



University of Toronto
Faculty of Law Review
84 Queen's Park
Toronto, Ontario
M5S 2C5

FIFTH ANNUAL CONFERENCE ON STUDENT PUBLISHING IN LAW

Hosted by the *University of Toronto Faculty of Law Review*

March 10 2009

A Right Without a Remedy: A critical analysis of damages for the tort of conversion

by

Michael Rosenberg

Conference Draft – Not to be cited without Permission

The Annual Conference on Student Publishing in Law is sponsored by
BLAKE, CASSELS AND GRAYDON LLP

Introduction

The recent decision of the Alberta Court of Queen's Bench in *Freyberg v. Fletcher Challenge Oil and Gas* signals a disturbing trend in the calculation of damages for the tort of conversion.¹ In light of the earlier decision of the Saskatchewan Court of Appeal in *Montreal Trust Co. v. Williston Wildcatters*,² *Freyberg* suggests that restitutionary relief will be less widely available in subsurface mineral lease disputes. While certainly important to the practice of natural resources law, these cases have broader significance because they tackle a problem that extends far beyond the oil patch. They ask how a court should divide the surplus that results when one party unknowingly takes and improves the property of another. Given the diversity of applications for these oil and gas precedents, it is unsettling that they were wrongly decided.

Freyberg and *Williston* address the relatively common situation in which one party innocently extracts and sells minerals to which it has no claim of right. Older authorities would have allowed the plaintiff a restitutionary disgorgement of the defendant's gains, less certain expenses.³ However, *Freyberg* and *Williston* bar some mineral rights owners from recovering more than they would have received under a royalty agreement. In turn, these decisions allow tortfeasors to retain a significant share of the profit from their wrongful conduct.

I argue that *Freyberg* fundamentally misstates the law of restitution. Kent J. mistakenly held that restitution is available only to redress bad faith on the part of the defendant. This error led the honourable judge to conclude that the plaintiff's claim was limited to what she had expected to receive, but for the defendant's tort. Yet this

¹ *Freyberg v. Fletcher Challenge Oil and Gas*, 2007 ABQB 353 [henceforth *Freyberg (Q.B. II)*].

² *Montreal Trust Co. v. Williston Wildcatters Co.*, 2004 SKCA 116, leave to appeal denied, [2004] S.C.C.A. No. 474.

³ See, for example, *Wood v. Morewood* (1841), 3 Q.B. 440n, 114 E.R. 575 (N.P.); *Weyburn Security Co. v. Sohio Petroleum Co.*, [1971] S.C.R. 81.

reasoning neglects the fact that the tort of conversion does not extinguish the property interest of the mineral rights owner.

Rather, the owner may trace her property and claim the proceeds from its sale. This forward-looking claim explains why the owner's restitutionary damages are not limited to the value of the minerals at the time they were taken. Instead, she is entitled to the surplus that was generated when her minerals were brought to the surface and sold. To ignore the surviving property interest, as *Freyberg* did, is to establish a dangerous precedent of undercompensating small subsurface mineral rights owners. More generally, this error perpetuates a line of authority that unduly limits restitutionary claims for proprietary torts.⁴ Restitution is not about recovering the thing that the plaintiff has lost, but rather, the thing that the owner's claim of right has become.

In the first section of this paper I discuss the *ratio decidendi* in *Freyberg*, noting the ways in which it echoes *Williston*. In the second section I review the jurisprudence and conclude that restitutionary relief has historically been available for the innocent conversion of minerals. In the third section I construct a theoretical framework of proprietary torts to demonstrate the plaintiff's entitlement to the profits from the extraction of her minerals. Finally, in the fourth section, I apply this framework to reveal the errors in *Freyberg* and argue that this case, and cases like it have been wrongly decided.

I The Sad Story of Lady Freyberg's Mineral Rights

(i) *Ivry's saga*

⁴ I define proprietary torts as those torts in which the tortfeasor intends to gain some benefit from interfering with the property rights of the plaintiff. See discussion in Peter Birks, *An Introduction to the Law of Restitution*, rev. ed. (Oxford: Clarendon Press, 1989), at 329. Trespass and conversion are the most common proprietary torts, and while they are similar, this paper focuses on the latter. Generally, trespass consists of interfering with the property rights of another by entering onto his land without justification. Conversion requires a deprivation of property without lawful authority. See Sir John Salmond, *The Law of Torts*, 6th ed. (London: Sweet and Maxwell, 1924) at 222.

In 1979 Lady Ivry Freyberg, an elderly British widow, inherited a 2/3 interest in the mineral rights beneath 637 acres of land in Alberta. Lady Freyberg inherited these mineral rights from her cousin, Noel Claude Fonnereau. In 1975, Fonnereau and N.V. Resources, which owned the remaining 1/3 interest in the mineral rights, had signed a lease with a predecessor in title to Fletcher Challenge Oil and Gas Inc (“the lease”).

Like many oil and gas leases, this agreement provided for a five year term, with an additional term to run so long as gas continued to be produced.⁵ If the lessee drilled a well but “shut-in” the gas, the well would be deemed to be producing gas, so long as the lessee made yearly “shut-in royalty payments.” However, if the lessee failed to produce gas when it would have been economic and profitable to do so, the lease would automatically terminate.

Several oil and gas companies became involved in the exploitation of the Fonnereau/Freyberg mineral rights, and a well was drilled in 1978. The well returned promising test results, but it was shut in and did not produce any gas until 1999. In 1999, however, production was commenced, and the well was so successful that Lady Freyberg became convinced that production would have been economic and profitable at an earlier date. She sued, seeking a declaration that Fletcher Challenge’s lease had terminated some time after 1987.

At trial, the Court of Queen’s Bench affirmed the validity of the lease.⁶ Romaine J. held that production was not economically profitable until 1999. She also held that even if production was economically profitable before 1999, the lessee’s failure to produce did not terminate the lease.

⁵ See *Freyberg v. Fletcher Challenge Oil and Gas Inc.*, 2005 ABCA 46, at paras. 27-32 for the full text of the relevant clauses of the lease.

⁶ *Freyberg v. Fletcher Challenge Oil and Gas Inc.*, 2002 ABQB 692 [henceforth *Freyberg (Q.B. I)*]

However, the Alberta Court of Appeal reversed the trial judge, holding that the lease terminated once it became profitable to produce gas.⁷ The Court of Appeal also concluded that it would have been economic and profitable to commence production prior to 1999.⁸ Consequently, Lady Freyberg was entitled to a declaration that the lease had terminated before Fletcher Challenge put its well into production. Leave to appeal to the Supreme Court of Canada was refused.⁹

On remand to the Court of Queen's Bench, Kent J. held that the defendants were not trespassers.¹⁰ The defendants had a right to take N.V. Resources' 1/3 of the gas, and there was no means to do so without simultaneously taking Lady Freyberg's gas. Additionally, the defendants held a valid surface lease. However, in light of the invalidity of the subsurface mineral rights lease, Kent J. concluded that the defendants had committed the tort of conversion by taking Lady Freyberg's gas from the wellhead and selling it.

Kent J. then turned to the calculation of damages, which is the focus of this paper. Lady Freyberg claimed that she was entitled to the defendants' net profit from the well, some \$4.8 million. The defendants answered that she was only entitled to a bonus payment of some \$150,000 and a 15-18% royalty on the gas that had been produced. In deciding between these two alternatives, Kent J. felt compelled to elect between restitutionary damages, which would strip the defendant of its wrongful gain, and compensatory damages, which would restore to the plaintiff the value of what she had lost.

⁷ *Freyberg (C.A.)*, *supra* note 5, at para. 50-58. The Court of Appeal held that this principle was well settled in law. See, for example, *Weyburn Security Co. v. Sohio Petroleum Co.*, [1971] S.C.R. 81; *Durish v. White Resource Management Ltd.* (1985), 55 Alta. L.R. (2d) 47 (Q.B.), *aff'd* (1988) 63 Alta. L.R. (2d) 265 (C.A.) and *Montreal Trust Co. v. Williston Wildcatters Co.*, [2001] S.J. No. 636 (Q.B.), *aff'd* [2002] S.J. No. 431 (C.A.), discussed below.

⁸ *Freyberg (C.A.)*, *supra* note 5, at paras. 69, 73. The Court of Appeal accepted that "a prudent lessee would have objectively foreseen profitability."

⁹ *Freyberg v. Fletcher Challenge Oil and Gas Inc.*, [2005] S.C.C.A. No. 167.

¹⁰ *Freyberg (Q.B. II)*, *supra* note 1, at para. 101.

Kent J. held that a royalty was appropriate because Lady Freyberg would have been unable to engage a contract operator to extract her gas.¹¹ Consequently, she could not have exploited her mineral rights without leasing them to an oil and gas company. On this basis, the defendants were liable for no more than Lady Freyberg would have received in royalty payments.

Kent J. held that “[t]he fundamental rule is that the quantum of damages should be in an amount to put the injured party in the same position, or as near to the same position as possible, as she would have been in, but for the tort.”¹² Kent J. concluded that damages should be calculated by asking what agreement the parties would have reached, had both known in 1999 that the lease was not valid.¹³ She imagined that these negotiations would have resulted in Lady Freyberg retaining “a significant amount of the production” but cautioned that “she would not have left the table with everything less expenses.”¹⁴ With these instructions, Kent J. referred the determination of an appropriate royalty to a master.

(ii) *The Williston decision*

The *ratio decidendi* in *Freyberg* expressly adopted the analysis in another recent case of a disputed oil and gas lease, *Montreal Trust Co. v. Williston Wildcatters Co.*¹⁵ In

¹¹ *Freyberg (Q.B. II)*, *supra* note 1, at para. 138. A contract operator would have extracted Lady Freyberg’s gas for a fee. Under that arrangement, Lady Freyberg would have assumed the costs of extraction, and she would have been free to sell her gas at the wellhead. By contrast, leasing her mineral rights to an oil and gas company like Fletcher Challenge entitled her only to a royalty payment on any production. However, under the terms of the lease, Fletcher Challenge would bear the costs of extraction.

¹² *Freyberg (Q.B. II)*, *supra* note 1, at para. 131.

¹³ *Freyberg (Q.B. II)*, *supra* note 1, at para. 140.

¹⁴ *Freyberg (Q.B. II)*, *supra* note 1, at para. 142.

¹⁵ *Williston (C.A.)*, *supra* note 2. See also *Montreal Trust Co. v. Williston Wildcatters Co.*, 2002 SKCA 91, leave to appeal denied, [2002] S.C.C.A. No. 392 [*henceforth Williston (C.A. II)*] (the resolution of the first

Williston, the lease provided for an initial ten-year term.¹⁶ If drilling operations commenced before the conclusion of this term, then the lease provided for a secondary term to run so long as drilling was prosecuted. If any mineral substances were discovered, the lease was to run so long as production continued.

In 1955, three years after the signing of the lease, an oil well was drilled and put into production. That well was still producing in 1990 when production stopped for a few months. Production resumed for a year and then the well was shut in, but not abandoned. Another well was drilled on the same section in 1992 and put into production.

At trial, Gerein C.J.Q.B. found that the lease had terminated when production stopped in 1990.¹⁷ The termination of the lease made trespassers of the defendant oil and gas companies, and they had committed the tort of conversion by extracting minerals. In calculating damages, Gerein C.J.Q.B. seemed to favour a restitutionary remedy. Yet he also found that Montreal Trust could not have engaged a contract operator to extract its minerals.

Like Lady Freyberg, Montreal Trust would have been forced to sign a lease with an oil and gas company, and it would never have had the full benefit of its minerals. In the interest of returning the plaintiff to the position it would have been in but for the defendant's wrong, Gerein C.J.Q.B. awarded the best royalty that the plaintiff could have obtained, plus an industry standard bonus.¹⁸ The Court of Appeal affirmed this portion of his judgement.¹⁹

phase of litigation, in which the Saskatchewan Court of Appeal upheld the decision of Gerein C.J.Q.B. that the lease had terminated).

¹⁶ See *Williston (C.A. II)*, *ibid.*, at para. 7 for the full text of the relevant portions of the lease.

¹⁷ *Montreal Trust Co. v. Williston Wildcatters*, 2001 SKQB 360, *aff'd*, 2002 SKCA 91, leave to appeal denied, [2002] S.C.C.A. No. 392 [*henceforth Williston (Q.B.)*].

¹⁸ This resulted in an increase in the royalty payment from 12.5% to 18%, effective from the beginning of the trespass. However, the plaintiff received only \$183,000, instead of the \$1.5 million in net revenue that had been realized by the defendant.

¹⁹ *Williston (C.A.)*, *supra* note 2, at para. 115.

The disputes in *Freyberg* and *Williston* resulted in some of the most prolific oil and gas lease litigation in recent years. Though oil and gas leases commonly give rise to litigation, most actions are resolved without such extensive judicial pronouncement. Given the judicial energy that has been invested in *Freyberg*, in particular, it seems likely to become a leading case. It is disturbing, therefore, that Kent J. made a serious error of law in calculating damages for the tort of conversion. Yet this error is emblematic of a more general misunderstanding of the law of restitution. As I argue below, the usual tort analysis, which fixes on restoring to the plaintiff the value of the thing that was taken, is not always appropriate in the context of proprietary torts.

II The Development of Restitutionary Claims in Mining Law

(i) *The early cases*

Cases concerning trespass and the conversion of minerals are classic examples of torts that generate surplus for the tortfeasor. In the vernacular, these tend to be torts that pay. Consequently, courts have long recognized the availability of restitutionary relief to address these proprietary wrongs.

This line of judicial authority is generally said to begin with *Martin v. Porter*.²⁰ In that case, the defendant knowingly trespassed on the plaintiff's property and mined the plaintiff's coal. Parke B. held that the plaintiff was entitled to recover the value of the coal at the point that it was severed from the earth. The defendant could recover the cost of transporting the coal to market and selling it, but no deduction could be made for the cost of mining the coal. Parke B. explained:

The plaintiff is entitled to be placed in the same situation as if these coals had been chattels belonging to himself, which had been carried away by the defendant, and must be paid their value at the time they were begun to be taken

²⁰ *Martin v. Porter* (1839), 5 M&W 351, 151 E.R. 149 (Exch. Pl.).

away. He had a right to them, without being subject to the expense of getting them, which was a wrongful act by the defendant, and for which the defendant cannot claim to be reimbursed.²¹

The remedy in *Martin* came to be known as the “harsh rule” for trespass and conversion of minerals. This was contrasted with the “mild rule” in *Wood v. Moorewood*, a later case in which the defendant trespassed innocently on the plaintiff’s property and mined the plaintiff’s coal.²² In *Wood* the defendant had received a conveyance of the mineral rights in question and mined the coal in good faith. As it happened, the plaintiff had received an earlier conveyance and had a better title. Parke B. gave the following instructions to the jury:

... if they found for the plaintiff, they were to determine what damages should be given: that, if there was fraud or negligence on the part of the defendant, they might give, as damages under the count in trover, the value of the coals at the time they first became chattels, on the principle laid down in *Martin v. Porter*; but, if they thought that the defendant was not guilty of fraud or negligence, but acted fairly and honestly in the full belief that he had a right to do what he did, they might give the fair value of the coals as if the coal field had been purchased from the plaintiff.²³

Following *Wood*, the plaintiff’s remedy turned on the willfulness of the defendant’s trespass. Where the defendant knowingly trespassed on the plaintiff’s property, the harsh rule would be applied, barring any mitigating circumstances. The harsh rule entitled the plaintiff to the value of the mined coal. Where the defendant trespassed innocently, the mild rule would be applied, and the plaintiff would receive the value of the coal *in situ*. Under the mild rule, the value of the coal *in situ* was calculated by deducting the cost of mining from the market price of the severed coal.

The English jurisprudence on harsh and mild remedies was adopted by the Supreme Court of Canada in *Lamb v. Kincaid*, which also served to demonstrate the

²¹ *Martin, ibid.*, at 150.

²² *Wood v. Morewood* (1841), 3 Q.B. 440n, 114 E.R. 575 (N.P.).

²³ *Wood, ibid.*, at 576.

applicability of this doctrine beyond the context of coal mining.²⁴ In *Lamb*, the defendant knowingly trespassed on the plaintiff's claim, mined ore, and obtained gold. Duff J. reviewed the English jurisprudence and applied the harsh rule as it was described in *Martin*.

(ii) A divergent path

The perplexing result in *Freyberg* has its origins not *Martin* and *Wood*, but rather, in the later case of *Livingstone v. Rawyards Coal Co.*²⁵ In *Livingstone* the plaintiff purchased a small plot from the owner of the surrounding lands. Both parties believed that the owner of the surrounding lands had reserved the mineral rights below the plaintiff's property. The owner of the surrounding land conveyed these mineral rights to the defendant, which proceeded to mine the coal under the plaintiff's property. Upon discovery of the error, the defendant was found to have committed an innocent trespass, ostensibly attracting restitutionary damages calculated under the mild rule.

However, the House of Lords found that the plaintiff would not have been able to mine his own coal. The defendant owned the only proximate mine, so the plaintiff would have been forced to contract with the defendant to extract his coal. Consequently, the House of Lords decided that the plaintiff could recover no more than the royalty that defendant had paid to all of the surrounding landowners. By comparison to *Martin* and *Wood*, Professor Bankes calls this the "really mild rule."²⁶ Yet their Lordships concluded that the plaintiff would receive more than he had lost if he were awarded the value of the coal *in situ*, as the mild rule provided.

²⁴ *Lamb v. Kinkaid*, [1907] S.C.J. No. 19, per Duff J. The mining law cases have since been applied far beyond the natural resources sector. See, for example, *Greenwood*, *infra* n 62, concerning stolen cars.

²⁵ (1880), 5 App. Cases 25 (H.L.).

²⁶ Nigel Bankes, "Termination of an Oil and Gas Lease, Covenants as to Title, and Assessment of Damages for Wrongful Severance of Natural Resources: A Comment on Williston Wildcatters" (2005) 68 Sask. L. Rev. 23 (QL), at para. 83.

In *Livingstone* Earl Cairns, L.C. emphasized the value of the minerals to the plaintiff. He stated that “[t]he question is, what may fairly be said to have been the value of the coal to the person from whose property it was taken at the time it was taken.”²⁷

Similarly, Lord Hatherley attempted to reconstruct the bargain that the parties would have reached, had the true facts of ownership been known:

there shall be such compensation made to him as will in fairness between both parties give to the one party the whole of that which was his, or the whole value of that which was his, and will at the same time give to the other, in calculating that value, just allowances for all those outlays which he would have been obliged to make if he had been entering into a contract for that being done which has, by misfortune and inadvertence on both sides, and through no fault, been done.²⁸

Finally, Lord Blackburn explained the doctrine:

The point may be reduced to a small compass when you come to look at it. I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated in damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

It is important to note two features of this decision, which will be the subject of later discussion. First, the plaintiff’s damages crystallized at the time the tort was committed. Consequently, he was not permitted to share in the surplus generated by bringing the minerals to the surface. His claim was entirely backward-looking from the moment of the tort. Second, the plaintiff’s damages were subjective. Because of the plaintiff’s deficiency, damages were assessed by reference to what he *would have* received for his coal, rather than what the defendant *did* receive for it. In this sense as well, the claim was backward-looking because the plaintiff was returned to the position he would have been in, but for the defendant’s tort.

²⁷ *Livingstone*, *supra* n 25, at 32.

²⁸ *Livingstone*, *supra* n 25, at 33-34.

In *Williston*, the Court of Appeal applied the reasoning in *Livingstone*.²⁹ The Court noted that “[t]his principle, stated by Lord Blackburn in *Livingstone*, has been repeatedly affirmed in Canadian courts...it is entrenched in our law. To claim that *Livingstone* is a ‘forgotten’ case of no application as the appellants do, is simply incorrect.”³⁰

In turn, *Freyberg* was decided by applying *Williston*. In *Freyberg* Kent J. quoted with approval from the judgement of Gerein C.J.Q.B. in *Williston*:

If one compares *Livingstone* with the case at bar, it is clear that the trial judge found the appellants could not and would not have produced oil from the land but would have engaged a third party to do it. To order the respondents to pay damages in the amount requested by the appellant would result in a large windfall profit to the appellant akin to the “singular stroke of luck” in *Livingstone*. The trial judge balanced all the equities and found that the value of the money that the appellant could realize for the leased substances in situ was the royalty, the best royalty attainable at the time plus a bonus. In my opinion, he was correct in so doing.³¹

Kent J. again made reference to the *Livingstone* doctrine when she decided to award a royalty:

The fundamental rule is that the quantum of damages should be in an amount to put the injured party in the same position, or as near to the same position as possible, as she would have been in, but for the tort...if it is shown that the owner could not have removed the minerals on her own, the amount will be calculated in a different manner such as royalty and bonus payment.³²

Freyberg and *Williston* suggest that damages should be calculated on the basis of the plaintiff’s ability to extract his minerals. In other words, they propose an exception to the mild rule of restitutionary damages that permits an innocent trespasser to retain profits that the owner of the mineral rights could not have earned himself.

²⁹ *Williston (C.A.)*, *supra* note 2, at para. 88. The Court of Appeal cited the recent cases of *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359 and *Cudworth Drilling Ltd. v. MacDonald et al.* (2000), 207 Sask.R. 216 (Sask C.A.).

³⁰ *Williston (C.A.)*, *supra* note 2, at para. 88.

³¹ *Freyberg (Q.B. II)*, *supra* note 1, at para. 129, quoting from *Williston (Q.B.)*, at para. 114.

³² *Freyberg (Q.B. II)*, *supra* note 1, at para. 131.

III A Theoretical Account of Restitution as a Remedy to Proprietary Torts

The result in *Freyberg* and *Williston* has been subject to criticism from a policy perspective. In his case comment, Ballem notes that these decisions penalize land owners who would not have been able to exploit their minerals without the assistance of an oil and gas company. However, he argues that courts are ill-prepared to speculate on what a landowner may or may not do in the future: “[t]he fact that the mineral owner may not be presently involved in the oil industry does not preclude him or her from hiring independent contractors to operate the properties.”³³

Moreover, Ballem finds that the method of calculating damages in *Freyberg* and *Williston* creates perverse incentives for an oil and gas company to continue production after a lease has been challenged:

...this method of determining damages could encourage the lessee to continue producing the well after the lease has been challenged, knowing the financial consequences will not be severe. Indeed, it would be very much to the lessee's advantage to do so as the result could end up being almost the same as if the lease were valid.³⁴

Professor Bankes agrees in his case comment, finding that that “the tortfeasor without title will generally be in exactly the same position as a lessee with title.”³⁵ As such, Ballem concludes that the rule in *Livingstone* is not simply the “really mild” rule, as Professor Bankes had suggested, but rather, the “too mild” rule.

I accept these policy arguments, but direct my analysis toward a broader problem: *Freyberg* and *Williston* are wrong in law.

The challenge of dividing the surplus produced by an innocent tort is hardly new, and *Martin* and *Wood* have long offered coherent solutions. Yet *Freyberg* and *Williston*,

³³ John Bishop Ballem, “The further adventures and strange afterlife of the oil and gas lease,” (2006) 44 *Alberta L. Rev.* 429 (QL), at para. 43.

³⁴ Ballem, *ibid.*, at para. 44.

³⁵ Bankes, *ibid.*, at para. 66.

like *Livingstone* before them, departed from the principled line of reasoning that linked the earliest cases to broader legal tenets. This section explores the rights-based logic that underlies a proper analysis of restitutionary claims for proprietary torts. In turn, it provides a framework with which to tackle future cases in this vein.

At first glance, neither of the parties in *Freyberg* seems to have a particularly strong claim to the surplus. On one hand, the owner of the minerals would have been unable to extract them without the services of an oil and gas company like the defendant. Why should she be entitled to gains that would not have accrued to her in the normal course of events? On the other hand, the defendant has no ownership in the minerals, and it only acquired possession by committing a tort. Why should it be entitled to any gains from the non-consensual sale of property that belongs to the plaintiff? Cast in these terms, both outcomes seem unfair.

From the perspective property rights, however, the solution to this dilemma is clear. In the analysis below, I apply the doctrines of following and tracing to demonstrate that Lady Freyberg had a right to claim the proceeds from the disposition of her gas.³⁶

(i) Hard nosed property rights

The property rights analysis provides a theoretical analysis of Lady Freyberg's claim in restitution. The property rights analysis begins with the proposition that property rights survive a proprietary tort. The tort of conversion alienates property from its owner. However, proprietary torts do not grant the tortfeasor a right of ownership. As

³⁶ More precisely, Lady Freyberg has an election. She may choose to sue in tort, and be returned to her position prior to the defendant's tort, or she may choose to sue in restitution, and claim a disgorgement of the defendant's gains. This election is similar, in effect at least, to the election made by a defendant who chooses to sue in waiver of tort. In that situation, the defendant may claim compensation in tort for the injury that he has suffered. He may also 'waive' the tort and instead claim the gain that the defendant realized by committing the tort. See, for example *United Australia Ltd. v. Barclays Bank Ltd.*, [1941] A.C. 1 (H.L.), at 18 (per Viscount Simon); 29-9 (per Lord Atkin); *Personal Representatives of Tang Man Sit v. Capacious Investments Ltd.*, [1996] A.C. 514, 1 All E.R. 193 (P.C.), at 198.

the Supreme Court of West Virginia eloquently stated in *Pittsburgh & West Virginia Gas Co. v. Pentress Gas Co.*:

By severing a part of the freehold and converting it into personalty, the trespasser does not thereby become vested with title. The title still remains in him to whom the real estate belonged at the time the trespass was committed, and he can follow the article so long as he can find it, and recover it for his own benefit without any deduction for the cost of making the severance.³⁷

Because the owner's property right survives the proprietary tort, she retains ownership of the minerals, and she may follow the chattels *in specie*.³⁸ Where she can identify the physical property that was taken from her, she may claim it against anyone but a *bona fide* purchaser for value without notice of the tortfeasor's title defect.³⁹ She may even follow her property into a divisible mixture, as in a gas pipeline.⁴⁰ Practically speaking, however, the owner's minerals will usually have been sold to a *bona fide* purchaser by the time a claim is made, barring her from following them.⁴¹

Consequently, the owner will generally elect to trace her property and claim the asset or assets for which it was exchanged.⁴² Tracing does not focus on the original asset

³⁷ *Pittsburgh & West Virginia Gas Co. v. Pentress Gas Co.*, 84 W.Va. 449, 100 S.E. 296 (W. Va. S.C. 1919). See also *Gaskins v. Davis*, 115 N.C. 85, 20 S. E. 188 (N.C. S.C. 1894).

³⁸ Lionel D. Smith, *The Law of Tracing*, (Oxford: Clarendon Press, 1997), at 70; *Indian Oil Corp. v. Greenstone Shipping SA (Panama)*, [1988] QB 345. In *Peruvian Guano Co. v. Dreyfus Brothers & Co.* [1892] A.C. 166, at 176, Lord Macnaghten imagined a situation like the one in *Martin*, and found that the mineral rights owner could still recover his coal if he confronted the trespasser at the mouth of the mine. Depending on the circumstances, the trespasser might be due the cost of mining the coal. However, the mineral rights owner would nonetheless be entitled to the coal *in specie*.

³⁹ *Foskett v. McKeown*, [2001] 1 AC 102 (H.L.) (per Lord Millett); *Re Ffrench's Estate* (1887), 21 LR Ir. 283 (C.A.).

⁴⁰ Smith, *supra* note 38, at 73-4, (when like assets are combined in a divisible mixture, shares are calculated by value, rather than volume. If one well contributes gas of a lower quality, the value of that gas, rather than its volume will be used to calculate the well's contribution to the mixture. The mixture is then divided *pro rata* on the basis of contribution to follow the original property rights), *Indian Oil*, *supra* note 38.

⁴¹ P.S. Atiyah, J.N. Adams, and H.L. MacQueen, *The Sale of Goods*, 11th ed., (Harlow, U.K.: Pearson Education, 2005), at 315-330; Smith, *supra* note 38, at 10-11. The plaintiff is permitted to follow her property as far as she can, and then trace it through subsequent asset substitutions. For example, Lady Freyberg could have followed her minerals into their severed form. The gas at the wellhead was still the same gas that she owned in the ground; it had simply been taken by the defendant. However, she could not have claimed that gas once it had been sold to a *bona fide* purchaser for value without notice. Thus she could trace the gas at the wellhead into the asset that the defendant exchanged it for: the proceeds of sale.

⁴² Smith, *supra* note 38, at 7-8, 121 ("We must distinguish the exercise of tracing from the question of what rights the plaintiff can establish.").

itself. Rather, it permits the plaintiff to assert in a new asset the same rights that she enjoyed in the original asset.⁴³ Naturally, this claim depends on the factual relationship between the assets. When it can be shown that one asset was exchanged for another asset, directly or indirectly, the close and substantial connection between them allows the substitute asset to stand in the place of the original asset.⁴⁴ The plaintiff may then assert legal and equitable claims against the substitute asset.⁴⁵

In the tracing exercise, the original asset matters only insofar as it establishes a normative link to the new asset claimed by the plaintiff.⁴⁶ As Lord Millett explained in *Foskett v. McKeown*, what the owner traces is “not the physical asset itself but the value inherent in it.”⁴⁷ Professor Smith further explains that tracing tracks the value inherent in the right of ownership, and he distinguishes this from the value ascribed to the asset itself:

... ‘value’ is simply a reification of the quality which allows us to connect an asset with the proceeds of its disposition. Whether a £10 note is used to buy a vase

⁴³ See *Foskett*, *supra* note 39, at 127-28 (per Lord Millett “[w]here one asset is exchanged for another, a claimant can elect whether to follow the original asset into the hands of the new owner or to trace its value into the new asset in the hands of the same owner.”); see also 110 (per Lord Browne-Wilkinson); 115 (per Lord Hoffmann); 119 (per Lord Hope). There is some debate over the implications of this election, but it is well accepted that the owner may elect to follow or trace her property, or both, so long as the plaintiff does not both follow and trace by taking judgement on multiple claims arising from the conversion of a single asset. See Peter Birks, “Mixing and Tracing: Property and Restitution” (1992) 45(2) *Current Legal Problems* 69; Smith, *supra* note 33, at 323-24.

⁴⁴ *Agricultural Credit Corporation of Saskatchewan v. Pettyjohn* (1991), 79 D.L.R. (4th) 22, 1991 CarswellSask 172 (C.A.), at para. 60.

⁴⁵ Canadian law is unclear on the circumstances in which the plaintiff will be entitled to a conveyance or a constructive trust over the property that she traces and claims. In some cases, the imposition of a constructive trust has been held to require a relationship of confidence, or even agency between the parties. See *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217. In other cases, however, the plaintiff has been awarded a constructive trust over traced property despite the fact that there was no fiduciary relationship between the parties. See *BC Teachers’ Credit Union v. Betterly* (1975), 61 DLR (3d) 755, B.C.J. No. 1158 (S.C.), at para. 15; *Lennox Industries Canada Ltd. v. R.*, [1987] 3 F.C. 338 (TD), at para. 14 (citing this passage in *Betterly* with approval). Ultimately, this question is beyond the scope of the present paper. Thus, when I refer to the plaintiff’s ownership right in traced property, I mean that she has, at the very least, a claim for damages in the amount of the value of that substitute asset. In other words, she has a right to be compensated as though she were the owner of that substitute asset and it had been taken from her.

⁴⁶ Graham Virgo “Vindicating vindication: *Foskett v. McKeown* reviewed,” in Alistair Hudson, ed., *New Perspectives on Property Law, Obligations, and Restitution* (London: Cavendish Publishing, 2004), 203, at 206.

⁴⁷ *Foskett*, *supra* note 39, at 128. See also *Pettyjohn*, *supra* note 39, at paras. 60; 72.

worth £100 or a glass of soda water at an overpriced night club, we trace the ‘value’ inherent in the ownership of the note into what is acquired with it. Conversely, the value inherent in the ownership of the soda water could be traced into ownership of the £10 note; a bad bargain from one point of view is a good bargain from the other. The concept of ‘tracing value’ does not imply or entail that the traceable proceeds of an asset must have a market value equivalent to the market value of that asset.⁴⁸

Where the plaintiff’s asset (A) has been given as full consideration for another asset (B), the plaintiff may claim A against anyone but a *bona fide* purchaser for value without notice of the tort.⁴⁹ Even if B is in the hands of a *bona fide* purchaser, the plaintiff may trace her rights in A through B to a third asset (C) which had been exchanged for B. Practically speaking, the plaintiff will generally establish a chain of substitute assets that connects A to the substitute assets in the hands of the tortfeasor. The plaintiff may then claim this ultimate asset (X) by virtue of her property right in A.

The plaintiff may claim X regardless of its value relative to A because ownership in X is the right for which the plaintiff’s ownership in A was exchanged.⁵⁰ Previously, it had been argued that the plaintiff’s claim to the substitute asset was based on unjust

⁴⁸ Smith, *supra* note 38, at 157. See also Virgo, *supra* note 41, at 217.

⁴⁹ See generally Smith, *supra* note 38, at ch. 4. This is known as a “clean” substitution because A constitutes full consideration for B (or B and other assets). This is distinguished from a mixed substitution, in which the plaintiff’s asset constitutes only part consideration for the new asset. The caveat is that the substitution must be traceable, meaning that the plaintiff can identify the asset for which her property was exchanged, and prove the normative linkage. The plaintiff may trace through a mixed substitution, but her claim to the ultimate asset will be diluted. See generally Smith, *supra* note 38, at ch. 5.

⁵⁰ Smith, *supra* note 38, at 7-8; 156-7.

enrichment.⁵¹ Alternatively, it had been held that the tortfeasor becomes a constructive trustee of any property that he has wrongfully taken.⁵²

However, *Foskett* decided that the vindication of property rights explains plaintiff's claim to a proprietary interest in the substitute asset. Lord Browne-Wilkinson held that the property right in A is transferred to X by operation of law because X stands in the place of A:

If, as a result of tracing, it can be said that certain moneys are what now represent part of the assets subject to the trusts of the purchasers of the trust deed, then as a matter of English property law the purchasers have an absolute interest in such moneys.⁵³

As Professor Virgo explains “[t]he value of the original asset is transferred into the substitute and it is this value which the claimant claims”.⁵⁴ In Professor Smith's formulation, the right of ownership in A is traced into the right of ownership in X, for which it was exchanged.⁵⁵ Where X is more valuable than A, the plaintiff's will claim X rather than claiming damages for the loss of A.

Of course, the tortfeasor may not deal reasonably with the plaintiff's property, and he may sell it for less than its market value. Because the owner does not consent, her

⁵¹ See Peter Birks, “Property, Unjust Enrichment, and Tracing,” (2001) 54 *CLP* 231; Smith, *supra* note 38, at 300-01; *Kuwait Airways v. Iraqi Airways (Nos. 4 and 5)*, [2002] 2 WLR 1353, at 1375 (H.L.) (per Lord Nicholls of Birkenhead). See also Ernest J. Weinrib, “Restitutionary Damages as Corrective Justice,” (2000) 1 *Theoretical Inquiries in Law* 1, at 13:

The fact that the damages are gain-oriented does not exclude their reflecting an injury to the plaintiff personally. One's rights provide the baseline for measuring injury. If those rights include the possibility of gain, then the defendant's gain measures the extent of the plaintiff's injury. The relevance of property is not that it is a facilitative institution, but that it connects the parties in such a way as to make the object owned - and thus the gain that dealings in that object can produce - the locus of a right and a correlative duty.

⁵² On this explanation, when the tortfeasor exchanges trust property for new assets, he holds those substitute assets in trust for the beneficiary. See *Betterly* and *Lennox*, *supra* n 45.

⁵³ *Foskett*, *supra* note 39, at 109.

⁵⁴ Virgo, *supra* note 46, at 219.

⁵⁵ Smith, *supra* note 38, at 157.

right is not devalued by the sale. She has a right to elect between an ownership interest in X or compensation for the market value of A.⁵⁶

It is important to note that a court has little discretion in granting the plaintiff these remedies. As Lord Millett stated in *Foskett*:

Property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend upon ideas of what is ‘fair, just and reasonable’. Such concepts, which in reality mask decisions of legal policy, have no place in the law of property.⁵⁷

(ii) Doing justice between the parties

The inquiry does not end there, because it may be unjust for the plaintiff to retain the benefit of the defendant’s services without compensating him. The plaintiff’s obligation to the defendant can be assessed from the perspective of two different theories: punitive justice and unjust enrichment. The first approach asks whether the defendant’s conduct was sufficiently reprehensible to bar him from recovering the cost of severing the minerals. The second approach asks if the defendant knowingly improved the property of another, thereby nullifying his claim in unjust enrichment. Both methods lead to the harsh and mild rules of restitutionary damages.

It is clear from the origins the harsh rule that this doctrine was designed to punish the willful trespasser. In *Martin*, Parke B. decided that the defendant should not be

⁵⁶ See *National Bank of Canada v. Corbeil*, [1991] 1 SCR 117, at para. 40 (in which the plaintiff was allowed to recover the cost of the property rather than the proceeds from its sale because the defendant had breached its duty to act honestly and in good faith in disposing of the plaintiff’s property); *Provincial Bank of Canada v. Gagnon*, [1981] 2 S.C.R. 98, at 112 (Lamer J. (as he then was) stated “it was for the Bank, once established that it had unlawfully sold the property of another, and not in realization of its security, to prove that the reduction in Air-Tech’s estate having regard to the creditors of the bankruptcy was less than in the amount of the value of these items; otherwise, the amount of the compensation should be the value of the items”). See generally *Armory v. Delamirie* (1722), 93 ER 664 (K.B.) (in which the plaintiff was allowed the most favourable remedy possible to disallow the defendant any gain from his willful interference with property rights).

⁵⁷ *Foskett*, *supra* note 39, at 127. See also at 109 (per Lord Browne-Wilkinson “[i]t is a fundamental error to think that, because certain property rights are equitable rather than legal, such rights are in some way discretionary. This case does not depend on whether it is fair, just and reasonable to give the purchasers as a result of which the court in its discretion provides a remedy. It is a case of hard-nosed property rights”).

compensated for the effort he expended in mining the plaintiff's coal. Explaining his decision, he stated "I am not sorry this rule is adopted; as it will tend to prevent trespasses of this kind, which are generally willful."⁵⁸

The punitive rationale for the harsh remedy is alive and well in modern times. For example, in *Williston*, Vancise J.A. noted that "[i]n the case of trespass, there is a punitive element to the damages which will be awarded that is reflected in the "harsher" rule as described in *Martin*. This rule is designed to deter wilful trespass."⁵⁹

By contrast, *Wood* held that the trespasser will not attract punitive sanction where he has acted "fairly and honestly (not honestly only) in the bona fide belief that he had to do what he did."⁶⁰ The mild remedy is available to both the innocent trespasser and the tortfeasor who innocently converts minerals without a trespass. However, *Lamb* suggests that a trespasser will only be entitled to the mild remedy if he proves that he acted with a high degree of moral probity.⁶¹

On this view, the question is not whether the defendant's conduct was sufficiently reprehensible to justify punitive measures under the harsh rule. The harsh rule seems to be the default. Rather, the question is whether the defendant's conduct was fair and honest enough to avoid punitive sanction. If the defendant's conduct was worthy, he might be entitled to have damages calculated under the mild rule.

Alternatively, Professor Weinrib argues that the harsh and mild remedies can be interpreted in light of the defendant's counterclaim in unjust enrichment rather than the

⁵⁸ *Martin*, *supra* note 20, at 150.

⁵⁹ *Williston (C.A.)*, *supra* note 2, at para. 110.

⁶⁰ *Lamb*, *supra* note 24, per Duff J., quoting *Wood*, *supra* n 22.

⁶¹ In *Lamb*, *supra* note 24, Duff J. stated that a trespasser will attract the harsh remedy where:

... he cannot be said to act "fairly and honestly," to use the language already quoted from the charge of, Parke B. in *Wood v. Morewood*, 3 Q.B. 440; or "wholly ignorantly and innocently," in the language of Lord Blackburn in *Livingstone v. Rawyards Coal Co.*, 5 App. Cas. 25, at page 40; or without any "sinister intention" in the language of Lord Cairns, in the same case at page 31. He is in a word, a wrong-doer in foro conscientiae - not in the eye of the law merely.

moral quality of her actions.⁶² Professor Bankes advances a similar argument in his comment on the *Williston* case.⁶³ A willful trespasser understands that by severing minerals, she is improving another person's property. She confers a benefit that the owner cannot help but accept. Because the owner has no knowledge of the trespass, there can be no question of leave and license. The trespasser takes a risk that she will not be paid for her labour.⁶⁴

Where the trespass and conversion are willful, therefore, the plaintiff is not under an obligation to compensate the defendant for the cost of severing the minerals, and the plaintiff is entitled to deem these services to have been rendered officiously.⁶⁵ Consequently, the trespasser cannot succeed in a counterclaim to recover the cost of mining the plaintiff's minerals.

On the other hand, where the trespass and conversion are innocent, the tortfeasor believes that she is improving her own property by severing the minerals. In this case, she has no donative intent whatsoever; and she labours with the expectation that she will be paid. Her work accomplishes precisely what the plaintiff would have done in any

⁶² *Weinrib*, *supra* note 51, at 14-16. See also *Greenwood v. Bennett*, [1973] Q.B. 193 (C.A.), per Lord Denning, M.R. (Lord Denning distinguished between the knowing and innocent trespassers, concluding that only the innocent trespasser had a right to recover in unjust enrichment). Smith, *supra* note 38, at 159 uses the language of a "counterclaim" to describe the defendant's entitlement to recover the cost of his services from the plaintiff. The defendant's entitlement could also be described as an allowance or deduction from the plaintiff's damages. I use all three terms in the course of this paper.

⁶³ *Bankes*, *supra* n 26, at para. 64.

⁶⁴ See *Taylor v. Laird* (1856), 156 E.R. 1203, per Pollock C.B. ("One cleans another's shoes; what cant the other do but put them on? Is that evidence of a contract to pay for the cleaning? The benefit of the service could not be rejected without refusing the property itself"); *Nicholson v. St. Denis* (1975), 8 O.R. (2d) 315 (C.A.) ("The plaintiff did not do work under the mistaken belief that he held title to the property...St. Denis neither sought nor desired the work to be carried out on the property, and was given no opportunity to express his position until long after the work was completed...I can see no grounds, under the circumstances of this case, for extending the doctrine of unjust enrichment or of restitution to the circumstances of this case").

⁶⁵ See Peter Birks, *An Introduction to the Law of Restitution*, (Oxford: Oxford University Press, 1989) 102-03 ("'Officiousness' is the quality of being over-astute to find a duty to be done...If the intervener takes the risk of losing his labour without return then he is a volunteer and his transfer of value is voluntary. To say he is 'officious' only reaffirms that he took the risk of disappointment").

event, and the plaintiff would be unjustly enriched if his claim was not reduced by the cost of mining the minerals.⁶⁶

In the case of an innocent trespass, the result is the same regardless of whether one applies the analysis of punitive justice or unjust enrichment. Either way, the availability of a restitutionary remedy does not depend on the defendant's *mala fides*. Furthermore, both theories entitle the plaintiff to recover the value of the severed minerals less the defendant's expenses.⁶⁷

By contrast, the "compensatory" damages awarded in *Freyberg* and *Williston* do not recognize the plaintiff's proprietary claim. Though the remedy in these decisions might appear to be compensatory at first blush, it is inconsistent with the property law analysis.

IV Applying Theory to Facts

The conceptual errors in *Freyberg* and *Williston* can be traced back to *Livingstone*, upon which these cases relied. The theoretical model outlined in the previous section demonstrates that *Livingstone* was wrongly decided. The error in that case stemmed from the decision to resolve a restitutionary claim by applying a backward, rather than forward-looking analysis. It was this mistake that led their Lordships to

⁶⁶ See *Greenwood*, *supra* note 57, per Phillimore L.J. ("on equitable principles someone who has improved the car since it was originally converted and who is not himself a wrongdoer...should be credited with the value of the work which he put into the car by way of improving it"); *Gidney v. Shank*, [1995] W.W.R. 385 (Man. Q.B.); *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989), D.L.R. (4th) 14 (S.C.C.), per La Forest J. (awarding a claim in unjust enrichment where the plaintiff saved the defendant a necessary expenditure).

⁶⁷ Under either theory, the innocent tortfeasor must disgorge his gain, but he will be allowed to deduct all of the costs of production, transportation, and marketing. S.M. Waddams, *The Law of Damages*, 3d ed. (Aurora: Canada Law Book, 1997), at 24, §1.510, argues that the defendant's deductions may be more extensive:

"it would seem that the appropriate deduction should be all of the defendant's costs including return on capital and this, it is suggested, is the method of calculation best reconcilable with the principle of compensation for fair value at the point of conversion."

This approach finds some support in the decision of the Supreme Court of Canada in *Weyburn Security Co. v. Sohio Petroleum Co.*, *supra* note 3.

conclude that the plaintiff's damages were limited to the value of the coal at the time it was taken. This mistake also led them to conclude that the plaintiff's damages were limited to the value that he had expected to receive for his property, but for the defendant's tort. A forward-looking property rights analysis explains why these holdings are incompatible with a restitutionary claim. I resolve these difficulties, and then turn to a final hurdle in the application of the property rights model: the valuation of improvements that the defendant makes to the plaintiff's property.

(i) Identifying the moment when damages crystallize

In *Livingstone*, the House of Lords decided that the defendant was entitled to the profit that had resulted from bringing the plaintiff's minerals to the surface. Their Lordships reached this conclusion on the basis that the plaintiff's loss should be measured by the value of the minerals at the time they were wrongfully taken.⁶⁸ In this regard, *Livingstone* parted with the earlier cases.

Though the matter was not discussed in any detail, the House of Lords seemed to accept that the defendant was due the value that its services had added to the coal. In essence, the defendant was the residual claimant after compensation for the value of the coal *in situ* had been paid to the plaintiff. This approach parallels the reasoning in the earlier case of *Reid v. Fairbanks*: where the increase in the value of the chattel is due to the acts of the defendant, the plaintiff's claim is limited to the original value of the chattel.⁶⁹ In that case, Jervis C.J. calculated damages in conversion with reference to the value of the chattel at the time it was taken.⁷⁰

⁶⁸ *Livingstone*, *supra* note 25, at 41-42.

⁶⁹ *Reid v. Fairbanks* (1853), 3 C.B. 692. See also *Monro v. Willmott*, [1949] 1 K.B. 295, at 298.

⁷⁰ *Ibid.*, at 729-30.

This approach would be logical if the plaintiff's damages had crystallized when the defendant began to work his minerals. Lord Blackburn, at the very least, seems to have decided that the plaintiff maintained some proprietary interest in the severed coal, raising the possibility of tracing.⁷¹ But because the damages crystallized when the tort was committed, the plaintiff's proprietary claim was limited to the valuation that he ascribed to his minerals at that time. On Lord Blackburn's reading, the plaintiff seemed to enjoy a charge or a lien on the severed coal, and in turn, on the proceeds of disposition. That lien was measured by the royalty that he would have received.

However, this approach is inconsistent with the property rights analysis described in the previous section. The property rights analysis recognizes that the plaintiff's *claim* crystallized when the tort was committed. At that moment he became entitled to some measure of damages. However, the quantum of damages did not crystallize at that time because the plaintiff retained the right to elect a forward-looking remedy.

Had he asserted that forward-looking claim, the analysis in the previous section demonstrates that the plaintiff's interest in the severed minerals is not limited to a charge for the value of the royalty that he would have received. Rather, by following his minerals into their severed form and then tracing into the proceeds of disposition, the plaintiff can track his right of ownership. His ownership of 100% of the subsurface minerals entitles him to claim the same interest in the severed coal, and in turn, in the proceeds of disposition. He claims the full value of the severed coal and the full value of the proceeds of disposition.

(ii) Objective, rather than subjective damages

⁷¹ *Livingstone, supra* note 25, at 42. Throughout the judgement, Lord Blackburn refers to the plaintiff's coal as "his coal" suggesting that some proprietary interest survived.

The forward-looking nature of the property rights analysis also explains why *Livingstone* erred in finding that the plaintiff's inability to mine his own coal limited his damages to the royalty that he had expected to receive. Their Lordships reasoned that the plaintiff should be returned to the position he would have been in, but for the defendant's tort. Mindful of the plaintiff's deficiency, they modified the remedy in *Wood* and valued the coal *in situ* with reference to a reasonable royalty. The plaintiff was due what *he* would have received for his coal, and not what the defendant, in actual fact, *did* receive. Because the defendant's tort was inadvertent, there was no need to impose punitive sanctions, as in *Martin*. Thus, the plaintiff was not entitled to a windfall, and he could not expect to benefit from the defendant's tort.

The *Freyberg* and *Williston* courts seem to have relied on *Livingstone* for the proposition that damages are generally calculated by reference to the plaintiff's subjective valuation of his loss. Kent J. held that she could not order a disgorgement of the defendant's profit unless she "found conduct that was sufficiently reprehensible to ignore the possibility that Lady Freyberg would be overcompensated."⁷² She regarded restitution as essentially punitive in nature. Absent circumstances that would merit punitive sanctions, the plaintiff was to be returned to the position she was in immediately before the tort was committed.

Yet this backward-looking valuation of the plaintiff's actual loss is inconsistent with the property rights analysis. The plaintiff's particular deficiency would only matter if he claimed damages for his original asset. By tracing and asserting a forward-looking claim to the proceeds of disposition, the plaintiff elects to have damages calculated with reference to a new asset. It is irrelevant that this new asset is more valuable than the original asset; what matters is that it was exchanged for the original asset.

⁷² *Freyberg (Q.B. II)*, *supra* note 1, at para. 131.

Though it might be, as the Lord Ordinary held in *Livingstone*, a “singular stroke of luck,”⁷³ the plaintiff can, in some circumstances, be put in a better position than she would have been, but for the defendant’s tort.⁷⁴ This is the nature of a forward-looking claim that does not depend on the value of the original asset that was taken from the plaintiff. As discussed earlier, in the tracing exercise the original asset is relevant only to establish a normative link to the ultimate asset in the hands of the defendant. Contrary to Kent J.’s holding, the ability to trace and claim does not depend on the *mala fides* of the defendant.

Vancise J.A. held that the subjective valuation of the plaintiff’s damages in *Livingstone* had been implicitly applied in *Mortimer v. Shaw and Dredge*.⁷⁵ In *Mortimer*, the defendant had prevented the plaintiff from occupying farmlands that were rightfully his. When assessing damages, the Saskatchewan Court of Appeal held that the plaintiff was entitled to damages calculated with reference to what *he* would have done with the land:

...in ascertaining the loss sustained, the first consideration is the use the plaintiffs intended to make of the land. If they did not intend to crop it themselves, but to let it out to others, the rent they would have received would represent their loss. But where, as here, it is established that they did not intend to rent the land, but to

⁷³ *Livingstone*, *supra* note 25, at 41.

⁷⁴ The waiver of tort cases provide an example of a situation in which courts will permit a plaintiff to recover more than he had expected to receive, but for the defendant’s tort. In these cases, as in *Freyberg*, the defendant had realized its gain by interfering with the plaintiff’s property rights. Though not couched in the language of tracing and claiming, these cases illustrate the application of restitutionary principles to remedy proprietary torts. For example, in the Ontario case of *Transit Trailer Leasing v. Robinson*, [2004] O.J. No. 1821 (Sup. Ct.), the plaintiff had leased a trailer to a third party. The defendant converted the trailer, but the conversion went unnoticed by the third party for some time, and the third party continued to pay rent. The plaintiff sued for the return of the trailer and the benefit that the defendant had derived from possession, measured as the rent that would have been charged. The defendant claimed that the plaintiff would be overcompensated because it would receive rent from both the third party and the defendant. Yet at para. 100 the court found for the plaintiff. See also *United Australia Ltd.*, *supra* n 36, at 18 (per Viscount Simon); 29-9 (per Lord Atkin); John D. McCamus, “Restitution as an Alternative to Damages in Contract and Tort,” in *Special Lectures of the Law Society of Upper Canada: The Modern Law of Damages* (Toronto: Irwin Law, 2006), at 123; P.D. Maddaugh and J.D. McCamus, *The Law of Restitution*, looseleaf (Aurora, Canada: Canada Law Book, 2004), at ch. 24.

⁷⁵ *Mortimer v. Shaw and Dredge*, [1922] S.J. No. 83 (C.A.).

crop it themselves, their damage is the loss sustained by not being permitted to put in that crop.⁷⁶

Similarly, in *Livingstone*, *Williston*, and *Freyberg* the plaintiff was entitled to recover only for what *she* would have done with the property, but for the defendant's tort.

Though it bears a certain attractiveness, the reasoning in *Mortimer*, like that in *Livingstone*, is flawed because it neglects the plaintiff's surviving claim to the substitute asset. Recognizing this flaw, *Bilambil-Terranora Pty Ltd. v. Tweed Shire Council* expressly overturned a trial decision that had followed *Livingstone* on this point.⁷⁷

Justice Reynolds found that the calculation of damages for trespass and conversion could not take into account the fact that the owner was "determined not to put the property to its best economic use."

Similarly, in *Ministry of Defence v. Ashman* the defendant unlawfully occupied a house owned by the plaintiff.⁷⁸ On the facts, the plaintiff would not have rented the house at market rates. Nonetheless, the Court of Appeal allowed the claim for the value of the benefit that the defendant received, rather than the loss that the plaintiff suffered.⁷⁹ The defendant's benefit was held to be the market price for comparable accommodation, rather than the price that the plaintiff had expected to receive.⁸⁰ In this sense, the law permits a forward-looking claim that captures the defendant's gain.

⁷⁶ *Mortimer*, *ibid.*, at para. 5.

⁷⁷ [1980] 1 N.S.W.L.R. 465, at 494.

⁷⁸ *Ministry of Defence v. Ashman*, [1993] 66 P&CR 195, 2 E.G.L.R. 102 (C.A.). See also *Ministry of Defence v. Thompson* [1993] 2 E.G.L.R. 107 (C.A.). Both of these cases were cited with approval in *Attorney General v. Blake*, [2001] 1 A.C. 268, at 281, per Lord Nicholls. See also *Forsyth-Grant v. Allen*, [2008] EWCA Civ 505.

⁷⁹ *Thompson*, *ibid.*, at 105, per Hoffman L.J. ("A person entitled to possession of land can make a claim against a person who has been in occupation without his consent on two alternative bases. The first is for the loss which he has suffered in consequence of the defendant's trespass. This is the normal measure of damages in the law of tort. The second is the value of the benefit which the occupier has received. This is a claim for restitution. The two bases of claim are mutually exclusive and the plaintiff must elect before judgment which of them he wishes to pursue. These principles are not only fair, but, as Kennedy LJ demonstrated, also well established by authority").

⁸⁰ *Thompson*, *ibid.*, at 119, per Kennedy L.J.

The well known case *Edwards v. Lee's Administrator* provides a stark illustration of this principle.⁸¹ In that case the defendant had built a successful tourist attraction in a cave below his property. As it happened, the Great Onyx Cave, as it was called, stretched onto the property of neighbouring landowners. One third of the cave was situated on the neighbours' property, but the neighbours could only access their portion of the cave by entering through the defendant's property. The neighbours sued in trespass for a share of the defendant's gains from exhibiting the cave.

The defendant responded that the plaintiffs had "simply a hole in the ground, some 360 feet below the surface, which they could not use and which they could not even enter except by going through the mouth of the cave on [the defendant's] property."⁸² In short, the plaintiffs could not possibly derive any value from the portion of the cave below their land. Their portion of the cave was only of value to the defendant.

Writing for the majority, Stites J. considered the English and American jurisprudence, finding that rent is generally awarded to the plaintiff in cases of trespass.⁸³ Yet Stites J. held that "it is apparent that rental value has been adopted, either consciously or unconsciously, as a convenient yardstick by which to measure the proportion of profit derived by the trespasser directly from the use of the land itself. In other words, rental value ordinarily indicates the amount of profit realized directly from the land as land, aside from all collateral contracts."⁸⁴ He awarded the plaintiff a share of the defendant's profits proportional to the fraction of the cave that was under the plaintiff's property.

In dramatic fashion, *Edwards* nails the coffin shut on *Livingstone's* erroneous contention that damages are limited by the plaintiff's subjective deficiency. The plaintiff's actual loss is irrelevant if he asserts a forward-looking claim.

⁸¹ *Edwards v. Lee's Administrator* (1936), 96 S.W. (2d) 1028 (Ky. App.).

⁸² *Edwards, ibid.*, at 1030.

⁸³ *Edwards, ibid.*, at 1031.

⁸⁴ *Edwards, ibid.*, at 1031. See also *Carmichael v. Old Straight Creek Coal Corporation*, 232 Ky. 133, 22 S.W.(2d) 572.

(iii) The final hurdle of valuing the defendant's improvements

The only remaining stumbling block to the application of the property rights analysis lies in the valuation of the defendant's services. The defendant's services improved the plaintiff's minerals and resulted in a corresponding increase in their value. I have demonstrated why the plaintiff is entitled to participate in the increase in the value of his property. Yet why should the defendant be denied the surplus value that resulted solely from its actions? Indeed, why should the defendant's contribution to the chattels not be valued by the resulting increasing in their worth? The answer lies in the nature of the defendant's interest in the property, which differs from that of the plaintiff.

Stated simply, the defendant does not gain an ownership interest in the plaintiff's minerals by severing them. Because the defendant's labours improve the property, it is entitled to deduct reasonable expenses from the plaintiff's damages, but it may claim nothing more. The fact that the defendant's services increase the value of the property is a necessary precondition to it receiving compensation, but the increase in the value of the property is not the measure of its compensation. It cannot participate in the surplus generated by its services.

Indeed, *Re Diplock*, the leading English authority, held that value cannot be traced into improvements made to land.⁸⁵ Professor Smith and Professors Scott and Fratcher agree that the rules governing improvements to real estate also govern improvements to chattels.⁸⁶ On this reasoning, the *Livingstone* defendant would not even have a counterclaim for the cost of its services. In *Re Diplock*, the plaintiffs' funds had been used to improve certain buildings. The Court used the uncertainty surrounding the plaintiffs' contribution to the value of the buildings as grounds to deny the claim. The

⁸⁵ *Re Diplock*, [1948] Ch. 465 (C.A.), at 545-50, aff'd on other grounds, [1951] AC 251 (H.L.)

⁸⁶ See Smith, *supra* note 38, at 351-52; Scott and Fratcher, *ibid.*, at 590.

plaintiffs were not entitled to any increase in the value of the buildings, despite the fact that they had contributed financially to the improvements.

Professor Smith criticizes this judgement as unprincipled, and argues that value can be traced into improvements.⁸⁷ Yet even if the value of an improvement can be established, and even if it yields some counterclaim, Professors Scott and Fratcher maintain that the claimant is only entitled to a lien for the value of the services contributed, not a share of the resulting increase in the value of the property.⁸⁸

In this sense, an improvement differs from a mixture. When chattels are inseparably mixed together, an innocent tortfeasor may trace and claim a share of the mixture in proportion to his contribution.⁸⁹ Matthews explains that a person has “‘improved’ goods if through his acts the increase in value.”⁹⁰ However, an improvement confers no right of ownership on the tortfeasor. At best, he has contributed accessions to a chattel, and at worst, he has contributed nothing more than his labour. In either case, an improvement is not really part of an inseparable mixture of chattels. Consequently, the tortfeasor is left with a bare claim for the value of his services.

Greenwood v. Bennett is on point in this regard.⁹¹ Mr. Bennett took his car to a garage for minor repairs. As it happened the mechanic was a rogue. He used the car himself and wrecked it in an accident. Mr. Harper, a garage operator, bought the wrecked car in good faith for £75 and spent £226 on labour and materials. He then sold it

⁸⁷ Smith, *supra* note 38, at 241.

⁸⁸ A. W. Scott and W.F. Fratcher, *The Law of Trusts*, 4th ed. (Boston: Little, Brown, 1989), vol. V, at 590-92. But see *Monro v. Willmott*, *supra* note 69, at 299, which relied on the problematic rule in *Reid*, *supra* note 69. The *ratio* suggests that Lynskey J. applied the *Livingstone* rule, but his order is a traditional mild rule remedy, as in *Wood*. Thus the result in this case, if not all of the reasoning, suggests that the plaintiff was due the increase in the value of the property, less the defendant’s expenses. Matthews takes this view, but cautions that the defendant knew he had no claim of right to possession: “it seems that a defendant who well knew he had no title, is allowed to deduct what he spend unnecessarily, in improving the plaintiff’s property.” Paul Matthews, “Freedom, Unrequested Improvements, and Lord Denning,” (Nov. 1981) 40(2) *Cambridge Law Journal* 340, at 344.

⁸⁹ See *supra* n 40.

⁹⁰ Matthews, *supra* n 88, at 346, fn 30.

⁹¹ *Greenwood*, *supra* n 62.

to a third party for £450. Bennett then involved the police to recover the car, and the police took out an interpleader summons to determine ownership. Bennett won at trial and sold the car for £400.

On appeal, Lord Denning M.R. held that “[t]he court will order the plaintiffs, if they recover the car, or its improved value, to recompensate the innocent purchaser for the work he has done on it.”⁹² Phillimore L.J., concurring, declared that Harper “should be credited with the value of the work which he put into the car by way of improving it.”⁹³ Cairns L.J., concurring, found that Harper was entitled to “the amount of his expenditure on the car.”⁹⁴

Lord Denning found that the value of the wrecked car was £75 at the time Harper acquired it. Had Bennett sued Harper in conversion at that time, Bennett would have received £75.⁹⁵ However, by selling the car after it had been repaired, Bennett received £400. The Court of Appeal ordered him to pay £226 to Harper. That left him with £174. These transactions suggest that Harper’s repairs generated a surplus of £99, above and beyond the cost of his efforts. Yet Harper was only entitled to the £226 for his parts and labour. In other words, his contribution was valued at the amount of his expenditure, and not the increase in the worth of the car that resulted from his efforts. The £99 surplus was due to Bennett, the original owner of the car, whose property right survived the rogue’s tort.

Boardman v. Phipps seems to confirm this approach.⁹⁶ In that case the defendant trustees innocently misappropriated a business opportunity that the trust was incapable of realizing. The trustees realized a profit. The beneficiaries sued and won a disgorgement of the profit, but Lord Denning M.R. held that the trustees ought to be compensated for

⁹² *Greenwood, supra* n 62, at 202.

⁹³ *Greenwood, supra* n 62, at 202.

⁹⁴ *Greenwood, supra* n 62, at 203. Lord Denning M.R., at 201, also speaks of the defendant recovering “the cost of his work.”

⁹⁵ *Greenwood, supra* n 62, at 201.

⁹⁶ *Boardman v. Phipps*, [1967] 2 A.C. 46 (H.L.).

their services.⁹⁷ Unlike *Livingstone*, however, the defendants were not permitted to claim the increase in the value of the trust that was attributable to their work. They received only reasonable fees for their labour.

Professor Smith suggests that the result in *Boardman* is applicable even in the absence of a trust relationship between plaintiff and defendant:

The only contribution that the defendant would be able to show would be an input of skill, say in choosing the investment which has appreciated in value. But this would not be an input which would be relevant in tracing. It might possibly give rise to a counterclaim in unjust enrichment, if the plaintiff's tracing exercise is going to allow her to take the appreciated asset, but that is a different matter from asserting a traceable interest produced by an exchange of value.⁹⁸

Similarly, *Brooks v. Conston* suggests that a salary is an appropriate valuation of the defendant's services, regardless of the existence of a trust relationship.⁹⁹ In that case the defendants had fraudulently induced the plaintiffs to them a chain of stores. The plaintiffs sued successfully for rescission and an accounting of profit. As it happened, the chain had thrived under the defendant's management; it had generated significant profits and increased greatly in value.

The court held that the defendants were entitled to deduct a "fair and reasonable" amount for the estimated value of the services rendered.¹⁰⁰ As in *Livingstone*, the plaintiffs, who had inherited the business, could not have performed the services of the defendants, who were experienced retailers. Though the defendants' services had significantly increased the value of the asset, the value of their services was calculated on the basis of a reasonable salary. They received no share of the chain's profits.

Compensation was the same for both the husband, who had perpetrated the fraud, and the

⁹⁷ *Boardman v. Phipps*, [1965] Ch 992 (C.A.), aff'd *ibid.*, (H.L.), at 1021 ("If the defendant has done valuable work in making the profit, then the court in its discretion may allow him a recompense...when, as in this case, the agents acted openly and above board, but mistakenly, then it would be only just that they should be allowed remuneration"). See also *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour*, [1943] A.C. 32 (H.L.), at 58-59.

⁹⁸ Smith, *supra* note 38, at 159.

⁹⁹ *Brooks v. Conston* (1950), 364 Pa. 256, 72 A.2d 75.

¹⁰⁰ *Brooks, ibid.*, at 262.

wife, who was innocent and had no knowledge of the fraud.¹⁰¹ This suggests that compensation measured by a reasonable salary is appropriate even where the tort was not willful.

Indeed, the court held that the husband received compensation only because his management services had been *bona fide*: “[t]he wrong that Conston [the defendant husband] committed was in his original acquisition of the stores, not in his operation of them.”¹⁰² Like the defendant in *Livingstone*, Conston worked to enhance the value of the plaintiff’s asset, and though “the fruits of his management ultimately accrue to the rightful owner, an allowance may properly be made for the services rendered.”¹⁰³

These authorities suggest that where the defendant renders his services without the consent of the plaintiff, he is not entitled to the resulting increase in the value of the property. Rather, he is entitled to deduct a reasonable salary from the plaintiff’s damages. In a case like *Livingstone*, where the defendant was a company and the services were rendered by its employees, the reasonable deduction should be calculated with reference to the defendant’s expenses, as it was in the court of first instance.

These authorities dovetail with the principle in *Pentress Gas* that the trespasser does not acquire an ownership interest in the property.¹⁰⁴ Thus the plaintiff may follow through a clean substitution into the severed coal and trace through a second clean substitution into the proceeds of disposition.

Valuing the defendant’s improvements at the cost of its services completes the property rights analysis of the *Livingstone* dilemma. This analysis provides a principled solution to a restitutionary claim for the surplus generated by an innocent tort. In turn, it

¹⁰¹ *Brooks, ibid.*, at 263 (The court stated that the result in this case was not based on the application of the usual rules to strip a faithless trustee of any gains from his misconduct).

¹⁰² *Brooks, ibid.*, at 263.

¹⁰³ *Brooks, ibid.*, at 264.

¹⁰⁴ *Pentress Gas, supra* note 37.

demonstrates why Livingstone was entitled to the value of his coal, less the expense that the defendant incurred in extracting it.

Conclusion

In bringing this paper to a close, it is worth noting that the errors in *Freyberg* and *Williston* might have been avoided if the Supreme Court of Canada had adopted clearer language in its most recent pronouncement on the subject of damages for subsurface mineral lease disputes. The SCC got it right, but an imprecise holding opened the door to misinterpretation. The case was *Weyburn Security v. Sohio Petroleum*, in which Martland J. found that the defendant's mineral lease had terminated prior to the date that the well was put into production.¹⁰⁵ The defendant was therefore an innocent trespasser and had converted the plaintiff's oil and gas.

The plaintiff, a financial services company, was acting in its capacity as a mineral trust manager. Like Montreal Trust Co. and Lady Freyberg, it is unlikely that it would have been capable of engaging a contract operator. It, too, would have been forced into a royalty agreement. Yet nowhere in any of the judgements of the Saskatchewan Court of Queen's Bench, the Saskatchewan Court of Appeal, or the Supreme Court of Canada was this issue even considered. Indeed, none of these courts mention the identity of the plaintiff, beyond its name. When determining a remedy, the Supreme Court of Canada merely noted that the trespass was innocent and adopted the remedy of the Saskatchewan Court of Appeal:

The respondent also sought an accounting of all petroleum, natural gas and related hydrocarbons removed from the land by the appellants, or damages in lieu thereof. The court has jurisdiction to grant this relief on terms which will be just and equitable to all parties involved. The appellant Sohio proceeded under a mistake as to its rights, and did not knowingly take an unfair advantage of the respondent's lack of appreciation of its legal rights. The appellants were first

¹⁰⁵ *Williston (C.A.)*, *supra* n 2, at para. 96.

aware that their position was challenged when the writ of summons was served upon them. At that time the revenue which they had received from the sale of the production exceeded the amount they had expended. **Under the circumstances, it would appear just and equitable to order the appellants to account for all benefits from production received by them after the date of service of the writ of summons upon them.**¹⁰⁶ [emphasis added]

Thus the plaintiff was entitled to recover none of the revenues prior to the point that the writ was served, and all of the revenues afterwards, with no deduction for the defendant's expenses.

Admittedly, the implications of this decision are open to interpretation. I contend that this remedy was devised as a pragmatic application of the mild rule of restitutionary damages. Ballem and Professor Bankes both find that this is the best explanation of the *Sohio* decision.¹⁰⁷ Crucially, the Court noted that the defendant had passed the point of breaking even at the time the writ was served. Therefore revenues calculated from the inception of production to the service of the writ compensated the defendant for the expenses that it had incurred in extracting the minerals. As the residual claimant, the plaintiff was then entitled to the surplus. A disgorgement of all revenues after the break-even point is essentially what the plaintiff would have received under the mild rule.

I understand the remedy in *Sohio* to have been a rough and ready approximation that reflected the difficulty in calculating the defendant's actual expenses. Gerein C.J.Q.B. confirmed this interpretation in *Williston*, stating "I do not understand the decisions to stand for the general rule or principle that the date of service of the writ of summons establishes the date after which the plaintiff gets all revenue from production. Rather, in that particular case it afforded a convenient method by which the Court could do that which was just and equitable."¹⁰⁸

¹⁰⁶ *Weyburn Security Co. v. Sohio Petroleum Co.*, [1971] S.C.R. 81, per Martland J., quoting and adopting *Weyburn Security Co. Ltd. v. Sohio Petroleum Co.*, [1969] S.J. No. 286 (C.A.), at para. 19.

¹⁰⁷ Ballem, *supra* n 33, at para. 37.

¹⁰⁸ *Williston (Q.B.)*, *supra* note 17, at para. 41.

In *Williston*, Vancise J.A. noted that both parties urged that the case be resolved on the principles in *Sohio*.¹⁰⁹ However, Vancise J.A. offered a very different interpretation of the decision:

The Court adopted the “just and equitable” approach that arises from the line of English authorities above. On the facts of *Sohio*, the decision reached was “just and equitable.” This is not to say that it is an error of law to find that in another case a royalty should be used to calculate damages, just as in *Livingstone*. At its highest, *Sohio* is consistent with the law as developed in England and Canada and stands for the proposition that the courts are to grant just and equitable relief to all parties involved. To read more into *Sohio* would simply be incorrect.¹¹⁰

Vancise J.A. essentially read *Sohio* to stand for the proposition that the wording of “just and equitable” freed the judge to craft whatever remedy he or she deemed fit.¹¹¹ He paid no attention to the fact that the *Sohio* judgement had been structured around the defendant’s notional break even point. Indeed, Vancise J.A. felt entitled to discard the mild rule entirely. He then formulated a “just and equitable” result that adopted the ratio in *Livingstone*:

In my opinion, the milder rule in the form outlined in *Wood* is generally applied in Canada where the plaintiff had the ability to exploit the resource themselves, but the defendant mistakenly did so. This is consistent with past precedent and principle. However, where, as here, the appellant could not have exploited the resource itself as in *Livingstone*, the *Wood* measure of damages would be inappropriate.¹¹²

In so holding, Vancise J.A. appears to have ignored the fact that *Sohio* was a case in which the defendant could not have exploited the resource itself, but nonetheless received something akin to a disgorgement of the defendant’s profits.¹¹³ That was what the Supreme Court had deemed to be “just and equitable” in similar circumstances. The error of Vancise J.A. was then compounded in *Freyberg*. Kent J. acknowledged *Sohio*,

¹⁰⁹ *Williston (C.A.)*, *supra* note 2, at para. 95.

¹¹⁰ *Williston (C.A.)*, *supra* note 2, at para. 102.

¹¹¹ Unfortunately, while other aspects of the *Sohio* decision have been interpreted and applied in subsequent cases, *Williston* was the first case to interpret the *Sohio* calculation of damages. As such, the jurisprudence provides nothing to contrast with the analysis of Vancise J.A.

¹¹² *Williston (C.A.)*, *supra* note 2, at para. 103.

¹¹³ At the very least, it is indisputable that the plaintiff received significantly more than a royalty on the same facts as *Williston* and *Freyberg*.

but relied on *Williston* to interpret it, and likewise preferred to decide the case on the basis of *Livingstone*.¹¹⁴

The final word

Ultimately, the holdings in *Freyberg* and *Williston* disregarded the most probable interpretation of the decision of the Supreme Court of Canada in *Sohio*. By applying *Livingstone*, they focus exclusively on the plaintiff's backward-looking claim to damages for her original asset. In so doing, they neglect the plaintiff's right to elect a forward-looking remedy based on her surviving claim to the ultimate asset in the hands of the defendant. If *Freyberg* and *Williston* have any precedential value, they rewrite the laws of property, tort and restitution. In turn, these flawed precedents will have broad application. As can be seen from this paper alone, the principles at play in this analysis apply to subjects as diverse as stolen cars (*Greenwood*), misappropriated business opportunities (*Boardman*), trespasses on tourist attractions (*Edwards*), and fraudulently obtained companies (*Brooks*). Indeed, *Freyberg* and *Williston* are applicable every time real or personal property appreciates in value while it rests in the hands of one who has taken it from its rightful owner.

Lady Freyberg was an elderly widow, and she was doubtless exhausted from years of protracted litigation. She did not appeal the decision of Kent J., thereby denying the Court of Appeal an opportunity to reverse the errors of the Court of Queen's Bench. For now, these errors stand as law. Let us hope that the next litigant has means and the will to correct this wrong and restore a principled understanding of restitution.

¹¹⁴ *Freyberg (Q.B. II)*, *supra* note 1, at para. 129.