accommodate collective bargaining can we not work towards a "strike free" or at least "strike inhibiting" version? Setting up the proposed structure would also involve constitutional difficulties of an acute type and other legal "technicalities", like it or not. Moreover, it would open up further potential sources of dispute and strike action, e.g., in trying to force an employer to "agree" to enter the bargaining sphere, or in inducing the Department of Labour not to appeal. But it is an interesting and constructive list, worthy of consideration and debate.

The author's ten strategic factors for stable bargaining are things which he argues should be built into whatever framework is adopted. Some are self evidently beneficial and could be used now in an arbitration system, e.g., that which suggests enhanced research facilities and training for practitioners, especially from unions, and that which argues for better grievance handling procedures. Professor Niland makes an immediate contribution to better training by publishing, in Appendix III, his own collective bargaining simulation exercise designed for Australian conditions. But as he observes, commitment to the agreement achieved and to the process will be more difficult to facilitate. The circumstances, or crises, in which collective bargaining should be suspended would also prove difficult to define.

In summary, much of the early part of this book is unconvincing and annoying, especially to a lawyer. But do not fling it aside half way through, as the reviewer was tempted to do. If bargaining of some type is emerging and likely to continue, it is important that we do not simply assume that "she'll be right mate". "She" may very well not be right. Professor Niland has performed a useful function in drawing attention to this emerging trend. One may find fault with some of his analysis and disagree with his suggested framework and strategic factors (as do some of those quoted in Appendix V), but the author will almost certainly achieve one of his stated objectives, namely the stimulation of "further examination of alternative approaches to industrial conflict in Australia".

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The Law of Restitution (2nd ed.), by Robert Goff and Gareth Jones, London, Sweet & Maxwell, 1978, lxxxiii + 614 pp. (including index). $60.50 (hard cover only).

This important book, now in its second edition, is the only comprehensive work on the restitution of unjust benefits in English jurisprudence. Since this work was first published in 1966 it has exerted

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a considerable influence on legal thinking in England, to the extent that the law of restitution has now been elevated to a separate subject in the major English universities and is starting to attract judicial attention in England and Australia. In Canada, where the law of restitution has been steadily developing since *Deglman* v. *Guaranty Trust Co. of Canada,*[1] this book is frequently judicially mentioned, most recently in *Bank of British Columbia* v. *Holinaty*[2] and *Hydro Electric Commission of the Township of Nepean* v. *Ontario Hydro.*[3]

It is therefore most appropriate that the second edition should have coincided with the first case in which the principle of unjust enrichment has been directly applied by an English court. In *China-Pacific S.A.* v. *The Food Corporation of India* (*The Winson*)[4] the plaintiff salvors of a ship which was aground off the Philippines took her cargo of wheat to Manila between February 10 and April 20 pursuant to a contract of salvage in the Lloyds' open form. Until the owners of the cargo took delivery on August 5, it was stored in Manila at a total cost of $383,392 for stevedoring and storage expenses. The defendant charterers paid the costs incurred after the owners had abandoned the voyage on April 24, but disclaimed liability for the costs incurred before then, arguing that the plaintiffs should look to the shipowners for reimbursement. Lloyd, J. considered that the case "involved an interesting investigation of the modern law of restitution". He held that the defendants were liable under the contract for the whole cost, and held further that even if the contract had come to an end, the plaintiffs' claim would succeed "on the principle of unjust enrichment . . . for the defendants have undoubtedly obtained a benefit at the plaintiffs' expense, and, in the circumstances, it would be unjust that they should retain that benefit without compensation". The principle of unjust enrichment was recently considered by the Supreme Court of New South Wales in *Sabemo Pty. Ltd.* v. *North Sydney Municipal Council.*[5] The updated and expanded second edition will prove particularly valuable to practitioners of the law at this time of emerging judicial recognition.

The second edition is rendered even more comprehensive than its predecessor by the addition of new chapters on subrogation, benefits acquired in breach of confidence and benefits acquired by reprehensible means. It contains new sections on economic duress and on contribution and recoupment; and the treatment of benefits acquired in breach of fiduciary relationships, on breach of contract, and on frustration of contract have been significantly revised. Additional Canadian and American authorities have been included.

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[1] [1954] 3 D.L.R. 785.
[2] [1979] 91 D.L.R. (3d) 255.
[3] [1979] 92 D.L.R. (3d) 481.
[4] [1979] 1 Ll. Rep. 167.
[5] [1977] 2 N.S.W.R. 880.

The first chapter at least should be required reading for all students of the law. It explains and analyses the fundamental principle of unjust enrichment which is the basis of the developing law of restitution: that a person who has been unjustly enriched at the expense of another is required to make restitution to the other. In the light of recent judicial statements such as those in *Nissan* v. *Attorney-General,*[6] *Greenwood* v. *Bennett*[7] and *Owen* v. *Tate*[8] the authors are now able to confidently assert that "the law is now sufficiently mature for the courts to recognize a generalized right to restitution". They point out (at page 24) that it has recently become possible to identify substantive categories, such as mistake and compulsion, into which the various restitutionary claims fall, and predict that the next step will be recognition that these categories are not merely united by the principle of unjust enrichment, but are illustrations of a generalized right to restitution, pointing out that a comparable development occurred with the tort of negligence in *Donoghue* v. *Stevenson.*[9] Already *The Winson*[10] bears out their prediction.

Those trained in the traditional common law concept of compensatory damages sometimes express a certain reluctance to accept a principle which measures recovery by the defendant's unjust gain rather than the plaintiff's loss. This hesitation must be overcome if the law of restitution is to develop as it should, and it is therefore important to appreciate at the outset that it is proper in certain circumstances to award recovery on a basis other than loss. The first chapter now includes a brief comparison of loss and benefit under the heading "Enrichment at the Plaintiff's Expense".

The concept of benefit is central to the principle of unjust enrichment, and the second edition introduces a more sophisticated analysis of the concept of benefit with the inclusion of the notion of incontrovertible benefit, first articulated by Professor Gareth Jones in an article in the *Law Quarterly Review* of 1977.[11] Where the defendant has unjustly obtained money or goods at the plaintiff's expense, it is clear that he has received a benefit. But this becomes more difficult to establish if the alleged benefit is in the form of unrequested services, for the defendant can deny that he has received a benefit by arguing that he did not request those services, and would not want to receive them if he would have to pay for them. It was therefore asserted in the first edition that there should be restitution for unrequested services only if the defendant freely accepted the plaintiff's services by accepting or retaining them with an opportunity of rejecting them and with know-

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[6] [1968] 1 Q.B. 286 at 352.
[7] [1973] 1 Q.B. 195 at 202.
[8] [1976] 1 Q.B. 402 at 413.
[9] [1932] A.C. 653.
[10] *Supra* n. 4.
[11] "Restitutionary Claims for Services Rendered" (1977) 93 *L.Q.R.* 273.

ledge that they were to be paid for. The second edition submits that recovery should also extend to situations where the defendant has been incontrovertibly benefited by the receipt of services, by making an immediate and realizable financial gain or by being saved an expense which he would otherwise have incurred.

Orthodox legal theory requires that a plaintiff who asserts a proprietary claim must establish that he has property in the thing claimed. The authors challenge this general proposition, and develop in this second edition a distinction between "pure" proprietary claims, which depend on the concept of property, and "restitutionary" proprietary claims, which, they assert, do not require proof that the plaintiff has property. Cases such as *Keech* v. *Sandford,*[12] *Bannister* v. *Bannister,*[13] *Binions* v. *Evans*[14] and *Hussey* v. *Palmer*[15] are explained as examples of the restitutionary type of proprietary claim, which lies to prevent another's unjust enrichment where it is necessary to give the plaintiff the additional benefits which flow from the recognition of a right of property. Only these proprietary claims are considered to fall within the law of restitution. Others do not take the view that restitutionary claims are independent of the concept of property;[16] but the thesis put forward by Mr Justice Goff and Professor Jones is most persuasive. "Benefit" and "property" are not inextricably connected. To establish that the defendant has received an unjust benefit, it is surely unnecessary to prove that he has acquired the plaintiff's property in the orthodox sense. A "property" analysis simply obscures the fundamental questions which must be answered: was the defendant enriched in circumstances which make it unjust for him to retain that enrichment, and if so, what is the most appropriate remedy in the particular case?

This restitutionary analysis views the constructive trust as a device for the prevention of unjust enrichment: this accords with the tendency of modern courts to regard constructive trusteeships as "no more than formulae for equitable relief".[17] But the authors also regard liens and subrogation as such remedies. Of considerable significance is their important new chapter on subrogation. Subrogation is treated as "essentially a remedy, which is fashioned to the facts of the particular case and which is granted in order to prevent the defendant's unjust enrichment". Some others who briefly shared the same view felt obliged to abandon it[18] in the light of the decision of the House of

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[12] (1726) Cas. Temp. King 61.
[13] [1948] 2 All E.R. 133.
[14] [1972] Ch. 359.
[15] [1972] 1 W.L.R. 1286.
[16] See, for example, S. J. Stoljar, *The Law of Quasi-Contract* (1964).
[17] *English* v. *Dedham Vale Properties Ltd.* [1978] 1 All E.R. 382 at 398.
[18] See G. Samuel, "Subrogation and Unjust Enrichment — New Feet in Old Shoes?" (1977) 93 *L.Q.R.* 344, 494; but compare the comments of J. Beatson, "Unjust Enrichment and the Moneylenders Act" (1978) 41 *Mod.L.R.* 330. See

Lords in *Orakpo* v. *Manson Investments Ltd.*[19]. But the authors are undeterred by this decision, which is relegated to the footnotes.

The recovery of benefits conferred by mistake forms an important category of the law of restitution. A particular problem exists in defining the circumstances in which money paid by mistake is, or should be, recoverable. The first edition canvassed the "fundamental mistake" doctrine and the "supposed liability" test for recovery of mistaken payments and rightly said that both are unsatisfactory, but concluded that no comprehensive standard for recovery could be postulated. The fundamental mistake doctrine was therefore suggested as the proper standard to govern the recovery of mistaken gifts of money. But it is quite inappropriate to take this doctrine from the law of contract and apply it to a simple payment situation. The fundamental test imposes a very strict standard in accordance with the principle *pacta sunt servanda,* but this policy does not operate in the area of mistaken payments, where quite different considerations apply. The governing principle here is simply the prevention of unjust enrichment.

The formulation of a "fundamental" test to govern non-contractual situations is also liable to mislead, by suggesting that the standard to be applied is identical to the doctrine which applies in relation to contracts. But this cannot be so. First, to render a contract void at common law both parties must have made a fundamental mistake, whereas in a simple payment situation it is only the payer's mistake which is relevant. Secondly, the relevance of common mistake in contract is that it negatives or nullifies consent: the mistake prevents there being the necessary correspondence of offer and acceptance. Consent in this sense is not relevant in a simple payment situation, where the question is not whether there is a valid bargain, but simply whether the money should be returned. Thirdly, the kinds of mistake which arise in contract and non-contractual situations are not always the same.

The second edition points out the inappropriate nature of this test and now suggests a comprehensive test for recovery: that "any mistake of fact which causes the payer to pay the money should be sufficient to permit recovery". The sole requirement is that the mistake actually caused the payment to be made: in other words, that it is a "material mistake".[20] This test avoids the problems of the fundamental mistake doctrine and gives proper effect to the governing principle of

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Footnote 18 (Continued).
also the Note in this Review, "Subrogation to the Security Rights of the Unpaid Vendor and Mortgagee".

[19] [1977] 3 W.L.R. 229.

[20] See C. A. Needham, "Mistaken Payments: A New Look at an Old Theme" (1978) 12 *U.B.C.L.R.* 159 at 217-224, where the same criterion for recovery was proposed.

unjust enrichment, which states that whenever a person has received an unjust benefit at the expense of another, he must make restitution to the other. Where the plaintiff has by mistake paid money to the defendant which he would not otherwise have paid, there is *prima facie* an unjust enrichment of the defendant which he should be compelled to restore. The "enrichment" is shown by the defendant's receipt of a sum of money. This benefit is obtained "at the expense of the plaintiff", since the payment was received from the plaintiff. The "unjust" character of the enrichment is indicated by the occurrence of a mistake which induced the payment. It is immaterial whether the mistake is "fundamental" in the contract sense or whether it is a "supposed liability" mistake. What is important is that the payment is actually caused by the mistake. If so, it is unjust for the defendant to retain the money, since he has received something to which he is not entitled and which he would not have obtained but for the plaintiff's mistake. But there should be no right to recover if the defendant was entitled to the money, since the benefit would not then be "unjust"; nor if the defendant received the money as agent and has paid it over to his principal, since the defendant has personally obtained no "benefit". The "material mistake" test can be appropriately applied to mistaken gifts as well as to other kinds of payments, and might also be applied to mistaken transfers of property other than money.

A mistake can be material although it is not the exclusive reason for the payment. Where the payer was influenced by several considerations to make the payment, the test would be satisfied if the mistake was the predominant factor. This balancing of factors will be particularly important in relation to gifts and payments made in submission to an honest claim. If money is mistakenly paid as a gift, there will be no material mistake if the main cause of the payment was the payer's desire to make a gift to the defendant, so that the element of donative intent outweighs the mistake factor. The requirement that the mistake be material preserves the rule that a payment, although made by a mistaken payer, is not recoverable if it is made in voluntary submission to an honest claim, for in such a case the dominant cause of the payment is the payer's desire to settle the claim, and the element of mistake is outweighed by the payer's determination to put an end to the matter. Similarly, where a payment is made recklessly without reference to the truth or falsehood of the payer's belief, it cannot be said that a material mistake has occurred. Despite the element of mistake, it is the payer's reckless desire to make the payment, whatever the true circumstances, which is the decisive factor. But where money is carelessly paid under the influence of a mistake, there will be a right to recover. Although the payer may have carelessly paid over the money without ascertaining the true situation, the payment is nonetheless induced by mistake. In this respect also the suggested

rule accords with the present law, which does not regard carelessness by the payer as a bar to recovery.

The authors suggest that the same criterion for recovery should govern mistakes of fact and law, but treat mistake of law in a separate chapter because "the limiting principle, that benefits conferred in submission to an honest claim are irrecoverable, assumes overwhelming importance if the payer's mistake is one of law". But as suggested above, this principle need not be treated separately from the right to recover. It is not a rule which operates to preclude recovery *after* a right to recover has been established. Rather, the submission factor is just one factor to be taken into consideration in deciding whether the mistake is sufficiently material to allow recovery. It is a part and parcel of the question whether a right to recover arises at all.

As regards mistaken improvements to land, considered in Chapter 5, mention might be made of some recent Canadian decisions which, in addition to *Estok* v. *Heguy*[21] and *T. & E. Development Ltd.* v. *Hoornaert*,[22] have contemplated a cause of action on the basis of unjust enrichment: *Nicholson* v. *St. Denis*;[23] *Ledoux* v. *Inkman*;[24] *MacIver* v. *American Motors (Canada) Limited*;[25] *Preeper* v. *Preeper*.[26]

Chapter 9 contains an interesting new section on the recovery of benefits conferred under economic duress, in which the authors justly criticize *Peter Kiewit & Sons Co.* v. *Eakins Construction Ltd.*[27] and prefer the approach of the Australian courts.

The section on ineffectual transactions has been substantially rewritten and contains several departures from the first edition. It is suggested in Chapter 23 that the innocent party to a breach of contract should be deprived of his existing right of election between a claim in restitution for the value of the services he has rendered and a claim for damages. On the other hand, the suggestion is made that the innocent party ought in certain circumstances to recover the profit made by a conscious wrongdoer from his breach of contract. Special mention should be made of the discussion of contracts discharged through frustration: this is contained in the appendix to the second edition and has been rewritten in the light of *B.P. Exploration Co. (Libya) Ltd.* v. *Hunt*,[28] the first case decided under the Law Reform (Frustrated Contracts) Act 1943. Chapter 23 might usefully be com-

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[21] (1963) 40 D.L.R. (2d) 88.
[22] (1977) 38 D.L.R. (3d) 606.
[23] (1976) 57 D.L.R. (3d) 699.
[24] [1976] 3 W.W.R. 430.
[25] [1976] 5 W.W.R. 217.
[26] [1978] R.P.R. 282.
[27] [1960] S.C.R. 361 (S.C.C.).
[28] Now reported [1979] 1 W.L.R. 783.

pared with the discussion of restitution remedies on breach or frustration of contract by Professor Treitel.[29]

The section dealing with benefits acquired by the defendant's own wrongful act now contains two new chapters and a somewhat revised treatment of the doctrine of waiver of tort. It is regrettable that this title cannot be dispensed with, for it suggests that the commission of a tort is a prerequisite for recovery. "Waiver" simply means that the plaintiff elects to bring a restitution action for money had and received to recover the amount of the defendant's wrongful gain, rather than claiming damages for his loss. The gist of the action is that the defendant has obtained an unjust benefit which he must disgorge. Thus it should be possible to "waive" a breach of contract, or indeed, any intentional wrongful act of the defendant.

The authors submit that a plaintiff who elects to waive the tort should be entitled to recover in restitution profits earned by the defendant by the use of the plaintiff's property. Perhaps this submission is not bold enough: the principle of unjust enrichment requires that the defendant disgorge the whole of the benefit he has obtained as a direct result of his wrongdoing, whether this happens to be produced by the plaintiff's property or not. It is also interesting to note that when discussing (at page 484) whether a restitionary proprietary claim should lie against a tortfeasor, the authors draw no distinction between the innocent and deliberate wrongdoer.[30]

If the wrongdoer's profits are recoverable, what should be the measure of recovery? Difficult problems arise where the profits are attributable in part to the wrongdoer's own efforts and expenditure. This question is not discussed apart from mentioning the allowance made in *Boardman* v. *Phipps*[31]. The defendant should be required to disgorge only so much of his enrichment as was obtained as a direct result of his wrongdoing, and accordingly certain expenditures and the value of certain services provided by the defendant should be allowable deductions. It is submitted that the important consideration is whether the expenditure or labour was beneficial to the plaintiff: if so, an allowance should be made. But non-beneficial expenditure, which the plaintiff did not request or freely accept, should not be deductible, whether the expenditure was incurred innocently or improperly. These suggestions are based on an analysis of *Bagnall* v. *Carlton*,[32] *Emma Silver Mining Company* v. *Grant*,[33] *Lydney and*

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[29] *The Law of Contract* (4th ed. 1975) at 497-701.

[30] But see the discussion of fiduciary agents at page 507 and G. Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968) 84 *L.Q.R.* 472.

[31] [1967] 2 A.C. 46.

[32] (1877) 6 Ch.D. 371.

[33] (1878) 11 Ch.D. 918.

Wigpool Iron Ore Company v. *Bird*,[34] *Munro* v. *Willmott*[35] and *In re Simms*.[36]

The discussion of bribes (at pages 509-10) accepts without criticism the supposed principle that in an action for money had and received the briber will be compelled to disgorge only the amount of the bribe. This rule is open to criticism on the basis that it imposes an unduly restrictive measure of recovery which does not give proper effect to the basis of the action. The defendant in an action for money had and received should be held liable for all the money or benefit he has obtained as a direct result of his wrongdoing. Presumably the briber's profit on the resulting transaction is at least equal to the amount of the bribe, and this amount is clearly recoverable. However, if it can be shown that the briber has obtained a further profit from his wrongdoing over and above the amount of the bribe, this should also be recoverable. A conscious wrongdoer should be stripped of the whole of his unjust gain.

As stated in the preface, the topic of benefit acquired in breach of fiduciary duty merits a monograph in itself;[37] but the authors in an expanded Chapter 35 and new Chapters 36 and 37 have endeavoured to place this topic in the context of the law of restitution, to analyse the governing principles and in a general fashion to shed light on the problems which arise.

The final Part, "Defences", treats the defence of change of position a little more fully than in the first edition. This defence is well established in the United States, and has recently been accepted by the Supreme Court of Canada in *Rural Municipality of Storthoaks* v. *Mobil Oil of Canada Ltd.*[38] It is to be hoped that it will soon gain acceptance by English and Australian courts. The authors explain why such a defence is needed, but consider that *Durrant* v. *The Ecclesiastical Commissioners for England and Wales*[39] and *Baylis* v. *The Bishop of London*[40] may stand in the way of its aceptance. But these authorities do not conclusively reject the defence.[41]

The discussion of estoppel focuses more on the requirement of a representation of fact than on the alternative requirement of a breach of duty. The latter requirement seems to contemplate a breach of a duty to accurately state accounts. To date, such a duty of accuracy has been imposed only upon paymasters and on bankers in relation to their customers. It appears that bankers do not owe such a duty to

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[34] (1886) 33 Ch.D. 85.
[35] [1949] 1 K.B. 295.
[36] [1934] Ch. 1.
[37] See P. D. Finn, *Fiduciary Obligations* (1977).
[38] (1975) 55 D.L.R. (3d) 1.
[39] (1880) 6 Q.B.D. 234.
[40] [1913] 1 Ch. 127.
[41] See Needham, *supra* n. 20.

persons other than their own customers, nor does a businessman rendering ordinary commercial accounts have a special duty of accuracy. *General Dairies* v. *Maritime Electric Co.*[42] does not appear to contradict the latter proposition, *contra* the suggestion in *Purity Dairy Ltd.* v. *Collinson per* Davey, J.A.[43]

The authors do not mention the concept of incontrovertible benefit in relation to these defences, but that concept can also be relevant to estoppel or change of circumstances, both of which depend upon proof of "detriment". The defendant must prove that he has changed his position in such a way that it would be inequitable for the plaintiff to enforce his claim. Suppose that a bank, by mistake of fact, has overpaid its customer $20,000, and the customer alleges that he has spent the money in reliance on the payment. It is frequently stated as a general rule that a payer is not estopped from recovering a mistaken payment merely because the payer has spent the money, but this statement is essentially meaningless. Of course a defendant cannot raise an estoppel by a bare assertion that the money has been spent. The real issues which must be determined are whether the defendant has changed his position at all as a result of the payment, and if so, whether the change of position is such that he would be prejudiced if he were required to return the money. These questions can only be answered by examining how the money was spent, and whether the expenditure was revocable or irrevocable. If the defendant has spent the money on wasting purchases which he would not ordinarily have made, his expenditure should constitute a detrimental change of position sufficient to raise an estoppel. But if he has converted the money into a tangible, realizable asset, he cannot convincingly argue that he has incurred any sufficient detriment. He can readily "cash in" his purchase, and will suffer no real prejudice if he must repay the money. In other words, the asset is an incontrovertible benefit, a concept which is relevant whenever it is necessary to determine benefit, or conversely, detriment.

This book provides a wide-ranging survey of an important and developing area of jurisprudence, of which Australian and English lawyers should be aware. It merits close attention by all who aspire to learn, to apply or to make the law.

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[42] [1935] S.C.R. 519 (S.C.C.), reversed on other grounds [1937] A.C. 610 (P.C.).

[43] (1966) 58 D.L.R. (2d) 67 at 74.

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