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Quasi-contract - Materialman's Lien for Unrequested Expenditures in the Preservation of Another's Property

William R. Jentes
University of Michigan Law School

QUASI-CONTRACT—MATERIALMAN'S LIEN FOR UNREQUESTED EXPENDITURES IN THE PRESERVATION OF ANOTHER'S PROPERTY—Plaintiffs were employed to make improvements on defendant's building. While the work was in progress the roof was partially destroyed by fire through no fault of plaintiffs. Necessary repairs were made without the express consent of the defendant, who was in Europe and who had left no one in charge of the building to act for him. The trial court entered judgment foreclosing a materialman's lien given by statute to "any person who shall, under oral or written contract with the owner of any tract or piece of land, perform labor or furnish material for the . . . repair of any building . . . thereon."[1] On appeal, *held,* affirmed. Plaintiffs can foreclose a materialman's lien based upon a quasi-contractual claim for labor and materials furnished without request when such labor and materials were necessary for the preservation of the defendant's property. *Berry v. Barbour,* (Okla. 1954) 279 P. (2d) 335.

[1] 42 Okla. Stat. (1951) §141.

In the absence of additional circumstances, Anglo-American courts have generally denied recovery to a party making improvements or repairs to the property of another without the latter's express or implied in fact consent. "Our whole attitude is that we require excuse and insist that it be good."[2] The courts have advanced a number of arguments supporting their denial of relief: (1) property owners should not be forced to receive an unrequested benefit;[3] (2) granting of recovery would induce intermeddlers to confer benefits indiscriminately; (3) persons conferring benefits should be presumed—and this has been made an irrebuttable presumption—to intend them as gifts;[4] and (4) recovery should not be based upon some abstract principle of "unjust enrichment."[5] In spite of this general hesitancy to grant relief, there are decisions permitting quasi-contractual recovery where the benefit is bestowed under certain defined and limited circumstances. Thus recovery has been given in instances where a special public interest is involved in the maintenance of the property;[6] where an emergency exists which endangers the property of another;[7] where an obligation is placed upon a particular class of persons to maintain the property of another, as in the case of bailees and finders;[8] or where, although there is no legal obligation, the person stands in such a relationship to the owner that the courts find him the party best fitted to preserve the property.[9] While these decisions indicate a willingness on the part of some courts to relax the general rule denying relief, there is considerable contrary authority in each instance. But even though these decisions do not establish exceptions to the general rule which are buttressed by a large body of authority, they do reveal that the courts will not always dismiss plaintiff's claim by referring to one of the first three reasons enumerated above. There is a recognition in these cases that in some circumstances a person conferring an unrequested benefit is neither acting "officiously" nor "gratuitously." Therefore, in analyzing the rationale for the general denial of relief, the controlling objection to granting recovery, though often unstated, seems to stem from an aversion to laying plaintiff's right to recover on the broad grounds of preventing "unjust enrichment." The restitutionary problem presented by the principal case is one where the courts cannot rely upon the familiar supports of mistake, misrepresentation, and duress. Consequently, they must advance their quasi-contractual remedies into relatively uncharted areas where the only landmark

[2] DAWSON, UNJUST ENRICHMENT 141 (1951).

[3] Falcke v. Scottish Imperial Ins. Co., 34 Ch. D. 234 at 248 (1887).

[4] WOODWARD, QUASI CONTRACTS §207 (1913).

[5] Holdsworth, "Unjustifiable Enrichment," 55 L.Q. REV. 37 at 51-53 (1939).

[6] Hope, "Officiousness," 15 CORN. L.Q. 25 at 47-49 (1929). See also the treatment given by the court in Manhattan Fire-Alarm Co. v. Weber, 22 Misc. 729, 50 N.Y.S. 42 (1898).

[7] Hope, "Officiousness," 15 CORN. L.Q. 25 at 38-41 (1929).

[8] Andrews v. Keith, 168 Mass. 558, 47 N.E. 423 (1897); Kirk v. Smith, 48 Mont. 489, 138 P. 1088 (1914).

[9] In re Bryant's Estate, 180 Pa. St. 192, 36 A. 738 (1897), permitted an agent to recover in quasi-contract for expenditures made immediately after the principal's death in order to preserve the property of the estate. See also 30 HARV. L. REV. 402 (1917).

for establishing relief is that of "unjust enrichment." It is true that there is comparative unanimity among the text-writers that recovery should be permitted in cases such as the present one,[10] but there is a dearth of case authority.[11] The reluctance of the courts is undoubtedly based upon a fear that such a broad test as "unjust enrichment" will result in the decision in each case being reached through the subjective moral determination of the judge and not in accordance with predictable or objective rules of law.[12] However, the courts need not deny recovery in a *particular* case solely because the *general* test of liability advanced is inadequate, being too broadly or indefinitely stated. There is no insuperable obstacle to the establishment of a test which will adequately describe the particular circumstances in which recovery is given.

The fact situation of the principal cases lies within that penumbra which the law first casts as it advances its judicial shadow over a field of action formerly governed solely by the community's pattern of conduct. It is an area in which the distinction between a moral and a legal right is unclear. But it is in such an area that it becomes apparent that the "law is also a conscious or proposed growth . . . [and] the judge is directed to the attainment of the moral end and its embodiment in legal forms."[13] It is clear that the community would not sanction the proposition that under all circumstances a person should be compelled to reimburse another for a benefit received regardless of any request. In an age of increasing interconnections between members of society, the autonomy of the individual is still recognized sufficiently to permit that much self-determination. But it is equally clear that there is an expectation that recovery should follow upon the performance of *certain* unrequested acts. The courts, recognizing this expectation, are beginning to establish the line between circumstances where legal relief will be given and those where it will not. The judicial rules defining that line are an attempt to prescribe some guidepost beyond mere "unjust enrichment," and the defining process is one of employing "experience developed by reason and reason tested by experience."[14] As has been pointed out, those rules must be drawn from a limited number of decisions which advance beyond the general conservative approach to these cases. But they indicate that recovery may be allowed, as in the present case, when the owner of property receives and retains a material benefit conferred by another who intends to be recompensed and who stands in such a relationship to the property that he may reasonably make expenditures necessary for the preservation of the property before

[10] RESTITUTION RESTATEMENT §117 (1937); WOODWARD, QUASI CONTRACTS §197 (1913); KEENER, TREATISE ON THE LAW OF QUASI-CONTRACTS 354 (1893); Thurston, "Recent Developments in Restitution: 1940-1947," 45 MICH. L. REV. 935 at 941-944 (1947).

[11] "The number of situations in which restitution has been permitted is surprisingly small." Reporters' Notes, RESTITUTION RESTATEMENT §117 (1937). But see Karon v. Kellogg, 195 Minn. 134, 261 N.W. 861 (1935), noted in 34 MICH. L. REV. 577 (1936).

[12] Holdsworth, "Unjustifiable Enrichment," 55 L.Q. REV. 37 (1939).

[13] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 105 (1921).

[14] POUND, JUSTICE ACCORDING TO LAW 60 (1951).

it is possible to communicate with the owner.[15] Such a test prescribes certain prerequisites to recovery in each case in the form of requirements as to the status of the person making the expenditures, the intent with which he makes them, the necessity of the repairs to the preservation of the property, and the immediacy of the prospective damage as justifying the failure to contact the owner.

In a case such as the instant one, it is not enough that the plaintiffs establish such a quasi-contractual right to recovery; they must still establish their materialman's lien according to the provisions of the statute. The statute by its terms covers only expenditures made under an "oral or written contract."[16] However, the holding of the principal case that the word "contract" includes "quasi-contract" is consistent with analogous cases giving a procedural right when the statute by its terms applies only to "contract" cases, e.g., attachment and counterclaim statutes and those limiting the types of cases to be heard by inferior courts.[17] There is considerable authority to the effect that such lien statutes should be narrowly construed in application.[18] Nevertheless, the court's holding is in accord with the broad purposes of the materialmen's lien statutes, which are "intended to enforce the equitable principle, that one who knowingly takes the benefit of the property or labor of another, in the form of improvements made upon his land, ought to have the land subjected to a lien for the value thereof."[19]

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[15] RESTITUTION RESTATEMENT §117 (1937); Hope, "Officiousness," 15 CORN. L.Q. 25 at 51 (1929).

[16] 42 Okla. Stat. (1951) §141.

[17] 15 MICH. L. REV. 332 (1917).

[18] Pace v. Nat. Bank of Commerce, 190 Okla. 503, 125 P. (2d) 178 (1942); 2 JONES, LIENS, 3d ed., §1554 (1914).

[19] Nellis v. Bellinger, 6 Hun (N.Y.) 560 at 561 (1876).