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Citation for published version:

MacQueen, H 2016, 'The Sophistication of Unjustified Enrichment: A Response to Nils Jansen', *Edinburgh Law Review*, vol. 20, no. 3, 3, pp. 312-325. <https://doi.org/10.3366/elr.2016.0361>

Digital Object Identifier (DOI):

[10.3366/elr.2016.0361](https://doi.org/10.3366/elr.2016.0361)

Link:

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

Document Version:

Peer reviewed version

Published In:

Edinburgh Law Review

Publisher Rights Statement:

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The Sophistication of Unjustified Enrichment: A Response to Nils Jansen

Hector MacQueen*

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A. INTRODUCTION

Nils Jansen's elegant and thought-provoking paper in the immediately preceding edition of this journal is a discussion of the development of "enrichment law" (if I can call it that) in the major German-speaking jurisdictions.¹ The story he tells, if I may presume to render it in a sentence, is one of the development towards an apparently unified law of unjustified enrichment which culminated in §§812–816 BGB in 1900, followed by a disintegrative process over the last 116 years which was inevitable given that the unification was of ideas which were (and are) actually irreconcilable with each other. He remarks towards the end of his paper on possible parallels with England; but it is surely fair to say that the unification of the English law began no more than fifty years ago, with the publication of the first edition of Goff & Jones's *Law of Restitution*;² and quite arguably it was not fully articulated until the publication of Peter Birks' *Law of Restitution*³ almost twenty years later. Even now, the

* Scottish Law Commissioner and Professor of Private Law, University of Edinburgh. This is a very lightly revised version of what was initially intended to be an orally delivered response to Nils Jansen's presentation of his paper at a seminar in the Edinburgh Law School on 26 February 2016. I would like to take the opportunity to dedicate this short paper to the memory of Professor Gareth Jones, who died on 2 April 2016. I owe much to his friendly, witty, and wise encouragement in my early days of thinking seriously about problems of unjustified enrichment.

¹ N Jansen, "Farewell to Unjustified Enrichment" (2016) 20 EdinLR 123.

² R Goff and G Jones, *The Law of Restitution* (1966).

³ P Birks, *An Introduction to the Law of Restitution* (1985).

ground is contested and the future uncertain; just possibly, however, the disintegrative part of the process has already begun.

Professor Jansen does not say anything about Scotland beyond noting our dependence in recent years on German thinking to develop our law of unjustified enrichment, notably in the writings of Niall Whitty and Robin Evans-Jones. It may help Scots lawyers to orientate themselves in relation to Professor Jansen's paper, however, if I say a few words about how we got to where we are today.

B. THE EVOLUTION OF UNJUSTIFIED ENRICHMENT IN SCOTS LAW

I think it would be generally agreed that the starting point towards the modern understanding of Scots law in this area is titles 7 and 8 of Book I of Stair's *Institutions*,⁴ respectively entitled "Restitution" and "Recompense, or Remuneration". Dot Reid has shown pretty conclusively that Stair derived the labels "restitution" and "recompense" from Aquinas' *Summa Theologica*.⁵ The general context in which the two titles are placed is Stair's account of personal rights, or obligations; real rights, or property, are dealt with in Book II. As is well-known, Stair divided obligations into two categories: the *obediential*, put upon men by the will of God, not by their own will (although such obligations might only become concrete "by the mediation of some fact of ours"), and the *conventional*, "such as we are bound by and through our own will, engagement or consent".⁶ Restitution and recompense were both obediential obligations, alongside those of husband and wife, parent and child, tutor and pupil, curator and minor, and "obligations of reparation of delinquency and damage", i.e. delict.⁷ Promise and contract were the most general forms of conventional obligation, dealt with in title 10; Stair then went on to deal with the particular contracts of loan, mandate, custody or deposit, permutation and sale, location, and society.⁸

⁴ J Dalrymple, Viscount Stair, *The Institutions of the Law of Scotland* (1681; 2nd edn, 1693). I have used the tercentenary sixth edition of Stair's *Institutions*, edited by D M Walker and published by Edinburgh University Press in 1981.

⁵ D Reid, "Thomas Aquinas and Viscount Stair: The Influence of Scholastic Moral Theology on Stair's Account of Restitution and Recompense" (2008) 29 *J of Leg Hist* 189.

⁶ Stair, *Inst* 1.3.3–4.

⁷ Stair, *Inst* 1.4–6.

⁸ Stair, *Inst* 1.6–16. Title 1.8 deals with accessory obligations; title 1.13 with liberation from obligations.

It is an important point for the present discussion that, for Stair, restitution and recompense are distinct headings in the law of obediencial obligations, and although they are treated next to each other, there is no explicit linking via any overarching enrichment concept or principle. Rather, to simplify somewhat, for Stair recompense comes in at the point when restitution ceases to have effect.

Stair's account of restitution, "the obligations whereby men are holden to restore the proper goods of others", is quite specific that it is "not by contract or consent".⁹ He is also at pains to distinguish the obligation of restitution from vindication of property. Restitution, he says, "*may seem to be an effect of property*"; but actually it

is a personal right, which is a power of the owner to demand it, not only when it is in the possession of the haver, but if he hath fraudfully put it away; and yet it is his [*i.e. the haver's*] once having it that obliges him.¹⁰

Further, the haver's fraud may be a delict, but it is not that wrong which gives rise to the obligation of restitution, which rather "continues ... as if he [*the haver*] yet had it".¹¹ Stair then goes on to disagree with Grotius who, he says (and as Nils Jansen also remarks¹²), made the obligation of restitution arise from dominion and property and so, says Stair, from tacit consent. This comment is because Grotius had stated in *De Iure Belli et Pacis*, that "this obligation [of restitution] is binding upon all men, as if by a universal agreement", i.e. since originally all property was common to all people, private property had emerged as the result of agreement amongst them.¹³ Stair's comment is: "Yet this will not hold, if we consider that, though for the most part property be by consent, yet in many things it is without consent".¹⁴ So for Stair restitution is an obediencial obligation or personal right only which, as we shall see, could not only be used *by* an owner but also *against* an owner.¹⁵ Further, Roman law's classification of restitutionary obligations as quasi-contractual could be invoked in support of

⁹ Stair, *Inst* 1.7.1.

¹⁰ Stair, *Inst* 1.7.2.

¹¹ *Ibid.*

¹² Jansen, "Farewell to Unjustified Enrichment?", at 129.

¹³ H de Groot (Grotius), *De iure belli et pacis*, II, x, 1; see also his *Inleidinge tot de Hollandsche Rechts-geleertheyd* (trans R W Lee, *The Jurisprudence of Holland by Hugo Grotius*, 1926) III, xxx, 1,3.

¹⁴ Stair, *Inst* 1.7.2. Stair here gives the example of specification.

¹⁵ See further Reid (n 5) 207, 209–212. See also D Reid, "Fraud in Scots Law", University of Edinburgh PhD thesis (2012) at 123, 238–242.

this position, because “tacit consents produce true, and not quasi contracts”.¹⁶ So Stair may have anticipated Pufendorf here, and certainly Wolff and Savigny.¹⁷

Stair next turns to the cases where the haver has possession of the things of others but *without* any fault or delinquency on the part of the haver. So, for example, things acquired by force and fear are brought about by delinquency and thus not to be included in this discussion, which is concerned only with good faith coming into possession.¹⁸ Stair gives six examples altogether where the obligation of restitution arises for a haver: (1) things straying; (2) things lost; (3) good faith acquisition (except where positive law secures the buyer, as is commonly the case); (4) things recovered from thieves, robbers and pirates.¹⁹ In all of these, it can be assumed that there is an owner separate and distinct from the haver. It is at the next point (5) that Stair brings the *condictiones* into his account of the obediational obligation of restitution. Here he talks of things

coming warrantably to our hands and without any paction of restitution, yet if the cause cease by which they become ours [*i.e. the haver is till now owner or at any rate entitled to possess*], there superveneth the obligation of restitution of them²⁰

“whence,” Stair continues, “are the condicions in law, *ob non causam* and *causa data, causa non secuta*”.²¹ His example is transfers of property in contemplation of marriage which will be undone if the marriage does not happen. But he also notes here that things received *ex turpi causa* do not fall to be returned – “*in culpa, potior est conditio possidentis*”, and the haver has become and remains owner despite the illicit cause.²² Finally, (6), “restitution extendeth to *indebite solutum*, when any party through error delivereth or payeth that which he supposeth due, or belongeth to another”,²³ *i.e.* the *condictio indebiti*. Stair again emphasises that this restitution is not by paction or contract, and notes too that a person who gets what he is owed cannot be made to make restitution even though the person who actually paid or performed was under no obligation to do so.²⁴

¹⁶ Stair, *Inst* 1.7.2.

¹⁷ Cf Jansen (n 1) at 130–131.

¹⁸ Stair, *Inst* 1.7.8 fin.

¹⁹ Stair, *Inst* 1.7.3_6.

²⁰ Stair, *Inst* 1.7.7–8.

²¹ Ibid.

²² Stair, *Inst* 1.7.9.

²³ Ibid.

²⁴ Ibid.

The obligation of restitution extends to the natural fruits of the thing in so far as not bona fide consumed, but it ceases when the haver in good faith ceases to have the thing in his power. If the putting away of the thing was in good faith, however, “in so far as he is profited in receiving more for it than he gave, he be liable by the obligation of remuneration or recompense”.²⁵ The same applies to liability for the fruits – none, unless there is profiting by the haver. Stair here, but only here, is beginning to use the language of enrichment, and that when the obligation has ceased to be restitution. The overall policy driver underpinning this is security of possession and transactions for those who act in good faith throughout their transactions with the goods.²⁶

But in the case of the haver who *fraudulently* puts away the thing, where the obligation of restitution survives the lack of power over the thing, the ex-haver is under an obligation of reparation for his wrong. This covers the value of the thing, plus the fruits enjoyed in bad faith, even though the ex-haver was not enriched by that enjoyment.²⁷ So Stair does not connect his account of the *condictiones* to any idea of enrichment-based liability; instead they are embraced within the wider concept of restitution, which in turn informs the recovery due for the delinquency in the fraudulent putting away. It is worth noting that, in the title on reparation, Stair says:

Reparation is either by restitution of the same thing, in the same case, that it would have been in if it had remained with the owner, and this most exact; or, where that cannot be, by giving the like value, or that which is nearest to make up the damage, according to the desire of the damnified. And if none be found fitter, reparation must be made in money, which is the common token of exchange and hath in it the value of everything estimable.²⁸

The obligation of recompense or remuneration arose for Stair, not from enrichment in general, but rather from a natural obligation to do one good deed for another. Along with the

²⁵ Stair, *Inst* 1.7.11.

²⁶ Stair, *Institutions*, I, vii, 10-12.

²⁷ Stair, *Institutions*, I, vii, 13 para 2. Para 1, which deals with the obligations of heirs and successors, looks rather out of place as such in the discussion.

²⁸ Stair, *Inst* 1.9.4 (last para). Note also 1.9.3, where it is said that not every damage leads to the obligation of reparation: “others may have their reparation arising from contracts, whereby, though a delinquency may arise in non-performance of the contract, yet the original cause of the obligation is the contract. Some also arise from deeds or things, the non-performance whereof is a delinquency; as in the obligations of restitution and recompense”.

presumption against donation, that meant returning in some way the good deed which was performed without intention to donate and thus “of purpose to oblige the receiver of the benefit to recompense”.²⁹ *Negotiorum gestio* was the first obligation to be embraced under this head. Here the debtor might be enriched; but this was not a necessary condition of liability.³⁰ The second obligation of recompense, however, was “for that whereby we are enriched by another’s means, without purpose of donation”.³¹ This could cover the case of the bad faith builder on another’s ground, and pupils and minors could also be made liable for their gains under this head.³² The second head further covered the *actio de in rem verso*, general average liability under the *lex Rhodia*, and obligations of relief.³³ Stair did not however offer very much detailed analysis of these obligations, although there is the useful sentence: “We are enriched either by accession of gain or prevention of loss”.³⁴

Long ago, David Sellar and I suggested that these latter passages showed recompense as a residual or subsidiary general enrichment action in Stair’s scheme – a suggestion which was not in general accepted by others working in the field.³⁵ I do not want to return to that argument now, but wish instead to make the point that in these titles on restitution and recompense there is no other hint of unjustified enrichment as the underlying principle supporting these particular obediencial obligations. And for the next 300 years this remained true of almost all accounts of Scots law in this area (the major exception being Lord Kames). Writers all talked instead of restitution and recompense as obligations outside contract, usually rather briefly, and treated the *condictiones* under the restitution heading.³⁶ In the nineteenth century, George Joseph Bell’s brother-in-law and posthumous editor, Patrick Shaw, applied the label “repetition” as a sub-heading within restitution, dealing mainly with the repayment of money, and so created what the late twentieth century came to know rather

²⁹ Stair, *Inst* 1.8.1–2. Dot Reid will have more to say about the significance of the presumption against donation in A R C Simpson et al (eds), *Essays in Honour of David Carey Miller* (forthcoming).

³⁰ Stair, *Inst* 1.8.3–5.

³¹ Stair, *Inst* 1.8.6.

³² *Ibid.*

³³ Stair, *Inst* 1.8.7–9.

³⁴ Stair, *Inst* 1.8.8.

³⁵ H L MacQueen and W D H Sellar, “Unjust Enrichment in Scots Law”, in E J H Schrage (ed), *Unjust Enrichment: the Comparative Legal History of the Law of Restitution* (1995). See, for contrary views, the published writings of N Whitty, R Evans-Jones, and others.

³⁶ MacQueen and Sellar (n 35) at 297–300.

irreverently as the “three R’s”.³⁷ In the twentieth century, they were usually grouped under the heading “Quasi-Contract” and dealt with in books on contract or alongside contract in more general books on Scots law.³⁸ As recently as 1991, the Court of Session held that repetition under the *condictio indebiti* did not depend on the debtor’s enrichment.³⁹ After all, if a payment or performance had not been due to the recipient, was there any need to point to a further reason why that payment or performance should be restored?

In all this, Scots law was clearly working within the pre-pandectist civilian or *ius commune* tradition described by Nils Jansen. So, it has many rather obvious parallels with French law as codified early in the nineteenth century and indeed as it continues to be presented in the many jurisdictions around the world influenced by the French code.⁴⁰ It continues to inform the new French Code of Obligations at articles 1300–1303. This still gives the subject-area the title “Quasi-contract”, and it consists of *la gestion d'affaire, le paiement de l'indu et l'enrichissement injustifié*. The last arises “*en dehors des cas*” of the other two, i.e. is only applicable outside their respective scopes.⁴¹ This recalls the Scottish notion of the “subsidiarity” of recompense, not to be used where another remedy is available.⁴²

C. THE ANALYSIS OF UNJUSTIFIED ENRICHMENT IN MODERN SCOTS LAW

Robin Evans-Jones has now completed a two-volume project re-casting our law on the model of German law as it has developed since 1900. This will also be the scheme used in Niall Whitty’s forthcoming exposition in the reissue of the Obligations title of the *Stair Memorial Encyclopaedia*. It is probably fair to say that a major factor prompting this development was

³⁷ R Evans-Jones, “Unjustified Enrichment” in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, 2 vols (2000) vol 2, 369 at 377–378; see further H L MacQueen, “Unjustified Enrichment, Subsidiarity and Contract”, in V V Palmer and E C Reid (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (2009) 322 at 338.

³⁸ See, e.g., W M Gloag, *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland*, 2nd edn (1929) ch XVIII; W M Gloag and R C Henderson, *Introduction to the Law of Scotland*, 1st edn (1927) ch XIV.

³⁹ *Royal Bank of Scotland v Watt* 1991 SC 48.

⁴⁰ MacQueen (n 37) at 324–326.

⁴¹ For the new French code of obligations on enrichment see arts 1300–1303 of the Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, accessible at <http://www.justice.gouv.fr>.

⁴² MacQueen (n 37) at 339–341, 343–345, 350–352.

the criticism of the traditional Scottish structure offered by Peter Birks in the mid-1980s and his suggestion that instead the model he proposed for English law be also applied to the Scottish material.⁴³ But, as shown by the scholarship of Evans-Jones and Whitty in particular, the German model 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.⁴⁴

In Scotland today, as Evans-Jones remarks, “[a] consensus has emerged [amongst legal writers] 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”.⁴⁵ Thus an approach founded on the manner of enrichment (whether by way of deliberate transfer to or unauthorised imposition upon the enriched party, including unauthorised performance of that party’s separate obligation, 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*,⁴⁶ the relevant chapter of the last two editions of *Gloag & Henderson* (with another on the way in 2017),⁴⁷ and an elementary student introduction to the subject which has so far appeared in four successive incarnations between 2003 and 2013.⁴⁸

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” in the three great cases of *Morgan Guaranty Trust Co of New York v Lothian Regional Council*,⁴⁹ *Shilliday v Smith*,⁵⁰ and *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd*.⁵¹ 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 judges in lower

⁴³ See further Hector MacQueen, “Peter Birks and Scots Enrichment Law” in Andrew Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (2006) ch 21.

⁴⁴ Peter Birks, *Unjust Enrichment* (2003; 2nd edn, 2005).

⁴⁵ Evans-Jones, *Unjustified Enrichment*, vol 2, para 1.52.

⁴⁶ M Hogg, *Obligations*, 2nd edn (2006) ch 4 part 1.

⁴⁷ W M Gloag and R C Henderson, *The Law of Scotland*, 12th edn, by H L MacQueen et al (2007) ch 25; 13th edn, by H L MacQueen et al (2012) ch 24.

⁴⁸ H L MacQueen, *Unjustified Enrichment Law Basics*, 1st edn (2004); 2nd edn (2009); 3rd edn (2013). The last-cited work first appeared as ch 8 in C Ashton et al, *Fundamentals of Scots Law* (2003).

⁴⁹ 1995 SC 151.

⁵⁰ 1998 SC 725.

⁵¹ 1998 SC (HL) 90.

courts and those arguing the law before them. It is apparent from now numerous examples, some of which Evans-Jones discusses in the opening chapter of his second volume, 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.⁵² The result is, as I have 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.⁵³

The key to a better understanding, as Evans-Jones re-argues forcefully in the first two chapters of the second volume of his *Unjustified Enrichment*, 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.⁵⁴

Shilliday was a non-contractual 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.

⁵² R Evans-Jones, *Unjustified Enrichment, Volume 2: Enrichment Acquired In Any Other Manner* (2013) paras 3.19–3.45.

⁵³ MacQueen, *Unjustified Enrichment* (n 48) Preface.

⁵⁴ *Shilliday v Smith* 1998 SC 725 at 727. Evans-Jones italicises the second sentence when he quotes this dictum in *Unjustified Enrichment* (n 52) para 1.51.

In *Shilliday*, Lord Rodger did not have to go on to discuss the third R, recompense. “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”, the random-ness with which these were developed through the cases prevented them from working as an overall analytical or even usefully descriptive tool, in part because some instances (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 subsidiarity, or the non-existence of another remedy) did not apply in all cases.⁵⁵

German law’s method of grouping enrichment cases outside conferral/transfer is thus preferable. 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 James Gordley’s summary of the thinking of one of their German progenitors, Ernst von Caemmerer:

“[W]hen 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 find “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.⁵⁶

In his second volume, Evans-Jones also demonstrates how these fact-based categories themselves developed from even more specific paradigm cases: the interference category from the remedies provided originally in Roman property law to the person deprived of ownership by a specificator 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

⁵⁵ Evans-Jones, *Unjustified Enrichment* (n 52) paras 1.48–1.52.

⁵⁶ J Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (2007) 422 (quoting E von Caemmerer, “Grundprobleme des Bereicherungsrechts”, in H Leser (ed), *Gesammelte Schriften* (1968) 391).

more general, or, as Evans-Jones would have it, from the foundational cases to those that, through the filter provided by the general principle, are analogous to those previously identified.⁵⁷

This does not infer, however, that the deployment of the four-group analysis of enrichment claims entails such fragmentation of enrichment law as to mean that we must bid farewell to unjustified enrichment, as Nils Jansen suggests. I hear echoes of the South African scholar Helen Scott's argument at a 2015 Edinburgh Law School symposium that absence of legal basis or justification for an enrichment is "of relatively little importance" outside conferral/transfer cases, i.e. by imposition or interference or performance of another's obligation, between which "there is in truth little coherence ... [N]o general concept can be formulated which captures the meaning of "legal ground" across all these cases, in the sense that its absence furnishes the central reason for restitution".⁵⁸ She argues in similar vein in her impressive monograph on unjust enrichment in South African law, where enrichment by transfer is the central focus of the analysis.⁵⁹ But does there have to be a *central* reason for restitution, or may there rather be a number of elements in play, the *balancing* of which will point in one direction or another so far as the award of restitution is concerned? This is the argument in South Africa of Danie Visser and Jacques du Plessis, who have discussed in great detail the difference between a narrow and a wider approach to the concept of absence of legal basis, arguing that the latter is to be preferred.⁶⁰ In this understanding, the issue is whether the plaintiff (or, in Scotland, pursuer) can establish all the requirements for a recognised enrichment action rather than whether the defendant need point only to a narrow legal ground or basis such as valid contract or gift under which the enrichment can be retained. With Visser, Du Plessis argues that South African law has long accepted various, more narrowly defined, actions deriving from the Roman-Dutch tradition which can be viewed as instances of imposition, interference, and performance of another's obligation. Their proposal is that the requirements in each of these actions can be regrouped and the

⁵⁷ Evans-Jones, *Unjustified Enrichment* (n 52) paras 2.14–2.26.

⁵⁸ Professor Scott's symposium paper was published as H Scott, "Rationalising the South African Law of Enrichment" (2014) 18 EdinLR 433 (the quoted portion appears at 436).

⁵⁹ H Scott, *Unjust Enrichment in South African Law: Rethinking Enrichment by Transfer* (2013).

⁶⁰ D Visser, *Unjustified Enrichment* (2008) 174–190; J du Plessis, *The South African Law of Unjustified Enrichment* (2012) 52–58. See also J du Plessis, "Labels and Meaning: Unjust Factors and Failure of Purpose as reasons for Reversing Enrichment by Transfer" (2014) 18 EdinLR 416.

results generalised to produce what are in effect new but fewer types of enrichment action covering more ground than their predecessors.

This means, I think, that the search should go on, in Scotland as well as in South Africa, for the principles underpinning the existence of these claims, so that we can distinguish between the deserving improver and the undeserving intruder upon other people's business, on the one hand, and on the other between the person who gains illegitimately by interference with another's rights and the one who legitimately competes with the plaintiff or is otherwise simply lawfully exercising its own rights. This was one of the reasons why I myself departed from an initial Birks "Mark I" understanding of Scots enrichment law; it simply did not reach some of the really relatively uncontroversial dimensions of that law, whereas they were all embraced within the German typology. A complex absence of basis theory may also allow us to get to grips better with the thorny question of multi-party, or indirect (rather than incidental) enrichment, on which the South Africans and, here in Scotland, Whitty and Evans-Jones have done much valiant and valuable work.⁶¹ In Scotland, at least, there is now consensus amongst serious researchers on enrichment law that this is the way in which the law can best be understood, presented, and analysed.

D. THE INTERFACE BETWEEN CONTRACT AND UNJUSTIFIED ENRICHMENT

It is certainly true in Scotland, however, that contract and enrichment lawyers have struggled with the interfaces between their respective subjects. While it is clear that enrichment provides the solutions to the problems of unwinding performances rendered under void contracts, and also, thanks to *Cantiere San Rocco SA v Clydebank Shipbuilding and Engineering Co*,⁶² frustrated contracts, we have difficulties with un-concluded contracts (i.e. pre-contractual or "Melville Monument" liability⁶³), illegal contracts, contracts terminated for material breach, gains made by contract-breakers, and voidable contracts. While there is no doubt that there is an unwinding or disgorgement of gain remedy of some kind in at least

⁶¹ Visser, *Unjustified Enrichment* (n 60) 193–217; du Plessis, *Unjustified Enrichment* (n 60) 151–160; N Whitty, "Indirect Enrichment in Scots Law" 1994 JR 200(part 1) and 239 (part 2); Evans-Jones, *Unjustified Enrichment* (n 52) ch 8.

⁶² [1923] UKHL 1, 1923 SC (HL) 105.

⁶³ So called after the first case to develop such liability, *Walker v Milne* 1823 2 S 379, which concerned a dispute over the siting of a monument in honour of Lord Melville in Edinburgh.

some cases, it is not at all clear whether that unwinding or disgorgement is based on enrichment principles or is rather something provided for, possibly in a rather *ad hoc* way, in contract law.⁶⁴

I do not have space to go into all the topics I have just mentioned, but perhaps I may be allowed a word or two on voidable contracts. Here the contract principle is that the contract is good at least until rescinded from by the party adversely affected by the cause of invalidity (fraud, undue influence, misrepresentation, and so on) or reduced by a court decree. The point of interest for us is that, in a development that I think is a borrowing from England sometime in the nineteenth century, before a court will grant reduction of a contract it must be shown that *restitutio in integrum* is possible between the parties; and then such *restitutio* follows on from the decree.⁶⁵ What is the relation between this *restitutio in integrum* and the more general obligation of restitution, or the reversal of unjustified enrichment? The tendency of the Scottish courts to insist on literal *restitutio in integrum* has pointed away from enrichment and more in the direction of some special (and rather strange) contract rule. Professor Jansen encourages us, I think, to go further in that direction.⁶⁶

In South Africa, however, Helen Scott has argued that the remedy of *restitutio in integrum* in Roman-Dutch law, although nowadays confined to cases of contract made avoidable by misrepresentation and compulsion, was formerly a free-standing, extra-ordinary and equitable remedy capable of providing relief in its own right, quite apart from its application within contract law, and should be extended.⁶⁷ Danie Visser has also argued that *restitutio in integrum* should be at least partially re-instated in the enrichment arena, although Jacques du Plessis disagrees with him as well as with Helen Scott.⁶⁸ The positive argument is that performances rendered before avoidance were made for the purpose of discharging what seemed to be a valid contractual obligation; but now that the contract has failed, so has the purpose of the performances, and they therefore fall to be reversed on both sides. The grounds on which the contract is avoided matter less to this than the non-fulfilment of the purpose for which the performances were made. There may still be room within this model

⁶⁴ Sonja Meier addressed many of these issues in her W A Wilson Memorial Lecture, “Unwinding Failed Contracts: New European Developments”, delivered on 27 April 2016 at the Edinburgh Law School.

⁶⁵ W W McBryde, *The Law of Contract in Scotland*, 3rd edn (2007) paras 14.49–14.52, 15.72–15.73, 16.36.

⁶⁶ Jansen (n 1) 142.

⁶⁷ Scott, *Unjust Enrichment* (n 59) 34–39, 46–51, 84–91, 122–125.

⁶⁸ Visser, *Unjustified Enrichment* (n 60) 517–526; du Plessis, *Unjustified Enrichment* (n 60) 68–75.

for discussion of the extent to which the obligations in a contract are divisible, so that restitution is not available in relation to reciprocal performances which discharge a particular obligation within the contract completely prior to the rescission for invalidity (this sort of thinking, incidentally, can also be applied to cases of breach or frustration). *Restitutio in integrum*, in other words, can be brought within the scope of enrichment law rather than remaining in an uncertain limbo between enrichment and contract. South Africa is better able to do this than either Scotland or England, where *restitutio in integrum* has become trapped by the notion that it must be possible *before* a contract can be avoided; that is, it is, bizarrely, both a condition and a consequence of avoidance. But this could be sorted out by either a little law reform, or closer professional and judicial attention to the mandate for a less literal approach to *restitutio in integrum* given by the House of Lords in *Spence v Crawford* as long ago as 1939.⁶⁹

E. CONCLUSION

In conclusion, I am not persuaded that “fragmentation” is quite the right way to characterise the process Nils Jansen has so brilliantly described. It is rather a growing sophistication in the understanding and handling of a powerful generalisation of law, the creative effects of which are far from spent, at least in Scotland. A final thought is that another generalisation in the law, in which Grotius and Stair played their parts in their respective times and places, was the law of contract. I think it detracts not at all from the continuing significance of that generalisation that underneath and indeed preceding it lay a law of particular contracts, for each of which the substance of the generalisation was not infrequently inapplicable at least in part.⁷⁰ But the generalisation allowed (and allows) the filling of gaps in the law of particular contracts, its re-working to meet changing realities (I have recently had experience of this in the reform of insurance and consumer law⁷¹), and, most importantly, the development and

⁶⁹ *Spence v Crawford* 1939 SC (HL) 52.

⁷⁰ See H L MacQueen, “General Concepts of Obligations and Contract: from Stair to Now” in Simpson et al (eds), *Essays* (n 29).

⁷¹ As a Law Commissioner whose work helped pave the way to the Consumer Insurance (Disclosure and Representations) Act 2012, the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870), the Insurance Act 2015, the Consumer Rights Act 2015 Parts 1 and 2, and the Enterprise Act 2016 Part 5.

legal recognition of new kinds of particular contract (not least, in the time of Grotius and Stair, insurance, and, in our own time, consumer contract law).