



PETER BIRKS

Peter Brian Herrenden Birks 1941–2004

PETER BIRKS, WHO WAS ELECTED to the Academy in 1989, was one of the most influential legal scholars of his generation. He owed that influence to the admiration in which his rigorous and innovative thinking was held by lawyers and judges not only in this country but throughout the Commonwealth and in Europe too. He was most widely known through his writings, but in Oxford, in particular, his reputation also rested on his teaching, especially in the famous restitution seminars which he conducted with various colleagues over three decades. His meticulous and sympathetic supervision of his doctoral students turned pupils into friends and fellow enthusiasts who are the first to acknowledge the continuing impact of his thinking on their work.

In a very real sense Peter's life centred on the colleges and universities in which he worked—University College London, Brasenose College, Oxford, Edinburgh, Southampton and Oxford again, this time in All Souls. For those in legal or university life who knew him as a passionate, generous and entertaining colleague and friend it comes as something of a shock to realise that in his *Who's Who* entry he did not record his school, either of his first two marriages or the existence of three of his four children. Nor did he keep in contact with friends from his school-days or from outside the university world. Uncomfortable or not, the truth seems to be that, being very deeply committed to the work which he was doing, more often than not—and not least in the last years—Peter would give it priority over competing personal and family concerns. Settled back in Oxford for the last fifteen years of his life, he was interested in the Law Faculty and his college and with everything that went on there. In an uncomplicated way, he loved the usual sights and sounds—

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the buildings, the choirs, walking in Christ Church meadow, cycling back and forth to his home on Boar's Hill. As a result, he could have a somewhat blinkered attitude to the challenges and opportunities of life outside the academic world. On one occasion this led him to make some spectacularly unwise public remarks when his younger daughter, Laura Bailey, who had a first-class degree in English, chose a career as a highly successful supermodel. The predictably derisive comments in the press he found hard to handle. Fortunately, in the weeks before he died, Peter saw his first wife, all his children and his three grandsons and heard about two more grandchildren who were on the way.

We make these points to explain why this memoir will concentrate almost exclusively on Peter's life within the academic and legal worlds. Nor, due to the limitations of space, shall we repeat in detail what we have said elsewhere.¹ After an outline of his career, we first examine his work on Roman law and then turn to his work on restitution and unjust enrichment.

Career²

Peter was born in Hassocks on the South Downs on 3 October 1941. His father, who was a doctor, was abroad in the army till the end of the war. During that time Peter lived with his mother, who was of Welsh descent. After the war, his father decided not to join the family medical practice but to move the family instead to Assam in India. Peter's brother was born there. Peter went to school in Assam until he was seven when he was sent home to Aymestrey House Preparatory School where he remained until the age of 13. Since he was able to return to India only twice and spent his holidays, unhappily, as a paying guest with a family (usually a clergyman's family), during those long years the school represented an element of stability. While in India, his father had become obsessed with trying to find a cure for a condition which he associated with drinking tea. As a result he lost money and, when the family returned to this country and Peter's sister was born, they were in bad financial straits. Peter was taken out of education for a whole year, during which he and his father

¹ In the Memorial Addresses reproduced in A. Burrows and Lord Rodger of Earlsferry (eds.), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford, 2006), pp. vii–xv.

² An outline, which includes a list of degrees and honours, is given at the very front of *Mapping the Law* (n. 1).

lived in a series of guest houses. Eventually, the family were reunited and his father settled into a medical practice. In October 1956 Peter became a pupil at Chislehurst & Sidcup Grammar School where he remained until 1960. He studied Latin and Greek. Being academically gifted, good at both rugby and cricket and taking part in school plays, he was held up to more junior boys as an ideal all-rounder. After leaving school, he spent a year teaching Latin at his old prep school. His success as a teacher was acknowledged in an appreciative letter from the school which Peter kept among his papers.

Although he briefly contemplated a career as a classics teacher, when Peter went up to Trinity College, Oxford, on a State scholarship in October 1961 it was to study law. He was awarded a minor scholarship in 1963. One of the law tutors at the college was John Kelly, a lively and high-spirited Irishman who had written a thesis on Roman law at Heidelberg with the renowned Romanist Wolfgang Kunkel. At the time, not only was Roman law one of the three subjects in the first-year examination, Law Moderations, but in the final examination, Schools, there was also a compulsory paper on the Roman law of contract and a popular paper on the Roman law of delict. These subjects, in particular, gave scope for Kelly's imagination and, with his classical background, Peter much enjoyed his teaching. Peter gained a first in the Final Honours School of Jurisprudence in 1964.

It appears that Peter did, briefly, consider going into practice, but was told by a partner in a City law firm that he seemed 'a bit of an egg-head'. In any event, by the time he left Oxford for a junior teaching post in the Northwestern Law School in Chicago, he had settled on a career in academic law. When he returned to this country he became a lecturer at University College London where Tony Thomas was the Professor of Roman Law. A superb teacher and dedicated scholar, he was, for Peter and many others, 'a dazzling and magnetic figure'.³ In the junior ranks of the Law Faculty Peter found himself among colleagues whom he liked and admired, in particular, the legal historian, John Baker—later Sir John Baker, the Downing Professor at Cambridge—and Paul Mahoney, who became the Registrar of the European Court of Human Rights and President of the European Union Civil Service Tribunal. Peter taught a variety of subjects and participated in the LL M seminar on restitution. But at this time his principal academic interest, which Thomas

³ 'Obligations: One Tier or Two?' in P. G. Stein and A. D. E. Lewis (eds.), *Studies in Justinian's Institutes in memory of J. A. C. Thomas* (London, 1983), pp. 18–38, at 19.

encouraged, was Roman law. He was an enthusiastic participant in meetings of the Roman Law Group, known informally as the *grex*, which Thomas established to rival the *gremium* in Cambridge. Peter was equally at home in the sessions in a local pub and in the dinners which always followed the meetings and which helped to form lasting friendships among the participants. While still at UCL in 1971, when the Bar qualification rules were about to be made stricter, Peter and Paul Mahoney decided to cram for the exams. But finding the grind repulsive, after two weeks he abandoned the effort to obtain what would have been, for him, a useless formal qualification as a barrister.

Peter had married while still at Oxford and he had a daughter, Zillah, by that marriage. But by about 1967 he and his wife had separated. As a result, he lived a somewhat unsettled existence, loyally supported at (not infrequent) times of crisis by Paul and Parvin Mahoney. Fortunately, he was an enthusiastic and skilful cook, as well as a lover of good wine. Still, the lack of a fixed base in London added to the attractions of a post in Oxford, to which Peter was always keen to return. But he had published relatively little—and that mostly on Roman law. Especially with the changes in the Oxford syllabus, which saw the end of the compulsory paper on Roman law in Schools and the introduction of new subjects, such as administrative law and family law, Peter may not have seemed to be offering the ideal range of subjects for a tutorial fellow. At any rate, more than one application for a fellowship was turned down before he was appointed to Brasenose College in 1971. At about the same time he remarried.

When he arrived at Brasenose, Barry Nicholas was a long-established fellow of the college. The following year, while remaining a fellow of Brasenose, he became Professor of Comparative Law. In 1973 Herbert Hart became Principal. The other law tutor was John Davies, an exceptionally successful teacher. In due course they were joined by Hugh Collins. Peter could not have found himself in more congenial company and surroundings. He proved to be an excellent, if demanding, tutor⁴ and a loyal servant of the college. Peter was devoted to Nicholas,⁵ a fellow Romanist, who in due course succeeded Hart as Principal. Nicholas, who had always valued quality over quantity in publications, would reassure

⁴ For a description of a tutorial, see Burrows in *Mapping the Law* (n. 1), pp. vii–viii.

⁵ As is apparent from the fine memoir which he wrote for these Proceedings: 'John Kieran Barry Moylan Nicholas (1919–2002)', *Proceedings of the British Academy*, 124 (2004), 219–39. Peter also edited a Festschrift for Nicholas: *New Perspectives in the Roman Law of Property: Essays for Barry Nicholas* (Oxford, 1989).

Peter if he ever worried that he was not publishing enough. It was during his time at Brasenose that he and Jack Beatson (later Mr Justice Beatson, but then a law don at Merton) began teaching in the restitution seminars which Guenter Treitel and Derek Davies had started some time before. These seminars were to be the arena in which, week by week, Peter hammered out his ideas on the subject. The series of sixteen two-hour seminars was not only a source of immense pleasure to Peter personally but soon established itself as a ‘must’ for serious BCL and M Jur. students from all over the world. In short, ‘Peter adored it and the students adored him.’⁶

But after he had been at Brasenose for a few years Peter’s private life was in chaos once more as his second marriage, by which he had two children, Laura and Ben, broke down. A bitter divorce followed. Forced to move back to live in college and with pressing financial demands, he nevertheless revealed little of his difficulties to his colleagues. Even during a period of sabbatical leave, however, Peter found himself unable to give his full attention to the *Introduction to the Law of Restitution* which he was contracted to write for the Clarendon Press. Around this time he even contemplated giving up his work as a law teacher and becoming a college bursar. In the end, because of the pressures in his private life, he accepted the invitation to apply for the Chair of Civil Law at Edinburgh which had become vacant when Alan Watson left for Pennsylvania in 1979.

Despite the invitation to Peter, certain prominent members of the Edinburgh Law Faculty were opposed to the appointment of another scholar of ancient Roman law who, it was argued, would contribute little to the education of modern Scots lawyers. They would have preferred someone with an interest in the *ius commune* or modern Roman-Dutch law. Moreover, relations with the Faculty of Advocates, which still had a say in appointments to the chair, were somewhat strained. Despite these very real difficulties, Peter—who was in reality the outstanding candidate—was appointed. Happily, he quickly established himself within the faculty, doing much, in particular, to encourage the other members of his department to undertake research.⁷ Peter soon became an admirer of the

⁶ Burrows in *Mapping the Law* (n. 1), p. viii.

⁷ Along with Grant McLeod, he wrote an important article on the Roman law background to Lord Mansfield’s judgment in *Moses v McFerlan* (1760) 2 Burr 1005: ‘The Implied Contract Theory of Quasi-Contract: Civilian Opinion Current in the Century before Blackstone’, *Oxford Journal of Legal Studies*, 6 (1986), 46–85. They also prepared a new translation of Justinian’s *Institutes*: *Justinian’s Institutes* (London and Ithaca, NY, 1987). Although Birks had eventually to withdraw, he was involved in securing the publication of the linked volume edited by his

Scottish institutional writers who, he felt, had laid a foundation for the analysis of Scots law which English law lacked but which Scots lawyers tended to neglect.⁸ Most importantly, two brilliant articles published in 1985 cut through the bewildering terminology of the Scots law of unjust enrichment and, in due course, set the law off on a new course.⁹ Nothing could better have answered those who had doubted the wisdom of appointing a real Roman law scholar to the Chair.

In 1984 Peter had married for the third time. This marriage was to last and to make him profoundly happy. His new wife, Jackie, continued to live and work in Oxford, while Peter lived in a rather spartan flat in the Trinity district of Edinburgh. During term, he regularly worked late into the evenings during the week and then, roughly every second weekend, he would travel from Edinburgh to London by the overnight coach and then go on to Oxford where he would teach restitution and take Roman law tutorials for Brasenose, while snatching some time at home. Then it was back by coach to Edinburgh on Sunday night.

Eventually, with his second son, Theodore, on the way, Peter decided to apply for the Chair of Law at Southampton. By this time, particularly with the publication of *An Introduction to the Law of Restitution* in 1985, Peter was, of course, a star and he was immediately appointed. But he was to spend only seven terms in Southampton. Tony Honoré retired from the Regius Chair of Civil Law in Oxford in 1988. The appointment fell to be made on the nomination of the Prime Minister, Mrs Thatcher. She took a personal interest in the matter and recommended that the Queen should appoint Peter with effect from 1989. Now aged 48 and in his prime, he was back in Oxford, where he had always wanted to be, and in a college, All Souls, which provided a setting in which he could get on with his work.

Now followed perhaps his most productive years. The ferment of developments in the law of restitution inevitably claimed most of his attention and he was able to find less time than he would have wished to

doctoral pupil, Ernie Metzger: *A Companion to Justinian's Institutes* (Oxford, 1998). See the Preface, pp. xiii–xiv.

⁸ 'The Foundation of Legal Rationality in Scotland' in R. Evans-Jones (ed.), *The Civil Law Tradition in Scotland* (Edinburgh, 1995), pp. 81–99; 'More Logic and Less Experience: The Difference between Scots Law and English Law' in D. L. Carey Miller and R. Zimmermann (eds.), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (Berlin, 1997), pp. 167–90.

⁹ 'Restitution: A View of the Scots Law', *Current Legal Problems*, 38 (1985), 57–82 and 'Six Questions in Search of a Subject', *Juridical Review* (1985), 227–52.

work on publications in Roman law—his last article on the subject proper appeared in 1998.¹⁰ However many new restitution cases came to his attention, Peter always had a complete mastery of the facts and the nuances of the judgments. As the new judgments arrived, cries of joy or howls of despair were soon to be heard and, in due course, acute observations would appear, *inter alia* in the articles which he and Bill Swadling prepared for the All England Reports Annual Reviews from 1996 to 2000. It all seemed so effortless that it was easy to forget that, as his closely written bound notebooks indicated, his bravura performance was based on a vast amount of sheer hard work.

Within the Oxford Law Faculty, Birks was a charismatic and dynamic figure renowned not only for the brilliance of his teaching and scholarship but also for his dedication to the faculty in various administrative roles. He went far beyond the call of duty in responding to any demand to serve or chair a faculty committee or examining board; and he spearheaded new faculty initiatives, such as the Clarendon Law Lecture series. He was particularly interested in developing postgraduate teaching and delighted in the success of the M Jur. degree which attracted excellent students from Civil Law countries. He was the driving force behind the creation in 1994 of the Oxford Institute of Legal Practice—the initiative to which he, at least, would probably have attached the most importance. His dream, that this would engender a more rigorous intellectual approach to training practitioners and so stimulate research into very practical areas of law, has yet to be realised.

Much of Peter's time, in the late 1980s and early 1990s, was devoted to legal education at the national level. He became a member of the Lord Chancellor's Advisory Committee on Legal Education but did not find their deliberations to his taste. The main focus of his efforts centred, however, on another of his passions: the Society of Public Teachers of Law (now the Society of Legal Scholars). He was concerned that academic lawyers were not given the status they merited and he saw the SPTL as a means to promote the interests of academic law on a national stage. To bring that about, a considerable shake-up of the Society was needed and as Honorary Secretary between 1989 and 1996 that is what he took it upon himself to achieve. Although his agenda, that all practising lawyers

¹⁰ 'Can we get Nearer to the Text of the *Lex Aquilia*?' in B. C. M. Jacobs and E. C. Coppens (eds.), *Een Rijk Gerecht* (Nijmegen, 1998), pp. 25–41. An article on 'Roman Law in Twentieth-Century Britain' appeared posthumously in J. Beatson and R. Zimmermann (eds.), *Jurists Uprooted: German-Speaking Emigré Lawyers in Twentieth-Century Britain* (Oxford, 2004), pp. 249–68.

should have a law degree, was one which he could never realistically hope to have accepted by the professions at that time, his structural reforms of the Society, and the profile he gave to it during those years, made him one of the greatest figures in its history. Fittingly he was its President in 2002–3, his year of office culminating in the annual conference in his beloved (and sunny) Oxford.

In about 2003 Peter began to experience difficulties with his health. He attended his general practitioner and was sent for various specialist investigations. Diabetes was diagnosed and treated, but he continued to suffer disturbing symptoms. He was persuaded to go for further investigations and, eventually, in March 2004 he was diagnosed as suffering from cancer of the oesophagus. Characteristically, in a telephone call the following morning about the diagnosis, he appeared more concerned to discuss an event in the world of Oxford law which had particularly annoyed him. It was believed that the tumour would be operable after a course of chemotherapy, but eventually the cancer spread before the operation could be carried out. Throughout all these problems with his health, Peter continued to work—doing his normal load of teaching and administration, finishing his book on *Unjust Enrichment* in September 2003 and then, when his cancer had been diagnosed, furiously preparing a new edition which the Oxford University Press had agreed to publish unusually quickly because of the alarming number of misprints in the first edition. Peter showed amazing bravery in the face of his illness. For instance, one evening in May 2004, he presided over dessert in All Souls, calmly conversed with the guests, helped them to coffee and liqueurs, then strolled round the quadrangle and talked about a range of subjects—before revealing that, earlier that day, he had unexpectedly learned that the cancer had spread and that the outlook was now probably hopeless. Except for a few days he spent in hospital, Peter continued to go into college and, despite increasing frustration as the illness progressed, he worked on his book right up until about ten days before he died, at home, on 6 July 2004. His funeral service took place in the chapel of All Souls and, in November, a memorial service was held in the University Church which was packed not only with his Oxford colleagues but with delegations and friends from all over the world.

While Peter's fame and influence derived, for the most part, from his work on restitution or unjust enrichment, his first love, and the main-spring of much of his thinking, was Roman law. So, in giving an account of his work, we start with Roman law.

Roman Law

Although Birks attended David Daube's lectures on Roman law for Moderations, he did not do any more advanced work with him—never even attending the smaller classes which Daube gave on *condictiones* for the BCL. This was a recurring source of regret to Birks who sometimes imagined that by not doing a doctorate he had somehow excluded himself from the authentic Oxford line of Roman law scholarship. Not the least of Barry Nicholas's services was to still those doubts. Of course, any regrets Birks may have had on this score did not diminish the gratitude which he felt towards John Kelly and Tony Thomas for their teaching. Typically, he gave very practical expression to this gratitude. For many years he placed articles in the *Irish Jurist* edited by Kelly. Then, after Kelly's death, he travelled to Dublin to give lectures on Roman law. Similarly, he contributed many lectures to the Current Legal Problems series published by University College London. It is indeed somewhat curious that, in his entire career, he published only three articles in specialist Roman law journals and none in the (leading) *Savigny Zeitschrift*.¹¹ This probably meant that his work reached a smaller international audience than it deserved.

The fact that Birks's teachers were John Kelly and Tony Thomas, who came from outside the mainstream of Oxford Roman law scholarship, may help to explain what is otherwise a somewhat surprising aspect of some of his work. For more than a century the study of Roman law has been bedevilled by uncertainty about the extent to which the texts which appear in the Digest under the names of jurists from the first two centuries AD have in fact been altered—'interpolated'—so as to incorporate later changes in the law. To begin with, the prevailing view was that there were many interpolations, but in the last forty years or so opinion has become more conservative. As it happens, Kelly and, more particularly, Thomas remained disposed to the more radical approach. And—despite the conservative stance adopted by Nicholas—especially in his later articles Birks too argued for more far-reaching changes in the texts than most scholars would nowadays accept.¹² As a result those articles received a

¹¹ 'The Early History of *Iniuria*', *Tijdschrift voor Rechtsgeschiedenis*, 37 (1969), 163–208; 'A Point of Aquilian Pleading', *IVRA*, 36 (1985), 97–107 and 'Wrongful Loss by Co-Promisees', *Index*, 22 (1994), 181–8 (a special volume comprising a festschrift for Peter Stein).

¹² See, for instance, 'Other Men's Meat: Aquilian Liability for Proper User', *Irish Jurist*, NS 16 (1981), 141–85, the radical approach in which he modified, but did not entirely abandon, in 'Ulpian 18 *ad Edictum*: Introducing *Damnum Iniuria*' in R. Feenstra and others (eds.), *Collatio*

somewhat mixed reception, even though they often contained valuable insights.¹³

While a lecturer at UCL, Birks did a part-time LL M course and in 1967 he was awarded the degree with distinction. His thesis was on 'The Development of the Law of Delict in the Roman Republic' and, in part, it covered the early period of Roman law, down to roughly the second century BC. The sources for that period are sparse and difficult to interpret so that use has to be made of non-legal works such as the plays of Plautus and Terence. Not surprisingly, therefore, it is not a field in which scholars have found it easy to produce a convincing account of the way the law developed.

Nevertheless, particularly because of his interest in work being carried on in the field of English legal history, Birks was attracted to this period. In the late 1960s Toby Milsom was Professor of Legal History at the London School of Economics. Sir John Baker has recalled how Peter would go to his classes and return from the Aldwych 'freighted with new ideas and already turning in his mind the possibilities for applying the new insights to the history of Roman law'.¹⁴ So, even before the publication of Milsom's *Historical Foundations of the Common Law* in 1969, his work was greatly affecting Birks's thinking about the way that Roman law might have developed.

Following Milsom, Birks noted, for example,¹⁵ that in English law the change from disputes being decided by divine adjudication to disputes being decided by juries was unlikely to have been sudden, since quite often one side would have an interest in arguing that the old ways should continue to be followed. Similarly, even if the procedural rules for bringing a dispute before the court were relatively well understood, to begin with, there would have been no rules of substantive law to which a tribunal could refer in order to decide the dispute. These rules would emerge only very gradually—and in English law the judges were able to postpone deciding many questions by putting the general issue to the jury.

Iuris Romani: Études dédiées à Hans Ankum à l'occasion de son 65e anniversaire (Amsterdam, 1995), vol. 1, pp. 17–36. This article also contains (p. 20 n. 18) a rather precipitate rejection of the text of D.9.2.29.6.

¹³ See, for instance, R. Feenstra, 'L'application de la loi Aquilia en cas d'homicide d'un homme libre, de l'Époque classique à celle de Justinien', in H. Ankum, R. Feenstra *et al.* (eds.), *Mélanges Felix Wubbe* (Fribourg, 1993), pp. 141–60, at 149, criticising the first of the articles in n. 12 above.

¹⁴ J. Baker, 'Bezoar-Stones, Gall Stones, and Gem-Stones: A Chapter in the History of the Tort of Deceit', in *Mapping the Law* (n. 1), pp. 545–59, at 545.

¹⁵ 'English Beginnings and Roman Parallels', *Irish Jurist*, NS 6 (1971), 147–62.

Arguing by analogy, Birks suggested that in Roman law the vital change from the old *legis actio* procedure to the formulary procedure should also be seen as a gradual process during which, so long as the law permitted it, litigants would seek to exploit any advantages which one or other of the procedures offered. In the *Lex Aebutia*, he suggested, the legislature intervened to remove the advantages of the option of using the old procedure.¹⁶ More generally, and contrary to the commonly held view, Birks argued that, just as in English law, so in early Roman law the main focus of attention would not have been on reforming procedures, but on trying to develop a body of law by which to decide the substance of disputes. Since in the early stages there would be no pre-existing body of rules, it is anachronistic, he maintained, to think of there then being a great divide between the *ius civile* and the law developed by the praetor. The idea of the praetor developing a distinct body of law to supplement or correct the old *ius civile*—which is the picture in the classical period of Roman law—could not have emerged until a stage when the general body of law had developed to such an extent that it was recognised as an entity, complete in itself, which might require such supplementing or correcting from another source.¹⁷ Birks sought to apply this general approach in tracing the development of particular aspects of the substantive law, such as the *condictio*,¹⁸ *iniuria*¹⁹ and theft.²⁰

There is no doubt that the approach which he advocates in these early articles, and which is perhaps his most distinctive contribution to the subject, is attractive. This is so even though it is vulnerable to an obvious objection of which Birks himself was very conscious: that the pattern of developments in English law is not necessarily any guide to the way that Roman law developed.²¹ Moreover, however sound, an approach which draws on analogies with English law is never likely to be taken up by Romanists in other countries who are unfamiliar with English legal history. Despite these drawbacks, Birks remained convinced that, while one had indeed to be cautious about drawing on the experience of English law, with further detailed work his approach would produce valuable

¹⁶ 'From *Legis Actio* to *Formula*', *Irish Jurist*, NS 4 (1969), 356–67.

¹⁷ *Irish Jurist*, NS 6, 147, 155.

¹⁸ *Irish Jurist*, NS 6, 147, 156–9.

¹⁹ 'The Early History of *Iniuria*', *Tijdschrift voor Rechtsgeschiedenis*, 37 (1969), 163; 'Lucius Veratius and the *Lex Aebutia*' in A. Watson (ed.), *Daube Noster: Essays in Legal History for David Daube* (Edinburgh, 1974), pp. 39–48. He dealt with later stages in the development of liability for *iniuria* in '*Infamandi Causa Facta* in Disguise', *Acta Juridica* (1976), 83–104.

²⁰ 'A Note on the Development of *Furtum*', *Irish Jurist*, NS 8 (1973), 349–55.

²¹ See, for instance, *Irish Jurist*, NS 6, 147 and 162.

results. So, even though he never got round to producing the larger work in which his thinking might have been developed systematically, he always spoke of coming back to the question—in an email dated 26 May 2004, after he had been told that the cancer had spread, he said, ‘I wanted to end with a Milsomian version of the R L of Delict, but that won’t be possible.’ As that message suggests, curiously enough, Milsom probably had a greater impact than any Romanist on Birks’s thinking about Roman law.

Birks appears to have stopped working consistently on early Roman law about the time he moved to Oxford in 1971, since the flow of articles dried up about that time. Indeed he published relatively little in the next few years. By contrast, after his appointment to the Edinburgh chair, he produced a large amount of work on Roman law, but mostly on the classical and Justinianic periods, including a masterly analysis of the Roman concept of ownership²² and, significantly for his work on English law, translations of the very difficult books 12 and 13 of the Digest dealing with what amounts to the Roman law of unjust enrichment.²³ During this time too, he engaged in a bitter public dispute with his predecessor in the chair, Alan Watson, over Watson’s intemperate criticisms of Tony Honoré’s work.²⁴

His study of English law and legal history made Birks particularly sensitive to matters of procedure and to pleadings. He was constantly asking himself—and anyone else who would listen—what would actually have happened in front of the praetor or the *iudex*. The question is, of course, particularly difficult to answer since very few accounts of actual cases have come down to us. Birks therefore paid close attention to such little evidence as could be gleaned from the speeches of Cicero²⁵ and from rhetorical works.²⁶ But, by good fortune, two recently discovered inscriptions from Spain provided new material which he was able to exploit.

The first of these inscriptions was the *Tabula Contrebiensis*, dating from about 87 BC. Birks was to make what turned out to be the crucial

²² ‘The Roman Law Concept of Dominium and the Idea of Absolute Ownership’, *Acta Juridica* (1985), 1–38.

²³ For A. Watson (ed.), *The Digest of Justinian* (Philadelphia, 1985; paperback reprint, 1998).

²⁴ See ‘Honoré’s Ulpian’, *Irish Jurist*, ns 18 (1983), 151–81 with references to the review and correspondence. Connoisseurs of the dispute will also read D. C(ohen), ‘The Battle of the Atlantic’, *Rechtshistorisches Journal*, 2 (1983), 33–6, A. Watson, ‘An Open Letter to D.C.’, *Rechtshistorisches Journal*, 3 (1984), 286–90 and T. Honoré, ‘New Methods in Roman Law’, *ibid.*, 290–305.

²⁵ Cf. ‘The Rise of the Roman Jurists’, *Oxford Journal of Legal Studies*, 7 (1987), 444–53.

²⁶ ‘*Infamandi Causa Facta* in Disguise’, *Acta Juridica* (1976), 83–104.

contribution to its interpretation. Early in 1983 John Richardson, his colleague in the chair of Classics at Edinburgh, who was preparing an article on the inscription for the *Journal of Roman Studies*, consulted Birks about it. The inscription contains the text of two formulae which had been used to decide a dispute over water rights between two communities in an area near the modern city of Zaragoza. Very few examples of the formulae—in effect, the pleadings—used in actual cases have been preserved and so the find was potentially extremely important. Birks, who was busy with other matters, noted, almost casually, that one of the formulae contained a fiction—something which the Spanish scholars who had previously studied the inscription had completely missed. Although, to begin with, Birks appeared not to realise this, his insight totally transformed the translation and interpretation of the text. Once persuaded—in an alcohol-fuelled discussion of the text that went on in his flat until three o'clock one Saturday morning—to give the matter his full attention, Peter immersed himself in the inscription and in its implications for our understanding of the formulary system of procedure. The result was not just that Richardson's draft article was radically altered,²⁷ but that the following year a further joint article was published which has become the standard study on the subject.²⁸ Remarkably, Birks was able to accomplish all this at a time when he was working to complete his *Introduction to the Law of Restitution*. Birks's work on the fiction in the *Tabula Contrebiensis* undoubtedly paved the way for his valuable article comparing the use of fictions in Roman and English law—very much to the advantage of the Roman system.²⁹

The other new inscription, discovered in 1981 and published in 1986,³⁰ contains much of the text of the so-called *Lex Irnitana*. This statute, which dates from the first century AD, regulated the affairs of the *municipium* of Irni in the south of Spain. For students of Roman law it is of enormous interest because chapters 84 to 93 give not only the details of the

²⁷ J. Richardson, 'The *Tabula Contrebiensis*: Roman Law in Spain in the Early First Century BC', *Journal of Roman Studies*, 73 (1983), 33–41. See especially 33 n. 1.

²⁸ P. Birks, A. Rodger, J. S. Richardson, 'Further Aspects of the *Tabula Contrebiensis*', *Journal of Roman Studies*, 74 (1984), 45–73. Although discussed with the other authors, Part III was very largely Birks's work—and would have been even more detailed and far-reaching if space had permitted. By this time he had triumphantly switched to a word processor and dot matrix printer which spewed forth sheet after connected sheet of text.

²⁹ 'Fictions Ancient and Modern' in N. MacCormick and P. Birks (eds.), *The Legal Mind: Essays for Tony Honoré* (Oxford, 1986), pp. 83–101.

³⁰ J. González, 'The *Lex Irnitana*: a New Copy of the Flavian Municipal Law', *Journal of Roman Studies*, 76 (1986), 147–243.

jurisdiction of the magistrates of Irni but the procedures to be followed by litigants. Certain aspects of these chapters have proved difficult to interpret, however, and Birks participated in a valuable colloquium organised by John Crook in Cambridge in March 1987 to stimulate thinking on the topic.³¹ The following year Birks published an article on the appointment of *iudices* which draws on the new material.³²

The same attention to the detail of what would have happened in court is apparent in a series of articles which Birks wrote on the *Lex Aquilia*, the Roman statute relating to property damage—a subject which he taught for many years to candidates for Schools and the BCL. Here he used various hypothetical arguments, which the parties might have deployed to gain an advantage in court, in order to try to choose between a number of possible versions of the text of the statute³³ and of the wording of the pleadings.³⁴ While not all of his suggestions are likely to win acceptance, the articles, especially on the formulae, highlighted questions which had been wrongly neglected. In particular, his suggestion³⁵ that the rubric of the relevant title in the Praetor's Edict was *de damno iniuria* rather than *ad legem Aquiliam* is both acute and potentially important.

Although Birks was, therefore, an active contributor to the specialist literature on ancient Roman law, he regarded it as anything but a subject of purely antiquarian interest. In a university environment where Roman law often seemed to be regarded as of no relevance to the study of modern law, Birks was passionate in his defence of its continuing importance in the education of modern lawyers. The decision of the Oxford Law Board to make Roman law optional in Law Moderations shocked and saddened him, but also made him more determined than ever to assert the case for Roman law. He was justly proud that, despite determined hostile propaganda in some quarters, a majority of undergraduates always opted

³¹ See J. A. Crook, D. E. L. Johnston and P. G. Stein, 'Intertiumjagd and the Lex Irnitana: a Colloquium', *Zeitschrift für Papyrologie und Epigraphik*, 70 (1987), 173–84. Some of the suggestions made by Birks during the colloquium are specifically identified in the report.

³² 'New Light on the Roman Legal System: The Appointment of Judges', *Cambridge Law Journal*, 47 (1988), 36–60.

³³ 'Can we get Nearer to the Text of the *Lex Aquilia*?' in *Een Rijk Gerecht* (n. 10), 25

³⁴ 'A Point of Aquilian Pleading', *IVRA*, 36 (1985), 97–107; 'The Model Pleading of the Action for Wrongful Loss', *Irish Jurist*, NS 25–7 (1990–2), 311–28, at 327. Birks argued that there was only one model for both chapter 1 and chapter 3. See also 'Doing and Causing to be Done' in A. D. E. Lewis and D. J. Ibbetson (eds.), *The Roman Law Tradition* (Cambridge, 1994), pp. 31–53, at 32.

³⁵ 'The Edictal Rubric "ad legem Aquiliam"' in R. Pérez-Bustamente (ed.), *Estudios de Historia del Derecho Europeo: Homenaje al Professor G. Martínez Díez* (Madrid, 1994), vol. 1, 81–9, at 83, and *Collatio Iuris Romani* (n. 12), vol. 1, 17, 23–4.

to take Roman law in Mods. The reintroduction of a revised course of Roman law as a compulsory subject in Mods in 2006 would not only have delighted him but was, in part at least, a vindication of his stand.

More persuasive in that battle than any mere words could have been was, perhaps, the very obvious fact that Birks's seminal work on the law of restitution owed much to his work on Roman law. In 1969, one of his very first articles—on quasi-delicts in Roman law³⁶—gave early notice of his interest in questions of classification. It was precisely because he regarded Gaius' 'short but brilliant exposition of the law'³⁷ for students as having made a major contribution to the kind of analysis of the law which Birks regarded as essential that he would go back to the Institutes again and again. Nevertheless, on this particular matter, he pointed to the 'very imperfect truth' of Gaius' statement in Institutes 3.88 that all obligations arise either from contract or from delict. Referring to a passage in Lord Chancellor Haldane's speech in *Sinclair v Brougham*,³⁸ Birks remarked that 'Statements of that kind typify the worst effects of the twofold classification of obligations. Quasi-contractual obligation, which should be based on the redress of unjust enrichment, becomes contaminated by contractual doctrine.'³⁹ Sixteen years later he returned to the passages in Gaius and Justinian as the starting-point of his argument that English lawyers would have to abandon the misleading terminology of quasi-contract if the law were ever to develop rationally and coherently.⁴⁰ Eighteen years after that, when his thinking on questions of classification had been progressively refined in a stream of publications,⁴¹ in his book on *Unjust Enrichment* Birks still devoted space to a careful discussion of the relevant passages of Gaius and Justinian.⁴² Moreover, his familiarity with the Roman texts on unjust enrichment undoubtedly eased his way

³⁶ 'The Problem of Quasi-Delict', *Current Legal Problems*, 22 (1969), 164–80. He can be seen still worrying away at the topic but now also drawing on Scots Law and the writings of Austin in 'Obligations: One Tier or Two?' in *Studies in Justinian's Institutes in memory of J. A. C. Thomas* (n. 3), p. 18.

³⁷ 'The Foundation of Legal Rationality in Scotland' in *The Civil Law Tradition in Scotland* (n. 8), pp. 81, 88.

³⁸ [1914] AC 398, 415.

³⁹ *Current Legal Problems*, 22 (1969), 164, 165.

⁴⁰ P. Birks, *An Introduction to the Law of Restitution* (Oxford, 1985; paperback edn., 1989), pp. 29–31.

⁴¹ Including 'Definition and Division: A Meditation on Institutes 3.13' in P. Birks (ed.), *The Classification of Obligations* (Oxford, 1997), pp. 1–36.

⁴² *Unjust Enrichment*, 1st edn. (Oxford 2003), pp. 28 n. 11 and 230–1; 2nd edn. (Oxford, 2005), pp. 30 n. 15 and 268–70.

into the Continental, especially German, work on the subject. As we shall see, this was eventually to revolutionise his own thinking.⁴³

Restitution and unjust enrichment

While Peter's first love was Roman law, the subject for which he was best known, and on which he had the greatest impact, was unquestionably the law of restitution or (as he latterly preferred to call most of it) the law of unjust enrichment. By the time of his death, he had become the world's leading academic authority on the topic. It was indeed to this area that he most successfully applied his deeply held beliefs about the law. That it should be transparently rational, coherent and elegant; that rigorous classification of the divisions within the law was crucial to orderly thinking; that confusing language and, even worse, legal fictions⁴⁴ should be excised; and that the law should be described in analytically precise language that illuminated, rather than obfuscated, its essential elements. Since Birks devoted so much of his working life to revising and refining his thinking on the subject, our account of his work must be correspondingly more detailed.

The long-neglected and little explored English law of restitution provided the perfect raw material for his approach. When Birks first became interested in the subject in the late 1960s, the first book on the English law of restitution, *The Law of Restitution* by Robert Goff (sometime Fellow of Lincoln College, Oxford, and later to become a Lord of Appeal in Ordinary) and Gareth Jones (Fellow of Trinity College, Cambridge) had only just been published (in 1966). They had seen and shown that underpinning a mass of apparently disparate cases, both in common law and in equity, was the principle that the unjust enrichment of a defendant at the expense of a claimant should be reversed. In other words, in line with Civil Law jurisdictions and as recognised in 1937 in the United States *Restatement of Restitution*, Goff and Jones persuasively argued that, while it was rare for the judges expressly to acknowledge that this was what was happening, English law did grant restitution of unjust enrichments. Even though it also included aspects of property law, the law of restitution was therefore a third major category of the law of obligations, alongside contract and tort.

⁴³ See below section 4, 'The Civilian Conversion'.

⁴⁴ See above, n. 29.

If Goff and Jones could justifiably be said to have ‘created’ the subject in England, it was Birks’s work, especially in providing a rigorous and illuminating conceptual structure for the subject, which triggered the huge modern academic interest in it. His work in a rapidly developing area of law also brought him into contact with, and to prominence among, judges and practitioners, most of whom had not previously encountered his work as a Roman law scholar. While Peter had no wish to join them, he found this direct contact with members of the practising profession stimulating. It also meant that his message on the merits of transparent rationality in the law had a wider and significantly different audience than if it had been confined to the classroom and the groves of academe.

Birks’s writings on the law of restitution/unjust enrichment were, by any standards, prolific albeit that, by today’s RAE-induced expectations, he started slowly. In retrospect, his publications in this area can be conveniently divided into four main phases: (1) early exploration (1971–82); (2) the unjust factors and quadrature scheme (1983–97); (3) the misnomer and multi-causality adjustments (1998–2002); (4) his civilian conversion (2003–5).

(1) Early exploration (1971–82)

Birks’s publications on restitution in this early period were almost exclusively the published versions of public lectures delivered in the Current Legal Problems series at University College London. There were five of these, published in 1971, 1972, 1974, 1980, and 1982.⁴⁵ Birks’s interest in the law of restitution was initially kindled by George Webber, who taught the subject at UCL. So, for this reason as well as his original connection with UCL, it is not surprising that Birks was such a regular contributor to the Current Legal Problems series. In contrast, it is a surprise, especially in the light of his later prodigious publication output, that, with only one exception (a 1976 article on the unrequested payment of another’s debt, co-authored with Jack Beatson)⁴⁶ he did not initially

⁴⁵ ‘*Negotiorum Gestio* and the Common Law’, *Current Legal Problems*, 24 (1971), 110–32; ‘The Recovery of Carelessly Mistaken Payments’, *Current Legal Problems*, 25 (1972), 179–99; ‘Restitution for Services’, *Current Legal Problems*, 27 (1974), 13–36; ‘Restitution from Public Authorities’, *Current Legal Problems*, 33 (1980) 191–211; ‘Restitution for Wrongs’, *Current Legal Problems*, 35 (1982), 53–76.

⁴⁶ ‘Unrequested Payment of Another’s Debt’, *Law Quarterly Review*, 92 (1976), 188–212.

publish on restitution other than through a Current Legal Problems lecture.

The first three Current Legal Problems lectures in the early 1970s follow a similar pattern. We see Birks's desire to articulate a clear scheme that rationally links decided cases back to unjust enrichment; his careful use of legal history; his reliance on analogical reasoning, most especially in arguing that what applies to the restitution of money must also apply to the restitution of the value of services; and his willingness to offer rational reinterpretations of past cases (e.g. the novel argument in his 1972 article on 'Negotiorum Gestio and the Common Law'⁴⁷ that *Craven-Ellis v Canons Ltd*⁴⁸ was best understood as a case on necessary services and inevitable expense saved). By the third of the articles we have Birks's first fully articulated conceptual scheme, which drew a distinction in the common law between 'weak quasi-contract' and 'strong quasi-contract'. The former dealt with non-contractual requested or freely accepted services; the latter with payments and other benefits that were, objectively, unequivocally beneficial. Weak quasi-contract was thought to be closer than strong quasi-contract to contract, because it did rely to an extent on the defendant's 'will'. There was no possibility of arguing that strong quasi-contract was part of contract whereas, at this stage in his thinking, Birks thought that it might be plausible to regard weak quasi-contract as contractual: hence the labels 'weak' and 'strong'.

As we have already mentioned, Birks was by now (the mid-1970s) teaching restitution on the Oxford BCL course along with Jack Beatson. Their co-authored article⁴⁹ argued that a debt is not automatically discharged by an unrequested payment, unless paid by compulsion (or probably by necessity) or if there has been free acceptance by the debtor. The then recent decision in *Owen v Tate*⁵⁰ was the particular focus of attention. This article contains the last published reference to Birks's 'strong' and 'weak' quasi-contract scheme. As this early scheme is less well-known than others that Birks devised in later years, it is worth setting out the succinct explanation of it in that article:

This restitutionary right [for compulsory discharge of another's debt] is based on the conjunction of two elements, first, that the debtor defendant has received an unequivocal benefit; second, that the benefit was not conferred voluntarily by the intervener-plaintiff. It is a right whose genesis is wholly independent of

⁴⁷ *Current Legal Problems*, 24 (1971), 110–32.

⁴⁸ [1936] 2 KB 403.

⁴⁹ See above, n. 46.

⁵⁰ [1976] QB 402.

the will of the defendant and which is incapable of contractual analysis. It should be contrasted with the right, which a voluntary intervener has against an assenting debtor, which depends on the will of the defendant, manifested in his assent, and which will frequently be capable of analysis in terms of genuine implied contract. To facilitate the contrast between these differently generated rights, one of us has suggested the labels 'strong quasi-contract' for the former and 'weak quasi-contract' for the latter. It is a serious criticism of *Owen v Tate*, even if its result be right, that it does not adequately distinguish between these two different bases of the appellant's case.⁵¹

Although elements of that early scheme were to remain important to Birks's thinking, especially in deciding whether a defendant had been benefited, the division between weak and strong quasi-contract was in due course abandoned. This was no doubt because Birks came to see it as misleading, not only because of the fictional connotations of 'quasi-contract' but also because the scheme focused only on the common law and excluded equity. In view of his later strong advocacy of the need to see common law and equity juxtaposed within the same books,⁵² it is perhaps surprising that in this early period he focused purely on the common law half of the picture. His early preoccupation with just the common law of restitution is further reflected in the fact that he approached the publishers of the Modern Legal Studies series in the early 1970s with the idea of a book on 'quasi-contract'. No doubt, in hindsight he would have regarded the publishers' rejection of that inadequately titled proposal as a blessing in disguise.

As we have already noted, perhaps because of his problems in his private life, in terms of publications the late 1970s were remarkably unproductive for Birks. Indeed he produced only one article in a four-year period (1977–80) and that was the written version of his Current Legal Problems lecture on 'Restitution from Public Authorities'.⁵³ In that article, Birks skilfully and persuasively exposed the inadequacies of the duress explanation of restitution from public authorities although, in contrast to his later, hugely influential, work on this topic, at this stage he stopped just short of advocating a full-blown right of a citizen to restitution of money demanded *ultra vires* by a public authority.

The last of Birks's publications in this early exploratory era was the most important. It was another Current Legal Problems lecture—this

⁵¹ *Law Quarterly Review*, 92 (1976), 188, 207–8.

⁵² See, e.g., his final book review in *Law Quarterly Review*, 120 (2004), 344–8.

⁵³ *Current Legal Problems*, 33 (1980), 191–211.

time on 'Restitution and Wrongs'.⁵⁴ Here we see an ever more confident Birks forging the distinction, which was to become so central to his thinking, between restitution of unjust enrichment by subtraction and restitution for wrongs. Prior to that article many had realised that 'waiver of tort' was a misleading description because in waiving a tort a claimant rarely excuses it. Few, however, had realised, with the clarity that Birks's account brought, that waiver of tort covered two fundamentally different routes to restitution. The first and usual way of 'waiving the tort' was to found one's claim to restitution by establishing the tort and then seeking restitution rather than the more usual response of compensation. The second was to found one's claim not on the tort but rather on unjust enrichment as an independent cause of action. At this stage Birks saw both areas as underpinned by the generic conception of unjust enrichment and as therefore falling within the law of restitution, the distinction between them turning on the different meanings of 'at the expense of': by committing a tort (or other wrong) to the claimant; and by subtraction from the claimant. As we shall now see, this was to be one of the central themes of the book that was to make his name.

(2) The unjust factors and quadrature scheme (1983–97)

By the early 1980s Birks had devised and, in his teaching on the BCL, had tested out a sophisticated and elegant scheme for understanding the English law of restitution, both at common law and in equity. Now all he had to do was to write it down. The completion of this task, which he had begun while still at Brasenose, preoccupied him in the hours which he could devote to the subject during his early years in Edinburgh.⁵⁵

The end product was his highly acclaimed *An Introduction to the Law of Restitution* published by the Clarendon Press in 1985. Birks was riddled with self-doubt as to its worth and told friends that he had seriously contemplated throwing the manuscript off the Forth Road Bridge. He need not have worried. The book was a huge success. As Derek Davies said in his review, 'The book is intended to be, and is, seminal'.⁵⁶ Up to this time, while Birks had built a reputation as a brilliant and challenging teacher, especially on the BCL restitution course, he was principally known among the academic fraternity as a Roman law scholar. His writ-

⁵⁴ *Current Legal Problems*, 35 (1982), 53–76.

⁵⁵ For his large output on Roman law at this time, see the text accompanying nn. 22–32 above.

⁵⁶ J. D. Davies, Review, *Lloyd's Maritime and Commercial Law Quarterly* [1986], 540, 541.

ten output on restitution had been relatively modest and his articles in *Current Legal Problems* did not have the wide readership of articles in journals such as the *Law Quarterly Review*, the *Cambridge Law Journal* or the *Modern Law Review*. His name was not well-known to most students or to the judges or practising profession. The book changed all that. Before long, his dramatic and unique style of prose and his search for rational transparency were capturing the imagination of scholars, students and judges all over the world. As Professor Robert Chambers, a Canadian who was later to write a D.Phil. under Birks, has expressed it: 'I had never before encountered a book like it. Although I had received a good basic legal education, it was on a minor scale: an understanding of particular rules in particular contexts. No one had asked the big questions about the organisation of the law as a whole and the relationships between the constituent parts. No one had analysed the law with such clarity and logic.'⁵⁷

The book took the raw material of the law of restitution, painstakingly unearthed by Goff and Jones, and gave it a clear and readily understandable conceptual structure. This involved separating out three main questions. (1) Was the defendant enriched (the 'benefit' question)? (2) Was the enrichment at the claimant's expense (the 'at the expense of' question)? (3) Was the enrichment at the claimant's expense unjust (the 'unjust' question)? Each of those three questions was then linked back to the black letter law in the cases by clearly articulated, and freshly labelled, concepts.

So on the first question, because a defendant can 'subjectively devalue' objective benefits, it was important to establish either that the defendant had been 'incontrovertibly benefited' or that he had 'freely accepted' the benefit. In relation to the 'at the expense of' question, there was a fundamental division between the 'subtractive' and the 'wrongdoing' senses: and within the former, one needed to recognise 'interceptive' as well as direct subtraction. Finally, and most importantly, the unjust question was to be answered by the claimant establishing an 'unjust factor'. In respect of restitution for wrongs, the unjust factor was the wrong. For the bulk of restitution, where one was concerned with unjust enrichment by subtraction, the unjust factors were divided into three main types. First, and principally, there were unjust factors that vitiated or qualified the claimant's voluntariness or consent in making a transfer. These included mistake, compulsion, and failure of consideration. Secondly, there was

⁵⁷ 'Resulting Trusts' in *Mapping the Law* (n. 1), pp. 247, 248.

the unjust factor of 'free acceptance'. This meant that a defendant had stood by, allowing a benefit to be conferred on him, knowing that the claimant expected to be paid for it. Free acceptance was unique in operating both as an unjust factor and as a test of benefit. Finally, there were unjust factors which led to 'policy-motivated restitution'. These unjust factors were miscellaneous policies dictating restitution such as 'no taxation without Parliament' and 'discouragement of illegal conduct'.

It can be seen that the scheme, using fresh and analytically tight labelling, was logical, simple and clear. It covered both common law and equity and it enabled one to see easily how the 'generic conception' of unjust enrichment brought together, through a layer of more specific principles and concepts, the black letter law in the cases. For Birks, the unjust enrichment was 'downward-looking' in the sense that he saw it primarily as an organising tool for the existing law rather than as an 'upward-looking' principle for the development of the law.

Birks's willingness to use new precise language to explain what the judges were doing, even if they had not expressed it in the same way as he did, is a hallmark of his book and indeed of all his later work. Some critics disliked it, arguing that it produced a jargon understood only by those steeped in the Birksian scheme. In reality, while new, it was straightforward and illuminating language that cut through some of the traditional obscure terminology used by the judiciary. Time has proved those critics wrong, for much of his distinctive terminology is now in standard use not only among academics but also among judges and practitioners.

The devising of a new scheme for understanding this area of the law captured the imagination of many lawyers, for whom the necessary combination of traditional doctrinal skills and a pioneering spirit proved irresistible. There was a shared belief that a new subject was being created which the English judges would soon inevitably have to recognise. Birks captured the spirit of the times, with the following passage written on the fly-sheet of his book:

Restitution is an area of the law no smaller and no less important than, say Contract, Tort, or Trusts. A series of intellectual and historical accidents has, however, scattered its raw material to the fringes of other subjects. Homes have been found for it under dishonest or opaque labels; quasi-contract . . . constructive trust, money had and received, and so on. Dispersed in this way, Restitution has escaped the revolution in legal learning which has happened over the past century. It has been the age of the textbook. Successive editions have settled the case-law of other subjects into well-tried and now familiar patterns. The case-law of Restitution remains disorganized: its textbooks have only just begun to be written . . . It is the last major area to be mapped and in some

sense the most exciting subject in the modern canon. There is everything to play for.

Two features of the scheme stand out. The first is that the unjust question was answered by the claimant needing to establish an unjust factor. Birks saw this as the distinctive approach of the common law in contrast to civilian systems where, once it was established that there was an enrichment at the claimant's expense, restitution would follow unless the defendant could show that there was a 'juristic basis' for the enrichment. In this he was very much reflecting the approach in Goff and Jones and what he saw as a list of some unjust factors first referred to by Lord Mansfield in *Moses v Macferlan*.⁵⁸ The second outstanding feature is that unjust enrichment and restitution were two sides of the same coin. There was a 'quadrature' between them. Unjust enrichment did not generate any responses other than restitution. One could therefore refer equally appropriately to the law of restitution or to the law of unjust enrichment.

Once the book was published, and with his personal life now stable and happy, Birks's output of articles, case notes and essays on restitution soared.⁵⁹ He published his views, often almost immediately, on virtually every new restitutionary development; and areas of the law that had escaped his detailed attention in the book were now addressed in articles. It was as if he were on a missionary-like crusade to convert sceptics to the newly accessible, long-neglected, creed of restitution; and it was all tremendously exciting, not least because judges too had caught the restitutionary bug.

In 1989 he produced a revised paperback version of his book. Unusually, this was not a second edition. Rather, the original text was left untouched apart from the correction of an unseemly number of typographical errors. Perhaps not altogether successfully, changes in the law were collected in a series of endnotes.

Still awaited was a case that would enable the House of Lords authoritatively to recognise in England the new law of restitution based on unjust enrichment. The opportunity came, and was taken, in *Lipkin Gorman v Karpnale Ltd*⁶⁰ in 1991 with, fittingly, the leading speech being given by Lord Goff.

⁵⁸ (1760) 2 Burr 1005.

⁵⁹ Between 1987 and 1997 he published on restitution alone a book, some 14 contributions to edited books and some 38 articles and case-notes. See 'The Publications of Peter Birks' compiled by Eric Descheemaeker in *Mapping the Law* (n. 1), pp. 641–51.

⁶⁰ [1991] 2 AC 548.

From his deluge of publications in this period, there are two articles that merit special mention. The first was his masterly examination of the law on ‘knowing receipt’, as it had conventionally been called, in his 1989 article, ‘Misdirected Funds: Restitution from the Recipient’.⁶¹ This was a prime example of the force of his analytical and analogical reasoning in creatively linking together apparently disparate cases in common law and equity. A restitutionary analysis of this area had not been attempted previously, but the article showed for the first time that, whatever other claims there might be, at the core of the facts in a knowing receipt case is the defendant’s unjust enrichment at the claimant’s expense, with the unjust factor being ignorance. Hence there was no good reason for insisting on fault-based liability. Rather, the facts were analogous to a mistaken payment and logic dictated that, as with that central restitutionary claim, liability for the receipt of misdirected funds should be strict, subject to protecting the recipient by recognising a change of position defence. Although English law still does not recognise that the recipient of misdirected funds should be strictly liable to make restitution, Birks’s thesis has been essentially accepted by eminent judges writing extra-judicially.⁶² It seems only a matter of time before it will be accepted authoritatively by the courts.

A second article of especial importance was his contribution to a seminar on Restitution organised by Professor Paul Finn in Canberra in September 1989. Birks’s essay, ‘Restitution from the Executive: a Tercentenary Footnote to the Bill of Rights’,⁶³ boldly argued that a citizen was entitled, as of right, to restitution of money demanded *ultra vires* by a public authority. At the time when he wrote, *Woolwich Building Society v IRC*⁶⁴ had reached the Court of Appeal. The reversal of the decision by the House of Lords owed much to the Birks essay, as Lord Goff generously acknowledged in the leading speech. The decision in *Woolwich* therefore constituted a rare example of judges and jurists working very closely together to produce a significant advance in the common law. Birks believed passionately in co-operative enterprise and that belief lay behind the series of Saturday seminars on various subjects, and involving academics, judges and practitioners, which he selflessly organ-

⁶¹ *Lloyd’s Maritime and Commercial Law Quarterly*, [1989] 296–341.

⁶² See, e.g., Lord Nicholls, ‘Knowing Receipt: The Need for a New Landmark’ in W. R. Cornish *et al.* (eds.), *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (Oxford, 1998), pp. 231–50.

⁶³ P. Finn (ed.), *Essays on Restitution* (North Ryde, NSW, 1990), pp. 164–205.

⁶⁴ [1989] 1 WLR 137, CA.; [1993] AC 70, HL.

ised in All Souls under the aegis of the SPTL.⁶⁵ Although he was too modest to see it in these terms, *Woolwich* was a glorious triumph for him.

Two further publications from his prodigious output in the early 1990s should be highlighted. The first was his short book, *Restitution—The Future*, which was largely conceived and written while he was visiting Australia and Hong Kong in 1990 and 1991. It pulled together developments in Birks's thinking on some central themes in the law of restitution. In particular, we see, in the first chapter, Birks forging an ever sharper distinction between restitution of unjust enrichment ('In time, this is what will be called, for short, Unjust Enrichment')⁶⁶ and restitution for wrongs.

The second of these publications was his initial analysis of the swaps cases that were to dominate restitutionary litigation in England from 1993 to the end of the decade and were not only to be a rich source of interest for academics but were also to lead to several important developments in the law (especially the removal of the mistake-of-law bar). Writing in 1993,⁶⁷ Birks criticised the idea, put forward at first instance by Hobhouse J in *Westdeutsche Landesbank Girozentrale v Islington BC*,⁶⁸ that 'absence of consideration' was an unjust factor. He argued that that was merely masking the truth that restitution was being granted for mistake or failure of consideration. As something of an afterthought he added to footnote 137 a comment to the effect that mistake could not justify restitution in a 'closed swap' (fully executed on both sides) because the effect of the mistake had by then been spent and there was no prejudice to the payor. By now Birks was held in such high esteem that when the first swaps case—the *Westdeutsche* case—reached the House of Lords, their Lordships spent a considerable time discussing that footnote before ultimately rejecting it.⁶⁹

The early and mid-1990s were golden years for Birks. Restitution was the sexy academic subject in English private law and new case law was coming thick and fast. Birks was at the centre of it all. His ideas were being debated not only on the BCL and in other courses around the globe but also in the courts. In 1995 his importance to the world of practice was appropriately recognised by his appointment as an honorary Queen's

⁶⁵ The contributions were published in various volumes which Birks edited for the Oxford University Press, e.g. *The Frontiers of Liability*, vols. 1 and 2 (Oxford, 1994).

⁶⁶ *Restitution—The Future* (Annandale, NSW, 1992), p. 2.

⁶⁷ 'No Consideration—Restitution after Void Contracts', *University of Western Australia Law Review*, 23 (1993), 195–234.

⁶⁸ [1994] 4 All ER 890.

⁶⁹ [1996] AC 669.

Counsel. Catching the mood, Birks persuaded Francis Rose to set up a new journal dedicated to restitution, the *Restitution Law Review*. The first edition was published in 1994 and contained Sir Peter Millett's article on the restitution of bribes which was almost immediately cited by the Privy Council in *Attorney General for Hong Kong v Reid*⁷⁰—something of a record for a new publication. Some academics found all the attention being paid to the law of restitution difficult to understand. It was predicted by some—inaccurately as it turned out—that it was a South Sea Bubble that was about to burst.

More seriously, Birks's work attracted fierce critics, the most vociferous of whom was Steve Hedley, then a don at Cambridge, who derided Birks and those who supported him as rule-formalists seeking to impose unnatural order on open-textured legal reasoning.⁷¹ Birks met such criticisms head-on and continued to argue the case for rational transparency and coherence in the law with his unique brand of learned, logical and passionate argument.

(3) The 'misnomer' and 'multi-causality' adjustments (1997– 2001)

Birks had always been deeply interested in the taxonomy of the law. Gaius' Institutes had been instrumental in drawing him to restitution⁷² and he increasingly found inspiration from modern civilian law, especially the law of Germany, where matters of doctrinal classification were taken much more seriously than had been usual in the common law system. So it was that, looking across English private law as a whole, he became convinced that the fundamental division he had drawn between restitution for unjust enrichment and restitution for wrongs meant that the two were not best regarded as part of the same subject. The 'generic conception' of unjust enrichment cut across what he had come to regard as the crucial and illuminating division between 'events' that happened in the world and legal 'responses' (by the creation of rights) to those events. Unjust enrichment was an event. Restitution was a response. The traditional way of classifying the law—and for Birks the best way—was by event. Increasingly his writings came to emphasise a four-fold categorisation of events in English private law into 'consent, wrongs, unjust enrich-

⁷⁰ [1994] 1 AC 324.

⁷¹ See, e.g., 'Unjust Enrichment', *Cambridge Law Journal*, 54 (1995), 578–99.

⁷² See the text accompanying nn. 37–42 above.

ment and others'.⁷³ Responses, in contrast, included compensation, punishment and restitution.

Moreover, Birks came to the view that it was incorrect to regard restitution as triggered only by unjust enrichment and wrongs. Rather, restitution could be triggered by consent (as where one promises to pay back a loan that one has received) or by other miscellaneous events.

In the light of these developments in his thinking, two vital adjustments were needed to the scheme set up in *An Introduction to the Law of Restitution*.

First, the name of the subject, and of the book, was incorrect. As an independent subject, it was the event of unjust enrichment that one was concerned with, not the response of restitution. The subject should therefore be called 'unjust enrichment'. Originating in the United States *Restatement of Restitution* in 1937, and followed through by Goff and Jones and by himself, restitution had been the wrong choice of name.

Secondly, unjust enrichment and restitution did not quadrate. His 'quadrature thesis', described in section (2) above, was misleading and should be abandoned. Although unjust enrichment triggered only restitution, restitution was 'multi-causal' and could be triggered by consent, wrongs and a variety of other events as well as by unjust enrichment.

In 1997 a conference was held in Cambridge to mark the imminent retirement of Professor Gareth Jones. Birks chose that occasion, packed with 'restitution lawyers', not least Goff and Jones, to present the two major adjustments to his scheme in his paper 'Misnomer'.⁷⁴ Those who attended the conference will recall the dramatic impact of Birks, now the guru of the subject, passionately arguing that, along with just about all those present, he had been talking about the wrong subject. It is hard to disagree with Mitchell McInnes's nomination (at the meeting of the Society of Legal Scholars in 2003)⁷⁵ of 'Misnomer' as the most important article on the law of restitution of the previous decade.

Many could not see that these adjustments really mattered. Surely this was all a question of terminology? There were mutterings that Birks was becoming too obsessed for his own good with taxonomy. After all, we all knew what we meant by the law of restitution. However, for Birks correct

⁷³ This four-fold classification was actually first put forward by him when discussing rights *in rem* in *An Introduction to the Law of Restitution*, p. 53. For the full picture of his thinking on this, see e.g., his Introduction to *English Private Law* (Oxford, 2000), xli–xlii, and *Unjust Enrichment*, 2nd edn. (Oxford, 2005) ch. 2.

⁷⁴ In *Restitution: Past, Present and Future* (n. 62), p. 1.

⁷⁵ M. McInnes, 'Misnomer: a Classic', *Restitution Law Review* [2004], 79–95.

classification was essential to orderly reasoning. It mattered a great deal that one's concepts were accurately and precisely labelled. Muddle and confusion would otherwise follow and, in turn, incorrect decision-making, even if only occasionally, would be the inevitable consequence. If the map was wrong, it had to be redrawn before someone got lost.

In the publications which followed that article, as he had done in the previous period, Birks took every opportunity to preach the merits of the 'multi-causal misnomer' message in the context of his 'consent, wrongs, unjust enrichment and others' picture of the events triggering rights in English private law. Indeed, branching out from unjust enrichment, his wider map of English private law led on to the ambitious project of producing a multi-authored two-volume overview of the principles of English law, structured in line with a classification that had its roots in Gaius' Institutes. Published under his general editorship in 2000, *English Private Law* (and its sister volume *English Public Law*) is a magisterial work that deserves wider acclaim than it has so far been afforded.

One other development in his thinking on unjust enrichment during this period is also worthy of mention. 'Free acceptance' as an unjust factor had been controversial from the outset and had been attacked by several academics. Having initially tried to defend it as based on 'unconscientious receipt', Birks came to think that it was best confined to its role as a test of benefit. This broke the final link with his early idea of 'weak quasi-contract'.⁷⁶ All the law of unjust enrichment except 'policy-motivated restitution' was 'claimant-sided' and sharply distinct from liability based on the will of the defendant. Abandoning free acceptance made the scheme of *An Introduction* even more elegant and straightforward: unjust factors either went to non-voluntariness (you must repay because 'I didn't mean it') or were policy reasons (you must repay because 'Mother says so').⁷⁷

The most refined statement of Birks's adjusted scheme for unjust enrichment and its relationship to restitution was set out in six lectures which he gave as Visiting Fellow at Wellington in 1999 and published as a short book, *The Foundations of Unjust Enrichment*, in 2002.

One particular jurisdiction that Birks thought it important to try to convert to his adjusted scheme was the United States. After decades of neglect, work had begun on a new *Restatement of Restitution* under the

⁷⁶ See above section 1, Early exploration.

⁷⁷ For Birks's use of this nursery language, to stress how simple his scheme was, see P. Birks and R. Chambers, *The Restitution Research Resource*, 2nd edn. (Oxford, 1997), p. 2.

leadership of the chief reporter, Professor Andrew Kull. In 2001 a conference was convened in Texas largely, it would seem, to enable Birks to argue his case, which he did with customary vigour in his paper 'Unjust Enrichment and Wrongful Enrichment'.⁷⁸ This was followed a couple of years later with 'A Letter to America'.⁷⁹ It was a disappointment to Birks that those responsible for the *Restatement* did not accept his arguments or at least did not think that they were sufficiently crucial to necessitate the abandonment of language that had been used ever since the first *Restatement*. It seems likely that the only concession to Birks's thinking will be to adjust the title of the *Third Restatement*⁸⁰ so that it includes both restitution and unjust enrichment. For Birks that would have represented an unsatisfactory muddle.

(4) The civilian conversion (2003–5)

One might have thought that Birks's adjustments to the scheme in *An Introduction* were dramatic enough. They were to be dwarfed, however, by the final stage of the Birks story. At one time he had been contemplating putting together a large practitioners' textbook. Instead, he decided to write a book, in the Clarendon Law Series (of which he had become the general editor), but under what he now saw as the correct title of 'Unjust Enrichment'. It would appear that he initially intended to set out his adjusted scheme along the lines of *The Foundations of Unjust Enrichment* (the short book referred to above). Comparative law would be used to show how the common law 'unjust factors' approach and the civilian 'absence of basis' approach reached similar results. However, in the course of writing the book in 2002 and 2003, Birks became convinced that a version of the civilian approach was better and more truly explained the cases than did the unjust factors scheme that he had spent the best part of thirty years perfecting. So it was that he announced himself a convert to 'absence of basis'. Indeed—and not necessarily correctly—he went further and argued that in the swaps cases the English courts had already switched to that approach. In his now famous, or infamous, preface to the first edition of *Unjust Enrichment*, published in 2003, we see him facing up squarely to the enormity of his change of sides:

⁷⁸ 'Unjust Enrichment and Wrongful Enrichment', *Texas Law Review*, 79 (2001), 1767–94.

⁷⁹ *Global Jurist Frontiers*, 3 (2003).

⁸⁰ This is due for completion in 2010.

Almost everything of mine now needs calling back for burning. St Paul was relatively lucky. In one flash of blinding light he knew that he must change sides. In the university the awful sense of having been wrong comes on more slowly and with it the still more awful realization that one must befriend those whom one has persecuted and persecute those who are one's friends. But universities are for getting to the bottom of things, come what may. Public apostasies may ruin a reputation and thus cost a merit point or two, but that cannot be helped. I dare not say that I am finally error-free, but in my view, for whatever it may still be worth, this butterfly, although it could certainly have been better depicted by another hand, is very beautiful and its emergence from the chrysalis of restitution is something to celebrate.

The book displays all the great features of Birks's writings: original ideas, depth of learning, rigorous reasoning and clarity of vision—and all in his unique succinct style of prose. In the months following publication, he continued to work on, and to refine, his new ideas, defending them with characteristic robustness not only in his BCL seminars but also at a specially convened academic symposium in Oxford in January 2004.⁸¹ As we have seen,⁸² this led to his decision that, despite ever-failing health, he must produce a slightly revised version of the new scheme. So it was that, a few days before his death, he completed a second edition that was published posthumously in 2005.

It remains to be seen whether the new Birksian scheme will be accepted by the courts. At the time of writing, academic argument rages over whether Birks Mark 2 (the 'New Testament') is to be preferred to Birks Mark 1 (the 'Old Testament').⁸³ In particular, 'absence of basis' can be criticised as superficially elegant and simple but as in practice throwing up a range of difficulties that are not encountered, or have already been solved, on the 'unjust factors' approach. As Professor Rose has written, 'The book is a cliff-hanger. Only time will tell whether this new world has been correctly predicted or will be built along these lines. If it is not, we shall never know whether theory might have been turned into practice by the force of Birks's intellect and personality.'⁸⁴ Certainly, past experience shows that Birks would have followed up the book with a torrent of articles and notes as he sought to explain further (and, yes, to refine still more) his new approach. He would perhaps have taken heart from *obiter*

⁸¹ The papers were published in *Restitution Law Review*, [2004], 260–89

⁸² At the end of our account of his career.

⁸³ These are labels commonly used by those teaching on the BCL Restitution course.

⁸⁴ 'The Evolution of the Species' in *Mapping the Law* (n. 1), pp. 13, 29.

dicta of Lord Walker of Gestingthorpe in the recent major restitution case, *Deutsche Morgan Grenfell Group plc v IRC*.⁸⁵ In paying fulsome tribute to Birks's contribution to the law of restitution, Lord Walker expressed tentative support for drawing the common law and civil law approaches together, using 'no basis' as a single unifying principle.⁸⁶

Birks had an enormous impact on the law of restitution/unjust enrichment both in the universities and in the courts. Nevertheless, it is strongly arguable that his legendary reputation suffered because of his willingness to change his views. For example, at least one eminent judge, who greatly admired Birks, indicated nervousness about applying his opinions lest he should later depart from them, leaving the judge stranded. Birks recognised the problem but saw it as a necessary evil on the way to a better version of the truth. After all, he was an academic with a markedly different role from that of a judge—even though he greatly supported co-operation between judge and jurist. One wonders, however, whether at times his drive for clarity and his excitement at discovering and teaching new insights led him to overstate his changes of mind. In other words, if one stands back and looks at his work in this area as a whole, the changes are perhaps not as dramatic as Birks portrayed them to be. It is at least arguable that they were, by and large, incremental developments from, rather than reversals of, previously espoused positions. So it was that his early scheme, of strong and weak quasi-contract, led through to his unjust factors scheme which led in turn to his version of 'absence of basis'. It might have been possible for Birks not to risk losing the faith of the judges in the co-operative enterprise by presenting his final enthusiasm for the civilian approach as a development of the scheme of unjust factors rather than as a rejection of them. Indeed, although it is not reflected in the tone elsewhere, in one part of his book⁸⁷ he did try to set out a 'limited reconciliation' using the image of a pyramid with unjust factors at the bottom and 'absence of basis' at the top.

Birks was a truly great scholar. Apart from the advances that he himself made, his work inspired many other academics to follow in his footsteps. The 'Birksian school of thought' has pursued, and will continue to pursue, rational transparency and elegant coherence in legal reasoning not only in the law of restitution but across English private law generally.

⁸⁵ [2006] UKHL 49, [2006] 3 WLR 781.

⁸⁶ At para. 158. See also Lord Hoffmann at paras. 21 and 28.

⁸⁷ *Unjust Enrichment*, p. 116.

That is his greatest legacy and the one for which he would most have wanted to be remembered.

ALAN RODGER

Fellow of the Academy

ANDREW BURROWS

Fellow of the Academy

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