

10-1959

Restitution--1959 Tennessee Survey

William Wicker
University of Tennessee

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Contracts Commons](#), and the [Tax Law Commons](#)

Recommended Citation

William Wicker, Restitution--1959 Tennessee Survey, 12 *Vanderbilt Law Review* 1332 (1959)
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol12/iss4/22>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.



DATE DOWNLOADED: Tue Sep 19 13:12:03 2023

SOURCE: Content Downloaded from [HeinOnline](https://heinonline.org)

Citations:

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.

William Wicker, Restitution--1959 Tennessee Survey, 12 VAND. L. REV. 1332 (1959).

ALWD 7th ed.

William Wicker, Restitution--1959 Tennessee Survey, 12 Vand. L. Rev. 1332 (1959).

APA 7th ed.

Wicker, W. (1959). Restitution--1959 tennessee survey. *Vanderbilt Law Review*, 12(4), 1332-1334.

Chicago 17th ed.

William Wicker, "Restitution--1959 Tennessee Survey," *Vanderbilt Law Review* 12, no. 4 (October 1959): 1332-1334

McGill Guide 9th ed.

William Wicker, "Restitution--1959 Tennessee Survey" (1959) 12:4 Vand L Rev 1332.

AGLC 4th ed.

William Wicker, 'Restitution--1959 Tennessee Survey' (1959) 12(4) *Vanderbilt Law Review* 1332

MLA 9th ed.

Wicker, William. "Restitution--1959 Tennessee Survey." *Vanderbilt Law Review*, vol. 12, no. 4, October 1959, pp. 1332-1334. HeinOnline.

OSCOLA 4th ed.

William Wicker, 'Restitution--1959 Tennessee Survey' (1959) 12 Vand L Rev 1332
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Provided by:

Vanderbilt University Law School

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

RESTITUTION—1959 TENNESSEE SURVEY

WILLIAM WICKER*

I. CANCELLATION OF INSTRUMENTS

II. REFORMATION OF INSTRUMENTS

III. RECOVERY OF TAX PAYMENTS

* * *

I. CANCELLATION OF INSTRUMENTS

A defrauded party to a contract may ask for the alternative right of cancellation of the contract and restitution of the consideration, rather than a right to damages for being led into the fraudulent transaction. This restitutionary remedy is the right of the defrauded party to be restored to the situation which he occupied prior to the fraudulent transaction.

In *Bluff City Company v. Davis*,¹ seller falsely represented that an automobile was new, and buyer relied on that representation. Within a reasonable time after buyer learned that he had bought a used automobile, he offered to return it. It was held that buyer was entitled to have the sale rescinded and the consideration returned to him.

In *Waller v. Hodges*,² the evidence showed that defendant had prepared a building contract, deeds of trust and notes and told complainants, who were simple, uneducated landowners, that they did not need a lawyer. Complainants then signed a written contract to pay to defendant \$10,250 for the erection of a building, whereas their oral bargaining agreement with defendant was to pay \$8,000 for the erection of the building. This evidence was held to sustain a finding of fraud justifying the chancellor in ordering a cancellation of the contract.

A party who has been fraudulently induced to enter into a contract may elect either to affirm the contract and sue for damages for the deceit, or to disaffirm the contract and sue for cancellation and restitution. The defrauded party is not entitled to maintain actions on both remedies, as that would result in double compensation for a single injury. The traditional view is that the mere bringing of an action for damages is a conclusive election by the defrauded party to affirm the contract. The modern tendency, however, is to require

* Dean, University of Tennessee College of Law.

1. 323 S.W.2d 1 (Tenn. 1959).
2. 321 S.W.2d 265 (Tenn. 1958).

some additional element, such as the retention of the subject matter of the fraud, or a change of position by the defrauding party in reliance on a course of action by the defrauded party. Thus, in *Continental Grain Company v. First National Bank of Memphis*,³ buyer bought and paid for beans, and seller delivered to buyer a warehouse receipt for the beans bought. After learning that the receipt was not supported by beans in the warehouse, buyer retained the receipt for a year, filed a proof of claim against the bankrupt seller for the amount buyer was defrauded and instituted a suit against the bondsman of the warehouse issuing the receipt. It was held that the defrauded buyer's inconsistent courses of action amounted to a conclusive election to treat the contract as valid and precluded a rescission.

II. REFORMATION OF INSTRUMENTS

Reformation is the appropriate remedy for making a writing that contains a blunder conform to the terms agreed on by the parties. Thus, where a deed contains an incorrect description in that it omits a portion of the land the parties agreed would be included in the grant, a suit for reformation can be maintained to make the deed express the agreed meaning. Negligence in failing to observe that the deed does not correctly express the agreement of the parties is no defense to such a suit. In *Town of McMinnville v. Rhea*,⁴ the bargain agreement covered all of grantor's land enclosed by a fence. The description in the deed omitted part of the land enclosed by the fence. This omission was not discovered until after the delivery of the deed and was due to a mutual mistake and negligence on the part of both vendor and purchaser. It was held that the deed should be reformed so as to comply with the bargaining agreement.

In *Marron v. Scarborough*,⁵ a written contract to sell real estate contained a covenant prohibiting the establishment by the purchaser of a gravel plant on the premises. The deed mistakenly omitted this covenant. Vendor, who was the owner of the adjoining tract, was held entitled to reformation so as to incorporate into the deed the covenant in the contract to sell.

A chancellor will not decree reformation of an instrument unless the facts required for such a decree are proven convincingly and to his satisfaction. A higher degree of proof is required than in most of the other types of civil actions. A complainant must prove his case by more than a preponderance of the evidence. In *Marron v. Scarborough*⁶ it was held that the Statute of Frauds is no defense to a suit

3. 162 F. Supp. 814 (W.D. Tenn. 1958).

4. 316 S.W.2d 46 (Tenn. App. M.S. 1958).

5. 314 S.W.2d 165 (Tenn. App. W.S. 1958).

6. *Ibid.*

for reformation of a deed, but to warrant reformation the oral evidence of fraud or mutual mistake must be clear and convincing.

III. RECOVERY OF TAX PAYMENTS

As a general rule, a taxpayer who pays an illegally collected tax to a state or a municipality is entitled to maintain a judicial proceeding for restitution of the amount paid, if such suit for restitution is permitted against the state and if the taxpayer reasonably believed that so long as the payment was not made the means taken to enforce collection would subject him to a serious risk of a substantial loss.⁷ There are code provisions in Tennessee making a suit against the Commissioner of Finance and Taxation the exclusive method of obtaining a judicial review of an illegal tax collection for the state, and such a suit cannot be maintained unless payment was made under protest and suit filed within thirty days of the payment.⁸ A 1959 act of the General Assembly of Tennessee⁹ amended these code provisions so as to make them applicable also to taxes illegally collected by municipalities.

7. RESTATEMENT, RESTITUTION § 75 (1937).

8. TENN. CODE ANN. §§ 67-2302, 67-2308, 67-2310-12 (1956).

9. TENN. CODE ANN. § 67-2313 (Supp. 1959).