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Review of “Mistake and Unjust Enrichment,” By George E. Palmer

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BOOK REVIEW

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

This book is a reprint of a series of lectures delivered at the Ohio State University Law Forum, and is confined to "mistake arising in connection with agreements or attempted agreements."¹ It is divided into three parts, in the first of which the author undertakes, within the limits of his subject, a fundamental classification of the mistake cases. The other two parts are detailed discussions of the worst problems, Part II of mistake in assumptions and Part III of the distinction between unilateral and mutual mistakes.

The book, though very clearly written, deals with such a variety of problems that I can only undertake to give a general idea of the contents. In Part I the author states that a scheme of classification must use two viewpoints: "one concentrates on the relationship of the mistake to the transaction, the other upon its possible legal effect on the transaction. The two factors interact and a workable system should take both into account."² He then isolates four classes of mistake cases: (1) "misunderstanding," which bears on the issue whether a contract was made; (2) mistake in integration, in which a writing does not correctly state the agreement of the parties; (3) mistake in assumptions, when one party or both falsely assume something that induces him or them to make a contract; and (4) mistake in performance, when one party renders a benefit to the other, falsely thinking that it is his duty under a contract. In his ensuing discussion of these categories the author constantly deals both with existing doctrine and appropriate policy. For example, the fundamental difference between mistake in assumption and mistake in performance is that the latter can be corrected without encountering "the policies favoring enforcement of contract."³ In cases of "misunderstanding," of a contract, though, in the author's opinion, he should sometimes receive relief even when there is a contract. A mistake in assumption may be ground for rescission if one party has an unanticipated gain from it because the usual policy supporting contracts does not operate normally in such a case. Reformation for a mistake in integration actually carries out the policies for enforcement of contracts. Mistake in performance (rendering a performance thinking that it is required

1. P. 4. [All citations are to PALMER, *MISTAKE AND UNJUST ENRICHMENT* (1962)].

2. P. 5.

3. P. 8.

by contract when it is not) has not, the author says, been recognized as a category in Anglo-American jurisdictions, though restitution is often given for it. The failure to adopt it has caused confusion between cases in which the defendant's expectations are disappointed, if relief is given, with those in which they are not. E.g., mistaken overpayment of a note (mistake in performance) does not disappoint the payee's expectations, which are limited to the amount actually due. Though the normal remedy in such cases is a common count at law, they bear a startling resemblance to mistakes in integration, for which the remedy is reformation in equity. Thus, the policy supporting contract-enforcement goes against relief for mistake in assumptions, but favors relief for mistakes in integration and performance. Part I ends with a warning against over-rigid classification:

There should be considerable flexibility of remedy throughout the law of mistake, and this is especially true in the borderline cases that do not fit comfortably into a single category. The attempt in this chapter to identify some of the principal categories should not interfere with this flexibility; on the contrary, I would hope that it might aid in a nicer shaping of judgments to meet the needs of whatever case is a [t] hand.⁴

Part II is an examination of the doctrines and policies applying to mistakes in assumption. The tension between the policy for enforcing contracts and the need for relief is expressed in the rule that the mistake, to justify relief, must be "basic." The author believes that the factors to be used in deciding whether a mistake is basic are "the way it influenced the formation of the contract,"⁵ and its effect "on the economic equivalence of the agreed exchange."⁶ Unjust enrichment, in the sense of "lack of economic equivalence, attributable to the mistake,"⁷ is "the idea that brings most of the cases together."⁸ The courts, in an effort to make the term "basic" more concrete, have developed two rules: that "relief will be given for mistake as to existence or identity, but not for mistake as to quality, attributes, or value,"⁹ and that "relief will be given for intrinsic but not for extrinsic mistake."¹⁰ There follows a lengthy critique of these rules, showing, with illustrations, that they are, in the main, inadequate. The rule that relief will be given for a mistake in identity does, the author concludes, make it less likely that the courts will require unjust

4. P. 32.

5. P. 37.

6. *Ibid.*

7. P. 38.

8. *Ibid.*

9. P. 39.

10. *Ibid.*

enrichment as a condition of relief in such cases, and more likely that that: "On the whole, the chance of upsetting a contract increases as they will give relief for unilateral mistake. The author's opinion is the error approaches the terms and decreases as it moves away from the terms into the context in which they were formulated."¹¹ There is an illuminating discussion of this principle, too long to summarize, which ends with the following paragraph:

There is no simple formula for testing relievable mistake. For the most part relief is given only if the mistake produced an unexpected gain to one party, whose claim to retain it finds less than full support in the protection of his contract expectations. If to this there can be added an understanding of the parties that looked toward a quite different exchange of values, the reasons for permitting enforcement or retention of the unexpected gain become even less persuasive. This may require searching the terms of the contract and the area of understanding that influenced the making of the contract on those terms. The case for relief is strengthened when the terms and context point to a particular fact as a central element in or underlying the arrangement. But at the critical point of decision there is no substitute for what Holmes once described as "judgment and tact."¹²

Part II ends with closely reasoned and well-illustrated discussions of the bearing of risk analysis upon mistake in assumptions, and of the effect of change of position.

Part III is a complicated discussion of the distinction between unilateral and mutual mistakes. The author offers these definitions:

Where there is a mistake as to some matter relevant to a two-party transaction, it will be regarded as unilateral if only one party was mistaken as to that matter; whereas if both were mistaken in the same way as to the same matter, it will be called mutual. This is accepted usage in this country . . .¹³

It follows that in many unilateral mistakes "there will in fact be mistake on each side, although not the same mistake,"¹⁴ and that unilateral mistake "covers a considerable variety of situations, each of which needs to be evaluated in its own terms."¹⁵ Recurring to the categories defined in Part I, the author concludes that the distinction has no function in cases of mistake in performance and integration, and that it is "inappropriate"¹⁶ for some cases of "misunderstanding" and "oversimplified"¹⁷ for others. The discussion of mistake in as-

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11. P. 46.
 12. P. 53.
 13. P. 68.
 14. *Ibid.*
 15. P. 70.
 16. P. 79.
 17. P. 80.

sumptions is long and complex. The author's conclusions are partly summarized in the following passage:

The general conclusion suggested is that the distinction between unilateral and mutual mistake in assumptions is sometimes important, but for the most part the problems need to be framed in different terms. Certainly it will not do to limit relief to mutual mistake. This would have shortcomings of the same order as would a strict insistence that contract be limited to an actual meeting of the minds.¹⁸

The next two paragraphs suggest further considerations, one that "mutual mistake provides a useful point of departure,"¹⁹ and the other that "Overhanging all problems of mistake . . . is the element of enrichment."²⁰

This survey gives only the vaguest and most general notion of what the book contains. I have not even referred to the discussions of the *Restatement*, of the relations between mistake and breach of warranty or the relations between mistake and impossibility and frustration, and I could list many other specific problems which I have omitted. Perhaps the survey does show how well the study is integrated. In addition, three qualities of the book stand out. First, there is the author's constant preoccupation with the problem of policy, of the criteria for determining what results are desirable and why. Second, the discussion centers throughout upon concrete situations and illustrative decisions, so that the abstractions I have summarized or quoted are actually made very concrete. Third, the reasoning, the discrimination between variant cases, is always very close. I must add that the book is very well written and as easy to follow as its uncommonly troublesome subject matter permits.

It is the usual fate of a monograph like this to be read by teachers, perhaps recommended or assigned to students, and ultimately forgotten. That this book has a real value for students and teachers goes without saying, but it deserves a wider audience, and I hope it finds it. Restitution is less understood than the other two groups of remedies in Anglo-American law, torts and contracts, and no part of it, I think, is less understood than mistake. A lawyer is apt to be familiar with contemporary judgments about policy in a field if he has anything to do with it at all, but a mistake dislocates the normal policies. It may even reverse them. This is a serious problem, but it is only the beginning. Mistake cases are hard to find by the use of the usual research tools, and when the lawyer finally has one that he might be able to use, he falls into a nest of conceptions—mistake in integration,

18. P. 96.

19. *Ibid.*

20. *Ibid.*

mistake in assumption, unilateral mistake, mutual mistake—that are not clearly or even consistently defined, and whose legal consequences are not clear. Professor Palmer's book is aimed at this trouble zone. It provides practicable definitions of meanings and of legal consequences, a theoretical framework suitable for general application in analysis, and an examination of policy considerations and their appropriate limits. The book is so unpretentious in size (about 96 pages of text and 16 more of footnotes) that it would be easy to overlook its value. I do not know any book that will yield as much enlightenment for equivalent reading-time. Its brevity is one of its greatest merits; the lawyer, seeking a general acquaintance with the subject, will find that he can get it quickly. More than this, he will get at least the fundamental bases for critical evaluation of the cases that he will later read in the reports. And in this field the lawyer, I think, needs these advantages more than he needs a case-in-point. In short, I recommend this study to the attention of judges and lawyers as well as of teachers, as a much-needed general approach to the law of mistake, which, if it is applied, will contribute greatly to the ordering of the field and its alignment with fundamental policy.

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