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A Sin of Admission: Why Section 62 Should Have Been Omitted from the Restatement (Third) of Restitution & Unjust Enrichment

Adam Rigoni

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A Sin of Admission: Why Section 62 Should Have Been Omitted from the Restatement (Third) of Restitution & Unjust Enrichment

Adam Rigoni*

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I. Introduction

*We must not say that every mistake is a foolish one.*¹

In this Article I first argue that Section 62 of the Restatement (Third) of Restitution & Unjust Enrichment sits in tension with the principles expounded in the rest of the work. I then try to show that this tension is mostly unnecessary because the majority of the cases covered by Section 62 could be either (1) explained by the rules of other sections or (2) dismissed as quaint products of a bygone era dominated by a robust conception of equity. I conclude that the Section should not have been included in the Restatement. However, in fairness, I must acknowledge that a reporter, striving to create a comprehensive Restatement, faces constant pressure to accommodate more cases, even though he may disagree with the reasoning within the cases. Hence, overinclusion is to be expected. Still, the inclusion of Section 62 remains a mistake, albeit not a foolish one.

* Adam Rigoni, University of Michigan. Special thanks to Professor Douglas Laycock.

1. MARCUS TULLIUS CICERO, DE DIVINATIONE 2.90.

My criticism of Section 62 is limited to the illustrations discussed and the cases referenced in Comments a–b. Comment c deals with limitations on the remedy a plaintiff receives in a restitution suit. It is not clear why this aspect of calculating the plaintiff's recovery is placed in a section ostensibly dealing with defenses to a claim of unjust enrichment. Moreover, Section 49's rules for calculating recovery, which include a rule that the measurement of recovery varies with the culpability of the defendant, seem to render this portion of Section 62 redundant. Nevertheless, a full explication of these criticisms of Comment c would tread too far from the criticism of Comments a–b to merit discussion in this paper. Hence, when I write of Section 62, I mean to refer to that Section sans Comment c.

II. The Tension Generated by Section 62 in General

Section 62 states:

Even if the claimant has conferred a benefit that results in the unjust enrichment of the recipient when viewed in isolation, the recipient may defend by showing some or all of the benefit conferred did not unjustly enrich the recipient when the challenged transaction is viewed in the context of the parties' further obligations to each other.²

This raises the following question: Why is "no unjust enrichment" a defense to an allegation of unjust enrichment as opposed to a proper answer? Kull responds by explaining:

[T]he practical application of the present rule is to [cases] . . . when the claimant alleges facts supporting a prima facie claim in unjust enrichment . . . but the recipient is able to show that the resulting enrichment is not unjust in view of the larger transactional context within which the benefit has been conferred.³

Hence Section 62 is not merely an assertion that the plaintiff fails to state a claim, but a defense available only in specific circumstances.

This general response implies that any case covered by Section 62 will sit in tension with whatever sections give rise to the "prima facie claim in unjust enrichment." The strength of the prima facie claim that Section 62 denies varies with each case, but each case will create at least some tension with other sections. Thus, by Kull's own lights, Section 62 serves as a

2. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 62 (2011).

3. *Id.* § 62 cmt. a.

repository for cases with results that seem incongruent with those found in other sections.

It would be troublesome enough if Section 62 were merely a repository for misfit cases; however, the situation is much worse. In some of the cases, such as Illustration 1, the result and reasoning is so inconsistent with other sections that it ought to be rejected. In other cases the result is consistent with other sections; in fact, the result follows from reasoning enunciated in other sections. However, that these results are not explained in the other sections and instead find themselves amongst misfit cases in Section 62 implies that those results cannot be explained by other sections. Hence, even the cases with correct results end up generating tension with the other sections.

It might be objected that there is no such implication because Kull never claims that the explanations in Section 62 are the only possible explanations for the results therein. He acknowledges that some results are overdetermined. However, this objection is unconvincing for two reasons. First, as discussed above, Kull admits that all the cases in Section 62 involve a prima facie case of unjust enrichment. By making the prima facie claim salient, Kull thereby makes salient the sections that form the basis for the prima facie claim. When he then goes outside the principles of those sections to explain the result, he creates a strong implication that doing so is necessary to reach the result. Second, the rule of Section 62 is a defense against a claim in restitution and thus it serves as a response to an otherwise valid claim. It would be odd to explain the denial of a claim as the result of an application of a defense if the claim itself is invalid. This suggests that the results found in Section 62 can be reached only by applying the rules found therein. Moreover, the reasoning used to explain results in Section 62 is disconcertingly vague and expansive, more so than that found in the other sections of the Restatement. Hence, even if Kull is not implying that the rule of Section 62 is the exclusive explanation of the results, he should still put the cases within the sections that better explain the results.

The Mansfield-era equity underpinnings of Section 62 are another source of tension between Section 62 and the rest of the Restatement. In the comment to Section 1, which elucidates general principles of restitution, Kull writes:

A significant tradition within English and American law refers to unjust enrichment as if it were something identifiable *a priori*, by the exercise of a moral judgment anterior to legal rules. This equitable conception of the law of restitution is crystallized by Lord Mansfield's famous statement in *Moses v. Macferlan*: "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." . . . Restitution in this view is the aspect of our legal system that makes the most direct appeal to standards of equitable and conscientious behavior

At the same time, the purely equitable account of the subject is open to substantial objections. . . . In numerous cases natural justice and equity do not in fact provide an adequate guide to decision, and would not do so even if their essential requirements could be treated as self-evident. . . . [Under this interpretation it] is difficult to avoid the objection that sees in "unjust enrichment," . . . at worst, an open-ended and potentially unprincipled charter of liability.

. . . .

The concern of restitution is not, in fact, with unjust enrichment in any such broad sense, but with a narrower set of circumstances giving rise to what might more appropriately be called *unjustified enrichment*. Compared to the open-ended implications of the term "unjust enrichment," instances of unjustified enrichment are both predictable and objectively determined, because the justification in question is not moral but legal.⁴

Here, Kull is rightly arguing that unjust enrichment, at least in its present form, is not an open invitation for judges to impose their moral sentiments upon the parties. For example, morality likely requires that a pitiful pregnant widow receive help in keeping her home, but that does not give her a restitution claim against her landlord for refusing to lower her rent.

Kull's criticism of the hoary conception of equity is well-founded and persuasive. Yet Section 62 states precisely such an antiquated view. *Moses* makes a triumphant return in the Reporter's Note to Section 62, as Kull writes, "Illustrations 1–4 are all within the scope of the well-known hypothetical cases put by Lord Mansfield in *Moses v. Macferlan*."⁵ He continues in the note to approvingly quote Mansfield's opinion in *Moses*:

This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial . . . It lies only for money which, *ex aequo et bono*, the defendant ought to refund . . . in all these cases [in which the plaintiff's restitution claim is denied], the defendant may retain it with a safe conscience, *though by positive law he was barred from recovering*.⁶

4. *Id.* at § 1 cmt. b (citations omitted).

5. *Id.* § 62 reporter's note b (citations omitted).

6. *Id.* (quoting *Moses v. Macferlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760)) (emphasis added).

It is startling to see Kull quoting the very same opinion that served in Section 1 as the exemplar of the theory of restitution that the Restatement rejects as flawed and outdated. Kull argued convincingly that we ought to understand "unjust enrichment" as "unjustified enrichment," where "unjustified" refers not to a priori moral principles but rather to objective principles of positive law.⁷ Yet in the quotation above, Mansfield explicitly says that the decision is based on who in equity and good conscience (*ex aequo et bono*) ought to have the money, even though the positive law compels a different result. Thus, the Reporter's Note for Section 62 stands in direct contrast to the reasoning in Section 1. In fact, they are not merely contrasting, but the comment to Section 1 explicit attacks the reasoning endorsed in the Reporter's Note to Section 62. This creates not just tension but open conflict between the two Sections.

Accordingly, Section 62 is a source of great dissonance within the Restatement. It stands in contrast with both the rules of specific sections and the general principles that were supposed to underlie all of restitution. If the purpose of the Restatement were purely normative—to lay out how the law of restitution ought to be—then it would be clear that Section 62 should have been removed. But the Restatement has more complicated goals. It strives to present the best theory that explains restitution as it is found in the case law. The reporter must balance trying to accommodate the results and reasoning in multifarious and sometimes contradictory cases with other theoretical virtues such as simplicity and consistency.

Thus, before concluding that the Section should not have been included in the Restatement, it is necessary to determine whether removing the Section would have created gains in consistency that outweigh the corresponding losses in explanatory power (i.e., the reduction in the number and importance of the cases explained by the principles of the Restatement). This section has shown that the gain in consistency would be significant. The next two sections demonstrate that the loss in explanatory power is slight relative to the gains in consistency.

III. The Illustrations in Section 62 Are Either Wrong or Explained by Other Sections

Before looking at the cases cited in the Reporter's Note to Section 62, it is necessary to examine the illustrations. As the illustrations are supposed

7. See *id.* § 1 cmt. b.

to be representative of a number of cases, inspecting them allows us to quickly deal with a number of cases by proxy. Most of the illustrations can be explained by rules from other sections. The remaining illustrations are so inconsistent with the principles found elsewhere in the Restatement that they should be rejected as wrong. Illustration 1 is as follows:

A owes B \$5000, but (unknown to either party) the debt is no longer enforceable because the statute of limitations has run. A pays B, then learns that his payment could not have been legally compelled. A has a prima facie claim to restitution of the mistaken payment (§ 6), but B is not unjustly enriched by A's payment of a valid but unenforceable debt. B is not liable to A in restitution. (For the contrasting outcome when A's payment of a prescribed debt is compelled by a judgment that is subsequently reversed, see §18, Comment *e*, Illustration 8.)⁸

A has a strong prima facie claim based on mistaken payment. It is explicit in the illustration that he paid under the mistaken belief that the debt was enforceable, and it seems very likely that such a mistake is present in any case where one pays an unenforceable debt and subsequently sues to recover the payment in restitution. B has no legal claim to the money. Thus, there has been *unjustified enrichment*. What justifies denying A's restitution claim if not an appeal to equity and good conscience?

One purported justification is to argue that B does have a legal claim to the money. This tact is taken by the court in *Jordan v. Bergsma*,⁹ which distinguishes a statute of limitations from a statute of nonclaim. The *Jordan* court argued that when a statute of limitations has run, the legal obligation remains, but the law withholds any remedy for the enforcement of the obligation.¹⁰ Contrastingly, when a statute of nonclaim has run, the legal obligation is extinguished. This justification is clever, but the distinction it draws is intolerably subtle and ad hoc. The result of either the statute of limitations or the statute of nonclaim running is the same in all instances except those like Illustration 1. The only practical difference between statutes of limitations and statutes of nonclaim is that the latter are not subject to equitable tolling, a distinction that is irrelevant in the context of Illustration 1.¹¹

Further, Kull does not draw the proffered distinction, so it is unlikely that Illustration 1 was supposed to represent cases where a statute of

8. *Id.* § 62 cmt. b.

9. *Jordan v. Bergsma*, 822 P.2d 319 (Wash. Ct. App. 1992).

10. *See id.* at 320.

11. *See Kubby v. Shaffer (In re Estate of Kubby)*, 929 P.2d 55, 56–57 (Colo. Ct. App. 1996).

limitations has run but not cases where a statute of nonclaim has run. If Kull intended to use such a subtle distinction to explain the result in Illustration 1, then surely he would have made it explicit. Therefore, this response fails to address the gist of the Illustration, even though it may technically explain the result.

A second possible justification is that *B* has a legal claim to money on the basis of a claim in restitution (i.e., *B* has no contractual claim on the money but he does have a claim for performance under an agreement that cannot be enforced pursuant to Section 31). A valid restitution claim is a legal claim, so *B* would have a legal right to the money if he has a valid claim in restitution. Unfortunately, Section 31 explicitly rules this out, stating, "[t]here is no claim under this section if enforcement of the agreement is barred by the applicable statute of limitations."¹²

However, the second attempt points the way to a more plausible justification. Perhaps giving *A* a claim in restitution defeats the policy behind statutes of limitations, which is the basis of her claim in the first place. As the Supreme Court put it, "[l]imitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights,"¹³ to which we might add a policy to avoid burdening courts with trials based on stale evidence. Denying *A*'s claim certainly lessens the incentive for *B* to timely prosecute his claim, but it is also true that in this Illustration, *A* is the party pursuing a trial based on stale evidence. After all, *A* is bringing a suit that she could have avoided by paying attention to the statute of limitations and not paying *B* in the first place. One might argue that allowing *A* to bring a suit on an old claim defeats the policy behind the statute of limitations. Therefore, the argument goes, denying *A* recovery gives people in her position incentive not to make the mistaken payment or at least not to waste the court's time with a suit based on stale evidence.

This argument is misguided for four reasons. First and foremost, the statute of limitations is directed at the holder of a claim. *A* does not have a claim until she makes the mistaken payment, while *B* has a claim from the moment *A* defaults. It is strange to think that the policy of the statute supports failing to penalize *B* in these circumstances.

Second, the gravamen of *A*'s claim is not based on the old debt, but on her recent payment to *B*. While evidence regarding the old debt is likely to come up, it does not form the basis for *A*'s claim. In fact, it is in *A*'s

12. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 31 (2011).

13. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983).

interest to say as little as possible about the old debt, because she would do better casting her claim as paying *B* money by mistake. Her claim is that *B* received money to which he has no legal entitlement; clearly this claim is not helped by evidence of a preexisting entitlement. The evidence regarding the old debt is going to be introduced by the defendant as part of his defense under Section 62.¹⁴ Hence it is not *A*'s claim but *B*'s defense that requires the court to deal with old evidence.

Third, it is not at all clear that denying *A*'s claim will have the practical effect of supporting the policy of the statute of limitations. Denying *A*'s claim clearly gives her less incentive to bring the suit and more incentive to make sure the statute of limitations has not run before she pays *B*. However, the debtors are much less likely than creditors to take such considerations into account. On the other hand, it also gives *B*, who is likely to be more legally sophisticated and hence more sensitive to legal incentives, less incentive to bring his claim in a timely manner. Yet such a slight shift in incentives is not likely to alter the behavior of actual creditors, because no creditor is going to let a claim lapse on the slight chance that the debtor will voluntarily and mistakenly pay after the statute of limitations has run. As denying *A*'s claim has little effect on the policy underlying statutes of limitations, that policy cannot justify the result of the Illustration.

Fourth, in almost every realistic circumstance, a restitution claim of this sort will involve a request or inducement by *B* toward *A*. It seems highly unlikely that a debtor who remained in default for more than the entire limitations period would decide to pay the debt without any action on the part of the creditor, only to later bring an action in restitution to recover the amount paid. Although Illustration 1 stipulates that neither party knows that the statute of limitations has run, in reality *A* will not know, prior to discovery, that *B* lacks this knowledge. Therefore in nearly every realistic case similar to the Illustration, there will be a claim for fraud based on *B* representing that he had an enforceable claim in addition to the restitution claim based on mistaken payment.¹⁵ The fraud case is not barred by the rule of Section 62, so the plaintiff will attempt to prove (1) that the statute of limitations has run and (2) that the creditor is aware that it has run. His

14. At best, *A* will stipulate to the existence of the debt, which *B* will not contest. This also eliminates the concerns about old evidence. Admittedly, there may still be dispute about the date on which the debt was created, but that dispute arises out of *B*'s defense, not *A*'s claim.

15. See, e.g., *Clifton Mfg. Co. v. United States*, 76 F.2d 577 (1935); *Jordan v. Bergsma*, 822 P.2d 319 (1992).

attempt to prove (1) is going to involve all the same old evidence that the mistaken payment claim would have involved. Hence the court has not avoided litigation dealing with stale evidence. Furthermore, the fraud case is going to involve a messy determination of whether the creditor had knowledge regarding the statute of limitations, which could have been avoided by allowing the debtor to recover on her restitution claim.

Thus, the result in Illustration 1 has no good explanation. It sits in such direct contrast with the other cases of mistake in Section 6 that it ought to be dismissed as wrongly decided. It also sits in contrast with Section 18, Comment e, Illustration 8, which is as follows:

A sues B to enforce a \$5000 debt. B defends on the basis of the statute of limitations. The trial court holds that the statute does not bar the action, and A obtains a judgment that B satisfies. A's judgment is reversed on appeal, on the ground that the action was time-barred. It is conceded that B's debt to A was legal and valid, and that it would have been enforceable were it not for the statute of limitations. B is entitled to restitution nevertheless.¹⁶

Kull tries to explain this discontinuity in the following manner:

When the case is within this section, the debtor has been compelled by law to pay a claim that is not legally enforceable. The need to remedy this misapplication of legal process—so that the law not stultify itself by requiring what it has declared may not be required—constitutes an important reason for restitution that is independent of the individualized equities of the parties. This public concern with the integrity and proper application of legal coercion has no application to a case in which a debtor has paid, without compulsion, money to which the creditor had a valid but not a legally enforceable claim.¹⁷

This explanation is inadequate because it fails to explain why the law should not be seen as stultifying itself when it denies *A*'s claim to restitution in Illustration 1. The court in Illustration 1 is in effect enforcing a debt that it has declared not legally enforceable. Refusing to grant restitution enforces the debt by providing it legal protection that it would not otherwise have. Although this enforcement takes effect only after *A* has made a mistake, it is enforcement nonetheless. The law still stultifies itself.

Kull's point about compulsion fares better than his contention about the law stultifying itself. *A*'s payment in Illustration 1 is more voluntary than *B*'s in Illustration 8. However, Kull overstates the degree of this

16. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 18 cmt. e (2011).

17. *Id.*

difference. *B* faces a judgment against him, but he does have the option of posting a bond pending appeal.¹⁸ While this option certainly does not eliminate the element of compulsion facing *B*, it does lessen the degree of compulsion involved. Moreover, *A* in Illustration 1 is acting under the assumption that she could be subject to a judgment against her, which no doubt constrains her choice. Finally, both Illustrations can be cast as instances of the same mistake. *A* in Illustration 1 and *B* in Illustration 8 both mistakenly believes that they have a legal obligation to pay a debt, and both pay their respective debts on the basis of that belief. Yet under Section 62, only one of them gets restitution.

Hopefully it is clear that Illustration 1 can be rejected without doing much violence to the Restatement. Turning to Illustrations 2 and 3,* they read as follows:

2. A owes B \$5000. Intending to pay C, another creditor, A sends \$5000 to B who accepts the payment despite notice of A's mistake. (B's notice of A's mistake means that B is not entitled to defend as a payee for value by the rule of § 67.) A has a prima facie claim to restitution of the mistaken payment (§ 6), but B is not unjustly enriched by A's unintended payment of a valid debt. B is not liable to A in restitution.
- 3.* Receiver of insolvent Association issues an assessment against each Member in the amount of \$1000. Some Members pay the assessment, but others resist. In litigation between Receiver and recalcitrant Members, it is determined that the duty of the Members runs only to Association's Creditors, not to Association itself. In consequence, Receiver had no legal authority to compel payment of the assessment. Nevertheless, Members who paid the assessment have no claim against Receiver (who has since made payment over to Creditors, Section 65), nor against Creditors (who have a defense by the rule of this section). Paying Members are entitled to restitution from nonpaying Members by the rule of § 23.¹⁹

Illustration 3* can be explained via the creditors qualifying under Section 67 as payees for value without notice, but Illustration 2 cannot. Both Illustrations can be explained as the court consolidating two different judgments in the name of efficiency: (1) a judgment that the defendant is liable in restitution and (2) a judgment that the plaintiff is liable on the debt.

18. *See id.* § 62 reporter's note c.

19. *Id.* § 62 cmt. b.

* This Illustration (Illustration 3 in a Tentative Draft of the Restatement) of Section 62 has since been removed from the final version. Subsequent references to this now-removed Illustration will be marked with an asterisk. References to Illustration 3 of Section 62 without an asterisk refer to the final version of the Restatement.

The court allows (1) to be offset by (2) with the result that the defendant owes no money. This explanation works well enough for Illustration 3,* where there is no explicit concern that other creditors will go unpaid, but it is a poor explanation of Illustration 2.

To see why that explanation is unsatisfactory, the context in which it makes sense for *A* to bring a restitution claim must be considered.²⁰ If both debts are enforceable and *A* is able to pay both of them, then the explanation above is adequate. However, in such a situation, it does not make sense for *A* to sue *B* in the first place, because even if *A* wins, he will still have to pay *B* eventually and it is doubtful that *B* will be hesitant to enforce the debt after losing in court. It makes sense for *A* to sue only when he is unable to pay both of his debts and must decide to default on one of the two debts. He may choose to default on his debt to *B* for a number of reasons: the contract with the other creditor (*C*) might have a severe liquidated damages clause or *C* might be an important supplier in *A*'s line of work and hence *A* cannot afford to upset him. Whatever his reason, he finds his plans irreversibly thwarted as result of a mistake, while *B* keeps the money despite having notice of the mistake.

More importantly, this leaves *C* at least partially unpaid. *C* has a prima facie claim in restitution against *B* under the rules of Section 47 and 48 for benefits received by defendant from a third party.²¹ Yet this claim must fail, because Section 62 deems *B* not unjustly enriched. In effect, *B* receives a priority superior to that of *C* as a result of the mistake. Further, Illustration 2 anomalously allows a defendant to retain a benefit despite having notice that it was received as a result of a mistake.

In light of the aforementioned concerns, Illustration 2 is simply wrong and should be removed from the Restatement. Illustration 3, on the other hand, is correct and nicely explained by Section 67 or as the result of offsetting a restitution claim with the defendant's claim on the debt. The remaining illustrations can be dealt with rather easily. Illustration 3 is as follows:

3. A agrees to settle a debt by giving B a promissory note for \$5000, payable in two years with interest. By a clerical error, the note delivered by A to B omits any reference to interest. The note is

20. The actual case upon which Illustration 2 is based is examined *infra* Part IV. The case itself differs substantially from Illustration 2.

21. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 47, 48 (2011).

* This Illustration (Illustration 3 in a Tentative Draft of the Restatement) of Section 62 has since been removed from the final version.³

thereafter negotiated by B to C, and by C to D, all parties acting in the mistaken belief that the note calls for payment of interest. At maturity, A pays D \$5000 plus accrued interest of \$600. When he examines the canceled instrument, A discovers that interest was not due by its terms; whereupon A sues D to recover \$600 by the rule of § 6. D is not liable to A in restitution, because (viewing the transaction as a whole) D has not been unjustly enriched at A's expense.²²

This result can be explained as repeated applications of the contract doctrine of reformation.²³ In every one of the transactions, the parties' intentions involved a note for \$5,000 plus interest. *A* does not have a claim in restitution because *D* has a legal right to have the note reformed to include interest as between himself and *C*. *C* has a right to have the note reformed to include interest as between himself and *B*. *B* has the right to have the note reformed as between himself and *A*. It is safe to assume that each of the intermediaries would want the note reformed to avoid liability for the interest, so the court simply follows the chain of reformations back to the beginning.

Illustration 4 is as follows:

3. *A* pays *B* \$5000 in settlement of *A*'s losses in an honest poker game. Under local law, a gambling debt of this kind is illegal and unenforceable; but (unlike the law of some jurisdictions) no statute authorizes the recovery of such a payment once made. *A*'s payment of an illegal obligation might give him a prima facie claim to recover \$5000 by the rule of § 32, but *B* is not unjustly enriched by the receipt of money won by an honest wager. (The fact that *A* had a fair chance of winning means that *A* has received "the counterperformance specified by the parties' unenforceable agreement" within the meaning of § 32(2).) *B* is not liable to *A*.²⁴

As Kull points out in the parenthetical, this result can be explained by applying Section 32(2)'s provision stating that there is no unjust enrichment if the plaintiff received the counterperformance specified by the parties' unenforceable agreement.²⁵

22. *Id.* § 62 cmt. b.

23. *See* RESTATEMENT (SECOND) OF CONTRACTS § 155 (1967).

24. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 62 cmt. b (2011).

25. It seems to me that *A* should be allowed restitution under § 32(1), which states: "[r]estitution will be allowed, whether or not necessary to prevent unjust enrichment, if restitution is required by the policy of the underlying prohibition." *Id.* § 32. Nevertheless, this is a difference of opinion regarding the best way to enforce the policy underlying

Finally, Illustration 5 reads:

4. Employee acts in an emergency to save the life of Employer, sustaining crippling injuries as a result. (Compare § 20, Illustration 7.) Believing that he faces legal liability for Employee's injuries, Employer continues for several years to pay Employee a portion of his former wages. When Employer is later advised (correctly) that applicable law gives him total immunity from Employee's claims, Employer discontinues these payments and sues for restitution on the ground of mistake (§ 6). Restitution will be denied. The reason is not that Employer acted under a mistake of law (see § 5, Comment g), but that under the circumstances Employee has not been unjustly enriched.²⁶

This Illustration is based on the famed case of *Webb v. McGowin*,²⁷ although *Webb* is a contracts case focused on whether an already conferred benefit can serve as consideration.²⁸

The result stands in contrast to Section 20, especially Illustration 7, where the non-professional rescuer is denied a claim in restitution against the rescued party.²⁹ It is tempting to try to distinguish the cases based on the voluntariness of the exchange, along the lines of Kull's attempt to distinguish Illustration 8 in Section 18 from Illustration 1 in Section 62. In Section 20 Illustration 7, the court refused to compel payment from the rescued party and thereby prevented an involuntary exchange.³⁰ In Section 62 Illustration 5, the payments were made voluntarily, hence the court protected payments voluntarily made.³¹ Yet the "voluntary" transaction in Section 62 is the result of a mistake, which normally gives rise to a claim in restitution under Section 5.³² The only salient difference between Illustration 5 and those cases that fall under Section 5 is that Illustration 5 involves an act of rescue. However, Section 18 states that the act of rescue does not ground a legal obligation.³³ Thus, Illustration 5 is at variance with the rest of the Restatement.

Still, the result of Illustration 5 can be accommodated without making use of the rules of Section 62. The disabled employee almost certainly has a

gambling prohibitions and not a disagreement about the underlying restitution principles.

26. *Id.* § 62 cmt. b.

27. *Webb v. McGowin*, 168 So. 196 (Ala. App. 1935).

28. *See* RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. d, illus. 7 (1967).

29. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 20 (2011).

30. *See id.*

31. *See id.* § 62 cmt. b.

32. *See id.* § 5.

33. *See id.* § 18.

change of position defense under Section 65.³⁴ This will block the restitution claim, which is the result in Illustration 5. This will not, however, explain the result in *Webb*, which was the creation of an enforceable contract.³⁵

In sum, Illustrations 1 and 2 are incorrect because they are grossly inconsistent with the principles found in other sections of the Restatement, while Illustrations 3–5 (and 3*) can be explained using principles from other sections. However, before we can conclude that the Restatement should not have included Section 62, we must look at the case law that forms the basis of the illustrations. If a large or prominent body of case law supports the results or reasoning found in Illustrations 1–2, then eliminating Section 62 would have resulted in a significant loss of explanatory power. Likewise, if a large or prominent body of case law supports the reasoning used in Illustrations 3–5 (and 3*), then explaining them instead with alternative reasoning would have caused a similar decrease in explanatory power. The next section undertakes this requisite analysis.

IV. *The Cases Inadequately Support the Illustrations*

The support given to the Illustrations by the cases Kull cites fails to overcome the inconsistency the Illustrations generate within the Restatement. Illustrations 1–4 are all drawn from hypothetical cases discussed by Lord Mansfield in *Moses v. Macferlan*.³⁶ Mansfield wrote:

It [an action for restitution] 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 is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law; 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.³⁷

34. See *id.* § 65 reporter's note c; see also *Westamerica Sec., Inc. v. Cornelius*, 520 P.2d 1262 (1974); *Woolsey v. Nationwide Ins. Co.*, 697 F. Supp. 1053, 1057 (W.D. Ark. 1988); *State ex rel. Steger v. Garber*, 1979 WL 207282 (Ohio Ct. App. 1979). But see *United States v. Smith*, 182 F. Supp. 503, 504 (S.D.N.Y. 1960).

35. See *Webb*, 168 So. at 196.

36. *Moses*, 2 Burr. at 1005.

37. *Id.* at 1012 (cited in RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 62 reporter's note b (2011)).

* This Illustration (Illustration 3 in a Tentative Draft of the Restatement) of Section 62 has since been removed from the final version.

While *Moses* is a famous case, it is worrisome that this portion of it serves as the basis for over half the illustrations in Section 62.

The portion quoted above is dicta very far removed from the holding in *Moses*. The quoted portion and all of Section 62 involve denying a plaintiff's claim to restitution, while the court in *Moses* actually upheld the action for restitution.³⁸ The discussion that Kull cites occurs in the midst of Mansfield's sermon extolling the virtues of unjust enrichment claims, which were new claims at the time. Part of Mansfield's attempt to encourage actions in restitution generally is arguing that such actions will not produce results that are repugnant to the legal minds of his time. This grand undertaking is hardly necessary to decide *Moses*; it is Mansfield pursuing a broad public policy goal. Furthermore, Kull cannot claim that Mansfield's rhetoric is an accurate outline of unjust enrichment, because in Section 16 the Restatement itself allows a minor to rescind a contract he accepted, which contradicts one of Mansfield's claims.³⁹

Moreover, *Moses* is over 200 years old, and hence is a bit outdated as a statement of the law of restitution. In fact, Kull himself argues this very point in Section 1 where he argues that Mansfield's equity-heavy conception of restitution should be supplanted by the more positivist conception captured by Kull's term "unjustified enrichment."⁴⁰ Thus, using *Moses* as the basis for the illustrations in Section 62 creates a dilemma. On the one hand, Kull has claimed that *Moses* is a poor description of the current state of the law of restitution.⁴¹ On the other hand, he uses the very same dicta that he criticized from *Moses* as the basis for four illustrations in Section 62.⁴² One of these positions must be abandoned for the sake of consistency, and the former seems more accurate than the latter.

Thus, *Moses* offers little support for keeping Section 62 unchanged. However, Kull cites other, more recent cases as well. Illustration 1 is based on *In re South Shore Co-op Ass'n*,⁴³ *Clifton Manufacturing Co. v. United States*,⁴⁴ and *Jordan v. Bergsma*.⁴⁵ It is best to consider each case individually. The only case from the last seventy years is *Jordan*, which

38. *Id.*

39. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 16 (2011).

40. See *id.* § 1 cmt. b.

41. See *id.*

42. See *id.* § 62 reporter's note b.

43. *In re South Shore Co-op Ass'n*, 103 F.2d 336 (2d Cir. 1939).

44. *Clifton Mfg. Co. v. United States*, 76 F.2d 577 (4th Cir. 1935).

45. *Jordan v. Bergsma*, 822 P.2d 319 (Wash. Ct. App. 1992).

was a state appellate court decision.⁴⁶ Kull himself notes that it is "unlikely that the decision is a sound illustration of more general principles of unjust enrichment."⁴⁷ Further, this decision makes use of the distinction between statutes of limitations and statutes of nonclaim which was shown to be irrelevant to Illustration 1.⁴⁸

In addition to drawing the distinction between statutes of nonclaim and statutes of limitations, the court also justifies its decision on contractual grounds, writing:

This principle [that the debt is not extinguished after the statute of limitations has run] is further supported by the general rule of contract law that a new promise to pay an obligation made after the statute of limitations has run on that obligation is still an enforceable promise. [I]f a debtor makes a new promise to his creditor to pay a debt that has already become unenforceable by operation of a statute of limitations, this promise is enforceable in accordance with its own terms without any new consideration. It is supported by the "past consideration." Though the debtor was protected by a legal bar, he is regarded as still under a moral obligation to pay the barred debt. . . . Corbin, *Contracts* § 214, at 289–90 (1963). The obligation is not erased by the statute of limitations but merely made unenforceable in court.⁴⁹

This contractual argument is worth noting because it provides a justification for the result in Illustration 1 that is not founded on principles of restitution. Section 82 of the Restatement (Second) of Contracts states:

1. A promise to pay all or part of an antecedent contractual or quasi-contractual indebtedness owed by the promisor is binding if the indebtedness is still enforceable or would be except for the effect of a statute of limitations.
2. The following facts operate as such a promise unless other facts indicate a different intention:
 - a) A voluntary acknowledgment to the obligee, admitting the present existence of the antecedent indebtedness; or
 - b) A voluntary transfer of money, a negotiable instrument, or other thing by the obligor to the

46. See generally *id.*

47. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 62 reporter's note b (2011).

48. See *supra* notes 9–18 and accompanying text.

49. *Jordan*, 822 P.2d at 329.

obligee, made as interest on or part payment of or collateral security for the antecedent indebtedness[.]⁵⁰

In cases like Illustration 1, applying this contract doctrine, which in effect allows a prior event to act as consideration for a present promise to pay, creates an enforceable contract upon the obligor's payment. As a valid contract preempts any restitution claim, the obligor has no claim in restitution.⁵¹ Hence the very case cited in the Restatement points the way to a clearer explanation than the one given by the Restatement.⁵² Therefore, *Jordan* offers little support to Illustration 1.

Turning to the older cases, *South Shore* has a better pedigree than *Jordan*, for it is a Second Circuit opinion.⁵³ Admittedly, the very brief opinion in *South Shore* states: "[the plaintiffs'] position . . . [is not] bettered by the fact that they paid a debt against which the statute of limitations might have been pleaded."⁵⁴ However, this judgment was secondary to the court's determination that the plaintiff's payment to a trustee in bankruptcy, to whom the plaintiffs owed no money, instead of the creditors, to whom the plaintiffs owed money, did not qualify as a mistake sufficient to void the transfer because the trustee was bound by law to give the money to the creditors anyway.⁵⁵ Yet, it would be disingenuous to characterize the court's rejection of the statute of limitations issue as dicta, for that step was necessary for the court to dismiss the plaintiff's case. *South Shore* unequivocally supports the reasoning in Illustration 1.

That said, the discussion of the statute of limitations issue in *Kelly Asphalt*, cited by the court in *South Shore* to support its position, is dicta.⁵⁶ In *Kelly Asphalt*, the president and half owner of the plaintiff company paid

50. RESTATEMENT (SECOND) OF CONTRACTS § 82 (1979).

51. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 2 (2011).

52. It may be that the justification for this contract doctrine is based on the same equitable considerations discussed in § 62 of the Restatement (Third) of Restitution. Whether or not those considerations create a tension in the Restatement (Second) of Contracts similar to one they create in the Restatement (Third) of Restitution is beyond the scope of this Article. Even if they did generate a similar tension, that is no reason to keep Section 62 unchanged. We ought not to allow a nettlesome doctrine from one area of the law to infect other areas. That the doctrine fits poorly with one restatement is no reason to put it in another restatement.

53. *South Shore*, 103 F.2d at 336.

54. *Id.* (citing RESTATEMENT (FIRST) OF RESTITUTION § 61 (1937) and *Kelly Asphalt Block Co. v. Brooklyn Alcatraz Asphalt Co.*, 180 N.Y.S. 805 (N.Y. App. Div. 1920) (citations omitted)).

55. See *South Shore*, 103 F.2d at 337–38.

56. See *Kelly Asphalt*, 180 N.Y.S. at 806.

a debt due to the defendant company, which was entirely owned by him, after the statute of limitations had run with respect to that debt.⁵⁷ The court did say that the "Statute of Limitations may not be invoked and used by the plaintiff to enforce the return of moneys paid in good faith to discharge a debt honestly due."⁵⁸ However, the court also found that "the directors of a corporation have power to waive a Statute of Limitations as against a debt justly due and owing."⁵⁹ A mistake relating to the application of the statute of limitations cannot void a valid waiver of the right to raise a statute of limitations defense because the purpose of the waiver is to resolve the issue of the statute of limitations.⁶⁰ Hence, if the president's action is viewed as a waiver, then any claim to restitution based on the running of the statute of limitations is misguided.

A stronger statement in support of the reasoning underlying Illustration 1 can be found in the 1906 case of *House v. Carr*,⁶¹ upon which *Kelly Asphalt* heavily relied.⁶² Justice Vann's dissent states: "[I]t is a general principle that the Statute of Limitations may be used as a shield but not as a sword."⁶³ Yet the majority opinion does not go that far, merely stating: "[I]t is settled law, as appears by the cases cited in my brother Vann's opinion, that equity will not set aside as a cloud upon title a lien outlawed by the Statute of Limitations."⁶⁴ Moreover, even the majority opinion's tempered support for the reasoning behind Illustration 1 is mitigated by the fact that the New York legislature overruled its interpretation of the relevant statute of limitations with the addition of subdivision 4 to section 500 of New York's Real Property Law in 1948.⁶⁵

Turning back to cases cited in the Restatement, *Clifton* seems to offer strong support for the reasoning of Illustration 1.⁶⁶ Like *South Shore*, it is a

57. *Id.* at 805–06.

58. *Id.* at 808.

59. *Id.* at 809.

60. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 5 (2011) (stating that "[a] claimant bears the risk of a mistake when (a) the risk is allocated to the claimant by agreement of the parties; (b) the claimant has consciously assumed the risk by deciding to act in the face of a recognized uncertainty; or (c) allocation to the claimant of the risk in question accords with the common understanding of the transaction concerned").

61. *House v. Carr*, 78 N.E. 171 (N.Y. 1906).

62. See *Kelly Asphalt*, 180 N.Y.S. at 805.

63. *House*, 78 N.E. at 178 (Vann, J., dissenting).

64. *Id.* at 174.

65. See *Garden City Country Club, Inc. v. Aldworth*, 19 Misc. 2d 352, 353 (N.Y. Sup. Ct. 1959).

66. See *Clifton Mfg. Co. v. United States*, 76 F.2d 577, 578 (4th Cir. 1935).

federal circuit opinion that offers unequivocal support for the result in Illustration 1, stating: "It is of great significance that the taxpayer was in truth indebted to the United States for taxes in the amount which it paid."⁶⁷ It is also similar to *South Shore* in that it offers a strained reading of the precedent upon which it relies. In *Clifton* the plaintiff is a taxpayer who, "[o]n June 25, 1923, more than five years after the first return . . . executed a waiver effective for one year from date, wherein it consented to a determination, assessment, and collection of the taxes for the year 1918, under section 250(d) of the Revenue Act of 1921."⁶⁸ He was suing to recover the taxes he paid on that assessment because the waiver was executed after the statute of limitations had expired. There was ample precedent to establish that such a waiver was valid despite having been executed after the statute of limitations had run.⁶⁹ Nevertheless, none of those cases discussed whether the taxpayer knew that the limitations period had expired when he signed the waiver. Of all those cases, the most likely to involve a taxpayer with that knowledge was *Burnet v. Chicago Railway Co.*,⁷⁰ and yet even the *Clifton* court admitted that "the decision [in *Burnet*] does not expressly show whether the taxpayer was also of the opinion that the period of limitations had not expired when the waiver was given."⁷¹ This casts doubt upon the *Clifton* court's assumption that the results in the aforementioned precedent would not change even if the taxpayers had demonstrated that they believed the limitations period had not expired.

Furthermore, even granting the *Clifton* court that assumption, the court's conclusion that the expiration of the statute of limitations provides no basis for a restitution claim does not follow. The results in the aforementioned cases comport entirely with the substance of Section 5 of the Restatement (Third) of Restitution & Unjust Enrichment.⁷² When a taxpayer executes a waiver allowing the IRS to assess taxes for a given year, either the waiver expressly allocates the risk of the limitations period running, or the taxpayer consciously assumes the risk that the period has run by deciding to act in the face of a recognized uncertainty, or allocating

67. *Id.* at 581.

68. *Id.* at 578.

69. *See Helvering v. Newport Co.*, 291 U.S. 485, 488 (1933); *McDonnell v. United States*, 288 U.S. 420 (1933); *W. P. Brown & Sons Lumber Co. v. Burnet*, 282 U.S. 283, 287 (1931); *Burnet v. Chicago Railway Equipment Co.*, 282 U.S. 295, 299 (1931); *Stange v. United States*, 282 U.S. 270 (1931).

70. *Burnet*, 282 U.S. at 295.

71. *Clifton*, 76 F.2d at 581.

72. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 5 (2011).

such risk to him accords with the common understanding of the transaction concerned. Any of these circumstances would bar his mistake claim under Section 5.⁷³ Accordingly, *Clifton*'s analysis shares the same flaws as that of *Kelly Asphalt*; namely, it takes a mistake claim that fails because of the nature of the agreement—a waiver in both cases—and uses it to create a much broader rule regarding all restitution claims based on the expiration of the statute of limitations.

As the preceding discussion shows, *South Shore*, *Kelly's Asphalt*, *House*, and *Clifton* all offer some support for the reasoning underlying Illustration 1. However, the age of the cases tempers the strength of this support. The cases were all decided prior to 1940, when Mansfield's equitable conception of restitution had greater currency than it does today. The weaknesses in their analyses, discussed above, further diminish the strength of their support. Moreover, all of them except for *Clifton* were decided using the distinction between mistake of fact and mistake of law that the Restatement (Third) of Restitution & Unjust Enrichment advocates abolishing.⁷⁴ Thus, the Restatement does not fully accommodate those cases despite their inclusion in Section 62.

Jordan provides similarly attenuated support. *Jordan* is much more recent than the cases mentioned above, but it is also much more poorly reasoned.⁷⁵ Even Kull admits that it is not useful as a statement of general principles of restitution.⁷⁶ Additionally, the contract doctrine that creates a valid contract upon payment of an expired debt may be doing most of the doctrinal work in reaching the result in *Jordan*.⁷⁷

Having examined the strengths and weaknesses of the case law supporting Illustration 1, we can now answer the question of whether the support it gives is sufficient to overcome the advantages that would be gained by removing Illustration 1. The weighing of theoretical virtues is a subtle and complicated matter.⁷⁸ This portion of my argument is likely to

73. *See id.*

74. *See South Shore*, 103 F.2d at 336; *House*, 185 N.Y. at 453; *Kelly Asphalt*, 180 App. Div. at 750; RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 5 cmt. g (2011).

75. *Jordan v. Bergsma*, 822 P.2d 319 (Wash. Ct. App. 1992).

76. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 62 reporter's note b (2011).

77. *Jordan*, 822 P.2d at 319.

78. *See, e.g.*, THOMAS KUHN, *Objectivity, Value Judgment, and Theory Choice*, in THE ESSENTIAL TENSION 320, 320–39 (1977); David Lewis, *New Work for a Theory of Universals*, 61 AUSTRALASIAN J. PHIL. 343, 343–77 (1983).

draw the most criticism, because I am arguing that the Illustration should have been omitted despite clear support in the case law. Nonetheless, given the flaws of the aforementioned cases and that the Restatement cannot fully accommodate most of them regardless of their inclusion in Section 62, I think the cases fail to justify the inclusion of Illustration 1 in the Restatement.

The cases underlying the rest of the illustrations from Section 62 can be more easily dismissed. Illustration 2 is based on the 120-year-old case of *Pensacola & A.R. Co. v. Braxton*.⁷⁹ This case simply does not support the Illustration.⁸⁰ The recipient of the money in *Pensacola* had no knowledge of the mistake, and hence has a defense as a payee without notice under Section 67.⁸¹ Further, the facts of *Pensacola* raised no concern that the other creditor would go unpaid. Hence the court decided the case by consolidating two separate debts: The judge refused to set off the plaintiff's damages on a tort claim by the amount the defendant paid by mistake because the jury found that the defendant owed the plaintiff that amount as payment for damages from another incident.⁸² The case contains the rhetoric concerning forbidding restitution where the money can be kept in good conscience that one would expect in a case from the 1894, but it is merely rhetoric, nothing more.⁸³

Illustration 3* is based on the part of *South Shore* not dealing with the statute of limitations issue.⁸⁴ The facts of the case support the Illustration, but the court's reasoning does not. The court cites the Restatement (First) of Restitution Section 60, which treats the existence of enforceable duty to transferee as a defense to a restitution claim.⁸⁵ While the current Section 62 incorporates many of the illustrations falling under the previous Section 60, Section 62 of the current version is clearly the progeny of the former Section 61, entitled "Existence Of Moral Duty By Transferor,"⁸⁶ which was

79. *Pensacola & A.R. Co. v. Braxton*, 16 So. 317 (Fla. 1894).

80. Compare *Pensacola*, 16 So. at 317, with RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 62 reporter's note b (2011).

81. See *Pensacola*, 16 So. at 320; RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 67 (2011).

82. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 67 (2011).

83. See *id.*

84. See *South Shore*, 103 F.2d at 336–38.

85. See *id.* at 338 (citing RESTATEMENT (FIRST) OF RESTITUTION § 60 (1937)).

86. RESTATEMENT (FIRST) OF RESTITUTION § 61 (1937).

* This Illustration (Illustration 3 in a Tentative Draft of the Restatement) of Section 62 has since been removed from the final version.

used by the *South Shore* court to justify its decision on the statute of limitations issue.⁸⁷ Hence we cannot assume that the reasoning from the old Section 60, which the *South Shore* court uses, is equivalent to the reasoning of the current Section 62. In fact, treating the existence of enforceable duty to transferee as a defense to a restitution claim seems more in line with the reasoning found in Section 67 in the current version.⁸⁸ Ergo, the reasoning upon which the court in *South Shore* relied is likely the reasoning currently found in Section 67, not Section 62, of the Restatement (Third) of Restitution and Unjust Enrichment.

Illustration 3* is also supported by the 1870 case of *Board of Supervisors v. Manny*,⁸⁹ in which the court ignored the technical deficiencies in the tax assessment and allowed the taxing authority to keep the money paid by the taxpayer. However, it seems that the court thought the deficiencies in the assessment were insufficient to invalidate the tax.⁹⁰ Moreover, the court believed that correcting the deficiencies would have resulted in the plaintiff owing the same amount of tax. Thus the court's reasoning can be explained as consolidation of (1) a judgment that the defendant is liable in restitution, and (2) a judgment that the plaintiff is liable on the debt. The court allows (1) to be offset by (2) with the result that the defendant owes no money.⁹¹ The absence of any other creditors in the case,⁹² and the high priority given to tax debt,⁹³ eliminate the problems that doomed Illustration 2.⁹⁴ Hence, *Board of Supervisors* offers little support for the reasoning in Illustration 3*.⁹⁵

87. See *South Shore*, 103 F.2d at 338 (citing RESTATEMENT (FIRST) OF RESTITUTION § 60 (1937)).

88. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 67 (2011).

89. *Bd. of Supervisors v. Manny*, 56 Ill. 160 (Ill. 1870).

90. *Id.* at 162–63 (noting that the plaintiff was under a *legal* and equitable obligation to pay the tax).

91. See *supra* notes 19–20 and accompanying text.

92. See *Bd. of Supervisors*, 56 Ill. at 160–63.

93. See 11 U.S.C. § 507(a)(8) (2006).

94. See *supra* note 20 and accompanying text.

95. Here one may object that I am ignoring Restatement (Third) of Restitution & Unjust Enrichment Section 19, specifically cmt. f of that Section, which discusses the application of Section 62 to illegal taxation claims. I am not. In Section 19 Kull states that "a claim in restitution to recover payments of taxes has usually been treated as *sui generis*, and principles thought to be specially applicable to tax cases usually determine the outcome." RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT at § 19 cmt. a. I treat them as such as well.

* This Illustration (Illustration 3 in a Tentative Draft of the Restatement) of Section 62 has since been removed from the final version.

Illustration 3 is based on the antiquated case of *Buel v. Boughton*.⁹⁶ Again, the facts support the Illustration, but it is not clear that the reasoning of the court follows that of the Illustration. The *Buel* court clearly contemplates a string of liabilities based on reforming the note and finds that such a series would end with the same state of affairs in which the parties currently find themselves.⁹⁷ The court efficiently applies all of those reformations in one fell swoop and thus bars the unjust enrichment claim.⁹⁸

Illustration 4 is based on the nearly bicentennial case of *Babcock v. Thompson*.⁹⁹ It is perplexing that Kull chose to base an illustration in Section 62 on this case. He is correct in that the *Babcock* court takes "the denial of restitution for money 'fairly lost at play' . . . for granted."¹⁰⁰ Yet, the holding in *Babcock* is that the doctrine of equitable disqualification/unclean hands bars the plaintiff from recovering money that the defendant cheated out of him in illegal gambling.¹⁰¹ Kull is obviously aware of this, for he uses *Babcock* as the basis for an illustration in the section on equitable disqualification.¹⁰²

If the cheated plaintiff is barred from recovering on the basis of equitable disqualification, then *a fortiori* the plaintiff who lost the money in fair play is barred from recovery as well. Thus, the most charitable and plausible reason for the court in *Babcock* to assume that the plaintiff cannot recover money lost in fair gambling is on the basis of equitable disqualification—the same basis upon which they decided the case. Why Kull would think otherwise, given his knowledge of the case, is puzzling.

Finally, Illustration 5 is based on the famed case of *Webb v. McGowin*.¹⁰³ *Webb* is a contracts case dealing with whether a promisee's past act of rescuing the promisor can serve as consideration to make the promise enforceable.¹⁰⁴ The court found that the past act of rescue could serve as consideration, writing:

It follows that if, as alleged in the complaint, appellant saved J. Greeley McGowin from death or grievous bodily harm, and McGowin

96. *Buel v. Boughton*, 2 Denio 91 (N.Y. Sup. Ct. 1846).

97. *Id.* at 93–94.

98. *Id.* at 94.

99. *Babcock v. Thompson*, 20 Mass. 446 (1826).

100. RESTATEMENT (THIRD) OF RESTITUTION § 62 reporter's note b (citing *Babcock*, 20 Mass. at 446).

101. *See Babcock*, 20 Mass. at 449.

102. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 63 cmt. b, illus. 1 (2011).

103. *Webb v. McGowin*, 168 So. 196 (Ala. App. 1935).

104. *See id.*

subsequently agreed to pay him for the service rendered, it became a valid and enforceable contract.¹⁰⁵

Kull had to modify the case for the Illustration, because merely barring the restitution claim is not the remedy in the actual case, which was to make the promise a contract. The principles in Section 62 only allow the promisee to keep the money he has already received,¹⁰⁶ while the doctrine of *Webb* allows him to continue to receive payments in addition to the money he already received.¹⁰⁷ *Webb* is commonly viewed as a contracts case, serving as part of the foundation for Section 86 of the Restatement (Second) of Contracts, entitled "Promise For Benefit Received."¹⁰⁸

Much like the contractual principle discussed in *Jordan*,¹⁰⁹ the contractual principle followed in *Webb* creates a valid contract that thereby blocks any potential restitution claims. As it did with Illustration 1 and *Jordan*,¹¹⁰ the Restatement again incorporates a misfit contract doctrine at the expense of simplicity and internal consistency. As a contracts case that does not comment on restitution, *Webb* does not support the reasoning behind Illustration 5.

V. Conclusion

*Sentimental lawyers cherish an old trope: they say that law works itself pure.*¹¹¹

This Article urges that the Restatement should not have included Section 62. In doing so it argues for three theses: (1) Section 62 is a source of great dissonance within the Restatement, (2) Section 62 produces holdings that are either wrong or attainable by using alternative principles, and (3) the support given to the principles of Section 62 by the case law is inadequate to outweigh the problems the Section causes, that is, the gains in consistency to be had from removing the Section are greater than the loss in explanatory power that results from the cases going unexplained.

105. *Id.* at 198.

106. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 62 (2011).

107. See *Webb*, 168 So. at 198.

108. See RESTATEMENT (SECOND) OF CONTRACTS § 86 reporter's note d (1979).

109. See *supra* note 75 and accompanying text.

110. See RESTATEMENT (SECOND) OF CONTRACTS § 86 reporter's note d (1979).

111. RONALD DWORKIN, LAW'S EMPIRE 400 (1986).

The remonstrance of (1) leaves, I think, little room for doubt. (2) is more dubious, but not very much so. (3) is certainly the most controversial. To accommodate as many cases as possible is a laudable goal, but we ought to be careful lest it thwart other equally important goals such as consistency and simplicity. (1) and (2) show that omitting Section 62 would have significantly improved the law of restitution. The law may work itself pure, but occasionally there are opportunities to help it along. The Restatement missed one such opportunity by including Section 62.

