RECENT DEVELOPMENTS IN RESTITUTION: RESCISSION AND REFORMATION FOR MISTAKE, INCLUDING MISREPRESENTATION

Edward S. Thurston

Harvard University; Hastings College of the Law, San Francisco

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Contracts Commons

Recommended Citation


Available at: https://repository.law.umich.edu/mlr/vol46/iss8/3

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
RECENT DEVELOPMENTS IN RESTITUTION: RESCISSON AND REFORMATION FOR MISTAKE, INCLUDING MISREPRESENTATION *

Edward S. Thurston †

A. Rescission or Reformation

In accordance with underlying equitable principles, restitution is granted where a mistake has been made by one or both parties to a transaction or series of transactions because of which one of them has obtained an advantage which it would be unjust for him to retain.

There are two forms of relief, one based upon rescission, the other upon reformation. The first seeks the undoing of a transaction and the replacing of the parties into the positions, as nearly as may be, originally occupied. On the other hand, reformation seeks the performance of an agreement as the parties to it had intended. For rescission there may have been no contract, as where a payment is made to one who is not a creditor. Reformation, however, can be granted only where the parties had reached an agreement. Thus where there is a misunderstanding between the parties because of an ambiguity of language for which neither was at fault, there can be rescission of the attempted transaction but no reformation, since no agreement was made. If, however, there was an agreement as to what the parties intended but a mistake was made in the documents which implemented it, reformation will be granted to accord with the original agreement.  

* This is the second of two articles dealing with “Recent Developments in Restitution.” Professor Thurston had almost completed this part at the time of his death in February of this year. Nothing of substance has been added. A few changes were made by Professor Warren A. Seavey, a long-time associate of Professor Thurston at the Harvard Law School, who had collaborated with him in the Restatement of Restitution. – Ed.

† Before his death, Professor of Law Emeritus, Harvard University; Professor of Law, Hastings College of the Law, San Francisco; adviser in the preparation of the Restatement of Restitution.

See Abbot, “Mistake of Fact as a Ground for Affirmative Equitable Relief,” 23 Harv. L. Rev. 608 at 610 (1910), where it was said: “Reformation, then, is an affirmation of the bargain as it was actually made. Rescission, on the other hand, is a disaffirmance of the bargain itself. It is the antithesis of reformation. Consequently, a mistake which is ground for reformation will not justify rescission in any ordinary case; while a mistake which is ground for rescission will not justify reformation, since it strikes at the bargain which must serve as the standard for reformation.”

See also 3 Pomeroy, Equity Jurisprudence, 5th ed., 870 (1941).

2 “In this connection it is necessary to distinguish carefully between two different types of mutual mistake. The first is that which results from the use of words or terms
cases restitution will follow to the extent necessary to avoid the consequences of the mistake. In either case the relief may be granted in proceedings in equity to reform a deed, or to recover the consideration paid in a fraudulently induced contract, or by an action to recover at law an overpayment made because of a misinterpretation of the terms of the agreement. In the absence of fraud, and sometimes even where there is fraud, a litigant whose claim can be satisfied by the payment of money may be able to get redress only in a law court. For reformation to a previous agreement it is immaterial whether the mistake is unilateral or was made by both parties and whether the mistake was of law or fact. For rescission, a mistake by only one of the parties may not be sufficient and the fact that the mistake was of law is sometimes fatal.

B. Void and Voidable Transactions

Since the right to restitution is normally equitable, it will not operate against subsequent bona fide transferees for value nor against the other party to the transaction if he has changed his position and was guilty of no misrepresentation. It is to be noted, however, that there are transactions described as “void,” that is, those from which no transfer of a title or right results. Aside from cases of illegality and incapacity, a transaction is void in this sense because of mistake only if its nature is entirely misunderstood by one party who is without fault. Where,
however, the transaction is understood but a mistake is made in the reason for entering into it, whether because of fraud or otherwise, or where there is fault in not understanding the nature of the transaction, it is merely voidable by the mistaken party. In these cases he can, if he so desires; make the transaction fully effective by ratification; in any event it is binding upon him with reference to one in the position of a bona fide purchaser or one who has innocently changed his position. A transaction may be voidable because of a self-induced mistake by one or both of the parties, or because of a misrepresentation either honestly or fraudulently made by one of them. Whether or not restitution is granted may depend upon the cause of the mistake, its size, or its mutuality or lack of mutuality.

made and fully comprehended by the seaman.) Sometimes it may be necessary to obtain a decree declaring a certain document to be void in order to remove a cloud on title. In Jones v. Jones, 158 Kan. 196, 146 P. (2d) 405 (1944), cancellation was granted of a quitclaim deed of land signed by an aged man with poor eyesight in reliance on the fraudulent statement of his son, the grantee, that the document was merely a lease of the land.


7 See Metropolitan Life Ins. Co. v. Stuckey, 194 S.C. 469 at 473, 10 S.E. (2d) 3 (1940), where the court, overlooking the distinction noted in the text, said: "It is generally affirmed as a rule that fraud avoids all contracts. But it would be more correct to say fraud makes all contracts voidable; for it is at the option of the party to be affected by the fraud whether or not he will treat the contract as void and rescind it."

But see the language of Lord Wright in Norwich Union Fire Ins. Society, Ltd. v. Wm. M. Price, Ltd., [1934] A.C. 455 at 463. "In Cooper v. Phibbs ... Lord Westbury used these words: 'If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake.' At common law such a contract (or simulacrum of a contract) is more correctly described as void, there being in truth no intention to contract."

8 Baker v. Casey, 166 Ore. 433, 112 P. (2d) 1031 (1941).

Sometimes it may be desirable for a defrauded person to ratify such a transaction and sue in tort for fraud. In Kordis v. Auto Owners Insurance Co., 311 Mich. 247, 18 N.W. (2d) 811 (1945), plaintiff, a pedestrian injured by a motorist, had been induced by the fraud of the agent of the motorist's insurer to sign a release of the motorist upon receipt of the wholly inadequate sum of $2,000 ($1,900 of which was by payment of his hospital and doctor bills). Plaintiff elected to sue the insurance company for its agent's fraud, which dispensed with the necessity of plaintiff's rescinding the release of the original tortfeasor and returning the money received by him. See also Mutual Savings Life Insurance Co. v. Osborne, 245 Ala. 15, 15 S. (2d) 713 (1943). (Release obtained from beneficiary of insurance policy by fraud. He may elect to affirm it and sue for damages.)

8 See Restitution Restatement, §§ 12, 13, 69, 142 (1937); 5 Williston, Contracts, rev. ed., §§ 1531, 1538, 1574 (1936).
C. Fraud

The most obvious situation where restitution is available is where a claimant's mistake whereby another is enriched has been brought about by the other party's fraud. The defrauded party has an election to abide by the transaction and sue for damages by bringing a tort action of deceit or to disaffirm and seek restitution. Also, he may set up the other's fraud as a defense, in whole or in part, to an action by the other on the contract or to the other's suit to cancel the contract.\(^9\)

To some extent the present discussion of restitution for fraud overlaps the field of "waiver of tort," which has already been considered,\(^10\) under which head relief is allowed by action of indebitatus assumpsit against a fraudulent converter of money or chattels and against one who by fraud has obtained the benefit of another's services. Cases in which specific restitution of a res is sought, or where plaintiff seeks to rid himself of something which he received in the course of a fraudulent transaction,\(^11\) since the claimant requires more than a mere money judgment, are not normally classified under waiver of tort, although of course they involve the underlying principle of restitution against a tortfeasor to prevent his unjust enrichment at the claimant's expense.\(^12\)

The requirement of good faith condemns as fraudulent not only affirmative misrepresentations knowingly made but also intentional concealment and even conscious non-disclosure where there is a duty to disclose.\(^13\) The Restatement of Restitution, after pointing out that

\(^9\) Kent v. Clark, 20 Cal. (2d) 779, 128 P. (2d) 868 (1942).
\(^11\) In Deckert v. Independence Shares Corporation, 311 U.S. 282, 61 S.Ct. 229 (1940), it was pointed out, with citations of authority, that a suit for rescission of a contract for fraud and restitution of the consideration paid, including relief against a transferee which had received some of the payments thus procured by fraud "may be maintained in equity, at least where there are circumstances making the legal remedy inadequate."

\(^12\) See the earlier reference to the equity doctrine as to specific delivery of a chattel wrongfully withheld, 45 Mich. L. Rev. 944 (1947). Waiver of tort so called is not available in some jurisdictions against a converter of a chattel who has not sold it. [See cases cited in Reporters' Notes to Restitution Restatement, § 128, comment h (1937)]. It is submitted, however, that under the principle now under discussion rescission and restitution should be available against such a fraudulent tortfeasor in equity if not by action at law, although he has not sold the chattel in question. The writer knows of no decision on this point.

\(^13\) 2 Contracts Restatement, §§ 471, 472 (1932); Restitution Restatement, § 8 (1937).

In Rogers v. Warden, 20 Cal. (2d) 286, 125 P. (2d) 7 (1942), the plaintiff's complaint alleged that the defendants, concealing the fact that plaintiff owned mineral
except in a few situations there is no general duty upon a party to a transaction to disclose facts to the other party,\textsuperscript{14} states that "a person who, before the transaction is completed, knows or suspects that the other is acting under a misapprehension which, if the mistake were mutual, would cause the transaction to be voidable, is under a duty to disclose the facts to the other."\textsuperscript{15} A dramatic instance of this rule is found in \textit{Clauser v. Taylor},\textsuperscript{16} where it was held that a non-disclosure by a seller of land that the land had been filled entitled the buyer to rescind the transaction.

Similarly in \textit{Conkling's Estate v. Champlin},\textsuperscript{17} gifts of money made to an elderly and blind widow in the mistaken belief that she was destitute were held recoverable from her estate. The court pointed out that although the record was silent as to any fraudulent misstatement on her part "the facts are such as to justify a conclusion of non-disclosure."

On the other hand, a non-disclosure which one has no reason to believe will affect the other in entering into the transaction, is of no legal significance.\textsuperscript{18}

\textsuperscript{14} \textit{Accord:} Haddad v. Clark, 132 Conn. 229, 43 A. (2d) 221 (1945).
\textsuperscript{15} Section 8, comment b (1937).
\textsuperscript{16} 44 Cal. App. (2d) 453, 112 P. (2d) 661 (1941), quoting 2 CONTRACTS RESTATEMENT, § 472 (b) (1932). But in \textit{Swinton v. Whitinsville Savings Bank}, 311 Mass. 677, 42 N.E. (2d) 808 (1942), a failure by a seller of a house to disclose that it was infested with termites was held not an actionable fraud, on the ground that since the parties were dealing at arm's length there was no duty of disclosure.
\textsuperscript{17} 193 Okla. 79, 141 P. (2d) 569 (1943), quoting \textit{RESTITUTION RESTATEMENT}, §§ 9, 26 (1937). In \textit{Old Men's Home v. Lee's Estate}, 191 Miss. 669, 2 S. (2d) 791 (1941), the value of gratuitous board and lodging procured by fraudulent misrepresentations of the donee that he was a pauper and unable to earn a living was recovered from his estate. See 41 Mich. L. Rev. 149 (1942). Both of these cases are cited earlier in this article.
\textsuperscript{18} In \textit{Dusenka v. Dusenka}, 221 Minn. 234 at 239-240, 21 N.W. (2d) 528 (1946), a son had purchased his father's half interest in their partnership in a liquor tavern in consideration of the son's promise to support and maintain his father during his lifetime, subject, however, to the understanding that the father would continue to assist in the operation of the business. In ignorance of this transfer, plaintiff, wife of the senior Dusenka and defendant's stepmother, continued each day to accompany her husband to the tavern, where she cooked his breakfast and at times performed other comparatively light services, such as tending bar for patrons and doing a certain amount of cooking, cleaning and scrubbing. She performed these services without expectation of pay and with the primary purpose of easing the daily tasks of her sick and ailing husband. Her claim to compensation was denied, the court saying: "If plaintiff had been informed of the transfer of her husband's interest, there is no reason to suppose, under all the circumstances of this case, that she would have altered
Typical of rescission and restitution for fraud is *Lang v. Giraudo*,\(^9\) where a plaintiff, who had conveyed land to defendant, induced by defendant's fraudulent representations as to her financial ability, was held entitled to bring suit to rescind the conveyance, upon reimbursing the grantee for her payments made for taxes and upon an outstanding mortgage.

In *Rogers v. Warden*,\(^20\) the plaintiff, a widow without business experience, was not aware that she was the owner in fee of mineral rights in certain land. The defendants, concealing from her the fact of ownership, fraudulently represented to her that one of them was the owner of the lots, that they were of little or no value and that large amounts of taxes were outstanding upon them and that plaintiff had no rights to the lots. They induced her to give them a quitclaim deed for the purpose, as they said, of removing a technicality in the title so that the lots would be marketable. A demurrer to a complaint setting up the above facts and seeking cancellation of the quitclaim deed was overruled.\(^21\)

An interesting case is *Seeger v. Odell*.\(^22\) Here the complaint alleged that a mortgage on the plaintiff's land held by one of the defendants had been foreclosed and the land bought in by the mortgagee; that this mortgagee and the other defendants, through an attorney, falsely and fraudulently stated to the plaintiffs that their equity in the land had been sold to two of the defendants in satisfaction of a money judgment secured by them (whereas in fact there had been no execution issued and no sale of the land) and that consequently the plaintiffs had no further interest in the land; that nevertheless the defendants desiring, as they said, to enable plaintiffs to get some return on the land, induced them to join with the mortgagee in an oil lease of her course of conduct or her expectations in the slightest degree, and for this reason we can attach no significance to, nor imply any breach of good faith in, defendant's failure to disclose his purchase of the father's interest. . . . Construing this evidence in the light most favorable to plaintiff, we hold that the court properly directed a verdict for defendant.\(^23\)

---

20 20 Cal. (2d) 286, 125 P. (2d) 7 (1942).
21 The court pointed out that not only did defendants make positive misstatements of fact, but also "when defendants undertook to tell the plaintiff why they wanted a deed from her, they were under a duty, even in the absence of a confidential relationship, to disclose the facts within their knowledge relating to her rights in the lots and the true reason why they were seeking the deed." 20 Cal. (2d) 286 at 289-290, 125 P. (2d) 7 at 8 (1942).
22 18 Cal. (2d) 409, 115 P. (2d) 977 (1941); the case is noted in 30 Cal. L. Rev. 197 (1941).
the land to the other defendants, by the terms of which lease the plain­
tiffs were to receive a $2½ per cent royalty; that the well subsequently
drilled by the defendants yielded a profit of more than $100,000. The Supreme Court, reversing a judgment on the pleadings for the defendants, held that on the facts stated in the complaint the plaintiffs were entitled to set aside the foreclosure sale, upon payment of the mortgage debt, to rescind the lease and to have an accounting of the profits received. 23

In Appeal of Robie, 24 a widow, who was also her husband's admin­
istratrix, by fraudulent statement as to the size of the estate, induced the plaintiff who was entitled by law to one-half of the estate, to assign her share to the widow in return for a sum equal to about one-tenth of the amount to which she was actually entitled. The court rescinded the assignment, stressing the confidential relation between the parties and the circumstance that the facts were well known to the one party but not to the other who lived in a different state.

As in the cases involving reformation, relief by way of rescission and restitution may often be had not only against the defrauding party but also against his transferee with notice. Thus in Miller v. Graves, 25 a client had made an oral agreement that the plaintiff, his attorney, should have as his contingent fee a one-third interest in the land that the attorney might recover for his client. Nevertheless, the client had subsequently conveyed her interest to another who took with notice of this agreement. The court held that the attorney was entitled to a personal judgment against the client for the reasonable value of his services 26 and also to have the conveyance to the client's grantee set aside on the ground that it was a conveyance in fraud of creditors, so that the property might be made subject to execution to enforce plaintiff's judgment against his client.

A fantastic case where restitution by way of cancellation of a docu­
ment was granted against a donee beneficiary for the fraud of his donor is Columbian Mutual Life Insurance Company v. Martin. 27 Martin induced his ignorant young employee, George, in whose life Martin had no insurable interest, to obtain from plaintiff life insurance

23 Citing Restitution Restatement, §§ 28, 65 (1937); Torts Restatement, §§ 526, 537, 539, 540, 541, 542 (1938). When the case went to trial the plaintiffs did not succeed in sustaining their charge of fraud. See Seeger v. Odell, 64 Cal. App. (2d) 397, 148 P. (2d) 901 (1944).
24 141 Me. 369, 44 A. (2d) 889 (1945).
27 175 Tenn. 517, 136 S.W. (2d) 52 (1940).
company a life insurance policy payable to George's estate. Martin paid the premiums and intended to acquire ownership of the policy, as he had done in the case of several other similar policies on the life of George, with the purpose of murdering George and getting the proceeds for himself. Martin murdered George. Suit was brought by the company to have the policy delivered up and cancelled; George's administratrix filed a cross-bill claiming the amount of the policy. The court held that Martin's fraudulent purpose precluded George's estate from claiming the benefit of the contract, since George, although not a party to Martin's fraud, had not furnished any consideration for the contract, but "was a donee of the policy and its benefits" and "a person, though innocent, cannot avail himself of any advantage obtained by the fraud of another, unless there is some consideration moving from himself."^{28}

D. Mistake

I. Mistake, innocent misrepresentation and fraud contrasted. The legal consequences of mistake and innocent misrepresentation differ sharply from those which follow fraud. Fraud gives rise to an action of tort as well as to right to avoid or rescind a transaction induced thereby and, where necessary, a right to have restitution. Mistake in the inducement to a contract or other transaction creates no tort liability, nor in most jurisdictions does an innocent misrepresentation do so even though negligently made,^{29} although the rights to avoid and rescind are much the same in the case of fraud.^{30} Further, as is pointed out in the Restatements,^{31} if the claimant's mistake was caused by the other's fraud it is sufficient that the fraud was one of the circumstances

^{28} 175 Tenn. 517 at 523, 136 S.W. (2d) 52 (1944); citing 2 Contracts Restatement, § 477 and comment a (1932); 5 Williston, Contracts, rev. ed., § 1518 (2d) (1936). See also Restitution Restatement, § 17 (1937).

^{29} See Prosser on Torts, § 701 et seq. (1941). Whether a given statement, known or suspected by the utterer to be false, is to be deemed actionable or whether it should be regarded as mere promise or prophecy, sellers' talk or opinion, apparently is determined by the same test when rescission or restitution is sought as when a tort action of deceit for damages is brought. Note, however, the frequent use of the misleading term "constructive fraud" in the equity cases, especially the older ones, as descriptive of mistake. Pomeroy uses the term "constructive fraud" to cover a multitude of situations. See 3 Pomeroy, Equity, 5th ed., §§ 922-974a (1941). See also Prosser on Torts, § 709 (1941).

^{30} See Restitution Restatement, § 28 (1937). The amount of recovery may, however, be greater against a fraudulent defendant than against an innocent one. See Restitution Restatement, § 155 (1937).

^{31} 2 Contracts Restatement, § 476 (1932); Restitution Restatement, § 9 (1937).
which induced the claimant's conduct, but where the mistake is caused by an innocent misrepresentation or wrongful non-disclosure the mistake must be as to a matter which is material, that is, "likely to affect the conduct of a reasonable man with reference to the transaction in question."  

2. Unilateral mistake in bargaining. As has been pointed out, unilateral mistake in the course of a bargaining transaction in the absence of fraud or guilty knowledge on the part of his adversary, does not entitle one to reformation. Nor do the authorities generally grant rescission and restitution in such a case; although there are numerous dicta and an occasional decision to the contrary. Professor Williston explains that to grant rescission would deprive the other party of his bargain honestly entered into, which runs counter to the objective theory of contracts. Professor Sharp has long contended that rescission should be granted for unilateral mistake with proper safeguards to protect the interest of the other party. California has construed certain code provisions as allowing such relief, but only where the other party can be restored to substantially his former position and subject to the provision that the court may require the claimant to make compensation to the other party if justice so requires.

---

82 Restitution Restatement, § 8 (2), § 9 (2) and comment b thereon (1937). 2 Contracts Restatement, § 470 (1932). This distinction is pointed out and the above noted sections of the Restatement are quoted in New York Life Insurance Co. v. McLaughlin, 112 Vt. 402, 26 A. (2d) 108 (1942).

83 Supra, p. 1037.


85 Often in a case denying reformation for unilateral mistake a court will volunteer the statement that were plaintiff seeking rescission the holding might well be otherwise.

86 Notably the well-known situation involving an erroneous bid. See 5 Williston, Contracts, rev. ed., § 1578 (1936).


Of course if the error is known to the other party when the trans­
action is entered into, there is no question as to the right to rescind.41

Typical of the prevailing doctrine denying relief for unilateral
mistake in the formation of a contract is In re Davenport's Estate.42
The plaintiff, in reliance upon allegedly fraudulent statements of
friends and relatives of an insane woman that she was without property,
entered into a contract with her guardian, which was approved by the
court, to care for and support the lunatic for $15 a week. Upon the
woman's death it was discovered that she had sufficient means to justify
a more adequate compensation. Plaintiff’s claim for additional compen­
sation was refused. The court pointed out that the guardian was not
responsible for the misstatements and that “the claimant got what she
bargained for whether the representations were true or false.” 43

3. Mutual mistake in bargaining. Rescission of a contract or convey­
ance for mutual mistake as to a basic fact and restitution of any benefits
conferred thereunder is granted almost as a matter of course, although
there may be some dispute as to just what is a mistake as to a basic
fact.44 In many situations, however, this point is clear. Thus in the
well-known case of Scott v. Coulson,45 the sale of an insurance policy
was rescinded because made in the mistaken belief of both parties that
the insured was still alive, which assumption, although as to a collat­
eral fact, “was a circumstance that went to the root of the matter.”

Another obvious case is that where the parties contract for the pur­
chase and sale of a nonexistent thing in the mutually mistaken belief
of its existence, for instance a sale of a dead horse, both parties believ­
ing it to be alive.

So where the parties contract with reference to a house which they

41 Kemp v. United States, (D.C. Md. 1941) 38 F. Supp. 568. (A mistake in a
bid submitted by the plaintiff was known to the government official in charge. Plaintiff
promptly reported his mistake, but cancellation was refused whereupon he declined to
perform. He sued under the Tucker Act for money due on other contracts. The
government set up a counterclaim for damages for breach of the first contract. The
court held that the contractor was not liable.) Accord: Connecticut v. F. H. McGraw
& Co., Inc., (D.C. Conn. 1941) 41 F. Supp. 369. See also Lange v. United States for
Use of Wilkinson, (C.C.A. 4th, 1941) 120 F. (2d) 886.
42 140 Neb. 769, 2 N.W. (2d) 17 (1942).
43 140 Neb. 769 at 778, 2 N.W. (2d) 17 (1942).
44 Restitution Restatement, § 9 (3) (1937). Baron Bramwell's notion that
"the mistake must be as to a fact which, if true, would make the person paying liable to
pay the money" [Aiken v. Short, 1 Hurl & N. 210, 156 Eng. Rep. 1180 (1856)],
although still occasionally repeated in the English cases, for example, Ayres v. Moore,
[1940] 1 K.B. 278, is commonly disregarded by the American courts. See Restitu­
tion Restatement, § 23 (1) (1937), and the authorities cited in the Reporters’
Notes to that section.
believe to be on a lot controlled by the seller while in fact it is upon a lot owned by another, the transaction is voidable. In Passent v. Peter Vredenburgh Lumber Company, the plaintiffs had bought from defendant lumber company a house built by it and believed by both parties to be on lot 429 and obtained a deed of that lot from the owner of record, defendant Wanless, plaintiffs giving a mortgage to an insurance company in consummation of the purchase. Several years later it was discovered that the house was on lot 426 which was not owned by the defendant. The owner of lot 426 disclaimed any interest in the house or any rents and claims for rents. The court upheld a decree providing that upon reconveyance of lot 429 to defendant lumber company the plaintiffs were entitled to cancellation of their note and mortgage which the lumber company had purchased in the meantime and to repayment of their purchase money and payments made on the mortgage and the value of their improvements, less the rents received and the rental value of the premise while occupied by the plaintiffs.

A release for a minor injury executed in the mutually mistaken belief as to the character or extent of the harm for which the releasee is responsible is usually held not to preclude an action for such unknown injury. But where the release expressly includes all injuries, known or unknown, courts sometimes deny relief for an injury the existence of which was unknown to the parties at the time the release was executed. However, it was held in Hume v. Moore-McCormack Lines, Inc. that a seaman, being a ward of Admiralty was not bound by such a provision when it later appeared that at the time he signed the release he was not aware that he had contracted tuberculosis by reason of the shipowner’s negligence in supplying improper sleeping quarters on board its vessel.

In Backus v. Sessions, a release expressed to be “in full satisfaction of all claims” but given for supposedly minor injury suffered by plaintiff in an automobile collision was held inapplicable to a serious injury of which the parties were ignorant at the time.

48 See the three different views of such a release expressed by the three judges in Ricketts v. Pennsylvania R.R. Co., (C.C.A. 2d, 1946) 153 F. (2d) 757.
49 (C.C.A. 2d, 1941) 121 F. (2d) 336.
50 17 Cal. (2d) 380, 110 P. (2d) 51 (1941).
51 The court relied on the provision of Cal. Civ. Code, § 1542 (1941): “A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.”

The case is noted in 30 Cal. L. Rev. 111 (1941), where it is suggested that the result ought not to have been the same had the release specifically included “all
4. *Ambiguous agreement.* Another illustration of a situation resulting in restitution is that where the parties to a transaction believed erroneously that they have entered into a contract with each other and money was paid or services rendered under the supposed contract. It is obvious that a duty of restitution should arise. The doctrine is well illustrated by the facts of *Meem–Haskins Coal Corporation v. Pratt,* where there was a misunderstanding as to the price to be paid for certain stone work done by plaintiff for defendant, the contractor believing he was to receive $1.50 per cubic foot, the owner that he was to pay $13.50 per cubic yard. The court ruled that the contractor should recover on a quantum meruit, saying that “Under such circumstances, the law presumes that the defendant agreed to pay the reasonable value of the services.” As previously noted, the court described this as a “contract implied in fact,” which seems difficult to sustain.

5. *Compromises.* Where parties compromise a dispute, ordinarily the compromise cannot be rescinded for mistake, since by their agreement of compromise the parties have intended to assume the risk of a mistake as to the matter compromised. Indeed, one may assume the risk of a mistake even though no compromise is involved. Thus in *Aldrich v. Travelers Insurance Co.,* the deceased, aged 67, paid defendant $5,000 for an annuity contract to pay her $31.70 monthly during her life. She died of cancer in less than a year. On a bill to rescind the transaction for mutual mistake as to the state of her health (no one knew she had a cancer) and for unconscionableness the court, reversing the decree below, held for defendant on the ground that the parties had assumed the risk.

On the other hand, if a compromise agreement was itself based upon an assumed basic fact as to which both were mistaken, it may be rescinded because of such underlying mistake. A payment made upon a life insurance policy is not recoverable upon discovery that the insured is still alive where there was doubt or the insurer assumed the risk of that contingency, usually by way of an agreement of compromise.
The rule is otherwise, however, where the payment is made under mutual mistake as to the death of the insured as to which there was no doubt. Thus in *Pilot Life Insurance Co. v. Cudd*, payment was made to the beneficiary of a policy, both parties believing mistakenly that the insured was dead, inasmuch as the ship on which he was employed had long been overdue and presumably lost or sunk by enemy action. Restitution was allowed of this payment when it later appeared that the insured was a prisoner of war in Japan.

In *Deibel v. Kreiss*, plaintiff, as his fee in an action to contest a will, took an assignment of a 2.5 per cent interest in any recovery that might be made. The contest was successful, but the inventory revealing that the net value of the estate was very small, plaintiff accepted as his fee a somewhat smaller percentage. Subsequently a savings bank account of the deceased amounting to upwards of $4,500 came to light. Held that plaintiff properly sued at law to collect the balance of his fee since he was entitled to rescind his accord and satisfaction and have restitution of the status quo ante because of the mutual mistake as to a material fact.

An extreme but doubtless sound decision is *Farhat v. Rassey*, where the parties to a law suit, after the case had been submitted to the trial judge, settled the claim for $1,400, not knowing that the judge had already filed his opinion awarding the plaintiff $3,933.33. Plaintiff's motion to repudiate the settlement and to enter a decree on the findings of the trial court was granted, the court pointing out that this was not a mistake of a doubtful, disputed, unassumed fact leading to the compromise, but that the basic assumption upon which the settlement rested was wrong in fact. Thus the state of mind of all the parties at the time of the settlement was not in accord with the fact that the judge had rendered his decision.

It is difficult, however, to sustain *United States v. Garland*, where plaintiff surrendered to defendant his life and disability insurance policy by exercising a cash surrender option included therein, in mutual

---

58 208 S.C. 6, 36 S.E. (2d) 860 (1945).
59 (Ohio App. 1943) 50 N.E. (2d) 1000.
60 Quoting 5 WILLISTON, CONTRACTS, § 1570 (1936). "Where a mistake as to the quantity, quality, or characteristics of the subject of a bargain is due to a mutual mistake regarding some means or measures which the parties took for fixing the quantity, quality or value of the performance rendered by one party, it seems clear that there may be a rescission."
ignorance of the fact that plaintiff had been permanently and totally disabled. The court denied plaintiff's suit to rescind the transaction for mutual mistake and enforce the disability provisions, on the ground that this was not a case of mutual mistake of fact, but an ordinary resolution of a doubtful claim. 63

6. Mistake as to area on sale of land. Cases involving fraud or mutual mistake as to the acreage of land sold by one party to another continue to arise where restitution is granted because the payor was mistaken as to the extent of his duty under the contract. 64 The general rule is that if the sale was specifically at so much per acre or other unit any overpayment is recoverable when the acreage is found to be less than what the seller had represented or what the parties had both believed. 65 Although relief is usually granted by action of assumpsit, this is in substance a form of reformation. 66 Where the sale was manifestly a sale by the tract, or "in gross," the purchaser is usually without remedy since he is deemed to have assumed the risk of a deficiency. But the discrepancy may be so great as to give rise to an inference of fraud in which case, of course, the purchaser at his election may rescind the transaction or sue for damages.

The troublesome question is to determine whether the sale was really at so much per acre or other unit or one where the price was determined by the supposed acreage on the one hand, or on the other hand was a true sale in gross. The most thorough analysis yet worked out is that of the Kentucky decisions of which the latest exponent is Humphries v. Haydon. 67 Here on a transaction involving the transfer of a farm of a specified number of acres restitution of an overpayment was allowed when a survey revealed a deficiency of nearly 13 per cent. The court said in part:

"The law of Kentucky with reference to the quantity or area of land sold in gross was laid down definitely by Chief Justice Robertson 110 years ago in Harrison v. Talbot. ... Transactions were classified into four kinds and the legal remedies for each was defined. That law has become a rule of property in the sense that

63 The case is criticized in 42 Col. L. Rev. 482 (1942).
64 As is pointed out in Restitution Restatement, § 21 and comment a (1937).
66 See Evans v. Renfroe, (Tex. Civ. App. 1943) 170 S.W. (2d) 636, where reformation of a lease and restitution of overpayments already made was granted.
67 297 Ky. 219, 179 S.W. (2d) 895 (1944). The 10 per cent rule as stated in this case does not apply where the sale is in terms by the acre or other unit. See cases cited in 153 A.L.R. 10 (1944).
it has been recognized by the courts as being a part of every conveyance of land. Many cases have arisen in which there was difficulty in determining whether the particular sales were within the second or the third category. The former embraces a sale by the tract in which a supposed or estimated quantity of land was mentioned or referred to in the contract, but only as being descriptive and under such circumstances as to show that the parties intended to risk the contingency of quantity. The latter embraces a sale in which it was made evident by certain extraneous circumstances, conduct and conversations that the parties did not contemplate or intend to risk more than the usual rates of excess or deficiency in similar transactions or as might reasonably be regarded as within the range of the ordinary contingency. It has also become a rule of property of the same character that 10 per cent of the quantity the land was represented to contain is the criterion of the reasonable or ordinary contingency; in other words, that if the difference is 10 per cent or more, the party suffering the loss is entitled to redress, which in an executed transaction is ordinarily the right to recover the proportionate sum paid. The idea is that the disparity is so great as probably not to have been within the contemplation of the parties, and the principle that one will not be permitted to get something for nothing. The law raises an implied contract to adjust the matter on the basis of mistake or deceit.”

The opposite situation, where there is a large excess of land sold by the acre, came up in another late Kentucky case, *McGeorge v. White.* Here White by letter offered Mrs. McGeorge $50 an acre for her land, saying that he understood it contained about ten acres. She accepted the offer, writing him “I have no idea how many acres I have, but I guess there is ten or more acres.” White sent his check for $250 promising to pay the balance on receipt of the deed. A survey revealing that the land contained 17 1/3 acres, White refused to go on. Mrs. McGeorge sued him for specific performance. He denied liability and sought restitution of his $250. The court decided in favor of White, stating, first, that there had been no meeting of the minds on this material part of the subject matter of the contract, and secondly, that even if the transaction was not in fact a sale by the acre, in any event an excess of 73 per cent over the estimated acreage was

---

68 297 Ky. 219 at 220-221, 179 S.W. (2d) 895 (1944).
70 The soundness of this analysis seems questionable.
beyond what the parties had intended to risk. Obviously, this is a just
decision, since otherwise great hardship might result.71

Whether the rate per acre should be reclaimed for a deficiency
is not entirely clear where the land conveyed has on it valuable im­
provements. In *Stuart v. Denman*,72 on a sale for $15 per acre of a
tract mistakenly believed to contain 1,600 acres there was a deficiency
of substantially 100 acres. The Court of Civil Appeals ruled that the
value of the buildings, $10,000, should be deducted from the purchase
price of $24,000 before computing the amount to be recovered. On
appeal the Supreme Court reversed this ruling,73 pointing out that it
was clear that the parties had spread the value of the improvements
out over 1,600 acres and determined that the value of each acre was
$15. It may be doubted that such a result would be reached in all
cases. Suppose, for example, that on the sale of a house and lot the
seller believes that it contains two acres, it later develops that the lot
contains but one acre. Would the court permit the vendee to buy the
house at half price just because the lot was only half as large as the
parties had believed it to be?

Perhaps a fairer rule in a case involving improvements or land of
equal value would be to allow restitution of the difference between
the price paid and the value of what the vendee actually received as
of the date of the sale.74

The same principle was applied in *Evans v. Renfroe*.75 Plaintiff
leased from defendant a ranch at a rental of 75 cents per acre. Plaintiff
had paid defendant his rent in the mutually mistaken belief that the
ranch contained 4480 acres whereas it later appeared that there were
only 3815 acres. Restitution of the overpayment was allowed. The
courts also reformed the lease to include a recital of the true acreage
and the rental due. Indeed it is submitted that the restitution granted
is in substance a reformation of so much of the transaction as has been

---

71 The annotation to this case in 153 A.L.R. 4 (1944) says that the decision
stands alone in allowing rescission on such facts and that a number of cases have required
the purchaser to pay the extra sum claimed by the vendor, although courts have some­
times allowed a vendor to rescind unless the vendee pays for the excess in acreage,
Lawrence v. Staigg, 8 R.I. 256 (1866), or have allowed the vendor to recover back
a proportionate part of the land conveyed to the vendee. Severeau v. Frazer, (Tex. Civ.
App. 1916) 189 S.W. 1003.


73 Denman v. Stuart, 142 Tex. 129, 176 S.W. (2d) 730 (1944).

74 In Murphy v. Boyt, (Tex. Civ. App. 1944) 180 S.W. (2d) 199, the per acre
price was recovered for a deficiency, the court noting that all the land was of the
same value.

consummated in order to make it conform to the intention of the parties.

Sometimes a mutual mistake as to the extent of work required under a contract will entitle a contractor to recover an additional sum for the extra work. Thus in *Transbay Construction Company v. City and County of San Francisco*, the plaintiff contracted to do the excavating for the foundation of a dam. Relying upon the defendant's honestly made estimate of 30,000 cubic yards to be removed, plaintiff made a corresponding bid. In fact, it was necessary to excavate 84,000 cubic yards. It was admitted that the defendant's estimate was as good as could have been made and there was no claim of misrepresentation. Finding that "circumstances unanticipated by the parties made radical changes in the character and amount of the work—, greatly increasing the expense," the court ruled that the contract should be deemed "abrogated" and a recovery allowed on a quantum meruit basis.

7. Gratuity conferred under mistake. A gift, being a non-contractual transaction, is rescindable for a material mistake on the part of the donor, particularly if there was non-disclosure of essential facts on the part of the donee. Thus in *Conkling's Estate v. Champlin*, a claimant who had for years paid an elderly and blind widow $100 a month under the misapprehension that she was in necessitous circumstances was allowed restitution from her estate.

Another instance of a gratuity conferred under mistake is *Byrd v. Byrd.* Here upon a divorce exclusive custody of a child was awarded to the wife and the husband was charged with an allowance for its support. Subsequently the wife and her second husband adopted the child, which relieved the father of his duty of support. In ignorance of the adoption he continued his allowance. The court granted restitution of the support payments made after the adoption as made "under a mistake of fact, or at the most a mistake of mixed law and fact."

---

78 The note on this case in 51 Yale L.J. 162 (1941) suggests that a simpler method would be to limit the scope of the contract to the work contemplated by the parties at the time of the contract was executed and to allow a quasi-contractual recovery for the "new and different work" as is sometimes done. The problem is somewhat like that as to the validity of an additional contract to pay for such unexpectedly burdensome work. See Lange v. United States for Use of Wilkinson, (C.C.A. 4th, 1941) 120 F. (2d) 886; Grand Trunk Western R. Co. v. H. W. Nelson Co., Inc., (C.C.A. 6th, 1941) 116 F. (2d) 823; Watkins & Son, Inc. v. Carrig, 91 N.H. 459, 21 A. (2d) 591 (1941).
79 193 Okla. 79, 141 P. (2d) 569 (1943).
80 (Ohio App. 1945) 69 N.E. (2d) 75.
81 The case falls clearly within "Mistaken Belief as to Existence of a Non-Contractual Duty to Pay," *Restitution Restatement*, § 19 (1937).
8. **Mistaken belief that a security or claim will result or be terminated.** Where a person transfers money or property to another in the belief that he will get something in return and does not, equitable principles require that he should be placed back, as nearly as may be, into his original position. Here it is sufficient that the benefit for which restitution is sought was conferred by reason of a unilateral mistake of the claimant.\(^82\) Thus, where an agent who has no authority to borrow money, nevertheless does borrow money from a person who mistakenly believes that the agent has such power, and the agent then uses the money so obtained to pay his principals’ debts, or places it in his principals’ bank account or remits the money to his principal, it is clear that the principal has benefitted. Being the beneficiary of a windfall, justice requires that he make restitution.\(^83\) On the other hand, where an agent in excess of his authority borrows money, banks it in his principal’s name and promptly withdraws and makes off with it, having had throughout an intention to obtain the money for his own purposes, it is obvious that the mere temporary crediting of the fund to his principal’s account constitutes no real benefit to the principal.\(^84\)

An instance of restitution by means of subrogation is that where money or property is fraudulently obtained from a claimant and used to

\(^{82}\) Provided that the other party is not a bona fide purchaser for value or has not changed his position or would otherwise be prejudiced by a judgment for restitution.

\(^{83}\) Duffy v. Scott, 235 Wis. 142, 292 N.W. 273 (1940) (Plaintiff furnished collateral and joined with the defendant’s agent in signing a note for $2,500, thus enabling the agent to borrow money from a bank in the defendant’s name. The agent had no authority to borrow money. The bank credited the money to the principal’s bank account upon which the agent had authority to draw. He did this to make good an amount which he had embezzled. The agent then transmitted to his principal a check drawn on this account for a slightly larger amount, in payment of the balance of the profits of the previous year. This check the defendant, in ignorance that it was the product of the agent’s unauthorized borrowing, deposited in his own bank and it was duly paid. The agent soon after absconded, whereupon it came to light that he had embezzled large sums from his principal. The bank sold plaintiff’s collateral and applied the proceeds in payment of the note. Held, in an action for money had and received, since “the defendant had received the avails of the $2,500 loan” and thus the plaintiff had conferred a benefit on the defendant through mistake, the defendant was liable to make restitution, citing the RESTITUTION RESTATEMENT, §§ 1, 6 and particularly 15, together with illustration 8 and the Reporters’ note thereto (1937). The court also mentioned AGENCY RESTATEMENT, §§ 97 and 98 (1933). Section 282 of the latter Restatement and in particular comment f thereon might well have been cited.

\(^{84}\) See AGENCY RESTATEMENT, § 282, comment g (1933). But see Woodward, QUASI CONTRACTS, § 76 (1913).

In Sumner v. Knighton (La. App. 1941) I S. (2d) 142, the plaintiff failed to show that money borrowed by an agent in excess of his authority was used for the benefit of the principal.
discharge a mortgage or other lien of an innocent obligor. In *Wilson v. Todd*[^85^], a husband used money acquired by fraud from plaintiff to discharge a mortgage securing a debt on which he and his wife were jointly liable. The claimant was properly subrogated to the rights of the encumbrancer against the wife since the transaction had resulted in her gratuitous enrichment by the discharge of the encumbrance, at the expense of the defrauded plaintiff.[^86^]

In accord with the rule that one who pays money to or for the benefit of another in the mistaken belief that he thereby acquires a valid right against that other is entitled to restitution,[^87^] was the case of *Schram v. Burt*.[^88^] Burt and his wife were the owners of a building lot as tenants by the entirety. To finance the building of a house on this lot Burt obtained a bank loan giving a note and mortgage signed by himself, but on which he forged the signature of his wife. The house was built and occupied by the couple for several years. Default occurred and the husband died, whereupon for the first time the mortgagee and its assignee, the plaintiff, learned of the forgery. The court awarded plaintiff restitution against the wife saying that the circumstances created an equitable mortgage (which is "founded upon the ancient cardinal maxim which regards that as done which was agreed to be done and should have been done") since the husband's agency to represent the wife both in building the house and in this loan transaction was clear. It is submitted that even without proof of such an agency the lender should have been entitled to relief.

In *Gladowski v. Felezak*,[^89^] an unincorporated lodge called the "Nest" deeded to an incorporated club, having substantially the same membership, certain land against which there was a judgment lien for $3,000. The clubhouse on this land had been seriously damaged by a flood. The club mortgaged the premises to plaintiff to secure a loan of $6,999 to enable it to pay the judgment and restore the building. After the judgment had been satisfied, the required repairs made and $2,000 paid on account of the mortgage debt, it was discovered that

[^85^]: 217 Ind. 183, 26 N.E. (2d) 1003 (1940).
[^86^]: The court said that since the wife after learning of the fact had failed to disavow the acts of her husband she was deemed to have ratified them and was therefore estopped to deny his authority to act for her. Is not this but another way of saying that she had been unjustly enriched at the expense of the claimant? However, there is a well-recognized doctrine that benefits received by the unauthorized act of one who purports to be the recipient's agent must be restored unless the purported principal is willing to adopt the transaction. See *Agency Restatement*, § 99 (1933).
[^88^]: (C.C.A. 6th, 1940) 111 F. (2d) 557.
[^89^]: 360 Pa. 660, 31 A. (2d) 718 (1943).
the conveyance from the lodge to the club was illegal and void, and consequently that plaintiff's mortgage was also void. In granting plaintiff an equitable lien upon the property in the amount of $4,000 and interest, the sum still due on the mortgage, the court said: "... the mortgage money was used wholly for the benefit of the property which has now been restored to the ownership and possession of the Nest. ... If the Nest were to be allowed, without any equitable obligation on its part, to hold the property freed of that judgment and with its club-house restored by the repairs made upon it, and plaintiffs were to be denied the right to recover the money loaned by them in good faith and used, in the manner indicated, for the ultimate benefit of the Nest, every proper conception of morals and fair dealing would be violated. It is not as if the mortgage money had been devoted to the erection on the premises of some structure or improvements which the Nest, as owner, neither required nor desired."

Where by reason of a mistake of fact money has been paid to the wrong person, if the payor has not already obtained restitution, the person actually entitled to the money may obtain it from the payee by an action for money had and received. In DuBois v. United States Fidelity & Guaranty Company, moneys due a contractor had by mistake been paid to the contractor's surety. The contractor had judgment against the surety.

9. Restitution of taxes. The harsh rule of the common law that taxes once paid under mistake and without duress are not recoverable from the taxing authority was dramatically illustrated in Pettibone v. Cook County where for forty-five years the plaintiff had paid upwards of

---


91 341 Pa. 85, 18 A. (2d) 802 (1941).

92 The court cited Restitution Restatement, § 126 (1937).

93 Maricopa County v. Arizona Citrus Land Co., 55 Ariz., 234, 100 P. (2d) 587 (1940) (though mutual taxes on improvements upon adjoining land were assessed to plaintiff and paid by him.) North Miami v. Seaway Corp., 151 Fla. 301, 9 S. (2d) 705 (1942) [no recovery of taxes paid under mistake of law without duress, citing 3 Cooley on Taxation, 4th ed., § 1282 (1924)].

Recovery is often provided for by statute, Board of County Commissioners of Morgan County v. Doherty, 114 Colo. 594, 168 P. (2d) 556 (1946), although the statutes are sometimes strictly construed. See note collecting authorities, 165 A.L.R. 879 (1946).

94 (C.C.A. 8th, 1941) 120 F. (2d) 850. It might perhaps have been argued that since the land taxed was not within the state, the usual rule justifying retention of taxes was inapplicable.
$11,000 for annual real estate taxes levied by the defendant county on certain islands situated in a boundary lake lying partly in Canada and partly in the United States. The plat filed by the International Boundary Commission with the Secretary of State on October 27, 1931, determined that the islands in question were in Canada, but the plaintiffs did not discover this nor did the General Land Office recognize the newly determined boundary until 1934 when the Land Office filed its supplementary plat. Action for restitution was brought in 1939. Relief was denied on the ground that such payments as were not barred by the Statute of Limitations were not recoverable, since in Minnesota a tax, whether legally or illegally imposed, if paid without coercion or imposition, is deemed voluntarily paid and, in the absence of a statute otherwise providing, is not recoverable. The fact that there may be a moral obligation supporting the claim does not change the rule.

A number of courts have recently accepted the view of the Restitution Restatement that one who has paid taxes on land in the mistaken belief of ownership may recover the sum so paid from the true owner of the land to the extent that the tax could have been collected from that owner and may have an equitable lien on the land or be subrogated to the right of the taxing power against the true owner.

95 See § 43 (1) and comment b and illustration 7 thereon, and §§ 161, 162 (1937).

96 Morrison v. Mansion Realty Company, 38 N.Y. S. (2d) 41 (1942). (Plaintiff by mistake paid taxes on defendant's land. Although no money claim was enforceable because the tax was merely a lien upon the land, plaintiff was entitled to be subrogated to the right of the taxing authority as this requires no contract.)

Brookfield v. Rock Island Improvement Co., 205 Ark. 573, 169 S.W. (2d) 662 (1943) (Plaintiff under bona fide claim of title had paid taxes on defendant's land, Held, entitled to recover payments not barred by statute of limitations and to an equitable lien on the land to secure such payments).


In Home Owners' Loan Corp v. Murdock, 150 Pa. Super. 284, 28 A. (2d) 498 (1942), a mortgagee of part of a tract who had purchased the mortgaged tract of foreclosure and had paid taxes due on the entire tract was denied relief against a bona fide purchaser of that part of the tract not covered by the mortgage. The court dis-
A troublesome question arose in an Arkansas case where the mortgagor of a life tenant, having paid taxes thinking that the mortgagor owned the fee, was granted an equitable lien on the land enforceable by subrogation of the plaintiff to the right of the taxing authority. A vigorous dissent pointed out that the payment of the taxes was of no real benefit to the remainderman, since “by paying taxes for the life tenant the plaintiff has deprived the remainderman of his statutory right to declare a forfeiture of the life estate.”

10. Improvements. There has long been a controversy as to the right, if any, of one who under mistake as to ownership or authority makes improvements on the land of another. An unfortunate decision, in the opinion of the writer, is Lauffer v. Vial, where the defendant’s son had no authority in writing as was required by the local Statute of Frauds, made an oral lease of defendant’s land to plaintiff in consideration of plaintiff’s agreement to clear the land and make it fit for agriculture. The plaintiff cleared the land, but defendant refused to ratify the lease. Held, that the plaintiff was not entitled to compensation for the value of his services, since “it does not appear that defendant had knowledge of any agreement or proposed lease, or that she had reason to know of plaintiff’s purpose upon her lands, or that she knew he expended money and labor thereon under the belief that he had an agreement with defendant which was non-existent.”

The case of improvements made by a trespasser, however innocent he may be, is less strong where there is no relation of agency, even though that agent acts in excess of his authority. In Matter of City of New York, 157th Street Queens, it appeared that one Norton, having probated a will under which she was devisee of certain land, borrowed money from a bank on a mortgage loan guaranteed by the Federal Housing Administrator, which money was spent on improvements. Subsequently, the will was set aside for duress, fraud and undue influence, and a prior valid will was probated under which Royster was the devisee of the land. The Federal Housing Authority paid the mortgage debt to the lender bank and took an assignment of the bank’s default distinguished the case from the rule laid down in Restitution Restatement, § 43 (1) (1937).

There is a conflict as to whether taxes mistakenly paid to the wrong tax district within a state are recoverable. See note 94 A.L.R. 1223 (1935).

1058 MICHIGAN LAW REVIEW [Vol. 46

Holloway v. Bank of Atkins, 205 Ark. 598, 169 S.W. (2d) 868 (1943). The court also suggested that a clearing of ground preparatory to plowing and sowing is not a permanent improvement inuring to defendant’s benefit.

judgment against Norton on her notes. It was held that the Federal Housing Authority was not entitled to an equitable lien on the land since its claim was through Norton, a trespasser. A dissenting judge took the view that "Royster had no equitable right to profit at the expense of the Federal Housing Authority to the extent of $1,500 for the wrong done by Norton." 101

A more satisfactory conclusion is reached by the Supreme Court of Oregon in Jensen v. Probert,102 in which state there was no pertinent statute. The minority doctrine first announced by Story, J., in Bright v. Boyd,103 and followed in Michigan,104 that relief may be had in equity at suit of the occupier against the true owner, was expressly approved. However, since in the instant case the owner had himself brought suit in equity to quiet his title, the court finally relied upon the well recognized rule that he who seeks equity must do equity. By way of relief, as the building erected by the trespassing improver was small and without a basement and was not claimed by the landowner, the court directed that a mandatory injunction issue requiring the trespasser to remove his building and to restore the land to its former condition, a refreshing illustration of the elasticity of the equitable decree, instead of the usual remedy of giving the owner an option to make compensation for the improvement or else release the land to the improver upon his payment of its value exclusive of the improvement.105

I I. Improvements before judgment reversed. As to the right to receive compensation for improvements made by one in possession of land pursuant to a judgment of sale, which judgment was subsequently reversed, there is a conflict of authority. The purchaser is of course entitled to restitution of his purchase money and reimbursement for taxes paid by him. In justice, since he was in no sense a wrongdoer, he should also be recompensed to the extent that his improvements have increased the value of the land and occasionally he is given such compensation.106

101 A note in 40 Col. L. Rev. 145 (1940), suggests that the dissenting judge was right in saying that the Federal Housing Authority, as assignee of the judgment against Norton who had an apparent record title, was in the position of a bona fide purchaser rather than that of a trespasser.
102 174 Ore. 143, 148 P. (2d) 248 (1944).
103 1 Story 478, 4 Fed. Cas., No. 1875 (1841).
105 Many statutes allow relief to an innocent trespasser who has color of title.
In *Krahenbuhl v. Clay*, one who in good faith made improvements while he was in possession as purchaser under a tax sale, subsequently declared by the court to be void, was allowed the enhancement thereby caused in the value of the land to the true owner thereof.

In *Anderson v. Connolly*, the court denied recovery for improvements made by a mortgagor who remained in possession after foreclosure, saying: “If he thought the foreclosure was good, he had no reason to believe that he still retained title to the property. If, however, he thought the foreclosure was invalid, then he could not under the Betterment Acts have any claim for improvements against the mortgagee.”


A note in 41 Col. L. Rev. 1272 (1941) discussing the problem, points out that in Golde Clothes Shop v. Loew’s Buffalo Theatres, 236 N.Y. 465, 141 N.E. 917 (1923), a tenant who had been wrongfully deprived of the remaining two years of his ten year lease by a judgment of ouster subsequently reversed, was not required to pay for costly improvements whereby his little shop had been turned into an entrance to a movie theatre, since the improvements “did not increase the value of the [tenant’s] interest.” Other cases, however, deny compensation even though the improvement has benefitted the other party.

107 346 Mo. 111, 139 S.W. (2d) 970 (1940).