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RESTITUTION—1954 TENNESSEE SURVEY

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The title, Restitution, is a comparatively new one. Over a period of many years there grew up separately a number of distinct legal and equitable remedies—quasi-contract, constructive trust, equitable lien, reformation, rescission and others. Only recently has it been perceived that a pervading general principle underlies all of these remedies—the principle that "a person who has been unjustly enriched at the expense of another is required to make restitution to the other."[1] Now that these several types of relief are being classed together it is more generally realized that their composite whole involves a very broad field of the law. During the past year there were ten Tennessee cases involving restitution and unjust enrichment.

I. Benefits Wrongfully Obtained

1. *Quasi-Contract*

If I steal your automobile you may bring an action of trover against me for its value, whether I have disposed of it or still have it. Trover will also lie against me if I am the innocent purchaser from a thief. Trover is a tort action compensating you for the injury which I have done to you, but it carries overtones of restitution. If I still have the automobile you may bring replevin and recover it. Here the automobile is restored and I have been required to make restitution to you. If I have sold the car, replevin no longer serves the purpose and you may resort to a third remedy and sue me in quasi-contract. This is sometimes called "waiver of tort," but it is actually an alternative remedy which the plaintiff may choose if he finds it more suitable for his needs. The idea is that the defendant has been unjustly enriched at the plaintiff's expense and should be required to make restitution. The measure of damages may be either the value of the automobile or the amount which the defendant received for it when he sold it.

All of this is perfectly illustrated in *Creach v. Ralph Nichols Co.*,[2] where the defendant, an automobile dealer which had innocently purchased and sold a stolen car, was held liable in "waiver of tort" for the proceeds of the sale of the car. Defendant had contended that it should be liable, if at all, only for the profit made in the purchase and sale of the car, since that was the extent of its net enrichment. There is a good deal of logic in this position, but the rule has always

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1. Restatement, Restitution § 1 (1937).
2. 267 S.W.2d 132 (Tenn. App. M.S. 1953).

been otherwise. Perhaps this is by analogy to the rule in trover, or perhaps it is due to the feeling that limiting a recovery to net enrichment would allow a thief who stole a car and sold it for a third of its value to be liable only for what he actually realized.

The opinion in the *Creach* case does not indicate why the plaintiff sued in quasi-contract rather than tort. There are numerous reasons why the remedy may be preferred. Sometimes, for example, this is done because of a longer statute of limitations period,[3] sometimes in order to make use of a set-off and sometimes for other reasons.

2. *Rescission*

Another method by which a defendant may wrongfully obtain a benefit is by fraud. Frequently a tort action of fraud and deceit will lie. But here, too, there are various remedies available in restitution. Defendant's fraud frequently produces a contract between the parties. One of the available remedies is a bill in equity for rescission of the contract and a restoration of the parties to the status quo. Three of last year's cases are illustrative here.

In *Dozier v. Hawthorne Development Co.*,[4] complainant had purchased a house from defendant in the suburbs of Nashville. Finding that the sewage disposal was inadequate because of the bad porosity of the soil around the overflow leading from the septic tank, he sued for a rescission on the ground of false representations. The chancellor found that defendant made no representation regarding the septic tank and drainage, and the Court of Appeals affirmed this as correct. The chancellor granted the relief, however, on the ground of fraudulent concealment. It appeared that the original plans for developing the subdivision in question had not been approved by the sanitary engineer of the county because of the nature of the soil and that new plans were drafted to provide for larger lots and make more drainage available. Under the new plan most of the lots, including the one in question, were approved. Nothing was said of this to the complainant and he asked no questions about the sewage disposal though he was an architect and designing engineer, with experience in developing subdivisions.

The Court of Appeals reversed the chancellor, saying: "Concealment or nondisclosure becomes fraudulent only when there is an existing fact or condition, as distinguished from a mere opinion, to be disclosed, and when there is a duty of disclosure upon the party having knowledge of such fact or condition. . . . Ordinarily, no duty of dis-

3. Thus in Kirkman v. Philips, 54 Tenn. 222 (1872), relied upon in the instant case, the court held that though an action in replevin or trover would be barred in three years, an action of quasi-contract could be brought within six years.

4. 262 S.W.2d 705 (Tenn. App. M.S. 1953).

closure exists except (1) where there is a previous confidential relation between the parties; (2) where it appears one or each of the parties expressly reposes a trust or confidence in the other; or (3) where the contract or transaction itself is intrinsically fiduciary and calls for good faith, as in cases of insurance contracts."[5]

It is sometimes difficult to distinguish between misrepresentation and concealment. In *Simmons v. Evans*,[6] the leading case in Tennessee, defendant sold a house without revealing that water was supplied only during daylight hours and not at night. Rescission was permitted, the court holding that defendant was under a duty to disclose, but adding that the statement that "there was available all the water which they wanted" might be treated as an actual misrepresentation if necessary. It is true that courts are slower to grant relief for failure to disclose; no tort action will lie. The action for rescission will normally lie only where there is a fiduciary or confidential relationship. But in the instant case rescission would probably have been granted if defendant had failed to put in an overflow at all or if the county sanitary engineer had refused to approve the lot in question.[7]

In *Gibbons v. Mutual Benefit Health & Accident Ass'n*,[8] complainant sought to set aside a release and settlement on the ground that it was obtained by fraud. To his claim under a health and accident policy the company had responded that it was not liable at all (because of complainant's "fraud"); but it had offered him a settlement of $500, which he accepted. Alleging that he later found that the statements were false he sued to rescind the settlement and to establish the liability of the company. He alleged that more than $500 was owed under the terms of the policy and prayed that judgment be rendered against the company, to be credited with the $500 already paid under the settlement. The chancellor sustained a demurrer to the complaint on the ground that repayment or tender of the $500 was a prerequisite to the maintenance of the suit. This decision was affirmed by the Supreme Court.

A rescission is a restoration of the *status quo*. A plaintiff should clearly not be entitled to have restored to him what he had given under the contract while he kept what he had received under it. In an action at law—*e.g.*, quasi-contract or replevin—it is sometimes held that the plaintiff must have made a tender before he brings suit; but in suits in equity it is generally held that an offer in the complaint to repay (or perhaps even to do equity) is sufficient.[9] There are a

5. *Id.* at 711.
6. 185 Tenn. 282, 206 S.W.2d 295 (1947).
7. The holding might well have been placed upon some ground other than fraudulent concealment, but it seems very likely that relief would have been granted.
8. 195 Tenn. 339, 259 S.W.2d 653 (1953).
9. The instant case is probably not inconsistent with this and would probably not require a tender prior to filing the complaint, though this is not

number of reasons for which a tender will be excused. One, set out in the instant case, is when the defendant has acknowledged liability in any event up to the amount which complainant received.[10] A number of courts hold, contrary to the instant case, that the offer is not required when all that the complainant has received is money which can be credited if restitution is granted.[11] This position seems less technical and somewhat more practical and realistic. If the complainant loses, no rescission is granted; if he wins and proves that more is due him than the $500, it is simple to credit the decree for that amount, while if he wins the rescission and less is due him than $500 a court of equity has power to render a suitable decree.

In *Brown v. Van Pelt*[12] defendant, who had previously had his license as real estate agent revoked, led complainants to believe that he was an authorized agent and induced them to sign a "power of attorney" giving him authority to sell their property. He then found a purchaser who paid him $200 as earnest money. This is a bill to rescind the deed made to the purchaser and the power of attorney. The purchaser allowed a decree *pro confesso* to be entered against him, and the chancellor held that defendant's conduct was fraudulent and granted the rescission of both instruments. He held also that the defendant was not entitled to a commission and that he must pay the $200 paid as earnest money to the complainants.

This was affirmed by the Court of Appeals. It held that the so-called "power of attorney" in this case did not take defendant's services out of the statutory provision that an unlicensed real estate broker is not authorized to do business and the judicial construction that he is not entitled to a commission.[13] As for the $200 the court said simply that the defendant's fraud "completely vitiated" the power of attorney and any rights which he obtained through it and declared that he "is not entitled to retain any benefits obtained by his fraud."[14]

3. *Constructive Trust*

In giving the complainants the $200 earnest money in *Brown v. Van Pelt*, the case just considered, the court was not restoring to them something which they had turned over to the defendant. This was not, strictly speaking, a part of the rescission. It was, instead, an action to prevent the defendant from profiting—from acquiring an unjust enrichment—from his fraudulent conduct. The remedy most

certain. It is somewhat strange that the complainant did not seek to amend to offer to do equity after the demurrer had been sustained.

10. See Conrad v. Interstate Life & Acc. Ins. Co., 141 Tenn. 14, 206 S.W. 34 (1918), to this effect.

11. This is the position of the *Restatement*. RESTATEMENT, RESTITUTION § 65(f).

12. 263 S.W.2d 956 (Tenn. App. W.S. 1953).

13. See Winn v. Wright, 28 Tenn. App. 40, 185 S.W.2d 908 (E.S. 1944).

14. 263 S.W.2d at 958, 959.

frequently used for this purpose is the constructive trust, and the court in *Brown* was actually imposing a constructive trust on the fund of $200.

Another case illustrating this remedy is *Bell v. Gailey.*[15] Complainant, an aged Negress, approaching senility, illiterate, ignorant of business transactions and property values, had come under the control of a ne'er-do-well son who was pressing her to raise money for him. Defendant, a real estate broker also in the "loan business," had been approached for a loan and had arranged for one secured by a mortgage on her home. She later asked defendant to sell the home. He told her that she could get more by selling on time, and when she insisted in selling for cash, had her sign a contract of sale which he had already filled out making himself the vendee. He delivered to the son a check as down payment on the purchase price and did not pay the remainder until he had found a buyer, arranging for the deed to be made direct to him.

This action was brought in behalf of the complainant by her daughter as soon as she discovered the facts, to set aside the transaction as induced by fraud. No rescission was granted, apparently because the buyer was a bona fide purchaser for value. But the court awarded against the defendant broker a recovery of $500, representing the profit which he made on the transaction, allowing credit for a 5% real estate agent's commission and certain expenses. The Court of Appeals affirmed, declaring that on both occasions the defendant "was consulted by the complainant in his capacity as broker and that in that capacity he undertook to advise her about the loan and later about the sale of the property. There was thus established a confidential relationship which amounted to a trust. . . . She was entitled to all of the agent's skill, knowledge and foresight, and the defendant could not take advantage of her ignorance in this respect to make a profit for himself by becoming the purchaser at a reduced price or otherwise."[16] Though the court did not use the expression, constructive trust, this is clearly the remedy which was applied in the case.

II. Benefits Conferred in Performance of a Contract

Just as restitution may provide alternative remedies to actions in tort, so may it also provide alternative remedies to actions in contract. If I have partially performed my contract with you and you entirely repudiate it, I can sue you for breach of contract. I may instead, however, disregard the contract and sue you in quasi-contract for the reasonable value of the work and services or materials which you have received. Sometimes restitution will afford the only available remedy.

15. 260 S.W.2d 300 (Tenn. App. W.S. 1951).
16. *Id.* at 303.

Sadler v. Middle Tennessee Electric Membership Corp.[17] is an example. Plaintiff brought an action to recover an amount due on a contract for constructing a rural electric distribution project. The jury found that plaintiff did not complete its contract with defendant and the court rendered a judgment dismissing the plaintiff's action. When this was affirmed by the Court of Appeals, the plaintiff filed a motion to rehear, contending that it was "entitled to recover for the value of the part performance of the contract by it, even though it breached its contract by failing to fully perform the contract." The court agreed that an action in *quantum meruit* might lie for the value of the benefits conferred but held that the "plaintiff had failed to show the value of the work which it actually did." There was proof that "the work actually done was, also, defectively done to defendant's damage." Since defendant was not allowed to show the defective condition of the work and the damage which it sustained, there was no way to determine the "value of the work which the plaintiff did in its defective condition."[18]

Here there could be no recovery on the contract and the basis of the action would have to be in restitution for the benefits conferred. It is the rule in a majority of the states, subject to some exceptions, that a party who has breached a contract cannot recover even in quasi-contract, the position being taken that the court should not aid him in any way. But a number of courts do allow recovery; and the position of the court in the instant case that he can recover for the net enrichment, less the damages incurred by defendant for breach of contract, seems eminently sound. The court is also wise in placing the burden on the plaintiff to establish the value of the net enrichment.

Robinson v. Durabilt Mfg. Co.[19] presents a very interesting situation. Defendant manufactured and sold at wholesale throughout the country a machine called a crop drier. It entered into an oral contract with plaintiff giving him exclusive agency for a number of southern states, including Mississippi. Plaintiff was to pay defendant $700 for each machine and to set the retail price himself, keeping all the profit; he was to pay all expenses and to decide what expenses should be incurred. After two years in which plaintiff sold several machines and expended several thousand dollars in advertising, the defendant, over plaintiff's protest, granted another person the agency for the machine in Mississippi. This was an action in *quantum meruit* for expenses incurred in advertising and promoting sales in the southern states. The lower court sustained a demurrer to the declaration "on the ground that the contract was indefinite, unenforceable, without mutuality or consideration."

17. 36 Tenn. App. 495, 259 S.W.2d 544 (M.S. 1952).
18. *Id.* at 500, 259 S.W.2d at 547.
19. 195 Tenn. 452, 260 S.W.2d 174 (1953).

The Supreme Court affirmed. It declared that under the common law rule a plaintiff cannot recover in *quantum meruit* more than the compensation set out in the contract, and plaintiff had received that compensation (his profit in the sale of the machines). It added that this "rule has been so far modified that where anything has been done from which the other party has received a substantial benefit, and which he has appropriated, a recovery may be had based upon such benefit. The basis of this recovery is not the original contract, but a new implied agreement deducible from the new delivery and acceptance of some valuable service or thing."[20] While the court construed the plaintiff's declaration as seeking to come within this principle it held the principle inapplicable to the facts since the defendant had no way in which it could refuse to accept the benefit of the advertising after it had given the second agency: "Where the nature of the benefit received by the employer is such that it cannot be abandoned by him upon his termination of a contract which he has a right to terminate, then he will not be required to pay for the receipt of such benefit."[21]

If there had been a definite contract in writing for a specific number of years, plaintiff might have sued for breach of contract and recovered for his advertising expenses as a part of the damages. If the advertising had been incurred at the direction of the defendant, the court would probably have found that this was a benefit which had been accepted and for which he must pay. The difficulty is that the benefit is incidental and indirect, that it was voluntarily incurred by the plaintiff for his own purposes and not asked for or deliberately received by the defendant. Yet there was both a benefit to defendant and a loss to plaintiff. The decision is a difficult one and must have occasioned much discussion in the judges' conference.

Recovery might possibly have been granted on an entirely different basis—that of protecting the "reliance interest" of the plaintiff. Thus in *Minsky's Follies of Florida, Inc. v. Sennes,*[22] the parties orally agreed for lease of a nightclub. The lessor, at lessee's request, obtained a liquor license, hired a watchman, paid counsel fees for preparing the lease and incurred other expenses. The lessee then repudiated the contract. Since the contract was within the statute of frauds and unenforceable, plaintiff was not allowed to recover rent but he did recover for the enumerated expenses. The similarity to the instant case is apparent.[23]

20. *Id.* at 175, quoting from Filden v Besley, 42 Mich. 100, 3 N.W. 278, 279, 36 Am. Rep. 433, 434 (1879).

21. *Id.* at 175.

22. 206 F.2d 1 (5th Cir. 1953), 52 MICH. L. REV. 761 (1954).

23. For other cases and a careful analysis of the "reliance interest" see Fuller and Perdue, *The Reliance Interest in Contract Damages,* 46 YALE L. J. 52 (1936).

III. BENEFITS CONFERRED UNDER LEGAL COMPULSION

Contribution Between Joint Tortfeasors

The *Restatement of Restitution* provides that "a person who has discharged more than his proportionate share of a duty owed by himself and another as to which, between the two, neither had a prior duty of performance, is entitled to contribution from the other. . . ."[24] Thus one of two sureties who pays the whole of an obligation may obtain contribution from the other. The same principle is obviously applicable to joint tortfeasors. But, deriving from the early, misunderstood case of *Merryweather v. Nixon*,[25] the general rule at common law came to be that restitution was not available to the plaintiff because of the wrongful nature of his conduct as a tortfeasor. The rule has been sharply criticized by numerous authorities and its obvious injustice caused many states to pass statutes changing the rule.[26] A few states followed a minority view and held that there might be contribution at common law between joint tortfeasors who were merely negligent. Tennessee is one of these states, reaching this forthright and commendable result in the case of *Davis v. Broad Street Garage*.[27]

Twice in the past year the Supreme Court had occasion to consider a suit for contribution between tortfeasors. *American Casualty Co. v. Billingsley*[28] raised no problems. It was held that contribution should be granted in a short opinion quoting at some length from the *Davis* case.

The second case, *Vaughn v. Gill*,[29] raises a number of problems. It is a very confusing case and its meaning and significance are not clear. Complainants Vaughn were father and son, owner and driver, respectively, of an automobile which collided with a car owned and operated by defendant Gill. Rose Finkelstein was a passenger in defendant's automobile. She and Gill filed suits against the two Vaughns. Gill lost his suit because of contributory negligence and Miss Finkelstein recovered a judgment for $2,000, which the insurance company paid. This is a bill by the Vaughns brought against Gill for contribution of half the judgment paid by the insurance company.

The Supreme Court held that a demurrer was properly sustained. The bill on its face showed that the insurance company was subrogated to the rights of the Vaughns and there was no indication that it was participating in the suit or that the suit was for its benefit. In addition

24. RESTATEMENT, RESTITUTION § 81 (1937).
25. 8 T.R. 186, 101 Eng. Rep. 1337 (K.B. 1799).
26. Allbright Bros. v. Hull-Dobbs Co., 209 F.2d 103 (6th Cir. 1953) is a case coming from the federal district court for Western Tennessee. It involves application of the Arkansas point tortfeasors statute.
27. 191 Tenn. 320, 232 S.W.2d 357 (1950), approved in 4 VAND. L. REV. 907.
28. 195 Tenn. 448, 260 S.W.2d 173 (1953).
29. 264 S.W.2d 805 (Tenn. 1953).

the plaintiffs, having themselves not lost anything, but having been wholly indemnified by the insurance company, had no basis for complaint. Either of these grounds, the court indicated, was sufficient to sustain the demurrer, and nothing further need have been said.

The Court proceeded, however, to declare that contribution was not available anyhow because it was not shown that defendant and the complainants were "under a common burden or liability." The meaning which the opinion imputes to this requirement is ambiguous. Two interpretations seem possible. There is some language which would appear to suggest that the parties are not to be regarded as "under a common burden or liability" until a judgment has been obtained by the injured party against both of them.[30] If this is the basis for the holding the doctrine of the *Davis* case has been completely emasculated. It is true that a judgment had been obtained against both tortfeasors in that case but no significance was attached by the court to this circumstance. In addition, there was no such judgment against the defendant in the *American Casualty* case, decided by the same court just five months prior to *Vaughn,* and it hardly seems likely that that case would so quickly be overruled *sub silentio.* If a judgment against both tortfeasors by the injured party is required this means that this party has complete control as to how the loss will eventually be distributed between the tortfeasors. It is enough to assure his own compensation from either tortfeasor and no legitimate or socially desirable interest will be advanced by allowing him control over the legal rights between the tortfeasors themselves.

The second possible interpretation of the opinion arises from the circumstance, incidentally referred to, that Miss Finkelstein's cause of action against Gill had at that time been barred by the statute of limitations and was no longer existent.[31] For this reason, the opinion seems to be saying, the parties are no longer "under a common burden or liability." This interpretation is reinforced by the fact that the court relies on a Wisconsin opinion in which contribution was not allowed because of a family immunity between the injured party and the defendant tortfeasor so that there was no "common liability"

30. "The test is not whether acting together, both tortfeasors were equally negligent and responsible for the tort, but whether both being under a common burden of liability, one of them had been made to pay more than his equitable share of such liability. A judgment was rendered in favor of Miss Finkelstein against Vaughn, but there never was rendered any judgment of liability in favor of Miss Finkelstein against Gill, therefore there never was any common burden of liability to invoke the equitable doctrine of contribution." *Id.* at 810.

31. "Obviously in the present case, it cannot be said that the complainants and Gill are under a common burden or liability, when it definitely appears from the fact of the bill that the complainants were judgment debtors to Miss Finkelstein; and that Gill was never such debtor, and that the statute of limitations has run against any claim that Miss Finkelstein might have against Gill as a result of the collision of automobiles." *Id.* at 808.

between the latter and the plaintiff tortfeasor.[32]

This second interpretation is less destructive of the previous state of the law, but even it seems questionable. When the plaintiff tortfeasor pays the judgment against him, he should immediately have a right of action for contribution against the defendant tortfeasor. This is a new, independent right of action; it should have its own statute of limitations running from the time it comes into existence and it should not be barred by the running of the one-year statute on the original tort claim.[33] A contrary holding here, too, would give the injured party an unhealthy control of eventual liability between the joint tortfeasors since he could secretly agree with the one who would undertake to testify for him that he would bring his suit against the other just prior to the time the statute had run.

All that the opinion has to say on contribution in the *Vaughn* case is essentially dictum, since the court had already sustained the demurrer on two other grounds, and it may well be hoped that the court will not feel bound by this confusing dictum in the future.

Two federal cases involve application of statutes giving rise to rights in the nature of restitution. *Allbright Bros. v. Hull-Dobbs Co.*[34] involves an Arkansas statute providing for contribution between joint tortfeasors. *Hutto v. Benson*[35] involves the statutory right of an employer (or its insurance carrier) which has paid a workmen's compensation claim, to recover from a third party who had negligently injured the employee. The restitutionary remedies of indemnity and of subrogation are analogous and have been held applicable to these facts without the need of a statute. Both cases involved statutes from other states, and they are discussed more in detail in the article on Conflict of Laws.

32. Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721, 92 A.L.R. 680 (1934).
33. This is the holding of the great majority of cases. For discussion and collection of the cases, see Note, 22 A.L.R.2d 925 (1951).
34. 209 F.2d 103 (6th Cir. 1953).
35. 110 F. Supp. 355 (E.D. Tenn. 1953), *rev'd*, 212 F.2d 349 (6th Cir. 1954).