Tatiana Cutts

Modern money had and received

Article (Accepted version) (Refereed)

Original citation:
Cutts, Tatiana (2018) Modern money had and received. Oxford Journal of Legal Studies, 38 (1). pp. 1-25. ISSN 0143-6503
DOI: 10.1093/ojls/gqy002

MODERN MONEY HAD AND RECEIVED*

1. Introduction

There has been a doctrinal revolution in private law, and its protagonist is the old *indebitatus assumpsit* count for money had and received. Over the last three decades, the many manifestations of that count have been revealed as hierophanies of a single truth: whether money is paid by mistake, stolen, or substituted without the owner's consent, there is a 'normatively defective transfer of value',[1] producing an imbalance that we call unjust enrichment at the claimant's expense.

In what follows, I argue that this tendency towards unification has led us to exaggerate the role of value, thus obscuring the true contribution that 'transfer' makes to the conclusion that the defendant should give up cash that she received, and retarding efforts to develop conceptual tools that are sufficiently robust to cope with claims to recover bank money.

In the first part of this article, I deal with claims that concern physical cash. I seek to show that 'transfer of value' is not an aggregate label for any event that prompts an economic change in the parties' respective balance sheet positions; rather, 'transfer' labels the *legal mechanism* through which that change occurs. That mechanism differs for each category of money had and received, variously describing: (i) a transfer of legal title; (ii) a breach of exclusionary duty, and (iii) a substitution of trust rights. I argue that the only mechanism properly associated with a restitutionary action in unjust enrichment is (i), a title-transfer.

* I am grateful to my referees, and to Caspar Bartscherer, Andrew Gold, Nick McBride, Charles Mitchell, Charlie Webb and Fred Wilmot-Smith for comments on earlier drafts.

1 *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29 [42] (Lord Reed); *Lowick Rose v Swynson* [2017] UKSC 32 [22] (Lord Sumption).

In the second part of this article, I show that when we came to shape the framework for restitutionary claims to bank money paid, we failed to maintain this focus on the legal mechanism by which a transfer is constituted. Instead, we took the passage of value *per se* as the fulcrum for liability, thus arrogating a great deal of explanatory latitude to these claims, and sidestepping the difficult task of locating anything normatively-akin to a title transfer in a bank payment from A to B.

Two conceptions of value – discrete and abstract – precipitated corresponding tests for connecting the parties: (i) particularised as a notional cash asset, bank money could be followed through accounts in order to support the liability of a 'direct' or 'indirect' payee; (ii) conceptualised as a shift in wealth, the abstract account admitted any causal link between debit and credit. The first borrows the logic of cash transfers, putatively obviating the need to account for a shift from material to intangible money. The second grounds liability in the mere fact of gain. Each encourages the conclusion that a third party defendant can be made to hand over a sum received as part of an independent transaction to which the claimant was not a party.

By preferring a third version of that nexus – a search for some 'single transaction' to which A and B are each a party – the Supreme Court decision in *Investment Trust Companies v Revenue and Customs Commissioners* takes two important steps towards a more robust account of the normative connection between the parties:[2] first, it encourages a renewed focus upon the legal mechanism through which value moves from one account to another; second, it allows us to address that task without cash fictions, by direct analysis of the legal content of a bank transfer from A to B. The final step that we must take, I argue, is to draw the parameters of the transactional account more clearly, and much more closely.

[2] *Investment Trust Companies* (n 1) [62] (Lord Reed).

2. Cash

In what follows, I consider three instances of the old *assumpsit* count for money had and received, each of which has played a crucial role in shaping the modern framework for unjust enrichment. I show that the emphasis on value has lent an appearance of uniformity to these cases, which is belied by a close analysis of the operative facts. I argue that 'transfer' is a term of art, which labels the legal mechanism by which B is enriched and A disenriched, and that this mechanism differs for each instance of money had and received.

A. Mistaken Payment

(i) From indebitatus assumpsit to unjust enrichment

In *Moses v Macferlan*,[3] Lord Mansfield, a self-professed 'friend' to the count,[4] summarised money had and received as follows: 'the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money'.[5] Amongst the panoply of situations in which money had and received could be invoked were, he said: payments made by mistake; payments made under duress or undue influence; and payments made for a consideration that had failed.[6]

It is difficult to overstate the conceptual importance of mistaken payment to our modern law of unjust enrichment. Birks began his second book, *Unjust Enrichment*, with a 'core case': *Kelly v Solari* was the 'classic English illustration' of mistaken payment,[7] and the pivotal

---

3 *Moses v Macferlan* (1760) 2 Burr 1005, 97 ER 676.
4 *Towers v Barrett* (1786) 1 Term Reports 133, 99 ER 1014.
5 *Moses v Macferlan* (1760) 2 Burr 1005, 1012; 97 ER 676.
6 ibid.
7 *Kelly v Solari* (1841) 9 M&W 54, 152 ER 24.

instance of unjust enrichment.[8] In that case, insurers were held to be entitled to recover a sum paid by cheque to the widow of Mr Solari under a life insurance policy, which had in fact lapsed before the end of the life insured. Birks identified four features of the case through which he generalised a new 'causative event' – a '*tertium quid*',[9] distinct from consent and wrongs.

The first feature was *value*: 'In our core case a mistaken payee receives money. The generalization enlarges the receipt of money to enrichment [because] what works for money must work for value received in other forms'.[10] The second was a *transfer*: 'Payment also supposes that the enrichment happens by transfer from another. Enrichment by transfer from another generalizes to enrichment at the expense of another'.[11] The third was *injustice* – described initially as a defect in the consent of the payor,[12] later and more controversially as an 'absence of basis' for the payment.[13] And the fourth was the innocence of the payee.[14] From these features – a transfer of value, and a claimant-sided account of injustice – Birks extrapolated a law of 'unjust enrichment', the unique concern of which was the reversal of defective transfers of value.

(ii) Value

It is not easy to pin down precisely what is meant by 'value' and 'value transfer'. For Birks, the best way to conceptualise enrichment was by means of a distinction between abstract and discrete wealth:

---

[8] Peter Birks, *Unjust Enrichment* (OUP 2004) 5.
[9] ibid 9.
[10] ibid 49.
[11] ibid 10.
[12] Peter Birks, *An Introduction to the Law of Restitution* (OUP 1985) ch VI-VII.
[13] Encapsulated by the common law label 'unjust', to the civilian 'unjustified' Birks (n 8) 155-156.
[14] ibid 5.

> The first sees the person's wealth as a list of particular assets, some corporeal, some incorporeal. This can be called the discrete conception of wealth, wealth as an inventory of distinct items such as a house, car, jewels, money, bank accounts, bonds, shares, and so on. The other conception envisages an individual's wealth as a single fund with a money value. When a celebrity is said to be worth millions, the speaker is thinking in terms of an abstract fund. This can be called the abstract conception of wealth.[15]

This is liable to confuse. We ordinarily reserve the term 'wealth' for abstract value alone: if exchange value describes the price that an asset is likely to fetch in a particular market, wealth describes the cumulative price of all the assets to which an individual has recourse, minus their liabilities. In short, wealth is the net worth of an individual. Birks' 'abstract' value is wealth, of this kind.

Birks' 'discrete conception' does not refer to value *per se*; rather, it frames enrichment as a right that *has* value – title to a house or car, a bank account, bond or share. I do not need or intend to draw any conclusions here as to whether onerous rights, or rights with a negligible market value, should be recoverable in unjust enrichment,[16] but it is worth pointing out that Birks' discrete conception envisages a limited role for value: it acts as a threshold, excluding from the restitutionary remit of unjust enrichment the kind of rights with which State-endorsed markets are not properly concerned. So, title to a gold bar is an enrichment, recoverable either

[15] Birks (n 8) 69.

[16] I think it likely that both are correct: there are some rights that are repugnant to markets, which cannot be recovered by virtue of the law's refusal to engage in those markets; there are rights with very little economic value that can nevertheless be recovered in unjust enrichment. Cf Robert Chambers, 'Two Kinds of Enrichment' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 255.

in specie or through ‘a substitutionary award in money’;[17] children and body parts are not enrichments; ‘adjustment in money is unthinkable’.[18]

In sum, Birks’ bifurcated model of enrichment gives us two ways to conceive of Mrs Solari’s enrichment: (i) a right; and (ii) a balance sheet increase.

(iii) Transfer

When we come to conceptualise ‘transfer’, there is a temptation to assume that the abstract view compels us to admit *any* causal link, as long as it brings about a net loss on one side of the equation and a net gain on the other. As Evans puts it: ‘value may be received (and, more importantly, retained) by the defendant in a manner causally linked to the claimant without any transactional link between them’.[19] We should resist that temptation: whatever we do about enrichment, there is a very good reason to think that *transfer* is particularised either way.

The problem with a wholesale commitment to the logic of the abstract view is exemplified prototypically as follows. Suppose that A mistakenly destroys a stamp – her own, and one of a pair; B owns the other stamp, the value of which is doubled as an immediate consequence. Each of the elements of the abstract enquiry is fulfilled, and yet:

> If I mistakenly destroy an asset I own and this causes your asset to increase in value, I cannot claim restitution against you despite the clear causal link between loss and gain. It is not just that there are good reasons to prevent claims in such factual situations; there is simply no reason for restitution at all.[20]

[17] Birks (n 8) 51-52.
[18] ibid.
[19] Simon Evans, ‘Rethinking tracing and the law of restitution’ (1999) 115 LQR 469, 479.
[20] Frederick Wilmot-Smith, ‘Taxing Questions’ (2015) 131 LQR 531, 534.

Our problem cannot be solved by reframing injustice so as to implicate the defendant more closely. Suppose instead that A and B own neighbouring shops, each of which sells identical produce. B lowers the price of items in her shop, hoping to drive custom away from A's shop. B succeeds, and A's takings for that period are substantially impoverished. Again, all elements of the abstract enquiry are met; yet, A has no claim in unjust enrichment. Indeed, as Lord Nicholls put it in *OBG v Allan*:[21]

> Competition between businesses regularly involves each business taking steps to promote itself at the expense of the other. One retail business may reduce its prices to customers with a view to diverting trade to itself and away from a competitor shop. Far from prohibiting such conduct, the common law seeks to encourage and protect it. The common law recognises the economic advantages of competition.[22]

Each example involves an event that causes a net increase to B's balance sheet, and a net decrease to A's. Yet, neither involves the kind of event with which the law of unjust enrichment is concerned.

In this way, we are propelled to the conclusion that it is not by virtue of *any* unjust wealth-conferring event that the law of unjust enrichment is engaged – and to which we ascribe the label 'transfer' – but rather by certain *types* of event. In *Kelly v Solari*, that event was a transfer of title: the source of Mrs Solari's increase in purchasing power was the monetary asset that she received from the insurers. And if the particularised view of the relevant nexus is that there has been a 'transfer of title from A to B', the abstract view completes that sentence with

[21] *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1.
[22] ibid [142].

'that causes B to be better off'. The width of the normative gap between these accounts is then determined by one's view of the role ascribed to value within the reason for restitution.

A. Theft

(i) From indebitatus assumpsit to unjust enrichment

The first writ for the recovery of chattels demanded that the plaintiff point to uniquely-identifiable goods in the defendant's hands at the time of the action.[23] Accordingly, the lack of an ear-mark – literally, that coins typically bore no marks of their holder –[24] defeated a claim whenever money paid had not been segregated.[25] Yet, high-denomination bank notes often were recorded by their issuee; in these cases the phrase 'money has no ear-mark' came to be shorthand for a defence awarded to the innocent purchaser of stolen cash,[26] most notably described by Lord Mansfield in the 18th century case of *Miller v Race.*[27] By removing the need to make enquiries as to the provenance of funds received, this step ensured functional homogeneity, lowering transaction costs and allowing currency to flow freely.[28]

The logic of the protection afforded by this defence was later held to extend to the recipients of fiat money.[29] It did not, however, extend to purchasers acting in the knowledge of

---

[23] This was true both of detinue on a bailment and detinue sur trover: even the bailee who drank a bottle of wine committed to his safekeeping could say that he no longer detained it. See J H Baker, *An Introduction to English Legal History* (4th edn, OUP 2002) 392.

[24] As opposed to their maker: discussions of this phrase often omit the fact that a great many of the coins in circulation bore the mark of their maker, a practice that was made mandatory by statute as early as 1363: Statute 37 Edward III c.7

[25] Sir Edward Coke, *The First Part of the Institutes of the Laws of England*, vol II (F. Hargrave and C. Butler eds, 18th Revised edn, London: J & W Clarke, R. Pheney and S. Brooke 1823) 286. See also *Anon* BL MS Add 36941, fo 35v, LI MS Maynard 87, fo 145v, CUL MS LI 3, 8, fo 160 (CP)

[26] *Ford v Hopkins* (1700) 1 Salk 283, 91 ER 250; *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321 326.

[27] *Miller v Race* (1758) 1 Burr 452, 97 ER 398.

[28] ibid [459] (Lord Mansfield).

[29] ibid. This step was placed on a statutory footing by the Bills of Exchange Act 1882.

a prior claim. In *Clarke v Shee & Johnson*,[30] the claimant had employed a clerk to collect money due to him. Instead, the clerk used that money to buy lottery tickets. Lord Mansfield considered that the bad faith receipt of coins and notes rendered them 'specific property', such that 'if their identity can be traced and ascertained, [the owner] has a right to recover'.[31]

The remedy for tortiously taking or detaining money departed from trover with the development of *indebitatus assumpsit* for money had and received in the seventeenth century. Yet, the formula was barely altered for these cases, mirroring the trover allegation perfectly: in *Holiday v Sigil*,[32] an action for money had and received was brought to recover the value of a £500 note. Following the judge's direction to consider whether the claimant had indeed established that 'he lost this note, and that the defendant found it', the jury found for the claimant, who was awarded damages of £500. [33]

Although the reason why the claimant acquired title to the cash was not raised in *Clarke*, there is nothing in his discussion to suggest that Lord Mansfield thought that what had been classified in *Holiday* as a wrong, for trover, was now to be thought of differently as an action in unjust enrichment: quite to the contrary, he considered that the case concerned whether money could be 'brought back by the true owner', who sued 'for his identified property'.[34] Nevertheless, in 1991, these cases were repurposed by Lord Goff to support a nascent law of unjust enrichment.[35]

In *Lipkin Gorman v Karpnale*, Cass, one of the partners of a firm of solicitors, withdrew £323,222 from a client account in order to gamble at the defendant casino. The court ordered the casino to pay the firm £150,960, taking into account sums paid out as winnings. Citing

---

[30] (1774) 1 Cowp, 98 ER 1041.
[31] ibid 1043.
[32] *Holiday v Sigil* (1826) 2 Car & P 176, 172 ER 81,
[33] *Clarke v Shee & Johnson* (1774) 1 Cowp, 98 ER 1041.
[34] ibid 1043.
[35] *Lipkin Gorman v Karpnale* [1991] 2 AC 548.

Clarke v Shee & Johnson,[36] Lord Goff explained that the action in that case and the instant one was 'founded simply on the fact that, as Lord Mansfield said, the third party cannot in conscience retain the money – or, as we say nowadays, for the third party to retain the money would result in his unjust enrichment at the expense of the owner of the money'.[37]

This case is a landmark in the law of unjust enrichment, the independent existence of which was then 'put beyond question' in England and Wales.[38] Money misappropriation appeared to display precisely those hallmarks of unjust enrichment which Birks had extrapolated from mistaken payment: it was, said Birks, wholly inconsistent to exclude instances of 'ignorance', or a total want of consent to the impugned transaction, from a law of unjust enrichment that admitted restitution for mistake.[39] The defendant had 'usurped an earning opportunity that belonged to the claimant';[40] the claimant who sued in unjust enrichment thereby renounced her claim from property and claimed the 'capital value' of the asset as an enrichment acquired unjustly at her expense.[41]

(ii) Value

We saw above that the particularised view of the relevant nexus – at least as it applies to *Kelly v Solari* – is that there has been a 'transfer of title from A to B', and that the abstract view is concerned with the change in balance sheet positions that results. If either is to cope with theft, we must first account for the fact that theft does not confer upon the thief her victim's title.

---

[36] (1774) 1 Cowp, 98 ER 1041.
[37] *Lipkin Gorman v Karpnale* [1991] 2 AC 548, 572.
[38] David Ibbetson, A Historical Introduction to the Law of Obligations (OUP 1999) 288.
[39] Peter Birks, An Introduction to the Law of Restitution (OUP 1985) 141.
[40] Mitchell McInnes, 'Interceptive subtraction, unjust enrichment and wrongs - a reply to Professor Birks' (2003) 62 CLJ 697, 713.
[41] Birks (n 8) 66-67; Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2010) 195.

Burrows purports to solve this problem by widening the category of enrichment. For Burrows, 'enrichment in the law of unjust enrichment is assessed factually and not in terms of legal entitlement'.[42] Thus, he if a defendant steals the claimant's £100 banknote, he argues that 'factually, the defendant is enriched by £100 even though the banknote still belongs to the claimant'.[43] Yet, it is not at all clear what 'factual value' means, nor that the measure of it should be £100.

Let us assume that 'factual value' means 'the price that the thief can fetch for onward sale'.[44] In order to arrive at a true quantification of price, one would expect the court to take account of the relative juniority of the thief's title, and the circumstances in which it was obtained.[45] This would matter a great deal for non-money assets: a stolen car is highly unlikely to fetch the same price as one offered with proof of title, with access to an open market. In fact, the value of best title is the assumed benchmark for damages for money and non-money cases alike:[46] the claimant does not sue recover the value of what the thief has, but the value of what *she* had.

Birks offered one solution for this problem: the claimant could either sue to protect her property right, or renounce her title and claim the value in an action in unjust enrichment.[47] In this way, the thief *would* acquire the claimant's title, and the value of best title would be the appropriate quantum of liability. The objection to this solution has been put succinctly, and I think it must be correct: 'How can the claimant simultaneously relinquish his title, and make a claim that the defendant has been unjustly enriched by the acquisition of that title?'.[48]

---

[42] Andrew Burrows, 'The Relationship between Unjust Enrichment and Property: some Unresolved Issues' in J Edelman and S Degeling (eds), *Unjust Enrichment in Commercial Law* (Thomson) 335.
[43] Burrows (n 41) 195.
[44] See e.g. James Edelman, 'The Meaning of Loss and Enrichment' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2008).
[45] See Robert Chambers, 'Two Kinds of Enrichment' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 250.
[46] See e.g. *Young v Marshall* (1831) 8 Bingham 43, 131 ER 316.
[47] Birks (n 8) 66.
[48] Lionel Smith, 'Tracing' in Andrew Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law* (OUP 2006) 121.

(iii) Transfer

We have already seen that the recipient for value from a thief acquires a defence to the claim of the prior owner, so that there is a good reason for thinking that money in the hands of a thief is just as valuable as money that has not been stolen; we can thereby sidestep the objection identified immediately above. Yet, we cannot thus overcome a second problem, which is that the subject matter of the thief's transaction is not the claimant's title; rather, it is the title that the thief obtains by acquiring possession. If both the abstract and particularised conceptions of unjust enrichment depend upon a 'transfer', by which these cases are delineated from mere causal enrichment, we have not yet found one.

But we need not look far. Unlike the claimant from whose shop business is diverted by the defendant's competitive activities, the property-holder's interest is one that the law recognises and protects. And unlike the claimant's accidental destruction of her own asset, the defendant infringes that right by stealing the thing to which it relates. And this is the point: that breach of duty is not only important to showing that the defendant has acted unjustly; it also allows the claimant to substantiate a 'transfer' of the relevant kind.

Yet, if this is so, it seems that we are dealing with something quite different from mistaken payment:[49] one type of claim depends on the defendant's breach, and allows the claimant to recover the value of her right; the other depends upon a title transfer from claimant to defendant, and allows the claimant to get the right back or its value (measured as an accretion to the defendant's wealth).[50] We are, I think, less likely to elide these distinctions if we continue

[49] See further William Swadling, 'Ignorance and Enrichment: the Problem of Title' (2008) 28 OJLS 627.
[50] This is not to argue that we cannot, at a certain level of abstraction, find a way of grouping both title transfer and breach of exclusionary duty within the same category – which category we might label 'protecting the decision-making powers of property holders' (I borrow this description from Charlie Webb, *Reason and Restitution* (OUP 2016) 93-94). Rather, it is to argue that there are sound reasons for conducting this classificatory exercise at a lower level, at which they are kept apart.

to attribute the work of the former to the law of wrongs, reserving the label 'unjust enrichment' for the latter.

C. Unauthorised Substitution

(i) From indebitatus assumpsit to unjust enrichment

Actions against factors for the price of goods were frequently brought in account,[51] debt;[52] later, assumpsit,[53] and as actions on the case for conversion.[54] But none of these actions provided much assistance to a principal whose factor became insolvent prior to the action. Moreover, even if detinue could be brought for such of the original goods as remained in the factor's hands,[55] a Jacobean statute mandated that everything in a bankrupt's hands at the onset of bankruptcy be distributed to his creditors.[56] So, claimants turned to Chancery, and found their solution in the established law of trusts: a factor entitled to the goods at law might nevertheless be a trustee of the right for which he had agreed to be accountable.[57]

The absurdity of denying a claim to a plaintiff who would succeed in a subsequent suit in Chancery drove the Common Law courts to reach an equivalent result. In *Scott v Surman*,[58] the claimants consigned tar to Scott as their factor, who sold it for promissory notes that were payable four months after delivery. Scott committed an act of bankruptcy, and his assignees

---

[51] *Perton v Tumby* YB 10 Edw II, Seldon Soc 54 109 (CP).
[52] *Core v May* KB 27/1097, m 33, Seldon Soc 94 327.
[53] *Orwell v Mortoft* YB Mich 20 Hen VII, fo 8, pl 18; (1505) B & M 406.
[54] *Halliday v Higges* BL MS Add 25203, fo 147v, YLS MS G R29 14, fo 15v, B & M 592.
[55] There is some disagreement over whether this was possible: *Anon* YB Mich. 41 Edw III fo 31 pl 37 (CP).
[56] An Act for the further Description of a Bankrupt, and Relief of Creditors against such as shall become Bankrupts, and for inflicting of corporal Punishment upon the Bankrupts in some special Cases 21 Jac 1 Cap 19 1623.
[57] (1708) 2 Vern 638, 23 ER 1017.
[58] (1742) Willes 400, 125 ER 1235.

acquired the notes and received the money due on them. The assignees attempted to distinguish the equitable cases, claiming that the factor had acted outside his authority in selling the tar on credit. Willes J rejected this argument: 'constant and daily experience' he said, 'shews that factors do sell upon credit without such a special authority. If it were otherwise, it would be the greatest prejudice to trade'.[59] To avoid circuity of action,[60] he found for the claimants, concluding that the debt owing in any such case would 'follow the nature of the thing out of which it is produced'.[61]

Thus, the factor's authority governed the claim in equity, and the parasitic claim at law, throughout the 18th Century. Yet, when in 1815 Willes J's conclusion was repackaged as a reason for extending the reach of money had and received to rights acquired without authority,[62] this part of the history of money had and received was overshadowed permanently.

In *Taylor v Plumer*,[63] Plumer gave his stockbroker, Walsh, a draft to buy Exchequer bills. Walsh exchanged it for Bank of England notes, with which he bought US government stock and Portugese gold coins. Plumer's agent apprehended him in the process of attempting to abscond, and took the stock and coins. Walsh's assignees in bankruptcy brought an action against Plumer, alleging that title had vested in them through Walsh's act of bankruptcy.

The assignees conceded that a principal could recover specific goods, or the product of such goods, in the possession of a bankrupt agent who had acted in pursuance of the trust.[64] The line, they argued, was at property that was acquired in fraud of the trust.[65] In light of *Scott v Surman*, and several other authorities prior to *Taylor v Plumer*,[66] they ought to have been on firm ground. Lord Ellenborough, however, considered that that argument was 'mischievous in

[59] ibid 407.
[60] ibid 405.
[61] ibid 404.
[62] *Taylor v Plumer* (1815) 3 M & S 562, 105 ER 721.
[63] ibid.
[64] ibid 723.
[65] ibid 723.
[66] *Perry v Phelips* (1790) 1 Ves Jr 251, 30 ER 327; *Cox v Bateman* (1715) 2 Ves Sen 19, 28 ER 13; *Gladstone v Hadwen* (1813) 1 M & S 517, 105 ER 193.

principle, and supported by no authorities of law'.[67] Echoing the words of Willes J in *Scott v Surman*, but giving them an explanatory force that Willes J had not, he said:

> If the property in its original state and form was covered with a trust in favour of the principal, no change of that state and form can divest it of such trust …for the product of or substitute for the original thing still follows the nature of the thing itself…[68]

Thus, agents could now be made accountable – whatever the parameters of their authority – on the basis of an enduring metaphysical connection between the trust right and its product.

Prior to *Taylor*, the term 'tracing' described the process of locating physical money.[69] After it, the label also came to describe asset substitution, and in 1997 this emerged as a fully-fledged theory of exchange product tracing:

> The fundamental idea underlying tracing is that sometimes, for certain legal purposes, one asset stands in the place of another. A claim which could have been made in relation to the original asset is allowed in relation to the new asset… Tracing is the process which can allow the transmission of that claim to the new asset.[70]

Yet, the etymological implication of continuity remained crucial. It permitted judges and academics at once to point out that the exchange product was different from the right

[67] *Taylor v Plumer* (1815) 3 M & S 562, 105 ER 721, 725–726.
[68] ibid 726.
[69] *Holiday v Sigil* (1826) 2 Car & P 176, 172 ER 81; *Clarke v Shee & Johnson* (1774) 1 Cowp, 98 ER 1041. This is now considered to be the exclusive preserve of 'following': Lionel Smith, *The Law of Tracing* (OUP 1997).
[70] Lionel Smith, *The Law of Tracing* (OUP 1997) 3.

substituted,[71] *and* to insist that a sufficiently close association existed between them that a good deal of the explanatory work for the claim could be found in the substitution itself:

> [W]e trace value: it is the only constant that exists before, through and after the substitution through which we trace. It exists in a different form after the substitution, and that is what can justify a claim to the new asset.[72]

This has led to spirited disagreement about the appropriate categorisation of claims for which tracing is a prerequisite. If the old right *is*, in some meaningful sense, the right for which it is substituted, a 'continuing beneficial interest' can simply persist throughout the substitution.[73] This argument was preferred unanimously by the House of Lords in *Foskett v McKeown*.[74] For Birks, however, it would not do to elide new and old rights; the substitute right in the hands of the trustee was a new right, and a new justification must be found for any claim to it.[75] As that claim was not based on consent, nor any wrong, it must belong to unjust enrichment: although the substitute asset did not originate from the claimant, nevertheless it was obtained using something that did. Thus, the traceable product represented 'wealth that had moved from the claimant absolutely without her consent'.[76]

(ii) Value

---

[71] ibid 119.
[72] ibid.
[73] *Foskett v McKeown* [2001] 1 AC 102. Birks called this the 'leech theory', dismissing it for failing altogether to provide an explanation for the fact that the beneficiaries acquired a new and different right: Birks, 'Property, Unjust Enrichment and Tracing' (2001) 54 CLP 231, 244.
[74] ibid.
[75] Peter Birks, 'Property, Unjust Enrichment and Tracing' (2001) 54 CLP 231.
[76] ibid 246-247.

The role of value in unauthorised substitution is twofold: first, and in the ordinary way, the claimant points to an asset acquired by the defendant; secondly, and unusually, value also describes a connection between that asset and the one held by or for the claimant.

The second demands that we think about value in a different way from price or wealth. I have demonstrated elsewhere that when 'value' is deployed in tracing, it usually refers to the potential for exchange inherent in an assignable right.[77] Yet, this potential cannot be move independently of the thing, so that 'value' adds nothing to what we say when we describe a substitution, one right for another.[78] What we must explain – to which I turn now – is how it is that product of a rights exchange (or the value that it adds to the defendant's balance sheet) represents a *transfer* from the claimant.

(iii) Transfer

There are two dominant explanations for what I will call the 'Substitution Rule', which is that the claimant whose right is exchanged for another acquires a claim to the exchange product. Although they attract different labels – one 'unjust enrichment', the other 'property' – each depends upon the idea that the Substitution Rule restores to the claimant something that is rightfully hers, and each applies the Substitution Rule to: (i) a substitution made by a trustee without authority; (ii) a substitution made by a thief of some thing from the claimant.

For Birks, the 'acquisitive opportunities'[79] properly attributable to A (owner) are 'usurped' whenever A's asset is exchanged without her consent,[80] so that the substitute asset

[77] Tatiana Cutts, 'Tracing, Value and Transactions' (2016) 79 MLR 381, 395-396.
[78] ibid and James Penner, 'Value, Property and Unjust Enrichment' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of Unjust Enrichment* (OUP 2009) 309: 'When one realises the exchange value [of something one owns], what one must reliquish is one's property. One never has the two of them at the same time'.
[79] Peter Birks, 'Property, Unjust Enrichment and Tracing' (2001) 54 CLP 231, 245.
[80] ibid 246, fn 35; Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th ed, Sweet & Maxwell 2016) [7-14]. See also See Peter Birks, *An Introduction to the Law of*

in the hands of B (thief or trustee) – though it did not actually emanate from A – nevertheless represents a wealth-transfer from A to B. We saw above that Birks dismissed the notion that property could justify the Substitution Rule. Yet, a more refined version of that thesis accounts for that rule in a fashion very similar to his own. For Webb, the 'means to acquire other items of wealth through exchange' is an incident of A's ownership,[81] which B 'as a matter of fact' places herself in the position to exploit.[82] In the event of any such exploitation, the Substitution Rule ensures that it is A, not B, to whom the benefit adheres.[83] Thus, for both Birks and Webb, B is accountable because she has usurped an incident of A's ownership; the Substitution Rule diverts the fruits to A.

Let us first test this usurpation thesis against the example of the substituting thief. Here, the Substitution Rule clearly does not follow from a 'transfer' akin to a mistaken cash payment: we have already seen that no title moves from A to B, and the rule does not purport to undo the effects of any transaction between them. Rather, as above, we are dealing with an infringement of some aspect of the claimant's entitlement. The difficulty here lies in the additional step that the Substitution Rule requires us to take, which is to explain A's connection with the new asset.

Again, we must be careful to distinguish title from the thing to which it relates. What B 'as a matter of fact' acquires through theft is a *new* legal title to the thing stolen, and it is *this* claim that B exploits through substitution. A retains her title, and her claim against B is the same throughout, which is an action in respect of B's breach of an obligation not to interfere with the object of A's title.[84] That is the extent of the law's protection for legal title.

Restitution (revised edn, OUP 1989) 394 ('geometric multiplication'); Lionel Smith, *The Law of Tracing* (OUP 1997) 358–361.

[81] Webb (n 50) 183.

[82] ibid.

[83] ibid 184.

[84] The substitution also awards A a new claim against the recipient, unless, of course, the thing is money and the recipient is in good faith: *Miller v Race* (1758) 1 Burr 452, 97 ER 398.

Trustee substitutions present a similar explanatory hurdle for the usurpation thesis: the title that the trustee substitutes is her own; it is not the beneficiary's equitable claim, which persists for so long as a defence cannot be raised.[85] Yet, there *is* a broader repertoire of protections for equitable ownership, and not all support a duty that is negative in form.

The scope of the fiduciary role had expanded long before *Taylor v Plumer*: after 1726, the trustee was no longer accountable only for an asset acquired within her authority, or otherwise by drawing upon the trust fund; she was accountable for any asset acquired within a particular zone of activity linked to her position as trustee, as a matter of primary right.[86] The case for Walsh's liability might have been made in this way – not on the basis of any breach of duty or because Walsh was enriched unjustly at Plumer's expense – but because of a rule, developed in the early Georgian era, that the trustee who acquires a right whilst (mis)managing the trust fund cannot easily escape from her duty to hand it to her principal.

It must be emphasised that I do not mean to suggest that the expanded notion of fiduciary responsibility actually informed the decision in *Taylor v Plumer* itself, nor any case that has borrowed the logic of tracing from it (of which there are many). I have simply sought to show that the 'transfer' identified by the Substitution Rule cannot be readily explained with the conceptual tools that we have aggregated so far, and that it might help us to look, not only at what A had at the start of the story, but also at the scope and content of B's duties to her.

3. Bank Money

[85] Even if a defence *can* be raised to the claim of the beneficiary, it is now settled that this defence operates to hold the beneficiary's claim in abeyance, rather than to defeat it: *Independent Trustee Services v GP Noble Trustees* [2012] EWCA Civ 195; [2013] Ch 91.

[86] *Keech v Sandford* (1726) Sel Cas Ch 61, 25 ER 223. See further Lionel Smith, 'Constructive trusts and the no-profit rule' (2013) 72 CLJ 260.

Thus far, I have considered three instances of the old action for money had and received as it was invoked in cases concerning physical cash, each of which has been described as an action to reverse a defective ‘transfer of value’. I have sought to make good three claims: (i) that ‘transfer’ is a term of art, and it describes the legal mechanism by which wealth is conveyed from one party to another; (ii) that this feature differs in each category of money had and received; and (iii) that the term ‘unjust enrichment’ should be reserved for an unjust transfer of title.

In this part, I show that when we came to shape the framework for restitutionary claims to bank money paid, we failed to maintain our focus on the legal mechanism through which wealth passes. Instead, we took the passage of value *per se* as the fulcrum for liability. This precipitated two tests, which broadly correspond to Birks’ distinction between discrete and abstract value: (i) particularised as a notional cash asset, bank money could be followed through accounts in order to support the liability of a ‘direct’ or ‘indirect’ payee; (ii) conceptualised as a shift in wealth, the abstract account admitted any causal link between debit and credit. The conceptual poverty of each has led courts to extend liability to recipients of value with whom the claimant has no normative link.

By reframing the test as a search for some ‘single transaction’ to which A and B are each a party,[87] the Supreme Court decision in *Investment Trust Companies v Revenue and Customs Commissioners* offers us an opportunity to leave behind cash fictions, and to refocus our attention upon the legal mechanism by which a ‘transfer of value’ is constituted. In what follows, I argue that a bank transfer – effected by payor and payee bank as agents for the parties to it – is a legal mechanism sufficient to sustain a claim in unjust enrichment, and that this legal mechanism must be understood more narrowly than has been popular hitherto.

---

[87] *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29 [62] (Lord Reed).

A. Discrete Enrichment

(i) Translation

Given what has been said so far, it is not immediately clear what permits us to conclude that the parties to a bank transfer are also parties to a 'transfer of value' for the purposes of an action in unjust enrichment. In *Uren v First National Home Finance*,[88] Mann J considered that:

> There should be some proper connection between the payment of the money and the enrichment. That is usually achieved in unjust enrichment cases by demonstrating money flowing from A to B, or money flowing from A to B's benefit because, for example, it has been spent on B's property.[89]

In cases that involve the payment of bank money by A to B, that link attracts little discussion; it seems 'obvious that the defendant's enrichment must have been gained "at the claimant's expense" on any sensible view of what that term means'.[90] Yet, such statements overstate the simplicity of the explanatory task. In any bank transfer from A to B, and unlike the mistaken cash payment in *Kelly v Solari*, no asset changes hands.[91] Indeed, as Webb puts it, 'we might say there is no true transfer at all'.[92]

---

[88] *Uren v First National Home Finance Ltd* [2005] EWHC 2529 (Ch).
[89] ibid [26].
[90] Charles Mitchell, Paul Mitchell and Stephen Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) [6-02]: this remains from the 8th edition.
[91] *R v Preddy* [1996] AC 815.
[92] Webb (n 50) 98. This is true both for the notion that there is a title, and for the idea that some intangible asset has been assigned: *Libyan Arab Foreign Bank v Banker's Trust Co* [1989] QB 728, 750. See also *Agip v Jackson*

One way of explaining away this distinction is simply to make an argument for the analogical application of cash principles; the relevant 'transfer' is then simply located in a notional title-transfer. For Fox, there is no contradiction in recognising the nature of bank money as obligational, and – provided that 'due allowance is made for the different ways in which legal and beneficial title to money is enforced' – describing it by reference to principles of property.[93]

Webb, too, purports to solve the problem of identifying a 'transfer' with a functional argument for conceptualising bank money as cash:

> [M]y bank account is not a repository of cash and the transfer of funds from my account to yours is not a handing over of cash from me to you. But it serves the same function, taking funds at my disposal and making them available to you. And so while this transfer of funds is in one sense notional, since there need be nothing which passes from me to you… it is no mistake for the law to treat this sort of transfer as a payment, as (at least for most purposes) equivalent to the handing over of that same sum in cash.[94]

Thus, the claim in unjust enrichment to bank money unjustly paid is 'justified by an extension of the same reasoning as justifies my claim in the case where my mistaken payment takes the form of cash'.[95] Let us call this 'translation': for the purposes of an action in unjust enrichment,

[1990] Ch 265, 286 (Millett J) 'nothing passes but a stream of electrons', and *Agip (Africa) Ltd v Jackson* [1991] Ch 547, 561 (Fox LJ) 'nothing passes in specie'.

93 David Fox, *Property Rights in Money* (OUP 2008) [1.77].

94 Webb (n 50) 98-99.

95 ibid.

the relevant connection between the parties to a bank payment is supplied by treating bank money as if it were physical cash.[96]

(ii) Tracing and translation

Translation is mostly obviously at work in triangular situations, in which the intervention of some third party, C, assists in effecting the money transfer from A to B. In these cases, B's liability has been justified on the basis that, though A and B have not dealt with one another, B nevertheless received A's money asset.

In *Banque Belge v Hambrouck*,[97] an employee had forged his employer's signature, thereby procuring a transfer of some £6000 from his employer's account to his own account at Farrow's bank. Hambrouck then drew cheques on this account, giving them to his mistress, Mlle Spanoghe, who credited her account with corresponding sums. The Court of Appeal held that Banque Belge could recover £315 then standing in Mlle Spanoghe's account as its property. *Taylor v Plumer* permitted 'money though changed in character to be recovered, if it can be traced',[98] and as she had given no valuable consideration, Mlle Spanoghe could not 'set up a title derived from Hambrouck, who had no title against the true owner'.[99]

In *Trustee of FC Jones v Jones*,[100] Mr Jones had drawn cheques in his wife's favour on his insolvent firm. She used the funds thereby credited to her account to speculate successfully in potato futures. The trustee in bankruptcy was held to be entitled to 'trace his money at Midland Bank into the money in the defendant's account with the commodity brokers',[101] and

[96] Fox uses the term in a similar way: 'the full process of 'translation' from one monetary form to another is rarely spelled out' David Fox, *Property Rights in Money* (OUP 2008) [1.03].
[97] [1921] 1 KB 321.
[98] *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321, 330.
[99] ibid.
[100] [1997] Ch 159.
[101] *Trustee of FC Jones v Jones* [1997] Ch 159, 170.

to claim the proceeds of her investments as its property. Lord Millett called this claim 'exclusively proprietary',[102] concluding that, 'as from the date of the act of bankruptcy the money in the bankrupts' joint account at Midland Bank belonged to the trustee'.[103]

According to Burrows, these cases exemplify a 'title and tracing' exception to the ordinary rule that the claimant must be the 'direct provider' of the defendant's enrichment, which operates in the same way as unauthorised substitution: 'by means of tracing and title, a claimant can show that value in a substitute asset comprises a transfer of value from the claimant: one is tracing value as it is transferred from the claimant's asset to its substitute'.[104]

Yet, even if we were to admit unauthorised substitution as a species of unjust enrichment, it is not clear on what basis we are entitled to extrapolate from the conclusion in *Taylor v Plumer*, that a trustee who swaps one trust right for another can be made accountable for the product, to the conclusion that money in the account of some third party represents the traceable product of money debited from the claimant's account. Whilst 'tracing value' is intended to indicate a 'substitution… *by some person*',[105] the product of any putative substitution in a bank transfer from A to B *remains with A*. If a bank transfer is a substitution at all,[106] it is *two* substitutions: (i) A's right to her old balance for A's right to her new balance; and (ii) B's right to her old balance for B's right to her new balance. But this, of course, gives us no solution for our problem – which is to show that (i) and (ii) are connected.

There was a trick in the extension of tracing to bank payments, and we missed it. In *Banque Belge* and *FC Jones* their Lordships were not 'tracing value' through asset substitutions; they were *following* a notional money asset from the claimant's account to that

[102] ibid 168.
[103] ibid 166. This nominally produced the absurd result that the trustee in bankruptcy was creditor, and in practice permitted the claimant to recover the original sum and profits, all of which had been paid into court.
[104] Burrows (n 41) 119.
[105] Lionel Smith, *The Law of Tracing* (OUP 1997) 134 (emphasis added).
[106] This was doubted in *Robb Evans & Associates v European Bank Limited* [2004] NSWCA 82 [139], and *Hillig v Darkinjung* [2006] NSWSC 1217 [20].

of the defendant. This is how it was possible for each court to conclude that the claimant had *retained* title in each case (or to have had it revested automatically upon rescission).[107] Moreover, this is why Lord Millett saw nothing wrong with the conclusion that the trustee's claim in *FC Jones* was both a claim at law, *and* a property claim: the subject matter of that claim was not the bank debt – which could only have been owing to Mrs Jones, and which could not have been 'owned' at all – but the notional money asset that it represented.

Thus it is that the 'intervention of a third hand' simply 'makes no difference' in these cases.[108] Translation goes to show that *the defendant has received the claimant's property*, so that – in Birks' words – 'it does not matter how many intermediate hands it has passed through'.[109] Yet, this is not the logic of unauthorised substitution; it is (for better or worse) the logic of theft: the normative claim, which I will examine in what follows, is not that B substituted a right to which A had a claim; rather, it is that B received A's money asset, thereby breaching the exclusionary obligation of which property is constituted. It is the imposition of this obligation that we must justify, when we justify translation.

(iii) Justifying translation

Given the manifest reluctance to subject third parties to undiscoverable exclusionary duties for intangible assets,[110] one might have expected a robust defence for translation: in any bank payment from A to B, the asset is not merely intangible; it is altogether invented. In fact, very little has been written on the subject.

---

107 *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321, 332. For why this is difficult to make sense of without viewing the case through the lens of a notional money asset see Ben McFarlane, 'Unjust Enrichment, Property Rights, and Indirect Recipients' ' [2009] RLR 37, 41-42.
108 Birks (n 8) 86.
109 ibid 86.
110 *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1; *Your Response v Datateam Business Media* [2014] EWCA Civ 281.

Webb makes one argument from functional homogeneity: a bank transfer is 'equivalent to the handing over of that same sum in cash' because it amounts to the depletion of a facility to put the holder in funds that is 'matched exactly and directly' by an addition to that of the transferee.[111] But that nexus is precisely what is at issue, here: the kind of directness that Webb's thesis demands is the passage of an *asset*. The kind that a bank transfer actually displays involves aggregating the various payment instructions and acts of participating banks into 'elements of a single transaction, with the single intended effect of my paying you'.[112] The argument is bootstrap: a payment is only 'direct' in the relevant sense if we first pretend that bank transfers are property transfers; we cannot then locate our justification for treating them like this in their directness.

The current editor of *Mann on the Legal Aspect of Money* makes a different, instrumental, case: 'consistency and a respect for precedent' demand that bank media be made to 'display characteristics which are in most respects similar to the more traditional, physical form of money'; only then will bank money be made to circulate as such.[113] These characteristics are: (i) a money transfer must be treated as a discharge of an equivalent liability for which it is paid, and (ii) money must be generally irrecoverable from a good faith payee.[114]

But the distinction between (i) and (ii) is key. We saw in the first part of this article that the point of having an idiosyncratic private property system for cash is to ensure the free currency of money by affording confidence to the holder that they will not be deprived of it.[115] For bank payments, that confidence is *already* supplied by the irrevocability of the payment instruction by which credit is transferred.[116] The rule in *Miller v Race* is necessary only if we first pretend that bank money is property – which is precisely the step for which we still lack

[111] Webb (n 50) ibid 99
[112] ibid.
[113] ibid.
[114] ibid.
[115] *Miller v Race* (1758) 1 Burr 452, 97 ER 398.
[116] *The Brimnes* [1973] 1 WLR 386; *Tayeb v HSBC Bank* [2004] EWCH 1529, [2004] 4 All ER 1024.

an explanation. What we need, it turns out, is an argument for *undermining* transactional security, and we do not yet have one.

If we cannot find a good justification for treating bank money as physical cash, we must look elsewhere to explain how it is that a bank payment from A to B, which is not an asset transfer, nevertheless comes to substantiate the requisite connection for the purposes of an action in unjust enrichment.

A. Abstract Enrichment

(i) From causation to transaction

We saw above that an abstract conception of value encourages a broad causal view of the event by which it is conveyed.[117] Accordingly, Birks advocated adopting a causal approach to 'at the expense of' in *Unjust Enrichment.*[118] In 2011, the editors of *Goff & Jones: The Law of Unjust Enrichment* adopted this approach, concluding that: 'a "but for" causal connection' might be enough to establish the requisite nexus.[119] Henderson J was persuaded of the merits of this move at first instance in *Investment Trust Companies v Revenue and Customs Commissioners*,[120] and in 2015, the UK Supreme Court adopted his formulation *in toto*.

---

[117] See the text accompanying fn 18-23.

[118] Birks (n 8) 89-98. See also Stephen Watterson, 'Direct Transfers" in the Law of Unjust Enrichment' (2011) 64 CLP 435.

[119] Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff & Jones: The Law of Unjust Enrichment* (8th edn, Sweet & Maxwell 2011) [6-25]. They seek to clarify this approach in the latest edition. They state that: 'On further reflection, we consider that it would be more conceptually accurate, and less productive of misunderstanding, to place a stronger emphasis on the need for a qualifying "transaction" involving the claimant and the defendant. It is the transaction that provides the qualifying link, rather than causal links alone' Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th ed, Sweet & Maxwell 2016) [6-09].

[120] *Investment Trust Companies* (n 1) [68].

In *Menelaou v Bank of Cyprus*,[121] the claimant bank sought to be subrogated to an unpaid vendor's lien with respect to a property, belonging to Melissa Menelaou, that was purchased with funds procured by releasing its charge on her parents' property. A majority of the Supreme Court concluded that the claimant could substantiate the connection by proof that the defendant's enrichment would not have occurred 'but for' the claimant's loss: 'The question in each case', said Lord Clarke, 'is whether there is a sufficient causal connection, in the sense of a sufficient nexus or link, between the loss to the [claimant] and the benefit received by the defendant'.[122]

I have already argued that the move from abstract value to a causal test involves a conceptual mistake. The abstract account of enrichment does not require us also to give an abstract account of 'transfer'; if we do, we will extend liability to very many defendants with whom the claimant has no normative link. Fortunately, that extension was to be short-lived.

In *Investment Trust Companies v Revenue and Customs Commissioners* (hereafter '*ITC*'),[123] the claimants sought restitution from HMRC of sums paid by investment managers ('the Managers') to discharge a putative tax liability from which the Managers were in fact exempt under EU law.[124] The claimants sought to ground their claim in an earlier payment that they had made to the managers in respect of services provided by the latter, called 'VAT' and paid on the understanding that it was so due. Giving judgment for the Supreme Court, Lord Reed rejected the causal premise of the claimants' arguments for a want of consistency with 'centuries' worth of relevant authorities'.[125] Lord Reed considered that a claim in unjust enrichment required proof of a 'direct transfer',[126] and that only a direct payment, or 'a single

121 *Menelaou v Bank of Cyprus* [2015] UKSC 66, [2016] AC 176.
122 ibid [27] (Lord Clarke).
123 *Investment Trust Companies* (n 1).
124 ibid [9].
125 ibid [40].
126 ibid.

scheme or transaction'[127] could substantiate such a transfer. In the instant case, there was no such 'single scheme'; rather, there were 'two separate transactions - first, between the Claimants and the Managers, and secondly between the Managers and the Commissioners'.[128] Thus, HMRC's enrichment was not at the claimants' expense.

ITC represents a welcome move away from both the fictional premise of translation, and the conceptual misstep of the causal model. By recognising openly that 'transfer of value' is not a *test* for liability – rather, it is a label that is attached to the conclusion that some qualifying event has occurred – Lord Reed encourages us to focus our attention upon the normative role that a bank transfer plays in an action for restitution of an unjust enrichment.[129] The task, then, is to describe that qualifying event more precisely.

(ii) Bank transfers and transactions

According to Smith, in any action to undo an unjust payment, it is possible to determine 'who has been enriched, and at whose expense' by simply 'determining what the rights and obligations of the parties were before the payment and after it'.[130] But it is not clear precisely *which* feature of the rights and obligations of A and B who are parties to a bank transfer will help us to conduct this enquiry. It cannot be the presence of an obligation to pay: in *ITC*, as in *Kelly v Solari* before it, the problem with the payment was precisely the *absence* of such an obligation. Indeed, if payment refers the discharge of a liability to pay, then unjust *payment* is something of a misnomer.

[127] ibid [61].
[128] ibid [72].
[129] ibid [43].
[130] Lionel Smith, 'Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction' (1991) 11 OJLS 481, 519.

Yet, this is not the only putative change in the legal relations upon which we might focus. Let us assume that A and B are customers of separate banks – Bank A and B respectively. In order to effect a credit transfer to B's account with Bank B, A issues a payment instruction to her bank, Bank A. If the account is in credit, Bank A must usually accept and comply. To do this, Bank A takes two steps: it alters the content of its own payment liability to A, and issues another payment instruction to Bank B; this is effected either by debiting Bank A's account with Bank B, or by adjusting the balances of each with some common banker.[131] And this, I think, is what is meant by the notion that there is a 'direct transfer' in these cases: A and B are each on the receiving end of the steps that participating banks take to alter their legal positions to give effect to A's payment instruction.[132]

McFarlane has described this legal mechanism as a loss and acquisition of rights;[133] elsewhere, it has been described as a mere alteration (reduction or accretion) to A and B's rights.[134] It is worth pointing out that the nature of Bank A and Bank B's liability to pay is just that – a liability, until a demand for payment is made.[135] The term 'right' must, therefore, be understood broadly here. Whether there is indeed a loss and acquisition of rights, understood thus, simply depends upon the level of abstraction at which the transfer is viewed. If the balance of each of A and B's account is £10, and A transfers £5 to B, we can either say that: (i) A has lost a claim to £10, acquiring a claim to £5 in its place, and B has lost a claim to £10, acquiring a claim to £15 in its place; or (ii) the content of the banks' payment liabilities have been altered,

---

131 Fox [5.20]. Of course, this is not usually done on the basis of a single transaction, but rather the net sums owing by each once the process of clearing is complete: [5.21].

132 Mitchell is correct, I think, to point out that what matters for the purposes of determining who has the right to sue is whether the bank is entitled to resort to the client's account in the event of an impugned (e.g. unauthorised or mistaken) payment. See further: Charles Mitchell, 'Banks, Agency, and Unjust Enrichment' in John Lowry and Loukas Mistelis (eds) *Commercial Law: Perspectives and Practice* (LexisNexis Butterworths, 2006) 109-121.

133 Ben McFarlane, 'Unjust Enrichment, Rights and Value' in D. Nolan and A. Robertson (eds), *Rights and Private Law* (Hart 2014).

134 Fox [5.23].

135 *Libyan Arab Foreign Bank v Banker's Trust Co* [1989] QB 728.

but not novated. Either way, a bank transfer is a legal mechanism distinct from an asset transfer; that mechanism connects A and B because participating banks act as agents on their behalf.

If agency meets the test for directness in bank payments cases, what remains of the notion that a 'single scheme or transaction' suffices to show that B is A's direct enrichee? I will deal first with one type of indirect transactional link for which some academics have argued; second, I will address two cases that Lord Reed considered in *ITC*,[136] and another case for which judgment was handed down on the same day as *ITC*.[137]

(iii) Subrogation to a causally-connected transaction

There may well be an argument from expediency for allowing the claimant to bypass her payee, and proceed directly against a counterparty to some defective payment that is *not* the claimant's own.[138] This can be explained straightforwardly by reference to the facts of *ITC*. As it stood, the managers could not have recovered from HMRC for the sums in question, those claims being time-barred under s80(4) of the Value Added Tax Act 1994. But suppose that the managers could have recovered from HMRC; rather than requiring the managers to sue, and the claimants to sue the managers in turn, the same result is achieved at substantially less time and cost by allowing the claimant to sue HMRC directly.

Importantly, however, subrogation to a causally-connected transaction must only be allowed if both claims are valid; if – as it happened – HMRC had a defence to the managers' claim, it ought to be entitled to avail itself of that defence in a direct action by the claimants.[139]

136 *Banque Financiere de la Cite SA v Parc (Battersea) Ltd* [1999] 1 AC 221; *Menelaou v Bank of Cyprus* [2015] UKSC 66; [2016] AC 176.
137 *Lowick Rose v Swynson* [2017] UKSC 32.
138 Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th ed, Sweet & Maxwell 2016) [6-28]. James Edelman and Elise Bant, *Unjust Enrichment* (2nd edn, Hart 2016)105 (though they call it 'tracing').
139 Cf James Edelman and Elise Bant, *Unjust Enrichment* (2nd edn, Hart 2016) 100-109.

(iv) Rectification by subrogation

Lord Reed's widened notion of a 'composite transaction' was informed by two cases:[140] the first was *Banque Financière de la Cité v Parc (Battersea) Ltd*;[141] the second was *Menelaou v Bank of Cyprus*.[142] In what follows, I argue that: (i) these cases do not exemplify a transactional nexus between claimant and defendant; and (ii) their logic is not that of fixing, not reversing, transactions, so that (iii) they should not be allowed to obscure the contribution that *ITC* makes to identifying the legal mechanism by which a transfer of value is effected.

In *Banque Financière*, a loan by the claimants ('BFC') to the first defendants ('Parc') had been effected in two steps, one Mr Herzig acting as intermediary. That loan was made on the understanding that Parc would repay part of a sum due to Royal Trust Bank (Switzerland) ('RTB'), secured by a first charge upon its property, and that all other claims by companies in the group to which Parc belonged would be subordinated to that of BFC. Mr Herzig did not, however, have authority to bind one such company – Omnicorp Overseas Ltd ('OOL') – whose debt was secured by a second charge over Parc's property. Parc's payment had the effect of discharging RTB's charge, and promoting that of OOL.

Lord Steyn dealt with 'at the expense of' as if there had been a single step, insisting that the interposition of Mr Herzig could not be allowed to obscure the 'reality that OOL was enriched by the money advanced by BFC via Mr Herzig to Parc'.[143] The remedy from subrogation was 'a means by which the court regulates the legal relationships between a plaintiff and a defendant or defendants in order to prevent unjust enrichment';[144] applied to the

[140] *Investment Trust Companies v Revenue and Customs Commissioners* (n 1) [65].
[141] [1999] 1 AC 221.
[142] [2015] UKSC 66; [2016] AC 176.
[143] ibid 227.
[144] *Banque Financiere de la Cite SA v Parc (Battersea) Ltd* 236 [1999] 1 AC 221.

instant case, that meant subrogating BFC to RTB's first charge (revived), for the purposes of securing BFC's repayment in priority to OOL.

Banque Financière is not an easy case. Even if we are able to ignore the interposition of Mr Herzig, this does not warrant the conclusion that OOL was a party to the impugned loan; if it had been, the claim would not have been necessary at all. It therefore seems impossible to avoid the conclusion that OOL's legal position was altered as a causal product of the loan to which it was not party.

The second problem is that the remedy follows an entirely different pattern from the restitutionary action to reverse an unjust enrichment. The counterfactual that ordinarily governs the claim in unjust enrichment is 'what position were the parties in before the transaction occurred?'; in *Banque Financière* the court asked 'what position would the parties have been in if the mistake had not been made?'. This is subtly but importantly different: undoing the transaction would have meant awarding BFC a personal claim to the value of the loan (presumably against Parc, the court having concluded that the interposition of Mr Herzig was irrelevant); putting the parties in the position in which they would have been if BFC had secured OOL's agreement to the conditions of the loan meant OOL ceding priority to BFC. This is *fixing* a transaction, not undoing one.[145]

In *Menelaou*, too, it was precisely the lack of Melissa's signed consent to the grant of a charge that rendered it invalid. To find that the 'substance of the transaction' nevertheless included both the bank's agreement with the Menelaous and Melissa's receipt of a charge-free property undermines the initial conclusion that she was not privy to the impugned transaction. Like *Banque Financière*, Melissa was in the position of a third party. Unlike *Banque Financière*, the unpaid vendor's lien was not something for which the bank could have

[145] Lord Sumption in *Lowick Rose v Swynson* [2017] UKSC 32 [30]: it 'does not restore the parties to their pre-transfer position. It effectively operates to specifically enforce a defeated expectation'.

bargained. Nevertheless, it was in function precisely the same as the charge for which it did. I do not, therefore, think that the court was wrong to frame the case similarly.[146] Thus, in each case, the remedy from subrogation supplied some missing peice of the transaction for which the claimant intended but failed to bargain.

The last case that I will consider in this section is *Lowick Rose v Swynson*.[147] In that case, Hunt owned and controlled a company, Swynson Ltd, from which he lent £15m to Evo Medical Solutions Ltd ('EMSL'), to enable EMSL to finance the management buy-out of a company trading as 'Evo'. Before entering into this transaction, Swynson and EMSL instructed a firm of accountants, who later adopted the name 'Lowick Rose LLP', to carry out due diligence on Evo. This Lowick Rose did negligently, failing to draw attention to various problems with Evo's finances. The buy-out went ahead, and Evo subsequently became a wholly-owned subsidiary of EMSL.

In the course of 2007, Evo began to experience cash-flow problems, and EMSL began to default on its interest payments. Hunt caused Swynson to lend some £4.75m to EMSL between 2007 and 2008. Evo's financial position did not improve. On 31 December 2008, Hunt and EMSL entered into a refinancing agreement, under which Hunt personally loaned £18.663m to EMSL, to be applied in satisfaction of two of the original loans. EMSL did this, with the result that only one loan of £3m remained outstanding. Hunt's objectives were to twofold – to remove a non-performing loan from Swynson's books, and to avoid tax that would otherwise have accrued.

By the time the case reached the Supreme Court, the only remaining question concerned the status of the refinanced loans. Lowick Rose argued that the repayment of those loans (albeit with money borrowed from Hunt) meant that its negligence had caused Swynson no

146 The other explanation – which was Lord Carnwath's position in the Supreme Court – is that the bank had an equitable interest in the purchase money, which interest it could trace to the house.
147 Indeed, the latter was postponed to allow for the former.

recoverable loss. Swynson and Hunt made several arguments in response, one of which was a claim that Hunt should be subrogated to Swynson's claim against Lowick Rose, the latter having been unjustly enriched by the negation of its liability to pay damages.

Lord Sumption considered that the various cases in which subrogation was awarded as a remedy for unjust enrichment could be united by following ideas: (i) 'the absence of the stipulated benefit disrupted a relevant expectation about the transaction under which the money was paid'[148] and (ii) 'the role of equitable subrogation is to replicate as far as possible that element of the transaction whose absence made it defective'.[149]

In the present case, by contrast, Hunt, 'received the whole of the benefit from the transaction for which he had stipulated',[150] namely, the covenant to repay (together with security) and 'cleaning up Swynson's balance sheet and reducing its liability to tax'.[151] In these circumstances, he said, subrogation 'is being invoked so as to enable Mr Hunt to exercise for his own benefit the claims of Swynson in respect of an unconnected breach of duty under a different transaction between different parties more than two years earlier'.[152] The defendant's benefit was thus 'purely incidental'.[153]

Again, I do not think that the answer lies in a search for the interdependence of transactions; like *Banque Financière* and *Menelaou*, the defendant in *Swynson* was a third party to the impugned transaction. If subrogation was appropriate in the former and not in the latter, it must be because the court thought that Hunt's mistake regarding the effect of his loan on Swynson's extant claim was not – for better or worse – a 'relevant expectation'.

148 *Lowick Rose v Swynson* [2017] UKSC 32 [31].
149 ibid.
150 ibid [32].
151 ibid
152 ibid.
153 ibid [20].

None of this has been to make any substantive claims about how rectification by subrogation should work, nor whether it should exist at all.[154] It has simply been to argue for the inoculation of Lord Reed's 'single transaction' tool from these cases. In this regard, I welcome Lord Sumption's conclusion that it would be a mistake 'to try to fit the subrogation cases into any broader category of unjust enrichment'.[155]

4. Conclusion

In the 9th edition of *Goff & Jones: The Law of Unjust Enrichment*, the editors wrote that 'there are risks in taking too literally both the idea of a 'transfer', and the idea that what is 'transferred' is 'value''.[156] I have sought to show the many ways in which those risks have materialised. When we made to mediate an economic shift from cash to bank money, we failed to maintain an appropriate focus on the legal mechanism by which a 'transfer' is constituted. In this way, we have come to extend liability in unjust enrichment to very many defendants with whom their respective claimants had no normative link.

In that respect, the Supreme Court decision in *Investment Trust Companies v Revenue and Customs Commissioners* should be welcomed. A bank transfer from A to B is not an asset transfer, but it does involve a legal mechanism that that can be described readily as a 'transaction'. However, if we do allow the notion of a transaction to inform the way in which we go about showing that there is a 'transfer' of the requisite kind, we must not attempt to squeeze within it cases that bear only a passing resemblance to that central case. The conceptual health of unjust enrichment depends upon it.

[154] Though it should be clear that it gives substantial assistance to a claimant whose mistake is unilateral, with an immediate and substantial cost to a third party
[155] *Lowick Rose v Swynson* [2017] UKSC 32.
[156] Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th ed, Sweet & Maxwell 2016) [6-04].