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## TAXATION - MISTAKE OF FACT - RESTITUTION - SUBROGATION

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## TAXATION — MISTAKE OF FACT — RESTITUTION — SUBROGATION —

Under the misapprehension of fact that he had an interest in the land, the plaintiff paid the taxes on land belonging to the defendant. The defendant did not know that the plaintiff intended to pay, nor did he promise, subsequent to payment, to reimburse the plaintiff. The action was brought to recover the amount of the payment, and for subrogation to the lien of the state for the taxes. The lower court denied relief; plaintiff appealed. *Held*, affirmed. *Federal Land Bank of Louisville v. Dorman* (Ind. App. 1942) 41 N. E. (2d) 661.

The *Restitution Restatement* takes a view opposed to that of the Indiana court.<sup>1</sup> It admits that at early common law, when a debt created a personal relationship between debtor and creditor, and debt claims were not assignable, a person could not make himself the creditor of another without that other's consent; for although the debtor might be willing to have *A* as a creditor, he might not be willing to have *B*. When however, these choses became freely assignable,<sup>2</sup> the personal relation of debtor and creditor could no longer be urged as a reason for denying restitution to one who paid the debt of another under a mistake of fact. Unclouded by the personal relation argument, it was simply a matter of restitution for benefits conferred under a mistake of fact. Although the validity of this analysis cannot be disputed, resort to it is unnecessary in the principal case. Here, the debtor-creditor relationship is not a personal one; the obligation to pay is founded on legislative declaration, not assent of the parties; the debtor exercised no selective processes to make the state his creditor.<sup>3</sup> On the basis of unjust enrichment, it is submitted that the plaintiff should have been granted restitution and subrogation.<sup>4</sup> It may be urged, however, that

<sup>1</sup> RESTITUTION RESTATEMENT, § 43 (1) (1937). "A person who, by payment to a third person, has discharged the duty of another or has released another's property from an adverse interest, doing so unintentionally or acting because of an erroneous belief induced by a mistake of fact that he was thereby discharging a duty of his own or releasing property of his own from a lien, is entitled to restitution from such other of the value of the benefit conferred up to the value of what was given, unless the other disclaims the transaction." At page 176, the Restatement sets forth the following hypothetical proposition, "A receives from the collector of taxes a notification of taxes due, describing lot X which is owned by B. Believing that it describes lot Y owned by him, A pays the tax. A is entitled to restitution from B." See also the Reporters' Notes on § 43.

In taking a view opposite to the Restatement, the court in the principal case relied on two earlier Indiana cases, *Carr v. Stewart*, 58 Ind. 581 (1877), and *McWhinney v. Logansport*, 132 Ind. 9, 31 N. E. 449 (1892). Since the situation is not one where reliance has been placed on existing law, the court might very well have reconsidered in the light of the Restatement.

<sup>2</sup> For a history of debt assignability, see: 2 WILLISTON, CONTRACTS, rev. ed., 1166 ff. (1936); 4 AM. JUR. 230, 246 ff. (1936); 6 C. J. S. 1051 ff. (1937).

<sup>3</sup> Legally, the state usually is not his creditor. See note 5 below.

<sup>4</sup> Cases are collected in annotations: 61 A. L. R. 587 (1929); 91 A. L. R. 389 (1934); 104 A. L. R. 577 at 609 (1936); 106 A. L. R. 1212 (1937).

Cases (limited to those involving a mistake of fact) supporting the Indiana court: *McMillan v. O'Brien*, 219 Cal. 775, 29 P. (2d) 183 (1934); *Massachusetts Mut. Life Ins. Co. v. Green*, 185 Mass. 306, 70 N. E. 202 (1904); *Bateson v. Phelps' Estate*, 145 Mich. 605, 108 N. W. 1079 (1906); *Maxwell v. Hatherly*, 170 Minn. 27, 211 N. W. 963 (1917); *Adams v. Taylor*, 149 Miss. 750, 115 So. 878 (1928); *Jacobs v. Webster*, 199 Mo. App. 604, 205 S. W. 530 (1918). Supporting the Restatement: *Kemp v. Cossart*, 47 Ark. 62, 14 S. W. 465 (1885); *Govern v. Russ*, 125 Iowa 188, 100 N. W. 325 (1904); *Baranowski v. Wetzel*, 174 App. Div. 507, 161 N. Y. S. 153 (1916); *Grosch v. Kessler*, 256 N. Y. 477, 177 N. E. 10 (1931); *Iron City Tool Works v. Long*, 4 Sadler (Pa. S. Ct. Cas.) 57 (1886); *Central Wisconsin Trust Co. v. Swenson*, 222 Wis. 331, 267 N. W. 307 (1936).

See also 9 ORE. L. REV. 65 (1929), dealing with the question of restitution of

the plaintiff's remedy should be limited to subrogation. Unless the legislature has declared otherwise, the state can proceed only against the land for the satisfaction of tax liability; it has no remedy against the landowner.<sup>5</sup> Would it not be inconsistent to impose a personal liability on the landowner merely because a third person has mistakenly paid the tax? The case assumes more than academic dimensions when the landowner believes the land to be worth less than the amount of the judgment for restitution. The situation is not inconceivable, particularly in times of deflated land values, but the "benefit conferred" will normally be the out-of-pocket payment by the plaintiff. Although the *Restatement* advocates restitution, it apparently requires a strict determination of the benefit conferred; <sup>6</sup> the hardship aspect then becomes inconsequential.

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benefits conferred on the land of another under a mistake of law; 21 MINN. L. REV. 218 (1937); Hope, "Officiousness," 15 CORN. L. Q. 25, 205 at 217 (1930).

Suppose, however, that a bona fide dispute existed between the landowner and the taxing authority as to tax liability at the time the mistaken payment was made. See *Montgomery v. City Council of Charleston*, (C. C. A. 4th, 1900) 99 F. 825.

<sup>5</sup> See 41 L. R. A. (N. S.) 730 (1913). No decisions, however, were found denying restitution on the ground that a tax on real estate was not the personal obligation of the landowner unless the legislature so provided.

<sup>6</sup> See note 1, above. Query, does the Restatement's clause providing for disclaiming the transaction have any significance in this connection?