



2014

# A Consideration Which Happens to Fail

Andrew Kull

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/olsrps>

---

## Recommended Citation

Kull, Andrew, "A Consideration Which Happens to Fail" (2014). *Osgoode Legal Studies Research Paper Series*. 18.  
<http://digitalcommons.osgoode.yorku.ca/olsrps/18>

This Article is brought to you for free and open access by the Research Papers, Working Papers, Conference Papers at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Legal Studies Research Paper Series by an authorized administrator of Osgoode Digital Commons.

# OSGOODE HALL LAW SCHOOL

## LEGAL STUDIES RESEARCH PAPER SERIES

**Research Paper No. 41**

**Vol. 10/ Issue. 10/ (2014)**

### **A Consideration Which Happens to Fail**

Kull, A. A Consideration Which Happens to Fail. *Osgoode Hall Law Journal*, 51(3), forthcoming.

Andrew Kull

**Editors:**

Editor-in-Chief: Carys J. Craig (Associate Dean of Research & Institutional Relations and Associate Professor, Osgoode Hall Law School, York University, Toronto)

Production Editor: James Singh (Osgoode Hall Law School, York University, Toronto)

This paper can be downloaded free of charge from:

<http://ssrn.com/abstract=2494819>

Further information and a collection of publications from the Osgoode Hall Law School Legal Studies Research Paper Series can be found at:

[http://papers.ssrn.com/sol3/JELJOUR\\_Results.cfm?form\\_name=journalbrowse&journal\\_id=722488](http://papers.ssrn.com/sol3/JELJOUR_Results.cfm?form_name=journalbrowse&journal_id=722488)



## **A Consideration Which Happens to Fail**

Kull, A. A Consideration Which Happens to Fail. *Osgoode Hall Law Journal*, 51(3), forthcoming.

Andrew Kull

### **Abstract:**

Recent English commentary employs the timeworn expression “failure of consideration” in an unprecedented way. It can now designate an expansive residual category of grounds for restitution: at its fullest, “the failure to sustain itself of the state of affairs contemplated as a basis” for a transaction by which one party is enriched at the expense of another. (Because the result is plainly to incorporate a civilian-style “absence of basis” test within common-law unjust enrichment, the new “failure of consideration” carries an incidental implication for Canadian restitution law: if *Garland v. Consumers’ Gas* really announced a shift from common-law “unjust factors” to civilian “absence of basis,” the change may not make that much difference.) Contrasting approaches to “failure of consideration” illustrate a broader difference in attitudes toward “restitution in a contractual context”: English law looks “off the contract” in situations where US law finds answers in the contract itself.

### **Keywords:**

Contract law, failure of consideration, American Restitution

### **Author(s):**

Andrew Kull

Professor

University of Texas School of Law

E: [akull@bu.edu](mailto:akull@bu.edu).

## **A Consideration Which Happens to Fail**

Andrew Kull

### Abstract

Recent English commentary employs the timeworn expression “failure of consideration” in an unprecedented way. It can now designate an expansive residual category of grounds for restitution: at its fullest, “the failure to sustain itself of the state of affairs contemplated as a basis” for a transaction by which one party is enriched at the expense of another. (Because the result is plainly to incorporate a civilian-style “absence of basis” test within common-law unjust enrichment, the new “failure of consideration” carries an incidental implication for Canadian restitution law: if *Garland v. Consumers’ Gas* really announced a shift from common-law “unjust factors” to civilian “absence of basis,” the change may not make that much difference.) Contrasting approaches to “failure of consideration” illustrate a broader difference in attitudes toward “restitution in a contractual context”: English law looks “off the contract” in situations where US law finds answers in the contract itself.

In descriptions of contract law, restitution, and the contested overlap between the two, the venerable expression “failure of consideration” has become an obstacle to communication. Lawyers in the U.S. no longer use the term at all, and it costs us a certain effort to recall what it used to mean. So we are nonplused by modern English commentary describing failure of consideration as one of the principal grounds for restitution, “second only to mistake” in its importance, one whose “true potential” as an organizing principle has yet to be fully realized.<sup>1</sup> Recognition of this principle, we are informed, “has been made possible by relatively recent judicial and academic restatements of the law of unjust enrichment”<sup>2</sup>—yet the words “failure of consideration” do not appear even once in the *American Restatement Third, Restitution and Unjust Enrichment* (“R3RUE”), published in the same year as the works just quoted.

When “failure of consideration” last had a recognizable meaning to American lawyers it was an expression from contract law, describing certain instances of “failure of

---

[Eventual author’s footnote to include acknowledgment of assistance from Mark Gergen and John McCamus.]

<sup>1</sup> Burrows, *Law of Restitution* 318 (3d ed. 2011).

<sup>2</sup> Goff & Jones, *Law of Unjust Enrichment* 363 (C. Mitchell et al. 8th ed. 2011).

performance.” Usually it was a material breach by one contracting party permitting the other party to terminate: that is, to withhold further performance on his side and sue the breaching party for damages (or possibly restitution) then and there.<sup>3</sup> In Canadian law, “failure of consideration” has generally retained the narrower connotation that (until recently) it still had in England: a claim in restitution (for “money had and received”) to recover the prepaid price of a contractual performance not subsequently received.<sup>4</sup> English judges announced at an early date that this money-back remedy would be available only when the “failure of consideration” was “total,” in other words when no part of the promised performance had been rendered. This led to what is perhaps the best-known feature of the traditional English doctrine, a tendentious decisional law in which an ostensible rule of “total failure” has sometimes been honored at the expense of plaintiffs who deserved a refund,<sup>5</sup> sometimes ignored at the expense of the facts.<sup>6</sup>

If “failure of consideration” were still confined to these traditional meanings, it could scarcely serve as a primary subdivision of the law of unjust enrichment. Recent English academic usage greatly extends its reach along two dimensions: first to occupy the whole

---

<sup>3</sup> See, e.g., Restatement of Contracts 74 (1932) (“Failure of Consideration as a Discharge of Duty”); 6 Corbin, Law of Contracts § 1255 (2d ed. 1962) (“Discharge by Failure of Consideration Either Existing or Prospective”); 6 Williston, Law of Contracts § 814 (Jaeger 3d ed. 1962) (“Although the expression ‘failure of consideration’ has been criticized, perhaps because loosely used at times, it is not inaccurate when employed in its generic sense to cover every case where a promised exchange of values does not take place, irrespective of whether with or without the fault of a party”).

<sup>4</sup> Fridman, Law of Contract in Canada 670-71 (6th ed. 2011); McCamus, Law of Contracts 965-68 (2005); Waddams, Law of Contracts ¶¶ 600-602 (6th ed. 2010).

<sup>5</sup> One classic instance involves a material breach of a landlord’s obligation to furnish habitable premises and a tenant who—after a brief period of unsatisfactory occupancy—seeks to recover prepaid rent. In *Hunt v. Silk*, 5 East 449, 102 Eng. Rep. 1142 (K.B. 1804), restitution was denied on the ground that the tenant’s few days of possession meant that consideration for the rent had not totally failed. See generally Burrows, *supra* note \_\_, at 324-26, 330-34 (noting “artificial” application of traditional rule and arguing that “partial failure of consideration” should be an acceptable ground for restitution as well as damages). “The reluctance of the common law to apportion losses in circumstances of this kind . . . rests on arid technicality and, fortunately, in the main, appears to have been ignored in the modern Canadian cases.” Maddaugh & McCamus, Law of Restitution ¶ 4:200.10 (2011).

<sup>6</sup> In *Guinness Mahon & Co. Ltd. v. Kensington and Chelsea RLBC*, [1999] Q.B. 215 (C.A. 1998), an interest-rate swap agreement was held subject to rescission and restitution on the ground of “total failure of consideration,” despite the fact that the agreement had been fully performed on both sides. After performance of the contract, it had been determined in other proceedings that municipal authorities in the U.K. lacked the capacity to enter such agreements.

domain of what American law calls “restitution in a contractual context,”<sup>7</sup> then to designate a sweeping category of transactional invalidity that might more appropriately be called “failure of condition” or “failure of basis.”<sup>8</sup> This expansive redefinition has taken place approximately a generation after the term “failure of consideration” was definitively expunged from American legal usage,<sup>9</sup> so “failure of consideration” as a division of R3RUE was naturally a non-starter.

The revised standard version of Canadian restitution law—on the occasion of the present Symposium, we might call it the “McCamus Version”—presents the subject as one that shares the concepts and the vocabulary of the American *Restatement* of 1937.<sup>10</sup> If the McCamus Version and a current “Restatement Version” are set side by side, there is probably no idea in either that does not find an analogy, if not a precise equivalent, in the other.<sup>11</sup> From either starting point, the idea of “failure of consideration” as a master concept within the law of restitution and unjust enrichment must be initially baffling.

The first object of what follows is to describe this new English “failure of consideration” for the benefit of readers who come to it from the received wisdom of U.S. or Canadian restitution law. An initial problem is to identify the set of cases the English writers now have in mind when they use the expression. For this task it proves helpful to

---

<sup>7</sup> Perillo, *Restitution in a Contractual Context*, 73 *Colum. L. Rev.* 1208 (1973).

<sup>8</sup> “The terminology of ‘failure of consideration’ is long established, and to depart from it now (by referring instead, for example, to ‘failure of condition’ or ‘failure of basis’) may be more confusing than helpful.” Burrows, *Restatement of the English Law of Unjust Enrichment* 86 (2012). Yet it is only the newly expanded version of “failure of consideration”—not the long-established meaning of the term—for which “failure of basis” makes an obviously better description. See Goff & Jones, *supra* note \_\_, at 366-68 (explaining the use of the term “failure of basis” in place of “failure of consideration”); Smith et al., *Law of Restitution in Canada 191-92* (2004) (explaining the use of the term “qualified intention” or “conditional intention” in preference to “failure of consideration”).

<sup>9</sup> See *Restatement Second, Contracts* § 237, Comment *a* (1981) (“What is sometimes referred to as ‘failure of consideration’ by courts and statutes . . . is referred to in this Restatement as ‘failure of performance’ to avoid confusion with absence of consideration”).

<sup>10</sup> See McCamus, *Forty Years of Restitution: A Retrospective*, 50 *Can. Bus. L.J.* 474 (2011).

<sup>11</sup> The texts on which this hypothesis might be tested today are Maddaugh & McCamus, *Law of Restitution* (looseleaf ed.) (2011 *et seq.*), and *Restatement Third, Restitution and Unjust Enrichment* (2011) (“R3RUE”). The standard English version, known as “Goff & Jones,” likewise stood in a recognizable relation to the “Restatement Version” so long as it was edited by Goff & Jones—that is, from the first edition of Goff & Jones, *Law of Restitution* (1966), through the seventh (2007). The successor work by C. Mitchell et al., *supra* note \_\_, marks a significant departure, not least in its treatment of “failure of consideration” in the manner to be discussed.

recall where the expression “failure of consideration” came from. Its diverse origins—in common law, in Roman law, and in the thinking of Peter Birks—provide the best explanation of its new and expanded meaning.

A brief digression at this point suggests the relevance of the new English “failure of consideration” to a current academic debate about Canadian restitution law. Is restitution in Canada still to be explained and understood in traditional common-law terms (as in the *McCamus* Version), or did the 2004 decision in *Garland v. Consumers’ Gas Co.*<sup>12</sup> announce a fundamental shift in orientation whereby all of the subject, or some part of it at least, must henceforth be conceived in terms derived from the civil law? The question occupies a very high level of generality: instead of approaching a restitution case by asking “did this transfer result in unjust enrichment?,” we would now ask instead, “did this transfer lack an adequate legal basis?” No one doubts that Canadian restitution law used to ask the former question. If it now asks the second, how is the transition from one regime to another to be managed? The contemporary English experiment with “failure of consideration” turns out to have a bearing on this very Canadian question, because the expansion of “failure of consideration” proves on examination to be a means of incorporating a civilian test of “failure of basis” within a traditional common-law restitution claim. Scratching the surface only slightly, the inclination on the part of some Canadian commentators to see a civilian revolution in *Garland*, and the inclination on the part of some English commentators to expand “failure of consideration” to include “failure of basis,” appear to be closely related.

The concluding section of the discussion reverts to general principles, without direct relevance to Canadian law, to argue that the traditional, all-or-nothing response to failure of consideration in England may explain much of the divergence between transatlantic attitudes in the area of “restitution and contract.” Confronted with an interrupted contractual performance and the need to unwind it, American law looks for the terms of restitution—the “baseline” of unjust enrichment, if enrichment is what we are after—in the terms of the failed agreement. English law, in comparable circumstances, looks outside the agreement. The fact that “failure of consideration” can be regarded as a foundational principle in one legal system when it has been discarded in the other reflects something of this deeper difference in approach.

---

<sup>12</sup> [2004] 1 S.C.R. 629, 237 D.L.R. (4th) 385.

## I. The new failure of consideration

### A. Which restitution cases are we talking about?

As epitomized by section 15 of Professor Burrows's *Restatement of the English Law of Unjust Enrichment* ("RELUE"):

(1) The defendant's enrichment is unjust if the claimant has enriched the defendant on the basis of a consideration that fails.

(2) The consideration that fails may have been—

- (a) a promised counter-performance, whether under a valid contract or not,
- or
- (b) an event or state of affairs that was not promised.<sup>13</sup>

A vast legal territory—the lion's share of R3RUE's chapter 4 on "Restitution and Contract"—is embraced by just the first half (clause (2)(a)) of this capacious and efficient definition. Restitution for failure of a promised counter-performance "under a valid contract" incorporates, first of all, all those cases in which U.S. law would permit "rescission and restitution" as an alternative remedy to damages for material breach (R3RUE §§ 37, 64).<sup>14</sup> Next, it includes cases in which the remedy for defendant's breach of contract takes the form of a money judgment measured by the value of claimant's performance, rather than by the value of the defendant's promised counter-performance as in the usual calculation of contract damages (R3RUE § 38). Such a remedy is well known to American law, where it is often called "restitution," though of course it has never been called "failure of consideration." (If it were not called "restitution," a claim of this kind would be more recognizable in the U.S. and Canada under the name "quantum meruit.")

The expansive implications of RELUE's definition begin to emerge at this point. If every "failure of a promised counter-performance" constitutes a failure of consideration and a source of unjust enrichment, then every material breach of contract gives the nonbreaching party not just an election of remedies but a choice between theories of

---

<sup>13</sup> Burrows, *supra* note \_\_, at 12-13, 86.

<sup>14</sup> This in itself represents a significant expansion beyond what the English decisions have traditionally allowed: it extends the possibility of restitution to plaintiffs whose performance consisted of something other than the payment of money, and it abandons the arbitrary requirement that a "failure of consideration" be "total." Reform to this degree would bring English law into line with what American and Canadian lawyers already tend to expect. See generally McCamus, *supra* note \_\_, at 965-72.



recovery: damages for breach vs. restitution of unjust enrichment. For the past hundred years, U.S. law has been moving to the opposite conclusion: that the right to restitution for breach or repudiation “would seem to be in reality nothing more than an alternative remedy arising from the violation of the contract”;<sup>15</sup> in other words, that restitution “is merely one of two or more alternative remedies given by the law to an injured party for a breach of contract. This is no more and no less than can be said for the remedy in damages.”<sup>16</sup> R3RUE states repeatedly and explicitly that the restitutionary alternatives to damages for breach of an enforceable contract—one of them being “rescission and restitution,” or “failure of consideration” in a more limited sense—bear no necessary relation to the unjust enrichment of either party.<sup>17</sup>

So far “failure of consideration” has grown from the original money-back remedy to occupy the whole of the area known to American lawyers as “restitution for breach.” The further specification, “whether under a valid contract or not,” incorporates the second principal division of “restitution and contract,” or what R3RUE calls “restitution to a performing party with no claim on the contract.”<sup>18</sup> Within this division of the topic, whatever it should be called, it is common ground that a party is potentially entitled to restitution on a theory of unjust enrichment if he has rendered a valuable performance under a contract that is unenforceable by reason of indefiniteness or lack of formality, illegality, or incapacity of the recipient; under a contract that has been discharged for mutual mistake or supervening circumstances (in other words, one whose performance has been frustrated); or when the claimant is himself the party in breach.<sup>19</sup> In the standard

---

<sup>15</sup> Woodward, *Law of Quasi Contracts* 411 (1913). The author continues: “Accurately speaking, therefore, it is not a quasi contractual right. The only primary obligation is the obligation to perform the contract; the only primary right is the right to such performance. As in the case of the action for restitution as an alternative remedy for certain torts, however, it has been commonly regarded as quasi contractual, and for that reason may be considered in this treatise.” *Id.*

<sup>16</sup> 5 Corbin, *Law of Contracts* § 1106 (2d ed. 1964).

<sup>17</sup> See R3RUE, Introductory Note to chapter 4, topic 2 (pages 606-12 of volume 1).

<sup>18</sup> R3RUE ch. 4, “Restitution and Contract,” includes one further contract-related topic that is transposed from the general subject of restitution for wrongs: § 39 on liability to disgorge the profits of cynical or “opportunistic” breach. This is “a claim for an account of profits/restitutionary damages for breach of contract as in *A-G v Blake* [2001] 1 AC 268,” bearing no relation to “failure of consideration” in its broadest definition. Burrows, *supra* note \_\_, at 89.

<sup>19</sup> English commentators extend “failure of consideration” to a significant category of cases that most U.S. lawyers would not analyze in terms of unjust enrichment: the claim to recover for benefits conferred “in anticipation of contract,” when the expected contract is not ultimately formed. See

North American view, recovery for performance under an ineffective contract is necessarily in unjust enrichment because—*ex hypothesi*—it cannot be in contract.<sup>20</sup> By contrast, if the failure of any promised counter-performance is in itself a source of unjust enrichment and a sufficient ground for restitution, it becomes immaterial whether the unperformed promise was enforceable or not. As we shall see, however, the theoretical difference between recovery “on” and “off” the contract is less significant than the degree to which the terms of the agreement, enforceable or not, govern the terms on which it will be unwound.

Finally—having occupied the entire field of “restitution and contract”—a further element of the expanded definition severs the link to failure of performance, making “failure of consideration” something much closer to “failure of condition.” As expressed by RELUE § 15(2)(b): “The consideration that fails may have been . . . an event or state of affairs that was not promised.” A recent decision of the High Court of Australia supplies everyone’s favorite illustration of this phase of the definition. In *Roxborough v. Rothmans of Pall Mall*,<sup>21</sup> a group of tobacco retailers had paid their wholesaler’s invoices which separately itemized (i) the price of the goods sold and (ii) an *ad valorem* “tobacco licence fee” to which the retailers were thought to be subject. After the licence fee was held in a separate action to be unconstitutional, the retailers sued to recover fees paid to the wholesaler and not yet remitted by the wholesaler to the taxing authority. U.S. law would unquestionably accommodate such a restitution claim, though it would never occur to an American lawyer to describe the problem as one of failure of consideration.<sup>22</sup> Such, however, was the

---

Burrows, *supra* note \_\_, at 371-80; Goff & Jones (ed. C. Mitchell et al.), *supra* note \_\_, ch. 16. U.S. law makes it easier to resolve these problems on a contractual basis—either the recipient has promised to pay for them, or else the performing party does not recover—both because of its greater flexibility in finding implied promises, and because of its unqualified acceptance of promissory estoppel.

<sup>20</sup> See R3RUE §§ 31-36; McCamus, *supra* note \_\_, at 986-91.

<sup>21</sup> 208 C.L.R. 516 (Austl. H.C. 2001)

<sup>22</sup> The only difficulty of deciding how to accommodate the *Roxborough* claim within the U.S. law of restitution may be that it is too easy. If the wholesaler would have no contractual claim to collect the tax once it was declared invalid, the same reasoning supports the retailer’s claim to recover the tax previously paid. Within the scheme of R3RUE the best fit is probably § 34, according to which “A person who renders performance under a contract that is subject to avoidance by reason of mistake or supervening change of circumstances has a claim in restitution to recover the performance or its value, as necessary to prevent unjust enrichment.”

Contract law . . . permits the avoidance of an obligation on which the parties ostensibly agreed but for which (as a result of their failure to apprehend or anticipate relevant circumstances) they did not actually bargain. To the extent the obligation in question remains executory, the issue between the parties is limited to the enforceability of the

explanation chosen by the High Court as the preferred theory of the retailers' claim. As expressed by Justice Gummow:

Is it unconscionable for Rothmans to enjoy the payments in respect of the tobacco licence fee, in circumstances in which it was not specifically intended or specially provided that Rothmans should so enjoy them? The answer should be in the affirmative. *Here, "failure of consideration" identifies the failure to sustain itself of the state of affairs contemplated as a basis for the payments the appellants seek to recover.*<sup>23</sup>

If "failure of consideration" includes "the failure to sustain itself of the state of affairs contemplated as a basis" for a challenged transaction, then "failure of consideration" encompasses every instance of unjust enrichment resulting from a transferor's failure to apprehend or anticipate relevant circumstances. *Roxborough* begins as a problem of contractual interpretation, but a "failure to sustain itself of the state of affairs contemplated" includes not only the whole of restitution and contract—where the idea is that I performed for you only on the basis that you would perform as promised for me—but a great deal of the law of restitution having nothing to do with contract. Examples from U.S. law might begin with the claimant who improves property in the erroneous belief (not founded on a promise) that he will become its owner (R3RUE § 27), or the restitution claim based on transfers of wealth between unmarried cohabitants (R3RUE § 28).<sup>24</sup> Restitution of mistaken gifts offers numerous examples of the failure of "an event or state of affairs," particularly when the mistake relates to circumstances motivating donative intent (R3RUE § 12). If instances such as these are brought within the definition of failure of consideration,

---

challenged agreement. . . . If the obligation has been partially or wholly performed, the same challenge to the transaction presents what is simultaneously a question of contract and a question of restitution.

R3RUE § 34, Comment *a*. More difficult questions are presented if the invalidated tax is one to which the seller (not the buyer) was subject, but which was separately invoiced in the price charged by the seller to the buyer. If such a tax is subsequently refunded to the seller, the first of several issues in restitution is whether the contracting parties understood the seller to be acting as taxpayer or tax collector. See R3RUE § 48, Illustrations 9-10; § 64, Illustrations 1-2.

<sup>23</sup> 208 C.L.R. at 558 (¶ 104) (emphasis added).

<sup>24</sup> Ward Farnsworth notes the parallels between the two sets of cases, as well as their basis in mistake:

The reason the law sometimes honors these claims can be viewed as analogous to its reasons for allowing recovery in cases where party improves property with the reasonable expectation that he owns it, or soon will, but turns out to be mistaken. The unmarried cohabitants in a restitution case likewise had an expectation that their lives would continue in a certain way. . . . The parties committed a temporal mistake.

Farnsworth, Restitution \_\_ (2014).

it is difficult to see why “failure of consideration” does not subsume the entire topic of restitution for mistake.<sup>25</sup>

B. What does “failure of consideration” mean?

The broad scope of the new “failure of consideration” is illuminated in important respects by the origins of the expression. For present purposes we may trace three distinct sources of the formula, attributable directly or indirectly to Lord Mansfield, to Justinian’s Digest, and to Peter Birks. The expanded version of “failure of consideration” draws on all three at once.

The words “failure of consideration” in their traditional usage refer to the ground on which someone who pays a contract price in advance, then fails to receive the promised exchange, can obtain restitution of the money paid as opposed to damages for breach. Universal use of the formula “failure of consideration” to designate this remedy appears to be something of an accident, due indirectly to the influence of Lord Mansfield. The case of *Moses v. Macferlan*,<sup>26</sup> the occasion of Mansfield’s famous essay on the scope and significance of the action for money had and received, was not itself an action to recover a prepaid sum; but in the course of his opinion Mansfield gave notable attention to the earlier decision in *Dutch v. Warren*, which was such a case.<sup>27</sup> There a buyer had paid £262 10s. in advance for five shares in the Welsh copper mines. When the time came for delivery, the seller repudiated his obligation. The buyer brought an action for money had and received, and the question was whether he could recover by that form of action, as opposed to an action “for the non-performance of the contract.” It was held that the action for money had and received was available to recover the prepayment:

The Court said, that the extending those actions depends on the notion of fraud. If one man takes another’s money to do a thing, and refuses to do it; it is a fraud: and it is at the election of the party injured, either to affirm the agreement, by bringing an

---

<sup>25</sup> “To recover money paid under mistake, it is not sufficient that the plaintiff establish that the money was in fact paid under mistake; he must in addition thereto prove that there has been a failure of consideration, in that the money was paid without his receiving an equivalent therefor.” Keener, *Law of Quasi-Contracts* 34 (1893).

<sup>26</sup> 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760).

<sup>27</sup> 1 Str. 406 (C.P. 1721). The more important account of *Dutch v. Warren* is the one that appears within *Moses v. Macferlan*.

action for the non-performance of it; or to disaffirm the agreement *ab initio*, by reason of the fraud, and bring an action for money had and received to his use.<sup>28</sup>

The question for now is merely how restitution to a prepaying buyer from a defaulting seller came to be uniformly associated with the particular form of words “failure of consideration.” The remedy, in one form or another, was not new. It seems to have been available (by an action for debt) almost 500 years before *Moses v. Macferlan*, and it had been available by one action or another during the intervening centuries.<sup>29</sup> Lord Mansfield’s account of *Dutch v. Warren* explained the recovery in such a case on the basis of fraud, not “consideration,” and in listing the cases for which the action of money had and received was available, Mansfield himself might have put *Dutch v. Warren* under the heading of “imposition (implied)”:

[I]t lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express, or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff’s situation, contrary to laws made for the protection of persons under those circumstances.<sup>30</sup>

Succeeding courts obviously found the association with “consideration” more natural than the association with fraud—not that the distinction had any further relevance, so long as the form of action was admissible. That the formula adopted for this standard case was “failure” of consideration, as opposed to “absence” or some other synonym, demonstrates

---

<sup>28</sup> 2 Burr. at 1011, 97 Eng. Rep. at 679. The curious feature of *Dutch v. Warren* relates to the amount of recovery. The value of copper-mine shares had fallen after the sale, and in 1721 the Court of Common Pleas left it to the jury to decide whether the buyer should recover the price paid (£262 10s.) or merely “the price of the said stock as it was upon the 22d of August, when it should have been delivered . . . which they did, and gave the plaintiff but £175 damages.” By the usual legal rule the jury got it backwards, awarding expectation damages in a case where the plaintiff was entitled to restitution. The analogous case in U.S. law is *Bush v. Canfield*, 2 Conn. 485 (1818), where a buyer paid in advance for flour at \$7 a barrel and the seller repudiated—improbably—after the price had fallen to \$5.50 a barrel. The jury in *Dutch v. Warren* accepted the argument of the sellers in these cases, that a buyer’s loss on the contract should be deducted from any refund of his prepayment. Of course the law is the other way.

<sup>29</sup> See Stoljar, *The Doctrine of Failure of Consideration*, 75 L.Q.R. 53, 54-55 (1959). In the Year Book case discovered by Stoljar, Chief Justice Mettingham observed in colloquy—

If a covenant be made between Robert de Hertford and me that he shall enfeoff me of a carucate of land and put me in seisin at Easter in consideration of thirty marks, and I pay to him the thirty marks; and Easter comes, and he does nothing for me; in that case I may choose whether I will demand the money by writ of Debt, or demand by writ of Covenant that he perform his covenant with me in respect of the land.

Y.B. 21 & 22 Edw. I 598, 600 (C.P. 1294) (Horwood ed. 1873) (Seipp 1294.178rs).

<sup>30</sup> 2 Burr. at 1012, 97 Eng. Rep. at 681.

the rhetorical influence of *Moses v. Macferlan*, since “failure of consideration” does not appear in the earlier decisions.

When Lord Mansfield included “a consideration which happens to fail” among the established uses of money had and received, he may have had a different sort of case in mind. In *Martin v. Sitwell*,<sup>31</sup> a merchant had paid a premium of five pounds to insure a shipment of goods; it transpired that the merchant had no goods on board the ship. When the merchant brought *indebitatus assumpsit* to recover his five pounds, the insurer’s counsel objected that the exclusive remedy was rather “a special action of the case upon the custom of merchants.” Chief Justice Holt would have none of this, observing that

the money is not only to be returned by the custom, but the policy is made originally void, the party for whose use it was made having no goods on board; so that by this discovery the money was received *without any reason, occasion, or consideration*, and consequently it was originally received to the plaintiff’s use.<sup>32</sup>

*Martin v. Sitwell* makes at least as good an illustration as *Roxborough v. Rothmans* for the aspect of “failure of consideration” that means “failure to sustain itself of the state of affairs contemplated.” A number of authorities have suggested that it was this sort of case—rather than the *Dutch v. Warren* paradigm of a breach by repudiation—to which Lord Mansfield referred with the expression “a consideration which happens to fail.”

Readers who come to *Moses v. Macferlan* with a knowledge of Roman law have seen in Mansfield’s outline of unjust enrichment a paraphrase of Digest sources. According to Sir William Evans, “[I]t will scarcely be contended that he founded the materials of his exposition in any preceding volume of *Reports*; whereas a very slight comparison will evince the source of it to have been the judicial wisdom of ancient *Rome*.” To prove it, Evans set forth in adjacent columns selected passages from *Moses v. Macferlan* alongside corresponding statements of Roman jurists. Next to the words “or upon a consideration which happens to fail,” he put: “The whole title in the digest, *de Conditioni causa data, causa non secuta*, is an amplified view of this proposition.”<sup>33</sup> The Latin is easier to grasp than to

---

<sup>31</sup> 1 Show. K.B. 156, 89 E.R. 509 (K.B. 1691).

<sup>32</sup> *Id.* at 157, 89 Eng. Rep. at 510 (emphasis added).

<sup>33</sup> Evans’s extended discussion of the Roman sources of *Moses v. Macferlan* appears in the course of an Appendix, “Of Mistakes of Law,” published with his English translation of Pothier’s *Obligations*.

translate literally: this *condictio* was an action to recover money paid, “a certain state of affairs having been posited, and the posited state of affairs having failed to come about.” If *causa* is translated as “consideration,” then the words “upon a consideration which happens to fail”—an odd phrase in English, taken by itself—make a notably apt rendering of the ablative absolute *causa non secuta*. The closeness of the language is why Evans so confidently identified Lord Mansfield’s words with this particular action in Roman law.

The circumstance of *causa data, causa non secuta* might indeed result from the nonperformance of a promise. In such a case, however, the reason for resort to the *condictio*—“the Roman general assumpsit”<sup>34</sup>—was that the promise, while genuine, was of a type unenforceable at Roman law.<sup>35</sup> I pay you to manumit Stichus, and you fail to do it: a promise to manumit a slave is unenforceable as such, but I can bring a *condictio* to recover the money, on a theory that looks (to us) like unjust enrichment. As the scope of enforceable contract expands, the role of the *condictio* is necessarily diminished. The more noteworthy applications of *causa data causa non secuta* are thus the cases in which the problem is something other than a simple default. I pay you to manumit Stichus, and before you do it, Stichus dies.<sup>36</sup> Roman authority for the same cases of failure of basis might alternatively have been found in the *condictio sine causa*—another form of action that was rendered in English, by 19th-century writers, using the word “consideration.” So it was under the heading “Of the Want of a good Consideration” that Pothier (as translated by Evans) gave this splendid example:

Every contract ought to have a just cause (or consideration). . . . For instance, if on the false supposition that I owe you a thousand pounds, left you by the will of my father, which has been revoked by a codicil, whereof I am not apprised, I engage to give you a certain estate in discharge of that legacy, the contract is null, because the cause of my engagement, which was the acquittance of a debt, is false; . . . you are not only without any right of action to compel me to deliver the estate, but even if I have delivered it I am entitled to reclaim it, and my right of action according to the Roman law was called *condictio sine causa*, which is the subject of a title in the *Digest*.<sup>37</sup>

---

The most accessible edition in U.S. libraries is Pothier, *Treatise on the Law of Obligations, or Contracts* (Evans trans., Philadelphia 1826) vol. 2, at 328-30.

<sup>34</sup> Dawson, *Unjust Enrichment* 42 (1951).

<sup>35</sup> See Zimmermann, *Law of Obligations* 834-38, 843-44 (1990).

<sup>36</sup> The Stichus examples are given by Ulpian, *Dig.* 12.4.3.2-3.

<sup>37</sup> Pothier, *supra* note \_\_, vol. 1 at 22 [part I, ch. 1, § 6, ¶ 42].

Applied to cases of this kind, there may have been no difference at all between the two *condictiones*, even at Roman law.<sup>38</sup> Once they both had been described in English in terms of “want of consideration,” they could not possibly be distinguished.

In short: some lawyers writing in English were at one time inclined to associate “consideration” with *causa*, and therefore—by triangulation through the *condictiones*—to associate “failure of consideration” with “failure to sustain itself of the state of affairs contemplated.” The association was possible, but the English judges who followed Lord Mansfield refused to make it, and “failure of consideration” as a common-law doctrine was kept within much narrower bounds. Birks regarded this as a serious historical error, and he wanted it corrected:

In the law of restitution the word “consideration” should be given the meaning with which it first came into the common law. A “consideration” was once no more than a “matter considered” . . . the reason for the act, the state of affairs contemplated as its basis. Failure of consideration for a payment should be understood in that sense. It means that the state of affairs contemplated as the basis or reason for the payment has failed to materialise or, if it did exist, as failed to sustain itself.<sup>39</sup>

When the Australian High Court in *Roxborough v. Rothmans* adopted these words (though without acknowledgment) to describe “failure of consideration” as “the failure to sustain itself of the state of affairs contemplated as a basis for the payments the appellants seek to recover,” Birks had scored a triumph.<sup>40</sup> Subsequent attempts by English commentators to redefine “failure of consideration” to include “failure to sustain itself of a state of affairs,” or more forthrightly to replace “failure of consideration” with “failure of basis,” constitute an explicit campaign to extend Birks’s Australian victory to the English common law.

---

<sup>38</sup> Africanus, Dig. 12.7.4, seems to say explicitly that there is not. Cf. Zimmermann, *supra* note \_\_, at 856-57.

<sup>39</sup> Birks, *Introduction to the Law of Restitution* 223 (1985).

<sup>40</sup> Celebrating this aspect the *Roxborough* decision (though criticizing it in other respects), Birks took the long view:

It would permanently avert a recurrent misunderstanding if “failure of basis” could once and for all displace “failure of consideration.”

The trouble has been that the unfortunate resonance between failure of consideration in this context and the doctrine of consideration in contract has repeatedly led judges to think that the only possible failure of basis was failure of contractual consideration. In fact it is only one example. The confusion would never have arisen if we had followed Sir William Evans in keeping our eyes on “*causa data causa non secuta*.”

Birks, *Failure of Consideration and Its Place on the Map*, 2 *Oxford U. Commw. L.J.* 1, 3-4 (2002).



## II. Mixing or merging

The 2004 decision of the Supreme Court in *Garland v. Consumers' Gas Co.*<sup>41</sup> set off a vigorous academic debate about the analytical foundations of restitution law in Canada.<sup>42</sup> Broadly speaking, the question is whether the Court's manner of framing the restitution issue in *Garland* displaced the traditional, common-law account of Canadian restitution law (in essence, the "McCamus Version"), substituting a characteristically civilian explanation. The basic choice between the common-law and civil-law descriptions of unjust enrichment is well recognized. For an American lawyer, it is the choice between "unjust enrichment" and "unjustified enrichment": does the plaintiff show that the defendant has been unjustly enriched by a particular transfer, or that there is no legal justification for the defendant to retain it? In English academic shorthand, it is the choice between "unjust factors" and "absence of basis" as the more apt descriptive template, or—what is the same thing—between the earlier and later views of Peter Birks.<sup>43</sup> Canadian writers describe the choice in the same terms, but Canada is different because of the possibility that Canadian courts have shown some interest in the subject.

It should be observed that that common-law and civilian ways of describing the law of restitution are by no means incompatible. Canada's most distinctive contribution to the language of restitution shows how easily they can be combined. This was the elegant formula devised by Dickson, J., whereby the cause of action required "an enrichment, a

---

<sup>41</sup> Note \_\_, supra.

<sup>42</sup> For provisionally retrospective views, compare Maddaugh & McCamus, supra note \_\_, ¶¶ 3:200.30-45, with Mines, *The Reason to Reverse: Unjust Factors and Juristic Reasons*, 92 B.U. L. Rev. 1049 (2012). For the contemporary blow-by-blow, see McInnes, *Unjust Enrichment, Juristic Reasons and Palm Tree Justice: Garland v. Consumers' Gas Co.*, 41 Can. Bus. L.J. 103 (2005); McCamus, supra note \_\_; Mines, *A Return to First Principles in Unjust Enrichment: Kerr v. Baranow*, 51 Can. Bus. L.J. 275 (2011); McCamus, *Unjust Enrichment, "Existing Categories" and Kerr v. Baranow: A Reply to Professor McInnes*, 52 Can. Bus. L.J. 390 (2012). See also Hunt, *The Decline of Juristic Reasons? Unjust Enrichment and the Supreme Court of Canada*, 43 U.B.C. L. Rev. 173 (2010).

<sup>43</sup> In 2003 Birks repudiated his published views on the role of "unjust factors," announcing that "[a]lmost everything of mine now needs calling back for burning." Birks, *Unjust Enrichment* xiv (2003). The tendency of English writers to see "unjust factors" and "absence of basis" as antithetical explanations of unjust enrichment is due almost entirely to the profound influence of Birks in describing the choice between them while advocating first one, then the other.

corresponding deprivation and absence of any juristic reason for the enrichment.”<sup>44</sup> And while it can certainly be said that the choice between “unjust factors” and “absence of basis” shows that the problem of unjust enrichment can be addressed from analytical starting points that are polar opposites,<sup>45</sup> it is much less clear that the choice of a point of departure makes a practical difference—inasmuch as any given problem in unjust enrichment should be (and predictably would be) decided the same way within either framework.<sup>46</sup>

In most of the world, the contrast between “unjust” and “unjustified” as a way of summarizing the law of restitution remains what it has always been: a matter of comparative law, in which “we do it this way, and they do it that way.” No one in the United States is proposing that restitution should henceforth be explained in terms of “absence of basis”—unless, in some particular setting, that way of putting the matter might help to make a point.<sup>47</sup> No one in France is suggesting that the jurisprudence of *enrichissement sans cause* should be should be recast in terms of “unjust factors.” In England and in Canada, by

---

<sup>44</sup> *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 848, 117 D.L.R. (3d) 257, 274. The sources of the novel expression “absence of juristic reason” are explored by Smith, *The Mystery of “Juristic Reason,”* 12 *Sup. Ct. L. Rev.* (2d series) 211, 215-19 (2000), and by Dannemann, *Unjust Enrichment by Transfer: Some Comparative Remarks*, 79 *Tex. L. Rev.* 1837, 1861-63 (2001). The American *Restatement* invokes the Canadian language of “juristic reason” to support its view that “unjust enrichment” and “unjustified enrichment” are two ways of describing the same liabilities. See R3RUE § 1, Comment *b*, and accompanying Reporter’s Note.

<sup>45</sup> Thus Lionel Smith described the question as “a tremendously important issue”:

On it turns the whole orientation of the law of unjust enrichment. A list of reasons for reversing enrichments will look very different from a list of reasons for keeping them. Every single case must be approached differently depending upon which way the matter is to be approached.

Smith, *supra* note \_\_, at 214.

<sup>46</sup> Writers who regard the choice as fundamental struggle to identify an occasional case where it might arguably make a difference in outcome. Suffice it to say that such cases—if they exist at all—are both debatable and exceptional.

<sup>47</sup> In preparing the new *Restatement*, the American Law Institute explicitly debated whether the concept of “unjust enrichment” might be better named “unjustified enrichment.” Supporters of the change argued that the term normally used in civilian jurisdictions (including Louisiana) was more descriptively precise, and that it would therefore help to avoid the imputations of “palm-tree justice” sometimes attaching to an unqualified “unjust.” Opposition was framed in practical terms: professional familiarity, consistency with the prior *Restatement*, and (most pointedly) the proven adaptability of “unjust enrichment” to new circumstances. See Linzer, *Rough Justice: A Theory of Restitution and Reliance*, *Contracts and Torts*, 2001 *Wis. L. Rev.* 695, 700-01. The thought that there might be an objection to the use of a civilian idea in a common-law *Restatement* did not occur to anyone. “Unjust enrichment” was ultimately retained, but with an endorsement of “unjustified enrichment” as a fully acceptable alternative, one with notable advantages in particular applications. See R3RUE § 1, Comment \_\_.

contrast, academic commentators actually inquire whether and by what means a legal system might choose to replace a common-law version of unjust enrichment with its civilian obverse. The question in England is whether (and to what extent) it would be desirable for the courts to follow the revised views of Professor Birks. The question in Canada is whether (and to what extent) *Garland* has actually effected such a change in Canadian law.

Even those commentators who are most emphatic that *Garland* marked a watershed acknowledge the difficulties of moving from one regime to another. Professor Mitchell McInnes, for example, is clear that “[i]n Canada, the momentous shift was actually realized. . . . *Garland*’s significance cannot be overstated. Centuries of common law were thrown over in favor of a civilian test of unjust enrichment. In a stroke, lawyers and judges were required to alter fundamentally their conception of injustice.”<sup>48</sup> Still, “[t]he real issue pertains to the desirability and advisability of shifting from one model to the other.”<sup>49</sup> Reflecting on the difficulties of the post-*Garland* transition in Canada—where “errors arise, lapses occur, and concepts are confounded”—Professor McInnes concludes on an almost elegiac note:

It is fascinating to consider the path that English law might have followed if Professor Birks had not died so soon after undergoing his civilian conversion. Given everything else that he accomplished, it is just possible that by force of personality and persistent argument, he might have won the day. The basic materials and propositions remain, of course, but the movement toward a juristic reason analysis in England seems to have lost steam.<sup>50</sup>

But assuming that what one wants to do is to move toward a “juristic reason analysis,” whether in England or in Canada, this is unduly pessimistic.

---

<sup>48</sup> McInnes, *supra* note \_\_, at 1056-57.

<sup>49</sup> *Id.* at 1065. Many others have described the same problem:

[T]he law of unjust enrichment in the common law is at a crossroads. It can remain true to the casuistic nature of the common law or it can adopt the abstract Civilian approach. There is no doubt that the Civilian approach has significant advantages. It is elegant and principled. . . . In making this choice, however, the real question is whether the Civilian model can be accommodated within a common law system and at what cost.

Grantham, *Absence of Juristic Reason in the Supreme Court of Canada*, [2005] *Restitution L. Rev.* 102. 109.

<sup>50</sup> McInnes, *supra* note \_\_, at 1065.

If the incorporation of “juristic reason” within “unjust factors” appears inherently difficult, it is only because Birks taught that it could not be done:

The list of unjust factors and the inquiry into the existence of an explanatory basis are two entirely different methods of determining that an enrichment at the expense of another must be given up. Although in the vast majority of cases they reach the same destination, the two methods cannot be mixed or merged.<sup>51</sup>

The rule against mixing and merging was certainly true for Linnaeus, working out kingdoms, classes, and orders. It may be true if one is writing a legal treatise, a monograph, or a Restatement, since otherwise it will be hard to get past the table of contents. For a lawyer trying to explain a problem or argue a case, it is not true at all. Failure of consideration shows how easy it is to mix and merge.

In the article already quoted, Professor McInnes explains how “a claimant in a civil system may establish that a transfer lacked a legal basis”:

[I]n the vast majority of actual cases, it is necessary to show that the transfer occurred for some purpose that somehow failed. Although the plaintiff acted for the purpose of performing a contract, fulfilling an obligation, or giving a gift, either no contract was created, the obligation did not exist, or a gift already was given.<sup>52</sup>

This a recognizable paraphrase of *causa data, causa non secuta*. But it is also a paraphrase of “the failure to sustain itself of the state of affairs contemplated as a basis for the payments the appellant seek to recover”—the words of the Australian High Court that exemplify, as we have seen, the new frontier of failure of consideration and the aspirations of the English *Restatement*. Failure of consideration remains, officially, a common-law unjust factor and a protean one. It may or may not be good taxonomy to freight one expression with so much meaning. But the fact that the new meanings are evidently civilian in character is plainly not an insuperable obstacle.

### III. All or nothing

The significant, reflexive difference between English and American law in this area of restitution is found at the traditional core of “failure of consideration,” not its new periphery. The difference is of long standing, and it has nothing to do with whether these cases are called “failure of consideration” or something else. Confronted with a problem of

---

<sup>51</sup> Birks, *supra* note \_\_, at 39.

<sup>52</sup> McInnes, *supra* note \_\_, at 1059.

restitution in a contractual context—when a contract “actual or supposed” has been terminated for breach, or avoided, or invalidated<sup>53</sup>—U.S. law looks longer and harder at the contract itself to decide the terms on which the parties’ performance should be unwound. A principal reason why the contract can be made to yield more of the terms of restitution is that “unjust enrichment” is so much more flexible a ground for recovery than “failure of consideration.”

At an initial level the issue is whether “restitution in a contractual context” should be understood as a remedy on or off the contract. Expanded failure of consideration views every failure of “a promised counter-performance, whether under a valid contract or not” as a potential source of unjust enrichment. American lawyers might be more likely to assume that the material failure of a promised counter-performance presents a potential case of restitution—though a restitution operating without regard to unjust enrichment, when the terms of the promised exchange have been validly fixed. But even this difference in orientation, at first glance so fundamental, can be rendered insignificant by the need to decide the extent (if any) to which the defendant has been unjustly enriched. To the extent that the parties’ contract, “actual or supposed,” furnishes the measure of the defendant’s enrichment when the transaction is unwound, the difference between a recovery on and off the contract will tend to disappear.

The familiar “losing contract” problem illustrates this difference in attitude, not because it happens often enough to be of practical importance—how often would anyone commit a material breach of a significantly advantageous bargain, and how often would the ensuing dispute be resolved by litigation?—but because it epitomizes the question of how enrichment “in a contractual context” is to be measured. In one view, the contract price does not limit the plaintiff’s recovery because he contracted for performance, not breach. “Since the circumstances are not as the parties anticipated, the transaction is non-consensual.”<sup>54</sup> In the other, an event which benefits A at the expense of B—namely, B’s

---

<sup>53</sup> The function of restitution in such cases is “to aid a party in withdrawing from a contract, actual or supposed, by ordering the surrender of any performance he had rendered in conformity with it.” Dawson, *Restitution Without Enrichment*, 61 B.U. L. Rev. 563, 576 (1981).

<sup>54</sup> Wilmot-Smith, § 38 and the Lost Doctrine of Failure of Consideration, in *The Restatement Third: Restitution and Unjust Enrichment, Critical and Comparative Essays* at 59, 73 (Mitchell & Swadling eds., 2013).

material breach permitting A to terminate a costly performance—cannot be a source of either enrichment to A or injury to B. Whether the remedy is conceived as on or off the contract thus becomes irrelevant. The logic of this second proposition is unanswerable, but only if it is accepted that a valid but unperformed contract can fix the baseline of enrichment on the one hand and injury on the other.

Professor Burrows himself recognizes that the terms of an unperformed contract may limit the extent of A’s benefit at B’s expense, even if his preferred explanation (in terms of “subjective devaluation”) seems unnecessarily laborious:

[T]he (pro rata) contract price is likely to be important not in avoiding a conflict with contract but as an inherent element of the unjust enrichment claim: more specifically, in establishing the defendant’s benefit. . . .

[U]nless one takes the extreme and unconvincing view that the contract price is irrelevant because a contract breaker, as a wrongdoer, cannot appeal to subjective devaluation, the pro rata contract price is likely to be crucial in establishing the defendant’s benefit. Birks, in agreeing with this reasoning, expressed the point by saying that the contract price is a “valuation ceiling” not a “contract ceiling.”

Normally, therefore, the pro rata contract price ought to act as the true measure of restitution.<sup>55</sup>

In light of this acknowledgment, it is curious that Burrows’s new RELUE includes a subsection, with accompanying comment, to entrench the proposition that “restitution for failure of consideration may enable a party to escape from a bad bargain” (RELUE § 15(4)(a)). If the benefit to A is established by the ratable contract price of B’s interrupted performance, then B escapes from his bad bargain only to the extent that A’s breach entitles B to stop work. But this is a consequence of contract remedies having nothing to do with unjust enrichment.

RELUE § 15(4)(a) thus appears to be largely a matter of abstract principle. It “reinforces the point that restitution of an unjust enrichment for failure of consideration is independent of a claim for breach of contract.”<sup>56</sup> RELUE insists, in other words, that “a valuation ceiling” is not “a contract ceiling,” and that it is worthwhile to draw such a

---

<sup>55</sup> Burrows, *supra* note \_\_, at 349-50 (citation omitted).

<sup>56</sup> Burrows, *supra* note \_\_, at 89.

distinction. R3RUE is equally emphatic in stating the contrary.<sup>57</sup> The underlying disagreement concerns the range of circumstances—the extent of deviation from untroubled performance on both sides—in which the parties’ contract, “actual or supposed,” may properly yield the terms on which a failed exchange is unwound.<sup>58</sup> The view that it may do so in cases of material breach is perhaps as much a matter of ideology as the view that it may not.<sup>59</sup> But the same reflexive choice can be observed in a number of settings throughout the topic called “failure of consideration.”

The famous frustration case of *Fibrosa S.P.A. v. Fairbairn Lawson Combe Barbour, Ltd.*<sup>60</sup> involved “certain flax-hackling machines” that the outbreak of war made it impossible for the defendant manufacturers to deliver c.i.f. from Leeds to German-occupied Gdynia in Poland. But the chief preoccupation of the House of Lords in *Fibrosa* was seemingly to repudiate the decision of the Court of Appeal in *Chandler v. Webster*,<sup>61</sup> one of the Coronation Cases, which had been cited ever since 1904 for the idea that when a contract is frustrated in mid-performance, “the loss lies where it falls.” On the contrary, according to the House of Lords in 1942, *Chandler v. Webster* had been a clear case of “total failure of consideration,” with the result that the would-be hirer of “rooms to see the procession” ought to have been entitled to a full refund of amounts already paid to the owner of the rooms at the point when the procession was called off. Many people would agree that a contract for “rooms to

---

<sup>57</sup> See n. \_\_ supra and accompanying text.

<sup>58</sup> Ideally, “the Third Restatement makes the field of unjust enrichment continuous with contract by the bold move of making a void, unenforceable or broken contract the preferred basis for defining the parties’ rightful positions for purposes of determining if one has been unjustly enriched at the expense of the other.” Gergen, *Restitution and Contract: Reflections on the Third Restatement*, 13 *Restitution L. Rev.* 224, 225 (2005).

<sup>59</sup> That particular conception of “contract law” that supplies a “contract” answer to any problem involving an enforceable contract is itself a particular one that sees the field as coextensive with “promise” or, alternatively, “consent.” . . . In the losing contract setting, giving the loser-plaintiff a remedy that exceeds the value one calculates based on the breacher’s promise would, it is said, “unjustly enrich” the plaintiff, presumably by giving the loser plaintiff more than he bargained for, or exposing the promisor to more liability than she assumed. This view of contract accords great respect to personal autonomy and freedom, both to make contracts and, importantly in this context, from liability not voluntarily assumed.

Woodward, *Restitution Without Context: An Examination of the Losing Contract Problem in the Restatement (Third) of Restitution*, in *Revisiting the Contracts Scholarship of Stewart Macaulay: On the Empirical and the Lyrical* at 347, 364-65 (Braucher et al. eds., 2013) (citations omitted).

<sup>60</sup> [1943] App. Cas. 32 (H.L. 1942).

<sup>61</sup> [1904] L.R. 1 K.B. 493 (C.A.).

see the procession” should have been analogized to a theater ticket, which by common understanding (if not express provision) is subject to refund if the show does not go on. But if so, it is not because there has been a “total failure of consideration” that can be identified in the abstract, but only because we conclude that the parties saw it that way. Agreements in which deposits and down payments are made nonrefundable are commonplace, so the question is merely how the agreements for “rooms to see the procession” should realistically have been construed.

In order to repudiate *Chandler v. Webster* in deciding *Fibrosa*, however, the House of Lords had to describe the frustrated flax-hackling contract as another instance of total failure of consideration. This necessitated a strained view of the agreement—in which the evident impossibility of delivery c.i.f. Poland resulted in the “total failure” of a promised performance which necessarily comprised both manufacture and delivery of custom-made machinery, despite the fact that considerable work had already been done on the machines by the time delivery became impossible. But there was more substance to be found in the frustrated contract than that. The Leeds manufacturers had required an initial payment of £1600, of which only £1000 had actually been paid. This payment term had been included in a contract between an English machinery manufacturer and a Polish buyer in which the manufacturer would foreseeably incur significant expenses of performance before it could ship to a port within the free city of Gdansk, alias Danzig—the end-point of the “Polish Corridor” created by the Treaty of Versailles, whose cession Hitler had demanded in March 1939. The contract was concluded on July 12, 1939, against a background that included—in addition to the imminent threat of the German invasion that occurred six weeks later—an established rule of English contract law by which the loss from frustration was understood to lie where it fell. It is not fanciful in such circumstances to look for an implicit *contractual* allocation of the risk of loss from *force majeure*, at least to the extent of the first £1600. Counsel for the defendant manufacturer attempted, without success, to make just this argument.<sup>62</sup> A U.S. court would have heard him.

The *Fibrosa* decision returned the buyer’s deposit without deduction for the seller’s expenses. This was not the end of the story in English law: the judges expressed discomfort with the inequitable consequences of their all-or-nothing resolution, inviting the legislative

---

<sup>62</sup> Id. at 37-38.



solution that was shortly forthcoming.<sup>63</sup> But a U.S. court might easily have achieved a more equitable resolution, without resort to statute, because it could have found that the parties to the frustrated contract had allocated more of the associated risks for themselves. And it could have done this, in turn, because the relevant doctrine in U.S. law is a flexible rule that Lord Mansfield would have recognized: “A person who renders performance under a contract that is subject to avoidance by reason of mistake or supervening change of circumstances has a claim in restitution to recover the performance of value, *as necessary to prevent unjust enrichment.*”<sup>64</sup> If a proposition in any such terms had been admissible in English law in 1943, it seems doubtful that the expression “failure of consideration” would still retain its current prominence.<sup>65</sup>

Cases of failure of consideration concerned in one way or another with the problem of forfeiture all invite the same analysis. In *Whincup v. Hughes*<sup>66</sup>—where a master had died only one year into a six-year apprenticeship, after the whole of the premium had been paid in advance—it seems idle to inquire whether the law might be willing “to apportion a prepaid sum” until we are satisfied what the parties had in mind when the sum was paid over; and once we know that, the problem of apportionment has been solved. In the converse case of *Cutter v. Powell*,<sup>67</sup> a seaman was engaged to work the homeward voyage from the West Indies at an unusually high wage of 30 guineas, “provided he proceeds, continues, and does his duty as second mate in the said ship from hence to the port of Liverpool.” The seaman performed faithfully for two months but died before the completion of the voyage. Before worrying about restitution on these famous facts, the initial question is necessarily whether the parties really intended that the seaman’s wages

---

<sup>63</sup> Law Reform (Frustrated Contracts) Act, 1943 (U.K.). Two *Uniform Frustrated Contracts Acts*, the first virtually identical to the English statute, have been enacted in various Canadian jurisdictions. See McCamus, *supra* note \_\_, at 603-04.

<sup>64</sup> R3RUE § 34(1) (emphasis added).

<sup>65</sup> As Stephen Waddams observes, unjust enrichment was acknowledged as a basis of the *Fibrosa* decision, but it was not yet admissible as an operative rule:

The House of Lords felt sufficiently emboldened to overrule a decision that had stood for forty years, and to do so on a very general principle derived from the broadest considerations of justice, and yet found that it lacked the power to define or articulate the principle in such a way as to avoid foreseeable future cases of admittedly serious injustice.

Waddams, *Principle and Policy in Contract Law* 145 (2011).

<sup>66</sup> L.R. 6 C.P. 78 (1871).

<sup>67</sup> 6 T.R. 320, 101 Eng. Rep. 573 (K.B. 1795)

should be earned only if the entire the voyage was completed. Either construction of the agreement—with or without an implied apportionment—would be equally admissible, once we reached a conclusion about the parties’ understanding.<sup>68</sup> Countless cases in which a purchaser of goods or real property has paid part of the price before repudiating the purchase resolve themselves, inevitably, into the same essentially contractual inquiry: whether a “deposit” made in part performance of a contract is understood to be refundable or not. It is not illogical to speak of “unjust enrichment” as a concern of the law in such cases, but the same might be said of the ordinary obligation to repay a loan.

Our analysis of the parties’ intentions will thus eliminate any concern with unjust enrichment whenever we are able to conclude either that a payment was understood to be nonrecoverable or that a performance not fully conforming to the contract was not to be compensated at all. Inevitably, our ideas about unjust enrichment will influence our conclusions about what the parties intended. In the famous New York case of *Jacob & Youngs, Inc. v. Kent*<sup>69</sup>—where the architect’s plans called for “wrought iron pipe . . . of the grade known as ‘standard pipe’ of Reading manufacture” and the builders inadvertently substituted otherwise indistinguishable pipe manufactured in Cohoes—payment was to be made in instalments. Owner’s obligation to pay the final instalment was conditioned on issuance of an architect’s certificate, attesting to the builder’s strict compliance with specifications. Because of the nonconformity of the pipe the certificate could not be obtained, so the question was whether the parties had really meant what they said. If they

---

<sup>68</sup> In his well-known discussion of the case, Stoljar insists that “employment-bargains cannot be given an aleatory interpretation.” Stoljar, *The Great Case of Cutter v. Powell*, 24 Can. Bar Rev. 288, 293 (1956). Doubtless an aleatory employment contract would be a rarity, but such a thing is easy enough to imagine, and some of the judges appear to have thought that Cutter and Powell had in fact made one. Cf. R3RUE § 38, Illustration 16. But if the “wagering” and “insurance” possibilities of the bargain can in fact be excluded—on the ground that the parties did not intend them—then it certainly follows, as Stoljar argued, that “we are left with only one alternative interpretation, namely, that the servant bargained every unit of his work for corresponding payment.” *Id.* at 298. His further discussion leads to what is still the essential point:

Indeed, resort to quasi-contract begs the entire question. Since the quasi-contractual remedy depends on unjust enrichment, the question whether the master is in fact unjustly enriched would again have to depend on whether there was a bargain or whether the transaction was a gift or a gamble. Quasi-contract thus directly enforces payment for a part-performed bargain, so that the here applicable quasi-contractual rule is essentially of the same legal type as those rules in contract which try to eke out broken-down contracts.

*Id.* at 299.

<sup>69</sup> 230 N.Y. 239, 129 N.E. 889 (1921).

intended to visit an innocent and meaningless departure from specifications with such harsh consequences, according to Judge Cardozo, there was nothing in New York contract law to stop them. But the injustice of the outcome weighed heavily against the likelihood that it had been intended:

*From the conclusion that promises may not be treated as dependent to the extent of their uttermost minutiae without a sacrifice of justice, the progress is a short one to the conclusion that they may not be so treated without a perversion of intention. Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable. If something else is in view, it must not be left to implication. There will be no assumption of a purpose to visit venial faults with oppressive retribution.<sup>70</sup>*

Reverting in this spirit to *Whincup v. Hughes* or *Cutter v. Powell*, if we conclude on analyzing either agreement that the parties did *not* understand that the relevant payment or performance should be subject to forfeit, it is a very short step—perhaps no distance at all—to a conclusion that the parties implicitly agreed that payment should be apportioned.<sup>71</sup> Whether we explain the remedy in terms of implied contract or unjust enrichment, the outcome is the same; and if the outcome is the same, it would seem unnecessary to distinguish the two theories.

But excluding any reference to implied contract, and assuming that a claimant will recover (if at all) only on a theory of unjust enrichment, the existence and extent of any such enrichment are often to be measured, in the U.S. view, by reference to the parties' bargain—giving their ensuing obligations in restitution, at the very least, a strongly contractual flavor. The leading American statement comes in another famous Cardozo opinion, this one in a case of frustrated contract:

Alberto Buccini made a contract with the Paterno Construction Company to decorate the ballroom, banquet hall and swimming pool in a dwelling described as "Paterno's Castle" on Riverside Drive in the city of New York. The character of the decorations was such as to call for the exercise of artistic skill, and there is a provision that all the decorative figured work shall be done by Buccini personally and that only the plain work may be delegated to mechanics. . . .

---

<sup>70</sup> Id. at 242, 129 N.E. at 891 (emphasis added).

<sup>71</sup> This is one of the points made by Stoljar, *supra* note \_\_.

Buccini died while the work was in progress. The contract being personal, the effect of his death was to terminate the duty of going forward with performance, but to leave the owner liable for benefits received.<sup>72</sup>

Owner's liability is in unjust enrichment, but the necessary points of reference will be found in the interrupted bargain:

Into every contract of personal service the law reads "the implied condition" that sickness or death shall be an excuse for non-performance. The parties may say by their contract what compensation shall be made in the event of that excuse. The award will then conform to the expression of their will. They may leave the subject open, to be governed by the law itself. The award will then conform to the principles of liability in *quasi*-contract and to the considerations of equity and justice by which that liability is governed. In either event the controversy is one that has its origin in the contract and in the performance of the work thereunder, just as much as if the work had been completed under a contract silent as to price, and the controversy had relation to the reasonable value. Death of the contractor has not nullified the contract in the sense of emancipating the claimant from the restraint of its conditions. *They limit her at every turn. She cannot stir a step without reference to the contract, nor profit by a dollar without adherence to its covenants.* The interrupted work may have been better than any called for by the plans. Even so, there can be no recovery if the contractor willfully and without excuse has substituted something else (*Jacob & Youngs, Inc., v. Kent*, 230 N. Y. 239). The value proportionately distributed may be greater than the contract price. Even so, the price, and not the value, will be the maximum beyond which the judgment may not go (*Clark v. Gilbert*, 26 N. Y. 279, 283). "The recovery in such a case cannot exceed the contract price, or the rate of it for the part of the service performed" (*id.*). The question to be determined is not the value of the work considered by itself and unrelated to the contract. The question to be determined is the benefit to the owner in advancement of the ends to be promoted by the contract.<sup>73</sup>

*Buccini v. Paterno* involved a contract valid at its inception and discharged after part performance by supervening circumstances. But an unenforceable contract, or one that is entirely invalid, may likewise determine the issue of enrichment between the parties. The question in each such case is whether the particular ground of invalidity undermines the parties' allocation of risks. A buyer who has received what he requested and agreed to pay for will not necessarily escape liability in restitution because a statute provides that his contract is "unenforceable and void."<sup>74</sup> A minor who purchases life insurance will be free to

---

<sup>72</sup> *Matter of Buccini v. Paterno Constr. Co.*, 253 N.Y. 256, 257-58 (1930).

<sup>73</sup> *Id.* at 258-59 (emphasis added).

<sup>74</sup> Modern consumer-protection statutes have led to updated examples of this traditional response to the original Statute of Frauds. In *Pelletier v. Johnson*, 188 Ariz. 478, 937 P.2d 668 (Ct. App. 1996),

repudiate his promise and avoid any further obligation to pay premiums, but not to recover premiums already paid for insurance already furnished.<sup>75</sup> Neither agreement can ever be a source of promissory liability, but either might furnish the baseline from which unjust enrichment will be measured following partial performance.

The most dramatic recent illustration of the contrasting instincts of English and American law in this area is hypothetical, because the U.S. side of the comparison has not been formally decided; but the likely difference in outcome is easy to anticipate. The announcement by the House of Lords in 1990 that municipalities in the U.K. lacked legal capacity to make contracts for interest-rate swaps took nearly everyone by surprise.<sup>76</sup> Hedging arrangements of this kind were widely employed and well understood; there was nothing fraudulent or abusive in their operation; countless swap contracts had been made and performed by municipalities on the same terms as everyone else. Because the contracts were now determined to be *ultra vires*, they were necessarily unenforceable to the extent they remained executory. Because the newly discovered rule was given retroactive effect, the question was how to deal with the swaps that had already been performed.

If a swap arrangement is discovered to be unenforceable when it has been only partly performed, the rescission remedy will often make sense in contract terms. Further performance will not take place and cannot be compelled. Interrupting the swap transaction in the middle, as in a game of musical chairs, would leave the parties with an exchange having no basis in their agreement. (A's net liability to B over the first part of the contract term might be increased, reduced, or reversed by payments that would have come due over the remainder, so the agreement yields no "contract rate" for a partial performance.) The case is different if the exchange has been completed, because both parties have received what they asked and promised to pay for.

---

defendant homeowner refused to pay builder for improvements after work requested had been completed as promised. Homeowner's contract with builder—otherwise unobjectionable—failed to contain particular language required by a consumer-protection statute; the statute provided that any home-improvement contract not incorporating the specified language should be "unenforceable and void." The evident concerns of the legislation were not at issue in the transaction between the parties. *Held*, that although the contract was legally ineffective, the facts of the parties' agreement (including the price defendant had agreed to pay) justified builder's recovery in restitution. See R3RUE § 31, Comment *h*.

<sup>75</sup> See R3RUE § 16, Illustration 14.

<sup>76</sup> *Hazell v. Hammersmith and Fulham London Borough Council*, [1992] 2 App. Cas. 1 (H.L. 1990).

In *Guinness Mahon & Co. Ltd. v. Kensington & Chelsea Royal London Borough Council*,<sup>77</sup> the swap contract—later revealed to be *ultra vires* the local authority—had been fully performed on both sides. Because the agreement (with the benefit of hindsight) had turned out to be disadvantageous to the bank, the bankers wished they had never made it. The English judges ordered the transaction to be unwound. To do so they first had to find that a completed swap transaction might be characterized as a “total failure of consideration”—a manifest absurdity, but one to which they were driven because at the time they could see no other basis for a claim in restitution.<sup>78</sup> Substituting “failure of basis” as the ground of restitution does not really help: it makes it necessary to say that the basis of the plaintiff’s performance was the enforceability of the defendant’s promise (which never had to be tested) rather than the defendant’s promised counter-performance (which was in fact received). This is like arguing that an unwritten contract within the Statute of Frauds, after full performance on both sides, might be subject to rescission and restitution because of “failure of basis.”<sup>79</sup>

An even more fundamental objection from the U.S. point of view is simply that on the facts of *Guinness Mahon* there was no unjust enrichment. The conclusion is obvious, if the parties’ agreement can be taken as the enrichment baseline. Fraud or pertinent illegality would rule it out for this purpose, in which case we might agree that the parties’ reciprocal payments had no more legal basis than would an equivalent series of payments between strangers. If the *Guinness Mahon* swap had been a prohibited transaction, if the Council were the party intended to be protected by the prohibition, and if the Council had

---

<sup>77</sup> [1999] Q.B. 215 (Ct. App. 1998).

<sup>78</sup> “Failure of consideration” was shortly replaced in this analysis by “mistake of law,” when the House of Lords decided (in another swaps case) that restitution might be available for mistake of law as well as mistake of fact. *Kleinwort Benson Ltd. v. Lincoln City Council*, [1999] 2 App. Cas. 349 (H.L. 1998). In abandoning the misconceived distinction between “mistake of fact” and “mistake of law,” *Kleinwort Benson* at last overruled what John Dawson once called “the original ‘mistake of law’ by Lord Ellenborough” in *Bilbie v. Lumley*, 2 East 469, 102 Eng. Rep. 448 (K.B. 1802). See R3RUE § 5, Comment *g*; Maddaugh & McCamus, *supra* note \_\_, ¶ 11:200.

<sup>79</sup> Cf. R3RUE § 31(1) (“There is no unjust enrichment if the claimant receives the counterperformance specified by the parties’ unenforceable agreement”); Ulpian, Dig. 12.4.1 (*causa secuta repititio cessat*, “if the state of affairs posited comes about, the action to recover the payment ceases”); Birks, No Consideration: Restitution After Void Contracts, 23 U. W. Australia L. Rev. 195, 206 (1993) (“there is in fact no compelling reason to allow a plaintiff to recover the value of his performance if he has received in exchange for it all that he expected”).

come out the loser, we would expect to see the contract treated as a nullity.<sup>80</sup> Instead this was an agreement negotiated in good faith, on competitive terms, whose legality and validity had never been doubted. The bank could not claim incapacity as a ground for avoidance. U.S. law would insist on evidence of unjust enrichment before it supplied a remedy.

We have no swaps cases in the U.S., because U.S. parties would not willingly entrust a commercial dispute of this magnitude to decision by the courts. Still, R3RUE confidently predicts that U.S. courts would not unwind a completed transaction like the one in *Guinness Mahon*. The most influential support for this prediction is probably to be found in yet another Cardozo opinion, this one in *Atlantic Coast Line R.R. v. Florida*.<sup>81</sup> The analogy is indirect but reasonably close. A state agency with authority to set railroad freight rates had approved an increase in a particular tariff. Shipper paid the higher rate but challenged the decision of the agency, on the ground that statutory procedures had not been followed. Shipper prevailed in its contention, and the agency decision allowing the increased tariff was held to be void. Naturally, Shipper now sued Railroad to recover the additional amounts it had paid under the invalid tariff. Shipper's payments at the unauthorized higher rate, it seems fair to say, fit perfectly within the scope of "failure of consideration" in its expanded conception.

Writing for the U.S. Supreme Court, Justice Cardozo denied Shipper's restitution claim. Following its initial, illegal action, Agency had revisited Railroad's rate application. This time, following proper procedures, Agency determined that a tariff increase was appropriate under the circumstances, and that the amount of the increase had been correctly determined the first time round. The lawful increase could not be made

---

<sup>80</sup> Identifying unjust enrichment in cases of *ultra vires* transactions by municipal authorities—as in cases of illegal contracts generally—is complicated by the different policy factors potentially involved and by the different consequences of restitution from one case to another. The policy underlying the relevant prohibition, and the circumstances in which the parties find themselves, may variously demand restitution, exclude restitution, or permit restitution to avoid unjust enrichment. See R3RUE § 32, Comment c ("Illegality—The primacy of statutory purpose"); § 33, Comment e ("Incapacity of Recipient—Municipal corporations"). The impulse toward restitution in the English swaps cases is much easier to understand if it can be assumed (i) that the policy underlying the relevant incapacity was to safeguard the municipalities against the risk of the very harm that eventuated to some of them, and (ii) that banks dealing with the municipalities had some reason to know that their contracts might be unenforceable.

<sup>81</sup> 295 U.S. 301 (1935).

retroactive. On the other hand, a shipper that had paid the higher tariff could not claim that Railroad had been unjustly enriched:

A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function. *Moses v. Macferlan*, 2 Burr. 1005; *Bize v. Dickason*, 1 Term Rep. 285; *Farmer v. Arundel*, 2 Wm. Bl. 824; *Kingston Bank v. Eltinge*, 66 N.Y. 625. The claimant, to prevail, must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it. . . . *The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it.*<sup>82</sup>

A handful of disparate examples proves nothing, but might nevertheless be suggestive. Confronted with a problem of restitution in a contractual context, U.S. law looks first for answers in the parties' agreement, "actual or supposed." Comparable results in English cases tend toward all-or-nothing, so that a contract terminated for breach, or avoided, or invalidated, leaves the parties to deal with each other as if they were strangers.

Part of the reason, the extent the comparison is justified, is the legacy of "total failure of consideration." Total failure resulted in money-back restitution, with no questions asked about unjust enrichment. Conversely, restitution was not possible at all unless the failure was total: this was "an outwork of the courts' reluctance to enter on the valuation of non-money benefits."<sup>83</sup> The consequences include cases like *Fibrosa* and *Guinness Mahon*, in both of which the courts (in order to give a remedy at all) first found, however implausibly, that consideration had totally failed; then awarded restitution without reference to the unjust enrichment of the defendant. American law escaped this kind of categorical thinking because it embraced, uncritically and at a relatively early date, the broadest generalities of Lord Mansfield's opinion in *Moses v. Macferlan*. Once it was accepted as a ground of restitution "that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money,"<sup>84</sup> the need to specify precise circumstances constituting "a consideration which happens to fail" inevitably became less urgent.

---

<sup>82</sup> Id. at 309-10 (emphasis added).

<sup>83</sup> Birks, *supra* note \_\_, at 244.

<sup>84</sup> 2 Burr. at 1012, 97 Eng. Rep. at 681.



