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**WHEN AND WHY DOES UNJUSTIFIED ENRICHMENT  
JUSTIFY THE RECOGNITION OF PROPRIETARY  
RIGHTS?**

**ROBERT STEVENS\***

INTRODUCTION .....	919
I. RIGHTS AND THINGS.....	920
II. RIGHTS AND TRUSTS .....	921
III. TRUSTS AND TRANSFERS.....	923
IV. RIGHTS AND VALUE .....	925
V. RIGHTS AND TRACING.....	929
VI. RIGHTS AND SUBROGATION .....	930
VII. RIGHTS AND LIENS .....	931
VIII. RIGHTS AND REMEDIES .....	932
IX. RIGHTS AND PRIORITIES .....	935
CONCLUSION.....	936

INTRODUCTION

A Restatement's central purpose is not to explain why the law is as it is, but rather to restate the law in as clear and coherent a manner as possible. In this paper my purpose is not to duplicate the (superb) work of the *Restatement (Third) of Restitution and Unjust Enrichment*,<sup>1</sup> but rather to try to explain why it is right and why the law, and consequently the *Restatement (Third)*, is as it is. I come to praise the *Restatement (Third)*, not to bury it.

To a Roman lawyer, or a modern-day German, Frenchman, or other civilian, the idea that unjustified enrichment was a source of proprietary rights would come as something of a surprise. The Germans, who, unsurprisingly, have the most coherent modern-day civilian code, see unjustified enrichment solely as part of the law of obligations.<sup>2</sup> The Roman and civilian methods for acquiring rights to things (occupation, accession, specification, etc.) is quite separate from the categories recognised by the law of obligations (contract, delict, unjustified enrichment, etc.).<sup>3</sup>

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\* Professor of Commercial Law, Barrister, University College London.

<sup>1</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (2011).

<sup>2</sup> See BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGL.] 195, as amended, §§ 812-822 (Ger.).

<sup>3</sup> See WILLIAM L. BURDICK, THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW 386 (photo. reprint 1989) (1938).

The thesis presented here is that the reason for the difference between the common law and civil law is the law of trusts. The logic of the trust compels the recognition of trusts over rights that have been acquired invalidly by the defendant at the plaintiff's expense. To understand why this is so, it is necessary to understand what we mean by proprietary rights. I shall show what is conceptually distinct about the rights of a beneficiary under a trust. In the spirit of the *Restatement (Third)*, I argue that the language of "equity," "equitable interests," "equitable ownership," and "equitable title" obscures what is going on and should be abandoned.

### I. RIGHTS AND THINGS

The modern distinction between rights *in rem* and rights *in personam* has its roots in Roman law.<sup>4</sup> Roman law, however, was a formulary system.<sup>5</sup> Lawyers thought in terms of recipes for relief, rather than conceptually in terms of our rights one against another.<sup>6</sup> The Roman *actio in personam* involved an action against another person, while the *actio in rem* involved an action in relation to a thing – for example, "that is my cow."<sup>7</sup> This division makes no sense in the common law for two reasons: first, because all actions are against persons, and second, because no *vindicatio* action of the form "that is my cow" exists. All claims to vindicate rights to things are brought by asserting a tort (e.g., "I have a right to possess that cow which is better than yours; you are committing a tort by refusing to hand it over to me").

The modern distinction between a right against one or more individuals (*in personam*) and a right in relation to a thing potentially exigible against (i.e., binding upon) all persons (*in rem*) came much later.<sup>8</sup> While many of our basic rights are potentially exigible against all other persons (e.g., my rights to bodily safety, to freedom of movement, and to my reputation), we would not usually refer to these examples as property rights because they do not have as their subject matter an identifiable thing separate from ourselves.<sup>9</sup>

The usage of "property rights" as rights to things that are potentially exigible against all other persons is particularly important within the law of torts.<sup>10</sup> If a railway company leases the use of a bridge from its owner, and the bridge is subsequently damaged by a lorry<sup>11</sup> driver's driving into it so that the

<sup>4</sup> W.J. BYRNE, A DICTIONARY OF ENGLISH LAW 476 (photo. reprint 1991) (1923).

<sup>5</sup> Max Radin, *Fundamental Concepts of the Roman Law*, 12 CALIF. L. REV. 393, 404 (1924).

<sup>6</sup> See Ernest Metzger, *Roman Judges, Case Law, and Principles of Procedure*, 22 LAW & HIST. REV. 243, 251 (2004).

<sup>7</sup> See BYRNE, *supra* note 4, at 476-77.

<sup>8</sup> 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 380 (photo. reprint 1996) (1879).

<sup>9</sup> See A. M. Honoré, *Rights of Exclusion and Immunities Against Divesting*, 34 TUL. L. REV. 453, 460 (1960).

<sup>10</sup> ROBERT STEVENS, TORTS AND RIGHTS 5-8 (2007).

<sup>11</sup> Truck.

bridge cannot be used, the railway company will be able to claim against the lorry driver for a tort it has suffered. A tort is a breach of a duty owed to another and synonymously the violation of a right of that other.<sup>12</sup> In order, therefore, to claim for a tort suffered as a result of the use of or damage to a thing, it is necessary to establish a right in relation to that thing. The lessee of the bridge has such a right because, at common law, a lease involves the conveyance to the tenant of a right to the bridge itself – a right *in rem*.<sup>13</sup> By contrast, a railway company with a mere contractual licence to use the bridge has a right only against the owner – a right *in personam* – not a right to the bridge itself. A licensee cannot, therefore, claim against the third party who has damaged the bridge, but a lessee can.

We could stipulate that property rights are, and are only, rights in relation to physical things that are potentially exigible against all others, but this would exclude many modern usages of property rights.<sup>14</sup> Intellectual property rights have no physical subject matter; there is no “thing,” but the rights are exigible against all the world. We call them property rights even though they do not have the same features as rights to things (for instance, they cannot be acquired by possession).

Commercial and bankruptcy lawyers commonly refer to all of a company’s wealth, whether shares, debts, or rights to stock, as its property. The usual distinguishing feature of property rights as used in this still wider sense is that they can be transferred or realised as money, unlike, say, my right to my reputation.<sup>15</sup>

## II. RIGHTS AND TRUSTS

A serious danger is that, because we afford something the label of “property right,” this right can be assumed to have all of the features of other property rights. This is important in relation to equitable property rights, which are conceptually, not just historically, quite different from rights to things at law, which are, properly speaking, *in rem*.<sup>16</sup>

Lawyers commonly think that if a right to land is held in trust, the proprietary right has been divided, creating a legal and equitable owner of the land.<sup>17</sup> This is quite wrong. I have one right to the computer on which I am

<sup>12</sup> STEVENS, *supra* note 10, at 2.

<sup>13</sup> BYRNE, *supra* note 4, at 521.

<sup>14</sup> See, e.g., BYRNE, *supra* note 4, at 709.

<sup>15</sup> Not all rights in relation to things exigible against all others can be transferred – for example, the exclusive right to run a market in a town.

<sup>16</sup> See Ben McFarlane & Robert Stevens, *The Nature of Equitable Property*, 4 J. EQUITY 1, 1 (2010).

<sup>17</sup> See, e.g., Ashley S. Hohimer, Comment, *Constructive Trusts in Bankruptcy: Is an Equitable Interest in Property More than Just a “Claim”?*, 19 BANKR. DEV. J. 499, 499 (2003).

typing, not one at law and another in equity either hidden within it or which could be carved out from it.

Any legal system that includes the concept of ownership must answer the question of who has the right to exclude all others from a thing. Is it comprehensible for a legal system to give two different answers to this question at the same time? Could the law be that simultaneously *A* is the sole owner of Blackacre (at law), while *B* is also the sole owner of Blackacre (in equity)? On its face, this is incomprehensible, and it may be that we can only accept it as true because we have been told this lie so often.<sup>18</sup>

If *A*, the owner of Blackacre, declares himself a trustee of the right to his land in *B*'s favour, equity does "not say that [*B* is] the owner of the land, it sa[ys] that the trustee [i]s the owner of the land, but add[s] that he [i]s bound to hold the land for the benefit of [*B*]." <sup>19</sup> This is demonstrated by the fact that *B* has no standing to sue for the violation of the right to the land itself: Only the trustee may sue a trespasser or the creator of a private nuisance.<sup>20</sup> If the trustee gives permission to a third party to occupy the land, the beneficiary may have a claim against the trustee, but the beneficiary will have no claim against the occupiers.<sup>21</sup> The answer to the question "Who owns the land?" had already been given by the law; it is impossible to imagine a workable system where an incompatible answer to the same question was given in equity. Equity *never* created rights to land (or goods, or shares).

*B*'s right, however, is *not* simply a right against the trustee personally. It is not merely *in personam* in the same way as is a contractual right to the performance of a service. The subject matter of *B*'s right is not the land but *A*'s right to the land. If *A* gives this right to *C*, *C* must hold the right he acquires for *B*.<sup>22</sup> Similarly, if *A* goes into bankruptcy, *B*'s right to *A*'s right is binding on the trustee in bankruptcy.<sup>23</sup>

The subject matter of a beneficiary's right is always a right of someone else, never a physical thing. That is why (the right to) goods, (the right to) land, (the right to be paid) debts, (the right to) shares, and intellectual property (rights) can all be held under the same trust. The rights that are held in trust may themselves be the rights against another trustee. Thus, we can have sub-trusts, sub-sub-trusts, sub-sub-sub-trusts, and so on. Such devices are not far-fetched. The intermediation of the holding of securities through a succession of agents is dependent upon such a chain of trusts. The division-of-ownership view leads to the false conclusion that there is a kind of Russian matryoshka doll,

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<sup>18</sup> See, e.g., ROGER A. CUNNINGHAM, WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 1.5 (2d ed. 1993).

<sup>19</sup> F. W. MAITLAND, EQUITY AND THE FORMS OF ACTION 17 (photo. reprint 1984) (1929) (emphasis added).

<sup>20</sup> CUNNINGHAM, STOEBUCK & WHITMAN, *supra* note 18, § 1.5.

<sup>21</sup> Cf. 90A C.J.S. *Trusts* § 718 (2010).

<sup>22</sup> See *id.* § 723.

<sup>23</sup> See *id.* § 730.

with each sub-beneficiary's rights being carved out of the ever-decreasing bundle. In truth, a trust is never a right to a thing, but always a right to another right.<sup>24</sup> The correct metaphor is a chain, not a matryoshka doll.

That the division-of-ownership view is incorrect is even clearer in relation to a trust of a debt than in relation to a trust over the right to land. A right to land can, at law, be divided up in relation both to the physical thing and along the temporal plane.<sup>25</sup> I could sell to you a right to a portion of Blackacre or lease the property to you for six months, conveying to you the right to exclude trespassers for that period (as landlord I would lose this right, as I have transferred it away). It is impossible to imagine how a right to be paid one dollar could be divided up in the same way. There is but one right, which the right holder has: he is owed one dollar and has the power to enforce this right by bringing a claim. He can hold this right in trust, but it could not be that in doing so his right to claim was in some sense divided: no division is conceptually possible. The truth is that the right to claim the debt is in the trustee, but that he must hold this right for the beneficiary.

The beneficiary's right is not, therefore, exigible against all others but only against whoever is the holder of the right that is the subject matter of his right from time to time. His right is neither in relation to a thing, nor is it good against all others. We could stretch the concept of "thing" to include "rights," but it hardly seems helpful to conflate something you can touch and kick with something that only exists because the legal system says so. Further, although the beneficiary's right is potentially binding upon anyone who acquires the rights that constitute the trust, this conditionality prevents us from saying the beneficiary's right is good against all others without more. I potentially have a right against anyone who makes a contractual promise to me, but that doesn't make contractual claims rights *in rem* either. The beneficiary under a trust does have a right against all others, namely, that they do not dishonestly assist in a breach of the trustee's obligations,<sup>26</sup> but this is observably not the same right as he has against the trustee and is a direct analogue to a contractual promisee's right that third parties do not procure a breach of contract.

### III. TRUSTS AND TRANSFERS

To transfer most rights in all common-law systems, a simple formless agreement is insufficient to achieve the transfer.<sup>27</sup> To transfer a right to land it was historically necessary to use a deed of conveyance, whereas nowadays it is

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<sup>24</sup> The same idea, expressed in different ways, is reflected in Robert Chambers, *Constructive Trusts in Canada*, 37(1) ALTA. L. REV. 173, 220 (1999), Ben McFarlane & Robert Stevens, *The Nature of Equitable Property*, 4 J. EQUITY 1, 1 (2010), and Lionel Smith, *Unravelling Proprietary Restitution*, 40 CAN. BUS. L.J. 317, 322 (2004).

<sup>25</sup> See 52 C.J.S. *Landlord & Tenant* § 1 (2003).

<sup>26</sup> See 90A C.J.S. *Trusts* § 725 (2010).

<sup>27</sup> See, e.g., 17 C.J.S. *Contracts* § 1 (2011).

usually necessary to alter the land register.<sup>28</sup> For registrable securities it is necessary to alter the securities register,<sup>29</sup> the assignment of a debt may require notice to the debtor,<sup>30</sup> and so on. Where a contract alone suffices, as it does for the transfer of rights to goods, it is frequently required that the contract must be in a particular form and signed before transfer can occur.<sup>31</sup>

These restrictions on transferability make sense because they prevent fraud (enabling the discovery of transfers away from a bankrupt to his relatives just before disaster occurs) and because third parties are more readily able to discover who is the right holder (by, for example, checking a register) and consequently to whom they owe their duties.

On one view, the rules of equity flatly contradict and undermine these rules. As soon as a buyer agrees to buy and pays for a right to land, a trust arises in his favour.<sup>32</sup> This trust is described in the United States as arising under the doctrine of equitable conversion.<sup>33</sup> The significance of this trust has arisen most frequently in American law because of the rules of inheritance. It has been important because of the different treatment of realty and personalty upon death.<sup>34</sup> If trustees have a duty to sell a right to land, the right to land was treated as money before they sold it.<sup>35</sup> If, therefore, the beneficiary died and left all his money to X, X would inherit that money even if the trustees still held the land at the moment of death.<sup>36</sup>

For our purposes, however, the significance of the doctrine is that as soon as the right holder comes under a prepaid contractual obligation to transfer the right, a trust arises before the steps to transfer the right have been taken.<sup>37</sup> This has been explained on the basis of the following maxim: "Equity regards that as done which ought to be done."<sup>38</sup>

On the view that equitable title is a division from or a weaker form of legal title, equity has permitted the transfer of the right to the land before the transfer has taken place at law, undermining the reasons behind the restrictions on transfer.<sup>39</sup> A magic spell is invoked as an explanation, one that actually explains nothing at all. Such a view is incorrect. The equitable rule neither contradicts the common-law rules on transfer, nor is it based upon magic.

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<sup>28</sup> BYRNE, *supra* note 4, at 286.

<sup>29</sup> For codification in U.S. federal law, see 15 U.S.C. § 77e(c) (2006).

<sup>30</sup> See BYRNE, *supra* note 4, at 76.

<sup>31</sup> See, e.g., *O.N. Jonas Co. v. Badische Corp.*, 706 F.2d 1161, 1163 (11th Cir. 1983).

<sup>32</sup> 18 C.J.S. *Conversion* § 9 (2007).

<sup>33</sup> See *id.*

<sup>34</sup> 96 C.J.S. *Wills* § 1250 (2011).

<sup>35</sup> *Id.* § 1278.

<sup>36</sup> See *id.*

<sup>37</sup> Chambers, *supra* note 24, at 186.

<sup>38</sup> E.g., 18 C.J.S. *Conversion* § 2 (2007).

<sup>39</sup> GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 885 (rev. 2d ed. 1982).

When the seller is obliged to hold the right to the land for the buyer who has paid,<sup>40</sup> a trust arises because that is what a trust is by definition. The right to the land is not divided, and nothing is transferred to the buyer. The buyer acquires a new right in relation to the right to the land, one that never existed before.<sup>41</sup> If the seller were to go into bankruptcy, the buyer would be secure even before formal transfer is made because the right to the land, not the land itself, is held in trust for him.<sup>42</sup>

We find precisely the same pattern within the law of unjustified enrichment.

#### IV. RIGHTS AND VALUE<sup>43</sup>

Within the law of contract we are familiar with the difference between obligations to transfer value and obligations to transfer particular rights. Again, precisely the same distinction is found within the law of unjustified enrichment, and consequently the *Restatement (Third)*.

If I agree to sell to you 1000 aubergines<sup>44</sup> for \$1000, neither seller nor buyer is under any obligation to transfer any specific right. The seller can appropriate any aubergines to perform his contract, and the source of the buyer's payment is completely up to him. If, by contrast, I contract to sell to you my horse Dobbin currently in my stables in Oxford, U.K., title to pass upon payment of \$1000, I have agreed to transfer to you the right to a particular horse upon payment. (No trust of the right to the horse will ever arise because as soon as payment is made, transfer of the right to Dobbin occurs. There is no gap between obligation and transfer.)

Within the law of unjustified enrichment, there are many cases where the plaintiff does not assert that he has transferred any right to the defendant that the defendant is now obliged to re-transfer back. This is most obvious in the case of services, such as where one party mistakenly repairs another's car, which the owner subsequently sells.<sup>45</sup> There can be no question of any trust arising, as the defendant is obliged to transfer to the plaintiff the value of the work done, not any particular right.

In some other cases, however, where a plaintiff makes a transfer to a defendant, it may be that the transfer is invalid for one of a number of reasons (mistake, duress, undue influence, etc.). In such a case, the defendant may be obliged not only to transfer back the *value* of what he has received but also,

<sup>40</sup> One must pay first, as "equity will not aid a volunteer." *E.g.*, *Wyser-Pratte v. Van Dorn Co.*, 49 F.3d 213, 218 (6th Cir. 1995).

<sup>41</sup> See 92 C.J.S. *Vendor and Purchaser* § 232 (2010).

<sup>42</sup> See 90A C.J.S. *Trusts* § 730 (2010).

<sup>43</sup> For more, see an extremely important essay on this distinction: Robert Chambers, *Two Kinds of Enrichment*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF UNJUST ENRICHMENT* 242 (2009).

<sup>44</sup> Eggplants.

<sup>45</sup> See, *e.g.*, *Iacomini v. Liberty Mut. Ins. Co.*, 497 A.2d 854, 856 (N.H. 1985); *Greenwood v. Bennett*, [1973] 1 Q.B. 195 at 196 (Eng.).

where identifiable, a *right* that traceably represents what has been transferred to him.<sup>46</sup> As we have seen, obligations to hold rights for another are trusts.<sup>47</sup>

Sometimes, the conditions for transfer of a right may not be satisfied at all. For example, for a right to goods to be transferred by delivery (e.g., Christmas presents), the right holder must intend to transfer title to a specific thing to a specific person, to whom he delivers that thing.<sup>48</sup> If, therefore, I give my wife a box I think contains a necklace I bought for her, but which in fact contains my tickets to the Red Sox game on Saturday, no title to the tickets will pass to her. A mistake as to identity or subject matter will prevent a transfer from occurring at all. My wife is obliged to hold the contents of the box for me, but a duty to hold a thing (such as arises upon bailment) is not a trust, as a trust's subject matter is always a right and never a thing.<sup>49</sup>

Sometimes, however, the requirements for the transfer of a right are satisfied, but the underlying basis for the transfer may be invalidated for one of a number of reasons (mistake, duress, undue influence, etc.). This requires the right to be transferred back. To transfer the right to registrable securities from me to you, for example, it is necessary and sufficient to alter the securities register. If, however, I transferred the securities to you, mistakenly thinking that I was obliged to sell them to you, when in fact the contract to sell was with a different party altogether, you are obliged to transfer the securities back into my name.<sup>50</sup> The mistake does not and cannot render the transfer a nullity. The duty to transfer the right back is a trust. As the *Restatement (Third)* commences in its section on constructive trust, "If a defendant is unjustly enriched by the acquisition of *title to* identifiable property . . ."<sup>51</sup>

Notice again, however, that the subject matter of the beneficiary's right need not be a legal right. If, for example, a beneficiary under a trust mistakenly transferred to the defendant his beneficial interest under the trust, the recipient would be obliged to hold that right for the original beneficiary. The sub-trust would also be created by unjustified enrichment.

*Scott on Trusts* is quite correct, therefore, when it states, "A constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it."<sup>52</sup> The phrase "title to property" means "right" here, and the word "equitable" is not doing any work at all.

By contrast, *Bogert* (which the *Restatement (Third)* also quotes approvingly) is confused when it states, "When a court of equity finds that a defendant is the

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<sup>46</sup> See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 (2011).

<sup>47</sup> See *supra* note 19 and accompanying text.

<sup>48</sup> 38A C.J.S. *Gifts* § 16 (2008).

<sup>49</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. f.

<sup>50</sup> *Id.* § 55(1); *id.* § 55 cmt. b.

<sup>51</sup> *Id.* § 55(1) (emphasis added).

<sup>52</sup> AUSTIN WAKEMAN SCOTT, *THE LAW OF TRUSTS* § 462, at 304 (William Franklin Fratcher ed., 4th ed. 1989).

holder of a property interest which he *retains* by reason of unjust, unconscionable, or unlawful means, it takes such interest from the defendant and vests it in the wronged party.”<sup>53</sup> If it were correct that the defendant had retained the property interest (by which is presumably meant the right), why would it be necessary to take that interest away from the defendant? It is tempting to think that just as with the mistaken delivery of the Red Sox tickets, equitable title is somehow retained when legal title passes; but if this were so, equity would again flatly contradict the answer to a question (“Has the right been transferred?”) that the law had already answered. There is not, of course, any wronged party in the context of unjustified enrichment either.

The above analysis explains three important features of the *Restatement (Third)*. First, rescission of a contract is rightly treated separately from constructive trusts. If you induce me to sell to you my car through a misrepresentation, my power to rescind the contract will not, from that moment, give rise to a trust. I have an option, or power, to rescind the contract, not an immediate right to the return of what was transferred. Prior to rescission there is no obligation on the part of the buyer to retransfer anything.<sup>54</sup> Within the context of rescission, however, different potential consequences of the exercise of this power are important to understand.

As we have seen, the right to goods can be transferred at common law by contract alone; no delivery or registration is required.<sup>55</sup> Once, therefore, the contract is avoided for misrepresentation (or for any other reason), title to the car will re-vest in the seller. There is no need for any trust, as the avoidance of the contract avoids the transfer itself. By contrast, if you induce me to sell to you registrable securities XYZ by misrepresentation, and I then alter the register in your favour, thereby transferring to you the right to the securities, the avoidance of the contract cannot automatically re-vest the right to the securities back into the seller. The transfer was not made by the contract, but rather by the alteration of the securities register. Avoiding the contract will oblige the buyer to transfer back to the seller the securities registered in his name: a trust.

Second, when and why a constructive trust arises is explained. If I pay a builder \$1000 to do some work for me, and the work is not done either because of his own breach or because of frustration (e.g., his death), I have a right in restitution to \$1000 (that is, to the *value* I have transferred to him). There is not, however, any trust. Why not? Let it be assumed that I paid in cash and that the very notes I paid with are still identifiable in his cold dead hands (or the hands of his widow). Is there a trust over the right to these notes? The correct answer is no. The transfer of the *value* of \$1000 was conditional. In order to earn it, the builder must do the work. If the work is not done, he does not earn the agreed sum. If payment was not to be made in advance, he could

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<sup>53</sup> BOGERT & BOGERT, *supra* note 39, § 471, at 3 (emphasis added).

<sup>54</sup> See 17B C.J.S. *Contracts* § 647 (2011).

<sup>55</sup> See *O.N. Jonas Co. v. Badische Corp.*, 706 F.2d 1161, 1163 (11th Cir. 1983).

not claim it by way of an action for the agreed sum. Where it has been paid, he (or his estate) must pay me back.

However, the transfer of the *right* to the specific \$1000 I paid was unconditional. I never expect to see those notes again. The duty of the builder is to make restitution to me in the value of \$1000 in money, not any particular notes or rights. No trust arises in this scenario for precisely the same reason that no trust arises in a contract to sell generic goods: there is no obligation to transfer any specific right.

It is possible for the payor to stipulate not only that the transfer of the value is conditional but also that the transfer of the right is conditional. So, if the employer stipulates that the sum paid is to be held in a separate account and cannot be retained if the work is not performed, a trust will arise over the fund at that point, as the builder is obliged to hold it for the employer.<sup>56</sup> This has the important consequence of securing the employer against the builder's bankruptcy.<sup>57</sup> In a case of a mistaken payment of \$1000 (or one induced by duress, or undue influence, etc.), the acquisition of both the value and the right were defective from the start. The claimant has a claim to the restitution of the value he has paid and, where he can identify it, the specific right in the defendant's hands.

Third, the separate treatment of equitable liens from constructive trusts within the *Restatement (Third)* is explicable because of their quite different justifications. The mistaken repairer of another's car may have a lien in relation to the car, but the justification for this is not that the defendant must hold a particular right for his benefit. One possible consequence of the sharp division I have drawn is that we have two different subjects rather than one: unjustified acquisition of value and unjustified acquisition of rights. One justification given for the defence of change of position, for example, is that it is a defence of disenrichment of value.<sup>58</sup> If I pay you \$1000 by mistake, and you as a result give \$750 to a charity, your net enrichment is now \$250, and not, as it was initially, \$1000. If, however, the very notes I paid you with are still in your hands, and the money you gave to charity was withdrawn from a separate account (albeit that without my payment, you would not have behaved as you did), can I claim that the specific \$1000 still in your hands is held in trust for me, since I can identify the very rights which are the subject matter of my claim? In principle, a proprietary claim of this kind should not be susceptible to the defence of change of position, tied as the defence is to enrichment in the sense of value. Similarly, if the right increases in value and

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<sup>56</sup> See Kent W. Collier, *The Nuts and Bolts of Bankruptcy, Trust Funds, and the Construction Industry: Building a Solution for Subcontractors "Nailed" with an Unpaid Bill*, 21 EMORY BANKR. DEV. J. 623, 623-24 (2005).

<sup>57</sup> See *id.*

<sup>58</sup> See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 cmt. a (2011).

is now worth far more than the value initially transferred, this is simply irrelevant to the success of the claim to the right.

#### V. RIGHTS AND TRACING

That it is incorrect to understand the interest of a beneficiary under a trust as a carve-out from the legal owner's title, and that it is wrong to understand the trust that arises from a mistaken payment as arising due to the retention of the equitable ownership, is demonstrated by claims to rights that substitute for rights originally acquired at the plaintiff's expense.

At law, when we speak of rules for following things, we are talking of identifying physical *things* to which the plaintiff wishes to assert a continuing right *in rem*.<sup>59</sup> If my oil (or seeds, or unmarked sheep, etc.) are mixed with yours, it may be impossible, as a matter of evidence, to prove which droplet of oil (or individual seed, or sheep, or atom) is mine and which is yours. If the mixture has been used, and then mixed with oil of another party, the law has rules for overcoming these insuperable evidential problems (i.e., the *pari passu* rule,<sup>60</sup> the lowest intermediate balance rule,<sup>61</sup> and the rule that everything is presumed against a wrongdoer<sup>62</sup>).

If a defendant steals a plaintiff's lorry<sup>63</sup> and exchanges it with a third party for a motorbike, there is no understandable doctrinal mechanism by which the plaintiff now has title to the motorbike itself. The original owner of the motorbike intended to transfer his right to the motorbike to the defendant, and has done so. Although the defendant now has the right to the motorbike, he must hold this right for the plaintiff. That is, there is a trust. Historically, therefore, it was the courts of equity that permitted a claim to be brought to substitute rights in this way. The common law could not do so, as the claim was dependent upon the logic of the trust. This claim was not, however, available on the basis that the initial right had been retained: as a matter of observable fact, the right to the motorbike is not the same right that the plaintiff had at the start of the story. Rather, the defendant is obliged to hold the right that he has acquired as a result of the lorry he has stolen; in other words, he holds the right to the motorbike in trust. This right of the plaintiff under the trust is a new right that, before the theft and the swap, observably did not exist.

Far more common than cases concerning swapped motorbikes are cases of misdirected funds. A plaintiff may wish to prove that money standing to the defendant's credit with his bank represents, in whole or in part, funds that have been misdirected from the plaintiff. The money here is not cash, but a claim

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<sup>59</sup> See 76 AM. JUR. 2D *Trusts* § 275 (2005).

<sup>60</sup> See LIONEL SMITH, *THE LAW OF TRACING* 70-77 (1997).

<sup>61</sup> See RESTATEMENT (SECOND) OF TRUSTS § 202 cmt. j (1959).

<sup>62</sup> See, e.g., *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989).

<sup>63</sup> Truck.

by the defendant against a bank to be paid a sum of money. The bank owes this duty to its customer. It cannot owe the money to anyone else as it has not contracted with anyone else. Just as we cannot say that the motorbike is owned by the plaintiff and not the defendant, we cannot say that the bank owes the money to anyone other than its customer. The divided interest theory of equitable property cannot explain the nature of the plaintiff's equitable right.<sup>64</sup> We can say, however, that the defendant must hold this right against the bank for the plaintiff: there is a trust.<sup>65</sup> The law then, by analogy, applies precisely the same rules for identifying droplets of oil to the inquiry into which rights in the defendant's hands represent the wealth that has been misdirected from the plaintiff. Although the rules are the same at law and in equity, the subject matter of what is being followed is not.

#### VI. RIGHTS AND SUBROGATION

An extension of the idea of asserting a right to a right arises in the context of subrogation. Consider two scenarios:

1. Trustee in breach of trust uses \$100,000 of trust funds to buy XYZ shares.
2. Trustee in breach of trust uses \$100,000 of trust funds to pay off a \$100,000 mortgage on the trustee's home.

In the first case, the beneficiaries have a claim to either \$100,000 or, if they choose, the shares. In the second case, the misdirected funds have been used to discharge an obligation of the trustee, not to acquire a new right. There is no extant right that the beneficiaries can say should be held by the trustee or the mortgagee for them. The beneficiaries, however, are entitled to be "subrogated" to the mortgage that their funds were used to discharge.<sup>66</sup> Here, this secured obligation of the trustee is revived or recreated, meaning that the beneficiaries may assert an identical right to that which the mortgagee had against the trustee. It is *as if* the beneficiaries could assert a right to the right of the mortgagee.

There are examples of subrogation (e.g., that of a liability insurer to the rights of an insured<sup>67</sup>) where the debt is not discharged and where, instead, the creditor who has been paid must hold the right for the beneficiary and the

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<sup>64</sup> *But see* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 58 cmt. c, illus. 6-7 (2011).

<sup>65</sup> *See* BOGERT & BOGERT, *supra* note 39, § 924.

<sup>66</sup> *See* Grant S. Nelson & Dale A. Whitman, *Adopting Restatement Mortgage Subrogation Principles: Saving Billions of Dollars for Refinancing Homeowners*, 2006 B.Y.U. L. REV. 305, 312.

<sup>67</sup> *See* 2 ALLAN D. WINDT, *INSURANCE CLAIMS AND DISPUTES: REPRESENTATION OF INSURANCE COMPANIES AND INSURED* § 10.6 n.4 (5th ed. 2007).

beneficiary must join the creditor in any action against the debtor. Here the analogy with asserting a right to another right is more transparent.

#### VII. RIGHTS AND LIENS

A lien, unlike a trust, is a form of security right.<sup>68</sup> A security right is a right that is defeasible (i.e., may be lost) by the debtor performing an obligation.<sup>69</sup> In the context of unjustified enrichment, the obligation is to make restitution of value, not of a particular right.<sup>70</sup> As the *Restatement (Third)* rightly makes clear, the reason for the existence of a lien is not, strictly speaking, anything to do with the law of unjustified enrichment, which only justifies the obligation secured, not the security itself.<sup>71</sup>

A common form of lien arises where one party mistakenly repairs or improves another's property believing it to be his own.<sup>72</sup> The improvement may be to land or goods.<sup>73</sup> The owner may then seek to recover the property.<sup>74</sup> The injustice here is of an identical kind to that which arises in the context of an unpaid seller, repairer, or carrier. In all these cases the law recognises a form of unbargained-for security. The plaintiff seeks to assert a right in relation to a thing against the defendant, whilst the defendant has a right against the plaintiff to be paid a sum of money in relation to the same thing. The mistaken improver's right arises in unjustified enrichment; the seller's, repairer's, and carrier's rights arise in contract.

The correct analogy here is with the set-off of mutual obligations. The plaintiff is prevented from relying upon his right to the extent of the cross-claim against him. Here the lien is merely a privilege to retain, a form of passive security. Put another way, the defendant has a licence to retain the property, and the plaintiff has no right to claim it from him until discharge of the obligation secured.<sup>75</sup> Historically, and in England to this day, there is nothing peculiar to equity of liens of this kind; they arose at common law.<sup>76</sup> No rights to other rights need to be invoked or relied upon to explain them.

<sup>68</sup> See Marjorie Ramseyer Bardwell, *What Title Insurance Does Cover – The Big Print*, 434 PLI/REAL 315, 320 (1998).

<sup>69</sup> But see Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359, 1385 n.139 (2010).

<sup>70</sup> See 30 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 77:121 (4th ed. 1993).

<sup>71</sup> See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 56 cmt. b, illus. 2-3 (2011).

<sup>72</sup> See 75 AM. JUR. PROOF OF FACTS 3D 1 (2003).

<sup>73</sup> See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 56 reporter's note cmt. b.

<sup>74</sup> *Id.* § 56(2)-(4).

<sup>75</sup> See 53 C.J.S. *Liens* § 12 (2005).

<sup>76</sup> See *id.*

Sometimes we refer to a party having an “equitable lien” when in fact they have a choice between two separate claims, either to a specific right or to value received. The *Restatement (Third)* gives the following example:

A transfers \$10,000 to B, induced by B’s fraudulent misrepresentations. After discovering the fraud, A is able to establish that B used A’s \$10,000, combined with \$10,000 of his own, to purchase for \$20,000 a collection of rare books. The books, of uncertain value, are still in B’s possession when A discovers the fraud. The court orders them sold. A is entitled to (i) an equitable lien on the sale proceeds, securing his claim to \$10,000 plus interest, or (ii) one-half the sale proceeds, whichever is more advantageous to A.<sup>77</sup>

Here the plaintiff has a claim either to the initial value of \$10,000 received by the defendant or to the right that the amount now represents in the defendant’s hands. The transfer back to the plaintiff of a sum *greater* than \$10,000 plus interest as a result of the sale must discharge both claims. If, however, the value of half of the (right to) rare books proves to be lower than the value received, the plaintiff may continue to assert this claim for value received in the alternative. This is not a true security interest but simply a product of the fact that the plaintiff has two different types of claim.<sup>78</sup> Given their quite different doctrinal explanations, it is a serious mistake to think that a judge should have discretion as to whether to award a trust or a lien in any given case.

#### VIII. RIGHTS AND REMEDIES

Looked at with English eyes, Americans are obsessed with remedies.<sup>79</sup> If restitution is taught in American law schools at all, it tends to be within a course entitled “Remedies.” One of the great goods the *Restatement (Third)* seeks to achieve is to salvage the subject from this fate. The right created by someone else’s unjustified enrichment is no more a remedy than is my right to be paid a contractual debt.

Hohfeld taught us to distinguish between different senses of “right.”<sup>80</sup> If I pay you \$1000 by mistake, you are, from that moment, subject to the liability

<sup>77</sup> RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 56 cmt. b, illus. 3.

<sup>78</sup> See *id.* § 56 cmt. b.

<sup>79</sup> Why? Is it because remedies are thought to apply to all states, whereas the laws of contract, torts, and so on are thought to differ from one state to the next? Is it because of Holmes’s “bad man” scepticism as to the reality of legal duties, the only issue being when a court would force someone to do something? See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897). Is it because of American legal realism more generally, so that all talk of rights is thought to be a screen for the court’s exercise of its remedial discretion? Whatever the reason, it is a malady that has now infected generations of lawyers.

<sup>80</sup> Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in*

that I may go to court to obtain an order that you pay that sum back to me. From the moment the payment is made, this liability to me accrues, meaning from that point I have the *power* to start legal proceedings. From that moment, time should start to run against me for the purposes of limitation. The expiry of the limitation will bring to an end the liability, but the now-unenforceable obligation remains, as is reflected in the fact that if payment is made under it, the payment cannot be recovered back.<sup>81</sup>

I do not, however, think it can be correct that you are necessarily under an obligation or duty to me from the moment of payment, without more. I may have paid the money into your bank account, and you may neither know nor be able to discover the facts that have given rise to your liability. It would, I think, be contrary to the rule of law for us to conclude that you owe me an undiscoverable obligation at that point. I do not, therefore, have a (claim-)right to repayment from that point, and it follows that there can be no trust (but merely a power) at that time too. From the moment, however, that you have discovered my mistake and I have asked you for repayment, you are obliged to repay, and I have a correlative right.<sup>82</sup> Generally the obligation and the liability exist together, but these examples show that they have independent existence.

If you refuse to pay and I go to court and obtain an order that you must pay me back \$1000, what has legally occurred? If (as I claim) you already owed me \$1000, what is the impact of the court telling you that, yes, you must pay me \$1000?

The answer is that the court's order is the source of a new right in me (and a new duty upon you). You must now pay me \$1000 because the court says so, regardless of any unjustified enrichment. This time, if you fail to fulfil your legal obligation, some further nasty consequences will follow (i.e., contempt of court). One usage of "remedy" is as a label for this new right that I get by virtue of the court order. This order replicates and replaces the obligation that existed previously and independently of the order, effecting a merger of the two.<sup>83</sup> The new right arises even if the court's decision is incorrect. It is, I think, in this sense that the *Restatement (Third)* is best read as describing subrogation, the equitable lien, and the constructive trust as remedies.<sup>84</sup> This is reinforced by the fact that the *Restatement (Third)* also treats the simple order to pay back the value of money received as a remedy.<sup>85</sup> Here, there is no doubt that the court's remedy reflects an obligation that existed prior to the order.

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*Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913).

<sup>81</sup> See BYRNE, *supra* note 4, at 536.

<sup>82</sup> See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 cmt. c, illus. 13.

<sup>83</sup> See BYRNE, *supra* note 4, at 574.

<sup>84</sup> See, e.g., RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 41 cmt. d, illus. 2.

<sup>85</sup> *Id.* § 49.

For constructive trusts, the correct position is that a trust exists both before and after the court order, just as an obligation to make restitution existed before and after the court ordered it to be done.

That this is what is intended is reinforced by the explanatory text:

[E]very judicial order recognizing that “B holds X in constructive trust for A” may be seen to comprise, in effect, two remedial components. The first of these is a declaration that B’s legal title to X is subject to A’s superior equitable claim. The second is a mandatory injunction directing B to surrender X to A or to take equivalent steps.

The flexibility of constructive trust is significantly enhanced because this implicit injunction – the order to surrender specific property to the claimant – can easily be (and is frequently) made conditional on further remedial steps necessary to complete justice in a particular case. For example, if the defendant is entitled to recover from the claimant the cost of acquiring the constructive trust property, it is a simple matter of order that “B holds X in constructive trust for A, subject to A’s reimbursement to B” of the amount in question.<sup>86</sup>

What is important is that only the second, ancillary, remedial component does not replicate the trust that already existed prior to the court order.<sup>87</sup> The trust itself is constructed not by the judge’s order but by the claim of the beneficiary to the right of the trustee. The judge is making a declaration of trust in the same way as when he declares that the payee does, indeed, have a duty to make restitution of \$1000.

Unfortunately, describing the constructive trust as remedial can also lead to confusion. It can make it appear that there is no trust at all before the court order and that the judge is creating property rights out of thin air where none existed before. Where the defendant is in bankruptcy proceedings, for example, allowing the judge to create rights that will afford the plaintiff priority when the plaintiff had no such entitlement beforehand is profoundly wrong. Legislatures have laid down codes for the distribution of a bankrupt’s assets. These codes allow for the protection of certain kinds of creditors (usually employees and the taxman, on the basis that they are involuntary creditors).<sup>88</sup> It runs flatly contrary to principle to allow judges to arrogate the power to create by court order new rights for the protection of particular creditors upon bankruptcy – rights that did not exist before.<sup>89</sup> Claims for remedial constructive trusts *in this sense* profoundly offend bankruptcy policy

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<sup>86</sup> *Id.* § 55 cmt. b.

<sup>87</sup> *See id.*

<sup>88</sup> *See, e.g.,* Michael I. Saltzman & Leslie Book, *Distribution of Property of the Estate and Discharge*, IRS Prac. & Proc. (RIA) ¶ 16.15, at \*7, available at 2005 WL 1912015.

<sup>89</sup> *See, e.g., In re Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 791 F.2d 524, 528 (7th Cir. 1986).

and are rightly struck down both in England<sup>90</sup> and the United States.<sup>91</sup> Just like the “remedies” of subrogation, rescission, and money judgments for the restitution of money paid, however, the *Restatement (Third)* does not employ “remedy” in this strong sense. The rights to rescind, to trusts, to liens, and to be subrogated to claims as embodied in the *Restatement (Third)* do not offend bankruptcy policy because they are not remedial in this strong sense. They simply reflect the rights that existed before the court order. It is the law that creates the trust, not any choice of the judge.

#### IX. RIGHTS AND PRIORITIES

Say I forgetfully leave my umbrella on the premises of a business. The next day I discover that the business has gone into bankruptcy. I return and ask for my umbrella back. The trustee refuses to hand it over, claiming that it is valuable and must be sold with the proceeds distributed to the general body of creditors. Does this raise a question of priorities?

No. It is my umbrella. I have better title to it than does the business. By refusing to return my umbrella, the trustee in bankruptcy is committing the tort of conversion and is personally liable in damages.<sup>92</sup> Colloquially, the umbrella is mine, and that is the end of it.

By contrast, if all or some of the assets (i.e., the rights) of the business are subject to security in my favour, a priority question can arise if other security has been created in relation to the same assets. If, in England, I take (an equitable) charge over the company’s premises, this may be in competition with other (equitable) charges granted to other lenders secured on the same property.<sup>93</sup> Although in the United States the rules on secured lending are now governed by Article 9 of the Uniform Commercial Code,<sup>94</sup> the priority of a number of equally valid security agreements can commonly arise. In both jurisdictions, the subject matter of the security holder’s proprietary right is not a thing, but a right. An issue of priority arises, where it does not in the case of the umbrella, because of competing equally valid claims *against* the business that it holds rights for others by way of security.<sup>95</sup> Security rights are not trusts merely because the security holder is not required to hold the rights for the benefit of another absolutely, but rather by way of security.<sup>96</sup>

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<sup>90</sup> See, e.g., *Re Polly Peck Int’l plc (in administration) (No 2) v. Stone* [1998] 3 All E.R. 812, at 823.

<sup>91</sup> See, e.g., *XL/Datacomp, Inc. v. Wilson (In re Omegas Grp., Inc.)*, 16 F.3d 1443, 1453 (6th Cir. 1994).

<sup>92</sup> See, e.g., *In re Paramount Publix Corp.*, 8 F. Supp. 644, 645-46 (S.D.N.Y. 1934).

<sup>93</sup> See BYRNE, *supra* note 4, at 698.

<sup>94</sup> U.C.C. art. 9 (2005).

<sup>95</sup> See, e.g., *Kimbell Foods, Inc. v. Republic Nat’l Bank of Dall.*, 557 F.2d 491, 497-98 (5th Cir. 1997).

<sup>96</sup> See BYRNE, *supra* note 4, at 802, 892.

Although less common, it is possible to have a priority dispute in relation to competing trusts. If I declare myself a trustee of (the right to) my computer in favour of *A*, and then in favour of *B*, and then in favour of *C*, each trust is equally valid. A priority dispute then arises between *A*, *B*, and *C*, resolved by who is first in time.<sup>97</sup> It is also possible to have a priority competition between a beneficial interest under a trust and a security right.<sup>98</sup> If, by contrast, I give my (right to my) computer to *A*, I cannot give it away again to *B* or *C*. The right has been transferred already; I have nothing left to give and no priority issue arises.

Some suggest that a court should try to resolve priority disputes by determining which creditors are particularly deserving.<sup>99</sup> Tort victims are deserving because they are involuntary creditors. Employees are deserving because they have swelled the debtor's overall assets by their work contributions. Some then argue that claimants in unjustified enrichment are peculiarly deserving, both because they are (generally) involuntary creditors *and* because they have swelled the asset pool.<sup>100</sup> If, however, arguments such as these were really the justification for giving claims in unjustified enrichment priority, then it would be wholly unnecessary to establish that these claims related to any particular rights. These are arguments in favour of priority for a particular kind of personal claim in general; they are not arguments for the existence of a trust or security. Arguments in favour of property rights, properly termed, must relate either to particular things or rights. Priority arguments of the above kind do neither and are simply irrelevant. Arguments for priority are the province of legislatures, and courts should shut their ears to them.

#### CONCLUSION

The title of the first Restatement was *Restatement of Restitution: Quasi Contracts and Constructive Trusts*. One of the lessons that all of the common-law world subsequently learned from the first *Restatement* was that "quasi-contracts" were not contracts, and it was better to drop the misleading label altogether. It is tempting from the conjunction in the title to conclude that "constructive trusts" should suffer a similar fate. After all, "constructive" may be thought to mean "constructed" (i.e., made up) and to be no more enlightening than the label "quasi-contract," save in telling us that we are not

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<sup>97</sup> See 55 AM. JUR. 2D *Mortgages* § 303 (2009).

<sup>98</sup> On this issue, Article 9 of the U.C.C. says nothing. Presumably the answer is to be found at the state level. See generally Gary W. Marsh & Angelyn M. Wright, *Use of Statutory, Express and Constructive Trusts to Recover from Contractors in Bankruptcy*, 9 J. BANKR. L. & PRAC. 75 (1999).

<sup>99</sup> See, e.g., Note, *Unsecured Creditors of Failed Banks: It's Not a Wonderful Life*, 104 HARV. L. REV. 1052, 1061 (1991).

<sup>100</sup> See, e.g., D. Benjamin Beard, *The Purchase Money Security Interest in Inventory: If It Does Not Float, It Must Be Dead!*, 57 TENN. L. REV. 437, 483 (1990).

dealing with an actual trust any more than we are dealing with an actual contract.

I think this is a mistake and that the *Restatement (Third)* is right to keep the category of constructive trusts, while also abandoning the language of quasi-contracts. We need a label to describe those trusts that arise other than by virtue of having been intentionally created, and “constructive trusts” is as good a label to capture this idea as any. That is not to say that all constructive trusts arise to reverse an unjustified enrichment, any more than all liens do. The reason to place you under a duty to hold a right for my benefit need not be because of unjustified enrichment, but because there is a contract or an equitable wrong or for some other reason.

In the United States the fusion of law and equity happened earlier<sup>101</sup> and has been more profound than elsewhere in the common-law world. This has had advantages and disadvantages. One advantage, as exemplified by the *Restatement (Third)*, is that the language of “law” and “equity,” which can only be understood with a grasp of the history of the two jurisdictions, can be abandoned. One disadvantage is that one may lose sight of what makes a beneficiary’s interest under a trust *conceptually* different from, say, legal title to land. Furthermore, the moves in the United States to place large areas of what may be termed commercial equity onto a statutory footing via the Uniform Commercial Code<sup>102</sup> have meant that much of the old learning, the bread and butter of an English lawyer such as myself, is no longer needed. Why should an American care how equity enabled and enables secured transactions<sup>103</sup> or intermediation of securities?<sup>104</sup> The temptation is then to wrongly conclude that the reason for the existence of a lien or a constructive trust is a (frequently unarticulated) policy decision made by the judge, rather than a result of the inexorable application of general principles. It is much to the *Restatement (Third)*’s credit both that the old language of equity has been abandoned and, more importantly, that the reasons why the law is as it is have been understood.

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<sup>101</sup> For example, the Field Code of New York, later adopted in most other states, anticipated by more than two decades the English attempts to fuse the administration of the two jurisdictions. An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State, ch. 379, 1848 N.Y. Laws 497.

<sup>102</sup> U.C.C. art. 8-9 (2005).

<sup>103</sup> See, e.g., Robert Stevens, *Contractual Aspects of Debt Financing*, in CORPORATE FINANCE LAW IN THE UK AND EU 213, 222-23 (Dan Prentice & Arad Reisberg eds., 2011).

<sup>104</sup> See, e.g., Ben McFarlane & Robert Stevens, *Interests in Securities: Practical Problems and Conceptual Solutions*, in INTERMEDIATED SECURITIES 33, 54 (Louise Gullifer & Jennifer Payne eds., 2010).