MAPPING THE LAW

Essays in Memory of Peter Birks

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Edited by
ANDREW BURROWS
and
LORD RODGER OF EARLSFERRY

OXFORD
UNIVERSITY PRESS

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UNIVERSITY PRESS
Great Clarendon Street, Oxford OX2 6DP
Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide in
Oxford New York
Auckland Cape Town Dar es Salaam Hong Kong Karachi
Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi Shanghai Taipei Toronto
With offices in
Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary Italy Japan Poland Portugal Singapore
South Korea Switzerland Thailand Turkey Ukraine Vietnam
Oxford is a registered trade mark of Oxford University Press
in the UK and in certain other countries
Published in the United States
by Oxford University Press Inc., New York

First published 2006

British Library Cataloguing in Publication Data
Data available
Library of Congress Cataloging in Publication Data
Data available
Typeset by Newgen Imaging Systems (P) Ltd, Chennai, India
Printed in Great Britain
on acid-free paper by
Biddles Ltd, King's Lynn, Norfolk
ISBN 0–19–920655–4 978–0–19–920655–1
1 3 5 7 9 10 8 6 4 2

Biographical Outline of Peter Birks 1941–2004

Educated at Trinity College, Oxford, and University College, London

Degrees and Honours

MA (Oxon), LLM (Lond), DCL (Oxon), LLD (Edinburgh)
Fellow of the British Academy, 1989
Fellow of the Royal Society for the Encouragement of Arts, Manufactures and Commerce, 1992
Fellow of University College London, 1993
Elected to Membership of Accademia dei Giusprivatisti Europei (Academy of European Private Lawyers), 1994
Honorary Fellow, Trinity College, Oxford, 1994
Queen's Counsel (honoris causa) 1995
Doctor of Law (honoris causa) Regensburg, 1996
Doctor of Law (honoris causa) De Montfort, 1999
Foreign Member, Royal Netherlands Academy, 2001
President of the Society of Legal Scholars, 2002–3
Doctor of Law (honoris causa) Nijmegen, 2003

Chronological Outline of Academic Career

Teaching Associate, Northwestern University Law School, 1964–5
Lecturer, University College London, 1967–71
Law Fellow, Brasenose College, Oxford and, concurrently, CUF Lecturer (Law), University of Oxford, 1971–81
Professor of Civil Law, University of Edinburgh, 1981–8
Professor of Law, University of Southampton, 1988–9
Regius Professor of Civil Law, University of Oxford, and Professorial Fellow of All Souls College, Oxford, 1989–2004

Visiting Posts

Mallesons Stephen Jacques Visiting Professor, Australian National University, 1989
Visiting Scholar, Albert Ludwigs University, Freiburg-im-Breisgau, 1992
Wisselleerstoelhouder, Catholic University of Nijmegen, 1994–96
Visiting Scholar, University of Western Australia, 1993, 1995
Distinguished Visitor, University of Hong Kong, 1991, 1995
Distinguished Visitor Academy of Law, Singapore, 1995
University of Auckland Research Foundation Scholar, 1997
Miegunyah Distinguished Visitor, University of Melboume, 1998
Centennial Visiting Fellow, Victoria University, Wellington, 1999
Visiting Professor University of Texas at Austin, 2000
Professor of Anglo-American Law, University of Leiden, 2001–2004

Addresses given at the Memorial Service for Peter Birks on 20 November 2004 in the University Church of St Mary the Virgin, Oxford

First Address (given by Andrew Burrows)

As I was taught by Peter Birks and taught with him, I have been asked to say some words about Peter as a teacher and as a colleague here in the Oxford Law Faculty.

I first met Peter thirty years ago when I came to Brasenose for my Oxford entrance interview. He was interviewing with the senior law tutor at BNC, John Davies, who, in customary fashion, began the interview by trying to relax me with some general questions. Peter said nothing during those first ten minutes but I was very conscious of him sitting restlessly on the settee. Then suddenly, pushing his hand back through the mop of hair that he then had, he said this, 'I am a Roman barber. I have set up stall in an open square. As I am shaving the beard of a customer, my hand is knocked by a ball kicked by boys playing nearby and I slash the face of my customer. Should I, the barber, have to pay compensation to the injured customer?' I cannot recall what answer I gave but I vividly remember the feeling of nervous excitement as whatever I said and whichever way I turned Peter was there firing another variation at me as we explored aspects of negligence and causation and volenti.

Tutorials in Brasenose with Peter engendered similar feelings of excitement tinged with fright. Peter was so passionate about the subjects he was teaching and so anxious for his students to share in the enterprise of constructing clear and elegant pictures of the law. But it could be nerve-racking because he would sometimes ask fiendishly difficult questions and expect us to come up with acceptable answers. Many people here may remember the grandfather clock that he had in his room. It had a very loud tick and Peter would ask these questions and we would sit in silence sometimes for several minutes with just the clock ticking away while Peter waited for us to come up with some sort of answer that he could use to guide us further towards the truth. He was also a meticulous marker of essays. Earlier this week I found one of my tutorial essays entitled 'The Relationship between the Doctrine of Consideration and the Doctrine of

Promissory Estoppel'. In typical Peter style there is half a page of tightly written comments at the end, which begin, 'Very Good but Fundamentally Flawed'.

When I returned to Oxford as a Tutorial Fellow it was a particularly great privilege to teach with Peter on the Restitution postgraduate BCL seminars (which I had attended as a student a decade earlier when being run by Peter and Jack Beatson). By now Peter had become the Regius Professor of Civil Law and, following on from the great pioneering work of Robert Goff and Gareth Jones, he had published his seminal book *An Introduction to the Law of Restitution*. Lord Rodger will be saying more about Peter's scholarship but it is noteworthy here that, for Peter, research and teaching complemented each other so that it was natural for him to continue to use the Restitution seminars to develop his published views. Those seminars constituted the most rewarding experience as a teacher that I have ever had. And it was all down to Peter. He assumed that the students had carefully read the cases on the reading list and knew what the judges had said; and Peter would take it on from there, provoking and challenging them with his latest interpretations and forever being able to cut through the detail with a masterly, decisive, crisp explanation. At times the depth of Peter's knowledge was simply breathtaking. He could move seamlessly from the latest case through English Legal History to Roman law to German law. In Peter's legal world there was no place for misleading labels and fictions and so it was that, in those seminars, we first heard the new precise language that so permeated Peter's work: unjust factors, subtractive enrichment, stultification, disimpoverishment, and so on. What was being discussed was at the cutting edge of the law and many of Peter's views as to what the law was, or what it ought to be—which was just about the only distinction that he did not draw sharply—have subsequently become law. Of course, Peter was never afraid to change his mind in the search for an ever more precise and stylish picture of the law so that as one came to the seminar one could never be sure what he was going to say. Indeed it was possible for what was indisputably correct one year to be indisputably incorrect the next—and vice versa. That all added to the fun. It was a two-hour seminar. We never had a break and we always ran out of time. Peter adored it and the students adored him. It is no surprise that many came to Oxford primarily to attend his seminars and that many went into academia, or out into practice, preaching the Birksian message of the importance of clear classification and of transparent rationality in the law.

Peter was not only a gifted teacher. He was an inspirational and dedicated doctoral supervisor, as several here today will testify. He regarded a DPhil as a joint project in which there was as much for him to learn as for the supervisee. It is a humbling experience to see in his rooms at All Souls a shelf laden with the bound theses of his many doctoral students.

Peter was a warm and entertaining companion but I am not sure he ever really switched off from thinking about law or legal matters. When they were under nines, his son Theodore and my oldest son played in the same football team. I was once acting as linesman in a match but that didn't stop Peter expecting me

to explain, as I was trying to concentrate on the offsides, when, if ever, you could refuse restitution because of a change of position that was not a disenrichment. I also remember going round to Peter's house in Boar's Hill one Sunday lunchtime to drop off a book. Peter was there under the trees in the garden working away with a rake and looking very relaxed. As he saw me he came over and said, 'I've had a really good hour's gardening. I've sorted out *Boulter v Barclays Bank*. The Court of Appeal has definitely got the burden of proof point wrong.'

Never attracted by practice, Peter regarded working in a university law school as a privilege in enabling one to search for the truth unhindered by the demands of clients or the fear of falling out with an employer. In the Oxford Law Faculty, as well as being our intellectual leader, he worked tirelessly and selflessly for the faculty's well-being. He would respond with an unconditional yes to any request to take on extra teaching or an administrative task or supervision. In addition to serving on many other committees, he was twice Director of Graduate Studies (Research), three times Chairman of FHS or BCL examiners, Chairman of the Management Committee at the Centre for Socio-Legal Studies, the person behind the Clarendon Law Lecture Series now in its tenth year, and, taking huge amounts of his time and energy over several years, he was the driving force behind the creation in 1994 of the Oxford Institute of Legal Practice and was still Chair of its Board of Studies until a few weeks before he died. And it is not as if he did these jobs in a token way. On the contrary, he threw himself into them and often spearheaded important and lasting reforms.

There have been many great figures in the long and distinguished history of the Oxford Law Faculty. But surely no one has combined the roles of teacher, supervisor, administrator, and scholar with such brilliance and such passionate commitment as Peter Birks.

There are many here today who became academic lawyers because of Peter and many others whom he helped in some way through his work. We are so grateful to him for being our mentor, our generous friend, and our inspirational colleague.

I want to conclude by reading a small extract from the cover of his *Introduction to the Law of Restitution*. Over the years, I have read this extract to students both here and abroad and although Peter would not express it in quite the same way today—in particular, he would be referring to the law of unjust enrichment rather than the law of restitution—this passage will for me be a poignant reminder forever of Peter's passion and enthusiasm for the subject and indeed for the study of law generally.

> 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.

Second Address (given by Alan Rodger)

We are here to give thanks for the life of Peter Birks. In the short time available it would be impossible to outline his career, far less all his achievements. But it is scarcely necessary to do so, since most of the story is well known to this congregation, if only from the two excellent obituaries which appeared shortly after Peter's death in July. In any event, we have come here from far and wide because Peter was one of the best loved, as well as one of the most distinguished, scholars in the history of the Oxford Law Faculty. What we are trying to capture today are some of those qualities that made him so.

Inevitably, on a University and College occasion such as this, the focus is on *iura virumque*, laws and the man. The double aspect is not inappropriate since the qualities that shaped the private man were essentially those that made the academic lawyer. First and foremost, Peter was a man of passions. For that reason, his public career could never have been one of smooth progress against the background of a serene and ordered private life. Rather—as Peter would readily acknowledge—until his late thirties, his relationships often seemed to bring more misery than happiness both to himself and, unfortunately, to those around him. Inevitably, that misery took its toll. But, in 1979, just when he was at his lowest ebb, he met Jackie; and, at a stroke, his life changed. Or, as he put it more passionately, in the words from *Fidelio* that he used in dedicating his Restitution book to her: 'Your faithfulness has saved my life'. Peter believed that, quite literally. His life began anew; Peter and Jackie married on 29 October 1984—significantly enough, the notional date that he gave to the preface to *Restitution*. In due course, Theodore was born. No doubt, Peter's family still had to make sacrifices, but, for the rest of his days, his home life was supremely happy and secure. With this dramatic change, his academic life too could flourish as never before. Even Jackie might admit that the statistics go far towards proving the point: in the 11 years from 1969 to 1980, Peter published 13 items; in the following 11 years, from 1981 to 1992, he published 52. Doubtless, the advent of computers also had something to do with the upsurge. The early printers, spewing forth lengths of faintly printed text, gave terrifyingly concrete form to Peter's enthusiasms. Six feet on the intricacies of Roman procedure could be daunting, to say the least.

From the outset, Peter had no doubt about his vocation as an academic lawyer. Not for him the temptations of practice: though he was delighted to be made an honorary QC in 1995, he had never qualified as a solicitor or barrister

and it did not cross his mind that he might be better as a practitioner or sitting as a judge. He had no desire to concoct arguments that might serve the needs of the hour or of some particular client. This did not mean that he underestimated the role of litigation or of the courts. On the contrary, he always insisted that 'the law was an intellectual and academic discipline which derived its autonomy, its difficulty and its satisfactions from its focus on litigation and, ultimately, adjudication'. But he wanted to take part in that difficult intellectual and academic discipline, rather than in the underlying litigations or adjudications. With this unclouded perception of his role, Peter did not suffer from the kind of inferiority complex that, at one time, crippled academic lawyers in this country. Let practitioners practise and judges judge; academics had their own job to do. And for Peter that job was, ultimately, more important than the others.

Not only more important, but more enjoyable too. Peter simply loved what he did. If he could never really see the point of taking holidays and was bad at the so-called work–life balance, this was because he was far too busy enjoying himself, in the congenial surroundings of Brasenose or All Souls, working with friends who happened also to be his colleagues and pupils. His ability to transmit this enjoyment to others was central to his success. He made any project seem not only worthwhile but enormous fun. Why did even hung-over young men and women prise themselves from their beds to attend the restitution classes which he loved to schedule, quite deliberately, for the early morning? Surely, because, under his leadership, the classes were both the most rigorous, and the most enjoyable, show in town. There were jokes galore but, above all, a feeling that the participants were lucky to be spending a couple of hours engaged together on an unendingly fascinating exercise. Similarly, more often than not, letters or, latterly, emails on a matter of business would contain a devastating aside on some absurdity or pomposity that had caught his eye. If you found yourself sitting near Peter at dinner, you knew that an entertaining evening was in prospect.

There was more to it than that, however. Like Justinian—not a comparison he would have permitted—Peter believed that there is a *cupida legum iuventus*, that there are young people eager to learn the law. Teaching, whether in Oxford or elsewhere, was therefore not a chore, but an opportunity to engage with them. He regretted not having been able himself to study full-time for a higher degree. In compensation, he was a devoted supervisor of his DPhil students, tirelessly questioning and probing but, above all, encouraging. His reward was a succession of fine theses which turned into important books. To his intense pride, his pupils went on to distinguished careers in practice and in universities throughout the Commonwealth and beyond. For instance, in Germany you constantly come across successful young lawyers who delight in recalling his restitution classes. It is no accident, either, that Peter received honorary degrees, for example, from Nijmegen and Regensburg. By his teaching, as well as his writing, Peter maintained and spread the influence of Oxford. And if in his approach one could sometimes detect imperial echoes, Peter was, after all, a son of the Raj. Indeed,

while, to his regret, the sun might be setting on the Privy Council in Downing Street, Peter was a kind of one-man Privy Council, welcoming the contributions of scholars and courts everywhere, but aiming to bring order and reason to the common law throughout the world. Outbursts of legal nationalism, whether in Scotland or in the far Antipodes, he treated with particular contempt, precisely because he saw them as introducing essentially irrational considerations into an area where they had no valid role to play.

Although Peter is best known for his work on unjust enrichment, his first love was Roman Law, which he learned in lively discussions with his tutor at Trinity, the charismatic John Kelly. At University College London the ebullient Tony Thomas encouraged his interest in the subject, and most of his early published work was on Roman Law. His Roman Law articles have many of the hallmarks that distinguish his work on English Law: a refined sensitivity to language and a concern with the precise wording of the pleadings, with what the parties would have said in court and, more generally, with the procedures that they used. Most importantly, perhaps, when the judges came to decide the cases, where did they find the law in the days before it was written down? In all this, the influence of English legal historians, especially Toby Milsom and Sir John Baker, is unmistakable and it gave Peter's work on Roman Law its distinctive character.

For Peter, at least, there was nothing strange in applying insights from English legal history to Roman Law. For instance, his fascination with fictions in both systems meant that, when, in 1983, he was shown the text of the recently discovered *Tabula Contrebiensis* from first century BC Spain, he immediately spotted—what other scholars had missed—that the second of the two formulae contained a remarkable and sophisticated fiction. Peter's insight proved to be the key to unravelling the inscription. And perhaps the key to unravelling Peter's career and his understanding of the role of the Regius Professor of Civil Law lies in his belief—which had also been the belief of Rudolf Jhering—that, fundamentally, Roman and English lawyers were doing the same kind of work—work, besides, which only trained lawyers could do. So, as Peter liked to remark—if not rebuked by the Lord Chief Justice for using Latin—Ulpian could sit in the appellate committee of the House of Lords on Monday morning, whereas, not being a lawyer, even so omniscient a Roman historian as Sir Ronald Syme could not. The study of Roman Law was therefore an essentially legal pursuit not remote from, but complementary to, the study of modern law, and vice versa. Peter's work on Roman Law flowed into his work on English Law.

Contrary to what is sometimes suggested, Peter's concentration on modern law in his more recent publications did not mean that his enthusiasm for, or commitment to, the study of Roman Law had diminished. A moment's conversation with him would have exploded that myth. Moreover, his unfulfilled ambition was to write a history of the Roman law of delict, for which he had prepared the way in a series of penetrating articles on the Lex Aquilia. But,

although Peter loved the countless intellectual puzzles to be found on every page of the Digest, he was not seduced by them. He, at least, never doubted that the importance of Roman Law for university education today lies in the Institutes of Gaius and Justinian, which offer a unique overview of the grammar of a legal system—the distinctions between property and obligations, between ownership and possession, etc. In Peter's judgment, only Barry Nicholas's *Introduction to Roman Law* could provide some of the same necessary insights. But the Institutes were the genuine article and so, along with Grant McLeod, Peter produced a marvellously readable translation of Justinian's version.

Peter loved the (true) story of the Scottish advocate who said to the judge in an insolvency case, 'Speaking personally, I have never seen much difference between rights *in rem* and rights *in personam*'. The story appealed to him because it demonstrated so clearly the pitfalls which lie in wait for lawyers, even intelligent lawyers, who have never had an opportunity to absorb the basic concepts. Hence Peter's very real concern about the proliferation of conversion courses, which profess to turn botanists into lawyers in the space of a year. Of course, when friends screwed up their courage to confess to him that their son or daughter had actually embarked on one of these courses, Peter tended to say, 'Oh, well, Sophie's different: I'm sure it will be all right in *her* case'. But he felt real anger—bitterness would not be too strong a word—at what he saw as the unthinking way in which, with the connivance of the profession, English law faculties had abandoned the study of Roman Law and so had deprived their students of the insights which that study offered. Even his beloved Oxford had taken a step in the same direction while he was on sabbatical leave in Freiburg. In Oxford Peter could, and did, fight relentlessly, and successfully, to maintain the position of Roman Law. He did so, not out of any selfish motive, but because he believed, with every fibre of his being, that today's students, just as much as their sixth-century counterparts, deserve the best possible start to their legal lives.

As early as 1971 Peter devoted a paper to the group of quasi-delicts in Roman Law. This is surely one of the dreariest topics known to man and one which not even Peter could really cheer up. In his view, however, it was a current legal problem deserving our attention, because it related to the manner in which a great legal system classified obligations. Years later, Peter felt unable to acquit his hero, Gaius, of responsibility for introducing the vocabulary of quasi-contracts and quasi-delicts, but he added, in mitigation, that Gaius probably did not expect 'them to do two thousand years of taxonomic service'. In the 1971 article we find a throwaway line that quasi-contractual obligation 'should be based on the redress of unjust enrichment'. In those few words one can already detect the beginnings of his thinking on restitution or, as he later came to see the subject, unjust enrichment.

At the very core of his revolutionary work on this subject lay questions of classification or taxonomy. Jackie introduced him to some undergraduate texts on taxonomy in the natural sciences and reminded him of Darwin. Soon his

articles and books began to be peopled, so to speak, with aquatic and herbivorous animals, as well as wolves, dingos, labradors, and six other breeds of dog. Those of us who had tended to skip over such abstract issues soon found ourselves confronted with grids, boxes, and maps, which were subtly revised as publication followed publication. Where was it all going?

The answer was that it was eventually going to end in a fundamental reassessment of Peter's own work on the English law of restitution. Nothing could better illustrate the importance which he attached to these issues of classification. For him the classes which he so painstakingly identified were not mere inventions which one could apply or not apply to the law, at will. Rather, for Peter, when Gaius set out the classifications, he was in effect giving the results of a discovery which he had made about the nature of legal systems. That discovery had indeed been imperfect, especially so far as unjust enrichment was concerned. Peter's aim, therefore, was to go further. Eventually, he reached a point where he had to change the entire focus of his work from the response of restitution to the event of unjust enrichment. That done, he set out to show how the obligation to reverse an unjust enrichment operated in English law. At first, he thought that English law worked differently but, under the pressure of the arguments of one of his restitution pupils, Dr Sonja Meier, a German lawyer, he came to believe that this could not be so and that the 'no basis' approach had to be followed in English law too. Moreover, he thought that, coincidentally, the courts had in effect reached the same position in the swaps cases. Hence, in what was to be the last year of his life, there came forth his book on Unjust Enrichment—the New Testament, as one of his colleagues has called it. The thesis has met with resistance, as he knew that it would, but Peter's view was that, ultimately, there was no answer to the criticisms of the old approach and so there could be no going back. Even his critics pay generous tribute to the sheer power and intellectual honesty of his argument. Whatever the personal cost, Peter felt compelled to make the argument and then, when he knew that he was fatally ill, to revise it.

Time and the courts will tell whether the new approach prevails and, if so, in what form. It is not only sad, but a great misfortune for the law, that Peter is not here to take his part in the arguments as they develop. That is no mere conventional compliment to an academic lawyer, such as judges frequently pay in after-dinner speeches or on occasions like this. Although, in a rather unattractive conceit, judges sometimes like to portray themselves as brutish day labourers who look to academic lawyers for a deeper understanding of the law, the truth is that only comparatively rarely do academics actually produce those novel fundamental insights. But one who did, to an exceptional extent, was Peter. To accord him his own highest accolade, Peter was 'the real thing'. Quite simply, everyone recognizes that he knew far more about unjust enrichment and its impact on other fields of private law than anyone else in the world. Judges do not scatter references to his writings through their opinions in order to give a spurious impression of intellectual depth. They refer to Peter because they find

in his work insights into the law which they could never hope to achieve for themselves. In most areas of unjust enrichment, it is Peter who has guided the courts. In Scotland, for example, two short articles which he wrote during his time as a professor at Edinburgh were sufficient to reinvigorate a previously moribund area of the law.

Sometimes critics in any given system might feel that he had rationalized some of the cases in a manner that would have surprised the authors of the judgments. But, in a very real sense, that was to miss the point: in his view, Peter was fitting the cases into the true structure of the law which he had worked out or—as I think he would have put it—which he had uncovered. In that respect, his writings more closely resemble the jurisprudence of German or French professors. It is therefore no coincidence that he was the first British academic lawyer to be honoured with an obituary in the *Juristen Zeitung*. In this kind of scholarly work, the opinions of the judges are just as likely to be criticized as those of other academic writers. The fact that, thanks to Peter, among others, the courts now welcome constructive writing of this kind means that the standing of British academic lawyers is higher today than at any time in the past.

Perhaps of all things, his role in that development would have pleased Peter, the immediate Past President of the Society of Legal Scholars. It has rightly been said that the Society owes a greater debt to him than to anyone in living memory. During his time as Secretary of the Society of Public Teachers of Law between 1989 and 1996, he not only embarked on a root-and-branch reform of its structures but somehow found time to organize a remarkable series of Saturday seminars in All Souls which attracted senior judges, practitioners, and academics from around the world. The whole point of these occasions was that everyone took part on an equal footing and that they all learned from one another. That was Peter's vision of how our understanding of the law would grow.

Unavoidably, my time has run out before the tale of Peter's life and works is even half told. That is, perhaps, as it should be, since it is all too clear that Peter's life too came to a close when there were still many things which he wished to say and do. In fact, however, he achieved an extraordinary amount and his influence was felt all over the legal world. Above all, Peter laid the intellectual foundations of a whole area of the law. That is given to very few.

With Peter's death, the legal world has lost one of its most inspiring figures; his University and colleges one of their most faithful servants; his family and friends a warm-hearted, generous, entertaining, and loyal companion. In our sadness we all have much, very much, for which to be grateful.

Foreword

This collection of essays has been written by his colleagues, friends and former pupils in honour of Peter Birks. Peter's interest in law was all-embracing—there was no part of the legal map he would have regarded as *terra incognita*—but these essays deal with the sections of that map which were closest to his heart. They constitute a remarkable testimony to his influence; there could be no better memorial to his work. It is particularly welcome that the editors have included the moving addresses they gave at Peter's Memorial Service, which captured so much of his personality and achievements, both the intellectual eminence of the scholar and the warmth and kindness of the man. It is good to have these addresses in permanent form.

There is little that I can, or would wish to, add. I came to know Peter during the ten years he spent as an Official Fellow of Brasenose College. Peter was the best of colleagues, not just for the other law tutors (Peter and I were subsequently joined by Hugh Collins), but for the Fellowship as a whole. He was as generous with his friendship as he was with his energy and enthusiasm. He was a brilliantly successful college tutor, demanding and inspiring, taking infinite pains with his pupils. All Brasenose lawyers of that decade will recognize Andrew Burrows's account (in his memorial address) of a Birks tutorial.

One of Peter's most admirable qualities was his strong sense of loyalty, as a virtue to be practised lifelong not only to his friends but also, just as strongly, to his institutions. He became very attached to Brasenose, and remained in close touch long after his departure. In that sense, it can be said that he never did depart. At one period, he even came from Edinburgh to Oxford on a fortnightly basis to teach Roman Law to Brasenose first year students. That was an heroic undertaking, travelling by the Edinburgh—London coach throughout Friday night (having taken two sleeping tablets, of a brand now withdrawn due to its alarming side-effects), and arriving by the London—Oxford coach on Saturday morning in time to give a full set of tutorials.

Peter's other great personal quality was his generosity; that generous spirit which led him to give so much time and thought to helping or supporting the work of others, whether they were pupils, research students, or colleagues. My own debt to him is immeasurable. Advice, comments, suggestions, vigorous discussion were always available and were always warmly encouraging. Peter was a great morale booster: after two hours in his company all things seemed possible.

The contributors to this distinguished collection of essays would no doubt have hoped to produce a book to mark his retirement. We can imagine the

pleasure with which he would have received it. Since, however, the book has to serve as a memorial, we must be grateful to them that they have produced a worthy one.

John Davies

Acknowledgements

We are grateful to Eric Descheemaeker, who was one of Peter's doctoral students at the time of his death, for compiling the list of Peter's publications. We are also grateful to Tony Weir, Fellow of Trinity College, Cambridge, for his translation from German into English of Essay 23. Oxford University Press has done an excellent job turning the essays into the fitting memorial intended and we would particularly like to thank Darcy Ahl, Gwen Booth, John Louth, and Virginia Williams. Thanks are also due to Alan Rodger's judicial assistant, Charles Banner, and Andrew Burrows's secretary, Lyn Hambridge.

Contents

Table of Cases

GERMAN CASES (IN CHRONOLOGICAL ORDER)

Table of Legislation

UK LEGISLATION

NATIONAL LEGISLATION

Australia

Canada

France

Germany

Roman Law

ROMAN LITERARY SOURCES

PRE-JUSTINIANIC LEGAL SOURCES

JUSTINIANIC LEGAL SOURCES

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Introduction

Andrew Burrows and Alan Rodger

Peter Birks, the Regius Professor of Civil Law at Oxford, who died on 6 July 2004, was the most influential English academic lawyer of his generation. He was a passionate believer in the rationality of law, in correct classification of the elements of the law, and in showing how they related to one another—hence the mapping analogy in the title of this collection. Peter inspired generations of students and fellow academics with his writing, teaching, and charismatic personality. The essays in this volume, written in his honour by his colleagues and friends (many of them former students), reflect his principal academic interests in the English, and comparative, law of unjust enrichment and restitution, in Roman law, and in legal history. For Peter these were not disparate areas, unconnected with one another. On the contrary, he carried over the ideas which he developed in the area of Roman law or English legal history or in examining modern German law into his work on contemporary English law and, in particular, into his work on unjust enrichment. This is perhaps most obviously shown by the use which he made of the Roman scheme of classification, to be found in his beloved Gaius, in analysing the structure of English private law. Given his catholic interests, we hesitate to say that Peter would have singled out the English law of unjust enrichment and restitution as his favourite subject, but it is certainly the one for which he is best known throughout the English-speaking legal world. It is therefore appropriate to begin the book with the essays on that topic.

1. The English Law of Unjust Enrichment and Restitution

This first part contains fifteen essays on aspects of the substantive law of unjust enrichment and restitution. But the first essay, by Francis Rose, sets the scene by offering a personal perspective on the development of the English law of restitution, both through the courts and especially through the work of academics. Some of this story, including features of Peter's role, has not previously been told. The essay leaves us with the 'cliff-hanging' question, which only time will resolve, of whether Peter's last book *Unjust Enrichment*[1] has correctly predicted the new

[1] (2nd edn, 2005).

world: if not, in Rose's poignant words, 'we shall never know whether theory might have been turned into practice by the force of Birks's intellect and personality'.

For convenience, the fifteen essays on the substantive English law of unjust enrichment and restitution are divided into three sections: general concepts; some particular unjust factors; and property, insolvency, and restitution.

1.1. General Concepts

Essay 2, by Andrew Burrows, analyses the new scheme in *Unjust Enrichment*[2] for answering the question whether an enrichment is *unjust*. It is argued that 'absence of basis' should not replace the traditional common law 'unjust factors' but should instead be used as a valuable cross-check in difficult or novel cases. There was therefore no need for Peter to say that 'Almost everything of mine now needs calling back for burning'.[3]

Robert Stevens then explores three controversial issues on *enrichment*. How is enrichment by services to be quantified? How is an enrichment established where it comprises an incomplete contractual performance? Can enrichment be established where title to the asset transferred does not pass? His answer to the last of these is particularly important in its firm rejection of the view, also explored in Lionel Smith's essay (see below), that unjust enrichment has no role to play where the claimant retains title to the asset in question.

In the fourth essay, Gareth Jones offers his thoughts on *change of position*, which is the most important defence, both theoretically and practically, to a claim for unjust enrichment. He principally examines the under-explored question of the impact of public policy on change of position. But his essay also looks at the following: the role of change of position in claims for rescission; whether change of position is a defence to 'claims based on the claimant's title'; and whether it is useful (he argues not) to confine one's articulated reasoning to it being 'equitable' or 'inequitable' on the facts to uphold the defence.

Graham Virgo's influential multi-causal view of restitution as being underpinned by three principles (the reversal of unjust enrichment, the giving up of wrongful profits, and the vindication of property) is well-known. In his contribution to this volume he explores the role of *fault* across that wide area. He concludes that it plays a different role in different parts of the law of restitution and that a proper analysis is being hampered by the lack of clarity in the terminology used to describe the various types of fault.

There then follow three essays by former doctoral students of Peter Birks, who (in addition to their other writings) have made major contributions to our understanding of the law by the publication of books based on their DPhil theses.[4] In this volume they have retuned to the subject-matter of their theses.

[2] ibid, chs 5 and 6. [3] ibid, p xii.

[4] See C Mitchell, *The Law of Subrogation* (1994); L Smith, *The Law of Tracing* (1997); J Edelman, *Gain-Based Damages* (2002). Essay 13 is by a fourth doctoral student of Peter Birks's,

Charles Mitchell's essay on *subrogation* (Essay 6) shows how cases on 'reviving subrogation' over the last decade, most importantly *Banque Financière de la Cité SA v Parc* (*Battersea*) *Ltd*,[5] constitute a major judicial advance in explaining and clarifying the law of subrogation. But as the essay goes on to point out, some old habits die hard and some difficult questions still remain (such as the precise impact of reviving subrogation on third parties).

Lionel Smith, giving hope to us all, claims in Essay 7 that, thirteen years on, he is still not sure he understands *tracing* very well. He then proceeds to show how some of the new and controversial arguments made by Peter in *Unjust Enrichment* were, to a greater or lesser degree, influenced by his understanding of the nature of claims to traceable proceeds. Particularly significant is the concluding observation that Smith's worries about lack of fit between unjust enrichment and claims to traceable proceeds are reduced if one adopts Peter's final vision for the law of unjust enrichment.

The first section is concluded by James Edelman's essay on *gain-based damages for wrongs* and their relation to compensation. He argues that 'damages' simply means a money award for a wrong; that recent cases have continued to recognize the distinction he drew in his book on the subject[6] between restitutionary damages and disgorgement damages; but that a 'rights-based' measure of compensatory damages, which, he argues, has been applied in many non-commercial wrongs cases, will normally render restitutionary damages superfluous.

1.2. Some Particular Unjust Factors

The second group of essays focuses on what, applying the traditional common law 'unjust factors' approach to unjust enrichment, would be regarded as principal unjust factors: namely, mistake and the *Woolwich* principle,[7] duress, undue influence, and failure of consideration. The last three of these essays will also be of direct interest to contract lawyers.

In Essay 9, Jack Beatson looks at the relationship between the *Woolwich* principle and other common law grounds for restitution, in particular mistake of law. He argues (writing before an appeal to the House of Lords) that the Court of Appeal's reasoning in *Deutsche Morgan Grenfell Group plc v IRC*,[8] denying restitution of 'overpaid' tax, cannot be supported. He points out, however, that the decision might be 'saved' if one applied Peter's radical thesis that absence of basis, and not mistake of law, triggered the restitutionary claim so that the extended limitation period for mistaken payments would be inapplicable.

Robert Chambers, whose book, based on his DPhil thesis, *Resulting Trusts* (1997), has again had a major impact on our understanding of the subject.

[5] [1999] 1 AC 221. [6] See n 4 above.

[7] It was laid down by the House of Lords in *Woolwich Building Society v Inland Revenue Commissioners* [1993] 1 AC 70 that a payment demanded of a citizen ultra vires by a public authority is recoverable as of right. [8] [2005] EWCA Civ 78, [2005] STC 329.

In the tenth essay Ewan McKendrick examines three aspects of duress: the setting aside of a contract for duress, the recovery of a non-contractual benefit because of duress, and the award of compensatory damages for duress. Particularly significant are his acceptance of the view that a threatened breach of contract is always illegitimate pressure for the purposes of economic duress, and his rejection of any difference in the causation test to be applied as between duress of the person and economic duress.

Mindy Chen-Wishart's essay on undue influence (Essay 11) rejects the claimant-sided consent-based view of the doctrine favoured by Peter. On the other hand, like Peter, she rejects a defendant-sided 'wrongful act' explanation. This leads her to suggest that the best explanation lies in a 'relational theory of undue influence'. This goes beyond a 'single factor' explanation but in essence views the doctrine as requiring the defendant to protect the claimant or to ensure that the claimant can protect herself.

In Essay 12 Gerard McMeel looks at the relationship between contract and claims for unjust enrichment (principally for failure of consideration) and argues that, on its true construction, a contract can rule out or limit a restitutionary claim for unjust enrichment even when the contract has been discharged and even where there is no direct contractual link between the claimant and defendant. Focusing on three different contexts (where there is a subsisting contract, where there is a discharged contract, and where there is a mere 'contractual setting' between the claimant and defendant) he sees the central question about the relationship between contract and unjust enrichment as being whether a contract, as a matter of construction, ousts an otherwise arguable restitutionary claim. He labels this a 'construction' approach, although one might equally perhaps call it a 'contracting-out of restitution' approach.

1.3. Property, Insolvency, and Restitution

In this final section on restitution in English law, some perplexingly difficult questions on property, insolvency, and restitution are explored. It begins with Essay 13 by Robert Chambers, another of Peter's star doctoral students, whose book on *Resulting Trusts*[9] (based on his doctoral thesis) has greatly enhanced our understanding of a complex topic. Here Chambers returns to that area and argues that seeing resulting trusts as effecting restitution of unjust enrichment can provide the paradigm for understanding all property rights to restitution of unjust enrichment.

Peter Millett does not agree with the Chambers/Birks approach to the relationship between unjust enrichment and property law. In his contribution (Essay 14) he reproduces some correspondence between himself and Peter as to the correct analysis of *FC Jones v Jones*.[10] Given Peter's death, Lord Millett regrets

[9] (1997). [10] [1997] Ch 159.

that he had the last word on this. But the second edition of *Unjust Enrichment* shows that Peter remained committed to his 'unjust enrichment' analysis of *Jones v Jones*. In his words, 'The only satisfactory explanation is that [Mrs Jones] was unjustly enriched at [the trustee in bankruptcy's] expense to the extent of the whole sum'.[11]

William Swadling's essay (Essay 15) focuses on when, if ever, a mistake in relation to a delivery of goods prevents title in the goods passing to the deliveree. When, in other words, is the delivery unjust? This question is of importance to unjust enrichment lawyers (in recognizing that there may be more than one way of framing a claim) even if one does not agree with Swadling that the existence of a claim in tort for unjust delivery precludes a claim for unjust enrichment.[12] He concludes that it is not clear that mistake should ever prevent title from passing and that three leading cases laying down the contrary are flawed.

In the final essay, Roy Goode examines the extent to which it is helpful to analyse the statutory provisions on the avoidance of transactions in insolvency proceedings as reversing an unjust enrichment. In the light of the policy of the relevant sections, he concludes that the common law rules of unjust enrichment (eg defences such as change of position) have no role to play except as regards, what he terms, 'transaction-related cross-claims' by the defendant.

2. The Comparative Law of Unjust Enrichment and Restitution

As we have already noted, Peter was receptive to ideas in other modern legal systems. More particularly, he openly acknowledged the significance of German law and juristic writings in bringing about the shift in thinking which gave rise to *Unjust Enrichment*. It seems fitting therefore to begin with four essays which deal with aspects of German law on this topic.

Reinhard Zimmermann was a close friend for many years and Peter was quick to recognize the significance of his *Law of Obligations: Roman Foundations of the Civilian Tradition*[13] which provided the first substantial and readable text from which students could trace the development of legal doctrines from Ancient Rome to the present day. In Essay 17, wearing his comparative law hat, Zimmermann explains how the German law relating to restitution after termination for breach of contract has been changed by the provisions which were inserted into the BGB (Bürgerliches Gesetzbuch: the German Civil Code) with effect from 1 January 2002. He concludes by setting those reforms in their wider European context.

In the preface to *Unjust Enrichment* Peter acknowledged the particular part which the comparative work of Sonja Meier had played in his fundamental

[11] *Unjust Enrichment* (2nd edn, 2005) 82.

[12] This issue (whether retention of title preludes unjust enrichment) is examined in the essays of Robert Stevens and Lionel Smith.

[13] (1990).

change to an absence of basis approach. Like everyone else, she regrets that his early death meant that she was not able to explore his new approach with Peter, but in Essay 18 she sets out her views. She welcomes the new approach to transfer, while exploring some of the difficulties which may lie ahead in adopting that approach in other areas of the law. Finally, on the basis of the experience in German law, she counsels against any tendency to over-generalize the lack of basis approach and suggests that it is preferable to concentrate on the justification for granting restitution in particular situations.

When he worked in Oxford, Gerhard Dannemann was part of the team which conducted the famous restitution seminars for the BCL. His particular role was to draw illustrations and arguments from a comparison between English and German law. In his essay (19) he too examines the new approach adopted by Peter in *Unjust Enrichment* and, in the light of the experience of German law, he suggests ways in which three particular areas of English law may have to be developed and analysed more deeply if the new approach is to work coherently.

Thomas Krebs is another former doctoral pupil of Peter's. His thesis[14] dealt with comparative aspects of German and English law at the very time when Peter's views were shifting. Here, in Essay 20, Krebs concentrates on the so-called *Eingriffskondiktion* and begins by sketching the way that German scholars and courts developed various theories to identify cases in which restitution should and should not be granted, with the attribution theory eventually becoming predominant. He goes on to suggest that, if English law moves in the direction advocated by Peter, then some version of the attribution doctrine may prove helpful in developing a theoretical basis for identifying those infringements of a party's rights for which restitution may be an appropriate response. The lessons of German law further lead him to suggest that the idea that restitution is triggered by a wrong may be flawed.

In Essay 21, Hector MacQueen takes us north of the border where Peter spent some years as Professor of Civil Law at Edinburgh University. Although he had never had occasion previously to look into the Scots law of unjust enrichment, Peter soon produced two remarkable papers which were to shake this area of Scots law to its core. The author traces the various ways in which Peter's influence was brought to bear not only on academics and law reformers but on the Scottish courts, culminating in decisions which sought to set the law off on a new and more coherent path.

3. Roman Law

This section opens with an essay (22) by Alan Rodger on the interpretation of the term *damnum iniuria*, the harm to property for which the Lex Aquilia

[14] On which he based his book, *Restitution at the Crossroads: A Comparative Study* (2001).

supplied a remedy. In particular, he suggests that the expression is an asyndeton in which *iniuria* refers to unlawful harm. While the suggestion runs counter to the interpretation which Peter adopted in one of his essays, the theme may be appropriate since exploration of *iniuria* in its various manifestations was one of Peter's abiding interests.

The next essay (23), by Georg Wolf, is inspired by the Lex Irnitana, a copy of the Flavian municipal law which was discovered in the south of Spain in 1981. It offered many new insights into the working of the Roman legal system and, more particularly, into the procedures of the Roman courts. From the first moment when he heard about the new discovery, after dinner in John Richardson's home in St Andrews, Peter became passionately interested in the new text. The essay highlights the importance of law in spreading that essentially urban Roman culture which has helped to shape Western civilization.

Ernie Metzger wrote a doctoral thesis, largely devoted to the Lex Irnitana, under Peter's supervision.[15] In Essay 24 he uses the provisions of chapter 84 of the statute and other texts to argue that what may at first sight appear simply to be requirements that the judge should adjourn proceedings in particular circumstances are better seen as a mechanism for ensuring that the parties' right to a fair trial is observed.

Arianna Pretto-Sakmann also wrote a doctoral thesis under Peter's supervision, on personal property.[16] She opens her essay (25) with an entertaining sketch of the way that Peter used animals, in particular the classification of animals, to illustrate his legal arguments. Then she goes on to look in detail at some aspects of the Roman law relating to bees, including the Aquilian liability of a defendant who burned bees—a topic which Peter liked to ponder in discussion with students and colleagues.

The influence of Roman law in the development of modern legal systems was only possible because of the work of the group of lawyers in sixth-century Constantinople who compiled the Digest. For almost four decades Tony Honoré, Peter's predecessor as Regius Professor of Civil Law, has been shedding light on the way that Justinian's compilers went about their mammoth task of reading and editing. In Essay 26 he returns to the vexed topic of the group of works known as the Appendix. With a wealth of detailed argument, he supports the thesis that the Appendix comprises works which were not available to the compilers until the process of reading was already under way. The compilers first shared these new works out among the existing groups but then changed their minds and allotted them to a separate ad hoc committee.

In Essay 27 David Johnston takes us backwards and forwards between classical Roman Law and the later developments which helped to shape thinking in modern law. He reminds us that, like history books, law books tend to be written

[15] Published as *A New Outline of the Roman Civil Trial* (1997).
[16] Published as *Boundaries of Personal Property: Shares and Sub-Shares* (2005).

by the victors with the result that doctrines which ultimately failed to prosper are rather overlooked. Drawing attention to two ultimately unsuccessful doctrines in contract and delict, he ponders why they failed in practice, even though, at first sight, they might seem to have been attractive, at least from the standpoint of legal theory.

Eltjo Schrage begins his essay (28) in the tenements of ancient Rome but then shows how medieval and later lawyers tackled the problem of the enrichment of a landlord which was liable to happen if, on the termination of the lease, a tenant was not allowed to remove the improvements which he had made to the landlord's property. He eventually brings the story right up to the present day with an examination of recent changes in practice and in the Dutch Civil Code, which have sought to meet the legitimate claims of tenants without forcing landlords to pay for improvements which they do not want.

4. Legal History

Peter's thinking about the way that Roman law developed was heavily influenced by the thinking of his colleagues on the development of actions in English law. In his essay (29) John Baker recalls how Peter would go off to hear Professor Milsom at the London School of Economics and would return to University College London 'freighted with new ideas' which he could apply to Roman law. Developing one of the major themes which attracted Peter, Baker discusses how the action on the case for deceit developed at a time when lawyers operated in a world where the categories of contract and tort were as yet unknown. In particular, under reference to the proceedings in *Lopus v Chandeler*, he shows how at the beginning of the seventeenth century, relying on earlier views, some of the judges were prepared to contemplate the possibility of giving a remedy for false misrepresentation, in the absence of a firm warranty—a step which was not actually taken until 1789.

With his colleague, Jeffrey Hackney, in Essay 30 we are back in the law of leases and on that boundary between obligations and property which so interested Peter. Starting from the modern law on a tenant's denial of his landlord's title, he uncovers two distinct strands in the medieval law which are often confused and then shows how a supposed analogy with denial of rent was used to help rationalize the law of conversion in *Isaack v Clark*.[17]

In Essay 31 Joshua Getzler, a colleague of Peter's who shared his passion for Roman law and legal history, takes us to another of the frontiers in the law which Peter liked to patrol, the division between law and equity. The duties of fiduciaries were a constantly recurring theme in his work and in this essay Getzler examines *Keech v Sandford*,[18] which is usually regarded as the starting-point of

[17] (1615) 2 Bulstr 306. [18] (1726) Cas T King 61.

the doctrine that a fiduciary cannot profit from his office. He explores both the reason why an apparently rather obscure decision was to come to have such great influence and the material in earlier cases which helped shape Lord Chancellor King's thinking.

In his essay (32) John Cairns takes an institution, slavery, which was a recognized part of Roman society and discusses the problems which it caused in the very different social conditions of eighteenth-century Scotland. The pursuer in a divorce action wished to call a slave from the Caribbean to give evidence of his wife's adultery. Cairns analyses the ensuing legal debate about the competence of a slave to give evidence and shows how the very fact that Scots law did not recognize or regulate slavery led to uncertainty and potential confusion.

In a world where lawyers are obsessed with the latest cases, Peter was always concerned to draw attention to the sophistication of lawyers of earlier generations. So, for instance, he would come back time and again to Lord Mansfield's judgment in *Moses v Macferlan*.[19] And he greatly admired Sir William Jones's *Essay on the Law of Bailments*.[20] Against the background of Jones's life and career, in the concluding essay in the volume David Ibbetson shows how, even though he went on to devote a great deal of attention to classification in the natural world, unlike Peter, Jones did not apply the same approach to the analysis of the law.

To some the collection may seem to lack a coherent theme. But to Peter, and to anyone who knew Peter, that is not so: they all deal with topics which would have been of immediate interest to him. In that very real sense they are a tribute to him. While the rest of us would struggle to understand, far less to assess, all the essays, it is an inspiring, if somewhat daunting, thought that Peter would have had an easy familiarity with, and clear views on, every chapter. Acutely aware of his high standards, the authors have tried to produce essays which would, at least, have stimulated him—whether into acceptance or into determined rejection. While we mourn the fact that we will never actually know Peter's views on the essays, still more do we mourn our inability to relive the intellectual excitement of debating the issues with him. But our sadness at that loss is tempered by the knowledge that, as the pages of this book make clear, Peter's influence is undimmed.

[19] (1760) 2 Burr 1005. [20] (1781).