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Citation for published version:

MacQueen, H 2015, 'Robin Evans-Jones, UNJUSTIFIED ENRICHMENT VOLUME 2: ENRICHMENT ACQUIRED IN ANY OTHER MANNER', *Edinburgh Law Review*, vol. 19, no. 1, pp. 147-150.
<https://doi.org/10.3366/elr.2015.0260>

Digital Object Identifier (DOI):

[10.3366/elr.2015.0260](https://doi.org/10.3366/elr.2015.0260)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

Edinburgh Law Review

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Robin Evans-Jones, UNJUSTIFIED ENRICHMENT VOLUME 2: ENRICHMENT ACQUIRED IN ANY OTHER MANNER

Edinburgh: W Green. 2013. xxv + 201 pp. ISBN 978 0 414 0849 5. £150.

With this book Robin Evans-Jones completes a two-volume project the first part of which appeared in 2003. While the claim that “this book is the first major systematic treatment of the Scottish law of unjustified enrichment” (para 1.01) overlooks the late Bill Stewart’s *Restitution* (1992, with supplement 1995), it is probably fair to say that the latter work was premature and overly enthusiastic about the structure proposed for Scots as for English law by the also now sadly late Peter Birks in the mid-1980s. The model espoused instead by Professor Evans-Jones in his two volumes is that of German enrichment law. It, as shown by the scholarship of Evans-Jones himself and a number of others, most notably Professor Niall Whitty, provides a much better “fit” for and explanation of the Scottish material on the subject; while Birks himself famously renounced his initial approach in favour of one much closer to that found in Germany. In Scotland today, as Evans-Jones further remarks, it is “universally agreed” amongst legal writers that this is “the best way in which the subject should now be organised” (para 1.01); “[a] consensus has emerged that the causes of action of the law of unjustified enrichment as a whole are usefully grouped according to the manner in which the enrichment was acquired” (para 1.52). Thus an approach founded on the manner of enrichment (whether by way of deliberate transfer to or unauthorised imposition upon the enriched party, or by that party’s interference with the rights of the other), plus the absence of a legally valid basis for retention of the enrichment by the defender (such as contract or gift), is to be seen in Martin Hogg’s *Obligations*, the relevant chapter of the last two editions of *Gloag & Henderson*, and this reviewer’s student introduction to the subject (which has so far appeared in four successive incarnations between 2003 and 2013). It will also be the scheme used in Niall Whitty’s forthcoming exposition in a *Stair Memorial Encyclopaedia* reissue.

This consensus in the literature is not yet, however, reflected in the decisions of the courts, even though it was indeed the judges who in the 1990s overthrew the old world of the “three Rs” – repetition, restitution and recompense – in the three great cases of *Morgan Guaranty Trust Co of New York v Lothian Regional Council* 1995 SC 151, *Shilliday v Smith* 1998 SC 725 and *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90. Relatively few enrichment cases since then have found their way to the upper levels of the Scottish court system, so the lack of authoritative judicial endorsement of the academic position is perhaps not surprising; but it makes life difficult for first instance judges and those arguing the law before them. It is apparent from now numerous examples, some of which Evans-Jones discusses in his opening chapter, that the struggle to come to grips with the law has often not got very far beyond the general propositions that enrichments are unjustified and fall to be reversed unless supported by a legal basis, and that this is an area of law informed by equity. The result is, as pointed out elsewhere, that

we face the danger identified by the great American comparatist John P Dawson in his famous book *Unjust Enrichment* (1952), that judges will either “jump off the dock” (p 8) or “rocket up into the stratosphere” (even if in the latter scenario they first “fasten their seat belts”) (p 12). This may have disastrous results for the predictability and

certainty of the law, with recovery denied in cases where it should have been allowed, or allowed where it should have been denied.¹

The key to a better understanding, as Evans-Jones re-argues forcefully in the first two chapters of the present volume, lies in probing further than was possible in the case itself, Lord President Rodger's comment in *Shilliday*:

As the law has developed, it has identified various situations where persons are to be regarded as having been unjustly enriched at another's expense and where the other person may accordingly seek to have the enrichment reversed. The authorities show that some of these situations fall into recognisable groups or categories.²

Shilliday was a case about a *conferral* of an enrichment upon the defender by the pursuer for a purpose that failed, conferral or voluntary transfer from one party to another being one of the major groups or categories of enrichment which is itself divided into further groups corresponding broadly with the *condictiones* of Roman law – *indebiti*, *causa data causa non secuta*, *ob turpem causam*, *ob causam finitam*, and so on. This was also in essence the field covered by the actions of repetition and restitution in the world of the three Rs, and the subject-matter of Evans-Jones' first volume. In *Shilliday* Lord Rodger did not have to go on to discuss the third R, recompense; in broad terms once again, this is the area which, for those whose understanding of the subject first developed under and is still shaped by the old currency, is now tackled in this second volume.

“Recompense” was never a very satisfactory way of categorising the cases that were grouped under that rather opaque heading. Evans-Jones notes that, while the category came to be defined by certain “marks or notes” (Lord Dunedin's phrase in *Edinburgh and District Tramways Co v Courtenay* 1909 SC 99 at 105), the random-ness with which they were developed through the cases prevented them from working as an overall analytical or even usefully descriptive tool, in part because some (enrichment of one by another without intention to donate) were too wide, while others (requirements of the pursuer's loss while not acting for its own benefit, error, and the non-existence of another remedy) did not apply in all cases. German law's method of grouping enrichment cases outside conferral/transfer is to be preferred. First there are the cases of interference with another's property rights without a legal ground for doing so; next come the cases where an unauthorised benefit is in good faith imposed upon another; and finally there are the cases of payment of another's debt or performance of another's duty. The great attraction of these factually described groupings is well caught by Evans-Jones' quotation (at para 2.03) of James Gordley's summary of the thinking of one of their German progenitors, Ernst von Caemmerer:

When it is a question of applying a general clause that is framed in so broad and general a way as the maxim of “unjust enrichment” one cannot use “abstract and general criteria of application”. A jurist, “like a judge in a system of case law”, must identify “groups of cases and types of claims”. To do so is not merely the first step in the analysis. It is the only way that the principle can be made concrete.

Evans-Jones also demonstrates how these fact-based categories themselves developed from even more specific paradigm cases: the interference category from the remedies

¹ Hector MacQueen, *Unjustified Enrichment Law Basics* (3rd edn, 2013), Preface.

² *Shilliday v Smith* 1998 SC 725, at 727. Evans-Jones italicises the second sentence when he quotes this dictum (para 1.51).

provided originally in Roman property law to the person deprived of ownership by a specifier who had put the object of property beyond vindication; imposition from the claim of the good faith builder on another's land that also existed in Roman law; and payment of another's debt from the Roman law institution of *negotiorum gestio*. The development illustrates the slow movement of the law from the particular to the more general, or, as Evans-Jones would have it, from the foundational cases to those that, through the filter provided by the general principle (which was of course also identified in Roman law, by the classical jurist Pomponius in the second century CE), are analogous to those previously identified.

The biggest difficulty with the new approach is of course that the main source material – the decisions of the courts and the authoritative writings from Stair on – is by and large not couched directly in the terms now being advocated. There is accordingly a job to be done in showing how the cases in particular may be made to fit the scheme without distorting them. A notable feature of the central chapters of Evans-Jones' treatise is the detailed analysis of various decisions long recognised as leading ones in the field, showing where they may be placed in the new map of the law. This ought to help pleaders in court who understandably have greater comfort dealing with the authority provided by precedent compared to teasing out the implications of principle for the particular set of facts before them. From time to time help is sought in comparative law: mostly South African texts and decisions, and only very occasionally English law, since the latter is by and large quite different from Scots law in its approach and its results in both interference and imposition cases. There is however little need to worry about Roman law concepts or Latin terminology here, by comparison with the first volume's detailed discussion of the *condictiones* as the continuing basis of Scots law in conferral/transfer cases post-*Shilliday*.

The consensus of the Scottish legal writers on basic structure does not necessarily extend to points of detail within that structure. In accordance with articles published *en route* to this volume, Evans-Jones argues that cases usually assigned to the imposition category, such as *Newton v Newton* 1925 SC 715, should instead be treated as instances of conferral/transfer, usually under the sub-heads of *indebiti* and *causa data causa non secuta* (paras 5.07-5.18). This is generally persuasive. But his separation out from the imposition category of the payment or performance of another's obligation rests on the unconvincing grounds that the third party's action does not create any new burden for the defender but merely puts a new creditor in place, and that in fact the debtor often consents to the third party's action (para 2.24). It is surely doubtful, however, that any claim is enrichment-based if the debtor has consented to the third party's action, while in the absence of consent a new creditor in a new obligation is surely "imposed" upon the debtor. Evans-Jones also adopts a relatively narrow approach to the interference category, focusing mainly on the enriched party's use of another person's property rights as an action which is that other party's exclusive preserve in law. While the unauthorised taking of a service (for example, by a stowaway on a ship or aircraft) may fall within the scope of interference (thus making the stowaway liable to pay for the transportation he or she receives), it is suggested that mis-use of a purely contractual right cannot. So *Teacher v Calder* (1899) 1 F (HL) 39, denying a claim to a contracting party for the gains made by his co-contractor through breach of the contract, is correctly decided as a matter of enrichment law, while the more recent English decision of *Attorney General v Blake* [2001] 1 AC 268 should not be followed (paras 4.30-4.32). Breach of fiduciary duties gives rise to claims for wrongfully made profits, but since these are not generally part of the law of unjustified enrichment (although there may be concurrency of claims in some factual contexts) they are dealt with in an appendix which also

covers in critical vein constructive trusts and the “knowing receipt” doctrine apparently received from English law by the First Division in *Commonwealth Oil & Gas Co Ltd v Baxter* 2010 SC 156. Obligations of relief and indemnity are also not, despite contrary judicial statements, to be explained as an aspect of unjustified enrichment (paras 2.60-2.66). Critical to their exclusion, and that of fiduciary obligations, is the absence of the general enrichment defence of change of position.

Ten years ago I welcomed the first volume in this project as reaching half-way towards a redefinition of Scots law in its subject area.³ Now that the project is complete, it may surely be more than possible for practitioners and the courts to see the law, as it were, whole, and to locate whatever the instant issue may be within that overall framework. With the reinforcements soon to be provided by Niall Whitty also coming to hand, the way should be fully open for judicial acceptance that the enrichment revolution which the courts initiated in the 1990s has indeed been completed by the jurists. Robin Evans-Jones deserves our thanks and plaudits for the superb completion of a task for which the Augean stable metaphor is particularly apt. A river of juristic analysis of the highest quality has swept away the remaining detritus of the three Rs. We should now be in a position to move the law forward on its new footings with confidence and certainty.

Hector MacQueen
Scottish Law Commission

³ Book review, 2004 SLT (News) 118-120.