Restitution -- 1958 Tennessee Survey

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Civil remedies may be grouped under three classifications: torts, contracts, and restitution. The plaintiff's objective in a tort action is a recovery for his loss which resulted from the defendant's wrongful act, the measure of recovery being the amount of that loss expressed in dollars. The plaintiff's objective in a contract action is a recovery for a breach of the defendant's promise, the measure of recovery being the net addition to the plaintiff's estate which would have resulted had defendant performed his promise. Restitution is a giving back of what has been taken away unjustly. The plaintiff's objective in a suit for restitution is a recovery of the specific benefit to defendant, or its value. The measure of the recovery in a suit for restitution is the addition to the defendant's holdings resulting from his wrongful act. To recover in restitution, the plaintiff must be out-of-pocket and the defendant must be in-pocket, and further, it must be inequitable for the defendant to keep the benefit.

A right to restitution may be enforced either by an action at law or by a suit in chancery. Substitutional redress may be obtained by way of a recovery of a judgment for a stated sum in an action at law, or specific reparation may be attained by way of an equitable decree that the defendant is a constructive trustee for plaintiff of the specific property of which the plaintiff has been deprived.

There are only five Tennessee restitution cases reported in the Southwestern Reporter for the year covered by this survey. The remedies sought in those cases were rescission, constructive trust and resulting trust. The cases will be analysed under those three headings.

**RESCISSON**

The general objective of the remedy of restitution is to restore the plaintiff to the position he was in before the occurrence of the transaction of which he complains. Even though the plaintiff has sufficient grounds for rescinding a contract, ordinarily he is not entitled to that remedy unless he puts the defendant back in the position the defendant occupied before the contract was made. *Christian v. Pan Am & Southern Corp.* shows, however, that a party who makes an alteration in a contract that is both fraudulent and material need not be restored to his former position.

A party who is guilty of making a fraudulent and material alteration in a written contract cannot recover on the contract. The Chris-
tian case goes a step further and also denies such a party the right to
be put back into the position he was in before the fraudulent alteration
was made. In that case a release of a prior lease was part of the con-
sideration for a new lease. After the new lease was executed, lessee
fraudulently inserted a clause in the new lease materially altering it
by requiring lessor to make repairs which would cost approximately
$3,000. The Tennessee Court of Appeals held (Judge Howard dissent-
ing) that lessor was entitled to a rescission of the new lease and
lessee was not entitled to reinstatement of the old lease.

CONSTRUCTIVE TRUST

Where a defendant acquires property under such circumstances
that he may not in good conscience retain the beneficial interest, equity
will declare him to be a constructive trustee of the property for the
person equitably entitled to it. This means that the party equitably
entitled to the property has the same remedies against the holder of
the legal title as he would have if such holder were an express trustee.
The constructive trust is merely a procedural device which will give
specific restitution of a received benefit in order to prevent an unjust
enrichment.

A defendant is not unjustly enriched, however, unless the plaintiff
is unjustly deprived of property to which the plaintiff is equitably
entitled. In the case of Rutherford County v. City of Murfreesboro\(^2\)
there was an enrichment of the defendant but no corresponding loss
to the plaintiff, since the plaintiff was never the equitable owner of
any part of the funds received by the defendant. There a contract
between TVA and the city permitted but did not require the city
to use as general funds that part of the revenues from its electric
system equivalent to taxes on that system. The city retained for its
general use that part of the electric system revenues which would
have been the equivalent of the state, county and city taxes, if that
system had been subject to taxes. It was held that there was no con-
structive trust for the benefit of the county in that part of the funds of
the electric system retained by the city which is the equivalent of the
county tax. The court found that the county tax equivalent was never
equitably owned by the county, since municipal property used exclu-
sively for municipal purposes is exempt from taxation.

Where a mortgagee forecloses on trust property and the trustee bids
in the property for himself, he can be compelled to hold the property
upon a constructive trust for the beneficiaries of the trust, subject to
a lien for the amount the trustee paid for the property. If a trustee
were permitted to make such a purchase for himself he would be

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\(^2\) 304 S.W.2d 635 (Tenn. 1957).
under a temptation to let the property be foreclosed and to discourage other bidders in order to get the property for himself below its market value. A trustee is in effect buying trust property for himself, if it is sold at a foreclosure sale to a third person who has agreed previously to reconvey it to trustee individually. But, as the case of *Bedford v. Megel* shows, if a third person, without such an agreement, buys the property at the foreclosure sale for himself and with his own money and subsequently sells it to the trustee, no constructive trust arises.

In the *Bedford* case the decedent died intestate, leaving a widow and minor children and land encumbered by a mortgage securing a loan and waiving the homestead exemption. X bought the land at a mortgage foreclosure sale for $777.77. Three weeks later X sold the land to the widow for $900. The deed to X and X's deed to the widow were recorded on the same day. The widow conveyed the property to the defendants and the children claimed an interest therein. The court held that this claim was without merit, as X acted for himself and not as the widow's agent in buying the land at the foreclosure sale, and in reselling it to the widow, and the widow acted for herself and in her own right in buying the land, and did not acquire the land by way of a payment or a redemption of a mortgage in which the children were co-owners of the equity of redemption.

**Resulting Trust**

A resulting trust arises where property is transferred to a defendant under circumstances which raise an inference that the transfer was not intended to be for the defendant's benefit. A common type of resulting trust occurs where property is taken in the name of one person and the purchase price is paid by another. Thus, if A pays the purchase price of real estate and the deed is made to B, B presumably holds upon a resulting trust for A. This presumption is rebutted, however, by evidence that A did in fact intend that B should have the beneficial interest. Thus, if B is A's wife, the inference is that A intended to make a gift to her. But if B is not the natural object of A's bounty, there is an inference of a resulting trust. If A purchases property and takes title in the name of B for the purpose of defrauding creditors, or for some other illegal purpose, the illegality will prevent A from obtaining restitution.

However, *Chappell v. Dawson* held that where a woman who was illegally cohabiting with a man paid the purchase price of a lot and also $5,000 for the erection of a building thereon, and the title to the

3. 301 S.W.2d 537 (Tenn. 1957).
5. 308 S.W.2d 420 (Tenn. 1957).
lot was taken in the name of the man, there was a resulting trust in favor of the woman and the infant child born as a result of the cohabitation. The court considered that the illicit cohabitation was not sufficiently related to the transaction to make the clean hands doctrine applicable.