both courts and university law schools. But there hangs in the balance the question whether the pursuit of rationality in law, which is certainly exceedingly arduous, will be laid aside before it has been properly tried. Legal reasoning is different from politico-moral reasoning. The differences derive from relatively straightforward imperatives: courts cannot leave difficult questions indefinitely open. They have to decide, and decision-making must be consistent; people and their advisers must be able to predict how disputes are likely to be decided. As the difficulty of saintliness is no argument in favour of unrestrained evil, so the impossibility of perfectly attaining these goals is no argument for preferring unrestrained intellectual disorder. Disorderly law is no more than an alibi for illegitimate power.