New Perspectives on Property Law, Obligations and Restitution

Edited by Alastair Hudson

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Preface

This collection of essays is a sister publication to *New Perspectives on Property Law, Human Rights and the Home*. The papers making up these collections were drawn from the 60 papers delivered at the annual WG Hart workshops held at the Institute of Advanced Legal Studies, University of London, between 1 and 3 July 2002 in Russell Square. The symposium was conceived and directed by Dr Alan Dignam and myself.

The theme of that symposium was 'The Idea of Property and Obligations in Law'. Our aim was to consider not only the conceptual notions of property and obligations but also to examine the ways in which those central concepts were applied in different legal contexts – in particular commercial law, family law, human rights law, land law, intellectual property law, the law of restitution and company law. Our central intellectual goal was to compare concept with context. Ideas of property and of obligations are central organising concepts within law but are nevertheless liable to fragmentation and esoteric development when applied in particular contexts. The result is a challenging and progressive series of papers which cohere into an extensive examination of the nature of private law. Whereas collections of essays can often seem diffuse and unconnected, both of the *New Perspectives* collections offer an interconnected examination of these issues.

It remains for me only to thank the contributors to the workshops and the attendees at those workshops for the spirited, challenging and convivial atmosphere in which they have allowed the papers in these two books to develop. To the contributors to this volume I owe a great debt of thanks for their good humour and the speed with which conference papers were fine-tuned and fashioned into the elegant pieces of scholarship you hold in your hands. To Cavendish Publishing a debt of thanks for the enthusiasm with which they assumed the task of realising our vision of a collection of these valuable and tightly-themed conference papers in a high-quality, accessible and affordable format. To the Institute of Advanced Legal Studies, and its director, Prof Barry Rider, many thanks for the opportunity to conduct these workshops and to develop these ideas.

My hope is that these essays will constitute for some time to come key statements of the intellectual positions of many of our finest emerging and established legal scholars, with their penetrating insights into the shortcomings and the possibilities of some of our most fundamental legal concepts. In that respect, I anticipate that this collection will entrench itself as an important survey of the past, present and future of the laws of property and of obligations. It should be noted that these papers were delivered in July 2002 and submitted for publication before Easter 2003.

Dr Alastair Hudson
Queen Mary, University of London
May 2003

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Elizabeth Cooke is Reader in Law at Reading University. Having practised as a solicitor since 1988, she is currently researching property law, particularly land registration. She is director of the Centre for Property Law at the University of Reading. Her publications include *The Modern Law of Estoppel* and *The New Law of Land Registration*.

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Introduction

Alastair Hudson

THE AIM OF THIS COLLECTION

The aim of the workshops on which this collection is based was to take stock of the many ways in which the notions of property and of obligations are deployed in legal theory. Our principal interest was the way in which different areas of the law have developed contrasting understandings not only of what constitutes property but also of the manner in which property law and the law of obligations could be deployed in other, contextual legal fields. The structure of the symposium, and consequently of this collection and its sibling,[1] was derived from that insight. In consequence the three-day symposium began with a day which focused on the relationship between property and obligations in relation to the trust and to tort, and also on the insurgent doctrine of restitution of unjust enrichment to the extent that it presents a new understanding of the nature of property law and of the law of obligations. The second day took the concerns of the first day into more specific contexts, particularly land law, family law and the home, the nature of a share as property in company law, commercial law and intellectual property law. In each of these contexts the core notion of property and of the obligation was conceived of differently. This particular collection focuses primarily on the line between property law, the law of obligations and the principle of restitution of unjust enrichment. The third day was divided more broadly still between welfare law, human rights law, planning and housing law, and comparative legal questions: these contributions are collected in the sister publication.[2]

THE BOUNDARIES BETWEEN PROPERTY, OBLIGATIONS AND UNJUST ENRICHMENT

Questioning the nature of property in law

To begin at the beginning, it is important to know what is meant by property. For the most part the essays in this collection carry out important analyses of the distinction between proprietary and personal rights without needing to consider the anterior questions as to how we justify the existence of rights in property. David Lametti[3] reaches back into those philosophical systems which informed Locke and others to identify property law as containing not only rights – as typically understood in the modern practice of property law – but also obligations. Property is identified as being necessarily social and therefore as raising moral questions as well as technical ones as to the composition of our typical 'bundles of rights' theories of property.[4]

1 Hudson (ed), *New Perspectives on Property Law, Human Rights and the Home*, Cavendish Publishing, 2003.

2 *Ibid.*

3 Lametti, this collection, 39.

4 The moral content of property ownership is considered in Hudson, 'Individualisation, equity and social justice' in the sister publication to this book, Hudson (ed), *New Perspectives on Property Law, Human Rights and the Home*, Cavendish Publishing, 2003, 1.

My own contribution[5] seeks to question our understandings of the very nature of the property which the law of property currently contains. Whereas the earliest property law is likely to have concerned the segregation of sacred sites away from social use, those forms of property with which modern property law has been required to deal have been intangible, quixotic and difficult to conceptualise.[6] A familiar distinction then establishes itself between those for whom property exhibits a lightness and those for whom property is necessarily weighty and burdensome.[7] That chapter builds on Richard Sennett's observation that many of the world's leading industrial figures consider their property not to be something which carries the ordinary burdens of ownership but rather as something which is comparatively light because it exists only as an expression of cash value.[8] Moreover, modern property law contains within it a number of conceptual weaknesses which, taken with the postmodern turn, suggest that its logic is no longer immutable. Models for such developments are to be found within the nature of legal co-operatives and in the manner in which property inevitably is conceived of in terms of its value rather than its essence. Examples of this lightness are identified in assertions that trusts should be considered simply as contracts, with analyses of the unit trust, quasi-property, and so called tangible property theory. By contrast, the domestic mortgage will be shown to be an example of a type of property relationship which, while a mere contract at root, imposes great weight on the mortgagor. Ultimately, it is argued that property law is necessarily organised around the tangible nature of property whereas this paradigm fails to understand the relativity and perpetual change which is a feature of the postmodern world order. This understanding requires nothing less than a re-conceptualisation of the nature of property itself.

Identifying the line between property and the law of obligations

A number of contributors attempted a taxonomy of property law and obligations.[9] At the symposium itself, although not in this collection, there were contributions concerned to establish the root of the trust as being in the law of obligations as opposed to the law of property. The core of this assertion is the frequency with which trusts are created over merely personal rights, such as bank accounts, and the equivocal manner in which we might

5 Hudson, this collection, 1.

6 The electronically-held bank accounts which have been at the heart of most recent tracing cases, for example, have not responded well to principles of trusts law generated centuries ago to deal with title to real property. Equally significantly, the owners of the most modern forms of property consider their property not to create problems of maintenance but rather to be merely assets which can be turned to account.

7 In Milan Kundera's novel *The Unbearable Lightness of Being*, it is suggested that the tragedy of human life is that moments of true happiness are too light and too fleeting to be capable of profound enjoyment. The social theorist Zygmunt Bauman draws on Kundera's theme to suggest that in the postmodern world there are those cosmopolitan enough (in Bauman's sense) to enjoy life on a plane which makes their existence seem perpetually light.

8 For such people, property exists only as something to be sold or disposed of when it is no longer useful. There is no emotional bond between owner and owned here; rather the attachments are light, and they are financial. It is suggested that this significant feature of property ownership is something which modern property law, as presently organised, is incapable of understanding.

9 Jaffey, this collection, 165; Hedley, this collection, 151.

consider a beneficiary's interests to constitute proprietary rights when those rights are so frequently established on the basis that equity operates *in personam*.[10]

Equally concerned with the re-conceptualisation of the nature of property law, in this case particularly as it overlaps with the law of obligations, is Paula Giliker.[11] Her focus is twofold: first on that common territory between property law and the law of torts which requires that the claimant have some right in property to found an action in nuisance and so forth, and secondly on the role which the Human Rights Act 1998 will play in the continuation of that principle. The rights to a family home and to one's possessions under the European Convention on Human Rights require that, for example, the right to one's home be respected even if one has no formal, legal right in the property which constitutes that home. The challenge which Paula Giliker identifies is that the development of human rights law therefore throws into question the possibility of continuing to predicate such torts on the pre-existence of a property right.

There is a common thread here between David Lametti's conviction that there is a social and moral content to all property law and Paula Giliker's identification of the tension between traditional approaches to property torts and the developing notion of human rights law. Paula Giliker is also suggesting that another mode of thought different from traditional tort or property law is likely to penetrate the area of 'property torts' in the form of the right to the family home, in Article 8 of the European Convention on Human Rights. My own contribution suggests that there continues to be a moral gap between the law's treatment of some property as being inherently light and other property as bearing great weight for its owner, particularly while we continue to talk of 'proprietary rights' as though they were a single category. Within that dichotomy are the fault lines for another spread of divisions between various forms of property which are in truth very different phenomena even though the law tends to package them under the general heading 'property' as though they were identical in essence.

Continuing with this theme, David Pearce lays out an analysis of the law of obligations and the law of property.[12] His approach is, in effect, an intellectual chronology of property and obligations theory. On the property side he begins with Hohfeld's 'bundle of rights' theory and follows through into the crisis that is prompted in property law – and suggested by Roger Cotterrell[13] – by virtue of its 'incoherence' in failing to connect such rights with identifiable or tangible property. This shapelessness in the one-size-fits-all approach to proprietary rights is identified by Pearce as being epitomised in the slew of banking and tracing cases in the 1990s which have tried to apply concepts developed for tangible property to intangible property. By contrast, contract theory is identified as having a

10 This issue is addressed further in my final essay in this collection, 'Between morality and formalism in property, obligations and restitution', Chapter 19. Maitland refers to the rights of beneficiaries as being merely personal rights on the basis that the 'Equity's darling' principle will operate to defeat an equitable interest even though it is purportedly a proprietary right. For my part, I do not consider this to be a proof of the purely personal nature of such rights but rather a rule of convenience developed by English courts to preserve the sanctity of free markets by reassuring purchasers that they will take good title unless they have acted in bad faith or, possibly, with constructive notice of another person's rights.

11 Giliker, this collection, 69.

12 Pearce, this collection, 87.

13 Pearce, this collection, 91, 28n.

different sort of theoretical discussion from that which informs property law. The obligation to pay damages in the event of a breach of contract was identified by Holmes as the core of the common law notion of contract, which is in itself an extension of his imprecation not to confuse moral questions with legal questions in this context. In that sense, this chapter returns to David Lametti's concerns.

Elizabeth Cooke[14] focuses on Honoré's celebrated conceptualisation of 'ownership' in relation to real property. Her particular concern is the change which the Land Registration Act 2002 introduces into land law. In particular she demonstrates how we can perceive a movement from a multititular system to a unititular system as part of the progressive movement away from fragmentation of title. Comparison is made with the unititular Romanic law code in Scotland and the Roman-Dutch in South Africa to highlight this trend from the multititular to the unititular in England and Wales. Martin Dixon similarly considers the changes which the 2002 Act will bring to land law.

The boundaries between property law and unjust enrichment

Craig Rotherham[15] has questioned many of the shibboleths of property law in his book *Proprietary Claims in Context*,[16] including the institutional-remedial divide and the source of property rights on the authorities. Akin to Graham Virgo's contribution, Craig Rotherham analyses the nature of the rights of beneficiaries by focusing on the House of Lords' decision in *Foskett v McKeown*.[17] In so doing he suggests that we ought not to presume a conceptual gulf between property law thinking and restitution thinking on the basis that each category is to be considered a prescriptive code on which we should base decisions in hard cases. Rather, it is suggested that these distinctions are merely techniques which we use in making decisions. This approach therefore falls outside the urge for taxonomy prevalent in many other contributions to this volume. He takes issue with Birks's contention that property is not a causative factor founding legal claims, on the basis that property rights often do play a 'causal role' in identifying the appropriate remedies.

In Craig Rotherham's essay there are also clear lines of distinction drawn with Graham Virgo's contribution[18] in that Rotherham suggests an open-textured form of academic enquiry whereas Virgo suggests that the property claim in *Foskett v McKeown* should be categorised as being outwith the grasp of unjust enrichment and should be considered differently from Rotherham. Virgo developed the notion of 'vindication' in his *Principles of the Law of Restitution*[19] as being one of the many bases on which the law of unjust enrichment operates. In his essay in this collection,[20] Virgo defends the notion of vindication of property rights as a form of unjust enrichment and analyses the deployment of that concept in *Foskett v McKeown*. Importantly, the decision in *Foskett* demonstrates a focus on value rather than on

14 Cooke, this collection, 117.
15 Rotherham, this collection, 187.
16 Rotherham, *Proprietary Remedies in Context*, Oxford: Hart Publishing, 2002.
17 [2001] 1 AC 102.
18 Virgo, this collection, 203.
19 Virgo, *The Principles of the Law of Restitution*, Oxford: Oxford University Press, 1999.
20 Virgo, this collection, 203.

any particularly identifiable item of property. While this might appear to suggest a flexible approach to the allocation of property rights, Virgo nevertheless contends that he is concerned with 'logical progression' and not 'causation', which suggests a concern for taxonomy and not morality. Indeed, the tracing claim in general terms demonstrates that English property law is not concerned simply with title in a particular 'thing' but is concerned more broadly with establishing a claim over whichever property the rights established in that 'thing' eventually come to rest upon. What Virgo argues, in contradiction to Birks and many of the restitution school, is that proprietary rights need not be carved up between 'real property rights' [*sic*] and 'substitute property', contending instead that they should be analysed in the same fashion regardless of their source.

Andrew Tettenborn asks where the principle of unjust enrichment fits between the law of property and the law of obligations.[21] His main focus is on the simple question: if I come into possession of your property in circumstances in which neither common law nor equity will recognise me as having any rights in that property, then how can I be said to be enriched by my possession of your property? This beguilingly simple question throws into stark relief the question where restitution of unjust enrichment fits into private law. If I cannot be demonstrated to have received any unjust enrichment, then on what basis can that principle have any sway in deciding these questions of recovery of property?[22] Andrew Tettenborn rightly identifies the solution to this question as being pivotal to the feasibility of the unjust enrichment project.

Another contribution to the symposium, not collected here, argued against the utility of the restitutionary resulting trust. At the root of this chapter was a disagreement with Chambers's assertion[23] that the consent of the settlor is all-important in establishing a resulting trust. Necessarily this requires a careful analysis of the many shades of opinion both in the authorities and in the academic literature: in particular those of Megarry J in *Vandervell (No 2)*,[24] Lord Browne-Wilkinson in *Westdeutsche Landesbank v Islington*[25] and the Privy Council in *Air Jamaica v Charlton*.[26] Resulting trusts are classified differently in this approach between trusts in the form of gifts and trusts which apparently fail. By stripping resulting trusts down to these essentials, it is said, we can rebuild them anew.

KEY CHALLENGES TO THE LOGIC OF UNJUST ENRICHMENT IN RELATION TO THE LAW OF OBLIGATIONS

The foregoing contributions, it is suggested, ask profound questions as to the nature of the law of unjust enrichment. There are two key essays in this collection which examine the possible taxonomy of unjust enrichment. The first by Peter Jaffey speaks in support of the

21 Tettenborn, this collection, 223.

22 The answer, as suggested in my concluding essay, 'Between morality and formalism in property, obligations and restitution', might be found in equity's historical conception of conscience as founding claims in this context.

23 Chambers, *Resulting Trusts*, Oxford: Oxford University Press, 1997.

24 [1974] 3 WLR 256.

25 [1996] AC 669.

26 [1999] 1 WLR 1399.

principle of unjust enrichment but questions many of its precepts.[27] As with Peter Jaffey's book *The Nature and Scope of Restitution*,[28] the essay in this collection concentrates on the many illogicalities in the application of the principle of unjust enrichment to the law of contract, and suggests a new understanding of the subject. Jaffey argues that unjust enrichment does not provide an 'underlying principle' in itself. However, any imprecision in the notion of unjust enrichment is not in itself considered to be an objection to such a concept, in the same way that the law of contract and the law of tort have similar areas of imprecision at their edges. The quadration theory, purportedly connecting unjust enrichment and restitution, is reassessed and the principle redesignated as a descriptive or a supplementary principle.

The other essay which concerns itself with the feasibility of the taxonomy of the law of restitution is Steve Hedley's contribution to this collection.[29] Those academics who cling to the ancient notion of equity as something built on a feasible notion of conscience are frequently dismissed as failing 'even to think',[30] by which is meant that the open-textured concept of conscience as a foundation for a claim lacks the assumed precision of unjust enrichment thinking.[31] What Steve Hedley suggests is that the restitution project has been through so many transformations that it is now in a condition where every contributor has his or her own radically different conception of the subject, such that its core cannot offer a useful model for legal practice, let alone academic debate. This questioning of the doctrine of restitution at the roots is indeed its greatest challenge.[32] Hedley gives us here a potted vision of the more complex arguments set out in his two books *Restitution – Its Division and Ordering*[33] and *A Critical Introduction to Restitution*[34] as he seeks to identify the central deficiencies in the restitution project.

Simone Degeling stretches our understanding of unjust enrichment again by confronting the policy against accumulations and three-party cases. The problem is that of multiple recovery in claims for damages.[35] As Degeling demonstrates, the policy against accumulation has a role to play beyond loss-based circumstances, particularly by reference to the recent decision of the High Court of Australia in *Roxborough v Rothmans of Pall Mall Australia*.[36]

27 Jaffey, this collection, 165.

28 Jaffey, *The Nature and Scope of Restitution*, 2000, Oxford: Hart Publishing.

29 Hedley, this collection, 151.

30 A remarkable suggestion made by one taxonomist at the symposium.

31 On the notion of conscience as a viable legal category, see my concluding essay in this collection, 'Between morality and formalism in property, obligations and restitution'.

32 See also Hudson, *Equity & Trusts* (3rd edn), Cavendish Publishing, 2003, chapter 35.

33 Hedley, *Restitution: Its Division and Ordering*, 2001, London: Sweet & Maxwell.

34 Hedley, *A Critical Introduction to Restitution*, 2001, London: Butterworths.

35 Degeling, this collection, 233.

36 [2001] HCA 68, 185 ALR 335.

FROM CONCEPT TO CONTEXT: THE CONTEXTUAL PROJECT OF THIS BOOK

Whereas the first two parts of this collection concern themselves with the perspectives on the core concepts of property law, the law of obligations, and the possibility of a coherent law of restitution, the final part is concerned with the commercial application of such conceptual debate to context.[37] Gerard McMeel[38] doubts whether the concept of bailment adds anything useful as a 'lump concept' between contract law and personal property law in its current role as an explanation for circumstances as diverse as honest finders of goods and aircraft leasing. This diversity, it is said, robs the concept of any coherence. One difficulty is the tendency of bailment to treat all property as chattels; another is the frequent tendency in the law to ignore the precise contractual structure of commercial arrangements in favour of standard legal models. Instead, the current category of bailment is divided by Gerard McMeel into the restitution lawyers' familiar quartet of consent, wrongs, unjust enrichment and property.

OBLIGATIONS OF RESPONSIBILITY IN COMMERCIAL PROPERTY LAW

Janet Dine[39] takes a very different perspective on property rights by considering the rights of nations under the Universal Declaration of Human Rights and property rights more generally in international trade. Moving beyond the traditional sphere of property law as tied to individual jurisdictions, and moving into the developing territory of human rights law, she contrasts the power of multinational enterprises in manipulating concepts of property and contract law to the detriment of community organisations within nation states or to the detriment of less-developed countries (to quote from the jargon) at the state level. The claims of human rights law offer a unique challenge in this environment for group rights counterbalancing the power of multinational, commercial enterprises. Equally, more technical approaches such as competition perhaps offer equally coherent means of achieving the same goals.

37 In private law there are two central concepts: those of property and of obligations. In English law those two central ideas give rise to the foundational legal subjects of land law and personal property law, trusts law, contract law and tort law. It would be possible to argue that most other areas of private law, and subsequent developments on those central concepts, applied to particular contexts: this is the division which this book seeks to establish between central concepts and their contextual application. By way of example, company law drew historically on the partnership contract and the trust to develop joint stock companies and later the company with limited shareholder liability. Even after the development of the company as a separate legal person in the *Salomon* decision, company law is still a stylised accumulation of contract (the role of the articles and memorandum of association; the directors' contracts of service; the rights of employees), tort (the liability of the company for the tortious acts of its agents; the personal liability of directors), trust (the liability of directors making secret profits from their fiduciary office) and property (the rights of the shareholders to the company's assets on winding up). Consequently the concepts of property and of obligations are expressed in central legal and equitable doctrine and also put to work in specific contexts. That insight informs the second half of this collection.

38 McMeel, this collection, 247.

39 Dine, this collection, 319.

Whereas international trade theory tends to think of the corporation as a black box dedicated to the generation of profit at any cost, any student who has read Janet Dine's textbook on company law[40] would know that within such entities are the competing claims and interests of the shareholders. In this vein Lisa Whitehouse[41] considers the nature of the share in a company. Her particular concern is with the notion of 'responsibility' of companies. Lisa Whitehouse draws on a wealth of legal theory from Giddens's social theory and Gray's theory of property, ranging through to Berle and Means's well-known statement of company law theory. Various facets of responsibility – from personal responsibility, to responsibility as an obligation, through moral and causal responsibility – are modelled to demonstrate the feasibility of closer regulation of corporate responsibility.

Ian Snaith[42] considers the little analysed[43] area of 'mutuals' and of industrial and provident societies, a form of entity which has been the subject of recent legislation (the Industrial and Provident Societies Act 2002) and which is held out by the Blair administration as being one means of providing financial services to the socially excluded. Snaith considers the wide range of entities which fall within the notion of a 'mutual' and the proposals for their ongoing development for altruistic, communal goals as they fall under the umbrella of the Financial Services Authority – itself perhaps an emblem of their transformation from organs of working-class solidarity into alternatives to mainstream financial services for the socially disenfranchised.

INTELLECTUAL PROPERTY LAW

Intellectual property law necessarily presents a great challenge to property law theory precisely because it occupies a place between genuine property rights and a conceit with which one can justify the protection of the means of exploiting commercial know-how or artistic works. Jonathan Griffiths[44] maps the process of the simplification of copyright law by judicial analysis at a time when there has been a commoditisation of many forms of information in the practice of intellectual property law. In this way the nature of those rights which will constitute copyright have become clearer – orientated around the protection of the skill and labour of the artist – while the form of action developed to counter breaches of copyright has increasingly come to resemble an action for trespass.[45] Ultimately, Jonathan Griffiths is unconvinced by the manner in which the language in these cases of 'labour of skill', of input and output, masks a number of highly subjective approaches to the

40 Dine, *Company Law*, 2000, London: Sweet & Maxwell.

41 Whitehouse, this collection, 331.

42 Snaith, this collection, 345.

43 Except primarily by Snaith, *The Law on Co-operatives*, Waterlow, 1984. See also Hudson, *The Law on Investment Entities*, London: Sweet & Maxwell, 2000, p 259.

44 Griffiths, this collection, 305.

45 It is a semantic irony that, while the theories of normative closure referred to by Jonathan Griffiths typically talk of inputs and outputs which are permitted and generated respectively by social discourse, some of the recent cases he discusses use a different test predicated on what input the rightholder has made and the output which the defendant has taken from that copyright. Therefore, while we look for closure of the concepts used in this test, it is the very language of input and output which seems to circumvent it. But I ought not to labour a weak autopoietic joke.

identification and protection of those bundles of rights which come to be commodified as copyrights.

Sol Picciotto and David Campbell[46] use an analysis of the legal problems concerning ownership of molecules by biotechnology companies who gain patents over them to found a broader consideration of whether or not it is possible to think of private property rights as being truly private at all. Many of the justifications for intellectual property law are considered to be merely consequentialist. This important essay returns us to the question with which we started this collection: the nature of property itself. Compellingly, Picciotto and Campbell argue that private property rights are to be considered as rights underwritten by the state through law as well as simply relationships between people and things. In this sense we are returned to Lametti's argument that all property is necessarily social at some level. Similarly, my own contribution sought to differentiate between private property, as ordinarily understood, and the common use of property such as Victoria Park in London's East End or the common ownership of property held by co-operatives, without any individual person in either case being able to establish meaningful ownership of the property in question. Indeed Picciotto and Campbell's example of the Joensuu, commonly-used bicycles,[47] is similar in that sense to my own discussion of the public park.[48]

From all of these contributions emerges the intractability of establishing any single explanation of property law, obligations or of unjust enrichment – whether in theory or by observation of practice – which will always convince. What we present instead is, taken together, an account of the issues which stand between us and such an understanding: an important undertaking, nevertheless, offering us important new perspectives on property law, obligations and restitution.

46 Picciotto and Campbell, this collection, 279.

47 Picciotto and Campbell, this collection, 282.

48 Hudson, this collection, 30.

THE NATURE OF THE LAW OF PROPERTY AND ITS RELATIONSHIP WITH THE LAW OF OBLIGATIONS