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Book Review [The Law of Restitution]

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BOOK REVIEW

THE LAW OF RESTITUTION. By George E. Palmer. Boston, Massachusetts, and London, England: Little, Brown and Company. 1978. Pp. xxxv + 2634 in four volumes. Hardbound. \$180.00.

*Reviewed by Alan W. Schefflin**

Socrates: The judging of law-suits is a duty that you will lay upon your Rulers, isn't it?

Glaucon: Of course.

Socrates: And the chief aim of their dedication will be that neither party shall have what belongs to another or be deprived of what is his own.

Glaucon: Yes.

Socrates: Because it is just?

Glaucon: Yes.

Plato, *The Republic*

Most legal systems provide procedures by which a person may recover a loss resulting in the unjust enrichment of another.¹ Several European countries have enacted into their civil codes legal principles preventing unjust enrichment, thereby establishing restitution as an independent cause of action in appropriate cases.² The German Civil Code is typical. Section 812 (1) provides:

Whosoever acquires anything through the acts of another, or in any way at that person's expense, without legal justi-

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1. It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some money derived from another which is against conscience that he should keep.

Such remedies in English law are generically different from remedies in contract or tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.

Fibrosa Spolka Ackyjna v. Fairbairn Lawson Combe Barbour, Ltd., [1943] A.C. 32, 61 (Lord Wright). In R. GOFF & G. JONES, *THE LAW OF RESTITUTION* 11 (1966), the learned authors state: "Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment." See also Friedmann, *The Principle of Unjust Enrichment in English Law*, 16 CAN. B. REV. 243, 244 (1938), and Holdsworth, *Unjustifiable Enrichment*, 55 L.Q. REV. 37 (1939).

2. See Gutteridge & David, *The Doctrine of Unjustified Enrichment*, 5 CAMBRIDGE L.J. 204, 209 (1934).

fication, is bound to restore it to him. Such obligation shall also arise when the legal justification ceases to exist, or where the intended purpose of a legal transaction has not been achieved.³

In other countries, the principle of preventing unjust enrichment has been judicially established. In France, for example, the judiciary has been actively creating and enlarging a law of restitution despite the silence of the Civil Code on the point.⁴

In light of this development, it would be natural to expect that the principle of preventing unjust enrichment would be firmly embedded in American and English law. But such is not the case. It remains a fact today that "English law has not as yet recognized any generalized *right* to restitution in every case of unjust enrichment."⁵ Indeed, Professor John Dawson believes that even the present progress of English law is in need of re-thinking. Dawson has written:

The English law of Restitution as a whole gives a remarkable example of the effects of freezing doctrine—still more of freezing minds—in an area still incompletely explored at the time the freeze sets in.⁶

3. BÜRGERLICHES GESETZBUCH [BGB] art. 812(1) (W. Ger.). See also CODICE CIVILE [C.C.] art. 2041 (Italy), which is similar to BGB art. 812(1), although limited in its application by C.C. art. 2042 (Italy) that states: "The application of enrichment is not available where the person who has suffered the loss can bring another action to make good the loss he has suffered."

4. The silence is strange in light of the remarks of Pothier:

Dans les contrats, c'est le consentement des parties contractantes qui produit l'obligation; dans les quasi contrats, il n'intervient aucun consentement, et c'est la loi seule ou l'équité naturelle qui produit l'obligation, en rendant obligatoire le fait d'où elle résulte.

2 POTHIER, OEUVRES § 114 (Bugnet ed. 1890). See J. DAWSON, UNJUST ENRICHMENT 92-109 (1951); Gutteridge & David, *supra* note 2 at 205-22; O'Connell, *Unjust Enrichment*, 5 AM. J. COMP. L. 2 (1956).

French judges, at least for the last 75 years, have consistently followed the principle of unjust enrichment and have treated it as on a par with Code provisions. The classic formula, adopted by the Cour de cassation in 1914, states:

Attendu que l'action de in rem verso, fondée sur le principe d'équité qui défend de s'enrichir au détriment d'autrui doit être admise dans tous les cas où, le patrimoine d'une personne se trouvant sans cause légitime enrichi aux dépens de celui d'une autre personne, cette dernière ne jouirait, pour obtenir ce qui lui est dû, d'aucune action naissant d'un contrat, d'un quasi-contrat, d'un délit ou d'un quasi-délit.

Id. at 7-8 (citing S. 1918-19.1.41; D.P. 1920. 1.102).

5. R. GOFF & G. JONES, *supra* note 1, at 13. See Maudsley, *Restitution in England*, 19 VAND. L. REV. 1123 (1966).

6. J. DAWSON, *supra* note 4, at 21.

Though not as bleak as English jurisprudence, the American law of restitution is still very much in its infancy. As late as 1970, a leading American scholar expressed the view that the American legal system has "split the whole field of civil obligation into contract obligations and tort obligations."⁷ For many practitioners, Professor Gilmore stated the accepted wisdom. But it is not the whole truth. With the publication of Professor George Palmer's four-volume treatise, *The Law of Restitution*, this neglected and still unfamiliar area of law may take its rightful place in the arena of civil duties and liabilities.

The rightful place of restitution was well-stated in 1958 by Professors Seavey and Scott, the two reporters for the Restatement of Restitution (a document which had the distinct privilege of restating an area of law whose very existence was unknown to a large segment of the bar and bench):

In this [the American Law Institute] has recognized the tripartite division of the law into contracts, torts and restitution, the division being made with reference to the purposes which each subject serves in protecting one of three fundamental interests. In this division, the postulate of the law of contracts (or of undertakings) is that a person is entitled to receive what another has promised him or promised for him. . . . The interest of the promisee or beneficiary which is protected by the law is his reasonable expectation that a promise freely made will be performed. The law requires the promisor, if he fails to perform the promise, to place the other, as far as reasonably can be done, in as good a position as if the promise had been performed. The law of torts is based upon the premise that a person has a right not to be harmed by another, either with respect to his personality or with respect to his interests in things and in other persons. The law protects this right by requiring a wrongdoer to give such compensation to the person harmed as will be substantially equivalent to the harm done. The accent is upon wrong and harm. Beside these two postulates there is a third, sometimes overlapping the others, but different in its purpose. This third postulate, which underlies the rules assembled in the Restatement under the heading 'Restitution', can be expressed thus: A person has a right to have restored to him a benefit gained at his expense by another, if the retention of the benefit by the other would be unjust. The law pro-

7. Gilmore, *Products Liability: A Commentary*, 38 U. CHI. L. REV. 103, 111 (1970), quoted in 1 G. PALMER, *LAW OF RESTITUTION* at 1 n.1 (1978).

fects this right by granting restitution of the benefit which otherwise would, in most cases, unjustly enrich the recipient.⁸

This was a far cry from the state of the law that prompted Oliver Wendell Holmes, Jr. to write "we are inclined to think that Torts is not a proper subject for a law book."⁹

In one respect, the law of restitution stands today where Holmes viewed torts in 1871. Before the publication of Palmer's treatise, few texts on restitution had appeared.¹⁰ The earliest was Professor Keener's *Quasi-Contracts*, published in 1883. It, of course, was limited in its scope and did not include much of what restitution is concerned with today. Thirty years later, the appearance of Professor Woodward's book, *Quasi-Contracts*, helped alert lawyers to this important area of civil obligation, but it was not until the Restatement of Restitution was published in 1937 that restitution emerged as a separate and distinct body of law. Unfortunately, that Restatement has had little impact on practitioners and judges who still view restitution as a mysterious and non-specific set of moral generalizations, useful only when more traditional arguments fail. Although several casebooks on restitution have appeared (one co-written by Professor Palmer),¹¹ none have been revised in over a decade.¹² The reluctance of law schools to add the course to their curricula has caused restitution to remain the forgotten child of common law.

The first legal text treating restitution as a unified, dis-

8. Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 31-32 (1938). Elsewhere, Professor Seavey has made the point: "Restitution is a term unknown to legal treatises, encyclopedias and digests, yet it represents one of a trinity of principles which actuate the proceedings for remedial justice." Seavey, *Problems in Restitution*, 7 OKLA. L. REV. 257 (1954).

9. R. GOFF & G. JONES, *supra* note 5, at 5 n.8 (citing a book review by Holmes that appeared at 5 AM. L. REV. 340-41 (1871)). Three years later, Holmes had a change of mind; see M. HOWE, MR. JUSTICE HOLMES, THE PROVING YEARS 1870-1882 at 65, 184 (1963).

10. See Wade, *The Literature of the Law of Restitution*, 19 HASTINGS L.J. 1087 (1968).

11. J. DAWSON & G. PALMER, *RESTITUTION* (1958); E. THURSTON, *CASES ON RESTITUTION* (1940); J. WADE, *RESTITUTION* (1958).

12. Professor Wade's casebook was revised for a second and final edition in 1966. The Dawson & Palmer casebook was revised in 1969 for a second and final edition. Special mention should be made of two symposia on restitution: *A Symposium on Restitution*, 19 VAND. L. REV. 1019 (1966); and *Symposium: Restitution*, 19 HASTINGS L.J. 993 (1968). Restitution as a separate law school subject now faces extinction in light of the proliferation of remedies courses.

tinct body of law appeared in England in 1966.¹³ Written by Professors Robert Goff and Gareth Jones, it was unique if only for the fact that at the time of its appearance, English law was not willing to concede that a systematic law of restitution even existed. Indeed, Professor Jones told me in conversation shortly after his book was published that some law libraries in Britain were not ordering it for precisely that reason.¹⁴ Shades of Holmes!

There is evidence that the long-ignored and grossly under-appreciated area of restitution may soon start receiving the attention it deserves. Writing specifically to assist practitioners in making use of restitutionary relief, Professor Graham Douthwaite published an *Attorney's Guide to Restitution* in 1977.¹⁵ This book, focusing on problems of procedure and proof and providing specific illustrations, was intended to be, and serves admirably as, a handy desk reference. For attorneys who seek a more academic presentation, and for members of the bench who need reinforcement that restitution is a legitimate and cohesive set of doctrinal principles, Professor Palmer's treatise is invaluable.

Palmer has done more than write about restitution—he has lived with it and creatively shaped it. For many years he has labored in its fields and his prior writings have been influential in developing several modern restitutionary concepts. In addition, many students of the subject, including myself, have been weaned on his casebook, fashioning our first acquaintance with this fascinating subject from its pages. Those of us who knew there was much more to be said can now be gratified that Palmer has said it, and said it well.

As the table of contents of Palmer's treatise demonstrates, the student of the law of restitution must be a jack-of-all-trades. Volume I begins with an historical examination of such central concepts as quasi-contract, the constructive trust, subrogation, and various equitable remedies. In chapter 2, Palmer addresses tort problems, infringement of copyrights, patents, trademark protection and the arcane but enchanting legal fictions necessary to solve tracing problems when money is commingled and later transferred or converted into other assets.

13. R. GOFF & G. JONES, *supra* note 1.

14. For contemporary verification of this attitude, see *Orakpo v. Manson Investment Ltd.*, (1977) 3 ALL E.R. 1, 7.

15. G. DOUTHWAITE, *ATTORNEY'S GUIDE TO RESTITUTION* (1977).

The tort emphasis is continued into the next chapter which focuses on fraud and misrepresentation issues. Volume I closes with an introductory examination of the relationship between contract and restitution.

Volume II begins with contract issues (unenforceable, frustrated and illegal contracts), continues with non-contractual concepts (duress, unsolicited benefits) and concludes with two chapters on mistake, an inquiry that takes up the entire next volume and a portion of the fourth volume as well. This last volume concludes with chapters on gifts, testamentary dispositions and three-party transactions. Few branches of the law escape mention, for the law of restitution requires the eclecticism of a Renaissance man. Because restitution is more often than not called upon when traditional branches of the law seem inadequate to do justice between the parties, eclecticism must be combined with the wisdom and judgment of a Solomon. It is this rare mixture of talents Palmer demonstrates in his treatise.

It is beyond the scope of this review to examine various substantive points for minor disagreements, sustained objections, or even wholesome praise. Rather, I much prefer to suggest that my overall perception is that Palmer's work is careful, balanced and well-presented. I found his writing to be clear and devoid of the irritating minutiae and convoluted embellishments that too often pass for scholarship in legal journals. There is a careful deliberation about Palmer's writing that I find appealing. Perhaps it is the many years of teaching that suggests the patient point-by-point, one-step-at-a-time approach. Or perhaps it is the natural logical orderliness of his mind that enables Palmer to state directly and simply the point he is making. Whatever the reason, his writing makes reading his work an enjoyable experience.

My delight with Palmer's treatise should not be taken as an indication of total agreement with its present format. Although substantive disagreements are usually just matters of personal taste, I believe there are two serious procedural flaws that may hinder the accessibility of Palmer's work.

A large share of confusion and ambiguity surrounding the law of restitution may be generated by the fact that there are essentially three distinct senses of "restitution" to be found in legal writing.¹⁶ The first uses "restitution" to mean a *measure*

16. See generally Note, *Restitution: Concept and Terms*, 19 HASTINGS L.J. 1167 (1968).

of recovery for violation of a traditional obligation already recognized by law. For example, where defendant breaches a contract duty, plaintiff might ask that damages be awarded not by the expectancy interest (the difference between what was promised and what was received), nor by the reliance interest (the out-of-pocket losses), but rather by the measure of the extent to which the defendant has enriched himself at the expense of the plaintiff. Thus, the restitutionary interest in contract is a measure of recovery for a breach of a traditional contract duty.¹⁷

The second sense in which "restitution" appears in the literature is as a *remedial technique* or *procedure* for traditional violations of civil obligations. In the law of torts, for example, instead of measuring damages to compensate what the plaintiff has lost, a specific remedy to disgorge defendant's ill-gotten gains might better suit the ends of justice. Use of such restitutionary remedies as the constructive trust and the equitable lien in traditional tort cases brings greater creativity and flexibility to time-honored and well-recognized causes of action.¹⁸

In each of the above two senses, "restitution" functions in a remedial capacity. In the first, it provides a formula for assessing monetary damages, while in the second, it provides a process to reach assets in the hands of the defendant that more rightfully belong to the plaintiff. In both of these cases, however, plaintiff must find a traditional cause of action to plead.

There is a third sense of "restitution", however, which recognizes that the very existence of an unjust gain in the hands of the defendant is a sufficient motivating factor to allow the courts to permit plaintiff to entertain an action against the defendant. Restitution as a *cause of action* is a quantum leap from restitution in a remedial sense. For most of the history of Anglo-American law, it was not the case that "for every wrong there is a remedy" despite language to that effect in many judicial opinions.¹⁹ The fit between right and remedy is a seamstress's nightmare and the vast amount of judicial tailoring to the common law has made the garment in many cases even more unseemly. But there has been steady progress and the

17. See Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VIRGINIA L. REV. 1115 (1971).

18. See York, *Extension of Restitution Remedies in the Tort Field*, 4 U.C.L.A. L. REV. 499 (1957).

19. See Note, *A Remedy for All Injuries?*, 25 CHI. L. REV. 90 (1946).

movement from restitution as a remedy to restitution as a right is more than an historical quirk of legal machinations; it portends an alternative jurisprudential approach to the role of law in resolving social disputes.

My criticism of Palmer is that by failing adequately to separate the three senses of "restitution" he not only makes understanding the cases and their evolution into legal principles more difficult, but, of much more significance, he fails to show the pivotal position of restitution as a philosophy of social relations and not merely one small branch of the vast legal system.

My second procedural criticism of Professor Palmer's treatise is addressed to its organization. While I believe that anyone who succeeds in ordering restitution into a coherent and logical structure is a fit candidate for the Pulitzer Prize, I think there are many ways to organize the material that will assist substantive analysis of it. Professor Palmer's treatise is without an overt analytical structure and it so announces itself by having no division other than numbered chapters.

There is obviously some natural order to any written work and Professor Palmer seems to be following one based upon how the defendant acquired the benefit now claimed to be unjustly held by him.²⁰ But if such is the case, some explicit discussion of that organizational scheme would seem vital. Students of restitution have the greatest difficulty understanding the subject as a whole and it is essential that a table of contents provide an analytical structure to the material. There is always a reason for presenting ideas in a certain order. In the area of restitution, that order, if cogent, will materially aid substantive understanding.

Professor Palmer's *Law of Restitution* is the product of a lifetime's work. It conveys a depth that comes only from familiarity and a breadth that suggests great tolerance and equanimity. It is bound to be a positive influence on the growth and quality of restitution; we shall all be the beneficiaries.

20. See 1 G. PALMER, *supra* note 7, at 40-44.