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Property--Recovery for Improvements Mistakenly Made on the Land of Another

James R. Watson
West Virginia University College of Law

case presents a good example of the judiciary taking a hand in the protection. An even more recent attempt at control can be seen in the recently adopted regulations of the Federal Trade Commission, providing for full disclosure in gasoline and supermarket give-away games.[25] Concern has been expressed at both the state and national levels. A consumer's choice of product or outlet could be based, not on the quality he receives, but on what he may be able to win "just for stopping in."

Where is it all going to end? Or is it? The answer may lie with the courts, as indicated by the *Schillberg* decision. West Virginia has already initiated the lottery approach in attacking the "bank night" promotions, and could conceivably use this as a stepping-off point on the road to consumer protection against the more modern schemes. But if the consideration element should become a major obstacle, then perhaps legislative action might be desirable—for regulation of fair and honest trade practices.

George William Lavender, III

Property—Recovery for Improvements Mistakenly Made on the Land of Another

The plaintiff Somerville and defendant Jacobs owned adjacent lots in the city of Parkersburg. Apparently relying on a surveyor's report and plat, plaintiff had a warehouse built on what he thought was one of his lots. The warehouse, however, was mistakenly constructed upon the defendant's property. Plaintiff then instituted a proceeding for equitable relief in the circuit court. The trial court entered judgment for the plaintiff and decreed that the defendant either buy the warehouse for $17,500, have judgment entered against him for that amount, or convey the lot upon which the building was constructed to the plaintiff. Defendant appealed. *Held,* judgment affirmed. A person, who through a reasonable mistake of fact constructs a building entirely upon the land of another,

[25]34 Fed. Reg. 13302 (1969).

and supposing in good faith that such land is his, is entitled to recover the value of the improvements and to a lien upon such property to enforce payment, or to purchase the land so improved at its pre-improvement value, even though the true owner is free from any inequitable conduct. *Somerville v. Jacobs,* 170 S.E. 2d 805 (W. Va. 1969).

At common law an occupier who, under a mistaken but bona fide belief that he was the owner of certain real estate, made improvements on it, had no right to compensation from the true owner.[1] As the common law developed, however, the courts began to permit the occupier to assert the improvements as a set-off against rents, profits or damages claimed in a suit by the owner.[2] The courts of equity concurrently began to adopt the more lenient civil law rule which required the owner who sought the aid of equity to recover possession or establish ownership to make compensation for the occupier's improvements on the equitable principle that "he who seeks equity must do equity."[3]

In Virginia the equitable principle which allowed the bona fide improver compensation was extended by statute in 1831.[4] The Virginia statute provides that any defendant against whom a decree or judgment has been rendered for land has the right to petition the court for compensation for improvements which were

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[1]"At the common law one was under no obligations to pay for unauthorized improvements made on his land, and one making them without his knowledge or consent could not recover therefor, even though he acted under a *bona fide* belief of ownership." Holmes v. Holt, 93 Kan. 7, 24, 142 P. 369, 375 (1914). *See, e.g.,* Boswell v. Hadfield, 202 Ark. 200, 149 S.W.2d 555 (1941); Kester v. Bostwick, 153 Fla. 437, 15 So. 2d 201 (1943); Bigelow v. Indemnity Ins. Co., 206 Iowa 884, 221 N.W. 661 (1928).

[2]"That rule is, that meliorations of the property, (which, necessarily, mean valuable and lasting improvements,) made at the expense of the occupant of the land, shall be set off against the legal claim of the proprietor for profits which have accrued to the occupant during his possession." Green v. Biddle, 21 U.S. (8 Wheat.) 1, 82 (1823). *See, e.g.,* Pritchard Petroleum Co. v. Farmers Co-Op., 121 Mont. 1, 190 P. 2d 55 (1948); Rogers v. Timberlake, 223 N.C. 59, 25 S.E.2d 167 (1943); Parker v. Daly, 58 Ore. 564, 114 P.926 (1911).

[3]"Consistent with the policy that he who seeks equity must do equity, the rule has been established that when the true owner seeks relief in equity . . . and where improvements upon real estate . . . are made in good faith by one in possession, believing himself to be a bona fide purchaser or owner . . . allowance may be made for the increased or enhanced value caused by the improvements . . . ." Hayes v. Davis, 307 Ill. App. 440, 444, 30 N.E.2d 521, 522 (1940). *See, e.g.,* Engsign v. Batterson, 68 Conn. 298, 36 A. 51 (1896); Putnam v. Tyler, 117 Pa. 570, 12 A. 43 (1888).

[4]*See* VA. CODE ANN. § 8-842 (Michie 1957); Dawson v. Grow, 29 W. Va. 333, 336, 1 S.E. 564, 566 (1887).

made upon another's land in good faith. The present West Virginia statute is patterned after the Virginia one.[5] The statutes of both states are qualified, limiting recovery only to *defendants* who have made improvements in good faith. In *Somerville,* however, the improver initiated the suit asking for equitable relief. The court ruled that since the improver had not previously been a defendant in an action by the owner he was beyond the scope of the statute.[6]

Since the improvements statute was inapplicable, the court turned its attention to numerous cases which allowed the improver to instsitute his own cause of action for mistaken improvements. The court found that several cases:

> recognize and sustain the jurisdiction of a court of equity to award compensation to the improver to prevent unjust enrichment to the owner and in the alternative to require the owner to convey the land to the improver upon his payment to the owner of the fair value of the land less the improvements.[7]

Apparently the earliest reported case in the United States sustaining such an equitable principle was *Bright v. Boyd.*[8] In this case a bona fide purchaser who had made permanent improvements on another's property was entitled to bring his own action for compensation after the true owner had recovered the premises at law. Not only did the improver bring his own suit, but he also was declared to have a right to full compensation or lien upon the property for the value of the improvements. Since the *Bright* decision, several jurisdictions have permitted the improver to main-

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[5]W. VA. CODE ch. 55, art. 5 § 1 (Michie 1966):
Any defendant against whom a decree or judgment shall be rendered for land, where no assessment of damage has been made . . . may, at any time before the execution of the decree or judgment, present a petition to the court . . . stating that he or those under whom he claims, while holding the premises under a title believed by him or them to be good, have made permanent improvements thereon, and praying that he may be allowed for the same the fair and reasonable value thereof. . . .

[6]Somerville v. Jacobs, 170 S.E. 2d 805, 807 (W. Va. 1969). "That statute has no application to the facts of this case, and this case, for that reason is not within the statute."

[7]*Id.* at 807.

[8]4 F. Cas. 127 (No. 1875) (C.C. Me. 1841), *opinion on entry of final decree* 4 F. Cas. 134 (No. 1876) (C.C. Me. 1843).

tain his own suit.[9] On the other hand, some jurisdictions deny the improver a right to action altogether[10] while some jurisdictions qualify such independent action.[11]

In *Somerville* the majority and minority basically disagreed over conflicting policy matters and the interpretation of case law. The majority opinion stressed the degree of hardship incurred by a bona fide improver[12] and conversely the degree of unjust enrichment incurred by the true owner.[13] On the other hand, the dissenting opinion stressed that the majority opinion resulted in a taking of private property for private use.[14] The dissenting oppinion also discussed the principle that as between two innocent parties the one who made the mistake should suffer the hardship rather than he who was without fault.[15]

The majority opinion in *Somerville,* in expounding the unjust enrichment argument, relied heavily on a similar New Jersey case, *McKelway v. Armour,*[16] for the proposition that the owner of the improved property must either buy the building or sell the property to the bona fide improver. It was the majority's view that the

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[9]*See, e.g.,* Pull v. Barnes, 142 Colo. 272, 350 P.2d 828 (1960); Schleicher v. Schleicher, 120 Conn. 528, 182 A. 162 (1936); Olin v. Reinecke, 336 Ill. 530, 168 N.E. 676 (1929); Union Hall Ass'n v. Morrison, 39 Md. 281 (1873); Hardy v. Burroughs, 251 Mich. 578, 232 N.W. 200 (1930); Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966).

[10]*See, e.g.,* White v. Stokes, 67 Ark. 184, 53 S.W. 1060 (1899); Putnam v. Ritchie, 6 Paige 390 (N.Y. 1837).

[11]*See, e.g.,* Barton v. National Land Co., 27 Kan. 634 (1882) (in court's discretion); Wilie v. Brooks, 45 Miss. 542 (1871) (equity having already obtained jurisdiction).

[12]Somerville v. Jacobs, 170 S.E.2d 805, 813 (W. Va. 1969). "[B]y the retention of the building by the defendant the plaintiff . . . will suffer a total loss of the amount of the value of the building."

[13]*Id.* at 813. "[I]f the defendants retain the building and refuse to pay any sum as compensation to plaintiff . . . they will be unjustly enriched in the amount of $17,500.00, the agreed value of the building . . . ."

[14]*Id.* at 817. "[F]or the court to permit the plaintiff to force the defendants to sell their property contrary to their wishes is unthinkable and unpardonable. This is nothing less than condemnation of private property for private use."

[15]*Id.* at 817. "It clearly is the accepted law that as between two parties in the circumstances of this case he who made the mistake must suffer the hardship rather than he who was without fault."

[16]10 N.J.Eq. 115 (Ch. Ct. 1854). Plaintiff erected a valuable dwelling house on defendant's land by mistake. Defendant saw work progress from day to day but did not know the house was being built on his land. The court found in favor of plaintiff.

later New Jersey case of *Kirchner v. Miller*[17] did not overrule *McKelway* as had been stated in a previous West Virginia case, *Cautley v. Morgan*.[18] The majority not only distinguished between the two New Jersey cases both as to the facts and the amount of hardship involved,[19] but also distinguished *Cautley* from *Somerville* on similar grounds. *Cautley* was distinguished from *Somerville* principally on the ground that the improver in *Cautley* would suffer relatively insignificant hardship if not compensated, while the improver in *Somerville* would lose the entire cost of the building.[20] The court also appeared to make one other significant point of distinction between the two West Virginia cases. The court stated that the plaintiff in *Cautley* had sufficient data to enable her to avoid a mistake, but that she did not make proper use of such available data.[21] The court distinguished *Cautley* from *Somerville* for this reason and implied that the erroneous surveyor's report,[22] which failed to provide Somerville with accurate data,

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[17]39 N.J.Eq. 355 (Ch. Ct. 1885). Plaintiff hired a surveyor to locate the dividing line between plaintiff's property and that of defendant. The surveyor mislocated the line and as a consequence plaintiff built a small house a few inches onto defendant's land. The court held that equity would not enjoin an ejectment action by defendant against plaintiff.

[18]51 W. Va. 304, 41 S.E. 201 (1902). Plaintiff had a contractual right to build a wall 10 inches onto defendant's property. After the wall was built it was discovered that the wall was 16 inches on defendant's property. Defendant brought ejectment action against plaintiff. Plaintiff then filed a bill to have defendant's ejectment action enjoined. The court held that equity would not enjoin the ejectment action.

[19]In *McKelway* an entire building was built on another's property while in *Kirchner* only a five inch strip fifteen feet long of a house was on the adjoining landowner's property. Also, in *McKelway* the cost of removal would have been for the whole house, while in *Kirchner* the cost of removal was estimated to be under one hundred dollars.

[20]In *Cautley* the improver encroached only six inches on the adjacent landowner's property and consequently the wall's removal would have been a relatively insignificant hardship. However, in *Somerville* the improver located his building, valued at $17,500, entirely on the defendant's property. Additionally, the building in *Somerville* was constructed of solid concrete blocks on a concrete slab which presented an extremely difficult job of removal without destruction of the building.

[21]Somerville v. Jacobs, 170 S.E.2d 805, 815 (W. Va. 1969). "[T]he plaintiff, [in *Cautley*] by not making proper use of *available data,* was guilty of careless or negligent conduct in making the mistake." (emphasis added).

[22]Nowhere in the case is it explicitly stated that the survey report was erroneous. However, the parties' stipulations and the opinion taken as a whole convey the distinct impression that reliance on an inaccurate survey caused the mislocation of the building. The first stipulation of the facts reads in part as follows: "The plaintiffs . . . *in mistaken reliance upon a surveyor's report and plat,* constructed the building . . . upon Lot No. 47 . . . believing that they were constructing the building upon Lot 46 . . . ." *Id.* at 806 (emphasis added).

was a determining factor.[23] It would appear, therefore, that improper use of sufficient data may operate to deny recovery by an improver, whereas initial lack of sufficient and accurate data would leave the case open for further analysis.

The dissenting opinion took the position that the *McKelway* case had been substantially overruled thirty years later by the *Kirchner* case. The dissent agreed with the statement in *Kirchner*,[24] that the forcing of an owner of property upon which a building was mistakenly constructed either to buy the building or to sell his property was a taking of private property for private use[25] and, therefore, a violation of a constitutional right.[26] The minority also contended that *Cautley* was not realistically distinguishable from

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[23]The improver in *Cautley* relied on a survey by the city engineer. Although it is not explicitly stated in *Cautley* that the improver relied on an accurate survey presented to her, and that the resulting mislocation was entirely her own doing, there is, nevertheless, a strong implication that this was the situation. At least it appears that this was the way the majority in *Somerville* interpreted *Cautley*.

[24]39 N.J.Eq. 355, 358 (Ch. Ct. 1885). "The exercise of such a judicial power, unless based upon some actual or implied culpability on the part of the party subjected to it is a violation of a constitutional right. No tribunal has the power to take private property for private use. The legislature itself cannot do it."

[25]There seems to be unanimous agreement that the taking of private property for purely private use is a violation of a constitutional right. In *Missouri Pacific Railway v. Nebraska*, 164 U.S. 403 (1896), the Court held that the Missouri legislature could not require a railroad corporation, which had permitted the construction of two grain elevators by private citizens on its right of way, to grant upon similar terms, a location to another group of farmers desiring to erect a third grain elevator for their own benefit. The Court stated:

> The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States. *Id.* at 417.

In a later case, however, the Court seemed to recognize that all takings of private property for private use might not be unconstitutional:

> We have found nothing in the Federal Constitution which prevents the condemnation by one person for his individual use of a right of way over the land of another for the construction of an irrigation ditch; of a right of way over the land of another for an aërial bucket; or of the right to flow the land of another by the erection of a dam.

Hairston v. Danville and Western Railway, 208 U.S. 598, 607 (1908).

The West Virginia Supreme Court has also held that the state constitution forbids the taking of private property for private use. *See* Varner v. Martin, 21 W. Va. 534 (1883) (forbidding taking for a private road); Hench v. Pritt, 62 W. Va. 270, 57 S.E. 808 (1907) (forbidding taking for private right of way).

[26]The majority was of the opinion that the statement in *Kirchner* regarding the violation of a constitutional right was only dictum, and that the only two cases found which quoted the statement did not rely on it for disposal of

Somerville and that the majority was in effect overruling prior case law.[27]

The question of which of the two innocent parties was to incur the hardship undoubtedly presented a difficult question for the court. One of the alternatives open to the plaintiff, although not discussed by the court, would have been a suit against the surveyor who apparently prepared the inaccurate report and plat.[28] Of course, in order to establish liability the other party would have to prove negligence on the part of the surveyor.[29] Nevertheless, once a surveyor's negligence has been established, it has been held that his employer may recover damages including the cost of removal of the building constructed on another's property in

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the case. At which point a taking of private property for private use on the basis of equitable principles becomes a violation of a constitutional right is not clear. In a recent Washington case, Arnold v. Melani, 449 P.2d 800 (1969), the state supreme court held that neither the state nor the federal constitution prevented that court from awarding an easement to an improver of land who had encroached onto the complainant's property. The state constitution specifically prohibited the taking of private property for private use except for private ways of necessity, and for drains, flumes, or ditches. The complainant had asked the court for a mandatory injunction to force the removal of the portion of the house the encroacher had built upon complainant's land. The court refused the mandatory injunction and awarded the encroacher a permanent easement. Referring to their state's constitutional provision forbidding the taking of private property for private use the court said:

> To suggest that such a provision somehow divests a court of equity of the power to refuse a mandatory injunction would necessarily by logical extension likewise prohibit the legislative body from establishing rules of limitation (adverse possession) and further, would bar the passing of title by other equitable doctrines based on negative conduct, such as estoppel, waiver or laches.

Id. at 805. For the dissenting opinion see 450 P.2d 815 (1969).

[27]Somerville v. Jacobs, 170 S.E.2d 805, 816 (W. Va. 1969).

[28]*See* Taft v. Rutherford, 66 Wash. 256, 119 P. 740 (1911). It could also be argued by analogy that a surveyor should be held liable for damages resulting from his negligence in much the same way as a register of deeds is held liable for damages resulting from his negligence. Registers of deeds have been held liable for damages to property owners for negligent failure to record deeds and mortgages correctly and timely. Upton v. Slater, 83 N.J.L. 373, 85 A. 225 (1912); Federal Land Bank v. Ginn., 106 Colo. 417, 106 P.2d 479 (1940). In a Pennsylvania case the court suggested that "[i]f the recorder was negligent in his duty, and gave her a false certificate, she had doubtless her right of action for damages against him." Prouty v. Marshall, 225 Pa. 570, 574, 74 A. 550, 551 (1909). See note 22 *supra* for a discussion of the apparently erroneous surveyor's report.

[29]Ferrie v. Sperry, 85 Conn. 337, 343, 82 A. 577, 579 (1912). "[T]he defendent surveyor . . . was bound to exercise that degree of care which a skilled civil engineer of ordinary prudence would have exercised under similar circumstances."

reliance on the erroneous survey.[30] Not only may the employer recover damages, but it also appears that an innocent third party injured by the negligent survey may recover damages to the extent of his injury.[31]

In conclusion, the court's disposal of the *Somerville* case on the equity principle of unjust enrichment seems to be well supported by authority.[32] The court's decision makes it clear that the right to recover the value of improvements made in good faith on land of another is not wholly derived from statutory authority but also exists under equity principles independent of any statute.[33] At the same time it is arguable that other resolution of the problem such as an action against a culpable third party (for example the surveyor in *Somerville*) would lead to a more desirable result.

James R. Watson

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[30]Taft v. Rutherford, 66 Wash. 256, 119 P. 740 (1911). Plaintiff hired defendant a civil engineer, to locate the exact boundary lines to plaintiff's property. Relying on the survey, plaintiff constructed an apartment house. The boundary lines were inaccurrate and defendant was held liable to plaintiff for the cost of moving the building back onto plaintiff's property. However, an important factor in finding liability against the surveyor was his knowledge of the type of structure plaintiff was going to build on the land.

[31]Huber v. Serpico, 71 N.J. Super. 329, 176 A.2d 805 (Ch. 1962). A landowner hired a surveyor to locate a boundary line between his property and that of the adjacent owner. The surveyor also had the right to remove timber on the landowner's property. The surveyor mislocated the boundary line, thereby causing him to remove valuable trees from the adjacent owner's land. The court allowed recovery by the adjacent owner against the surveyor.

Another alternative solution for disposition of the *Somerville* type situation would be to require the plaintiff and defendant to exchange deeds to their property. This is a simple solution when lots are adjacent and approximately equal in value and size. Voss v. Forgue, 84 So. 2d 563 (Fla. 1956). Apparently this solution was not practical in *Somerville* since the court cited *Voss* but refrained from applying its principle. Somerville v. Jacobs, 170 S.E.2d 805, 811 (W. Va. 1969).

[32]*See* 2 H. Tiffany, Real Property § 625 (1939, Supp. 1969).

[33]Wood v. Cahill, 21 Tex. Civ. App. 38, 40, 50 S.W. 1071, 1072 (5th Dist. 1899). The West Virginia court did not cite this case, but it appears that the Texas court succinctly stated the principle laid down in *Somerville*: "It is well to bear in mind, however, that the right to recover the value of improvements placed upon the land of another in good faith does not arise wholly upon our statute, above referred to, but exists under the principles of equity, independent of such statute."