



Scottish Law Commission

DISCUSSION PAPER NO. 99

JUDICIAL ABOLITION OF THE ERROR OF LAW RULE AND ITS AFTERMATH

APPENDIX

DRAFT RULES ON UNJUSTIFIED ENRICHMENT AND COMMENTARY

(Note: This paper was prepared by Dr E M Clive for a seminar on 22 October 1994. The rules were framed to test the feasibility of a codification of Scots enrichment law. They represent Dr Clive's personal views and not necessarily those of the Scottish Law Commission.)

DRAFT RULES

**which might form the basis of instructions for an
UNJUSTIFIED ENRICHMENT (SCOTLAND) BILL**

ARRANGEMENT

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DRAFT RULES

General principle

1. A person who has been enriched at the expense of another person is bound, if the enrichment is unjustified, to redress the enrichment.

Enrichment

2.(1) A person is enriched if he acquires an economic benefit.

(2) A person acquires an economic benefit if his net worth is increased or is prevented from being decreased, and accordingly a person may be enriched, among other ways, by

- (a) acquiring money or other property
- (b) having value added to property
- (c) being freed, in whole or in part, from an obligation, or
- (d) being saved from a loss or expenditure.

(3) A person is treated as acquiring an economic benefit under a void contract, or under a voidable contract which has been reduced, rescinded or otherwise set aside, or under a contract which has been terminated by frustration or rescission for breach or by some other means (apart from full performance) or under any other transaction or purported transaction which does not provide legal cause for the acquisition, if he would have acquired an economic benefit but for the fact that he gave consideration, and accordingly in such circumstances both parties to the transaction or purported transaction may be regarded as being enriched.

At the expense of another person

3. (1) The enrichment of one person is at the expense of another person if it is the direct result of

- (a) a payment, grant, transfer, incurring of liability, or rendering of services by the other person
 - (i) to the enriched person
 - (ii) in fulfilment of an obligation of the enriched person
 - (iii) in adding value to the enriched person's property, or
 - (iv) in acquiring some other economic benefit for the enriched person, or
- (b) in any case not covered by paragraph (a), an interference with the patrimonial rights of the other person otherwise than by the operation of natural forces.

(2) A person interferes with the patrimonial rights of another person if, among other things, he

- (a) extinguishes those rights or acts in such a way that they are extinguished
- (b) disposes or purports to dispose of property belonging to that other person
- (c) uses property which that other person has the right to use to the exclusion of the interferer, or

(d) actively intercepts a benefit due to the other person but a person does not interfere with the patrimonial rights of another person merely because he breaches a contract between himself and the other person.

(3) A person who claims redress of any unjustified enrichment resulting from an interference with his patrimonial rights is treated for the purpose of any claims by or against third parties as thereby ratifying the interference.

(4) A person who purchases property in good faith from someone who is not the owner of the property is not treated as being enriched at the expense of the owner or of any former owner by reason only of any economic benefit derived by him from the purchase or the property; and the same rule applies to any other acquirer, in good faith and for value, of the right, or of what purports to be the right, to deal with the property or rights of another, and to anyone deriving title from such a purchaser or acquirer.

(5) Where a person (E) has been enriched indirectly as a result of performance by another person (C) under a contract between C and a third party (T), E's enrichment is not regarded as being at the expense of C, even if C is unable to recover under his contract with T.

(6) This rule is subject to rule 8 (which deals with certain exceptional cases where redress is due for indirect enrichment).

Unjustified

4. An enrichment is unjustified unless it is justified under rules 5 or 6.

Enrichment justified by legal cause

5.(1) An enrichment is justified if the enriched person is entitled to it by virtue of

- (a) an enactment
- (b) a rule of law
- (c) a court decree
- (d) a contract (whether or not the person claiming redress is a party) or unilateral voluntary obligation
- (e) a will or trust
- (f) a gift, or
- (g) some other legal cause.

(2) The reference to an enactment or rule of law in rule 5(1) is to an enactment or rule of law which confers rights directly and not to an enactment or rule of law in so far as it operates indirectly by regulating the effects of court decrees, contracts, wills, trusts, gifts or other legal causes.

(3) A purported or apparent legal cause does not justify an enrichment if it is void or if, being voidable, it has been reduced, rescinded or otherwise set aside.

(4) An acquisition of property is not a justified enrichment merely because legal title to the property has been acquired.

Enrichment justified by public policy

6.(1) An enrichment is justified if it is the result of

(a) work or expenditure which was undertaken or incurred by the other person for his own benefit, or for the benefit of a third party or the public at large, which has incidentally conferred a benefit on the enriched person, and which was undertaken or incurred when the person knew or could reasonably have been expected to know that there would be a benefit to the enriched person and accepted, or could reasonably be supposed to have accepted, the risk that the enriched person would not pay for the benefit

(b) the voluntary and deliberate conferring by the other person of a benefit on the enriched person, in the knowledge that it is not due and in acceptance of the risk that the enriched person may choose not to pay or do anything in return

(c) a voluntary performance by the other person of an obligation which has prescribed, even if he erroneously believed that the obligation was still due, provided that any due counter-performance has been given

(d) a voluntary performance by the other person of an obligation which is invalid for some formal reason only, even if he erroneously believed that the obligation was valid, provided that any due counter-performance has been given

or if there is some other consideration of public policy which requires it to be regarded as justified.

(2) For the purpose of rule 6(1)(a) "benefit", in relation to a person who has done work or provided services in tendering for a contract or in the anticipation of obtaining a contract, includes the benefit to that person of having, or improving, the chance of obtaining the contract.

Exceptions to rules 5 and 6

7.(1) Rule 5(1)(b) does not apply in so far as the enrichment is the result of any rule of law on the acquisition of property by accession or specification, or any analogous rule whereby one person may acquire another's property when it becomes attached to or mixed with his own.

(2) Rule 5(1)(d) does not apply in so far as the contract or obligation,

(a) is unenforceable because of an enactment or rule of law

(whether or not it is also illegal), unless allowing redress for the enrichment would contravene the policy underlying the enactment or rule of law

(b) has been terminated by rescission or frustration or some other means (apart from full performance) and the contract or obligation does not, expressly or impliedly, exclude redress in respect of the benefit in question.

(3) For the purpose of rule 7(2)(b) a contract which provides for performance in severable parts or stages is presumed, unless the contract indicates the contrary, to exclude redress in so far as performance by one party under, and substantially in accordance with, the contract has been met by performance by the other party under, and substantially in accordance with, the contract.

(4) Rule 5(1)(f) does not apply where the gift
(a) was made in error, whether of fact or law, or
(b) was subject to a condition, which has been met, that it would be returned.

(5) Rule 6(1)(a) and (b) do not apply where the other person has, in circumstances where it was reasonable to do so,
(a) paid a monetary debt due by the enriched person
(b) fulfilled an alimentary obligation due by the enriched person
(c) incurred expenditure or performed services necessary for preserving the life, health or welfare of the enriched person, or
(d) incurred expenditure or performed services urgently necessary for preserving the property of the enriched person or preventing it from being dangerous.

Redress for indirect enrichment

8(1) (a) Where a person (E) has acquired money or money's worth from a third party (T) by disposing or purporting to dispose of property belonging to another person (C), or by otherwise interfering with C's patrimonial rights, or by disposing of property acquired by him from C under a transaction voidable at C's instance, E's enrichment is treated, notwithstanding anything in the preceding rules, as being at the expense of C and as not being justified by any contract between himself and T.

(b) Paragraph (a) does not apply if E was a purchaser in good faith of the property in question, or had otherwise acquired, in good faith and for value, the right, or what purported to be the right, to deal with the property or rights in question, or had derived title from such a purchaser or acquirer.

(2) Where a person (T) has been enriched at the expense of another person (C) and T has transferred to another person (E) any benefit arising out of the enrichment then, notwithstanding anything in the preceding rules, E is taken to be enriched at the

expense of C and neither the transfer by T to E, nor any voluntary obligation underlying the transfer, justifies the enrichment if

(a) T's enrichment at the expense of C was unjustified or was justified only by a transaction voidable at C's instance

(b) C is unable to recover from T, or cannot reasonably be expected to attempt to recover from T, and

(c) the acquisition by E from T was not in good faith and for value.

(3) Where a person (E) has been enriched by receiving a benefit from a trust estate or from the estate of a deceased person, the fact that E's enrichment is the result of a transfer from a trustee or executor does not prevent him from being liable to make redress to

(a) a creditor of the estate to the extent that the creditor, because of the transfer to the beneficiary, has been unable to recover from the trustee or executor, or

(b) a person (the true beneficiary) who is legally entitled to the benefit in question.

(4) Where a debtor pays the wrong person, that person is enriched at the expense of the true creditor in so far as the payment extinguishes the liability of the debtor to the true creditor.

(5) Nothing in these rules affects any procedural rule designed to avoid duplication of proceedings.

Redress due

9.(1) The redress due by an enriched person under these rules is such transfer of property or payment of money, or both, to the claimant as is required to redress the enriched person's unjustified enrichment at the expense of the claimant.

(2) The redress due is assessed in accordance with the rules in the schedule in any case where those rules are applicable.

(3) Where the enriched person has been enriched at the expense of the claimant in more than one way, the rules in the schedule apply cumulatively unless there would be double redress in respect of the same enrichment.

(4) This rule is subject to the provisions of rule 10.

Court's powers to refuse or modify award

10.(1) Where, in an action for unjustified enrichment, it appears to the court that each party is bound to make redress to the other, the court may

(a) refuse to grant decree against the defender until satisfied that the pursuer has made, or will make, the redress due by him, or

(b) where both obligations are to pay money, set off one

entitlement against the other and grant decree for the difference.

(2) Where, in an action for unjustified enrichment based on the passive receipt of a benefit by the enriched person, it appears to the court

- (a) that the enriched person had no reasonable opportunity to refuse the benefit
 - (b) that the enriched person would have refused the benefit if he had had such an opportunity
 - (c) that the enriched person cannot, or cannot reasonably be expected to, convert the value of the benefit into money or money's worth, and
 - (d) that it would be inequitable to make a full award
- the court may refuse or modify the award accordingly.

(3) Where, in an action for unjustified enrichment based on the defender's acquisition of the pursuer's property by accession or specification or any analogous rule, it appears to the court that the pursuer has acted in good faith and that, having regard to the respective values of the properties involved, the conduct of the parties and all other relevant factors, the most appropriate and equitable solution would be for the defender to be ordered to sell to the pursuer such property at such a price as would enable the pursuer to regain his property without prejudice to the defender, the court may grant decree accordingly.

(4) Notwithstanding anything in the preceding rules, a court deciding an action for unjustified enrichment may refuse to make an award, or may make a reduced award, or may grant decree subject to conditions, if it considers

(a) that the person enriched, where he did not know, and could not reasonably be expected to know, that redress was due, changed his position (whether by spending money, disposing of property, consuming property or its fruits, abandoning rights, failing to exercise rights in time, or otherwise) in reliance on his enrichment, and it would for that reason be inequitable to make a full award or grant decree unconditionally

(b) that the claimant was so culpable or negligent in causing the unjustified enrichment that it would be inequitable or contrary to public policy to make a full award or grant decree unconditionally

(c) that the claimant would be unjustly enriched if a full award were made or if decree were granted unconditionally, or

(d) that, for any other reason, it would be inequitable or contrary to public policy to make a full award or grant decree unconditionally.

Bars to proceedings

11. (1) (a) An action for unjustified enrichment cannot be brought under these rules if there is, or was,

(i) a special statutory or contractual procedure for dealing with the situation giving rise to the enrichment or

(ii) another legal remedy for the enrichment

and if the claimant could reasonably have been expected to use that procedure or remedy.

(b) Paragraph (a) does not apply if the enactment or contract providing the other procedure or remedy indicates expressly or impliedly that it is intended to be in addition to any remedy available under the general law on unjustified enrichment.

(c) The availability of damages for loss does not preclude an action for redress of unjustified enrichment but, without prejudice to his right to claim damages for any consequential or other loss, the claimant cannot claim both redress of the other party's unjustified enrichment and damages for his corresponding loss.

(2) (a) A person who, before a court decision in proceedings to which he was not a party, has made a payment or transfer which was apparently due under the law as it was commonly supposed to be at that time cannot bring an action for unjustified enrichment in respect of that payment or transfer on the ground that the decision has shown that the law was not as it was commonly supposed to be and that the payment or transfer was accordingly not in fact due.

(b) In the preceding paragraph, "decision" in any case where a decision is affirmed or restored on appeal means the decision so affirmed or restored and not the decision affirming or restoring it.

(3) The bars mentioned in this rule are in addition to any bar resulting from the operation of the general law on personal bar.

Areas of law not affected

12. (1) These rules replace the existing Scottish common law on unjustified enrichment, including

(a) the common law on restitution in so far as it is part of the law on unjustified enrichment

(b) the common law on repetition and recompense, and

(c) the *condictio indebiti*; the *condictio causa data causa non secuta*; the *condictio ob turpem vel iniustam causam*; the *condictio ob non causam*; the *condictio sine causa*; the *actio in quantum locupletior factus est*; and the *actio de in rem verso* in so far as they form part of the existing law.

(2) Nothing in these rules affects

(a) any enacted law

(b) the law on rights of relief of cautioners and co-

obligants

(c) the law on subrogation of insurers or those who have paid an indemnity

(d) the law derived from the case of *Walker v Milne* (whereby loss suffered or expenditure incurred in the expectation of a contract may in certain circumstances be recovered)

(e) the law on the rights of a defrauded person as against the creditors of the person who defrauded him

(f) the law on the recovery by a person of the possession or control of his own property or of any other property to the possession or control of which he is entitled

(g) the law on the special obligations of those in a fiduciary position

(h) the law on general average or salvage

(i) the law on *negotiorum gestio*.

Interpretation

13.(1) In these rules, and in the schedule where applicable,

(a) "court decree" includes the decision of any tribunal, quasi-judicial body or arbiter having jurisdiction

(b) "enactment" includes subordinate legislation

(c) "gift" includes a gratuitous waiver, renunciation or discharge of a right

(d) "he" means he, she or it; "him" means him, her or it; and "his" means his, hers or its

(e) "patrimonial rights" include rights flowing from the ownership of property, rights to protect confidential information and other rights having an economic value but do not include purely personal rights, such as the rights to life, liberty, bodily integrity or reputation, and

(f) "property" means property of any kind, corporeal or incorporeal, heritable or moveable.

(2) Any reference in these rules to a contract which has been terminated by rescission or frustration includes a reference to a contract which has been substantially terminated by rescission or frustration and a reference to a severable part of a contract which has been terminated by rescission or frustration.

SCHEDULE

REDRESS DUE

PART I

E acquires benefit directly from C

1. This part of the schedule applies where the enriched person (E) has been enriched by acquiring a benefit directly from the claimant (C).

2.(1) Where the unjustified enrichment resulted from the acquisition of money by E from C, the redress due by E to C is the amount acquired, with interest from the time of acquisition.

(2) Where the unjustified enrichment resulted from the acquisition of other property by E from C, the redress due by E to C is

(a) if the property is corporeal and can be returned in substantially the same condition as it was in at the time of the acquisition, the return of the property in that condition along with a sum of money to take account of any benefit derived by E from the ownership, use or possession of the property and interest on that sum where appropriate

(b) if the property is corporeal and cannot be returned in substantially the same condition as it was in at the time of the acquisition, the amount which it would have been reasonable to expect E to pay C for the property at the time of its acquisition by E, with interest on that amount from the time of acquisition

(c) if the property is incorporeal, the return of the property where possible and, whether or not return is possible, a sum of money to take account of any benefit derived by E from the ownership of the property and interest on that sum where appropriate.

3. Where the unjustified enrichment resulted from the addition of value by C to E's property, the redress due by E to C is the amount which it would have been reasonable to expect E to pay C for his work or expenditure in adding that value, or the amount of value added (at the time when the addition was made), if less, with interest where appropriate.

4. Where the unjustified enrichment resulted from the discharge or reduction of any liability of E by means of a payment by C, the redress due by E to C is the amount paid, with interest from the date of payment.

5. Where the unjustified enrichment resulted from E's being saved a loss or expenditure by receiving C's services, the redress due by E to C is the amount which it would have been reasonable to expect E to pay for those services, or the amount of loss or expenditure saved, if less, with interest where appropriate.

6.(1) Where the unjustified enrichment resulted from E's being saved a loss or expenditure by using or possessing C's property, the redress due by E to C is the amount which it would have been reasonable to expect E to pay for that use or possession, or the amount of loss or expenditure saved, if less, with interest where appropriate.

(2) Where the unjustified enrichment resulted from E's being saved a loss or expenditure by consuming C's property, the redress due by E to C is the amount which it would have been reasonable to expect E to pay for the property at the time of consumption, or the amount of loss or expenditure saved, if less, with interest where appropriate.

(3) Where the unjustified enrichment resulted from E's being saved a loss or expenditure by interfering with C's patrimonial rights in any other way, the redress due by E to C is the amount which it would have been reasonable to expect E to pay C, at the time of the interference, for permission to interfere with those rights in that way in the circumstances, or the amount of loss or expenditure saved, if less, with interest where appropriate.

7. Where the unjustified enrichment resulted from the acquisition of any other benefit by E from C, the redress due by E to C is the amount which it would have been reasonable to expect E to pay C for the benefit at the time of acquisition, or the amount of E's actual enrichment, if less, with interest where appropriate.

PART II

E acquires benefit from T at indirect expense of C

8. This part of the schedule applies where the enriched person (E) has been enriched indirectly at the expense of the claimant (C).

9. Where E has enriched himself by using or disposing of C's property, or otherwise interfering with C's patrimonial rights, in order to obtain money or money's worth from a third party (T) the redress due by E to C is the amount which it would have been reasonable for E to pay C at the time of the use, disposal or interference for permission to use or dispose of C's property or to interfere with his rights in that way, or the amount of E's actual enrichment attributable to the use, disposal or interference, if less, with interest where appropriate.

10. Where E has been indirectly enriched at the expense of C as a result of the transfer of a benefit from a third party (T) in the circumstances covered by rule 8(2) (transfer of benefit arising from unjustified enrichment to person taking otherwise than in good faith and for value) T is treated as if he had been acting as E's agent and accordingly the redress due by E to C is the same, and is due on the same conditions, as it would have been if E had acquired the benefit directly from C.

11. Where E has been indirectly enriched at the expense of C in the circumstances covered by rule 8(3) (transfers from trusts or executries) the redress due by E to C is

(1) where C is a creditor claiming under rule 8(3)(a) the amount of the debt due to C out of the estate or the amount of E's enrichment out of the estate, whichever is the less, with interest where appropriate

(2) where C is a true beneficiary claiming under rule 8(3)(b), and the benefit due to him out of the estate and received by E was a special legacy, the transfer of the subject matter of the legacy along with a sum to take account of any benefit derived by E from its use or possession or, if the subject matter of the legacy cannot be transferred in substantially the same condition as it was in when acquired by E, an amount representing its value when acquired by E, with interest from that date

(3) where C is a true beneficiary claiming under rule 8(3)(b), and the benefit due to him out of the estate and received by E was not a special legacy, the amount of the benefit due to C out of the estate or the amount of E's unjustified enrichment out of the estate, whichever is the less, with interest where appropriate.

PART III

General

12. Any reference in this schedule to the return of property includes a reference to a return by reconveyance or by any other means by which ownership can be restored to the other person.

13. For the purposes of paragraph 2(2) corporeal property acquired by the enriched person by accession or specification, or any analogous rule whereby one person may acquire another's property when it becomes attached to or mixed with his own, is treated as property which cannot be returned in substantially the same condition as it was in at the time of acquisition.

14. Where property is to be returned or transferred to the claimant by the enriched person under these rules, the expenses of the return or transfer are to be borne

- (1) by the claimant if the enrichment was in good faith, or
- (2) by the enriched person if the enrichment was in bad faith

unless a court dealing with the claim orders otherwise.

15. In assessing what it would have been reasonable for E to pay C for any interference with C's rights or for permission to interfere with those rights regard may be had to any factors which would have made C reluctant or unwilling to permit the interference.

COMMENTARY

GENERAL

The draft rules. The draft rules have been prepared within the Scottish Law Commission, first, to see whether it would be possible to state the law on unjustified enrichment in this form and, second, to serve as the basis of consultation. They are tentative and exploratory - a first sketch of a possible solution to certain structural and other problems in the present law.

The draft rules are not intended to be a restatement of the existing law with all its defects. They are not an attempt at a codification in that sense. They are intended to be the basis of a new law on unjustified enrichment which would preserve the many positive features of the existing Scottish law, answer some questions which are not clearly answered by the existing law, and remove some obvious defects. Some of these objectives could be achieved by piecemeal reforms. One of the main defects of the present law is, however, its complicated and unsatisfactory structure and only a new statutory framework could cure that. There are also dangers in piecemeal statutory reforms. They can lead to new inconsistencies and anomalies and can ossify parts of the law.

The draft rules do not have the brevity of some foreign codes on this subject, which often deal with everything in ten short articles.¹ We may admire and envy extreme brevity in legislation but we suspect that the users of legislation in Scotland would expect and prefer slightly more detailed provisions. The draft rules aim to have the structural strength of a civilian code but to move on from the level of general principle to the level of rules, and exceptions and qualifications to rules, without descending to the level of detail found in many modern United Kingdom statutes. They could be applied in the same way as any statute. They would not require the adoption of novel principles of statutory interpretation.

The structure of the draft rules. The draft rules have a simple structure. There is one general principle - that a person who has been enriched at the expense of another is bound to redress the enrichment if it is unjustified. The three essential elements in

¹The Italian Civil Code of 1942 has eight articles (2033 - 2040) on payment of what is not due and two (2042 - 2043) on enrichment without cause ("arricchimento senza causa"). The new Civil Code of Québec (1991) has two articles on reception of a thing not due (arts 1491 - 1492) and four on unjustified enrichment (arts 1493 - 1496). The new Netherlands Civil Code (Books on Patrimonial Law - in force 1992) has nine articles on undue payment (Book 6, arts 203 - 211) and one on unjustified enrichment (art 212).

this principle - "enrichment", "at the expense of", "unjustified" - are then explained. The remaining rules are ancillary. They deal with exceptional cases where redress is due for indirect enrichment; the nature and amount of the redress due for unjustified enrichment; powers to modify awards; bars to proceedings; scope and interpretation.

The structure of the existing law. The structure of the existing law is more complex and uncertain. Different writers adopt different schemes.² On one view there are five levels of generality.

I. UNDERLYING PRINCIPLE.

The underlying principle is that any unjustified enrichment of one person at another's expense should be redressed. The branch of the law covered by this principle is sometimes called unjustified enrichment, sometimes unjust enrichment and sometimes restitution. The first two terms focus on the event giving rise to the obligation: the third focusses (unsatisfactorily) on one particular form of redress for some types of unjustified enrichment.³ It is not, for example, satisfactory to talk of "restitution" in this broad sense where the unjustified enrichment has resulted from the receipt of another person's services. The services cannot be restored.

II. OBLIGATIONS

Stair, in the earliest systematic treatment of the Scottish law of obligations, referred to two main obligations which would now be regarded as coming under the underlying principle - restitution and recompense. Restitution at this level is an obligation to restore property, including money paid when not due. Recompense (which Stair also called "remuneration") is an obligation to pay for some benefit received, to the extent that the recipient is enriched.⁴ This bipartite division is reproduced in some modern treatments of the subject.⁵ There are difficulties in knowing what should be included under restitution. In particular, should restitution cover the obligation which

²For the approaches of the Institutional writers, see Whitty, "The Taxonomy of Unjustified Enrichment in Scots Law" - a paper given to a seminar on unjustified enrichment in Parliament House, Edinburgh on 23 October 1993 - Appendix A. This valuable paper is referred to as Whitty, *Taxonomy*, in later footnotes. For an interesting scheme, influenced by recent writings on English law, see Stewart, *Restitution* (1992).

³See Birks, "Six Questions in Search of a Subject - Unjust Enrichment in a Crisis of Identity" 1985 JR 227 at p 233.

⁴*Institutions*, Book I, titles 7 and 8.

⁵See Birks, "Six Questions", cited above, at p 233; Stewart, *Restitution*, at p 25.

corresponds to the right of an owner to recover his property?⁶

III. REMEDIES

Nowadays it is usual to say that there are three remedies for unjustified enrichment in Scottish law - repetition, restitution and recompense.⁷ There is a difference of opinion as to the basis of this tripartite classification. On one view repetition is the appropriate remedy where money has been paid; restitution where property other than money has been transferred; and recompense where some other benefit, such as the provision of services, has been conferred on the enriched person. In other words the classification is according to the nature of the benefit received.⁸ The difficulty with this view is that recompense has traditionally been regarded as the appropriate remedy for certain cases where a benefit has been received in the form of money or property.⁹ Another view is that the basis of classification depends on the measure of recovery. On this view repetition is the appropriate remedy where what is sought is the money paid plus interest; restitution where what is sought is the property transferred plus its fruits or accessions (or equivalent value); and recompense where what is sought is the redress of enrichment (including in some cases enrichment by the receipt of money or property).¹⁰ To be a useful basis of classification this would have to assume that "enrichment" in the context of recompense meant something different from value received. In other words the basis of classification would have to be a distinction between value received (with a subdivision of a practical rather than a logical nature between money and other property) and value surviving. It is, however, by no means clear that the measure of recovery in recompense is always

⁶Stair included this under "restitution" but it is better regarded as part of property law. See Reid, "Unjustified Enrichment and Property Law" 1994 JR 167.

⁷ The word "remedy" is itself used in different senses. In one sense the remedy for any unjustified enrichment is the actual decree (eg for payment or delivery), followed by implementation or enforcement where necessary. In the text "remedy" means, roughly, type of action or claim.

⁸See Birks, "Six Questions", cited above, at pp 235 - 237.

⁹See Whitty, *Taxonomy*, at para 1.34 (giving the examples of loans to persons of limited capacity, the provision of aliment, indirect benefits, and cases where money has been misappropriated by the defender).

¹⁰ See Whitty, *Taxonomy*, at para 1.34.

value surviving.¹¹ There is probably no satisfactory basis for the tripartite division.

IV. FORMS OF ACTION

Below repetition and restitution in the existing law are various forms of action or types of claim. There are nominate claims or *condictiones*, like the *condictio indebiti*, the *condictio causa data causa non secuta* and (in the view of some writers) the *condictio ob turpem vel iniustam causam*, the *condictio ob non causam*, and the *condictio sine causa*. There may also, depending on the view which is taken of the number and scope of the nominate *condictiones*, be innominate actions of repetition or restitution.¹² Recompense is not normally subdivided into different forms of action.¹³ There is simply an action for recompense.

V. SPECIFIC GROUNDS

To succeed in a nominate claim it is necessary to establish the specific grounds appropriate to that claim. There is room for doubt as to what these are. For example, in the case of the *condictio indebiti* it is generally thought that the ground is excusable error but it has been argued that the ground is simply that the payment or transfer was undue and was made without knowledge that it was undue.¹⁴ The view taken on this issue affects the room left for the

¹¹As Mr Whitty himself recognises. See *Taxonomy*, Appendix B para 3.14 - an "important unresearched question is what is the relevant time for assessing enrichment. Probably in most cases it is the time of the action (or demand?) for recompense." (Emphasis added.) Recompense has traditionally been regarded as the appropriate remedy where the pursuer seeks to recover the amount of a loan to a person who lacks contractual capacity and in that context value surviving is the measure of recovery. See Stair, I.8.6. However, value received is the measure of recovery in recompense where aliment has been supplied by a person not under any obligation of aliment. See Stair, I.8.2. And it would be surprising if value surviving were the measure of recovery in recompense cases where the defender has made a profit out of the unauthorised use of the pursuer's property.

¹² See Whitty, *Taxonomy*, at para 1.38.

¹³Stair, however, included under recompense (a) the various forms of action arising out of *negotiorum gestio* (b) the action *de in rem verso* and (c) rights of relief among those who are liable *in solidum*. I.8.3 - I.8.9. *Negotiorum gestio* and rights of relief are probably best regarded as special subjects with their own rules. They are left out of the scope of unjustified enrichment in the draft rules.

¹⁴ See Evans-Jones, "A Scottish Response to Woolwich Equitable Building Society v Inland Revenue" - a paper delivered to the seminar referred to in note 3 above.

condictio ob turpem vel iniustam causam, the *condictio ob non causam* and the *condictio sine causa*. The specific grounds for recovery under these *condictiones* or under innominate actions of repetition or restitution have not been elucidated by Scottish case law, which has scarcely acknowledged their existence. The relationship between the nominate and innominate actions of repetition has not been worked out. There would not seem to be much point, for example, in having strict requirements for a *condictio indebiti* if anyone who did not satisfy them, but who came within the general principle against unjustified enrichment by the acquisition of money, could raise an innominate action of repetition. There is doubt as to the scope of the *condictio causa data causa non secuta*.¹⁵ In relation to the nominate *condictiones* it might seem that the obvious source of elucidation would be Roman law or the *ius commune* developed from it, but one of the many serious difficulties in using that source is the difficulty of fixing a reference point in time. Roman law was not static and it may be unwise to look only to the Roman law of Justinian's time in order to fill out the terminology of Institutional writers who were aware of later developments.¹⁶ So far as recompense is concerned, the courts have consistently declined to lay down specific grounds for recovery. Indeed they have repeatedly said that recompense cannot be defined precisely.¹⁷ Again, the relationship between the nominate actions and recompense is unexplored. What is the point of strict rules on the nominate *condictiones* if an action based on recompense is available in any case coming under the general principle against unjustified enrichment?¹⁸

¹⁵ See Evans-Jones, "Unjust Enrichment, Contract and the Third Reception of Roman Law in Scotland", 109 LQR 663 (1993) and *Connelly v Simpson* 1993 GWD 15-981..

¹⁶See Evans-Jones, "Unjust Enrichment, Contract and the Third Reception of Roman Law in Scotland" 109 LQR (1993) 663.

¹⁷ See *Edinburgh and District Tramways Co v Courtenay* 1909 SC 99 at pp 105; *Varney (Scotland) Ltd v Lanark Town Council* 1974 SC 245 at pp 250 and 258; *Lawrence Building Co v Lanark County Council* 1978 SC 30 at p 53.

¹⁸See MacQueen and Sellar, "Unjust Enrichment in Scots Law" in Schrage (ed), *The Comparative Legal History of the Law of Restitution* (1994, forthcoming). It cannot be denied that the width of the traditional formulation of the law on recompense in Scotland is such that, as these authors suggest, it could serve as the general obligation to redress unjustified enrichment, but that gives rise to yet another difficulty - the relationship between the "residual" innominate actions of repetition and restitution and the "residual" action for recompense. It is not very satisfactory to have two residual categories. See Whitty, "Some Trends and Issues in Scots Enrichment Law" 1994 JR 127 at p131 fn37. Yet, as the result of unco-ordinated development, that

The existing structure is unnecessarily complicated and confusing. There are doubts, difficulties and disputes at every level of generality. There is an unsatisfactory mixture of vague general provisions and rigid, archaic forms of action classified "in Latin and, worse than that, in Latin which is at best slippery even to those who still know that language".¹⁹ These fundamental defects are not just an academic matter of conceptual elegance. They affect the ease with which the law can be taught, learned, understood and applied. They are a potential source of endless errors. Very few lawyers have the time necessary to disentangle the confusions. It is not acceptable that people should have to wrestle with such difficulties in order to do their job competently.

The commentary. The purpose of the commentary is to give a brief explanation of the draft rules and to show how they would work in a variety of typical situations. Throughout the commentary "he" means he, she or it, and "him" and "his" have corresponding meanings. The "it" may, for example, be a company or a public body. In the examples, C refers to the person claiming redress for unjustified enrichment; E refers to the person who is, or who is alleged to be, enriched; and T refers to a third party. It would not be appropriate to talk of pursuers and defenders because those terms suggest that there is a court action. We are concerned with obligations, not actions. For the same reason it would be inappropriate to talk of a "general enrichment action".

For ease of reference, each draft rule, or relevant part of a draft rule, is reproduced before the commentary on it. The division of the rules is into rules, sub-rules, paragraphs and sub-paragraphs in the style 1.(2)(c)(iv). The division of the schedule is into paragraphs and sub-paragraphs.

TITLE
DRAFT RULES
which might form the basis of instructions for an
UNJUSTIFIED ENRICHMENT (SCOTLAND) BILL

COMMENT

The only comment which need be made on the title relates to the

is what we may well have. One difficulty in assessing the present law is that the courts have not always made it clear under what doctrine or principle they were proceeding. Some innominate actions of this nature (eg for reimbursement of aliment paid or provided to someone the defender was obliged to support, or against an intromittor with teinds which ought to have been paid to the pursuer) could be regarded, according to choice, as innominate actions of repetition or innominate actions of recompense or even as innominate actions for the redress of unjustified enrichment - giving us a third "residual" action!

¹⁹Birks, "Six Questions in Search of a Subject" 1985 JR 227 at p238.

use of the word "unjustified" rather than "unjust. Both terms are used in the existing law. "Unjustified" is more accurate, although less specific. "Unjust" normally refers to a moral criterion. So if it is used in the present context a lot of effort has to go into explaining that it does not mean unjust in the normal sense but has a very special and unusual meaning. "Unjustified" could refer to various criteria. In the rules it refers to a lack of justification by reference to legal cause or public policy. There are many enrichments which may be regarded as unjust - for example, the enrichment of a bankrupt who is discharged on paying a dividend of ten pence in the pound, or the enrichment of someone who acquires property as the result of a technical rule of the law on prescription, or the enrichment of someone who reaps an incidental benefit from another person's expenditure for his own purposes - but which are justified by a legal cause or by a consideration of public policy.

RULE 1

General principle

1. A person who has been enriched at the expense of another person is bound, if the enrichment is unjustified, to redress the enrichment.

COMMENT

There is nothing revolutionary in this general principle. It can be traced back to the Roman law²⁰ and is familiar to lawyers throughout the western world. The three essential components - (1) an enrichment (2) at the expense of another, which is (3) unjustified - are elaborated in the rules which follow. It is important to note that the rules are concerned with a personal obligation, and corresponding personal right. They are not concerned with the right of the owner of property to vindicate it from someone who has no right to retain it.²¹ See rules 11(1) and 12(2)(f).

RULE 2

Enrichment

2.(1) A person is enriched if he acquires an economic benefit.

(2) A person acquires an economic benefit if his net worth is increased or is prevented from being decreased, and accordingly a person may be enriched, among other ways, by

- (a) acquiring money or other property
- (b) having value added to property
- (c) acquiring a right
- (d) being freed, in whole or in part, from an obligation, or
- (e) being saved from a loss or expenditure.

²⁰Pomponius, D 12 6 14 - "*neminem cum alterius detrimento fieri locupletorium*". In this form the principle is far too wide. The idea of "without justification" has to be included and refined in order to keep the principle within acceptable bounds.

²¹On this crucially important distinction see Reid, "Unjustified Enrichment and Property Law" 1994 JR 167.

(3) A person is treated as acquiring an economic benefit under a void contract, or under a voidable contract which has been reduced, rescinded or otherwise set aside, or under a contract which has been terminated by frustration or rescission for breach or by some other means (apart from full performance), or under any other transaction or purported transaction which does not provide legal cause for the acquisition, if he would have acquired an economic benefit but for the fact that he gave consideration, and accordingly in such circumstances both parties to the transaction or purported transaction may be regarded as being enriched.

COMMENT

This rule is intended to remove some possible doubts about what is meant by "enrichment".

Rule 2(1) makes it clear that enrichment is an economic concept. We are not concerned with such matters as sensory, psychological or spiritual enrichment.

Example 1. C, a street singer, argues that E, who has listened to his singing for an hour and is about to walk away without putting anything in the hat, is legally obliged to pay something because he has been enriched by receiving C's services as an entertainer. This argument is legally unsound. E's net worth has not been increased. He has not, it may fairly confidently be supposed, been saved any expenditure by receiving C's services. He may have received some non-economic benefit but he has not acquired any economic benefit and is therefore not enriched for the purposes of the rules.

Example 2. C, a landowner whose land includes several Munros, attempts to charge mountaineers a land-use fee when they descend from the hills. C argues that they have been enriched by having an enjoyable day in magnificent scenery and that their enrichment is at his expense because it involves an interference with his property rights. They have used his property without authorisation. C does not get past the first, enrichment, hurdle. The mountaineers may have been enriched in a non-economic sense but there has been no economic benefit.

Rule 2(2) makes it clear that "enrichment" is not limited to an actual addition to a person's patrimony. "We are enriched either by accession of gain or prevention of loss."²² There are various ways in which a person may increase his net worth or have a decrease in his net worth prevented. Some of these are set out in rule 2(2). It would be possible to go into more detail and to provide, for example, that a person may be saved from an expenditure,

- (i) by using another person's property
- (ii) by consuming another person's property
- (iii) by receiving another person's services, or
- (iv) by any other means

²²Stair I.8.8.

but the provision is long enough and there is a point beyond which further examples become unnecessary and unhelpful.

An acquisition of money or property does not necessarily result in enrichment. The person may have simply exchanged one asset for another of precisely equivalent value. A person who buys shares worth £5000 for £5000 is not enriched. A person who is owed a debt worth £1000 is not enriched when the debt is extinguished by payment of £1000. Immediately before the payment the person had a book asset worth £1000. Immediately after the payment he has lost that book asset but has instead cash, or another book asset such as a banker's draft, worth £1000. This is not enrichment. There is no increase in net worth. It would be different if the debt, although of a nominal value of £1000, was worth only, say, £500 because the debtor was known to be in such financial difficulties that nothing more than payment of 50p in the £ could be expected. In that case there would be enrichment if the debt were paid in full. No doubt it would be a justified enrichment but that is another issue.

Similarly, a person who acquires a benefit from a third party is not enriched if he comes under an immediate liability to the third party of equivalent value. This gives rise to problems in cases where the enrichment takes the form of interference with another's rights. The thief who sells my painting and comes under an immediate liability to repay the purchaser could argue that he was not enriched or at least that his contingent liability should be taken into account in valuing his enrichment. He clearly would not be enriched if he did actually repay the purchaser, and it would be odd if his liability one minute before he made a repayment he was bound to make could not be taken into account. A special provision is necessary to deal with this problem.²³ We are not concerned here with the thief's liability in delict. That depends on loss, not enrichment. So the same difficulty does not arise.

A person will only be saved a loss or expenditure if he would otherwise have incurred it. Whether he would otherwise have incurred it is a question of fact to be decided, in case of dispute, on a balance of probabilities. The measure of redress is not necessarily the value of the loss or expenditure saved. This is dealt with later²⁴ but an example may be given here.

Example. My house is saved from being burned down by C's timely intervention with a fire extinguisher before any damage is done to the house. I have been enriched by being saved a loss. However, it would be unacceptable if I were obliged to pay C the value of my house. A more reasonable measure of the redress due is what I could reasonably have

²³See rule 3(3).

²⁴See rule 9 and the schedule.

been expected to pay for C's services.²⁵

Whether the mere receipt of services should be regarded as an enrichment is a difficult question of policy on which different views could be taken.²⁶ The approach provisionally taken in these rules is to regard the mere receipt of services, which has no effect on the recipient's net worth, as not in itself an enrichment. There would, however, be an enrichment if it could be established that the recipient had been saved an expenditure or had otherwise had a decrease in his net worth prevented.

Example 1. A firm of driving instructors operates on the principle that it charges a higher rate than normal if a pupil passes but charges no fees if the pupil does not pass. A pupil receives a course of instruction under the firm's "No pass, no fee" contract and fails. The firm then discovers that the contract is void and claims a reasonable fee for the course of instruction on the basis of unjustified enrichment. It will not recover. The pupil has not been saved any expenditure or any other decrease in his net worth. Having failed, he would not have had to pay anyway even if the contract had been valid. The mere receipt of services is not regarded as in itself an enrichment. It would be different if the pupil had passed and had then refused to pay. In that event a claim based on unjustified enrichment would have every chance of success.

Example 2. An oil exploration company enters into a contract with E whereby it agrees to prospect for oil on E's land on the terms that it will not receive any payment unless oil is found and extracted, in which case it will receive a royalty of so much per barrel. After some exploration has been done, but before any oil has been discovered, the contract is frustrated. The value of E's land has not been increased by the prospecting on it. There is no indication that it does contain oil. The oil company claims redress from E on the basis that he has been enriched by receiving the benefit of its exploration services which have saved him from incurring exploration expenditure. E is a man of modest means who can show that he would not have incurred any expenditure on exploration if the oil company had not offered him this type of contract. The company will not be entitled to redress from E. He has not been enriched. The company took the risk of premature termination. (Example suggested by *BP Exploration Co v Hunt (No 2)* [1979] 1WLR 783.)

It is not the function of the law on unjustified enrichment to provide compensation for losses or interferences with rights

²⁵See schedule, para 5.

²⁶See Beatson, *The Use and Abuse of Unjust Enrichment* (1991) Ch 2.

which do not result in enrichment. It follows that there will be many cases where a person's property has been wrongfully used or consumed or destroyed or disposed of, or where his patrimonial rights have otherwise been invaded, but where there is no redress for unjustified enrichment because the wrongdoer has not been enriched. There is always a temptation to extend obligations and remedies out of sympathy for those who have suffered loss. This temptation has to be resisted in so far as it leads to unnecessary and inappropriate legal responses. The law on unjustified enrichment should not attempt to duplicate the law on delict.

Example 1. A vandal damages my car. There is an interference with my rights but the vandal is not enriched. He may have gained some psychological satisfaction from his anti-social action but certainly no economic benefit. This is a case for other branches of the law - on crime, delict or insurance - not for the law on unjustified enrichment.

Example 2. My valuable Koi carp is eaten by my neighbour's cat. My neighbour's net worth is not increased by this event. His cat is no more valuable than it was before. My neighbour is not saved any loss or expenditure. He does not know of the event until later and feeds his cat as usual. He is not enriched. I have therefore no claim against him for unjustified enrichment. I should try a claim under section 1 of the Animals (Scotland) Act 1987.

Example 3. E's cattle graze for two summer months on C's field. E thought the field belonged to him. If he had not had the use of C's field E would have had to lease a field of similar size and fertility for grazing. Here E has been enriched. He has been saved the expenditure which he would have had to incur to lease a field. C would have a claim for unjustified enrichment.

Example 4. My car is retained by the proprietors of a garage who think they have a right to keep it but who do not in fact have that right. Their net worth is not increased by the temporary possession of my car. They are not saved any loss or expenditure. They have not acquired any economic benefit. They have not been enriched. This is not, therefore, a case for the law on unjustified enrichment. I should look to the law on property and delict for a remedy.

Example 5. A thief steals my painting. He is not enriched by acquiring property. He acquires no property in the painting. If he just keeps it or gives it away or destroys it he is not enriched, unless it could be shown that he has been saved the expenditure of buying a painting for himself to keep or give or destroy, which would probably be difficult.

Rule 2(3) deals with a fundamental and difficult point. Is there

enrichment if full consideration has been given?²⁷ Normally there is not. As we have seen, if I buy shares worth £5000 for £5000 I am not enriched by the transaction. However, there are some situations where it is useful and appropriate to provide for mutual restitution. For example, if a person who lacks contractual capacity because of mental illness sells all the furniture in his house because he believes, wrongly, that he will never need it again, and if the sale is discovered by the person's curator before the furniture has left the house, it is useful to be able to unravel the transaction, even if the full second hand value of the furniture has been paid. Similarly, if goods sold are rejected by the buyer and the contract of sale is rescinded by the buyer after property in the goods has passed in exchange for payment of the price, it is useful to provide for mutual restitution. Again, if a contract is frustrated it may be desirable to provide for mutual restitution of benefits received under it. It would be possible to say that there was no enrichment in these, and other similar, situations but that a special set of rules, or several different sets of rules, on non-enrichment restitution was needed. However, that would complicate the law unnecessarily. The approach adopted in rule 2 is to say that if a benefit is acquired for consideration under a void contract, or under a voidable contract which has been reduced or rescinded or otherwise set aside²⁸, or under a contract which

²⁷"Consideration" is used here in a non-technical, Scottish sense.

²⁸There is an unfortunate variation in terminology in relation to the setting aside of voidable contracts. "Reduce", "rescind", "void", "set aside", "annul" and "revoke" can all be found in the cases and books. "Reduce" may be thought more appropriate where there is a writing to be reduced, although some judges have used it more widely. "Rescind" may be thought more appropriate in relation to an oral contract, although it leads to confusion with rescission for breach. "Set aside" is conveniently non-technical and is included to avoid any technical arguments as to the precise scope of reduction and rescission. There has been a surprising lack of discussion in the Scottish cases of the important question, which divides French and German law (see Carbonnier, *Droit Civil, 4 Obligations*, 4th edn, para 50), of when a court decree is necessary to set aside a voidable contract. It seems clear that reduction of a writing will require a decree but it is not clear that rescission of an oral voidable contract will, at least in a question between the two parties to the contract. See Thomson, *Fraud*, in the Stair Memorial Encyclopaedia, vol 11 at p 294. The Scottish Law Commission's continuing work on contract law may provide an opportunity for some clarification in this area. The rules on unjustified enrichment must just accept the law on voidable juristic acts as it stands.

has been terminated²⁹ otherwise than by full performance (or under any other transaction or purported transaction which does not provide legal cause) then there can be said to be enrichment both ways, thus allowing for mutual redress under the law on unjustified enrichment. The theory is that the lack of legal cause splits the transaction into two legally unrelated transfers. It should be noted, however, that there is a special rule for merely formal invalidity in rule 6(1)(d).

Example 1. A man aged 60 and apparently in good physical health buys a life annuity from an insurance company for £250,000. This is, let us suppose, a fair price for the annuity. If the contract is valid there is no enrichment because full consideration is given. However, at the time of entering into the contract the man is mentally incapable of contracting. He is not, let us suppose, incapable of paying the price of the annuity to the insurance company when the time for payment arrives. In return for the price he receives a bond of annuity. Shortly thereafter a curator bonis is appointed to him. Before anything has been paid by the insurance company the curator bonis learns of the annuity transaction. He regards it as unwise. The man has a reasonable income and has no need of an annuity. The curator claims that the contract was void (as indeed it was under Scottish law) and that the £250,000 should be returned, with interest. Rule 2(3) means that this is a good claim. However, the insurance company has a counterclaim for the return of the incorporeal property constituted by the bond of annuity. In the circumstances that would be best achieved by the curator granting a discharge of the obligations under the bond. The result is that both enrichments are redressed and the parties are restored to their former positions.

Example 2. The position is as in the last example except that the curator discovers the transaction after the insurance company has paid one year's instalment of, say, £30,000. The only difference in this case is that the curator would have to return the £30,000, with interest, in addition to discharging the bond.

Example 3. The position is as in the last example except that the transaction is discovered by the annuitant's executor only after the annuitant has died. The only difference this makes is that there would be no need for the executor to discharge the bond.³⁰ The obligations under

²⁹A contract may not be wholly terminated by rescission or frustration. Some ancillary clauses, such as arbitration clauses, may survive. This is covered by rule 13(2).

³⁰The bond has been discharged by performance and has ceased to exist as an item of incorporeal property. It cannot therefore be returned. The redress due is regulated by the Schedule, Part I, para 2(2)(c).

it have come to an end. The executor is entitled to the return of the £250,000 with interest and the insurance company is entitled to the return of the £30,000 with interest.

These three examples are variations on an example, itself based on a series of English "annuity cases", discussed in Birks, "No Consideration: Restitution after Void Contracts" 23 Western Australian Law Review (1993) 195.

RULE 3

At the expense of another person

3.(1) The enrichment of one person is at the expense of another person if it is the direct result of

(a) a payment, grant, transfer, incurring of liability, or rendering of services by the other person

(i) to the enriched person

(ii) in fulfilment of an obligation of the enriched person

(iii) in adding value to the enriched person's property, or

(iv) in acquiring some other economic benefit for the enriched person, or

(b) in any case not covered by paragraph (a), an interference with the patrimonial rights of the other person otherwise than by the operation of natural forces.

(2) A person interferes with the patrimonial rights of another person if, among other things, he

(a) extinguishes those rights or acts in such a way that they are extinguished

(b) disposes or purports to dispose of property belonging to that other person

(c) uses property which that other person has the right to use to the exclusion of the interferer, or

(d) actively intercepts a benefit due to the other person

but a person does not interfere with the patrimonial rights of another person merely because he breaches a contract between himself and the other person.

(3) A person who claims redress of any unjustified enrichment resulting from an interference with his patrimonial rights is treated for the purpose of any claims by or against third parties as thereby ratifying the interference.

(4) A person who purchases property in good faith from someone who is not the owner of the property is not treated as being enriched at the expense of the owner or of any former owner by reason only of any economic benefit derived by him from the purchase or the property; and the same rule applies to any other acquirer, in good faith and for value, of the right, or what purports to be the right, to deal with the property or rights of another, and to anyone deriving title from such a purchaser or acquirer.

(5) Where a person (E) has been enriched as a result of performance by another person (C) under a contract between C and a third party (T), E's enrichment is not, for the purposes of these rules, regarded as being at the expense of C, even if C is unable to recover under his contract with T.

(6) This rule is subject to rule 8 (which deals with certain exceptional cases where redress is due for indirect enrichment).

COMMENT

This rule looks at the enrichment situation from the point of view of the claimant, rather than the enriched person, and it

deals with the nature of the link between the enriched person and the claimant which is necessary to give rise to an obligation of redress under the law on unjustified enrichment. The rule performs several important functions.

First, it anchors unjustified enrichment in the private law. We are not concerned with enrichment at the expense of the community at large, or at the expense of poor countries, or at the expense of past generations or future generations. We are concerned with the enrichment of a person at the expense of another identified person.

Secondly, it introduces the requirement of a causal link between the enrichment and some sort of detriment (in a very wide sense) to the claimant. It is clearly not sufficient that there should be an enrichment of one person and a loss of a corresponding amount to another. If two speculators on the stock exchange meet for a drink at 5 o'clock and one says that he has made £1500 that day and the other says that he has lost £1500 that day it is obvious that no obligation of redress arises. There is a gain on one side and a precisely corresponding loss on the other but no causal link between them.

Thirdly, rule 3 introduces the general requirement of a direct causal link. The question of indirect enrichment is discussed more fully later.

Fourthly, rule 3 defines the nature of the causal link which brings an obligation of redress into existence. Here it draws heavily on, but does not follow exactly, the very influential classification of enrichment situations by the German jurists Walter Wilburg and Ernst Von Caemmerer³¹. The result is to confine the general obligation to redress unjustified enrichment within certain boundaries and to make it more manageable. It may be objected that using the Wilburg/Von Caemmerer classification in this way gives an unnatural meaning to the phrase "at the expense of another person". However, it is necessary to define the phrase. The ordinary meaning of "at the expense of" is dangerously loose.

Example 1. Two chess players are competing for a prize fund of several thousand pounds. One wins. It might be said, loosely, that he has been enriched at the expense of the other. However, it could also be said that he has been enriched (justifiably) at the expense of those who provided the prize fund. Clearly, there should be no obligation on the winner to hand over his winnings to the loser. The rules on unjustified enrichment have to make it clear that

³¹ For brilliant surveys of the development of enrichment law in Germany, see Zimmermann, "A road through the enrichment-forest? Experiences with a general enrichment action" (1985) 18 CILSA 1 and Zimmermann and du Plessis "Basic Features of the German Law of Unjustified Enrichment" (to be published in 1994 Restitution Law Review).

the "at the expense of" phrase does not cover this type of situation.

Example 2. One make of jeans suddenly becomes fashionable and another unfashionable. A trader (E) who has a large stock of the first type is enriched because the value of his stock has increased. A trader (C) who has a large stock of the second type finds that the value of his stock has decreased. In ordinary language it might be said that the first trader has been enriched at the expense of the second. However, there is no direct causal link between the enrichment and the impoverishment. E's enrichment is simply the result of market forces, not of the loss to C. The enrichment and the impoverishment both arise out of the same movement in fashion but the enrichment is not the result of the impoverishment. The rules have to make it clear that in this type of case the enrichment of E is not regarded as being at the expense of C.

Example 3. A new shop comes to the village. It takes away most of the business from the existing shop. In common parlance it might be said that the proprietors of the new shop are enriched at the expense of the proprietors of the old shop. However, we do not want the rules to cover this type of case and the "at the expense of" requirement is a convenient way of excluding it. Strictly speaking, the enrichment of the new proprietors is at the expense of their customers, and is justified.

Example 4. E develops a holiday camp on a beautiful beach. It is a great success and increases the value of E's property. However, the noise and traffic cause a serious diminution in the value of C's adjacent property. In a loose sense it could be said that E's enrichment has been at the expense of C. However, it would be equally possible to say that E's enrichment and C's loss are both simply the result of E's lawful endeavours and that the link between them is not such that E's enrichment is, strictly, at the expense of C. It is this stricter meaning which we want for legal purposes.

It would be possible to provide, for example, that where E's enrichment and C's loss both arose out of the same natural causes or market forces, or both arose out of lawful competition or lawful endeavour on the part of E, then the enrichment would not be treated as being "at the expense of" C or would not be treated as unjustified. A variant on this approach was adopted in an earlier draft of these rules. It is probably safer, however, to define the type of link between the enrichment and C which causes the enrichment to be treated legally as being "at the expense of" C. This keeps a potentially unruly concept within more manageable bounds.

The law on unjustified enrichment is concerned with two types of situation. Viewed from the point of view of the claimant, these are, in the broadest terms, (a) where the claimant has done

something (such as transferring property or incurring a liability or rendering services) and (b) where the claimant has had something done to him (such as having his property taken or used without his consent).³² In rather more detail the two situations can be said to be (a) where the claimant has paid, granted or transferred something, or incurred a liability or rendered services and (b) where the claimant has suffered an interference with his patrimonial rights. The first category can be further refined into cases where the payment, grant, transfer, incurring of liability or rendering of services is (i) to the enriched person (ii) in fulfilment of an obligation of the enriched person (iii) in adding value to the enriched person's property, or (iv) in acquiring some other economic benefit for the enriched person. The second category includes not only cases of interference by the enriched person but also interference by a third party. It is convenient, however, to exclude interference by natural forces.

Interference with rights in this context is not the same as a wrong. We are not at this stage concerned with whether or not the enrichment at the expense of C is justified. That comes later. There may well be an enrichment of one party caused by an interference with the rights of another which is justified (for example, by statute) and which is not a wrong.³³ There may also be cases where the mental element necessary for the commission of a particular wrong is missing. An unintentional, non-negligent interference with rights would still be an interference for the purposes of rule 3. For example, if a person without the mental capacity to commit a delict, such as a very young child or a severely mentally ill adult, were to eat C's food there is no reason why they should not be liable to pay for it on principles of unjustified enrichment if they had the means and had saved themselves from expenditure at C's expense. For this reason, among others, the distinction between rule 3(1)(a) and rule 3(1)(b) is not the same as the distinction made by Professor Birks, in his analysis of the English law on restitution, between enrichment by subtraction and enrichment by wrongdoing.³⁴

A potentially difficult case for rule 3(1) is that of a transfer

³²Professor Reid uses the terms "giving" and "taking" for these two types of case. See 1994 JR 167 at p171 - 172. In the following commentary they will sometimes be called "transfer" cases and "interference" cases.

³³It could be argued that there can never be a legally justified interference with rights because to the extent that interference is legally justified the rights are diminished. That, however, is getting a bit divorced from reality. If my property is expropriated I would be inclined to regard this as an interference with my rights even if I was forced to concede that it was authorised by statute.

³⁴See Birks, *An Introduction to the Law of Restitution* (rev'd ed 1989) pp22 - 27.

brought about by an interference with patrimonial rights. I refuse to give you back your property unless you pay me £20. You pay me. The opening words of paragraph (b) have the effect of allocating this type of case to the transfer category rather than the interference category.

Another potentially difficult case is that of enrichment by accession or specification. Here the answer will depend on how the enrichment takes place. If C incurs expenditure or does work in adding to E's property, the enrichment will come under rule 3(1)(a). If E, or indeed anyone else, takes C's property and deals with it in such a way that it ceases to exist and becomes merged in E's property, E's enrichment would come within the interference category in rule 3(1)(b). The claimant in this second case has not paid or transferred or granted anything, or incurred any liability, or performed any services, but his rights have been interfered with.

What about cases where the enriched person intercepts and appropriates a benefit due to the claimant?³⁵ These are clearly not transfer cases. The claimant has not transferred anything and may not even know of the interception. They are interference cases, although they require some special provisions to make it clear that they are all covered by the rules. This is discussed in the comments on rule 3(3).

The distinction between paragraphs (a) and (b) of rule 3(1) is not of great importance under the following rules.³⁶ The main importance of rule 3(1) is in what it leaves out - for example, enrichment of one person rather than another by lawful competition. The internal divisions of rule 3(1) are mainly for descriptive purposes.

RULE 3(1) (a)

(1) The enrichment of one person is at the expense of another person if it is the direct result of

- (a) a payment, grant, transfer, incurring of liability, or rendering of services by the other person
 - (i) to the enriched person
 - (ii) in fulfilment of an obligation of the enriched person
 - (iii) in adding value to the enriched person's property, or
 - (iv) in acquiring some other economic benefit for the enriched person,

³⁵Professor Birks calls these "interceptive subtraction". See his *An Introduction to the Law of Restitution* (rev'd edn, 1989) pp 133 - 139. However, in the classification used here the word "subtraction" has no significance and we can simply talk of interception.

³⁶Rule 8(1) refers to "interference" cases but applies the same rule to property acquired under voidable transactions. The measure of recovery depends more on the type of enrichment than on whether it was by transfer or interference. See the schedule.

Comment. Rule 3(1)(a)(i) deals with the most obvious case where one person's enrichment can be said to be at the expense of another - the case where C pays money to E, or grants a right to E, or transfers property to E, or incurs a liability to E, or renders services to E. The enrichment of E at the expense of C may be justified or unjustified. We are not concerned with justification at this stage.

Rule 3(1)(a)(ii) is very similar. Here, however, C fulfils an obligation which E owes to a third party and enriches E by freeing him from the obligation.

Rule 3(1)(a)(iii) deals with cases which are not covered by (i) or (ii) but where C's payment etc confers an economic benefit directly on E by adding value to his property.

Example. C incurs expenditure on what he thinks is his own property. The property is actually owned by E and its value is increased by C's expenditure. There is, let us suppose, no transfer of property by C to E, and C does not render services to E. He pays for someone to render services to him (C). E's enrichment is nonetheless at the expense of C because of rule 3(1)(a)(iii).

Rule 3(1)(a)(iv) deals with cases which are conceptually similar to those in (iii) but where the benefit to E takes some form other than the addition of value to his property.

Example 1. C pays T to transfer property or grant a right to E. There is no payment or transfer by C to E, and C is not fulfilling an existing obligation of E, but there is clearly an enrichment of E at the expense of C.

Example 2. C is thinking of doing some work on his property for his own benefit. It will incidentally save E expenditure. C agrees with E that E will make a contribution to the cost of the work. However, after the work has been done, it becomes apparent that the contract is void. E has not paid his contribution and refuses to pay. C has a claim by virtue of rule 3(1)(a)(iv). His claim is for what it would have been reasonable to expect E to pay him or the amount of E's actual saving if less.³⁷

RULE 3(1)(b)

(1) The enrichment of one person is at the expense of another person if it is the direct result of...

(b) in any case not covered by paragraph (a), an interference with the patrimonial rights of the other person otherwise than by the operation

³⁷See schedule, para 7. If there had been no void contract C could not have recovered because of rule 6(1)(a). This example is taken from von Caemmerer, "Problèmes Fondamentaux de L'Enrichissement sans Cause" (1966) 18 Rev Int de Droit Comparé 573 at p577.

of natural forces.

Comment. Rule 3(1)(b) deals with enrichment by interference.³⁸ Some cases where redress for unjustified enrichment has been allowed under the existing law³⁹ cannot be adequately explained without some such category and there would be a large gap in the new law if it were to be omitted. It is important to note that the interference need not be by the first person to interfere with the rights of the claimant. It may be, for example, by someone who has acquired possession of the claimant's property from the first interfeerer.

Example 1. T has stolen chemicals from C. T sells them, at less than their market value, to E who acquires them in bad faith, knowing or having good reason to know, that they have been stolen. E uses the goods in his factory to make fertiliser and acquires the property in them by specification. T has disappeared and there is no prospect that C will be able to recover anything from him. C has a claim against E based on unjustified enrichment. E has been enriched. He was not enriched when he acquired possession of the goods. Property in them did not pass to him. They remained C's goods. Legally E acquired nothing other than precarious possession at that stage. However, he was enriched when he used the goods to make fertiliser and acquired the property in them. He was enriched at C's expense. He interfered with C's rights in his own goods. He could not argue that he was entitled to do so by virtue of his contract with T. That contract gave him no right to the goods. (Example suggested by *Faulds v Townsend* (1861) 23D 437 but with the important assumption that there was bad faith on the part of E.)

The following are further examples of the operation of rule 3(1)(b).

Example 2. A state expropriates C's property. There is no transfer by C. The property passes by force of law. It is taken rather than transferred. Clearly, however, the enrichment of the state is at the expense of C.

Example 3. Without C's authorisation, E uses farm buildings of which C is the tenant to stable his horses while he is harvesting a crop and thereby saves himself expense. This is an interference with the rights of C to the exclusive

³⁸For an account of the rudimentary state of the existing Scottish law on this subject and of some possible reasons for that, see Blackie, "Enrichment and Wrongs in Scots Law" 1992 *Acta Juridica* 23.

³⁹Eg *Faulds v Townsend* (1861) 23D 437; *McGregor v Ireland* (1901) 17 Sh Ct Repts 26; *Mellor v William Beardmore & Co* 1927 SC 597; *Shetland Islands Council v BP Petroleum Development Ltd* 1990 SLT 82.

use of the property of which he is tenant. In this type of case there may well be no actual patrimonial loss to C. He may have intended to leave his property unused. Nonetheless E's enrichment is treated as being at the expense of C. (Example suggested by *McGregor v Ireland* (1901) 17 Sh Ct Repts 26, where C was the outgoing tenant and E was the incoming tenant who had bought the waygoing crop.)

Example 4. Torrential rain causes flooding which removes rich topsoil from C's land and spreads a layer on E's land, making it more fertile. E acquires property by accession. There has been an interference with C's rights in the topsoil. He has lost them completely. E is enriched as a result. It is assumed, however, that for policy reasons there should be no claim for redress in this type of situation. The most convenient way of achieving this result is by means of the "at the expense of" formula.

Example 5. A third party, T, attaches C's property to E's so that E becomes owner. E is enriched at the expense of C. The difference in result between this case and the last is explained by saying that C can reasonably be expected to anticipate and accept that his property may be affected by natural forces, such as winds, rains, currents and tides. Nothing can be done about them. The law can have no deterrent effect. C cannot be expected to accept human interferences as part of the natural order of things and the law may have a deterrent effect on those who might be tempted to accept the benefits of others' wrongdoing.

Example 6. A photographer takes, perfectly lawfully, a photograph of a famous person and sells the photograph to a newspaper. The photographer is enriched but there is no interference with the rights of the famous person. So the enrichment is not at the expense of the famous person within the meaning of rule 3.

Example 7. A beekeeper (E) keeps hives next to a vast heather moor belonging to C. There is no other source of nectar within range of the bees. C claims from E the value of the nectar gathered by E's bees from C's land. He argues that E has been enriched at his expense. He is not entitled to payment. The present law does not (it is thought, and hoped) recognise the taking of nectar by bees from flowers on C's land as an interference with C's rights. E is enriched (by acquiring property) but it is not, legally, at the expense of C.

The interference must be with the claimant's patrimonial rights. These are defined later⁴⁰ as including rights flowing from the ownership of property, rights to protect confidential information, and other rights having an economic value but as excluding purely personal rights, such as the right to life,

⁴⁰See rule 13(1).

liberty, bodily integrity or reputation. This represents a fairly traditional approach to a question which has given rise to discussion.⁴¹ To allow, say, a defamed person to recover the profits made by the defamer would be to effect a major change in the existing law which would be highly controversial and which could only be recommended, if at all, after extensive consultation on this specific issue.

A fifth important function of rule 3 is to make it clear who is the creditor in the obligation laid down in rule 1.⁴² Rule 3 prevents a person from claiming redress for unjustified enrichment in many cases where the enrichment is only indirectly at his expense. There are good policy reasons for this. To allow a claim for indirect enrichment would often expose the defender to double liability, deny the defender the benefit of defences he might have had against the intermediate third party, frustrate the operation of the normal rules in bankruptcy or insolvency, and complicate the law unduly. There are also other reasons which operate in some cases. All of these reasons are discussed in Whitty, "Indirect Enrichment in Scots Law" 1994 JR 200, from which many of the following examples are taken.

Example 1. C does some work for T under a contract. T by mistake pays E who has done nothing to induce the payment. (So it is not an interference case.) C claims the amount of the payment from E. He will not succeed. E's enrichment was at the expense of T. In relation to C it is not within rule 3(1) and cannot therefore be regarded as being at the expense of C. To allow C to recover from E would risk double liability for E, who would have no defence to a claim for repayment by T, and double recovery for C, who still has his contractual claim against T. (Example suggested by *Fraser v Robertson* 1989 GWD 5-194.)

Example 2. C gives an object to T. E induces T by unlawful threats to transfer the object to him. T is not willing to seek recovery from E. C resents the fact that E is enjoying a gift which was intended for T. He claims the object from E, arguing that E has been enriched indirectly at his expense and that the enrichment is unjustified. C is not entitled to recover from E. E's enrichment is at the expense of T, not C. It is up to T to take action if he wishes to do so.

Example 3. T borrows money from C and pays it to E. T is unable to repay C. So C claims the money from E on the

⁴¹See Birks, *An Introduction to the Law of Restitution* (1989) pp313 - 357, 471 - 473; Burrows, *The Law of Restitution* (1993) pp376 - 419 for accounts of the problems and further references.

⁴²In a system which saw the law in terms of court-based remedies this might be expressed as "title to sue". See eg Tettenborn, *Law of Restitution* (1993) pp 7 - 9.

ground that E has been indirectly enriched at his expense. C will be unsuccessful. He cannot bring himself within rule 3(1). E's enrichment (if there was any) was at the expense of T. T, having borrowed the money, "was absolute master of the money. It was his money; he might do what he liked with it". (Example suggested by *Sinclair, Moorehead and Co v Wallace and Co* (1880) 7R 874 and words quoted from p 878.)

Example 4. T buys groceries on credit from C and gives them to her invalid mother (E) who is confined to her house. T is not acting as the agent of E. T cannot pay the debt due to C. C sues E for the value of the groceries consumed by E on the ground that E has been enriched indirectly at C's expense. C cannot recover. E's enrichment was the result of a benefit acquired directly from T. It was at the expense of T, not C. It would, in any event, have been justified by the gift from T to E.

RULE 3(2)

- (2) A person interferes with the patrimonial rights of another person if, among other things, he
- (a) extinguishes those rights or acts in such a way that they are extinguished
 - (b) disposes or purports to dispose of property belonging to that other person
 - (c) uses property which that other person has the right to use to the exclusion of the interferer, or
 - (d) actively intercepts a benefit due to the other person
- but a person does not interfere with the patrimonial rights of another person merely because he breaches a contract between himself and the other person.

Comment. The concept of interference with rights requires some explanation and expansion. It is not the same, as has already been noted, as a wrong. Rule 3(2) specifies some important types of interference, removes doubts about whether certain acts are to be counted as interferences, and makes it clear that a simple breach of contract with the other party is not counted as an interference with rights for present purposes.

Paragraph (a) meets a quibbling argument that "interference" implies something less than total extinction.

Paragraph (b) makes it clear that if E purports to sell property belonging to C, E is interfering with C's rights. It might otherwise have been argued that as C remains owner, and retains his full rights as owner, there is no interference with his rights.

Paragraph (c) makes it clear that if E uses property which he has no right to use he is interfering with the rights of the person who has the right to use it to the exclusion of E. It would not be right here to refer to using the property "of another" because an owner who has leased his property would interfere with the rights of the tenant if he used his own property in circumstances not permitted by the lease.

Paragraph (d) deals with the case where E intercepts a benefit due to C. The difficulty here is that in most cases C will still have his rights, undiminished and unaffected, after the interception. If T owes C £100 and E comes along and pretends to be C's agent and obtains £100 from T, that has no effect on C's rights, if we assume that C knows nothing of E's actions and has done nothing to hold E out as his agent. In this type of case, therefore, it cannot on the plain terms of rule 3(1)(b) be said that E's enrichment is at the expense of C. It is at the expense of T. Only if E's interception does affect C's rights - as might be the case, for example, if C had held E out as his agent so that T was discharged of his liability by paying to E - would E's interception be "at the expense of" C under rule 3(1)(b) read on its own. However, rule 3(1)(b) is expanded by rule 3(2) to make it clear that the interception is regarded as an interference with C's rights.

The concluding words of rule 3(2) make it clear that for the purposes of the rules a breach by E of a contract between E and C is not regarded as an interference by E with C's rights. This is the present law in Scotland⁴³. There may be a case for some change to deal with cases where a cynical contract breaker deliberately takes advantage of the fact that, in the particular case, contractual remedies are inadequate to protect the interests of the other party in having the contract performed according to its terms. However, a suitably limited rule would not be easy to frame and to allow a party to a contract to recover the profit made by the other contracting party out of a breach of the contract would be such a major change in the law on the consequences of a breach of contract that it would require consultation addressed to this specific issue. This is not the sort of change which would be expected in a statutory restatement of the law on unjustified enrichment. The rules therefore preserve the traditional position for the time being. However, if the enriched person (E) induced a third party to breach a contract between that third party and C, that would be an interference with C's rights for the purposes of the rules and could give rise to a liability to redress any resulting unjustified enrichment.

Example 1. C lent money to E for use in E's timber business in return for a share in the profits of the business. It was an express term of the contract that E should keep his own capital in the business at a certain level. In breach of this term E withdrew much of his own capital and invested it in a distillery business where it made much more profit than it would have earned if employed in the timber business. C claims the profit that E has made, arguing that E has been enriched by breaching C's contractual rights. C will not recover. He is entitled to

⁴³ *Teacher v Calder* (1899) 1F (HL) 39. On the whole question of the relationship between breach of contract and unjustified enrichment see MacQueen "Unjustified Enrichment and Breach of Contract" 1994 JR 137,

damages for breach of contract, based on what the withdrawn money would have earned in the timber business, but not to E's profit. This is not regarded as an interference with C's rights for the purposes of the rules. (Example based on *Teacher v Calder* (1898) 25 R 661; (1899) 1F (HL) 39.)

Example 2. C has a contract with T under which C supplies T with valuable information on the express condition that T is not to pass it on to anyone else. E, with whom C has declined to contract, induces T to breach the contract and pass the information to him, thus saving himself the cost of subscribing to another information service. C considers, rightly or wrongly, that he would have difficulty in recovering damages for breach of contract from T because C has not suffered any obvious loss. C claims redress from E under the law on unjustified enrichment. He would have every prospect of success. E has enriched himself by interfering with C's patrimonial rights. (Example based on *Exchange Telegraph v Giulianotti* 1959 SC 19 where, under the existing law, recovery was refused on the ground that the pursuer had suffered no loss.)⁴⁴

There may be cases where there is a breach of contract and also an interference with patrimonial rights which the claimant has quite apart from the contract. In such a case a claim for redress would not need to found on the contract and would not fail merely because there also happened to be a breach of contract.

Example. E has hired a boat from C. He does not return it at the end of the hire period but instead makes money out of it by charging T for its use. The failure to return is a breach of contract. However, there is also an interference with C's exclusive right to the use of his own boat and this would be sufficient to found a claim.

RULE 3(3)

(3) A person who claims redress of any unjustified enrichment resulting from an interference with his patrimonial rights is treated for the purpose of any claims by or against third parties as thereby ratifying the interference.

Comment. In the absence of this provision there would very often be no enrichment on the part of the interferer because he would be liable to repay a third party. If the provision were limited to deeming the interferer to be enriched notwithstanding his liability there would be the twin dangers of double liability on him (to the claimant and to the third party) and of double recovery for the claimant (from the interferer and from the third party). One application of the sub-rule is in cases where a person has made money from a third party by selling the claimant's property. The effect of the rule is to preserve for the claimant the option of proceeding against the intermediate

⁴⁴The decision is discussed and criticised in Blackie, "Enrichment and Wrongs in Scots Law" 1992 *Acta Juridica* 23 at p39.

seller. This is worth doing because in practice the property may well be irrecoverable.

Example 1. E sells to T a lorry belonging to C. C claims delivery of the lorry from T, who immediately reclaims the price from E. C also claims from E the price received by E on the sale of the lorry. In the absence of this provision C would be able to reclaim his property but would have difficulty in recovering from E under the law on unjustified enrichment because E could argue, realistically in these circumstances, that he was not enriched by receiving money which he was obliged to return. Rule 3(3) has the effect of giving C the option of proceeding against T or E. However, in order to avoid double liability and double recovery, if he proceeds against E he ratifies the disposal to T, thus preventing T from claiming the return of the price from E and forfeiting his own right to recover the lorry from T.⁴⁵

The sub-rule also covers the special case of an intercepted benefit.⁴⁶ One problem in such cases is that the interceptor may be liable to repay to the person who paid or transferred to him something which was not due. Another problem is that the interception may not extinguish the liability of the debtor to the true creditor.⁴⁷ To allow the true creditor to recover from the interceptor therefore risks exposing the interceptor to double liability and giving a double right to the true creditor. Rule 3(3) attempts to deal with these problems, and the fundamental problem that the interceptor may not be enriched if his liability to repay is taken into account. Is it worth the effort? An alternative would be to deny the true creditor the right to recover from the interceptor and to force him to recover from his debtor, thus forcing the debtor in turn to attempt to recover from the interceptor. However, this would be cumbersome

⁴⁵A similar solution was put forward as one of the options for consideration in the Scottish Law Commission's Memorandum on *Corporeal Moveables* (Memo No 31, 1976). The König proposals for reform of the German law on unjustified enrichment provide in art 2.1(1) that "In case of an ineffective disposal the entitled person can demand compensation of the value from the encroacher reciprocally with ratification." (Translation by Johann Dieckmann.)

⁴⁶For an interesting analysis of the problems presented by such cases, see Smith "Three-party Restitution: A Critique of Birks's Theory of Interceptive Subtraction" (1991) 11 *Oxford Journal of Legal Studies* 481.

⁴⁷It will do so if the debtor has the defence of *bona fide* payment ie the defence of "payment *bona fide* to him who had not the true right, but where there was another preferable right which the defender neither did nor was obliged to know". See Stair IV.40.33.

and unduly harsh in some cases, as where a large number of small tenants had wrongly paid rents to a usurping landlord. It would be just as undesirable to force the tenants into the expense and trouble of assigning their rights against the interceptor to the true creditor, or to force them to participate as additional pursuers⁴⁸ or additional defenders⁴⁹ in an action by the true creditor against the interceptor. On balance it does seem to be worthwhile making provision for this type of case, of which there are scattered, unsystematised examples in the existing law.⁵⁰ However, for a case based on interference there would have to be some active interception. A mere mistaken payment to a non-creditor who had done nothing to solicit it and who could not be said to have interfered actively with the claimant's rights in any way, does not seem to call for any general right of recovery by the true creditor against the wrongly paid person.⁵¹ The debtor is likely to be at fault in such a situation and can reasonably be expected to pay the true creditor and to seek to recover from the third party to whom he has carelessly paid.

Example 1. E demands and receives rents from the tenants of a large estate. He was not entitled to them because his title to the estate was void and, at the time in question, he knew this. C was entitled to the rents. E has interfered with C's rights. C can claim the intercepted rents directly from E. However, if he does so he ratifies the payments by the tenants to E and cannot claim the rents from them. (Example suggested by *Gracie v Hannay's Reps* (1832) 10S 628)

Example 2. E manipulates a computer programme so that sums due by T to C in the normal course of business are instead paid into E's bank account. By the time this interception is discovered, T is bankrupt. C is entitled to claim the intercepted sums directly from E but if he does so he

⁴⁸As happened in *Countess of Cromertie v Lord Advocate* (1871) 9M 988. Here the action took the form of a *condictio indebiti*. So the debtor sued to recover what he had paid. The true creditor (the countess) sued for a declarator that she was the true creditor. There was clearly a private arrangement between the two pursuers. The real question in the case was whether the defender was liable for interest on the intercepted funds. From this point of view it would have been better if the countess had sued directly because the most important argument on the interest question was that she had disintitiled herself by failing to assert her rights to the payments. The interposition of the debtor just confused this issue.

⁴⁹As happened in *Earl of Cawdor v Lord Advocate* (1878) 5R 710.

⁵⁰See Scottish Law Commission, *Recovery of Benefits Conferred under Error of Law* (DP No 95, 1993) Vol I pp 141 - 144.

⁵¹Some exceptional situations are covered in rule 8.

cannot lodge a claim in T's sequestration for the amounts due.

RULE 3(4)

(4) A person who purchases property in good faith from someone who is not the owner of the property is not treated as being enriched at the expense of the owner or of any former owner by reason only of any economic benefit derived by him from the purchase or the property; and the same rule applies to any other acquirer, in good faith and for value, of the right, or what purports to be the right, to deal with the property or rights of another, and to anyone deriving title from such a purchaser or acquirer.

Comment. This sub-rule deals with a very common type of indirect enrichment. E buys property in good faith from T. The property belongs to C. E converts the property into something else or sells it at a profit to someone else. E may well be enriched. His enrichment might well be regarded, in the absence of rule 3(2), as being at the expense of C.⁵² Should C be able to claim the amount of E's enrichment from him? Different answers could be given to this question. Under the existing Scottish law *bona fide* purchasers have been held liable to the former true owner of the property for the value of the property if it has been accidentally destroyed (*Ferguson v Forrest* (1639) Mor 4145) or consumed (*Faulds v Townsend* (1861) 23D 437; *Oliver & Boyd v The Marr Typefoundry Co Ltd* (1901) 9 SLT 170; *International Banking Corporation v Ferguson, Shaw and Sons* 1910 SC 182). Where the *bona fide* purchaser has resold the goods it has been said that, under the existing law, he is liable to the true owner of the goods in so far as he has been enriched. See *Stair, Institutions*, I.7.11 and the *obiter dicta* in the two cases last cited. The existing law is not attractive. It is difficult to see any justice in holding the *bona fide* purchaser liable for the value of the goods if they have been consumed or accidentally destroyed and, in cases of resale, the prospect of ten or twelve intermediate purchasers who all acted in good faith being pursued for small profits by the owner of the goods (who might well recover the goods themselves at a later date) is not appealing. Another consideration is that a *bona fide* purchaser might resell at a loss. It seems unsatisfactory that he should be regarded as a sort of agent for the true owner if he makes a profit but not if he makes a loss. The treatment of the purchaser who is indirectly enriched at the claimant's expense is also inconsistent with the treatment of other people who are indirectly enriched. These people are not generally held liable under the law on unjustified enrichment. In English law the *bona fide* purchaser from a third party has a defence to a claim based on restitution. See *Burrows, The Law of Restitution* (1993) 472 - 475. This seems the sounder policy and is the one provisionally adopted in the rules. The point is dealt with in rule 3 because it is an aspect of remoteness and indirect enrichment. The policy is that a purchase in good faith, or similar transaction in good faith and for value, breaks the link between the claimant and the enriched person.

⁵² Rule 3(1)(b) read with rule 8(1).

Example 1. E, the owner of a shop, bought goods from T, a wholesaler, in good faith and at a normal price, and sold them at a profit. It turns out that the goods did not belong to T but belonged to C. T is now bankrupt. C claims payment from E of the profit made by E on the sale of the goods. E is not liable. His enrichment is not regarded as being at the expense of C.

Example 2. A consignment of meat belonging to C is delivered to the wrong merchant (T) because of the negligence of a carrier. T sells the meat at an apparently normal price to a hospital (E) with which he regularly deals. The hospital buys in good faith. It has no reason to suspect that the meat does not belong to T. It uses the meat in its kitchens. T has now gone bankrupt and C sues the hospital for the value of the meat. The hospital is not liable. It is probably not enriched. Even if it is enriched (because it actually got the meat at slightly less than what it would have had to pay elsewhere) its enrichment is not at the expense of C. C's remedy for unjustified enrichment lies against T, for what it is worth.

Example 3. C delivers a crate of wine to T by mistake. T enters into a contract of barter with his friend E who acts in good faith. T gives E the wine in exchange for a ticket to a football match which is of approximately the same value. E drinks the wine. C claims the value of the wine from E, claiming that E has had the benefit of it. C is not entitled to payment from E. E is not enriched. Even if he were enriched by acquiring a benefit from T at less than market value, his enrichment would be at the expense of T, not C. C's claim should be directed against T.⁵³

Example 4. T steals C's goods and sells them to E who makes them into fertiliser. E purchases the goods in good faith. C has no claim against E. (Example based on the facts in *Faulds v Townsend* (1861) 23D 437.)

Further examples of cases involving purchasers in good faith are given later in the comments to rule 8 on indirect enrichment.

RULE 3(5)

(5) Where a person (E) has been enriched indirectly as a result of performance by another person (C) under a contract between C and a third party (T), E's enrichment is not, for the purposes of these rules, regarded as being at the expense of C, even if C is unable to recover under his contract with T.

Comment. Rule 3(5) excludes liability for unjustified enrichment in another common type of indirect enrichment case - where a claim is made by a contracting party against someone, not a party to the contract, who has allegedly been enriched indirectly by receiving the benefit of the performance rendered under the

⁵³See rule 8(1)(a) and schedule, para 9.

contract. The usual reason for such a claim is that the other contracting party is bankrupt or not worth suing. There may, depending on the facts, be various answers to this type of claim. In some cases the obvious answer will be that E has not been enriched: he may have paid the full market value of any benefit received. In other cases the obvious answer will be that E's enrichment is justified: he may have made a good bargain in a contract with T. However, the most general reason for denying recovery in this type of case is the remoteness of the link between C and E. C ought to look to T, the party with whom he contracted, for his remedy. To allow him to claim against E is to risk an element of double recovery and to risk denying E the benefit of defences which he might have to a direct claim by T. There is not a sufficiently direct link between the claimant and the enriched person. The rules therefore provide that any enrichment of E is not regarded as being at the expense of C.

Example 1. E is the owner of a car which was badly damaged in a crash. His insurance company (T) arranged to have the car repaired at its expense in terms of the insurance policy. The insurance company entered into a contract with a garage, C, to have this work done. The work has been carried out and the car has been returned to E, but the garage has not been paid. The insurance company has now gone into liquidation and the garage sues E for redress for unjustified enrichment. It claims that E has been enriched at its expense. It has rendered services which have added value to E's damaged car. Let us assume that E has been enriched. He may, for example, have paid only one premium of £400 and have received repairs to his car worth £800. And let us assume that his enrichment is unjustified. His insurance contract, for example, may be void. C will still not be able to recover. Rule 3(3) means that E's enrichment is regarded as not being at the expense of C. C's contract was with T. The fact that C cannot recover in full from T is not a reason for allowing recovery against E. C provided the services to T and must look to T or T's insolvent estate for payment. If the insurance contract were void, T's liquidator might have a claim for unjustified enrichment against E (on offering a return of premiums paid under the void insurance contract) on the ground that T had provided E with a benefit which was not due. However, there might be defences available to E against this claim - if, for example, the insurance company had culpably induced him to enter into the void insurance contract.⁵⁴ One of the policy reasons for not allowing a direct claim by C against E is precisely that it might deprive E of defences he might have against T. (Example suggested by *Kirklands Garage (Kinross) Ltd v Clark* 1967 SLT (Sh Ct) 60. See also *Express Coach Finishers v Caulfield* 1968 SLT (Sh Ct) 11.)

Example 2. E has had a building constructed by a contractor (T) who offered E an unrealistically low price. E has paid

⁵⁴See rule 10(4)(b).

T. T becomes insolvent and a sub-contractor (C), engaged by him to do work on the building but not paid by him, sues E for redress for unjustified enrichment, claiming that E has been enriched at his (C's) expense. C has rendered services which have added value to E's property. Even if E has been enriched (by, for example, getting C's work for less than its full value) and even if his enrichment was unjustified by his contract with T (because, say, his contract with T was void) C can still not recover from E. C's contract was with T and rule 3(3) applies. Any unjustified enrichment of E was at the expense of T and not C. (Example suggested by *J B Mackenzie (Edinburgh) Ltd v Lord Advocate* 1972 SC 231.)

Example 3. T engages a contractor (C) to build a building on T's land. C builds the building using his own materials. It then emerges that the land belongs to E who acquires the building by accession. T refuses to pay C. C claims redress from E, arguing that E has been enriched at his expense. He has rendered services and supplied materials which have added value to E's land. C cannot recover from E. His contract was with T and he must look to T for payment. It is up to T to pursue any claim for unjustified enrichment against E. E is not regarded as having been enriched at C's expense. To allow C to recover from E would be to give him a double remedy because he still has his contractual claim against T. It might also deprive E of defences which he might have to a claim by T. For example, a defence of gross negligence in not checking the title to the land⁵⁵ might be available to E against T but not against C, who would not be expected to check the title of the person employing him. The correct course is for C to claim against T in contract and for T to claim against E on the basis of unjustified enrichment.

RULE 3(6)

(6) This rule is subject to rule 8 (which deals with certain exceptional cases where redress is due for indirect enrichment).

Comment. Rule 3(6) simply paves the way for rule 8.

RULE 4

Unjustified

4. An enrichment is unjustified unless it is justified under rules 5 or 6.

COMMENT

The basic principle of the rules is that an enrichment at the expense of another is unjustified unless it is justified either by a legal cause (such as a statute or a contract) or by a consideration of public policy. Framing the rules in this way ("unjustified unless" rather than "unjustified if") has four advantages. First, it avoids the risk of confining the general principle more than is necessary. Rules 2 and 3 already provide

⁵⁵See rule 10(4)(b).

limits. Secondly, it avoids some problems of definition which arise when specific grounds for recovery are set out. For example, if error is a ground for recovery of a payment or transfer, what is meant by error? If compulsion is a ground for recovery, what is meant by compulsion? (The cost of this advantage is, of course, that similar problems of definition could arise in relation to some of the justifications mentioned in rules 5 and 6.) Thirdly, it avoids the danger of an unprincipled proliferation of specific grounds as more and more cases are discovered where redress for unjustified enrichment would be appropriate. Where the law is set out in a comprehensive statute it is desirable to avoid the need for regular additions. That could be done by having a residual category comprising, say, "any other case where the enrichment is unjustified". That, however, would mean either leaving the law unacceptably vague as to what was meant by "unjustified" or reverting to an "unjustified unless" approach for the purpose of the residual clause. Fourthly, the "unjustified unless" approach makes for easier drafting. One difficulty with an approach which says that an enrichment of E at the expense of C is unjustified only if, say, there has been error or incapacity or duress or ignorance or some other vitiating factor is that it is necessary to provide in each case for the possibility that an enrichment unjustified because of the particular factor may nonetheless be justified by a statute, contract or other legal cause.⁵⁶ The specific ground may be necessary but it cannot be sufficient to found a claim for unjustified enrichment. For example, the fact that I pay in error, thinking that the payment is due under a contract when it is in fact not due under the contract, does not necessarily mean that the enriched person's enrichment is unjustified. He may be entitled to the payment anyway under a statute or court decree or even another contract which has superseded the one under which I thought I was paying. Similarly, the fact that I think I am improving my own property when I am in fact improving someone else's does not necessarily mean that the other person's enrichment is unjustified. I may be bound to effect the improvement anyway under a contract or statute. In short, an enrichment which is unjustified by a ground or factor is only *prima facie* unjustified and never necessarily absolutely unjustified. This means that even on a particular ground or factor approach it is necessary to consider what might provide justification for an enrichment, which leads right into an

⁵⁶This point was noted, in the context of enrichment by wrongdoing, by Professor Blackie in "Enrichment and Wrongs in Scots Law" 1992 *Acta Juridica* 23 at p42 - "one qualification on the idea that wrong should result in the enrichment obtained by bribery being claimable must be the qualification that it does not apply if the enrichment was something to which the person was legally entitled". See also Zimmermann, "A road through the enrichment forest? Experiences with a general enrichment action." (1985) 18 *CILSA* 1 at p13 - "If, however, the owner had allowed the other party to use or consume his object or if there is another specific justification that that party might keep the benefit, the *condictio* is excluded..." (Emphasis added.)

"unjustified unless" approach. It may seem dangerous to say that an enrichment is unjustified unless it is justified by a legal cause or a consideration of public policy but, first, we are dealing only with cases where the enrichment is "at the expense of" another person⁵⁷ and, secondly, the justifications are, it is hoped, framed sufficiently widely to prevent unacceptable results.

RULE 5

Enrichment justified by legal cause

5.(1) An enrichment is justified if the enriched person is entitled to it by virtue of

- (a) an enactment
- (b) a rule of law
- (c) a court decree
- (d) a contract (whether or not the person claiming redress is a party) or unilateral voluntary obligation
- (e) a will or trust
- (f) a gift, or
- (g) some other legal cause.

(2) The reference to an enactment or rule of law in rule 5(1) is to an enactment or rule of law which confers rights directly and not to an enactment or rule of law in so far as it operates indirectly by regulating the effects of court decrees, contracts, wills, trusts, gifts or other legal causes.

(3) A purported or apparent legal cause does not justify an enrichment if it is void or if, being voidable, it has been reduced, rescinded or otherwise set aside.

(4) An acquisition of property is not a justified enrichment merely because legal title to the property has been acquired.

COMMENT

The principle behind this rule is that an enrichment is justified if the enriched person is entitled to it by virtue of some recognised legal "cause", such as a statute or contract. The following examples illustrate the operation of the paragraphs of rule 5(1).

RULE 5(1) (a)

(a) an enactment

Example 1. A local authority exacts payment of local taxation from someone who is liable to pay it under a statute. The local authority is undoubtedly enriched at the expense of the taxpayer but the enrichment is justified by the enactment.

Example 2. A bankrupt is discharged on paying a dividend of ten pence in the pound. The bankrupt has been enriched at the expense of the creditors. He has been freed from his obligations. There has been an interference with their rights. But the enrichment is justified by the Bankruptcy

⁵⁷So it is not so much like saying "the following are non-crimes" as like saying "hitting other people is a crime unless ...".

(Scotland) Act 1985.

Example 3. E becomes the owner of unsolicited goods by virtue of the Unsolicited Goods and Services Act 1971. E is enriched at the expense of the sender of the goods but the enrichment is justified by the enactment.

Example 4. A wife has her husband excluded from the matrimonial home because of his conduct towards her. She remains in occupation. The house belongs to him. After some months he claims the equivalent of rent from her, arguing that she has used his property, has saved herself the cost of accommodation elsewhere, and has therefore been enriched at his expense. He will not succeed. The wife is entitled to occupy the home by virtue of a statute - the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

RULE 5(1)(b)

(b) a rule of law

Example. A man died leaving all his property to an old friend. The executor transferred the property to the legatee. After some time an unknown child of the testator turns up and claims legitim. The legatee pays the child the amount to which the child is entitled. The child is enriched at the expense of the legatee but the enrichment is justified because the child is entitled to it by the rule of the common law on legitim.

RULE 5(1)(c)

(c) a court decree

Example. A court orders a husband to pay his wife a capital sum on divorce. The payment enriches the wife at the expense of the husband but the enrichment is justified by the court decree.

RULE 5(1)(d)

(d) a contract (whether or not the person claiming redress is a party) or unilateral voluntary obligation

Example 1. A couple buy a house for far more than it is worth. They were rash and foolish but the contract is perfectly valid and unassailable. The seller is enriched at the expense of the buyers, but the enrichment is justified by the contract.

Example 2. A stockbroker misappropriates £50000 from a client's funds and uses this sum to pay off his own overdraft with a bank, which receives the money in good faith. The stockbroker is now bankrupt. The client sues the bank for the £50000, claiming that the bank has been enriched at his expense. The bank is not bound to pay the client. It may argue that it has not been enriched. It has just received payment of a debt which was due to it. Even

if it was enriched, by receiving good money in place of a worthless debt, and even if its enrichment is legally at the expense of C, which is doubtful because it is the indirect result of an interference with C's rights, its enrichment was justified. It was entitled to the money under its contract with its client, the stockbroker. The bank was not bound to inquire into the way in which the stockbroker got the money to pay it. The client's remedy is against the stockbroker. (Example suggested by *Thomson v Clydesdale Bank* (1893) 20R (HL) 59.)

Example 3. A man agrees to buy shares in a company at a certain price. He pays the price but it is agreed between the parties that the shares will be transferred on a future date. When that date arrives the shares have declined in value to such an extent that they are worth only a fortieth of what the buyer has paid for them. There has been no breach of contract which would entitle the purchaser to rescind the contract and the contract has not been terminated by frustration. The purchaser cannot refuse the shares and claim the return of the price on the principle of unjustified enrichment. If the seller has been enriched by receiving more for the shares than they turn out to be worth at the agreed date of transfer that is an enrichment to which he was entitled by virtue of the contract. The buyer has been foolish. He has made a bad bargain. (Example suggested by *Connelly v Simpson* 1993 GWD 15-981 where, however, the facts were more complicated.)

Example 4. A company enters into a unilateral voluntary obligation to pay a reward for information leading to the return of stolen property. A woman who happened to see the property being unloaded from a lorry while she was walking her dog provides the necessary information and is paid the reward. She is enriched by the payment, and is enriched at the expense of the payer, but the enrichment is legally justified by the unilateral voluntary obligation.

Example 5. A bank lends money to a local authority for the purpose of road building. Unknown to the bank, the local authority has no power to borrow the money. The loan contract is *ultra vires* and void. The bank cannot recover under the contract but it can recover under the law on unjustified enrichment. The local authority has been enriched at its expense and cannot rely on the contract to justify the enrichment because the contract is a nullity. (Example suggested by *Magistrates of Stonehaven v Kincardineshire County Council* 1939 SC 760.)

Example 6. C and E are in dispute about a matter involving C's potential liability to pay E a substantial amount. The facts are uncertain. In order to avoid the expense of further dispute and possible litigation, C and E agree to a settlement. C pays E a sum which is expressed to be in full satisfaction of any claim E may have against C arising

out of the matter in question. C then discovers that the facts favoured his arguments in relation to the dispute. If these facts had been known to him earlier he would not have paid E anything. There is no suggestion of any fraud on E's part. C claims redress from E. He would not succeed. The contract whereby the dispute was settled provides full justification for E's enrichment.

RULE 5(1)(e)

(e) a will or trust

Example. A man dies, apparently intestate. The executor pays over the whole estate to the man's brother, his only surviving relative. Then a will turns up, under which a legacy is left to E. The brother pays E the legacy to which he is entitled. E is enriched at the brother's expense but the enrichment is justified by the will.

RULE 5(1)(f)

(f) a gift

Example. A person gives a pound to someone collecting for a charity. The charity is enriched at the expense of the donor but the enrichment is legally justified by the gift.

RULE 5(1)(g)

(g) some other legal cause.

Example. A lawful exercise of the Royal prerogative enriches one person at the expense of another. The enrichment is legally justified.

RULE 5(2)

(2) The reference to an enactment or rule of law in rule 5(1) is to an enactment or rule of law which confers rights directly and not to an enactment or rule of law in so far as it operates indirectly by regulating the effects of court decrees, contracts, wills, trusts, gifts or other legal causes.

Comment. This sub-rule is inserted to meet the quibbling criticism that if enactments and rules of law are referred to as legal causes there is no need to refer to anything else. Enactments and the common law may be direct sources of rights as well as sources of law and it is as direct sources of rights that they are referred to in rule 5(1).

RULE 5(3)

(3) A purported or apparent legal cause does not justify an enrichment if it is void or if, being voidable, it has been reduced, rescinded or otherwise set aside.

Comment. This provision states the obvious. A person will not be entitled to an enrichment by virtue of a legal cause if the cause

is itself void or if, being voidable, it has been reduced, rescinded or otherwise set aside. So a person could not justify an enrichment by reference to an enactment which was invalid because beyond the powers of the enacting body, or by reference to a contract or gift which was void because the person entering into the contract or making the gift was a young child who lacked the legal capacity to do so. Although it states the obvious, rule 5(3) is inserted because of the importance of the point with which it deals.

RULE 5(4)

(4) An acquisition of property is not a justified enrichment merely because legal title to the property has been acquired.

Comment. In the absence of this provision it might be possible to argue that any acquisition of property was a legally justified enrichment because the enriched person must have acquired title by virtue of an enactment or rule of law on the acquisition of property. For example, a person to whom banknotes had been paid by mistake could have argued that the property in the actual notes had passed to him by virtue of the law on negotiable instruments and that any enrichment was therefore justified by an enactment or rule of the common law. Similarly, a person to whom a house was conveyed in error could have argued that the property had passed to him by virtue of the enactments and rules of law on the conveyance of heritable property and that the enrichment was therefore justified. Rule 5(4) is intended to preclude such arguments.

RULE 6

Enrichment justified by public policy

6.(1) An enrichment is justified if it is the result of

(a) work or expenditure which was undertaken or incurred by the other person for his own benefit, or for the benefit of a third party or the public at large, which has incidentally conferred a benefit on the enriched person, and which was undertaken or incurred when the person knew or could reasonably have been expected to know that there would be a benefit to the enriched person and accepted or could reasonably be supposed to have accepted the risk that the enriched person would not pay for the benefit

(b) the voluntary and deliberate conferring by the other person of a benefit on the enriched person, in the knowledge that it is not due and in acceptance of the risk that the enriched person may choose not to pay or do anything in return

(c) a voluntary performance by the other person of an obligation which has prescribed, even if he erroneously believed that the obligation was still due, provided that any due counter-performance has been given

(d) a voluntary performance by the other person of an obligation which is invalid for some formal reason only, even if he erroneously believed that the obligation was valid, provided that any due counter-performance has been given

or if there is some other consideration of public policy which requires it to be regarded as justified.

(2) For the purpose of rule 6(1)(a) "benefit", in relation to a person who has done work or provided services in tendering for a contract or in the anticipation of obtaining a contract, includes the benefit to that person of having, or improving, the chance of obtaining the contract.

COMMENT

The distinction between this rule and rule 5 is pragmatic rather than logical. It could be argued that the causes recognised by this rule are, precisely because they are so recognised, legal causes. Indeed an enrichment justified under rule 6 could be said to be justified by an enactment and therefore to come under rule 5. It is, however, convenient to distinguish between legalistic and policy justifications for enrichments. The purpose of rule 6 is to cover those cases where the enriched person cannot point to any specific legal cause for the enrichment, such as a valid contract, but where there is some good reason of public policy for not regarding the enrichment as unjustified, even although it may clearly be at the expense of another person. Rule 6 is extremely important in excluding redress for unjustified enrichment in many common situations where it clearly ought not to be allowed.

RULE 6(1)(a)

(a) work or expenditure which was undertaken or incurred by the other person for his own benefit, or for the benefit of a third party or the public at large, which has incidentally conferred a benefit on the enriched person, and which was undertaken or incurred when the other person knew or could reasonably have been expected to know that there would be a benefit to the enriched person and accepted or could reasonably be supposed to have accepted the risk that the enriched person would not pay for the benefit

Comment. This is an important provision. A less developed version of it has frequently been applied in the Scottish cases on recompense. It prevents people from claiming redress from those who have merely been incidentally enriched by their work or expenditure in cases where they are not acting under error. It does not prevent a claim by a mistaken improver of another's property who does not realise, and could not reasonably have been expected to realise, that his work or expenditure would accrue for the benefit of the true owner. Nor does it prevent a claim by someone who realises that another may benefit from his work and enters into a contract with the other, which turns out to be void, whereby the other will pay a contribution. In such a case the claimant did not accept the risk that the other would not pay. He attempted to ensure that he would pay, but something went wrong.

Example 1. A tropical fish shop is kept constantly warm. The payments for heating benefit the occupiers of the flat above who are saved expenditure on heating. They are enriched at the expense of the owners of the shop but the enrichment is not unjustified. It is the result of expenditure which was undertaken by the proprietors of the

fish shop for their own benefit, which has only incidentally conferred a benefit on the occupiers of the flat above and which was undertaken or incurred when the proprietors of the fish shop knew, or could reasonably have been expected to know, that there would be a benefit to the proprietors above and accepted, or could reasonably be supposed to have accepted, the risk that they would not pay for that benefit.

Example 2. A company erects boards for its own purposes. The boards, as the company knows or can reasonably be expected to know, can be used by an advertising agency which is consequently saved the expense of erecting boards itself. The advertising agency is enriched at the expense of the company but, for the same reasons as in the last example, the enrichment is not unjustified. (Example suggested by *Edinburgh and District Tramways Co Ltd v Courtenay* 1909 SC 99.)

Example 3. C is the liferenter of some houses from which he draws the rents. E is the fiar. C spends money on renewals and improvements and claims payment from E. He argues that he has added value to E's property and that E has accordingly been enriched at his expense. C is not entitled to payment. The work was done for his own benefit as liferenter. He has houses with a higher rental value. It has only incidentally conferred a benefit on E. C knew, or could reasonably have been expected to know, that any value added to the houses would accrue to the fiar. (Example suggested by *Wallace v Braid* (1900) 2F 754.)⁵⁸

Example 4. C is empowered by a private Act of Parliament to carry out works in connection with the erection of a bridge for the public benefit. In carrying out the works C fills in a shallow part of the river bounding E's property and thereby increases the extent of E's land. C claims redress from E on the basis that E has been enriched at his expense. He will not succeed. The work and expenditure were for the public benefit. E's benefit is only incidental. C was not labouring under any error. He could reasonably have been expected to know that any additions to E's property incidental to the carrying out of the works would accrue to E's benefit and, in the absence of any provision on the matter in the statute, could reasonably be supposed to have accepted the risk that E would not pay. (Example suggested by *Fisher v Duke of Atholl's Trs* (1836) 14S 880 where, however, C's bold claim was that he actually owned the land

⁵⁸The older case of *Haliday v Gardine* (1706) Mor 13,419 is inconsistent with this but is not now regarded as authoritative. See *Dobie, Liferent and Fee* 84 - "a liferenter who voluntarily incurs capital expenditure must be assumed to have done so for his own benefit, and in the hope of increased returns during the remaining currency of his right."

which he had "made". This claim was easily rejected. There was no claim based on unjustified enrichment.)

Example 5. C, knowing that he has no title to a plot of land belonging to E, who has emigrated to America, builds a house on it. E returns and claims the land and the house, which has become his by accession. C counterclaims for the cost of the house on the basis that E has been enriched at his expense. C will not recover. He incurred the expenditure for his own benefit in full knowledge of all relevant facts. He knew, or could reasonably be expected to have known, that the benefit would accrue to E. He took the chance that E would not return and make a claim. (Example suggested by *Barbour v Halliday* (1840) 2D 1279 where the facts were slightly more complicated as there was an intervening sale by E to T, who built the house, followed by a repurchase by E when T became anxious about E's inability to furnish a proper title.)

Example 6. C, the owner of a plot of land, builds on it and greatly increases its value. He does so in ignorance of the fact that E holds a heritable security, duly registered in the Register of Sasines, over the land. The value of E's security is greatly increased. C claims redress from E on the view that E has been enriched at his expense. He will not recover. One reason, used in the case on which this example is based, is that C could easily have searched the register. It was most unusual that this had not been done. His ignorance of the security was not excusable. His expenditure was for his own purpose and he could reasonably have been expected to know that it would incidentally benefit E and to have accepted the risk that E would not pay for it. (Example suggested by *Soues v Mill* (1903) 11 SLT 98.)

RULE 6(1)(b)

(b) the voluntary and deliberate conferring by the other person of a benefit on the enriched person, in the knowledge that it is not due and in acceptance of the risk that the enriched person may choose not to pay or do anything in return

Comment. This is another important provision which is necessary if a grounds-based approach to unjustified enrichment is rejected. There is an overlap between this rule and the previous one but the difference is that in the circumstances covered by the previous rule the main intention is not to confer a benefit on the enriched person. The benefit to the enriched person is entirely incidental. In the circumstances covered by rule 6(1)(b) the intention is to confer a benefit on the enriched person, in the hope that he will pay or do something in return. The rule operates within a fairly narrow area because it is necessary only if there is no intention of donation. Its purpose is to prevent the law on unjustified enrichment becoming a chancer's charter.

There are exceptions to rule 6(1)(b) for such matters as the

payment of another's monetary debt or alimentary obligation and expenditure necessary for saving another's property.⁵⁹ There is no exception for what English writers call "free acceptance" - that is, for the case where the enriched person, knowing that the benefit is being conferred by the chancer, stands by (in circumstances not amounting to the formation of a contract) and allows it to be conferred.⁶⁰ The provisional view taken in the rules is that anything short of a contract does not warrant the chancer in assuming that there is no longer a risk. It is not, in general, a good idea to enable people to force other people into the position of having to take some action in order to prevent a liability from arising. In an earlier version of the rules this rule was confined to unsolicited benefits. That will be its normal sphere of application but the real question relates to the assumption of risk. If E solicits a benefit but makes it clear that C takes the risk that E may or may not choose to pay, C should have no redress in unjustified enrichment if he chooses to assume that risk.

Example 1. I think that my neighbours' house needs to be painted. I wait until they have gone on holiday and then paint it. I do not intend to give them the benefit of my work and materials free of charge. I intend to submit a bill and do so. I can prove that had I not painted their house they would have incurred expenditure in having it painted. They are enriched at my expense but they are not bound to pay. I voluntarily and deliberately conferred the benefit on them, knowing that I was not bound to do so, and accepting the risk that they would choose not to pay.

Example 2. A building company is in dispute with a local authority as to the latter's obligation to construct sewers serving a scheme being developed by the company. Instead of waiting for the dispute to be resolved, the company proceeds to construct the sewers itself and then claims payment for its services from the local authority. The company will not succeed. It voluntarily and deliberately conferred the benefit on the local authority, knowing that it was not due and accepting the risk of non-payment. It should have waited until the dispute had been resolved in the proper way. (Example suggested by *Varney (Scotland) Ltd v Lanark Town Council* 1978 SC 245.)

Example 3. A firm of contractors, employed to carry out work to a certain standard, do the work, unasked, to a far higher standard, thus adding value to the employer's property. They cannot claim payment over and above the contract price for having done so. They have voluntarily conferred the benefit of the extra work on the other party, knowing that they were not bound to do so and accepting the

⁵⁹See rule 7(5).

⁶⁰See Birks, *An Introduction to the Law on Restitution* (Rev'd edn 1989) pp 265 - 293.

risk that he would choose not to pay for it. (Example suggested by *Grant v Macleod* (1856) 19D 127.)

Example 4. E, a childless, widowed, ill farmer proposed to C that C should give up his job and come to live on the farm and look after both E and the farm and that E would make C his heir. C came to the farm and looked after E and the farm for 16 years without remuneration. On E's death no will could be found. C cannot found on contract because the contract, being innominate and unusual, could only be proved by writ or oath. C claims redress for unjustified enrichment from E's executor. He avers that he had been assured by C, before giving up his job, that the necessary steps had been taken to make him E's heir. Rule 6(1)(b) will not make his claim irrelevant. He is entitled to attempt to prove his averment as to the basis on which he conferred the benefits. It may well be that he did not deliberately confer benefits on E in acceptance of the risk that E would not do anything in return. It may well have been reasonable for him to rely on E's assurance that E had taken the necessary steps. (Example based on *Gray v Johnston* 1928 SC 659 where the court held the claim irrelevant. The Lord Ordinary held that the pursuer "took the risk", a matter which, one would have thought, could only have been determined after proof. Two members of the Inner House thought that the pursuer could not plead both contract and, if that failed, recompense. Why not? They may have been thinking that an express contract excludes an implied contract, but recompense is not based on implied contract. The Lord Justice-Clerk (Alness) dissented and his dissenting view is the one which might well prevail under the new rules. In the similar case of *Degelman v Guaranty Trust Co of Canada and Constantineau* [1954] 3 DLR 2d 785 the Supreme Court of Canada allowed a claim based on restitution.)

RULE 6(1)(c)

(c) a voluntary performance by the other person of an obligation which has prescribed, even if he erroneously believed that the obligation was still due, provided that any due counter-performance has been given

Example 1. A man has been due to pay a bill for work done on his house. He eventually pays it. He then discovers that the bill had prescribed and seeks the return of the money on the ground that the tradesman has been enriched at his expense and that the enrichment was unjustified. The tradesman cannot argue that he was legally entitled to the money. Nonetheless as a matter of public policy his enrichment should not be regarded as unjustified. The purpose of the law on prescription is to protect people from stale claims, not to enable them to claim the return of money which they have already paid for benefits which they have already received. Rule 6(1)(c) ensures that the money will not be recoverable.

Example 2. C and E entered into a contract seven years ago whereby C would pay E a certain sum in exchange for the assignation of certain rights. Both parties forgot about the contract but C now wants to reactivate it. C sends E the money and asks for the counter-performance. E says, correctly, that the obligations under the contract have prescribed and refuses to perform his part of the contract but he does not return the money. In this case C could successfully claim the return of his money because the counter-performance due under the contract has not been given.

RULE 6(1)(d)

(d) a voluntary performance by the other person of an obligation which is invalid for some formal reason only, even if he erroneously believed that the obligation was valid, provided that any due counter-performance has been given

Example 1. The contract for the sale of a business provides that the buyer will pay a certain sum in cash and grant a bond, payable in three years time, for a further sum. The buyer duly pays the sum apparently due under the bond and then discovers that it was formally invalid because it had not been properly witnessed. There would be no claim for repayment.

Example 2. A person pays rent in advance under a lease which is void because not entered into in properly authenticated writing. The recipient founds on the informality to refuse entry to the premises but refuses to return the rent paid in advance. In this case a claim for repayment would be available because no counter-performance has been given.

RULE 6(1)(end)

or if there is some other consideration of public policy which requires it to be regarded as justified

Comment. This paragraph is included, in spite of its obvious dangers, in order to provide flexibility and room for development of the law by the courts. It might conceivably be used in cases, similar in essence to those in the two preceding paragraphs, where there would have been a legal obligation to pay but for some legal technicality, where there was accordingly a "natural" obligation to pay, and where it would be contrary to public policy to allow a claimant to obtain return of a payment which was morally, if not legally, due. It will, however, be for the courts and the writers on law to explore the possibilities of this provision.

RULE 6(2)

(2) For the purpose of rule 6(2) "benefit", in relation to a person who has

done work or provided services in tendering for a contract or in anticipation of obtaining a contract, includes the benefit to that person of having, or improving, the chance of obtaining the contract.

Comment. The policy behind this sub-rule is that the person tendering for a contract must be regarded, in the absence of any agreement to the contrary, as accepting the risk of not getting it and of not getting paid for any work done in preparing estimates or proposals.⁶¹

Example. A firm of woodworm eradicators estimates for a contract to treat a house. The owner of the house decides that the estimate is too expensive and that he will do the work himself. The firm claims that he has been unjustifiably enriched by receiving the benefit of its services in surveying his property and revealing the extent of the treatment required. It claims payment based on what it would have cost the houseowner to obtain an equivalent survey. The claim would not succeed. The firm carried out the work for its own benefit - namely the benefit of having the chance of obtaining the contract.

RULE 7

Exceptions to rules 5 and 6

7.(1) Rule 5(1)(b) does not apply in so far as the enrichment is the result of any rule of law on the acquisition of property by accession or specification, or any analogous rule whereby one person may acquire another's property when it becomes attached to or mixed with his own.

(2) Rule 5(1)(d) does not apply in so far as the contract or obligation
(a) is unenforceable because of an enactment or rule of law (whether or not it is also illegal), unless allowing redress for the enrichment would contravene the policy underlying the enactment or rule of law
(b) has been terminated by rescission or frustration or some other means (apart from full performance) and does not, expressly or impliedly, exclude redress in respect of the benefit in question.

(3) For the purpose of rule 7.2(b) a contract which provides for performance in severable parts or stages is presumed, unless the contract indicates the contrary, to exclude redress in so far as performance by one party under, and substantially in accordance with, the contract has been met by performance by the other party under, and substantially in accordance with, the contract.

(4) Rule 5(1)(f) does not apply where the gift
(a) was made in error, whether of fact or law, or
(b) was subject to a condition, which has been met, that it would be returned.

(5) Rule 6(1)(a) and (b) do not apply where the other person has, in circumstances where it was reasonable to do so,
(a) paid a monetary debt due by the enriched person
(b) fulfilled an alimentary obligation due by the enriched person
(c) incurred expenditure or performed services necessary for preserving the life, health or welfare of the enriched person, or
(d) incurred expenditure or performed services urgently necessary for preserving the property of the enriched person or preventing it from

⁶¹See eg *Site Preparations Ltd v Secretary of State for Scotland* 1975 SLT (Notes) 41.

being dangerous.

COMMENT

This rule sets out some exceptions to rule 5(1).

RULE 7(1)

(1) Rule 5(1)(b) does not apply in so far as the enrichment is the result of any rule of law on the acquisition of property by accession or specification, or any analogous rule whereby one person may acquire another's property when it becomes attached to or mixed with his own.

Comment. Rule 5(1)(b) says that an enrichment is justified if the person enriched is entitled to it by virtue of any rule of law. Rule 5(4) qualifies this by making it clear that the mere fact that the enriched person has acquired title to property does not make the enrichment a justified one. Rule 7(1) supplements and reinforces rule 5(4) in relation to two rules of the common law on the acquisition of property. It is included because the person acquiring property by virtue of these rules might argue not only that the rules give him a title but also that they regulate conclusively the question of who is to keep the property and therefore provide a legal cause for the enrichment. In order to avoid injustice it is necessary to make it clear that the law on unjustified enrichment can operate in relation to these two rules.

The first of the common law rules is the rule on the acquisition of property by accession. A person may acquire the property of another person if that property becomes sufficiently attached to, or "accedes" to, his own property. For example, the owner of land will normally become the owner of a house built on his land. This gives rise to a classic problem for the law on unjustified enrichment. If a person builds a house on another person's land in good faith, in the mistaken belief that the land is his, should he be able to claim payment from the owner of the land who acquires the house by accession? The question is not easy and different legal systems have answered it in different ways. The owner of the land may not have wanted a house and may not be able to pay for it. Scottish law has always recognised the claim of the *bona fide* improver. Indeed, this has been regarded as the paradigm case of recompense. Rule 7(1) preserves this position, although some necessary flexibility is provided by rule 10. Indeed, read on its own, rule 7(1) prevents the owner of the land from relying on the rule of law on accession as an answer to a claim for payment on the basis of unjustified enrichment even by someone who built a house on the land in bad faith, in the full knowledge of the true ownership of the land. However, the claim of the improver in bad faith would be met by rule 6(1)(a) or (b). Rule 7(1) is not confined to land. It would also apply to cases of accession to moveable property - for example, where a new sun roof is installed in a car.

A person may acquire property by specification if he converts someone else's property into a sufficiently different form. For

example, if a baker makes bread out of flour belonging to someone else the baker owns the bread. A claim by the deprived owner based on redress for unjustified enrichment is a necessary corrective to the injustice to which specification could give rise if, in the circumstances, there is no claim based on delict (for example, because the acquirer is in good faith and is not negligent). Rule 7(1) therefore prevents the acquirer from pleading that his enrichment is justified by virtue of the rule of law on specification.

The reference to analogous rules is inserted out of caution to cover cases which seem really to be examples of the acquisition of property by accession or specification but which have sometimes been discussed under different headings, such as "contexture", "commixtion" or "confusion". See Scottish Law Commission, *Corporeal Moveables: Mixing, Union and Creation* (Memorandum No 28, 1976).

RULE 7(2)

- (2) Rule 5(1)(d) does not apply in so far as the contract or obligation (a) is unenforceable because of an enactment or rule of law (whether or not it is also illegal), unless allowing redress for the enrichment would contravene the policy underlying the enactment or rule of law.

Comment. This rule deals with contracts or obligations which are unenforceable because of illegality or some other reason. Many illegal contracts are void. In their case an action for redress for unjustified enrichment would be available, although the court's discretion under rule 10(4)(b) to award reduced or no redress because of the culpability of the claimant might come into play. If there is no reason to apply rule 10(4)(b) then someone who has performed his side of the void contract ought to be able to recover if the other party has been enriched by the performance. See eg *Cuthbertson v Lowes* (1870) 8M 1073 where a person who had supplied potatoes under a contract which was illegal and void because it used a non-standard unit of measurement was held entitled to recover their market value. There may also be cases where an illegal contract has been terminated, otherwise than by performance, and in these cases too redress will generally be available, because of rule 7(2)(b), subject to the application of the discretion in rule 10(3)(b). However, some illegal contracts are not void, but merely unenforceable, and are not terminated early. In their case the enriched person could, in the absence of an exception to rule 5(1)(d), argue that the enrichment was the result of a contract and was therefore justified, even although the other person could not enforce the contract. In many cases it is in accordance with public policy that a party to an illegal contract should not be able to recover in respect of anything paid or done under it. So a general rule of non-recovery is not unacceptable. It could, however, be unduly harsh to deny recovery in all cases. The same considerations apply to contracts which are declared by statute to be unenforceable even if nothing is said about illegality. It is very difficult to produce precise rules for illegal and other

unenforceable contracts or obligations. The background law is difficult and unsatisfactory. The distinction between contracts which are void and those which are valid but unenforceable is often unconvincing and arbitrary. Much may depend on the precise words chosen by the drafter of a 19th century statute who may have given little thought to problems of unjustified enrichment. Legislation on unjustified enrichment cannot resolve problems in contract law. It can only adapt to them as well as possible. The safest course is to refer to the policy behind the rule in question. One situation where the policy behind the rule would not be contravened by allowing redress for unjustified enrichment is where a contract is made unenforceable (or illegal and unenforceable) for the protection of members of a certain class and the person claiming redress for unjustified enrichment is a member of that class. So, for example, if contracts with unlicensed insurance companies have been made illegal and unenforceable in order to protect the public but a member of the public pays a premium in advance under such a contract in good faith and not knowing that the company is unlicensed, the member of the public, on discovering the true position, could recover the amount paid even if the contract is regarded as valid (though unenforceable) and still in existence. This exception is recognised in the existing law where it has been applied in relation to contracts with unregistered moneylenders. See Gloag, *Contract* (2d edn) p 588. In the case of gambling debts, however, where the public policy behind unenforceability is simply that the courts ought not to be troubled with such matters (*sponsiones ludicrae*) it would contravene that policy to allow someone who could not recover his winnings under contract law to sue for the recovery of his stake under the law on unjustified enrichment.

Example. C, a builder, does work under a contract which, under the applicable law, is not void but is unenforceable for lack of writing. He cannot recover anything under the contract but claims redress of the employer's unjustified enrichment. He will be entitled to succeed if the court concludes that to allow the claim would not contravene the policy underlying the law on the requirement of writing (which might, for example, simply be to provide a cooling-off period while matters are still entire). (Example based on the Australian case of *Pavey and Matthews Pty Ltd v Paul* (1987) 69 A.L.R. 577 where the court allowed recovery.)

RULE 7(2)

- (2) Rule 5(1)(d) does not apply in so far as the contract or obligation ...
(b) has been terminated by rescission or frustration or some other means (apart from full performance) and does not, expressly or impliedly, exclude redress in respect of the benefit in question.

Comment. The policy adopted in the rules is that, so long as a contract is valid and still in operation, it should govern the relations between the parties. However, if it has been brought to an end before it has been fully performed, and does not regulate the resulting situation, the law on unjustified enrichment may have a role to play.

Example 1. A house painter abandons a job half finished. There is nothing in the contract covering this situation. He claims payment on the basis of unjustified enrichment from the other contracting party for the value of work and materials already provided. The other party can stand by the contract and say "Everything you have done and supplied I was entitled to receive under the contract. I will pay you, as the contract provides, when the work is completed but not before." So long as the other party chooses to stand by the contract the painter has no remedy in unjustified enrichment. His remedy is to complete the work and claim the contract price.

Example 2. The facts are as in the previous example but the painter makes it clear that he cannot or will not complete the contract. The other party rescinds the contract by telling the painter that the contract is at an end. The contract does not regulate this situation. The painter now has no way of recovering anything otherwise than by a claim based on unjustified enrichment. It could, depending on the situation, be unfair to leave him without a remedy. Rule 7(2)(b) accordingly gives him a claim for redress, once the contract has been terminated by the other party, unless this is excluded by the terms of the contract. Under rule 10(4)(b) the court would have a discretion to modify the amount awarded to take account of any culpability of the painter. If, for example, it were proved that he had always had the intention of abandoning the job if a more profitable one came along, a full award might well be considered inequitable or contrary to public policy. The other party would also have a claim for damages for breach of contract. So, for example, if the cost of employing another contractor to complete the job exceeded the original contract price, the painter's claim on the basis of unjustified enrichment might be cancelled out completely by the other party's claim for damages.

Example 3. Under a contract for the sale of goods the seller supplies goods which do not conform to contract. There is a material breach of one of the implied terms in the Sale of Goods Act 1979. The buyer promptly rejects the goods and rescinds the contract, as he is entitled to do. The buyer, if he has already paid, can claim the return of the price because of rule 7(2)(b).

Example 4. A party to a contract has paid in advance for work to be done or goods to be supplied. The other party then refuses to perform his part of the bargain. The payer can simply rescind the contract and claim the return of the advance payment.

Example 5. A person has paid in advance for some work to be done. Before work has commenced the contract is frustrated by some event (such as the outbreak of war) which makes performance impossible. The contract does not provide for the advance payment to be retained in that situation. The

payer can recover the payment on the basis of unjustified enrichment. (Example suggested by *Cantiere San Rocco v Clyde Shipbuilding Company* 1923 SC (HL) 105.)

Example 6. A student pays a lump sum in advance for a course of tuition, which is to last for a year, by a renowned master craftsman. Part of the way through the year the master craftsman dies. The contract is terminated by frustration. The student would have a claim for the return of the lump sum. The craftsman's executor would, however, be entitled to payment for the value of the tuition already given (on the basis that the student has been saved expenditure). The student would, therefore, recover a proportion of the advance payment. See rule 10(1). (Example suggested by the old cases of *Ogilvy v Hume* (1683) 2 BS 34 and *Cutler v Littleton* (1711) Mor 583.)

Example 7. A person enters into a contract to do something if certain other people all contribute a fixed sum each. The contract expressly provides that it is to come to an end if, by a stated date, any contributions are still unpaid. Most of the parties pay their contributions by the stated date but some do not and the contract accordingly comes to a premature end. Those who have paid can recover their contributions because of the words "or some other means" in rule 7(2)(b). (Example suggested by *Brown v Nielson* (1825) 4S 271.)

Example 8. Under a contract of sale the purchaser is bound to make an advance payment of 10% of the purchase price. The contract does not provide expressly or impliedly that this payment is to be retained by the seller if the sale does not go through. It does provide that failure to pay the balance of the price on a certain date is to be regarded as a material breach of contract which entitles the seller to rescind. The purchaser cannot find the price by the due date. The seller then rescinds the contract and resells the property at a much higher price. The seller suffers no loss as a result of the buyer's breach of contract. The buyer is entitled to claim the return of the advance payment. The contract has been brought to an end by rescission and does not exclude repayment.

Example 9. The facts are similar to those in the last example but the contract refers to a deposit instead of to an advance payment and the court construes the contract as providing for the deposit to be forfeited to the seller if the contract is terminated by reason of the buyer's breach. The buyer cannot recover. (Example suggested by *Zemhunt Holdings Ltd v Control Securities plc* 1992 SLT 151.)

RULE 7(3)

(3) For the purpose of rule 7.2(b) a contract which provides for performance in severable parts or stages is presumed, unless the contract indicates the contrary, to exclude redress in so far as performance by one party under, and

substantially in accordance with, the contract has been met by performance by the other party under, and substantially in accordance with, the contract.

Comment. A continuing contract, such as a contract of employment or hire or a contract for the sale of goods by instalments, or a contract for the construction of something in identifiable stages, payment being made in instalments on the production of architects' or engineers' certificates as the work progresses, may be rescinded or frustrated when it has already been performed satisfactorily for some time on both sides. In such a case it would normally be unnecessary and unwise to require the contract to be unravelled. This provision is designed to prevent that. There may, however, be cases where the contract itself indicates that there is to be restitution on both sides in the event of premature termination. Rule 7(3) allows for this.

RULE 7(4)

- 7.(4) Rule 5(1)(f) does not apply where the gift
- (a) was made in error, whether of fact or law, or
 - (b) was subject to a condition, which has been met, that it would be returned.

Comment. Normally people who make gifts cannot change their minds and claim the gifts back on the ground that the donees have been enriched at their expense. The gift is itself a sufficient legal justification for the enrichment. However a gift may be made in error or subject to a condition and in these situations it would be unreasonable to regard it as providing a justification for the enrichment of the donee at the expense of the donor. If the donee had changed his or her position in reliance on the gift then it might be unreasonable to award full redress but that is another matter which is covered by rule 10(4)(a). For the moment it is assumed that there is no reason why the gift should not be returned.

Example 1. A woman intends to make a substantial gift to a well-known Scottish charity. She discusses this with her relatives and with the treasurer of the charity. Thinking that an English charity with a similar name is the head office of the Scottish charity she makes out a cheque in favour of the English charity and sends it to them. The mistake is discovered immediately but the English charity refuses to return the money. An action for repayment on the basis of unjustified enrichment ought to be successful if it can be proved that the gift was made in error.

Example 2. A benevolent association has power to make *ex gratia* payments to the widows of deceased seamen. Thinking that a woman's husband is dead, it makes payments to her. In fact he is alive. It would not be an answer to a claim for the recovery of the payments that the gift provided a legal cause for them. The gift was made in error. Rule 10 might well come into operation to prevent hardship in this type of case, but that is a different matter. (Example suggested by *Masters and Seamen of Dundee v Cockerill* (1869) 8M 278 where, under the existing law, recovery was denied.)

Example 3. A man is in financial difficulties. He reaches an agreement with all of his creditors except one whereby they agree to discharge his debts on receiving payment of 60 pence in the pound. The one awkward creditor insists on payment in full. Later the man's fortunes improve and he decides to give each of his accommodating creditors what they had agreed to forego. By mistake a payment is sent to the one creditor who had insisted on payment in full. The payment could be recovered. (Example suggested by *Moore's Exrs v McDermid* 1913 1SLT 278 and 298.)

Example 4. A man sends a wedding present to a young couple. The wedding is cancelled. The present is returnable. It was made on the implied condition that it would be returned if the wedding did not proceed.

RULE 7(5)

(5) Rule 6(1)(a) and (b) do not apply where the other person has, in circumstances where it was reasonable to do so,

- (a) paid a monetary debt due by the enriched person
- (b) fulfilled an alimentary obligation due by the enriched person
- (c) incurred expenditure or performed services necessary for preserving the life, health or welfare of the enriched person, or
- (d) incurred expenditure or performed services urgently necessary for preserving the property of the enriched person or preventing it from being dangerous.

Comment. The existing Scottish law allows a claim for recompense where someone has paid the monetary debt of another;⁶² or has fulfilled an alimentary obligation owed by another; or has alimented, without intention of donation, someone with the means to pay whom he was not bound to aliment; or has taken necessary steps to preserve the property of another in circumstances where, had the owner been absent, *negotiorum gestio* would have applied. There appears to be no good reason to change this position.⁶³

⁶²Where C pays a debt which E owes to someone else it is only if the effect of the payment is to discharge E that E is enriched. If E remains liable he is not enriched. The law on when a payment of another's debt operates to discharge that person is not clear but that is a matter which cannot be helped in these rules. See Scottish Law Commission, *Recovery of Benefits conferred under Error of Law* (DP No 95, 1993) Vol I, pp 154 - 158.

⁶³We considered the rules in relation to reimbursement of aliment in our consultative memorandum on *Aliment and Financial Provision* (Memo No 22, 1976 pp 45 - 56) and in our subsequent report on *Aliment and Financial Provision* (Scot Law Com No 67, 1981, pp 24 - 25). We recommended no change in the common law position. In English law, where the doctrine of *negotiorum gestio* is not recognised, there has been some limited recognition of restitutionary claims by "necessitous interveners" or those under a "moral compulsion" to intervene. See Goff and Jones, *Restitution* (4th ed 1993) Chap 15; Birks, *An Introduction to the*

Rules 6(1)(a) or (b) would prevent such claims and therefore have to be excluded. Rule 7(5) does this. Another approach would be to reform the law on *negotiorum gestio*⁶⁴ so as to cover these, and other similar, cases. The underlying policy is that, as in the case of maritime salvage, there are certain cases involving socially useful conduct where it is reasonable for the law to protect, and even reward, people who have taken trouble, incurred expenditure and even perhaps run risks in doing for others what they would (if it had been possible), or ought, to have done for themselves.⁶⁵ It may well be that the criteria for recovery ought not to use enrichment as a limiting factor but ought to be more flexible, referring to various factors, including the reasonableness and utility of the action taken, the expenditure incurred and the benefit, if any, conferred. However, reform of the law on *negotiorum gestio* is beyond the scope of this exercise and, to avoid leaving a gap, rule 7(5) is included for the time being.

It may be asked why the voluntary payment of another's monetary debt, or fulfilment of his alimentary obligation, or preservation of his life, health or welfare, or preservation of his property in situations of urgent necessity should be treated in a different way from a voluntary payment or transfer to him or rendering of services to him or incurring of expenditure on improvements to his property. Part of the reason is that the circumstances make it less necessary to treat the claimant as a donor. In the first two cases the interposition of the creditor in the debt or obligation which has been met is sufficient to make the situation less akin to donation. If I voluntarily make an unsolicited payment directly to E, in the knowledge that it is not due and without making it clear that it is a loan, I have only myself to blame if the law treats this as if it were a donation. There is no very plausible reason why I should make the payment if I do not intend donation. The position is the same if I voluntarily transfer property to E,⁶⁶ or render services to him, or confer a benefit on him by improving his property, knowing that the benefit will accrue to him. Where, however, I pay a debt due by E or fulfil an alimentary obligation owed by E, I may well be motivated by a regard for the creditor's

Law of Restitution (rev'd ed 1989) 193 - 202.

⁶⁴See Leslie "Negotiorum gestio in Scots Law: the Claim of the Privileged Gestor" 1983 JR 12 and Whitty, "Indirect Enrichment in Scots Law: Part III" 1994 JR (forthcoming).

⁶⁵For interesting discussions of the relationship between salvage and *negotiorum gestio* see Forte, "Salvage Operations, Salvage Contracts and Negotiorum Gestio" 1993 JR 247 and J P van Niekerk, "Salvage and Negotiorum Gestio", 1992 *Acta Juridica* 148.

⁶⁶Compare the policy behind the Unsolicited Goods and Services Act 1971 which enables the recipient of unsolicited goods, after a certain time, to deal with the goods "as if they were an unconditional gift to him". S.1(1).

position and may make the payment to help the creditor, or to avoid the effects of further action by the creditor, without intending any donation to E. Similarly, if some intervention is necessary to save E's life or safeguard his health, or if it becomes necessary as a matter of urgency for someone to take steps to preserve E's property, the practical needs of the situation are sufficient to provide a non-donation explanation for any action I may take. There is in all of these cases at least the possibility of a plausible reason for conferring the benefit without intending a donation. Another part of the reason is that the circumstances in the situations covered by this rule, when taken along with the requirement that the claimant's actions must have been reasonable, make it less likely that the claimant is a mere chancer or officious intermeddler.

It must also be asked why the fulfilment of a monetary debt or alimentary obligation should be regarded as different from the fulfilment of any other obligation, such as an obligation to supply goods or render services. The answer may be that there are policy considerations in favour of encouraging the satisfaction of monetary debts and alimentary obligations, and no policy considerations operating the other way. In the case of a monetary debt, the debtor cannot normally prevent his creditor from assigning and has not normally a strong interest in who the creditor is. Moreover there is no benefit to the monetary debtor in meeting his debt personally. The position is different in the case of many other obligations. It would be unacceptable if, say, a stonemason who had failed to win a contract to repair some stonework which was accessible from a public road could perform the obligation of the mason who had won the contract and then claim payment from him under the law on unjustified enrichment. In the case of alimentary obligations it is not a bad thing if the needy are supported and if the expense is made to fall on those who are legally liable to support them. Of course, in some cases the fulfilment of another's monetary debt or alimentary obligation may actually be a gift. Where this is the case the enrichment will be justified under rule 5 (legal cause) and it will be unnecessary to refer to rule 6.

Example 1. A company wished to bring an employee home from a foreign country at short notice. In order to ease the process and prevent any damage to the company's reputation, but without intending donation, the company paid off some debts which the employee had incurred in that country. The company is entitled to be reimbursed. (Example suggested by *Duncan v Motherwell Bridge and Engineering Co* 1952 SC 131.)

Example 2. C, a neighbour, takes in a child, aged 5, on the death of the child's mother and incurs expenditure on supporting the child, knowing that this is relieving the child's father, E, who refuses to take any responsibility for the child, but without intending any donation to E (as is shown by frequent claims against E for payment). C is entitled to recover from E even although it could be said that he is acting for the child's benefit knowing that E will derive an incidental benefit or that he is voluntarily

conferring a benefit on E knowing that he is not bound to do so and accepting the risk that E will not pay. (Example suggested by *Gairdner v Munro* (1848) 10D 650. For the purposes of this example C's remedy under the Child Support Act 1991 - an application for a maintenance assessment - is ignored.)

Example 3. C makes payments, without the intention of donation, to preserve the welfare of her mentally incapacitated son, aged 40, even after he has succeeded to a substantial fortune. She can recover from his estate. (Example suggested by *Drummond v Stewart* (1756) Mor 1037.)

Example 4. C's grandchild, E, is about to graduate. E has an overdraft of £2000. C says to E, in the presence of members of the family, that he will pay off this overdraft as a graduation present, and does so by means of a payment to the bank. Later E behaves in a way of which C disapproves and C decides to claim the £2000 back from E. He is not entitled to it. It was a gift. Rule 5(1)(f) applies.

Example 5. C, a carrier, is unable to continue with the carriage of E's goods because of events for which C is not responsible. The contract of carriage is frustrated. C asks E for instructions in relation to the goods, which will perish or be severely damaged if nothing is done. E refuses to accept responsibility, assuming wrongly that the matter is C's responsibility under the contract of carriage. C takes the necessary measures, thus enriching E (by adding to the value of his property or saving him expenditure which he would have had to undertake himself). C is entitled to redress from E. (Example based on *Garriock v Walker* (1873) 1R 100, where the master of a ship saved a putrefying cargo of whale blubber and whale heads by having it unloaded, cleaned and put into casks, to the great profit of the cargo owner, and *North British Railway Co v Tod* (1893) 9 Sh Ct Repts 326, where the railway company recovered the cost of veterinary charges and livery charges when the defender's colt was injured and he refused to take any responsibility. As the judge said (at p 329) "The pursuers could not leave the animal lying on the platform." In both cases the law on *negotiorum gestio* was inapplicable because the owner was present but simply refused to accept responsibility.)

Example 6. A bank (C) has an arrangement with a property developer (E) whereby the bank, unless otherwise instructed by E, will, on presentation of architects' certificates, meet periodic payments due to contractors building a shopping centre for E. E is dissatisfied with one set of architects' certificates and instructs the bank to withhold the corresponding payment. The bank, however, thinks that it will be in E's long-term interests to make the payment. It pays, notwithstanding its instruction not to, and

extinguishes E's debt to the contractor to that extent. The bank cannot recover from the contractor who would argue that he had not been enriched and that even if he had been his enrichment was justified by his contract - that, in short, he had just received what was due to him. So the bank tries to recover from E. It cannot do so on contract because it had been instructed not to pay. So it tries unjustified enrichment, arguing that E has been enriched by having his debt met and that this enrichment was at the expense of the bank. The bank would probably not succeed, because of the words "in circumstances where it was reasonable to do so". It was, we may suppose, unless the circumstances were quite exceptional, unreasonable for the bank to ignore express instructions not to pay and to pay a debt which it knew its customer did not want to be paid. (Example suggested by *Standard Bank Financial Services Ltd v Taylam (Pty) Ltd* 1979 (2) SA 383 (C) discussed in Visser, "Rethinking Unjustified Enrichment" 1992 *Acta Juridica* 203 at p207.)

RULE 8

Redress for indirect enrichment

8(1) (a) Where a person (E) has acquired money or money's worth from a third party (T) by disposing or purporting to dispose of property belonging to another person (C), or by otherwise interfering with C's patrimonial rights, or by disposing of property acquired by him from C under a transaction voidable at C's instance, E's enrichment is treated, notwithstanding anything in the preceding rules, as being at the expense of C and as not being justified by any contract between himself and T.

(b) Paragraph (a) does not apply if E was a purchaser in good faith of the property in question, or had otherwise acquired, in good faith and for value, the right, or what purported to be the right, to deal with the property or rights in question, or had derived title from such a purchaser or acquirer.

(2) Where a person (T) has been enriched at the expense of another person (C) and T has transferred to another person (E) any benefit arising out of the enrichment then, notwithstanding anything in the preceding rules, E is taken to be enriched at the expense of C and neither the transfer by T to E, nor any voluntary obligation underlying the transfer, justifies the enrichment if

- (a) T's enrichment at the expense of C was unjustified or was justified only by a transaction voidable at C's instance
- (b) C is unable to recover from T, or cannot reasonably be expected to attempt to recover from T, and
- (c) the acquisition by E from T was not in good faith and for value.

(3) Where a person (E) has been enriched by receiving a benefit from a trust estate or from the estate of a deceased person, the fact that E's enrichment is the result of a transfer from a trustee or executor does not prevent him from being liable to make redress to

- (a) a creditor of the estate to the extent that the creditor, because of the transfer to the beneficiary, has been unable to recover from the trustee or executor, or
- (b) a person (the true beneficiary) who is legally entitled to the benefit in question.

(4) Where a debtor pays the wrong person, that person is enriched at the expense of the true creditor in so far as the payment extinguishes the liability of the debtor to the true creditor.

(5) Nothing in these rules affects any procedural rule designed to avoid duplication of proceedings.

COMMENT

The preceding rules normally preclude, as we have seen, claims for indirect enrichment. Rule 8 deals with some exceptional cases where a claim for indirect enrichment is allowed. Before these exceptional cases are considered, however, it may be useful to consider how the preceding rules affect some cases of indirect enrichment, or apparent indirect enrichment.

Example 1. It appears that C owes £100 to T and that T owes £100 to E. C, with T's consent, pays E £100 in such a way as to extinguish T's debt to E. It then emerges that C did not owe T anything. C cannot recover from E. E has not been enriched. See rule 2. His net worth has not been increased. He has gained £100 but lost a book asset worth £100. C has a claim for unjustified enrichment against T because T has been directly enriched at his expense by having his debt to E extinguished.

Example 2. The facts are as in the last example except that this time it emerges that T did not owe E anything. If C was not acting on behalf of T, but on his own behalf with T's consent, then this is a simple case of direct enrichment. C has paid E a sum which was not due and can recover from him. If C was acting on behalf of T, then again it is a simple case of direct enrichment but this time the two parties are T and E. T, acting through the hand of his agent C, has paid E a sum which was not due and T can recover from E. T would be liable under the law on agency to reimburse C for any money laid out by C on his behalf.

Example 3. The facts are as in the previous two examples except that this time it emerges that C did not owe T anything and T did not owe E anything. Either C or T has a claim against E. Which one has the claim again depends on whether C was acting on his own behalf (in which case he has the claim) or on T's behalf (in which case T has the claim but would have to reimburse C for the money laid out by C on his behalf).

Example 4. T owes E £500. C thinks, mistakenly, that he is the person who is liable for that debt. C sends £500 to E with a note saying "Here is the £500 I owe you". E realises that C does not owe him anything but takes the view that if C wants to make him a gift of £500 he may as well keep it. This is a straightforward case of direct unjustified enrichment of E at C's expense. T is not enriched and there could be no claim by C against him. The payment was not ascribed to T's debt and would not extinguish that debt. T still owes E £500.

Example 5. E owes T £500 and C, purporting to pay E's debt on E's behalf as his agent, pays £500 to T. Let us suppose

that the payment extinguishes the debt. In fact C, although acting in good faith, is not authorised to act as E's agent. E is enriched at C's expense. His debt has been extinguished. T, however, has not been enriched. He has £500 but he no longer has the debt worth £500. C would have a claim for unjustified enrichment against E.

Example 6. A solicitor, who holds a deceased's will and assumes that he will be appointed to act on behalf of the executors, arranges for a bank to grant overdraft facilities to the executry and to pay beneficiaries whom the executors are bound to pay. In fact the solicitor has no authority to act on behalf of the executors. They have preferred to appoint another solicitor. The bank sues the executors to recover the amount paid out to the beneficiaries. This looks like a three-party case but juridically it is a two-party case. The solicitor did nothing on his own behalf, received nothing on his own behalf, and was not authorised to do anything on the executors' behalf. He was just part of the background explanation for a mistaken payment by the bank which enriched the executors directly by meeting their liability. The bank can recover from the executors. (Example suggested by *Commercial Bank of Scotland v Biggar* 1958 SLT (Notes) 46.)

Similar to the last example juridically are those cases where T, a fraudster, induces C to transfer money or property directly to E, there being no valid legal cause for the transfer. Again these are cases of direct enrichment of E at the expense of C. (See Whitty, "Indirect Enrichment in Scots Law", Part II, forthcoming in 1995 JR.) The role of T is simply as part of the background explanation for the transfer.

The preceding rules also deal with certain cases involving *bona fide* purchasers. Rule 3(4) contains an express provision for such purchasers where they have bought from a non-owner. Cases involving purchasers from owners do not need any such special provision. They are covered by the general rules.

Example 7. C sells an object to T who sells it to E, a *bona fide* purchaser. T has disappeared. T has not paid C, and E cannot pay T because he does not know where he is. C claims the value of the object from E. E is not liable. First, E may not be enriched. He is still liable to pay T and may well have bought at full market value. Secondly, even if E is enriched (because he made a good bargain or because his liability to pay T falls to be discounted) his enrichment is at the expense of T, not C. It is not the direct result of a transfer by C or of any interference with C's rights. Thirdly any enrichment of E is justified because he is entitled to it by virtue of his contract with T (rule 5(1)(d)). If E were liable to C there would be a risk of double liability because E is still liable to T who might return at any time.

Example 8. C made improvements to land belonging to T. The land has been sold by T to E, who bought in good faith and without knowledge of any claim by C. C claims the value of the improvements from E on the ground that E has been enriched at his expense. He is not entitled to payment from E. The reasoning is the same as in the last example. First, E may not be enriched. He may have paid T the full market value of the property. Secondly, even if he is enriched his enrichment is at the expense of T, not C, and is justified by his contract with T. If E were liable he would be paying for the improvements twice - once to T as part of the purchase price and again to C. (Example suggested by *Beattie v Lord Napier* (1831) 9S 639.)

The rules, properly applied, also cover various cases where the justification for a *bona fide* third party's benefit is not purchase but some other cause. Certain cases of third parties who are not in good faith are covered by the special rule in 8(1).

Example 9. C sells goods to T who donates them to E. T cannot pay C. C sues E for the value of the goods. C is not entitled to payment. E's enrichment is at the expense of T, not C (rule 3) and is also justified by the gift, which provides a legal cause for E's enrichment in terms of rule 5(1)(f). (Example suggested by *obiter dicta* in *Venables v Wood* (1839) 1D 659 at pp 666 - 667.)

Example 10. E is a secured creditor of T by virtue of a contract under which T granted E a standard security over his house in exchange for a loan. The house is improved by work done by C under a contract with T. T does not pay C and goes bankrupt. If C had not done the work the value of the house would have been less than the amount of the debt owed by T to E. The work done by C enables E to recover the full amount of his debt. C sues E for redress for unjustified enrichment, claiming that E has been enriched at his expense. C is not entitled to payment from E. E's enrichment is not at the expense of C (rule 3(5)) and is justified by his contract with T. (Example suggested by *Renfrew Brothers v Stewart* (1895) 11 Sh Ct Rep 179. The position is the same where the creditor's enrichment results from the operation of the law on diligence or bankruptcy. See eg *Mess v Sime's Tr* (1898) 1F (HL) 22.)

The position can be summed up by saying that in cases of indirect enrichment where there is a transaction between C and T and another transaction between T and E it will generally be the case that C cannot recover from E on the basis of unjustified enrichment either because E has not been enriched at all, or because his enrichment is not at the expense of C, or is justified. However there are exceptional cases where, on policy grounds, the normal rules on unjustified enrichment should not preclude a claim where E's enrichment is indirectly at the expense of C. Rule 8 deals with such cases.

RULE 8(1)

(1) (a) Where a person (E) has acquired money or money's worth from a third party (T) by disposing or purporting to dispose of property belonging to another person (C), or by otherwise interfering with C's patrimonial rights, or by disposing of property acquired by him from C under a transaction voidable at C's instance, E's enrichment is treated, notwithstanding anything in the preceding rules, as being at the expense of C and as not being justified by any contract between himself and T.

(b) Paragraph (a) does not apply if E was a purchaser in good faith of the property in question, or had otherwise acquired, in good faith and for value, the right, or what purported to be the right, to deal with the property or rights in question, or had derived title from such a purchaser or acquirer.

Comment. Rule 3 requires an enrichment to be "the direct result" of, broadly, a transfer by the claimant or an interference with the claimant's patrimonial rights before it is regarded in law as being at the expense of the claimant. Rule 5 provides that a contract can be a legal cause for an enrichment even if it is not between the claimant and the enriched person. There are good reasons for these provisions in general. However, subject to a protection for *bona fide* purchasers and those in a similar position, the general rules should not be allowed to prevent a claim against someone who has made money (or its equivalent) by "selling" the claimant's property or by interfering with the claimant's patrimonial rights in other ways. This is the purpose of rule 8(1).

Example 1. E borrows C's bicycle and "sells" it to T for £100. It is worth more. T is untraceable. E has been enriched (by acquiring money) at C's expense, notwithstanding that the money came from T. His contract with T does not justify the enrichment. C can recover the £100 from E under the law on unjustified enrichment - but by claiming from E would ratify the sale to T.

Example 2. C owns fishing rights on a Scottish river. E, a local hotel proprietor, mistakenly thinks that he owns the fishing rights and makes money out of them by charging T for a week's fishing. E acquires the money directly from T but is nonetheless regarded as being enriched at C's expense because he has enriched himself by turning C's rights to his own profit. His contract with T does not justify the enrichment.

Example 3. E obtains a car from C by fraud and, before the transaction has been rescinded, sells the car to T at a considerable profit. T acquires a good title and has no claim against E. E has been enriched at C's expense and his enrichment is not justified by his contract with T.

Rule 8(1)(b) contains an exception for the purchaser in good faith and others in a similar position and those who have derived title from them. This is necessary because otherwise rule 8(1) would, in cases to which it applied, conflict with rule 3(4) and the policy behind it.

RULE 8(2)

8(2) Where a person (T) has been enriched at the expense of another person (C) and T has transferred to another person (E) any benefit arising out of the enrichment then, notwithstanding anything in the preceding rules, E is taken to be enriched at the expense of C and neither the transfer by T to E, nor any voluntary obligation underlying the transfer, justifies the enrichment if

- (i) T's enrichment at the expense of C was unjustified or was justified only by a transaction voidable at C's instance
- (ii) C is unable to recover from T, or cannot reasonably be expected to attempt to recover from T, and
- (iii) the acquisition by E from T was not in good faith and for value.

Comment. This sub-rule introduces another exception to the general rule against allowing redress for indirect enrichment. It preserves some well-established rules of the existing Scottish law but resolves some doubts about their extent. One typical case for the application of rule 8(2) is where a fraudster (T) has passed on what he has acquired from the defrauded person (C) to a third party (E) who acquires gratuitously or in bad faith. In the existing law it is clear that C can recover from E. The principle is that no-one can benefit from another's fraud. It is not clear in the existing law whether the same rule allowing recovery from the third party applies where T has acquired a benefit from E under some other type of voidable transaction or in circumstances where T's enrichment at the expense of C is unjustified (for example, where it is without any legal cause at all, or is the result of a transaction which is completely void rather than just voidable). Rule 8(2) resolves this doubt. The amount of redress due is dealt with in rule 9 and the schedule.

Example 1. T acquires a valuable piece of electronic equipment from C at a fraction of its true value by means of fraud. Before the fraud is discovered T sells the equipment to E who knows of the fraud and takes in bad faith. T is not worth suing but E is. C makes a claim against E. Apart from rule 8(2) E could argue that his enrichment was not at the expense of C and was justified by his contract with T. Rule 8(2) makes these arguments unavailable.

Example 2. T, a few days before attaining the age of 16, buys from C, on credit, an expensive present for T's mother. The contract of sale is void because of T's lack of contractual capacity. T, having attained the age of 16, gives the item to her mother (E). T has no money and an action against her would be pointless. C can recover the value of the present from E. Rule 8(2) prevents E from arguing that her enrichment was at the expense of T, not C, and was justified by the gift from T.

Example 3. T defrauds C of a sum of money and transfers the proceeds of his fraud to E who takes gratuitously. T is not worth suing. C can recover from E. E is not entitled to profit from T's fraud. See *Gibbs v British Linen Co (1877)* 4R 630; *M & I Instrument Engineers Ltd v Varsada* 1991 SLT

Example 4. C gives £300 to T. The gift was made in error. T, fearing that the error will be discovered and the money reclaimed, quickly gives it to his daughter, E. T has no money and is not worth suing. C can recover from E.

RULE 8(3)

(3) Where a person (E) has been enriched by receiving a benefit from a trust estate or from the estate of a deceased person, the fact that E's enrichment is the result of a transfer from a trustee or executor does not prevent him from being liable to make redress to

- (a) a creditor of the estate to the extent that the creditor, because of the transfer to the beneficiary, has been unable to recover from the trustee or executor, or
- (b) a person (the true beneficiary) who is legally entitled to the benefit in question.

Comment. This sub-rule deals with two situations in which a claim for redress of unjustified enrichment would be allowed under the existing law and, as a matter of policy, ought to be allowed. Both situations involve a transfer by a trustee or executor to a beneficiary or supposed beneficiary. Normally, the appropriate course, if the transfer resulted in an unjustified enrichment, would be for the trustee or executor to claim redress from the beneficiary and for anyone with a claim against the trustee or executor to claim directly against him. However, this is not always possible. The trust or executry may have been wound up. It is therefore convenient to allow claims in some cases against the beneficiaries who have received a share of the estate. Rule 8(2)(a) deals with the claim of a creditor of the estate against a beneficiary who has received the estate or a part of it. There may not be a trustee or executor by the time of the creditor's claim. The claim of an onerous creditor ought not to be cut off by the process of transmission of the estate. It is important, however, to ensure that the beneficiary is not liable for more than the share of the estate received. This is why the provision refers to the creditor recovering only to the extent that he cannot recover from the trustee or executor *because of the transfer to the beneficiary*. See eg *Wylie v Black's Tr* (1853) 16D 180.

Rule 8(3)(b) deals with the claim of a true beneficiary against someone to whom the estate or part of it has been transferred in error. It prevents any argument that the transfer from the trustee or executor (1) meant that the enrichment had to be treated as being at the expense of the trustee or executor or (2) in itself provided a legal cause for the enrichment.

RULE 8(4)

(4) Where a debtor pays the wrong person, that person is enriched at the expense of the true creditor in so far as the payment extinguishes the liability of the debtor to the true creditor.

Comment. Normally, as we have seen, an unsolicited payment by a

debtor to the wrong person gives the debtor, but not the true creditor, a claim for repayment against the recipient. The true creditor still has his claim for the debt against the debtor and, in the absence of special provision, would be able to recover twice if allowed to claim redress from the enriched person. This sub-rule deals with an exceptional case where the true creditor ought to be allowed to claim from the enriched person and where allowing the claim does not mean double recovery. The essential feature is that the payment, unusually, extinguishes the liability of the debtor to the true creditor.

Example. T pays to E a debt which he thought, reasonably and in good faith, that he owed to E. The circumstances are such that T has the defence of *bona fide* payment.⁶⁷ In fact the true creditor is C. T has paid his debt to the wrong person. E has received the payment which ought to have gone to C. However, in this case the result of the payment is to extinguish T's liability to C. Under the normal rules in rule 3, E's enrichment would not, if it is assumed that E did not actively interfere with C's rights, be regarded as being at the expense of C. C's right has been extinguished, but the enrichment of E is not the direct result of this extinction. It is the direct result of the transfer from T. Rule 8(4) remedies this. It prevails over rule 3 and allows C to recover from E.

RULE 8(5)

(5) Nothing in these rules affects any procedural rule designed to avoid duplication of proceedings.

Comment. This sub-rule preserves some existing procedural rules which could be useful in preventing unnecessary duplication of actions and leaves the way open for new rules designed to achieve the same end. The existing position was explained as follows in the Commission's discussion paper on *Recovery of Benefits Conferred under Error of Law* (Scot Law Com No 95, 1993) at paragraph 3.59 (footnotes omitted).

"There is authority in cases involving mistaken payments of teinds to the effect that, in order to avoid "circuitry of action" (unpaid true creditor sues paying debtor; paying debtor sues wrongly paid putative creditor), the unpaid true creditor may sue the wrongly paid putative creditor direct either with the debtor's concurrence or where the paying debtor is also convened in the process or in a combined action as defender. On general principles, in the case of an erroneous payment by a trustee, the unpaid beneficiary may sue the wrongly paid putative beneficiary with the trustee's concurrence. Similar rules apply to trustees in bankruptcy sequestrations and liquidators. A special legatee may sue directly the holder of the legacy provided he convenes the executor in the process. If the

⁶⁷ See *Stair*, IV, 40, 33 and *Stewart's Trs v Evans* (1871) 9M 810 at p 813.

trustee refuses to lend his name to an action of repetition by the true beneficiary and refuses to acknowledge any error, holding that the actual payee is the true beneficiary, the unpaid true beneficiary may sue the wrongly paid payee for repetition to the trustee convening the trustee as additional defender."

RULE 9

Redress due

(1) The redress due by an enriched person under these rules is such transfer of property or payment of money, or both, as is required to redress the enriched person's unjustified enrichment at the expense of the claimant.

(2) The redress due is assessed in accordance with the rules in the schedule in any case where those rules are applicable.

(3) Where the enriched person has been enriched at the expense of the claimant in more than one way, the rules in the schedule apply cumulatively unless there would be double redress in respect of the same enrichment.

(4) This rule is subject to the provisions of rule 10.

COMMENT

This rule deals with the nature and amount of redress due for unjustified enrichment. The general principle is stated in rule 9(1) but rule 9(2) refers to the schedule for the details. This is expedient because the rules have to take into account a number of factors. The most important are whether the enrichment was direct or indirect and what form the enrichment took. The questions of "fruits", interest and the expenses of reconveying property also have to be addressed.

Rule 9(3) makes it clear that, unless it would lead to double redress in respect of the same enrichment, the rules in the schedule apply cumulatively so that, for example, a person who saves himself expenditure by first using another person's property and then consuming it will be liable to make redress in respect of both the use and the consumption. Sometimes a claimant will have a choice between two measures of redress.

Example 1. C does work and supplies materials in repairing E's property under a contract which turns out to be void. The contract price was £500 and that is also the amount which it would be reasonable for E to pay C for the work and materials supplied. E would have had to get the work done anyway and would have had to pay £500 to get it done even if he had not contracted with C. The value of E's property is increased by only £400. C has a choice. He could claim under part I para 3 of the schedule on the ground that he has added value to E's property. His claim would be for £400 (the amount of value added). Or he could claim under para 5 on the ground that E has been saved expenditure by receiving his services and acquiring his materials. His claim would be for £500 (the amount which it would have been reasonable for E to pay him, which is also in this case the amount E has been saved). If it is assumed that there would be no difficulties of proof under either

claim, C would doubtless choose to claim under para 5. The rule against double redress in rule 9(3) prevents him from recovering under both paragraphs of the schedule.

To some extent the treatment of the nature and amount of redress for unjustified enrichment in rule 9 and the schedule follows the structure of the existing law but it makes no attempt to follow the existing law exactly. Some problems which the existing law attempts to solve under the heading of measure of recovery are dealt with by rule 10. This gives the court a discretion to modify an award if, for example, there has been a change of position (widely defined) on the part of the recipient. The flexibility introduced by rule 10 makes it possible to adopt a firmer and clearer line in rule 8 and to avoid the difficulties - such as the difficulties of tracing funds or property - associated with a "value surviving" measure of recovery.⁶⁸ Rule 9, read with the schedule, answers a number of questions which are not clearly answered by the existing law.

RULE 10

Court's powers to refuse or modify award

10.(1) Where, in an action for unjustified enrichment, it appears to the court that each party is bound to transfer property to, or pay, the other, the court may

- (a) refuse to grant decree against the defender until satisfied that the pursuer has made, or will make, the transfer or payment due by him, or
- (b) where both obligations are to pay money, set off one entitlement against the other and grant decree for the difference.

(2) Where, in an action for unjustified enrichment based on the passive receipt of a benefit by the enriched person, it appears to the court

- (a) that the enriched person had no reasonable opportunity to refuse the benefit
- (b) that the enriched person would have refused the benefit if he had had such an opportunity
- (c) that the enriched person cannot, or cannot reasonably be expected to, convert the value of the benefit into money or money's worth, and
- (d) that it would be inequitable to make a full award

the court may refuse or modify the award accordingly.

(3) Where, in an action for unjustified enrichment based on the defender's acquisition of the pursuer's property by accession or specification or any analogous rule, it appears to the court that the pursuer has acted in good faith and that, having regard to the respective values of the properties involved, the conduct of the parties and all other relevant factors, the most

⁶⁸For a very thorough historical, comparative and critical analysis of the problem of the measure of recovery, see Visser, "Responsibility to Return Lost Enrichment" 1992 *Acta Juridica* 175 - 202. The author's conclusion is that "The ideal model seems to me to be one in which the defence is allowed by way of exception and the limits thereof carefully defined by continuing case law to effect an equitable division of the risk between enrichment-creditor and -debtor." In a statutory restatement some attempt has to be made to set the limits of a change of position defence, and any other defences serving a similar function, in advance.

appropriate and equitable solution would be for the defender to be ordered to sell to the pursuer such property at such a price as would enable the pursuer to regain his property without prejudice to the defender, the court may grant decree accordingly.

(4) Notwithstanding anything in the preceding rules, a court deciding an action for unjustified enrichment may refuse to make an award, or may make a reduced award, or may grant decree subject to conditions, if it considers

(a) that the person enriched, where he did not know, and could not reasonably be expected to know, that redress was due, changed his position (whether by spending money, disposing of property, consuming property or its fruits, abandoning rights, failing to exercise rights in time, or otherwise) in reliance on his enrichment, and it would for that reason be inequitable to make a full award or grant decree unconditionally

(b) that the claimant was so culpable or negligent in causing the unjustified enrichment that it would be inequitable or contrary to public policy to make a full award or grant decree unconditionally

(c) that the claimant would be unjustly enriched if a full award were made or if decree were granted unconditionally, or

(d) that, for any other reason, it would be inequitable or contrary to public policy to make a full award or grant decree unconditionally.

COMMENT

This rule contains some important qualifications of the right to redress for unjustified enrichment which is conferred by the preceding rules. Some of its provisions give the court a wide discretion and this could be objected to on the ground that it makes the law too vague. However, it has always been accepted in core areas of the Scottish law on unjustified enrichment that the courts need to have a broad discretion to refuse or modify relief where this would be equitable. In relation to the *condictio indebiti* it has been constantly emphasised that the remedy is an equitable one and may be denied "when considerations exist on the other side outweighing the equity on which the claim is made". See *Bell v Thomson* (1867) 6M 64 at p 69 and the other authorities cited in the Commission's discussion paper on *Recovery of Benefits Conferred under Error of Law* (Scot Law Com No 95, 1993) at Vol II, paragraphs 2.47 to 2.49. The same is true of recompense where "it must be shown that in all the circumstances it would be equitable for the pursuers to be reimbursed." See *Lawrence Building Co Ltd v Lanark County Council* 1978 SC 30 at pp 41-42.

RULE 10(1)

10.(1) Where, in an action for unjustified enrichment, it appears to the court that each party is bound to make redress to the other, the court may

(a) refuse to grant decree against the defender until satisfied that the pursuer has made, or will make, the redress due by him, or

(b) where both obligations are to pay money, set off one entitlement against the other and grant decree for the difference.

Comment. In some cases there may be a right to redress for unjustified enrichment on both sides. It would be possible to leave such cases to be dealt with by way of cross-actions or counter-claims. However, under the existing law the court can simply make an allowance for the sum due by the defender. (See *Ogilvy v Hume* (1683) 2 BS 34 and *Cutler v Littleton* (1711) Mor

583; *Watson v Shankland* (1871) 10M 142 at p 152.) This sub-rule is intended to preserve the flexibility of the existing law.

Example 1. A contract is void. One party seeks recovery of a payment made in advance. The other has a right to redress (smaller in amount) for enrichment resulting from work already done under the contract. The court could set off the entitlements against each other and grant decree for the difference.

Example 2. A contract for the sale of goods has been rescinded by the seller, who claims the return of the goods supplied by him under the contract. The buyer has paid part of the price in advance. The court could refuse to grant decree until satisfied that the pursuer had repaid, or would repay, the part of the price already paid.

RULE 10(2)

- (2) Where, in an action for unjustified enrichment based on the passive receipt of a benefit by the enriched person, it appears to the court
- (a) that the enriched person had no reasonable opportunity to refuse the benefit
 - (b) that the enriched person would have refused the benefit if he had had such an opportunity
 - (c) that the enriched person cannot, or cannot reasonably be expected to, convert the value of the benefit into money or money's worth, and
 - (d) that it would be inequitable to make a full award
- the court may refuse or modify the award accordingly.

Comment. This sub-rule deals with what has been called "subjective devaluation".⁶⁹ It enables an award to be reduced in certain circumstances where the recipient, if he had had the chance, would have declined the benefit.

Example. C improves E's property in good faith thinking it is his own. E does not want the improvements, cannot easily afford to pay for them and cannot turn them into money. C claims redress for E's unjustified enrichment. The normal way of valuing E's enrichment would be by reference to what he could reasonably have been expected to pay for the benefit or to the value added to his property, if less. That could be unfair in this situation. So the court could use rule 10(2) to justify a reduced award.

RULE 10(3)

- (3) Where, in an action for unjustified enrichment based on the defender's acquisition of the pursuer's property by accession or specification or any analogous rule, it appears to the court that the pursuer has acted in good faith and that, having regard to the respective values of the properties involved, the conduct of the parties and all other relevant factors, the most appropriate and equitable solution would be for the defender to be ordered to sell to the pursuer such property at such a price as would enable the pursuer to regain his property without prejudice to the defender, the court may grant

⁶⁹See Birks, *An Introduction to the Law of Restitution* (rev'd edn 1989) pp 109 -132.

decree accordingly.

Comment. This provision is based on a suggestion made by Professor Richard Sutton of the New Zealand Law Commission during a visit to the Scottish Law Commission in July 1994. It extends the range of solutions available to the court. It would be most useful in cases where the claimant has, in good faith, built on a comparatively small piece of the enriched person's land. The ownership of the building may be a matter of great importance to the person who has built it. The ownership of a small corner of neglected land may be of little importance to the owner of a large estate who may hardly have known that he owned it. In such circumstances, the most appropriate solution may well be for the owner to convey, for a fair price, the small piece of land to the person who has built on it. In many cases the parties would doubtless arrive at that solution for themselves by negotiation. It would be useful, however, to enable the court to impose such a solution directly.

RULE 10(4)(a)

(4) Notwithstanding anything in the preceding rules, a court deciding an action for unjustified enrichment may refuse to make an award, or may make a reduced award, or may grant decree subject to conditions, if it considers

(a) that the person enriched, where he did not know, and could not reasonably be expected to know, that redress was due, changed his position (whether by spending money, disposing of property, consuming property or its fruits, abandoning rights, failing to exercise rights in time, or otherwise) in reliance on his enrichment, and it would for that reason be inequitable to make a full award or grant decree unconditionally

Comment. This paragraph enables a court to take account of the fact that the defender may have changed his position in reliance on the receipt of the benefit. It would enable a court, in appropriate cases, to refuse to make an award or to confine an award to "value surviving" or the extent to which the enriched person is still enriched at the time of the claim. This could be particularly important and useful in the case of transactions with young people under the age of 16. Under the existing law a 15 year old who borrowed money under a contract which was void because of his incapacity would be liable to return only so much of the money as he retained or had invested for his benefit, and not what he had spent. (See Stair 1.8.6). The Commission criticised the existing law in its report on the *Legal Capacity and Responsibility of Minors and Pupils* (Scot Law Com No 110, 1987 at paras 3.34 to 3.36). It commented that the limitation on a young person's obligation of restitution might be appropriate where the adult had taken advantage of the young person's immaturity in transacting with him but might not be appropriate in all cases. A rigid limitation to value surviving would be too arbitrary.

"No consideration would be given to the circumstances of the particular transaction or to the young person's reason for disposing of the benefit received. His inability to make restitution might arise unintentionally or he might deliberately dispose of the benefit so as to escape his obligation to restore."

The Commission therefore considered, in the 1987 report, recommending a more flexible rule whereby the courts would be able to modify the young person's obligation in any way it considered equitable in the circumstances of the case. A solution of this kind had been supported by a majority of those who had expressed views on the consultative memorandum which had preceded the report. In the end, however, the Commission decided that it would be anomalous to reform the law on unjustified enrichment only for the case of transactions involving young people. It concluded that

"the correct approach would be to consider general reform of the law of unjustified enrichment."

The discretions conferred by rule 10, and by rule 10(4)(a) in particular, would provide a more flexible solution than the present law. The main purpose of the law on unjustified enrichment is to redress unjustified enrichment. That has to be qualified in the case of recipients, including young recipients, who may have spent the money received or otherwise changed their position, but there is no reason why the qualification should go beyond what is necessary in the interests of justice.

Example 1. C lends money to E who is only 15. C has not been culpable or negligent in making the loan. (If he had been then rule 10(4)(b) could also be used to restrict his right to recover the amount lent.) E spends most of the money on a holiday. C claims the return of the money. Normally the whole amount would have to be returned, with interest, but here the court could make a reduced award, depending on its assessment of the equities of the situation. It could take into account, for example, whether E had other funds which could be used to make repayment and whether E had deliberately taken advantage of the situation.

Example 2. C gives money to E by mistake. E, believing in good faith that the money was intended for him, spends much of it on food, drink and entertainment. He would not otherwise have incurred this expenditure and would now be placed in financial difficulty if required to repay the full amount received. The court could take his change of position into account and reduce an award accordingly.

Example 3. A bank (C) paid E £18,000 to which he was not entitled. C was not in any way culpable in making the payment. E's role in relation to the payment was such as to raise doubts as to his good faith. C reclaims the money from E. E argues that he has given most (but, significantly, not all) of the money to T who has disappeared and who, it is now clear, was using E to assist him to defraud the bank. E says that any award should be restricted to the amount of the money which he still retains. The court would be unlikely to award C less than the full amount. E has changed his position but it would not be inequitable to award full redress against someone who facilitated a fraud and about whose good faith there are at least serious doubts.

(Example suggested by *Royal Bank of Scotland v Watt* 1991 SLT 138 where, however, the case proceeded on the footing that the defender was innocent.)

Example 4. As in the last example, a bank (C) pays E a substantial sum of money to which he is not entitled but this time E receives the money in good faith thinking that it represents the proceeds of some investments held for him by the bank. In reliance on the receipt of this money E pays a large sum to a charity. This sum is irrecoverable. If the bank claimed repayment from E, E would be able to plead rule 10(4)(a) with every prospect of success.

Example 5. C is being sued for payment of a sum. He writes to the pursuer saying, "I now accept that this payment is due and enclose my cheque for the full amount. I trust that you will now abandon the proceedings against me." The pursuer abandons the proceedings. C then says "I have changed my mind. I do not think the payment was due after all. Please let me have it back." If C sought to recover the payment he could be met by a plea based on rule 10(4)(a). In English law the same result would be reached by applying the doctrine known as "submission to an honest claim". See Goff and Jones, *Restitution* (4th ed 1993) pp 50-54. This doctrine has not been recognised in the Scottish authorities and, in situations not giving rise to an equitable bar arising from a change of position, would seem to be inconsistent with the principles underlying the Scottish law. There is no reason why someone who has, in response to a claim (honest or dishonest), paid a sum which is not due should be barred from recovery merely by virtue of that fact.

RULE 10(4)(b)

(b) that the claimant was so culpable or negligent in causing the unjustified enrichment that it would be inequitable or contrary to public policy to make a full award or grant decree unconditionally,

Comment. This paragraph enables a court to take account of the culpability of the person claiming redress for unjustified enrichment so as to reduce, or refuse, an award. It enables a flexible approach to be taken to some problems which, under the existing law, may have to be dealt with in an inflexible way. Some examples of its potential utility have already been noted. For example, in the case of *ultra vires* borrowings by local authorities it would enable a court to distinguish between a bank which culpably participated in what was, in essence, a gambling transaction and a bank which in good faith lent money to a local authority for what seemed a perfectly proper purpose. It could also be useful in other cases.

Example 1. An employer, through negligence, pays an employee too much over a period of a year. The employee received the payments in good faith, without realising that there had been an error. The employer claims repayment. Even in the absence of a change of position defence, the

court could refuse to make an award on the ground that it was the employer's own negligence which brought about the situation.

Example 2. C pays E £5000 to commit a crime. E commits the crime but is discovered and convicted. C claims the return of the money on the ground that the contract was void. C would be denied recovery under rule 10(4)(b). It would clearly be contrary to public policy to allow recovery in this type of situation. The £5000 ought to be confiscated by the state under the law on confiscation of the proceeds of crime. See the Scottish Law Commission's report on *Confiscation and Forfeiture* (Scot Law Com No 147, 1994 para 4.4 and draft Bill, clause 2(1)).

Example 3. A bank ceases to be liable to pay certain dues to a public body after a change in local government boundaries. Nevertheless it continues to make the payments, unasked, for a number of years. The most cursory of enquiries would have revealed that the payments were not due. The payments were received in good faith and were used each year for public purposes. The bank claims repayment of the amounts paid. The recipient offers to repay the amounts paid in the last two years. The bank refuses this offer and raises an action for redress of unjustified enrichment in which it seeks the return of the full amount paid in error over many years, with interest. The court could take the bank's negligence into account and, if it thought that it would be inequitable to award full redress in the circumstances, could restrict an award to the amount the recipient was willing to pay. (Example suggested by *National Bank of Scotland v Lord Advocate* (1892) 30 S L Rep 579 where exactly this result was achieved under the existing law.)

RULE 10(4)(c)

(c) that the claimant would be unjustly enriched if a full award were made or if decree were granted unconditionally

Comment. One type of case where this paragraph could be applied is that in which the person claiming redress has managed to mitigate his loss and where it would accordingly lead to an enrichment of the claimant if full redress were to be awarded. This may be considered unjust. (It will be noted that the word "unjustly" rather than "unjustifiably" is, quite deliberately, used here. In this context the reference is to ordinary ideas of justice.) It will be a question of fact whether the claimant would be enriched, and sometimes a difficult question of fact. For example, in cases where it is argued that the claimant has mitigated his loss by passing on an *ultra vires* charge to customers it may be very difficult to determine whether the increased price has had the effect of diminishing sales. There is a precedent for this type of provision in section 24 of the Finance Act 1989 (now consolidated in section 80 of the Value Added Tax Act 1994) which deals with the refunding of overpaid value added tax. Subsection (3) provides that

"it shall be a defence, in relation to a claim under this section, that repayment of an amount would unjustly enrich the claimant".

RULE 10(4)(d)

(d) that, for any other reason, it would be inequitable or contrary to public policy to make a full award or grant decree unconditionally.

Comment. This paragraph is designed to preserve the existing degree of flexibility in the law. One possible application for it would be in cases where the claimant has lured the enriched person into, say, using his property.

Example 1. C owns some vacant waste ground next to an expensive parking lot. Knowing that people who work nearby are desperate to find a place to park their cars, he opens up the vacant ground, scatters some gravel, makes entry and exit easy, and parks two cars as decoys. To avoid any suggestion of implied authorisation, he puts up a small, handwritten notice saying "No use authorised". He then secretly takes a note of the numbers of the cars parking regularly on the land and of the amount of time they are parked. After some months he claims payment of what the car owners have saved by not having to use the expensive car park. He argues that they have interfered with his property rights by using his property without authorisation and that they have been enriched at his expense and without justification. E, a regular parker, has been presented with a bill for £400 which he refuses to pay. C takes him to court. At most C is entitled to what it would have been reasonable to expect E to pay for the use of the property, with interest,⁷⁰ but the court may conclude that even that is too much and that it would be inequitable or contrary to public policy to allow C to lure people into a situation where he could present them with retrospective bills in the absence of any contract.

Example 2. C is a lazy farmer. He cannot be bothered to harvest and sell his turnips. So he leaves a few gates open and encourages E's cattle to come in and eat all the turnips. He then sends a bill to E. Even if E is enriched (which would depend on whether there had been any saving to him) he could rely on rule 10(4)(d) to avoid liability.

In both of these examples the situation is akin to that in which a person deliberately confers a benefit on another, knowing it is not due and taking the risk of not being paid, except that here C lures E into taking the benefit. The policy is the same - that people should not be able to set out deliberately to create an unjustified enrichment situation.

RULE 11

⁷⁰See schedule, para 6(1).

Bars to proceedings

11.(1)(a) An action for unjustified enrichment cannot be brought under these rules if there is, or was,
 (i) a special statutory or contractual procedure for dealing with the situation giving rise to the enrichment or
 (ii) another legal remedy for the enrichment
and if the claimant could reasonably have been expected to use that procedure or remedy.

(b) Paragraph (a) does not apply if the enactment or contract providing the other procedure or remedy indicates expressly or impliedly that it is intended to be in addition to any remedy available under the general law on unjustified enrichment.

(c) The availability of damages for loss does not preclude an action for redress of unjustified enrichment but, without prejudice to his right to claim damages for any consequential or other loss, the claimant cannot claim both redress of the other party's unjustified enrichment and damages for his corresponding loss.

(2)(a) A person who, before a court decision in proceedings to which he was not a party, has made a payment or transfer which was apparently due under the law as it was commonly supposed to be at that time cannot bring an action for unjustified enrichment in respect of that payment or transfer on the ground that the decision has shown that the law was not as it was commonly supposed to be and that the payment or transfer was accordingly not in fact due.

(b) In the preceding paragraph, "decision" in any case where a decision is affirmed or restored on appeal means the decision so affirmed or restored and not the decision affirming or restoring it.

(3) The bars mentioned in this rule are in addition to any bar resulting from the operation of the general law on personal bar.

COMMENT

This rule deals with situations where, even although all the requirements of a claim for redress of unjustified enrichment are satisfied, an action will still be barred. Sub-rules (1) and (2) are justified by two policy considerations - (a) the need to prevent special statutory procedures, such as those operating under the income tax legislation, and other remedies, such as those available under the law on contract or property, from being bypassed by resort to the general law on unjustified enrichment and (b) the need to prevent a flood of attempts to re-open settled transactions every time a court decision alters the general understanding of what the law is on a particular point. Sub-rule (3) is inserted to prevent any argument that because two bars have been expressly mentioned the ordinary law on personal bar is impliedly excluded.

RULE 11(1)

(1)(a) An action for unjustified enrichment cannot be brought under these rules if there is, or was,
 (i) a special statutory or contractual procedure for dealing with the situation giving rise to the enrichment or
 (ii) another legal remedy for the enrichment
and if the claimant could reasonably have been expected to use that procedure or remedy.

(b) Paragraph (a) does not apply if the enactment or contract providing the other procedure or remedy indicates expressly or impliedly that it is intended to be in addition to any remedy available under the general law on unjustified

enrichment.

(c) The availability of damages for loss does not preclude an action for redress of unjustified enrichment but the claimant cannot claim both redress of the other party's unjustified enrichment and damages for his corresponding loss.

Comment. The general law on unjustified enrichment is designed to deal with unforeseen situations of unjustified enrichment which have not already been adequately dealt with by other branches of the law. It is not designed to provide an alternative remedy for an enrichment situation which is already regulated by a statute or a contract or an established rule of the common law. This is the existing Scottish law in relation to recompense.⁷¹ In French law too the corresponding action is regarded as a subsidiary remedy.⁷² The Italian Civil Code contains the following provision

"Ancillary character of action. An action for unjust enrichment cannot be instituted if the person injured can exercise another action to obtain compensation for the injury suffered."⁷³

There are good policy reasons for regarding an action for the redress of unjustified enrichment as a subsidiary remedy, at least in most cases. To do otherwise would often frustrate legislative policy or the intentions of contracting parties. If, for example, a taxing statute sets up a special system of assessments and appeals against assessments, a taxpayer ought not to be able to bypass that system and go to the ordinary courts with a claim for redress of unjustified enrichment on the ground that he had been charged more tax than was legally due.⁷⁴ Similarly, if a contract provides for certain matters to be referred to arbitration, and if the arbitration clause survives termination of the rest of the contract by frustration or rescission, one party, even after frustration or rescission of the contract, ought not to be able to bypass the contractual remedy and raise an action for redress of unjustified enrichment. Even where there would be no risk of distorting legislative policy or frustrating the intentions of contracting parties it

⁷¹ See *Varney (Scotland) Ltd v Lanark Town Council* 1974 SC 245; *City of Glasgow District Council v Morrison McChlery & Co* 1985 SC 52.

⁷² See Mazeaud et Chabas, Leçons de Droit Civil, Obligations (8th ed) Vol 2, p 840.

⁷³ Art 2042 (Translation by Beltramo, Longo and Merryman, 1969)

⁷⁴ See eg *Commissioners of Inland Revenue v Adams* (1973) 48 TC 67; *British Railways Board v Glasgow Corporation* 1976 SC 224; Reid, "Failure to Exhaust Statutory Remedies" 1984 JR 185; Bradley, *Stair Memorial Encyclopaedia* Vol 1 (1987) paras 304 - 305.

may be thought undesirable to duplicate remedies unnecessarily and to create a temptation to extend the basic concepts of the law on unjustified enrichment to provide remedies where other remedies already exist. So where C's corporeal moveable property has fallen into the hands of someone else, who has not acquired ownership of the property, C can and should simply assert his property rights by claiming delivery of the property. There is no need to attempt to rely on the law on unjustified enrichment to recover possession. To do so would indeed involve a distortion of the idea of enrichment. The other party is not enriched by the mere fact that C's property has fallen temporarily into his possession. Similarly, a person who has effected emergency repairs to property which he owns in common with someone else should make his claim to a contribution from that person under the law on common property and not under the law on unjustified enrichment. And a person who can have a conveyance of his property to someone else reduced or annulled on an independent ground, such as force or fear, with the effect that the property remains his, has no need to use the law on unjustified enrichment to secure a return of the property.

The availability of a remedy by way of compensation for a loss is different from the availability of a remedy for the redress of enrichment. Rule 11(1)(c) makes it clear that the availability of damages for loss does not preclude an action for unjustified enrichment. However, the claimant cannot obtain double recovery for the same loss. The policy here is familiar both in the common law and in modern statutes. In the common law it is well established that where a contract is induced by fraud, and the defrauded party is in a position to restore what he received under the contract, he has the option of claiming damages or of reducing or rescinding the contract and claiming restitution.⁷⁵ An example of the same policy in a modern statute is section 61 of the Patents Act 1977 where it is provided that the proprietor of a patent can claim damages or an account of profits for an infringement of the patent (unless the infringer proves that at the date of the infringement he was not aware, and had no reasonable grounds for supposing, that the patent existed) but cannot obtain both in respect of the same infringement. It might be argued that to allow an enrichment claim in respect of profits made out of a delict which involves an interference with patrimonial rights, such as wrongful use of another's property or confidential information, is to frustrate the long-established policy of Scottish law against punitive damages. However, there is no public policy against allowing unjustified enrichments to be redressed - quite the reverse - and it therefore seems that the policy against punitive damages is based on upholding the purity of the idea that damages are for the compensation of loss and resisting the idea that the civil courts should have a broad

⁷⁵*Graham v Western Bank* (1864)2M 559 and (1865)3M 617; *Bryson & Co Ltd v Bryson* 1916 1SLT 361; *Smith v Sim* 1954 SC 357.

discretion to punish for conduct of which they disapprove.⁷⁶ This policy would not be frustrated by allowing redress for unjustified enrichment arising out of interferences with patrimonial rights, particularly as the measure of recovery would have regard not only to the extent of the enrichment but also to what it would have been reasonable to expect the enriched person to pay.⁷⁷

The following examples deal first with cases where there is another statutory remedy, then with cases where there is an appropriate contractual remedy, then with the effect of an available delictual remedy and finally with cases where there is an appropriate remedy provided by property law.

Example 1. C is assessed to income tax. He has a statutory right to appeal against the assessment but declines to exercise it. He pays the tax assessed and then claims the return of some of it by raising an action for redress of unjustified enrichment in which he claims that some of the tax was not due. C's action should be dismissed. He could reasonably have been expected to use the statutory procedure provided.

Example 2. C has overpaid value added tax. He raises an action founded on the general law on unjustified enrichment. This action is misconceived and incompetent. There is a specific statutory remedy (Value Added Tax Act 1994, s 80) for this type of enrichment which he can reasonably be expected to use.

Example 3. E has made profits by deliberately infringing C's patent. C has a statutory remedy in the form of a claim for an account of profits under the Patents Act 1977 s. 61. He can reasonably be expected to use this remedy rather than an ordinary action for unjustified enrichment. Section 61 of the Patents Act provides that its remedies are "without prejudice to any other jurisdiction of the court" but that is not an indication that the remedy of an account of profits is intended to be in addition to a remedy under the general law on unjustified enrichment. So paragraph 11(1)(b) does not apply.

Example 4. A wife divorced her husband. She did not claim financial provision on divorce under the Family Law (Scotland) Act 1985. She has now raised an action based on unjustified enrichment against her former husband in which

⁷⁶In its report on *Breach of Confidence* (Scot Law Com No 90, 1984, para 4.98) the Scottish Law Commission recommended that the remedy of an accounting for profits should be available in respect of a knowing and deliberate breach of an obligation of confidence.

⁷⁷See the provisions in the schedule. Only the lesser of the two amounts would be due.

she claims that he was enriched by her services in his business over the years of the marriage. This action should be dismissed. There is a statutory remedy for this situation in the Family Law (Scotland) Act 1985 which, in setting out the main principles of the law on financial provision on divorce, expressly provides that "fair account should be taken of any economic advantage derived by either party from contributions by the other". The wife could reasonably have been expected to use this remedy. She ought not to be allowed to have a second bite at the cherry by means of an action based on unjustified enrichment.

Example 5. A contract provides that any questions arising out of the premature termination of its main provisions, including any questions as to the return of anything paid or delivered under it prior to the termination, are to be referred to arbitration. This provision would, because of rule 11(1), prevent either party from raising an action for the redress of any unjustified enrichment arising out of frustration of the contract.

Example 6. E steals C's camera by snatching it from him. E is arrested shortly afterwards. He throws away the camera immediately before he is seized but it is recovered by the police. Clearly, C does not need to, and could not appropriately or competently, invoke the law on unjustified enrichment in order to secure the return of his camera. First, E is not enriched. He has had nothing other than temporary possession. Secondly, C has remedies in property law. In practice the police would usually return the camera to C. If C has to raise a civil action to get the camera back it should simply be an action for delivery founded on C's ownership or, if there are competing claimants, an action of multiple-poiniding.

Example 7. The facts are as in the last example except that E still has the camera in his possession when he is arrested. The legal position is the same. E is not enriched. C's remedies are founded on ownership rather than unjustified enrichment.

Example 8. As a result of a purported contract which is void, C's cow passes into the hands of T who purports to transfer it to E. T cannot however transfer to E property which he does not own. The cow remains the property of C. C cannot claim against E under the law on unjustified enrichment. He has a remedy based on property law. He can simply conclude for delivery of his own cow. See *Morrisson v Robertson* 1908 SC 332.

Example 9. E forces C at gunpoint to sign a disposition of a plot of land and holds C prisoner until he has registered the disposition in the register of sasines. C cannot raise an action for redress of unjustified enrichment. He has another remedy which it is reasonable to expect him to use.

He can simply raise an action for reduction of the disposition on the ground of force and fear and record the decree of reduction. That will have the effect of undoing the transfer of the property and revesting it automatically in C. There is no need to rely on the law on unjustified enrichment. C would also on these facts have an action for damages against E but that has no bearing on the question of unjustified enrichment.

Example 10. E forces C at knife-point to hand over his camera. E is caught by the police with the camera in his possession. The position is very similar to that in example 7 where E simply snatched the camera. There is no transfer of ownership. The camera still belongs to C. C cannot use the law on unjustified enrichment and does not need to. He simply claims his own camera.

Example 11. E by fraudulent means induces C, a vulnerable old lady, to sell him a valuable painting at a fraction of its value. C realises that she has been duped and asks for the painting to be returned in exchange for the price. E denies any fraud and claims that the sale was voluntary and fair. C seeks legal advice. She is told that she has an action for damages for fraud. However, she wishes to recover the painting. Because fraud makes a contract voidable rather than void,⁷⁸ property will have passed to E and a simple property remedy is not available to C. C's remedy is to rescind the contract and claim the return of the property under the law on unjustified enrichment, while offering to return the price. Rule 11(1)(c) preserves the option, which she has under the existing law, of claiming damages for the delict or rescinding and claiming restitution.

Example 12. C hires a car to E. At the end of the hire period E retains the car and hires it out to someone else for two days. E then returns the car. The contract between C and E obliges E to return the car at the end of the hire period but does not say what is to happen if he does not. C could claim damages for breach of contract but, let us suppose, could establish only a minimal actual loss as there was no other customer for the car. Paragraph (c) enables C to claim redress for E's unjustified enrichment in this situation notwithstanding the availability of the small claim for damages. C's claim is not precluded by the rule that mere breach of contract is not regarded as an interference with patrimonial rights because his right to the exclusive use of the car in the period after the end of

⁷⁸See *Graham v Western Bank* (1865)3M 617 by Lord Ardmillan at p 641. "A contract induced by fraud is ... not void, but voidable. The party defrauded has a right to set aside, to reduce, the contract and on reduction to obtain restitution in *integrum* - that is, each party restoring what was respectively contracted for."

the contract flows from his ownership of the car and not from the contract.

Rule 11(1) may also help to solve some cases of indirect enrichment or apparent indirect enrichment.

Example 1. C has a contract with his bank (T) whereby the bank, in return for certain charges, is to pay £1000 once a year to X. In breach of this contract the bank mistakenly pays to E, to whom C owes nothing, and debits C's account. C cannot recover the money from E because he has a perfectly adequate contractual remedy against the bank. (This result could also be reached by applying the word "direct" in rule 3(1). E's enrichment is not the direct result of a transfer by C. E has been enriched at the expense of T, not C.) The bank can claim repayment from E, although E might, depending on the circumstances, have defences. See rule 10.

Example 2. As in the last example, C has a standing order with his bank (T) whereby the bank is to pay £1000 once a year to E. The bank duly pays in accordance with the order. However, C has forgotten to cancel the order and a payment is made to E which is not due. This time C can recover from E. Rule 11(1) does not apply. C has no contractual remedy. The bank was acting within its authority and was therefore paying on behalf of C. This is not therefore a case where E was enriched indirectly at C's expense. E was enriched directly at C's expense through the hand of his agent, T.

RULE 11(2)

(2)(a) A person who, before a court decision in proceedings to which he was not a party, has made a payment or transfer which was apparently due under the law as it was commonly supposed to be at that time cannot bring an action based on unjustified enrichment in respect of that payment or transfer on the ground that the decision has shown that the law was not as it was commonly supposed to be and that the payment or transfer was accordingly not in fact due.

(b) In the preceding paragraph, "decision" in any case where a decision is affirmed or restored on appeal means the decision so affirmed or restored and not the decision affirming or restoring it.

Comment. One of the fears which has often been expressed about allowing claims for unjustified enrichment based on payments made under an error of law is that this would lead to the reopening of many settled transactions. Thousands of people who had paid on what they assumed to be the true state of the law might lodge claims for repayment if a court decision showed that that assumption had been incorrect. This sub-rule is designed to allay these fears. It is, of course, unjust in its effect on those who have already paid in error, but it is nonetheless justifiable on the same sort of ground as the law on prescription and limitation of actions is justifiable. It protects the security of receipts which the recipients could reasonably have regarded as secure. At the same time it allows the person who actually challenges the

erroneous common understanding of the law to reap the benefit of a successful challenge. It also, because it is only a bar to bringing a new action, allows those who have already commenced proceedings to reap the benefit of the successful challenge. For similar responses to the same policy considerations, see *Murphy v Attorney General* [1982] IR 241, where the Irish Supreme Court, in holding that certain taxes had been levied unconstitutionally, denied recovery to those who had not already commenced proceedings for recovery, and *Defrenne v Société Anonyme Belge de Navigation Aérienne (SABENA)* [1976] 2 CMLR 98 where the European Court of Justice adopted a similar technique.

RULE 11(3)

(3) The bars mentioned in this rule are in addition to any bar resulting from the operation of the general law on personal bar.

Comment. The rules already cater for many situations of personal bar in the provision on change of position (rule 10(4)(a)). However, personal bar is a doctrine of potentially wide application and it is desirable to make it clear that it is not impliedly excluded by the rules.

RULE 12

Areas of law not affected

12. (1) These rules replace the existing Scottish common law on unjustified enrichment, including

- (a) the common law on restitution in so far as it is part of the law on unjustified enrichment
- (b) the common law on repetition and recompense, and
- (c) the *condictio indebiti*; the *condictio causa data causa non secuta*; the *condictio ob turpem vel iniustam causam*; the *condictio ob non causam*; the *condictio sine causa*; the *actio in quantum locupletior factus est*; and the *actio de in rem verso* in so far as they form part of the existing law.

(2) Nothing in these rules affects

- (a) any enacted law
- (b) the law on rights of relief of cautioners and co-obligants
- (c) the law on subrogation of insurers or those who have paid an indemnity
- (d) the law derived from the case of *Walker v Milne* (whereby loss suffered or expenditure incurred in the expectation of a contract may in certain circumstances be recovered)
- (e) the law on the rights of a defrauded person as against the creditors of the person who defrauded him
- (f) the law on the recovery by a person of the possession or control of his own property or of any other property to the possession or control of which he is entitled
- (g) the law on the special obligations of those in a fiduciary position
- (h) the law on general average or salvage
- (i) the law on *negotiorum gestio*.

COMMENT

The boundaries between the law on unjustified enrichment and other areas of the law are not always clear. Several legal doctrines seem to be concerned, even if only in a rather special way, with redressing unjustified enrichment. The purpose of rule 12 is to identify the scope of new statutory rules on unjustified enrichment. Rule 12 makes it clear that the new rules replace only the existing Scottish common law on unjustified enrichment.

The replacement of restitution is only to the extent that it forms part of the law on unjustified enrichment. There will continue to be an obligation of restitution in relation to property which is claimed by the owner or someone entitled to its possession. This obligation to restore is simply the counterpart of the claimant's right to property or possession. It has nothing to do with the temporary possessor's enrichment.

The rules do not affect any statutory provision. So, for example, the recent enactment by the United Kingdom of the provisions of the International Convention on Salvage 1989⁷⁹ would be completely unaffected by the rules. So would the legislation on the rights and obligations of landlords and tenants in relation to tenants' improvements.

Rule 12 also identifies certain areas of the law which might be thought to be based on the redress of unjustified enrichment but which are to be unaffected by the new rules because they have well-developed rules of their own which are sometimes incompatible with the new rules on unjustified enrichment. Reference has already been made to rule 12(2)(f) which makes it clear that the new rules do not affect the law on the recovery by a person of his own property and reinforces the point made above in relation to the scope of restitution. The new rules are concerned only with the redress of unjustified enrichment (which may sometimes require the reconveyance of property acquired by the enriched person), not with the right to assert ownership of, or claim delivery of, property which has never ceased to belong to the claimant. The law on the special obligations of fiduciaries differs from the law on unjustified enrichment in that the policy behind it is not so much to redress an imbalance as to encourage high standards of probity. Accordingly the obligation to account for profits could only with some artificiality be said to be to redress an enrichment "at the expense of" a beneficiary. Salvage is still referred to in rule 12(2)(h) because the enacted law referred to above is not yet in force. The law on *negotiorum gestio* differs from the law on unjustified enrichment in that the gestor can, in most cases, recover his expenses and outlays regardless of whether the other person has been enriched.⁸⁰ It may be worth considering at a later stage whether any of the excluded topics could be brought, in whole or in part, within the general rules on unjustified enrichment. For the meantime it seems safer to exclude them.

RULE 13

Interpretation

- 13.(1) In these rules, and in the schedule where applicable,
(a) "court decree" includes the decision of any tribunal, quasi-

⁷⁹Merchant Shipping (Salvage and Pollution) Act 1994 (to be brought into force by statutory instrument).

⁸⁰See Whitty, "Indirect Enrichment in Scots Law: Part III" 1994 JR (forthcoming).

- judicial body or arbiter having jurisdiction
- (b) "enactment" includes subordinate legislation
 - (c) "gift" includes a gratuitous waiver, renunciation or discharge of a right
 - (d) "he" means he, she or it; "him" means him, her or it; and "his" means his, hers or its
 - (e) "patrimonial rights" include rights flowing from the ownership of property, rights to protect confidential information and other rights having an economic value but do not include purely personal rights, such as the rights to life, liberty, bodily integrity or reputation, and
 - (f) "property" means property of any kind, corporeal or incorporeal, heritable or moveable.

(2) Any reference in these rules to a contract which has been terminated by rescission or frustration includes a reference to a contract which has been substantially terminated by rescission or frustration and a reference to a severable part of a contract which has been terminated by rescission or frustration.

COMMENT

This rule is concerned with the interpretation of some terms used in the rules. The definition of "property" is unnecessary, as the word would have this meaning anyway, but is inserted because in the past some people have doubted whether all of the rules on unjustified enrichment applied equally to moveable and heritable property. It is also useful to make it clear that incorporeal property is included. Paragraph (2) is included because certain clauses of a contract, such as arbitration clauses, will often survive rescission or frustration. It also covers cases of instalment contracts where only part may be rescinded or frustrated.

SCHEDULE

REDRESS DUE

COMMENTS ON SCHEDULE

The basic policy on the measure of recovery is that it should be such as to redress the enriched person's enrichment at the other's expense.⁸¹ In straightforward cases involving the transfer of money or property from C to E that gives rise to no problem because C's loss is the same as E's gain. In other cases it often means that the redress due should be the lesser of E's enrichment and the amount necessary to remove C's detriment. The latter amount can often be expressed as the amount which it would be reasonable to expect E to pay C for the benefit in question or for the chance of acquiring it. This is the general theme which runs through the provisions in the schedule.

The provisions in the schedule reflect three other major policy choices.

⁸¹See rule 9(1).

First, there is a bias in favour of redress in money.⁸² The rules are concerned with an obligation to redress unjustified enrichment - not with an obligation to return property to its owner. Money is by far the most flexible and convenient way of making redress. This is most clearly seen in relation to the fruits of property which has temporarily passed to the enriched person. To require them to be transferred in kind leads to complications because, for one thing, it can cost money to ingather fruits. Monetary compensation enables attention to be concentrated on net benefit. The position is not the same as in the case of a claim by the owner for the return of property which has never left his ownership. In this latter case the owner has always owned the fruits and there may be no alternative, consistent with principle, to providing for return in kind. It may be asked whether all redress for unjustified enrichment should not be in the form of money. This, however, would be going too far. Where, for example, a contract for the sale of goods is void or is rescinded on the goods being rejected by the buyer, the expectations of the parties will generally be that the property should be restored where it is possible for it to be restored in the same condition as it was on receipt. The rules in the schedule, however, confine the obligation to restore actual property to those cases where it gives rise to least difficulty.

Secondly, there is a bias in favour of value received as the measure of enrichment. This is balanced by the provisions in the rules themselves enabling a court to modify an award on various equitable grounds, including change of position on the part of the enriched person. To make the normal measure of enrichment the value surviving in the hands of the enriched person would not be a wise solution.⁸³ It gives rise to certain obvious difficulties and dangers. What is the relevant point in time? We are concerned with an obligation, not a court-based remedy. There may never be a court case. It would seem odd therefore to refer to the value surviving on any date associated with court proceedings. As an

⁸²A general development in this direction has been noted in French law. See Malaurie, *Les Restitutions en Droit Civil* (1991) pp 104 - 108.

⁸³"Value surviving" is the basic rule in German enrichment law but it has led to unhappy results in some cases and has been much criticised. See Visser, "Responsibility to Return Lost Enrichment" 1992 *Acta Juridica* 175. "Placing the risk entirely on the shoulders of the enrichment-creditor, not only for the loss of the benefit received but also for any related expenditure or loss, has drawn increasing criticism from academic writers....The widely held view is that the basic principle of the law of unjustified enrichment should be that that which was received must be returned and that loss of enrichment may be claimed only as an exceptional defence in circumstances where care has been taken to ensure that it is equitable to place the risk for the loss of enrichment on the creditor." (Art. cited, at p 187: footnotes omitted.)

alternative, reference could perhaps be made to value surviving on the date when the claimant intimates his claim for redress, but even that seems odd. There is an obligation before then and it ought to be possible to say what it is. There is therefore a difficulty in choosing a date for a value surviving test. Another difficulty is in calculating value surviving. In many cases this will involve tracing particular funds or holdings of property and deciding, for example, whether expenditure should be attributed to the funds or property acquired from the claimant or to other funds or property of the enriched person. Scottish law has generally managed to keep such tracing exercises, with all their difficulties and anomalies, within the narrowest of bounds and it would not be wise to seek to extend them. Yet another difficulty is that a value surviving test cannot readily be applied to those cases where the enrichment takes the form of being saved a loss or expenditure. Once it is saved, it is always saved. It is not easy to see how the incurring of new expenditures could be "traced", in any meaningful sense, to a particular saving. These are some of the practical difficulties of using a value surviving test. The main danger in a value surviving test is that it makes the amount of redress due depend on the choices of the enriched person after the enriching event has occurred. The potential for abuse and injustice is obvious. For all of these reasons the rules in the schedule take value received as the starting point.

Thirdly, the role of good or bad faith is limited. An earlier version of the draft rules drew a distinction in many cases (including cases involving the use or consumption of another's property) between the acquirer of the benefit in good faith and the acquirer in bad faith. It is tempting to make use of this distinction in "interference" cases. It seems to reflect the principle that a person should not be allowed to profit from his own wrong. However, it is inconsistent with the basic principle governing the measure of redress because it loses sight of the point that enrichment "at the expense of" the claimant cannot be measured solely by reference to the enriched person's gain. More importantly, it leads to absurd results in some cases.

Example 1. E's house is about to catch fire. There is a small flare-up in an area packed with flammable material. E seizes an old jacket belonging to his estranged wife (C) and uses it, knowing what he is doing, to extinguish the flames. This saves his house, uninsured at the time, from certain destruction. His wife learns what has happened. If E's use in bad faith of his wife's property meant that he was liable for the value of the loss it prevented he would be liable to pay her the full value of his house. This would be an unreasonable and unacceptable result.

Example 2. A contractor (E) is building a motorway. To avoid incurring a penalty of thousands of pounds he has to complete a section that day. A vital machine breaks down. It could be temporarily repaired by using a bolt from an old piece of rusty farm machinery lying nearby and belonging to C, the farmer. E knows that C, who was a

leading campaigner against the motorway, would not give him any help at all. So in complete bad faith, knowing that he has no right to do so, he borrows the bolt, repairs his machine, completes his section, avoids his penalty and enriches himself at C's expense. Unfortunately, as he is returning the bolt to the machine, C comes along and discovers what has happened. If E were liable to pay C the whole amount of the enrichment which he had acquired by interfering with C's property in bad faith, he would be bound to pay C thousands of pounds for the use of an old bolt for a short time. This, it is thought, would be widely regarded as an unreasonable result.

Example 3. The facts are as in the last example except that this time, instead of avoiding a penalty, E stands to collect a bonus of many thousands of pounds if he completes the section on time. This should make no difference. It would be unsatisfactory to draw any distinction in this respect between enrichment by being saved a loss and enrichment by making a gain.

In all of these cases it seems clear that a better measure of recovery would be the amount which it would be reasonable to expect E to pay C for the unauthorised use of the property. That in itself can have a measure of flexibility built into it. For example, where E makes a vast profit by publishing confidential information relating to C, thus interfering with C's patrimonial rights, it should be possible to take into account, in assessing what it would be reasonable to expect E to pay C, the fact that the nature of the interference was such that C would have been unwilling to give permission lightly if at all.⁸⁴

PART I

E acquires benefit directly from C

1. This part of the schedule applies where the enriched person (E) has been enriched by acquiring a benefit directly from the claimant (C).

Comment. The schedule deals first with cases of direct enrichment and then, in part II, with indirect enrichment.

Para 2(1)

2.(1) Where the unjustified enrichment resulted from the acquisition of money by E from C, the redress due by E to C is the amount acquired, with interest from the time of acquisition.

Comment. This paragraph applies where the unjustified enrichment results from the acquisition of money by E from C. The redress due is repayment, with interest.

Example 1. A pays B an amount which he thinks he owes him. A has overlooked the fact that he has already paid this

⁸⁴See schedule, para 14.

bill. The amount is recoverable, with interest.

Example 2. The Inland Revenue charge a building society tax under a regulation which is invalid because it is ultra vires. The building society can recover the amount paid, with interest. (Example suggested by *Woolwich Equitable Building Society v IRC* [1993] 1 AC 70 - a simple case made difficult by the inadequacies of the existing English law.)

Example 3. A public body charges C more than it is entitled to charge under a statute. C can recover the amount overpaid, with interest. (Example suggested by *British Oxygen Co v South of Scotland Electricity Board* 1959 SC (HL) 17.)

Example 4. A bank charges a customer more for certain financial services than it is entitled to charge under its contract with the customer. It has deducted the charge from the customer's account before the error is noticed. The amount overcharged is recoverable, with interest.

Example 5. E, who is not in any fiduciary relationship with C, but who happens by chance to have access to some funds belonging to C, takes money from C's funds. C can recover the amount taken, with interest. (Example suggested by *Extruded Welding Wire (Sales) Ltd v McLachlan and Brown* 1986 SLT 314.)

Example 6. A buyer has paid in advance for goods. When the goods are delivered they are manifestly defective and do not conform to contract. The buyer rejects the goods and rescinds the contract. The seller is bound to refund the price, with interest on it from the date on which it was paid. This is the same rule as in articles 81 and 84 of the United Nations Convention on Contracts for the International Sale of Goods.

Para 2(2)(a) and(b)

(2) Where the unjustified enrichment resulted from the acquisition of other property by E from C, the redress due by E to C is

(a) if the property is corporeal and can be returned in substantially the same condition as it was in at the time of the acquisition, the return of the property in that condition along with a sum of money to take account of any benefit derived by E from the ownership, use or possession of the property and interest on that sum where appropriate

(b) if the property is corporeal and cannot be returned in substantially the same condition as it was in at the time of the acquisition, the amount which it would have been reasonable to expect E to pay C for the property at the time of its acquisition by E, with interest on that amount from the time of acquisition

Comment. These provisions apply where the unjustified enrichment results from the acquisition of the ownership of property other than money. It is important to remember that the rules are concerned with the personal obligations and rights arising from unjustified enrichment, not with vindicatory claims by property

owners for the return of their own property. So we are concerned here with cases where corporeal property has passed to the enriched person. The basic rule is that if the enrichment is unjustified, within the meaning of the rules, and if the property is in substantially the same condition as it was in at the time of the acquisition by the enriched person, the property must be returned. This may be by redelivery, in the case of corporeal moveables; or by a reconveyance in the case of immoveable property; or by any other means by which ownership can be restored. If the property cannot be returned in substantially the same condition its value must be paid. In the case where the property can be returned the enriched person must also pay a sum of money to take account of any benefit derived by him from the ownership, use or possession of the property, and interest on that sum where appropriate. Where a sum of money is payable in lieu of the return of the property, the enriched person must pay interest on that sum.

Example 1. A seller has supplied goods under a sales contract which provides that if the price is not paid in full by a certain date the seller can rescind the contract. The buyer has never had any intention of paying. He has just wanted to obtain the free use of the goods for a period. The buyer fails to pay and the seller rescinds the contract. The goods are in substantially the same condition as they were in when acquired by the buyer. The buyer must return the goods and account to the seller for any benefit derived from them. Again this is the same rule as in article 84 of the United Nations Convention on Contracts for the International Sale of Goods.

Example 2. C transferred goods to E under a contract of sale which both parties assumed to be valid but which turns out to be void. Property passed to E by delivery, coupled with the intention to transfer it. E consumed the goods, which were at the time his to consume. (This is not, therefore, an "interference" case.) E has not paid for the goods. E must pay, not the contract price, because the contract was void, but the amount which it would have been reasonable to expect him to pay C for the goods at the time of their acquisition (which would normally be their market value), with interest on that amount from the time of acquisition. (Example suggested by *Wilson v Marquis of Breadalbane* (1859) 21D 957.)

Example 3. The facts are as in the last example but the goods were destroyed accidentally by fire while in E's ownership. Again he must pay the market value, with interest. As the goods were his, he ought to have had them covered by insurance. There is a general principle that the owner bears the risk of loss. (*Res perit domino.*) C, thinking the goods were now E's, would have acted quite reasonably if he had cancelled his insurance. If the facts of a particular case made it inequitable to require E to pay the full market value (for example, if C had been culpable in bringing about the situation and it would not

have been reasonable to expect E to insure) the court would have a discretion to modify the award under rule 10.

Example 4. The facts are as in the last example but the goods are badly damaged while in E's ownership. Again he must pay the market value, with interest. He may or may not have been insured against the damage. That is his concern, not C's.

Para 2(2)(c)

(c) if the property is incorporeal, the return of the property where possible and, whether or not return is possible, a sum of money to take account of any benefit derived by E from the ownership of the property and interest on that sum where appropriate

Comment. Incorporeal property differs from corporeal property in a number of respects which are significant in the present context and which, taken together, appear to justify a different rule on the measure of recovery. First, it is not helpful to talk of incorporeal property being in substantially the same condition as it was in at the time of acquisition. Incorporeal property - such as a debt, or a bond, or a share in a company - may cease to exist or become more or less valuable but it cannot change its physical condition. Secondly, incorporeal property cannot be physically used or possessed. Thirdly, it is not so easy, and may often be impossible, to insure against its disappearance. There is something unsatisfying about having a different rule for incorporeal property, and a great deal of thought has been given to ways of avoiding this, but for the time being it appears that a different rule may be the least unsatisfactory solution. The rule adopted is that the property should be returned if possible, along with a sum of money to take account of benefits, such as interest payments or dividends, received by the enriched person while owner of the property. Where the property cannot be returned - for example, where it consisted of a share in a partnership which has been dissolved or shares in a company which has been liquidated - the rule adopted is that the enriched person does not have to pay the market value of the property when it was acquired (as would be the case with corporeal property) but has to pay a sum in respect of benefits derived by him from his ownership, which would include property received in replacement of the property which has disappeared. It would be unsatisfactory to require the value of the property when received to be paid when the property could not be returned. That would result in dramatic and arbitrary differences in result depending on whether the issue arose, say, just before or just after a liquidation.

Example 1. C transfers shares worth £5000 to E for no consideration, wrongly thinking that he was bound to do so. In fact the shares should have been transferred to T. Four different situations now have to be considered depending on whether, by the time C discovers his error, the shares have

- (i) increased in value (to, say, £8000)
- (ii) decreased in value (to, say, £2000)
- (iii) ceased to exist because (say, because the

company has been liquidated, leaving nothing for the shareholders) or
(iv) been converted into shares of a different type (worth, say, £6000) on a company re-organisation.

In cases (i) and (ii) E is bound to re-transfer the shares to C and pay a sum to take account of any dividends received. In case (iii) C is only bound to pay a sum in respect of any dividends received - and in the circumstances there might well not have been any. In case (iv) E is bound to transfer the replacement shares to C, again with a sum to take account of any dividends received. Interest may also be payable. These results seem reasonable. The real difficulty arises if there has been consideration for the shares.

Example 2. The facts are the same as in example 1, except that a seller transfers the shares (worth £5000) to a buyer for £5000 under a contract which turns out to be void. (In practice the transfer would often be affected by the same ground of nullity but we must suppose, for the purposes of this example, that that is not so in this case.) In case (i) (where the shares have increased in value) the buyer is bound to re-transfer them, plus dividends, provided that the seller offers to repay the price. In case (ii) (where the shares have decreased in value) it is more likely that the buyer would be the claimant once the facts are discovered. The seller would be bound to repay the price if the buyer offered to re-transfer the shares, plus dividends. In case (iii) (liquidation) it would again be the buyer who would be the likely claimant and the seller would be bound to repay the price, in exchange only for any dividends. In case (iv) (company re-organisation) the buyer would be bound to transfer the replacement shares, plus dividends, and the seller would be bound to repay the price. Again interest might be payable on the sum of money in each case. The hardest case is (iii) (liquidation) where the seller must repay the price for nothing, but case (ii) (decrease in value) could also give rise to apparently harsh results. However, contracts are not made null for no reason. Also, if the void transaction had never been entered into and the seller had retained the shares he would have borne the risk of any decrease in value or disappearance in any event. Finally, a court could take into account any culpability or negligence on the part of the claimant, or any change of position on the part of the enriched person and could refuse or reduce an award under rule 10. For all these reasons, the results seem acceptable, and certainly preferable to the arbitrary distinctions which would result from having one rule for decreases in value and another for cases where the shares had ceased to exist.

Para 3

3. Where the unjustified enrichment resulted from the addition of value to E's property, the redress due by E to C is the amount which it would have been

reasonable to expect E to pay C for his work or expenditure in adding that value, or the amount of value added (at the time when the addition was made), if less, with interest where appropriate

Comment. The measure of recovery here is, broadly speaking, the lesser of C's loss and E's gain. It is only that amount which, in this type of situation, can be said to represent E's enrichment at the expense of C.

Example 1. C builds a house in good faith on E's land, thinking that the land belongs to him. E must pay the amount which it would be reasonable to expect him to have had to pay C for his work or expenditure. That might well be less than the amount of value added to E's land. However, if C had acted in a wasteful and inefficient way and had actually added less value to E's land than the value of the work and materials put into the building, E only has to pay the lesser amount. It will be remembered that rule 10 gives courts powers to modify an award in certain cases of this type.

Para 4

4. Where the unjustified enrichment resulted from the discharge or reduction of any liability of E by means of a payment by C, the redress due by E to C is the amount paid, with interest from the date of payment.

Comment. This paragraph covers the case where C pays E's debt, or meets E's liability, in circumstances which give rise to a claim by C against E for unjustified enrichment. The measure of recovery is the amount paid, with interest from the date of payment.

Para 5

5. Where the unjustified enrichment resulted from E's being saved a loss or expenditure by receiving C's services, the redress due by E to C is the amount which it would have been reasonable to expect E to pay for those services, or the amount of loss or expenditure saved, if less, with interest where appropriate.

Example. An employee continues to work for a company under a contract which, unknown to both parties, has come to an end. The employee has not yet been paid for the period in question. He is entitled to redress for unjustified enrichment based on what it would have been reasonable to expect the company to have had to pay for his services, or the amount which it has saved by not being contractually bound to pay him, if that is less. Under both measures the redress due would be likely to be based on the rates of remuneration payable during the period when the contract was in operation.

Para 6

6.(1) Where the unjustified enrichment resulted from E's being saved a loss or expenditure by using or possessing C's property, the redress due by E to C is the amount which it would have been reasonable to expect E to pay for that use or possession, or the amount of loss or expenditure saved, if less, with interest where appropriate.

(2) Where the unjustified enrichment resulted from E's being saved a loss or expenditure by consuming C's property, the redress due by E to C is the amount which it would have been reasonable to expect E to pay for the property at the time of consumption, or the amount of loss or expenditure saved, if less, with interest where appropriate.

(3) Where the unjustified enrichment resulted from E's being saved a loss or expenditure by interfering with C's patrimonial rights in any other way, the redress due by E to C is the amount which it would have been reasonable to expect E to pay C, at the time of the interference, for permission to interfere with those rights in that way in the circumstances, or the amount of loss or expenditure saved, if less, with interest where appropriate.

Comment. It is tempting to say that the measure of redress due in the types of case covered by paragraph 6 should be simply the amount which it would have been reasonable to expect the enriched person to have had to pay for the benefit received, without reference to the amount saved. However, that would be inconsistent with the principle underlying the measure of recovery and would have the serious disadvantage that it would lead to abrupt differences between cases where there was, say, a saving of a penny and cases where there was no saving at all. If the element of saving is used in the concept of enrichment then, in order to avoid unacceptable results, it has to be used in the measure of recovery too.

In several of the provisions in the schedule reference is made to interest being due "where appropriate". Under the existing law interest may be due on general principles on, for example, sums due by way of recompense for the use of another person's property. See eg *Shetland Islands Council v BP Petroleum Development Ltd* 1990 SLT 82. The references to interest "where appropriate" are intended to preserve this position.

Example 1. A company has in good faith, as a result of an error, used storage space belonging to another company, thus saving itself expenditure on renting equivalent space. The using company is bound to pay the owning company the amount which it would have been reasonable to expect it to pay for the use of that storage space or the amount of its saving, if less. In this type of case the two amounts would probably be the same.

Example 2. An oil company occupies land belonging to a local authority for a number of years under informal arrangements which are eventually held not to constitute a lease, thus saving itself the rent which would have been payable if there had been a lease. The oil company is liable to pay what it would have been reasonable to expect it to pay for the use of the land, or the amount of rent saved if less. The two amounts are likely to be the same in this type of case. (Example suggested by *Shetland Islands Council v BP Petroleum Development Ltd* 1990 SLT 82.)

Example 3. Landlords purport to bring a lease to an end. They take legal proceedings against the tenants for removal. The proceedings are defended by the tenants in good faith and drag on for some years, during which the

tenants continue to occupy the premises. It is eventually held that the landlords did validly terminate the lease. The tenants are bound to pay what it would have been reasonable to expect them to pay for the use of the premises during the period of occupation since the termination of the lease, or the amount of rent saved, if less. In this case the two amounts would be likely to be the same. (Example based on *HMV Fields Properties Ltd v Skirt 'N' Slack Centre of London Ltd* 1986 SLT 114.)

Example 4. E uses C's word-processor to write a story which wins a prize of £5000. He has thereby saved himself the cost of renting a machine. This is not a case where he has used C's property "in order to" obtain money from a third party (as would be the case if he had rented C's machine to the third party). He has used C's property for his own purposes to write a story which may or may not be worth money. His enrichment comes under part I, not part II, of the schedule and the redress due is the amount which it would have been reasonable to expect E to have had to pay for the use of the machine or the amount of expenditure he has saved, if less.

Example 5. A consignment of meat is delivered to a hospital by mistake. It ought to have been sent to another hospital. The hospital consumes the meat in good faith and, because of the delivery, has to buy less to restock its freezers. It must pay the amount which it would be reasonable to expect it to have had to pay for the meat at the time of its consumption or the amount which it has saved, if less. In this type of case the amounts are likely to be the same.

Example 6. A large package of prime quality meat is delivered to a private individual by mistake. The meat is consumed and the individual is saved some expense as a result but not as much as the value of the meat because he would never have chosen to buy so much top quality meat at one time. In this case the redress due is the amount saved, which might be considerably less than the market value of the meat. (Example suggested by *Findlay v Monro* (1698) Mor 1767.)

Para 7

7. Where the unjustified enrichment resulted from the acquisition of any other benefit by E from C, the redress due by E to C is the amount which it would have been reasonable to expect E to pay C for the benefit at the time of acquisition, or the amount of E's actual enrichment, if less, with interest where appropriate.

Comment. This is simply a residual provision which applies more generally the principle underlying the specific cases already mentioned.

PART II

E acquires benefit from T at indirect expense of C

8. This part of the schedule applies where the enriched person (E) has been enriched indirectly at the expense of the claimant (C).

Comment. Different rules are required for cases where E has been enriched indirectly at the expense of C but only because the enrichment takes a different form. The basic principles are the same.

Para 9

9. Where E has enriched himself by using or disposing of C's property, or otherwise interfering with C's patrimonial rights, in order to obtain money or money's worth from a third party (T) the redress due by E to C is the amount which it would have been reasonable for E to pay C at the time of the use, disposal or interference for permission to use or dispose of C's property or to interfere with his rights in that way, or the amount of E's actual enrichment attributable to the use, disposal or interference, if less, with interest where appropriate.

Comment. The redress due under this paragraph is in addition to any redress due under part I.⁸⁵ There may be, for example, cases where the enriched person first saves himself expenditure by using C's property himself and then makes money out of C's property by renting it out to T. For the first period part I would apply and for the second period part II would apply.

In the following examples it is only part II which applies.

Example 1. A doctor sells confidential medical information relating to a famous patient to a newspaper for a large sum of money. The doctor has interfered with the patient's rights to have the confidentiality of the information respected - rights which are within the definition of patrimonial rights. The patient would not, for twice the sum received by the doctor, have granted permission for the information to be published. The patient is entitled to recover from the doctor the amount he received from the newspaper.

Example 2. A consignment of goods is sent by a manufacturer to the wrong retailer. The property in the goods remains with the manufacturer. The retailer has ordered a similar consignment from another supplier with a later delivery date and thinks that his supplier has simply delivered early. He receives and sells the goods in good faith at a price slightly in excess of the normal wholesale price. The wholesale price remains stable throughout the period in question. The retailer is bound to pay the manufacturer the amount which it would be reasonable to expect him to have had to pay for the goods, which would presumably be the usual wholesale price, but can retain any profit made on their resale.

⁸⁵See rule 9(3).

Example 3. The facts are as in the last example but the market changes between the receipt of the goods by the retailer and his disposal of them. He sells the goods at a price greatly in excess of the normal wholesale price which the intended deliverer would have paid. The retailer is bound to pay the manufacturer the amount which it would be reasonable for him to pay for the goods at the time of their disposal by him, which would, in the absence of special circumstances, be the increased wholesale price at that time. Again he could keep any element of profit which is no more than the reward for his retailing effort. The manufacturer will have had to supply his real customer at the contract price. If the goods had not been disposed of by the retailer the manufacturer would have been able to reclaim them and sell them at the prevailing higher price.

Example 4. The facts are as in the last example except that the retailer is in bad faith. He knows the goods are not meant for him but, as they are in great demand, sells them. The redress due is the same as in the last example. It might be argued that, as the retailer was in bad faith, he should be liable to account for the element of profit due to his retailing efforts. There is a superficial attraction in this approach. However, it is not clear why the manufacturer should receive a windfall gain. In many "interference" cases, as we saw earlier, to relate the measure of recovery solely to the profits made or losses avoided, even in cases of bad faith, would lead to unacceptable results.

Para 10

10. Where E has been indirectly enriched at the expense of C as a result of the transfer of a benefit from a third party (T) in the circumstances covered by rule 8(2) (transfer of benefit arising from unjustified enrichment to person taking otherwise than in good faith and for value) T is treated as if he had been acting as E's agent and accordingly the redress due by E to C is the same, and is due on the same conditions, as it would have been if E had acquired the benefit directly from C.

Comment. This paragraph deals with the situation where T has been enriched at the expense of C (the enrichment being unjustified or being justified only by a voidable transaction), where C cannot recover from T or cannot reasonably be expected to attempt to recover from T, and where T has transferred any benefit arising out of the enrichment to E who does not take in good faith and for value. The rule is that E is treated as if he had acquired the benefit directly from C, through the actings of T as his agent. Accordingly, the redress due will depend on the nature of the benefit transferred.

Example 1. T, a few days before attaining the age of 16, buys from C, on credit, an expensive present for T's mother. The contract of sale is void because of T's lack of contractual capacity. T, having attained the age of 16, gives the item to her mother (E). T has no money and an

action against her would be pointless. C can recover the present (or its value, if it cannot be returned in substantially the same condition as when bought) from E.

Example 2. T defrauds C of a sum of money and transfers the proceeds of his fraud to E who takes gratuitously. T is not worth suing. C can recover the sum of money from E, with interest from the date when it was acquired by T.

Example 3. C gives £300 to T. The gift was made in error. T, fearing that the error will be discovered and the money reclaimed, quickly gives it to his daughter, E. T has no money and is not worth suing. C can recover from E, with interest.

Para 11.

11. Where E has been indirectly enriched at the expense of C in the circumstances covered by rule 8(3) (transfers from trusts or executries) the redress due by E to C is

(1) where C is a creditor claiming under rule 8(3)(a) the amount of the debt due to C out of the estate or the amount of E's enrichment out of the estate, whichever is the less, with interest where appropriate

(2) where C is a true beneficiary claiming under rule 8(3)(b), and the benefit due to him out of the estate and received by E was a special legacy, the transfer of the subject matter of the legacy along with a sum to take account of any benefit derived by E from its use or possession or, if the subject matter of the legacy cannot be transferred in substantially the same condition as it was in when acquired by E, an amount representing its value when acquired by E, with interest from that date

(3) where C is a true beneficiary claiming under rule 8(3)(b), and the benefit due to him out of the estate and received by E was not a special legacy, the amount of the benefit due to C out of the estate or the amount of E's unjustified enrichment out of the estate, whichever is the less, with interest where appropriate.

Comment. This paragraph deals with the special case of transfers out of trusts or executries. The general principle is that the recipient is bound to pay the lesser of his own unjustified enrichment and the amount due to the creditor or true beneficiary. However, in the case of a special legacy (such as a bequest of a particular item of jewellery) which has been transferred to the wrong person by an executor, the subject matter of the legacy must be restored to the true legatee if possible.

Example. An executor conveys a house to a legatee who appears to be entitled to it under the testator's will. The disposition is recorded in the Register of Sasines. Then, after the executry has been wound up, another will turns up which revokes the previous one and leaves the house to someone else. The true legatee claims the house from the false beneficiary. The false beneficiary is bound to convey the house to the true legatee and account for any benefit derived from the use of it, such as rents received. A court

could modify the award, or grant decree subject to conditions, in order to achieve an equitable result if, for example, in reliance on the legacy the false beneficiary had changed his or her position. See rule 10(4)(a).

PART III

General

12. Any reference in this schedule to the return of property includes a reference to a return by reconveyance or by any other means by which ownership can be restored to the other person.

13. For the purposes of rule 2(2) corporeal property acquired by the enriched person by accession or specification, or any analogous rule whereby one person may acquire another's property when it becomes attached to or mixed with his own, is treated as property which cannot be returned in substantially the same condition as it was in at the time of acquisition.

14. Where property is to be returned or transferred to the claimant by the enriched person under these rules, the expenses of the return or transfer are to be borne

- (1) by the claimant if the enrichment was in good faith, or
 - (2) by the enriched person if the enrichment was in bad faith
- unless a court dealing with the claim orders otherwise.

15. In assessing what it would have been reasonable for E to pay C for any interference with C's rights or for permission to interfere with those rights regard may be had to any factors which would have made C reluctant or unwilling to permit the interference.

Comment. Paragraph 12 makes it clear that return may be by any appropriate means. Paragraph 13 is necessary because the property in question may change at the very moment of acquisition. Paragraph 14 regulates the question of the expenses (such as conveyancing fees) of returning or transferring property to the claimant, subject to any decision on the matter by a court dealing with the claim. Paragraph 15 deals with cases, such as publication of sensitive confidential information, where the claimant may have strong personal reasons for refusing permission to interfere with his rights. This can be taken into account in assessing what it would have been reasonable to expect E to pay C. In some cases of this nature C would never, if asked in advance, have permitted the interference for any amount of money. However, the assessment for the purposes of the schedule is done after the event, when the interference has taken place. So the question is what sum would be reasonable given that the interference cannot now be prevented.