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PROPERTY RIGHTS AS A LEGALLY SIGNIFICANT EVENT

R.B. GRANTHAM* AND C.E.F. RICKETT**

THERE is at present something of a schism between restitution scholars. There are those who maintain that restitution may arise as a response, inter alia, to rights *in rem* and there are those who maintain that it may not. At one level, this is a debate about the internal boundaries of the law of restitution, principally about whether restitution arises exclusively as a response to the principle of unjust enrichment,[1] or whether it may also arise as a response to a number of other causes of action.[2] More fundamentally, however, the schism rests on a difference of view as to whether it is logically and conceptually possible to say that a right *in rem* is an event that gives rise to or generates other rights, such as to have the asset restored, to have restitution made, or to be compensated for loss suffered,[3] or whether a right *in rem* can only ever arise as itself a response to other events.[4]

We have argued previously that, as a matter of principle, property rights must be regarded as a species of right-generating event and not merely as a category of response to other events.[5] In our view, while the creation of property rights may be attributed to some earlier event, once in existence they are themselves a species of event that gives rise to legal rights and duties, such as those to receive and make compensation and/or restitution. The important

* Professor of Commercial Law, The University of Auckland.
** Sir Gerard Brennan Professor of Law and Dean, T.C. Beirne School of Law, The University of Queensland. We are very grateful to Dr. Allan Beever for his perceptive and helpful comments on a draft of this paper. The errors remaining are not his!

[1] A. Burrows, "Quadrating Restitution and Unjust Enrichment: A Matter of Principle" [2000] R.L.R. 2; Lord Goff and G.H. Jones, *The Law of Restitution* (6th edn., London 2002) 4.

[2] M.P. McInnes, "Restitution, Unjust Enrichment and the Perfect Quadration Thesis" [1999] R.L.R. 118; P. Birks, "The Law of Restitution at the End of an Epoch" (1999) 28 West. Aust. L.R. 13; G.J. Virgo, *The Principles of the Law of Restitution* (Oxford 1999), 17.

[3] Virgo, *ibid.* R. Grantham and C.E.F. Rickett, *Enrichment and Restitution in New Zealand* (Oxford 2000), chap. 3.

[4] P. Birks, "Definition and Division: A Meditation on *Institutes* 3.13" in Birks (ed.), *The Classification of Obligations* (Oxford 1997) chap. 1; P. Birks, "Property and Unjust Enrichment: Categorical Truths" [1997] N.Z. Law Rev. 623; P. Birks, "The Law of Restitution at the End of an Epoch" (1999) 28 West. Aust. L.R. 13; P. Birks, "Property, Unjust Enrichment, and Tracing" (2001) 54 C.L.P. 231.

[5] Grantham and Rickett, *Enrichment and Restitution in New Zealand*, chap. 3 and "Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity?" [1997] N.Z. Law Rev. 668.

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implication of this analysis is that the right to compensation and/or restitution is on occasion a response to a non-wrongful interference with the claimant's subsisting property rights and, therefore, does not need to be rationalised as a response to either wrongdoing or unjust enrichment. While the House of Lords in *Foskett* v. *McKeown*[6] has come close to endorsing this view,[7] and while other commentators have accepted it,[8] it nevertheless remains hotly contested by many scholars.[9] The purpose of the present paper is, therefore, twofold. First, we explore and highlight the deficiencies of the view that property rights are conceptually and logically only a species of response. For this purpose, we take the views of Professor Peter Birks, its leading exponent, as representative of the "property rights as response" analysis. Second, we offer a refined and expanded account of why, as a matter of principle, property rights must be regarded as themselves a source of further rights. In doing so, we aim to clarify any ambiguities inherent in our previous articulation of this analysis and to highlight the implications of our view for the law of unjust enrichment.

I. One Taxonomy of the Private Law

Professor Birks is undoubtedly the leading modern theorist on the taxonomy of the private law. In a substantial body of writing, he has articulated a taxonomy that, drawing upon Roman and modern Civilian foundations,[10] classifies the entirety of the private law according to the categories of "events" and "responses".[11] The concept of event identifies those matters that generate rights and duties. Thus, for example, the entering into of a contract or the receipt of a mistaken payment is an event. The creation of a contract is something that gives rise to the right to have the contract performed (or, perhaps, to receive compensation if the

[6] [2001] 1 A.C. 102.

[7] Birks, "Property, Unjust Enrichment, and Tracing", at p. 234.

[8] Virgo, *op. cit.*, pp. 11–16.

[9] Birks, "Property, Unjust Enrichment, and Tracing", at p. 245; A. Burrows, "Proprietary Restitution: Unmasking Unjust Enrichment" (2001) 117 L.Q.R. 412; L. Smith, "Unjust Enrichment, Property, and the Structure of Trusts" (2000) 116 L.Q.R. 412; D. Fox, "Legal Title as Ground of Restitutionary Liability" [2000] R.L.R. 465; W. Swadling, "Property and Unjust Enrichment" in J.W. Harris (ed.), *Property Problems: From Genes to Pension Funds* (London 1997), chap. 11.

[10] These influences can be seen in "Definition and Division: A Meditation on *Institutes* 3.13"; "Obligations: One Tier or Two?" in P.G. Stein and A.D.E. Lewis (eds.), *Studies in Justinian's Institutes* (London 1982), chap. 3; "Introduction" in P. Birks (ed.), *English Private Law: Volume I* (Oxford 2000), xxxv. This is not to say that Birks' taxonomy is entirely novel in the common law: see P.J. Fitzgerald, *Salmond on Jurisprudence* (12th edn., London 1966), 452.

[11] See, principally, "Definition and Division: A Meditation on *Institutes* 3.13"; "Rights, Wrongs, and Remedies" (2000) 20 O.J.L.S. 1; "The Concept of a Civil Wrong" in D.G. Owen (ed.), *Philosophical Foundations of Tort Law* (Oxford 1997), chap. 1; "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 West. Aust. L.R. 1.

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contract is not performed[12]), while the making of a mistaken payment gives rise to a right to receive restitution.[13] For Birks, all of the rights and duties that comprise the private law are, and indeed must be, explicable as arising from four generic events. These are consent (which is the category into which contract, inter alia, falls), wrongs (which comprises both torts and equitable wrongs), unjust enrichment (which is the category into which a mistaken payment, inter alia, falls)[14] and miscellaneous other events. The concept of response identifies a legal right-duty relationship to do or not do something. Thus, the right-duty to perform a contract (or, perhaps, to pay compensation for its non-performance) is the response to the event of consent. In the same way, the right-duty to restitution is the response to the event of unjust enrichment. The range of possible responses is varied, but includes the right-duty to performance, or to compensation, or to restitution, or, perhaps, to punishment.[15] While there is a temptation to treat the two as synonymous, the concept of response must be distinguished from that of "remedy".[16] While the rights and duties that arise in response to an event may in one sense remedy a claimant's grievance, a response arises independently of the order of the court.[17] The court's order realises the right, but is not itself the source of the right.

For Birks, the proper place of property rights, or rights *in rem*,[18] in this classification is in the category of responses, not that of events.[19] Property rights do not give rise to other rights, but rather are a response to one or other of the events of consent, wrongs, unjust enrichment or miscellaneous events. Rights *in rem* thus sit in the same series as the rights *in personam* to performance,

[12] Birks, "Obligations: One Tier or Two?", at p. 20. The compensation may be payable either as a monetary equivalent to performance (*Semelhago* v. *Paramadevan* [1996] 2 S.C.R. 415) or, more commonly, as reparation for the loss caused by the wrong of non-performance.

[13] Birks, "The Concept of a Civil Wrong", at p. 48.

[14] Unjust enrichment has been described as a central part of the law of obligations: *Banque Financière de la Cité* v. *Parc (Battersea) Ltd.* [1999] 1 A.C. 221, 227 *per* Lord Steyn. See also Lord Goff, "The Search for Principle", most easily accessed in W. Swadling and G.H. Jones (eds.), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford 1999), Appendix at p. 324. However, the scope and extent of unjust enrichment is nevertheless much disputed.

[15] See A. Beever, "The Structure of Aggravated and Exemplary Damages" (2003) 23 O.J.L.S. 87.

[16] Generally, see P. Birks, "Rights, Wrong, Remedies" (2000) 20 O.J.L.S. 1; K. Barker, "Rescuing Remedialism in Unjust Enrichment Law: Why Remedies Are Right" [1998] C.L.J. 301; S. Evans, "Defending Discretionary Remedialism" (2001) 23 Sydney L.R. 463.

[17] Although, in some cases the court's order may itself be the event. This is likely to be the case where the right is subject to strong curial discretion, as in the case of the remedial constructive trust: *Fortex Group Ltd. (In Receivership and Liquidation)* v. *MacIntosh* [1998] 3 N.Z.L.R. 171 (C.A.).

[18] We use these terms interchangeably in this paper.

[19] Birks, "Property and Unjust Enrichment: Categorical Truths"; "Definition and Division: A Meditation on *Institutes* 3.13".

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compensation, restitution or punishment, and like these rights must for their creation be referable to one or other of the events. Birks states: "The law of property and the law of obligations are formally categories of the same kind. They align with one another. They are both categories of consequence ... Rights are creatures of events. Rights *in personam* (obligations) are the creatures of events. No less than obligations, proprietary rights arise from events. It is not common to say so, but we might propose, making some slight modification to the series just mentioned, they arise from events generically identical to those that give rise to obligations ..."[20]

Birks' analysis of the nature of rights *in rem* as a category of response rests on two premises. First, an "event" is not an abstract legal conception, but is rather a physical thing that happens in the real world. Thus, Birks states: "We cannot begin to understand the law unless we can say from what physical events rights arise".[21] Events are thus "facts that happen in the real world"[22] and all "rights, personal and proprietary, arise from events which happen in the real world".[23] For Birks, therefore, an event appears to be an essentially empirical occurrence or a set of observable facts to which the law responds by creating rights and obligations: "'You owe me five farthings!' The immediate response is, 'Why?', meaning 'Because of what facts?'"[24] This impression is, moreover, borne out by the illustrations of events offered by Birks. "A loan of money is a causative event. It is something that happens in the real world and which generates rights".[25] Similarly, a "punch on the nose"[26] and a mistaken payment are identified as events.[27] In both cases there is some real world happening to which the law responds. In the case of the punch on the nose, it is the throwing of the punch and, in the case of the mistaken payment, it is the unintended transfer of money. Defined in such fundamentally empirical terms, it follows, as Birks concludes, that property rights are not an event. A right *in rem* is an intellectual and normative construct rather than an empirical one. While assets exist in the real world, a right *in rem* does not. It is a purely legal concept created and defined by the legal system itself.

Birks' second premise is that that which is a response cannot also be an event: "A right which the law recognises in response to

[20] Birks, "Property and Unjust Enrichment: Categorical Truths", at p. 628.
[21] P. Birks, "Unjust Enrichment and Wrongful Enrichment" (2001) 79 Texas L.R. 1767, 1788.
[22] Birks, "Property, Unjust Enrichment, and Tracing" (2001) 54 C.L.P. 231, 245.
[23] Birks, "Private Law" in P. Birks and F.D. Rose (eds.), *Lessons of the Swaps Litigation* (London 2000), chap. 1 at 7.
[24] Birks, "Definition and Division: A Meditation on *Institutes* 3.13", at p. 17.
[25] Birks, "Unjust Enrichment and Wrongful Enrichment", at p. 1779.
[26] *Ibid.*, p. 1778.
[27] Birks, "The Concept of a Civil Wrong", at p. 48.

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events cannot itself be an event".[28] Birks thus appears to regard the categories of event and response as mutually exclusive. Membership of one category, therefore, necessarily precludes membership of the other. This analysis, however, is presented as an *a priori* conclusion rather than as an empirical one, and in this sense it represents an application of something akin to the law of non-contradiction: nothing can be both X and not X.[29] The further conclusion that Birks derives from this premise is that property rights cannot be an event. Adding the additional minor premise that rights *in rem* do in fact arise as a response to an event,[30] it follows as a matter of logic that a right *in rem* cannot also be an event that gives rise to rights.

An important implication of Birks' taxonomy is that where the claimant retains a right *in rem* in an asset in the defendant's hands, the claimant's rights to compensation for the loss of the asset, or to restitution of the value of the asset, or to the delivery up of the asset (in equity at least) cannot be responses to that right *in rem*. As property rights are only ever a response, the right *in rem* cannot, therefore, be the event that generated the rights to compensation, restitution or delivery up. These rights must instead be referable to one of the recognised events. At common law, these events are located in the categories of wrongs and unjust enrichment. The right to compensation arises from the wrong of interfering with the claimant's property rights, while the right to restitution arises from the unjust enrichment of the defendant through the receipt of the value inherent in the asset in respect of which the claimant has rights *in rem*. This, in Birks' view, is also true in equity where the direct vindication of the claimant's property rights is permitted.[31] In equity, while the claimant may rest his claim directly on his persisting property right, the subsidiary *in personam* duty to deliver up the asset which arises following a declaration of the claimant's right, and which is necessary to give effect to the inert right *in rem*, must, as with all rights, be referable to an event. As the right *in rem* cannot be an event, the right to a transfer of the asset must be a response to some other event, an event that Birks tentatively identifies as the receipt of property belonging to another.[32]

[28] Birks, "Property, Unjust Enrichment, and Tracing", at p. 245.

[29] J. Hospers, *An Introduction to Philosophical Analysis* (2nd edn., London 1970), 209.

[30] For example, a right *in rem* may arise as a consequence of a contract for sale and purchase of an asset and the conveyance of title. In terms of the taxonomy, this is a species of the generic event of consent.

[31] Birks, "Property and Unjust Enrichment: Categorical Truths", at pp. 656–657.

[32] Birks, "Property, Unjust Enrichment, and Tracing", at p. 251; "Unjust Enrichment and Wrongful Enrichment", at p. 1775. He locates this event in the fourth miscellaneous category.

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II. Property Rights as a Category of Event

It cannot but be acknowledged that the taxonomy developed by Professor Birks has had a profound effect on the understanding of the structure of private law. Not only has his work highlighted the importance of sound taxonomy to the coherence of the private law, but his particular classification based on events and responses has been both explicitly and implicitly adopted as the basis for much recent private law scholarship.[33] Moreover, even for those who differ as to which categories fall within events and responses, or as to the detailed content of those categories, his events/responses taxonomy nevertheless provides the framework within which these contrary views are developed and expressed.[34] In this respect, our position is no different. We are content to adopt the distinction between events and responses as the basis for an analysis of the private law.[35] Nevertheless, we argue that Birks' analysis of rights *in rem* as a species of response is not compelling. First, the two premises upon which he bases his conclusion that rights *in rem* cannot be an event are false. The notion of event cannot be understood as a purely physical occurrence; and there is no logical inconsistency in suggesting that rights *in rem*, being a response to a prior event, cannot, once in existence, be an event generating further responses. Second, the nature of rights *in rem* as rights against the entire world, but against no one in particular, means that an interference by a particular individual with an asset in respect of which the claimant has a right *in rem* can and must be sanctioned by the creation of new rights *in personam* in the claimant as against that individual. These *in personam* sanctioning rights arise in response to and serve to vindicate the claimant's right *in rem*.

A. Is Event a Physical or a Legal Concept?

As outlined above, Professor Birks seeks to define the notion of event as a purely physical occurrence or a set of facts that is independent of either legal characterisation or abstract legal conceptions. This conception of event, however, simply will not do. Physical events in and of themselves have no meaning. They can

[33] See, for example, Burrows, "Proprietary Restitution: Unmasking Unjust Enrichment"; Smith, "Unjust Enrichment, Property, and the Structure of Trusts"; Swadling, "Property and Unjust Enrichment"; R. Chambers, *Resulting Trusts* (Oxford 1997), chap. 4; J. Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Oxford 2001), chap. 2; Fox, "Legal Title as a Ground for Restitutionary Liability"; M.P. McInnes, "Knowing Receipt and the Protection of Trust Property: *Banton* v. *CIBC*" (2002) 81 Can. Bar. Rev. 171.

[34] Virgo, *Principles of the Law of Restitution,* 15–17; J. Dietrich, *Restitution* (Sydney 1998) chap. 1.

[35] Grantham and Rickett, *Enrichment and Restitution in New Zealand,* chap. 3.

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acquire meaning only through a process of interpretation. Thus, legal rights and duties do not arise from raw and unreconstructed happenings in the physical world, but from an interpretation of those physical happenings within the intellectual framework of the law. Thus, it is not the bare fact of a statement that gives rise to a right-duty to performance of the matters stated, or the physical transfer of money that gives rise to a right-duty to restitution. In order for a legal right-duty to arise there has to be not only the physical occurrence, but also an interpretation of that physical occurrence within conceptual and legal constructs.[36] It is thus, for example, only in respect of those physical happenings that we interpret as being legally binding promises or agreements that it can be said that the law recognises the creation of a right to performance. Similarly, a legal right to the reversal of a transfer of money arises not simply from the physical transfer of money, but from an interpretation of the transfer that involves consideration not only of the subjective intentions of the transferor but also of what the law regards as a mistake justifying restitution. In reality, what the law responds to are "legal facts", which are essentially abstract notions derived from the physical occurrence. They cannot be the physical occurrences themselves.

The difficulty of conceptualising the notion of event as a purely physical occurrence and, therefore, the resulting need for some legal interpretation of those facts, can be illustrated by reference to the examples that Birks himself gives of right-generating events. As an example of rights and duties arising from the event of consent, Birks supposes a contract to build a factory: "[T]he primary obligations are born of the agreement itself, and the primary event is the formation of that agreement. From the side of the builder, his principal primary obligation is to put up the factory, on the other side to pay the price".[37] Viewed in purely physical terms, the physical aspects of this scenario are the making of verbal or written statements by the builder and the client. On Birks' definition of event, it is thus these facts that generate and explain the respective rights to performance and payment. However, it requires only a rudimentary knowledge of contract law to realise that one cannot leap from the mere physical occurrence of a statement or statements to the conclusion that there exists a legal obligation to perform the content of the statement.[38] The law does not recognise or enforce all statements made by the parties. Indeed, it does not

[36] The same need for interpretation also arises in determining whether a moral right-duty arises.

[37] Birks, "Obligations: One Tier or Two?", at pp. 20–21.

[38] Sir Frederick Pollock's classic definition of a contract was a "promise or set of promises which the law will enforce": P. Winfield, *Pollock's Principles of Contract* (13th edn., London 1950), 1. See also B. Coote, "The Essence of Contract" (1988) 1 J. Contract Law 91; P.S.

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even recognise or enforce all statements that can be interpreted as "promises" or "agreements". What the law recognises as having legal consequences are those statements that, first, may be interpreted as "promises" and, second, are a type of promise that ought to attract legal consequences. In short, it is the abstract notion of *contract* that generates the legal right to performance. The notion of contract is thus both a factual one and a legal one, dependant upon an interpretation of the physical occurrence of statements as amounting to an agreement as that latter concept is understood by the law, a task which is performed by interpretative constructs such as that of offer and acceptance, the doctrine of consideration, the rules on contractual capacity and the notion of an intention, objectively determined,[39] to create legal relations. While, therefore, the physical happening of a statement or statements may be necessary to the creation of a contract, the mere factual existence of that statement or those statements is not a sufficient explanation of the rights to performance.

A second example deals with the event of unjust enrichment, and in particular mistaken payment. "I pay you £100 by mistake. You are enriched by subtraction from me and, subject to some fine-tuning which we may assume to be satisfied, the mistake is a factor which the law regards as sufficient to characterise your enrichment as unjust ... These facts provide a wholly satisfactory explanation of the obligation to make restitution".[40] If Birks is correct as to the nature of an event as a physical occurrence, then it must be possible to deduce, from the payment of the money alone, the conclusion that the claimant has a right to restitution. Plainly, however, this is not the case, as Birks' reference to the need for some "fine-tuning" of the nature of the mistake implicitly recognises. A claimant cannot simply allege the making of a payment and thereby establish a prima facie right to restitution. It is not every payment that warrants or justifies restitution. What is also needed is an interpretation of that payment in terms of the claimant's subjective intention and the law's notion of "mistake".[41]

Atiyah, *An Introduction to the Law of Contract* (5th edn., Oxford 1995), 37–38; G.H. Treitel, "Contract" in Birks (ed.), *English Private Law: Volume II* (Oxford 2000), chap. 8 at p. 4.

[39] Such is the degree to which the law concentrates on objective consent at the expense of the actual, subjective agreement of the parties that it is said to be possible for a contract to arise even though, subjectively, *neither* party intended to be bound: see *Furness Withy (Australia) Pty. Ltd.* v. *Metal Distributors (U.K.) Ltd.: The Amazonia* [1990] 1 Lloyds Rep. 236, 243 (C.A.).

[40] Birks, "The Concept of a Civil Wrong", at p. 48.

[41] In common parlance "mistake" is a concept of wide import. It may suggest, on the one hand, an incorrect supposition that certain facts were true or that a certain state of affairs existed, while on the other hand, it may include a disappointed expectation or frustrated motivation. For the purposes of restitutionary recovery, however, "mistake" is defined more narrowly. Mistake is thus limited to a "supposition that a specific fact is true" (*Kelly* v. *Solari* (1841) 9 M. & W. 54, 58 *per* Parke B.) or that a certain state of affairs existed. Generally, see D.

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Therefore, to reach the conclusion that the claimant has a right to restitution, he must prove that he was mistaken and that the mistake he has made is legally significant: that the circumstances fall within the legal concept of mistake for the purpose of restitutionary liability. The fundamental role of abstract conceptions such as intention and mistake in explaining the source of rights and duties is perhaps even more apparent in another example given by Birks: "I receive a mistaken payment. I must repay a like sum .... My obligation does not arise from any breach of duty but from the mere fact of the receipt in circumstances in which the law says that there must be restitution".[42] It is thus not the "mere fact" of receipt alone that generates the obligation to make restitution, but the receipt together with the *legal* interpretation of the circumstances as being such as to justify restitution.[43]

A third and final example concerns the event of wrongs. In describing the two-tier structure of wrongs, Birks gives the following illustration: "If you negligently break my leg in breach of your duty to take care not to cause me foreseeable injury, your breach of that duty will generate a further obligation to pay me money".[44] In this example, the only physical events that occur in the "real world" are some action or conduct on your part and the fracture in my leg. These facts, however, cannot of themselves give rise to an obligation to pay me money. It is not the mere physical occurrence of my broken leg that entitles you to compensation. Thus, for example, I may have lost control while skiing and crashed into you. You are the immediate cause of my injury, but my injury will not give rise to an obligation in you to pay me money. Whether or not an obligation to pay me money is created depends upon an interpretation of the physical occurrences within a particular intellectual framework: that there was a prior right-duty to take reasonable care, a sufficient legal causal link between your conduct and my injury,[45] and that your conduct fell below the standard of care required of you in the circumstances. It is through these concepts that your action and

Sheehan, "What is a Mistake?" [2000] L.S. 538 and H. Dagan, "Mistakes" (2001) 79 Texas L.R. 1795. Moreover, until the recent decision of the House of Lords in *Kleinwort Benson Ltd.* v. *Lincoln City Council* [1999] 2 A.C. 349, a mistake of law did not support restitutionary recovery.

[42] Birks, "Definition and Division: A Meditation on *Institutes* 3.13", at pp. 25–26.

[43] As an explanation of the creation of the right to restitution, however, this is deeply circular: the right to restitution arises in those circumstances in which the law says that there must be restitution. This nonetheless further highlights the crucial role of the legal characterisation of the facts in the generation of legal rights and duties.

[44] Birks, "The Concept of a Civil Wrong", at p. 37.

[45] The idea of a sufficient causal link imports not only a chain of physical cause and effect, but also the satisfaction of the legal standard of causation, generally referred to in tort law as remoteness. See W.V.H. Rogers, *Winfield and Jolowicz on Tort* (15th edn., London 1998), 207.

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my broken leg are transformed from a merely unfortunate incident (or physical occurrence) in the "real world" into to a legally significant event that explains and justifies my obligation to pay you compensation.

The notion of an event as a purely physical occurrence is, therefore, untenable. Legal rights and duties do not arise from bare facts, but from the interpretation and legal conceptualisation of those facts. Rights and duties arise not from the mere existence of an expression of consent or a payment, but from the legal abstraction of those facts as a contract or a mistaken payment. One cannot, therefore, exclude rights *in rem* from the concept of event merely because they are legal constructs as opposed to physical "real world" occurrences. Once in existence, rights *in rem* are as much a "legal fact" as a contract, a mistaken payment, or a duty to take reasonable care. Moreover, the existence of a right *in rem* is something that the law must respond to if the notion of property rights is to maintain any independent creditability. Property rights are a significant matter in the common law and represent one of the fundamental building blocks of the Anglo-American legal tradition.[46] It would be odd indeed if they were not in themselves a source of rights and duties.

B. The Relationship of Events to Responses

The categories of events and responses are presented as mutually exclusive categories. From this Professor Birks draws the conclusion that is it logically impossible for something to be both an event and a response, and thus as rights *in rem* are a type of response, they cannot also be an event. In considering whether and to what extent this conclusion is valid, we must first resolve an inherent ambiguity. The conclusion may be understood in either of two ways. The first, and narrow, way is that it is logically impossible for a response to be the event that brought that particular response into existence. That is, right X cannot arise as a response to or consequence of right X. Thus, for example, a right to the performance of a contract cannot be the source of the right to specific performance. In the context of rights *in rem*, this means that a proprietary right to a particular asset cannot be the event that generated that proprietary right in that asset. This narrow version must, of course, be a valid conclusion. It is obviously contradictory to say that something is its own cause. The idea of cause and effect

[46] R. Epstein, "The Ubiquity of the Benefit Principle" (1994) 67 Southern Cal. L.R. 1369; C. Rotherham, *Proprietary Remedies in Context* (Oxford 2002), 34; J.W. Harris, *Property and Justice* (Oxford 1996), 3.

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presupposes a temporal relationship in which the cause always and necessarily precedes the effect.[47]

The other, and wider, way in which the conclusion on the relationship between events and responses can be understood is that, in general, responses cannot also be events. That is, a response cannot be an event even for the purpose of generating other responses apart from itself. This conclusion is not logically necessary. While right X cannot be the source of right X, there is no logical contradiction in saying that right X is the source of right Y. This is not to say that responses do in actual fact generate further responses. That is a matter of the policies and principles underpinning the particular area of the law. There is, however, no *logical* contradiction in the proposition that a response may generate further responses.[48]

For present purposes, the important implication of determining the validity of the proposition that a response cannot also be an event is that while a right *in rem* cannot be the source of its own creation, and must therefore be referable to the events of consent and wrong, and possibly also unjust enrichment and other miscellaneous events, once the right *in rem* is in existence there is no conceptual impossibility in the notion that the property right can generate further rights. That property rights must and in fact do so is demonstrated in the following section.

C. *The Nature of Property Rights*

Rights *in rem* must and do arise as a response to events. The vast majority of rights *in rem* arise as a response to the event of consent, in particular a conveyance. The right *in rem* of the present authors in the computer they are using was created by delivery following purchase. A right *in rem* may also arise as a response to a wrong,[49] and possibly also an unjust enrichment.[50]

[47] H.L.A. Hart and A.M. Honoré, *Causation in the Law* (2nd edn., Oxford 1985), 16–18; Hospers, *Introduction to Philosophical Analysis*, 279–281.

[48] This is true both of the creation of rights *in personam* and of rights *in rem*. There is no logical contradiction in the proposition that right *in rem* X can give rise to right *in rem* Y. Thus, as discussed below, the right *in rem* in an original asset may generate a new right *in rem* (if it is analytically necessary to conceive of it as a new right) in the traceable substitute of the original asset.

[49] As perhaps occurred in *Attorney General for Hong Kong* v. *Reid* [1995] 1 A.C. 324. On one view, the Crown's equitable property rights in the assets acquired with the funds received by Reid arose because of Reid's breach of his fiduciary duties: see Rotherham, *Proprietary Remedies in Context*, 17, Alternatively, *Reid* may be seen as a case where the court gave effect to the intention of the parties as reflected in Reid's acceptance of his fiduciary duties. On this basis, the Crown's equitable property rights arise as a legal (though not necessarily real) implication of the fiduciary duty. See Grantham and Rickett, *Enrichment and Restitution in New Zealand*, 409.

[50] See, for a potential example, *Chase Manhattan Bank N.A. Ltd.* v. *Israel-British Bank (London) Ltd.* [1981] Ch. 105.

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However, once in existence, a right *in rem* is also itself an event.[51] Once the claimant has a property right (where that property right may date from a prior consent, wrong, unjust enrichment or other event quite unrelated to the present claim founded on the property right itself[52]), this is in itself an "event" which gives rise to rights and duties. This argument proceeds in two stages. The first is that the doctrinal nature of a right *in rem* is such that any interference with the asset in which the right inheres must and can be sanctioned only by the creation of a new right *in personam* in the claimant as against the particular individual who has so interfered. The second is that such an *in personam* sanctioning right arises in response to and serves to vindicate the right *in rem*.

1. Property Rights and Sanctioning Rights

The common law, and indeed most legal systems, recognise a distinction between rights *in personam* and rights *in rem*. Broadly speaking, a right *in personam* is a right against a particular individual, while a right *in rem* is a right held against an indefinite class of persons in respect of an asset (*res*).[53] However, while this distinction between rights *in personam* and rights *in rem* accords with our intuitive understanding of property rights as essentially thing-centred, the question whether rights *in personam* and rights *in rem* are qualitatively or analytically different is more controversial. This controversy is largely a consequence of the scholarship of Professor Wesley Hohfeld.[54] Hohfeld sought to eliminate, or at least minimise, the distinction by deconstructing rights *in rem* into mere bundles of rights *in personam*. For Hohfeld, a right *in rem* was to be understood merely as a vast bundle of rights *in personam*, held by the right-holder against each and every other member of society.[55] However, Hohfeld did recognise that rights *in rem* and rights *in personam* differ from each other. This difference lay in the fact that rights *in rem* *always* exist as bundles of fundamentally

[51] The view that rights *in rem* are only ever a response also seems incapable of explaining how rights arise in an asset that has not previously been owned. Thus, a fisherman who catches a fish from the ocean becomes the owner of the fish, but it is difficult to see to what event (other than by yet a further addition to the rather overworked rubbish bin of the miscellaneous fourth category) that right *in rem* is a response.

[52] Once in existence, however, a right *in rem* may then generate further rights *in rem*.

[53] This distinction may also be described in terms of exigibility: from whom may the right be demanded? See P. Birks, *An Introduction to the Law of Restitution* (Oxford 1985), 49–50; J. Penner, *The Idea of Property in Law* (Oxford 1997), 31. Rights *in personam* are exigible against a specific individual, while rights *in rem* are exigible against an indefinite class of persons.

[54] *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven, 1919).

[55] Generally, see Harris, *Property and Justice*, 120–125; P. Eleftheriadis, "The Analysis of Property Rights" (1996) 16 O.J.L.S. 31.

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similar rights *in personam*.[56] While Hohfeld's analysis has been highly influential, it is now widely regarded as fatally flawed.[57] One sign of this was Hohfeld's inability to explain why, in the case of rights *in rem*, the rights *always* come in bundles of rights *in personam*.[58] This is clearly the defining feature of property rights, yet he was unable to offer a positive explanation of this quality.

The better and prevailing view, therefore, is that rights *in rem* are qualitatively distinct from rights *in personam*. This distinction lies primarily in the identity of the subject of the obligation that the right reflects.[59] While a right *in personam* embodies an entitlement against a particular person, the subject of a right *in rem* is not a particular person but a thing or *res*. The *res* thus stands between the right-holder and the duty-ower as the focus of both the right and the duty. The right to enjoyment of the *res* is one held as against every person subject to the particular legal system, but it is a right held as against an indefinite class of persons rather than specific individuals. The correlative duty is one owed by everyone and everyone owes the same duty, but it is not owed directly to the individual right-holder.[60] Rather, it is a duty in respect of the *res* itself. Accordingly, the right-duty correlation in respect of a right *in rem* is both impersonal and asymmetrical.[61] It is impersonal in that there is no direct chain of obligation between the right-holder and duty-ower and the identity and personal characteristics of the right-holder are irrelevant to the articulation and understanding of the right. It is asymmetrical in that the right is held as against a class of persons, but the duty is owed to the *res*.

An important analytical consequence of the nature of rights *in rem* concerns the manner in which an interference with an asset is sanctioned. Although a right *in rem* is a right that binds all the world, when a right *in rem* is infringed by interference with the relevant asset, that infringement is necessarily the activity of a particular person. Accordingly, for the right *in rem* to mean anything in respect of that particular person, a secondary or consequential *in personam* obligation must be generated, by virtue

[56] Hohfeld made this distinction through the concepts of "multital" rights (rights *in rem*) and "paucital" rights (rights *in personam*): *Fundamental Legal Conceptions,* 72.

[57] P. Birks, "Before We Begin: Five Keys to Land Law" in S. Bright and J. Dewar (eds.), *Land Law: Themes and Perspectives* (Oxford 1998), chap. 18 at p. 473; J. Penner, "The 'Bundle of Rights' Picture of Property" (1996) 43 U.C.L.A.L.R. 711; Harris, *Property and Justice,* 120–125.

[58] Hohfeld identified the difference as being "extrinsic" to the nature of the right itself. Beyond this, however, he was not able to explain what makes a multital right multital. See Eleftheriadis, "The Analysis of Property Rights", at pp. 46–47; A.M. Honoré, "Rights of Exclusion and Immunities Against Divesting" (1960) 34 Tulane L.R. 453.

[59] Generally, see Penner, *The Idea of Property in Law*, 23–31.

[60] *Ibid.*, p. 24. See also L. Smith, *The Law of Tracing* (Oxford 1997), 50–51.

[61] *Ibid.*, p. 29.

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of which that person's activity is sanctioned. Thus, *Salmond* states: "The reason why sanctioning rights are *in personam* is obvious enough. Rights *in rem* are negative and avail against all the world, *i.e.*, an open or indefinite class of persons. Violations of such rights, therefore, must consist of positive acts, and positive acts can only be performed by specific persons; it makes no sense to talk of a positive act performed by an indefinite class of persons; in other words a violation by all the world is a logical impossibility. Consequently it is only against specific persons that sanctioning rights can be either necessary or operative: they must be, therefore, rights *in personam*".[62] To similar effect, Dr. James Penner states:

> We do not have to frame the duty to respect property as a duty to particular individuals, but as a duty in respect of things. This will, of course, benefit the individual right-holders, but they need not be individually enumerated in order to understand the content of the duty. When the duty is breached, and the individual owner sues the individual trespasser, only then do we have a claim which is properly *in personam*, against a specific individual. But we must bear in mind that this is a secondary, or remedial right which arises on the breach of the primary one.[63]

The *in personam* sanctioning right thus arises on the interference with the right *in rem*, in order to transform the rights held by a particular individual in respect of the *res*, which are owed by an indefinite class of persons, into a right in that particular individual held as against another particular individual. Although this process might be described in terms of a crystallisation of the right held as against an indefinite class of person into a right held as against a particular person,[64] the right *in personam* nevertheless arises not as a substitute for the right *in rem*, but in addition to it. The existence of the right *in personam* "does not turn powers and rights *in rem* into a different kind of power or right *in personam*, because these powers and right continue to exist only so long as the *res* itself does, and only against those who are in actual violation of the right *in rem* ..."[65]

2. Sanctioning Rights as a Response to Property Rights

Property rights are, therefore, in a sense inert or superstructural rights. Although they create right-duty relationships that bind everyone as a class, in order to sanction interferences with those rights *in rem* it is necessary to create right-duty relationships

[62] Fitzgerald, *Salmond on Jurisprudence,* 244.
[63] *The Idea of Property in Law,* 24.
[64] C.R. Noyes, *The Institution of Property* (New York 1936), 241.
[65] Penner, *The Idea of Property in Law,* 31.

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between the particular right-holders and the particular infringers. It is only by creating these additional rights *in personam* that the law can sanction or remedy particular infringements. The creation of these *in personam* sanctioning rights does not of course necessarily imply that the rights *in rem* are the event that creates them. It is clear, however, from an analysis of claims that serve to protect rights *in rem* that the *in personam* sanctioning rights that arise upon an interference with rights *in rem* do in fact arise in response to and serve to vindicate rights *in rem*.

This is most obviously so in respect of claims to vindicate property rights recognised in equity. A claimant holding an equitable property right may seek directly to enforce that right. In substance, the claimant asks the court to declare his equitable ownership of the identified asset.[66] Thus, for example, in *Macmillan Inc.* v. *Bishopsgate Investment Trust plc (No. 3)*,[67] the claimant effectively asked the court to declare that the shares which Robert Maxwell caused to be transferred to Berlitz belonged in equity to it and that Berlitz thus held the shares on trust for it. Such a claim, which will be referred to by its Latin name, the *vindicatio*,[68] is based upon the claimant's proprietary entitlement to the asset in the defendant's hands and will succeed without proof of fault. The declaration of equitable ownership is, however, inert.[69] In order to recover the asset itself and thus fully vindicate his property right the claimant also needs a right as against the defendant to have the defendant transfer the asset to him. This right, which is a right *in personam* distinct from and additional to the right *in rem*, is the mechanism by which the particular defendant's interference with the claimant's right *in rem* is sanctioned.

The important analytical question for present purposes is thus: what is the event that gives rise to the *in personam* sanctioning right? We can immediately reject any suggestion that the event is the order of the court. The court's order is remedial only in the weakest possible sense.[70] It reflects a pre-existing right that arose at the moment of the interference and therefore well before the litigation ever began. This would be true, moreover, even if the

[66] *Westdeutsche Landesbank Girozentrale* v. *Islington London Borough Council* [1996] A.C. 669, 707 *per* Lord Browne-Wilkinson. See also Birks, "Property and Unjust Enrichment: Categorical Truths", at p. 650; P. Birks, "Personal Property: Proprietary Rights and Remedies" (2000) 11 King's College L.J. 1, 4–5; McInnes, "Knowing Receipt and the Protection of Trust Property: *Banton* v. *CIBC*", at pp. 176–177.

[67] [1996] 1 W.L.R. 387 (C.A.).

[68] B. Nicholas, *An Introduction to Roman Law* (Oxford 1962) 125–128; W.W. Buckland, *A Textbook of Roman Law from Augustus to Justinian* (3rd edn. rev. by P.G. Stein, Cambridge 1963), 675; F. Schulz, *Classical Roman Law* (Oxford 1951), 368–372.

[69] Birks, "Property and Unjust Enrichment: Categorical Truths", at p. 656; "Property, Unjust Enrichment, and Tracing", at p. 250.

[70] Birks, "Rights, Wrongs, Remedies", at p. 15.

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court were not prepared to order the transfer of the particular asset, but instead ordered the defendant to pay a sum of money.[71] The remedy, whether *in specie* or in pecuniary form, reflects and fulfils a pre-existing right. In our view, the *in personam* duty to transfer the asset is and must be a response to the claimant's right *in rem*. This conclusion rests upon three considerations.

First, the existence of the duty to transfer the asset is intelligible only in terms of the pre-existing right *in rem*. Where, as with the *vindicatio*, the claimant's case rests on his right *in rem*, the only justification or explanation of the claimant's right to have the asset transferred to him is that right *in rem*.[72] He is entitled to the asset precisely because it is his. This point can also be demonstrated in a different way. As a possessor, a defendant has a form of property right that is good against all except the rightful owner.[73] Thus, for example, in *Armory* v. *Delamirie*,[74] Pratt C.J. said: "[T]he finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner ..." The only reason, therefore, for imposing a duty on the defendant to transfer the asset, thereby overreaching his possessory right, is that the claimant is indeed the owner and thus has a superior entitlement. The claimant's right *in rem* is, therefore, both a necessary and sufficient explanation of the duty to transfer the asset.

However, Professor Birks suggests that the event that gives rise to this right is "the receipt of an asset belonging to another".[75] While the description of the event as the acquisition of an asset belonging to another is not inappropriate, and may indeed be more graphic, it is nevertheless plain that such an event is not intelligible without the reference to the right *in rem*. The fundamental legally relevant element of this event is that the thing received is one that belongs to another. While the receipt of the asset is that which brings the claimant to court, the receipt itself is legally significant

[71] It is important not to infer from the pecuniary nature of the award that the award is in response to some wrongdoing. It is perfectly rational for a system of law to convert all obligations into pecuniary form at the point of judgment. In Roman law, this was referred to as the principle of *condemnatio pecuniaria*. See H.F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law* (3rd edn., Cambridge 1972), 204–205, 213–214.

[72] This is manifested in the definition of those entitled to bring a claim in conversion in terms of those with either actual possession or the right to possess. Possession is central to the common law concept of title to chattels. Generally, see A.M. Honoré, "Ownership" in A.G. Guest (ed.), *Oxford Essays in Jurisprudence* (Oxford 1961), at p. 113; C.M. Rose, "Possession as the Origin of Property" (1985–1986) 52 Univ. Chicago L.R. 73.

[73] *J A Pye (Oxford) Ltd.* v. *Graham* [2003] 1 A.C. 419. Indeed, in some circumstances possession becomes a property right good against all including the rightful owner.

[74] (1772) 1 Strange 505. Generally, see Rogers, *Winfield and Jolowicz on Tort* (15th edn.), 600; A.M. Dugdale, *Clerk & Lindsell on Torts* (18th edn., London 2000), 749.

[75] Birks, "Property and Unjust Enrichment: Categorical Truths", at p. 657; "Property, Unjust Enrichment, and Tracing", at p. 251; "Unjust Enrichment and Wrongful Enrichment", at p. 1775.

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only because another person owns the asset received. The mere receipt of an asset is incapable of generating any rights to recovery and it is only where the receipt infringes the claimant's persisting right *in rem* that there is anything for the law to respond to. Notwithstanding this, however, Birks still insists that this event must be located in his miscellaneous fourth category. This is so, it seems, primarily because of his commitment to the proposition that rights *in rem* cannot be a category of event.[76] While in principle one could continue to insist that the event must still be located in the miscellaneous fourth category, such is the prevalence of property rights in the legal system that this would not only greatly distend the miscellaneous category, but it would also seem to run counter to the very impetus for taxonomy: the identification from the mass of individual genera and species.

Second, the identification of the event as the claimant's right *in rem* is consistent with and gives effect to the idea that the duty to transfer the asset is consequential upon the *vindicatio*. The claimant's claim, it will be recalled, is based upon his right *in rem* in the asset and serves to vindicate that right. In essence, what the claimant seeks is the return of his property. The additional right *in personam* to a transfer of the asset is merely the perfection or realisation of his claim to recover his asset. The right *in personam* is only necessary because, as discussed above, the right *in rem* is inert and can be made to bear directly on the particular defendant only through the imposition of a further personal obligation. Moreover, the claimant's right *in rem* is also the basis upon which the courts conceive themselves to be acting. Thus, for example, in *Macmillan Inc.* v. *Bishopsgate Investment Trust plc. (No. 3)*,[77] Millett J., as he then was, said: "any liability of the defendants to restore the shares or their proceeds to Macmillan or to pay compensation for their failure to do so must be based upon Macmillian's continuing ownership of the shares".

Third, the event that gives rise to the duty to transfer the asset must be the claimant's right *in rem* because there is simply no other event in play that would entitle the claimant to the delivery up of the asset. Almost by definition the event cannot be in the category of consent. The claimant's case arises as a result of a non-consensual transfer of the asset. Nor, however, is the event found in the wrong of interference with the asset. While, of course, it is the interference that brings the claimant into court,[78] the mere

[76] Birks, "Property, Unjust Enrichment, and Tracing", at p. 245.

[77] [1996] 3 All E.R. 747, 758.

[78] There is an important analytical distinction between the *possibility* of analysing the claimant's case as one for redress for a wrong and the *necessity* of doing so. In cases where the law will give effect directly to the primary right, there is no need for a wrongs analysis. Perhaps the

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receipt of the asset by the defendant is not of itself wrongful.[79] It is thus not surprising that the claimant is not required to prove fault or wrongdoing as a pre-condition to establishing the defendant's duty to transfer the asset. This conclusion is, moreover, borne out by a comparison with the recaption of goods.[80] Here, the claimant does not need the court's help to recover the asset, but instead relies directly on his property right. Thus, for example, if the claimant sees his bicycle, which has been taken from him, leaning against a wall in the High Street, he is able fully to vindicate his right *in rem* in the bicycle by simply re-taking it. The act of re-taking, and the duty imposed on the defendant to transfer the bicycle in cases where it cannot be simply re-taken, are functionally equivalent. Both serve to fulfil the claimant's right *in rem* by restoring the asset to the claimant. This equivalence suggests strongly that, at an analytical level, the duty imposed to transfer the asset must arise as a consequence of the claimant's right *in rem*.

Locating the event in the category of unjust enrichment, rather than in consent or wrongdoing, seems more plausible, though ultimately this possibility must also be rejected. Although the event could be made to fit within the notion of unjust enrichment, principally by treating the notion of "enrichment" as satisfied by the mere factual receipt of the asset, as Birks notes, it is neither desirable nor plausible to do so.[81] One consequence of identifying the event as unjust enrichment would be to subject the claimant's rights to the defence of change of position. The consequence is that merely because of the inert nature of rights *in rem*, which requires the imposition of a consequential duty to transfer the asset, the rights *in rem* would be subjected to the inherent weakness of all rights consequent upon unjust enrichment. Not only is this not in fact the law, but it would also represent an undesirable weakening of the security and enforceability of property rights.

An analysis of the duty to transfer the asset in terms of unjust enrichment must also now be regarded as having been ruled out as a matter of precedent by the decision of the House of Lords in *Foskett* v. *McKeown*.[82] The case concerned a claim to money stolen

clearest example of this is the case of contract. The right to specific performance is not a response to the wrong of breach of contract, but is the fulfilment of the right to performance. Thus, specific performance is available where there is no breach: *Hashiam* v. *Zenab* [1960] A.C. 316 (P.C.). See also *Semelhago* v. *Paramadevan* [1996] 2 S.C.R. 415 (performance secured by an award of money as a substitute).

[79] Birks, "Property and Unjust Enrichment: Categorical Truths", at p. 657; "Property, Unjust Enrichment, and Tracing", at p. 251.

[80] *In re Eastgate* [1905] 1 K.B. 465; *Tilley* v. *Bowman* [1910] 1 K.B. 745.

[81] Birks, "Property and Unjust Enrichment: Categorical Truths", at pp. 657–658.

[82] [2001] 1 A.C. 102. Birks acknowledges this in "Property, Unjust Enrichment, and Tracing", and in "Receipt" in P. Birks and A. Pretto (eds.), *Breach of Trust* (Oxford 2002), at pp. 216–217.

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by a trustee to acquire, in part, an insurance policy. The House of Lords held that the beneficiaries of the trust were entitled to a beneficial interest in the proceeds of the policy in the same proportion as the trust money that had been used to acquire it. For present purposes, the importance of the case is that their Lordships treated the beneficiaries' rights in the proceeds of the policy as arising, not from unjust enrichment, but from the beneficiaries' rights in the original trust money. Lord Browne-Wilkinson's view was that: "The only trusts at issue are the express trusts of the purchasers' trust deed. Under those express trusts the purchasers were entitled to the equitable interests in the original moneys. Like any other equitable proprietary interest, those equitable proprietary interests ... now exist in any other property which, in law, now represents the original trust assets".[83] These comments leave little room for any conclusion other than that the event from which the duty to transfer arises following a successful *vindicatio* is the claimant's property rights.

It is also the case at common law that the source of the right *in personam* that arises on an interference with the claimant's right *in rem* is the right *in rem* itself, though this is rather less clear than in respect of equitable claims. The obfuscation of this point is due principally to the decline and eventual disappearance from the common law of an action directly to vindicate property rights. As a matter of distant history, the common law probably did vindicate property rights directly. The writ of detinue in its original form was a direct proprietary action.[84] As a *praecipe* writ, it sought, *not* redress for a wrong, *but* the restoration of the claimant's rights: "An ear-marked chattel belonging to the plaintiff has come, no matter how, into the possession of the defendant. The claim rests not upon any transaction but upon the ear-mark. In modern or Roman terms this is the elementary proprietary claim, the claim of the owner against the possessor".[85] However, with the rise of the action on the case, and its considerable procedural advantages, the writ of detinue fell into disuse and although "revived"[86] after 1833

[83] *Ibid.*, p. 108.

[84] J.H. Baker, *An Introduction to English Legal History* (4th edn., London 2002), 57–59; S.F.C. Milsom, *Historical Foundations of the Common Law* (2nd edn., London 1981), 243–246, 269–275; D.J. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford 1999), 107–108; A.W.B. Simpson, "The Introduction of the Action on the Case for Conversion" (1959) 75 L.Q.R. 864.

[85] Milsom, *op. cit.*, 270. There is a fundamental cleavage in the common law between claims demanding performance of a right and those seeking redress for a wrong. Historically, this was reflected in the distinction between actions founded on a *praecipe* writ and those founded on a *plaint*. This distinction is said to be Germanic in origin: F. Pollock and F.W. Maitland, *The History of English Law* (2nd edn., Cambridge 1968) vol. 2, 571.

[86] Baker, *Introduction to English Legal History,* 399; Rogers, *Winfield and Jolowicz on Tort* (15th edn.), 583–585.

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with the abolition of wager of law, its distinct juridical nature was not. Thus, until its abolition in the United Kingdom in 1977,[87] it was treated as a species of wrong.

For at least the last 300 years, therefore, the common law has had no direct claim to enforce and protect rights *in rem*. In the void left by the absence of a *vindicatio*, the common law has instead sanctioned the interference with rights *in rem* principally through the law of wrongs, and in particular through the claim in conversion.[88] Thus, rather than allowing the claimant to put rights *in rem* directly before the court, as in equity, at common law the claimant was forced to allege a wrongful interference with the asset over which he had a right *in rem*, which interference founded a right to monetary compensation for the loss caused by that interference. One important consequence of the role taken on by conversion was that while historically and formally it was a species of wrongdoing, it absorbed many of the features of the *vindicatio*.[89] Thus, by the mid-eighteenth Century, the allegation of wrongdoing had become a mere fiction, untraversable by the defendant.[90] As in the *vindicatio*, liability thus became strict. Moreover, the claimant's proprietary rights in the asset misappropriated had become an indispensable foundation of the claim. Although, unlike a true *vindicatio*, liability in conversion extends beyond those who hold the *res*, the claimant's case is nevertheless founded upon an interference that is inconsistent with the claimant's right *in rem* to

[87] The Torts (Interference with Goods) Act 1977, s. 2, abolished detinue and extended conversion to those cases that detinue did not reach. See Dugdale, *Clerk & Lindsell on Torts,* 728.

[88] While they are the most well understood, torts are not the only form of indirect enforcement of common law property rights. In particular, the actions in money had and received and debt may serve to vindicate property rights in money (see Goff and Jones, *The Law of Restitution,* 3–4, 96–103; *Holiday* v. *Sigil* (1826) 2 Car. & P. 176). The English Court of Appeal's decision in *Trustee of Jones* v. *Jones* [1997] Ch. 159 illustrates this. Money was transferred from the account of the plaintiff trustee to Mrs. Jones, who had no right to it. Mrs. Jones speculated with the money and multiplied it several times. She deposited the sum in an account specially opened for that purpose. The plaintiff sought recovery of all the funds thus deposited. The Court was clearly of the view that the plaintiff was simply seeking to protect his property rights and that the medium of this protection was the action in debt (or possibly money had and received).

Their Lordships' emphasis in *Lipkin Gorman (a firm)* v. *Karpnale Ltd.* [1991] 2 A.C. 548, on the plaintiff's title to the money as the foundation of the claim in money had and received also suggests that the event in respect of which the *in personam* right to restitution arose was property (see W. Swadling, "Restitution and *Bona Fide* Purchase" in W. Swadling (ed.), *The Limits of Restitutionary Claims: A Comparative Analysis* (London 1997) chap. 4 at pp. 97ff; G.J. Virgo, "What is the Law of Restitution About?" in W. Cornish, R. Nolan, J. O'Sullivan and G.J. Virgo (eds.), *Restitution: Past, Present and Future* (Oxford 1998), chap. 20, at pp. 313–314; *Box* v. *Barclays Bank plc.* [1998] Lloyd's Rep. Bank 185.

[89] Thus, conversion is often described as a proprietary action: Baker, *Introduction to English Legal History,* 399; J. Fleming, *The Law of Torts* (9th edn., Sydney 1998), 61.

[90] *Hartop* v. *Hoare* (1743) 2 Str. 1187; *Cooper* v. *Chitty* (1756) 1 Burr. 20. See also J.H. Baker and S.F.C. Milsom, *Sources of English Legal History* (London 1986), 583–584. The point here is that while there will always be some "wrongdoing" in the sense that the defendant has interfered with a right of the plaintiff, analytically the basis of the claim is no longer the defendant's fault or culpability.

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the asset in question. Thus, in *Baldwin* v. *Cole*, Holt C.J. stated: "What is conversion but assuming upon one's self the property and possession of disposing of another's goods?"[91] More recently, in *Kuwait Airways Corporation* v. *Iraqi Airways Co. (Nos. 4 and 5)*,[92] Lord Hoffmann said: "The tort exists to protect proprietary or possessory rights in property; it is committed by an act inconsistent with those rights and it is a tort of strict liability. So conversion is 'a taking with the intent of exercising over the chattel an ownership inconsistent with the real owner's right of possession': per Rolfe B in *Fouldes* v. *Willoughby* (1841) 8 M & W 540, 550. And the person who takes is treated as being under a continuing strict duty to restore the chattel to its owner".[93]

The indirect nature of the law's response to the interference with the right *in rem* through the law of wrongs must, however, be acknowledged.[94] Although the so-called "proprietary torts" are atypical of wrongs generally, in that they impose strict liability, they have traditionally been classified as wrongs and they do give rise to a response, that of compensation, that is usually associated with wrongs. However, while the formal nature of these claims is that of redress for a wrong, it is much less clear whether it is appropriate for taxonomic purposes to describe the law as responding here to wrongdoing or to the claimant's rights *in rem*. There are three factors that argue in favour of the latter view.

First, the wrong of interference is intelligible only in terms of the claimant's subsisting right *in rem*.[95] The analytical structure of wrongs is such that they necessarily pre-suppose the existence of some prior right.[96] The wrong is the breach of that prior right, but not its source. Thus, for example, the right to compensation for battery arises, formally, as a result of the defendant's breach of the claimant's right not to be hit. However, the tort of battery does not itself constitute the right not to be hit. That right must necessarily already be in existence at the moment the wrong of battery occurred and, consequently, its origins must be found elsewhere. The right not to be hit (of which the wrong of battery is the breach) is thus a response to some earlier more fundamental primary event, such as, for example, membership of society (of

[91] (1705) 6 Mod. 212.

[92] [2002] 2 W.L.R. 1353. Lord Nicholls (at p. 1375) briefly considered the suggestion that the claim in conversion might be analysed in terms of the principle of unjust enrichment. It is clear, however, from his Lordship's characterisation of this suggestion as a "radical reappraisal" that he did not regard this as the nature of the tort at the present time.

[93] *Ibid.*, p. 1388. Generally, see T. Weir, *Tort Law* (Oxford 2002), chap. 11.

[94] Birks, "Personal Property: Proprietary Rights and Remedies", at p. 7.

[95] Smith, *Law of Tracing*, 285.

[96] Birks, "The Concept of a Civil Wrong".

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which corporeal integrity is a key aspect[97]). All rights and duties born of wrongs are, therefore, necessarily secondary.

The same is true of claims, such as conversion, that serve to protect property rights.[98] In such cases the right that the defendant has breached is a right *in personam* against the particular defendant not to interfere with the claimant's right *in rem*.[99] The defendant's action is wrongful only because at the moment of the interference the claimant had a right to, and the defendant a duty of, non-interference. This *in personam* right to non-interference, however, must in turn be referable to some primary event. One has to answer the question: why should the claimant have a right to non-interference? The answer to this question cannot be found in the event of consent. Interference presupposes no personal relationship between the claimant and the defendant, and indeed the claimant may never have even met the defendant. Nor can the answer be found in the event of unjust enrichment: "The positive assertion of title is a denial of the holder's enrichment, not an assertion that he has been enriched and should disgorge".[100] The answer to this question is and can only be found in the claimant's right *in rem*. The right *in rem* is what gives the claimant the right to undisturbed enjoyment of the asset, and it is the right to undisturbed enjoyment of the asset that justifies the law's imposing liability on the defendant for infringing that right. The only complication in this is the need for the interposition of an *in personam* right-duty of non-interference, to which the law then, formally, responds. This, however, is the price the common law must pay for the loss of its *vindicatio*.[101]

Second, whatever the form of the claim in the action in conversion, its function is undoubtedly to protect the claimant's rights *in rem* in the asset. This is clear not only from the historical origins of conversion, but also from what counts as interference. In *Fouldes* v. *Willoughby*,[102] the defendant asked the plaintiff to remove his horses from the defendant's ferry. The plaintiff refused and the defendant led the horses from the ferry and let them loose. This was held not to be conversion because the defendant's actions were not inconsistent with the plaintiff's dominion over the horses. In contrast, in *Moorgate Mercantile Co. Ltd.* v. *Finch*,[103] the defendant

[97] Weir, *Tort Law,* 126.
[98] Smith, *Law of Tracing,* 52.
[99] Penner, *The Idea of Property in Law,* 128–152; Honoré, "Ownership", 119–120. Harris, *Property and Justice,* 24, 86–90, refers to this as the non-trespass rule.
[100] Birks, "Unjust Enrichment and Wrongful Enrichment", at p. 1775.
[101] While somewhat convoluted, there is nothing illogical in the indirect enforcement of rights *in rem*. The nature of the right and the means of protecting and enforcing the right are distinct issues. See Smith, *Law of Tracing,* 59–60.
[102] (1841) 8 M. & W. 540, 550.
[103] [1962] 1 Q.B. 701.

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borrowed a car and used it for smuggling. The car was seized and forfeited by Customs and the defendant was held liable in conversion. In the Court of Appeal's view, it was inevitable that in using the car in that way forfeiture would result, and forfeiture was inconsistent with the plaintiff's proprietary rights.

Third, the purpose of taxonomy, or at least of a good taxonomy, is to offer a map or structure of the subject matter that enables it to be better and more clearly understood. To achieve this, however, it is not enough to be content with superficial appearances. The taxonomist "must be willing to deal in differences which really matter".[104] It is classification on the basis of essential or fundamental similarities and differences that keeps us from lumping whales together with sharks, or treating the sex of the seahorse that gives birth to its young as female.[105] In the present context, there can be no doubt that in claims such as that in conversion, the law is formally responding to a defendant's wrongdoing. However, the explanatory force of the notion of a wrong is extremely weak. As Birks notes: "To say that a consequence follows certain conduct because that conduct is a breach of a primary duty is to offer a formal explanation but not a satisfying one. The real explanation has to be completed in every case from the policies and values underlying the recognition of the primary duty which is in question".[106] The real explanation of the claim in conversion is the protection of the claimant's rights *in rem*. If, therefore, the taxonomy of the private law is to deal in differences that really matter and thereby offer more than a simply formal explanation, it is arguably more enlightening to identify the event to which the law is responding as the claimant's right *in rem*.

D. Property Rights as an Event: A Summary

The argument developed in this part of the paper may be summarised as follows. First, in a taxonomy of the private law structured according to the distinction between events and responses, the creation of property rights *de novo* must be attributable to one or more of the events of consent, wrongs, and unjust enrichment. Second, once in existence, however, rights *in rem* are a legally significant event in that on an interference with the asset in which the right inheres, and therefore in effect with the right itself, a further right *in personam* arises. Third, the role of rights *in rem* as a source of legal rights is a consequence of

[104] Birks, "Equity in the Modern Law: An Exercise in Taxonomy", at p. 16.
[105] These examples are taken from Birks, *ibid.*, at p. 6.
[106] Birks, "The Concept of a Civil Wrong", at p. 51.

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the peculiar nature of rights *in rem*. As an abstract, impersonal right-duty that binds everyone, but no-one in particular, the right *in rem* has to be made to bear on the particular individual defendant in order to sanction the latter's interference with the right. This is achieved by the creation of a right *in personam* in addition to the right *in rem*. Fourth, the sanctioning rights *in personam* are, and must be, a response to the claimant's rights *in rem*. It is clear from an analysis of claims both at law and in equity, that the right *in personam* so generated is intelligible only in terms of the underlying right *in rem*, and that there are few, if any, plausible alternatives. Fifth, the precise content of the sanctioning right *in personam* is in turn dependant upon and shaped by the particular claim available to protect the right *in rem*. Thus, in equity, where this is direct vindication, the right *in personam* is simply to have the asset transferred to the claimant. At common law, where the claimant cannot directly put the right *in rem* before the court, the right *in personam* must be conceived of as a personal obligation of non-interference, mirroring the content of the right *in rem*, the breach of which entitles the claimant to compensation.

III. The Implications of Property Rights as a Category of Event

The importance of taxonomy lies in the fact that the classification not only offers a map or structure that is reflective of the content of legal rules, but that it also influences and determines the very content of those rules. This is particularly true in the present context. If property rights are properly to be regarded as an event, this has important implications for both the structure of the private law generally and for the law of unjust enrichment in particular. Two of these will be highlighted here. First, recognition that rights, such as those to the recovery of an asset or its value and to compensation, may be a response to the claimant's pre-existing right *in rem* has important implications for the scope and role of the principle of unjust enrichment. In cases where the claimant retains title to the asset in the defendant's possession, there is neither the need for, nor room for, the imposition of an obligation derived from the principle of unjust enrichment. In such cases it is not possible to say that the defendant will be improperly enriched but for the imposition of an obligation to make restoration. Second, rights that arise as a consequence of tracing must be referable to the right *in rem* rather than to unjust enrichment.

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A. The Subsidiary Nature of Unjust Enrichment

At a doctrinal level, the sphere of operation of the principle of unjust enrichment is defined by two factors. There must be a defect in the claimant's subjective consent of a type that the law regards as sufficient to render unacceptable the defendant's retention of the enrichment transferred to him by the claimant.[107] There must also be a transfer of an asset that is prima facie effective to vest in the defendant not merely possession but also rights to the asset and thus to the enrichment represented by it.[108] Such a transfer assists in showing that the defendant is enriched, but, more importantly, the objective of the law of unjust enrichment, to restore the *status quo ante* as between the parties, can only be understood against the background of a transaction that is prima facie effective.

As we have sought to demonstrate elsewhere,[109] an important implication of the doctrinal conditions of the operation of the law of unjust enrichment is that it has no role to play where the consequences of a defect in the claimant's consent are already regulated, such that the restoration of the *status quo ante* is already provided for.[110] This is most obviously the case where the parties have dealt with the matter by express agreement.[111] Thus, for example, where the parties have agreed that if, in making payment, the assumptions upon which the claimant paid turn out later to have been mistaken, the defendant will return the payment, the doctrinal basis for restoration of the payment to the claimant is the

[107] In English law, the concept of unjust enrichment does not of itself articulate a standard of justiciability. The principle of "unjust enrichment" is thus merely a descriptive label that looks downward to the cases to divine its content. In this respect, although recent academic analyses have sought to add further categories of "unjustness", the list of factors recognised in the authorities has not changed greatly from the list proposed by Lord Mansfield in *Moses* v. *Macferlan* (1760) 2 Burr. 1005, 1012: "... money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express, or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances". The justification for the restoration of the *status quo ante* inherent in these circumstances is that the plaintiff did not subjectively consent to the enrichment of the defendant. Whether manifested in the denial of legal capacity to minors and juristic persons, or the presence of mistake, coercion, or morbid dependence on the defendant, it is the defect in the plaintiff's subjective consent that identifies the transfer of wealth as one that, if not reversed, would unjustly enrich the defendant.

[108] *Ilich* v. *R.* (1987) 162 C.L.R. 110; *Portman Building Society* v. *Hamlyn Taylor Neck (a firm)* [1998] 4 All E.R. 202.

[109] R. Grantham and C.E.F. Rickett, "On the Subsidiarity of Unjust Enrichment" (2001) 117 L.Q.R 273.

[110] B. Nicholas, "Modern Developments in the French Law of Unjustified Enrichment" in P. Russell (ed.), *Unjustified Enrichment: A Comparative Study of the Law of Restitution* (Amsterdam 1996), 77, 94, speaking in the context of French law, says: "Windscheid's formulation does, however, point to the fundamental limit on any enrichment remedy—that it must not circumvent an existing rule or law which envisages the relevant aspect of the matter in issue. It must not perpetrate a fraud on the law".

[111] Virgo, *Principles of the Law of Restitution,* 41. This is also true of the German law of unjustified enrichment: see B.S. Markesinis, W. Lorenz and G. Dannemann, *The German Law of Obligations* (Oxford 1997), vol. 1, p. 43.

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express agreement, not the law of unjust enrichment. Thus, in *The Trident Beauty*,[112] it was held that ship charterers could not recover advance hire payments from the vessel's owners in unjust enrichment, since the charterparty provided expressly for repayment. The express provision was thus the basis for restitution. This conclusion, furthermore, does not turn merely on some ill-defined hierarchical notion of the primacy of contract, but rather on the simple fact that, since the parties have already provided for the possibility of restoration if the claimant's subjective consent was defective, there is simply no call for the intervention of the law of unjust enrichment. The agreement means that it will not be the case that, but for the imposition of a restitutionary obligation, the defendant will be able to retain an enrichment in circumstances that make it unjust for him to do so.

For present purposes, the important point is that this is also true of cases where the claimant retains rights *in rem* in the asset in the defendant's possession. In such cases, the claimant's recovery of that asset can, and can only, be a response to the interference with those rights *in rem*.[113] The right to protection from interference and the right to exclusive benefit of the asset are central rights that in large measure define rights *in rem*.[114] The claimant's right to recover the value of the asset, and indeed any incidental benefits obtained from the use of the asset, are, therefore, already present at the moment of interference by virtue of that claimant's right *in rem*. The presence of such a right of recovery means, therefore, that it is not possible to say that the defendant will be improperly enriched but for the imposition of an obligation to make restoration. An obligation already exists, by virtue of the claimant's right *in rem*, in the defendant to restore the value he received, and that obligation necessarily has its origins in an occurrence prior to the fact of the defendant's receipt. The *in personam* obligation of the defendant to restore the value of the asset to the claimant arises out of the claimant's pre-existing right *in rem* in the asset. While it may be possible in lay terms to describe the defendant as enriched, as a matter of legal science and doctrine there is no enrichment.[115] The defendant's receipt was always encumbered with an obligation, arising from the claimant's right *in rem*, to return the property.

[112] *Pan Ocean Shipping Ltd.* v. *Creditcorp Ltd.: The Trident Beauty* [1994] 1 W.L.R. 161, 164 *per* Lord Goff. See also *Stocznia Gdanska S.A.* v. *Latvian Shipping Co.* [1998] 1 W.L.R. 574 (H.L.), where it was held that the contract itself dealt with the consequences of rescission of the contract.

[113] See further, Grantham and Rickett, *Enrichment and Restitution in New Zealand,* chap. 3.

[114] Honore, "Ownership".

[115] In *Portman Building Society* v. *Hamlyn Taylor Neck (a firm)* [1998] 4 All E.R. 202, the Court of Appeal rejected the notion that a purely factual enrichment would suffice for this purpose.

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There is, therefore, nothing for the principle of unjust enrichment to do.

More fundamentally, where the claimant retains title to an asset that passes into the defendant's possession, the conditions that, at a doctrinal level, invoke the principle of unjust enrichment simply do not arise.[116] The objective of the law of unjust enrichment is to restore to the claimant wealth where the transfer of the asset representing that wealth cannot be permitted to stand.[117] This objective is achieved through the imposition of a new obligation that carries the wealth back to the claimant, thus restoring the *status quo ante* between the parties. Logically, however, that response is called for only where, but for the intervention of the law of unjust enrichment, the defendant would be able to retain the enrichment. Indeed, quite to the contrary, a transfer that is prima facie effective to convey rights to the asset to the defendant is a necessary condition for the operation of the principle of unjust enrichment. It follows that, if at the moment of transfer, the law, or indeed the parties,[118] have already provided for restitution in the event that the transfer of the asset representing the wealth cannot be permitted to stand, the conditions which would otherwise call unjust enrichment into play do not arise. In such cases, the presence of a mechanism to restore the *status quo ante*, which encumbers the enrichment from the moment of receipt, denies the possibility both that the defendant is enriched and that such enrichment is unjust. There can be no enrichment because the defendant already bears a liability to return the asset or its value. The receipt is not unjust because, in being compellable to restore the value inherent in the enrichment, the defendant "buys" an entitlement, in much the same way as a converter does,[119] to what he has received.

Professor Birks has suggested that, notwithstanding the presence of some other right to restoration, the law of unjust enrichment will be available by way of an alternative analysis.[120] That is, even though the claimant has a right that will effect restoration, the law will or should recognise unjust enrichment as an alternative basis for restoration. In some cases this may no doubt be so. However,

[116] Generally, see Grantham and Rickett, "On the Subsidiarity of Unjust Enrichment".

[117] *Moses* v. *Macferlan* (1760) 2 Burr. 1005, 1012; *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32, 61; *Dollar Land (Cumbernauld) Ltd.* v. *CIN Properties Ltd.* [1998] 3 E.G.L.R. 79 (H.L.); *Banque Financière de la Cité* v. *Parc (Battersea) Ltd.* [1999] 1 A.C. 221, 231.

[118] *Pan Ocean Shipping Ltd.* v. *Creditcorp Ltd.: The Trident Beauty* [1994] 1 W.L.R. 161, 164 *per* Lord Goff.

[119] Fleming, *Law of Torts*, 61; W.L. Prosser, "Nature of Conversion" (1957) 42 Cornell L.Q. 168; E.H. Warren, "Qualifying as Claimant in an Action for Conversion" (1936) 49 Harv. L.R. 1084.

[120] Birks, "Property and Unjust Enrichment: Categorical Truths", at pp. 645–650.

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where the mechanism for restoration provided outside of unjust enrichment arises at or before the moment of transfer, there can be no alternative analysis. The defendant's receipt is already encumbered with a right to recover the enrichment. That right not only provides a more than sufficient means of restoration, but also leaves no room for unjust enrichment. The possibility of the defendant retaining wealth that, *ex aequo et bono*, he should not, is already precluded.

B. The Origin of Rights Contingent on Tracing

Until recently, the dominant view of the origin of the claimant's right in the traceable product was that the right always and necessarily arises as a response to the principle of unjust enrichment.[121] Professor Birks states:[122] "Proprietary interests contingent on tracing, which is as much to say proprietary interests in traceable substitutes for other assets in which the claimant undoubtedly did hold a proprietary interest, always arise from unjust enrichment". This conclusion rests on the view that the right cannot be attributable to any other event. It cannot be a response to consent because the right in the product arises by operation of law; it cannot be attributed to the defendant's wrongdoing, as there are cases where the defendant is wholly innocent; and it cannot be attributed to the claimant's right *in rem* in the original asset because property rights are not a species of event. Thus, it is concluded, the right that arises in the substitute as a result of the tracing process must be a response to the defendant's unjust enrichment.

However, once it is recognised that, in cases where the claimant retains legal or equitable rights *in rem* in the original asset even after the transfer of possession to the defendant, those persisting rights *in rem* alone are the (and, indeed, are the only) basis for recovery, then it follows that the most likely event to which the creation of rights in the traceable product is a response is also the property rights held in the original asset. This is most obviously so where the claim is in respect of equitable rights *in rem*. As *Foskett* v. *McKeown*[123] illustrates, where the claimant's claim is one to vindicate his rights *in rem* in the asset, the law's response is simply to declare that the claimant's rights in the original asset are now

[121] Birks, *ibid.*, p. 661. See also P. Birks, "Establishing a Proprietary Base" [1995] R.L.R. 83, 91; P. Birks, "On Taking Seriously the Difference Between Tracing and Claiming" (1997) 11 Trust Law Int. 2, 7–8; Smith, *Law of Tracing*, 299–301; C. Rotherham, "The Metaphysics of Tracing: Substituted Title and Property Rhetoric" (1996) 34 Osgoode Hall L.J. 321; S. Worthington, "Justifying Claims to Secondary Profits" in E.J.H. Schrage (ed.), *Unjust Enrichment and the Law of Contract* (London 2001), 451, 463–464.

[122] *Ibid.*

[123] [2001] 1 A.C. 102.

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exigible against the traceable product. Even if we need insist either that doctrinally the rights *in rem* in the traceable product are new rights, or that there must be imposed upon the defendant a further subsidiary obligation to transfer rights in the traceable product in order to give effect to the otherwise inert *vindicatio*,[124] these rights or obligations must arise from the claimant's rights *in rem* in the original asset. The claimant's persisting property rights is not only the most obvious source of such a response, but there will be cases, of which *Foskett* is an example, where there is simply no other possible basis.[125]

Although more complicated, the same conclusion must hold in respect of claims at common law. While, as we have seen earlier, the common law does not provide for this direct vindication, claims such as those in conversion do serve to vindicate legal property rights. While such claims give rise only to an *in personam* response, that response is nevertheless also a response to the claimant's persisting legal rights *in rem*. This is borne out by cases such as *Lipkin Gorman (a firm)* v. *Karpnale Ltd.*[126] and *Trustee of Jones* v. *Jones*,[127] where the effect of tracing is conceived as being merely to permit the claimant to treat the new asset as though it were his original property. As Lord Goff said in *Lipkin Gorman*, "'tracing' or 'following' property into its product involves a decision by the owner of the original property to assert his title to the product in the place of the original property".[128]

The House of Lords in *Foskett* v. *McKeown* has now confirmed that a claimant's rights *in rem* in the traceable product are a response to, and a means to vindicate, the claimant's rights *in rem* in the original asset. The plaintiffs in *Foskett* claimed a proportionate share of the proceeds of a life insurance policy. This claim arose out of the use by a trustee of money held in trust for the plaintiffs. This money had been settled upon trust to finance a real estate development. In fact the trustee misappropriated the trust money to pay three[129] of the five premiums paid under a life insurance policy. This policy was held for the benefit of the trustee's children. Their Lordships were agreed that the plaintiffs' claim was not one in unjust enrichment, but was one to vindicate

[124] Birks, "Property and Unjust Enrichment: Categorical Truths", at pp. 646–657.

[125] In *Foskett*, the claimant's could not have made out a claim unjust enrichment. Their Lordships (without dissent on this point) found that the defendants were not enriched by the plaintiffs' value and, being innocent donees, there was no unjust factor that could be asserted against them.

[126] [1991] 2 A.C. 548.

[127] [1997] Ch. 159 (C.A.).

[128] [1991] 2 A.C. 548, 573.

[129] While it was clear that trust money was used to pay the fourth and fifth premiums, there was some doubt as the provenance of the money used to pay the third premium.

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their undoubted equitable property rights in the original trust money. Lord Browne-Wilkinson stressed that once the plaintiffs had successfully identified the insurance proceeds as the traceable product, "then as a matter of English property law the [plaintiffs] have an absolute interest in such moneys".[130] It is clear furthermore that his Lordship saw this "absolute interest"[131] as being a consequence of the plaintiffs' original interest in the money. Thus, the trust upon which the insurance proceeds would be held for the plaintiffs was not a constructive or resulting trust, but *the same express trust* as that upon which the original trust money had been held. In Lord Millett's view, the claim of a "continuing beneficial interest in the insurance money"[132] involved the "transmission of a claimant's property rights from one asset to its traceable product".[133] This process was, in his Lordship's view, a part of the law of property, not of the law of unjust enrichment.[134]

Despite the unanimous view of their Lordships in *Foskett* that the basis of the plaintiffs' claim was their rights in the original trust moneys, two contrary arguments are nevertheless made. First, it is suggested that it is incoherent to argue that the beneficial interest or property right can be detached from one *res*, float independently of any *res*, and then re-attach to a new *res*.[135] Property rights, it is said, simply cannot do this. Second, it is argued that the right in the substitute cannot be the same right as that held in the original asset because, following the identification of the substitute, the claimant is entitled to choose between claiming either a proportionate share of the substitute or a lien over it to secure the value of the original asset. As the right comprised in the lien is of a different type and extent from that held in the original asset, there cannot, it is said, be merely a transmission of rights *in rem*.[136] However, neither argument is persuasive.

As to the first argument, the suggestion that the right *in rem* can detach from one *res* and re-attach to another *res* is incoherent only if such an ability is not an attribute of the right in question. Unlike the *res* itself, which has immutable physical attributes, a right *in*

[130] [2001] 1 A.C. 102, 109.
[131] "Absolute" was used by Lord Browne-Wilkinson to indicate that no discretion was involved.
[132] [2001] 1 A.C. 102, 127.
[133] *Ibid.*
[134] *Ibid.*
[135] Birks, "Property, Unjust Enrichment, and Tracing", at pp. 244–245; Burrows, "Proprietary Restitution: Unmasking Unjust Enrichment", at p. 418.
[136] Rotherham, *Proprietary Remedies in Context*, 98; Worthington, "Justifying Claims to Secondary Profits", at pp. 463–464; Birks, "Property, Unjust Enrichment, and Tracing", at p. 244.

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rem is an intellectual construct whose attributes are malleable and are not bounded by factors beyond the intellectual construct itself.[137] It is, therefore, only incoherent to conclude that the right *in rem* cannot be transmitted from *res* to *res* if non-transmissibility is an attribute accorded to the concept of right *in rem*. In this respect, while matters may be different with respect to legal rights *in rem*, it would seem that the ability to transfer from *res* to *res* is properly an attribute of equitable rights *in rem*. Indeed, without such transmissibility, the equitable doctrine of overreaching would not be sustainable.[138] Overreaching is the mechanism by which a trustee may transfer trust property from the trust fund and confer good title on the transferee unencumbered by the beneficiary's equitable interest. The corollary of the trustee's power effectively to transfer trust assets is that any assets received in exchange are made subject to the same equitable interests as bound the original trust assets. The important point for present purposes is that the doctrine of overreaching is clearly premised upon the notion that equitable rights *in rem* may be transmitted from one *res* to another. If this were not the case, the exchange of trust assets would entail that the beneficiary's equitable right *in rem* in the original asset was extinguished, and a new right *in rem* in his favour was created in the substitute. This would result in the original and later assets being held under what must conceptually be different (but in other ways identical) trusts. Moreover, such a change in the equitable property rights would also seem to entail that each exchange should be subject to the formalities requirements associated with dealings in such interests.[139] In fact, however, neither of these consequences follows the process of overreaching. Even where all of the assets of the trust are exchanged, there remains only the original trust and the rules on formalities do not apply.[140] This is difficult to explain unless the equitable interest in the new asset is the same interest as that which inured in the original asset.

The second argument is that because the claimant has the option of either a proportionate share in the substitute asset or a lien to secure the value of the original asset, the right in the substitute asset cannot be the same as the right in the original

[137] Generally, see G. Samuel, "Can Gaius Really be Compared to Darwin?" (2000) 49 I.C.L.Q. 297; K. Gray, "Property in Thin Air" [1991] C.L.J. 252; R. Cotterrell, "The Law of Property and Legal Theory" in W. Twining (ed.), *Legal Theory and Common Law* (Oxford 1987), Ch. 5; C. Rotherham, "Conceptions of Property in Common Law Discourse" (1998) 18 L.S. 41.

[138] Generally, see C. Harpum, "Overreaching, Trustees' Powers and the Reform of the 1925 Legislation" [1990] C.L.J. 277; D. Fox, "Overreaching" in Birks and Pretto (eds.), *Breach of Trust*, chap. 4; R. Nolan, "*Vandervell* v. *I.R.C.*: A Case of Overreaching" [2002] C.L.J 169.

[139] Law of Property Act 1925, s. 53(1)(c), requires all dispositions of equitable interests to be in writing.

[140] Nolan, "*Vandervell* v. *I.R.C.*: A Case of Overreaching".

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asset. This argument, however, rests on the mistaken premise that the lien is a remedial response to the infringement of the claimant's equitable right *in rem*. In fact, however, the lien is a (proprietary) response to a related but distinct *personal claim* against the trustee for a breach of the terms of the trust upon which the original asset was held. Lord Millett makes this clear in *Foskett*: "The simplest case is where a trustee wrongfully misappropriates trust property and uses it exclusively to acquire other property for his own benefit. In such a case the beneficiary is entitled at his option either to assert his beneficial ownership of the proceeds or to bring a personal claim against the trustee for breach of trust and enforce an equitable lien or charge on the proceeds to secure restoration of the trust fund".[141] The first claim involves the beneficiary electing to treat the substitution as authorised.[142] The substitution is thus binding on the trust: the original asset passes unencumbered to the third party and the asset received by the trustee is treated as an acquisition by the trust. The beneficiary's interest in the new asset is thus of the same type and extent as his interest in the original asset. This is the so-called proportionate share option. The second claim involves the beneficiary's disavowing the substitution and treating it as wrongful. The substitution is thus not binding on the beneficiary and the trustee is personally liable to restore the asset improperly lost. While this claim is a personal one, the trustee's obligation is nevertheless secured by a lien or charge over the asset received by the trustee as the exchange product. The beneficiary is extended the advantage of the lien simply as a means of securing the trustee's performance of his personal duty. The choice between, on the one hand, a proportionate share in the substitute and, on the other hand, a lien over the substitute is, therefore, not a case of the claimant electing between different remedial options in respect of a proprietary claim. Rather, the election is as to the nature of the very claim itself: the *proprietary claim* alleges that the substitute is properly to be regarded as a trust asset, and the *personal claim* is that the trustee must restore the trust fund. Where, therefore, the claimant elects to assert his equitable rights *in rem* in the original asset, there is only one response and that is to recognise the claimant as having exactly the same interest (as to type and extent) in the substitute as he held in the original.

[141] [2001] 1 A.C. 102, 130.

[142] There may be an analogy here with notions of ratification: *Re Hallett's Estate* (1880) 13 Ch. D. 696, 708–709; Rotherham, *Proprietary Remedies in Context*, 94.

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IV. Conclusion

In comparison with the Civil law, the study of structure or taxonomy has been rather neglected in the common law. Perhaps because of the common law's more pragmatic and casuistic approach, there has been a tendency to dismiss as too rarefied the broader doctrinal issues of how the law is and should be categorised. However, taxonomy is fundamental and has important consequences for the practical application of the law. This is particularly true in the present context. Property rights are a significant matter in the common law and represent one of the fundamental building blocks of the Anglo-American legal tradition.[143] Although sometimes hidden by the peculiarities of history,[144] property rights have a powerful normative force that attracts a level of protection that borders very close to the absolute.[145] One's right to do as one pleases on or with one's property is constrained only at the margins, and protection from interference is available against even the most innocent. From this kind of perspective, the idea that an interference with a claimant's property rights is relevant only as a means to substantiate a claim born of unjust enrichment or some type of wrongdoing would be a contraction quite out of keeping with the otherwise generous protection afforded to rights *in rem*. It should, therefore, not be surprising that property rights are a right-generating event. Indeed, it would be very surprising if they were not.

[143] R. Epstein, "A Clear View of *The Cathedral*: The Dominance of Property Rules" (1997) 106 Yale L.J. 2091, 2097; C. Rotherham, "Property and Justice" in M. Kramer (ed.), *Rights, Wrongs and Responsibilities* (London 2001), chap. 5. Blackstone, *Commentaries on the Laws of England* (1st edn., 1766) Book 2, p. 8, made the point thus: "Necessity begat property, and, in order to insure that property, recourse was had to civil society, . . ." See also the comments of Lord Camden in *Entick* v. *Carrington* (1765) 2 Wils. 275, 291: "the great end for which men entered society was to preserve their property. That right is preserved sacred and incommunicable . . ."

[144] See G. Samuel, "The Many Dimensions of Property" in J. Maclean (ed.), *Property and the Constitution* (Oxford 1999), chap. 3.

[145] Cf., *J A Pye (Oxford) Ltd.* v. *Graham* [2003] 1 A.C. 419.

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