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RESTITUTION—1961 TENNESSEE SURVEY

JOHN W. WADE*

I. SERVICES RENDERED

II. RESCISSION

III. LEGAL COMPULSION

“A person who has been unjustly enriched at the expense of another is required to make restitution to the other.” This is the first section of the *Restatement of Restitution*.¹ It indicates the principle underlying a field of the law co-ordinate with tort and contract. About a dozen cases during the survey period may be classified as raising a problem within this general subject. They do not cover the whole range of the field and have here been classified on a pragmatic rather than an analytical basis.

I. SERVICES RENDERED

Services are normally rendered under a contract which governs the nature of the services and the compensation to be given. This contract may be expressed, or it may be implied from the conduct of the parties, in which case some of the details of the contract may not have been spelled out. The services may also have been bestowed on a party gratuitously, with no intent to charge for them. But cases arise where there was no binding contract between the parties and the services should not be treated as a gift. In such circumstances the recipient may be held under a duty to make restitution. Four cases present the question of whether such a duty was raised.

In *Cotton v. Robert's Estate*,² a nephew resided with his family on his aunt's farm, on a crop-sharing basis. During her lifetime, the nephew and his family rendered various personal services (*e.g.*, driving an automobile, running errands, milking cows, tending sheep), and on her death, when he received less in her will than he anticipated he filed a claim against her estate. The court of appeals affirmed a dismissal of the claim. The court found no indication that the nephew had ever intended to charge for the services or that the aunt had expected to be charged for them, and it adverted to the well established “presumption” that “services are rendered gratuitously, from

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1. RESTATEMENT, RESTITUTION § 1 (1937).
2. 337 S.W.2d 776 (Tenn. App. W.S. 1960).

motives of affection and duty," when they are performed "by a member of a family on behalf of another member of the same family."³ It was the conclusion of the court that claimant had rendered the services in the hope that his aunt would provide for him in her will, and it followed the uniform rule that one who bestows benefits under such an expectation cannot sue for the value of the benefit when he is disappointed.⁴

In *Jennings v. Davidson County*,⁵ one Mosley had long been an inmate of the Davidson County Hospital as a pauper. Shortly before her death she came into possession of an estate, and the county claimed for the value of the services rendered. Early cases almost uniformly held that a governmental agency or other person who bestowed services on a supposed pauper could not recover for their value unless there was fraud involved. The holding was that the services were given gratuitously, and the fact that this was under a mistake was held to make no difference.⁶ A number of recent cases have regarded the mistake as controlling and have allowed recovery.⁷ Tennessee adopted this doctrine many years ago.⁸ The instant case extends this position by holding that the decedent's estate is liable for services rendered even if the decedent was in fact a pauper. The reason given is that the services were never really gratuitous, since they were ordered by law. "The patient at all times owed for the services."⁹ The court also held that the county was performing a governmental function in rendering the services, so that the six-year statute of limitations did not apply.

In *Woodard v. Bruce*,¹⁰ where a trust deed and note given for home improvements were cancelled for fraud and sharp dealing, it was held that the contractor was entitled to the value of his services in making

3. *Id.* at 780. For an extensive collection of cases on these presumptions, see Annot., 7 A.L.R.2d 8 (1949).

4. There are many cases to this effect. The rule goes back to the early English decision of *Osborn v. Governors of Guy's Hospital*, 2 Strange 728, 93 Eng. Rep. 812 (K.B. 1727); see also *Brown v. McCurdy*, 278 Pa. 19, 122 Atl. 169 (1923). The subject is treated in RESTATEMENT, RESTITUTION § 57 (1937). Illustration 1 under this section reads as follows: "A supports B, his aunt, for a number of years, indicating that he is doing so from a feeling of moral obligation for the family. He anticipates, although he does not so manifest, that his aunt will leave him her estate. B leaves her estate to charity. A is not entitled to receive compensation for his services."

5. 344 S.W.2d 359 (Tenn. 1961).

6. *E.g.*, *Chariton County v. Hartman*, 190 Mo. 71, 88 S.W. 617 (1905); *Chester v. Underhill*, 16 N.H. 6 (1844).

7. *E.g.*, *Old Men's Home, Inc. v. Lee's Estate*, 191 Miss. 669, 4 So. 2d 235 (1941); *Conkling's Estate v. Champlin*, 93 Okla. 79, 141 P.2d 569 (1943).

8. *McNairy County v. McCoin*, 101 Tenn. 74, 45 S.W. 1070 (1898).

9. 344 S.W.2d at 361. Many states have statutes affecting the municipality's right of recovery. See generally Annots., 125 A.L.R. 712 (1940), 29 A.L.R.2d 732 (1953).

10. 339 S.W.2d 143 (Tenn. App. W.S. 1960).

repairs on the home of complainant, "on a quantum meruit basis."

In *Nunnery v. Nunnery*¹¹ an attorney was held to be entitled to a reasonable fee for services rendered. He had been employed to arrange for the interpretation of a will and the partition and sale of certain real property. A designated fee was set for the first parcels of land. Later, while work on the case was proceeding, the attorney was discharged and other lawyers employed. When the litigation was finally completed and the sale took place, the attorney was held to be entitled to a reasonable percentage of the value of the property involved, and the value of the property was determined as of the time of the sale (it had increased greatly in value), rather than at the time the contract was initially entered into.

II. RESCISSION

A rescission of a voidable or apparently valid contract is often granted in order to prevent unjust enrichment. This year's cases illustrate some of the reasons why this is done. One of the most common reasons is fraud, as in the case of *Woodard v. Bruce*.¹² There, an elderly colored woman "of very poor mentality," having been notified by the city that she must make repairs on her home, was induced by defendants to enter into a contract for repairs at an excessive price and to give a note and deed of trust for payment at a rate much higher than she had any probability of paying. The court of appeals approved the holding of the chancellor below—that while mere inadequacy of consideration in itself may not be sufficient to grant relief unless very extreme, the situation is different when the accompanying incidents are inequitable. "In this case we have a contract made for insufficient consideration by a person of weak mind in necessitous circumstances. This amounts to constructive fraud."¹³ The defendants included not just the contractor but the person who had made the loan and the subsequent purchaser of the note. The former was held to have been a party to the original fraudulent conduct and the latter either to have known about it or to have intentionally and wilfully remained ignorant of it. The defense of bona fide purchase for value was therefore held inapplicable.¹⁴

A second case in which relief was granted from fraudulent conduct is *Williams v. Burmeister*.¹⁵ Like the *Woodard* case it arose in Memphis and involved a money lender and real estate dealer. The de-

11. 335 S.W.2d 737 (Tenn. App. W.S. 1959).

12. 339 S.W.2d 143 (Tenn. App. W.S. 1960). See text to note 10 *supra*.

13. *Id.* at 149.

14. See RESTATEMENT, RESTITUTION § 174 (1937) (treating notice).

15. 338 S.W.2d 645 (Tenn. App. W.S. 1959).

defendant here had engaged in a devious course of conduct to take advantage of a plaintiff in a necessitous condition due to an adverse judgment and impending sale of his real property. Defendant's scheme involved a "John Doe letter," a warranty deed, a lease-purchase agreement, a note and deed of trust and other instruments. "These several instruments were designed to confuse and deceive [plaintiff] into believing that he was actually saving his building though it would take him thirteen to fifteen years before it would be clear of debt. From the beginning [defendant] had by the provisions of forfeiture in the lease contract, what card players sometime call a 'lead pipe cinch' to declare the lease purchase contract forfeited at anytime he . . . thought it propitious so to do and thus become the legal owner of the entire fee in the property [worth more than \$30,000] at a total consideration of approximately \$20,000."¹⁶

The court held the defendant to be a constructive trustee, declared the warranty deed to be a mortgage, purged the transaction of all usury and granted other relief. Judge Carney's opinions in the two cases indicate that the court will be alert to detect "sharp practices" and to utilize its powers to protect the victims of such schemes.¹⁷

In *Life & Casualty Insurance Co. v. Jackson*,¹⁸ rescission was granted of certain insurance policies. The insured had epilepsy, and his answers in the application might have been treated as misrepresentations, but the court found this unnecessary since the policies had a "good health clause" providing that the company's liability should be "limited to the return of premiums if the Insured was not in sound health on the date of issuance and delivery of this Policy." The clause was held not to be waived, and the company was relieved of liability upon payment of the premiums.

*Chance v. Geldreich*¹⁹ is another case where the relief granted amounted to a rescission. Complainant conveyed certain property to defendants so that they could obtain a G.I. loan on it for her. Having done so, they conveyed it back to her, but she failed to record the deed. Subsequently they conveyed to another defendant, who knew of the transaction. This case involved a bill to remove the last deed as a cloud on title, and the relief was granted, despite the contention (and the holding in the lower court) that complainant should be denied relief because of unclean hands.²⁰ Defendants, however,

16. *Id.* at 654.

17. See generally, RESTATEMENT, RESTITUTION § 166 (1937).

18. 342 S.W.2d 720 (Tenn. App. W.S. 1960).

19. 337 S.W.2d 770 (Tenn. App. M.S. 1959).

20. The argument is essentially that the parties were *in pari delicto*, but the court held that the grantee of the deed sought to be removed was not a party to the G.I. loan transaction, and added that there was no real indication of illegality or fraud on anyone in that transaction, since the lender was fully aware of the details.

were allowed equitable liens for amounts expended on the property.

In *Post Sign Co. v. Jemc's, Inc.*,²¹ a receiver of a corporation sought to have the sole shareholder's note declared "tainted with usury and unjust enrichment" and purged of the usury. The relief was denied on the ground that the note was that of the shareholder, not the corporation, and the corporate entity could not be ignored.

In *Harwell Motor Co. v. Cunningham*,²² a complainant who had purchased an automobile while a minor was permitted to rescind the transaction two years later when he became of age, and to recover his money back. "[I]t is the law that a minor can disaffirm a disadvantageous contract not for necessities upon the attainment of his majority. . . ."²³ The court found that complainant had not fraudulently misrepresented his age and had not affirmed or ratified the contract after coming of age.

III. LEGAL COMPULSION

In *Jack Cole Co. v. MacFarland*,²⁴ complainant paid a privilege tax under protest and sued for recovery. The tax was held to be an income tax, not authorized by the state constitution and therefore unconstitutional and void. Recovery was allowed under a code provision,²⁵ but the principle on which the statute is based is the restitutionary principle that a payment made under coercion may be recovered back if it was not due.²⁶ In a similar suit the tax was held to be due, and recovery was not allowed.²⁷

21. 342 S.W.2d 385 (Tenn. App. E.S. 1960).

22. 337 S.W.2d 765 (Tenn. App. M.S. 1959).

23. *Id.* at 769.

24. 337 S.W.2d 453 (Tenn. 1960).

25. TENN. CODE ANN. § 67-2305 (1956).

26. See RESTATEMENT, RESTITUTION § 75 (1937) (void taxes and assessments).

27. *General Tel. Co. v. Boyd*, 343 S.W.2d 872 (Tenn. 1960).