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Mistake and Unjust Enrichment, by George E. Palmer

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MISTAKE AND UNJUST ENRICHMENT. By George E. Palmer. Columbus: Ohio State University Press. 1962. Pp. 114. \$3.75.

One should not expect this book to be a best seller. Except for what I think is a modernistic jacket design, *Mistake and Unjust Enrichment* is a decidedly old-fashioned book. Nothing has happened in recent years to cause any new anxiety about the subject matter; interdisciplinary significance is lacking; and the author has not availed himself of symbolic logic or electro-magnetic assistance. Instead, he has done the rather tedious job of analyzing, synthesizing and criticizing appellate case material in a private law area distinguished by a long history of classificatory chaos.

The mess which one finds in the general area of Restitution has been documented by others. In his Restitution casebook, Dean Wade reports that the General Digest user is without a "rubric" and must consult over 25 key numbers to get at the relevant cases.¹ But there is some hope according to two authors who, in remarkably similar passages, suggest that something or someone is beginning to bring order out of chaos.² Cer-

19. P. 124.

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1. WADE, CASES AND MATERIALS ON RESTITUTION 37 (1958).

2. "The remedies aimed at restitution of unjust enrichment have grown like Topsy. They could be better described as a diversified litter of Topsies, with a common parentage that was only recently discovered." Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175 (1959).

"The subject of Restitution never really grew or developed. Rather, it has been like dim fragments moving amongst the bright stars of the curricular firmament, sweeping up cosmic dust and the shattered pieces of other bodies as they disintegrated,

tainly the law school curriculum has done its best to compound the confusion by scattering among the courses in Contracts, Equity, Remedies and Restitution, the muddled mixture of unilateral and mutual mistake, mistake as to substance, mistake as to value, rescission, reformation, cancellation, restitution, money had and received, quasi contract, minds didn't meet, objective theory, etc.

Since Professor Palmer's classification thesis and discussion are brief and tightly drawn, a summarization would be inadequate. A few samples of his treatment must therefore suffice. With one exception (mistake in performance), he stays with traditional categories of mistake: mistake of misunderstanding, mistake in basic assumptions, and mistake in integration. He does insist on a number of "distinctions" and "interacting factors." He suggests that some of our confusion in the misunderstanding category stems from an unnecessary doctrinal logic. Where an inaccurate or imprecise description of property causes a buyer to "mistakenly" accept a seller's offer, traditional contract doctrine gives relief to the buyer on the theory that no contract ever came into existence. Where, however, the property is accurately described and the buyer still accepts in the mistaken idea that he is buying other property, the objective theory is applied, a valid contract is found, and the mistake is denied legal significance. Professor Palmer argues that this logic distracts attention "from the inescapable problems of justice. . . . [I]f the lot owned by the vendor and described in a written contract were worth only half the agreed price, whereas the lot the purchaser thought he was getting was worth the full price, the question that should be faced is whether it is fair to hold the purchaser to his agreement. There is a better way to decide this than through a shifting formulation of contract theory."³

Most of the author's discussion centers on the "mistake in basic assumptions," a mistake of the party or parties which concerns some matter relevant to the decision to enter into a contract. In the inevitable clash between the policies of finality of transactions and the just result in the particular case, the author discards the traditional "mistake as to substance" and "mistake as to quality" tests. Instead, he suggests two decision-influencing, interacting factors. The first concerns the relation between the mistake and the terms of the contract. The chance of upsetting the contract increases as the error approaches the terms and decreases as it moves away from the terms and into the context. Thus in

until the conglomeration began to incandesce and appear on the star charts of academic searchers of the heavens." York, BOOK REVIEW, 11 J. LEGAL ED. 425 (1959).

3. P. 12.

the English case of *Scott v. Coulson*,⁴ the seller of a life insurance policy was successful in setting aside the sale on the ground that neither he nor the buyer knew that the person whose life was insured was dead at the time of the sale. The price had been fixed with reference to the surrender value of the policy which was slightly more than one-half the amount of the face value. The English describe the result as dictated by a "mistake in existence or identity." Professor Palmer terms this a meta-physical test. He would prefer to say that the mistake relates to a matter which is objectively basic since the terms of the contract make it evident that the insured's existence or non-existence was a highly relevant fact.⁵

The second decision-influencing factor is the unjust enrichment element—a theme which runs throughout the book. Although Professor Palmer recognizes that freedom of contract includes the freedom to agree to an unequal exchange, he argues that this policy is only compelling when the inequality is understood and consciously built into the bargain. The reasons that justify enforcement of contract are much diluted when the inequality "is not contemplated by the parties or at least by the one who was hurt."⁶ But doesn't the "or" clause contain the rub? If the inequitable exchange can be upset whenever the aggrieved party is mistaken, will we not find almost as many mistaken claimants as inequitable exchanges?

For those who have had difficulty in reconciling the divergent results in the sale of land with undiscovered oil and the sale of a cow with an undiscovered calf, the author's analysis will be helpful.⁷ His trenchant comments on the risk analysis⁸ and the old distinction between unilateral and mutual mistake⁹ should be hidden from first year law students and used exclusively for the edification of the instructor. And this suggests an unintended by-product. The author's material constitutes a bonanza for the instructor in Legal Method who conducts an annual search for problem material. If he can successfully hide this book, the cases cited and discussed will serve as ideal raw material for sharpening the first year skills of analysis and synthesis. Professor Palmer is to be specially commended for the dispatch with which he has accomplished his mission. In 97 small-sized pages of text he has illumined one of the dark corners of the common law.

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4. [1903] 2 Ch. 249, *Affirming* [1903] 1 Ch. 453, cited pp. 33-36.

5. P. 47.

6. P. 38.

7. Pp. 15, 51.

8. Pp. 53-58.

9. Pp. 67-90.

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