The text under consideration, by its nature, has much overlapping of concepts and variation of terminology and approach. The index normally adopts the terminology in use at any given moment coupled with a liberal use of cross-references to indicate where alternative approaches are to be found.

References to countries are subsumed in the subject headings either as subheadings or (where the references are many) as part of a main heading. To avoid unwieldy and repetitious lists, cross-references usually omit this country element. Equally to avoid unwieldiness and repetition, references to countries are omitted where this would seem not to add significant information.

**actio de in rem verso**, 444, 513, 520, 578–9, 595–7, 602, 617–18, 621–2, 666, 682 n. 149, 683

**actio in quantum locupletior factus est**, 248, 682 n. 149, 700

**actio quod metus causa**, 202–3

agency. See fiduciary obligations, restitutionary damages for breach

**Anweisungsfall**, 540

**assignatus utitur iure auctoris**, 461

**aufgedrängte Bereicherung**, 312

**bad faith**

*See also* good faith

**condictio causa data causa non secuta and, 141–2, 145

England, 123–4, 141–3, 155–6, 169–70, 176, 506

France, 444

Germany, 142 n. 42, 169–70, 179, 595, 675

Quebec, owner/ possessor relationship and, 595

Roman law, 142 n. 43

Scotland, 141 n. 41, 142, 145–6, 155–6, 392, 396–404, 722–3

South Africa, 396 n. 49

**Bereicherung in sonstiger Weise**, 4, 540, 544

**betterment acts**, 376–8

**betting debt**, 43–4, 72

**bona fide** purchase for value, 311–12

**bonus index varie ex personis causisque constituit**, 370

**breach of contract. See contract, restitutionary damages for breach: frustration or fundamental breach of contract as ground for restitution burden of proof
civil law, 126–7

England, 23, 92, 97, 99–100, 126–7

Germany, 79, 85, 213

Netherlands, 208

Scotland, 390 n. 26, 482, 722–3

South Africa, 212–13

**casum sentit dominus/res perit domino**, 133, 273–4

**causation**

*See also* three-party situations: tracing ‘at the expense’ requirement

England, 553–4
Germany, 554
South Africa, 562
constructive trusts
Scotland, 584–7, 665–8
United States, 555–6
delic/tort and, United States, 557
factual/legal, 556–8
insolvency and, United States, 555–6
parity of creditors and
England, 559–60
France (Bouvier), 560
Scotland, 558–9, 723–6, 729
South Africa, 565
two-party situations, United States, 555–8
cessio legis, 577–8
change of position
restitutio in integrum and, 243–85
unwinding of contract and, 24, 259–60, 282–5
change of position (England), 642–3, 654–5, 703
bad faith and, 506
defendant, 23–4, 51, 164, 168–74
devaluation of counter-restitution and, 187
estoppel/personal bar distinguished, 24, 275
plaintiff, 180–2
tort/unjust enrichment claims
distinguished, 589
undue influence and, 24, 170–1, 174
change of position (Germany)
on basis of contract with incompetent party, 233–4
defendant, 23–4, 164, 168–74, 179
enrichment, relevance, 227–42
plaintiff, 179–80
three-party situations, 522
undue influence and, 24, 74, 170–1
unwinding of contract and, 259–60
change of position (Scotland)
condictio indebiti and, 703
estoppel/personal bar distinguished, 24, 275
change of position (United States)
on basis of contract with incompetent party, 233–4
enrichment, relevance, 227–42
Clive Code (1996), 26–7, 482–5, 644, 660
n. 15, 670, 691–3, 702
exactus volui principi, 17, 221
commodum eius esse debet, causas periculam est, 274
compulsion, 210, 446–7, 700–1
condictio causa data causa non secuta
condictio ob causam finitam distinguished, 144
Germany, 40–1, 67, 73, 142, 156
Roman law, 67, 142
Scotland, 26, 129–35, 143–4, 145, 154–5, 254, 386, 387–8, 404–6, 467 n. 29, 639
condictio ex causa furtiva, 591–3, 705–6
condictio indebiti
civil law, 135–6
England, 4, 38–9, 65, 73–4, 76, 92–3, 98, 136–7, 139
Germany, 38, 40–1, 55, 206, 207–8, 212–13, 258
Italy, 683
Louisiana, 683
Netherlands, 683
Quebec, 683
Romand law, 7–8
Scotland, 42 n. 15, 73, 75, 136, 213
South Africa, 212–13, 683
condictio ob causam finitam, 135, 136–7, 144
condictio ob turpem vel iniustam causam, 135, 217–18, 467, 696–7
condictio obligandi/donandi causa, 135, 137
Scotland, 699–700
condictio possedimenti, 594
condictio sine causa, 30, 38, 136–7, 143–6, 217–18, 712–13
Scotland, 142–6, 386, 387–8, 696–7
separability of cause, 147–8
condictio sine causa specialis, South Africa,
217–18
condiciones
fraud/dure and, 202
retention without a legal basis (sine causa) as underlying principle, 135–6
unjust factors compared, 135–6
consent of plaintiff. See fraud/dure as ground for rescission; viation/
qualification of plaintiff's consent
consideration in English law
See also failure of consideration as cause, 16, 139, 147–9, 154–6
as condition governing transfer of benefit, 105, 120–1, 128–9, 139–40
benefit to claimant, 104
without performance, 105
condictio causae data causa non secuta and, 129
contractual and restitutionary meanings distinguished, 69, 103–5, 128–9, 151–6
‘Coronation’ cases, 128–9
Fibrous, 129, 133–4
performance without benefit to claimant, 104–5, 187–8
constructive trusts
England, 667–8
Scotland, 584–7, 665–8, 676, 722–3, 729
South Africa, 667
United States, 555–6
contract
See also contract, restitutionary damages for breach; failure of consideration as ground for restitution (England); frustration or fundamental breach of contract as ground for restitution; illegality of contract; rescission; restitution in case of void transactions; unwinding of contract equality of parties, 356–9
contract (England)
allocation of risk, 10, 110–11, 112–13, 131, 139, 274
non-operative
as requirement for remedy of restitution, 10, 109–11, 131
civil law distinguished, 110
determination as, 109
measure of enrichment and, 10, 110–11
separability of interest and capital, 114–15
termination
for breach, 255–6
judicial, 247–8
contract (France), termination by court (article 1184 of Civil Code), 451–4
contract (Germany)
allocation of risk, 274
casum sentit dominus/ re perit domino,
273–4
mutuality, 178–9, 259, 271–3
Synallagma, 271 n. 79
normative Kraft des Räktischen, 272–3
relief principle, 272
termination
for breach, 66, 260
judicial, 248 n. 10
will of the parties, relevance, 271–2
Willenserklärung, 200–1
contract, restitutionary damages for breach (England), 10–11, 327–47, 678. See also encroachments, restitutionary liability; measure of enrichment/ damages
Attorney-General v. Blake, 10–11, 327, 330–4
criticisms of, 337–47
City of New Orleans v. Firemen’s Charitable Association, 337–9
contract/property right distinction, 355
defective compensatory measures and, 334–7, 354
displacement of contractual remedies (Adras), 332–4, 354
in lieu of injunction, 328–9
loss to claimant, relevance, 11, 337–9, 354
measure ‘consumer surplus’, 335, 341–2
contractual basis, 328–9
restitution/compensation divide, 329, 342–7
mitigation of loss requirement, 332–4
performance interest and, 334–7
skimped performance, 337–42
contract, restitutionary damages for breach (Israel), 354–9
Adras Building Material Ltd v. Harlow and Jones GmbH, 332–4, 354
measure
market value, 355–9
profits accruing to defendant, 354–9
contract (Scotland)
allocation of risk, 274
condictio sine causa in case of breach, 142–6
counter-restitution. See also measure of enrichment/damages; restitution; Saldotheorie
counter-restitution (England), 116–17
as resitutio in integrum, 173, 256, 271
bad faith and, 176
contractual mistake and, 46–7
equity/common law distinguished, 116–17
incontrovertible benefit and, 185–6
liability mistake and, 46–7
partial failure of consideration and, 16, 116–17, 277–8
rescission in case of impossibility, 40, 174–8, 182, 203–5, 204 n. 46, 252–5, 272, 407–9
restoration of status quo ante, as object, 180 n. 80
slow development of concept, 116
subjective devaluation, 187
third party as beneficiary, relevance, 187–8
counter-restitution (Germany), 174–5, 261
counter-restitution (Scotland)
damage
by transfer and, 703–5
defences
See also change of position;
estoppel/personal bar; fraud/duress as ground for rescission; illegality as defence; limitation periods; mistake; restitution without enrichment by transfer and, 703–5
defences (England)
odi ob rem, 206 n. 57
debt. See betting debt; insolvency; payment of another's debt without authorisation; performance of another's obligation
Deckungsverhältnis, 540
defences
See also change of position;
estoppel/personal bar; fraud/duress as ground for rescission; illegality as defence; limitation periods; mistake; restitution without enrichment by transfer and, 703–5
defences (England)
detrimental reliance on payment, 55
discharge of obligation, 19, 53–4
failure to comply with legal formalities, 71–2
knowledge of claimant, 58–9, 73–4, 165–6
moral/natural obligation, 56
payment under unenforceable promise, 98
'submission to an honest claim', 58–62, 120 n. 53
defences (Germany), 88–90
aufgedrangte Bereicherung, 312
bona fide purchase for value, 311–12
failure to comply with legal formalities, 71–2, 88–9
fulfilment of moral duty, 56
good faith of defendant, 18, 59, 322
knowledge of claimant, 38–9, 58–9, 73, 204–5
bad faith and, 169
fraud/duress and, 213
mistake of law and, 55
unjust factors and, 192–3
venire contra factum proprium, 204
natural obligation, 56, 90
valid contract, 39, 65–7
defences (Netherlands), knowledge of claimant, 213
defences (Scotland)
knowledge of claimant, 73 n. 127
'submission to an honest claim', 703–4
delict (Germany), unjustified enrichment remedies distinguished, 12, 220–2
delict/or tort
causation/tracing and, 557
interface with unjust/unjustified enrichment, 12–13, 177, 220–2, 510–12, 589–93, 635–4, 679–80, 705–6, 727
disgorgement, 11, 678 n. 121, 679–80
do facit qui petit quod redditurus est, 216
dolus
See also fraud/duress
Durchgriffskondiktion, 540
duress. See fraud/duress
EC Directive on the Protection of Consumers in respect of Distance Contracts, 426
Eingriffskondiktion, 4, 12 n. 35, 162, 206, 311
natural obligation, 56, 90
valid contract, 39, 65–7
'encroachment', 349 n. 2
measure
compensation for harm to plaintiff, 351–2
market value, 352
profits accruing to defendant, 351–2
mixed public/private basis, 348–65
© Cambridge University Press www.cambridge.org
encroachments, restitutio (cont.)
on patrimonial rights (Scotland), 680,
705–7
three-party transactions and, 517–18
unauthorised alienation/unauthorised
use distinguished, 352–3
enrichesment sans cau
er restitutionary, 441–2, 444–5, 448,
454
enrichment. See unjust/unjustified
enrichment
equitable considerations (England),
589–90, 610–13, 672–3
couter-restitution, 116–17
property rights, 294–8
equitable considerations (United States),
551–2
estoppel/personal bar, 312 n. 12
change of position distinguished, 24,
275
restitutio in integrum/
counter-restitution
distinguished, 275
ex turpi causa non oritur actio,
298, 312–13,
315–16
exceptio deli, 276, 405
execution en nature, 449–50
execution forc
e en nature, 449
exploitation. See fraud/duress
fa
culté de remplacement, 449–50, 452,
454–5
failure of consideration as ground for
restitution (England)
See also frustration or fundamental
breach of contract as ground for
restitution; mistake as ground for
restitution (England)
acceptance by other party, need for,
142–3
as unjust factor, 15–16, 77, 81–3, 91–2,
93, 94, 97–8, 108–9, 135–6, 155–6
bad faith and, 123, 141–3
breach of contract and, 66–7, 107
broad-ranging nature, 136–40
Coronation cases, 131
failure of condition, 155–6
frustration and, 256–7
mistake as cause of action distinguished,
39–40, 41–3, 44–6, 137–41
partial failure as basis for restitution,
16, 147–9, 154–6
advantages, 16, 117–18, 127
counter-restitution and, 16, 116–17,
277–8
exceptions to ‘total failure’
requirement and, 115
setting-aside of contract and, 148–9
proprietary consequences, 107–8
Quistclose trust, 108
restitution in absence of failure
insurance contracts, 71–2
minors’ contracts, 70–1
separability of contract and, 132
swaps litigation and, 14–15, 68–9,
81–3, 107–8, 118–22, 139–40, 152–4,
618
total failure requirement, 16, 111–12,
131, 133–5, 146–9, 256, 257
collateral benefit and, 113, 115
condictio causa data causa non seru
tand, 132, 153–6
contract as determining factor, 113
counterclaims and, 132–3
‘entire contract’and, 112–13
historical context, 117
separability of contract and, 114–15,
132
ultra vires demands and, 64–5, 82–3,
107–8, 118–22
unjust enrichment arising from, 108–9,
111, 123
valid contract and, 93, 155–6
vitiation/qualification of plaintiff’s
covenant and, 140–3
void contract as result of failure, 67–72,
78, 310
void contract causing, 76, 105–6,
118–20, 121
failure of consideration as ground for
restitution (Germany), as unjust factor,
260
failure of consideration as ground for
restitution (Scotland)
See also restitution in case of frustration
or fundamental breach of contract,
Scotland
breach of contract and, 143–6
total failure requirement, Cantiere,
132–3, 154–5
fault, examples, 382. See also bad faith
fiduciary obligations, interface with
unjust/unjustified enrichment, 11,
360–4, 395–6, 408–9, 672, 678–9
fiduciary obligations, restitutionary damages for breach, 360–4
deterrence and, 361–3
enrichment, relevance, 363
inequality of parties, 362
measure, profits accruing to defendant, 361–4
Snepp v. United States, 360–4
voidable nature of transaction, 408–9
fraud/duress See change of position;
fraud/duress as ground for rescission;
fraud/duress, definitions; fraud/duress, effect on; rescission; restitution without enrichment (Wegfall der Bereicherung);
Saldotheorie; unwinding of contract fraud/duress as ground for rescission
(England), 159–93
alternative ‘unjust factors’, 210–11
as independent cause of action, 17–18
as unjust factor, 4, 17–18, 77, 164–6, 209–10
bad faith and
defendants’, 169
minors, 169–70
by third party, 165–6
compulsion and, 210
constructive fraud/exploitation
constructive notice, 161
misrepresentation, 161, 168, 197–8
O’Brien doctrine, 165, 167–8, 172–4, 187–8, 504
unconscientious receipt, 166–7
unconscientious receipt of consortium, 161, 168–9, 170 n. 46
undue influence, 161, 167–8, 170–2, 174, 198
due legal process as, 78
in pari delito rule and, 301
unconscientious procurement, 166
vitiation/qualification of plaintiff’s consent and, 164, 165
fraud/duress as ground for rescission
(Germany)
remedies, 258–60
right of rescission, 258
three-party situations, 675
fraud/duress, definitions 196–200. See also fraud/duress as ground for rescission
compulsion or threat, 210, 700–1
duress, 198–200
civil law, 199–200
common law concept, 198
England, 210
Germany, 198–9
Netherlands, 198–9
South Africa, 199
undue influence distinguished, 198
duress, fraud and exploitation, 164–8
fraud/fraudulent misrepresentation
common law concept, 196
England, 197–8
Germany (argumentative Täuschung), 196, 198
Netherlands (bedrog), 196–7, 198
South Africa, 197
fraud/duress, effect on remedies (civil law), 200–24
as delicts, 220–2
basis of restitution obligation, 222
due transfers and, 213–18
remedies (England),
vitiation/qualification of plaintiff’s consent and, 164
remedies, (Germany)
as delicts, 221–2
bad faith and, 169–70
declaration of intent and, 164, 214–16
due transfers and, 214–18, 231
lack of legal cause/gound and, 17, 192–3
Leistungskondition and, 207–8
remedies (Roman-Dutch law), due transfers and, 214
remedies (South Africa), as delicts, 221
transfer of ownership
civil law, 218–20, 222–3
Germany, Verpflichtungsgeschäft/Verfügungsgeschäft distinction, 218–19
Netherlands, 220
South Africa, 219–20
rei vindicatio, 219–20
frustration or fundamental breach of contract as ground for restitution
(England), 65–7, 107, 109, 265–6. See also failure of consideration as ground for restitution (England)
breach of contract and invalidity of initio distinguished, 112, 265–6
in case of valid contract, 65–7
condictio causa data causa non secuta, relevance, 67, 129–35

© Cambridge University Press
www.cambridge.org
frustration or fundamental (cont.)
consideration/expectation of
counterperformance and, 16, 66–72,
77, 106, 107, 153
frustrating event as invalidation of
obligation to pay, 66–7
payments outstanding at time of
frustration, 66
payments prior to frustration, 66
requirements
non-operation of contract, 10, 109–11,
123–4, 155
total failure of consideration
requirement, 115, 256–7
statutory basis, 115
frustration or fundamental breach of
contract as ground for restitution
(Germany), 65–6
condictio causa data causa non secuta,
relevance, 67
rescission affecting terms of contract as
basis, 66
unjust enrichment as basis, 15,
66
other than on grounds of unjust
enrichment, 12
frustration or fundamental breach of
contract as ground for restitution
(Scotland), 265–6
bad faith and, 141 n. 41
breach of contract and invalidity
ab initio distinguished, 265–6
condictio causa data causa non secuta,
132–3, 143–4, 154–5, 254, 699
fault and, 141 n. 41, 145–6
total failure of consideration
requirement and, 143–6, 254–5
furtum, 591–3, 594
fundamental breach of contract as ground
for restitution. See frustration or
fundamental breach of contract as
ground for restitution
Gestaltungtrecht, 247
gestion d’affaires, 441–5, 454, 488
gifts
England
mistake as ground for restitution,
47–8, 52, 54
nature of obligation, 44–5
Germany, as binding contract, 44

© Cambridge University Press
www.cambridge.org
INDEX

good faith and, 322
in pari turpitudine melior est causa possidentis, 316–21
mutual performance, 320–1
nemo auditar turpitudinem suam allegans, 311 n. 4, 315–16
quantum meruit action and, 316–21
unilateral performance, 317–20
illegality of contract
England
effect, 289, 303
examples, 289–90
Germany, whether justifying restitution, 86–8
improvement of another's property as ground for restitution
England
absence of remedy, 369 n. 1
US law distinguished, 368–71
France, right to require removal, 416 n. 128
Germany, 22, 371 n. 9
forced exchange, duty in tort to mitigate damages compared, 381
Italy, right to require removal, 416
Roman law, 21–2
South Africa, voluntaary expenses, 394 n. 28, 427
improvement of another's property as ground for restitution (Scotland)
accession, 392, 413–17
other than by accession, 393, 417–21
bad faith and, 392
Bankton's Institutions, 393–4
basis of owner's liability
condictio causa data causa non secuta, 404–6
condictio indebiti, 406–7, 709
implied contract, 411
lack of legal cause/ground, 402–3
unjust use, 411
donation and, 392, 405 n. 87
EC Directive on the Protection of Consumers in respect of Distance Contracts, 426
English law distinguished, 411
examples, 384
male fide improvers, 396–8
measure of enrichment, 413
mode of enrichment, relevance, 412–13
objective approach, 424–6
quantum meruit, 407 n. 9, 429–30
saved expense, 401, 418, 428–9
subjective devaluation, 421–4
where value of improvement realized through sale or lease, 423–5
mistake, relevance, 398–404
necessary, profitable and voluntaary expenses, relevance, 394
recoverable 'enrichment', 419–21
remedies
diversity, 22, 386–9
forced exchange, 414
money equivalent, 414
recompense, 398, 708–9
retention, 393–4
right of removal (ius tollendi), 394, 415–16
right to require removal, 416–17
waiver, 417 n. 131
Shilliday v. Smith, 385–9, 404–5, 427, 465–6, 585
Stair's Institutions, 387–9, 391–3
tenant's right, 392
necessary, profitable and voluntaary expenses, relevance, 394
void contract and, 406–7
voidable contract and
Adamson v. Glasgow Corporation WaterWorks Commissioners, 409
Boyd & Forrest v. Glasgow & South Western Railway, 407–11
York Buildings Co. v. Mackenzie, 394–6, 419, 424
improvement of another's property by mistake as ground for restitution (United States)
alternative remedies, 22–3, 370, 375–6
betterment acts, 376–8
defered relief, 375
English law distinguished, 368–71
fault, relevance, 382, 383
measure of enrichment, 22–3, 371–83
fault/relative hardship and, 373
incontrovertible benefit to owner/cost to improver dichotomy, 12, 22–3, 372–3
liquidity and, 373–5
market value, 381–2
owner's own revaluation, 374–5
improvement of another's property (cont.)
saved expense, 374
remedies
forced exchange, 22, 375–6, 378–81
lien, 22
tender to improve at unimproved value, 22
Restatement of Restitution (1936), 371 n. 8, 375 n. 16, 381–2
in pari delicto potior est conditio defendentis/in pari turpitudine melior est causa possidentis, 298–9, 301–2, 316–21
incompetence of contracting party
See also minors
Germany
change of position and, 233–4
void transaction, 260
Scotland, 699–700
United States, change of position, 233–4
indebitum solutum, 683–4. See also indebito
inequality of parties, 57, 64–5, 167–8, 231–2, 301–3, 356–7, 362
insolvency
constructive trusts, Scotland, 584–7, 665–8, 722–3, 729
interface with unjust/unjustified enrichment, Scotland, 677–8, 723–6
parity of creditors (paritas creditorum)
France, 560
Scotland, 723–6
United States, 558, 586, 723–6
proprietary restitution and, 577–8, 584–7
subrogation/cessio legis, 577–8, 665–8
tracing, United States, 555–6
insurance contracts, 71–2, 577, 680–1
interest
England, delay in payment of debt and, 455
France (article 1153 of Civil Code), 454–5
ius in personam ad rem acquirendum, 579
ius tollendi, 394, 415–16
just factors (Germany). See defences
(Germany)
knowledge of claimant defence. See defences, knowledge of claimant
lack of legal cause/ground (Germany), 5, 14–15, 17–18, 37, 38, 79. See also performance/transfer without legal basis (Leistungskondiktion)
conditions, 135–6
duress and. See fraud/duress
unjust enrichment and, 311, 494
unjust factors, relevance, 18, 192–3, 649–50
laesio enormis, 231
leapfrogging. See three-party situations
Leistung/Leistungskondiktion
England, 82, 92–3, 702–3
Germany, 4, 5, 17, 40–1, 162, 205–8, 224, 467–9, 479, 539–41, 544–7, 554, 616–17, 701. See also performance/transfer without legal basis (Leistungskondiktion (Germany))
Scotland, 467–9
Leistungskette, 540 n. 46
Leistungspri apartheid, 539, 541
liens and hypothecs, proprietary restitution in case of, 578–9, 665
limitation periods
England
failure of consideration, 83, 125–6
mistake, 125–6
right to payment, 56–8
Germany, 56, 90
subsidiarity and, 608–9
mandament van spolie, 216 n. 99
mandat, 441, 442–3, 445
measure of enrichment/damages
See also contract, restitutionary damages for breach; encroachments, restitutionary liability; improvement of another's property as ground for enrichment; quantum lucratum; quantum meruit/quantum valebat; restitutio in integrum
in absence of unjust factor, 185–6
compensation for harm to plaintiff, 351–2
‘consumer surplus’, 335, 341–2
contract as determinant, 10–11, 110, 184–5, 327–9
non-operative contract, 10, 110–11
defendant's enrichment, 183–5
difficulty in case of non-money benefits, 373–4
INDEX

disgorgement, 11, 678 n. 121, 679–80
fault/relative hardship and, 373
incontrovertible benefit to owner/cost to improver dichotomy, 12, 22–3, 372–3
law of delict as determinant, 12
liquidity and, 373–5
market value, 352, 355–9, 381–2
mode of enrichment, relevance, 412–13
mutual restitution in money and, 177–8, 182–3
non-contractual situation, 184
objective approach, 182–3, 424–6
owner’s own revaluation, 374–5
plaintiff’s enrichment, 185–6
policy-motivated, 13
profits accruing to defendant, 351–2, 361–4, 653–4
punitive damages, 654 n. 129
quantum meruit, 407 n. 98, 428–30
restitution/compensation divide, 329, 342–7
saved expense, 374, 403, 418, 428–9
unjust factors, relevance, 168, 182–3, 185–6
where value of improvement realized through sale or lease, 423–5
meta, 195 n. 5, 199
mis re venturiallis, 199

See also incompetence of contracting party
England
bad faith, 169–70
failure of consideration as ground for restitution, 70–1
Germany
bad faith, 169–70, 179
unwinding of contract, 260
Scotland, unwinding of contract, 253, 281
mise en demeure, 450–1
misrepresentation (England), 161, 168, 197–8
mistake as ground for restitution (England), 37–62, 73–4, 120, 311
as ‘unjust factor’, 15–16, 21, 72, 77, 93, 94, 504, 704–5
causal mistake, 49–53, 73–4, 125
neglect of recipient’s interests, 53
contractual mistake, 46–7
counter-restitution and, 46–7
degrees of mistake, relevance, 48, 52
failure of consideration as cause of action distinguished, 125, 136–40, 618
as ground, 125, 136–40, 618
formation of intention/absence of legal ground distinguished, 46, 311
gift, 47–8, 52, 54
‘legal ground’ approach and, 5, 27–8, 43, 48, 53–4, 58, 65, 75
liability mistake, 38–40, 45, 46–7
contractual mistake distinguished, 39–40, 41–3, 44–6, 137–41
mistaken assumption of valid contract, 68
unenforceable obligation and, 46
limitation period, 125–6
mistake of fact, 38–9, 50, 124–6
mistake of law, 16–17, 29, 55–8, 59–60, 72–5, 83–5, 97, 107 n. 15, 124–6, 508, 655, 663–4
judicial change in the law and, 28, 74–5, 83–5, 93
non-liability mistake, 43–54 as origin of remedy, 46–7
objective approach, 5
right of rescission, 40, 258
unenforceable obligation and, 41–8
mistake as ground for restitution
Germany, as ‘unjust factor’, 85–6
Roman law, 37–8
mistaken assumption of liability (Scotland)
condictio indebiti, 42 n. 15, 73, 75, 136, 213 n. 80, 249 n. 14, 696–7
mistake, need for, 696–9
mitigation of damages (England), 456–7
breach of contract, 332–4
duty in tort, 381
reasonableness test, 456–7
money
bad faith and, 675
tracing, 673–6
mora creditoris, 438, 446
mutual restitution, See counter-restitution; mutual restitution; restitution; Saldotheorie
nam hoc natura aequum est neminem cum alius detrimento et iniuria fieri locupletiorem, 3

© Cambridge University Press  www.cambridge.org
negotiorum gestio
civil/common law compared, 652–3
classification, 652–3, 681
England, 652–3
Germany, 19, 98 n. 58, 459–60, 511 n. 61
Quebec, 594
Scotland, 462–3, 472–4, 476, 487–9, 681, 729
agency of necessity distinguished, 463
improvements to another’s property, 398 n. 58
nemo auditur turpitudinem suam allegans, 312–13, 315–16
Nichtleistungskondiktion, 496, 499–500, 511 n. 61
normative Kraft des Faktischen, 272–3
obligations de faire, 454–5
paiement, 434–5, 441, 454
paritas creditorum, 558, 585–6
parity of creditors
causation and, 558–60, 723–6, 729
hypothesis, 665
insolvency and, 558, 560, 586, 677–8, 723–6
payment of another’s debt without authorisation, civil/common law compared
assignability of debt, 461–2
consent of creditor, need for, 461
Scots law lessons, 485–9
‘unjust factor’ requirement, 462
payment of another’s debt without authorisation (England), 19–20, 28–9, 50 n. 28
payment of another’s debt without authorisation (France), 19–20, 28–9
payment of another’s debt without authorisation (Germany), 50 n. 28
as special category of enrichment, 468–9
creditor’s right of refusal, 471–2
negotiorum gestio, 19, 459–60, 468
Rückgriffskondiktion, 19, 467–9, 480, 488, 710–11
payment of another’s debt without authorisation (Scotland), 462–72
basis of liability, 715–18
by mistake, 477–82
Clive Code, 482–5
creditor’s right of refusal, 484–5
discharge of debt, 469–72, 481–2, 486–7, 710–11
right of recompense, 474–6, 710–11, 715
recovery on basis of negotiorum gestio, 472–4, 487–9
repetition (condictio indebiti), 476–7, 481–2, 714–15
Rückgriffskondiktion, 467–9, 480, 488, 710–11
subrogation, 463 n. 16
payment of another’s debt without authorisation (South Africa)
discharge of debt, 536–8
Govender v. The Standard Bank of South Africa, 478–9, 481–2, 534–5
performance of another’s obligation, see also payment of another’s debt without authorisation
performance of another’s obligation (England)
as ‘vicarious performance’, 445–6, 457
by mistake, 477–82, 504
creditor’s right of refusal, 445–6, 460–1
‘officious intermeddling’, 447–8, 460
discharge of debt, 19, 446–7
intervention under compulsion of law, 446–7
necessity, 447
loan at interest, 455–7
as mitigation of damage, 456–7
right of recovery, 447
subrogation, 447 n. 70
substitute performance, 455–7
tender of due performance, effect, 446
performance of another’s obligation (France)
action in de rem verso, 444 n. 55
bad faith and, 444
by interested third party, 439–40, 448, 454
by non-interested third party, 440–4
by interested third party, 439–40, 448, 454
enrichissement sans cause, 441–2, 444–5, 448, 453–4
gestion d’affaires, 441–5, 484, 454
mandat, 441, 442–3, 445
right of recovery, 441–4
Civil Code
article 1142, 448–55
INDEX 741

proprietary restitution, 268–70. See also subrogation/cessio legis

definitions

property, 352–3

proprietary, 571–2, 676–7

insolvency and, constructive trusts,

584–7, 665–8

interface with unjust/unjustified

enrichment, 12–14, 268–70, 290–1,

292–8, 392, 588–9, 665–71, 705–8,

726–7

liens and hypothecs, 578–9, 665

personal rights and, 579

property rights, 707

rei vindicatio. See vicarious

remedies/vindicatio

vindicatory action as enrichment action,

574–5

quantum lucratus, 244, 428–9

quantum meruit/quantum valebat, 25, 44,

313–14

England, 122–3, 177, 312 n. 11

Germany, 316–21

Scotland, 407 n. 98, 429–30

Quistclose trust, 108

reception/réparation de l'indu, 434 n. 6, 594–5,

599, 682–3

Rechtsgeschäft, 200–1

rechtshandeling, 201

recompense (Scotland)

as general remedy, 464–9

mistake, reliance, 398 n. 59, 474–6,

708–9

relevance of term, 428–9

unauthorised payment of another’s debt,

474–6, 710–11

reduction of contract (Scotland), 248 n. 10,

267–268, 427

impossibility of restitution/counter-restitution and, 204 n. 46,

252–5, 267, 272, 407–9, 583–4

real/personal effect, 581–4

third party rights and, 270

void contract, 267

reduction of contract (Scotland). See reduction of contract (Scotland)

relief as unjust enrichment remedy

(Scotland), 387 n. 7, 428, 463 n. 15, 680

article 1144, 433, 435, 443, 448–57,

461 n. 6

article 1236, 433, 436, 439–45, 454

article 1237, 436–8

consent of creditor, need for, 437–9

right of refusal, 438–9, 445

English law distinguished, 445–8, 455–7

judicial authorisation of performance at debtor’s expense, 433, 448–57, 461 n. 6

exécution en nature, 449–50

exécution forcée en nature, 449

faculté de remplacement, 449–50, 454–5

judicial discretion and, 451–5

mise en demeure, 450–1

obligations de faire, 454–5

subrogation, 19, 439–42, 445, 463 n. 16

terminology, 433–5

débiteur, 434

paiement, 434–5, 441, 454

prestation, 434, 437–9

performance/transfer without legal basis

conditions, 135–6

duress and. See fraud/duress

relevance of other factors, 18, 192–3

unjust enrichment and, 311

performance/transfer without legal basis

(Leistungskondiktion (Germany), 4, 17,

40–1, 205–8, 467–9. See also undue

transfers

duress/fraud and, 207–8, 213, 215, 224

failure of purpose, relevance, 206–7,

215–16, 224

Leistungsprinzip, 539, 541

Nichleistungskondiktion, 496, 539, 544

unenforceable obligations, 40–1

performance/transfer without legal basis

(Leistungskondiktion) (Scotland), 693–713

‘transfer’, 694–5

personal bar. See estoppel/personal bar

powerlessness as unjust factor, 672, 707–8

prestation, 434, 437–9

promises in English law

enforceability, 41–3

restitution distinguished, 42–3

payment under unenforceable promise,

98

proportionality, England,

counter-restitution and, 177–8

proprietary basis for unwinding of

contracts, 268–70

proprietary restitution, 268–70. See also subrogation/cessio legis

definitions

property, 352–3

proprietary, 571–2, 676–7

insolvency and, constructive trusts,

584–7, 665–8

interface with unjust/unjustified

enrichment, 12–14, 268–70, 290–1,

292–8, 392, 588–9, 665–71, 705–8,

726–7

liens and hypothecs, 578–9, 665

personal rights and, 579

property rights, 707

rei vindicatio. See vicarious

remedies/vindicatio

vindicatory action as enrichment action,

574–5

quantum lucratus, 244, 428–9

quantum meruit/quantum valebat, 25, 44,

313–14

England, 122–3, 177, 312 n. 11

Germany, 316–21

Scotland, 407 n. 98, 429–30

Quistclose trust, 108

reception/réparation de l'indu, 434 n. 6, 594–5,

599, 682–3

Rechtsgeschäft, 200–1

rechtshandeling, 201

recompense (Scotland)

as general remedy, 464–9

mistake, reliance, 398 n. 59, 474–6,

708–9

relevance of term, 428–9

unauthorised payment of another’s debt,

474–6, 710–11

reduction of contract (Scotland), 248 n. 10,

267–268, 427

impossibility of restitution/counter-restitution and, 204 n. 46,

252–5, 267, 272, 407–9, 583–4

real/personal effect, 581–4

third party rights and, 270

void contract, 267

reduction of contract (Scotland). See reduction of contract (Scotland)

relief as unjust enrichment remedy

(Scotland), 387 n. 7, 428, 463 n. 15, 680

© Cambridge University Press www.cambridge.org
repetition (Scotland)
condictio indebiti and, 464–5, 476–7
mistake, need for, 464–5
restitution distinguished, 388–9, 405 n. 84
res perit domino, 133, 273–4
rescission (England)
See also counter-restitution; fraud/duress as ground for rescission (England); restitution in case of worthless contract, 180 n. 81 classification of remedy, 250–1 contract/unjust enrichment interface, 161 German law distinguished, 86, 137 n. 21, 174–7, 250 impossibility of restitution/counter-restitution and, 40, 174–8, 182, 204 n. 46, 258, 260, 262–3, 272, 312 n. 12 partial rescission, 173–4, 186–7, 189–91 restitution as consequence, 40, 86, 161, 163 termination distinguished, 262–5 third party rights and, 270 rescission (Germany) (Anfechtung) classification of remedy, 250 English law distinguished, 86, 137 n. 21, 174–7, 250 grounds, 86, 258 impossibility of restitution/counter-restitution and, 203–5, 258, 260, 261 rescission contract void ab initio, 86 restitution on basis of underlying ground for rescission, 86 right of, 247, 258 termination distinguished, 263–5 vertragsähnliches Recht, 137 n. 21 rescission (Netherlands), impossibility of restitution/counter-restitution and, 204, 209
rescission (Scotland)
See also reduction of contract termination distinguished, 265 Restatement of Contracts (Second), 233 Restatement of Restitution, 371 n. 8, 375 n. 16, 381–2, 506 n. 43, 647–8 restitutio in integrum, 24. See also measure of enrichment/damages arguments in favour of principle, 270–7, 281–5 as contractual concept, 203, 221 change of position and, 24, 243–85 England in case of, 265–6 transactions, 267–8 counter-restitution as, 173, 256, 271 definition, 281–2 Germany, 203–5, 261 void transactions, 267 rescission and, 202–5 Roman law, 202–3 Scotland in case of, 265–6 transactions, 267–8 definition, 281–2 frustration, 265–6 improvements to another's property, 407–9, 427–8 limitation to rescission of legal act, 253 South Africa, 201, 221 unwinding of contract and, 24, 243–77 restitution See also contract, restitutio in integrum for breach; failure of consideration as ground for restitution (England); frustration or fundamental breach of contract as ground for restitution; frustration or fundamental breach of contract as ground for restitution; improvement of another's property as ground for restitution; mistake as ground for restitution; proprietary restitution; restitutio in integrum; restitution without enrichment; subsidiarity; ultra vires acts of public authorities (England) history, 227–9 private/public law régimes, ultra vires acts, 664–5 scope of remedy, 41–2, 312 n. 12 unjust enrichment, equivalence, 3, 497, 647–9 variety of meanings, 647–8 restitution (civil law), bad faith and, condicio causa data causa non secuta, 141–2 restitution (England) alternative grounds/remedies, 124–6, 135–6, 581, 590–1, 653–4, 703 limitation periods and, 83, 125–6 basis, vitiation of consent, 49, 140–3
in case of
  moral obligation, 41-2, 312 n. 12
  unenforceable obligation, 47-8, 55-8, 70-2
  civil law distinguished, 76
  counterclaims and, 133-4
evolving system, 127
monetarization, 174-8, 182
mutual, 177-82
policy-motivated, 55-9, 61, 78-9, 84, 93-8, 170-1, 176-7
court’s discretion in respect of illegal transactions, 94-5
Insolvency Act, 1986 93-5
Law of Property (Miscellaneous Provisions) Act, 1989 95-7
time-barred claim, 55
proprietary nature, 175-6
requirements
enrichment. See restitution without enrichment
  non-operation of contract, 10, 109-11, 123-4, 155
unjust factors, 76
rescission and. See rescission
restoration of parties to previous position as objective, 116
scope of remedy, 106-7
benefit to claimant as basis, 106-7
failure of consideration, relevance, 107-9
restitution (France), 436
restitution (Germany)
  alternative grounds/remedies, 594
  policy-motivated, 59
  secondary enrichment, 182-3
restitution (Quebec), alternative grounds/remedies, negotiorum gestio, 594
restitution (Scotland)
in case of wrong of third party, 673-4
  linkage with unjust enrichment, condicio causa data causa non secuta, 26, 386, 404-6
repetition distinguished, 388-9, 405 n. 84
restitution in case of void transactions (England), 67-9, 76, 78-9, 82-3, 84-5, 95-7, 109, 237-8, 616-17, 701-2
  betting debt, 43-4, 72
  breach of contract distinguished, 112
consideration/expectation of counterperformance and, 67-72, 105-6, 109, 118-22
  impossibility of restitution/counter-restitution and, 267-8
  lack of clarity of concept, 72, 267-8
  mistake of law and, 45, 72-5, 84-5, 92-3, 107 n. 15
  remedy in tort, 256-7
  unjust factor, need for, 701
void/unenforceable distinction, 70
void/voidable distinction, 94, 201 n. 37, 267-8
without failure of consideration, 69-72
restitution in case of void transactions (Germany), 80, 86-6. See also lack of legal cause/ground (Germany)
  avoidance of nichtig where right to restitution not intended, 87-8, 93, 99
  clarity of concept, 72, 267-8
  condicio causa data causa non secuta, relevance, 67 n. 98, 73
  consideration/expectation of counterperformance and, 67 n. 98
  impossibility of restitution/counter-restitution and, 267-8
incompetence of party, 260
  intended discharge of contract as basis of payment, 67
  rescission (Anfechtung) giving rise to, 86, 268
  restitution without enrichment (Wegfall der Bereicherung) and, 235-8
  right to claim back transferred goods, 260
void/voidable distinction, 267-8
restitution in case of void transactions (Netherlands), void/voidable distinction, 201 n. 37
restitution in case of void transactions (Scotland), 254, 406-11, 702
impossibility of restitution/counter-restitution and, 267-8
restitution in case of void transactions (United States), void/unenforceable distinction, 70
restitution without enrichment. 227–42.
See also change of position; contract,
restitutionary damages for breach;
fraud/diurex, effect on, transfer of
ownership; frustration or fundamental
breach of contract as ground for
restitution; proprietary restitution;
restitutio in integrum
restitution without enrichment
fiduciary relationship, 363
improvement of another's property and,
381–3
retained ownership and, 573–5
restitution without enrichment (England),
void transactions, 237–8
restitution without enrichment (Germany)
(Wegfall der Bereicherung), 229–42
cases outside doctrine
bona fide purchaser, 210
change of position on basis of contract
with incompetent party, 233–4
exploitation, 231–2
liability for actions of sub-contractor,
238–9
void transactions, 235–8
wrongful appropriation of benefit, 232
restitution without enrichment (United
States), 239–42
cases outside doctrine
change of position on basis of contract
with incompetent party, 233–4
liability for actions of sub-contractor,
238–9
void transaction, 236–7
wrongful appropriation of benefit, 232–3
restitutionary damages for breach of
contract. See contract, restitutionary
damages for breach
right of recovery, 447
risk, allocation of, 10, 110–11, 112–13, 131,
139, 273–4. See also res perit domino
splitting the loss, 280–1
Rückgriffsverwaltungsrecht
Germany, 4, 19, 467–9, 480, 488
Scotland, 19, 467–9, 710–11
Rücksichtswirtschaft, 260, 263
Saldotheorie, 178–80, 188, 205, 234–5,
258–61, 267, 279
description, 178–9
displacement, 179, 205
Zweikondiktionenlehre and, 179, 192, 205,
258
salutis, 214
specificatio, 517
subcontractors. See restitution without
enrichment; three-party situations
subrogation/jerio legi
See also tracing
insolvency and, 577–8
Scotland, 665–8
insurance contracts, 577, 680–1
payment of another's debt without
authorisation, 463 n. 16
performance of another's obligation
England, 447 n. 70
France, 19–20, 439–42, 445, 463 n. 16
special patrimonies/trusts, 577
trusts, 577
subsidiarity, 596–623
actio de in rem verso and, France, 597,
602, 617, 622 n. 122, 666
applicability of different set of legal
principles, 597–607
availability of alternative remedies, 581,
596, 607–9
Quebec, 607–8
in case of
contractual remedy, 599–602
defendant's contract with third party
Germany, 605
Quebec, 605–6
illegal, void or unenforceable
transactions, 598
plaintiff's contract with third party
Canada, 603–4
France, 602
Germany, 604
Quebec, 602–3
range of unjustified enrichment
remedies, 598–9
tort/delict
France, 705
Germany, 608
justification, 609–13
Leistung and, Germany, 599, 604
potential for conflict, 612–13
prescription and, 608–9
in three-party situations, 558–66, 602–7,
617 n. 108
England, 559
INDEX

France, 560
Germany, 561–2
Italy, 559–60, 617 n. 108
Scotland, 558–9
South Africa, 562–6
weak subsidiarity, Quebec, 597

Swaps litigation (England)
See also ultra vires acts of public authority
derivation of problem, 80–1, 149–51
failure of consideration and, 14–15, 68–9, 81–3, 107–8, 118–22, 139–40, 152–4, 618
interrupted swap, 81–2

Synallagma, 271 n. 79

tantum et tale doctrine (Scotland), 676

taxonomy
See also unjust factors; unjust/unjustified enrichment, definitions;
unjust/unjustified enrichment, interface with and under separate subject headings
Birks, 4–5, 39–40, 49, 164–6, 659–60, 670–1, 688, 691, 693–4, 715
Burrows, 688–91, 693–4
codification and, 643–4
common law/equity dualism, 672–3
harmonisation, scope for, 659–61
importance, 632–44
lack of attention to (England), 628–57
Lipkin Gorman, 630, 641–3, 668
liability/remedy, 187–8, 270, 336.
See also performance of another's obligation

three-party situations
See also causation; insolvency; payment of another's debt; performance of another's obligation; subsidiarity; tracing
diversity of approach, 526–30, 542, 562
fraud/dupress and, 675
other than payment of another's debt, 20
policy considerations underlying liability, 530–3, 557–8, 566–7
sub-contractor's rights against beneficiary of performance, 20, 542–52, 561–6, 606–7
three-party situations (England)
agency, 513–14
alignment with two-party situations, 672–3
causation, leapfrogging, 518–24
change of position defence, 522
interceptive subtraction, 506–12
leapfrogging, 493, 504, 512–24
proprietary connection and, 515–19
Lipkin Gorman, 514–15, 517–19, 528, 575, 668
other than payment of another's debt, 20
restitution based on 'encroachment', 517–18
sub-contractor's rights against beneficiary of performance, 20
putative contract, 504–6, 510–12
valid contract, 502–4
traceability, 519
three-party situations (France)
actio de in rem verso, 513, 578–9, 602, 682
n. 149, 683
Boudier, 560, 578–9, 602, 682
three-party situations (Germany)
actio de in rem verso, 513
Canaris principles, 20, 616
change of position defence, 522
compensation for necessary expenses (Civil Code provision (BGB) (s 944ff)), 561–2
enrichment, need for, 539–42
interceptive subtraction, 512
Leistungskonkliktion and, 527–8, 539–41, 544–7, 554, 616–17
three-party situations (Germany) (cont.)
  subcontractor’s rights against
  beneficiary of performance, 20, 544–7, 561–2
  Elektrogütefall, 544–5
  third party beneficiary of contract,
  putative contract, 504–6, 510–12
three-party situations (Scotland)
  bad faith and, 722–3
  divergence from two-party transactions,
  672
  strict liability, 729
  subcontractor’s rights against
  beneficiary of performance, 546–7
  contract with contractor as bar, 20, 558–9
three-party situations (South Africa)
  enrichment, need for
    First National Bank v. B & H Engineering,
    535–8
    Govender v The Standard Bank of South
    Africa, 534–5
  subcontractor’s rights against
    beneficiary of performance, 562–6
    ABSA, 564–6
    Buzzard Electrical, 542–4, 546–7, 563–4
    unjustifiedness of enrichment, 
    relevance, 542–4
three-party situations (United States)
  enrichment, need for, 537–8
  strict liability, 718–19
  subcontractor’s rights against
    beneficiary of performance, 550–2
    Commerce Partnership 8098 LP v. Equity
    Contracting Co., 551–2
  third party beneficiary of contract,
    putative contract, 504
  tracing of money or other property, 13–14, 
    553–4, 667, 671–6. See also subrogation
  transfer of ownership. See fraud/duress, 
  effect on; undue transfers; unwinding of
  contract
trusts
  See also constructive trusts
  Scotland, 676–7
  subrogation, 577
ultra vires acts of public authorities
  (England), 62–5, 107–8, 118–22, 653, 
  664–5. See also swaps litigation
  illegality of demand, 62–5
  public authority liability in Germany
  distinguished, 62
  unjust factors and, 4, 27–8, 62–5, 
  664–5
  failure of consideration, 64–5, 82–3, 
  107–8, 118–22
  undue influence (England), 24, 170–1, 174, 
  198
  undue influence (Germany), 24, 74, 170–1, 
  198–9
  undue transfers
    See also performance/transfer without 
    legal basis (Leistungskondiktion)
    mistake, relevance, 697–9, 728
    undue transfers (France), répétition de l’indu,
    434 n. 6, 683, 697–8
    undue transfers (Netherlands)
    See also performance/transfer without 
    legal basis (Leistungskondiktion)
    (Germany)
    unjust enrichment/undue payment 
    distinguished, 194–5
    fraud/duress and, 208–9, 224
    undue transfers (Scotland), 682
    compulsion and, 700–1
    undue transfers (South Africa), condicio 
    indebiti and, 212–13
    unjust factors
    See also failure of consideration as 
    ground for restitution; fraud/duress; 
    fraud/duress as ground for rescission; 
    illegality as cause of action (England); 
    inequality of parties; lack of legal 
    cause/ground (Germany); measure of 
    enrichment/damages; mistake as 
    ground for restitution; 
    performance/transfer without legal 
    basis (Leistungskondiktion); ultra vires 
    acts of public authorities 
    advantages of system, 160–1, 191–3, 
    649–51
    lack of legal ground and, 18, 192–3, 
    649–51
    unjust factors (England) 
    condicio indebiti and, 38–9, 65, 73–4, 76, 
    92–3, 98, 139
    conditions compared, 135–6
    exploitation of claimant’s weakness, 
    77–8, 185–6
    ignorance, 77 n. 7, 91, 672, 707–8, 
    719–22, 728
lack of coherent system, 5–6, 135, 159–60, 162–3, 649–51, 665, 672–3, 690–1
need for, 58–9
powerlessness, 672, 707–8, 728
unjust factors (Germany)
illegality, 88
immorality, 88
mistake, 85–6
relevance of concept, 159–64, 192
unjust factors (Scotland), non-voluntariness, 211
unjust/unjustified enrichment as corrective, 610–12, 619–21
definitions, 3–8, 647–9
‘enrichment’, 651–2
loss, relevance, 500–1
by wrong/enrichment ‘by subtraction’ distinguished, 4–5, 164, 497–9,
524–5, 553
|possession distinction and, 573
|ownership remains unchanged, 578, 589–96
‘unjust’, 654–6
unjust enrichment/restitution, equivalence, 3, 497, 647–9
‘unjust/unjustified’ distinguished, 79, 530 n. 16
‘unjustified unless’, 691–3
‘enrichment’, corresponding loss, relevance, 11, 500–1, 509–12
general action, 192, 593–4, 595–6, 617–18, 621–2, 686–7
history of concept, 8–9, 227–9
interface with contract law, 9–12, 202–9, 262–4, 497–9, 524–5, 543–4, 546–7,
598–607, 614–19, 678, 701–3, 727
criminal law, 663–4
deficit/tort, 12–13, 177, 220–2, 510–12,
589–93, 653–4, 679–80, 705–6, 727
daress, 220–2
as defence, 312–13
fiduciary obligations, 11, 360–4, 395–6, 408–9, 672, 678–9
insolvency law, 677–8, 723–6
law of wrongs, 12, 608, 619, 621–2
|possession|transfer of property, 13–14, 398–402
remedies, 574–5, 669–71
repetition of the undue, 682
trusts, 676–7
where ownership remains unchanged, Scotland, condicio ex causa furtiva, 705–6
unjust/unjustified enrichment (England) as independent source of rights and obligations, 9
burden of proof, 126–7
‘enrichment’ ‘at the expense of’, 493–525, 553–4, 562, 565
subtraction, 506–12
by performance/other than by performance, 496, 499–500
causation, 553–4
|corresponding loss, relevance, 11, 500–1, 509–12
unjustified|relevance, 547–50
failure of consideration giving rise to, 108–9, 111
non-monetary enrichment, 122–3
measure of enrichment. See measure of enrichment|damages
property rights distinguished, 290–1, 292–8, 575–7, 666–71, 707–8
quantum mututal|quantum valebat actions and, 122–3, 177
‘unjust’, 110, 111
|unjust factors, relevance, 77
unjust/unjustified enrichment (France), ‘enrichment’, corresponding loss, relevance, 705
unjust/unjustified enrichment (Germany) See also restitution without enrichment ‘at the expense of’, causation, 554
Civil Code provision (BGB) (§ 812(1)), 4, 79, 496, 561, 593–4
condictio indebiti|condictio sine causa and, 38, 40–1, 55
proposed revision, 696
sweeping nature, 79–80, 88, 93, 205
|codification of law, effect, 194
‘enrichment’ ‘at the expense of’, 493–4, 496
unjust/unjustified enrichment (cont.)
by performance (Leistung)/other than by performance (Nichtleistung), 80, 91, 496, 499–500, 511–12, 539, 604, 686–7
incurred by claimant (Verwendungen), 4, 554
corresponding loss, relevance, 496 n. 12, 500–1, 510–12
‘in another way’ ( Irrrichtung in sonstiger Weise), 4, 544
general action, 192, 593–4, 686–7
where ownership remains unchanged, 593–4
condictio possessionis, 594
unjust/unjustified enrichment (Netherlands), general action, 683
unjust/unjustified enrichment (Quebec) Civil Code provisions, 594–6
general action, actio de in rem verso as, 595–6, 617–18, 621–2
reception de l’indu, 594–5, 599, 608 n. 80
where ownership remains unchanged, 594–6
unjust/unjustified enrichment (Roman law) where ownership remains unchanged, 591–3
condictio ex causa furtiva, 591–3
unjust/unjustified enrichment (Scotland)
See also improvement of another’s property as ground for restitution (Scotland) Clive Code (1996), 26–7, 482–5, 644, 660 n. 15, 670, 691–3, 702
delict/contract, 498–9
diversity of remedies, 387–9, 488
croachment on claimant’s property (Eingriff), 680, 705–7
‘enrichment’, 411–13, 417–21, 651–2
‘at the expense of’, 554
and, 663–4
by performance/other than by performance, 684–6, 694–705
‘transfer’, 694–5
unjustifiedness, relevance, 545–7
‘unjustified unless’, 691–3
where ownership remains unchanged, liens and hypothecs, 578
unjust/unjustified enrichment (South Africa)
‘enrichment’
‘at the expense of’, 554, 562, 565
‘enrichment’
corresponding loss, relevance, 534–8
unjustifiedness, relevance, 542–4, 546–7
general action, 684
unjust/unjustified enrichment (United States) ‘enrichment’
‘at the expense of’, 493
unjustifiedness, relevance, 550–2
unwinding of contract
change of position defence and, 24, 259–60, 282–5
effect on contract, 244, 252–70
transfer of property, 244–5
failure of consideration and, 260, 262–3
methods automatic, 248, 266
classification of remedy, 250–70
effect on contract, 252–70
exceptio against plaintiff, 248
judicial, 247–8
obligational, 247, 266
proprietary basis, 268–70
reasons, 248–50
terms to be avoided, frustration, 244–6
unified system, desirability, 262–70
unwinding of contract (England)
breach of contract, 256
defective goods, 255
frustration, 256–7
mistake, fraud, force or fear, 255
where transfer of property rendered void, 257–8
unwinding of contract (Germany), 258–60
breach of contract, 260
minority, 260
mistake, fraud, force or fear, 258–60
rescission/termination distinction, 263–5
splitting the loss, 261, 280–1
Zweikondiktionenlehre, 261, 278–9
unwinding of contract (Scotland)
minority, 253, 281
mistake, fraud, force or fear, 252–3
Verwaltungslehre, 260
venire contra factum proprium, 204, 274–6.
See also estoppel/personal bar
Verfugungsgeschaft, 218–19
Verpflichtungsgeschäft, 218–19
vertragsähnliches Recht, 137 n. 21
Verwendungskondiktion, 4, 467, 554
‘vicarious performance’, 445-6, 457
vindicatory remedies/vindicatio, 13–14, 573–5, 596, 619–21, 669–71, 675
England, 13, 591
Germany, 218–20, 249, 250–1, 268–9, 594
interface with unjust/unjust enrichment, 574–5, 669–71
Roman law, 591–3
South Africa, 219–20, 564
vitiation/qualification of plaintiff’s consent. See failure of consideration as ground for restitution (England);
fraud/duress as ground for rescission;
illegality as cause of action (England)
void/voidable transactions
See also restitution in case of void transactions
right to claim back transferred goods, 260
subsidiarity in case of, 598
Verleistungsfälle, 137 n. 25
Wandelung, 247
Wegfall der Bereicherung, 227–42
Willenserklärung, 200–1
Zuweisungsgehalt eines Rechts, 511
Zweikondiktionenlehre, 179, 192, 205, 258, 261, 278–9