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John W. Wade

RESTITUTION—1955 TENNESSEE SURVEY

JOHN W. WADE*

"A person who has been unjustly enriched at the expense of another is required to make restitution to the other."[1] This principle is a pervasive one, running throughout the common law. It is implemented by many remedies, both at law and in equity; and only in recent times has the single idea underlying the several remedies been clearly perceived. The Tennessee cases on Restitution will here be collected according to the remedies involved.

(1) *Constructive Trust*

In *Black v. Pettigrew*,[2] a testator named Black left all of his property to his wife "for and during her natural lifetime, to have and to enjoy in any way she may deem proper, also she may sell or dispose of any or all of my realty as she may desire." His wife took charge of the property; she relied on a nephew, Homer Black, for advice and gave him power of attorney to handle her real estate. Later she gave a garage building, the principal item of real estate, to Homer and his brother Roy and surrendered without consideration a note and trust deed to Roy and sold certain shares of stock to Homer. In the instant case the remaindermen sought relief against the transactions.

The Court of Appeals held first that there was no evidence to support the contention that Mrs. Black was of unsound mind or incapable of conducting her business. It then held that though the provision in the will allowed her to sell the property and use the proceeds if she wished, it did not entitle her to give the corpus away. This meant that the court below properly set aside the gifts of the corpus, subject to a valid lien which had been created in a bona fide purchaser for value. The surrender of the note to Roy was also invalid.

An additional reason for granting relief regarding the garage property lay in the fact that "a relationship of trust and confidence existed between Homer and Mrs. Black." He was her nephew and her agent, and he advised her in the conduct of her business. "Roy, as well as Homer, was not only charged with constructive knowledge of the lack of testamentary authority in Mrs. Black to give away the corpus of her husband's property but had actual knowledge of the confidential relationship between Homer and Mrs. Black, which, if abused, would make both Homer and Roy constructive trustees of any property obtained from her by reason of Homer's violation of that confidence. . . .

*Dean, Vanderbilt University School of Law; member, Tennessee Bar.

1. RESTATEMENT, RESTITUTION § 1 (1937).
2. 270 S.W.2d 196 (Tenn. App. W.S. 1953).

Under the circumstances the burden rests equally upon the estate of Homer and upon Roy to overcome the prima facie presumption of invalidity of the transaction and, having failed in this regard, neither will be allowed to profit in any manner by reason of the gift."[3]

Mrs. Black would have had the authority under the will to give away the rent or use of the garage property for the period of her lifetime, but the circumstances here of breach of a confidential relation were held to make the constructive trust apply also to the rental value. Though the property was conveyed to both Homer and Roy, Homer soon conveyed his half interest to Roy. Roy therefore was the only one who benefited from the use of the building and the only one liable for its rental value during the period of Mrs. Black's life. The shares of stock transferred to Homer were given for a consideration, "but being a transaction between principal and agent by which the agent acquired property from the principal, the burden was on Homer's administrator to overcome the prima facie presumption of invalidity." This burden was not met and the transaction was set aside.

(2) *Subrogation*

The facts in *Amos v. Central Coal Co.*[4] are complicated. Somewhat simplified they were as follows: Harrison made a coal lease to Kemmerer, reserving a royalty of ten cents per ton. Kemmerer subleased to Davis, who agreed that he would pay the original ten-cent royalty for Harrison, plus an additional twenty-cent royalty and that his interest might be forfeited for more than thirty days' delay in payment. Davis assigned to Central Coal Company (defendant here). Central Coal Company assigned a part of the tract to Amos (complainant here), who agreed to pay the original ten-cent royalty but no more. In the meantime Kemmerer had assigned his interest to Harrison, who was now entitled under the separate leases for both the ten-cent and twenty-cent royalties.

Complainant paid his royalties promptly to defendant, but defendant defaulted in paying Harrison both the ten-cent royalty (Harrison-Kemmerer lease) and the twenty-cent royalty (Kemmerer-Davis lease). In order to protect his own interest as sub-lessee complainant had to pay Harrison substantial sums under both leases. He then brought this bill to be subrogated to the rights which Kemmerer had in the Kemmerer-Davis lease. This would permit him to forfeit that lease for default in payment. The chancellor granted the relief and declared the lease terminated; and the Court of Appeals affirmed. Some of its remarks are worthy of quotation:

"Subrogation is a right which is founded upon equity and justice and

3. *Id.* at 202-03.
4. 277 S.W.2d 457 (Tenn. App. M.S. 1954).

> accrues when one person for the protection of his own interests, pays a debt for which another is primarily liable. . . . 'It is a doctrine therefore which will be applied or not according to the dictates of equity and good conscience, and consideration of public policy, and will be allowed in all cases where the equities of the case demand it. It rests upon the maxim that no one shall be enriched by another's loss, and may be invoked wherever justice demands its application, in opposition to the technical rules of law which liberate securities with the extinguishment of the original debt.' "[5]

Two cases involved an insurance company's right to subrogation to the rights of the insured when it has paid him for property which was lost by a third party. In *Jones v. Allied American Mut. Fire Ins. Co.*,[6] an automobile was stolen while in the custody of a service station. The insurance company was subrogated to the owner's rights of action against the station for negligence. The right was said to be one of "general law," though the policy also specifically provided for it. In *Continental Ins. Co. v. Weinstein*,[7] a shipment of diamonds was lost while being returned to the consignor (the insured). The consignee (defendant here) was probably liable because it had valued them with the express company for the nominal amount of $50. But the consignee then sent the consignor a check for the diamonds retained, marking it "Payment in full for all claims," and the consignor had accepted it. Since the consignee had no knowledge at the time that the insurance company had paid for the value of the diamonds and had subrogation rights, these rights were extinguished by the consignor's cashing of the check. The latter may now be liable to the insurance company.

(3) *Quasi-Contract*

In *Powell v. Bundy*,[8] two real estate agents earned a commission by their joint efforts. The defendant collected the commission and refused to pay the plaintiff his half. It was held that an action might be brought at law to recover the half due to the plaintiff. The court indicates that if the agents had been partners the suit would have had to be brought in equity for an accounting. But here they were not partners but were simply engaged in a joint enterprise. The action here may possibly have been in contract, for breach of a specific agreement to divide the commission, but it was probably in quasi-contract, the normal action at law for restitution of money or money's worth. It is then not necessary to prove an express contract to pay and the law will impose an obligation to divide the proceeds of the joint effort,

5. *Id.* at 462, 463. The double quotation is from 25 R.C.L. 1313 (1919), by way of Dixon v. Morgan, 154 Tenn. 389, 397-98, 285 S.W. 558, 560 (1926).
6. 274 S.W.2d 525 (Tenn. App. E.S. 1954).
7. 267 S.W.2d 521 (Tenn. App. M.S. 1953).
8. 272 S.W.2d 990 (Tenn. App. M.S. 1954).

to prevent the defendant from being unjustly enriched at the expense of the plaintiff.

(4) *Rescission*

When a party is induced to execute a document by means of fraudulent misrepresentations, one remedy for accomplishing restitution is an action in equity for rescission. This is illustrated by the case of *Burge Ice Machine Co. v. Strother*,[9] where notes and a chattel mortgage were "set aside and held for naught," though this was not the primary objective of the suit.

(5) *Reformation*

Reformation is the remedy given when through mistake or fraud a legal instrument fails to express the actual agreement. If the parties failed to reach a real agreement, rescission rather than reformation is the remedy. But if there was a real agreement and the instrument improperly expresses it a court of equity may reform the instrument to make it reflect that agreement.

Two cases are worthy of mention here. In *Sky Chefs v. Pryor*,[10] complainant sought reformation of a bill of sale of restaurant equipment to make it provide that the date for delivery of the equipment depended on the process of remodeling a building in which complainant was installing new equipment, thus making the old equipment available for delivery. The court held that the bill of sale indicated no time for delivery and that since it did not "contain the entire agreement" reformation was not necessary but that "parol evidence must be considered to supply the missing terms."[11]

On the other hand, in *Petty v. Sloan*,[12] a declaratory-judgment action for construction of a lease contract, the defendants claimed that the parties had agreed on an extraordinary meaning for one of the terms of the contract and that this construction should be given to it. The Supreme Court declined to accept this position, saying: "Any restricted meaning would have to be set forth at the time the contract is entered into, otherwise the contract would have to be taken as is, subject to the common ordinary meaning of the word there used. The court must take this as the intention of the parties when the contract was made. If such was not their intention after the contract was drawn and signed they should have then done something else about it."[13] Perhaps if the defendant had sought reformation of the contract and had persuaded the court by clear and convincing evidence

9. 273 S.W.2d 479, 487 (Tenn. 1954).
10. 276 S.W.2d 485 (Tenn. App. E.S. 1954).
11. *Id.* at 487.
12. 277 S.W.2d 355 (Tenn. 1955).
13. *Id.* at 360.

that both parties had actually agreed on the meaning he asserted, the court would have changed the written language to make it conform to the actual agreement.[14]

14. This case has other features and is discussed in detail in the articles on *Contracts* and *Evidence*. It did not actually involve reformation, and no attempt is made here to set out a complete exposition.