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Law of Restitution, by George E. Palmer

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Book Review

LAW OF RESTITUTION. By George E. Palmer. Boston, Mass. Little. Brown and Company, 1978. Four Volumes. pp. 2634. \$180.00

MAURICE J. HOLLAND*

The appearance of this estimable work, a *chef-d'oeuvre* in every sense, is an extremely welcome and important event in contemporary American legal scholarship. Apart from the great *Restatement of Restitution*,¹ it constitutes the first comprehensive, extended treatment of this elusive and profound subject since the publication of Woodward's *The Law of Quasi Contracts* in 1913. The *Restatement* was, of course, primarily intended to prescribe rather than to analyze, so the unique service to this area of law which could only be rendered by the qualified treatise writer was clearly long overdue. Professor Palmer's qualifications are those of a grand master, his years of writing on restitution and of teaching the subject at the University of Michigan Law School having equipped him with the breadth of knowledge and mature soundness of judgment requisite for success in an undertaking of the magnitude of this treatise.² His effort has been crowned in this work with brilliant success, and has thereby placed all branches of the legal profession in his debt.

Practitioners may find in it both theoretical and practical grounds for obtaining adequate recoveries for clients in situations where the ordinary measure of damages, based upon provable loss, would render a favorable verdict respecting liability but a hollow victory. Judges may derive from it guidance and clarification in an area where court decisions have often been characterized by muddle and results dubiously grounded in principle. It may, however, be among teachers and students of the law that these volumes will have their most significant impact. They should prove both an inspiration and a resource for renewed attention to a field of law which, by its nature, is, in a sense, classical in its orientation towards hard, lawyerlike analysis of exquisitely difficult fact situations.

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¹(1937). Though not without its critics, among whom Professor Palmer is one, the *Restatement* has been widely acclaimed and has been generally regarded as among the most successful products of the restatement enterprise. See, e.g., Winfield, *The American Restatement of the Law of Restitution*, 54 L.Q.REV. 529 (1938); Wright, Book Review, 51 HARV. L. REV. 369 (1937); and Patterson, Book Review, 47 YALE L.J. 1420 (1938).

²Only two other contemporary names come to mind as having attained comparable eminence as restitution scholars: Professor John P. Dawson of Harvard, and Dean John W. Wade of Vanderbilt. The latter has compiled a useful listing of important writings on the subject: Wade, *The Literature of the Law of Restitution*, 19 HASTINGS L.J. 1087 (1968).

Restitution considered as a law school course should be seen as an ideal vehicle for carrying into the second and third years the analytic and doctrinal focus of the first-year curriculum, and for providing a bridge between contracts and torts on the one hand, and on the other such advanced courses as creditors' rights, trusts, copyright, patents, unfair competition, and the like, wherein theoretical grasp can easily be lost sight of in the welter of intricate statutory frameworks. A restitution course is admirably suited not only for carrying forward unifying remedial themes from the first year, but also for rekindling among second and third-year students the special intellectual excitement engendered by legal study at its best, which consists of the discipline and technique of connecting practical solutions of concrete problems with a hierarchy of jurisprudential principles and premises; of proceeding cogently, in other words, from the general to the particular.³

With restitutionary problems, the deductive process is all the more challenging because of the extreme generality of the sole encompassing principle, and the virtual absence of useful intermediate ones to afford guidance across the chasm separating theory from specific decisions. As formulated by the *Restatement*, that principle is that "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other."⁴ Simply noting the critical adverb "unjustly" suffices to indicate the "at-large" quality of restitution cases, for nearly all of which this precept supplies the ultimate *ratio decidendi*, with precedent typically availing little by way of narrowing the scope of inquiry. The jurisprudential problem is, as with equity generally, to derive and articulate a reasonably stable set of mediating principles, or rules, by which to control and rationalize restitution decisions so that the latter are not merely idiosyncratic, moralistic responses of indignant judges to the conduct of defendants, while at the same time avoiding such a degree of mechanistic rule-orientation as would disable restitution from achieving its essentially equitable goals. The problem is the more acute because restitution, though commonly thought of as wholly remedial in character, has, in contrast to the law of compensatory damages, a considerable substantive scope of operation. It is concerned, not merely with determining the measure and form of plaintiff's relief, but also with defining various occasions for relief when there exists no independent grounds for imposing liability.⁵

³When, in one of his famous aphorisms, Justice Holmes observed that "[g]eneral propositions do not decide concrete cases," *Lochner v. New York*, 198 U.S. 45, 76 (1905)(Holmes, J., dissenting), he was speaking of political and economic doctrine, not legal principles. If "concrete cases" are not decided in accordance with "general propositions" of some kind, this must be understood to mean that less general, mediating principles or rules are needed as well, or else the ideal of principled adjudication must be given up.

⁴RESTATEMENT OF THE LAW OF RESTITUTION §1 (1937).

⁵While in the vast majority of cases a restitutionary remedy is granted to redress violation of a duty created by the law of torts, contract, or fiduciary obligation, there are some occasions when liability is imposed solely to avoid unjust enrichment in the absence of any

No inference is intended by what has been said that Professor Palmer has produced a work of airy speculation or abstract philosophizing. On the contrary, these volumes are intended for use by practitioners as well as scholars and should prove immensely valuable to both. The analysis, though refined and critical, is firmly rooted in the cases. The exposition is lucid and thoughtfully organized. This is not an encyclopedic treatise on the model of Wigmore's *Evidence*,⁶ an *omnium gatherum* of all leading decisions in which one can find the law and leading authorities for every Anglo-American jurisdiction. The Wigmore model was here wisely eschewed, because the additional length necessitated by such extensive footnoting would not have been worth the added cost and cluttered apparatus. In many jurisdictions, the reported cases amount to little more than a largely unconnected array of particular instances from which few settled principles, susceptible of useful generalization, can be distilled.

Professor Palmer has supplied what the law of restitution and those concerned with it, whether academically or professionally, sorely needed. That is, a carefully organized, gracefully erudite, and lucidly written exposition of restitution doctrine and its manifold applications. Many of those applications will open up new perspectives in remedial theory and practice for lawyers whose only previous acquaintance with any aspect of restitution might well have been in connection with rescission of contracts.

Finally, a word of commendation is in order for the publisher of these fine volumes for the high quality of their production. The typography and binding are both excellent. The utility of the text is much enhanced by tables and indices which are both complete and accurate. The collaboration between author and publisher has, in this instance, obviously been a most fortunate one.

other wrong. Apt examples of these are the mistaken conferral of a benefit and performance under a contract discharged for impossibility.

⁶*I.e.*, J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (3d ed. 1940).

