# ARTIFICIALITY IN FAILURE OF CONSIDERATION

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## I INTRODUCTION

It has been recognised since at least the seventeenth century that failure of consideration gives rise to a claim in (what we would now call) unjust enrichment.[1] In the mid-eighteenth century Lord Mansfield included failure of consideration in his classic exposition of money had and received,[2] and there have been two and a half centuries of judicial development since then. It might be hoped that, by now, the law would be settled.

A glance at the literature immediately dispels this hope. Edelman and Bant, for instance, warn their readers at the very beginning of their chapter on the subject that 'failure of consideration is intensely difficult – one of the most difficult and controversial of all the unjust factors'.[3] This article focuses on two (possibly inter-related) issues that go to the root of this intense difficulty. The first is the lack of clarity as to what 'failure of consideration' actually means; the second is the way that the courts approach the requirement that the failure of consideration must be total.

So far as the meaning of 'failure of consideration' is concerned, it is now generally agreed that 'failure of consideration' can be paraphrased as 'failure of basis';[4] but to ask when, exactly, the basis of a transaction fails, is simply to put the question differently. Most authors cite the comments made by Lord Simon LC in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Limited*, to the effect that failure of consideration is all about performance.[5] On this view, what is crucial is that the recipient of the claimant's payment should have given or done at least part of what was understood to be due in return for the payment.[6] On the other hand, there is support in more recent cases for a view of failure of consideration that focuses not on performance, but on the underlying legal validity of the transaction. Thus, in *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council*[7] it was held that all payments made under a

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1 *Martin v Sitwell* (1691) 1 Show KB 156. For the medieval remedies available where a payment had been made for a purpose that had failed see David Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) 267-268. For a general discussion of the historical background see Samuel Stoljar 'The Doctrine of Failure of Consideration' (1959) 75 *Law Quarterly Review* 53, 54-56.

2 *Moses v Macferlan* (1760) 2 Burr 1005, 1012.

3 James Edelman and Elise Bant, *Unjust Enrichment in Australia* (2006) 242.

4 *Roxborough v Rothmans of Pall Mall Australia Limited* [2001] HCA 68, 208 CLR 516, [16] (Gleeson CJ) and [104] (Gummow J) .

5 [1943] AC 32, 48: 'when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise'.

6 Andrew Burrows, *The Law of Restitution* (2nd ed, 2002) 324-325; Andrew Burrows, Ewan McKendrick and James Edelman *Cases and Materials on the Law of Restitution* (2nd ed, 2006) 251; Graham Virgo *The Principles of the Law of Restitution* (2nd ed, 2006) 306: 'Consideration for the purposes of the law of restitution is not concerned with the existence of promises under the contract, but with the performance of those promises'.

7 [1999] QB 215.

void contract were to be reversed, since there had been a failure of consideration in respect of each one of them. The facts of the *Guinness Mahon* case provide a particularly striking illustration of why it matters whether the emphasis in failure of consideration is on performance or legal validity, because, in that case, all the payments specified in the void contract had been made: if the emphasis was on performance, there was no scope for a claim at all; but if, as the Court of Appeal held, the legal validity of the transaction was decisive, the fact that all payments had been made was irrelevant.

The second problem relates to the requirement that a failure of consideration must be 'total' in order for a claim in unjust enrichment to lie.[8] The problem here is that, whilst the courts are consistent in insisting that the failure must be total, there is a reluctance to carry the requirement to its logical extremes. For instance, it has been accepted that payments may be severed, and apportioned to specific elements of the contractual performance; where only part of the expected performance is rendered, it can be said that there has been a total failure of the unperformed elements, and, therefore, that the payment allocated to those unperformed elements must be returned.[9] Applied creatively, this principle of severability effectively eliminates the requirement of total failure.[10]

These problems about the ambiguity of 'failure of consideration' and the requirement of total failure may be linked. In order to avoid the injustice of denying a claim in unjust enrichment to a claimant who has received a small measure of performance, courts may have been tempted to modify their approach to what counts as the 'basis' of the transaction: by holding that what the claimant has received was not truly part of the consideration for which the payment was made, the unjust enrichment claim for total failure of consideration is preserved, and justice is done. But it is done at a price, the price being the manipulation of the concept of total failure of consideration, risking confusion and incoherence in the law. Commentators have detected this manipulation in several instances, which will be discussed fully below, but one example can be used to illustrate the point here. In *Rowland v Divall*[11] the claimant, a consumer, had purchased a car from the defendant. The claimant used the car for several weeks, but it then emerged that the defendant had had no title to sell, and the true owner reclaimed the vehicle. The claimant sought to recover the price he had paid, basing his claim on total failure of consideration, and succeeded. The consideration for payment of the price was the receipt of good title to the car, according to the Court of Appeal; the claimant having received no title, the consideration had wholly failed. On this analysis, therefore, the claimant's use of the car did not amount to part of the consideration for payment, and did not prevent the claim from succeeding. This, Burrows has said, was 'an artificial view of total failure'.[12] The same writer highlights the point by contrasting the analysis in *Rowland v Divall* with *Hunt v Silk.*[13] In the latter case the claimant agreed to become the defendant's tenant, and went into possession immediately, paying £10. The formal lease was to be granted ten days later, once some repairs had been carried out, but neither the lease nor the repairs were ever completed; the claimant left the house 'some days'[14] after the ten day period elapsed. His claim to recover £10 on the ground of failure of consideration was rejected.

This article argues that the criticism of *Rowland v Divall*, and similar cases, as being artificial is mistaken. On the contrary, *Rowland v Divall* both highlights and exemplifies an approach to failure of consideration, which analyses the basis of the

8 *Whincup v Hughes* (1871) LR 6 CP 78.
9 See, for example, *Goss v Chilcott* [1996] AC 788.
10 See, for example, *D O Ferguson & Associates v Sohl* (1992) 62 BLR 95.
11 [1923] 2 KB 500.
12 Burrows, see above n 6, 329.
13 (1804) 5 East 449. Also, see above n 6, 340.
14 Ibid 450.

transaction in terms of the legal rights conferred on the payer in return for the payment. This analysis in terms of rights can be seen in some of the earliest cases on failure of consideration, and continues to be used by courts through the nineteenth and twentieth centuries. It will also be argued that part of the reason for any apparent artificiality in cases like *Rowland v Divall* is that there is in fact no contrast with *Hunt v Silk*; that case was actually concerned with a different point, which was whether the contract could be rescinded ab initio. Finally, it should be made clear that this article is not intended as a contribution to the ongoing debate as to whether the law should insist on total failure of consideration before a claim in unjust enrichment will lie.[15] Rather, the article demonstrates that, in cases like *Rowland v Divall*, the courts have not been covertly implementing a reform of the total failure requirement. The true significance of those cases is that they represent a distinctive, and hitherto insufficiently acknowledged, approach to the concept of failure of consideration.

## II RESCISSION AB INITIO

As indicated above, one of the criticisms of *Rowland v Divall*, which is said to highlight the artificiality of that case's approach, is its inconsistency with *Hunt v Silk*. At first glance the point seems a powerful one. The claimant in *Rowland* received no title to the car, and recovered his payment; the claimant in *Hunt* received no title to the land, but his claim failed. Both claimants enjoyed some use of the asset they had contracted for. One of these cases must be wrong, it would seem.[16]

In fact, a closer inspection of the reasoning in *Hunt v Silk* shows that the point of that case was not whether there had been a total failure of consideration. The issue was whether the contract could be rescinded ab initio for the defendant's breach, and the court held that rescission was impossible given the claimant's occupation of the premises. In other words, as Lawrence J put it, it was necessary that 'both parties were put in the same position they were in before [and] that cannot be done here'.[17]

The requirement that the contract between the parties must be rescinded ab initio before a claim for money had and received could be brought for total failure of consideration was not new. It had been asserted emphatically nearly a century earlier, in *Dutch v Warren*, where the King's Bench was reported as having said that:

> If one man takes another's money to do a thing, and refuses to do it; it is a fraud: and it is at the election of the party injured, either to affirm the agreement, by bringing an action for the non-performance of it; or to disaffirm the agreement ab initio, by reason of the fraud, and bring an action for money had and received to his use.[18]

The editor of Strange's reports, in which a brief account of *Dutch v Warren* was given,[19] brought out what disaffirmation ab initio meant: 'the contract must be totally rescinded, and appear unexecuted in every part at the time of bringing the action'.[20]

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15 For a comprehensive analysis of the arguments see, Peter Birks, 'Failure of Consideration' in Francis Rose (ed) *Consensus ad Idem* (1996) 179.

16 Samuel Stoljar 'The Doctrine of Failure of Consideration' (1959) 75 *Law Quarterly Review* 53, 72: footnote 7 comments that 'some reinterpretation of *Hunt v Silk* is … required to reconcile it with *Rowland v Divall*'. Burrows, see above n 6, 340 regards the decision in *Hunt v Silk* as highlighting the artificiality of *Rowland v Divall*.

17 (1804) 5 East 449, 452-453.

18 Quoted by Mansfield CJ in *Moses v Macferlan* (1760) 2 Burr 1005, 1011.

19 (1721) 1 Str 406.

20 Ibid.

The reason for this insistence on rescission ab initio was the concern that the action for money had and received should be kept within proper limits, and not be allowed to overrun actions for breach of contract.[21] The requirement continued to be strictly enforced after *Hunt v Silk*, with it being made clear that the mere fact of possession would bar a claim for unjust enrichment, whether or not any physical change had been made to the premises.[22] The same principles applied to chattels.[23] At the same time, however, claimants could sometimes benefit from the emphasis on returning the parties to the same *legal* position. Thus, in *Wilkinson v Lloyd*[24] the action for money had and received was allowed where, as a matter of law, a purported transfer of shares had been ineffective, and the value of the shares had subsequently fallen: the vendor's legal position was easily restored (by returning the share certificates), although his financial position was damaged in the process.

A more significant emphasis on the parties being returned to their previous *legal* position was that the situation lent itself to analysis in terms of legal rights. Thus, in *Beed v Blandford*,[25] whilst Alexander LCB spoke of the necessity 'that the parties should, by the plaintiff's recovering the verdict, be placed in the same situation in which they originally were before the contract was entered into',[26] Vaughan B used different terminology:[27]

> The decision in *Hunt v Silk* lays down a very clear and just rule in these cases: if the circumstances be such that, by rescinding the contract, the rights of neither party are injured, in that case, if one contracting party will not fulfil his part of the engagement, the other may rescind the contract, and maintain his action for money had and received, to recover back what he may have paid upon the faith of it.

This emphasis on the rights of the parties being injured was, as Vaughan B hinted, implicit in *Hunt v Silk*.[28] There, it will be recalled, the claimant entered into possession, paying £10, on the basis that certain repairs and a lease would be affected within ten days. Neither the repairs nor the lease were completed within those ten days, but the claimant remained in possession for 'some days after',[29] and then sought to rescind. It is made clear that what prevented rescission was the claimant's occupation for the additional days. Lord Ellenborough CJ said:[30]

> Now where a contract is to be rescinded at all, it must be rescinded in toto, and the parties put in statu quo. But here was an intermediate occupation, a part execution of the agreement, which was incapable of being rescinded. If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed, and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account.

Lawrence J stated that 'the money was paid generally on the agreement, and the plaintiff continued in possession after the ten days, which can only be referred to the

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21 See, for example, *Weston v Downes* (1778) 1 Doug 23; *Longchamp v Kenny* (1779) 1 Doug 137; *Hulle v Heightman* (1802) 2 East 145.
22 *Blackburn v Smith* (1848) 2 Ex 783.
23 *Beed v Blandford* (1828) 2 Y & J 278; *Valentini v Canali* (1889) 24 QBD 166.
24 (1845) 7 QB 27.
25 (1828) 2 Y & J 278.
26 Ibid 283.
27 Ibid 284.
28 (1804) 5 East 449.
29 Ibid 450.
30 Ibid 452.

agreement'.[31] Le Blanc J similarly emphasised that 'The plaintiff voluntarily consented to go on upon the contract after the defendant had made the default of which he now wishes to avail himself in destruction of the contract'.[32] Why was the occupation for the first ten days insufficient? Surely that was just as incapable of reversal as the subsequent two or three days' occupation? The obvious answer is that the defendant was not entitled to demand that the first ten days' occupation be reversed, because the claimant had the right (granted by the defendant) to be in possession for those first ten days. That initial period did not, in the phrase used by Vaughan B, injure the defendant's rights; the two day period after the ten days had elapsed did, by contrast, injure those rights, and could not be reversed. The two day period, therefore, was the only period of occupation that prevented rescission.[33]

As the nineteenth century progressed, the insistence on rescission ab initio would occasionally be reasserted[34] but, at the same time, other cases were less dogmatic,[35] and a more nuanced approach could be seen emerging to deal with the issue of when rescission might be barred. This more nuanced approach took account of the claimant's legitimate exercise of rights. For instance, in *Head v Tattersall*[36] Bramwell B could assert that whilst it was true 'as a general proposition'[37] that a chattel the subject of a contract must be restored in the same state as when it was bought, the general proposition required qualification. Dealing with the example of a horse, he explained that:[38]

> The buyer must return the horse in the same condition as when he bought it, but subject to any of those incidents to which the horse may be liable, either from its inherent nature, or in the course of the exercise by the buyer of those rights over it which the contract gave.

For instance, he continued, the right to rescind would remain if an injury to the horse was inflicted 'by reason of a trial necessary to test the warranty the horse was sold under'.[39] A year later, in *Heilbutt v Hickson*[40] Bovill CJ made the same point, although now expressed in terms of a general right to recover the price paid for defective goods:[41]

> It is, however, generally necessary, in order to enable the purchaser to recover back the price which he may have paid for the goods, that he should not have done more than was necessary for a fair trial of them, or for the purpose of examination and comparison, and also that he should reject the goods within a reasonable time, and that he should not have done any act to alter the position of the vendor, nor ... to delay the return of the goods.

When the law on this issue was codified in the Sale of Goods Act 1893, the general principle was expressed in terms of the buyer doing 'any act in relation to [the goods] which is inconsistent with the ownership of the seller';[42] the buyer was also to be given a

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31 Ibid 453.
32 Ibid.
33 Cf, Peter Birks, *An Introduction to the Law of Restitution* (1985) 417, where it is said, too broadly, that 'even a few days' possession' barred the claim in *Hunt v Silk*.
34 *Valentini v Canali* (1889) 24 QBD 166.
35 See, Tariq Baloch, *Unjust Enrichment and Contract* (2009) 124-128.
36 (1871) LR 7 Exch 7.
37 Ibid 12.
38 Ibid.
39 Ibid.
40 (1872) LR 7 CP 438.
41 Ibid 451.
42 See now, *Sale of Goods Act 1979* s 35 (1)(b).

reasonable opportunity of examining the goods, it being implicit that such examination was not inconsistent with the seller's ownership.

The decision in *Hunt v Silk*, therefore, can be seen as an important contribution to the early nineteenth century law on when a contract could be rescinded ab initio. In particular, it implicitly introduced the test of injury to the parties' rights, which would be made explicit and expanded by later courts. However, the case had nothing to say about the concept of failure of consideration. On the law as it then stood, the precondition for bringing a successful claim in unjust enrichment was that the contract be rescinded ab initio; that precondition was not satisfied on the facts of *Hunt*'s case, and it is hardly surprising that the court did not go on to consider what the result would have been if the precondition had been satisfied. Under current English law – as established by the House of Lords in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Limited*[43] – it is no longer necessary for any contract to be rescinded ab initio. All that is required is that the contract be terminated.[44] Indeed, it is now recognised that rescission ab initio for breach of contract is impossible; rescission for breach can only operate prospectively, with rights that the parties had accrued before the breach remaining intact.[45] In Australia, the current position is even further removed from the principles set out in *Hunt v Silk*, since a claim for total failure of consideration can arise despite the relevant contract remaining in force.[46] The reasoning in *Hunt v Silk* is, therefore, of no application today either in England or in Australia. It may, perhaps, be possible to reinterpret the case as an example of affirmation, as has been done by Goff and Jones,[47] but it is difficult to see the couple of extra days, during which the claimant continued to request completion, as an expression of intention to be bound.[48] Ultimately the case is best seen as historically interesting, but overtaken by later judicial developments.

## III THE ORIGINS OF FAILURE OF CONSIDERATION

The previous section has demonstrated that the decision in *Hunt v Silk* provides no basis for criticism of *Rowland v Divall*. However, the broader question still remains, namely, whether failure of consideration should always, as a matter of principle, focus on the recipient's failure to give or to do what was promised. Certainly there seems to be support for this view in dicta of high authority. For instance, in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Limited*[49] Lord Simon LC remarked that:[50]

> when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise.

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43 [1943] AC 32.

44 Or, possibly, in suspense: *Miles v Wakefield Metropolitan District Council* [1987] 1 AC 539, discussed in Phillip Sales, 'Contract and Restitution in the Employment Relationship: No Work, No Pay' (1988) 8 *Oxford Journal of Legal Studies* 301, and Geoffrey Mead, 'Restitution within contract?' (1991) 11 *Legal Studies* 172.

45 *Johnson v Agnew* [1980] AC 367. See further, Charles Mitchell '*Johnson v Agnew* (1979)' in Charles Mitchell and Paul Mitchell (ed) *Landmark Cases in the Law of Contract* (2008) 351 at 354-359.

46 *Roxborough v Rothmans of Pall Mall Australia Limited* [2001] HCA 68, 208 CLR 516.

47 Lord Goff of Chieveley and Gareth Jones, *The Law of Restitution* (7th ed, 2007) 20-013.

48 See the principles in Hugh Beale (ed) *Chitty on Contracts* (30th ed, 2008) 24-003.

49 [1943] AC 32.

50 Ibid 48.

Similarly, there are cases where judicial analysis has emphasised receipt of performance.[51] However, as this section will show, there is nothing in the concept of failure of consideration which requires it to be exclusively concerned with performance. The next section will then go on to illustrate how the courts have adopted a broader approach.

Failure of consideration had been articulated as a ground of recovery by the late seventeenth century, but it is widely acknowledged that the judgment in *Moses v Macferlan*[52] gave the action for money had and received a system and structure that it had previously lacked. It is the obvious place to begin our investigation into the failure of consideration doctrine.

*Moses* was not argued as a case on failure of consideration, but failure of consideration makes two appearances in Lord Mansfield CJ's judgment. The first is in relation to the decision in *Dutch v Warren*, which concerned the failure to perform a contractual obligation to transfer shares. Lord Mansfield reported the Court as having said that:[53]

> If one man takes another's money to do a thing, and refuses to do it; it is a fraud: and it is at the election of the party injured, either to affirm the agreement, by bringing an action for the non-performance of it; or to disaffirm the agreement ab initio, by reason of the fraud, and bring an action for money had and received to his use.

The second reference is in the list of situations where the action for money had and received would lie:[54]

> it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.

In the case before him, Lord Mansfield was not being asked to consider the precise scope of the concept of failure of consideration, so it is not surprising that he did not explore the matter further. Certainly the decision in *Dutch v Warren* was an example of failure of consideration which involved failing to perform a contractual obligation. But there was nothing in Lord Mansfield's language to suggest that failure of consideration was confined to instances of failure to perform a contract. Indeed, he followed the list quoted above with a statement that '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'.[55] This would suggest that he did not envisage the categories he had set out as being interpreted narrowly.

Later commentators, however, have found a reason to interpret the concept of failure of consideration narrowly in the inspiration which Lord Mansfield probably took from Roman Civil law. In 1802 Sir William Evans had noted that Lord Mansfield 'very compendiously stated the nature and principles of [the action for money had and received], coinciding in effect with the institutes of the civil law'.[56] Four years later, in

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51 See, for example, *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 WLR 912 at 923: 'The test is whether or not the party claiming total failure of consideration has in fact received any part of the benefit bargained for under the contract or purported contract' (Kerr LJ).

52 (1760) 2 Burr 1005.

53 Ibid 1011.

54 Ibid 1012.

55 Ibid.

56 William Evans, *An Essay on the Action for Money Had and Received* (1802) 7 (reprinted in [1998] *Restitution Law Review* 1).

the Appendix to his translation of Pothier's treatise on obligations, he would be more explicit, asserting that 'the source' of Lord Mansfield's exposition was 'the juridical wisdom of ancient Rome',[57] and setting out the judgment and corresponding Roman sources in parallel columns over three pages.[58] Evans' analysis eventually came to the attention of Samuel Warren, who included it in the third edition of his *Introduction to Law Studies* (1863).[59] There it could be picked up by a wider undergraduate audience, such as the young Thomas Scrutton (later, as Scrutton LJ, a member of the Court of Appeal that decided *Rowland v Divall*), who used it in his prize essay on the influence of Roman law on English law.[60] The same analysis appealed to Peter Birks who, in 1984, argued that *Moses* represented 'a species of reception of Roman law',[61] and his approach has been echoed in the recent work of Edelman and Bant.[62] The significance of this influence of Roman law for the concept of failure of consideration was universally agreed to be that Lord Mansfield was importing the *condictio causa data causa non secuta* into English law.[63]

If Lord Mansfield really was intending to import the *condictio causa data causa non secuta* into English law this was indeed significant, because that *condictio* was aimed precisely at situations of failure of performance.[64] It had been created to provide a remedy in situations where parties had made an agreement which fell outside the recognised contractual categories – for instance, the Roman law of sale required a price in money, so an agreement to exchange goods for other goods did not give rise to an enforceable contract. If such an agreement had been performed by one party, but not the other, the performing party could bring the *condictio causa data causa non secuta* to recover the value of his performance. Crucially, for our purposes, the *condictio causa data causa non secuta* was not triggered by a failure to create legal rights; indeed, the whole point of it was that it provided a remedy only where counter-performance of an unenforceable agreement was incomplete. If English law is based on the *condictio causa data causa non secuta*, failure of consideration must mean failure of counter-performance.

However, a closer examination of Lord Mansfield's judgment in *Moses v Macferlan* indicates that he was not merely transplanting Roman law into English common law. As commentators have pointed out, there is a strong theme of equitable

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57 Jean Pothier, *A Treatise on the Law of Obligations or Contracts* translated by William Evans (1806) vol 2 at 378.

58 Ibid 379-381.

59 Samuel Warren *A Popular and Practical Introduction to Law Studies* (3rd ed, 1863) 1353-1354. There is no trace of Evans' Roman law analysis in the corresponding part of the second edition (Samuel Warren, *A Popular and Practical Introduction to Law Studies* (1845) 320-322).

60 Thomas Scrutton *The Influence of the Roman Law on the Law of England* (1885) 181; the source is acknowledged at footnote 2 on that page.

61 Peter Birks, 'English and Roman Learning in *Moses v Macferlan*' (1984) 37 *Current Legal Problems* 1.

62 James Edelman and Elise Bant, *Unjust Enrichment in Australia* (2006) 242.

63 Evans, see above n 56, 25; Evans, see above n 57, vol 2 at 380, after setting out the sentence on failure of consideration in *Moses v Macferlan* states that: 'The whole title in the digest, *de Condictione Causa data, Causa, non secuta*, is an amplified view of this proposition'; Birks, see above n 61, 18. See also, Peter Birks 'Failure of Consideration and Its Place on the Map' (2002) 2 *Oxford University Commonwealth Law Journal* 1, 3: 'The confusion [about the meaning of failure of consideration] would never have arisen if we had followed Sir William Evans in keeping our eyes on '*causa data causa non secuta*'.

64 See generally, J A C Thomas, *Textbook of Roman Law* (1976) 327; Reinhard Zimmermann *The Law of Obligations* (1996) 843-844.

concepts and the role of conscience in Lord Mansfield's judgment.[65] Furthermore, even if, when he referred to 'failure of consideration', Lord Mansfield was taking direct inspiration from Roman law, it does not follow that he must have been thinking specifically of the *condictio causa data causa non secuta*. The Digest also includes a broader category – the *condictio sine causa*[66] (debt claim where the basis is absent) which, although in some ways a residual category,[67] also includes wide statements of principle, and was regarded by some Civilian authors as providing a general remedy. Pothier, for instance, regarded the claim to recover a mistaken payment as being based on the *condictio sine causa.*[68] The texts on the *condictio sine causa* in the Digest contain statements not dissimilar to those made by Lord Mansfield. For instance, the title on the *condictio sine causa* opens with the following extract from Ulpian:[69]

> There is also this kind of *condictio* for the case in which someone makes a promise with no basis or pays what is not owed. But one who promises with no basis cannot bring a *condictio* for the amount promised but for the obligation itself. 1. Further, if he gives a promise on a basis which fails to materialize, the *condictio* must be said to lie. 2. Whether the basis of the promise is absent from the start or is present but fails to endure or materialize, the condictio must be said to lie. 3. It is agreed that the *condictio* can only go against someone for something which came to him on other than a legally sufficient basis or comes to be referable to a basis which is not legally sufficient.

Here, as in Lord Mansfield's phrase, no particular reason (such as non-reciprocation) is given for the failure of basis. It is also striking that in 7.1.2 Ulpian is at pains to stress that the *condictio* will lie no matter when the basis happened to fail; Africanus makes the same point in 7.1.4. That is exactly the implication in Lord Mansfield's terminology of the action lying where the consideration 'happens to fail'. At the very least, we can conclude that if Lord Mansfield had intended to confine failure of consideration to the circumstances in which the *condictio causa data causa non secuta* would lie, it would have been easy to say so, but he did not impose such restrictions.

Finally, it may well be that the concept of failure of consideration provides the key to understanding *Moses v Macferlan* itself. On the facts of that case the claimant owed £26 to the defendant, which he was unable to pay. The claim went to arbitration, where the claimant agreed to pay £20 and to assign four promissory notes (which were owed to the claimant) to a total value of £6, over to the defendant. The defendant would then enforce the promissory notes, thus recouping the debt. The parties agreed to share the

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65 Ben Kremer 'The Action for Money Had and Received' (2001) 17 *Journal of Contract Law* 93; Warren Swain, '*Moses v Macferlan* (1760)' in Charles Mitchell and Paul Mitchell (ed) *Landmark Cases in the Law of Restitution* (2006) 19 at 27-28. One comment that may have been particularly influential, given its likely large readership of impressionable students was that of Samuel Warren, who, in *A Popular and Practical Introduction to Law Studies* (2nd ed, 1845) set out Lord Mansfield's judgment and added (at 322), 'What is this, in effect, but a very cheap, convenient, comprehensive and effectual Bill in Equity?'. In the third edition (1863) Warren would also bring the Roman law influence to the attention of his readers (see above n 59).

66 D 12.7.

67 Zimmermann, see above n 64, 856.

68 See, for example, Pothier, *A Treatise on the Law of Obligations or Contracts* translated by William Evans (1806) vol 1, 24-25. Evans' understanding of Lord Mansfield's Roman law sources has been set out above, at n58. It is perhaps significant that, unlike his treatment of many other passages in Pothier's, *Treatise*, Evans added no commentary or footnotes to this section to bring out any similarities with English law.

69 D 12.7.1. Translation from A Watson (ed) *The Digest of Justinian* (1985).

cost of collection if the sum was recovered in full.[70] The defendant had promised not to sue the claimant on the endorsements, but went back on that promise, bringing a successful claim in the Court of Conscience. The claimant then brought an action for money had and received to recover back the amount he had been required to pay under the Court of Conscience's judgment. He succeeded, but the precise reason for his success has been found difficult to articulate, and it has been said that the outcome of the case can only be explained as an award of restitutionary damages for breach of contract.[71] However, there is surely another explanation. The basis of the claimant's endorsement of the promissory notes was that he would not be sued on the endorsement. That basis failed when the defendant brought the claim in the Court of Conscience. Lord Mansfield CJ recognised this. Having quoted the observation from *Dutch v Warren* that 'if one man takes another's money to do a thing, and refuses to do it; it is a fraud',[72] he remarked that the 'fraud' on the facts of the case before him was 'stronger' – 'The indorsement, which enabled the defendant to recover, was got by fraud and falsehood, for one purpose, and abused to another'.[73] On this analysis, the only difficulty that arises relates to the fact that the claimant did not pay money to the defendant, but rather assigned debts due to him from a third party. A strict, technical analysis might insist that the action for money had and received could only arise in respect of cash payments, but, as Lord Mansfield was at pains to point out in his judgment, strict, technical analyses were not appropriate in this form of action. In any case, it was hardly a radical innovation to regard the assignment of a debt as the equivalent of a cash payment of the same amount in circumstances where separate provision had been made for any expenses that might be incurred in its collection, and the assignor would himself be liable (on ordinary principles of law) if the collection was unsuccessful.

## IV FAILURE OF CONSIDERATION AND CONFERMENT OF RIGHTS

Up to this point, this article has shown that, when deciding whether there has been a failure of consideration, there is no compelling reason to focus solely on the receipt of performance, to the exclusion of issues of legal rights. This section demonstrates that there are, in fact, many situations where courts have consciously emphasised the absence of legal rights as the reason for a consideration having failed even though (factual) performance has not failed. These cases show that the decision in *Rowland v Divall* is not artificial, but represents an important general principle in the law of failure of consideration.

### A *Insurance Contracts*

Cases on insurance contracts provide one of the earliest instances of courts emphasising the conferment of legal rights in their analyses of failure of consideration. As Ben Kremer has shown,[74] courts consistently held that where a premium was paid in

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70 These full facts are not set out in the law reports, but were recorded by Lord Mansfield CJ at the trial: James Oldham *The Mansfield Manuscripts* (1992) 169-175, 258-259.

71 Birks, see above n 61, 24.

72 (1760) 2 Burr 1005, 1011.

73 Ibid 1012.

74 Ben Kremer, 'Recovering Money Paid Under Void Contracts: 'Absence of Consideration' and Failure of Consideration' (2001) 17 *Journal of Contract Law* 37, 43-45.

respect of a policy that was either illegal, or in respect of which the insurer never went on risk, the payment had been made for 'no consideration'.[75]

At first glance such cases provide strong support for the thesis being advanced here, namely, that the courts have consistently emphasised the conferment of legal rights in their analyses of failure of consideration. However, caution is required for two reasons.

First, the thesis being advanced is that the courts emphasise conferment of rights even where (as in *Rowland v Divall*) some factual benefit of performance has been received. In insurance contracts the insurer confers no factual benefit distinct from his promise to make good any insured loss: the conferment of the legal right on the assured is the performance. The insurance cases do not, therefore, provide compelling evidence in support of the approach to failure of consideration taken in *Rowland v Divall*.

Second, although the courts consistently held that there was no consideration in respect of premiums where the insurer never went on risk, it did not follow that the premium in all such cases was recoverable. A distinction, inspired by the equitable dimension of the action for money had and received, was drawn between executed and executory contracts, with premiums recoverable only in respect of executory contracts. Thus, in the leading case of *Stevenson v Snow*[76] it was crucial that the assured sought repayment of the premium as soon as he realised that the conditions stipulated for the policy to become effective could not be satisfied. By contrast, in *Lowry v Bourdieu,*[77] where the assured lacked an insurable interest, and the claim to recover the premium was not made until the completion of the voyage, Buller J stated:[78]

> There is a sound distinction between contracts executed and executory, and if an action is brought with a view to rescind a contract, you must do it while the contract continues executory, and then it can only be done on the terms of restoring the other party to his original situation … if the plaintiffs in the present case had brought their action before the risk was over, and the voyage finished, they might have had a ground for their demand; but they waited till the risk, (such as it was, not indeed founded in law, but resting on the honour of the defendant,) had been completely run.

The distinction was subsequently approved,[79] and applied beyond the insurance context.[80]

Whilst this distinction continued to be drawn between executed and executory contracts there was, in effect, no meaningful role for conferment of rights in the analysis of failure of consideration. A court might hold that a payment had been made without consideration (because the agreement was unenforceable), but whether the payment was recoverable turned, in effect, on whether the promised performance had occurred.

### B *Documents Lacking Legal Effect*

Better evidence of the importance of legal rights can be seen in cases where money is paid in exchange for the execution of a document, but the document proves to be

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75 See, for example, *Stevenson v Snow* (1761) 1 Black W 315, 318; 3 Burr 1237 and *Tyrie v Fletcher* (1777) 2 Cowp 666. For a later example see *Re Phoenix Life Assurance Company* (1862) 2 J & H 441.

76 (1761) 1 Black W 315, 318; 3 Burr 1237.

77 (1780) 2 Doug 468.

78 Ibid 471.

79 *Andree v Fletcher* (1789) 3 TR 266.

80 *Tappenden v Randall* (1801) 2 Bos & Pul 467; *Aubert v Walsh* (1810) 3 Taunt 277; *Davis v Bryan* (1827) 6 B & C 651. The equitable basis of the principle is particularly well brought out by Evans, see above n 56, 49: 'the true course should be to enquire what natural equity requires to be done, and whether under all the circumstances the money can be fairly and conscientiously retained'.

legally ineffective. One early example is *Jones v Ryde,*[81] where a bill payable by the navy was discounted by the defendant to the claimant. When the bill was presented for payment it emerged that, although the document was a genuine navy bill, someone had altered the sum due (by changing £870 to £1870) before the bill reached the defendant's hands. The transport board paid the amount actually due, leaving the claimant £1000 out of pocket, which he recovered in an action for money had and received against the defendant. Similarly, in *Young v Cole*[82] a payment for Guatemala bonds was held to be recoverable where the bonds delivered had not been stamped (as required by an 1829 order of the Guatemala government) and were not, therefore, enforceable. Bosanquet J and Coltman J held that the bonds 'were not Guatemala bonds',[83] but Tindal CJ adopted a more careful analysis. The payment, he said, had been made 'on the understanding that the bonds [the claimant] had received from the Defendant were real Guatemala bonds, such as were saleable on the Stock Exchange'.[84] As Tindal CJ appreciated, the bonds were 'real' in the sense that they were not forgeries, but the basis of the transaction failed because they did not confer the anticipated rights on the buyer. Lord Campbell CJ expressly adopted the same, careful approach in *Gompertz v Bartlett*,[85] and the principle was subsequently applied in cases where payments had been made in exchange for bills of sale that turned out to be void.[86]

In all of these cases the payee had carried out the factual side of performance in full, but the failure of that performance to confer the desired legal consequences led to the conclusion that there had been a failure of consideration. That conclusion was clearly right. On any sensible analysis the basis of the payment was not to obtain a worthless piece of paper, it was to obtain the valuable legal rights that the paper symbolised. The disparity in value between the factual performance and the legal rights conferred made the answer obvious,[87] and was skilfully emphasised by counsel;[88] but the same analytical approach could apply where both legal rights and factual performance were of similar value.

### C *Guarantees*

One of the first, and most significant, indications that failure of consideration could be conceptualised in terms of a failure to confer legal rights can be seen in the cases on securities for the payment of annuities. The four Annuities Acts[89] (repealed in 1854)[90]

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81 (1814) 5 Taunt 488. See also, *Gurney v Womersley* (1854) 4 E & B 133.

82 (1837) 3 Bing (NC) 724.

83 Ibid 731 (Bosanquet J) and 732 (Coltman J).

84 Ibid 730.

85 *Gompertz v Bartlett* (1853) 2 E & B 849, 854, where he described *Young v Cole* as 'a very strong case; for the things sold there as Guatemala bonds were in one sense of the word Guatemala bonds; but they were not what was professed to be sold, viz bonds binding on the Guatemala Government'.

86 *Bradford Advance Co Ltd v Ayers* [1924] WN 152; *North Central Wagon Finance Co Ltd v Brailsford* [1962] 1 WLR 1288.

87 Cf the extreme and unusual facts in: *Begbie v Phosphate Sewage Company, Limited* (1875) LR 10 QB 491, (1876) 1 QBD 679, where it was held that a payment was made in order to obtain only 'an ostensible grant of an exclusive right' ((1875) LR 10 QB 491, 499), which the payer knew would have no legal effect.

88 See in particular Petersdorff's submissions, as counsel for the claimant, in *Gompertz v Bartlett* (1853) 2 E & B 849, 851-852.

89 (1) An Act for registering the Grants of Life Annuities and for the better Protection of Infants against such Grants, 17 Geo III c 26 (1777);
(2) An Act to Repeal an Act of the 17th year of the reign of his present Majesty, intituled an 'Act for Registering the Grants of Life Annuities, and for the better protection of Infants

required that a memorial of the instrument creating the annuity had to be registered; failure to register meant that the annuity was 'void',[91] which was creatively interpreted as meaning 'voidable on the application of the grantor'.[92] The first of the Acts (1777) did not expressly demand the registration of any securities which might be given for payment (such as bonds or warrants of attorney), requiring only that 'a memorial of every deed, bond, instrument, or other assurance, whereby any annuity … shall … be granted'[93] should be enrolled. The courts, however, quickly decided that the language of the statute was broad enough, and the policy underlying the Act desirable enough, for securities to be included in the obligation to register.[94] As Lord Commissioner Eyre put it in *Hood v Burlton*, 'though the language is, 'whereby an annuity shall be granted', yet the construction ought to be, whereby it shall be in any manner secured to be paid'.[95] He also took the view (in the same case) that the failure to include a security in the memorial of an annuity made not only that security void, but also destroyed the validity of the memorial of the underlying annuity as well, since that memorial was incomplete.[96] This extreme view seems to have been novel,[97] and quickly fell out of judicial favour,[98] although in 1822 statutory intervention was still thought to be needed to clarify that the failure to register a security did not automatically make a memorial of the underlying annuity invalid.[99]

Where securities for payment had not been registered, the courts held that the consideration for the grant of the annuity had failed, and the action for money had and received would lie. Thus, in *Straton v Rastall*[100] and *Este v Broomhead*[101] there was held to be a failure of consideration where a bond and a warrant of attorney had not been properly registered. The importance of legal rights is made particularly clear in *Scurfield v Gowland,*[102] where a defect in the registration of one out of several securities given for

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against such Grants' and to substitute other Provisions in lieu thereof, 53 Geo III c 141 (1813);

(3) An Act to explain an Act of the 53d year of the reign of his late Majesty respecting the Inrolment of Memorials of Grants of Annuities, 3 Geo IV c 92 (1822);

(4) An Act to explain an Act of the Fifty-third year of the reign of his late Majesty respecting the Inrolments of Memorials of Grants of Annuities, 7 Geo IV c 75 (1826).

90 Act to Repeal the Laws Relating to Usury and to the Enrolment of Annuities 1854.

91 An Act for registering the Grants of Life Annuities and for the better Protection of Infants against such Grants, 17 Geo III c 26 (1777) s 1.

92 *Davis v Bryan* (1827) 6 B & C 651; *Cowper v Godmond* (1833) 9 Bing 748; *Molton v Camroux* (1849) 4 Ex 17.

93 An Act for registering the Grants, see above n 89, s 1.

94 *Straton v Rastall* (1788) 2 TR 366; *Hopkins v Waller* (1791) 4 TR 463; *Hood v Burlton* (1792) 4 Bro CC 121 at 124, 2 Ves Jun 29 at 34-35. For more detail see William Lumley *A Treatise Upon the Law of Annuities and Rent Charges* (1833) 94-95.

95 *Hood v Burlton* (1792) 2 Ves Jun 29, 34.

96 *Hood v Burlton* (1792) 2 Ves Jun 29, 34-35 (the point is not made in the briefer report in 4 Bro CC). Lord Commissioner Ashurst expressed no view on the matter.

97 See, for example, *Straton v Rastall* (1788) 2 TR 366, where the failure to register a bond guaranteeing payment of an annuity was discussed solely in terms of the bond now being unenforceable (see particularly at 371, per Grose J).

98 See, for example, *Scurfield v Gowland* (1805) 6 East 241 where Lord Ellenborough CJ, despite the point being pressed, was careful to make clear that he found for the claimant on different grounds (see below, text accompanying n 103).

99 An Act to explain an Act of the 53d year of the reign of his late Majesty respecting the Inrolment of Memorials of Grants of Annuities, 3 Geo IV c 92 (1822) s 2.

100 (1788) 2 TR 366.

101 (1801) 3 Esp 261.

102 (1805) 6 East 241.

a validly registered annuity was held to amount to a failure of consideration. Lord Ellenborough CJ emphasised the importance of rights:[103]

> The plaintiff contracted for one entire assurance consisting of several securities, and he has a right to have that assurance entire or to have back his money. The defendant has taken away one of his securities, and therefore the consideration for the money has failed.

This reasoning was followed in two later cases.[104]

The principle that failure of a security for performance could amount to a failure of consideration for the whole transaction was not confined to annuities, as the House of Lords' decision in *National Bolivian Navigation Company v Wilson*[105] made clear. There, a scheme for constructing an ambitious transport link between Bolivia and the Atlantic Ocean was financed by the issue of bonds. Bondholders were to be repaid out of the profits made by operating the railway section of the link, and the repayments were guaranteed by a charge on customs duties paid to the Bolivian government on all goods imported by the River Amazon. No satisfactory work was done on the railway, and four years after the issue of the bonds – with no prospect of completion in sight – the Bolivian government revoked the charge it had granted over customs duties. Much of the discussion in the case concerned the likelihood of the railway (ever) being completed, and the legality of the Bolivian government's decision to revoke the charge, but it was also made clear that the loss of the security for repayment had, in itself, amounted to a failure of consideration. In the Court of Appeal, Brett LJ had observed that once the charge was cancelled, 'so great a part of the benefit which was to go to the bondholders is gone, that, even though the railway were made, it seems to me that the scheme has become impracticable'.[106] Brett LJ equated such impracticability with total failure of consideration.[107] The House of Lords emphatically endorsed this view. Lord Selborne remarked that 'the entire basis of the prospectus, trust deed and security contract, on the faith of which the bondholders lent their money, has been destroyed by the action of the Bolivian Government'.[108] Lord O'Hagan described the concession as 'an essential basis of the agreement',[109] adding that 'Even if the railway had been completed, the bondholders would not, in the absence of the concession, have got that for which they bargained'.[110] Earl Cairns LC,[111] Lord Hatherley,[112] Lord Penzance[113] and Lord Blackburn[114] expressed similar views.

In all of these cases an emphasis on performance of the payee's side of the bargain would have resulted in very different analyses, in which any discussion of security would have been irrelevant. Indeed, the nature of security is that it is not performance of a primary obligation, but is a means of placing the creditor in as good a position as if the primary obligation had been performed. The courts' repeated assertion that failure of security can amount to failure of consideration emphatically demonstrates that failure of consideration cannot simply be equated with failure to perform.

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103 Ibid 244.
104 *Cowper v Godmond* (1833) 9 Bing 748; *Huggins v Coates* (1843) 5 QB 432.
105 (1880) 5 App Cas 176.
106 *Wilson v Church* (1879) 13 ChD 1 at 55.
107 Ibid 50.
108 (1880) 5 App Cas 176 at 205.
109 Ibid 200.
110 Ibid 201.
111 Ibid 183.
112 Ibid 190.
113 Ibid 196.
114 Ibid 209.

### D *Insistence on the Creation of Rights*

The next category of cases to be discussed in this section consists of instances where courts have insisted that particular legal rights must be conferred, or the consideration will fail. That insistence might be prompted by the consideration being of a peculiarly legal kind. For instance, in *Kelly v Lombard Banking Co Ltd*[115] a car was acquired under a hire-purchase agreement and the hirer dutifully paid the instalments until only £100 remained owing. At that point execution was levied on the hirer's goods by a judgment creditor, and the finance company exercised an option to terminate the agreement. The dispute between the hirer and the finance company concerned the first instalment paid under the contract, which was expressed to be 'in consideration of the option to purchase contained in clause 3(b)'. Clause 3(b) granted that option to a hirer who paid all the instalments promptly. The claimant argued that, since he had been deprived of the opportunity to pay the instalments, he had never received the option, and there had, therefore, been a failure of consideration for his initial payment. The Court of Appeal rejected the claim, holding that the option to purchase was acquired immediately, but was subject to conditions which remained unfulfilled. Rather than taking the broad view that the consideration for payment was use and enjoyment of the car, which the hirer had received, the Court of Appeal carefully analysed the nature of the rights conferred.

The legal dimension of the consideration might also be implicit. Thus, in *Essery v Cowlard*[116] a settlement in consideration of marriage failed where the couple cohabited and had three children, but did not marry. More strikingly, there was also a failure of consideration in *In re Ames' Settlement*,[117] where the couple had been through a valid marriage ceremony and cohabited as man and wife, but the marriage had been annulled twenty years later. In this latter case, the consideration of 'marriage' brought with it a rigorous insistence on all the legal requirements of a valid marriage being satisfied.

A similar, but rather more restrained, approach evolved in transactions where the consideration involved enjoyment of a patent right. Initially the same rigorous insistence on validity that characterised *In re Ames' Settlement* was applied to patents. Thus, in *Hayne v Maltby*,[118] where the claimant had granted the defendant permission to use his patent for an engine, and it subsequently emerged that the invention was not new, Buller J could assert that 'it is now discovered that [the claimant] had no such [exclusive] right, and therefore the defendant has not the consideration for which he entered into his covenant'.[119] Fifteen years later, however, a less strict approach could be seen in *Taylor v Hare*.[120] The facts were essentially identical to *Hayne v Maltby*, the claimant having used for five years, and paid for the use of, the defendant's patent on apparatus for preserving the essential oil of hops. On evidence emerging that the defendant was not the inventor of the apparatus, the claimant sought to recover the sums paid. The court, however, held that no payment was recoverable, the claimant having had the enjoyment of what was stipulated for. Chambre J was particularly influenced by the recent, highly public controversies surrounding Arkwright's patents,[121] which had been overturned following protracted litigation. The same approach was subsequently endorsed in *Lawes v Purser*, [122] where Wightman J encapsulated the principle neatly: 'enjoyment by permission of the patentee, while the patent was supposed to be valid, is

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115 [1959] 1 WLR 41.
116 (1884) 26 ChD 191.
117 [1946] 1 Ch 217.
118 (1789) 3 TR 438.
119 Ibid 442.
120 (1805) 1 Bos & Pul (NR) 260.
121 Ibid 262.
122 (1856) 6 E & B 930.

consideration'.[123] This less strict line, which we might characterise as requiring the conferral of 'relative' rather than 'absolute' rights, was probably a response to the notorious shortcomings of the patent system.[124]

The insistence on the conferment of legal rights was also applied in situations where no particularly legal dimension of performance was involved. The emphasis in *Rowland v Divall* on passing of title has already been mentioned.[125] An earlier, equally striking instance, can be seen in *Bostock v Jardine*,[126] where the claimant had instructed the defendant, a cotton broker, to purchase 50 bales of Surat cotton for him. The defendant received similar instructions from other parties, and purchased 300 bales of Surat cotton in its own name, allocating 50 of those bales to the claimant once they were delivered. The quality of some of the claimant's 50 bales was unsatisfactory, and the claimant sought to recover money he had paid to the defendants in advance. The claim succeeded, on the ground that the contract made by the defendants in their own name was not the contract which had been agreed as the basis for payment. The contract contemplated as the basis for payment, the Court held, was one where the claimant would be a principal, and the defendants his agents; what had in fact been done 'prevented [the claimant] from coming forward as principal and protecting his rights'.[127] In other words, the payment was not for cotton, but for contractual rights in relation to cotton.

Most recently, courts deciding cases on the consequences of *ultra vires* interest rate swap transactions entered by local authorities have insisted that legal rights must be conferred if the basis of the transaction is not to fail.[128] These decisions continue to be highly controversial. The initial view of Peter Birks, shared by many other writers, was that they were incorrectly decided.[129] He later, as part of a radical transformation in his thinking, came to accept them, claiming that the courts had (perhaps unwittingly) fundamentally altered the structure of the law of unjust enrichment.[130] That structural debate will continue. However, leaving aside questions about how the law ought to be structured, the material analysed in this section thus far demonstrates that the courts' approach in the swaps cases was neither radical nor unorthodox. The emphasis on the conferment of legal rights in failure of consideration had been a consistent theme of the previous two hundred years of legal development.

### E *Situations Where Rights Have Not Been Prioritised*

The cases and discussion under the four previous sub-headings have highlighted the emphasis given to the conferment of legal rights in assessing whether there has been a failure of consideration. It must be acknowledged, however, that there are also instances where a failure to confer legal rights has not exercised a decisive influence on the analysis of failure of consideration. These instances can be divided into two categories.

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123 Ibid 935.

124 For a contemporary discussion, see Anon, review of Charles Babbage, 'Reflexions on the Decline of Science in England, and on some of its Causes' (1830) 43:86 *Quarterly Review* 305, 333-340. Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law* (1999) 101-110 chart the efforts to improve patent law in the early nineteenth century.

125 See above n11.

126 (1865) 3 H & C 700.

127 Ibid 705.

128 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890; *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215. The ultra vires nature of these transactions was determined in *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1.

129 Peter Birks 'No Consideration: Restitution after Void Contracts' (1993) 23 *University of Western Australia Law Review* 195.

130 Peter Birks *Unjust Enrichment* (2nd ed, 2005) chapter 5, particularly at 112-113.

First, situations where the courts have held that receipt of some benefit from the transaction is sufficient, despite the absence of rights, to provide consideration. Second, situations where the reason for the failure to confer legal rights is disregarded as being a mere technicality.

In the first category there are two very similar cases to consider: *Steinberg v Scala (Leeds) Limited*[131] and *Linz v Electric Wire Company of Palestine, Limited.*[132] Both concerned transfers of shares which were legally ineffective. In *Steinberg* the purchaser was an infant; in *Linz* the resolution of the company authorising the shares to be issued was invalid. On an analysis emphasising the conferment of rights, both claims to recover the price paid for the shares would have succeeded, but both failed. In each case it was held that there was no failure of consideration because something of value had been received by the purchaser. The Privy Council in *Linz* gave particular weight to the fact that the purchaser there had sold on her shares (before the invalidity of the allotting resolution was appreciated), and it was, therefore, 'contrary to the plain fact'[133] to claim that the consideration had failed. *Linz* has now been disapproved[134] and, although it has not been expressly said so, it is difficult to see how *Scala v Steinberg (Leeds) Limited* can escape the same fate. Both cases exemplify an approach to failure of consideration that focuses exclusively on receipt of factual benefit; as will be argued in the final section of this article, this is an approach which has been rightly rejected.

The second category of cases where the conferral of legal rights has not been prioritised involves situations where the reason for the failure to confer rights is regarded as a mere technicality, which does not impair the underlying substance of the transaction. There are three cases to consider, each concerned with the formal requirements imposed by the Statute of Frauds.

In the earliest case of the three, *Casson v Roberts,*[135] a deposit had been paid under a parol agreement for the purchase of freehold land. The purchaser decided not to proceed, and sought to recover his deposit. Sir John Romilly MR allowed the claim, taking the simple approach that, in the absence of a contract the deposit was recoverable. This was a straightforward application of the general principle that the consideration for a payment failed if the relevant legal rights were not conferred on the payer. However, this straightforward position did not find favour with later courts.

In *Thomas v Brown*,[136] the facts of which were essentially indistinguishable from *Casson v Roberts*,[137] Quain J held that the reasons given by Sir John Romilly MR in the earlier case were not satisfactory, and that the deposit could not be recovered. He held that, because the vendor was willing to complete the sale, there was no failure of consideration: 'the defendant has always been ready and willing to assign the purchased property to the plaintiff in pursuance of the contract; in short, to give the plaintiff all that was bargained for'.[138] The same result was reached in *Monnickendam v Leanse*,[139] albeit by a subtly different route. There Horridge J agreed that the decision in *Casson v Roberts* was unsatisfactory, but gave his own reasons why the deposit was not recoverable:[140]

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131 [1923] 2 Ch 452.
132 [1948] AC 371.
133 Ibid 377.
134 *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215, 240: 'the case is probably best regarded … as anomalous' (Robert Walker LJ).
135 (1862) 31 Beav 613.
136 (1876) 1 QBD 714.
137 Cf the unconvincing attempts by Mellor J to find a distinction at (1876) 1 QBD 721-722.
138 (1876) 1 QBD 714, 723.
139 (1923) 39 TLR 445.
140 Ibid 447.

> there being … a good contract between the parties, but one which could not be enforced under the Statute of Frauds, and the deposit having been paid in pursuance of that contract and the defendant being entitled to hold it as security against the purchaser's not going on with the transaction, there had been no total failure of consideration.

This was significantly different from the analysis of Quain J in *Thomas v Brown*. For Quain J, consideration for the payment of the deposit was provided by the vendor's readiness to convey the property; in other words, despite the absence of legal rights, the purchaser would enjoy the same factual position as if legal rights had been conferred. For Horridge J, however, what was important was that legal rights were conferred – there was 'a good contract between the parties' – although those rights could not be enforced directly. Quain J emphasised factual benefit, Horridge J conferral of rights.

With the introduction of a broad statutory discretion to order the return of deposits in sales of land[141] and the abolition of the Statute of Frauds formalities,[142] it is unlikely that the English courts will now decide which analysis is preferable. The cases do, however, indicate vividly the range of analytical approaches that are available when a legal transaction fails for want of formality. In particular, the approach of Horridge J (which echoed earlier analyses of annuities transactions)[143] highlighted that, at least where the formal requirements lacked widespread support,[144] transactions which lacked those requirements could still be regarded as having an underlying legal force, which provided consideration for any payments made.

## V CONCLUSION

This article demonstrates that when, in *Rowland v Divall*, the Court of Appeal analysed failure of consideration in terms of the failure to confer particular rights on the purchaser, it was not indulging in artificial reasoning. On the contrary, the approach that it was adopting was already well-established. Scrutton LJ, who gave the leading judgment, was aware (or, at least, had been aware) of some of that background, having discussed the Roman law influences on Lord Mansfield's judgment in *Moses v Macferlan* in an essay published in 1885.[145]

As the article has also demonstrated, conceptualising failure of consideration as a failure to confer legal rights was sometimes inevitable (as when the consideration was expressed in terms of a legal concept, such as a marriage, or patent), and sometimes the only sensible way to identify the basis of the transaction (as where a document with no legal effect changed hands). But sometimes a conceptualisation in terms of legal rights was neither inevitable nor the only sensible approach to take. In those circumstances – of which *Rowland v Divall* was merely one example – a choice could be made between emphasising a conferral of rights on the one hand, or emphasising the receipt of a benefit in fact on the other. The courts typically opted for conferral of rights, and there are at least two broad reasons why they were correct to do so. First, enforceable legal rights

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141 Law of Property Act 1925 s 49(2) (UK).

142 Law Reform (Enforcement of Contracts) Act 1954 (UK).

143 Evans, see above n 56, 70-73.

144 The first article published in the *Law Quarterly Review* argued for the abolition of the Statute of Frauds formalities: James Stephen and Frederick Pollock 'Section Seventeen of the Statute of Frauds' (1885) 1 *Law Quarterly Review* 1. For a perceptive analysis of differing attitudes to the Statute of Frauds formalities see: R Ferguson 'Commercial Expectations and the Guarantee of the Law: Sales Transactions in Mid-Nineteenth Century England' in Gerry Rubin and David Sugarman (ed) *Law, Economy and Society: Essays in the History of English Law 1750-1914* (1984) 192 at 198-206.

145 Thomas Scrutton *The Influence of the Roman Law on the Law of England* (1885) 181.

could often be seen as the basis on which a payment had been made. For instance, in the annuity cases the grantee of the annuity was dependent on continuity of payment over a long period; to such parties security of payment was fundamental.[146] Second, and more generally, when parties make use of legal machinery to carry out their transactions, the law should be very slow to conclude that the receipt of enforceable legal rights was not a basis for making the payment. Of course, such transactions are not impossible. The facts of *Begbie v Phosphate Sewage Company, Limited*,[147] where a payment was made solely to obtain 'an ostensible grant', which the payer knew would be of no legal effect, illustrate that parties might enter a legal relationship where the party making a payment was completely indifferent to the conferment of legal rights. But such situations are extremely unusual. To say in the context of an ordinary sale of shares, as the courts did in *Steinberg v Scala (Leeds) Limited*[148] and *Linz v Electric Wire Company of Palestine, Limited*, [149] that the transaction was invalid, but the basis of payment under that transaction had not failed, was highly implausible. Similarly, had it been held in *Rowland v Divall* that there was no failure of consideration, despite the breach of the implied term to convey good title, the failure of consideration analysis would have failed to reflect the legal machinery that the parties had used. Passing of title is recognised as one of the key, defining legal characteristics of sale;[150] a transaction that does not pass title cannot be coherently said to have a legal basis as a sale.

The point that the analysis of failure of consideration should take account of the legal machinery regulating the parties' transaction also explains another phenomenon, which has troubled commentators, namely, why it is that when courts assess whether there has been a total failure of consideration in sale of goods cases, they disregard use made of the goods before rejection.[151] The reason is that the law gives the buyer the right to reject in certain circumstances, which includes the right to examine and make use of the goods for the purposes of ascertaining whether they should be rejected.[152] It would be incoherent for the law to assert, simultaneously, that the buyer had a right to use the goods so as to ascertain whether they should be rejected, and also that by exercising that right, the buyer prevents the basis of the transaction from failing. The correct view, which both the law of sale and the law of unjust enrichment reflect, is that the use of the goods before they are rejected is part of the legal machinery that ascertains whether the basis has failed: it neither commits the buyer to ownership, nor counts as a fulfilment of the basis of the transaction. Analytically, the position is very similar to *Hunt v Silk*[153] (as explained in Part II above), where the enjoyment of ten days' occupation by the defendant did not affect his rights, because that occupation had been expressly granted to him as an interim arrangement, pending the claimant's fulfilment of the obligation to grant a lease and carry out repairs to the premises.

The final question to consider is what effect the conceptualisation of failure of consideration in terms of rights should have on our understanding of the present law. Clearly it is no longer adequate to place the sole emphasis on factual performance, but it

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146 The opening sentence in William Hunt *A Collection of Cases on the Annuity Act* (1791) makes the point neatly: 'The practice of purchasing annuities for lives at a certain price or premium, instead of advancing the same sum on an ordinary loan, arises usually from the inability of the borrower to give the lender a permanent security for the return of the money borrowed, at any one period of time' (page 1).

147 (1875) LR 10 QB 491, (1876) 1 QBD 679.

148 [1923] 2 Ch 452.

149 [1948] AC 371.

150 See, for example, *Saunders v Anglia Building Society* [1971] AC 1004.

151 See, for example, *Baldry v Marshall* [1925] 1 KB 260. Birks, see above n 15, 182 for discussion.

152 See, for example, *Bernstein v Pamson Motors (Golders Green) Ltd* [1987] 2 All ER 220.

153 (1804) 5 East 449.

would be a mistake to go to the opposite extreme, and focus exclusively on rights. Rather, the best way to understand the subject may be through the comment of Lord O'Hagan in *National Bolivian Navigation Company v Wilson*,[154] when he said that '*an* essential basis'[155] (emphasis added) of the transaction was the Bolivian government's customs concession. The implication was that there was not just one basis, and that was surely correct, both on the facts of that case and more generally. Transactions typically have at least two potential bases: that they will confer legal rights, and achieve practical results.

Identifying the bases for a payment requires both careful scrutiny of the transaction itself, and legal analysis of the relevant generic situation, because the parties' transaction is constituted by the combination of their express dealings and rules of law (such as the law of sale). Thus, in *Rowland v Divall*, for instance, the basis of payment was *both* delivery of the car *and* the conferral of rights against the world to retain the car. Either a failure to deliver, or a failure to pass title, would make the basis of the transaction fail. By contrast, it would not, as a matter of law, make the basis of a similar transaction fail if the seller delivered a car, with good title, but the car was not of satisfactory quality:[156] the fulfilment of the quality obligation is not a fundamental, defining feature of sale. In other situations, such as insurance, it may be that the sole basis for payment was the conferral of rights (in the insurance context, the right to recover insured losses from the insurer). Conversely, it may be that the conferral of rights serves only as a form of security for performance of the principal obligation. In such cases it may often be appropriate to emphasise performance rather than rights, when ascertaining whether the basis has failed. This was the kind of situation involved in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Limited,*[157] and provides the context for Lord Simon LC's famous generalisation about failure of consideration (quoted above at note 50), although that context is too easily forgotten. But it may also be the case that the conferral of particular rights goes beyond providing security, and remains fundamental, despite even full performance. The peculiar facts of the swaps cases illustrate how this might occur; and also illustrate the decisive role that ascertaining the basis *as a matter of law* can have, with their emphasis on the public law principles of *ultra vires*. In short, the cases examined here serve to highlight that legal transactions are based on a combination of legal rights and factual outcomes, which change according to the kind of transaction involved; a fuller understanding of failure of consideration reveals that, appropriately enough, the law of unjust enrichment is responsive to fundamental failures in either aspect of the particular transaction.

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[154] (1880) 5 App Cas 176.
[155] Ibid 200.
[156] *Yeoman Credit Ltd v Apps* [1962] 2 QB 508.
[157] [1943] AC 32.