This article falls into three parts: in the first part, I shall sketch the outline of a model of organising legal rules; in the second part, I shall apply this model to clarify the relation of unjust enrichment to quasi-contract; and in the third part, I shall apply it to clarify the relation of unjust enrichment to restitution. A model of organising legal rules is a second order model and falls within the province of legal philosophy. The adequacy of such a model should be judged mainly by its explanatory power, by its simplicity and elegance, and by its philosophical fruitfulness. A model of unjust enrichment is a first order model, since it is a model constructed with reference to certain specific legal rules. Such a model falls within the province of law; its adequacy should be judged mainly by its relevance to the legal rules with reference to which it is constructed, by its simplicity and elegance, and by its legal and social fruitfulness. I shall not attempt here to discuss the adequacy of models of unjust enrichment. I shall be content to

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1 For the purposes of this article, I shall use a “rule model”. Such a model, like most models, raises certain difficulties, but it would be impractical to discuss these here.
clear the air of confusions, and to prepare the ground for such a discussion. The subject-matter of this article presents an excellent opportunity of demonstrating something which should be self-evident, namely, that a first order model cannot be adequate unless it is based on an adequate second order model. If legal philosophy is the tail of law, then it is the tail that wags the dog.

I. Preliminaries.

(a) Legal subjects and branches of law

There is an old parable about a group of blind men who are ushered into the presence of an elephant and asked to name the object with which they are confronted. One touches a foot of the elephant and claims that he is touching a mountain. Another touches its tail and claims that it must be a snake, and so on. I was reminded of this parable when I started thinking about the identity of the subject designated by the names unjust enrichment, quasi-contract and restitution. The position here, however, is different and more complicated than in the parable. There we know that the blind men are confronted by one object, and we also know that it is correctly named “elephant”. Here, on the other hand, we are not dealing with a physical object which can be recognized as one unit and correctly named by almost everybody; we are dealing with an abstraction, namely, with an alleged legal subject or subjects. Hence, what is the legal subject, or what are the legal subjects, which are designated by the names unjust enrichment, quasi-contract and restitution, will depend on what we mean by a “legal subject” and on how we use these names. Although no lawyer will have any difficulty in giving examples of legal subjects, few will have considered what makes a particular legal subject a “legal subject”, and there will be no general agreement about the use of the names unjust enrichment, quasi-contract and restitution.

The examples of legal subjects given by lawyers will be those which figure in the syllabi of law schools and in legal textbooks. We can learn from them an important lesson, namely, that by and large the names of legal subjects correspond to the names of branches of law. We may say, therefore, that legal subjects are concerned with branches of law, and that different legal subjects are concerned with different branches of law. The relation between legal subjects and branches of law is illuminating up to a point, but the notion of a legal subject cannot be explicated with reference to the notion of a branch of law, unless we also explicate the
latter. This cannot be done simply by reducing it to a collection of legal rules, for such a reduction fails to explain why some legal rules can figure in more than one branch of law, and how it comes about that a mere collection of legal rules can have the coherence and unity of a branch of law.

(b) Branches of law and legal conceptual schemes

According to my model, it is the relevance of certain legal rules to a “legal conceptual scheme”, and vice versa, which gives these rules the coherence and unity of a branch of law. The same legal rules may be relevant to more than one legal conceptual scheme, in which case they will figure in more than one branch of law. Although legal conceptual schemes appear to have grown up organically, they are in fact a loose agglomeration of first order models which are constructed and reconstructed through a process of trial and error by judges, and through a process of rationalisation by legal commentators. What makes such models “models of a legal conceptual scheme” are certain family resemblances between them which may but need not include a common legal key concept. It is a necessary condition of a legal conceptual scheme that it be used by judges, but their verbal approval is not a sufficient condition of such a scheme, and their verbal disapproval is not necessarily fatal. The adequacy of a legal conceptual scheme should be judged mainly, as I have already suggested, by its relevance to the legal rules with reference to which it is constructed, by its simplicity and elegance, and by its legal and social fruitfulness.

The relation between legal rules and legal conceptual schemes is one of interdependence. Legal rules are dependent on legal conceptual schemes inasmuch as they are not separate self-contained units, but are related to other legal rules with reference to a legal conceptual scheme or schemes, however fragmentary and provisional these schemes may be. Legal conceptual schemes, on the other hand, are dependent on legal rules inasmuch as the former must be relevant to the latter and reflect any changes in them. A legal conceptual scheme is not a purely theoretical construct, but a construct with a certain empirical content and with a certain predictive power.

(c) Legal concepts

According to my model, legal concepts serve as focal points through which certain legal rules are linked to one or more

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2 See infra.
legal conceptual schemes. Although ostensibly the same legal concept may link the same legal rule to several legal conceptual schemes, legal concepts and rules are "bent" by the way they are used in legal conceptual schemes. Usually a legal concept, or a cluster of legal concepts, link a number of legal rules to a certain part of a conceptual scheme, but sometimes a legal concept is so basic that it is regarded as the key to a whole legal conceptual scheme, though ostensibly the same legal concept may figure in a subsidiary capacity in other legal conceptual schemes. In the first case the name which designates the legal concept, or the cluster of legal concepts, may also designate a sub-branch of law and a topic of a legal subject. In the second case the name of the basic legal concept may designate a whole branch of law and a whole legal subject. No rigid line can be drawn between a single legal concept and a cluster of legal concepts, for the former may be split into sub-units and the latter consolidated into single units.

(d) The functions of legal conceptual schemes

Legal conceptual schemes fulfil, I suggest, three main functions: a systematising function, a developmental function and a social function. These functions are all interdependent. Since legal rules are not static, and do not operate in a vacuum, they cannot be systematised without taking into account their future development and social purposes. They cannot be developed without systematising them and taking into account their social purposes; and their social purposes cannot be achieved without systematising them and taking into account their future development. The capacity of serving these functions are broadly what I meant when I said that the adequacy of a first order model should be judged, inter alia, by its legal and social fruitfulness.

II. Quasi-Contract and Unjust Enrichment.

(a) Terminology and substance

In this part I want to apply my model of organising legal rules to clarify the relation of unjust enrichment to quasi-contract, and in particular I want to discuss the following question: Is it possible to give the coherence and unity of a separate branch of law to those substantive legal rules, or a significant proportion of them, which are traditionally classified as quasi-contractual, without relying on the concept of unjust enrichment? It should be evident from the way I have formulated the question that it is not simply one of terminology, but basically one of substance. At the same
time, the question of terminology is not irrelevant to the question of substance. To coin a phrase, a name may lead as well as mislead, and we should choose the one that will lead us along the road which we wish to take, and not one that is traditionally used to designate another road. Hence, if the answer to the above question were no, it would be misleading to designate a branch of law by the name quasi-contract.

(b) Winfield's account of quasi-contract

Although Winfield uses the term "quasi-contract", he says that it is a pity it cannot be eliminated in favour of some other more exact name, for some of the obligations comprised in it have nothing whatever to do with contract. Winfield defines "genuine quasi-contract" as a "liability not exclusively referable to any other head of the law, imposed upon a particular person to pay money to another particular person on the ground of unjust benefit". He then offers two other definitions which he criticises. The first is by Jenks:

When the law imposes upon one person, on grounds of natural justice, an obligation towards another similar to that which arises from a true contract, although no contract, express or implied, has in fact been entered into by them to that effect, such obligation is said to arise from quasi-contract.

Historically, Winfield says, there is much to be said for this definition, but there are two drawbacks to it. First, it persists on the analogy of contract which is not always appropriate. Secondly, the phrase "natural justice", though it is correct both historically and, properly understood, even at the present day, sets up the risk of confusion with equitable obligations in the sense of obligations formerly enforceable only in the Court of Chancery.

The second definition is one from the Encyclopaedia of the Laws of England:

A quasi-contract right, or right of restoration, [is] a right to obtain the restoration of a benefit, or the equivalent thereof, conferred by the claimant, but unjustly retained by the defendant.

This definition, Winfield says, does not separate quasi-contract from tort, for it would just as well describe detinue or trover, and

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5 (2nd ed., 1906), pp. xii, 166.
6 For Winfield's criteria of separation, see infra.
it might well cover some breaches of trust. Moreover, the conferring of a "benefit" might include the transfer of land or of a chattel, and it is doubtful whether in the English law of quasi-contract anything except pecuniary compensation is recoverable. Finally, there are some instances of waiver of a tort in which the situation is more accurately described by saying that the defendant has reaped a benefit by inflicting an injury on the plaintiff, not that the plaintiff has "conferred" a benefit on the defendant.

However, these suggestions may be but motes in other definitions as against a beam in the one which we have framed. In any event, the reader must be warned that it is no more than a description of what true quasi-contract appears to be in English law, for . . . quasi-contractual remedies have been applied to relations which by no amount of ingenuity can be scientifically reckoned as quasi-contractual.7

Winfield groups quasi-contracts as follows:8

(A) Pseudo-quasi-contracts. These are cases in which the idea of quasi-contract is now entirely inapplicable. Examples given are contracts of record, the duty of a finder of goods, and duties arising from a public calling or profession.

(B) Pure quasi-contracts, that is, where the obligation is quasi-contractual, and the facts do not give rise to any alternative liability, whether in tort, contract, or on any other ground. Here, if the plaintiff had no remedy in quasi-contract, he would have none at all. The following examples are given: salvage,9 total failure of consideration, money paid under mistake, quantum meruit, liability of a stakeholder, money paid over on an illegal purpose, money paid at the request of another, compulsory payment of another's debt or discharge of another's liability, liability of husband for wife's necessaries, liability of lunatics and drunkards for necessaries, unauthorised gains of agent.

(C) Quasi-contract which is alternative to some other form of liability. Here the facts would equally well support an action in tort, or on contract, or otherwise. Examples given are account stated, money paid to recover goods wrongfully detained, waiver of a tort.

(D) Doubtful quasi-contracts, where it is not certain whether the obligations should be regarded as quasi-contractual or should be placed under some other species of obligation. Examples given

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9 Although Winfield here includes salvage under pure quasi-contracts, he changed his mind subsequently. See The American Restatement of the Law of Restitution (1938), 54 L.Q. Rev. 531.
are implied warranty of authority, customary duty, statutory duty, liability of minor for necessaries, general average.

Applying my model, we may say that Winfield uses the name "genuine quasi-contract" to designate a separate branch of law which is given coherence and unity by a legal conceptual scheme based on the concept of unjust enrichment, but that he restricts the scope of this scheme to legal rules which fall within a certain *procedural* class, that is, apparently to the substantive legal rules engendered by the common law forms of action of debt and account, and in particular by *indebitatus assumpsit*. I suggest that a legal conceptual scheme cannot be built on the common procedural origin of certain substantive legal rules, and that it is undesirable to restrict a legal conceptual scheme built on some other foundation to legal rules which fall within such a class. Certainly, the procedural history of legal rules has left its mark on their content. But these marks should not be regarded as immutably fixed; they should be re-examined afresh in the light of any new legal conceptual scheme which is adopted, and preserved only to the extent that their preservation is important for its successful integration into an overall legal conceptual framework. No legal conceptual scheme could stand on its own feet if it were not allowed to transcend the procedural antecedents of the individual legal rules to which it gives the coherence and unity of a separate branch of law.

Winfield's valuable account of quasi-contract is, as one might expect from his choice of name, somewhat obscured by his preoccupation with legal history; and the key concept of unjust enrichment is all too often submerged by the flotsam and jetsam left behind by the forms of action. There are also two other factors which tend to weaken Winfield's account. The first is the influence exerted on it by the Roman classification of obligations into contractual, quasi-contractual and delictual. This influence is apparent in Winfield's definition of genuine quasi-contract as a "liability not exclusively referable to another head of the law . . .", and in his definition of "pure" quasi-contracts. The essentially negative conception of quasi-contract as a dumping ground for a mixed bag of obligations which cannot be accommodated elsewhere is at variance with another interpretation of the Roman classification of obligations which foreshadows the birth of restitution as one of three *necessary* divisions of law:

\[\ldots\] the idea of it was bound to come sooner or later. There must always

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10 See *infra*.  
11 See *supra*.  
12 See *infra*.  

be circumstances which make one man civilly liable to another on
grounds reducible neither to contract nor to tort. The principle that "one
person shall not unjustly enrich (preferably ‘benefit’) himself at the
expense of another" must penetrate any system of law. That principle
is at the root of all genuinely quasi-contractual relations. We shall show
later that it will not account for all relations that have been called
quasi-contractual. The entry of the idea of quasi-contract into our law,
is, as in all other parts of the system, implicated with procedure and
much confused by it.\textsuperscript{13}

The other factor which tends to weaken Winfield's account of
quasi-contract is his use of the definitional method to determine
the province of the law of tort and to mark it off from other
branches of law, including contract and quasi-contract. Thus Win-
field says that at the present day tort and contract are distinguish-
able from one another in that the duties in the former are primarily
fixed by the law, while in the latter they are fixed by the parties
themselves. Moreover, in tort the duty is towards persons generally,
in contract it is towards a specific person or persons.\textsuperscript{14} While there
is something in both these points, they are quite inadequate to
mark off tort from contract definitionally. Indeed, such a defini-
tional marking off is not possible. All we can do is compare the
legal conceptual scheme which gives coherence and unity to the
law of torts with the legal conceptual scheme which does the same
for the law of contract. Similarly, Winfield's definitional demar-
cation of quasi-contract from tort on the ground that the scope
of the duty in the latter is towards persons generally, and in the
former to a particular person,\textsuperscript{15} will not do.\textsuperscript{16}

Finally, it should be noted that Winfield's account of quasi-
contract shows up well the danger of confusing the name with the
thing designated by it. I have said that a name may lead as well as
mislead, and that we should choose the one that will lead us along
the road which we wish to take, and not one that is traditionally
used to designate another road. The name quasi-contract is tra-
ditionally used to designate a procedural class of rules, not all of
which, as Winfield himself recognizes, are relevant to a legal con-
ceptual scheme based on the concept of unjust enrichment. Hence,
it would have been better if Winfield had used the name unjust
enrichment instead of quasi-contract.\textsuperscript{17}

\textsuperscript{13} Winfield, \textit{op. cit.}, footnote 3, pp. 121-122.
\textsuperscript{14} \textit{Ibid.}, p. 40.
\textsuperscript{15} \textit{Ibid.}, p. 188.
\textsuperscript{16} For a criticism of this distinction, see \textit{e.g.} J. G. Fleming, \textit{The Law of
\textsuperscript{17} If it were desirable to restrict the scope of such a legal conceptual
scheme to legal rules which fall within a certain procedural class, which I
(c) Forms of action and substantive legal rules

Maine said: “So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure”. This comes about because the existence of a remedy begets the rules which regulate its use. In the Middle Ages the limelight was on the procedure.

As Maitland remarks:

Knowledge of the procedure in the various forms of action is the core of English medieval jurisprudence. The Year Books are largely occupied by this. Glanvill plunges at once into the procedure in a writ of right. Bracton, with the Institutes scheme before him, gives about 100 folios to Persons and Things and about 350 to the law of Actions.19

But we must not be misled by the emphasis of early English law on the formal requirements of individual forms of action. The very fact that forms of action mushroomed at an ever increasing pace shows that the driving force behind their development was the desire to mark out an ever growing area of substantive law which would provide a remedy when such a remedy ought to be available. True, in the Middle Ages, the “lawyers say very little of the procedure in an action, very much of the procedure in some action of a particular kind”, but the judges nevertheless become increasingly aware of the need to bring some order into the legal rules which regulate the remedies given by the multifarious forms of action. A powerful instrument in achieving this order was the use of fictions:

... a gradual process of formal decay ... set in soon after the death of Edward I in 1307, and together with this formal decay [went] a vigorous but contorted development of substantive law brought by fiction within the medieval forms. This is a long process; we may say that it even extends from 1307 to 1875.21

In this development there are two stages:22 the stage of evasory fiction, the last days of which are well described by Blackstone. During this stage a few relatively modern actions substantially take over from the rest. These actions are trespass and its progeny. Steps are dropped out of the procedure on the fiction that they have been taken, and the courts of Kings Bench and Exchequer greatly increase their jurisdiction by similar means. A new stage have denied, then this could be made clear by qualifying the name unjust enrichment. Compare e.g. G. H. L. Fridman, The Quasi-Contractual Aspects of Unjust Enrichment (1936), 34 Can. Bar Rev. 393.

20 Ibid., p. 9. 21 Ibid., pp. 78-79. 22 Ibid., pp. 79-80.
began in 1832 with the Unification of Process Act\textsuperscript{23} of that year. So far no destruction of the forms of action was attempted, but the original and the mesne process are henceforward to be statutory and uniform in all personal actions. The next great step was taken by the Common Law Procedure Act 1852.\textsuperscript{24} Under this statute no form of action is to be mentioned in the writ, which is for the future to be a simple writ of summons; but the various forms of action still retain their own precedents.

The last great step comes with the Judicature Acts of 1873\textsuperscript{25} and 1875,\textsuperscript{26} which introduced a new unified code of civil procedure for law and equity and gave the judges wide discretionary powers. Henceforward not only is the writ a simple writ of summons but there are no longer any "forms of action" in the old sense of the phrase.

The plaintiff is to state his case, not in any formula put into the king's mouth but in his own (or his adviser's) words endorsed upon the writ, and his pleader is to say not upon what form of action he relies but merely what are the facts upon which he relies. Some differences there are in the procedure due to differences in the nature of the action, of the facts relied upon and of the rights to be enforced. Thus in some cases there is and in others there is not a right to a trial by jury, . . . and so forth. . . . but it is no longer possible to regard any form of action as a separate thing. This results in an important improvement in the statements of the law—for example in textbooks—for the attention is freed from the complexity of conflicting and overlapping systems of precedents and can be directed to the real problem of what are the rights between man and man, what is the substantive law.\textsuperscript{27}

But in the famous phrase of Maitland, the forms of action, though we may have buried them, still rule us from their graves. Thus their influence has been a powerful deterrent to the recognition of a legal conceptual scheme based on unjust enrichment. This point is made by Friedmann at the very outset of his article on The Principle of Unjust Enrichment in English Law:

It would not be surprising if many English lawyers felt critical about the very title of this study, regardless of its contents. Is not the approach implicit in it alien to English law? English law has been built upon forms of action which were gradually extended and adapted to new needs, but it has not been built upon abstract principles. There is no form of action equivalent to a general action for unjust enrichment, nor—so at least would many English lawyers say—is there any need for one. Has not English law found equitable solutions in other ways?\textsuperscript{28}

\textsuperscript{23} 2 & 3 Will. 4, c. 39. 
\textsuperscript{24} 15 & 16 Vict., c. 76. 
\textsuperscript{25} 36 & 37 Vict., c. 66. 
\textsuperscript{26} 38 & 39 Vict., c. 77. 
Nevertheless, Friedmann observes, such a study appears to be profitable and even necessary for the following reasons:

1. English law, although originally based on individual forms of action, has fast moved away from them in recent years. As law becomes more complex and precedents more numerous, as the complexity of new social problems demands new remedies, it becomes more and more necessary to find general principles, both for purposes of clarification and for the guidance of those engaged in the practical application of the law. This tendency, though particularly notable in the law of torts, applies equally to other branches of the law.

2. A number of legal problems are at present not satisfactorily solved by English law, and a more adequate solution would require the elaboration of some general principles of unjust enrichment.

3. The problem of unjust enrichment is of great significance in comparative jurisprudence.

4. The principle of unjust enrichment has repeatedly been alleged to be a principle of international law.29

Friedmann follows the vogue of classifying unjust enrichment as a legal principle. It should be noted that the description of unjust enrichment as a principle is elliptic. A legal principle, I suggest, is a postulate of a legal conceptual scheme. Unjust enrichment is, strictly speaking, a legal (or moral) concept. This concept may be used as in section 1 of the American Restatement of the Law of Restitution, to state a legal principle:30

A person who has been unjustly enriched at the expense of another is required to make restitution to the other.

Similarly, Pomponius' famous maxim which dates back to the second century A.D. states a legal principle:

... it is only right, as a matter of natural law, that no one should become richer to the injury of another.31

(d) The implied contract theory

We have seen that a legal conceptual scheme cannot be built on the basis of the common procedural origin of certain substantive legal rules.32 Attempts have been made, however, to construct such a scheme with the help of a theory distilled from the form of action of indebitatus assumpsit. The split of assumpsit after Slade's case33 into "special assumpsit" which was the appro-

29 Ibid., at pp. 243-244. 30 (1937).
31 Dig. XII. VI. 14, transl. H. Monro.
appropriate form of action where the defendant's promise or undertaking was express, and into *indebitatus assumpsit*, which was the appropriate form of action where the promise or undertaking was implied, led to the use of the name quasi-contract to designate all claims which could be brought under the umbrella of *indebitatus assumpsit*. These claims were first restricted to cases where it was possible to imply *in fact* a promise or undertaking on the part of the defendant, but the form of action was subsequently extended by means of a fiction to allow recovery in a variety of cases where no contract could be implied in fact. It was from these procedural beginnings that the implied contract theory was developed. According to it, quasi-contract is concerned with those obligations which are founded on the inferred or purely notional existence of an implied contract between the plaintiff and the defendant.

It should be self-evident that the implied contract theory cannot give the coherence and unity of a separate branch of law to those legal rules which are traditionally classified as quasi-contractual. It cannot do this because in those cases where the implied contract is merely notional, the theory leaves open the question in what circumstances the law will imply a quasi-contractual obligation. In those cases, on the other hand, where a contract can be implied in fact, the obligation which is created by this implication is contractual.

(e) Holdsworth's account of unjustifiable enrichment

Although Holdsworth entitled his famous article *Unjustifiable Enrichment*, the whole burden of his article is that the concept of unjustifiable enrichment cannot by itself provide the foundation for a legal conceptual scheme:

When can a person who has been unjustifiably enriched at the expense of another be compelled to make restitution? That is a problem which all legal systems must endeavour to solve. They have generally solved it by means of a set of principles and rules which are placed under the rubric "quasi-contract". The word "quasi" has in this connexion a negative meaning. It denotes the absence of that consent without which there can be no contract. On the other hand, the word "contract" appended to the word "quasi" denotes that the obligation which the law imposes has some resemblance to a contractual obligation. That resemblance consists, as Professor Winfield has pointed out, in the fact

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34 (1939), 55 L.Q. Rev. 37.
35 For my reasons for preferring unjustifiable enrichment to unjust enrichment, see infra.
that, like contract, and unlike tort, the relation created by a quasi-contract is to a particular person.\textsuperscript{36}

These reasons for the use of the name quasi-contract are hardly convincing. A contract does not necessarily require the consent of the parties in the sense that they must be \textit{ad idem}, and the distinction between an obligation to persons generally and an obligation to a particular person is also open to criticism.\textsuperscript{37}

Holdsworth's reference to the principles and rules which are placed under the rubric "quasi-contract" in the first paragraph does not prepare us for the surprise of being told in the second paragraph that the "conditions under which English law will impose a quasi-contractual obligation to restore an unjustifiable enrichment depend, as in other branches of English law, partly upon the rules of common law and partly upon the rules of equity; and those rules fall into two distinctive branches—rules which give a proprietary remedy, and rules which give a personal remedy". In this passage at least, Holdsworth would seem to use the name quasi-contract to designate a branch of law which transcends the substantive legal rules engendered by the personal action of \textit{indebitatus assumpsit} and other personal common law actions; for he also admits equitable and proprietary rules if their purpose is to restore an unjustifiable enrichment.

The main burden of Holdsworth's account, however, is to deny that the concept of unjustifiable enrichment can by itself provide the foundation for a legal conceptual scheme, and in particular to deny that it can provide the foundation for such a scheme without the help of the implied contract theory in those cases in which the form of action of \textit{indebitatus assumpsit} was appropriate. In \textit{Moses v. Macferlan},\textsuperscript{38} Holdsworth says, Lord Mansfield thought that he had found in this form of action an instrument by which he could realize his wish to make some sort of fusion between the rules of law and equity, but though Lord Mansfield did succeed in making \textit{indebitatus assumpsit} a remedy for many cases of unjustifiable enrichment, his attempts by means of this form of action, and in other ways, to give effect to equitable rights in a court of law were rejected by his successors.

The judges laid it down that it lay, not to recover any unjustifiable enrichment which a defendant ought \textit{ex aequo et bono} to refund, but only in cases where they could say that it was fair that the law should imply a promise by the defendant to repay. In other words, the remedy given

\textsuperscript{36} Holdsworth, \textit{op. cit.}, footnote 34, at p. 37.

\textsuperscript{37} See \textit{supra}.

\textsuperscript{38} (1760), 2 Burr. 1005. See \textit{infra}.
by this action depended, not on the fact that it was the right and fair thing that a repayment should be made, but on a true quasi-contract, i.e. upon the question whether the circumstances of the case were such that it was right that the law should imply an obligation analogous to a contract to repay. I think it is clear that, throughout the nineteenth century, the judges applied the personal remedy for unjustifiable enrichment—the action of *indebitatus assumpsit*—in this way.49

Applying my model, we may say that while according to Winfield the concept of unjust enrichment provides the key to a legal conceptual scheme which gives the coherence and unity of a separate branch of law to “genuine quasi-contract”, according to Holdsworth it can only provide such a key together with the implied contract theory. We have seen that this theory will not do, since it leaves open the question in what circumstances the law will imply a quasi-contractual obligation in those cases where the implied contract is merely notional.40 Holdsworth attempts to answer this question by saying that the courts will imply such an obligation if it is fair or just for the defendant to restore an unjust benefit. But seeing that the situation is not one to which contract is relevant, the whole work is in fact done by the concept of unjust enrichment. There is no virtue in shackling this concept to the dead hand of implied contract, for the latter can have no life of its own, but only such life as is given to it by the former. It can have no life of its own because the implied contract is merely a fiction which is introduced through the concept of unjust enrichment. For these reasons it is misleading to say either that contract furnishes a valuable analogy to quasi-contract, or that a personal remedy for unjust enrichment is available if it is legally possible to imply a contract between the parties.

Holdsworth cites41 in support of his version of the implied contract theory the famous dictum of Lord Sumner in *Sinclair v. Brougham* that the law “cannot *de jure* impute promises to repay, whether for money had and received or otherwise, which, if made *de facto*, it would inexorably avoid”.42 Now it is true that if the question is asked whether or not there was a valid contract between the Building Society and the depositors in that case, the answer is no, because the contract was *ultra vires* the Society; but it is a *non sequitur* to say that because there cannot be a valid contract between the parties, the law cannot imply a notional contract between them in quasi-contract.

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49 Holdsworth, *op. cit.*, footnote 34, at p. 41.
40 See *supra*.
41 *Op. cit.*, footnote 34, at pp. 41-42.
It is instructive to look at the reasons which prompted Holdsworth to espouse his version of the implied contract theory. They were both technical and ideological. As a "technical" lawyer, Holdsworth accepted the theory as a legal fact of life and did his best to adjust it to functional ends. Hence, his admission of unjustifiable enrichment as a partner with the implied contract theory, his emphasis on the supplementary function of the rules of equity and of maritime law, and his concession that the rules of common law may require amendment in some particulars. But his main reason for supporting the theory was fear of anarchy. He was afraid of relaxing the technical rules of law in favour of vague general standards of fairness and justice.

Two morals can, I think, be drawn from the study of Scots and French and German law. First, whatever theory is adopted, the law must adopt some technical rules to determine whether or not an action for unjustifiable enrichment will lie; and there seems to me to be no advantage in substituting the French or German technical rules for our own. Secondly, if the result of the adoption of the French or German technical rules is to leave the matter wholly to the discretion of the judge, it means in effect that the law has thrown up the sponge, and has abandoned the attempt to produce any workable rules on this question.43

I agree with both these morals, but they are quite consistent with subscribing to a legal conceptual scheme based on the concept of unjust enrichment. There can be no advantage, and there is a considerable disadvantage in tying this scheme to the implied contract theory. The fiction of an implied contract was a useful means of giving relief in many cases of unjust enrichment within the framework of the form of action of indebitatus assumpsit; but it is nothing but a deadweight now when we are free to develop legal conceptual schemes without fitting them into the straight-jackets of forms of action.

(f) Lord Mansfield and the moral concept of unjust enrichment

Holdsworth's opposition to freeing unjust enrichment from the implied contract theory was, I think, greatly strengthened by his assumption that Lord Mansfield had been using the former to open the floodgates to the dangerously vague and general moral standards of what is fair and just. This would give the judges an unlimited discretion to wreck the painstakingly developed technical rules of the common law. But to put the matter in this way is, I suggest, misleading. Applying my model, we may say that what Lord Mansfield was trying to do was to transform the moral concept

of unjust enrichment into a *legal* concept which would provide the key for a new legal conceptual scheme. This would not be restricted to the substantive legal rules engendered by certain forms of action, and in particular by *indebitatus assumpsit*; it would cut across all procedural and purely formal distinctions. Lord Mansfield was influenced in this endeavour not so much by any concrete legal conceptual scheme which had been worked out in Roman law or on the continent, as by the common moral ideas of equity and justice which inspired both the development of Roman and English law. The moral concept of unjust enrichment, and through it the legal concept, is closely tied to the moral concept of justice which is concerned with the maintenance or *restoration* of a balance or proportion between persons.\(^44\)

The moral concept of unjust enrichment has clearly played a significant part in the shaping of *many* legal conceptual schemes, but it is important to distinguish between those cases where the moral concept plays a part behind the scenes, and those cases where it is transformed into a legal concept and provides the key for a separate legal conceptual scheme. In my view, Lord Mansfield did try to bring about such a transformation. Unfortunately, his purpose has been widely misunderstood and he has been credited with aims which he did not have. Thus, he did not confound law with morality, but merely drew on the latter to develop the former. Lord Mansfield was aware that moral conceptual schemes cannot be taken over directly lock, stock and barrel by legal conceptual schemes. They must not only be adapted so as to fit in with already existing legal conceptual schemes—though the former may modify or even be instrumental in phasing out the latter—but they must also be constructed in such a way as to make them suitable for legal enforcement. Thus even in Roman law, unjust enrichment emerged only gradually as a fully fledged legal conceptual scheme from specific cases in which relief was given on the ground of unjust enrichment.

That Lord Mansfield did not confound law with morality but merely drew on the latter to develop the former, is, I suggest, borne out by the following famous passage from his judgment in *Moses v. Macferlan.*\(^45\)

>This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore must be encouraged. It lies only for money which, *ex aequo et bono*, the defendant ought to refund: it does not lie for money paid by the plaintiff, which

\(^{44}\)See Aristotle, Nicomachean Ethics (1890). 1132a and b.

\(^{45}\)Supra, footnote 38.
is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the statute of limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or, for money fairly lost at play: because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.46

As Dawson remarks, the "essential point as to Moses v. Macferlan is that in this decision Mansfield took hold of the action for money had and received and universalized its grounds".47 Two further points should be made in this connexion. It is to misrepresent Lord Mansfield to suggest that he was naive enough to believe that a fully fledged legal conceptual scheme can simply be deduced from the general principle that an unjust benefit must be restored. But although it is impossible to deduce any legal conceptual scheme from any general principle, it does not follow from this that no general principle is of any practical use. The second point I want to make is that what is an unjust enrichment is never a question of fact; it is always a question of values, of moral values in a moral conceptual scheme, of legal values in a legal conceptual scheme. Hence, it is pointless and misleading to pose the question "What is an unjust enrichment?" as a question of fact, but it is not pointless or misleading to pose it as a question of values. It seems unlikely that Lord Mansfield was not aware of this distinction. For all these reasons I prefer the name "unjustifiable enrichment" to "unjust enrichment", though for the sake of preserving uniformity I shall continue to use the latter. The advantage of the former to my mind is that it avoids the moral connotation of the latter, that it has a pragmatic rather than an a priori flavour, and that it indicates concern with values rather with facts.

(g) Quasi-contract and obligations quasi ex contractu

In another famous passage of his judgment in Moses v. Macferlan48 Lord Mansfield says:

46 Ibid., at p. 1012.
48 See supra, footnote 38.
If the defendant be under an obligation, from the ties of natural justice, to refund; the Law implies a debt, and gives this action, founded in the equity of the plaintiff's case; as it were upon a contract ("quasi ex contractu", as the Roman law expresses it).\(^{40}\)

There have been some attempts, Dawson states, to show that Lord Mansfield in *Moses v. Macferlan* was consciously importing some Roman doctrine. But the influence from this source is most attenuated. The illustrations given in the opinion are English illustrations, substantially all of them supported by earlier English decisions.\(^{50}\) Although the name quasi-contract\(^{51}\) was undoubtedly borrowed from the Roman obligations *quasi ex contractu*, it would be an error to suppose that what the common lawyers meant by quasi-contract—and their use of that name is ambiguous enough as we have seen—is the same as what the Roman lawyers meant by it. As d'Entrèves emphasizes in connexion with natural law, the formal continuity of certain expressions is not decisive, since the same notion may have had very different meanings and served many different purposes.\(^{53}\) The name quasi-contract does not appear in the *Digest*, but it is found in Justinian's *Institutes* to designate a mixed bag of legal obligations which could not be accommodated in either contract or delict.\(^{53}\) It was not, however, as Dawson points out, reserved for obligations arising out of unjust enrichment,\(^{54}\) and the Roman law of unjust enrichment was not in fact developed through the obligations *quasi ex contractu*, but principally through the forms of action of *condictio* and *negotiorum gestio*.\(^{55}\)

(h) *Stoljar's proprietary theory*

Applying my model, we may say that Stoljar's proprietary theory is an attempt to give the coherence and unity of a separate branch of law to a significant proportion of the substantive legal rules which are traditionally classified as quasi-contractual, without relying either on the implied contract theory or on the concept of unjust enrichment. Stoljar concedes that the implied contract theory will not do. Still, he goes on to say that if the modernists made good points against implied contract, they were wrong to think that this either disposed of the traditionalist case or justified their own

\(^{40}\) Ibid., at p. 1009.  
\(^{51}\) The term appears already in Bracton (1895), Selden Society, Fol. 100.10.  
\(^{53}\) A. P. d'Entrèves, Natural Law (1951), pp. 9-10.  
\(^{54}\) See III.13 and III.27.  
\(^{55}\) Ibid., footnote 47, p. 13.  
\(^{55}\) Ibid., p. 42 et seq.
theory. What the traditionalists were really demanding, or searching for, was some basic principle.

And it is this demand that the modernists failed to meet. Because if their whole explanation was that a court could do what was "just and reasonable", this was either trivial or false. Surely we must anyhow suppose that a court will make "fair" or "just" or "reasonable" decisions. . . . and, in any case, the question is not whether a decision is fair, but why it is fair: the alleged fairness suggests reasons which must tie up with earlier decisions. . . . In other words, what is needed is some statement of principle or basis or theory that not only reveals a sensible continuity between the cases, but also identifies what it is that commonly denominates or connects at least the principal results usually classified as quasi-contractual.56

According to Stoljar, if we look for an independent source of quasi-contract, we do not have to find it in "unjust enrichment" or "equity", or "implied contract". We can find it, Stoljar says, in those rules that here, as in other cases, protect basic proprietary interests, and this has occasionally, if far from consistently, been recognized by the judges. By way of illustration, Stoljar mentions three ways in which P has paid money to D which he now demands to be returned:

(i) P may have paid money to D mistaking him for C; (ii) P may have paid money to D to keep it for him for the time being; (iii) P may have paid money to D either in pursuance of a bargain, or to discharge an existing debt or liability or to make him a gift. The various transfers in (iii) constitute what Stoljar calls a "trans-action", that is, a transfer or payment that is truly consensual as well as intended to be final and irrevocable. Precisely these transactional elements are absent in (i) and (ii); in the former P's payment to D is fortuitous rather than consensual, while in the latter the payment is intended to be temporary, not permanent.

. . . the only way of completely transferring money (or, for that matter, any other thing) is by way of a transaction, either contract or gift, since only a transaction will transfer "property" or "title" from P to D. The obvious corollary is that not only can P recover his money where no such transaction takes place, but that this right of recovery derives from his own right of property. Of course P may have another kind of money-action against D. So he may wish to recover money lent, or the price of goods sold, or a reward for services rendered; though clearly all these actions will depend on there being some contract in which D has expressly or impliedly promised to pay. In this way, we can briefly say that the right to recover money is of two kinds: it is either contractual or is proprietary.57

57 Ibid., p. 6.
Stoljar's proprietary theory seems to have been influenced by an article of Lord Denning to which he refers. Lord Denning there says:

_Indebitatus assumpsit_ for "money had and received to the plaintiff's use" lay whenever the defendant had received money which in justice and equity belonged to the defendant. This action was not based on an implied contract or an implied promise. It was based on a concept of property.  

The first sentence of the above passage, which Stoljar omits, puts a very different complexion on what might otherwise be taken to be a plug for a proprietary theory. The use of the name "property" to designate an obligation of justice and equity illustrates well the extreme vagueness and ambiguity of this much abused legal concept. To rely on its help is indeed to clutch at a straw. The division of actions into real and personal, and into partly real and personal, is just about as useful a legacy from Justinian's _Institutes_ as the division of obligations into contractual, quasi-contractual and delictual. This is what Maitland has to say about it:

Now these famous distinctions have at various times attracted English lawyers, and attempts were made to impose them upon the English materials, attempts which have never been very successful. Such phrases as criminal and civil, real and personal, possessor and proprietary, contractual and delictual are apparent already in Glanvill and prominent in Bracton's work. . . . These divisions of actions never, however, well fit the native stuff.

The weakness of the "proprietary" label is multiplied several times by its combination with the "money" label, for "money" has been used in English law to designate perhaps almost as great a variety of things as "property". The following passage by Stoljar shows some of the complications which result from mixing "property" with "money":

First of all we never "own" money in the sense of owning specific notes or coins, so that our right of property can only take the form of a right to an equivalent amount. In this respect, indeed, money bears some resemblance to . . . _res fungibles, i.e.,_ things like wine or wheat, which if lent for use cannot be specifically returned to the borrower, but can only be returned in like kind and quantity. Putting this differently, we

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58 Ibid., p. 7.
60 The other dicta on which Stoljar relies are hardly more convincing. See J. W. Wade's review of Stoljar's book in (1965), 16 U.T.L.J. 473, footnote 4.
may say that whereas the right to money is proprietary, the action by which we enforce it is "personal". It is personal as are all legal actions in which a defendant is not liable to do or give something in specie, but is made liable in a pecuniary way in that he will have to pay money out of his own pocket.

I suggest that indebitatus assumpsit and the various money counts were not only personal actions, but that they were not used to enforce a proprietary right, that is, a right based on the plaintiff's property or title to certain monies; they were used to enforce claims based on certain non-proprietary grounds, such as mistake, compulsion, misappropriation, failure of consideration, and so on. Stoljar tries to make his theory plausible by claiming that the only way of completely transferring money, or any other thing is by way of a "transaction", that is, by a transfer or payment that is truly consensual as well as intended to be final and irrevocable. Yet his claim that in all other cases the payer retains the property or title to money is far too sweeping. Thus he himself is perfectly aware that a bona fide transferee for value of currency acquires a good title without the need for a "transaction", by the original owner. Moreover, a contract is not necessarily a "transaction" since it need not be truly consensual, but a payment of money under it may nevertheless give the payee a good title. Conversely, not every "transaction" will give the transferee a good title. For instance, the "transaction" may be illegal or unenforceable.

Stoljar's proprietary theory, moreover, would at best only apply to the substantive legal rules engendered by "money had and received". One reason why Stoljar prefers the name quasi-contract to unjust enrichment is that the former, unlike the latter, "has long been associated with the classical money counts". But although Stoljar restricts the scope of his proprietary theory to money claims, he makes a Herculean effort to take in "money paid" under the heading of Reimbursement. Both claims for complete reimbursement (indemnity) and partial recovery (contribution), Stoljar says, presuppose the same basic facts: that one person (P) has advanced money to a third party (C), not on his own account but for, or on behalf, of another person (D), and that P then seeks repayment of this advance from D. In these cases, it will be noticed the payment is not made by the plaintiff to the defendant, but by the plaintiff to a third party for the benefit of the defendant. How then can the plaintiff recover from the defendant the money paid to the third party on the strength of his

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title to the money? P's payment, Stoljar says, is meant to be no more than an advance, not to D himself, yet for his use.

Nor does it matter that D does not actually receive any money; what matters is that D receives a clearly identifiable financial benefit, and if the law did nothing to make D repay P's advance, D would obtain this benefit without any of the recognised methods by which a person is entitled to acquire tangible or intangible property.57

"You see, of course, what this approach actually does", comments Wade. "It would allow the 'proprietary theory' to apply to any situation where the defendant is unjustly enriched at the plaintiff's expense."68 I imagine Stoljar's answer to this would be that the money is recoverable not on the ground of unjust enrichment, but because it was not completely transferred under a "transaction", but that does not alter the fact that the action is only allowed against the defendant on the ground of the benefit which he received by the payment to C.

Another point also deserves mention here: If Stoljar's proprietary theory were valid, one would expect the proprietary remedy of following or "tracing" money to be conterminous with the personal remedy for money had and received; but the two remedies are not conterminous as can be seen from Sinclair v. Brougham.69 Although tracing is proprietary in origin, its subtle and complex development by the Courts of Equity can only be properly understood with the help of the concept of unjust enrichment.

(i) Impure quasi-contracts

Stoljar has to admit that his proprietary theory does not apply to all legal rules which are traditionally classified as quasi-contractual. He divides his book into three parts: the first deals with all situations in which a plaintiff cannot recover except on a proprietary theory. These are the claims for money paid by mistake or by compulsion, the claims from wrongdoers, from fiduciaries as well as from successive transferees; moreover, all claims that lie in money had and received. This part also includes claims for reimbursement which are enforceable by another money count, that of money paid.70 Stoljar distinguishes these "quasi-contractual" rules that have a "pure" or proprietary function from those that can be called "impure" as they are more or less involved with contract law.71

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In the second part of his book Stoljar is concerned not with the refunding of sums of money, but with the claims for reward or recompense where work is done by P for D, but which even if beneficial to D, D has never asked or bargained for. Such actions for reward lack a proprietary base, simply because, unlike money and things, work is not specifically returnable, and so can only be paid for, or rewarded, in money or kind. But, as Stoljar himself emphasizes, money is also not recoverable in specie, and hence by analogy “money had and received” would lack a proprietary basis. Stoljar’s real point would seem to be that a value has to be put on services (and on things for that matter, unless they are returnable), while in actions for the recovery of money a valuation is unnecessary. Unlike Roman law, English law, Stoljar says, has never drawn a rigid line between money claims and claims for services, but has linked them together under a common rubric of implied contracts, or of money or indebitatus counts.

What, then, is the essential feature of claims of reward? Since they are not and cannot be proprietary in character, their basis must needs be a contractual one: contractual because... claims for money either rest on a contractual or consensual basis, or rest... on a proprietary theory.

Yes, but only if Stoljar’s premises are correct, which I have denied. Stoljar gives two reasons for including actions for reward in a quasi-contractual inquiry. The first is that in English law the division between implied contract and quasi-contract has been much blurred, particularly in connexion with the action of quantum meruit. But what “quasi-contract” here really means is that we imply a quasi-contractual obligation as though (quasi) the parties arrived at an express contract when they only made a tacit or silent one. The second reason which Stoljar gives is that there are two remarkable exceptions to the rule that reward-actions are nothing but contractual in character. They are the doctrine of maritime salvage and a group of cases in which certain urgent and necessary services were rewarded even though the services were unsolicited. But the exceptions “do not reveal a new source of quasi-contractual obligation in conflict with the sources so far identified”.

It should be noted that for Stoljar implied contract, to the extent to which he allows it, is genuinely contractual. Where contracts for reward are implied, they are implied in fact, and not as a construction of law. As regards the exceptions, Stoljar admits that

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72 Ibid., p. 160.  
73 Ibid., p. 162.  
74 See supra.  
there is a kind of salvage for which a contract cannot always be implied. This is so in the case of salvage of wrecks and help against fire, but still, he says, it is significant that non-contractual salvage has been kept within very small compass. In the case of unsolicited services, Stoljar claims, the different results obtained by adopting a “material” viewpoint are far less disturbing from a “formal” viewpoint. “The reason is that those results that do admit reward may be brought either within a bailee’s agency of necessity or may be put under a law of status or persons; and so accommodated we also avoid any clash with the contract principle.” Here, I am afraid, Stoljar gets quite carried away by his own ingenuity and his determination to keep out unjust enrichment at any price. Certainly, there is room for a “contract implied in fact doctrine” in contract, but it cannot be a rival for a legal conceptual scheme based on the concept of unjust enrichment.

In the third part of his book Stoljar uses the name “quasi-contract” to designate certain special remedies in contract: “restitutionary remedies permitting a party to recover a payment, sometimes to recover a reward, where a contract breaks down or proves ineffective or is otherwise unenforceable”. These are like other and more familiar remedies, such as damages or rescission or specific performance; they are all remedies for the protection of contractual rights when these are threatened. Stoljar gives two reasons why these restitutionary remedies have been regarded as quasi-contractual. The first is historical and has to do with the fact that it was *indebitatus assumpsit*, and particularly money had and received, which at common law made a restitutionary remedy possible at all. The second reason is that these remedies only arise where the original contract is put an end to, so that the right to recover money shares something of the non-contractual or proprietary features of pure quasi-contract. But surely the mere fact that the contract breaks down in one way or another, does not revive the title of one of the parties to money paid under it. Here too the concept of unjust enrichment would seem to be highly relevant and one cannot but be puzzled again why it is so rigorously declared out of bounds.

III. Unjust Enrichment and Restitution.

(a) Terminology and substance

In this part I want to apply my model of organising legal rules to clarify the relation of unjust enrichment to restitution, and in

77 *Ibid.*, p. 188.  
particular I want to discuss the following question: Does a legal conceptual scheme based on the concept of restitution give the coherence and unity of a separate branch of law to those legal rules which are often classified under unjust enrichment? This question is again not simply one of terminology, but basically one of substance, though here also the former is not irrelevant to the latter. As I have said, a name may lead as well as mislead, and we should choose the one that will lead us along the road which we wish to take, and not one that is traditionally used to designate another road.⁷⁹ Hence, if the answer to the above question were no, it would be misleading to designate a breach of law by the name restitution.

(b) The American Restatement of the Law of Restitution

The case for a legal conceptual scheme based on restitution is best outlined by the reporters W. A. Seavey and A. W. Scott in their famous explanatory article on the American Restatement of Restitution.⁸⁰ They begin their article by saying that the word "restitution" is to the best of their knowledge not used as a title in any law digest or treatise. The matters with which it deals are found scattered through many sections of the digests and in treatises on apparently diverse subjects. The reporters then address themselves to the question why such a grouping of material was undertaken and why they gave to it a title which is indefinite in connotation and unfamiliar to the profession. Although, the reporters say, in the restatements already published, it has been possible to use familiar names and familiar categories, it so happens that because of the way in which the English law developed, a group of situations having distinct unity has never been dealt with as a unit, and because of this has never received adequate treatment.

It was for the purpose of making clear the principles underlying this group and of attempting to give to it the individual life and development which its importance demands that the restatement of this subject was undertaken. Although it is a rule of the Institute that no new word should be coined, it is consistent with its practices to use an old word with either a more precise or a more generalized meaning. With this in mind, the word "restitution" was chosen, a word which has a connotation of the right to recover back something which one once had.⁸¹

The scope of the subject includes most of the situations dealt with in the few works on quasi-contracts, together with the addition

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⁷⁹ See supra.
⁸⁰ Restitution (1938), 54 L.Q. Rev. 29. See also Winfield, op. cit., footnote 9, at p. 529.
⁸¹ Ibid., p. 29.
of corresponding matters dealt with in treatises on equity and trusts, including the specific remedy of constructive trust.\(^{82}\) The reporters give us the following statement of what restitution includes:\(^{83}\)

1. Situations where recovery is or may be granted because money has been paid or property has been transferred, or services have been rendered by mistake. Restitution here may be of the amount or of the value of what was given.

2. Situations where a benefit has been conferred on another as a result of coercion. "Coercion" includes here not only unlawful coercion but also lawful compulsion, as where a person pays money or transfers property to save himself from loss, the result being that another, who had a prior or equal duty to make the payment, would be improperly or excessively benefited if not required to reimburse the payer.

3. Cases where money is paid or property is transferred in the expectation of receiving something which the transferor does not in fact obtain.

4. Where a benefit has been conferred without mistake or coercion, but where reasons of policy make it unofficious for a person to confer a benefit on another without his request and sometimes against his wishes.

The reporters then mention two groups of situations calling for restitutional recovery which differ from the preceding types in that the person seeking restitution has not himself transferred the benefit to the recipient, but the latter has acquired it either rightfully or wrongfully without any act on the claimant's part.

(c) The tripartite division of law

In bringing the above situations together under one heading, the reporters say that the Institute \("recognized the tripartite division of the law into contracts, torts and restitution, the division being made with reference to the purposes which each subject serves in protecting one of three fundamental interests\).\(^ {84}\)

The postulate of the law of contracts (or of undertakings) is that a person is entitled to receive what another has promised him or promised another for him. (The obligations from trusts are considered as falling within the contract field.) The interest of the promisee or beneficiary which is protected by the law is his reasonable expectation that a promise freely made will be performed. The

\(^{82}\) The full title of the Restatement is Restatement of the Law of Restitution, Quasi Contracts and Constructive Trusts.


\(^{84}\) Ibid., p. 31.
law requires the promisor, if he fails to perform the promise, to place the other, as far as reasonably can be done, in as good a position as if the promise had been performed.

The law of torts is based on the premise that a person has a right not to be harmed by another, either with respect to his personality or with respect to his interests in things and other persons. The law protects this right by requiring a wrongdoer to give such compensation to the person harmed as will be substantially equivalent to the harm done. The accent is on wrong and harm.

Beside these two postulates there is a third, sometimes overlapping the others, but different in its purpose. This third postulate, which underlies the rules assembled in the Restatement under the heading "Restitution", can be expressed thus: A person has a right to have restored to him a benefit gained at his expense by another, if the retention of the benefit by the other would be unjust. The law protects this right by granting restitution of the benefit which otherwise would, in most cases, unjustly enrich the recipient.\(^85\)

The basis of the tripartite division of law is presumably the social purpose which each division serves in protecting one of three fundamental social interests. But here we must surely wonder (1) why there are just these three divisions of law, (2) why there are just these three fundamental social interests, and (3) why there should be a one to one correspondence between divisions of law and fundamental social interests. The model, moreover, being static, makes no allowance for changes in the law and in the fundamental social interests protected by them. Thus according to the reporters, the social purpose of the law of torts is to protect a person's interest not to be harmed by another through that person's wrong or fault. Now we may say that this was its key social purpose at one stage of its development, but it is doubtful whether this is still true today. For instance, according to Fleming, the "law of torts . . . is concerned with the allocation of losses incident to man's activities in a modern society".\(^86\)

It is arguable that a similar shift from the protection of private interests to public policy has occurred in the law of contract, and that the "expectation interest" now takes second place to the policy objective of regulating transactions for the public good. But even in the heyday of the "expectation interest", it never had a monopoly. Thus Fuller, its great exponent, mentions three principal purposes in awarding contract damages: (1) Prevention of gain by the defaulting promisor at the expense of the promisee,

\(^{85}\) Ibid., p. 32. Italics mine.

that is, prevention of unjust enrichment. (2) To undo the harm which reliance on the defendant’s promise has caused, that is, to put him in as good a position as he was in before the promise was made. (3) To give the promisee the value of the expectancy, that is, to put the plaintiff in as good a position as he would have occupied if the defendant had performed his promise. Fuller calls these three interests the “restitution interest”, the “reliance interest” and the “expectation interest” respectively. They do not all, he says, present equal claims to judicial intervention.\(^87\)

\(\ldots\) ordinary standards of justice would regard the need for judicial intervention as decreasing in the order in which we have listed the three interests. The “restitution interest”, involving a combination of unjust impoverishment with unjust gain, presents the strongest case for relief. If, following Aristotle, we regard the purpose of justice as the maintenance of an equilibrium of goods among members of society, the restitution interest presents twice as strong a claim to judicial intervention as the reliance interest, since if A not only causes B to lose one unit but appropriates that unit to himself, the resulting discrepancy between A and B is not one unit but two.\(^88\)

(d) The remedy of restitution

It is important to distinguish clearly between the social interest which it is the social purpose of legal rules to protect, and the legal remedy or remedies for protecting that social interest. Hence, if the social purpose of certain legal rules is to protect social interest X, the social interest protected by these rules is X, and consequently the legal remedy for protecting X cannot also be X. I suggest that an understanding of this point is crucial for a proper understanding of the relation of unjust enrichment to restitution. Thus if, as Fuller contends, the prevention of unjust enrichment is one of the social purposes of awarding contract damages, the interest protected is the “unjust enrichment interest”, and not the “restitution interest”. Restitution is not an interest, but a legal remedy which is, inter alia, the appropriate remedy for protecting the “unjust enrichment interest”. The remedy of restitution is an essential corollary of unjust enrichment, since the latter, denoting as it does, the disturbance of a just balance, implies the justice of restoring the balance that was disturbed. The converse, however, is not true. Unjust enrichment is not an essential corollary of restitution. Thus both Fuller’s “reliance interest” and “restitution interest” are enforced by the remedy of restitution, and the latter


\(^88\) Ibid., at p. 56.
crops up in many different branches of law, for instance, in torts, in property law, in matrimonial law and in criminal law. For these reasons, I suggest, that a legal conceptual scheme based on the concept of restitution does not give the coherence and unity of a separate branch of law to those legal rules which are often classified under unjust enrichment, and that consequently it is misleading to designate a branch of law by the name restitution.

I have described restitution as a "remedy", but it must not be supposed that it is a procedural remedy in the sense of a form of action, or a remedy in the technical sense of a specific kind of court order, (though it is sometimes used in the last sense). Restitution is a distinctive remedy in virtue of its object, which is to restore the plaintiff to the position which he previously held. The remedy of restitution may not only be granted for a great variety of reasons, but it may also take a great variety of forms, since the plaintiff may be restored to his previous position in a number of ways. Thus it is usually impossible, unnecessary and undesirable to restore money in specie, for the plaintiff can be restored substantially to his former position by awarding him an amount equivalent to that which he paid. Similarly, the awarding of the value of a chattel will usually be just as satisfactory and more convenient than its specific restitution. In the case of services rendered, restitution in specie is of course impossible, and only the value of the services can be recovered.

Conclusion

I have suggested that legal subjects are concerned with branches of law, and that it is the relevance of certain legal rules to a legal conceptual scheme, and vice versa, which gives these rules the coherence and unity of a branch of law. If we accept this model, the controversy between those who assert that unjust enrichment is a legal principle and those who deny that status to it, will appear in a new light. We will be aware that legal principles are postulates of legal conceptual schemes, and that although such schemes appear to have grown up organically, they are in fact a loose agglomeration of first order models which are constructed and reconstructed through a process of trial and error by judges, and through a process of rationalisation by legal commentators. It is a necessary condition of a legal conceptual scheme that it be used by judges, but their verbal approval is not a sufficient condition of such a scheme, and their verbal disapproval is not necessarily fatal. I have suggested that it is not possible to give the coherence
and unity of a separate branch of law to a significant proportion of those substantive legal rules which are traditionally classified as quasi-contractual, without relying on the concept of unjust enrichment, and that consequently it is misleading to designate a branch of law by the name quasi-contract. Finally, I have suggested that restitution is a remedy which is a necessary corollary of unjust enrichment, but that unjust enrichment is not a necessary corollary of restitution, and that consequently it is misleading to designate a branch of law by the name restitution.