

UNJUST ENRICHMENT AND THE ROLE OF LEGAL HISTORY IN ENGLAND AND AUSTRALIA

WARREN SWAIN*

I THE NOVELTY OF UNJUST ENRICHMENT

Private law evolves slowly over decades or even centuries. Without the benefit of hindsight it is not always obvious that any change has taken place at all.¹ Yet this observation does not inevitably hold true. The emergence of unjust enrichment in the final decades of the twentieth century is a clear counter-example. Little more than a generation has passed since Lord Diplock could state that ‘there is no general doctrine of unjust enrichment recognised in English law’.² In England such remarks would now be all but impossible. What was once an academic backwater³ has assumed great importance in claims involving enormous sums of money.⁴ The decision which gave unequivocal judicial approval to unjust enrichment as a distinct legal category in England has not yet celebrated its 25th birthday.⁵ Judicial recognition of unjust enrichment was also late in coming in the High Court of Australia⁶ and the New Zealand Court of Appeal.⁷ The Supreme Court of Canada was more prescient in this regard, but the

* Senior Lecturer in Law, TC Beirne School of Law, University of Queensland. I am very grateful to my friend and colleague Professor Kit Barker for his helpful comments. Any errors or misunderstandings are entirely my own fault.

1 For some sophisticated attempts to get to grips with legal change, see Alan Watson, *The Evolution of Western Private Law* (John Hopkins University Press, 2001); S F C Milsom, *A Natural History of the Common Law* (Columbia University Press, 2003).

2 *Orakpo v Manson Investments Ltd* [1978] AC 95, 104. Lord Diplock’s remarks overlooked the recent *Tort (Interference with Goods) Act 1977* (UK). For other sceptics, see *Boissevain v Weil* [1950] AC 327, 341 (Lord Radcliffe); *Ministry of Health v Simpson* [1951] AC 251, 275 (Lord Simonds); *Reading v Attorney-General* [1951] AC 507, 513–14 (Lord Porter); *Guinness plc v Saunders* [1990] 2 AC 663, 689 (Lord Templeman).

3 The pioneers are chronicled by Francis Rose, ‘The Evolution of the Species’ in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, 2006) 13.

4 The so called ‘swaps’ litigation is a good example; see Peter Birks and Francis Rose (eds), *Lessons of the Swaps Litigation* (Mansfield Press, 2000).

5 *Lipkin Gorman (a Firm) v Karpnale Ltd* [1991] 2 AC 548.

6 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221.

7 *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211, 215 (Thomas and Tipping JJ). For an account of the subject in New Zealand, see Ross B Grantham and Charles E F Rickett, *Enrichment and Restitution in New Zealand* (Hart Publishing, 2000).

law in that jurisdiction has veered off in a very different direction to the rest of the Commonwealth.⁸

It is sometimes tempting to assume that if there was ever a legal category without a history then unjust enrichment is it. Until recently its very existence was questioned. Yet there is a paradox here. Despite the novelty of unjust enrichment, arguments based on historical sources have played a critical role. The contrast with contract and tort in this respect is striking.⁹ The reason for this is not hard to find. In the battle for acceptance, history is thought by many to be a powerful weapon against the sceptics. In the past decade in Australia, matters have taken a very different turn. Historical arguments have been utilised to discredit unjust enrichment rather than to defend it. The merits of unjust enrichment should not be determined by history alone. An examination of the historical arguments is, in any event, unlikely to change the minds of sceptics or supporters. Nevertheless, since history is so intertwined with the debate about the existence of unjust enrichment, the past deserves to be properly understood. By coming to terms with the thread of history which runs through the case law and academic commentary, it is possible to come to some broader conclusions about the roles of judges and legal academics in the process of legal change.

II HISTORY AND THE BIRTH OF UNJUST ENRICHMENT

A good case can be made for recognising James Barr Ames as the founding father of unjust enrichment in the United States.¹⁰ Ames is usually better remembered as a legal historian and his expertise clearly influenced his views on unjust enrichment. In an article on the history of the action of *assumpsit*, Ames went on to draw the broad conclusion that:

8 *Degelman v Guaranty Trust Co of Canada* [1954] SCR 725. For a discussion of recent decades, see Mitchell McInnes, 'Unjust Factors, Juristic Reasons and Contracts in Anglo-Canadian Law' in Paula Giliker (ed), *Re-examining Contract and Unjust Enrichment: Anglo-Canadian Perspectives* (Martinus Nijhoff, 2007) 23, 34–48.

9 There are of course examples of historical argument in contract and tort cases in both England and Australia. The point is that historical arguments haven't shaped the modern law in such a fundamental manner. See, eg, Keith Stanton, 'Use of Scholarship by the House of Lords in Tort Cases' in James Lee (ed), *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Hart Publishing, 2011) 201, 210–11; James Lee, 'Confusio: Reference to Roman Law in the House of Lords and the Development of English Private Law' (2009) 5 *Roman Legal Tradition* 24. The authorities supporting advocates' immunity in negligence, in particular, are full of historical references: *Giannarelli v Wraith* (1988) 165 CLR 543, 555 (Mason CJ), 580 (Brennan J), 591 (Dawson J); *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 20 (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Rondel v Worsley* [1969] 1 AC 191, 242–4, 259–64, 278, 287–9. On the other hand, the decision which abolished advocates' immunity in England, *Arthur JS Hall & Co (a Firm) v Simons* [2002] 1 AC 615, refers to only two authorities pre-dating 1900.

10 Andrew Kull, 'James Barr Ames and the Early Modern History of Unjust Enrichment' (2005) 25 *Oxford Journal of Legal Studies* 297. For a discussion of Ames more broadly, see David M Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (Cambridge University Press, 2012) ch 9.

One is often bound by those same ties of justice and equity to pay for an unjust enrichment enjoyed at the expense of another, although no money has been received. The quasi-contractual liability to make restitution is the same in reason, whether, for example, one who has converted another's goods turns them into money or consumes them.¹¹

Moses v Macferlan,¹² decided in 1760, was at the heart of what Ames had to say. It concerned a dispute about promissory notes. Jacob made out four promissory notes in the name of Moses. Macferlan, wishing to recover in his own name against Jacob, asked Moses to indorse the notes. By indorsing the notes, Moses as well as Jacob was potentially liable to Macferlan.¹³ In spite of a written agreement between him and Moses not to sue on the indorsement, Macferlan brought an action. The Court of Conscience ruled that Moses had to pay and refused to receive the agreement in evidence.¹⁴ Moses sought to recover his payment using an action for money had and received. The main interest in the decision lay in some passages in the judgment of Lord Mansfield. Subsequent writers have debated whether or not these words support the idea of unjust enrichment. Ames thought that when combined with Roman law they did support such a principle.¹⁵

From the beginning in the United States the unjust enrichment was largely a creation of the law schools. The process began at Harvard and, as a body of literature emerged,¹⁶ restitution started to be taught elsewhere. Legal practitioners were not major participants.¹⁷ When Warren Seavey and Austin W Scott produced the first *Restatement on the Law of Restitution: Quasi Contracts and Constructive Trusts* in 1937,¹⁸ the esteem with which the American Law Institute was held nevertheless ensured that restitution was quickly embraced by the legal profession.¹⁹ Whilst academic interest in the subject never entirely disappeared,²⁰

11 James Barr Ames, 'The History of Assumpsit: II. Implied Assumpsit' (1888) 2 *Harvard Law Review* 53, 68. The article is reprinted in James Barr Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (Harvard University Press, 1913).

12 (1760) 2 Burr 1005; 1 Wm Bla 219; 97 ER 676. For a more detailed discussion, see Warren Swain, 'Moses v Macferlan (1760)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart Publishing, 2006) ch 2.

13 On the importance of indorsement and transferability, see James Steven Rogers, *The Early History of the Law of Bills and Notes: A Study of the Origins of Anglo-American Commercial Law* (Cambridge University Press, 1995) ch 8.

14 The Court of Conscience was a tribunal for the recovery of small debts: Margot C Finn, *The Character of Credit: Personal Debt in English Culture, 1740–1914* (Cambridge University Press, 2003) 197–235.

15 Ames, 'The History of Assumpsit', above n 11, 64. Ames probably had a text of the jurist Pomponius in Justinian's *Digest* in mind although he made no explicit reference to it. For Ames's use of Roman law, see D J Ibbetson, 'Unjust Enrichment in English Law' in E J H Schrage (ed), *Unjust Enrichment and the Law of Contract* (Kluwer Law, 2001) 33, 46.

16 William A Keener, *A Treatise on the Law of Quasi-Contracts* (Baker, Voorhis & Co, 1893); Frederic Campbell Woodward, *The Law of Quasi Contracts* (Little, Brown & Co, 1913).

17 They were not entirely oblivious to developments even in the early days. Learned Hand wrote 'Restitution or Unjust Enrichment' (1897) 11 *Harvard Law Review* 249.

18 Warren Seavey and Austin W Scott, *Restatement on the Law of Restitution: Quasi Contracts and Constructive Trusts* (American Law Institute, 1937).

19 Andrew Kull, 'Three Restatements of Restitution' (2011) 68 *Washington and Lee Law Review* 867, 868.

the later history of restitution is less happy.²¹ There are hopes that a recent *Restatement* may prompt a revival.²²

The first reference to unjust enrichment in England occurred at least as far back as 1802.²³ In his *Essays: On the Action for Money Had and Received, on the Law of Insurances, and on the Law of Bills of Exchange and Promissory Notes*,²⁴ Sir William Evans closely identified the action for money had and received with unjust enrichment.²⁵ Whilst Evans's translation of Robert Joseph Pothier's *A Treatise on the Law of Obligations or Contracts*²⁶ had a profound impact on the law of contract,²⁷ his views on unjust enrichment were ignored. His contemporaries continued to assert that money had and received was founded on an implied contract,²⁸ or more rarely, equity.²⁹ Money had and received had been seen as giving rise to a type of implied contract for at least a century. In his lectures in the 1750s, Sir William Blackstone treated money had and received as a species of implied assumpsit.³⁰ Blackstone's approach did not change in his published *Commentaries*,³¹ despite the fact that by this time *Moses v Macferlan* had been decided. The implied contract analysis was continued by Blackstone's successors: Sir Robert Chambers³² and Richard Wooddeson.³³

By the mid-19th century legal writers were becoming more uncomfortable with classifying money had and received as a sub-genre of the law of contract. Leake wrote that these obligations rested in justice and equity,³⁴ Pollock stressed

-
- 20 John P Dawson, *Unjust Enrichment* (Little, Brown & Co, 1951); John Philip Dawson and George E Palmer, *Cases on Restitution* (Bobbs-Merrill, 1958); George E Palmer, *The Law of Restitution* (Little, Brown, 1978).
 - 21 John H Langbein, 'The Later History of Restitution' in W R Cornish et al (eds), *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (Hart Publishing, 1998) 57.
 - 22 *Restatement of Law Third: Restitution and Unjust Enrichment* (American Law Institute, 2011); Douglas Laycock, 'Restoring Restitution to the Canon' (2012) 110 *Michigan Law Review* 929.
 - 23 Some of this material is discussed from a different angle by Ibbetson, above n 15, 33.
 - 24 William David Evans, *Essays: On the Action for Money Had and Received, on the Law of Insurances, and on the Law of Bills of Exchange and Promissory Notes* (Merritt and Wright, 1802).
 - 25 *Ibid* 8. The essay is reproduced at (1988) 6 *Restitution Law Review* 1.
 - 26 Robert Joseph Pothier, *A Treatise on the Law of Obligations or Contracts* (Butterworth, 1806).
 - 27 For a variety of perspectives, see David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999) ch 12; B Rudden, 'Pothier et la Common Law' in J Mon  ger (ed), *Robert-Joseph Pothier, d'Hier    Aujourd'Hui* (Economica, 2001) 91; Warren Swain, 'The Classical Model of Contract: The Product of a Revolution in Legal Thought?' (2010) 30 *Legal Studies* 513, 528–32.
 - 28 Samuel Comyn, *A Treatise of the Law Relative to Contracts and Agreements Not Under Seal: With Cases and Decisions Thereon in the Action of Assumpsit* (A Strathan, 2nd ed, 1824) vol 2, 4–5; C G Addison, *A Treatise on the Law of Contracts and Rights Liabilities Ex Contractu* (W Benning, 1849) ch 7.
 - 29 William Fox, *A Treatise on Simple Contracts and the Action of Assumpsit* (Stevens and Norton, 1842) 122.
 - 30 All Souls MS 300 vol 18 (unfol).
 - 31 Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1768) vol 3, 162.
 - 32 Thomas Curley (ed), *A Course of Lectures on the English Law: Delivered at the University of Oxford, 1767–1773* (University of Wisconsin Press, 1986) vol 2, 224.
 - 33 *A Systematic View of the Laws of England: As Treated in a Course of Vinerian Lectures, Read at Oxford, During a Series of Years, Commencing in Michaelmas Term, 1777* (E Lynch, 1794) vol 3, 158.
 - 34 Stephen Martin Leake, *The Elements of the Law of Contracts* (Stevens, 1867) 38–9.

that there was no true contract – only something analogous to one³⁵ – and Anson suggested that money had and received was seen as a form of contract claim because of the historical need to use contractual forms of action rather than any well-reasoned theory.³⁶ All of these writers nevertheless continued to include money had and received within their contract treatise. Perhaps the most forthright attempt to extricate money had and received from the law of contract was made by Sir Henry Maine. In his famous work, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas*,³⁷ he drew a firm distinction between implied and quasi-contract. Of the former he wrote:

The law, consulting the interests of morality, imposes an obligation on the receiver to refund, but the very nature of the transaction indicates that it is not a contract, inasmuch as the Convention, the most essential ingredient of Contract, is wanting.³⁸

The attachment to implied contract theory continued well into the 20th century. Writing in the *Law Quarterly Review*, Seavey and Scott thought that they had diagnosed the cause of the subject's poor state of health in England:

That its outlines have been dimly perceived and little discussed is due, we think, to the fact that the English law has developed through forms of action; the writings of analytical jurists have had little effect upon a bench and bar largely historically minded and educated through the study of decisions in which procedure has long played a predominant part.³⁹

Their pessimism was not entirely unfounded. Philip Landon, in his review of Percy Winfield's *The Province of the Law of Tort*,⁴⁰ stated bluntly '[o]ur law does not recognise the existence of quasi-contract'.⁴¹ For Landon, English law recognised two categories; contract and tort. Legal historians and others were beginning to question this view. Under Ames's influence, Sir William Holdsworth initially began to treat *Moses v Macferlan* as a case on unjust enrichment, noting that the obligation 'imposed by law had nothing contractual about it'.⁴² Within just over a decade he had reverted to a more orthodox analysis. He now concluded that in *Moses v Macferlan*, 'the vagueness of the principles stated by Mansfield led him into error'.⁴³ It was argued that if the decision was based on unjust enrichment it was derived from equity and had not been followed.⁴⁴ An article published the following year did little to clarify his

35 Sir Frederick Pollock, *Principles of Contract at Law and in Equity: Being a Treatise on the General Principles Concerning the Validity of Agreements, With a Special View to the Comparison of Law and Equity, and with References to the Indian Contract Act, and Occasionally to Roman, American, and Continental Law* (Stevens, 1876) 28–9.

36 Sir William Reynell Anson, *Principles of the English Law of Contract* (Clarendon Press, 1879) 7, 321–7.

37 (John Murray, 1861). See also Ibbetson, above n 27, 284.

38 Maine, above n 37, 305.

39 Warren A Seavey and Austin W Scott, 'Restitution' (1938) 54 *Law Quarterly Review* 29, 32.

40 Percy H Winfield, *The Province of the Law of Tort* (Cambridge University Press, 1931).

41 Philip Landon, 'The Province of the Law of Tort: By Percy H Winfield, LL.D' (1931) 8 *Bell Yard: Journal of the Law Society's School of Law* 19, 21.

42 Sir William Searle Holdsworth, *A History of English Law* (Methuen, 2nd ed, 1933) vol 1, 96–97.

43 Sir William Holdsworth, *A History of English Law* (Methuen, 1938) vol 12, 545.

44 *Ibid* 542–9.

position.⁴⁵ R M Jackson and Sir Percy Winfield distinguished quasi-contract from actual contract,⁴⁶ but neither treated *Moses v Macferlan* as a case on unjust enrichment. The overwhelming view of the time was that the decision was founded on equity.⁴⁷

Historical arguments derived from English case law were present at the birth of unjust enrichment in the United States. By the 1930s the discussion had gone full circle. The American *Restatement of the Law of Restitution* began to attract attention in England.⁴⁸ Lord Wright was an enthusiastic supporter of the American approach both on and off the Bench.⁴⁹ In 1942 he held that:

It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, ... Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.⁵⁰

Lord Wright recognised that history could be an obstacle to his preferred approach when he noted that '[p]erhaps in England, the subject has been obscured by the old forms of action'.⁵¹ But it was a help as well. He contended that *Moses v Macferlan* was the 'basis of the modern law of quasi-contract',⁵² while conceding that, '[l]ike all large generalizations, it has needed and received qualifications in practice',⁵³ which meant that the 'standard of what is against conscience in this context has become more or less canalized or defined'.⁵⁴ Lord

45 W S Holdsworth, 'Unjustifiable Enrichment' (1939) 55 *Law Quarterly Review* 37, 42. Holdsworth seems to suggest liability rested both on contract principles and unjustifiable enrichment.

46 Winfield, above n 40, 128–34; Sir P H Winfield, *The Law of Quasi-Contracts* (Sweet & Maxwell, 1952) 9–12; R M Jackson, *The History of Quasi-Contract in English Law* (Cambridge University Press, 1936) thought that the cases could be explained by a contract implied in law which he also described as a 'purely dogmatic fiction': at 122.

47 A number of writers were of this view; Winfield, described this as 'Mansfield's equity' as opposed to 'Chancery equity': Winfield, above n 40, 12. See also H G Hanbury, 'The Recovery of Money' (1924) 40 *Law Quarterly Review* 31, 35; Sir Carleton Kemp Allen, *Law in the Making* (Clarendon Press, 3rd ed, 1939) 329; H D Hazeltine in the editor's preface to Jackson, above n 46, xiv. Winfield also sought to identify situations in which equity granted relief in situation that were similar to common law quasi-contract: Percy H Winfield, 'Equity and Quasi-Contract' (1948) 64 *Law Quarterly Review* 46.

48 P H Winfield, 'The American Restatement of the Law of Restitution' (1938) 54 *Law Quarterly Review* 529; D W Logan, 'Restatement on Restitution' (1938) 2 *Modern Law Review* 153.

49 Lord Wright, 'Restatement of the Law of Restitution' (1937) 51 *Harvard Law Review* 369, 370; Lord Wright, '*Sinclair v Brougham*' (1938) 6 *Cambridge Law Journal* 305. For a discussion of Lord Wright generally, see Neil Duxbury, 'Lord Wright and Innovative Traditionalism' (2009) 59 *University of Toronto Law Journal* 265.

50 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 61 ('*Fibrosa Spolka*'). For a similar statement see Lord Wright, 'Restatement', above n 49, 371: 'restitution should be made where there has been unjust enrichment'. See also *Brook's Wharf and Bull Wharf v Goodman Brothers* [1937] 1 KB 534, 545.

51 Lord Wright, 'Restatement', above n 49, 370.

52 [1943] AC 32, 62.

53 Ibid.

54 Ibid 63.

Denning⁵⁵ and Lord Atkin⁵⁶ – who when speaking of the forms of action memorably said, '[w]hen these ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undeterred'⁵⁷ – were other early converts. Lord Justice of Appeal Scott asserted that *Moses v Macferlan* was based on unjust enrichment.⁵⁸ Lords Atkin, Wright and Denning were very significant figures in the history of English law in the 20th century but were in the minority on this issue. Mainstream opinion was much more ambivalent. It was left to Robert Goff and Gareth Jones to reignite interest in the subject with the publication of *The Law of Restitution* in 1966.⁵⁹ Their aim was 'to state, in a coherent and rationale form, the principles of the English Law of Restitution'.⁶⁰ They readily admitted their debt to the American *Restatement*. The significance of their work was immediately recognised,⁶¹ but very little actually changed.

III UNJUST ENRICHMENT IN ENGLAND: THE ACADEMIC AND THE PRACTITIONER

The next milestone on the road to the recognition of unjust enrichment was the appearance of Peter Birks's *An Introduction to the Law of Restitution*.⁶² Birks, like Ames before him, was heavily influenced by the past. Roman law and legal history helped to inform his rejection of the traditional view that quasi-contract was an offshoot of contract and encouraged him to create a new taxonomical structure for the law of obligations.⁶³ Birks's initial scheme and the ones that replaced it were informed by deep learning which, when combined with a charismatic and forceful personality, made him a formidable advocate of the

55 Lord Denning made some of these arguments decades earlier as counsel: *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 7. On the Bench, see *Reading v Attorney General* [1948] 2 KB 268, 275. Extra-judicially, see A T Denning, 'The Recovery of Money' (1949) 65 *Law Quarterly Review* 31, 35; Alfred Denning, *The Changing Law* (Stevens, 1953) 62–5.

56 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 26–9.

57 *Ibid* 29.

58 *Morgan v Ashcroft* [1938] 1 KB 49, 75.

59 Both authors had published on the subject before: Gareth H Jones, 'Change of Circumstances in Quasi-Contract' (1957) 73 *Law Quarterly Review* 48; Robert Goff, 'Reform of the Law of Restitution' (1961) 24 *Modern Law Review* 85.

60 Robert Goff and Gareth Jones, *The Law of Restitution* (Sweet & Maxwell, 1966) v ('Goff and Jones').

61 See especially Lord Denning, 'Goff and Jones's *The Law of Restitution* (Sweet & Maxwell Ltd, 1966)' (1967) 83 *Law Quarterly Review* 277; W R Cornish (1966) 29 *Modern Law Review* 579; D R Harris [1967] *Cambridge Law Journal* 114. The work was also described as 'admirable' by Edmund-Davis J in *Chesworth v Farrar* [1966] 2 WLR 1073, 1079.

62 Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1985). A revised edition appeared in 1989.

63 Lord Rodger, 'Memorial Address for Peter Birks' in Burrows and Rodger (eds), above n 3, x, xii; Gerard McMeel, 'What Kind of Jurist was Peter Birks?' (2011) 19 *Restitution Law Review* 15, 18–23.

cause of unjust enrichment. He also began to gather disciples.⁶⁴ There were some sceptics too but in England they were soon very much in the minority.⁶⁵

History continued to be important. The argument was usually put that unjust enrichment had existed long before the *Restatement* under other names. All it needed was to be rediscovered. It was merely hidden behind the dark cloud of legal history.⁶⁶ In these circumstances it is hardly surprising that legal historians have played such a prominent role in this area.⁶⁷ In the eyes of many modern English writers, *Moses v Macferlan* can be explained as a case on unjust enrichment.⁶⁸ Birks referred to the decision many times, yet his own position is uncharacteristically difficult to pin down. In 1984 he wrote that '[e]veryone knows that *Moses v Macferlan* is the leading case in the Anglo-American law of restitution or ... of unjust enrichment'.⁶⁹ *An Introduction to the Law of Restitution* was more ambiguous.⁷⁰ By the late 1990s, *Moses v Macferlan* was once again presented as a case on unjust enrichment.⁷¹ Birks's final word on the subject was that it was not based on unjust enrichment, as opposed to restitution for wrongs, after all.⁷²

Goff and Jones have consistently asserted that *Moses v Macferlan* was a case of unjust enrichment.⁷³ And it was Robert Goff, by now Lord Goff, who took

64 This list included some of the leading names in the field: Andrew Burrows, 'Memorial Address for Peter Birks' in Burrows and Rodger (eds), above n 3, vii, viii.

65 Professor Steve Hedley has been a trenchant, long-standing and scholarly critic of the unjust enrichment project. See Steve Hedley, *A Critical Introduction to Restitution* (Butterworths, 2001); Steve Hedley, *Restitution: Its Division and Ordering* (Sweet & Maxwell, 2001).

66 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 691 (Lord Goff).

67 Eltjo J H Schrage (ed), *Unjust Enrichment The Comparative Legal History of the Law of Restitution* (Duncker & Humblot, 1999); Ibbetson, above n 27, ch 14; Mitchell and Mitchell, above n 12; James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford University Press, 2007) ch 19; Tariq Baloch, *Unjust Enrichment and Contract* (Hart Publishing, 2009). It might even be said that this is an example of 'applied legal history'; see Alfred L Brophy, 'Introducing Applied Legal History' (2013) 31 *Law and History Review* 233.

68 Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd ed, 2010) 3; Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 2nd ed, 2006) 6; Andrew Tettenborn, *Law of Restitution in England and Ireland* (Cavendish, 2002) 3.

69 Peter B H Birks, 'English and Roman Learning in *Moses v. Macferlan*' (1984) 37 *Current Legal Problems* 1, 3.

70 It is not entirely clear whether this unusual ambiguity was intentional, although Birks did state that Lord Mansfield had left the frontier of quasi-contract 'quite unexamined'; see Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, revised edition, 1989) 32.

71 Peter Birks, 'The Law of Restitution at the End of an Epoch' (1999) 28 *University of Western Australia Law Review* 13, 25.

72 Peter Birks, *Unjust Enrichment* (Clarendon Press, 2nd ed, 2005) 14.

73 This has taken place primarily through the various editions of *The Law of Restitution*. The work is now, with a new title and editors, in its eighth edition; Charles Mitchell, Paul Mitchell and Stephen Watterson (eds), *Goff and Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 8th ed, 2011).

centre stage at the second main event.⁷⁴ Lord Goff had promoted the cause of unjust enrichment on the Bench since the 1970s.⁷⁵ His efforts were finally rewarded in *Lipkin Gorman (a Firm) v Karpnale Ltd*.⁷⁶ Superficially, Lord Goff was prepared to integrate some legal historical analysis into his speech. He said that:

It [the plaintiff's claim] is 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.⁷⁷

The remarks referred to were taken from *Clarke v Shee and Johnson*.⁷⁸ *Moses v Macferlan* was mentioned briefly as well. Lord Goff explained that Lord Mansfield made 'broad statements ... to the effect that an action for money had and received will only lie where it is inequitable for the defendant to retain the money'.⁷⁹ These historical references did not play a crucial part in his reasoning. In recognising a change of position defence, Lord Goff was seemingly more influenced by what was going on in other parts of the Commonwealth.⁸⁰ No attempt was made to link the modern change of position defence with Lord Mansfield's 'broad statements'. More critically, Lord Goff accepted without further comment that Lord Mansfield was advocating something akin to modern unjust enrichment without any explanation of how and why this was so.⁸¹ English judges have consistently taken the same line ever since.⁸² In recent times, any possible connection with equity is almost, if not quite entirely, ignored.⁸³

In a lecture to members of the Bar and Bench, Birks listed some academics who in his view had the greatest influence on the legal profession.⁸⁴ He might without undue modesty have mentioned himself.⁸⁵ The rise of unjust enrichment

74 For a recognition of Lord Goff's role, see *Haugesund Kommune v Depfa ACS Bank* [2012] 2 WLR 199, 203 (Atkins LJ); Gareth Jones, 'Lord Goff's Contribution to the Law of Restitution' in William Swadling and Gareth Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford University Press, 1999) 207. This is not to say that Lord Goff slavishly followed Goff and Jones on the bench: *Barclays Bank Ltd v WJ Simms and Cooke (Southern) Ltd* [1980] QB 677.

75 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783, 799 is an early example.

76 [1991] 2 AC 548.

77 *Ibid* 572.

78 (1774) 1 Cowp 197; 98 ER 1041.

79 *Lipkin Gorman (a Firm) v Karpnale Ltd* [1991] 2 AC 548, 578.

80 *Ibid* 579–80.

81 Graham Virgo, 'The Law of Unjust Enrichment in the House of Lords' in Lee (ed), above n 9, 169, 178 has observed that, 'the relevance of the unjust enrichment principle was asserted, rather than analysed logically and rigorously'.

82 *Westdeutsche Landersbank Girozentrale v Islington London Borough Council* [1996] AC 669, 697 (Lord Goff); *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380, 386 (Evans LJ); *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561, 625 (Lord Walker).

83 See, eg, *Banque Financière de la Cité SA v Parc (Battersea) Ltd* [1999] 1 AC 221, 237 (Lord Clyde); *Vedatech Corporation v Crystal Decisions (UK) Ltd* [2002] EWHC 818 [84] (Jacob J); *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561, 640 (Lord Mance).

84 Peter Birks, 'The Academic and the Practitioner' (1998) 18 *Legal Studies* 397.

85 *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, 166 (Lord Goff); *Banque Financière de la Cité SA v Parc (Battersea) Ltd* [1999] 1 AC 221, 226, 228 (Lord Steyn).

in England and Wales was at heart a very academic coup.⁸⁶ There are numerous references to Goff and Jones, Birks, Burrows and others in the case law.⁸⁷ Legal academics have played a larger role than in other fields of legal development.⁸⁸ In the period since the Second World War, administrative law is the only other area of law where the contribution of jurists has been in any way comparable.⁸⁹ In Australia a very different story has unfolded.

IV THE HIGH COURT OF AUSTRALIA AND THE RISE OF UNJUST ENRICHMENT

For a time, developments in Australia mirrored those in England. There was some isolated judicial recognition of unjust enrichment,⁹⁰ but the idea was not much discussed.⁹¹ If anything there was probably a stronger history of support for unjust enrichment in England,⁹² but it was the High Court of Australia in *Pavey & Matthews Pty Ltd v Paul*⁹³ that first seized the initiative. The decision was

86 Gareth Jones, 'A Topography of the Law of Restitution' in P D Finn (ed), *Essays on Restitution* (Law Book, 1990) 1, 2; Margaret Halliwell, 'Academics, Equity and Unjust Enrichment' (2001) 34 *Canadian Business Law Journal* 391, 396.

87 See, eg, *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669; *Guinness Mahon & Co Ltd v Kensington and Chelsea Roral London Borough Council* [1999] QB 215; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349; *Foskett v McKeown* [2001] 1 AC 102; *Cressman v Coys of Kensington (Sales) Ltd* [2004] 1 WLR 2775; *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 AC 558; *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561; *Test Claimants in the Franked Investment Income Group Litigation v Commissioners of Inland Revenue* [2012] 2 AC 337. The most recent decision of the Supreme Court on the subject follows this trend: *Benedetti v Sawiris* [2013] 3 WLR 351.

88 Comparatively recently only a small number of the Law Lords claimed to read academic articles on a regular basis. See Alan Paterson, *The Law Lords* (Macmillan, 1982) 14–15. For a detailed study, see Neil Duxbury, *Jurists and Judges: An Essay on Influence* (Hart Publishing, 2001).

89 Professor Sir William Wade QC and Professor S A de Smith undoubtedly both played a central role in shaping modern administrative law: Christopher Forsyth and Ivan Hare, *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC* (Oxford University Press, 1998) ch 1; Obituary, 'Professor S A de Smith' (1974) 33 *Cambridge Law Journal* 177.

90 *Mason v New South Wales* (1959) 102 CLR 108, 143 (Windeyer J). Justice Windeyer was also interested in legal history and in his book on the subject he described *Moses v Macferlan* as based on 'the general principles of morality and good conscience': W J V Windeyer, *Lectures on Legal History* (Law Book, 1938) 206. For more detail on the Australian background, see Keith Mason, 'Searching for Restitution in Australia' in Mitchell McInnes (ed), *Restitution: Developments in Unjust Enrichment* (LBC, 1996) 1.

91 There are, however, some examples, particularly within New South Wales: *George v De Georgio* [1968] 3 NSWLR 593; *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880, 897 (Sheppard J); *Bilambil-Terranora Pty Ltd v Tweed Shire Council* [1980] 1 NSWLR 465, 495 (Mahoney JA); *Re Sara Properties Pty Ltd (in liq)* [1982] 2 NSWLR 277, 282 (Rath J). For Victoria, see *Re Gasbourne Pty Ltd* (1984) 79 FLR 394, 490–3, *Shell Co of Australia Ltd v Esso Australia Ltd* [1987] VR 317, 329 (Murphy J), 342, 345 (Nathan J). For Western Australia, see *Esanda Ltd v Tesser* (1985) 3 SR (WA) 199, 200 (Heenan J).

92 Compare, eg, *Fibrosa Spolka Akcyjna v Fairbairn, Lawson, Combe Barbour Ltd* [1943] AC 32 with *James v Oxley* (1939) 61 CLR 433.

93 (1987) 162 CLR 221 ('Pavey').

welcomed by English supporters of unjust enrichment in the years prior to *Lipkin Gorman (a Firm) v Karpnale Ltd.*⁹⁴ The discussion of history, ancient and modern, in the High Court⁹⁵ has been described as ‘both weighty and accurate’.⁹⁶ Much of the content was technical. In part this can be explained by the fact that the forms of action survived for so long in New South Wales.⁹⁷ The utility of this aspect of the discussion has also been doubted.⁹⁸ At a higher level of generality – the recognition of the principle of unjust enrichment and the rejection of the view that liability was based on implied contract – less was said. According to Mason and Wilson JJ this approach was first advocated by Lord Mansfield.⁹⁹ Fuller and Perdue’s seminal article on contract damages,¹⁰⁰ along with a judgment of Denning LJ in *James v Thomas H Kent & Co Ltd*,¹⁰¹ were also cited. Justice Deane agreed with the analysis:

The basis of the obligation to make payment for an executed consideration given and received under an unenforceable contract should now be accepted as lying in restitution or unjust enrichment.¹⁰²

Although no mention was made of Lord Mansfield, Deane J also drew extensively and impressively on the English case law. He referred to speeches and judgments of Lord Denning,¹⁰³ Lord Wright,¹⁰⁴ Viscount Haldane,¹⁰⁵ along with several other English authorities.¹⁰⁶ The writings of Ames,¹⁰⁷ Holdsworth,¹⁰⁸ and Jackson¹⁰⁹ were cited along with Goff and Jones.¹¹⁰

94 [1991] 2 AC 548. See Gareth Jones, ‘Restitution: Unjust Enrichment as a Unifying Concept in Australia?’ (1988) 1 *Journal of Contract Law* 11, 14; J Beatson, ‘Unjust Enrichment in the High Court of Australia’ (1988) 104 *Law Quarterly Review* 13; Birks, above n 72, 448–9; Peter Birks, ‘Equity, Conscience, and Unjust Enrichment’ (1999) 23 *Melbourne University Law Review* 1, 13.

95 There was a great deal of discussion of history in the Supreme Court of New South Wales as well, especially in the judgment of McHugh J in *Paul v Pavey & Matthews Pty Ltd* (1985) 3 NSWLR 114.

96 David Ibbetson, ‘Implied Contracts and Restitution: History in the High Court of Australia’ (1988) 8 *Oxford Journal of Legal Studies* 312, 313.

97 Geoff Lindsay, ‘Understanding Contract Law through Australian Legal History: Whatever Happened to Assumpsit in New South Wales?’ (2012) 86 *Australian Law Journal* 589, 591.

98 Ibbetson, above n 96, 327; Jones, above n 94; J C Sheahan, ‘Use and Misuse of Legal History: Case Studies from the Law of Contract, Tort and Restitution’ (1997) 16 *Australian Bar Review* 280, 290–6. The decision is not unique in this respect, see *Schwarstein v Watson* (1985) 3 NSWLR 134, 143–6 (Priestley JA).

99 *Pavey* (1987) 162 CLR 221, 227.

100 L L Fuller and William R Perdue, ‘Reliance Interest in Contract Damages’ (Pt 2) (1936) 46 *Yale Law Journal* 373, 387.

101 [1951] 1 KB 551, 556. Justice Brennan, who dissented, referred to the same passage and drew the same conclusion, see *Pavey* (1987) 162 CLR 221, 239–40.

102 *Pavey* (1987) 162 CLR 221, 255.

103 Ibid 253–5. In addition to *James v Thomas H Kent & Co Ltd* [1951] 1 KB 551, reference was made to the Privy Council decision in *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192, 204–5.

104 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 61–2.

105 *Sinclair v Brougham* [1914] AC 398, 417.

106 *Pulbrook v Lawes* (1876) 1 QBD 284; *Re Rhodes* (1890) 44 Ch D 94.

107 *Pavey* (1987) 162 CLR 221, 246, 265.

108 Ibid 247, 255.

109 Ibid 246.

110 Ibid 267. Goff and Jones was described as a ‘landmark work’.

If *Moses v Macferlan* was somewhere in the background to these deliberations, it was not as prominent as it later became in the High Court's deliberations. The rest of the supporting evidence for unjust enrichment is easier to discount. Jackson recognised that quasi-contract was distinct from contract but was not advocating a doctrine of unjust enrichment.¹¹¹ Fuller and Perdue merely repeat a passage from Samuel Williston's great work on contract which itself is no more than an assertion.¹¹² Although both were great judges, neither Lord Wright nor Lord Denning represented mainstream opinion of their day. Lord Haldane's speech in *Sinclair v Brougham* merely approves a passage of Ames as someone to whom 'lawyers and historians alike owe much'.¹¹³ The remaining English authorities do not really justify Justice Deane's contention that the claim lies in restitution or unjust enrichment.

In the immediate aftermath of *Pavey*, judges at state and federal level began to recognise the principle of unjust enrichment,¹¹⁴ or, at the very least, to reject the traditional implied contract analysis.¹¹⁵ Exactly what was being embraced was less clear. There are a number of ways of analysing the concept of unjust enrichment.¹¹⁶ Justice Gummow distinguished between a descriptive use of unjust enrichment and one with normative force.¹¹⁷ He equated the latter with a cause of action. The suggestion that unjust enrichment might be a cause of action is occasionally hinted at,¹¹⁸ but it has also been firmly rejected.¹¹⁹ In Australia, at least, the fact that no attempt is ever made to identify the constituent elements of any cause of action points to much the same conclusion.¹²⁰

111 See especially Jackson, above n 46, 128.

112 Samuel Williston, *The Law of Contracts* (Baker, Voorhis & Co, 1920) § 1455.

113 [1914] AC 398, 417.

114 *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662, 673 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ); *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 175 (Gaudron J); *National Mutual Life Association of Australasia Ltd v Walsh* [1987] 8 NSWLR 585, 595 (Clarke J); *Public Trustee v Fraser* [1987] 9 NSWLR 433, 443 (Kearney J); *Nepean District Tennis Association Inc v Penrith City Council* (1988) 66 LGRA 440, 448–9 (Hodgson J); *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 66–8 (Mason CJ).

115 *Milgun Pty Ltd v Austco Pty Ltd* [1988] 2 Qd R 670.

116 For a more sophisticated analysis of the meanings of unjust enrichment, see Kit Barker, 'Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons' in Jason W Neyers, Mitchell McInnes and Stephen G A Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing, 2004) 79.

117 *Winterton Construction Pty Ltd v Hambros Australia Ltd* (1991) 101 ALR 363, 374. Justice Gummow expanded on this theme extra-judicially in an important early statement of his views on unjust enrichment: W M C Gummow, 'Unjust Enrichment, Restitution and Proprietary Remedies' in P D Finn (ed), above n 86, 47.

118 '[A]n action in unjust enrichment': *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 379 (Deane and Dawson JJ). But see the position in England: *Foskett v McKeown* [2001] 1 AC 102, 129 (Lord Millett).

119 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 406 (Dawson J); *Hill v Van Erp* (1997) 188 CLR 159, 239 (Gummow J).

120 Beyond the observation that unjust enrichment was not a licence for judges to do what is just or fair: *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 265 (Deane J). For similar remarks, see *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 378–9 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

Rather than comprising a cause of action, unjust enrichment can be viewed as a way of rationalising existing cases in a principled manner. This can be done by using unjust enrichment as a normative term short of a cause of action, or a term of description, or both of these things. Justice Deane's judgment, with which Mason and Wilson JJ agreed,¹²¹ was ambiguous. The phrase 'the basis of the obligation',¹²² and the remark that 'unjust enrichment ... explains why the law recognizes ... an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff' can certainly be credited with normative force.¹²³ *Pavey* and other authorities from this period also stressed that unjust enrichment was a 'unifying concept'.¹²⁴ Irrespective of the precise usage, unjust enrichment cannot be dismissed as unimportant at this time. That would soon change. For a period afterwards unjust enrichment was marginalised. It was argued that unjust enrichment was not a unifying principle.¹²⁵ At best it was said that 'the concept of unjust enrichment may provide a means for comparing and contrasting various categories of liability'.¹²⁶ The ground may be shifting yet again.¹²⁷ Even if the direction of travel is not yet certain, the most recent High Court decision, *Equuscorp Pty Ltd v Haxton*,¹²⁸ offers renewed hope to those who would like unjust enrichment to flourish in Australia. In the previous decade those who wished to give unjust enrichment a more limited role have deployed a range of justifications. History has once again played a vital role.

V *MOSES V MACFERLAN*, UNJUST ENRICHMENT AND EQUITY

For a decision which is 250 years old and concerned with a long-abolished form of action, *Moses v Macferlan* has enjoyed a remarkably long legacy. Following the statement by Mason and Wilson JJ in *Pavey* that Lord Mansfield was an advocate of unjust enrichment,¹²⁹ English and Australian judges have gone in completely different directions. The former have largely lost interest in historical analysis. In common with Lord Walker, who recently described *Moses*

121 (1987) 162 CLR 221, 227.

122 Ibid 255.

123 Ibid 255–7.

124 Unjust enrichment was described as 'at the very least a unifying legal concept': *Baumgartner v Baumgartner* (1987) 164 CLR 137, 153 (Toohey J); *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 378 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

125 *Farah Construction Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 156 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) ('*Farah Constructions*'); *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 665 (Gummow, Hayne, Crennan and Kiefel JJ).

126 *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 299 (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

127 It was recently said that 'this is an area of law which often seems in a state of constant refinement': *MG Corrosion Consultants Pty Ltd v Gilmour* [2012] FCA 461 [13] (Barker J).

128 (2012) 246 CLR 498.

129 (1987) 162 CLR 221, 227.

v Macferlan as ‘the fountain-head of ... unjust enrichment’,¹³⁰ most English judges are happy to accept that the case is based on unjust enrichment. The decision itself is rarely mentioned.¹³¹ The position in Australia is quite different. *Moses v Macferlan* in particular and historical arguments more generally have continued to play a prominent role. One leading English scholar has gone so far as to unfairly describe the Australian law as being in a ‘sorry state’.¹³² A series of decisions over the last decade or so have questioned whether unjust enrichment is really the basis of the law of restitution in Australia after all. In Australia, sceptics have turned historical arguments on their head. Rather than using history to support unjust enrichment, it has been used to undermine it.

It is difficult to put a date when the decline of unjust enrichment in Australia began. *Pavey* showed that the High Court of Australia was receptive to the idea of unjust enrichment, but only the most blinkered enthusiast could claim that the decision settled all doubts.¹³³ There was, in contrast, nothing equivocal about Justice Gummow’s powerful judgment in *Roxborough v Rothmans of Pall Mall Australia Ltd.*¹³⁴ At its centre was a detailed discussion of *Moses v Macferlan*¹³⁵ running to many pages. His central contention was that the decision was derived from equity. Any possible Roman law influence was downplayed.¹³⁶ As he explained: ‘[i]n all of these areas, as in *Moses v Macferlan*, notions derived from equity have been worked into and in that sense have become part of the fabric of the common law.’¹³⁷

It was argued that restitution should be equated with unconscionability,¹³⁸ rather than unjust enrichment. The objections did not end there. It was said that unjust enrichment was not just bad history from a doctrinal point of view, it was also flawed from the point of view of the philosophy of the common law which ‘is derived from judicial decisions upon particular instances, not the other way around’.¹³⁹

Justice Gummow is not the first to subject a key passage in *Moses v Macferlan* to close scrutiny. It is worth setting out what Lord Mansfield said down in full:

130 *Test Claimants in the Franked Investment Income Group Litigation v Commissioners of Inland Revenue* [2012] 2 WLR 1149, 1173.

131 For a rare example, see *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561, 578 (Lord Hope), 603 (Lord Nicholls), 624 (Lord Walker).

132 Burrows, above n 68, 43. Burrows has discussed the Australian law in more detail in his chapter ‘The Australian Law of Restitution: Has the High Court Lost its Way?’ in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 67.

133 Joachim Dietrich, *Restitution: A New Perspective* (Federation Press, 1998) 11, 18.

134 (2001) 208 CLR 516 (*‘Roxborough’*).

135 Much of what was said was later repeated extra-judicially in W M Gummow, ‘*Moses v Macferlan*: 250 Years On’ (2010) 84 *Australian Law Journal* 756.

136 *Roxborough* (2001) 208 CLR 516, 548.

137 *Ibid* 554.

138 *Ibid* 555.

139 *Ibid* 544.

If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ('quasi ex contractu' as the Roman law expresses it). This species of assumpsit ('for money had and received to the plaintiff's use') lies in numberless instances, for money the defendant has received from a third person; which he claims title to, in opposition to the plaintiff's right; and which he had, by law, authority to receive from such third person.¹⁴⁰

As long ago as 1806, Sir William Evans argued that Lord Mansfield based his judgment on Roman law.¹⁴¹ In modern times Birks has also supported this explanation.¹⁴² One of Birks's criticisms of Gummow J is that he marginalised the influence of Roman law.¹⁴³ Roman law should not be completely discounted as a possible source.¹⁴⁴ It is however impossible to be certain whether Lord Mansfield was borrowing the substance as well as the terminology of the *Digest*.¹⁴⁵ He was certainly familiar with Roman law and drew explicitly on it in a number of his judgments.¹⁴⁶ Roman law is not the only possible inspiration behind Lord Mansfield's reasoning. When his statement is combined with a later passage in the same judgment a further explanation emerges:

This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, ex æquo et bono, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law.¹⁴⁷

The argument that Lord Mansfield was seeking to develop money had and received by analogy with equity is a strong one.¹⁴⁸ It was in keeping with

140 (1760) 2 Burr 1005, 1008-9; 97 ER 676, 678.

141 W D Evans and R Pothier, *A Treatise on the Law of Obligations or Contracts* (A Strahan, 1806) vol 2, 378-81. See also Peter Birks, 'Comparative Unjust Enrichment' in Peter Birks and Arianna Pretto (eds), *Themes in Comparative Law: In Honour of Bernard Rudden* (Oxford University Press, 2002) 137, 139.

142 Birks, above n 69, 16-18.

143 Peter Birks, 'Failure of Consideration and its Place on the Map' (2002) 2 *Oxford University Commonwealth Law Journal* 1, 13.

144 Dawson, above n 20, 12. Ibbetson, above n 27, 272 has noted that Blackstone's report of the case suggests that the Roman learning might have been introduced by Wilmot J rather than Lord Mansfield. Justice Wilmot was very much in the habit of drawing on Roman law. See *Pillans v Van Mierop* (1765) 3 Burr 1663, 1670; John Eardley-Wilmot, *Memoirs of the Life of the Right Honourable Sir John Eardley Wilmot, Knt: Late Lord Chief Justice of the Court of Common Pleas, and One of His Majesty's Most Honourable Privy Council* (White and Cochrane, 2nd ed, 1811) 210.

145 The relevant texts are D 12.6.14 and D 50.17.206, using the translation in A Watson (ed) *The Digest of Justinian* (University of Pennsylvania Press, 1985). The broader notion of equity reflected in the term 'ex æquo et bono' was also well established in Roman law, see W W Buckland, *Equity in Roman Law* (University of London Press, 1911) 11.

146 *Windham v Chetwynd* (1757) 1 Burr 414, 425-6; *Goss v Withers* (1758) 2 Burr 683, 693; *Hamilton v Mendes* (1761) 2 Burr 1198, 1214; *Frogmorton, ex dimiss Bramstone v Holyday et al* (1765) 3 Burr 1618, 1624; *Hogan v Jackson* (1775) 1 Cowp 299, 305.

147 *Moses v Macferlan* (1760) 97 ER 676, 680-1.

148 For other discussions of equity and money had and received, see Ben Kremer, 'The Action for Money Had and Received' (2001) 17 *Journal of Contract Law* 93; Graham Virgo, 'Restitution through the Looking Glass: Restitution within Equity and Equity within Restitution' in Joshua Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (Oxford University Press, 2003) 82, 87-8.

contemporary perceptions. His willingness to borrow from equity more generally was condemned by everyone from the satirist ‘Junius’ to the future Lord Chancellor, Lord Eldon.¹⁴⁹ Lord Mansfield stood accused of making the law too uncertain because of his fondness for equity. These criticisms were reflected in the way that Lord Mansfield made free use of terms like ‘natural justice’¹⁵⁰ and ‘conscience’.¹⁵¹ In *Alderson v Temple* he went as far as saying that:

The most desirable object in all judicial determinations, especially in mercantile ones, (which ought to be determined upon natural justice, and not upon the niceties of law,) is, to do substantial justice.¹⁵²

His detractors still paint a partial picture of a judge who can also be found extolling the virtues of certainty.¹⁵³ Equity itself could be used in different ways. Equity as used in *Moses v Macferlan* and elsewhere can be equated with fairness or natural justice. A narrower interpretation is also possible but it is usually overlooked. Equity also refers to the jurisdiction of the Court of Chancery. Furthermore, it was not the only occasion on which Lord Mansfield was prepared to borrow from equity in this sense in the cause of extending the common law.¹⁵⁴

Money had and received was already well established by the mid-18th century.¹⁵⁵ Lord Mansfield listed a series of instances when it could be used.¹⁵⁶ These mirrored the situations identified by earlier generations of judges.¹⁵⁷ The novelty of his judgment lay in the way that money had and received was rationalised. The analogy with equity was deliberately designed to extend the scope of money had and received beyond the existing categories. This was why Lord Mansfield described it as a ‘liberal action’.¹⁵⁸ This position could be justified on the grounds that money had and received was like a bill in equity. Three years before *Moses v Macferlan*, in another action on a different common

149 John Cannon (ed), *The Letters of Junius* (Oxford University Press, 1978) 209–10; Anthony Lincoln and Robert McEwen (eds), *Lord Eldon’s Anecdote Book* (Stevens, 1960) § 238.

150 *Vintner’s Co v Passey* (1757) 1 Kenyon 500, 503; *Windham v Chetwyn* (1757) 1 Burr 414, 430; *Rose v Green* (1758) 2 Kenyon 173, 178; *Godin v London Exchange Assurance* (1758) 2 Kenyon 254, 256; *Burton v Thompson* (1758) 2 Kenyon 375, 376; *Hawkes v Crofton* (1758) 2 Kenyon 389, 390; *Foxcraft v Devonshire* (1760) 1 Wm Bla 193, 195; *Robinson v Bland* (1760) 1 Wm Bla 256, 263; *Baskerville v Brown* (1761) 1 Wm Bla 293, 294; *Ingle v Wandsworth* (1762) 3 Burr 1284, 1286; *Plumer v Marchant* (1762) 3 Burr 1380, 1384; *Goodright d Carter v Staplan* (1774) 1 Cowp 201, 203; *Holman v Johnson* (1775) 1 Cowp 341, 343.

151 *Anderson v George* (1757) 1 Burr 352, 353; *Bird v Randall* (1762) 3 Burr 1345, 1353.

152 (1768) 4 Burr 2235, 2239.

153 *Vallejo v Wheeler* (1774) 1 Cowp 143, 153; *Buller v Harrison* (1777) 2 Cowp 556, 567; *Medcalf v Hall* (1782) 3 Doug 113, 115.

154 The doctrine of consideration is another example, see Warren Swain, ‘The Changing Nature of the Doctrine of Consideration, 1750–1850’ (2005) 26 *Journal of Legal History* 55, 62–5.

155 J H Baker, ‘The History of Quasi-Contract in English Law’ in Cornish et al (eds), above n 21, 62.

156 *Moses v Macferlan* (1774) 97 ER 676, 680.

157 *Attorney-General v Perry* (1735) 92 ER 1169. For further examples, see Baloch, above n 67, 26–8.

158 *Sadler v Evans* (1766) 98 ER 34, 35. Lord Mansfield used similarly expansionist terminology to describe the action for money paid around this time, see *Decker v Pope* (1757) LI MS Misc 129 (unfol). Lord Mansfield made the same comment about actions of the case generally in *Gardiner v Crosedale* (1760) 1 Wm Bla 198, 199.

money count for money laid out against a surety, Lord Mansfield had used very similar reasoning.¹⁵⁹

The action for money laid out had a direct equivalent in Chancery in the form of a bill for contribution.¹⁶⁰ Such reasoning was therefore firmly grounded in equity. Money had and received was different. It too was also likened to a bill in equity.¹⁶¹ There was not an exact match however, even if it covered some of the same ground as remedies in Chancery.¹⁶² After a period of expansion in the 1760s, by the 1770s Lord Mansfield and others were becoming more cautious.¹⁶³ In part this may have stemmed from a fear of undermining other legal institutions including the law of pleading,¹⁶⁴ the law of contract,¹⁶⁵ the law of bankruptcy,¹⁶⁶ and even the action of trover.¹⁶⁷ The fate of money had and received may also be a further example of Lord Mansfield becoming more cautious later in his tenure as Chief Justice.

Some judges would continue to refer to equity, good conscience or the maxim *ex aequo et bono* in the context of money had and received right up until the second decade of the nineteenth century.¹⁶⁸ Others were worried that Lord Mansfield's rationalisation was too broad.¹⁶⁹ In 1849, Pollock CB articulated the new orthodoxy when he explained that money had and received 'is a perfectly legal action, and no good can result from calling it an equitable one'.¹⁷⁰ This has remained the position in England ever since.

VI A WELL-MEANING SLOPPINESS OF THOUGHT?

The view that Australia is a 'system in which equity prevails'¹⁷¹ has had important consequences for the law of restitution. In *Farah Constructions*,¹⁷²

159 *Decker v Pope* (1757) LI MS Misc 129 (unfol). This decision also provides a good example of Lord Mansfield seeking an informal consensus amongst the judges: James Oldham, 'Law-Making at Nisi Prius in the Early 1800s' (2004) 25 *Journal Legal History* 221, 235.

160 Gareth Jones, 'The Role of Equity in the English Law of Restitution' in Schrage (ed), above n 67, 149, 165.

161 *Clarke v Shee* (1774) 1 Cowp 197, 199; *Jeston v Brooke* (1778) 2 Cowp 793, 795.

162 In particular Chancery would order the repayment of money paid as a result of mistake or fraud: Ibbetson, above n 27, 273–4.

163 *Longchamp v Kenny* (1779). 1 Doug 137, LI MS Hill 13 fl 311; 99 ER 92

164 Warren Swain, 'Cutter v Powell and the Pleading of Claims of Unjust Enrichment' [2003] *Restitution Law Review* 46, 51.

165 *Cutter v Powell* (1795) 6 TR 320; 101 ER 573.

166 *Brown v Bullen* (1780) 1 Doug 407, discussed by Baloch, above n 67, 38–9.

167 *Nightingal v Devisme* (1770) 5 Burr 2589; *Longchamp v Kenny* (1778) 1 Doug 137.

168 *Master v Miller* (1791) 4 TR 320, 342–3; *Harrison v Walker* (1791) Peake 150, 151; *Cotton v Thurland* (1793) 5 TR 405, 409; *Greville v Da Costa* (1797) Peake Add 113, 114; *Wright v Hunter* (1800) 1 East 20, 29; *Surtees v Hubbard* (1802) 4 Esp 203, 204; *Simpson v Swan* (1812) 3 Camp 291, 293; *Foster v Stewart* (1814) 3 M & S 191, 200; *De Silvale v Kendall* (1815) 4 M & S 37, 46.

169 *Johnson v Johnson* (1802) 3 B & P 162, 169; *Cooth v Jackson* (1801) 6 Ves Jun 12, 39.

170 *Miller v Atlee* (1849) 13 Jur 431.

171 *Roxborough* (2001) 208 CLR 516, 553.

172 (2007) 230 CLR 89.

instead of utilising unjust enrichment the High Court preferred to apply the longstanding equitable rules of knowing receipt. As a result, liability was seen as fault-based rather than strict.¹⁷³ Decisions like this have caused rancour.¹⁷⁴ Equity lawyers have accused unjust enrichment lawyers of empire building.¹⁷⁵ Unjust enrichment lawyers have countered that equity lawyers are promoting uncertainty and inconsistency.¹⁷⁶ This argument is sometimes used less against equity as a body of doctrine than what Gummow J has described as ‘equitable notions’.¹⁷⁷ Equity in this sense is sometimes seen as rather closer, but not identical to, natural justice than the body of rules and doctrine derived from the Court of Chancery. It is said that, as a result, it is impossible to identify with precision when money cannot be retained because of the recipient’s unconscionable conduct.¹⁷⁸ This is something akin to the accusation made by Scrutton LJ against Lord Mansfield that he was guilty of a ‘well-meaning sloppiness of thought’.¹⁷⁹ There is some force in these criticisms.

Equity remains capable of various meanings.¹⁸⁰ It has been argued that unconscionability is not even definable.¹⁸¹ In a passage approved by Gummow J it was noted that there is a danger that ‘unconscionable conduct is better described than defined’.¹⁸² It has also been said that the ‘statement that enforcement of the transaction would be unconscionable is to characterise the result rather than to identify the reasoning that leads to the application of that description’.¹⁸³ It does not necessarily follow from this that judges are empowered to do what they subjectively believe to be fair. Such a power has

173 For an argument that liability should be strict and founded in unjust enrichment, see Burrows, above n 68, 38–9.

174 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 685.

175 R Meagher, D Heydon and M Lemming, *Meagher, Gummow & Lehane’s Equity Doctrine and Remedies* (Butterworths, 2002) xi. For an entertaining account of ‘the Equity wars’, see Keith Mason, *Lawyers Then and Now* (Federation Press, 2012) 174–82.

176 Peter Birks ‘Reviews and Notes: Meagher, Gummow and Lehane’s Equity Doctrines and Remedies, 4th ed’ (2004) 120 *Law Quarterly Review* 344; Burrows, above n 68, 39.

177 *Roxborough* (2001) 208 CLR 516, 553–4.

178 J Beatson and G J Virgo ‘Contract, Unjust Enrichment and Unconscionability’ (2002) 118 *Law Quarterly Review* 352, 354; Ross Grantham, ‘Restitutionary Recovery *ex aequo et bono*’ [2002] *Singapore Journal of Legal Studies* 388, 397. For a contrary view, see Ben Kremer, ‘Restitution and Unconscientiousness: Another View’ (2003) 119 *Law Quarterly Review* 188, 190–1.

179 *Holt v Markham* [1923] 1 KB 504, 513.

180 Ross Grantham, ‘The Equitable Basis of the Law of Restitution’ in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Thomson Lawbook, 2005) 349.

181 Paul Finn, ‘Unconscionable Conduct’ (1994) 8 *Journal of Contract Law* 37. Conscience has always had a range of different meanings, see Dennis Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010).

182 *Australia Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 74 (Gummow and Hayne JJ), citing *Australia Competition and Consumer Commission v C G Berbatis Holdings [No 2]* (2000) 96 FCR 491, 501–2 (French J).

183 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 409 (Gaudron, McHugh, Gummow and Hayne JJ).

been explicitly denied.¹⁸⁴ Under the rubric of unconscionability there is room for a set of principles to emerge,¹⁸⁵ even if sometimes there is some leeway in the way in which those principles are applied.¹⁸⁶ Some will see this as a good thing; others will disagree. A system which incorporates too much flexibility may make it difficult for legal practitioners to give reliable advice.¹⁸⁷ At the same time it is quite wrong, as some of those who oppose Australian developments have tried to do, to present unjust enrichment and unconscionability as though the former is completely certain and the latter completely uncertain. Unjust enrichment enthusiasts have always regarded mistaken payment as a core case. Yet even here there is a considerable amount of latitude in something as fundamental as whether or not the defendant is unjustly enriched.¹⁸⁸ The same point can also be illustrated by drawing a comparison between the Australian unconscionable dealing doctrine, and undue influence which is the preferred way of dealing with transactions of this sort in England. In terms of certainty these two approaches are much closer than they may at first appear to be.¹⁸⁹

The roots of English hostility to an equitable explanation of *Moses v Macferlan* go back into the 19th century. It is no coincidence that Chief Baron Pollock's remarks of 1849 occurred when the relationship between law and equity was a particularly sensitive issue.¹⁹⁰ In the aftermath of the *Supreme Court of Judicature Act 1873* (UK) many important equitable doctrines were marginalised.¹⁹¹ Money had and received was just another victim. The equitable

-
- 184 With respect to unjust enrichment, see above n 120. Other examples include *Muschinski v Dodds* (1985) 160 CLR 583, 616 (Deane J); *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394, 443 (Deane J); *Attorney-General of New South Wales v World Best Holdings Ltd* [2005] 63 NSWLR 557, 583 (Spigelman CJ).
- 185 A good example of a principled approach can be found in Justice Deane's judgment in *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 474.
- 186 *Louth v Diprose* (1992) 175 CLR 621 provides an excellent example. It can be argued that *Bridgewater v Leahy* (1998) 194 CLR 457 provides another, see C E F Rickett, 'Bridgewater v Leahy – A Bridge Too Far?' (2012) 31 *University of Queensland Law Journal* 233. It may well be that the pendulum is swinging back in favour of a more conservative application of the unconscionable bargain doctrine: *Kakavas v Crown Melbourne Ltd* [2013] HCA 25.
- 187 A number of experienced practitioners made this point very forcibly during a discussion of Australian developments that took place in an LLM seminar conducted by the author in April 2013.
- 188 The modern test is that laid down by Goff J in *Barclays Bank Ltd v W J Simms, Son and Cooke (Southern) Ltd* [1980] QB 677. It was later approved in *Lloyds Bank plc v Independent Insurance Co Ltd* [2000] QB 110 (CA) and *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 AC 558.
- 189 Michael Bryan, 'Unjust Enrichment and Unconscionability in Australia: A False Dichotomy?' in Jason Neyers, McInnes and Pitel (eds), above n 116, 47, 57–62; Rick Bigwood, 'From Morgan to Etridge: Tracing the (Dis)Integration of Undue Influence in the United Kingdom' in Jason W Neyers, Richard Bronaugh and Stephen G A Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009) ch 15. The uncertainty of undue influence has been recognised by the House of Lords: *National Westminster Bank plc v Morgan* [1985] AC 686, 709 (Lord Scarman).
- 190 Michael Lobban, 'Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part II' (2004) 22 *Law and History Review* 565, 584.
- 191 Stephen Waddams, 'Equity in English Contract Law: the Impact of the Judicature Acts (1873–75)' (2012) 33 *Journal of Legal History* 185.

roots of *Moses v Macferlan* were lost in the noisy debate about the relationship between common law and equity.

VII ENGLAND AND AUSTRALIA: THE PAST AND THE FUTURE

More than 20 years ago Gummow J of the Federal Court wrote that:

I return to perhaps the principal significance of *Pavey's* case, the familiarity with the older decisions and use thereof in propounding the modern law. One striking feature of much of the writing by proponents of some normative doctrine of restitution or unjust enrichment is the close attention apparently paid to cases decided in the 18th or 19th century. Encouragement is said to be derived from them, in the sense that the new doctrine propounded by the writer is presented as consistent with the old cases. However, it is a reasonable criticism of much of the modern writing on restitution that it does not get the past right.¹⁹²

As far as *Moses v Macferlan* is concerned, his analysis may well be right. In the desire to promote unjust enrichment the true meaning of *Moses v Macferlan* was obscured in England. It is more difficult to be sure how committed the rest of the High Court of Australia is to Justice Gummow's equitable rationalisation of unjust enrichment.¹⁹³ Of course it was not the work of one man alone. The judgment of Gleeson CJ, Gaudron and Hayne JJ in *Roxborough* referred to the 'equitable foundation for a claim in restitution',¹⁹⁴ but the point was not analysed. There was no more than a brief mention of *Moses v Macferlan*.¹⁹⁵ Later decisions of the High Court have mainly involved joint judgments which have also endorsed the equitable approach.¹⁹⁶ There is an older precedent pointing the same way. In 1881, having quoted at length from *Moses v Macferlan*, Sir James Martin CJ emphasised that money had and received was based on the notion of money that *ex æquo et bono* ought to be repaid.¹⁹⁷

The way that history is used is not all that separates England and Australia in relation to unjust enrichment. Most obviously equity plays a much more central

192 Gummow, above n 117, 60.

193 This point is overlooked by supporters and detractors of the equitable approach at least as far as *Roxborough* is concerned: see Grantham, above n 180, 350. For a slightly different type of scepticism from another judge writing extra-judicially, see Paul Finn, 'Equitable Doctrine and Discretion in Remedies' in Cornish et al (eds), above n 21, 251, 252.

194 (2001) 208 CLR 516, 528.

195 Ibid 525.

196 *Farah Constructions* 2007) 230 CLR 89; *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635 (Gleeson CJ delivered a separate judgment); *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269.

197 *Lyons v Hardy* [1881] 2 NSWLR 369, 374 cited by Gummow J at *Roxborough* (2001) 208 CLR 516, 545. There are other examples discussed by Mason, above n 90, 5 including *White v Copeland* (1894) 15 LR (NSW) 281; *R v Brown* (1912) 14 CLR 17, 25; *Campbell v Kitchen & Sons Ltd* (1910) 12 CLR 515, 531; *Sargood Bros v Commonwealth* (1910) 11 CLR 258, 303.

role in Australian law in a variety of contexts.¹⁹⁸ There are also some important differences of tone. Some Australian judges have expressed themselves to be wary of the merits of taxonomy¹⁹⁹ and ‘too high a level of abstraction’.²⁰⁰ Yet even those who support unjust enrichment would strongly resist the charge of top-down reasoning. Birks and those who followed him have always been careful to advocate looking down to the cases.²⁰¹ The challenges of taxonomy are often underestimated by academic lawyers.²⁰² But the way that the debate has been so shaped by taxonomy also reflects the way in which academic writers have played such a vital part in steering the direction of unjust enrichment in England.

There is a long tradition of academic writing on restitution in Australia. Samuel Stoljar published his *The Law of Quasi-Contract*²⁰³ two years before *Goff and Jones*. The academic literature in Australia is more diverse than in England. Dates may matter too. *Mason and Carter*, the Australian equivalent of *Goff and Jones*, did not appear until after *Pavey & Matthews Pty Ltd v Paul*.²⁰⁴ Whilst its authors found examples of restitution in the case law that pre-dates *Pavey & Matthews Pty Ltd v Paul*,²⁰⁵ the difference in timing may well be crucial.²⁰⁶ In contrast, by the time Lord Goff delivered his speech in *Lipkin Gorman (a Firm) v Karpnale Ltd*, much of the ground had already been cleared. The structure of the subject was in place. So were many of the details. There is some significant academic support for the English approach in Australia,²⁰⁷ but there are dissenters as well.²⁰⁸ The balance of power between the academics and judges is also rather

198 There are numerous examples: see P D Finn ‘Equity and Contract’ in P D Finn (ed), *Essays on Contract* (Lawbook, 1987) 104; Anthony Mason, ‘The Place of Equity and Equitable Remedies in the Contemporary Common Law World’ (1994) 110 *Law Quarterly Review* 238; Anthony Mason, ‘The Impact of Equitable Doctrine on the Law of Contract’ (1998) 27 *Anglo-American Law Review* 1; A F Mason, ‘Contract, Good Faith and Equitable Standards in Fair Dealing’ (2000) 116 *Law Quarterly Review* 66.

199 *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 300.

200 *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 661; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 [114] (Gummow and Bell JJ).

201 Birks, above n 72, 19; Burrows, above n 132, 73–4.

202 For an account of the historical problems of taxonomy, see S M Waddams, *Dimensions of Private Law Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge University Press, 2003). These objections disappear if one takes the by no means uncontroversial view that appellate judges are engaged in an exercise in interpretive legal theory, see Allan Beever and Charles Rickett, ‘Interpretive Legal Theory and the Academic Lawyer’ (2005) 68 *Modern Law Review* 320.

203 S J Stoljar, *The Law of Quasi-Contract* (Lawbook, 1964). The author noted in the preface to the second edition, S J Stoljar, *The Law of Quasi-Contract* (Lawbook, 2nd ed, 1989) that ‘[i]n the early 1960s quasi-contract was still, at any rate in England and Australia, quite a novel subject, of somewhat remote interest’: at v.

204 Keith Mason and J W Carter, *Restitution Law in Australia* (Butterworths, 1992).

205 *Ibid* vii.

206 Mason and Carter’s important book was warmly welcomed by English supporters of unjust enrichment, Peter Birks et al, ‘The First Australian Textbook on Restitution’ (1997) 5 *Restitution Law Review* 229.

207 James Edelman and Elise Bant, *Unjust Enrichment in Australia* (Oxford University Press, 2006); Kit Barker and Ross Grantham, *Unjust Enrichment* (LexisNexis, 2008); Michael Bryan, ‘Peter Birks and Unjust Enrichment in Australia’ (2004) 28 *Melbourne University Law Review* 724.

208 In addition to Stoljar, see I M Jackman, *The Varieties of Restitution* (Federation Press, 1998); Dietrich, above n 133.

different.²⁰⁹ In Australia, the initiative, in both a positive and negative sense, in this area has largely come from judges.²¹⁰ From as far back as the 1930s English academics have been at least as important as the judges in the story of the development of unjust enrichment.

In England the future of unjust enrichment appears to be secure.²¹¹ It is more difficult to predict what will happen in Australia. In the latest High Court statement on the subject, and the last before he retired from the Bench, Gummow J, with whom Bell J agreed, continued to argue that money had and received was a 'liberal action in the nature of a bill in equity'.²¹² The joint judgment of French CJ, Crennan and Kiefel JJ offers rather more hope to those favouring a more English view of unjust enrichment.²¹³ Not only is it accepted that unjust enrichment has a taxonomical function,²¹⁴ it is seen as akin to a principle which can be used to develop the law in novel situations.²¹⁵ The High Court also made clear that there was to be no independent substantive role for unconscionability of the sort proposed by those Australian jurisdictions which have experimented with the notion of 'unconscionable retention of benefit'.²¹⁶ Taken together this marks a significant shift. Once more unjust enrichment seems to have normative force. It is possible that following his retirement, Justice Gummow's equitable analysis, while historically well-grounded, may fade away. Recent decisions in New South Wales suggest that it might.²¹⁷

Whatever form unjust enrichment takes in the future, it can and should stand on its own terms. Legal history has great value. All the same there are few, if

209 For a criticism of the academic mind-set, see *Roxborough* (2001) 208 CLR 516, 544 (Gummow J); *Farah Constructions* (2007) 230 CLR 89, 158 (Heydon J).

210 A few judges such as Edelman J of the Supreme Court of Western Australia have a foot in both academic and judicial camps. Enthusiasts for unjust enrichment will hope that any attempt to impose his academic beliefs do not meet the same fate as those of another judicial scholar, Mason P, in *Farah Construction* (2007) 230 CLR 89; see especially at 149–59. President Mason referred to the incident in a speech to mark his retirement: 'Farewell Ceremony for the Honourable Justice Mason AC' (Speech delivered by the Supreme Court of New South Wales, Banco Court, 30 May 2008) <http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/mason_speeches.pdf> [59].

211 An English restatement has recently appeared: Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press, 2012).

212 *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 545 [114].

213 *Ibid* [29]–[30].

214 *Ibid* [30].

215 *Ibid*.

216 Elise Bant, 'Illegality and the Revival of Unjust Enrichment Law in Australia' (2012) 128 *Law Quarterly Review* 341, 343.

217 *Citigroup Pty Ltd v National Australia Bank Ltd* [2012] NSWCA 381 [49] (Barrett JA); *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* [2011] NSWSC 267; *Australian Financial Services and Leasing Pty Ltd v Bosch Security Systems Pty Ltd* [2012] NSWCA 380 [70] (Allsop P), [181] (Meagher JA). Indeed it could be argued that unjust enrichment never really went away especially but not only in New South Wales: *Vickery v JJP Custodians* [2002] NSWSC 782 [134]; *Torpey Vander Have Pty Ltd v Mass Constructions Pty Ltd* [2002] NSWCA 263 [34]; *Say-Dee Pty Ltd v Farah Construction Pty Ltd* [2005] NSWCA 309 [222]; *Hollis v Atherton Shire Council* [2003] QSC 147 [10]; *ABL Custodian Services Pty Ltd v Smith* [2010] VSC 548 [54]; *Ideas Plus Investments Ltd v National Australian Bank Ltd* [2006] WASCA 215 [64]–[65], [96]; *Ethnic Earth v Quoin Technology* [2006] SASC 7 [64]–[65].

any, lawyers who would suggest that the modern law of contract and tort should be determined by the law as it stood in the mid-18th century. Unjust enrichment should be no different. Many unjust enrichment lawyers would argue that even if *Moses v Macferlan* borrowed from equity that fact is irrelevant. Birks has said that conflict between unjust enrichment and equity is 'logically impossible'. Unjust enrichment is jurisdiction neutral. It draws on both law and equity and the fact that there was once a historical divide between law and equity ought not to matter.²¹⁸ This basic point has been accepted in the High Court of Australia.²¹⁹ Problems are sure to emerge when the same or similar set of facts give different results depending on whether liability is characterised as legal or equitable. It is not necessary to possess the foresight of Tiresias in order to prophesy that any re-emergence of unjust enrichment is likely to lead to trouble in cases like *Farah Constructions*.²²⁰

As for *Moses v Macferlan* itself, as long ago as 1797 it was held that contrary to Lord Mansfield's opinion money paid under legal process could not be recovered using money had and received.²²¹ It is to be hoped that the rest of the decision can be afforded a quiet and dignified burial. It has already endured much too long. As long as Lord Mansfield's words continue to dominate the discourse, more important questions such as the precise role, juridical basis, scope, organisation and even standing of unjust enrichment in Australia will continue to be obscured.

218 Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *University of Western Australia Law Review* 1, 67.

219 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 376 (Deane and Dawson JJ).

220 (2007) 230 CLR 89.

221 *Marriott v Hampton* (1797) 2 Esp 546.