

THE LAW OF RESTITUTION

By George E. Palmer

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4 volumes, \$180.00

KEITH TURNER, Q.C.*

Once, in what seems the long ago, Abraham Lincoln, so the story goes, was sitting barefoot on a woodpile with a book. His friend Squire Godbey asked him, "What are you reading?" Lincoln replied, "I ain't reading; I'm studying."¹ There is, of course, a difference. I mention this at the very outset of this review because, while I feel I have been enriched by becoming acquainted with Palmer's four volumes on restitution, I can make no claim to having "studied" the treatise in Lincoln's sense of the term. Nor, as yet, have I put the volumes to use either in the classroom or in the courtroom. Perhaps on that morning, about one hundred and fifty years ago, when Godbey interrupted Lincoln, he was studying Blackstone — that is rather suggested by the context in which Sandburg tells the story. If so, absent remarkable clairvoyance on Lincoln's part, it would seem highly unlikely that he could have foreseen the impact which the idea of unjust enrichment would today have in American law; it is almost a certainty that he could not have discerned it from Blackstone. This is not to suggest that unjust enrichment was unknown in either Blackstone's day in England, or in Lincoln's day in the United States of America.

Restitution, Palmer points out at the very beginning of his treatise, has no well-defined boundaries "because it is concerned with unjust enrichment, and that can appear in many places [and he might have added, 'guises'] over almost the entire body of private law as well as in some parts of public law."² It is very important to keep this in mind when considering the monumental task which Palmer set for himself; he acknowledges that he does not know whether a truly comprehensive treatment of restitution can be written.³ He has certainly made a valiant effort. So much so, that I doubt that I can begin to do justice to it in this review.

The first major contribution to a general view of restitution, Palmer footnotes, was by Professor W.A. Keener⁴ with the most important modern contribution to the organization and development of American law being the *Restatement of Restitution*. It starts with the

* Of the Faculty of Law, University of Manitoba.

1. C. Sandburg, *Abraham Lincoln, The Prairie Years* (1926) 96.
2. IG. Palmer, *The Law of Restitution* (1978) Preface.
3. *Ibid.*
4. W. Keener, *Quasi-Contracts* (1883).

general principle that, "A person who has been unjustly enriched at the expense of another is required to make restitution to the other."⁵ Dean J.B. Ames had used almost the same language in 1888.⁶ Keener adopted this five years later in his *Quasi-Contracts* (1893). Palmer observes that the outstanding contribution in more recent times is that of Professor John P. Dawson in his *Unjust Enrichment* (1951),⁷ and he acknowledges in the Preface his debt to Dawson.⁸ And, of course, the author does not overlook Goff and Jones, *The Law of Restitution* (1966) in English law, or Denning's "The Recovery of Money,"⁹ and *The Changing Law* (1953). Canadian lawyers will, too, wish to refer to McCamus, "Restitutionary Remedies,"¹⁰ and Fridman, "Reflections on Restitution."¹¹ Palmer notes that Mansfield set the pattern, as he put it, in *Moses v. Macferlan*,¹² "but his views have had more influence in the United States than in England."¹³ This, then, is a necessarily brief, but necessary, backdrop to Palmer's work.

Palmer begins:

It has been traditional to regard tort and contract as the two principal sources of civil liability at common law, although liability arising out of a fiduciary relationship has developed largely outside these two great categories. [Reference should be made at this point, I think, to Oakley's *Constructive Trusts* (1978), and to Water's *The Constructive Trust* (1964), both English books]. There is another category that must be separated from all of these; this is liability based on unjust enrichment. In particularized form this has been part of our law from an early time, but it has been slow to emerge as a general theory. In present American law, however, the idea of unjust enrichment has been generally accepted and widely applied.¹⁴

It is pointed out that the term "restitution" is not wholly apt since it suggests restoration to the successful party of some benefit obtained by him, and while this is usually so, it is not always or necessarily so.¹⁵ Also, unjust enrichment is an indefinable idea in the same way that justice is indefinable — many of the meanings of justice are derived from a sense of injustice.¹⁶ Palmer cites Cahn, *The Sense of Injustice* (1949), but might more fully have gone on to cite Aristotle on that score.^{16a} There must be no mistake about it, therefore, that

5. *Restatement of Restitution* (1937) s. 1, quoted in Palmer, *Supra* n. 2, at 2 n. 3.

6. J. Ames, "The History of Assumpsit" (1888), 2 Harv. L. Rev. 53, at 64.

7. *Supra* n. 2, at 2 n. 3.

8. See also J. Dawson and G. Palmer, *Cases on Restitution* (2d ed. 1969).

9. (1949), 65 L.Q. Rev. 37.

10. [1975] L.S.U.C. Special Lectures 255.

11. (1976), 8 Ottawa L. Rev. 156.

12. (1760), 2 Burr. 1005; 97 E.R. 676 (K.B.).

13. *Supra* n. 2, at 5 n. 14.

14. *Id.*, at 1-2.

15. *Id.*, at 4.

16. *Id.*, at 5.

16a. Aristotle, "On Justice," *The Nicomachean Ethics*, Bk. V, ch. 2, found in R. McKeon (ed.), *The Basic Works of Aristotle* (1941) 1004-06.

the concept of unjust enrichment is a tough nut to crack, but not necessarily more so than that of, say, negligence.

Naturally enough, Palmer takes the constructive trust as an early illustration, noting that it has been a principal difficulty to free constructive trust of the belief that it is available only where there is a fiduciary relationship. As to restitution where there is another adequate remedy, the author maintains that it is not dependent upon inadequacy of the alternative remedy.¹⁷

Most restitution cases, says Palmer, fit into one or more of the following general categories: (1) the benefit was acquired by the defendant by an act that was wrongful as against the plaintiff, (2) the benefit was transferred by the plaintiff to the defendant in performance of an actual or a supposed contract, (3) the benefit was knowingly transferred but not pursuant to an actual or supposed contract. The term "benefit" has no single meaning in the law of restitution, but will vary with the circumstances, especially with the ground of restitution: "The two most important meanings are, first, that there has been an addition to the defendant's wealth or an increase in his estate; and, second, that a performance requested by the defendant has been rendered. But a crucial question in many circumstances is *when* a benefit has been transferred."¹⁸

Now, having barely scratched the surface of Palmer's introductory chapter, it remains to outline briefly, for present purposes, the tangled web of human circumstances when this idea of restitution, unjust enrichment, may take hold. This reviewer, at this point, feels an awesome inadequacy. But, Palmer himself says "This book is not comprehensive, partly because I do not have sufficient knowledge of many branches of the law."¹⁹ If a book-reviewer is supposed to criticize where criticism is due, and commend where commendation is due, then a Canadian lawyer with less than adequate knowledge can do little, if anything more, when reviewing an American treatise which covers so much ground, than sketch for his brother and sister lawyers in Canada the scope of the work. But, I am as certain as I can be that Palmer's treatise is one which most definitely deserves the attention of students (who always have the advantage!), teachers, general practitioners and specialists and, last but not least, Judges in this country, standing as we do at the crossroads of English and American jurisprudence.

The work is in four volumes comprising twenty-three chapters with, of course, tables of cases and statutes and an apparently ample

17. *Supra* n. 2, at 33.

18. *Id.*, at 44-45.

19. *Supra* n. 2.

index. Under the head Tort or Equitable Wrong, Palmer cites *Hambly v. Trott*²⁰ where a converter of goods died before action was brought, the owner suing the personal representative of the wrongdoer. Lord Mansfield, recognizing that the tort action for conversion then died with the tortfeasor, said that recovery could be had in quasi-contract and that this action survived. He saw a "fundamental distinction":

If it is a sort of injury by which the offender acquires no gain for himself at the expense of the sufferer, as beating or imprisoning a man etc. there, the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the property shall survive against the executor.²¹

Palmer puts it that the English rejection of Mansfield is especially evident in the failure to capitalize on his opinion in that case, while in the United States Mansfield's insight is well on the way to universal recognition.

Under Fraud and Misrepresentation, in contrast to the previous situation in which there was no consent of the person wronged, the author deals with the situation where the claimant transferred the benefit knowingly, but seeks restitution because the transaction (contract or other consensual arrangement) was induced by fraud or misrepresentation. Citing misconceptions and confusion in early English cases of the basis of quasi-contractual actions²² in the context of rescission, Palmer observes that on the whole American courts have exercised authority similar to that given to English courts by *The Misrepresentation Act, 1967*. The *Act* authorizes a court to deny rescission for innocent misrepresentation and award damages if it is of the "opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as the loss that rescission would cause to the other party."²³

Under the head of Restitution for the Defendant's Breach of Agreement, the author notes that on the basis of restitution the result may be that the defendant is subjected to the risk of paying more for part performance than he agreed to pay for full performance. The defendant's conduct having the effect of cancelling and annulling the contract, it could not be used to limit the amount of recovery. Thus, in a New York case, a lawyer discharged by his client without cause recovered a judgment of \$13,000, having completed five-sixths of the work, despite the fact that the contract price for full performance

20. (1776), 1 Cowp. 371; 98 E.R. 1136 (K.B.).

21. *Id.*, at 376, 98 E.R., at 1139.

22. *E.g.*, *Strutt v. Smith* (1834), 1 Cr. M. & R. 312; 149 E.R. 1099 (Ex.).

23. *Supra* n. 2, at 353. See also P. Atiyah and G. Treitel "Misrepresentation Act, 1967" (1967), 30 Mod. L. Rev. 369.

was \$5,000.²⁴ The dissenting Judge would have awarded five-sixths of the contract price which in Palmer's view would have been the fair solution to the problem.

But, lawyers apart, there are cases such as those where a contractor recovered over \$257,000 in quasi-contract when by the terms of the contract he would have been entitled only to an additional \$20,000 had he completed performance; and where an architect recovered after part performance \$1,690 where the contract price for full performance was \$490. One must keep in mind that in those cases, the *defendants* breached the contracts. Palmer notes:

There has been an occasional suggestion that for part performance there can be no recovery in excess of the whole contract price; but as the foregoing cases demonstrate, this has been widely rejected by the decisions In all of these cases there was a prospective gain to the defendant under the contract; and if the plaintiff had breached, the defendant would have been entitled to recover this prospective gain as damages. It would be a gross miscarriage of justice to award this same prospective gain to the defendant, through deduction from the plaintiff's recovery, when the defendant is the party guilty of the breach of contract²⁵

As to Restitution to a Party in Default on a Contract, notwithstanding an early reluctance to give any relief to the contract-breacher, there has been a "significant movement in the direction of awarding restitution in order to prevent unjust enrichment."²⁶ But, the decisions do not correspond to any useful generalization. Legal development is not as far along as it is with respect to the *defendant's* breach, but as the idea of unjust enrichment gains acceptance, Palmer expects that restitution in favour of a defaulting party will be given more freely. There are however two key problems: (1) the harm caused by the breach and (2) the quality of the breach (bad faith, willful and deliberate breach). Bad faith would not mean that restitution be denied, but rather that it would be allowed less readily.

Dealing with Restitution under Unenforceable Contracts, unenforceable either because of the Statute of Frauds or indefiniteness, the author says that it is inaccurate to assert, as is done in the *Restatement of Contracts*, that the "rules governing restitution as a remedy against one in default on a contract that is unenforceable by reason of a Statute of Frauds are the same as in the case of contracts not within the Statute."²⁷ In general, restitution does not do violence to the Statute whose purposes are to protect against false claims.

At this point in my review of Palmer's multi-volumed treatise, I think it is not only appropriate, but necessary to borrow from the

24. *In re Montgomery's Estate* (1936), 272 N.Y. 323, 6 N.E. 2d 40 (C.A.).

25. *Supra* n. 2, at 391-92.

26. *Supra* n. 2, at 568.

27: H G. Palmer, *The Law of Restitution* (1978) 3.

precedents of reviewers of Wigmore's multi-volumed treatise on the *Law of Evidence*, and to acknowledge as they did that it is manifestly impossible to examine in detail any of the topics discussed in the treatise; that it is impossible to give so much as an outline.²⁸ I would hope that enough has thus far been indicated to suggest to Canadian lawyers that Palmer's work is well-deserving of their attention. Whether I could say, as those reviewers did of Wigmore, that no Law Library can be considered complete without it, and that in the preparation of a case no advocate alert to his client's interests can afford not to examine the views and arguments advanced, would, I am afraid, be hyperbole on my part. That surely is a matter best left to the individual good judgment of lawyers who confront restitution problems, given especially that this is a first edition of an American work.

I would, therefore, simply note by reference to Palmer's Summary of Contents such highlights as: frustrated and illegal contracts, benefits obtained by duress, volunteers, mistake, and three-party problems such as restitution of benefits received by the defendant from a third party, restitution based upon payment or transfer to a third person, and benefits and burdens where two parties are separately liable to a third party.

Of these matters, Mistake must be singled out as one of the toughest of the restitution problems. Palmer deals with it in Chapters 11 to 20, extending across Volumes II, III and IV. On the problems of mistake a Canadian lawyer will wish to refer to "Rectification and Rescission" by the late A.S. Patillo, Q.C. in the Law Society of Upper Canada Lectures²⁹ and to "Restitutionary Remedies" by John D. McCamus.³⁰ As McCamus puts it, "The subject of mistake is . . . a rather treacherous one for concise treatment . . ." ³¹ The writings on the subject are immense, and Palmer points out that, "In American law the emergence of anything like a whole view of mistake has been delayed by the division between law and equity, and this is true particularly of relief for mistake in basic assumptions."³² He says, too, that the limited view which English lawyers take on the matter "may be explained in part by a failure to recognize that relief for mistake is connected with the prevention of unjust enrichment, coupled with a reluctance to generalize about unjust enrichment."³³

Palmer points up one necessary distinction in the law of mistake,

28. (1923), 1 Can. B. Rev. 789; (1940), 23 Can. B. Rev. 514.

29. [1955] L.S.U.C. Lectures 217, at 233-38.

30. *Supra* n. 10.

31. *Id.*, at 284.

32. *Supra* n. 27, at 487.

33. *Ibid.*

that between mistake in business transactions and mistake in connection with gifts. "Mistake takes various forms, and one of the great needs is for a workable scheme of classification."³⁴ With all respect, I doubt this very much; it seems to me that pursuit of classification of mistake is a will-o'-the-wisp. But, I hasten to add that my skepticism is no doubt in large measure a product of too many years of wrestling unsuccessfully with classification in "that Serbonian bog Where armies whole have sunk" of Similar Facts in the Law of Evidence.

In closing, I must note the case of *Cie Immobiliere Viger Ltée v. L. Guigère*,³⁵ and the following passage from the headnote:

Incorporation of the theory of unjust enrichment into the civil law is no longer open to debate; discussion relates only to its theoretical basis and to the conditions of its application. Most authorities recognize six such conditions: (1) an enrichment; (2) an impoverishment; (3) a correlation between the enrichment and the impoverishment; (4) the absence of justification; (5) the absence of evasion of the law; (6) the absence of any other remedy.

This is a decision of a five-Judge Court, speaking unanimously through Mr. Justice Beetz. What significance this may have in the common law provinces, in the long view, remains to be seen.

Meanwhile, I look forward to the second edition of Goff and Jones, *The Law of Restitution*, expected shortly, and to the opportunity to review it. Also, I await the appearance of Maddaugh and McCamus, *The Law of Restitution*, referred to in McCamus's "Restitutory Remedies," in 1975 as being "in publication."

Finally, it is of interest to note that, in the context of rescission, the idea of unjust enrichment or restitution was applied under the rubric *quantum meruit* in *Festing v. Hunt*.³⁶ This was a jury trial. The Attorney-General, "Fighting Joe" Martin, represented the defendant. The jury fixed the compensation, and the Court of Appeal then dealt only with the question of law on rescission. Mr. Justice Bain on appeal put it this way:

[T]he defendant having, as the jury have found, told the plaintiff that he did not intend to give him the compensation for his work that he had promised, the plaintiff was justified in treating the contract as rescinded, and that he is entitled to recover from the defendant what his services were fairly worth for the time he worked.³⁷

Were it otherwise, I suggest, the defendant would have been unjustly enriched and the plaintiff would have been unjustly deprived.

34. *Id.*, at 482.

35. [1977] 2 S.C.R. 67.

36. (1890), 6 Man. R. 381 (C.A.)

37. *Id.*, at 387.