p.200); reaching for "interpretive tools rather than engaging in a direct face-off with Parliament that would culminate in outright curial disregard of the offending provision" (see at p.201).

Though it is tempting to treat such tools as an instance of "weak-form" rather than "strong-form review" (Kavanagh (2015) 13 ICON 1008), the courts can achieve a relatively high level of rights-protection by interpreting legislation and Executive action creatively and compatibly with rights. Using the principle of legality, the courts operate a presumption of statutory interpretation that fundamental rights cannot be overridden by general or ambiguous words. Therefore, judges will "decline to hold that Parliament interfered with fundamental rights unless it has made its intentions crystal clear" (*R. (on the application of Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262 at [159]). In doing so, "judges act as partners in a collaborative enterprise, striving to give effect to the law, whilst simultaneously integrating ongoing legislation into the broader backdrop of constitutional principle" (Aileen Kavanagh, *The Collaborative Constitution* (2023), at pp.220–221)). As Joanna Bell observed (at p.270) in her insightful chapter on Executive action, "the courts do not understand their role as being that of choosing between legislation and common law, but rather understanding the former in terms of the latter". In seeking to reconcile the two, the courts have some robust tools in their interpretive toolkit which they employ with a mixture of caution and creativity. The principle of legality becomes a "working hypothesis" in the constitutional partnership between courts and legislatures as they discharge their shared responsibility to uphold rights. The upshot is that even if the HRA is repealed, the courts have a firm foundation of rights jurisprudence to fall back on.

In curating this volume of excellent essays on the content, scope and meaning of common law constitutional rights, Mark Elliott and Kirsty Hughes have performed a valuable service. Together with the assembled authors, they survey the terrain and explore the depths of how common law constitutional rights work. As such, this volume is required reading for anyone who wishes to grapple with the complexity of common law rights in the UK constitutional order.

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The Laws of Restitution, 1st edn, by Robert Stevens, (Oxford: Oxford University Press, 2023), 433pp., hardback, £90.00, ISBN: 978-0-19-288502-9.

In 1966, Robert Goff and Gareth Jones produced a remarkable work, *The Law of Restitution*. In that book they considered the vast range of different grounds upon which a person was entitled to restitution of a benefit. Those different reasons for restitution were united by little more than their common remedy. At the outset, Goff and Jones said (at p.12) that a principle of unjust enrichment underpinning instances of restitution was not a "precise 'common formula' but an abstract proposition of justice". This highly particularised perspective concerning the many and varied instances of restitution in the law was challenged in a stunning work

of generalisation by Peter Birks, *An Introduction to the Law of Restitution* (1985). Birks, and other brilliant writers who followed him, including Andrew Burrows and Robert Stevens himself, took the general principle of unjust enrichment and sought to create a general legal framework based on four questions to focus the enquiry where a right to restitution arose: (i) was the defendant enriched?, (ii) was it at the claimant's expense?, (iii) was the enrichment unjust?, (iv) do any defences apply? The important third question was said to require a claimant to prove the existence of an "unjust factor" such as mistake, duress, undue influence or failure of consideration to obtain restitution of the enrichment.

Birks' generalised view of restitutionary recovery was widely adopted by courts and commentators across the common law world, although it was not applied rigidly and came to be seen as unhelpful in instances of restitution that came to be understood as lying beyond unjust enrichment, such as restitution for wrongs. Birks subsequently argued for a further, and greater, generalisation of restitution for unjust enrichment in his final book: *Unjust Enrichment*, 2nd edn (2005). Developing the approach taken in some civilian jurisdictions such as Germany, Birks argued that all grounds for restitution of unjust enrichment were ultimately directed only to establish an absence of a juristic basis to retain the enrichment where the juristic basis could be a gift, a contract or any other source of legal entitlement. A similar approach was taken by the Supreme Court of Canada in *Garland v Consumers' Gas Co* [2004] SCC 25; [2004] 1 S.C.R. 629, but other common law jurisdictions are yet to follow.

In *The Laws of Restitution*, Stevens recants the earlier views that he had expressed in support of Birks' generalised four-fold inquiry. He argues that the four-fold approach is overgeneralised, and that the language of each inquiry is inapt. But he does not suggest a return to the highly particularised approach in Goff and Jones' early work. Stevens argues instead for a middle path, one that is not as generalised as Birks' but not as particularised as the early Goff and Jones. The laws of restitution, he argues, should be divided and classified by categories of unjustified performance, conditional performance, and a miscellany of cases (not considered further in this review) concerning intervention in another's affairs. Like Birks' framework, Stevens' grand scheme is much more than just a taxonomy of cases with a new legal language. Within his taxonomy he descends to the particular and considers many specific legal rules that he sees as demanded by "justice" and the language with which those rules should best be described. His deep thinking and great depth of analysis often hits the mark, particularly at the level of specific rules. But sometimes, particularly at the high level of classification, it misses.

Much like Birks' style of writing, Stevens' highly entertaining and accessible style has no truck with the slow or incremental development of the law that is the concern of legal practitioners and judges. His concern with justice and the best statement of a legal rule means that cases are often useful only for their facts and, where he sees the decision as just, for their outcome (at pp.18–20). Stevens thus re-sculpts the reasoning in many of the decisions to conform with his preferred vision of justice, sometimes rejecting familiar language that has been developed by the courts over years, decades and, occasionally, centuries.

The bulk of restitutionary claims in Stevens' ingenious scheme fall within the category of unjustified performance. That category is not radically different from Birks' absence of (juristic) basis. But it uses different language as part of the process of determining whether a restitutionary claim exists based on the absence of juristic basis. Rather than requiring an "enrichment" or "benefit" at "the expense of another", Stevens suggests a requirement of "performance" that is "towards" another and "accepted" by that other (at p.37). Rather than requiring that enrichment be "unjust" due to an absence of a juristic basis, Stevens insists (at p.9) that the performance be "unjustified" due to "the lack of any good reason justifying it". Rather than restitution operating to reverse a transfer of value arising from an enrichment at the expense of another without juristic basis, restitution is said to reverse an accepted performance where the performance was unjustified (at pp.9 and 57).

Some of Stevens' reasons for rejecting the language with which lawyers have become familiar have force. Others are unpersuasive. For instance, he argues in favour of a concept of accepted performance and against the concept of enrichment (or, more appropriately, benefit) by taking an artificially narrow view of benefit. Although Stevens, quite rightly, observes (at pp.9 and 57) that restitutionary claims are not concerned with enrichment or benefit at the time of trial, that does not mean that restitutionary claims are unconcerned with benefit. Legal relations arise when events happen. The recipient of a non-obliged payment made by mistake is liable to make restitution of the benefit at that time. The recipient can comfortably be described as having obtained a benefit at the time of that receipt, irrespective of defences that might arise from a subsequent loss of the benefit. Contrary to Stevens' views (at pp.64–65), everyday notions of benefit also arise when a person requests and obtains, or takes, valuable goods, services or opportunities for free even if they do not ultimately profit from them. A person who hires a concrete mixer obtains a benefit (the opportunity of use) and must pay the daily hire, even though they may not in the event have been able to use the mixer because of rain. As Lord Hoffmann said for the House of Lords in *Dimond v Lovell* [2002] 1 A.C. 384 at 397; [2000] 2 All E.R. 897 at 906, it was a benefit for Mrs Dimond to obtain "8 days use of a Ford Mondeo for nothing", irrespective of whether she actually used the car on any of those days, rightly saying that it was "irrelevant" whether at the time of trial she was "on balance no better off". Similarly, in *Inverugie Investments Ltd v Hackett* [1995] 1 W.L.R. 713; [1995] 3 All E.R. 841, contrary to Stevens' view (see p.349), the concept of benefit comfortably applies to the intentional possession of another's hotel apartments for use in a commercial operation; the trespasser obtains the benefit of the free use of the apartments even if no net profit is made.

Stevens' preferred new language of reversing an accepted performance also invites confusion. A "performance" connotes a process, not an outcome. It might be an apt label in relation to services where the "reversal" of the performance of a service is a metaphor (since a person's actions cannot be reversed) to describe a response to the process (time, effort, expense) of providing a service. The label, "performance", usefully separates the service from any end product that results from it. But the label is inapt to describe the process of instruction to a bank and consequent operation of the banking system where the concern of restitution is the

ultimate increase in debt (or reduction in liability) that the payee's bank assumes to the payee rather than the inter-bank process by which that occurs. The "reversal" is concerned with the outcome of the process—that is, the ultimate increase in the bank's debt to the payee—not the process itself.

Stevens' preferred language of "acceptance" might also be said to be both overgeneralised and overinclusive. Stevens insists that a claim cannot be brought for unjustified performance unless the performance is "accepted", by which he appears to mean some objective act of acceptance manifested to the person performing, even where a deed of gift has taken effect (historically by delivery). By contrast, in *William Siggers v Thomas Sutton Evans* (1855) 5 El. & Bl. 367 at 380; 119 E.R. 518 at 523, the court had "no doubt that a grant of goods … passes the property without assent". In a chapter entitled "Practice" (Ch.6), Stevens argues (at p.89) that "contracts and gifts both require an offer and an acceptance", relying upon the rhetorically powerful argument that the intended (onerous) gift of a camel, dumped in another's front yard, will not pass title without acceptance. That may be correct for camels, and perhaps for chattels generally, but it is, at best, misleading in relation to intangibles such as the common example of an intangible "gift" of electronic funds in another's bank account. Neither the donee nor the donee's bank "receives" or "accepts" anything. Like the creation of rights by the declaration of a trust (which also need not be accepted) the donee's bank decides whether to *create* an increase in its debt to a customer in credit following an electronic instruction. Since the customer does not usually accept this increase in debt owed to them at that time, many cases have said that acceptance is "presumed" subject to disclaimer (see e.g., *William Siggers v Thomas Sutton Evans* (1855) 5 El. & Bl. 367 at 380; 119 E.R. 518 at 523; *Hill v Wilson* (1873) L.R. 8 Ch. App. 888 at 896; (1873) 21 W.R. 757 at 759; *London & County Banking Co Ltd v London & River Plate Bank Ltd* (1888) 21 Q.B.D. 535 at 541–542; (1888) 37 W.R. 89 at 90; *Matthews v Matthews* [1913] HCA 49; (1913) 17 C.L.R. 8 at 31 and 43–44). Stevens' notion of acceptance is also overgeneralised in relation to cases where a service is requested for performance on a basis or condition which fails. In ordinary language, it is very difficult to describe a service as having been accepted before it is received. Yet when the party performing a service in accordance with the request obtains restitution from the recipient, it is not necessary to prove any act of acceptance of the service subsequent to the request. The request is enough.

An important difference in content between Stevens' notion of unjustified performance and Birks' concept of failure of basis is that Birks included failure of basis within unjust enrichment but Stevens jettisons from unjustified performance any claims for failure of consideration. In this respect, Stevens' taxonomy may be insufficiently generalised. He treats claims for failure of consideration as part of a separate category of "conditional performance"—performance upon an agreed condition (objective basis, purpose) that fails—rather than as part of the category concerned with "unjustified performance". However, as Stevens rightly recognises (at p.109), when a "performance" is rendered upon an agreed condition that fails "the bargain no longer supports [the performance] and so restitution follows". The performance is no longer justified. It seems that the reason that Stevens removes restitution for "conditional performance" from the category of "unjustified performance" is his view that a failure of a condition requires restitution for the

additional reason that "not to do so would be contrary to the agreement" (at p.109). The double negative in this proposition might suggest a contrived implied term; an agreement that restitution must follow a failure of the condition. Otherwise, it would be facile to say that a performance is not inconsistent with an agreement: *anything* that is not prohibited by the agreement would not be inconsistent with it. But, if such an implied term really existed, then the category would not be failure of condition. It would be an instance where restitution is expressly or impliedly agreed.

The category of conditional performance is also too narrow in another respect. Stevens argues (at pp.123–124) that cases of fully executed, but void, swap agreements are a nullity and that the reversal of the performance under those agreements must be because the performance was unjustified, as opposed to the performance being upon a condition or basis that failed. But the legal nullity of the obligations in the agreement need not invalidate the fact of the agreement itself or any agreed basis for it (the banks then acting on that basis that they were "on risk"). Just as legal consequences can flow from the *fact* of *ultra vires* and invalid administrative actions (as to which see *Boddington v British Transport Police* [1999] 2 A.C. 143 at 172; [1998] 2 All E.R. 203 at 225–226), so too the fact of an agreed basis (which fails) might also give rise to the legal consequence of restitution despite the invalidity of the promissory obligations in the agreement.

On the other hand, aspects of Stevens' arguments concerning failure of condition overgeneralise. Immediately after referring to the "dangers of over-generalisation" (at p.133), Stevens argues for the generalisation that all claims for restitution of the value of work done, as a *quantum meruit*, should be capped by the contract price. This issue was confronted by the High Court of Australia in *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32; (2019) 267 C.L.R. 560. The minority (Kiefel C.J., Bell J. and Keane J.) avoided the issue by concluding that a *quantum meruit* can never exceed an award of damages. Three members of the majority (Nettle J., Gordon J. and Edelman J.) held that a claim for a *quantum meruit* could co-exist with a claim for damages and, exceptionally, might exceed the contract price (at [215]). The other member of the majority, Gageler J., would have confined recovery of a *quantum meruit* in a rateable way to "the portion of the overall price set by the [c]ontract that is attributable to the work", apparently even where the price of that portion was determined by reference to the price of other portions (at [105]).

Stevens rapidly dispenses with the views of the minority of the High Court in *Mann* as "insupportable" (at p.134). But he adopts (at p.135) neither of the views in the majority, preferring a generalised rule that imposes a contract ceiling not "as a *rateable* limit on what can be recovered, but as an overall cap". The problem with Stevens' generalised approach is that, as Nettle J., Gordon J. and Edelman J. said, the "expected benefits to the contractor" might not be limited to payments of money but might also include "the value of promises or releases" (at [205]). A promise to allow a contractor a longer time to perform, for example, can have a clear monetary value, quantified in liquidated damages. Consider an owner of land who contracts for work to be done on their land by a contractor with a date of completion of 1 July 2024 (time being of the essence). Suppose that the owner and the contractor negotiate a contract price of £200,000. The contractor thinks

that they might need more time. So, the parties renegotiate a price of £180,000 with a date of completion of 1 December 2024. In other words, the contractor gives up £20,000 and the owner gives up the power to terminate the contract and to remove the contractor from the land, or to recover liquidated damages, from the earlier date of 1 July 2024. Suppose then that the owner repudiates in June 2024 and that the work, with a market value of £200,000, can be completed without much additional cost before 1 July 2024. The generalised approach of insisting always upon the contract price as the ceiling would treat the value of the contractor's work as capped at £180,000 based on a premise (completion by 1 December 2024) that does not apply and despite a known market value of the work of £200,000, which was recognised by both parties in the negotiations as the value of the work in the event that the work would be completed by 1 July 2024.

Two matters must be emphasised in conclusion. First, this review has sought to engage with Stevens' work on its own terms: a book that is not concerned with cautious, interstitial development of the law in the language in which law has been long understood. The engagement is instead on his terms of restating rules of justice and categorising and describing those rules as best reflects their nature. Secondly, the cautionary notes sounded in this review should not distract from the compelling detail of much of Stevens' account of the laws of restitution, an account which exposits hundreds of particular legal rules and their rationales in justice. Sometimes his arguments will suggest re-thinking of long-established legal rules. Sometimes they will suggest re-thinking how those rules are expressed. But the principal point of this review is to re-emphasise perhaps the most important concern which is at the heart of *The Laws of Restitution*: the more that one attempts to generalise from a rule that operates in the circumstances of a particular case, the more difficulties will be encountered in the application of that broader generalisation or classification.

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The History of the Technology and Construction Court on its 150th Anniversary: Rewriting the Rules, 1st edn, by Sir Peter Coulson and David Sawtell (eds), (Oxford: Bloomsbury Hart, 2023), xxxii +398pp., hardback, £100.00, ISBN: 978-1-50996-417-8.

Judges and academics have enjoyed an increasingly productive dialogue over the last half-century on questions of general private law. But the Technology and Construction Court (TCC) and its predecessor the Official Referees (ORs) have sometimes been left out of the conversation. *A History of the Technology and Construction Court on its 150th Anniversary: Rewriting the Rules* provides a valuable resource for anyone seeking to redress the balance. This collection of essays written by judges, practitioners and academic construction lawyers has three principal aims. The first is to explain the somewhat humble origins of what is now an integral part of the English High Court and a global leader in the specialist resolution of construction, engineering and technology disputes. The second is to