Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact, he denies that there is a contract; the obligation is as efficacious as if it were upon a contract. The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort though it resembles contract rather than tort.\(^1\)

I Introduction

Prima facie, the injustice of unjust enrichment is the injustice of keeping what was not given as a gift – of retaining benefits received in the absence of donative intent. Mistaken payments are the prototypical example of unjust enrichment because the plaintiff’s mistake evidences that the transfer of benefit to the defendant took place, as it were, behind the plaintiff’s back. The defendant’s retention of the benefit is unjust in that it violates the plaintiff’s right to keep what is hers until she freely parts with it. The defendant cannot claim to retain what was not given to her as a gift.

This unintended transfer of benefit need not take place behind the plaintiff’s back in order to activate the restitutionary operations of the law of unjust enrichment. Mistaken payments aptly exemplify, not completely exhaust, the situations that activate those operations. An absence of donative intent may be evidenced other than by way of mistake.

Thus, for example, if a nephew performs services over a number of years for his aunt on the understanding that she will leave her house to him in her will, and this understanding winds up being legally unenforceable because it is unwritten, the nephew may still recover against the deceased aunt’s estate for the value of the services rendered.\(^2\) In such a case, the


agreement between nephew and aunt is normatively but not factually irrel­
levant. It is normatively irrelevant because, as an unenforceable contract, it
cannot ground the estate's obligations toward the nephew. It is factually rel­
levant in that, regardless of its enforceability, the agreement evidences that
the nephew's services were not performed gratuitously. Though not per­
formed behind the plaintiff's back, the services were nonetheless per­
formed in the absence of donative intent. As in cases of mistaken payment,
this absence is the ground of the plaintiff's recovery, not in contract, but in
unjust enrichment.

Yet viewed merely as a subjective matter taking place in the plaintiff's
head, this absence of donative intent is insufficient to ground recovery un­
der the auspices of the law of unjust enrichment. This insufficiency is
brought into relief in cases involving unrequested benefits. She who cleans
another's windshield while the other waits at a red light confers a benefit in
the absence of donative intent. Nonetheless, the law of unjust enrichment
refuses recovery for the benefit thus conferred.

The reflection that follows is an effort both to understand and to thema­
tize the grounds on which the law of unjust enrichment refuses recovery for
unrequested benefits. The question to be dealt with is why a body of law that
routinely grants recovery for benefits conferred in the absence of donative
intent nonetheless refuses recovery in cases where the benefits conferred
are unrequested, even though she who confers them does so in the absence
of donative intent.

To be sure, examined in the light of the above example about the neph­
ew and the aunt, the problem of unrequested benefits is not as intractable
as it might at first appear. For the agreement between nephew and aunt ev­
edences that the non-gratuitous character of the benefit flowing from the
one to the other shows on both sides. Apart from its unenforceability, the
fact of the agreement evidences that the services were to be paid for - and
that this is as true for the defendant as it is for the plaintiff. The law of unjust
enrichment thus construes the absence of donative intent not unilaterally,
as a subjective matter taking place in the plaintiff's head, but rather bilater­
ally, as an inter-subjective matter taking place between plaintiff and defend­
ant. Forcing the defendant to disgorge the benefit received in the absence
of this bilaterality would amount to granting the plaintiff the privilege of
unilaterally constituting another's obligation. Unrequested benefits fall
outside the law of unjust enrichment in that, having failed to display the re­
quired bilaterality, their disgorgement would itself be unjust.

But examined in the light of the prototypical example of mistaken pay­
ments, the problem of unrequested benefits cannot help but appear to re­
main intractable. On the one hand, mistaken payments are unrequested.
On the other, the grounds of liability in cases of mistaken payment seem,
at least *prima facie*, to be constituted solely in terms of a unilateral mistake on the plaintiff's part — in terms, that is, of a unilateral inquiry into the plaintiff's merely subjective intent. Thus the plaintiff's recovery in cases of mistaken payment cannot help but amount to an argument, forceful if perhaps not definitive, for the plaintiff's recovery in cases of unrequested benefits.

The resulting disjunction is clear: either the law of unjust enrichment is incoherent in its refusal of recovery for unrequested benefits or the requirement of bilaterality just sketched above is somehow operative in cases of mistaken payment.

The reflection that follows is primarily but not exclusively concerned with unrequested benefits. It seeks to set forth an understanding of the refusal of recovery for unrequested benefits in the hope of preparing the ground upon which, under the rubric of bilaterality, unrequested benefits and mistaken payments are to be placed within one and the same conceptual structure. The bilateral structure I have in mind is that of ‘corrective justice,’ as formulated by E.J. Weinrib in *The Idea of Private Law.*

In Part II, I develop the bilaterality of unjust enrichment. In Part III, I both further develop and deploy this bilaterality as an effort to account for the refusal of recovery for unrequested benefits. In Part IV, I conclude that this bilaterality is indeed operative in cases of mistaken payment by way of the defence of 'change of position.'

II The Bilaterality of Unjust Enrichment

The law of unjust enrichment grounds liability not in the defendant's having promised something to the plaintiff, but rather in his having become unjustly enriched at the plaintiff's expense. It is not because the defendant voluntarily assumed the obligation to do so that he is ordered to disgorge the benefit received. As in tort, the defendant's obligation is imposed by law, not derived from the defendant's promissory consent, whether express or implied. 4

At the same time, however, the law of unjust enrichment refuses recovery for unrequested benefits on the grounds that the defendant neither requested nor accepted the benefit received — on the grounds, that is, of an absence of bilaterality. But this requirement of request and/or acceptance must not be construed as a requirement for the defendant's consent. For such a construal would submerge the law of unjust enrichment under the contractual trappings of implied promise.

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The question posed, therefore, is that of the difference between the bilaterality required by the law of unjust enrichment and the bilaterality of offer and acceptance required by the law of contract. The problem is that of formulating the bilaterality of unjust enrichment apart from any consent of the parties or any privity of contract. In this Part, I set forth that differentiation through an examination of Moses v. Macferlan,\textsuperscript{5} Deglman,\textsuperscript{6} Pavey \& Matthews Pty. Ltd. v. Paul,\textsuperscript{7} and Pettkus v. Becker.\textsuperscript{8}

In Moses, Moses, holder and payee of promissory notes made by a third party, endorsed the notes to Macferlan so that Macferlan could recover the money payable on those notes in an action in his own name. Macferlan assured Moses that Moses would not suffer prejudice as a result of the endorsement. Macferlan in fact agreed in writing that Moses would not be liable on the notes. Nonetheless, Macferlan subsequently sued Moses in a court equivalent to what today we might call a small claims court. The Court held in Macferlan's favour, stating that, while it had no jurisdiction over the agreement between the parties, it had jurisdiction over the endorsement. Moses now sought to recover the money he had been ordered by the inferior court to pay to Macferlan. Lord Mansfield found in Moses' favour, but not on the basis of the agreement. 'In one word,' he held, 'the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.'\textsuperscript{9}

It would be a mistake to grasp these 'ties of natural justice and equity' merely as Lord Mansfield's way of achieving indirectly what could not be achieved directly through the agreement. First, Lord Mansfield clearly

\textsuperscript{4} On the autonomy of unjust enrichment as a cause of action, distinct from both tort and contract, see P. Birks, An \textit{Introduction to the Law of Restitution} (Oxford: Oxford University Press, 1989) at 1–6 and 28–49 [hereinafter \textit{Introduction}]. See also P. Birks, 'The Independence of Restitutionary Causes of Action' (1990) 19 U. Queensland L.J. 1 [hereinafter 'Independence']. In \textit{Introduction} at 22, referring to misleading attempts to capture unjust enrichment under the rubric of 'quasi-contract,' Birks writes: 'Among the sillier Oxford stories is that of the Dean's dog. The college's rules forbid the keeping of dogs. The Dean keeps a dog. Reflecting on the action to be taken, the governing body of the college decides that the labrador is a cat and moves to next business. The dog is a constructive cat. Deemed, quasi- or fictitious, it is not what it seems. When the law behaves like this you know it is in trouble, its intellect either genuinely defeated or deliberately indulging in some benevolent dishonesty. ... If cuckoos had to be quasi-thrushes or constructive blackbirds we should know less about them.'

\textsuperscript{5} (1760), 97 E.R. 676 (K.B.) [hereinafter Moses].

\textsuperscript{6} Supra note 2.

\textsuperscript{7} (1987), 162 C.L.R. 221 (Australia H.C.) [hereinafter Pavey].

\textsuperscript{8} [1980] 2 S.C.R. 834 [hereinafter Pettkus].

\textsuperscript{9} Moses, supra note 5 at 681.
tells us that his decision in no way implies that the inferior court erred in its refusal to consider the agreement. Lord Mansfield's concern is not that Macferlan's recovery on the promissory notes was somehow rooted in an error in law. His concern is elsewhere: 'Money may be recovered by a right and legal judgment; and yet the iniquity of keeping that money may be manifest, upon grounds which could not be used by way of defence against the judgment.' Macferlan got the money by 'a right and legal judgment.' It is not some wrongfulness of the defendant's getting but rather the iniquity of his keeping of the money that concerns Lord Mansfield. The grounds of Lord Mansfield's decision are independent from any claim that, by suing on the notes, Macferlan breached a legally binding promise made to Moses.

Second, Lord Mansfield explicitly distinguishes between an action upon the inequity arising out of the agreement and an action on the agreement itself. Moses' action is of the former kind. The difference between the non-contractual and the contractual action is that whereas the former requests that 'the defendant may refund the money,' the latter requests that, 'besides refunding the money, he may pay the costs and expenses the plaintiff was put to.'

Thus Moses recovers, but not as a contracting party. Similarly, Macferlan is found liable, but not because of his having breached a promise made to Moses. The contract appears as a happening between the parties, but not as what defines the normative relation between them. The agreement between the parties is construed as an exclusively factual matter whose normative meaning is formulated not from the point of view of whether the promise in question is or is not enforceable, but rather from the point of view of what Lord Mansfield calls 'the ties of natural justice and equity.' The function of the promissory transaction — as distinct from a legally binding contractual relation — is not normative but evidentiary. Regardless of its enforceability, the promise attached to the happening whereby Macferlan came into possession of the notes evidences that, despite the appearance created by the endorsement, Moses never intended to transfer the money to Macferlan. Thus Macferlan 'ought not in justice to keep' the money because it was 'money had and received to the plaintiff's use.'

10 Ibid. at 679.
11 On the independence of unjust enrichment from wrongdoing, see Birks, Introduction, supra note 4 at 22–25. See also Birks, 'Independence,' supra note 4 at 11–13.
12 Moses, supra note 5 at 679.
13 Ibid. at 679.
14 Ibid. at 678.
An analogous dynamic takes place in *Deglman*. In that case, Constantin­
eau performed services for his aunt in exchange for her promise that she
would leave her house to him in her will. The *Statute of Frauds*, however, ren­
dered the unwritten agreement unenforceable. The Court held that Con­
stantineau was nonetheless entitled to recover for the services rendered on a *quantum meruit* basis. Cartwright J. stated that the plaintiff's right to recover for the services is 'based, not on the contract, but on an obligation imposed by law.' As Rand J. put it,

On the findings of both courts below the services were not given gratuitously but on the footing of a contractual relation: they were to be paid for. The statute in such a case does not touch the principle of restitution against what would otherwise be an unjust enrichment of the defendant at the expense of the plaintiff.

Thus, as in *Moses*, the promissory background is relevant only as evi­
dence to establish the absence of donative intent on the plaintiff's part - as evidence, that is, that the services performed by Constantineau were not an instance of gift-giving. To suggest that Constantineau's recovery is rooted in a fresh or implied promise providing that his aunt pay for the services is simply 'to draw an inference contrary to the fact.' The fact is that the aunt promised no such thing.

The exclusively evidentiary function fulfilled by a promissory back­
ground in a case involving non-contractual restitutionary liability is explic­
itly formulated by the court in *Pavey*, a case similar to *Deglman* in that it in­
volved a contract rendered unenforceable because it was unwritten. In holding for the plaintiff's entitlement to recovery on a *quantum meruit* basis, Deane J. stated that the fact that the defendant's obligation arises

independently of the unenforceable contract does not mean that the existence or terms of that contract are necessarily irrelevant. In such an action, it will ordinarily be permissible for the plaintiff to refer to the unenforceable contract as evidence, but as evidence only, on the question whether what was done was done gratuitously.

'The purpose of proving the contract,' as Mason and Wilson JJ. put it in the same decision, 'is not to enforce it but to make out another cause of action having a different foundation in law.'

The fact that all three cases present, though in varying ways, some kind of promissory background might give rise to the impression that the non-contractual foundation in law of which they speak is somehow dependent

15 *Deglman*, supra note 2 at 734.
16 Ibid. at 728.
17 Ibid. at 735.
18 *Pavey*, supra note 7 at 257.
19 Ibid. at 228.
upon agreement – if not normatively, at least factually. *Pettkus* suffices to put this misguided and misleading impression to rest. In so doing, *Pettkus* will move us toward the specific non-contractual bilaterality of unjust enrichment.

In *Pettkus*, plaintiff and defendant had lived together as common law wife and husband for many years. Upon the sundering of their relationship, the plaintiff-respondent, Becker, sought a declaration of entitlement to a one-half interest in the lands and a share in the beekeeping business the couple had acquired and developed together through their efforts, earnings and labour. The moneys and property had been placed in Pettkus’s name. At no time during the relationship had there been any agreement to share either the moneys or the property.

Dickson J. found that Becker’s claim grounded upon resulting trust must fail owing to the absence of an express or implicit intention by the parties to create it. Dickson J. categorically refused to glean a ‘fugitive common intention’ or ‘phantom intent’ from the conduct of the parties: ‘I am not prepared to infer, or presume, common intention when the trial judge has made an explicit finding to the contrary and the appellate court has not disturbed the finding.’ But a constructive trust, rooted in the principle of unjust enrichment, is altogether a different matter: ‘It is imposed without reference to intention to create a trust, and its purpose is to remedy a result otherwise unjust.’

No longer a question about whether the facts support an inference or imputation that the parties had implicitly agreed to carry on a common enterprise, the problem posed is normatively transfigured. It emerges rather as a question about whether, explicitly without reference to common intention, Pettkus’s retention of a full interest in the moneys and property that had been placed in his name would amount to an injustice. The problem of unjust enrichment, not that of express or implied common intention, will now determine the normative import of the factual inquiry.

Dickson J. formulates three requirements that must be satisfied before an unjust enrichment can be said to exist: ‘[T]he facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason – such as a contract or disposition of law – for the enrichment.’

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20 *Pettkus*, supra note 8 at 842.
21 Ibid. at 843.
22 Ibid. at 846. It is in fact this categorical refusal to infer common intention that crucially differentiates Dickson J.’s majority judgment from both Ritchie J.’s and Martland J.’s dissents.
23 Ibid. at 843.
24 Ibid. at 844. See also the similar formulation at 848.
Here is how, on the facts of this case, Dickson J. puts these requirements to work:

On these facts, the first two requirements ... have clearly been satisfied: Mr. Pettkus has had the benefit of nineteen years of unpaid labour, while Miss Becker has received little or nothing in return. As for the third requirement, I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.25

Thus Dickson J. ruled in favour of Becker.

Pettkus provides the ground for the following three observations pertinent to our present context. The first is that Pettkus reminds us of the independence of restitutionary from contractual causes of action. These different causes of action appeal to different foundations in law.

The second is that – unlike Moses, Deglman, and Pavey – Pettkus, precisely because it is explicitly devoid of a promissory background, confirms the conclusion that, when present in the context of a restitutionary cause of action, such background is but a particular set of circumstances that happen to be more or less accurately described as promissory but which are nonetheless to be legally analyzed from the non-contractual point of view of unjust enrichment. That is, such background is but evidentiary material to be normatively ordered not in terms of the categories of offer, acceptance, and consideration, but in terms of those of enrichment, corresponding deprivation, and absence of juristic reason for the enrichment.

The third observation, which I will now elaborate, is that Pettkus reveals the bilaterality of unjust enrichment in that it explicitly holds that, though necessary, the plaintiff’s merely subjective lack of donative intent is not in and of itself sufficient to ground the defendant’s liability in unjust enrichment. Becker’s expectation of remuneration, even if eminently reasonable, is not in and of itself sufficient to generate a restitutionary remedy. Pettkus’s free acceptance of the benefit in circumstances in which he knew or ought to have known of Becker’s reasonable expectation is an additional necessary element. In the absence of such acceptance on Pettkus’s part, Becker’s claim would not have succeeded. The non-gratuitous character of the benefit, that is, must show on both sides. It must appear not unilaterally but bilaterally.

The injustice of unjust enrichment is not so much the injustice of retaining a benefit received in the absence of donative intent as much as it is the

25 Ibid. at 849.
injustice of retaining a benefit received in the absence of any juristic reason to do so - of any right to do so.\textsuperscript{26} In the above four cases, the respective defendants could claim that they should in justice retain the benefit received by establishing that they had a right to do so - in other words, by establishing that the plaintiff either had a duty to benefit the defendant or in fact conferred a gift on the defendant. Absent such a showing on the defendant’s part, the plaintiff recovers.

What all four cases have in common is that they each present a factual situation in which the defendant’s enrichment at the plaintiff’s expense is, despite appearances to the contrary, devoid of legal weight. The defendant cannot assert that, in conferring the benefit upon him, the plaintiff thereby simultaneously conferred an entitlement to retain the benefit. Moses’ endorsement of the notes is belied by Macferlan’s promise not to sue on it. Once the contracts under which they were performed are deemed normatively inopercative, Constantineau’s and Pavey’s services lose their character as services performed in discharge of a duty owed to the defendant. Becker’s identity as Pettkus’s common law wife does not entail that she was, in the circumstances, legally bound to benefit him. All four cases, that is, are about unintended enrichments.

In each of the four cases, the defendant has \textit{in fact} received a benefit from the plaintiff, but he cannot \textit{in law} assert an entitlement against the plaintiff to retain that benefit. For the plaintiff neither acted in fulfilment of an obligation to benefit the defendant nor intended to benefit the defendant gratuitously. In each of the four cases, the defendant’s enrichment at the plaintiff’s expense is unjust because the defendant’s retention of the benefit would amount to forcing the plaintiff to impoverish herself for the sake of another. The principle informing a specifically legal determination that a particular enrichment is unjust is the principle that a person is entitled to what is his until he freely parts with it.\textsuperscript{27} This is the principle informing ‘the ties of natural justice and equity’ of which Lord Mansfield speaks in Moses, as well as the ‘absence of any juristic reason for the enrichment’ of which, recalling Moses, Dickson J. speaks in Pettkus.\textsuperscript{28}

\textsuperscript{26} See, for example, Aiken v. Short (1856), 156 E.R. 1180 (Ex.) at 1181, where a mistaken payment was retained because the defendant had a ‘perfect right’ to it.

\textsuperscript{27} In Private Law, supra note 8 at 140, E.J. Weinrib writes: ‘The ultimate basis of this recovery is that corrective justice, being in Aristotle’s words “towards another,” assumes the mutual externality of the parties and the consequent separateness of their interests. Accordingly, corrective justice recognizes no obligation to enrich another. The conferral of a benefit is literally within the free gift of the donor as a self-determining agent. Consequently, only if the donor acts in execution of a donative intent is the transfer of benefit an expression of right.’

\textsuperscript{28} Pettkus, supra note 8, citing Moses at 847.
The fact that this principle is indicative of a certain bilaterality is already evidenced in that, on its basis, the injustice of unjust enrichment is formulated not as flowing from the absence of donative intent on the plaintiff's part, but rather as flowing from the *ties* of natural justice and equity, from the absence of any juristic reason for the defendant to retain the benefit received. The merely subjective absence of donative intent on the plaintiff's part is insufficient to establish a restitutionary claim. The principle that a person is entitled to what is his until he freely parts with it is indeed thoroughly meaningless when deployed in respect of some isolated person. It is as meaningless for Robinson Crusoe to assert the principle as it would be for a plaintiff to sue himself in its name. The principle has legal meaning only in terms of the bilateral relation between plaintiff and defendant. The very phrase 'ties of natural justice and equity' is itself a warning that the equation of the fundamental category of absence of juristic reason with a unilateral absence of donative intent on the plaintiff's part is mistaken.

The category 'absence of juristic reason' is through and through a bilateral category. It pertains as much to the defendant as it does to the plaintiff. It pertains to the plaintiff in that the defendant cannot claim to retain what was not given to him as a gift because such a claim is inconsistent with the plaintiff's entitlement to what is his until he freely parts with it. Yet it pertains as much to the defendant in that the defendant cannot claim to retain what was not given to him as a gift because such a claim is simultaneously inconsistent with the defendant's own entitlement to what is his until he freely parts with it. In denying the other's right, the defendant denies his own. In so doing, he undermines his own claim to retain the benefit. This is because, strictly formulated, the principle at the heart of the law of unjust enrichment is not the principle that a person is entitled to what is his until he freely parts with it. Rather, it is the bilateral principle that plaintiff and defendant are each equally entitled to what is theirs until they freely part with it. The import of this equality is that a denial of the one's entitlement must *eo ipso* amount to a denial of the other's.

Thus, short of asserting their inequality, Macferlan can claim that he is entitled to retain the money he received from Moses only at the cost of conceding that he himself has no entitlement to retain what he claims as his until he freely parts with it. Indeed, this is precisely why Lord Mansfield, not without first asking Macferlan whether he can show an entitlement or juristic reason to retain the money, orders him to return it to Moses.

The point here is by no means to suggest that the defendant's obligation to disgorge is, as it were, an obligation he owes to himself as the logically consistent bearer of a right to retain what is his until he freely parts with it. The point, rather, is to observe that the untenability of Macferlan's claim to retain the benefit received is but a manifestation of the radically
bilateral nature of unjust enrichment. From the point of view of this bilaterality, the defendant’s duty to disgorge is but the obverse of the plaintiff’s right to restitution.

This point of view is neither the plaintiff’s nor the defendant’s. It is rather the point of view of a common standard that, as such, is equally and bilaterally applicable to both. Macfarlan’s duty to disgorge is constituted in and through a determination, a judgment that his retention of the benefit would amount to a violation of that standard — that is, to an unjust enrichment. Lord Mansfield’s order is a reassertion of the standard — an undoing of the defendant’s negation of it.29

To say that the restitutionary remedy is a restoration of the equality of the parties is thus another way of saying that an enrichment is unjust where the defendant’s retention of the benefit received violates the equality between plaintiff and defendant as equal bearers of the right to what is theirs until they freely part with it. It is not the enrichment per se30 but its inconsistency with that equality that renders it unjust. It is not material deprivation but normative harm that the plaintiff must show.31 To lose sight of this requirement is to lose sight altogether of the normative specificity of the injustice of unjust enrichment.

The defendant cannot retain the benefit because that retention would amount to a unilateral imposition by the defendant upon the plaintiff of a legal duty to benefit the defendant gratuitously — of a demand that the plaintiff part with what is his in accordance not with his own will but with the defendant’s mere wish to have it. The unilaterality of this imposition is a normative violation of the equality of the parties. A mere wish cannot suffice to establish the defendant’s entitlement to the benefit any more than, in a world premised on equality, a person’s dreams, so to speak, can be constitutive of another’s obligations. The defendant’s duty to disgorge the benefit received is thus but a confirmation of his failure to elevate his wish to retain the benefit to the level of a legal reality capable of rendering the plaintiff’s impoverishment normatively justified.


30 Pelkus, supra note 8 at 828: ‘The common law has never been willing to compensate a plaintiff on the sole basis that his actions have benefited another. ... It is not enough for the court simply to determine that one spouse has benefited at the hands of another and then to require restitution.’

The fundamental import of this observation for an understanding of the grounds on which the law of unjust enrichment refuses recovery for unrequested benefits is contained in its necessary implication that just as the defendant cannot retain the benefit received if such retention violates the equality of the parties, so must the plaintiff's claim to restitution be consistent with that equality. Just as the law of unjust enrichment is not in the business of fulfilling the dreams of the defendant, so is the law of unjust enrichment not in the business of fulfilling the dreams of the plaintiff.

If Macferlan cannot retain the money on the basis of a mere wish to keep it, Moses must himself present more than a mere wish to have it back. Moses cannot recover on the mere basis of his having had a thought, thoroughly internal to himself, that the money was not a gift. Rather, Moses must show that the non-gratuitousness he claims shows on Macferlan's side as well. He must show, on the facts, that the absence of donative intent on which he bases his claim is as real from the point of view of the defendant as it is from the point of view of the plaintiff. He must show that is, that the defendant can be held to the absence of donative intent on the plaintiff's part. This is precisely what Moses shows when he points to the promise made to him by Macferlan upon receipt of the endorsement of the notes. Through that evidence, and only through that evidence, Moses' wish to have the money back emerges rather as a legal reality binding upon Macferlan.

Similarly, Pettkus' free acceptance in circumstances where he knew or ought to have known of Becker's non-donative intent is the sine qua non of the success of Becker's action. Without that acceptance, Becker would be reduced to the untenable position that her mere thought that her contribution to the lands and beekeeping business was not a gift, her merely subjective expectation that she would get something in return, could be constitutive of another's obligation. Becker accomplishes through Pettkus's free acceptance what Moses accomplishes through Macferlan's promise.

Whether in Moses or in Pettkus, granting the plaintiff's wish for a restitutionary remedy in the absence of such evidence of bilaterality would have violated the equality of the parties. The equality that normatively structures the relation between plaintiff and defendant informs the requirement that, factually, the plaintiff must provide evidence that the non-gratuitousness of the benefit shows on both sides. This normatively ordained evidentiary journey from wish to reality, from desire to right, is that which he who confers unrequested and/or unaccepted benefits cannot negotiate. This failure to establish bilaterality accounts for the law of unjust enrichment's refusal to grant him restitution.
III The Absence of Bilaterality in Unrequested Benefits

In Taylor v. Laird, Taylor was employed by Laird to command a boat. Taylor was paid for seven months before the voyage started. Sometime before the end of the ninth month of the voyage, he got into some disagreement with another member of the expedition and relinquished command. Nonetheless, he continued performing other work on the ship. Laird was not himself on board. Upon completion of the voyage, Taylor brought an action to recover additional salary, either on the contract or on a quantum meruit basis.

Holding that Taylor was entitled to recover only for an additional month’s wages, Pollock, C.B. stated:

Such evidence as you press of a recognition or acceptance of services may be sufficient to shew an implied contract to pay for them, if at the time the defendant had power to accept or refuse the services. But in this case it was not so. The defendant did not know of the services you rely on until the return of the vessel, and it was then something past, which would not imply – perhaps would not support – a promise to pay for it.

Suppose I clean your property without your knowledge, have I then a claim on you for payment? How can you help it? One cleans another’s shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning? The benefit of the service could not be rejected without refusing the property itself. So in the present instance. The ship came home, say partly by the assistance of the plaintiff; what could the defendant do but receive his ship back again?

The difficulty to be dealt with in the present context is that, writing as he was at a time when the independence of restitutionary causes of action had not yet taken root, Pollock C.B. formulates the refusal of recovery in the language of implied contract – in terms, that is, of the law of contract rather than that of unjust enrichment.

32 (1856), 25 L.J. Ex. 329 [hereinafter Taylor].
33 Taylor, supra note 32 at 332.
34 For brief accounts of the trials and tribulations attendant on the emergence of unjust enrichment as an independent cause of action, see Birks, Introduction, supra note 4 at 1–6 and 268–76; and Birks, ‘Independence,’ supra note 4 at 1–6. See also the judgments per Mason, Wilson, Brennan, Deane, and Dawson J.J. in Proctor, supra note 7.
35 See also, for example, Bowen L.J.’s formulations in Fälcke v. Scottish Imperial Insurance (1886), 34 Ch.D. 234 at 248 and 251: ‘Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will. … There can be no question here of acquiescence. … If there were any acquiescence … it would be an acquiescence from which in common law you would draw the inference of a contract; but, as I said before, there is no fact that leads to that.’
Taylor presents us with a fact situation capable of supporting neither an inference of a promise to pay nor a factual finding of a free acceptance of the benefit on the defendant’s part. This means that the plaintiff can recover neither in contract nor in unjust enrichment. But, on penalty of dissolving the specificity of restitutionary causes of action, the reasons for which Taylor cannot recover in contract cannot be the reasons for which he cannot recover in unjust enrichment. For, even where leading to the same result, the absence of promise cannot be normatively equated with the absence of free acceptance. To put it differently, the refusal of recovery in unjust enrichment on the basis of the absence of free acceptance cannot be adequately captured as a refusal to impose obligations that have not been voluntarily assumed by the obligee.\(^{36}\) The obligations imposed by the law of unjust enrichment are not mediated by consent. They are imposed by law. Thus the problem posed through Taylor is why a body of law that has no qualms about imposing obligations regardless of the obligee’s consent nonetheless limits its powers of imposition in cases of unrequested benefits.

This difficulty is in fact far deeper than it may at first appear. For it reveals the insufficiency as much as the fruitfulness of the foregoing account of the specific bilaterality of unjust enrichment.

The fruitfulness of that account lies in its permitting an approach to the problem of unrequested benefits from a point of view no longer encumbered by the equation of the fundamental category of ‘absence of juristic reason’ with a unilateral absence of donative intent on the plaintiff’s part. The bilaterality of unjust enrichment thus posits that Taylor’s clearly non-donative intent is not in and of itself constitutive of a right to restitution. Consequently, it suggests the possibility of formulating the refusal of recovery for unrequested benefits in terms of the law of unjust enrichment rather than the law of contract. More specifically, it suggests the proposition that the plaintiff in Taylor finds himself in the untenable position that the plaintiff in Pettkus would have been in had the defendant in that latter case not freely accepted the benefit conferred. Thus, just as in Pettkus the defendant’s free acceptance of the benefit grounds the plaintiff’s right to restitution, so in Taylor the absence of free acceptance on the

\(^{36}\) The American Law Institute’s Restatement of Restitution (St. Paul: American Law Institute Publishers, 1937) at 16, itself uses language that suggests that the refusal of recovery for unrequested benefits is rooted in a concern over imposing obligations that, at the very least implicitly, have not been voluntarily assumed: ‘A person is not required to deal with another unless he so desires and, ordinarily, a person should not be required to become an obligor unless he so desires. ... [W]here a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be unjustly enriched.’
defendant's part grounds the plaintiff's failure to recover. From the point of view of unjust enrichment, it is this absence of free acceptance, not of implied contract, that accounts for the refusal of recovery for unrequested benefits.

Yet this proposition, while correct as far as it goes, is in need of further elaboration. It is in need of further elaboration because it threatens to import into the very heart of the law of unjust enrichment the requirement that, for recovery to take place, there must be some kind of pre-existing relationship between plaintiff and defendant capable of supporting a factual finding of free acceptance (whether because the relationship is promissory, as in Moses, Deglman, and Pavey; or because it is tantamount to spousal, as in Pettkus; or because of some other feature of the relationship). But this importation of a pre-existing relationship into the very heart of unjust enrichment is thoroughly unacceptable. It is thoroughly unacceptable because it would render the law of unjust enrichment literally unable to grant recovery in the prototypical cases of mistaken payment, in which recipients of the benefits conferred are absolutely passive and in which there is no pre-existing relationship to be found. 37

Moreover, the importation of a pre-existing relationship between plaintiff and defendant is unacceptable in that it begs, rather than resolves, the question of the independence of restitutionary from contractual causes of action. For if the pre-existing relationship is said to be necessary in order to permit a factual finding that the defendant freely accepted the benefit,

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37 See Nicholson v. St. Denis (1975), 8 O.R. (2d) 315 (C.A.) for an account of unjust enrichment that appears to posit the requirement of a pre-existing relationship between plaintiff and defendant. MacKinnon J.A., at 317-18, states: 'It is difficult to rationalize all of the authorities on restitution and it would serve no useful purpose to make that attempt. It can be said, however, that in almost all of the cases the facts established that there was a special relationship between the parties, frequently contractual at the outset, which relationship would have made it unjust for the defendant to retain the benefit conferred on him by the plaintiff — a benefit, be it said, that was not conferred "officiously." This relationship in turn is usually, but not always, marked by two characteristics, firstly, knowledge of the benefit on the part of the defendant, and, secondly, either an express or implied request by the defendant for the benefit, or acquiescence in its performance.' As I just noted, one cannot help but wonder how, once a 'special relationship' between the parties is thus imported into the very heart of the law of unjust enrichment, it can be at all possible to account for recovery in cases of mistaken payment, in which there is no 'special relationship' to be found. By the same token, nor can one help but observe that once a requirement of a 'special relationship' is thus presupposed, it comes as no surprise that the task of 'rationalizing' the authorities on unjust enrichment appears at best difficult and at worst intractable. Of course, whether this means that attempting such a task would serve no useful purpose is altogether another matter. On the virtues of attempting to map the 'legal country' of unjust enrichment coherently, see Birks, 'Independence,' supra note 4 at 1–6; and Birks, Introduction, supra note 4 at 16–22.
then it is by no means self-evident why this pre-existing relationship is not sufficient to permit an inference of a promise to pay on the part of the defendant. More precisely, even if this pre-existing relationship is said to be such that it can support a factual finding of free acceptance, but not necessarily an inference of contract, it is by no means self-evident that the concern over the factual finding of free acceptance is qualitatively distinct from a concern that the defendant not be forced into obligations she has not voluntarily assumed. Thus the importation of a pre-existing relationship into the heart of unjust enrichment presupposes, rather than articulates, a fundamental normative difference between the restitutionary requirement of free acceptance and the contractual requirement of voluntary assumption of obligation.

But while the foregoing account of the independence of the bilaterality of unjust enrichment from that of contract is insufficient, it does suggest the direction to be followed in an effort to resolve this difficulty.

It will be recalled that, viewed conceptually, the movement in the foregoing account from Moses, De Glman, and Pavely, on the one hand, to Pettkus, on the other, fulfilled a threefold function. First, it revealed that the promissory background in the former three cases evidences not a unilateral concern with a merely subjective absence of donative intent but rather a bilateral concern with the two-sidedness of the non-gratuitousness of the benefit conferred. Second, it revealed that a promissory background is not constitutive of but is rather a particular instance of that two-sidedness—a mere evidentiary means, as it were, to establish bilaterality. And third, it revealed that the required bilaterality can be evidenced other than by pointing to a promissory background, as in the conjunction of non-donative intent and free acceptance present in Pettkus.

It was indeed Dickson J.’s categorical refusal to find a promissory background that permitted the deployment of Pettkus in the effort to liberate the specific bilaterality of unjust enrichment from the trappings of implied promise. The categorical absence in Pettkus of a factual situation capable of supporting an inference of common intention brought more sharply into relief elements of the specific bilaterality of unjust enrichment that could not be as distinctly perceived in Moses, De Glman, and Pavely.

Notwithstanding its insufficiency, the foregoing account of the specific bilaterality of unjust enrichment is helpful because it suggests that the categorical absence in Taylor of a factual situation capable of supporting a finding of free acceptance may bring more sharply into relief elements of the law of unjust enrichment that could not be as distinctly perceived in Pettkus itself. In other words, Taylor is to accomplish in respect of Pettkus a conceptual function similar to that accomplished by Pettkus in respect of Moses, De Glman, and Pavely.
Thus, through *Taylor*, the pre-existing relationship between plaintiff and defendant found in the four cases examined so far is itself to be formulated not as a requirement but as a particular instance of – a mere evidentiary means to establish – the bilaterality of unjust enrichment. This prescinding from the requirement of a pre-existing relationship should, on the one hand, permit a frankly non-contractual account of the normative import of free acceptance where it arises and, on the other, set the stage for a placing of unrequested benefits and mistaken payments within the same conceptual series.

The requirement that the non-gratuitousness of the benefit conferred show on both sides has thus far emerged as a manifestation of the equality of the parties as persons neither of which has a duty to benefit the other gratuitously. The plaintiffs in *Moses, Deglman, Pavey*, and *Petkus* all recover because the respective defendants' retention of the benefit received in each case would amount to a unilateral imposition of such a duty upon the plaintiff.

The problem posed through *Taylor* is that the plaintiff's position in that case cannot be – at least not without further ado – assimilated into that of the defendants' position in the four cases examined thus far. Taylor's position cannot be accurately rendered as a claim that the defendant benefit him gratuitously. For Taylor is only asking that Laird give back to him the value of the benefit that he conferred upon Laird.

As we have seen, the answer to Taylor cannot be that Laird never voluntarily assumed the obligation to pay for Taylor's services. For this answer collapses unjust enrichment into contract. Nor can the answer be, without further elaboration, that Laird never freely accepted or never had an option to reject the benefit received. For, left as it stands, this answer presupposes rather than articulates a fundamental normative difference between restitutionary and contractual causes of action.

Nonetheless, it is clear that the answer to Taylor must go through a specification of the injustice that would be imposed upon Laird were recovery allowed. The conceptual shift suggested by *Taylor* is a shift from the specification of the grounds on which the defendant's retention of the benefit is held to be unjust to a specification of the grounds on which the defendant's disgorgement of the benefit is held to be unjust. This shift may be formulated as a shift from a conceptual specification of the absence of juristic reason to a conceptual specification of the presence of juristic reason for the defendant to retain the benefit. Its need follows from the fact that, as distinct from the cases examined thus far, *Taylor* presents an instance where the plaintiff fails to recover.

But this specification of the presence of juristic reason neither can nor ought to be conceived as external to the specification of the absence of juristic reason. It is not a matter of grasping the presence of juristic reason as
a right of the defendant that somehow 'trumps' the plaintiff's right to restitution. It is not as if the 'officious' plaintiff's right to a restitutionary remedy is fully constituted yet rendered inoperative by some would-be superior right of the defendant. For this way of framing the problem would do little more than introduce extraneous considerations into the law of unjust enrichment. It would do nothing more than raise the question of how this would-be superior right made its way into the very heart of the law of unjust enrichment.

This means that the shift to a conceptual specification of the considerations informing a determination that the defendant has a right to retain the benefit is not a shift to a distinct subject-matter but rather an effort, provoked by Taylor, to deepen the understanding of unjust enrichment developed up to this point. The specification of the presence of juristic reason is to be unfolded from within the same set of considerations that govern the specification of its absence. The point is that the presence of juristic reason prevents the constitution of -- rather than 'trumps' -- an already constituted right to a restitutionary remedy.

An intuitive grasp of the infringement that forcing Laird to disgorge the benefit received from Taylor would entail is in fact already present in Pollock C.B.'s memorable and evocative image: 'One cleans another's shoes; what can the other do but put them on?'[38] [Emphasis added.] It is clear, of course, that this other could pay the shoe-cleaner for the value of the shoe-cleaning. But the problem Pollock C.B. has in mind is not a physical impediment preventing the defendant from paying the plaintiff for the value of the services rendered. The problem is not physical but normative.

The problem is that ordering the payment is tantamount to awarding the shoe-cleaner a unilateral right to impose upon the shoe-owner a condition on the use of her own shoes.[39] Short of permitting the shoe-cleaner unilaterally to interpose herself between the shoe-owner and the use of her own shoes, what, indeed, can the shoe-owner do but put them on? The shoe-owner's entitlement to the autonomous use of her own shoes could not possibly remain intact if the shoe-cleaner had a unilateral right to meddle with the shoe-owner's use of her own shoes. Thus Pollock C.B. does not

38 Taylor, supra note 32 at 332.
39 It is as if the plaintiff had said: 'I have poured the labour of my body and the work of my hands into your shoes. I have mixed something of mine with your shoes and thereby increased their value. I did not intend to benefit you gratuitously and I have no duty to do so. I am now entitled to an interest in your shoes, as there is something of mine in them. You should respect this interest by paying me either for the value of my work and my labour or for the difference in value between the shoes as they were before I cleaned them and the shoes as they are now, for either of those values can be said to be the measure of the benefit you have received from me.' And the defendant had responded: 'Your
say that the defendant has not received a benefit. Pollock C.B. says that ‘[t]he benefit of the service could not be rejected without refusing the property itself.’

The juristic reason that accounts for the defendant’s retention of the benefit is an autonomy interest – a right of the defendant to the autonomous use of what is hers. This autonomy interest presents considerations implicit in, rather than considerations extraneous to, the plaintiff’s assertion that she has no duty to benefit the defendant gratuitously. For the absence of this duty is itself an autonomy interest.

The entitlement to what is one’s own until one freely parts with it – from which the absence of a duty to benefit another gratuitously itself derives – presupposes one’s entitlement to security in the autonomous use of what is one’s own. One’s right to recover from another on the grounds that what that other holds wound up in her hands without one’s freely granting it to her manifests the presupposition that one’s relation to what this other holds is radically exclusive of that other. The right to restitution in unjust enrichment is a manifestation of the entitlement to autonomous exclusivity of use.

Hence it follows that the plaintiff cannot, in a manner consistent with the equality of the parties, invoke an autonomy interest whose application in the circumstances amounts, for the defendant, to an infringement of the very autonomy of which the interest invoked by the plaintiff is but an instance. The plaintiff’s position is untenable in that its denial of the defendant’s autonomy is, from the point of view of the equality of the parties, a denial of her own standing as an autonomous claimant. It is this untenability that prevents the constitution of the ‘officious’ plaintiff’s right to a restitutionary remedy.

The law of unjust enrichment refuses recovery for unrequested benefits not because it hesitates to impose obligations that the obligee has not

work and your labour may perhaps entitle you to an interest in the shoes or even to the shoes themselves if the shoes belonged to no one when you worked and laboured on them. But these shoes are mine. You worked and laboured on them without my knowledge or agreement. What you intended to do is your own business. I do not so much impose upon you a duty to benefit me gratuitously as much as I simply put my shoes on. Perhaps a kinder man would pay you for your work and your labour, but your work and your labour cannot in and of themselves entitle you to anything from me any more than I need your permission to wear my own shoes. Nonetheless, I do thank you for your kindness in cleaning them, and I won’t be so rude as to look a gift-horse in the mouth.’ The phrase ‘the labour of his body and the work of his hands’ is John Locke’s. See J. Locke, Second Treatise of Government, ed. by C.B. Macpherson (Indianapolis: Hackett Publishing Company, 1980) at 19.

\(^{40}\) Taylor, supra note 32 at 332. Cf. Birk’s comments on Taylor in Introduction, supra note 4 at 113-14, 281, and 413.
voluntarily assumed but because it refuses to impose obligations that violate the equality of the parties. To put it differently, in examining the circulation of benefit from plaintiff to defendant, the law of unjust enrichment asks not whether the latter voluntarily assumed the obligation to return the benefit to the former, but whether the latter's retention of the benefit is unjust. Its response is that this retention is not unjust where the defendant's disgorgement would grant the plaintiff a unilateral sovereignty over the defendant's entitlement to the autonomous use of what is hers.

The law of contract and the law of unjust enrichment are both concerned not with gifts but with non-gifts. They are both concerned, that is, with the circulation of non-gratuitous benefits. That which is not a gift either is a renunciation or falls within the purview of either contract or unjust enrichment. Yet these two bodies of law do and must construe the circulation of benefits in different ways. For the law of contract finds the parties as already normatively linked in and through the formulation of a common intention in regard to a particular circulation of benefit. But the law of unjust enrichment finds the parties as having become factually linked in and through a particular circulation of benefit from the one to the other in the absence of a pre-formulated normative nexus.

This is why the law of unjust enrichment imposes — and cannot help but impose — a normative nexus independent of the parties' disaggregated intentions. Yet it does not do so at will. Rather, it normatively construes the circulation of benefit in terms of the parties' equal entitlement to the exclusivity of autonomous use. In so doing, it evaluates the defendant's behaviour not from the point of the voluntary assumption of obligation but from the point of view of its consistency with that equal entitlement.

Thus where the law of contract deploys the categories of offer, acceptance, and consideration, the law of unjust enrichment deploys the categories of enrichment, corresponding deprivation, and absence of juristic reason for the enrichment. The resulting difference between asking whether the defendant voluntarily assumed the obligation to exchange the benefit, on the one hand, and asking whether the defendant's retention of the benefit is unjust, on the other, is the difference between the normative function of promise in contract and the normative function of free acceptance in unjust enrichment. This is the difference between (1) a normative framework that analyzes the circulation of benefit under the aspect of exchange and

therefore in terms of a normative nexus inseparable from the parties' intentions to create legal relations and (2) a normative framework that analyzes the circulation of benefit under an aspect other than that of exchange and therefore in terms of a normative nexus imposed independently of the disaggregated intentions of the parties.

The fact that the law of unjust enrichment construes the circulation of benefit from the point of view of an imposed normativity recalls its similarities with the law of tort rather than contract. This suggests that the normative function of free acceptance in the law of unjust enrichment is best grasped by analogy not to the normative function of voluntary assumption of obligation in contract, but rather by analogy to the normative function of proximate cause in tort. For it is the category of proximate cause that, in tort, plunges the defendant into legal relations with the plaintiff irrespective of the defendant's intentions to do so.

In tort, the plaintiff must establish that the defendant's act was not only the cause-in-fact of the plaintiff's injury but also its proximate cause. The application of the category of proximate cause facilitates a distinction between a mere accident and a tort. It construes the incident not sociologically, as a mere happening in the field of social interaction, but rather normatively, as an incident giving rise to legal relations. Within the context of this construal, the defendant cannot escape liability merely by alleging that she did not intend to cause the plaintiff's injury. But nor can the defendant be captured within the web of liability merely by reference to the bare fact of the plaintiff's injury. The objective standard of negligence is not a subjective standard pertinent to the defendant's intention. But nor is the objective standard a standard of strict liability exclusively concerned with the plaintiff's injury. Rather, the fundamental determination is a factual determination of whether the plaintiff's injury falls within the reasonably foreseeable orbit of the risk created by the defendant's act.

Similarly, in unjust enrichment, the plaintiff must establish not only that the defendant's enrichment corresponds to the plaintiff's deprivation but also that the defendant's retention of the benefit is unjust. The application of the category of absence of juristic reason facilitates a distinction between a mere benefit and an unjust enrichment. It construes the circulation of benefit not sociologically, as a mere happening in the field of social interaction, but rather normatively, as a transfer of benefit giving rise to legal relations. Within the context of this construal, the defendant cannot escape liability merely by alleging that she did not voluntarily assume

42 Here I am following E.J. Weinrib's account, in 'Corrective Justice,' supra note 29 at 10-16, of the objective standard in tort as neither a subjective standard nor a standard of strict liability. See also E.J. Weinrib, Private Law, supra note 3 at 177-83.
the obligation to return the benefit to the plaintiff. But nor can the defendant be captured within the web of liability merely by reference to her having received a benefit from the plaintiff. The objective standard—as we may call it—of absence of juristic reason is not a subjective standard pertinent to the defendant’s intention. But nor is it a standard of strict liability exclusively concerned with the plaintiff’s deprivation. Rather, the fundamental determination is a factual determination of whether the defendant received the benefit in circumstances in which she knew or ought to have known of the plaintiff’s lack of donative intent.

Thus the defendant in Pettkus cannot escape liability merely by alleging that he did not enter into a contract with the plaintiff any more than the defendant in Vaughan v. Menlove can escape liability merely by alleging that he did not intend to burn the plaintiff’s property. Just as in Vaughan the determination of the defendant’s liability is made through a factual determination of whether the plaintiff’s injury fell within the foreseeable orbit of the risk created by the defendant’s act, so in Pettkus the determination of the defendant’s liability is made in and through a factual determination of whether the defendant freely accepted the benefit in circumstances in which he knew or ought to have known of the plaintiff’s non-donative intent.

By the same token, the defendant in Taylor cannot be captured within the web of liability merely by reference to the plaintiff’s unilateral lack of donative intent any more than the defendant in Palsgraf v. Long Island R.R. Co. can be captured within the web of liability merely by reference to Mrs. Palsgraf’s injury. Just as in Palsgraf the determination of the absence of liability is made in and through a factual determination that the plaintiff’s injury did not fall within the reasonably foreseeable orbit of the risk created by the defendant’s act, so in Taylor the determination of the absence of liability is made in and through a factual determination that the defendant received the benefit in circumstances in which he neither knew nor ought to have known of the plaintiff’s non-donative intent.

If, in tort, the risk reasonably to be perceived defines the duty to be obeyed, then, in unjust enrichment, the plaintiff’s non-donative intent reasonably to be perceived defines the duty to disgorge the benefit received. The law of unjust enrichment accomplishes for the circulation of benefits what the law of tort accomplishes, so to speak, for the circulation of harms. Both bodies of law

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43 (1837), 132 E.R. 490 (C.P) [hereinafter Vaughan].
44 In ‘Corrective Justice,’ supra note 29 at 10-16, E.J. Weinrib develops his account of the objective standard in tort as an analysis of Vaughan, supra note 42. See also E.J. Weinrib, Private Law, supra note 3 at 177-84.
45 (1928), 162 N.E. 99 (N.Y.C.A.) [hereinafter Palsgraf].
46 See E.J. Weinrib’s analysis of Palsgraf, ibid., in Private Law, supra note 3 at 159-68.
normatively construe the interaction of persons whose life-paths have crossed in the absence of a pre-formulated common intention. Thus, if the law of unjust enrichment resembles the law of contract in that it deals with the circulation of benefits, it nonetheless resembles the law of tort in that it deals with that circulation from a point of view indifferent to the parties’ intentions to enter into legal relations.

IV The Bilaterality of Mistaken Payments

In *Moses, Deglman,* and *Pavey,* the plaintiff recovers in promissory circumstances. But in *Pettkus,* the categorical absence of such circumstances presents no bar to recovery. Thus *Pettkus* confirms the non-contractual basis of unjust enrichment. It posits a distinction between the cause of action in unjust enrichment and the promissory circumstances in which that cause of action makes its appearance in *Moses, Deglman,* and *Pavey.* To place *Pettkus* alongside *Moses, Deglman,* and *Pavey* is to observe that what is at issue in the constitution of the cause of action in unjust enrichment is not a promissory background but rather a pre-existing relationship between plaintiff and defendant capable of supporting the factual finding that the non-gratuitousness of the benefit in question shows on both sides - that is, that the plaintiff’s non-donative intent is reasonably to be perceived by the defendant.

It is not the pre-existing relationship *per se* but the factual finding it supports that is fundamental to the cause of action in unjust enrichment. Thus in *Taylor,* a pre-existing relationship between plaintiff and defendant proves insufficient to ground recovery. *Taylor* posits a distinction between the cause of action in unjust enrichment and the context of a pre-existing relationship between plaintiff and defendant in which that cause of action makes its appearance in *Moses, Deglman,* *Pavey,* and *Pettkus.* Just as *Pettkus* invokes the independence of unjust enrichment from the promissory circumstances present in *Moses, Deglman,* and *Pavey,* so does *Taylor* evoke the independence of unjust enrichment from the pre-existing relationship between plaintiff and defendant present in *Pettkus* itself. In so doing, *Taylor* suggests the possibility that the grounds of recovery in unjust enrichment - like those in tort and unlike those in contract - do not require any previous involvement of the parties with one another.

This possibility is concretized in cases of mistaken payment. In such cases, the absence of a pre-existing relationship between plaintiff and defendant presents no bar to recovery. Mistaken payments are the prototypical example of unjust enrichment because they exhibit the specific, radically non-contractual bilaterality of unjust enrichment in its starkest form - in a form that prescinds from any pre-existing relationship between plaintiff
and defendant. The liberation of unjust enrichment from contract thus culminates in a liberation of unjust enrichment from pre-existing relationship.

Mistaken payments pose the problem of the grounds upon which, even in the absence of a pre-existing relationship between plaintiff and defendant, the law of unjust enrichment can nonetheless arrive at a factual finding that the non-gratuitousness of the benefit in question shows on both sides. This problem demands an elaboration of the way in which a passive and unaware recipient of a mistaken payment can be meaningfully subjected to a factual inquiry oriented by the maxim that the plaintiff's non-donative intent reasonably to be perceived defines the duty to disgorge the benefit received. The law of unjust enrichment conducts such an inquiry in and through the defence of 'change of position.'

The Supreme Court of Canada established the change-of-position defence in Storthoaks (Rural Municipality of) v. Mobil Oil Canada. In Mobil Oil, Mobil Oil Canada held petroleum and gas leases from the Rural Municipality of Storthoaks. Under these leases, compensatory royalties were payable by Mobil to the Municipality in certain circumstances, but not beyond the time at which Mobil chose to exercise its option to surrender the leases. Yet when Mobil did in fact exercise that option, Mobil's accounting section was not notified. Thus Mobil continued to pay royalties for several years even though its obligation to do so had come to an end. Unaware of the mistake, the Municipality took the moneys paid by Mobil into general account. By the time Mobil discovered its mistake and requested a refund from the Municipality, the Municipality had already expended the funds.

Mobil commenced an action to recover the moneys mistakenly paid to the Municipality. Martland J. held:

In my opinion it should be open to the Municipality to seek to avoid the obligation to repay the moneys it received if it can be established that it had materially changed its circumstances as a result of the receipt of the money. Accordingly I have reviewed the evidence to ascertain whether there was such a change of circumstances. I have concluded that there was not. The evidence of Mrs. Gauthier, the secretary-treasurer of the Municipality, was that the moneys received from Mobil were put in the general account along with tax moneys to pay general everyday expenses. There is no evidence of any special projects being undertaken or special financial commitments made because these moneys were received. The mere fact

that the moneys were spent does not, by itself, furnish an answer to the claim for repayment.\textsuperscript{48}

Having found that the defendant had not changed its position, Mar­tland J. ruled in the plaintiff’s favour: ‘In my opinion, therefore, the Municipality has failed to establish that it had so altered its position as a result of the receipt of the payments that it would be inequitable to require it to repay.’\textsuperscript{49}

In \textit{Mobil Oil}, then, the plaintiff’s mistake did not preclude the defendant from seeking, albeit unsuccessfully, to avail itself of the change-of-position defence. This means that the grounds of liability in cases of mistaken payment – as elsewhere in unjust enrichment – are by no means constituted in terms of an exclusively unilateral inquiry into the plaintiff’s non-donative intent. The mistaken plaintiff does not recover merely because he made a mistake. Rather, the plaintiff’s mistake establishes nothing more than a \textit{prima facie} claim to a restitutionary remedy.\textsuperscript{50}

That proof of the plaintiff’s mistake is not in and of itself sufficient to establish the defendant’s liability is by no means surprising. A mistake is a unilateral event taking place solely on the plaintiff’s side. As such, it cannot in and of itself account for the defendant’s liability. The fact that the mistaken plaintiff’s \textit{prima facie} claim to restitution is subject to the change-of-position defence evidences that mistaken payments are no exception to the requirement that the non-gratuitousness of the benefit show on both sides. Viewed as a refusal to award a restitutionary remedy solely on the unilateral basis of the plaintiff’s mistake, the change-of-position defence is but an instance of the bilaterality of unjust enrichment.

It is true, of course, that proof of the mistaken plaintiff’s payment establishes (1) an enrichment on the defendant’s side as well as (2) a corresponding deprivation on the plaintiff’s side. It is also true, moreover, that proof of the plaintiff’s mistake establishes (3) an absence of donative intent on the plaintiff’s side. But, once again, precisely as merely unilateral, this absence of donative intent on the plaintiff’s side is not yet absence of juristic

\textsuperscript{48} \textit{Mobil Oil}, supra note 47 at 13. In \textit{Lipkin}, supra note 47 at 534, Lord Goff of Chievelley formulated the change-of-position defence as follows: ‘At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full. I wish to stress, however, that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things.’

\textsuperscript{49} \textit{Mobil Oil}, ibid. at 14.

\textsuperscript{50} See \textit{Barclays Bank v. W.J. Simms Son \& Cooke (Southern)}, [1979] 3 All E.R. 522 (Q.B.) [hereinafter \textit{Barclays Bank}].
reason for the defendant's enrichment. The category of absence of juristic reason is a bilateral category. While proof of the plaintiff's payment can and does in and of itself establish both that (1) the defendant has become enriched and that (2) the plaintiff has become correspondingly deprived, proof of the plaintiff's mistake neither can nor does in and of itself establish that (3) the defendant has become unjustly enriched.

The mistaken plaintiff recovers not merely because he made a mistake but because it would be unjust for the defendant to retain the benefit. The plaintiff's prima facie claim to restitution must therefore subject itself to an inquiry into whether circumstances are such that, notwithstanding the mistake, the defendant's retention of the benefit would not be unjust. This inquiry is none other than the change-of-position defence. It is an inquiry into whether there is, after all, juristic reason for the defendant's enrichment.

An enrichment is unjust where the defendant's retention of the benefit in question violates the equality between plaintiff and defendant as bearers of the right to what is theirs until they freely part with it. There is no juristic reason for the defendant's enrichment where the defendant's retention of the benefit in question is inconsistent with the equality of the parties. By the same token, this very equality entails that an enrichment is not unjust where the plaintiff asserts the right to what is his until he freely parts with it in a manner inconsistent with the defendant's equal right. The plaintiff cannot assert an interest whose application in the circumstances amounts, for the defendant, to a violation of that very same interest. Thus there is juristic reason for the defendant's enrichment where— as in cases involving unrequested benefits—the defendant's disgorgement of the benefit in question would grant the plaintiff unilateral sovereignty over the defendant's right to what is his until he freely parts with it.51

The requirements of the change-of-position defence indicate its function as a way of precluding recovery in circumstances where the defendant's disgorgement of the benefit would be unjust. The defendant falls short of meeting the requirements of the defence either (1) where he has not spent the money received by mistake from the plaintiff or (2) where he has used the money to cover expenditures he would have incurred in any event. This

51 In Liphin, supra note 47 at 532, Lord Goff of Chievely formulates this point as follows: 'The claim for money had and received is not ... founded on any wrong committed by the club [i.e., the defendant] against the solicitors [i.e., the plaintiff]. But it does not, in my opinion, follow that the court has carte blanche to reject the solicitors' claim simply because it thinks it unfair or unjust in the circumstances to grant recovery. The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle.'
is because in neither case can the defendant sustain the allegation that, as a result of the plaintiff's mistaken payment, he has done with what is his otherwise than he would have done had the mistake not taken place. In neither case, that is, can the defendant sustain the allegation that forcing him to disgorge the benefit is inconsistent with his right to what is his until he freely parts with it. Not having spent the money on a special project, the defendant cannot assert that he has so altered his position that it would be unjust to require him to repay it. He cannot assert that there is, after all, juristic reason for the enrichment.

Strictly speaking, even expenditures incurred on a special project are not in and of themselves sufficient to meet the requirements of the change-of-position defence. For the defence is one of change of position in good faith. Thus a special project undertaken in circumstances in which the facts entitling the plaintiff to restitution are reasonably within the defendant's purview is insufficient to meet the requirements of the defence. At issue is not a special project per se but a special project undertaken in circumstances in which the facts otherwise entitling the plaintiff to restitution are not reasonably within the defendant's purview. In a word, the defendant must have reasonably believed that the money he was spending was his own.

Two brief examples will suffice. In Morgan Guaranty, Osborne J. ruled that the defendant met the requirements of the change-of-position defence in respect of a mistaken transfer of $150,000. But Osborne J. did not so rule without first finding that circumstances were such that, notwithstanding the plaintiff's mistake, the defendant reasonably believed that he was entitled to the use of the money in his own bank account:

Having been informed of the transfer, but without knowledge of any banking error, the defendant's staff checked with an employee of the plaintiff to verify the legitimacy of the transfer. The defendant relied on the information Dianne Cavanaugh was given on or about January 24, 1984. I think it is important that the amount transferred was generally consistent with discussions the defendant had had with Weiss about closing out the Rosenberg-Greyman files. Thus, the transfer set off no warning signals because of the amount involved. [Emphasis added.]

Had the transfer set off 'warning signals,' the defendant would have been unable to meet the requirements of the change-of-position defence. Thus the facts in Morgan Guaranty indicate that the defendant's success in making out the change-of-position defence is premised on his having had no reason to believe that the money spent was not his own.

52 See Barclays Bank, supra note 50 at 535; Morgan Guaranty, supra note 47 at 194; and Lipkin, supra note 47 at 534.
53 Morgan Guaranty, supra note 47 at 196.
In *Dawson*, the mistaken transfers, though far smaller ($4,919.74 and $3,206.70) than that in *Morgan Guaranty*, did set off warning signals. Surprised as they were to find themselves in possession of the moneys mistakenly paid, the defendants did not make use of the moneys in question before they obtained reassurance - which itself turned out to be mistaken! - from the plaintiff that no mistake was involved. Thus, as in *Morgan Guaranty*, the facts in *Dawson* indicate that the defendants’ success in making out the change-of-position defence is premised on their having had no reason to believe that the money they spent was not their own.\(^{54}\)

Similarly, in *Mobil Oil* itself, the defendant failed to establish the change-of-position defence not because it lacked good faith but because it had not spent the money on a special project. The plaintiff’s mistaken payments were so far from setting off warning signals that, when the plaintiff at one point temporarily discontinued the payments, the defendant demanded their continuation and the plaintiff complied! It was not until four months later that the plaintiff finally became aware of its mistake. Had the defendant spent the money on a special project, it would have succeeded in meeting the requirement that it had changed its position in good faith - that is, in circumstances in which it had no reason to believe that the money it spent was not its own.

Good faith, then, is the reasonableness of the defendant’s belief that he is entitled to the money he spends. To say that the defendant changed his position in good faith is to say that he changed his position in circumstances in which he neither knew nor ought to have known of the plaintiff’s mistake. Good faith is the absence of warning signals. It is the absence of circumstances in which the plaintiff’s non-donative intent is reasonably to be perceived.\(^{55}\)

The point is that where he has changed his position in good faith, the defendant cannot reject the benefit of the plaintiff’s mistaken payment.


\(^{55}\) Whereas the change-of-position defence was recognized in Canada as early as *Mobil Oil*, supra note 47, in 1975, it was not recognized in England until *Lipkin*, supra note 47, in 1991. In *Lipkin* at 534, Lord Goff of Chieveley states:

> I am most anxious that, in recognising this defence to actions of restitution, nothing should be said at this stage to inhibit the development of the defence on a case by case basis, in the usual way. It is, of course, plain that the defence is not open to one who has changed his position in bad faith, as where the defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution ...

Note that Lord Goff is careful to present the defendant’s actual knowledge of the facts entitling the plaintiff to restitution as an example, not a definition of bad faith. The approach to both good and bad faith in terms of a nuanced concept of ‘warning signals’ gleaned from *Morgan Guaranty* and *Dawson* bears out Lord Goff’s caution.
without refusing his own right to the use of his own bank account in good faith. The defendant's entitlement to the autonomous use of his bank account could not possibly remain intact if a unilateral event on the plaintiff's side - that is, an event of which the defendant neither knew nor ought to have known - would be sufficient to grant the plaintiff a right to meddle with the defendant's use of his own bank account. To find in the plaintiff's mistake reason to award a restitutionary remedy even where the defendant has changed his position in good faith is to permit the plaintiff unilaterally to interpose himself between the defendant and the defendant's entitlement to the use of what is his. It is to deprive the defendant of the assurance that his use in good faith of what is his is not unilaterally contestable.

To recall Pollock C.B.'s imagery in *Taylor*, the plaintiff's mistake can no more constitute the defendant's liability than the recipient of an unrequested shoe-cleaning needs the shoe-cleaner's permission to wear his own shoes.

Where the defendant changes his position in good faith, the plaintiff's mistake leaves the law of unjust enrichment unmoved. Proof of the plaintiff's mistake proves insufficient to activate the restitutionary operations of the law of unjust enrichment. The plaintiff has after all failed to establish the bilateral ground of the defendant's liability. There is enrichment but no unjust enrichment. The defendant's enrichment is construed as an instance of good fortune. Similarly, the plaintiff's corresponding deprivation is construed as an instance of bad fortune. The circulation of benefit from plaintiff to defendant appears not as a transfer of benefit giving rise to legal relations but as a mere happening in the field of social interaction. The plaintiff's mistake is but an event in the world - a misfortune of the plaintiff's that, merely because it happens to have worked out to the defendant's benefit, cannot be laid at the defendant's door.

By contrast, where the defendant spends the money in question in bad faith - that is, in circumstances in which warning signals bring the facts entitling the plaintiff to restitution within the defendant's reasonable purview - the defendant places himself in a position analogous to that of the defendant in *Pettkus*. Having spent the money in circumstances in which he knew or ought to have known of the plaintiff's non-donative intent, the defendant has in fact freely accepted the benefit of the plaintiff's payment. The non-gratuitousness of the benefit thus appears bilaterally rather than merely unilaterally. The defendant's free acceptance elevates the plaintiff's mistake from the level of a *prima facie* claim to that of a fully constituted right to a restitutionary remedy.

But where the defendant changes his position in circumstances in which warning signals are absent, he places himself in a position analogous to that of the defendant in *Taylor*. Having spent the money in circumstances in
which he neither knew nor ought to have known of the plaintiff’s non-donative intent, the defendant has received the benefit of the plaintiff’s payment, but has not freely accepted that benefit. The non-gratuitousness of the benefit appears merely unilaterally rather than bilaterally. The absence of free acceptance on the defendant’s side precludes the plaintiff’s prima facie claim from constituting itself as a right to a restitutionary remedy.

Thus the defendant’s change of position in good faith precludes liability for mistaken payments in the same sense that the absence of free acceptance on the defendant’s side precludes liability for unrequested benefits. In both cases, the plaintiff’s non-donative intent fails to establish the bilateral ground of liability because it would not be reasonably perceived by the defendant. In both cases, the defendant is enriched but not unjustly enriched. And in both cases, the defendant’s retention of the benefit is not unjust because its disgorgement would amount to granting the plaintiff unilateral sovereignty over the defendant’s entitlement to the use of what is his.

It follows that both ‘change of position’ in the law of mistaken payments and ‘free acceptance’ in the law of unrequested benefits pertain to a factual inquiry normatively ordained by the maxim that the plaintiff’s non-donative intent reasonably to be perceived defines the duty to disgorge the benefit received. Mistaken payments and unrequested benefits thus fall within one and the same conceptual structure – that of the fundamental normative bilaterality of unjust enrichment.

56 C.f. Birks, Introduction, supra note 4 at 413.