RESTITUTION AND THE ARGUMENT OF
SUBJECTIVE DEVALUATION:
WHEN IS AN ENRICHMENT
NOT AN ENRICHMENT?

BY S. R. SCOTT

I. INTRODUCTION

The law of restitution has had a turbulent history, evoking the passions of supporters and detractors alike. Support for what we would now describe as restitutionary relief is to be found in the mid-1700s in Moses v. Macfarlan. Although the views of Lord Mansfield, expressed in this case, on the availability of the action for money had and received are well known, it is worth recalling that he considered that, “[t]his kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, ex aequo et bono, the defendant ought to refund.” Approximately 150 years later, however, the views of Lord Mansfield had been subjected to the “pungent criticism” of Lord Sumner and had been discarded. The then prevailing view, encapsulated in the famous dicta of Scrutton L.J. in Holt v. Markham, was that “the whole history of... [the action for money had and received] has been... a history of well-meaning sloppiness of thought”. The implied contract theory was perceived as providing the underlying basis for all the common counts.

Notwithstanding the hostility which arguments advancing restitutionary principles have attracted in this century, the 1990s have seen the recognition of an independent law of restitution by the House of Lords in both Lipkin Gorman v. Karpnale Ltd. and Woolwich Building Society v. I.R.C. (No. 2). As Mr. McKendrick has observed, in Lipkin Gorman v. Karpnale Ltd., their Lordships, “[a]t the level of high general principle, ha[ve], for the first time, clearly and unequivocally recognised the existence of a law of restitution based

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1 (1760) 2 Burr. 1005; 97 E.R. 676.
2 Ibid. 1012; 680.
3 Holt v. Markham [1923] 1 K.B. 504, 513 per Scrutton L.J.
5 Supra n. 3.
6 Ibid. 513.
upon unjust enrichment".9 In a similar vein Professor Birks observed that as a result of this case,

[It should not now be necessary to mount complex experiments to prove that the law of restitution, based on the principle against unjust enrichment and packed with cases of the greatest practical importance, is an essential category of our law. This is a great advance. The flat-earthers have sometimes seemed likely to get the better of the argument...]

This recognition of the law of restitution and the principle of unjust enrichment was built on by both the English Court of Appeal10 and their Lordships in Woolwich Building Society v. I.R.C. (No. 2), in which it was held by a majority that the Woolwich Building Society had a restitutionary right to recover tax payments which it had been required to pay pursuant to an ultra vires regulation.

With this recent recognition of the principle of unjust enrichment it is appropriate to consider what constitutes an enrichment: a question which, as Mr Beatson has observed, "is not as simple as might appear at first sight".12 It is not the aim of this article to attempt to answer this general question, but to examine the general response of Professor Birks to it, in particular his so-called "argument of subjective devaluation". In An Introduction to the Law of Restitution, Professor Birks suggests that the common law recognizes an argument "that benefits in kind [i.e. the receipt of goods or services or the payment of another's debt] have value to a particular individual only so far as he chooses to give them value".13 This is the argument of "subjective devaluation". It is an argument which enables a recipient of a benefit in kind to override objective evidence and deny that he or she has in fact been enriched by the receipt of that benefit.

Professor Birks employs this argument to explain why, throughout the history of the law of restitution, the recovery of money through the action for money had and received has been more favourably received than those actions dealing with non-monetary enrichments or "benefits in kind". Put simply, if there is no enrichment, then restitutionary relief (presumed upon the receipt of an unjust enrichment) is unavailable.14

14 Lord Goff of Chieveley and G. Jones, The Law of Restitution (3rd ed., 1986) (hereafter referred to as Goff and Jones, Restitution) at 16 suggest that "the principle of unjust enrichment... presupposes three things: first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain the benefit" (their emphasis).
In the following part of this article both the argument of subjective devaluation and the exceptions to it are introduced. Part III comprises an evaluation of the “argument”. At the outset it is respectfully submitted that subjective devaluation is a product of nineteenth-century and early twentieth-century hostility to the recognition of a law of restitution. Although this may appear to be something of a paradox, it is submitted that Professor Birk's, fearful of undermining or hindering the development and recognition of the law of restitution, has advanced a narrow view of what actually constitutes an enrichment. Now that the House of Lords has spoken, recognizing the law of restitution and the principle of unjust enrichment, it is submitted that, before the argument of subjective devaluation harms the evolution and development of the law of restitution, it should be rejected.

II. SUBJECrIVE DEVALUATION—THE “ARGUMENT”

As noted earlier, subjective devaluation is premised upon the proposition “that benefits in kind have value to a particular individual only so far as he chooses to give them value”. As Professor Birk's explains:

What matters [to the recipient of a benefit in kind] is his choice. The fact that there is a market in the good which is in question, or in other words that other people habitually choose to have it and thus create a demand for it, is irrelevant to the case of any one particular individual. He claims the right to dissent from that demand. Market value is not his value. Suppose that without his knowledge his car has been serviced or his roof mended. There is a market in car-servicing and roof-mending. It is easy to find the market value of work of that kind, what the going rate is between reasonable people. But he says that he had decided to go in for do-it-yourself or to take the risk of disaster by doing nothing. Indeed to make his point he does not even have to say that he had actually decided; let alone prove that he had decided, to dissociate himself from the particular demand. For his point is sufficiently made by saying that he has continuing liberty to choose how to apply his particular store of value and that in the case of this car-servicing or roof-mending he simply had not made his choice.

An initial challenge to the persuasiveness of subjective devaluation comes from cases, such as Greenwood v. Bennett, which are simply incompatible

Some theorists have questioned whether the principle of unjust enrichment can adequately explain areas of the law which they would regard as restitutionary. Professor Stoljar, for instance, considered that restitutionary relief is as much concerned with the recovery of losses as it is with the recovery of enrichment and advanced a principle of “unjust sacrifice” to explain and justify restitutionary relief in situations in which there may not be an enrichment. S. Stoljar, “Unjust Enrichment and Unjust Sacrifice” (1987) 50 M.L.R. 603.

17 [1972] 3 All E.R. 586. Professor Birk's also refers to Cooper v. Phipps (1876) 1 L.R. 2 H.L. 149 and Boardman v. Phipps [1967] 2 A.C. 46 as displaying the same objective approach phenomenon to determining enrichment, see Introduction, supra n. 13, 125–126.
with it. It will be recalled that in that case a car (which was worth between £400 and £500) was taken to a Mr Searle for repairs. The car was extensively damaged while Searle was driving it, and he purported to sell the wreck to a Mr Harper for £75, who spent £226 on labour and materials in repairing it. Ultimately, as a result of interpleader proceedings brought by the police to determine who was entitled to the car, it was recovered by its true owner who sold it for “£400 or so”. The Court of Appeal upheld Mr Harper’s claim that the true owner was liable to him for the money which he had spent in restoring the car. Professor Birks acknowledges that in this case, “the court . . . took the view that the recipient’s benefit was ‘obvious’”, 18 but discounts it by pronouncing that this case does not reflect the significance which the law attributes to subjective devaluation, and therefore should not be followed.19

Professor Birks suggests that the argument of subjective devaluation is only overcome in those circumstances in which the recipient has “freely accepted” the benefit or has received an “incontrovertible benefit”. In An Introduction to the Law of Restitution, Professor Birks suggests that free acceptance occurs “where a recipient knows that a benefit is being offered to him non-gratuitously and where he, having the opportunity to reject, elects to accept”.20 In a recent essay, “In Defence of Free Acceptance”, however, Professor Birks refines the concept of free acceptance suggesting, that “in relation to the issue of enrichment, its meaning is determined by the larger question whether the court could in all the circumstances reasonably allow the defendant to resort to subjective devaluation”.21 Significantly, no positive action by the recipient is required to constitute a free acceptance; it is deemed to have occurred by the recipient failing to confront the conferor of the benefit and advising the conferor that he or she does not want that benefit. As Professor Birks explained in An Introduction to the Law of Restitution, “[i]f I have stood by watching you clean my car, knowing that you did not intend to make a gift, I cannot easily appeal to my right of free choice. For I made my choice when I had the opportunity to reject. If I did not want the car cleaned, I should have said so”.22 This argument is reiterated in “In Defence of Free Acceptance”. Using the

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18 Birks, Introduction, supra n. 13, 124.
19 In introducing these cases Professor Birks suggests that if the courts were “frequently” to simply take “the view that the recipient’s benefit was ‘obvious’ . . . it would change the whole orientation of the law towards benefits in kind. For to take enrichment simply as a matter of impression, not calling for analysis, would be to apply a rough and ready standard of reasonableness. In other words, to adopt an objective approach, exactly the opposite technique from that with which the common law has grown up”. Ibid. 124–125.
20 Ibid. 265.
example of a person mistakenly building a garage on his or her neighbour’s land (the neighbour knowing of the mistake and the work being done, but doing nothing), Professor Birks argues the neighbour is enriched, saying:

[S]he [i.e. the neighbour] cannot conscientiously assert, ‘Oh, but I did not choose to have this garage built’. She had her opportunity to say so earlier. It is not that her neglect of that opportunity affirmatively indicates that she attached value to the garage; it merely makes it impossible for her to get to her appeal to the subjectivity of value. It would be outrageous in the circumstances if she were allowed to evade objective valuation by calling for a defence of the right to freedom of economic choice.  

The argument of subjective devaluation is also defeated by showing that the recipient received an “incontrovertible benefit”. In developing this exception Professor Birks has drawn a distinction between “a straightforward objective standard of value”, which he asserts is defeated by the argument of subjective devaluation, and a “no reasonable man test”, which is not defeated. The “no reasonable man” exception was presumably developed to avoid a fundamental problem underlying subjective devaluation. As observed by Mr Burrows, “The problem with a purely subjective approach [such as subjective devaluation to determining the receipt of a benefit] is that one can never be sure what the defendant [i.e. the recipient of the benefit] is thinking and, in any event, one would probably not wish to prejudice the plaintiff according to the eccentricities of the defendant.”  The role of the “no reasonable man” test is simply to “moderate the greater absurdities of a subjective approach”. As Professor Birks argues, the essence of the incontrovertible benefit exception is that “on the facts any recourse to subjective devaluation would be so absolutely unreasonable that no reasonable man would try it. Or, put more simply, no reasonable man would say that the defendant was not enriched.” Because “no reasonable man” would argue that the receipt of money is not an enrichment, Professor Birks suggests that this particular benefit provides the “commonest example” of an incontrovertible benefit.

With benefits in kind the no reasonable man test is said to be satisfied in “two currently identifiable” situations. The first situation occurs when, in conferring the benefit in kind, the conferor has anticipated either “factually” or “legally” necessary expenditure which would otherwise have been incurred by

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23 Birks, “In Defence of Free Acceptance” supra, 131. The change in subject matter of the example from a clean window to a garage may be in response to Mr Beatson’s argument that usually a service cannot constitute an enrichment. See J. Beatson, “Benefit, Reliance and the Structure of Unjust Enrichment” (1987) 40 C.L.P. 71.
26 Idem.
27 Ibid. 117.
28 Idem.
the recipient. Anticipation of factually necessary expenditure occurs when no reasonable man would deny that it was likely that the recipient of the benefit in kind would have chosen to have obtained that particular benefit. 29 Craven-Ellis v. Canons Ltd. 30 is cited as an example of the conferment of a benefit in kind which anticipated necessary expenditure by the recipient. In the absence of the "managerial" services so supplied by Mr Craven-Ellis, the company would have had to obtained them; it was therefore deemed to have received an incontrovertible benefit.

A recipient of a benefit in kind is also incontrovertibly benefited when he or she has been saved "legally necessary expenditure". Contrary to a "commonsense view" of when a debt is discharged, 31 this exception does not apply whenever a legitimate debt has been paid by another. The reason why it does not apply further challenges the persuasiveness of subjective devaluation. If a debt is regarded by the law as being discharged, its discharge must have benefited or enriched the debtor who can no longer be sued for the debt. Subjective devaluation, however, enables the debtor to assert that the mere fact of another's payment of the debt does not constitute a benefit or enrichment. To resolve this apparent conundrum Professor Birks and Mr Beatson have suggested that the mere fact of another's payment of a debt does not discharge that debt; 32 they suggest that the debt will usually only be discharged if the debtor ratifies the payor's actions and thereby adopts the payment. In the absence of the debtor's ratification the debt will only be discharged if the payor was legally compelled to make that payment. This legal compulsion exception comes within the rubric of "legally necessary expenditure", and Exall v. Partridge 33 is cited in support of it. Here, Exall's carriage, while on Partridge's household premises, had been distrainted by the landlord. To recover his carriage Exall was required to pay Partridge's rental arrears and Exall successfully sought reimbursement from Partridge. Because Exell had been

29 According to Professor Birks, "a factual necessity does not have to be absolute" to constitute an incontrovertible benefit: "[A] plaintiff can claim to have anticipated inevitable expenditure even though it cannot be said to be 100 per cent certain that the defendant would have incurred the expenditure anyhow or would if he had been able to give his mind to it. . . . So when one says that a given expenditure was factually necessary or inevitable for the defendant, one excludes unrealistic or fanciful possibilities of his doing without it." Ibid. 120.
30 [1936] 2 K.B. 403.
33 (1799) 3 Esp. 8; 170 E.R. 520.
compelled to make the payment, Professor Birks asserts that Partridge’s debt had been discharged. By discharging the debt, “an expenditure which [Partridge] was legally bound to make”, 34 Exall had incontroversibly benefited Partridge.

Although Professor Birks considers that this “is the easiest kind of case under this head” of incontroversible benefit, 35 a puzzling aspect to his reasoning is that Partridge may not have regarded himself as being enriched. If this subjective consideration would have been decisive if Exall had voluntarily paid the rental arrears as negating the receipt of an enrichment, why is it simply overridden when he was compelled to make that payment to recover his carriage? In both situations it is the same debt. One is left with the suspicion that the reason why the law regards “voluntary” payment of another’s legitimate debt as not justifying restitutionary relief may be more to do with considerations of officious behaviour than acceptance of the argument of subjective devaluation.

The second situation in which Professor Birks suggests that the no reasonable man test is satisfied is when a recipient of a benefit in kind has turned that benefit into money. Although conceding that there may be practical difficulties if the benefit is not relatively quickly converted into money, Professor Birks argues that this test is employed in the context of tortious actions for damages arising from an act of conversion. 36 In this situation, “[t]he law is that you can recover only the pre-improvement value, except in the case in which I was more than a merely technical wrongdoer because I knew that I had no right to deal with the res in question. When you recover the pre-improvement value I take the benefit of my input”. 37

This concludes the introduction to the argument of subjective devaluation. As developed by Professor Birks, it has the ability to restrict significantly the availability of restitutionary relief in those situations in which the “enrichment” takes the form of a benefit in kind. In the absence of free acceptance of the benefit, or no reasonable man doubting the conferment of an incontroversible benefit (which presumably may only occur if inevitable expenditure by the recipient has been saved or if the “benefit” has been realized into money), the conferor of the benefit in kind is unable to satisfy the first precondition of a restitutionary claim—the fact of an enrichment.

III. AN EVALUATION OF SUBJECTIVE DEVALUATION

The preceding introduction to subjective devaluation has revealed cases, such

34 Birks, Introduction, supra n. 13, 118.
35 Idem.
36 Ibid. 121–124.
37 Ibid. 121.
as Greenwood v. Bennett 38 which, as recognized by Professor Birks, have adopted an objective view of enrichment; it has also revealed the circularity of argument associated with the “legally necessary expenditure” exception. Although these cases and circular argument must question the persuasiveness of subjective devaluation, its supporters can argue that it provides an explanation for the difference in the common law treatment of money benefits and benefits in kind. While it may provide an explanation, it is respectfully submitted that the subjective devaluation explanation is not a convincing one.

For the writer a more persuasive explanation is that there are two interrelated reasons underlying the law’s historically cautious approach to restitutionary claims in respect of benefits in kind—a fear of officious conduct and a common inability to restore a benefit in kind. These reasons can be seen in the following observation of Scarman L.J. from Owen v. Tate: “If... the plaintiff has conferred a benefit on the defendant behind his back in circumstances in which the beneficiary has no option but to accept the benefit, it is highly likely that the courts will say that there is no right of indemnity or reimbursement”.39

The common law has a fear of officious behaviour and does not wish to provide any encouragement to those who intermeddle in the affairs of others. The window-cleaner, for instance, who, unrequested, cleans my windows in the hope that I will pay him or her is not to be encouraged. As Professor Palmer has observed, the common law has a “background of a long-standing judicial reluctance to encourage one person to intervene in the affairs of another by awarding restitution of benefits thereby conferred”.40 The plaintiff in Owen v. Tate, for instance, had “assumed the obligation of a guarantor behind the backs of the defendants, against their will and despite their protest”.41 Given this officious behaviour, is it surprising that the plaintiff was denied restitutionary relief, notwithstanding the fact that the bank’s recourse to his guarantee discharged the defendant’s debt?

Even if the conferor of a benefit in kind has not acted officiously—for instance, by acting under a mistake—another reason why English law has looked unfavourably upon the restitutionary claim is that the specific benefit so conferred may be unable to be restored. Although the recipient of money may also be unable to return that money because it has been spent, it has been the recipient’s decision to spend the money. With benefits in kind, the inability to restore the benefit may be attributable not to the actions of the recipient but to the nature of the benefit. As Goff J. (as he then was) observed in B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2), “By their nature, services cannot be restored; nor in many cases can goods be restored, for example where they

38 Supra n. 17.
41 Supra n. 39, 134 per Scarman L.J.
have been consumed or transferred to another". Perhaps the reluctance to grant restitutionary relief in those situations in which the benefit in kind cannot be restored is attributable to an underlying recognition of a rudimentary change of circumstances defence.

Returning to the evaluation of subjective devaluation, a principal difficulty which the writer has with it is that it allows the recipient of a benefit in kind to negate objective evidence suggesting the receipt of an enrichment. For Professor Birks, however, this is a strength of subjective devaluation; he argues:

The argument [of subjective devaluation] derives its force from the need to protect people generally from the danger implicit in obligatory market valuation, namely that their choices will be dictated to them by their being made to pay for what they themselves do not value.

As recognized by Professor Birks, a consequence of the availability of subjective devaluation is that its application "is bound to produce conclusions which will be very surprising to some or even most people". Assume that my $5,000 car has been stolen. You, the innocent purchaser from the thief, have had the car repainted, and as a result the car has appreciated in value; it is now worth $5,500. Upon learning of the thief’s actions you voluntarily return the car to me. You now seek reimbursement of the costs incurred by you in improving my car (or the increase in the car’s value attributable to your actions, if this is less). Alternatively, assume that you are my bank. An electrician carries out authorized electrical repairs for me. By mistake, and without my authority, you pay my legitimate account and the electrician regards the account as discharged. You now seek to recover your payment from me. In both examples restitutionary relief may be denied. Does this denial occur, however, because of subjective devaluation and my assertions that I did not want my car painted or my legitimate account paid, or for some other reason? One could be forgiven for assuming that the fact of my enrichment is indisputable. In the first example I now own a more valuable car, while in the second I have been saved paying a legitimate account—my wealth has been preserved. Notwithstanding the objective evidence, the argument of subjective devaluation allows me to assert that I was not enriched by your actions. Can this be right?

The application of subjective devaluation in the first example is even more surprising when it is remembered that, if you had not voluntarily returned the car to me and I had sued you in conversion, I may have recovered only the

43 Birks, "In Defence of Free Acceptance", supra n. 21, 129.
44 Ibid. 130.
unimproved value of the car.\textsuperscript{45} If I had successfully brought an action for recovery of the car I may have had to pay you a “fair and just allowance” for the improvements.\textsuperscript{46}

For the writer, tacit acknowledgement of the problems associated with freedom of choice in determining the existence of an enrichment is provided by the no reasonable man exception to subjective devaluation. Determining whether a recipient of a benefit in kind has been enriched may be “surprisingly complex”,\textsuperscript{47} but it is suggested that, unless the law is to “adopt an unnecessarily narrow concept of enrichment”,\textsuperscript{48} common sense would indicate that the commencing point should be objective evidence.

In anticipation of this reaction Professor Birks suggests that “[t]he startling nature of some of the results [applying subjective devaluation] easily distracts the observer from the strength of the logic by which they are dictated”,\textsuperscript{49} “the logic of respect for people’s freedom to order their own priorities”.\textsuperscript{50} Appeals to freedom of choice are attractive and, as we shall see, they are not new to the law of restitution. Attractive as such appeals are, however, should they play a role in a law of restitution premised upon the restoration of enrichments?

In considering “the logic of respect for people’s freedom to order their own priorities” and its application to the law of restitution, it should be recognized that in the late 1960s to early 1970s, when Professor Birks was first formulating subjective devaluation,\textsuperscript{51} the law of restitution lacked widespread judicial acceptance. The very existence of a law of restitution was debatable; indeed, with some notable exceptions,\textsuperscript{52} judicial opinion was against any such recognition. The then orthodox view was that the common counts were based upon an implied contract. At the zenith of its express influence the implied contract theory was used to restrict the availability of the common counts (or quasi-contractual remedies as they became known) to those situations in which

\textsuperscript{46} Peruvian Guano Co. Ltd. v. Dreyfus Brothers & Co. [1892] A.C. 166, 176 per Lord Macnaghten.
\textsuperscript{48} Birks, “In Defence of Free Acceptance”, supra n. 21, 145.
\textsuperscript{49} Ibid.
\textsuperscript{50} Idem.
\textsuperscript{51} While the argument of subjective devaluation is to be found expressed in its most developed form in Birks’s \textit{Introduction}, the basis of it can be found in two of Professor Birks’s early articles: “\textit{Negotiorum Gestion And The Common Law}” (1971) 24 C.L.P. 110 and “Restitution For Services” (1974) 27 C.L.P. 13.
\textsuperscript{52} For instance Lord Wright’s famous observation from \textit{Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour} [1943] A.C. 32. At 61 Lord Wright observed: “It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep”.

a contract could validly have existed.\textsuperscript{53} As A.T. Denning Q.C. (as he then was) observed, a plaintiff seeking a quasi-contractual remedy had to “rely on facts from which a contract would be inferred”.\textsuperscript{54}

In hindsight it can be seen that the implied contract theory, and the associated perception that the quasi-contractual remedies were an adjunct to the law of contract, has had an influential effect (albeit a detrimental one) upon the development of the law of restitution. One way in which restitutionary theory has been influenced is through the introduction of contractual principles. As observed by Mr Beatson, a significant legacy of the implied contract theory has been the inference that restitutionary remedies are “subordinate to and subject to contractual principles”.

This legacy is displayed in the law’s response to an argument which the recipient of an unrequested benefit may raise when asked to pay for it. Put simply, this argument is: why should I have to pay for something which I never requested? Even with the acceptance of a law of restitution and the underlying principle of unjust enrichment, this argument remains persuasive. At a time when the implied contract theory, and not unjust enrichment, provided the rationale for relief; this argument could be seen as decisive; liabilities were not to be imposed upon another without his or her consent. As Professor McCamus has observed: “Closely allied to the notion that restitutionary liability could be premised only on an implied contract was the notion that one would be liable for the value of services rendered only if they had been requested or if the recipient, having had an opportunity to reject, freely accepted them”.\textsuperscript{56}

The influence of contractual principles upon restitutionary theory can be discerned further in Professor Stoljar’s early attempt to provide a rationale for the quasi-contractual remedies. He suggested that these remedies could be divided into two groups depending upon whether they were protecting property rights or curing defects in consensual transactions. Except where the benefit took the form of the payment of another’s debt, benefits in kind generally did not come within either group.\textsuperscript{57}

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\textsuperscript{53} As Lord Haldane L.C. observed in \textit{Sinclair v. Brougham} [1914] A.C. 398, 415: “Broadly speaking, so far as proceedings in personam are concerned the common law of England really recognises (unlike the Roman law) only actions of two classes, those founded on contract and those founded on tort. When it speaks of actions quasi ex contractu it refers merely to a class of action in theory based on a contract which is imputed by a fiction of law. The fiction can only be set up with effect if such a contract would be valid if it really existed”.


\textsuperscript{57} S. J. Stoljar, \textit{The Law of Quasi-Contract} (1964) 126. Recovery in this situation was apparently premised upon the payer’s retention of “property rights” to the money. At 187 Professor Stoljar...
this exclusion of benefits in kind graphically displays the influence of contractual principles. He argued:

What, then, is the essential feature of claims of reward? [i.e. claims for work done or services supplied] Since they are not and cannot be proprietary in character, their basis must needs be a contractual one: contractual because ... claims for money either rest on a contractual or consensual basis, or rest ... on a proprietary theory. But this immediately raises a further difficulty. For to say that claims of reward depend on contract is clearly to say that one need not pay for services except those one has contracted or bargained for. Again this means that P cannot claim reward on the ground that by his services D has been unjustly benefited or enriched, as D is always entitled to reply that, enriched or not, he never wanted these services at all, and that anyhow he has a right to exercise his freedom of choice as regards the services that he may want or need.58

The influence of Professor Stoljar’s theory upon Professor Birks is displayed in one of his early articles, “Negotiorum Gestio And The Common Law”.59 While Professor Birks does not expressly refer to Professor Stoljar, he is at pains to refute the suggestion “that payment for services ought to be left exclusively to voluntarily created obligations”.60 While conceding that “[n]o doubt a manifestation of a man’s will to expend money is the first and best criterion to decide whether he ought to pay”, Professor Birks argues that “[t]here is, however, no sound a priori argument that it is the only one”.61 He goes on to suggest that traditionally the “outstanding difficulty” for an unofficious conferor of a non-requested benefit in kind was “proof of benefit to the defendant of such an order as to make it just to compel payment”.62 Having introduced the idea of subjective devaluation as the basis for this “difficulty”, Professor Birks proceeds to discuss in some depth the exceptions thereto.

An advantage of subjective devaluation in the 1970s was that it offered an explanation as to why restitutionary relief for benefits in kind was relatively rare. The recognition of exceptions to this “argument” also showed that this “difficulty” could be overcome and, if overcome, that restitutionary relief was potentially available for benefits in kind. In purporting to remove the influence of contractual principles in determining the availability of restitutionary relief, however, has Professor Birks merely camouflaged their influence, allowing them to remain active through the operation of the argument of subjective

suggests that there may be a few anomalous situations, for instance the burial cases, in which restitution is potentially available for services.


60 Ibid. 114.

61 Idem.

62 Idem.
devaluation? The “logic of respect for people’s freedom to order their own priorities” is attractive but, to return to a question asked earlier, should it play a role in a law of restitution premised upon the restoration of enrichments?

Given the cases which are inconsistent with subjective devaluation, the circular arguments associated with it, the fact that the law’s reluctance to grant restitutionary relief for benefits in kind can be explained by the principle against officious behaviour, and the application of what I described earlier as a rudimentary change of circumstance defence, the fact that subjective devaluation allows a recipient of a benefit in kind to negate objective evidence, and the question whether its underlying “logic” is applicable to restitution, its persuasiveness must be questioned. In *An Introduction To The Law of Restitution*, Professor Birks advances two factors which he suggests provide support for subjective devaluation. The first factor is the differences in the wording of the old forms of action for money had and received and those for benefits in kind. The second factor is the existence of some judicial observations which he suggests display an intuitive judicial “commitment to a subjective approach to the issue of enrichment”.

Do these factors outweigh the inconsistencies in subjective devaluation?

1. The forms of action

At the outset Professor Birks suggests that the “basic orientation” of English law towards the argument of subjective devaluation “is expressed in the wording of the old forms of action” or “common counts”. Unlike the counts for benefits in kind, in which a request by the defendant was part of the pleading, the count for money had and received simply alleged that the defendant had received the money to the use of the plaintiff. Professor Birks argues:

The operative part of the count for money had and received—that is to say, the part which recited the indebtedness as opposed to the evidently inoperative part which recited the *assumpsit* to pay—said nothing about the defendant’s having wanted or chosen to have the money. The allegation was simply that he had received the named sum to the use of the plaintiff. Consequently there was no obstacle to the development of claims which were in every respect independent of the defendant’s will.

Suppose that instead of money you received a benefit in kind. With only that change I now must say I acted at your request. This is not just an accident. It represents intuitive deference to the argument from subjective devaluation.

The form which the common counts took for benefits in kind was different.

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63 Birks, “In Defence of Free Acceptance”, supra n. 21, 145.
65 Ibid. 111.
66 Ibid. 111–113.
from that for money had and received and probably this difference was probably not “an accident”. Does the difference represent “intuitive deference to the argument from subjective devaluation” however? I would suggest no. A stronger argument may be that it represents intuitive deference to a general policy assumption underlying contract—that there should be no liability without consent.

When considering the common counts it is important to recall that they were in essence common or stylized pleadings based upon the writ of assumpsit. One of the progeny of trespass on the case, assumpsit came to provide a cause of action or remedy in what we would today refer to as contractual cases. Unlike the common counts for benefits in kind which really arose out of the development of assumpsit, the count for money had and received could trace its ancestry to the writ of account. As Professor Ames has observed: “Assumpsit for money had and received was in its infancy merely a substitute for Account”, as such it focused upon the actual receipt of the money. Although the House of Lords in Sinclair v. Brougham was to hold that the implied contract theory also underlay the action for money had and received, as Professor Birkis has observed, this action “was equipped with a sound non-contractual base and had only to transcend a fiction to be recognised as its true self”.70

This recognition can be seen in the third edition of Bullen’s and Leake’s Precedents of Pleadings, one of the practitioners’ books which Lord Goff believes was “a major force in the moulding of the law”. While the common counts for benefits in kind were regarded by Messrs Bullen and Leake as contractual actions, and as such a “request” had to be expressly alleged in the pleadings or be capable of being inferred from the consideration, influenced perhaps by the views of Lord Mansfield, they regarded the action for money had and received as something different. In describing this count they observed:

This is the most comprehensive of all the common counts. It is applicable wherever the defendant has received money which in justice and equity belongs to the plaintiff under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff.71

68 As Professor Ames observed in explaining the operation of the writ of account, “[O]ne who received money from another to be applied in a particular way was bound to give an account of his stewardship. . . . If he failed for any reason to apply the money in the mode directed, the auditors would find that the amount received was due to the plaintiff, who would have a judgment for its recovery.” Ibid. 66.
69 supra n. 53.
71 Woolwich Building Society v. I.R.C. (No. 2), supra n. 8, 756.
73 Ibid. 44.
A difficulty in ascribing significance to the pleading of a request in the common counts for benefits in kind is that their development is a history of fictions. Professor Ames has shown that the *assumpsit* itself was in many cases a fiction.74 Professor Lücke has argued that the “request” also became in some situations a fiction justifying the continued use of the general declaration of facts associated with the common counts.75 Because of the way in which the common counts developed with the use of fictions and the range of situations in which they were available, it may be impossible now to categorically determine the significance of the request. In any event, at the close of the twentieth century, should forms of pleading developed in the sixteenth and seventeenth centuries influence substantive rights by precluding a court from recognizing the receipt of an enrichment when, judged objectively, an enrichment has in fact been conferred? As Lord Aitken observed in *United Australia Ltd. v. Barclays Bank Ltd.*:

> These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of actions which have now disappeared should not in these days be allowed to affect natural rights. When these ghosts of the past stand in the path of justice clanking their mediæval chains the proper course for the judge is to pass through them undeterred.

2. Intuitive judicial commitment

Professor Birks also relies upon two judicial observations which he suggests display an intuitive judicial “commitment to a subjective approach to the issue of enrichment.”77 These observations are that of Bowen L.J. in *Falcke v. Scottish Imperial Insurance Co.*78 and that of Pollock C.B. from *Taylor v. Laird.*79

(a) *Falcke v. Scottish Imperial Insurance Co.*

Mr Emanuel was the owner of the equity of redemption in a life assurance policy over the life of the Duchesse de Bauffremont. The equity of redemption was in turn mortgaged to Mr Falcke. In the mistaken belief that he had reacquired Mr Falcke’s interest in the policy, and with the aim of preserving

74 J. B. Ames, “The History of Assumpsit”, supra n. 67, 64.
75 H. K. Lücke, “Slade’s Case and The Origins of the Common Counts” (1965) 81 L.Q.R. 422 and 539; (1966) 82 L.Q.R. 81. At 93–94 he argues that “[i]n cases involving request *assumpsit* the general declaration was justified on the basis that the defendant knew which things or services he had requested and could therefore not expect the plaintiff to set this out in detail in the declaration”. At trial the true facts and arguments in support of relief would emerge.
76 [1941] A.C. 1, 29.
78 (1886) 34 Ch. D. 234.
79 (1856) 25 L.J. Ex. 329.
the policy, Mr Emanuel paid the premium then due. On the insured’s death Mr Emanuel sought reimbursement of this payment and claimed a lien on the proceeds received by Mrs Falcke (as Mr Falcke’s personal representative).

Unsurprisingly the Court of Appeal unanimously rejected Mr Emanuel’s claim. As Cotton L.J. observed, “It would be strange indeed if a mortgagor expending money on the mortgaged property could establish a charge in respect of that expenditure in priority to the mortgagee”. While this observation may provide in essence the ratio decidendi of the Court’s judgment, Falcke v. Scottish Imperial Insurance Co. has become famous for the general observations of the members of the Court, particularly that of Bowen L.J., that the mere fact of Emanuel’s benefiting Falcke by paying the premium and keeping the policy justified relief. Bowen L.J. observed:

The general principle is, beyond all question, that work or labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor even, if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced on people behind their backs any more than you can confer a benefit upon a man against his will.

In the early 1970s this observation could be seen as being hostile to any law of restitution; indeed in his early writings Professor Birks expressed his fears that Falcke v. Scottish Imperial Insurance Co. could be a “final rejection of the uninvited intervener’s claim”. With the development of restitutionary theory in the last twenty years, however, this case and the observation of Bowen L.J.

80 Supra n. 78, 243.
81 See Goff & Jones Restitution supra n. 14, 337 n. 49 on the significance of the positioning of this comma.
82 Ibid. 248. Both Cotton and Fry L.JJ. made similar observations. At 241 Cotton L.J. observed:

Now let us see what the general law is. It is not disputed that if a stranger pays a premium on a policy that payment gives him no lien on the policy. A man by making a payment in respect of property belonging to another, if he does so without request, is not entitled to any lien or charge on that property for such payment. If he does work upon a house without request he gets no lien on the house for the work done. If the money has been paid or the work done at the request of the person entitled to the property, the person paying the money or doing the work has a right of action against the owner for the money paid or for the work done at his request.

At 253 Fry L.J. observed:

[J] It is said that when one person makes an outlay upon property, and another person takes the benefit of that outlay, a request is implied, and the person who takes the benefit must pay the money, or submit to a lien upon the property benefited for the repayment of the money. To apply that general proposition to the relation which we are now considering, that of mortgagor and mortgagee, would amount to saying that the mortgagor remaining in possession would be entitled to a lien against his mortgagee, and in priority of the mortgage money, for every sum which is expended in the repair or the improvement of the estate; and of which the mortgagee by entering into possession might take the benefit. Such a proposition is untrue to the knowledge of every one in whose hearing I am speaking.

need no longer possess the significance which it has historically attracted. Specifically it is suggested that the observation of Bowen L.J. does not display an intuitive judicial "commitment to a subjective approach to the issue of enrichment". The observation of Bowen L.J. assumes the conferral of a benefit. Both Cotton and Fry L.JJ. also recognized that Mrs Falcke was benefited by Emanuel's action.

Mr Emanuel was denied relief, not because the Falckes had not received a benefit, but because their retention of it was not unjust; as Professor Birks has acknowledged, not only had Emanuel acted in his own self interest but recovery in that case would have undermined Falcke's security. The thrust of the observation by Bowen L.J. is to refute the suggestion that the mere fact of the receipt of a benefit raises an obligation upon the recipient thereof to pay for it.

(b) Taylor v. Laird

It is also questionable whether the remarks of Pollock C.B., made during argument, support the conclusion of Professor Birks. This case involved inter alia a claim by a ship's captain for wages. During an exploration and trading expedition the captain had relinquished the "navigation and social management" of the ship to another. On the return journey, however, the captain performed some duties, for instance discharging the native crew and engaging a new crew, landing parts of the cargo, and ordering repairs.

In response to the argument that the defendant had had the benefit of the captain's services during the return voyage and therefore was under an obligation to pay for them, Pollock C.B. made the following observation, part of which Professor Birks quotes:

> Suppose I clean your property without your knowledge, have I then a claim on you for payment? How can you help it? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning? The benefit of the service could not be rejected without refusing the property itself. So in the present instance: The ship came home, say partly by the assistance of the plaintiff: what could the defendant do but receive his ship back again? There was nothing in that to imply a contract to pay the defendant anything. [The part quoted by Professor Birks is emphasized.]

In commenting upon the extract quoted by him, Professor Birks observes that

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85 Cotton L.J. expressly recognized that Mrs Falcke "gets the benefit of payment": supra n. 78, 242. Inherent in Fry L.J.'s rejection of Emanuel's argument that "when one person makes an outlay upon property, and another person takes the benefit of that outlay, a request is implied, and the person who takes the benefit must pay the money, or submit to a lien upon the property benefited for the repayment of the money", is also the acknowledgement of the receipt of a benefit: ibid. 253.
87 Supra n. 79, 332.
"Its premiss is that a choice is necessary". In some respects this observation is correct, but was choice necessary to establish a contract to pay or to establish the conferral of a benefit? Was Pollock C.B. also displaying judicial disencouragement to what might be officious conduct and/or negating the argument that the use of an improved chattel constitutes acceptance of an obligation to pay for the improvement? Contrary to Professor Birks's assertions, I am not sure whether the retort of Pollock C.B. shows a "commitment to a subjective approach to the issue of enrichment". In any event, is restitutionary theory to be premised upon judicial comments made to counsel during argument?

IV. Conclusion

The argument of subjective devaluation is a product of its time; a time influenced by both the implied contract theory and hostility to the recognition of a law of restitution. Professor Birks suggests that his theory is a response to restitution's "desperate need... for a simple, even an over-simplified, account of how its pieces fit together". While it cannot be doubted that Professor Birks's theory "represents... a sophisticated attempt... to map out the law of restitution", it is suggested that it is something more. It is also an attempt to silence the critics.

To a large extent the critics have been silenced and Professor Birks must receive a share of the credit for this. His theoretical structure shows that restitution is more than a collection of disparate topics. As shown by the treatment of "the principle" against unjust enrichment, Professor Birks also takes pains to emphasize that his theoretical structure is grounded upon the existing case law and thereby refute the suggestion that the recognition of a law of restitution will lead to "palm-tree" justice or "uncontrollable aberration[s]".

With hindsight it may be suggested that in developing his theory Professor Birks has placed too much emphasis on the need to silence the critics. It may be observed that, in attempting "to refute the modern Lord Sumners who, it will be recalled, condemned the law of restitution as vague jurisprudence", Professor Birks has "sought to create a conceptual framework which is rigorously logical". The influence of the critics upon Professor Birks is also displayed in his attempt to incorporate and explain within his theory the existing case law, including the hostile case law. This is a very important fact.

88 Birks, Introduction, supra n. 13, 114.
89 Ibid. 113.
90 Ibid. 1.
92 Birks, "Restitution For Services", supra n. 51, 13.
when considering Professor Birks's theory. Professor Sutton has warned that, "[t]hose who are developing restitutionary theory are very sensitive to... [the] limitations of case law, and try to adapt their theory accordingly." It is submitted that this has occurred with Professor Birks; indeed, he expressly cautions that his theory "has sometimes to be forced on to cases which themselves perceive it, if at all, intuitively." 

This caution is particularly apposite to the argument of subjective devaluation. It is submitted that while Bowen L.J. in Falcke v. Scottish Imperial Insurance Co. and Pollock C.B. in Taylor v. Laird may have perceived the significance of officious behaviour, their observations do not display an intuitive judicial "commitment to a subjective approach to the issue of enrichment". In the 1960s and 1970s these judicial observations could be perceived as displaying an apparent general hostility to restitutionary relief. It is submitted that it was for the specific purpose of deflecting this hostility and incorporating these observations within his theory, that Professor Birks discovered this "commitment" to subjective devaluation within them.

As a general theory the persuasiveness of the argument of subjective devaluation is also questionable. In situations in which objectively I have received an enrichment, should I be able to assert that since I neither requested nor freely accepted the benefit I do not regard myself as enriched and therefore am not enriched? Perhaps the no reasonable man exception which Professor Birks has grafted onto the argument of subjective devaluation is both a recognition of the problems inherent in the "argument" and a means of ultimately circumventing it.

It is submitted that it is now time for the argument of subjective devaluation to be removed from restitutionary theory. The need for it and perhaps its sole justification—to placate the critics of restitution—no longer exist. In situations in which, when viewed objectively, a party has been unequivocally enriched by the actions of another, the law should disregard any appeal to the argument of subjective devaluation and recognize the existence of the ensuing enrichment. Whether the law will then require the enriched party to disgorge that benefit is another issue.

As noted earlier, Lord Aitken has advised us that when "ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred". Ignoring this advice may be bad enough, but are we going to compound the situation by introducing a new twentieth-century "subjective devaluation" ghost to haunt the future development of the law of restitution?