BOOK REVIEWS

Essays on Restitution edited by P. D. Finn (Law Book Co., 1990), pages 1-351, index 353-6. ISBN 0 455 20987 1.

This volume is the latest in the justly acclaimed series of essays which follow specialist seminars held at the Australian National University on a private law topic of current intellectual concern. *Essays on Restitution* fully upholds the proud reputation established by its predecessors. A recurrent, if sometimes facile, complaint of reviewers of collections of essays is that they are of uneven quality. As far as the present volume is concerned, every essay contains perceptive lines of inquiry which will compel readers to clarify their own positions, even if not all the conclusions reached will command universal assent. This is most definitely not, however, a book for the newcomer to restitution. Those who regard restitution lawyers as a closed priesthood chanting repellent refrains of 'subjective devaluation' and 'interceptive subtraction' will have their prejudices reinforced rather than removed by some of the essays under review.

Three major figures have shaped the discussion of modern restitution, at least in Commonwealth jurisdictions. One of them, Samuel Stoljar, died not long before this volume was published. The many references in these essays to the second edition of his *Law of Quasi-Contracts*[1] testify to his influence on restitution thinking, especially in Australasian jurisdictions. His analysis of *negotiorum gestio* in the *International Encyclopedia of Comparative Law*[2] was particularly valuable, and Garry Muir's essay on unjust sacrifice builds fruitfully upon Stoljar's pioneering work.

The other two major shapers of restitution scholarship, Professor Gareth Jones and Professor Birks, both contribute essays to this volume. Jones deftly considers the major concepts of 'benefit', 'at the plaintiff's expense' and 'unjust' enrichment. His is a tantalizing performance, provoking thoughts on what he chooses not to discuss (such as the role played by proprietary remedies in unjust enrichment) as much as by what he discusses. Fortunately, some of his deliberate omissions are taken up elsewhere in the volume. Birks, in contrast, pursues a detailed and narrowly focused inquiry into the recovery of benefits wrongly exacted by the executive. The apparent banality of his conclusion, that there should be an automatic right of restitution to payments collected *ultra vires* by government, disguises his painstaking argument that the conclusion is not as self-evident as it may appear and has been obscured by a line of authority which inappropriately drew an analogy between recovery of unlawfully exacted payments and the law of duress. To me, the achievement lies in Birks' method of crafting a conclusion from a consideration of the wrong paths taken by the common law as well as from a careful reading of cases drawn variously from Australia, Canada, England, Scotland, Ireland and the Court of Justice of the European Community. His technique, best exemplified of course in his book *Introduction to the Law of Restitution*,[3] finds its conscious and unconscious imitators in other essays in this volume.

A writer with no need to imitate the Birks (or any other) style is Mr Justice Gummow. He uses a number of examples drawn from traditional areas of restitutionary analysis to underline the importance of a proper understanding of legal history as a prerequisite to understanding the place of unjust enrichment in the scheme of civil recovery. Not surprisingly, it is the failure of restitution writers to get basic equitable doctrine right that incurs his special wrath. In his analysis of *Phillips v. Homfray*[4] Mr Justice Gummow demonstrates the truth of A. E. Housman's remark that accuracy is a duty not a virtue. The case has been generally treated as authority for the proposition that no quasi-contractual action can lie where the defendant has merely gained a negative benefit. He convincingly

1 Stoljar, S., *Law of Quasi-Contracts* (1989).
2 David, R., *et al.* (ed.) (1971).
3 Birks, P., *Introduction to the Law of Restitution* (1989).
4 (1883) 24 Ch.D. 439; [1892] 1 Ch. 465.

shows the case to be authority for no such thing. A discussion of proprietary remedies as a means of restoring the 'value surviving' of an unjust enrichment leads to a similar dissection of Viscount Haldane's judgment in *Sinclair v. Brougham*[5] and an assessment of Birks' views on the availability of proprietary remedies. Given Mr Justice Gummow's sceptical approach to the whole restitutionary enterprise, Birks emerges remarkably unscathed from this elaborate scrutiny.

Other essays demonstrate less swashbuckle but plenty of solid analysis. Keith Mason Q.C. ably discusses recent restitutionary developments in Australian law, paying due regard to Birks' oft repeated admonition to make '"unjust" look downwards to the cases'. Gaudron J.'s opportunistic use of unjust enrichment to outflank the doctrine of privity of contract in *Trident General Insurance Co. v. McNeice Bros Pty Ltd*,[6] as well as her appeal to principles of unconscionability in *Stern v. McArthur*,[7] are rightly criticized for ignoring the basic criteria for unjust enrichment recovery and reducing the doctrine to the incoherent level of unstructured discretion, although it could be said that the author is wasting valuable powder and shot on too obvious a target. P. A. Butler examines cases where money has been paid under a mistake and concludes that recovery should be predicated upon failure of consideration. The proposal has the merit, as the author points out, of permitting recovery in at least some cases where recovery has been denied because the mistake has been one of law. Any reform which extirpates once and for all the most unsustainable of all distinctions, that between mistakes of fact and mistakes of law, has a great deal going for it. This proposal does, however, risk creating some uncertainty given the definitional problems surrounding the concept of consideration. The history of consideration encourages no great confidence that courts will be content to adopt the neat definition of consideration as 'a matter considered' favoured by Birks and adopted by Butler for the purposes of his exposition.

Nicholas Seddon's essay on 'Compulsion in Commercial Dealings' offers a lucid account of recent developments in economic duress, although analysis of restitutionary remedies is subordinated to an exploration of the meaning of economic duress. J. W. Carter's piece on 'Ineffective Transactions' represents one of the most convincing analytical attempts to adopt the primarily English framework of authors such as Goff and Jones and Birks to a specifically Australian context. The focus of the essay is upon recovery for services carried out under anticipated contracts which fail to materialize, contracts which are void and contracts which are unenforceable, for example for failure to comply with a formality such as the Statute of Frauds. The author canvasses the merits of estoppel as the basis of *quantum meruit* recovery, especially where work has been done in furtherance of an anticipated contract which failed to materialize. This idea certainly provides a more satisfying explanation of cases like *Sabemo Pty Ltd v. North Sydney Municipal Council*,[8] and now that the High Court has freed estoppel from its defensive shackles in *Waltons Stores (Interstate) Ltd v. Maher*,[9] it may well be that, in Australia at least, estoppel will supply a remedy where in other jurisdictions courts must establish a possibly artificial incontrovertible (or limited) benefit conferred on the defendant as a precondition for recovery.

The uncertain and generally unfavourable legal position of those who mistakenly build on another's land, or who fix new parts to a chattel, is the concern of Professor Sutton in his essay 'What Should be Done for Mistaken Improvers?' This long and subtle essay is really an exercise in special pleading by an author who is clearly convinced that mistaken improvers are a hitherto unrecognized oppressed minority, and who believes that, if their special claims are not to be recognized by legislation, then redress should be provided by expanding, if not distorting, property doctrines. The law of fixtures, the old rules of accession and confusion of chattels, and tracing are all called into service for this purpose even though, as the author admits, orthodox applications of these discrete areas of law stop short of providing improvers with the remedies he would like them to possess. It is unlikely that judicial creativity will live up to Professor Sutton's expectations, and reform, if it is to come at all, will probably have to be legislative, either similar to the Torts (Interference with Goods) Act 1977 (U.K.) s. 6(1) for chattels or along the lines of United States 'betterment' statutes.

5 [1914] A.C. 398.
6 (1988) 165 C.L.R. 107, 176.
7 (1988) 165 C.L.R. 489.
8 [1977] 2 N.S.W.L.R. 880.
9 (1987) 164 C.L.R. 387.

In the final essay Garry Muir develops a theory of 'unjust sacrifice'. As he rightly observes, cases where a plaintiff expends time or effort for the benefit of a defendant cannot comfortably be forced into the traditional unjust enrichment analysis whereby it is assumed that a benefit has been transferred from the plaintiff to the defendant. Hence a cause of action for unjust sacrifice would fill a gap in the existing framework of legal remedies. The essay is really an academic *jeu d'esprit*, as the likelihood of courts developing a discrete principle of unjust sacrifice must be regarded as minimal. But those who do not subscribe to the concept can at least admire how the author throws fresh light on the well known cases where interveners save life, preserve property or discharge the debts of another.

This stimulating collection of essays covers all the major areas of current concern in restitution. There is a useful index, but some essays are marred by poor proofreading. The essays of Professor Sutton and Garry Muir, in particular, abound with elementary proofing errors. There is also no agreement as to what constitutes the correct apostrophized version of Professor Birks' name, the text containing a range of permissible and impermissible variants. As will be apparent from a reading of this review, Paul Finn assembled an impressive array of scholars from Australia, New Zealand and the United Kingdom to explore modern trends in restitution. With hindsight, a Canadian perspective would have been welcome, given the rough treatment meted out by some contributors to the Supreme Court decision in *Air Canada v. British Columbia*[10] (where a novel proposition was advanced that payments made under a mistake should be irrecoverable if recovery was liable to disrupt public finances) and to recent Canadian decisions on constructive trusts. But it is much easier for a reviewer to organize the perfectly planned volume of essays from the comfort of an armchair than it is for those actually entrusted with the task of finding and assembling speakers and arranging publication. Restitution lawyers will be grateful for an absorbing collection of essays which maintains a consistently high level of analysis.

MICHAEL BRYAN*

[10] (1989) 95 N.R. 1.

* B.A. (Hons) (Oxf.), B.C.L. (Hons) (Oxf.), Ph.D. (Lond.). Senior Lecturer in Law, University of Melbourne.