

PROPERTY RIGHTS, RESTITUTION AND FRAUD: DISCIPLINING WRONGDOING IN CAPITALIST SYSTEMS

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Abstract. *The Anglo-American ability to award property rights in order to achieve justice in personam marks a conceptual difference between civil and common law systems. 'Property' is an adjectival concept at common law. Judicial orders made on restitutionary claims may affect the status of property owner as related to the victims of wrongdoing. This paper examines the way in which the interrelation of property rights, restitution and fraud is used as an anti-fraud weapon in capitalist countries with common law legal systems.*

Key words: *property rights, restitution, fraud, unjust enrichment, civil law and common law.*

1. INTRODUCTION: THE SENSES OF "PROPERTY"

The purpose of this article is to explain to civil lawyers the doctrines and consequences of common law property rights, restitution and fraud. The doctrine of unjust enrichment will be distinguished. Notable differences at the level of first principle exist between the two legal systems. Civil law senses of "property", "property rights" and "ownership" are unlike property and ownership in common law legal systems. The article then discusses some of the anti-fraud consequences which follow.

The civil law countries of Europe developed a "unitary theory of property rights" during the course of the 19th century. Property rights known as rights *in rem* are concentrated in a single owner of an asset by this principle. Title is and was absolute within this system. "[T]he actual physical thing, not a right over it" is the proper object of ownership.¹

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¹ F.H. Lawson, *A Common Lawyer Looks at the Civil Law* (The Thomas M Cooley Lectures, University of Michigan Press, 1953), p.108. Only a small number of exceptions to the unitary theory of property rights exists (*numerus clausus*) in respect of such things as co-tenancy, servitudes, mortgages of land, security interests in personal property. See: Henry Hansmann and Reiner Kraakman "Property, contract, and verification: the *numerus clausus* problems and the divisibility of rights" (2002) 31 *Journal of Legal Studies* 373, 375 quoting the German Civil Code at §§1008-11, §§1018-89, §§1113-90 and §§1204-5 BGB.

At common law, by contrast, the status and immunity of property owners is relatively diminished because restitutionary remedies can be ordered with proprietary effect. Rights *in rem* can be derived from delicts and other breaches of *in personam* obligations. Common law courts frequently create property rights in response to the commission of frauds and other wrongs. Property rights at common law are otherwise divided in multiple ways according to estate, time, interest, quality of right and other contingencies. Professor Kevin Gray states that it is a "mistaken reification" for a common lawyer to speak of property as that which is owned rather than of rights to the thing which is owned.² The thing is not property. Nor is title absolute. Instead, the common law idea of "property" is of a power-relation comprised of the right to the thing. Property rights are private claims, which the state enforces to regulate the access of strangers to the benefits of society's resources.³

Consider how a common lawyer might reason to the existence of a property right in ambiguous circumstances. In 1936, a horse-racing promoter enclosed a stadium where races were conducted with a fence and charged the public for admission. The owner of a house next door built a wooden platform on his property with a wide view over the horse-racing stadium — including boards used by the racing promoter to notify persons in the stadium of races, the horses competing and betting odds. The neighbour entered an arrangement with a radio corporation to broadcast racing reports from the wooden platform. Had the neighbour taken anything which might be regarded as the racing promoter's property? Was it possible for the promoter to have any property right in the spectacle which the horse racing events represented? By a bare majority, the High Court of Australia in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 decided that the answer was "no" and the promoter did not have property in "the spectacle". Nor had any other right of the promoter been infringed.⁴ The neighbour's oversight had simply not been excluded by means to which the promoter had recourse.⁵

Restitutionary or remedial property rights are significant, but academically contentious in the laws of the United Kingdom and Australia. Sometimes these rights are referred to as *equitable* rights.⁶ Commentators are divided about the usefulness of describing an aspect of property law by the historic "equity" label.⁷ An equitable competence in North American law has developed without use of the "equity" word through the use of an expanded definition of "property" which includes the law's remedial ability to create property rights as a means of remedying injustice.

² See: K. Gray and S.F. Gray, *Land Law* 6th edn (Oxford University Press, 2009), [1-081].

³ See: Kevin Gray "Property in thin air" (1991) 50 *Cambridge Law Journal* 252, 294.

⁴ Namely, no breach of copyright occurred when the neighbour referred to the messages on the boards and no actionable nuisance prevented the promoter from using its stadium as desired.

⁵ See: (1937) 58 CLR 479, 494, Latham CJ and 507, Dixon J.

⁶ See: R. Goff et al, *The Law of Unjust Enrichment*, Charles Mitchell et al (eds) (Westlaw UK, 2011), [37-02]ff ("Goff *Unjust Enrichment*"); K. Mason and J.W. Carter, *Restitution Law in Australia* 2nd edn. (LexisNexis, 2003), [1727]; R. Grantham and C. Rickett, *Enrichment and Restitution in New Zealand* (Hart Publishing Oxford, 2000), 441 and fn.18; P. Maddaugh and J. McCamus, *The Law of Restitution* (Canada Law Book, 1990), 109-10, 148-50; and D. Dobbs, *Law of Remedies: Damages, Equity-Restitution* 2nd edn. (Westlaw, 1993) § 4.3(1).

⁷ See: W. Swadling, "Property and unjust enrichment" in J.W. Harris (ed), *Property Problems: From Genes to Pension Funds* (Kluwer, 1997), 130; S. Worthington, *Equity* 2nd edn. (Oxford University Press, 2006) Chapter 3: Creating property; R. Nolan, "Equitable property" (2006) 122 *Law Quarterly Review* 232, 254-261; G. Gretton, "Trusts without equity?" (2000) 49 *International and Comparative Law Quarterly* 599, 541-542; G. Gretton, "Up there in the *Begriffshimmel*?" in L. Smith (ed) *The Worlds of Trust* (Cambridge University Press, 2013), 524.

Equitable property rights or rights flowing from the remedial definition of property rights form a 'baseline' of entitlements around which the law's remedy-systems must work. Property rights of the remedial and restitutionary kind are based in defendants' unconscionable conduct.⁸ Claimants assert powers to create rights and duties *in rem*. The public at large, including receivers, liquidators and unsecured creditors are obliged not to interfere with what claimants have established as their property. Peter Birks has illustrated how restitutionary powers *in rem* arise:⁹

If you have obtained my car as the result of misrepresentation or undue influence, the car for the moment is yours. But that *res* in your hands is liable to be re-vested in me. I for my part have a right *in rem* which for a number of reasons is difficult to name and analyse. It could be said that I have a floating, or uncrystallised, ownership which I bring down on the *res* if I act in time. But it is probably better to say that my right is a 'power *in rem*', a power to change the legal status of the *res* owned by you.

Constructive trusts provide that right which 'is difficult to analyse' which Peter Birks named other equitable remedies with proprietary competence, like the lien, subrogation and the account, achieve the same end. 'Undue influence' is a species of equitable fraud.¹⁰ The problem posed in this article is the assertion of powers *in rem* and the re-vesting process.

Equity or remedial property law functions distributively in the award of proprietary remedies. Relative *fault* is the distributive criterion applicable to most cases.¹¹ In this way, the law acting *in personam* awards proprietary remedies, which give one creditor priority over another in a debtor's insolvency. Other legal remedies, including those for unjust enrichment, are liable to abate in the defendant's insolvency – after the manner of all substitutionary or value claims.¹²

EQUITY, REMEDIAL PROPERTY AND LAW

There is a further reason why equity and the common law are kept separate. Much has been written on the subject.¹³ Equity must be maintained as a separate system, with its own concepts and doctrines, if it is to continue to function as the law's corrective. The purity of equity will be lost if its doctrines are applied as rules, rather than as the expression of

⁸ See: *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 707, Lord Browne-Wilkinson; rights, duties and powers explained by J. Penner, *The Idea of Property in Law* (Clarendon Press, 1997), 29-30.

⁹ P. Birks, *Introduction to the Law of Restitution*, Revised edn. (Clarendon Press 2001) 66.

¹⁰ 'Undue influence' corresponds to 'unconscionable dealing' in Australia; 'misrepresentation' has now become a statutory wrong.

¹¹ See: C. Rotherham, *Proprietary Remedies in Context: A Study in the Judicial Redistribution of Property Rights* (Hart Publishing Oxford, 2002) ("Rotherham"), 80.

¹² See: Goff *Unjust Enrichment* at [37-07]-[37-08].

¹³ See: e.g., R. Newman *Equity and Law: A Comparative Study* (Oceana Publications, 1961), 33-49; Meagher, Gummow and Lehane's *Equity Doctrines and Remedies*, 5th edn. J.D. Heydon et al (eds) (LexisNexis 2015), [2-325]-[2-400]; W. Gummow, *Change and Continuity: Statute, Equity and Federalism* (Oxford University Press 1999), 38-70; for a different view, see: F. Maitland, *Equity: A Course of Lectures*, revised edn. (Cambridge University Press, 1936), Lects 1 and 2; P. Birks, 'Equity in the Modern Law: an exercise in taxonomy' (1996) 26 *University of Western Australia Law Review* 1, and P. Birks, 'Equity conscience and unjust enrichment' (1999) 23 *Melbourne University Law Review* 1.

underlying principles.¹⁴ There is also the following *mercenary* reason for supporting the continuance of the divide.

Equity's collection of doctrines and 'remedy triggers' are now primarily used in commercial law.¹⁵ Markets for capital and legal services have few borders. Legal systems actively compete with each other for work. Most large conflicts between governments and suppliers of capital, between corporations and their stakeholders, and between global banks and the victims of fraud are mobile in nature. Equity and the remedial sense of property are particularly used where there is a contested *locus of value* - like an account containing misappropriated funds,¹⁶ or an heirloom.¹⁷ The 'space' between ownership and obligation made by equitable categories and the availability of proprietary relief is often critical,¹⁸ yet the importation of equitable doctrines into commerce was for a long time thought to be undesirable.¹⁹

London is an important centre of international litigation. The power and depth of pre-trial and proprietary relief is at least part of the reason why so much legal business comes to London.²⁰ Close-fought fraud litigation is unlikely to be attracted by a tidy range of personal remedies. Equity raises the stakes.

Through the creation of the 'trust', equity has conveniently bridged the ownership and obligation divide. Several non-common law jurisdictions supply remedies which parallel trust law in Anglo-American and equivalent jurisdictions.²¹ Commercial use of the trust has dramatically increased in recent years.²² The trust has become the 'queen' on the chessboard of financial planning and tax avoidance. Commercial significance of the trust has been acknowledged on a national level by several civil law countries and the device has been widely copied.²³ Tax havens are conduits through which much of the world's

¹⁴ See: MGL [2-085]-[2-135].

¹⁵ Noted by A. Mason in 'The place of equity and equitable remedies in the contemporary common law world' (1994) 110 *Law Quarterly Review* 238, 238.

¹⁶ E.g., as in *Re Goldcorp Exchange Ltd (in rec)* [1995] 1 AC 74 (PC).

¹⁷ E.g., as in *Re Montagu's Settlement Trusts* [1987] Ch 264 (CA).

¹⁸ See: D Wright 'Proprietary remedies and the role of insolvency' (2000) 23 *University of New South Wales Law Review* 143, 156-60.

¹⁹ There are many references; see, e.g., *Mogul Steamship Co Ltd v McGregor and Co* (1889) 23 QBD 598, 614, affd [1892] AC 25; *Re Wair* [1927] 1 Ch 606, 635-40, Atkin LJ (CA); *Scandinavian Trading Tanker Co Ltd v Flota Petrolera Ecuatoriana* [1983] 2 AC 694, 703-4, Lord Diplock; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 118-9, Wilson J; discussed by D. Hayton 'The uses of trusts in the commercial context' in D. Hayton (ed) *Modern International Developments in Trusts Law* (Kluwer 1999), 145; and A. Mason 'Equity's role in the twentieth century' (1997) 8 *Kings College Law Journal* 1, 7; but cf. J. Getzler 'Patterns of fusion' in P. Birks (ed) *The Classification of Obligations* (Clarendon Press, 1997), 157, 158-67.

²⁰ See, e.g., *Grupo Torras SA v Al Sabah (No 5)* [2001] Lloyds Rep Bank 36, discussed in 'London hosts its biggest fraud trial in years' (anon.) (1999) 36 *International Commercial Litigation* 3; *Bishopsgate Investment Management Ltd (in liq) v Homan* [1995] Ch 211.

²¹ See: R Freeland 'The Islamic law of the waqf' (2001) 15 *TLI* 13; M. Arai 'The law of trusts and the development of trust business in Japan' in D. Hayton (ed), n. 19, 63; H. Kötz 'The modern development of trust law in Germany' in D. Hayton, (ed), n. 19, 49; M Benoit 'Trusts in a civil law jurisdiction: a unique Canadian environment for pension fund fiduciaries' (1994) 8 *TLI* 3; and D. Hayton 'Principles of European trust law' in D. Hayton (ed) n. 19, 19.

²² See: L. Ho, "Trusts: the Essentials" in L. Smith (ed) *The Worlds of Trust* (Cambridge University Press 2013), 1, 10.

²³ See: The Hague Convention of 1 July 1985 on The Law Applicable to Trusts and Their Recognition, and Brussels and Lugarno Conventions on Civil jurisdiction and Enforcement of Judgments applying to EU and European Free Trade Area countries, discussed in D. Hayton 'Principles of European trust law', 20-29, in D. Hayton n.19.

liquid capital is now invested.²⁴ “Sham” trusts, “grasshopper” trusts, “blackhole” trusts and other means of exploiting the secrecy and non-accountability of the device have been facilitated by the municipal legislation of off-shore centres.²⁵

This paper concentrates on theoretical and comparative aspects of the divide between ownership and obligation in non-trustee contexts. Relevant principles applicable in Anglo-American, Australian, Canadian and New Zealand law are informed by the trusts law of those jurisdictions. There is an occasional factual overlap. Fiduciary law leads to proprietary remedies. Tort law and unjust enrichment do not. Unconscionable conduct is remediable by restitution in specie. ‘Proprietary’ torts and other common law wrongs attract only personal remedies.

RESTITUTION

Equity, restitution and the remedial uses of property rights are often associated.

The primary (or natural) meaning of ‘restitution’ is restoration in kind of a specific thing.²⁶ This is the first sense of the word that most dictionaries provide.²⁷ Most judges understand restitution in this way.²⁸ Many equitable remedies are restitutionary in nature. Specific recovery through the constructive trust has ‘efficient and ingenious techniques for reaching particular assets’. Equitable title claims are vindicated as a species of property right: as if one said ‘those shares (or sale proceeds) are mine’. Equitable value claims make only an instrumental use of property, or no use at all, and may need bolstering. ‘[D]eterring wrongdoing’, according to John P. Dawson, supplies an ‘additional motive’ for ‘compelling restitution of profit’. This refers to ‘unjust enrichment’, a subsidiary reason for upholding restitutionary proprietary claims, ‘chiefly relevant in cases of intentional wrong’.²⁹

Some of equity’s most powerful remedies make restitutionary responses. Assets are traced to where they lie. Misappropriators, insolvency administrators and third party possessors are required to restore property in specie. Wrongful profits are followed into the hands of profiteers, or parties to whom the profits have been passed, and the possessors must disgorge the profits to the claimant without abatement.

A further use of the term ‘restitution’ is to name a disparate collection of money claims at common law. Mistaken payments, payments under compulsion, benefits tortiously acquired, payment of another’s debt and the cost of necessitous intervention were, until recent years, classified as ‘quasi-contract’³⁰ - a term derived from the *Institutes of Justinian*.³¹ Common law

²⁴ See: D. Lessard and J. Williamson, *Capital Flight: The problem and policy responses* (Washington DC, Institute for International Economics, 1987).

²⁵ See: D. Hayton, ‘Anglo-trusts, Euro-trusts and Carribo-trusts: whither trusts?’ and ‘Exploiting the inherent flexibility of trusts’ in D. Hayton (ed), n. 19, 1 and 319.

²⁶ See: D. Laycock ‘The scope and significance of restitution’ (1989) 67 *Texas Law Rev* 1277, 1279.

²⁷ E.g., *The New Shorter Oxford English Dictionary* (Oxford, Clarendon Press, 1993), vol 2: ‘**restitution**. *n.* ME [(O) FR., or L *restitutio* (*n*-), *f.* as RESTITUTE: see -ION.]. 1 The action or act of restoring or giving back something to its proper owner...’; discussed by D. Laycock, *ibid*, 1279.

²⁸ See: A Kull ‘Rationalising restitution’ (1995) 83 *California Law Review* 1191, fn. 66.

²⁹ J. Dawson, *Unjust Enrichment: A Comparative Analysis* (Little Brown, 1951), 33.

³⁰ See: S. Stoljar, *The Law of Quasi-Contract* 2nd edn (Law Book Co 1989), 1-17; R. Jackson, *The History of Quasi-Contract in English Law* (Cambridge University Press, 1936); and P. Winfield, *The Law of Quasi-Contracts* (Sweet & Maxwell, 1952).

³¹ Noted by P. Winfield, *ibid*, 4.

restitution leads only to personal remedies. This was re-emphasised in the United Kingdom House of Lords.³² Equity guards the gate to relief in specie.

Common law restitutionary claims may also vindicate proprietary rights and offer them a measure of protection. This is what occurred in *Lipkin Gorman (a firm) v Karpnale*.³³ A partner in a firm of solicitors withdrew funds from the firm to gamble at the defendant's club and lost the funds at the betting tables. The firm made a personal claim to recover the funds as money had and received by the club to the firm's use and relied on the club's inability, in gambling transactions, to establish the defence of good consideration. Lord Goff held that the firm should succeed. 'On this aspect of the case', he said,

'the only question is whether the solicitors can establish legal title to the money received by [the partner] from the bank by drawing cheques on the client account without authority.'

Lord Goff held that the debt arising from the banker and customer relationship was a chose in action, which could be traced into the funds withdrawn by the partner. By concession, the funds were followed into the moneys received by the club. Liability followed from the fact that the club had received the firm's money without cause. Continuing property rights, in this way, were upheld in a case where the plaintiff made no proprietary claim. Some commentators see this decision as upholding a right to restitution based in unjust enrichment.³⁴ If so, the 'unjust ground' must be retention of the plaintiff's property. 'Unjust enrichment' adds nothing. 'Property' is the causal event from which the right derives.³⁵ We will return to this proposition.

Misappropriators are deprived of their unjust gains when items of misappropriated property are restored to their rightful owners. Equitable restitution reverses unjust enrichments in addition to restoring property. Reversing an unjust enrichment is the usual, though not an inevitable corollary when the restitutionary response is employed.³⁶

'The modern law of restitution was invented by the American Law Institute'.³⁷ 'A person who has been unjustly enriched at the expense of another is required to make restitution to that other', states the first section of the *RESTATEMENT OF THE LAW OF RESTITUTION*.³⁸ 'Restitution', in this way, is 'recovery based on and measured by unjust enrichment'.³⁹ This is an 'artificial' use of the term.⁴⁰ Only a stipulative connection exists between restitution and unjust enrichment. Authors of the Restatement believed that certain rights and remedies which attracted a restitutionary response were insufficiently

³² See: *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] AC 669, 716, Lord Browne-Wilkinson; also *Re Goldcorp Exchange Ltd* [1995] AC 74.

³³ [1991] 2 AC 548, 572, 574; see also the other leading speech of Lord Templeman, esp. at 566-7.

³⁴ See: e.g., E. McKendrick, 'Restitution, misdirected funds and change of position' (1992) 55 *Modern Law Review* 377; and A. Burrows, *The Law of Restitution* 2nd edn. (Butterworths 2002), 191-3.

³⁵ Following the persuasive thesis of S. Stoljar, n. 30, 2-7.

³⁶ See: D. Laycock, n. 26, 1280.

³⁷ Observed by A. Kull, n. 28, 1192, 1212-3; see also E. Sherwin "Restitution and equity: an analysis of the principle of unjust enrichment" (2001) 79 *Texas Law Review* 2083.

³⁸ American Law Institute, *Restatement of the Law of Restitution* (St Paul, American Law Institute, 1937), '§ 1 Unjust enrichment'.

³⁹ See: D. Laycock, n. 26, 1279.

⁴⁰ See: A. Kull, n. 28, at fn. 66.

rationalised at general law.⁴¹ Unification by means of a common causative event was suggested. For this reason, the various forms of restitution were said to respond to the occurrence of ‘unjust enrichments’.

Quasi-contracts and constructive trusts comprised the main division in the right and remedy collection of the *Restatement of Restitution*. A large number of wrongs in equity and at law were included. Chapter 12 is headed ‘Acquisition of property by a fiduciary’, with the idea of including all species of property-based recovery flowing from the wrongs of fiduciaries. One commentator has observed:⁴²

the choice of the name ‘restitution’ to designate the law of unjust enrichment was in fact a serious blunder; the word’s ordinary connotations of restoration and giving back describe remedies that bear no necessary relation to enrichment-based liability.

English restitutionary scholars are divided about whether unjust enrichment has the explanatory potential claimed for it in the first *Restatement of Restitution*.⁴³ ‘Quadrature’ of unjust enrichment with restitution in the sense of logical implication is a common image used.⁴⁴ Established texts follow the *Restatement* and are avowedly quadraturenist.⁴⁵ Andrew Kull continues to treat unjust enrichment as the basis of all restitution – including the equitable frauds to which our present discussion applies.⁴⁶ ‘Multicausalists’, on the other hand, believe that restitutionary responses can be triggered by ‘one of a number of distinct causative events’, including ‘wrongs’.⁴⁷ Unjust enrichment does not explain all restitution – a view which seems manifestly correct.

UNJUST ENRICHMENT

Unjust enrichment is an overused and ambiguous term.⁴⁸ There is no cause of action in unjust enrichment in Anglo-Australasian law.⁴⁹ To allege an ‘unjust enrichment’ entitles

⁴¹ See: W Seavey and A Scott ‘Restitution’ (1938) 54 *Law Quarterly Review* 29, 29.

⁴² See: Andrew Kull, n. 28, 1214; he was the Reporter of the *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT*.

⁴³ See: P. Birks ‘Misnomer’ in W. Cornish et al *Restitution Past, Present and Future* (Hart Publications, 1998), 1, and P. Birks ‘Unjust enrichment and wrongful enrichment’ (2001) 79 *Texas Law Review* 1767, 1772-6; S. Hedley ‘Unjust enrichment as the basis of restitution – an overworked concept’ (1985) 5 *Legal Studies* 56 and G. Virgo *Principles of the Law of Restitution*, 6-17; cf. A. Burrows ‘Quadrating restitution and unjust enrichment: a matter of principle?’ [2000] *Restitution Law Review*, 257, and M. McInnes ‘Restitution, unjust enrichment and the perfect quadrature thesis’ [1999] *Restitution Law Review*, 118.

⁴⁴ An idea used in: Birks *Introduction* n.9, 39-44.

⁴⁵ See: G. Palmer *The Law of Restitution* vol 1 (Little Brown, 1978), § 1.1 (USA); Goff, *Unjust Enrichment* [1-001] and Burrows, *Restitution* n.6 5-7 (UK); P. Maddaugh and J. McCamus, n.6, 31-38 (Canada); Mason & Carter [104] (Australia).

⁴⁶ See: A. Kull, n. 28, 1196-7.

⁴⁷ See: P. Birks, ‘Unjust enrichment and wrongful enrichment’ n.43, 1770 and I. Jackman, *The Varieties of Restitution* (Federation Press, 1998), 9-12.

⁴⁸ Noted in: Mason & Carter, n.6 [128].

⁴⁹ See: (Aust) *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, [74], Gummow J; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 378-9, Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 256-7, Deane J; (UK) *Woolwich Equitable Building Society v IRC* [1993] AC 70, 196-7, Lord Browne-Wilkinson and Goff & Jones, [1-012]-[1-015]; (NZ) *Bomac Laboratories Ltd v F Hoffman-La Roche Ltd* (2002) 7 NZBLC 103, 627, [132], Harrison J.

the plaintiff to no relief. Claims for the recovery of mistaken payments and similar causes of action, must be independently pleaded and justified- however closely they are associated with the unjust enrichment rationale. Canadian law was different for many years. The Canadian constructive trust was treated as exclusively responding to unjust enrichments and awarded on an 'enrichment and corresponding deprivation' formula.⁵⁰ In 1997, the Canadian Supreme Court returned the constructive trust to a more 'eclectic', equitable basis, enforcing 'high standards of trust and probity' and preventing people from retaining property 'which in "good conscience" they should not be permitted to retain.'⁵¹

When judges have recourse to 'the principle of unjust enrichment', they are often searching for authority in hard cases. Unjust enrichments are invoked where the facts fall between doctrinal rules, or in situations where the application of doctrine leads to an unfair result.⁵² The concept functions somewhat like equity in the Aristotelian sense. In the contemporary civil systems of Germany, Switzerland and France, unjust enrichment is a right with a 'subsidiary' and 'corrective or supplementary' character.⁵³ Zweigert and Kötz remark that German enrichment claims are 'based in the last resort on considerations of equity and justice.'⁵⁴

Theorists in Britain and the United States have used 'unjust enrichment' as a 'common theme' for restitution cases.⁵⁵ Taxonomic use is made of the concept. 'Unjust enrichment' is a 'descriptive and organising principle', or 'generic conception', regulating the use of the law's application of the restitutionary response. There is limited authority on unjust enrichment being used deductively, as a standard for decision.⁵⁶

Unjust enrichment as an organising principle has no overlap with equity. There are two reasons why this is so, each touching on an important aspect of equitable liability. One relates to property, the other relates to fault.

UNJUST ENRICHMENT AND PROPERTY

Property-based restitution cannot be mediated through unjust enrichment. There are at least two reasons why this is so. First, on an abstract level, the 'unjust' element in unjust

⁵⁰ Following *Pettkus v Becker* [1980] 2 SCR 834: see: M. Litman 'The emergence of unjust enrichment as a cause of action and the remedy of the constructive trust' (1988) 26 *Alberta Law Review* 407, 414; but cf. A. McLean 'Constructive and resulting trusts-unjust enrichment in a common law relationship -*Pettkus v Becker*' (1982) 16 *University of British Columbia Law Review* 155, 170. Judge-made law in Canada may have incorporated aspects of the civilian *actio in rem verso* through the influence of law from the Province of Quebec.

⁵¹ As an alternative to remedying unjust enrichments: see *Soulos v Korkontzilas*[1997] 2 SCR 217, [17] per McLachlin J for the majority.

⁵² See, e.g., *Commonwealth of Australia v Amman Aviation Pty Ltd* (1991) 174 CLR 64, 117, Deane; *Chanrich Properties Pty Ltd* [2001] NSWSCA 229 (2 April, 2001) [112], Hodgson CJ in Eq; *Vickery v JJP Custodians* [2002] NSWSC 782 (30 August, 2002), [121]-[123], Austin J; *Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1992) 39 FCR 97, 117, Hill J; *Marriott Industries Pty Ltd v Mercantile Credits Ltd* [1991] SASC 2874 (30 May, 1991), [34], King CJ explained by Gummow J in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, [75].

⁵³ See: B. Nicholas, 'Unjustified enrichment in the civil law and Louisiana law' (1962) 36 *Tulane Law Review* 605, 607-10;

⁵⁴ See: K. Zweigert and H. Kötz, *An Introduction to Comparative Law* 3rdedn, tr. T Weir (Clarendon Press, 1998), 561.

⁵⁵ See: e.g., Birks *Introduction*, n.9, 15-17.

⁵⁶ See: A. Kull, n.28, 1196.

enrichment is determined by distributive principles where property is involved.⁵⁷ The ownership of resources is apportioned proportionately according to the deserts of litigating parties.

By contrast, the idea of unjust enrichment functions on an exclusively corrective plane. A gain to one litigant is matched by a corresponding loss to another. There is a philosophic difference between the exercise of dividing the resources of property law and resolving the plus and minus equation of correlative justice. Property and obligations have been distinguished in the law since ancient times.⁵⁸

The fact that unjust enrichment cannot support the weight of distributive property analysis is reflected in the present state of the common law. Proprietary remedies, in doctrinal terms, involve a remedial definition of "property" that is not amenable to the *in personam* analysis of unjust enrichment. It is both inappropriate and unlikely that restitutionary proprietary remedies will be 'organised' by the unjust enrichment principle.

At a doctrinal level, the enforcement of property rights is inconsistent with the structure of unjust enrichment. This can be illustrated simply. If I retain property in enrichment, it is unnecessary to allege that a defendant who wrongly possesses it is 'enriched' in order to recover the property.⁵⁹ One does not say that the person who steals my bicycle is under an obligation to 'restore the enrichment' that the bicycle represents.⁶⁰ Property law takes priority. Use made of the bicycle and 'unjust factors' are unnecessary considerations beside more significant liability - in the tort of conversion or pursuant to equity's proprietary regime. Or again, if the plaintiff's ownership rights are undisturbed, any gain of the defendant is not at the plaintiff's expense. No corresponding deprivation has occurred.⁶¹ Restitutionary liabilities do not arise where victims retain ownership of their stolen property.⁶² Ownership trumps enrichment.

Fault is required to trigger almost all remedial property or equitable liability. 'Wrongful enrichments belong in the law of wrongs', as Peter Birks says:⁶³ The law of unjust enrichment is concerned solely with enrichments which are unjust independently of wrongs and contracts.

The province of unjust enrichment, Peter Birks continues, is a 'miscellany of causative events'. It incorporates 'the category of quasi-contract, which was displaced and taken over by restitution.' Yet fraud or comparable wrongdoing is present in nearly all restitutionary proprietary claims. Liability arising on a fault-free basis is not relevant. Reasoning towards equitable and remedial property interests of the remedial kind is necessarily based in the defendant's fault. Unjust enrichment liability, by contrast, is fault-free.⁶⁴

The ownership of property is a source of obligation, in a series with contract and wrongs. It is the cause (or 'event') to which the largest part of restitution responds. Division of the

⁵⁷ See the excellent analysis of Rotherham, n.11, 80-1.

⁵⁸ See discussion in: William Blackstone, *Commentaries on the Law of England*, Book 1 (Clarendon Press 1765) 134.

⁵⁹ See: A. Burrows *Restitution* n.6, 75-6; G. Virgo 'What is the law of restitution about?' in W. Cornish et al (eds) *Restitution Past Present and Future* (Hart Publications, 1998), 312-9, 'Reconstructing the law of restitution' (1996) 10 *TLI* 20, and Virgo, n.43, 594-601; also R. Grantham and C. Rickett, 'Restitution, property and mistaken payments' [1997] *Restitution Law Review*, 83.

⁶⁰ The example of R. Grantham and C. Rickett, n.6, 40.

⁶¹ See: W. Swadling 'A claim in restitution' [1996] *Lloyds Maritime and Commercial Law Quarterly* 63, 65.

⁶² See: *Illichv R* (1987) 162 CLR 110, 140-1, Brennan J.

⁶³ P. Birks (2001) 79 *Texas L Rev* 1763, 1794.

⁶⁴ See: P. Birks. 'Strict liability and fault' in *Restitution – The Future* (Federation Press, 1992), 26-60.

private law into rights *in personam* and rights *in rem* is one of the principal common and civil law inheritances from the jurisprudence of the Romans. All law relates to persons, or things or procedure.⁶⁵ The distribution was ‘a great achievement in mental abstraction’, as Sir Henry Maine observed in 1883.⁶⁶ Things and not just people can be the subject of rights. William Blackstone’s famous *Commentaries* put the matter even higher. ‘The Laws of England’, he said, are ‘extremely watchful’ of property rights, which derived from ‘the great charter’ as well as ancient statutes.⁶⁷ Rights *in rem*, deriving from the law of property, are undoubtedly a category of right, which ‘balances’ rights *in personam*.⁶⁸

Some rights correlate to general duties.⁶⁹ The duty to respect property is an example. It is not owed to any particular individual and exists in respect of things.⁷⁰ When the duty is breached, the owner sues the trespasser by making an *in personam* claim. The owner exercises a secondary right, which arises on breach of the primary right of ownership. Property rights in this way are universally enforceable by actions *in personam*. An ‘infinite number of rights’ may be implied by rights *in rem*. Each *in rem* right is exigible *in personam*.⁷¹

A challenging critique to equity’s hegemony has arisen from this view, whereby property is marginalised and the advantages of specific relief are deprived of their rationale.⁷² A reply from the world of academia is appropriate. Commercial litigators may decide to pass on undeterred. The challenge begins with an axiom. All legal acts are either ‘events’ or ‘responses’. The category of ‘events’ includes ‘wrongs’, ‘unjust enrichment’ and ‘other events’. Property is notably excluded as ‘event’. In fact, only species of obligation fit within the classification. The taxonomic premise is false where property is concerned. No true disjunction can be drawn. To the extent that property rights are the source of property-protective claims, they are an ‘event’. Correlative duties for others are implied.⁷³ To the extent that property rights are created through the exercise of consent, they are a ‘response’.⁷⁴ Property rights come into existence through the occurrence of another ‘event’.

Both common law and civil law legal systems require the mediation of other rights to make a property claim. A constructive trust may need to be alleged in a common law system. Property rights are said to respond in all cases to an ‘other causative event’ and

⁶⁵ *Omne autem ius, quo utimur, vel ad personas pertinent vel ad res vel ad actions*, see: *Corpus Iuris Civilis* T. Mommsen, P. Krüger, R. Schöll, W. Kroll (eds) (var. ed. 1904, 1911, 1915 - the ‘Berlin stereotype’ edition), Bk 1, tit. 2, 12, restating the *Institutes of Gaius* 1.8.

⁶⁶ See: Sir Henry Maine, *Dissertations on Early Law and Custom* (John Murray, 1883), 391-2; also Sir F. Pollock, *A First Book of Jurisprudence* 6th edn (Macmillan, 1929), 85-6, 94-5; and W. Buckland, *A Text Book on Roman Law from Augustus to Justinian* 3rd edn, revd P. Stein (Cambridge University Press 1963), 28, 56-7, 180.

⁶⁷ W. Blackstone, *Commentaries*, n.58, 134.

⁶⁸ Said to be ‘shocking’ fact, but accepted by P. Birks in ‘Rights, wrongs and remedies’ (2000) 20 *Oxford Journal of Legal Science* 1, 21.

⁶⁹ With specific exceptions: see J. Penner, n. 8, 24

⁷⁰ Cf. P. Birks ‘Definition and division: a meditation on *Institutes* 3.13’ in P. Birks (ed) *The Classification of Obligations*, n. 19, 9-10.

⁷¹ See: W. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, new edn, D. Campbell and P. Thomas (eds)(Dartmouth Publishing, 2001), 70. A single multital right, or claim (right *in rem*), correlates with a duty resting on one person alone, not with many duties (or one duty) resting on all the members of a very large and indefinite class of persons.

⁷² See: P. Birks, ‘Definition and division’, n. 70, 27-34; ‘Property and unjust enrichment: categorical truths’ [1997] *New Zealand Law Review*, 623, 631.

⁷³ See: J. Penner, *The Idea of Property in Law* (Clarendon Press 1997), 71.

⁷⁴ Or (exceptionally) through the commission of wrongs; see the powerful argument of R. Grantham and C. Rickett, n.6, 31-2.

the 'inert' fact of ownership is not causative. But we have more sophisticated systems of law than the Romans had. There are more secondary rules.⁷⁵ As J.E. Penner states in his *Idea of Property in Law*, any true right of an owner to exclude others must be understood to be an auxiliary right which enforces or protects the right to property:⁷⁶

The right to property itself is the right which correlates to the duty *in rem* that all others have to *exclude themselves* from the property of others . . . the fact that we may not have the right to throw trespassers off our land, and must call the police to do so instead, does not mean that we do not have a right to the land, but only that our means of effecting the right are circumscribed.

Nearly all relevant responses are restitutionary. 'Equity' or the remedial sense of property are terms used to classify the rights and remedies involved and signify the chosen sense of 'Restitution'. No unjust enrichment is needed or implied. Equitable restitution is awarded even though not all defendants are 'enriched'⁷⁷ and not all enrichments are 'unjust'.⁷⁸

FRAUD

Fraud is infinite..., were a Court of Equity once to lay down rules, how far they would go, and no farther, in extending their relief against it, or to define strictly the species of evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes which the fertility of man's invention would contrive.⁷⁹

'Fraud' is something of an omnibus word - without an accepted reference. Criminal senses of fraud are now mostly included in the meaning of 'dishonesty'. The United Kingdom adopted the *Theft Act 1968* (UK) and Australian states have enacted corresponding legislation⁸⁰ - using 'dishonest appropriation' as the basic concept and deleting all reference to fraud.⁸¹ The offence of 'Conspiracy to defraud the Commonwealth' was found to 'incorporate' the idea of dishonesty in *Peters v The Queen*.⁸²

Civil fraud is often classified as 'actual' or 'constructive'.⁸³ Actual fraud implies deception. A 'wicked mind' is needed.⁸⁴ This is the sense of fraud for tortious purposes determined in

⁷⁵ On the distinction between primary and secondary rules, see H.L.A Hart, *The Concept of Law* (Oxford, Clarendon Press, 1961), 79-96.

⁷⁶ J Penner, n. 73, 71-2.

⁷⁷ See: J. Dawson, 'Restitution without enrichment' (1981) 61 *Boston University Law Review* 563 (contractual restitution).

⁷⁸ See above, and *Boardman v Phipps* [1967] 2 AC 46, 104, 112; *Orr v Ford* (1989) 167 CLR 316, 332, Wilson, Toohey and Gaudron JJ and D Wright *The Remedial Constructive Trust* (Butterworths, 1998), [7.21]-[7.36].

⁷⁹ Lord Hardwicke, letter to Lord Kames June 30, 1759, quoted in *Snell's Equity* 30thedn, J. McGhee (ed) (London, Sweet & Maxwell, 2000), [38-08]; see also *Reddaway v Banham*[1896] AC 199, 221, Lord Macnaghten, who added: 'sometimes [fraud] is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it.'

⁸⁰ See: C. Williams *Property Offences* 3rdedn (Law Book Co, 1999), 1.

⁸¹ See the Criminal Law Revision Committee's Eighth Report *Theft and Related Offences* Cmd 2977 (HMSO, 1966), [30]-[39].

⁸² Juries do not need to be separately instructed on the issue: see (1998) 192 CLR 493, 508, Toohey and Gaudron JJ, McHugh and Gummow JJ agreeing, referring to the *Crimes Act 1914* (Com), s 86(1)(e).

⁸³ E.g., in *Black's Law Dictionary* 7thedn, B. Garner (ed) (West, 1999).

⁸⁴ See: L. Sheridan *Fraud in Equity* (Pitman, 1957), 4.

*Derry v Peek*⁸⁵ – a case decided, as Lord Haldane pointed out, without an equity lawyer on the bench.⁸⁶

Constructive (or equitable) fraud is much broader. It includes conduct which falls short of deceit, ‘but [imports] a breach of a duty to which equity attaches its sanction.’⁸⁷ After referring to this definition, Lord Justice Millett said in *Armitage v Nurse* that equitable fraud includes ‘breach of fiduciary duty, undue influence, abuse of confidence, unconscionable bargains and frauds on powers.’⁸⁸

‘Frauds’ which trigger restitutionary proprietary responses are of present relevance. These include subrogation and equitable rescission, which lead to responses similar *in effect*, and equitable compensation, which leads to a response similar *in measure*. Third party wrongs do not trigger ‘restitution’ in the same sense. However, they also attract ‘equitable sanction’ and relief is partly based on property considerations. Personal measures of restitution and non-restitutionary remedies are remedial alternatives to proprietary restitution tending to the same effect.⁸⁹

FRAUDS AND LEGITIMATE COMPETITION

An illustration of the difference between frauds and legitimate competition is provided by terms of the *Competition and Consumer Act 2010* (Com). The Australian High Court in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary*⁹⁰ described the policy behind comparable provisions of earlier legislation relating to ‘Misuse of market power’ and ‘restrictions on advantage-taking’ as protection of the ‘interests of consumers’. For this, the assumption was that competition protects consumers. Relevant provisions, the Court said, were ‘cast in such a way as to prevent conduct designed to threaten competition.’ Competition is the thing protected, not individual competitors.

By contrast, restrictions on unconscionable advantage-taking in other sections of the Act ‘have the intention of preventing stronger parties taking unconscionable advantage of weaker parties.’⁹¹ Competitors and not competition are protected to the extent that the Act applies to the marketplace. A policy tension exists between the doctrine which informs ‘unconscionability’ in the consumer protection provisions of the Act and the economic and market efficiency objectives informing prohibitions on misuse of market power and improper advantage taking.

Competition in a capitalist economy is ruthless. Competitors strive to injure each other economically with all available means within the confines of the marketplace. ‘Most businessmen don’t like their competitors, or for that matter competition’, as Posner J said in *Olympia Equipment Leasing v Western Union Telegraph*.⁹²

⁸⁵ (1889) 14 App Cas 337.

⁸⁶ See: *Nocton v Lord Ashburton* [1914] AC 932, 951.

⁸⁷ See: *Nocton v Lord Ashburton* [1914] AC 932, 953, Vis. Haldane LC.

⁸⁸ [1998] Ch 241 (CA), 252-3, citing *Nocton* *ibid* at 953.

⁸⁹ E.g., see *Giumelli v Giumelli* (1999) 170 CLR 394 (estoppel and specific transfer of property).

⁹⁰ *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary* (1988) 167 CLR 177, 191, Mason CJ and Wilson J

⁹¹ Referring to the general law: see Economic Planning Advisory Council ‘Promoting competition in Australia’ *Council Paper* No 38 (Canberra, Office of EPAC, 1989), 5-6.

⁹² (1986) 797 F 2d 370, 379, referred to in *Queensland Wire Industries v BHP* (1989) 167 CLR 177 at 191.

They want to make as much money as possible and getting a monopoly is one way of making a lot of money. That is fine, however, so long as they do not use methods calculated to make consumers worse off in the long run.

The common law relation between frauds and legitimate competition mirrors that between property and restitution. A pragmatist approach is taken to legal theory. Moral responsibility is applied both across distributive and corrective contexts.⁹³

The profit motive has been said to ‘purify’ a given transaction, ‘clothe it with legal justification’ and provide immunity from other restraint.⁹⁴ It is doubtful whether this result is achieved or achievable. Competition law may be simply inconsistent with the method of equitable regulation. Time will tell which regime prevails.

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SVOJINA, RESTITUCIJA I PREVARA: SUZBIJANJE ŠTETNIH RADNJI U KAPITALISTIČKIM SISTEMIMA

Osnovna konceptualna razlika između evropsko-kontinentalnog i anglo-saksonskog pravnog sistema leži u mogućnosti anglo-saksonskog prava da oštećenoj strani prizna određena prava svojine kako bi se postigla pravičnost in personam. U anglo-saksonskom pravnom sistemu, koncept "svojine" se koristi u pridevskom značenju. Sudske odluke o restitutivnom zahtevu mogu uticati na imovinski položaj vlasnika u odnosu na oštećenu stranu. U radu se analizira međusobni odnos između svojine, restitucije i prevare u kapitalističkim zemljama anglosaksonskog/anglo-američkog pravnog sistema, i sagledava na koji način se taj odnos može iskoristiti kao instrument u borbi protiv štetnih i prevarnih radnji.

Ključne reči: *svojinska prava (in rem), restitucija, prevara, neosnovano bogaćenje, građanskopravni i običajnopravni sistemi*