151. However, the entire text totals 210 pages only, with ten of these pages being the Index. This means that on average, each chapter is five pages long. Put mildly, the layout of the book is unusual, with some of the chapters unusually short, the shortest being Chapter 29 which contains four lines of text and one footnote (p168). In fact, there are nine chapters with texts of less than a page (ie: Chapters 20-22, 25-26, 28-29 and 30-31). The Table of Contents is found at pages xiii-xiv and the multitude of cases referred to (there are approximately 1150 of them) is listed in the Table of Cases in alphabetical order (see ppxv-xxiv). The Table of Statutes is found at pxxxi and the only interpretation act referred to is the *Acts Interpretation Act* 1901 (Cth). It would have been useful if the author had provided a list of comparable legislation in relation to the other jurisdictions in Australia like the *Interpretation Act* 1987 (NSW), *Acts Interpretation Act* 1954 (Qld), *Acts Interpretation Act* 1915 (SA) and *Interpretation of Legislation Act* 1984 (Vic). However, this comment is by no means meant as a criticism because the author does not pretend that the book is exhaustive in any sense.

In conclusion, it may be said that the critical approach adopted by the author in parts makes the book interesting reading. His comprehensive discussion of certain rules is certainly elucidating. And, in the words of Sir Harry Gibbs, his "firm views on aspects of the matters that are controversial" (pviii) make it, in a way, riveting.

ALEXIS L GOH*

ESSAYS ON RESTITUTION edited by P D Finn, Sydney, Law Book Company, 1990, 356pp, $79, ISBN 0 455 209871.

In 1989, a small group of legal academics, practitioners, and judges gathered at the Australian National University to discuss the developing field of restitution in Australia. The principal papers presented at the conference were thereafter revised by their authors, edited by Professor Finn, and published in this volume.

The book is not a treatise on the subject of restitution nor does it present a comprehensive treatment of any subpart of restitution. Instead, it is simply a collection of essays on a variety of subjects held together by a common concern for cases having to do with issues such as unjust enrichment, mistaken improvement, and quasicontract. Each essay ably analyses the pertinent cafe law, reviews the relevant commentaries, and presents reasonable arguments. As such, each chapter provides the reader with useful information about a particular issue, whether it be mistaken payments (Butler, P A, "Mistaken Payments, Change of Position and Restitution", Chapter 4, p87), ineffective transactions (Carter, J W, "Ineffective Transactions" Chapter 7 p206), or mistaken improvers (Sutton, R J, "What Should be Done for Mistaken Improvers?", Chapter 8, p241.). Taken as a whole, however, the

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book does little to clarify the ambiguities and mysteries of those cases lumped together under the rubric of restitution.

To an American reviewer, the Australian concern with the complexities of restitution is at first surprising, but, on reflection, it is refreshing. American lawyers are familiar with attempts to bring order to this part of the law. There have been major treatises for a century, (Keener, *QuasiContracts* (1893); Woodward, *Law of QuasiContracts* (1913); Palmer, *The Law of Restitution* (1978)) and the American Law Institute published the *Restatement of the Law of Restitution* in 1937. The merger of law and equity in most American jurisdictions reduced the doctrinal difficulties involved in deciding whether a specific set of facts would support a claim in law or in equity, but there have been no shortages of confusing and contradictory decisions and opinions. The American Law Institute began a project to revise the *Restatement* almost a decade ago, and it has become bogged down in doctrinal difficulties and policy disagreements. Whether this project will ever get anywhere is an open question; unlike the revision to the *Restatement of Contracts* which proceeded slowly but inexorably until it was completed.

The Australian commentators, by comparison seem to be approaching the entire subject with greater care for its theoretical underpinnings. "Unjust enrichment" is often said to be the key do understanding restitution, but as Gummow J points out so clearly in his essay:

> The expression "the principle of unjust enrichment is amphibolous, ... before an unjust enrichment may be said to exist one must show (i) an enrichment; (ii) a corresponding deprivation; and (iii) absence of "any juristic reason" for the enrichment. (Page 49, citing Pettkus v Becker (1980) 117 DLR (3rd edn) 257 at 273-275.)

The point made by Gummow J is apparent in Gareth Jones' introductory essay entitled "A Topography of the Law of Restitution". An "unjust enrichment" may arise from an intentional tort, such as a wrongful taking of property or from a mistake, such as that committed by the mistaken improver who acts without tortious intent and sometimes without negligence.[1] But restitution is not limited to cases that arise *ex delicto*. In his essay, Jones attempts a refinement of the concept of unjust enrichment with the result that the discussion moves to a consideration of benefits and reliance as well as injustice. This is typical of the problems associated with attempts to universalise a principle as ambiguous as unjust enrichment and use it as the basis for an entire field of law.

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1 In some cases, courts have allowed a recovery in restitution whene there has been a failed contract and the non-breaching party seeks to recover for the fair value of services rendered or materials supplied instead of for the allocable amount due under the contract. In such cases, there is no tort and the receipt of the benefits was "just" because the benegits were transferred by reason of contractual obligation. Retention of the benefits likewise is "just" so long as the recipient transfers the agreed upon consideration. Allowing a recovery in restitution may be useful and it may be a way to "punish" the one who breaches a contract, but it stretches any definition of unjust enrichment to say that it is the basis for the recovery. See eg Hunter and Carter, "Quantum Meruit and Building Contracts Part I", (1989) 2 *JCL* 95; Hunter and Carter, "Quantum Meruit and Building Contracts Part II", (1990) 2 *JCL* 189.

The very nature of this volume is a commentary on the state of the law of restitution in Australia. There is not, at present, a wholly satisfactory principle or set of principles around which commentators and judges can build an internally consistent body of law. At the same time there are cases which have addressed a series of circumstances that do not fit within the traditional categories of tort or contract but which raise questions that resonate with equitable principles. In these circumstances, courts have come up with a variety of solutions. The essays address the issues in much the same ways as the courts. They have taken the facts as presented and the general principles of equity, and with a nod to the law, have moulded them into a result.

For example, Butler's essay, "Mistaken Payments, Change of Position, and Restitution," (p 87) argues that current restitution cases involving mistakes evolved from the actions of debt and account rather than from implied contracts and that the underlying principle is failure of consideration (p107-109).

John Carter's chapter offers yet another series of arguments about basic justifications and rationales in connection with those cases which involve ineffective transactions. He states:

> . . . whereas unjust enrichment is a satisfactory explanation, or basis, fox quantum merit claims in respect of ineffective transactions, it must be supplemented by estoppel, particularly in the context of anticipated contracts which fail to materialise. In developing this line of approach I seek to minimise the relevance of "acceptance" as a criterion relevant to benefit, and to eliminate the concept of "limited" acceptance. A byproduct of the approach will be a reduction in the number of concepts required for an explanation of unhurt enrichment. ("Ineffective Transactions", p206 at 218.)

The greatest danger in an ad hoc approach is that the results will be contradictory, arbitrary, unpredictable, or in some sense unhurt. That is why it is important to have commentaries such as those contained in this volume to provide a basis for comparative analysis and testing of results against established principles. Attempting to divine an overarching theory to be applied to the wide range of circumstances discussed by the various essayists may be both a daunting and an unnecessary task. The wisest course may be that suggested in Keith Mason's essay, "Restitution in Australian Law"(p 20) which is to keep a pragmatic eye on developments after *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221, in light of similar cases in other parts of the common law world and to identify patterns as they emerge.

Indeed, that is not a bad prescription for most doctrinal analysis of the common law. Even if this volume does not bring order to a disorderly subject, it does provide useful and sometimes provocative commentary on a range of subjects within a rapidly changing area.

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