BOOK REVIEWS
CHRONIQUE BIBLIOGRAPHIQUE

Paul-André Crépeau *et al.*, éd., *Dictionnaire de droit privé.* Montréal, Centre de recherche en droit privé et comparé du Québec, 1985. Pp. xvii, 213 [19,50 $]. Commenté par Christophe Jamin.*

> Les mots du lexique ne sont pas un simple répertoire indifférencié et immuable.[1]

La publication du premier dictionnaire de droit privé du Québec est une oeuvre nécessaire et importante.[2]

Sa nécessité résulte de la situation particulière du droit privé québécois. Droit civil immergé dans un océan de *common law,* il peut en subir les influences et s'en voir déformé.[3] Droit civil issu de la pensée juridique française,[4] il s'en distingue aujourd'hui pour acquérir son originalité. Or, cette double émancipation, géographique et historique, s'exprime d'abord par les mots.

Son importance provient de sa méthode d'élaboration. Dès 1978, juristes et linguistes s'associaient pour le dépouillement des textes juridiques d'origines fédérale et provinciale et aboutissaient à une nomenclature du droit privé au Québec comprenant 13 000 termes. À l'issue de ce premier travail, un comité francophone s'orientait vers la rédaction du présent ouvrage. Chaque mot faisait alors l'objet d'une analyse systématique regroupant législation, jurisprudence et doctrine pertinentes pour permettre la rédaction d'un projet de définition. Celui-ci était ensuite présenté lors d'une réunion hebdomadaire du comité de rédaction du *Dictionnaire* en vue de son approbation éventuelle.

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[1]C. Hagège, *L'homme de paroles: Contribution linguistique aux sciences humaines,* Paris, Fayard, 1985 à la p. 55.

[2]P.-A. Crépeau *et al.*, éd., *Dictionnaire de droit privé,* Montréal, Centre de recherche en droit privé et comparé du Québec, 1985 [ci-après le *Dictionnaire*].

[3]Si les deux systèmes juridiques peuvent avoir des principes de politique comparables, il n'en demeure pas moins que des différences essentielles subsistent: voir R. David, «Les caractères originaux de la pensée juridique anglaise et américaine» (1970) 15 Arch. phil. dr. 1.

[4]Le *Code civil du Bas-Canada* de 1866 reprend largement le *Code Napoléon* de 1804.

La mise en oeuvre d'une telle procédure ne pouvait aboutir qu'à des définitions rigoureuses qui se réduisent souvent à des formules nettes et sans équivoque. Mais les auteurs ne se sont pas bornés à de telles figures abstraites. Ainsi, pour mieux cerner le sens de certains termes et en fixer les limites, signalent-ils, outre les anglicismes et les expressions spécifiquement québécoises, les synonymes, les antonymes, ou encore les analogies. En outre, l'explication étymologique est fréquente[5] et l'indication de la langue d'origine, très souvent le latin, est systématiquement mentionnée.[6]

Enfin, de nombreux exemples, citations et remarques permettent de situer le mot ou l'expression dans son contexte. À vrai dire, certains d'entre eux constituent de véritables intrusions dans le régime des moyens de technique et des institutions ainsi définies,[7] marquant les limites d'un tel ouvrage qui ne peut être, en aucune façon, un répertoire. Cependant, une liste détaillée des auteurs et des ouvrages cités, qu'on trouve à la fin du *Dictionnaire*, permettra au lecteur intrigué de poursuivre sa réflexion à partir de ces premiers indices.

Une même limite se retrouve dans la définition de notions floues, controversées ou complexes. Citons le terme «tiers» qui est défini comme une «personne étrangère à un rapport juridique».[8] Certes, l'affirmation est exacte, mais elle n'exprime pas l'absence d'homogénéité de la notion.[9] Citons encore le mot «contrat» qui est un «acte juridique résultant d'un accord de volontés, entre deux ou plusieurs personnes, en vue de produire des effets de droit».[10] Si, dans une perspective empruntée à Kelsen, l'accord des volontés constitue le critère du contrat,[11] il n'en demeure pas moins que cette analyse subjective a pu être contestée au regard d'une conception plus objective des

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[5]Sur l'intérêt et les limites du recours à l'étymologie, en particulier lorsque le sens originaire du mot n'a pas été confirmé par l'usage, voir F. Gény, *Science et technique en droit privé positif*, t. 3, Paris, Sirey, 1921 aux pp. 460-61.

[6]Les termes latins représentent 4,5 pour cent des définitions.

[7]Voir P. Roubier, *Théorie générale du droit*, 2e éd., Paris, Sirey, 1951 à la p. 117. L'auteur distingue deux sortes de vocables juridiques: ceux qui désignent les moyens de technique et ceux qui désignent les institutions.

[8]*Dictionnaire, supra*, note 2 à la p. 185.

[9]Voir J.-L. Goutal, *Essai sur le principe de l'effet relatif du contrat*, Paris, L.G.D.J., 1981, no 10 et s. L'auteur distingue quatre catégories de tiers selon que l'on se rapproche du «foyer contractuel»: les *penitus extranei*, qui n'ont aucun lien avec les contractants; les tiers qui, sans acquérir de droits d'un contractant, ont contracté avec lui; les ayants cause à titre particulier et enfin, les ayants cause universels et à titre universel.

[10]*Dictionnaire, supra*, note 2 à la p. 50.

[11]H. Kelsen, «La théorie juridique de la convention» (1940) Arch. phil. dr. soc. jur. 33; J. Ghestin, *Les obligations: Le contrat*, Paris, L.G.D.J., 1980, no 188 et s.

conventions reposant sur les notions d'intérêt[12] ou d'échange.[13] Une telle analyse permettrait de mieux comprendre l'évolution actuelle du droit des contrats qui dérive d'une logique libérale, fondée sur les notions de volonté et de responsabilité, à une logique sociale, où la notion d'équilibre devient prépondérante, ainsi que le démontrent l'introduction dans le *Projet de Code civil* du Québec d'un principe général de lésion ou l'existence d'une Commission des clauses abusives en France.[14] Enfin, que dire de la définition du terme «droit», confondu avec un «ensemble de règles ... sanctionnées par la puissance publique»[15] et dont l'inspiration strictement positiviste est trop certaine. Sans aller jusqu'à partager le pessimisme de M. Villey sur la capacité des juristes à définir leur matière,[16] nous reconnaissons qu'un tel exercice est fort complexe et que le volume, non seulement d'un dictionnaire, mais d'un traité, n'y suffirait pas. Aussi, en désespoir de cause, ne faudrait-il pas se tourner vers l'ordre plus léger des beaux-arts pour y puiser, à l'exemple de M. Jestaz, une définition du droit qui est comme une critique de celle donnée par le *Dictionnaire*:

> Le droit est l'art de résoudre, si possible à l'avance, les difficultés nées de la vie en société selon des critères de justice et sous l'arbitrage au moins virtuel de l'autorité tenue pour légitime. Cet art qui est un art de la solution tend de plus en plus à s'exprimer sous forme de règles au point qu'on le confond avec l'étude de celles-ci, voire avec la matière même de ces règles.[17]

Ainsi, d'une réserve que nous formulions quant à la limite du *Dictionnaire* tenant à la brièveté des définitions données, nécessaire dans un tel ouvrage, nous sommes insensiblement passés à une critique sur leur contenu

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[12]R. Demogue, *Traité des obligations en général*, t. 1, Paris, Arthur Rousseau, 1923, no 16*bis*: «Ce qui caractérise l'acte bilatéral: convention ou contrat, c'est d'être une transaction entre deux intérêts opposés»; J. Martin de la Moutte, *L'acte juridique unilatéral: Essai sur sa notion et sa technique en droit civil*, Paris, Sirey, 1951, no 33: «[Le] caractère propre de la convention est de naître de besoins qui s'opposent, se rencontrent, et entre lesquels les contractants s'efforcent d'établir un équilibre transactionnel»; G. Rouhette, *Contribution à l'étude critique de la notion de contrat*, thèse de doctorat en droit, Université de Paris, 1965 à la p. 631 et s. [non publiée]. Sur ce fondement, l'auteur définit le contrat comme «un acte productif de normes ... bilatérales, c'est-à-dire liant deux centres d'intérêts».

[13]Sur la question, voir Ghestin, *supra*, note 11, no 176. La volonté perd de son importance au profit du déplacement de valeurs entre les patrimoines des parties.

[14]Sur cette évolution, voir le remarquable ouvrage de F. Ewald, *L'État providence*, Paris, Grasset, 1986.

[15]*Dictionnaire*, *supra*, note 2 à la p. 72.

[16]Voir M. Villey, *Philosophie du droit*, t. 1, 3e éd., Paris, Dalloz, 1982, no 8 où l'auteur rapporte que Kant déniait aux juristes la capacité de répondre à la question: qu'est-ce que le droit (*quid jus*)?

[17]P. Jestaz, «Pour une définition du droit empruntée à l'ordre des beaux-arts: Éléments de *MÉTAJURIDIQUE* amusante» (1979) 78 Rev. trim. dr. civ. 480.

même.[18] D'une analyse trop subjective du contrat à une conception trop positiviste du droit, on perçoit une identité de traits des différentes définitions du *Dictionnaire*: leur extrême classicisme. Derrière «l'accord des volontés» et «l'ensemble des règles» ne voit-on poindre, d'une part, l'autonomie de la volonté[19] et, d'autre part, une école moderne de juristes positivistes qui, sous l'avalanche des textes, ne s'en font souvent que les commentateurs?[20]

On pourrait, cependant, nous reprocher d'être injuste dans notre critique. N'a-t-on pas pris des termes trop importants dont la discussion ne peut être menée dans un tel ouvrage, qui doit nécessairement simplifier?

Pourtant, ce classicisme paraît dans des définitions de termes plus «anodins». Nous n'en prendrons que quelques exemples pour les opposer à une doctrine civiliste contemporaine qui, essentiellement française, marque les limites d'une critique à nuancer en fonction de la réalité québécoise.[21]

accessoire

Relevons d'abord le mot «accessoire». La lecture d'une thèse relativement récente qui lui est consacrée permettra d'en compléter, voire d'en

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[18]On ne peut, en effet, comparer notre critique de la définition de «tiers» qui tient à une absence de nuance que ne peut rectifier un dictionnaire à celle de «droit» ou de «contrat» qui porte sur le concept même que ces termes recouvrent.

[19]En affirmant que «l'accord de volontés» existe *en vue* de produire des effets de droit, les auteurs ne précisent pas qui, de la volonté des parties ou du droit objectif, en est à l'origine. On ne peut donc dire avec certitude que les auteurs du *Dictionnaire* se rattachent à l'école libérale.

[20]Pour une critique de l'attitude contemporaine des juristes, voir Villey, *supra*, note 16, no 2 et s. Voir aussi Ewald, *supra*, note 14 à la p. 434:

> À l'égard de l'énoncé de la loi, les juristes deviennent des techniciens, des praticiens d'un droit qui devient lui-même de plus en plus technique. Ils s'attachent à mettre de l'ordre dans la prolifération indéfinie d'un arsenal législatif et réglementaire de plus en plus complexe. Mais ce n'est plus à eux que l'on peut demander de nous guider quant à la définition d'une politique de droit. Ils ne sont plus les gardiens du droit.

[21]L'originalité québécoise mentionnée au début de cette étude s'exprime tant par des institutions distinctes du droit français que par des institutions communes dont l'évolution a révélé des divergences. Ainsi, les conclusions de thèses françaises reposant sur une analyse du droit positif ne sont pas toujours transposables dans le contexte québécois. Mais la comparaison, alors nécessaire, entre les deux réalités juridiques se révèle parfois difficile en l'absence de thèses québécoises sur ces différentes questions. À ce sujet, voir P.-G. Jobin, «Les réactions de la doctrine à la création du droit par les juges: Les débuts d'une affaire de famille» (1980) 31 Trav. Assoc. Henri Capitant 65 à la p. 70 où l'auteur recense seulement onze thèses de doctorat consacrées au droit civil québécois entre 1960 et 1975. La parution du *Dictionnaire, supra*, note 2, par les controverses qu'il peut engendrer sur telle ou telle définition, ne peut que susciter des vocations ...

critiquer la définition.[22] Si celle-ci suggère que la notion ne peut être envisagée isolément et qu'elle n'existe que dans un rapport d'accessoire à principal, les expressions de «rattachement»[23] ou de «lien de dépendance»[24] employées par le *Dictionnaire* sont peut-être trop vagues. Elles ne précisent pas comment s'opère ce rapprochement. Or, M. Goubeaux montre que celui-ci peut être le fait d'une affectation — l'accessoire vient se joindre au principal,[25] ou d'une production — le principal permet à l'accessoire de naître et le soutient.[26] En outre, quelle que soit la source du rapport d'accessoire à principal, l'accessoire peut être défini, selon l'auteur, comme ce qui s'ajoute au principal et lui est subordonné sans, pourtant, s'y absorber.[27]

De là, l'impossibilité de soutenir que l'accessoire «est soumis à la même règle légale» que le principal. En effet, «le régime de l'accessoire ne se confond pas avec celui du principal, mais en subit l'attraction».[28]

De là, encore, le refus d'avoir une conception purement quantitative de la notion, comme pourrait le laisser croire la définition de l'adjectif. L'accessoire n'est pas ce qui est de peu d'importance.[29]

confirmation

Pour la définition de la «confirmation», les auteurs du *Dictionnaire* ont certainement rejeté la conception classique qui voit dans celle-ci, outre la renonciation au droit de demander l'annulation de l'acte, sa réparation par la suppression du vice dont il était entaché.[30] Ici, point de référence à

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[22]G. Goubeaux, *La règle de l'accessoire en droit privé*, Paris, L.G.D.J., 1969.

[23]Définition de l'adjectif «acccssoire» donnée par le *Dictionnaire*, *supra*, note 2 à la p. 4: «Qui se rattache à quelque chose sans en être un élément essentiel.»

[24]Définition du nom «accessoire» donnée par le *Dictionnaire*, *ibid.*: «Bien qui, de par son lien de dépendance avec le bien principal, tient de la nature juridique de celui-ci ou cst soumis à la même règle légale.»

[25]On s'accorde aujourd'hui pour dire que les sûretés sont des accessoires de la créance qu'elles garantissent. Or, l'art. 2016 *C.c.B.-C.* définit l'hypothèque comme «un droit réel sur les immeubles *affecté* à l'acquittement d'une obligation» [nos italiques]. À ce sujet, voir Goubeaux, *supra*, note 22, no 19 et s.

[26]Ainsi, le fruit est un accessoire du principal: voir J. Carbonnier, *Droit civil*, 7e éd., Paris, Presses universitaires de France, 1973 aux pp. 73-75. Or, les fruits ne sont pas au service de la chose frugifère et ont un but qui leur est propre: voir Goubeaux, *ibid.*, no 21 et s.

[27]Cette phrase résume l'analyse de Goubeaux, *ibid.*, no 23 et s.

[28]*Ibid.* Tel est, par exemple, le cas dans toutcs les situations où le principal disparaissant, l'accessoire lui survit: Goubeaux, *ibid.*, no 48 et s.

[29]*Ibid.*, no 13 et s.

[30]Pour une telle analyse, voir C. Aubry et C. Rau, *Cours de droit civil français*, t. 4, 6e éd. par E. Bartin, Paris, Éditions techniques, n.d. à la p. 385: «La confirmation est l'acte juridique par lequel une personne fait disparaître les vices dont se trouve entachée une obligation contre laquelle elle eut pu se pourvoir par voie de nullité ou de rescision.» Dans le même sens: G. Marty ct P. Raynaud, *Droit civil*, t. 2, Paris, Sirey, 1962, no 201; H., L. et J. Mazeaud, *Leçons de droit civil*, t. 2, vol. 1, 6e éd. par F. Chabas, Paris, Montchrestien, 1978, no 309.

un acte qui serait purgé de ses vices par la confirmation.[31] Cependant, il n'eut peut-être pas fallu s'arrêter là. Sans aller jusqu'à reprendre l'analyse de M. Couturier,[32] qui voit dans la confirmation une simple renonciation au droit de critiquer un acte régulier quelle que soit la gravité du vice ou la nature de la nullité et dont on a pu dire qu'il déformait la réalité,[33] les rédacteurs du *Dictionnaire* auraient pu reprendre une distinction importante entre la confirmation-renonciation (ou confirmation *stricto sensu*) et la confirmation-réparation (ou régularisation) que M. Ghestin a récemment systématisée.[34]

La définition donnée ne serait ainsi que celle de la première notion, la renonciation au droit de critique, sans recouvrir la seconde qui s'analyse «en une intervention portant sur l'acte et visant à le rendre conforme à la règle qu'il violait par son contenu initial».[35]

Or, la différence n'est pas simplement formelle. En particulier, alors que la confirmation-renonciation n'a d'effet qu'à l'égard du renonçant, la régularisation rend l'acte valable à l'égard de tous.

On aurait ainsi pu définir la confirmation comme «un acte juridique, ni réglementaire, ni législatif, qui vise à valider rétroactivement un autre acte frappé de nullité, soit par la renonciation du titulaire de l'action en nullité, soit par la réparation de l'irrégularité dont l'acte était affecté».[36]

Il s'ensuit que la nécessité de distinguer entre les actes frappés de nullité relative qui, seuls, pourraient donner lieu à confirmation, et les actes frappés de nullité absolue, s'estompe. Pour la régularisation, elle n'a pas de sens dans la mesure où cette forme de confirmation a pour but de réparer le vice[37] et, pour la confirmation *stricto sensu*, elle pourrait même être contestée: une telle confirmation ne peut-elle être valable si, au moment où elle intervient, elle ne heurte plus l'intérêt général?[38]

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[31]Définition du nom «confirmation» donnée par le *Dictionnaire*, *supra*, note 2 à la p. 47: «Acte juridique unilatéral par lequel une personne, en renonçant au droit d'invoquer la nullité relative d'un acte antérieur, le valide rétroactivement.»

[32]G. Couturier, *La confirmation des actes nuls*, Paris, L.G.D.J., 1972.

[33]La critique est de Ghestin, *supra*, note 11, no 797.

[34]*Ibid.*, no 797 et s. On peut voir les premiers linéaments d'une telle analyse dans G. Ripert et J. Boulanger, *Traité de droit civil*, t. 2, Paris, L.G.D.J., 1957, no 737-44; G. Farjat, *L'ordre public économique*, Paris, L.G.D.J., 1963 aux pp. 419-20.

[35]Ghestin, *ibid.*, no 797.

[36]*Ibid.*

[37]C. Dupeyron, *La régularisation des actes nuls*, Paris, L.G.D.J., 1973, no 343.

[38]Voir Couturier, *supra*, note 32, no 319 et s.; et Ghestin, *supra*, note 11, no 840 et s. Cependant, cette opinion est minoritaire et ne correspond ni à la jurisprudence québécoise: voir J.-L. Baudouin, *Les obligations*, 2e éd., Cowansville, Qué., Yvon Blais, 1983, no 318 et s.; ni à la jurisprudence dominante de la Cour de eassation française: voir Cass. civ. 1re, 4 mai 1966, D.1966.Jur.553 (note P. Malaurie), J.C.P. 1967.II.15038 (note J. Mazeaud).

dette de valeur

Les auteurs du *Dictionnaire* ne donnent qu'une définition fonctionnelle de la notion de «dette de valeur».[39] Mais, ainsi que l'indique M. Pierre-François, si la dette de valeur réalise un transfert de valeur dans le temps du jour de sa naissance au jour de son exécution, ce mécanisme n'est possible que parce qu'«elle a pour objet une valeur autre que monétaire qui échappe de ce fait au nominalisme».[40] Et c'est précisément en recherchant l'objet (la valeur) de la prestation due par le débiteur qu'on pourra aboutir à une définition conceptuelle qui, seule, permettra vraiment de distinguer la dette de valeur d'une dette de somme d'argent assortie d'une clause d'indexation. Ainsi pourrait-on écrire que

> les dettes de valeur sont des obligations qui ont pour objet une valeur autre que monétaire: intermédiaires entre les obligations de somme d'argent et les obligations de fournir une prestation en nature, elles s'exécutent comme les premières par le versement d'une somme d'argent, mais comme les obligations en nature elles restent à l'abri de la dépréciation monétaire et leur évaluation se fera de manière à exprimer toujours la valeur réelle de la chose qui est au fond l'objet de l'obligation.[41]

Mais, nous dira-t-on, le *Dictionnaire* mentionne le caractère intermédiaire de la notion de dette de valeur. Cependant, pourquoi l'avoir fait simplement en remarque alors que cet élément procède de la définition même du terme?[42]

Confondre les deux analyses — conceptuelle et fonctionnelle — aurait permis de mieux cerner le caractère intermédiaire ou hybride de la notion.[43]

uullité absolue

Les auteurs du *Dictionnaire* retiennent que la «nullité absolue» «sanctionne la violation d'une règle de formation d'un acte juridique visant à protéger ... l'ordre public ... ».[44] C'est reprendre l'analyse classique[45] dont

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[39]Définition du nom «dette de valeur» donnée par le *Dictionnaire, supra,* note 2 à la p. 65: «Obligation de payer une somme d'argent équivalente à une valeur économique et déterminée au moment du paiement, plutôt qu'une somme fixe.»

[40]G.L. Pierre-François, *La notion de dette de valeur en droit civil: Essai d'une théorie,* Paris, L.G.D.J., 1975, no 59.

[41]*Ibid.*, no 143.

[42]La définition donnée par le *Dictionnaire, supra,* note 2 à la p. 65 est suivie, aux pp. 65-66, de la remarque suivante: «La dette de valeur s'analyse comme une notion intermédiaire entre l'obligation de somme d'argent et l'obligation en nature ... .»

[43]Pierre-François, *supra,* note 40, no 143: «[La] dette de valeur n'est ni une notion purement conceptuelle ni une notion purement fonctionnelle.»

[44]*Dictionnaire, supra,* note 2 à la p. 131.

[45]Voir en ce sens Mazeaud, *supra,* note 30, no 299 et s.; B. Starck, *Droit civil: Obligations,* Paris, Librairies techniques, 1972, no 1631 et 1633.

on peut trouver le fondement dans le *Code civil du Bas-Canada.*[46] Mais celle-ci n'en paraît pas moins incomplète à une époque où le législateur multiplie les lois d'ordre public. Une distinction entre diverses catégories d'ordre public paraît, aujourd'hui, souhaitable. Ainsi que l'avait déjà remarqué Ripert,[47] un ordre public économique lié à l'interventionnisme croissant de l'État doit apparaître à côté de l'ordre public traditionnel, l'ordre public moral et politique «qui tend essentiellement à faire respecter l'organisation de l'État et des pouvoirs publics, le statut de la famille et les bonnes moeurs».[48] En outre, cet ordre public économique doit faire lui-même l'objet d'une nouvelle distinction. Dans certaines situations, le législateur peut sanctionner les abus engendrés par la puissance économique d'une des parties en rétablissant un équilibre contractuel rompu. On doit alors parler d'ordre public de protection. Tel est le cas des textes visant à protéger les salariés, les locataires ou encore les consommateurs. Leur violation postule une nullité relative: ces textes ne doivent pouvoir être invoqués que par ceux qu'ils visent à protéger. Mais il est d'autres situations, définissant un ordre public de direction, où l'État intervient dans la vie économique du pays pour en maintenir les grands équilibres ou y exercer une emprise plus dirigiste. Les infractions aux règles ainsi édictées ne peuvent qu'entraîner une nullité absolue, car elles contreviennent à une certaine conception de l'intérêt général.

Cette division interne à l'ordre public économique[49] pourrait être reportée dans l'ordre public classique. Dans la majorité des cas, celui-ci vise une certaine conception de l'intérêt général,[50] mais il peut aussi constituer un ordre public de protection. Ainsi, les règles visant l'incapacité des mineurs sont généralement d'ordre public, mais elles n'ont été établies que pour «la protection de l'incapable contre lui-même».[51] La *summa divisio* des finalités

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[46]Art. 13 et 990 *C.c.B.-C.*

[47]G. Ripert, «L'ordre économique et la liberté contractuelle» dans *Recueil d'études sur les sources du droit en l'honneur de François Gény*, t. 2, Paris, Sirey, n.d., 347. Voir aussi: G. Ripert, *Le régime démocratique et le droit civil moderne*, Paris, L.G.D.J., 1936, no 140 et s.

[48]Ghestin, *supra*, note 11, no 107.

[49]C'est tout au moins de cette façon qu'elle est présentée: Ghestin, *ibid.*, no 106 et 778 où, cependant, l'affirmation est moins nette.

[50]C'est en cela qu'on a pu le rapprocher de l'ordre public économique: J. Ghestin, *Le contrat dans le nouveau droit québécois et en droit français: Principes directeurs, consentement, cause et objet*, Montréal, Institut de droit comparé de l'Université McGill, 1982 à la p. 35. Peut-on, cependant, qualifier l'ordre moral et politique d'ordre public *de direction*? Nous le pensons, car si l'ordre public classique, plus diffus dans le corps social, ne présente pas le caractère d'instabilité de l'ordre économique, il n'en demeure pas moins qu'il imprime, dans l'ordre moral et politique, une forme de direction à la société.

[51]H., L. et J. Mazeaud, *Leçons de droit civil*, t. 1, vol. 3, 6e éd. par M. de Juglart, Paris, Montchrestien, 1976, no 1245. Dans le même sens, voir C. Atias, *Les personnes: Les incapacités*, Paris, Presses universitaires de France, 1985, no 89; Ripert et Boulanger, *supra*, note 34, no 706; G. Marty et P. Raynaud, *Droit civil*, t. 2, 2e éd., Paris, Sirey, 1967, no 503; J. Carbonnier, *Droit civil*, t. 2, 9e éd., Paris, Presses universitaires de France, 1972, no 123.

de l'ordre public n'est peut-être plus entre un ordre moral et politique et un ordre économique, mais entre l'ordre public de direction et l'ordre public de protection. Et l'infraction aux règles édictées par le premier implique une nullité absolue alors que la violation des règles imposées par le second entraîne une nullité relative.

Ainsi, les auteurs du *Dictionnaire* auraient dû préciser que la nullité absolue sanctionne la violation d'une règle de formation d'un acte juridique visant à protéger l'ordre public *de direction* et ce, aussi bien en matières morale et politique qu'économique.

simulation

Selon la définition du *Dictionnaire*, la «simulation» doit procéder de la volonté de deux personnes.[52]

C'est affirmer, conformément à la doctrine classique, le caractère conventionnel de la simulation.[53] Mais M. Dagot a bien montré que ce caractère n'avait rien d'évident et qu'il était inspiré de la théorie classique des contre-lettres à un contrat. Selon lui, on aurait étendu à l'ensemble de la simulation la conception des contre-lettres en exigeant, sans véritable discussion, la nécessité d'un «accord simulatoire».[54] Or, il est des situations où celui-ci est difficilement concevable. Tel est le cas pour les actes juridiques unilatéraux que sont les dissolutions fictives de société[55] ou les legs déguisés sous une reconnaissance de dettes, alors que le légataire ignore tout du legs. Tel est même le cas pour de simples faits juridiques: l'élection d'un domicile ou d'un siège social fictifs.

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[52]Définition du nom «simulation» donnée par le *Dictionnaire*, *supra*, note 2 à la p. 175: «Opération par laquelle les parties conviennent de dissimuler leur volonté véritable, destinée à demeurer secrète, derrière un acte ostensible qui ne sera qu'une apparence.»

[53]Voir, en ce sens, Demogue, *supra*, note 12, no 159; E. Gaudemet, *Théorie générale des obligations*, Paris, Sirey, 1965 à la p. 232; Ripert et Boulanger, *supra*, note 34, no 586; A. Colin et H. Capitant, *Cours élémentaire de droit civil français*, t. 2, 10e éd. par L. Julliot de la Morandière, Paris, Dalloz, 1948, no 185 et s.; Marty et Raynaud, *supra*, note 30, no 273 et 327; Martin de la Moutte, *supra*, note 12, no 244 et s.; H. de Page, *Traité élémentaire de droit civil belge*, t. 2, 3e éd., Bruxelles, Emile Bruylant, 1964, no 618.

[54]M. Dagot, *La simulation en droit privé*, Paris, L.G.D.J., 1965, no 12 et s.

[55]Cass. civ., 2 avril 1924, S.1927.I.261. On pourrait encore citer cet arrêt où un patron avait déguisé une retenue opérée pour couvrir une assurance contre les accidents du travail sous un article du règlement d'atelier intitulé «entretien de l'outillage et du materiel»: Cass. civ., 16 novembre 1910, S.1911.I.142.

Bien plus, il semble que la jurisprudence, tout au moins française, n'ait jamais exigé la preuve d'un accord simulatoire pour admettre la simulation.[56] La «convention entre les parties» dont nous parle le *Dictionnaire* ne serait pas ainsi de l'essence de la simulation!

L'analyse, fort incomplète, de ces quelques termes tend simplement à montrer cette tendance du *Dictionnaire* à un trop grand classicisme dans les définitions. Or, «si le droit est un phénomène essentiellement historique»,[57] celles-ci doivent évoluer pour correspondre à l'état le plus avancé de la pensée juridique. Mais les auteurs du *Dictionnaire*, parce qu'ils rédigent un dictionnaire, ne peuvent aller au fond des controverses suscitées par la doctrine la plus moderne, sans pourtant les ignorer au risque de retenir des formules dépassées. Aussi doivent-ils jouer entre ces extrêmes que sont des définitions trop approfondies ou trop superficielles, trop modernes ou trop classiques, pour trouver un juste milieu qui reçoive l'assentiment du plus grand nombre, ou tout au moins présenter l'état de ces controverses pour les notions les plus incertaines. C'est en appréhendant la réalité juridique dans sa modernité et sa diversité que le *Dictionnaire* deviendra, dans ses éditions successives,[58] une oeuvre, non seulement nécessaire et importante, mais aussi novatrice.

Cependant, sa version actuelle constitue déjà un outil indispensable, tant pour les étudiants, dont les premières années à la Faculté représentent bien souvent l'apprentissage d'un langage, que pour les universitaires et les praticiens qui pourront y trouver la définition qui leur manque parfois ainsi que d'utiles éléments de réflexion pour une recherche plus avancée.

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[56]Dagot, *supra*, note 54, no 23 et s.

[57]Ewald, *supra*, note 14 à la p. 42.

[58]Le *Dictionnaire* devrait être publié par tranches successives et cumulatives pour atteindre une version définitive comprenant plus de 10 000 termes.

Wojciech Sadurski, *Giving Desert Its Due: Social Justice and Legal Theory*. Dordrecht, The Netherlands: Reidel, 1985. Pp. xii, 329 [£37.50]. Reviewed by A. Grant McCrea.*

Mr Sadurski's main aim in this book is to argue for a theory of distributive justice as an "equilibrium of benefits and burdens".[1] He begins by contending that only distributive, as opposed to commutative, justice constitutes justice properly so called. Much of the remainder of the book is concerned with establishing the central role of the concept of "desert", or deserving, in his theory. Desert, Mr Sadurski asserts, is fundamental to the determination of just distributions beyond the level of the satisfaction of basic needs.

Whatever the merits of Mr Sadurski's tolerably interesting thesis, they are far outweighed by the confused and superficial nature of much of the discussion in this book. It is astonishing that a respectable academic publisher such as Reidel would publish work in this condition. There is virtually no evidence of the editorial hand. Sentences such as "[t]he second type of theory, as exemplified by Rawls, is not restricted by such conditions but, in turn, it has no claim as a justification of the obligatoriness of justice" abound,[2] and they are highly distracting.

Mr Sadurski clutters up the discussion with innumerable trivial digressions and silly arguments. One can forgive the author his awkward use of English, which is apparently not his mother tongue, but neither he nor his editors should feel proud of the extraordinary amount of dross in this book.

My original intention had been to use this review as a forum to discuss the lamentable lack of rigour in evidence in much recent scholarship in the philosophy of law, but this book's shortcomings extend so far beyond lack of rigour as to render such a discussion inappropriate. The author seems to feel that lists of examples are adequate substitutes for real argument. For instance, at page 81 he comes to the far-reaching conclusion that "it is both unjust and impossible [Mr Sadurski adores unequivocal terms such as "impossible"] to abolish classifications of legal subjects by legal rules" on the basis of two short paragraphs containing two "examples". Even more absurd is the claim at page 179 that "[t]his highly unsystematic and far from exhaustive list [which includes such profound observations as: "[W]e have

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[1]W. Sadurski, *Giving Desert Its Due: Social Justice and Legal Theory* (Dordrceht, The Netherlands: Reidel, 1985) at 101.

[2]*Ibid.* at 61.

reached an unprecedented degree of global mass communication through radio, TV, press, tourism etc."] shows that the use of the notion of 'world community' is justified, and that McDougal, Lasswell and Reisman are right ... ". Earlier, he disposes of the problem of free will in just four pages.[3] It seems he also believes that argument by majority rule is acceptable. See page 89, where we are informed that "[w]e do not condemn as violative of the principle of equality ... programs ... if we approve of the aim" and that "[i]t is now widely accepted that racial classifications are not forbidden *per se*".

Mr Sadurski is given to forming grand conclusions on the basis of skimpy argument (*e.g.*, "Everything depends on the criteria of classification ... . [I]t is impossible [*sic*] to treat people equally in one respect without ... treating them unequally in other respects",[4] or "[N]o characteristic is irrelevant *per se*"[5]). Some of his other indulgences are less egrégious from a philosophical point of view, but they are just as annoying. These range from superficial displays of erudition, such as the shallow and irrelevant discussions of U.S. case law,[6] to *non sequiturs*[7] to belabouring of the obvious.[8] The author spends pages knocking over straw men, as at page 63 where he discusses the proposition that "[o]ne possible answer would be that those who are worse off have no choice anyway", while important issues languish unattended. See, for example, page 178, where the author informs us that he will not "discuss the problem of the justice constituency in detail here". In a theory which balances benefits bestowed against burdens imposed upon the individual, the determination of the relevant group to which the individual belongs[9] is crucial. This is even more obviously true in the case of distributions at the level of basic needs, for what is a "basic need" is relative to the standards of the community.

This is all very unfortunate, for Mr Sadurski's thesis is not lacking in interest. Moreover, Part II of the book — "Justice as Equilibrium" — does not suffer quite as grievously from the author's peccadilloes. My patience,

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[3]*Ibid.* at 131-34.

[4]*Ibid.* at 80.

[5]*Ibid.* at 91.

[6]See, *e.g.*, *ibid.* at 89.

[7]See, *e.g.*, *ibid.* at 84, where the author states: "It is difficult to see how this can be made compatible with a democratic creed." The reference to democracy leaps at the reader from nowhere.

[8]At one point we read that "the fact that this judgment is held by others does not amount to producing a good reason for it", a trite but simultaneously astonishing claim given the author's proclivity, noted above, for arguing in just that manner. *Ibid.* at 75.

[9]For example, the world of all individuals or only those members of a particular state or society.

however, was taxed beyond the point of caring by the accumulated annoyances noted in this review. Perhaps a more forgiving reader would have the stamina to separate the wheat from the chaff. In the meantime, Mr Sadurski would be well advised to hire a good editor to turn this book into a decent fifty-page journal article.

Peter Birks, *Introduction to the Law of Restitution*. Oxford: Clarendon Press, 1985. Pp. xxxiv, 455 [$99.50]. Reviewed by David Stevens.*

> "When *I* use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean — neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things".
>
> "The question is," said Humpty Dumpty, "which is to be master — that's all."[1]

The complexity of analysis and the profusion of vocabulary in the law of restitution indicate that the language of restitutionary claims is not susceptible of the kind of rigorous usage one expects in a language of legal justification. One has the sense that in this area of the law there have been too many Humpty Dumpties and not enough Alices, with the result that there can be few masters of restitutionary analysis. Perhaps this is not a surprising state of affairs. Although modern English philosophy has been preoccupied with the problem of language for nearly a century, it is only recently that students of Anglo-American private law have begun to take seriously the proposition that law is, among other things, a language.[2] Had common-law lawyers taken an interest in this feature of law earlier, they might have diagnosed a case of aphasia in its early stages and done something about it before the affliction brought them to the point of virtual incapacity to communicate.

One would think that men and women as practical as lawyers are supposed to be would be able to express, in a comprehensible manner, the grounds for recovery in situations where the defendant has received from the plaintiff a benefit that he does not deserve to keep. Recovery of money paid by mistake is an easy case which ought to admit of straightforward

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[1]L. Carroll, "Through the Looking Glass" in D.J. Gray, ed., *Lewis Carroll: Alice in Wonderland* (New York: N.W. Norton, 1971) at 163.

[2]See, *e.g.*, W. Twining & D. Miers, *How To Do Things with Rules*, 2d ed. (London: Weidenfeld & Nicolson, 1982); J.B. White, *The Legal Imagination* (Boston: Little, Brown, 1973); W.R. Bishin & C.D. Stone, *Law, Language, and Ethics* (Mineola, N.Y.: Foundation Press, 1972); and B. Danet, "Language in the Legal Process" (1980) 14 L. & Soc'y Rev. 445.

legal justification.[3] But, as Peter Birks observes in *Introduction to the Law of Restitution*, English lawyers have barely begun to expose the "skeleton of principle", the common sense behind the mass of technical detail, which holds the law of restitution together.[4] The rationalizing enterprise commenced in contract and tort law over a century ago is just now being undertaken in an area of civil responsibility at least as transparent as contract or tort.[5] Remnants of a nineteenth-century legal language based on long-abolished forms of action and the divided jurisdiction of equity and law survive with near-undiluted force in the modern restitution lawyer's vocabulary.[6]

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[3]The law, as it stands, is not clear as to what kinds of mistake will ground recovery. Mistake of law, in particular, has generated enormous confusion. The early nineteenth-century authority of *Bilbie* v. *Lumley* (1802), 2 East 469, 102 E.R. 448 (K.B.), which first denied recovery of payments made under a mistake of law, has been roundly condemned by academics and not a few members of the judiciary as "monstrous", "hasty and ill-considered" and "unfortunate". The more recent criticisms include: R. Goff & G. Jones, *The Law of Restitution*, 2d ed. (London: Sweet & Maxwell, 1978) at 90-92; G.B. Klippert, *Unjust Enrichment* (Toronto: Butterworths, 1983) at 147-56; G. Klippert, Case Comment (1983) 21 U.W.O. L. Rev. 289; G.E. Palmer, *The Law of Restitution* (Boston: Little, Brown, 1978) at 336-57 and 466-79; C.A. Needham, "Mistaken Payments: A New Look at an Old Theme" (1978) 12 U.B.C. L. Rev. 159. See also *Hydro-Electric Comm'n of the Township of Nepean* v. *Ontario Hydro* (1982), [1982] 1 S.C.R. 347 at 349, 132 D.L.R. (3d) 193, Laskin C.J.C. and Dickson J. dissenting [hereinafter *Nepean* cited to S.C.R.]. Yet the rule still survives as law in Canada with its numerous exceptions and circumventions: see, *e.g.*, the majority decision in *Nepean*, *supra* at 380.

Even in situations where recovery is available, the ground of recovery varies from case to case. The action for money had and received, equitable tracing and the constructive trust are the predominant modes of justification. See *Barclays Bank, Ltd* v. *W J Simms Son & Cooke (Southern) Ltd* (1979), [1980] Q.B. 677, [1979] 3 All E.R. 522 (C.A.) [hereinafter *Barclays Bank*]; and *Chase Manhattan Bank (N.A.)* v. *Israel-British Bank (London) Ltd* (1979), [1981] Ch. 105, [1980] 2 W.L.R. 202 (H.L.). But even these avenues of recovery are not always deployed in a manner which would indicate that they have an intelligible purpose: see *Bank of Nova Scotia* v. *Cheng* (1981), 33 Nfld & P.E.I.R. 89 (Nfld S.C.T.D.).

[4]P. Birks, *Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1985) at 1.

[5]Many have even suggested that restitutionary recovery is more obviously justifiable than recovery in contract. P. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979) at 4, has argued that "the grounds for the imposition of [promise-based obligations] are, by the standards of modern values, very weak compared with the grounds for the creation of benefit-based . . . obligations." See also L.L. Fuller & W.R. Perdue Jr, "The Reliance Interest in Contract Damages" (1936) 46 Yale L.J. 52 at 53-54 and 56-57.

For synopses of the transformation of contract law in the nineteenth century, in addition to Atiyah, see A.W.B. Simpson, "Innovation in Nineteenth Century Contract Law" (1975) 91 L.Q. Rev. 247 [hereinafter "Innovation"]; A.W.B. Simpson, "The Horwitz Thesis and the History of Contracts" (1979) 46 U. Chi. L. Rev. 533; and M.J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass.: Harvard University Press, 1977) c. 6.

[6]It is apposite to recall that Lord Atkin's famous dictum about "the ghosts of the past stand[ing] in the path of justice clanking their medieval chains" was made in a restitution case: *United Australia, Ltd* v. *Barclays Bank, Ltd* (1940), [1941] A.C. 1 at 29, [1940] 4 All E.R. 20 (H.L.) [hereinafter *United Australia* cited to A.C.].

Birks does not offer any explanation for this phenomenon.[7] Rather, his aim is to make a textbook contribution to the subject that, in the manner of such nineteenth-century monuments of legal scholarship as *Chitty on Contracts* or *Addison on Torts*, reveals the underlying structure of discourse in restitution cases. His goal is "to find the scheme on which the law in those cases can be most elegantly and efficiently arranged", "stripping" the law of "its merely intellectual errors and presenting it clearly, according to a system which would be economical and rational."[8] Birks claims, somewhat disingenuously, that he is working in the spirit of Austinian positivism, maintaining a categorical distinction between description and evaluation. Thus, his enterprise is exclusively to describe, a step prior to evaluation in the Austinian tradition. In fact, the book presents a radical departure from traditional ways of conceiving issues and articulating justifications in this category of private law.[9] As a result, despite Birks' claim to descriptive neutrality, it contains significant evaluative suggestions, much as one might expect of a novel description. In most of his effort and in a good deal of his execution, Birks is right. His treatise is a welcome contribution to English private law, as valuable in its own way as is the text by Sir Robert Goff and Professor Gareth Jones to which Birks quite rightly pays respectful tribute.[10]

This review discusses the major ideas presented in Birks' book and offers a modest critique of the system he has constructed. Much of Birks' analysis is an elaboration of ideas first presented in article form, but the book has fashioned these ideas, and others, into an integral system of basic principles.[11] It is apparent that the book has been written less to alter the

[7]An explanation would have to take account of political and cultural factors, as well as purely doctrinal and intellectual ones. Some of this story is chronicled in Atiyah, *supra*, note 5 at 479-90, but his interests lie elsewhere than in showing why a rationalistic view of these claims did not emerge in nineteenth- and early twentieth-century English private law. Indeed, he thinks, *supra* at 768-69, that the arguments in favour of the modern contender for such a unifying theme — unjust enrichment — are "misconceived".

Underlying the repugnance felt by most common-law lawyers of that era for any non-contractual unifying principle to the restitution cases was their half-articulated suspicion that the recognition of any such principle would entail the disintegration of contract law. An investigation of the nature of this suspicion would be a fruitful starting point in the search for an explanation.

[8]Birks, *supra*, note 4 at vii.

[9]The pretension to descriptive neutrality remains a necessary rhetorical attribute in this kind of endeavour, as it was for its nineteenth-century precursors in contract and tort. See Simpson, "Innovation", *supra*, note 5.

[10]*Supra*, note 3.

[11]These include the following works by P. Birks: "*Negotiorum Gestio* and the Common Law" (1971) 24 Curr. Legal Probs 110; "Restitution for Services" (1974) 27 Curr. Legal Probs 13; "Restitution and Wrongs" (1982) 35 Curr. Legal Probs 53; "Restitution and the Freedom of Contract" (1983) 36 Curr. Legal Probs 141; "English and Roman Learning in *Moses* v. *Macferlan*" (1984) 37 Curr. Legal Probs 1; and with J. Beatson, "Unrequested Payment of Another's Debt" (1976) 92 L.Q. Rev. 188.

way modern English courts think about restitutionary problems than to influence the way English academics conceive of them. Perhaps one day, a generation hence, the shape of arguments in English courts will change as a result of acceptance of the ideas presented in this book. Irrespective of its chances for success on that front, as a book that advocates a major restructuring of analysis in this area of law, *Introduction to the Law of Restitution* merits closer scrutiny than one might be inclined to give modern treatises on torts or contracts based on rational structures developed decades ago.

Another reason for responding to Birks in some detail is to alert Canadian readers to those features of his approach which have little or no relevance in a Canadian setting. Since the law of restitution in Canada is markedly different from its counterpart in England, it is worthwhile to indicate these differences and explain the reasons for the divergence.[12]

I. Definitions and the Legal Status of Unjust Enrichment

Birks starts with a definition of "restitution". It is a word, he observes, that is incongruous in the series: contract, tort, trust, restitution.[13] The first three terms name events, "composite set[s] of facts giving rise to legal consequences", or, as some prefer, causes of action or sources of civil liability.[14]

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[12]The most significant difference is that Canadian courts, by and large, have accepted an analysis based on unjust enrichment: see *Deglman* v. *Guaranty Trust Co. of Canada* (1954), [1954] S.C.R. 725, [1954] 3 D.L.R. 785; *County of Carleton* v. *City of Ottawa* (1965), [1965] S.C.R. 663, 52 D.L.R. (2d) 220; and *Pettkus* v. *Becker* (1980), [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257. Pockets of resistance remain, however: see, *e.g.*, *Nicholson* v. *St Denis* (1975), 8 O.R. (2d) 315, 57 D.L.R. (3d) 699 (C.A.). See also Klippert, *Unjust Enrichment*, *supra*, note 3 at 28-35.

[13]This division of private-law claims is theoretical or conceptual rather than practical or empirical in nature. It therefore does not require that all private-law claims fall into one and only one of the categories. Rather, it serves merely to structure the discourse in private-law disputes and to provide criteria of relevance for legal arguments.

This review proceeds on the rather simplistic assumption that contract, tort, trust and unjust enrichment exhaust the categories of civil liability in common-law jurisdictions. It does not argue this point, however, and in fact, the division is probably neither exhaustive nor entirely accurate. For example, on the former point, Birks suggests that there is a fifth category of "miscellaneous" claims, roughly corresponding to the category of the civil-law jurisdictions identified by the phrase, "obligations which arise from the operation of law solely" (Arts 983 and 1057 *Civil Code of Lower Canada*). On the latter point, it may be that the cases comprehended by "trust" are more properly divided between "contract" and the miscellaneous claims.

For recent attempts to rationalize the common law's civil liability regime into such basic categories, see A.S. Burrows, "Contract, Tort and Restitution — A Satisfactory Division or Not?" (1983) 99 L.Q. Rev. 217; and R.A. Samek, "The Synthetic Approach and Unjustifiable Enrichment" (1977) 27 U.T.L.J. 335.

[14]*Supra*, note 4 at 9.

"Restitution", by contrast, denotes a type of legal response and more properly belongs in the series: compensation, punishment, restitution. Further, "restitution" is a word with several distinct connotations: "There can be restitution of a thing or person to an earlier condition and restitution of a thing to a person."[15] Birks suggests that modern lawyers have chosen the second connotation, preferring to label the first "compensation" or "restoration to the *status quo ante*".

But, he argues, there are problems with the second connotation. It fails, for example, to embrace all cases that modern lawyers would include in the law of restitution.[16] It also inadvertently takes in one extremely large body of law, property law, which is not restitutionary according to the conception of modern lawyers.[17] Consequently, Birks modifies his preliminary definition, "Restitution is the response which consists in causing one person to give back something to another", to "Restitution is the response which consists in causing one person to give up to another an enrichment received at his expense or its value in money".[18] Birks then proceeds to specify the causative event in restitution cases which is the missing term in the series: contract, tort, trust, ? . "Unjust enrichment at the expense of another" is the event which, analogous to the other events named in the series, motivates common-law courts to respond with restitution. Just as sale, lease, agency and partnership are instances of contract, payments by mistake, payments made under compulsion, payments made on bases which fail, *quantum meruit*, *quantum valebat* and the like are instances of unjust enrichment.

Most English judges (with such notable exceptions as Lords Wright, Atkin and Denning), when given the occasion to speak on the status of unjust enrichment in English law, have rejected it in categorical terms.[19] A recent example of this hostile posture is Lord Diplock's statement in *Orakpo* v. *Manson Investments Ltd*:

> My Lords, there is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of

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[15]*Ibid.* at 10.

[16]In particular, it does not include the class of case which Birks calls restitution for wrongs, as to which, see *infra*, "Unjust Enrichment and Wrongs".

[17]*Supra*, note 4 at 13-16.

[18]*Ibid.* at 11 and 13.

[19]For Lord Denning, see *Greenwood* v. *Bennett* (1972), [1973] Q.B. 195 at 200, [1972] 3 W.L.R. 691 (C.A.). For Lord Wright, see *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd* (1942), [1943] A.C. 32 at 62-63, [1942] 2 All E.R. 122 (H.L.) [hereinafter *Fibrosa* cited to A.C.]; and *Brooks Wharf & Bull Wharf, Ltd* v. *Goodman Bros* (1936), [1937] 1 K.B. 534 at 545-46, [1936] 3 All E.R. 696 (C.A.) [hereinafter *Brooks Wharf*]. For Lord Atkin, see *United Australia*, *supra*, note 6 at 27. For more recent approval, see *Nissan* v. *A.G.* (1967), [1968] 1 Q.B. 286 at 351-52, [1967] 2 All E.R. 1238 (C.A.), Winn L.J., aff'd (1969), [1970] A.C. 179 (H.L.).

> what might be classified as unjust enrichment in a legal system that is based upon the civil law.[20]

Unlike their Canadian counterparts, judges in England do not appear to be persuaded that significant benefits are to be gained by admitting unjust enrichment to the ranks of legal doctrine. Birks, however, argues that these advantages are clear and compelling. He asserts that an identical principle and the same problems are present in such diverse doctrines as *quantum meruit* for services rendered pursuant to an unenforceable contract and the constructive trust for money paid by mistake. Unjust enrichment, in identifying the essential unity of these claims, not only avoids the confusing fragmentation of legal doctrine, it also helps to expose some of the tenacious legal fictions which English lawyers have used, unconsciously one supposes, to the detriment of legal discourse and justice in this field of law.[21] The argument which denies unjust enrichment any legal status is probably motivated by an atavistic desire to preserve historic patterns of juristic speech and to retain the basic division of the rules of civil liability between common law and equity. Perhaps, too, there is an innate bias among common-law

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[20](1977), [1978] A.C. 95 at 104, [1977] 3 W.L.R. 229 (H.L.). Other examples include *Sinclair* v. *Brougham* (1914), [1915] A.C. 398 at 415, [1914-15] All E.R. Rep. 622 (H.L.), Viscount Haldane L.C.:

> [B]roadly speaking, so far as proceedings in personam are concerned, the common law of England really recognizes . . . only . . . two classes [of claims], those founded on contract and those founded on tort.

See also *Baylis* v. *Bishop of London* (1913), [1913] 1 Ch. 127 at 140, 107 L.T.R. 730 (C.A.), Hamilton L.J. quoted with approval in *Holt* v. *Markham* (1922), 128 L.T.R. 719 at 725 (C.A.), Scrutton J.:

> To ask what course would be *ex aequo et bono* to both sides never was a very precise guide, and as a working rule it has long since been buried . . . . Whatever may have been the case 146 years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled "justice as between man and man".

[21]With respect to the fragmentation point, the principle brings together *quantum meruit, quantum valebat,* some of the money counts, contribution, indemnity, tracing, equitable liens, some aspects of the constructive trust and some aspects of subrogation and rights akin to subrogation. Predominant examples of legal fictions include the requirement in equity that there be a fiduciary relationship in order for equitable tracing or the constructive trust to be available and the implied-contract theory of quasi-contract which, although dismissed by almost everyone today, still has a damaging influence on many areas of quasi-contractual doctrine. As to the first, see, *e.g., Chase Manhattan Bank (N.A.)* v. *Israel-British Bank (London) Ltd, supra,* note 3; *English* v. *Dedham Vale Properties Ltd* (1977), [1978] 1 W.L.R. 93, [1978] 1 All E.R. 382 (Ch.D.); and *Goodbody* v. *Bank of Montreal* (1974), 4 O.R. (2d) 147, 47 D.L.R. (3d) 335 (H.C.). As to the second, see Goff & Jones, *supra,* note 3 at 5-11. For a recent attempt to revive the implied-contract theory, see R.A. Posner, *Economic Analysis of Law,* 2d ed. (Boston: Little, Brown, 1977) at 97-98.

On legal fictions generally, and their role in the development of legal doctrines, see L.L. Fuller, *Legal Fictions* (Stanford, Calif.: Stanford University Press, 1967); H.S. Maine, *Ancient Law,* 9th ed. (London: John Murray, 1883) c. 2; and R. Demogue, *Les notions fondamentales du droit privé* (Paris: Librairie nouvelle de droit et de jurisprudence, 1911) at 238-52.

lawyers against a conception which seems extravagantly metaphysical. To the latter, Birks responds that "the word 'unjust' might, with a different throw of the dice, have been 'disapproved' or, more neutrally, 'reversible'".[22] In any event, "unjust enrichment" is no more opaque or abstract than "contract" or "tort".

When Birks comes to specify the precise legal status to be accorded to unjust enrichment, though, his argument takes a strategic turn. It would not be prudent for an English textbook writer, in the inhospitable environment fostered by English courts, to argue for a full-fledged doctrine of unjust enrichment. Too much has been said against it by distinguished members of the English bench and bar for it to be tenable to claim today that unjust enrichment is a source of legal obligation or a cause of action in English law. Hence, Birks asserts that it is preferable to say that "[t]here are circumstances in which the law does not permit one person to be enriched by subtraction from another" rather than to say that "the law does not permit one person to be unjustly enriched at the expense of another."[23]

In the characterization preferred by Birks, unjust enrichment is merely the "generic conception" of events that call for restitution. It serves the limited purpose of permitting the needed rationalization and stabilization of patterns of legal discourse. The latter formulation is said by Birks to be dynamic and normative. It is a "general principle" and not a "generic conception", prescriptive rather than descriptive. Birks maintains that there is a danger that the prescriptive formulation will cause lawyers inadvertently to disregard precedent and to ignore such intermediate concepts in the law of restitution as mistake, compulsion or necessity, which have been developed decisionally.

It is just as easily argued that there is an equally serious danger that his descriptive formulation will cause lawyers to be fixated by precedent. They will then fail to make justifiable extensions of restitutionary relief in situations where no obvious precedent exists.

There is another objection to this aspect of Birks' argument, however, which is more fundamental: the distinction he draws between the descriptive and prescriptive formulations is one with very little by way of difference. The critical point is that both formulations identify a set of normative criteria which defines what is to count as a good legal argument or a sound

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[22]*Supra*, note 4 at 19.
[23]*Ibid.* at 23-24.

judicial decision in restitution cases.[24] The only difference is that Birks' descriptive formulation merely gives implicit or covert recognition to the "general principle" he ostensibly rejects. But it is recognition nonetheless, since the descriptive formulation is expressly intended to alter radically the pattern of normative discourse in restitution cases. It is doubtful whether Birks would dissent from these criticisms, given his opening claim that the chief purpose of re-classifying the relevant common-law and equitable doctrines into one category is to cleanse the law of its "intellectual errors" so as to reveal its underlying "skeleton of *principle*".[25] His use of the descriptive formulation is best explained as a guarded way of expressing acceptance of that principle, intended solely to give the arguments developed in the remainder of the book the appearance of conforming with the persistent denial of the principle's existence in English law.

This strategy also partially explains Birks' retention of "restitution" as the name for his subject. Given his persuasive arguments that, in its pristine version, it is incongruous in the list of causative events and inherently ambiguous as a legal concept, one wonders why it should be retained as a term of art.Why not say simply that unjust enrichment is a cause of action in English law? This, in fact, is precisely what the contrived definition of restitution says: "restitution" is stipulated by Birks to mean "reversal of the enrichment", and the ground calling for reversal is identified, if only guardedly, as unjust enrichment at the expense of another.[26] Since, however, unjust enrichment is a category of claim forever banished from English law, Birks is forced to call his body of law something else, "restitution", and to argue, rather tenuously, that his constrained definition of restitution does not entail recognition of the unwholesome general principle.[27] This strategy allows Birks to conclude, at the end of Chapter 1, that his point of view is not a radical departure from the conservative perspective of English courts.[28] "Restitution", despite its obvious failings as an organizing principle and

[24]The following is a representative sampling of the kinds of statements Birks makes, *ibid.* at 1 and 18, respecting the importance of recognizing the normative criteria: Restitution is in "desperate need... [of] a simple, even an over-simplified, account of how its pieces fit together"; and the "reluctance to deal in the language of unjust enrichment has to be overcome, for it has done and is doing enormous damage to the whole law of restitution ... ."

[25]*Ibid.* at vii and 1 [emphasis added].

[26]The statement is not entirely accurate since Birks modifies this stipulation to take account of the restitution-for-wrongs cases. It is argued *infra*, "Unjust Enrichment and Wrongs", that this particular modification is misconceived.

[27]This move on Birks' part is somewhat surprising since he is one of the few to have identified the inappositeness of the name "restitution". See also Samek, *supra*, note 13.

[28]*Supra*, note 4 at 26-27.

legal concept, serves well as a Trojan horse for a cause of action in unjust enrichment.[29]

Canadian readers ought to be alerted to Birks' conceptual finesse, not least because our courts have not exhibited anything like the hostility towards unjust enrichment as a cause of action as that associated with English courts.[30] There is, therefore, no need to obfuscate in Canada by disguising the cause of action in unjust enrichment as a legal response — restitution — peculiarly defined. "Restitution" thus presents a good case for Ockham's razor. It may be used henceforth as a shorthand expression for "reversing an enrichment gained at the expense of another" but, recognizing that it is a term of convenience only, nothing further can turn on its "true" meaning.

One last observation about the word "restitution" is appropriate. It has been seen that it carries several connotations: restoration of the *status quo ante* (rejected by Birks); restoration of property belonging to the plaintiff (rejeeted by Birks); and reversal of an enrichment (adopted by Birks). In restitution, thus defined, the plaintiff recovers because the defendant has received a benefit directly or indirectly *from* the plaintiff that he does not deserve to keep. Such claims comprise the entire law of unjust enrichment.[31]

There is another class of case where the defendant enriches himself through the breach of a duty owed to the plaintiff. In *Reading* v. *R.*, for example, Sergeant Reading made a large profit by breaching his duty to the Crown.[32] In this case and others like it, defendants are enriched undeservedly, but it is not possible to say that anything has been received, directly or indirectly, *from* the plaintiff. The circumstances of the receipt indicate that it is probably not right for Sergeant Reading to keep his profit, but it is not clear who should get it or why, since the plaintiff has not lost its equivalent. Indeed, the plaintiff has not lost anything. In Chapters 2 and 10, Birks characterizes these cases as "restitution for wrongs" and he argues that restitution is awarded on the basis of the wrong, not because the defendant has been unjustly enriched at the expense of the plaintiff.

Notice that "restitution" has just acquired yet another meaning. By Birks' convention, "restitution" comes to mean sometimes reversing an

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[29]For a construably similar effort, see G.H.L. Fridman & J.G. McLeod, *Restitution* (Toronto: Carswell, 1982) at 39-47.

[30]See the cases cited, *supra*, note 12.

[31]It is not property law because the plaintiff is unable to say that the defendant's benefit — money, services or goods — is, at the date of the action, still his property. It is not tort, contract or trust law because the nexus between the plaintiff and the defendant required by each of these categories of civil liability is not present. These points are developed in the second section of the review.

[32](1948), [1948] 2 K.B. 268, aff'd (1949), [1949] 2 K.B. 232 (C.A.), aff'd (1951), [1951] A.C. 507 (H.L.) [hereinafter *Reading*].

enrichment and sometimes forcing the defendant to *give up* to the plaintiff gains made through the commission of a wrong.[33]

Birks is correct when he asserts that the recognition of unjust enrichment "effects no change [to the law] except what comes from better understanding of what is there already"[34] if he means that the essential integrity of case law will remain undisturbed insofar as the motivating intuitions, some of the reasons and most of the results of litigation are concerned. Much of the traditional language of justification, however, is odd, even antiquarian, and ought to be abandoned. There is a lot of nineteenth-century underbrush which the generic conception or principle, when correctly applied, helps clear away. Taking this step enhances the intelligibility of this very small, and otherwise transparent, corner of English private law.

II. Differentiation

A. Unjust Enrichment and Contract

Accommodating a new category of civil liability in English law requires demarcation of the conceptual boundaries between the newcomer and the better-established categories of contract, tort and trust. In Chapter 2 of his book, entitled "Differentiation", Birks examines the fit of unjust enrichment in the law of obligations and its relationship to the law of property. He first outlines the Roman-law origins of obligations arising *quasi ex contractu* and observes that what English lawyers came to call *quasi-contract* in the late nineteenth century is similar to, but not the same as, Roman law's obligation *quasi ex contractu.* The Roman classification denoted a group of situations where the relief granted was analogous to that available for breach of contractual obligations. Consequences flowing from the receipt of a mistaken payment were the same as those which attached to the receipt of a loan (*mutuum*). They were therefore sanctioned by the same action, *condictio,* or debt. Similarly, *negotiorum gestio* attached the same consequences to the unsolicited intervention in the affairs of another as availed in the contract of mandate, namely that the *gestor* was obliged to conduct his intervention with care. But because English law never has recognized the "quasi-mandate" obligation of *negotiorum gestio,* its *quasi-contract* category was not co-extensive with the Roman category *quasi ex contractu.*

[33]"That's a great deal to make one word mean," Alice said in a thoughtful tone. "When I make a word do a lot of work like that," said Humpty Dumpty, "I always pay it extra." Carroll, *supra,* note 1 at 164.

[34]*Supra,* note 4 at 27.

The implicit basis of this aspect of English law, argues Birks, has always been unjust enrichment. But because of the name, and owing to two other factors, liability in *quasi-contract* attracted a delinquent association with contractual obligations. The two other factors were the mistaken inclusion of some situations vindicated by the writ of debt (one of the sixteenth-century precursors to unjust enrichment) in *assumpsit* and Sir William Blackstone's erroneous explanation of quasi-contractual obligations as arising by implication from obligations grounded in the social contract. Birks argues that these three factors gave rise to the predominant view in the nineteenth and early twentieth centuries that quasi-contract was really "sort-of-contract", involving the fictional implication of essentially contractual obligations in what we now recognize as unjust enrichment claims. This view yielded spectacular errors in several famous cases, including *Sinclair* v. *Brougham*,[35] and led to unsuccessful attempts at rectification by Lord Wright in *Brooks Wharf* and *Fibrosa* and by Lord Atkin in *United Australia*. Birks recounts the history of this error in a lucid fashion, and his attribution of complicity to Blackstone is original and persuasive.[36]

Having argued that quasi-contract is not contract, thereby removing one obstacle to the demarcation of the contract/unjust enrichment boundary, Birks goes on to observe, following the American *Restatement of the Law of Restitution*, that many categories of equitable relief are also based on unjust enrichment.[37] This point raises the contract/unjust enrichment boundary problem in a different context. The observation that a good deal of equity is based on the imperative against unjust enrichment is complemented by the corollary observation that a great many of equity's doctrines are contractual in substance. The constructive trust is a telling but hardly unique example of an equitable doctrine that appears contractual in some guises and based on unjust enrichment in others.[38] If the niceties of legal language

[35]*Supra*, note 20. There are many examples. Another particularly interesting one is *A.G.* v. *De Keyser's Royal Hotel, Ltd* (1920), [1920] A.C. 508, [1920] All E.R. Rep. 80 (H.L.).

[36]But here, as in several other key places in the book, Birks fails to put the language of law back into its social context. In the result, although his explanation is persuasive and conceptually sound on its own terms, it fails to satisfy completely. He asserts *supra*, note 4 at 34, for example, that "it is a quite remarkable coincidence of legal history, to have the same error re-inforced from three angles." It is difficult to believe that this mistake was the result of such a coincidence and that England's nineteenth-century lawyers were so insensitive to the political implications of their technical discourse.

[37]*Restatement of the Law of Restitution Quasi-Contracts and Constructive Trusts* (1937).

[38]Whenever the constructive trust is deployed to satisfy the plaintiff's expectation interest, it is contractual in substance. The law is sometimes ambivalent about the legal status of a statement made by the defendant owing to technical problems relating to contract formation, third party enforcement of contracts, or the *Statute of Frauds*. These technical problems aside, the law is reasonably certain that the statement should be construed as a legally-binding promise in favour of the plaintiff. The ambivalence can be resolved by calling the enforcement of the

are put to one side, it becomes apparent that a similar observation can be made with respect to estoppel, promissory estoppel and the resulting trust. Says Birks, on the contractual aspect of this argument:

> Local difficulties may for a time obscure the fact that contracts, like roses, remain the same under all names. If I induce and assume responsibility for your expectation in relation to a particular matter, then, whatever words I have actually used, the effect is that I have promised you that I will make that expectation good. If the law then says that that promise is legally binding and can be enforced against me, then, whatever words the law actually uses to describe that enforceable promise, there is, according to jurisprudential usage freed from local constraints, a contract.[39]

The lesson to be drawn from this discussion is that common-law lawyers ought to examine the various doctrines of equity carefully in their endeavour to re-classify the rules of civil liability into the categories of contract and unjust enrichment. Unfortunately, there recently has been a tendency on the part of restitution lawyers to attempt to explain too much of equity with unjust enrichment,[40] in much the same fashion, ironically, that nineteenth-century common lawyers attempted to explain too much of the common law with contract.

B. Unjust Enrichment and Wrongs

There are situations where courts award a plaintiff the value of a benefit that his defendant has obtained as a consequence of a breach of a duty imposed by the law of torts, the law of trusts or, as some have argued, the law of contracts. Are these unjust enrichment claims, or are they tort, trust or contract claims or something else entirely? To put this question in a slightly different way, how is the recovery of the defendant's profit or saved expense to be justified in those cases where there has been no apparent subtraction from or loss to the plaintiff?

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expectation interest a constructive trust, thereby preserving the integrity of contract doctrine. Textbook examples include *Inwards* v. *Baker* (1965), [1965] 2 Q.B. 29, [1965] 1 All E.R. 446 (C.A.); *Affrêteurs Réunis Société Anonyme* v. *Walford* (1919), [1919] A.C. 801 (H.L.); and *Bannister* v. *Bannister* (1948), [1948] 2 All E.R. 133, [1948] W.N. 261 (C.A.).

Conversely, the constructive trust can be deployed to effect a reversal of an unjust enrichment: see, *e.g.*, *Chase Manhattan Bank (N.A.)* v. *Israel-British Bank (London) Ltd*, *supra*, note 3; and *B.C. Teachers' Credit Union* v. *Betterly* (1975), 61 D.L.R. (3d) 755.

Constructive trusts are available in other situations as well. For example, they are deployed to justify the distribution of family assets on the breakdown of marital relations. See Dickson J.'s concurring opinion in *Rathwell* v. *Rathwell* (1978), [1978] 2 S.C.R. 436, 83 D.L.R. (3d) 289; and *Pettkus* v. *Becker*, *supra*, note 12.

[39]*Supra*, note 4 at 47 [reference omitted].

[40]See, *e.g.*, Goff & Jones, *supra*, note 3, which consistently makes this error.

This question has arisen in many cases. *Strand Electric and Engineering Co.* v. *Brisford Entertainments Ltd*[41] is a leading case on the recovery of expenses saved by a defendant through the commission of a tort, *Reading* v. *R.*[42] on the recovery of profits made in the commission of a "wrong", *Boardman* v. *Phipps*[43] on the recovery of profits made through the innocent breach of a fiduciary duty, and *City of New Orleans* v. *Firemen's Charitable Ass'n*[44] on the recovery of expenses saved through a breach of contract. Birks is clearly correct in asserting that the vast majority of these cases cannot be explained by unjust enrichment: in most of them, there is no conceivable way to say that the defendant was enriched by receiving something from the plaintiff. Birks explains these cases as instances where restitution in the sense of "giving up", and not "giving back", is awarded on account of "wrongs". He therefore calls them "restitution for wrongs". His discussion penetrates much of the judicial and academic confusion surrounding this class of case;[45] as such it merits careful assessment.[46]

Strand Electric, Reading, Boardman and *City of New Orleans* do not represent the historical paradigms in the restitution-for-wrongs category. Birks argues that at least some of the waiver-of-tort cases do, and it is therefore with these cases that he begins his discussion.[47] Since some of the waiver-of-tort decisions are to be included in the restitution-for-wrongs category, Birks adopts the convention of discussing "wrongs" rather than "torts".

He then notices that the term "waiver" is ambiguous and misleading and, on that account, argues that it ought to be abandoned. It has, he suggests, at least three possible connotations.[48] It could mean that the plaintiff may choose to *ignore* the wrongful character of the defendant's act and recover the value received in unjust enrichment. An example would be recovery of benefits obtained through duress. The plaintiff may sue for the tort of duress and recover damages, or he may ignore the tort of duress and sue in unjust enrichment to recover the value of the benefit involuntarily transferred. Secondly, waiver could mean that the plaintiff may elect to *extinguish* the wrong by accepting as valid the actions of his defendant. The

[41](1952), [1952] 2 Q.B. 246, [1952] 1 All E.R. 796 (C.A.) [hereinafter *Strand Electric*].

[42]*Supra*, note 32.

[43](1966), [1967] 2 A.C. 46, [1966] 3 W.L.R. 1009 (H.L.) [hereinafter *Boardman*].

[44]9 So. 486 (Sup. Ct La 1891) [hereinafter *City of New Orleans*]. The plaintiff failed to recover the defendant's saved expense in this case.

[45]"Restitution and Wrongs", *supra*, note 11.

[46]The ideas that are summarized in the text that follows are contained in Chapter 2, "Differentiation", and Chapter 10, "Restitution for Wrongs".

[47]For a fresh look at the waiver-of-tort cases that, in some respects at least, coincides with the critique of Birks' restitution-for-wrongs cases developed below, see S. Hedley, "The Myth of 'Waiver of Tort'" (1984) 100 L.Q. Rev. 653.

[48]*Supra*, note 4 at 314-18.

sole example is the case where the plaintiff ratifies the act of a self-styled agent. Such a plaintiff is permitted to sue for the price of a chattel sold by his defendant where the latter, at the time of the sale, was purporting to act as the plaintiff's agent. In so doing, the plaintiff extinguishes the wrong. Thirdly, waiver may mean that a plaintiff has a choice of *two remedies* deriving from a single wrong. The example offered by Birks is *United Australia*, where the conversion of a cheque gave rise to a claim for money had and received and a claim in conversion. The essential feature of this third group of claims is that, in making out either of the alternative claims, the plaintiff is required to prove the same wrong.

Although the second sense of waiver is perhaps the one for which the label is most appropriate, it is an historical anomaly and therefore does not merit special attention. The case cited as an example of it would be dealt with today as an instance of waiver in the first or third sense. Birks is concerned, instead, to draw a hard distinction between the first sense, which he calls "alternative analysis" (highlighting the availability of alternative characterizations of the facts) and the third sense, which he calls "restitution for wrongs" (highlighting the contingent nature of the restitutionary claim). His argument proceeds to an examination of this distinction.

In the alternative analysis cases, the conceptual division of private law claims into tort, unjust enrichment, contract and trust allows for overlapping characterizations in individual fact situations. There is nothing to object to here. The principal issues it raises for the law are whether the plaintiff should somehow be restricted to one or the other of the characterizations and, if not, what the timing of his election between the two should be. This is a familiar but difficult issue on the contract/tort boundary and proved problematic on the tort/unjust enrichment boundary as *United Australia* showed.[49]

The restitution-for-wrongs cases comprise the more intriguing half of the dichotomy. If there is to be such a category of claim, then two obvious questions arise: does it take in more than the relevant instances of the traditional waiver-of-tort claims? And if so, which other wrongs give rise to a claim of restitution (giving up) and why? To the first question, Birks answers an unqualified yes, thus justifying his initial change in terminology from "torts" to "wrongs". Birks asserts, in answer to the second question,

[49]For treatments of the contract/tort overlap, see: M. Bridge, "The Overlap of Tort and Contract" (1982) 27 McGill L.J. 872; G.H.L. Fridman, "The Interaction of Tort and Contract" (1977) 93 L.Q. Rev. 422; B. Morgan, "The Negligent Contract-Breaker" (1980) 58 Can. Bar Rev. 299; W.D.C. Poulton, "Tort or Contract" (1966) 82 L.Q. Rev. 346; and J. Blom, "The Evolving Relationship Between Contract and Tort" (1985) 10 Can. Bus. L.J. 257.

that there are three alternative tests to determine whether a particular wrong should give rise to a claim of restitution (giving up):

1. Deliberate Exploitation of Wrongdoing: If the defendant deliberately committed the wrong complained of in order to make a profit, he should be forced to give it up to the plaintiff. If the defendant, for example, deliberately defamed the plaintiff in order to increase sales of his book, the plaintiff should be entitled to the profits stemming from the defamation.

2. Anti-Enrichment Wrongs: Some acts are designated legal wrongs as a matter of policy, at least in part, to prevent enrichments. The duty not to exploit trade secrets related in confidence, for example, is based partially on a prohibition against obtaining a benefit by committing the wrong of breach of confidence.[50] Similarly, and more obviously, the duty not to interfere with a property entitlement of the plaintiff is designed as a matter of policy to prevent enrichment.[51] The test is whether the defendant has enriched himself through the commission of an anti-enrichment wrong.

3. Prophylaxis: Finally, the law imposes an obligation to give up enrichments where they have been gained through the breach of a fiduciary duty. The law does this, as a matter of policy, to protect the integrity of fiduciary relationships, notwithstanding that no corresponding harm was caused to the plaintiff.[52]

Birks concludes by illustrating the application of these principles in several problematic cases, namely, profits made through breach of contract, profits made through interference with contractual relationships, profits made through breach of fiduciary duties and profits made through breach of confidence.

There are two major problems with Birks' analysis of the restitution-for-wrongs cases. A portent of the first problem lies in Birks' admission to having considerable difficulty in including *United Australia* as a member, let alone a paradigm, of the restitution-for-wrongs category. It is, he says, as easily classified as a member of the alternative-analysis category:

> On the facts of *United Australia* there is ... some doubt whether there can or cannot be said to be a subtraction as well as a wrong.[53]

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[50]The example is *Peter Pan Mfg Corp.* v. *Corsets Silhouette Ltd* (1962), [1964] 1 W.L.R. 96, [1963] 3 All E.R. 402 (Ch.D.) [hereinafter *Peter Pan*].

[51]The example is *Strand Electric, supra*, note 41.

[52]There may be other cases where the law acts to protect a particular class of relationship. The point is that if a gain has been obtained through the breach of a duty arising out of the relevant kind of relationship, the law requires that it be given up, notwithstanding the lack of actual harm to the plaintiff.

[53]*Supra*, note 4 at 321.

More importantly, he observes that the distinction between alternative analysis and restitution for wrongs is very frequently a difficult one to draw:

> Though there are many cases in which plaintiffs have obtained restitution from wrongdoers it is not often possible to say whether they succeeded on the basis of alternative analysis or restitution for wrongs. In particular there are very few cases which fall unequivocally into the latter category ... .[54]

It bears repeating that the possibility of drawing this distinction is stated by Birks to be of some importance. He is clearly correct in this assessment. The distinction marks the conceptual boundary between all unjust enrichment claims that also happen to involve wrongs and all those restitution claims in which courts order defendants to give up benefits obtained through the commission of a wrong where there is no loss or subtraction in the plaintiff corresponding to the benefit.

More will be said concerning the nature and importance of this distinction below, but the first problem can be identified immediately. It lies in the attempt to include *United Australia*, and numerous similar cases such as *Strand Electric* and *Peter Pan Mfg Corp.* v. *Corsets Silhouette Ltd*, in the restitution-for-wrongs category in the first place. Notwithstanding Birks' argument to the contrary, the entire sub-category of anti-enrichment wrongs belongs in the alternative-analysis half of the dichotomy. *Strand Electric* is a paradigm case in that category and therefore the one best suited to illustrating this point.

Strand Electric involved both a tort claim and an unjust enrichment claim. As a tort claim, the relevant issue was the compensation to which the plaintiff was entitled by virtue of the loss caused him by the defendant's tortious act. As an unjust enrichment claim, the relevant issue was the enrichment the defendant received at the expense of the plaintiff. There is, on the facts of *Strand Electric*, the paradox that the defendant had more in its hands, so to speak, than the plaintiff apparently had lost. It is this paradox which leads Birks to maintain, mistakenly, that *Strand Electric* should not be explained as a tort claim or an unjust enrichment claim, because there was no equivalency between the plaintiff's recovery and his actual loss (tort) or subtraction (unjust enrichment). The paradox is obviously problematic for the tort characterization. In the unjust enrichment characterization, it surfaces in the guise of two related conundrums that have been discussed with some frequency in the restitution literature: whether a plaintiff's recovery is restricted to the apparent subtraction or extends to include the entire

[54] *Ibid.* at 318.

amount of the defendant's gain;[55] and whether a plaintiff is permitted to count the saved expense of his defendant as a benefit, negative though it may be, for the purposes of an unjust enrichment claim.[56]

The paradox from the tort perspective dissolves once it is recognized that there is a critical problem respecting the quantification of loss in all the possessory tort claims. Indeed, the common law has always allowed a range of possibilities on this issue, sometimes equivocating completely by leaving the matter to the plaintiff's discretion. For example, historically the plaintiff was permitted to choose the value of the chattel at the date of judgment and sue in detinue or choose the value of the chattel at the date of the wrongful act and sue in conversion. The issue will remain unsettled precisely because this tort claim is designed to vindicate a wrong committed to the plaintiff's property. That wrong and the resultant loss can be characterized in any number of ways.[57] As plaintiff's counsel suggested in *Strand Electric*, there is no reason in principle for the range of choice afforded the plaintiff or the court in this class of tort claim to be restricted so as to exclude recovery of the rental value of a chattel in the appropriate case. When the loss is so characterized, the recovery is equivalent to the loss. *Strand Electric* was thus properly dealt with as a tort claim.

The paradox dissolves from the perspective of the unjust enrichment claim for the same reason. All that need be recognized is that the economic value taken from the plaintiff was originally in the form of a property interest in a chattel. Property interests have economic value in at least three distinct

[55]See *Lamine* v. *Dorrell* (1705), 2 Ld Raym. 1216, 92 E.R. 303 (Ch.D.), a waiver-of-tort case where the plaintiff waived the torts of detinue and trover and sued the defendant in money had and received for the price received by the defendant on the sale of the plaintiff's debenture. It seems, on these facts, that the plaintiff did not actually lose anything save the fair market value of the debentures at the date of the conversion or the date of trial. If the sale price was greater than the respective fair market values, was the plaintiff entitled to it instead?

[56]In *Strand Electric, supra*, note 41, it was at least arguable that the plaintiff did not actually lose anything. It never was entitled to the receipt of any rent for the chattel, so no rental payments were actually taken from it. Was it nevertheless entitled to the defendant's saved expense?

[57]In the tort of conversion, for example, the plaintiff's loss is quantified in different ways depending on the circumstances, *e.g.*, the plaintiff may be entitled to the market value of stocks at the date he first became aware of their conversion and is not limited to the market value at the date of conversion (see *Dominion Securities Ltd* v. *Glazerman* (1984), 29 C.C.L.T. 194 (Man. C.A.)); he may be limited to the cost as opposed to the retail price of inventory wrongfully seized under a debenture (see *Ronald Elwyn Lister Ltd* v. *Dunlop Tire Canada Ltd* (1985), 52 O.R. (2d) 88, 105 D.L.R. (3d) 684 (C.A.), rev'd (1982), [1982] 1 S.C.R. 726, 135 D.L.R. (3d) 1); he may be limited to the purchase price of platinum as opposed to its value at the date of trial (see *Canadian Laboratory Supplies Ltd* v. *Engelhard Industries of Canada Ltd* (1975), 12 O.R. (2d) 113, 68 D.L.R. (3d) 65 (H.C.), rev'd on other grounds (1977), 16 O.R. (2d) 202, 78 D.L.R. (3d) 232 (C.A.), aff'd (1979), [1980] 2 S.C.R. 450, 97 (3d) D.L.R. 1).

ways: the *usus*, *abusus* and *fructus* of the civil law. How the value is particularized according to these three interests is a problem for individual fact patterns. There can be no objection in principle to characterizing it as *usus*, as in *Strand Electric*, especially considering that this was exactly how the defendant itself valued the chattel.[58]

The crux of Birks' problem lies in wanting to be too materialistic in defining "subtraction". Money paid by mistake is always an easy case on this issue because it is obvious that when money is mistakenly paid, there has been a "subtraction" from the plaintiff and that the subtraction is equal to the quantity of money paid. But economic value can come in many forms besides money. When it does, as in the case of property interests in chattels, the court must be careful to conceptualize the "subtraction" problem in the way that best identifies that aspect of the property interest that was taken *from* the plaintiff.

Arguments to similar effect could be made for most of the other cases Birks includes in his sub-category of anti-enrichment wrongs. These cases all involve situations in which the law is attempting to give a remedy for the misappropriation of a property entitlement or a legal interest akin to a property entitlement. As such, there must always be a direct correspondence between the plaintiff's loss and the plaintiff's recovery (the tort characterization) or the defendant's gain and the plaintiff's subtraction (the unjust enrichment characterization). What makes them problematic is that the quantification of the loss or subtraction has to be conceived of in other than conventional ways. But as *Strand Electric* shows, that only puts them nearer the frontier of the relevant category, not beyond it, since the novel conception of the loss or subtraction required is, nonetheless, juristically sound. Moreover, from a common sense point of view, it is the only reasonable characterization of the loss or subtraction given the peculiar facts of the cases concerned.

The thrust of these arguments is that Birks' initial enterprise of explaining private law, so far as is possible, in terms of the categories of tort, trust, contract and unjust enrichment is not to be abandoned so readily. The purpose of that enterprise is to achieve a rationalization of the language of private-law justification by making it conform with basic norms that are intelligible to the modern mind. Grounding the relevant claims in such norms has the singular virtue of permitting arguments by analogy and criticisms of legal decisions based on principle. Birks is too willing to gather these claims into a category consisting of a miscellany of "policy"-motivated rules.

[58]In *Lamine* v. *Dorrell*, *supra*, note 55, the subtraction was identified as *abusus*.

This latter observation sets the stage for the discussion of the second major problem with Birks' treatment of restitution for wrongs: it is the more fundamental criticism that the restitution-for-wrongs category lacks unity and intelligibility. As a result, there can be no basis for comparing or contrasting it with any other category of private law claim or for determining its membership.

In Chapter 2, where Birks introduces the argument for the two meanings of restitution, he makes the rather weak claim that the division of his subject into restitution meaning "giving back" and restitution meaning "giving up" is more economical involving, regrettably, some "artificial specialization of the terminology".[59] The dichotomy is thus first recommended on the basis of mere convenience. Birks' equivocation regarding the anti-enrichment cases is another indication that his embrace of the dichotomy is only tentative. In Chapter 10, however, where Birks discusses the restitution-for-wrongs cases in more detail, he maintains that the dichotomy is substantive and not merely conventional. Readers are told at the beginning of the chapter that, in embarking on the study of these cases, they are crossing a "major divide".[60] This point is reinforced by Birks' claim that the distinction between alternative analysis and restitution for wrongs is of crucial importance.

The second description of the distinction is better. Whereas unjust enrichment is of the essence of restitution meaning "giving back", there is no unity to the cases in which restitution means "giving up" except, perhaps, that the restitutionary claims comprehended by it are not unjust enrichment claims. It is this feature, however, which makes it particularly inappropriate to talk about the two classes of claim as belonging to the same area of law. It demonstrates that there is no conceptual similarity between the two except the superficial one that the response to both might, *by convention only*, be called "restitution". Including restitution for wrongs in the same book as unjust enrichment is akin to devoting a separate chapter to tort damages in a treatise on contract.

But even if there is some value in examining the restitution-for-wrongs cases alongside the unjust enrichment cases, it is doubtful whether the cases Birks includes as restitution for wrongs are adequately explained by that rubric. There is a lack of integrity in the category in the sense that the reasons for recovery in these cases are inextricably tied to the social purposes of the discrete areas of law in which they arise and therefore can be explained solely in the light of those purposes. Calling these cases "restitution" does

[59]*Supra*, note 4 at 42.
[60]*Ibid.* at 313.

not aid in the identification of the reasons for legal intervention. This argument can be illustrated by re-examining the cases Birks gives as examples of his first and third principles.

1. Deliberate Exploitation of Wrongdoing: The defamer's profits present a problem for tort law. Conventional tort-law analysis prefers to deal with the issue of the basis and quantum of the plaintiff's recovery as one concerning the availability of punitive damages.[61] Perhaps there is some attraction in deviating from conventional usage by calling the plaintiff's recovery "restitution": if the plaintiff recovers the actual profits made by his cynical defendant, there is at least the appearance of a benefit being given up. But calling the recovery "restitution" does not explain the court's intervention, and this is exactly what needs to be known if the recovery is to be justified. If the resolution of this latter problem is not to be found within the scheme of corrective justice presented by tort law, that is to say, if there is no conceivable way to characterize the defendant's profits as the plaintiff's loss, then the resolution must be that such recovery represents a policy-motivated private-law claim. The policy advanced in the case of the defamer is the one set out for punitive damages by Lord Devlin in *Rookes* v. *Barnard*.[62] "Penalty" is a more apt description than "restitution" because it identifies the nature of the response to the plaintiff's claim and leads directly to the articulation of the reason for intervening: for policy reasons the law wants to punish the defendant.

3. Prophylaxis: The fiduciary's profits present a problem for trust law broadly conceived. The explanation that Birks gives for this case is probably right. Recovery of profits made through at least some breaches of fiduciary duty is, like the recovery in the case of the defamer, an instance of a private-law claim being deployed instrumentally for the advancement of a specific policy objective.[63] In this case, the general object is to deter breaches of fiduciary duty by imposing severe sanctions when they occur. As in the case of the

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[61]Sometimes, however, the recovery can be justified as an actual loss, in which case the orthodox view is to distinguish such recovery as "aggravated damages": see G.H.L. Fridman, "Punitive Damages in Tort" (1970) 48 Can. Bar Rev. 373 at 379; and D.L. Hawely, "Punitive and Aggravated Damages in Canada" (1980) 28 Alta L. Rev. 485.

[62](1964), [1964] A.C. 1129 at 1226, [1964] 1 All E.R. 367 (H.L.):

> [T]here are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strengths of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal.

In the discussion which follows, Lord Devlin sets out three categories of claim for punitive damages. There is considerable doubt whether Canadian courts have felt restricted by these categories: see Fridman, *ibid.*; and Hawley, *ibid.*

[63]See also E.J. Weinrib, "The Fiduciary Obligation" (1975) 25 U.T.L.J. 1. There may be other justifications, including the possibility in some cases that recovery of the fiduciary's gain is a surrogate measure for the plaintiff's actual loss.

defamer, "restitution" is inadequate as the name for this type of recovery because it does not identify the nature of or reason for the intervention.

There is a further objection to Birks' analysis. Given that the relevant policies in both cases constitute strong reasons for moving against the defendant, there still has been no explanation as to why the plaintiff, and not the State or some third party, should recover from the defendant, nor what the quantum of the plaintiff's recovery should be.[64] Birks does not attempt to answer these questions but merely presumes that the relevant policies are best implemented by a private-law claim in which the measure of recovery is restricted to the defendant's profit. But his resolution of these issues is not obviously the best one and requires, in any event, more in the way of argument than Birks is able to offer. Since the claims are policy-motivated, there can be only pragmatic arguments as to the appropriateness of the resolution, the soundness of which can be tested solely by reference to the specific policy sought to be implemented. Presuming the recovery is "restitutionary" obscures this enquiry.

The implication of the foregoing analysis is that Birks' initial question — which wrongs give rise to restitution in the "giving up" sense? — is misconceived. The discussion of the two examples suggests that there is no internal coherence to the "restitution for wrongs" category. Rather, the law responds with favour to the plaintiff's claim in these cases for a variety of policy reasons related to the social purposes of the area of private law in which the claims arise. Further, the law selects the plaintiff and quantifies his recovery on a purely pragmatic basis connected with the policy interest which supports the initial intervention. The fact that there is no unity or intelligibility to this class of case means that there is no basis in principle to identify additions to it.[65]

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[64]For a recent case which overlooks these issues and calls the claim "unjust enrichment", see *Rosenfeldt* v. *Olson* (1984), 59 B.C.L.R. 193, [1985] 2 W.W.R. 502 (S.C.), rev'd (1986), [1986] 3 W.W.R. 403 (B.C.C.A.), rev'd (31 July 1986) no. 19893 (S.C.C.) [unpublished], where money paid into a trust set up by the RCMP in favour of a murderer's wife and child in exchange for information relating to the murders was recovered by the victims' families.

[65]Birks argues, *e.g.*, for the possibility of having restitution-for-wrongs claims available for some instances of breach of contract. He suggests that *City of New Orleans* is a type of case in which the test of deliberate exploitation ought to be brought into play so as to allow recovery of profits against an unscrupulous contract breaker. For a better reasoned justification of the recovery, see E.A. Farnsworth, "Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract" (1985) 94 Yale L.J. 1339; but compare G. Jones, "The Recovery of Benefits Gained from a Breach of Contract" (1983) 99 L.Q. Rev. 443. On the non-availability of exemplary damages for breach of contract, the leading case in Ontario is *Cardinal Construction Ltd* v. *R.* (1981), 32 O.R. (2d) 575, 122 D.L.R. (3d) 703 (H.C.), aff'd (1981), 38 O.R. (2d) 161, 128 D.L.R. (3d) 662 (C.A.).

C. Unjust Enrichment and Property

The last boundary question to be examined, that between property and unjust enrichment, is the most complex. Any attempt to draw the boundary between property and unjust enrichment raises the more general problem of distinguishing the whole law of obligations from the law of property. It also raises issues concerning the integrity of the various classes of claim within the law of obligations itself.

There is a sense in which the whole law of obligations is contained in the law of property. Contract, for example, can be conceived of as the consensual transference of "right", and "right" in turn can be conceived of as the generic name for property. Thus, a breach of contract always involves a transgression of a property entitlement. Parallel arguments can be made with respect to tort and unjust enrichment since tort, broadly conceived, concerns illegitimate interference with "right" and unjust enrichment, broadly conceived, concerns defective transference of "right".

Moreover, the categories on the obligations side of the distinction can be collapsed, with some ingenuity, into each other. The history of English private law provides some very striking illustrations of this point.[66] What makes each of the categories intelligible to the modern mind, and therefore worthy of independent consideration, is that they involve substantially different kinds of legal relationships: the nexus between plaintiff and defendant in each category is defined in essentially different ways. The common law can be said to "know" that the nature of the nexus is the crux of the matter in its expression "cause of action"; the civil law "knows" this in its expression "source of civil liability". Thus, contract involves the consensual formation of obligations, tort, the imposition of obligations on the basis of fault, and unjust enrichment, obligations arising on a defective transference of "right".

At this level of abstraction, however, it is difficult to discern the difference between those portions of tort law where property entitlements are vindicated and unjust enrichment, since both of these kinds of claim deal

[66]A.W.B. Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford: Clarendon Press, 1975); S.F.C. Milsom, *Historical Foundations of the Common Law*, 2d ed. (Toronto: Butterworths, 1981); and C. Fifoot, *History and Sources of the Common Law: Tort and Contract* (London: Stevens & Sons, 1949). This point is often lost sight of by those who argue against a cause of action in unjust enrichment. They mistakenly assume that contract and tort are inherently intelligible and mutually exclusive categories of claim when they argue that unjust enrichment, by contrast, "exerts influence over many branches of the law, while providing the complete explanation of none": see, *e.g.*, S. Hedley, "Unjust Enrichment as the Basis of Restitution — An Overworked Concept" (1985) 5 Legal Stud. 56 at 59; and G.H.L. Fridman, "Restitution Revindicated, Or, the Wonderful World of Professor Samek" (1979) 29 U.T.L.J. 160.

with situations where there has been a defective transference of "right". The only difference is practical. The tort claims arising on defective transference of property entitlements usually depend on the continued existence of an identifiable *res*. In unjust enrichment, the vindication of "right" is expanded to include situations where there has been a defective transfer of a benefit which, by its nature, is not and usually never was, in the form of an identifiable *res*. This is always the case where the benefit was in the form of services and money and sometimes the case where the benefit was in the form of goods. This point is crucial because it is the only way to mark the boundary between unjust enrichment and these kind of tort claims.[67]

These abstract problems surface in positive law in the common law and equitable doctrines of tracing, equitable liens, some instances of the money counts and the constructive trust. They are dealt with in Chapter 11 of Birks' book, entitled "The Second Measure of Restitution". I have written on these problems elsewhere so will confine myself to outlining Birks' thesis in regard to them and providing an abbreviated critique. This area of the common law is easily one of the most complex and perplexing and Birks' discussion is detailed and subtle.

The common sense of the matter is contained in two contradictory propositions. On the one hand, as a claim in corrective justice not involving the vindication of a property interest *per se*, one would think that the cause of action in unjust enrichment would give rise to recovery in the form of money only. On this view, the court, so far as it is able, should calculate the value of the enrichment and give it back to the plaintiff in money, in the same way as it calculates damages in contract and tort. On the other hand, there are many situations where the defendant is possessed of an asset which is easily identifiable as having come, through a series of intermixtures and substitutions, from the plaintiff, but which, by the rules of property law, cannot be said to belong to the plaintiff. A straightforward example of this phenomenon is presented by the early nineteenth-century English case of *Taylor* v. *Plumer*.[68] Plumer gave money to his broker to buy one thing, exchequer bonds, but the broker, having decided to abscond to America, purchased American investments and some bullion instead. Plumer's attorney caught up with the broker before he could leave Falmouth and took the investments and bullion. The broker's assignee in bankruptcy sued Plumer in conversion. It was held that the investments and bullion belonged to Plumer and the action therefore failed. Intuitively, this result seems correct. The legal justification for Plumer's success, however, is much less clear.

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[67]For an attempt to explain some parts of quasi-contract as essentially proprietary in nature, thereby overlooking this distinction, see S.J. Stoljar, *The Law of Quasi-Contract* (Sydney: Law Book, 1964).

[68]*Taylor* v. *Plumer* (1815), 3 M. & S. 562, 105 E.R. 721 (K.B.) [hereinafter cited to M. & S.].

Previous efforts to explain the fact that the above-mentioned common law and equitable doctrines seem to be unjust enrichment claims which give rise to recovery of a specific asset or fund belonging to the defendant have characterized the doctrines as "restitutionary" or "instrumental" "proprietary claims". The effort to justify the proprietary nature of the relief granted, though, has come to nought. The only justification offered heretofore has been that "instrumental" relief should be granted when the court thinks it "appropriate".[69]

Birks thinks there are better reasons than mere convenience supporting the proprietary effect of these doctrines. He says that these doctrines involve situations where a second measure of recovery in restitution is at stake. He calls the second measure "value surviving", contrasting it with the *prima facie* measure which he calls "value received". He suggests that there are two distinct categories of claim in which the second measure should be available to unjust enrichment plaintiffs; only the first category is relevant here. The first category he identifies gives rise to claims he calls "proprietary claims" and comprises situations where the plaintiff maintains throughout what Birks calls a "proprietary base". This category and the reasons supporting it are offered as a fundamental justification of the areas of positive law mentioned.

The simplest way to expand on and to criticize Birks' rationalization of the "proprietary claims" is to begin, not with the reasons why "proprietary" relief is available, but with an identification of the interests of the plaintiff that are served by having "proprietary claims" in the first place. There are three such interests. First, the defendant may be insolvent, in which case the point of the "proprietary claim" from the standpoint of the plaintiff is to achieve priority over the defendant's creditors. Second, the investment of the original benefit received by the defendant may have resulted in a profit to him, in which case the plaintiff might like to have the original back plus the appreciation. Third, the original benefit may have passed into the hands of a third party, such as the initial recipient's wife, in which case the plaintiff might like to sue the wife and the original recipient together.

It is readily seen that each of these three interests requires arguments that, in some manner or form, participate in the concept "property". Hence, the appellation "proprietary claims". If this is what the plaintiff is after, how does he justify getting it? Assuming the plaintiff can show that there has been an initial unjust enrichment, Birks' answer is as follows:

> The only satisfactory basis for raising a restitutionary proprietary right in the assets in which, by substitutions and intermixtures, the original enrichment

[69]See, *e.g.*, Goff & Jones, *supra*, note 3; Fridman & McLeod, *supra*, note 29; and, to a lesser extent, Klippert, *Unjust Enrichment*, *supra*, note 3.

> now survives is as follows: the circumstances of the original receipt by the defendant must be such that, either at law or in equity, the plaintiff retained or obtained the property in the matter received by the defendant, and then continued to retain it until the moment at which the substitution or intermixture took place.

And later the answer is formulated:

> [I]f he wishes to assert a right *in rem* in the surviving enrichment, the plaintiff must show that at the beginning of the story he had a proprietary right in the subject-matter, and that nothing other than substitution or intermixtures [that are morally neutral or fortuitous acts] happened to deprive him of that right *in rem*.[70]

This is almost right.

A clear case of a true property claim is first required in order to contrast it with the "proprietary claim" in unjust enrichment. Consider the case of a converter who is still in possession of the plaintiff's chattel. Suppose he goes bankrupt. There is no question that the plaintiff has a priority claim in the bankruptcy estate. He simply says that he still owns the chattel and makes the estate itself a defendant in a personal action in conversion. This is how the common law articulates and justifies that priority claim. The key feature of this fact situation for present purposes is that there is an identifiable *res* in the possession of the defendant, or his bankruptcy estate, which came from (indeed, we say, still belongs to) the plaintiff.

What if, prior to his bankruptcy, the defendant had sold the chattel and purchased another? Does the plaintiff still have the priority claim? This modification of the initial fact pattern raises a possible instance of a restitutionary "proprietary claim". The examples could be multiplied but two more will suffice for the purposes of demonstration: these two, together with the first, parallel the interests of the plaintiff outlined above. Suppose the same defendant sells the original chattel and buys an appreciating asset. Is the plaintiff entitled to claim the value of the appreciated asset? Suppose the same defendant sells the original chattel, buys another, and gives it to his wife. Can the plaintiff sue the wife?[71]

The correct answer to each of these three questions must be one that is consonant with the nature of the action which justifies the recovery that

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[70]*Supra*, note 4 at 378-79 [footnotes omitted].

[71]The leading articles on "restitutionary proprietary claims" which deal with the questions raised are M. Scott, "The Right to 'Trace' at Common Law" (1966) U.W. Aust. L. Rev. 463; R.M. Goode, "The Right to Trace and Its Impact in Commercial Transactions" (1976) 92 L.Q. Rev. 360 and 528; S. Khurshid & P. Matthews, "Tracing Confusion" (1979) 95 L.Q. Rev. 78; D. Friedman, "Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong" (1980) 80 Colum. L. Rev. 504. On "proprietary claims" generally, see Goff & Jones, *supra*, note 3, c. 2; and Klippert, *Unjust Enrichment*, *supra*, note 3, c. 7.

the plaintiff seeks. In all three examples, assuming that the plaintiff cannot bring a true proprietary claim, he must justify his recovery on the basis of another cause of action. It is suggested that the relevant cause of action is unjust enrichment. Thus, in the first example, he must say that the estate (and therefore all the creditors of the estate) would be unjustly enriched if it were not forced to give back the value of the second chattel. Similarly, in the second example, the plaintiff must say that the enrichment retained by the defendant is equal to the value of the appreciated asset, and in the third example, he must say that the defendant's wife is unjustly enriched.

The crucial point to recognize is that the complex and sometimes arbitrary rules governing the right to trace through substitutions and intermixtures are subsumed under these more fundamental questions: the tracing rules have justificatory force only to the extent that they are subsumed in the cause of action in unjust enrichment. Recall, here, the initial point that unjust enrichment claims are problematic precisely because they never deal with situations where there is an identifiable *res* that belonged to and still belongs to the plaintiff. That is to say, simply, that they are not true proprietary claims. The issues raised in the first and third examples, therefore, are best understood as problems of causation in unjust enrichment. We have no difficulty with causation in the parallel property claims because there is an identifiable *res* that can be followed into the hands of the estate or of the wife. The issue raised in the second example concerns a problem of quantification of the recovery in unjust enrichment. There is no analogous problem in the parallel property claim because there is, in such a claim, an identifiable *res*, the market value of which determines the quantification of the recovery.[72]

The problem with calling the recovery "proprietary" is that such a label merely asserts the conclusion. It does not attempt to explain the fictions or arbitrary rules which are called in aid of its invocation. To return to the example of *Taylor* v. *Plumer*, it is merely the conclusion to say that the investments and the bullion "belonged", in equity or at law, to Plumer. In order to come to that conclusion, one is forced to resort to arbitrary or fictional justifications such as: the broker was acting as Plumer's agent when he purchased them or, Plumer retained a beneficial interest in the investments and bullion, because any argument to the contrary would be "mischievous in principle".[73] On the facts of *Taylor* v. *Plumer*, the first justification is clearly false. The second merely restates the conclusion without offering justification. There is no sleight of hand involved, however, in saying that the broker's creditors would be unjustly enriched if they were allowed to

[72]Although choosing the characterization and timing for the market value is problematic.
[73]*Taylor* v. *Plumer*, *supra*, note 68 at 574.

rank equally with the plaintiff in regard to the value of those assets. On this characterization of the conclusion, the tracing rules resolve a question of causation in the law of unjust enrichment: through those rules, the law is asking whether the value represented by the American investments and the bullion came from the plaintiff. If so, and if the circumstances surrounding each transfer of that value indicate that it was unjustly obtained, then the plaintiff is entitled to his "priority". The unjust enrichment analysis thus explains why the tracing rules are being applied in a way that the "proprietary claims" analysis cannot. Analogous arguments can be made for all the other common law and equitable doctrines having similar effect.

The criticism of Birks' formulation implicit in these observations is that his formulation begs the question of justification. He states that if there is an original proprietary base that can be traced through "neutral" intermixtures and substitutions, then a plaintiff is entitled to the priority in the defendant's bankruptcy, to the appreciated asset, or to a claim against the wife. He does not say what is to count as a proprietary base or which intermixtures and substitutions are morally neutral and therefore irrelevant. But this is exactly what we need to know in order to apply his analysis and justify the recovery.

In fact, it is clear from Birks' discussion of "proprietary claims" that all the cases he describes as "proprietary claims" are more simply described as straightforward unjust enrichment claims *and* that there are no unjust enrichment claims which are not also, in effect, one of his "proprietary claims". Since, in Birks' view, unjust enrichment is the relevant "causative event" in the restitution-meaning-giving-back cases, there are no such restitution claims which are not also "proprietary claims". "Proprietary claims", therefore, is an unhelpful and redundant concept.

Conclusion

The argument in this review can be summarized as follows:

(1) Unjust enrichment is a cause of action in Canadian law. It includes all those claims that in the nineteenth century were classified as quasi-contract. It also comprehends many aspects of equitable doctrine. It is preferable to attempt to unify the various claims so included as instances of the action in unjust enrichment, because, without such a basic principle, this entire area of law is unintelligible. This is the same argument that was advanced in the case of contract and tort law over a century ago and involves the completion of the transition from a writ-based system of private law to a source-based system of private law.

(2) "Restitution" is an inappropriate name for this area of law. "Restitution" is the name of a fact — a legal response — and, as such, is incapable of serving as the name of a legal principle. In any event, it is inherently ambiguous and therefore not helpful as the name of anything.

(3) Unjust enrichment is essentially distinct from those cases where courts require the defendant to pay penalties to the plaintiff because of a wrong committed by the defendant. The latter group of cases can be explained only by reference to the specific policy objectives of the areas of law and social life in which they arise. The similarity between these cases and the unjust enrichment cases is only superficial and arises because of a misguided impulse to call the remedy available in both "restitution".

(4) There are no restitutionary "proprietary claims". The difference between the law of unjust enrichment and the law of property is that the latter deals with situations where there is a single identifiable *res*, the former where there is no *res*, only identifiable value. Tracing, equitable liens, instances of the constructive trust and instances of the money counts are all examples of unjust enrichment claims where the possibility of following value, through various forms or from person to person, is in issue.

It is hoped that enough has been said to indicate that these points are substantially correct, even if they call for fuller elaboration. The importance of raising them in a review for Canadian readers is to indicate the points at which the structure of the analysis in *Introduction to the Law of Restitution* is misleading or mistaken. Canadian readers are singled out for special attention because Canadian law recognizes a cause of action in unjust enrichment. Points (2), (3) and (4) are all logical consequences of this recognition.

The remainder of the book, fully two-thirds of it in volume, deals with the problems of identifying and quantifying benefit, determining whether a benefit is unjustly retained and the defences available in an unjust enrichment claim. This portion of the book is excellent, and is not affected by the errors outlined here. On this basis, the book is commended to Canadian lawyers.