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Common Law and Equity in R3RUE

Lionel Smith*

Abstract

One of the most remarked-upon achievements of the first Restatement of the Law of Restitution was the consolidation into a single treatment of all of the law that concerned the Reporters, whether it came from common law or Equity. In the Restatement (Third) of Restitution & Unjust Enrichment (R3RUE), there was initially an even more dramatic idea: to restate the law without even any reference to the historical distinction between common law and Equity. In the final product, however, there are several references to the peculiarly Equitable origins of certain juridical solutions to the problems addressed by this Restatement. The goal of this Article is to take a critical look at this evolution in the drafting of R3RUE. Ought the Reporter to have kept to the original idea, which would have perfected, in a sense, the accomplishment of the first Restatement? Or, is there a good reason to continue to distinguish between common law and Equity, even while we know very well that in at least some dimensions, the dichotomy is little more than an accident of history? This Article argues that there are some respects in which common law and Equity remain fundamentally and substantively different. For the moment, full fusion therefore rests in a state of impossibility. Fusion is achievable; but the road is rockier than most jurists realize. Some of the differences between common law and Equity are profound, and bridging them requires not just translation but also a kind of transliteration. The rewards of such an exercise, however, would be rich. When we can accurately describe and distinguish between the nature of an Equitable interest in property and a common law interest in property, without using those merely jurisdictional labels, we will be ready to comprehend all of private law within a single organizing system.

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I. Introduction

The Restatement of the Law of Restitution: Quasi-Contracts and Constructive Trusts¹ achieved many things. One of them was to consolidate into a single treatment all of the law that concerned the Reporters, whether it came from common law or Equity.² This was the subject of a great deal of positive commentary at the time.³ Andrew Kull has shown, in a moving study, that the impetus for this unification came from the largely unpublished work of James Barr Ames, and that it was built on his deep learning in both the common law and the civil law traditions.⁴

In the Restatement (Third) of Restitution & Unjust Enrichment (R3RUE), there was initially an even more dramatic idea: to restate the law without even any reference to the historical distinction between common law and Equity. In the final product, however, there are several references to the peculiarly Equitable origins of certain juridical solutions to the problems addressed by this Restatement, namely the law of unjust

1. RESTATEMENT OF THE LAW OF RESTITUTION: QUASI-CONTRACTS AND CONSTRUCTIVE TRUSTS (1937).

2. Warren A. Seavey & Austin W. Scott, *Restitution*, 54 L.Q.REV. 29, 39-42 (1938). In this Article, it is necessary to distinguish the system of legal principles that derive from the Court of Chancery, and so are "equitable" in a technical sense, from the wider idea of equity which also informs the part of the law of unjust enrichment that finds its origins in the common law. With this goal in mind, Equity and Equitable are used for the former sense, while equity and equitable are used for the latter sense.

3. See Andrew Kull, *Restitution and Reform*, 32 S. ILL. U. L.J. 83, 88 n.17 (2007) (collecting citations from contemporary reviews).

4. See generally Andrew Kull, *James Barr Ames and the Early Modern History of Unjust Enrichment*, 25 OXFORD J. LEGAL STUD. 297 (2005).

enrichment and the remedies therefor, and the remedies available to take away the profits of wrongdoing.⁵

The goal of this Article is to take a critical look at this evolution in the drafting of R3RUE. Ought the Reporter to have kept to the original idea, which would have perfected, in a sense, the accomplishment of the first Restatement? Or, is there a good reason to continue to distinguish between common law and Equity, even while we know very well that, in at least some dimensions, the dichotomy is little more than an accident of history? This Article argues that there are some respects in which common law and Equity remain fundamentally and substantively different. For the moment, full fusion therefore rests in a state of impossibility. Fusion *is* achievable; but the road is rockier than most jurists realize. Some of the differences between common law and Equity are profound, and bridging them requires not just translation but also a kind of transliteration. The rewards of such an exercise, however, would be rich.

Everyone knows that the incidents of an Equitable interest in property are fundamentally different from the incidents of a common law interest in property. For example, in resolving a priority dispute, the classification of competing interests as legal or Equitable is an essential first step, for the applicable priority rules are different in the two cases. But those labels are merely jurisdictional. Their continued importance reveals that we are far from having a single organizing system. If we arrived at a point where we could describe and discuss legal and Equitable property interests, including their creation, characteristics, transfer, and destruction, *without* using those merely jurisdictional labels, we would be ready to comprehend all of private law within a single organizing system.

II. Theorizing Equity

The law that comes from Equity has not been as thoroughly theorized as the common law. The nineteenth century saw a flourishing of textbooks in the common law world, particularly in England but also in the U.S. Of course, the common law had long had great books, going back to the one

5. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 4, 24, 45, 63, 66 (2011). These Sections make explicit reference to Equity or doctrines characterized as Equitable. However, this does not mean that such doctrines are limited to their traditional fields, as will be discussed below. On the other hand, wholly Equitable doctrines are restated without identifying their jurisdictional origins in Sections 55, 57–59.

known as *Bracton* in the thirteenth century, and following through the centuries with dozens of works. Some were justly famous like those of Littleton, Coke and Blackstone; many more were less so—less justly famous, or less famous, justly or not. But there was something new in the crop of books that appeared in the nineteenth century, in which we find Anson, Pollock, Chitty, and Story. This was a vocation to lead the judges, rather than to follow them. These were books that took it upon themselves to order the law in ways that could not be found in the law itself.⁶ Many of their authors were inspired by the developed systems in the civil-law world.

The timing was not accidental. The civil law had always been systematic in its organization, and the most learned of common lawyers knew something, or a great deal, of the civil law. It is true that, for centuries, the systematic nature of the civil law was somewhat schizophrenic. The vast bulk of the civil law was in the *Digest*, which is not systematic at all, and whose ordering is no more logical than the alphabetical Abridgements of the medieval common law. The system of the civil law was in the *Institutes*, those of Justinian and those of Gaius on which Justinian's were modelled. But the *Institutes* were an overview, an outline with little substance, intended for and primarily used by students. The Roman jurists were not systematic in the sense that modern lawyers mean by this word; they did not envision their legal system as built up from elements (such as consent or will, rights, and obligations), each of which could be understood as based upon abstract foundations; they were more like early common lawyers, in understanding the law primarily from the perspective of the *actions* available to litigants.⁷

Later civilian jurists found other systematic inspiration, and the sixteenth century saw the beginning of systematization of the civil law in

6. To be fair to Sir William Blackstone, his *Commentaries* of the late eighteenth century certainly did so as well. Although this work was hugely influential, his scheme for ordering all the law in terms of rights and wrongs never gained acceptance. Blackstone also had relatively little to say about Equity, and so his important contribution does not undermine my point here. See Peter Birks, *Rights, Wrongs, and Remedies*, 20 OXFORD J. LEGAL STUD. 1 (2000) (offering a profound study of Blackstone's achievement); ALAN WATSON, *ROMAN LAW AND COMPARATIVE LAW* 166–81 (1991) (arguing that Blackstone's system was indirectly derived from Justinian's Institutes).

7. See HENRY S. MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* 389 (1883) ("So great is the ascendancy [*sic*] of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through . . . its technical forms.").

the modern understanding of that idea.⁸ This systematization developed in the succeeding centuries in the hands of great natural lawyers like Hugo Grotius and Samuel Pufendorf, and then those of such scholars as Jean Domat and Robert-Joseph Pothier; and it reached new heights during the nineteenth century, the heyday of codification. Napoleon's Civil Code, a masterpiece of legislation, came into force in 1804. To call it a masterpiece does not mean that it is flawless, but is only to acknowledge its enormous influence in Europe and beyond, and the fact that it remains in force, little changed, even while the Republic of France has changed constitutions many times during the same period. The French Civil Code incorporates not only the *ius commune*, derived from the *Digest*; it also codifies elements of local customary laws that were in force, particularly in the north of France, at the time of codification.⁹ But it takes this substance, this blend of customary law and *ius commune* covering all of private law, puts it into a deceptively accessible linguistic register, and organizes it according to a simple—perhaps too simple—table of contents. All of private law in a little book: this was an inspiring project. The Germans would undertake their own codification project, conceived rather differently, later in the same century.¹⁰

And in the course of that century, there was a development that was tremendously important for the intellectual history of the common law. This was the abolition of the forms of action.¹¹ The forms of action were procedural packages that governed every aspect of the claims of litigants. The difference between two forms of action was not just the difference between two different kinds of claim. Two different forms of action might have different processes for getting the defendant into court, and different

8. See Peter Stein, *The Quest for a Systematic Civil Law*, 90 PROC. BRIT. ACAD. 147, 154 (1995). Stein identified the French humanist scholars of the sixteenth century as the first systematizers: "For the first time the content of Justinian's law was separated from its form, for the humanist systematisers combined enormous respect for the substance of Roman law, with complete disregard for the way it was presented." *Id.* By contrast, JAMES GORDLEY, *FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT* 7–14 (2006) gave pride of place to the contemporaneous Spanish natural law school (or late scholastics) as the first systematizers. "[T]hey were the first to give Roman law a theory and a systematic doctrinal structure." *Id.* at 9.

9. KONRAD ZWEIGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 87–89 (Tony Weir trans., 3d ed. 1998).

10. *Id.* at 143–57.

11. In England, this process was gradual and was not completed until the Judicature Acts 1873–1875. In the United States the crucial first step was the Field Code in New York, enacted in 1850, which was adopted in many states and influenced the English reforms.

rules for how long the defendant could delay the proceedings. Crucially, they might have different rules for how the plaintiff went about proving his claim. And they might certainly have different rules about what orders the court could make, should the plaintiff succeed. Precedents on one form of action were not relevant to another. Much of the development of the common law was in terms, not of whether a plaintiff had a certain right, but of whether he could be allowed to use a certain form of action.¹² Upon their abolition, common lawyers began to think instead in terms of *causes* of action.

True, Maitland famously said, "The forms of action we have buried, but they still rule us from their graves."¹³ We might imagine that he meant little had changed. This would be a misunderstanding of the event and of his interpretation of it. They still rule us, because all lawyers have to categorize grievances; it is the only way to have a legal system based on principle rather than instinct. The abolition of the forms of action gave no license to modify the substantive law, and so the learning as to what counted as an actionable grievance—the reason for an action, or a "cause of action"—did not change. That is why, still today, people talk about claims in replevin or in conversion. But there was a very important change, in that there was now only one law of civil procedure for all claims. This allowed the substantive law to emerge from the civil procedure that had previously dominated the attention of jurists.¹⁴ In Maitland's conclusion:

This results in an important improvement in the statements of the law—for example in text-books—for the attention is freed from the complexity of conflicting and overlapping systems of precedents and can be directed to the real problem of what are the rights between man and man, what is the substantive law.¹⁵

12. See generally FREDERIC W. MAITLAND, ALFRED H. CHAYTOR & WILLIAM J. WHITTAKER, *EQUITY; ALSO THE FORMS OF ACTION AT COMMON LAW: TWO COURSES OF LECTURES* (1929).

13. *Id.* at 296.

14. The law of real property had always been the most systematized part of the law, but it was also dominated by procedural considerations, leading as in other fields to the need to resort to legal fictions to develop the law. For an example, see SIR JOHN BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 301–03 (4th ed. 2002).

15. MAITLAND, *supra* note 12, at 375. Also see the introduction to SIR FREDERICK POLLOCK, *THE LAW OF TORTS* vi (2d ed. 1890), framed as a letter to Oliver Wendell Holmes Jr.: "The really scientific treatment of principles begins only with the decisions of the last fifty years; the development belongs to that classical period of our jurisprudence which in England came between the Common Law Procedure Act [1852] and the Judicature Act

When those textbooks were written, their authors were frequently inspired by the civil law, which, as we have seen, had renewed and developed its systematic foundations in the preceding centuries, and in particular in the preceding decades. The very first page of *Chitty on Contracts*¹⁶ draws on Roman law and on the French author Robert-Joseph Pothier as it discusses the idea of an obligation.¹⁷ John Austin developed a distinction between primary and secondary rights that was almost certainly borrowed from Pothier.¹⁸ And the common law of private international law, systematized in the same period, uses categories of moveable and immovable property that are foreign to the domestic common law but fundamental to the civil law.¹⁹

There were textbooks on Equity, too, but there was no systematic civil law to which the authors could look. The civil law has and had an idea of equity, of course; but not a body of Equity.²⁰ It should come as no surprise that for many decades, the textbooks on Equity did not aspire to lead, but only to follow. They did not systematize, except where the judges did. Still today, we have a basic classification of trusts that can only be described as bizarre: express, resulting, and constructive trusts. It comes from the Statute of Frauds, drafted by Lord Nottingham L.C. and enacted in

[1873]." The Common Law Procedure Act was one of the crucial steps in the abolition of the forms of action.

16. See JOSEPH CHITTY, A PRACTICAL TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL 1 (2d ed. 1834).

17. See WILLIAM R. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT 4-5 (1879) (referring to Roman law and to the German jurist Friedrich C. von Savigny in order to examine the idea of obligation); FREDERICK POLLOCK, PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY 4-5, 10 (2d ed. 1878) (bringing in German law and Roman law to analyze the idea of agreement, and noticing French and German law on the question whether we are concerned in contract law with subjective intention, or objective manifestations of intention).

18. See ROBERT J. POTHIER, TRAITÉ DES OBLIGATIONS § 183 (1761) (distinguishing *obligations primitives* from *obligations secondaires* in the context of contractual penalty clauses). These became primary and secondary obligations in the hands of William D. Evans, one of Pothier's most influential translators into English. Bernard Rudden, *Correspondence*, 10 OXFORD J. LEGAL STUD. 288, 288 (1990). Austin expanded the idea of primary rights to the extracontractual context, although he preferred "sanctioning" right to "secondary" right. JOHN AUSTIN, LECTURES ON JURISPRUDENCE 45-46 (4th ed. 1873).

19. See ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN CONFLICT OF LAWS 93 (1992); Blaine Baker, *Interstate Choice of Law and Early-American Constitutional Nationalism: An Essay on Joseph Story and the Comity of Errors*, 38 MCGILL L.J. 454 (1993).

20. See *supra* note 2 for the distinction between Equity and equity in this Article.

1677.²¹ Only recently, one might say in the last twenty years, do we see books on Equity and trusts that look critically at their subject matter, and do not simply describe what the courts do, but ask whether it can be made sense of. And these are not the leading texts, most of which originated in the nineteenth century and have been through multiple editions; they are newer books. The leading texts on Equity and trusts, those with a pedigree of over a century, tend to avoid systematization.²² The same phenomenon is evident in relation to private international law: the common law of private international law was inspired and informed by the civil law, but the civil law does not have Equity, and only very recently has there been thought given to what might be the rules for choice of law in relation to many doctrines of Equity.²³ Much of the early work of that genius of analytical jurisprudence, Wesley Newcomb Hohfeld, was inspired by a desire to understand the relationship between common law and Equity.²⁴ Arguably, however, he never quite came to the point of using his justly famous fundamental legal conceptions to analyze the nature of the beneficiary's interest under a trust.²⁵ This was a subject that preoccupied

21. Lionel Smith, *Constructive Trusts and Constructive Trustees*, 58 CAMBRIDGE L.J. 294, 297–98 (1999).

22. See RODERICK P. MEAGHER, JOHN D. HEYDON, & MARK J. LEEMING, MEAGHER, GUMMOW, AND LEHANE'S EQUITY DOCTRINES AND REMEDIES (4th ed. 2002) (showing an entirely self-conscious reactionism, especially in the Preface, to late 20th century projects of systematizing Equity). This book does not have 19th century roots; its first edition dates from 1975. The state of New South Wales, however, where the book was published, did not enact the Judicature Act reform, combining the administration of the common law with that of Equity, until 1972. The book, therefore, reflects a pre-Judicature approach to Equity.

23. See generally, e.g., TIONG MIN YEO, CHOICE OF LAW FOR EQUITABLE DOCTRINES (2004). The choice of law rules for trusts are better developed in the United States than elsewhere in the common law world, via the Restatements of the American Law Institute.

24. See Wesley N. Hohfeld, *The Relations Between Equity and Law*, 11 MICH. L. REV. 537, 537–572 (1913).

25. See *id.* at 555–56 (touching on the subject, but only through the use of some examples, and not engaging the question occupying so many of his contemporaries—whether the beneficiary's right was in rem or in personam); see also Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 20 (1913). Hohfeld states: "A later article will deal specially with the analysis of certain typical and important interests of a complex character—more particularly trusts and other equitable interests." In that second article, Hohfeld mainly developed the idea of "paucital rights" and "multital rights" as his elucidation of the best way to understand the distinction between rights in personam and rights in rem. See Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917). He did show, at the very end, that beneficiaries' rights are multital (in rem). *Id.* at 763–66. This passage is marked, however, by some confusion, as Hohfeld treats the holder of a legal contingent

legal thought in his day, and that is now attracting further attention as legal scholars seek, finally, to theorize the law of trusts in a way that will allow it to be understood as part of the same system that incorporates the rest of private law.²⁶

III. Equity and the Restatement (Third) of Restitution & Unjust Enrichment

The Restatement (Third) of Restitution & Unjust Enrichment started with what might be called a radical fusionist project, in which the language of Equity would disappear. The final text represents a more modest project.

My argument to this point is that systematizing Equity is unfinished business. In other words, the field of Equity (and particularly of the law of trusts) has not been described in the kind of juristic language that is used to describe all the rest of private law. To talk of "equitable interests" is to describe something with a purely historical label. This observation helps us to understand why, in some parts of the common law world (although not so much in the United States), there is a live issue about the fusion of common law and Equity: whether it is a good idea, whether it is even possible.²⁷ It may seem very odd to some lawyers that anyone would question fusion. But fusion skepticism has more than one foundation. It is based partly on logic. The fusion of common law and Equity was a procedural step. No one's substantive rights were changed by any fusion of the courts. Moreover, there is a very real sense in which the mission of Equity is precisely to differ from the common law because Equity has always been understood as, in some sense, corrective of the common law.

remainder alongside a trust beneficiary. *Id.* He fails to engage fully with the difficult point that a trust beneficiary does not generally have any claim against a tortfeasor who damages the trust property, and ultimately says that "[t]he nature of the equitable rights, privileges, powers, and immunities of the *cestui que trust* is too large a subject for adequate treatment in the present place; and so any further consideration of that interesting subject must be reserved for another occasion." *Id.* at 766. However, Hohfeld died in 1918. Note that the two *Yale Law Journal* articles were later published as a book, of which there are several editions such as W.N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (1964).

26. See generally, e.g., Robert Chambers, *Constructive Trusts in Canada*, 37 ALBERTA L. REV. 173 (1999); Ben McFarlane & Robert Stevens, *The Nature of Equitable Property*, 4 J. EQUITY 1 (2010); Lionel Smith, *Unravelling Proprietary Restitution*, 40 CANADIAN BUS. L.J. 317 (2004).

27. There was a conference on the subject in Sydney in 2004, leading to the publication of SIMONE DEGELING & JAMES EDELMAN, *EQUITY IN COMMERCIAL LAW* (2005).

Hence, a substantive fusion would seem to contradict the reason for which Equity arose. Substantive fusion, though, can be understood in different ways. Just as the procedural abolition of the forms of action at common law led to the systematization of that legal order,²⁸ so too the procedural fusion of law and Equity arguably requires their conceptual integration into a single legal order. This may point in the direction of a kind of fusion that requires all of the private law to be made sense of within a single conceptual framework; the doctrines of Equity will survive, but our understanding of them will be more systematic. Fusion skepticism is also based on conservatism: the preservation of the distinctness of Equity is important to many.²⁹ This conservatism plays out in many ways, including in how the subject is taught in law faculties.³⁰

In this Section, I will seek to assess the fusion project in the R3RUE via two three-fold classifications of Equity: an old and well-established one, that dates, it seems, from the eighteenth century; and a new one, recently proposed by Andrew Burrows to organize our thinking about fusion.³¹

The old classification seems to have originated with John Fonblanque's notes in his annotated editions of the eighteenth century *Treatise of Equity* attributed to Henry Ballow, although it was adopted and popularized by Joseph Story and others.³² In this sense, it is a rare example of a scheme of systematization of Equity that did not come from the courts. It divides the jurisdiction of the Court of Chancery into three parts: original or exclusive, concurrent, and auxiliary. The original jurisdiction refers to situations where the plaintiff's only right is Equitable. The rights of a beneficiary under a trust are the clearest example. The plaintiff typically has no right at all at common law, and if he does not have an Equitable

28. See *supra* notes 11–15 and accompanying text.

29. See Lionel Smith, *Fusion and Tradition*, in EQUITY IN COMMERCIAL LAW 19 (Simone Degeling & James Edelman eds., 2005).

30. It was Maitland's comment on how Equity should be taught that engaged the attention of Hohfeld. See Hohfeld, *supra* note 24, at 537–40. Maitland's famous book was not written as a book but is based on student notes from his series of law school lectures. *Supra* note 12. Today, there are still books and law school courses entitled Equity in some places, but not in others.

31. See Andrew Burrows, *We Do This at Common Law But That in Equity*, 22 OXFORD J. LEGAL STUD. 1 (2002).

32. See Mike Macnair, *Equity and Conscience*, 27 OXFORD J. LEGAL STUD. 659, 664–66 (2007) (offering a brief history of the classification, which was challenged and modified by many authors).

recourse then he has nothing at all. The concurrent jurisdiction refers to the case where the plaintiff has a legal right and yet goes to Equity for some remedy that the common law cannot provide. Injunctions and specific performance are the core examples.³³ The plaintiff has a common law right that the defendant perform his contractual promise, or that the defendant stay off the plaintiff's land; but the common law deals almost exclusively in damages, and so the plaintiff may go to Equity for those remedies that command the defendant to do or not to do something other than the payment of money. The auxiliary jurisdiction is a bit more obscure, and refers primarily to pretrial procedure. Even in relation to a lawsuit at common law, the Court of Chancery could order the production of documents, which common law courts could not. Pretrial discovery of documents, and a great deal else of our modern civil procedure, comes from the Chancery.

The classification has not been a particularly successful one and little is heard of it today, but in one respect it focuses attention on an important point. Some, but only some, of the recourses provided by Equity are, to this day, discretionary. Specific performance is a good example. This discretionary character can be made sense of, at least in part, inasmuch as the plaintiff has a *right* to compensatory damages whether or not she is able to secure a decree of specific performance. For the same reason, in relation to such decrees, the orthodox principle is that the plaintiff has to show that the common law recourse, which by hypothesis is available, is in some way inadequate. This leads some people to generalize, to the effect that there is something inherently discretionary about Equity, or that Equitable remedies only arise where common law remedies are inadequate. But neither of these ideas has any relevance in the exclusive jurisdiction. There is no whiff of judicial discretion anywhere in the basic principles of the law of express trusts; it is all a matter of rights.³⁴ And this is not surprising, inasmuch as if Equity does not help a trust beneficiary, she typically has no possibility of common law recourse.

The other three-fold classification, posited by Andrew Burrows, is not intended simply as a way of organizing the jurisdiction of Equity, but as a way of organizing a project of substantive (and not merely procedural) fusion between the common law and Equity. Burrows divides the private

33. Others might include subrogation and marshalling.

34. Unless the terms of the trust create discretions, a state of affairs which has become the norm; but this is discretion in the trustees, not the court.

law—the common law and Equity together—into three areas. The first is the field in which the common law and Equity coexist coherently, and in which retaining separate labels still provides "the best or, at least, useful terminology."³⁵ In this category he places the trust, and also "the general priority rule that a bona fide purchaser for value of a legal interest without notice takes free of a prior equitable interest in the same property."³⁶ As he notes, it is difficult to describe this rule without using the labels "common law" and "equitable" to categorize the interests held by the competing parties, because the rule is based on precisely such a categorization.

Burrows's second category covers situations where, as in the first category, the common law and Equity coexist coherently, but unlike in the first category, the traditional designations of "common law" and "equitable" are superfluous. One of his examples is the subject of threats or pressure that induce a contract or gift and may allow it to be set aside. The common law always had a doctrine of duress; Equity added the idea of undue influence, allowing some transactions to be set aside that the common law would not. But, he argues, nothing is gained by perpetuating the historical labels. We might as well just list all the threats or pressure that allow a transaction to be avoided. Although he does not specifically place it in this category, the law of specific performance and injunctions seems to belong here as well. We might formulate the traditional sentence, "where the defendant has breached a contract, the plaintiff has a right to compensatory damages at common law; but in Equity, as a matter of discretion, he may get a decree of specific performance." This proposition could be reformulated, "where the defendant has breached a contract, the plaintiff has a right to compensatory damages; but, as a matter of discretion, he may get a decree of specific performance." This category, one might say, lends itself easily to a kind of terminological fusion, without any effect on the substance of the law.³⁷

Burrows's third category comprises situations in which, in his view, the common law and Equity are different, at least slightly so, and, unlike in the first category, this difference is not a useful or justifiable one.³⁸ The

35. Burrows, *supra* note 31, at 5.

36. *Id.*

37. Of course not everyone would agree with this. The traditional position would be that the retention of the label "Equitable" keeps the jurisdiction to award specific performance in intellectual contact with the whole body of Equity, which has its own internal logic.

38. Burrows, *supra* note 31, at 6–7.

result is that in this third category, the common law and Equity do *not* coexist coherently. The differences need to be ironed out. Substantive fusion is needed. Burrows gives many examples, including the law on compound interest (which in English law is only available for Equitable claims), and the law of tracing (which in English law is thought by many to differ as between "common law tracing" and "Equitable tracing").³⁹ As Burrows acknowledges, the difference between his first and third categories is a matter of judgement: if one believes that there is a good justification for a difference between the common law and Equity, one will place the matter in the first category, otherwise in the third.⁴⁰

Although he does not mention the older classification, it is interesting to observe that Burrows's first category, where he would provisionally accept that the law remain in its traditional state, lines up closely, if not exactly, with the "exclusive" jurisdiction of that older classification. Similarly, even those who are critical of the coherence of the older classification are likely to accept that there is a crucial distinction between the exclusive jurisdiction and the rest of Equity.⁴¹

If we assess the fusion project of the R3RUE against Burrows's classification, we can speculate that he would approve of a great deal of what is accomplished by the new Restatement. Perhaps exemplifying Burrows's second category, we see duress and undue influence brought together in Sections 14 through 15 without any references to the legal or Equitable origins of one or the other.⁴² Similarly, the R3RUE restates the law of mistake in Sections 5 through 12 and 34 without reference to common law or Equity. It goes so far as to overturn, in some cases, the traditional doctrine that neither common law nor Equity will perfect an imperfect gift. Again, Section 13 restates the law of fraud and misrepresentation, bringing together the law of fraud (that comes from the common law) and the law of innocent misrepresentation (that comes from Equity). Subrogation, most of which comes from Equity, is restated in

39. *Id.* at 7. *But see* LIONEL SMITH, *THE LAW OF TRACING* 174 (1997); Lionel Smith, *Simplifying Claims to Traceable Proceeds*, 125 L.Q. REV. 338 (2009).

40. For example, Burrows suggests that an example of his third category is the inconsistent treatment, in law and Equity, of misappropriated money (Burrows, *supra* note 31, at 7 n.26), but he has already placed the law of trusts in the first category, which suggests that it is justifiable that the rights of a legal owner of money will not necessarily be the same as the rights of a beneficiary of a trust or a legatee under an estate.

41. MEAGHER, HEYDON, & LEEMING, *supra* note 22, at 10–11.

42. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 14–15 (2011).

Sections 24 and 57 in a way that uses the word "equitable" (Section 24 is labelled "equitable subrogation") but that does not depend on any jurisdictional distinctions for its content or the scope of its applicability.

Other elements of R3RUE could be said to illustrate Burrows's third category. That is, there are provisions that bring the common law substantively in line with Equity, in situations where, at least on some views of the law, there was traditionally a difference between them. Taking some elements from among Burrows's examples, we find that the law relating to illegality⁴³ and tracing⁴⁴ are restated in a unified way.⁴⁵ Perhaps the strongest example is the restatement of the "unclean hands" doctrine in Section 63. It is labelled "Equitable disqualification (unclean hands)," but it is made to apply to any claim. This is a significant development from the traditional position, according to which the doctrine applies only to the enforcement of Equitable rights.

Finally, let us come to Burrows's first category. Here Burrows argues that the common law and Equity coexist coherently and the labels do need to be perpetuated. Above, it was suggested that this category corresponds to the original or exclusive jurisdiction of the traditional classification, where a claimant has a purely Equitable right. The R3RUE in some ways reflects Burrows's position. One of his examples of this category is the defence by which the purchase in good faith of a legal interest in property, for value, without notice of a pre-existing Equitable interest, will defeat that interest. We see this defence restated in Section 66, with explicit reference to the legal (common law) and Equitable natures of the respective interests.⁴⁶

Burrows's other example of his first category is the law of trusts, and here the R3RUE presents some difficult questions. On the traditional view, the trust belongs to the exclusive jurisdiction of Equity. A trust is an obligation relating to the benefit of particular property, however that

43. *Id.* § 32.

44. *Id.* §§ 58–59.

45. Although some would argue that even in England and the rest of the common law world, there is only one law of tracing. *See supra* note 39 and accompanying text.

46. Conversely, the defence in Section 67 is for payments of money, where the common law provided a good faith purchase defence that would defeat legal interests, although it did not provide one for transfers of other kinds of property. The common law defence always had different rules about what counted as value; in particular, a promise to pay money is value at common law, but not for the purpose of the Equitable defence. The R3RUE has apparently diminished protection of Equitable interests by restating value in Section 68 in line with the common law defence.

obligation may arise. If it arises by consent, it is an express trust; if it arises by operation of law, it is a resulting or constructive trust.⁴⁷ United States law has for many years taken the position that the constructive trust is not really a trust at all; it is only a remedy, explained by analogy to the law of trusts.⁴⁸ This view is echoed in R3RUE, where it restates constructive trusts in Section 55. There it is suggested that not only is the constructive trust not a trust; it is not even a remedy, but only "a manner of speaking."⁴⁹

The suggestion that a constructive trust is not a trust is difficult to understand if we note that it is, like all trusts, a relationship between people with respect to property that arises out of the obligation of the owner of the property to hold it for the benefit of the beneficiary. It is easier to understand if we take a narrower definition of trust, that confines the word "trust" to expressly created trusts.⁵⁰ This is the view that seems to lie behind such rhetorical devices as the claim that a constructive trust is no more a trust than a quasi-contract is a contract. But the word "constructive" indicates clearly that the constructive trust does not arise by a settlor's intention. The better formulation is that in the Restatement of the Law of Restitution: Quasi-Contracts and Constructive Trusts—a constructive trust differs from an express trust in much the same way as a quasi-contractual obligation differs from a contractual obligation.⁵¹

This seems exactly right: both a contractual obligation and a quasi-contractual obligation are obligations, but only the former arises by consent, while the latter, by operation of law. So too, both the express and constructive trusts are trusts, with trust property, trustees, and beneficiaries, whose equitable interest gives them priority in the case of trustee insolvency to the extent that trust property can be found. One arises by consent, one by operation of law.

47. Ben McFarlane, *The Centrality of Constructive and Resulting Trusts*, in CONSTRUCTIVE AND RESULTING TRUSTS 183 (C. Mitchell ed., 2009).

48. RESTATEMENT OF THE LAW OF RESTITUTION: QUASI-CONTRACTS AND CONSTRUCTIVE TRUSTS § 160 cmt. a (1937); DAN B. DOBBS, LAW OF REMEDIES 401 (1993); I AUSTIN W. SCOTT, WILLIAM F. FRATCHER, & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 2.1.1 (2006) (citing and following the Restatements of the Law of Trusts). Unlike previous editions, *Scott and Ascher on Trusts* no longer deals with constructive trusts.

49. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 cmt. b (2011).

50. This view is not significantly different from the view that a trust must definitionally be a fiduciary relationship.

51. RESTATEMENT OF THE LAW OF RESTITUTION: QUASI-CONTRACTS AND CONSTRUCTIVE TRUSTS § 160 (1937).

If the claim that a constructive trust is not a real trust is merely a way of saying that it does not arise by consent, then no one would disagree with the conclusion, even if they might disagree with the terminology. But there is a way of understanding the claim that is importantly different, and that arises out of the suggestion that a constructive trust is "only a remedy." That can be understood as the idea that its grant lies in the discretion of the court, and it belongs conceptually not with express trusts, but with injunctions and specific performance.⁵² In terms of the old classification of Equity jurisdiction, this means that the constructive trust should not belong in the exclusive jurisdiction, but in the concurrent jurisdiction. In modern terms, this is just another way of saying that you do not get it as a matter of right, but as a matter of discretion. And many cases, including many recent cases, have accepted this vision of the "remedial constructive trust." The trust is awarded in the discretion of the court, when it is shown that other remedies are inadequate.⁵³

But there is a paradox here, in that this proves too much, or at least more than the Reporter of the R3RUE, Andrew Kull, wishes to prove. The implication of the remedial view of constructive trusts, which lines them up with injunctions and decrees of specific performance, is that, like injunctions and decrees of specific performance, they are created by the order of the judge. They do not exist before that time. This contrasts with the view of constructive trusts that sees them as obligations with respect to the benefit of property, arising by operation of law from unjust enrichment or some other cause. On that view, the trust arises when the obligation arises. This has enormous implications in bankruptcy. If a defendant holding the contested property has become bankrupt, and before the moment of bankruptcy, he held that property in trust, then the property does not form part of the bankruptcy estate. That is the law everywhere. But if the property does form part of the bankruptcy estate because it is not held in trust, and a plaintiff appears before the judge and asks for an injunction that the property be transferred to him, then the plaintiff appears not in the role

52. The analogy is drawn explicitly in the R3RUE. Section 55 Comment b indicates that an order recognizing a constructive trust is a composite of a declaration and an injunction. See Andrew Kull, *Deconstructing the Constructive Trust*, 40 CANADIAN BUS. L.J. 358, 360 (2004); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 631 (1995) (describing the constructive trust as "a species of equitable remedy, comparable in function to the injunction or the decree of specific performance").

53. The Supreme Court of Canada has certainly accepted this view. See, e.g., *Kerr v. Baranow*, 2011 S.C.C. 10.

of trust beneficiary; rather, he appears in the role of a creditor seeking to be promoted above the others. His request will surely be denied because bankruptcy seeks to treat all creditors equally. And if a constructive trust is nothing but a kind of injunction, then the plaintiff who appears seeking a constructive trust can expect to be treated in exactly the same way.⁵⁴

Andrew Kull wants constructive trusts to provide priority in bankruptcy, just as Austin Scott did.⁵⁵ This presupposes that the plaintiff's trust interest exists before the bankruptcy.⁵⁶ But this is precisely the traditional or institutional view of constructive trusts, and on this view it is very difficult to see what is left of the idea that the constructive trust is "just a remedy." Kull's view seems to be that the constructive trust arises from the facts that create it, such as an unjust enrichment, and not from the court order. The court order is only a declaration of what already exists. Again, this is just like the traditional or institutional view of the constructive trust. Kull's understanding of the idea that the constructive trust is "just a remedy" remains true, he argues, in the sense that the court's order settles what was otherwise a disagreement between the parties regarding what was the pre-existing state of affairs.⁵⁷ But this seems to mean that everything on which a court passes judgment is just a remedy. Who owns an asset? Did a corporation exist? Was an express trust, or a contract, created? Did the defendant owe a duty of care, and if so, did he breach it? All these are questions as to which there might be a disagreement that only a court can settle. If this means they are all remedies, then the label does not tell us much. "Remedy," it has been shown, is a word with very many meanings.⁵⁸

54. For a well-known U.S. example, see *In re Omegas Group, Inc.*, 16 F.3d 1443 (6th Cir. 1994). A Canadian example is *Bedard v. Schell*, 59 Sask. R. 71 (Q.B. 1987).

55. Andrew Kull, *Restitution in Bankruptcy: Reclamation and Constructive Trust*, 72 AM. BANKR. L.J. 265, 287 n.54 (1998) (citing AUSTIN SCOTT, SCOTT ON TRUSTS § 462.4 (4th ed. 2004)).

56. *See id.* at 287.

57. *Id.*

58. *See* Birks, *supra* note 6 (identifying five distinct senses of the word "remedy"). Indeed if the fact that a court passes judgment on a matter in dispute makes that matter or that order a remedy, then even questions of fact would be remedies, or disputes about facts would be resolved by remedies.

IV. Conclusion

The contributions of Equity to the modern law are enormously important. To say nothing of all of the law of trusts, it has given us equitable liens, subrogation, tracing, discovery, and much else. The integration of Equity and the common law is something that seems overdue to many commentators. The R3RUE, like Andrew Burrows, takes the line that this is a process that should have happened long ago, and that we should move it along as quickly as can be. In my own view, that project is premature. We cannot integrate the common law and Equity until we have systematized Equity. We cannot put any Equitable doctrine into one of Burrows's categories until we understand it fully, and understand how it relates to the neighbouring common law. It may be—and this would have been Maitland's view—that almost all of our law actually belongs in Burrows's second category.

The law of constructive trusts serves only as the most telling illustration of this point. A legal realist approach led to the idea that it was naïve to think that constructive trusts were really trusts. They were pushed aside and treated as remedies. Not surprisingly, after decades of academic commentary saying that they were not trusts but only remedies, some courts took the view that they were not trusts but only remedies. This has led to confusion and injustice. It has also led, in the United States, to the ejection of constructive trusts from the subject of trust law, which is a mistake. Constructive trusts give beneficiaries priority in the insolvency of the trustee because constructive trusts are trusts. Terminology always matters in the law.

A task for the future will be to analyze trusts—all of the law of trusts—as carefully and as fully as we have analyzed the law of restitution for unjust enrichment and the law of gain-based remedies for wrongful conduct. Hohfeld started the job, and we need to finish it. The ultimate result will be that we could, if we wanted to, describe all of the law of trusts in a precise juridical terminology that would not depend on historical distinctions between the common law and Equity. We could preserve the substance, influence and genius of Equity even while dispensing with the historical terminology that has been handed down to us. And this would, if we wished it, allow us to achieve the unfulfilled goal of the R3RUE, to restate any body of law without reference to the labels "common law" and "Equity."