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I. Constructive Trust and Equitable Lien

Constructive trusts are related to the field of trusts in somewhat the same way that quasi-contracts are today related to the field of contracts—in misnomer only. A judicial declaration of a constructive trust means simply that the holder of legal title to the property affected, must convey it to the person for whose benefit the constructive trust is declared.[1] The primary efficacy of this equitable remedy is that it gives the successful complainant a preference over all the defendant's creditors; its theory is not that the complainant is trying to reach the defendant's property, but rather that the property which the defendant holds belongs to the complainant.[2] A preference over general creditors is also obtained by a party in whose favor a court establishes an equitable lien.[3] These two remedies overlap to a significant extent; generally either is available to a complainant whose property has been misappropriated by the defendant under such circumstances that the defendant holds legal title.[4] The gravamen of both is unjust

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1. Professor Austin Scott, who served as reporter for that part of the *Restatement of Restitution* dealing with constructive trusts, uses the following as a rough description: "A constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. . . . He is not compelled to convey the property because he is a constructive trustee; it is because he can be compelled to convey it that he is a constructive trustee." 4 Scott, Trusts § 462, at 3103 (2d ed. 1956).

2. This point is well illustrated by Preston v. Moore, 133 Tenn. 247, 180 S.W. 320 (1915), where *M* misappropriated *P's* money and used it to purchase some land and build a house thereon. In the suit that followed *P* traced the funds into the realty, but the trial court held that *M* was entitled to a homestead because of the exemption statute. Shannon's Code § 3798 (1896) (now Tenn. Code Ann. § 26-301 (1956)). The supreme court held that *M* could not obtain a homestead against *P*. *P* was not a creditor seeking to enforce a claim against *M's* property; his claim was in the property itself, not merely against *M*.

3. "Where property of one person can by a proceeding in equity be reached by another as security for a claim on the ground that otherwise the former would be unjustly enriched, an equitable lien arises." Restatement, Restitution § 161 (1937).

4. See *id.* § 161, comment *a*.

enrichment; both presuppose that legal title to the property in question is held by the defendant; both result only from judicial declaration and both result in a preference over general creditors (so far as the relevant property is concerned). The primary difference between these remedies lies in the nature of the interest in the property held by the defendant which a court grants to a successful complainant. This can be best understood in a "mingled fund" context—under an equitable lien theory the successful complainant has "a lien upon the mingled fund for the amount [of his contribution] that went into it";[5] one in whose favor a constructive trust is established receives "a share of the mingled fund in such proportion as his contribution to the fund bears to the whole of the fund."[6] An example will perhaps be helpful. Assume that an attorney puts one hundred dollars belonging to his client into his own bank account, which already contains two hundred dollars belonging to the attorney. Under a constructive trust theory, the client has a one-third interest in the bank account and a one-third interest in all funds withdrawn from the account,[7] assuming no subsequent additions to the account of the attorney's own money.[8] This interest in the money withdrawn from the fund will be important only if the withdrawals (1) are not dissipated (1/3 x 0 = 0), or (2) are not paid to a bona fide purchaser.[9] Under an equitable lien theory, the client has a lien to the extent of one hundred dollars on the bank account and a similar lien on all withdrawals from the account,[10] again unless the recipient of the withdrawals is a bona fide purchaser. It should be noted that a person who has an equitable lien, like the holder of a judgment lien, cannot recover more than the amount due him; on the other hand, a party in whose favor a constructive trust has been declared may profit considerably through wise investments purchased by the wrong-

5. 4 SCOTT, *op. cit. supra* note 1, § 515, at 3289.

6. *Ibid.*

7. The most common example of the importance of a constructive trust in withdrawals from such a fund is the situation where one who has wrongfully mingled another's funds with his own uses the money to pay for insurance premiums on his life and later dies. In such a case it is almost universally held that the person whose money has been so used can share pro rata in the *proceeds* of the policy. The cases are collected in Annot., 24 A.L.R.2d 672 (1952).

8. Subsequent additions would result in a proportionate reduction in the client's share of the fund.

9. RESTATEMENT, RESTITUTION § 172 (1937).

10. The development of the rule allowing an equitable lien to attach to withdrawals from the mingled fund provides an interesting example of the ingenuity of the common law in adapting itself to changing situations. See Clayton's Case, 1 Mer. 572, 35 Eng. Rep. 781 (Ch. 1816); Knatchbull v. Hallett, 13 Ch. D. 696 (C.A. 1880); *In re* Oatway [1903] 2 Ch. D. 356; *In re* Kountze Bros. 79 F.2d 98 (2d Cir. 1935). The first three of these cases are discussed in 4 SCOTT, *op. cit. supra* §§ 517, 517.1.

doer with the mingled fund.[11] It is therefore required that the defendant be a conscious wrongdoer before the complainant can recover more than his loss.[12]

In *State ex rel. Moulton v. Holland*,[13] the state had formerly condemned mortgaged property for highway purposes but had neglected to discover the existence of the mortgage. Consequently the full value of the property (35,000 dollars) had been awarded and paid the mortgagor, *H*, who had failed to mention the fact that the property was mortgaged. Sometime later *C*, the mortgagee, instituted an action against the state to recover the amount of the indebtedness secured by the mortgage (14,000 dollars). The state then filed the present suit to enjoin *C's* action; in the alternative the bill requested that, in the event the state was required to pay *C*, the fund awarded to *H* be impressed with a constructive trust in favor of *C* and that the state be subrogated to *C's* rights against *H*. The court of appeals for the eastern section held, first, that *C's* action against the state was not barred.[14] The court then held that *H* had been unjustly enriched in the amount of the mortgage indebtedness, because he knew at the time of the condemnation suit (1) that the property was encumbered by the mortgage and (2) that this fact was unknown to the state, the court, and the jury.[15] Because of *H's* conduct (or lack of it), *C* could have had a constructive trust imposed upon the property for his benefit. Since *C* has, however, chosen to pursue his remedy against the state, the validity of which has been sustained,[16] the state was held entitled to be subrogated to *C's* remedy against *H*. The court noted that the state's claim could not exceed 14,000 dollars, "leaving [of the 35,000 dollars awarded *H*] some $21,000 not subject

11. If in our hypothetical the attorney had bought stock with 75 dollars from the mingled fund and at the time of the suit the stock was worth 900 dollars, the client, utilizing a constructive trust theory, would be entitled to one-third of the 225 dollars remaining in the account *and* one-third of the value of the stock. Under an equitable lien theory, however, the client would have originally had a lien of 75 dollars on the stock, which would have risen to 100 dollars when the value of the stock reached that amount; but the lien on the stock could never exceed 100 dollars, no matter what the value of the stock. He would, of course, also have retained a 100 dollar lien on the remainder of the fund.

12. RESTATEMENT, RESTITUTION § 210 (1937), especially comment *b;* see generally Monaghan, *Constructive Trust and Equitable Lien: Status of the Conscious and the Innocent Wrongdoer in Equity*, 38 U. DET. L.J. 10 (1960).

13. 367 S.W.2d 791 (Tenn. App. E.S. 1962).

14. The reason given was that there was no proof that *C*, the mortgagee, "knew the jury would assess the damages on the false assumption the State would get a title free of his encumbrance or, if not, that the mortgagors would be allowed to appropriate the money to their own use and not pay the mortgage debt." *Id.* at 794.

15. *H* "remained silent when it was [his] duty in all good conscience and honesty to speak and accepted the mouey rightfully due the mortgagee knowing that he would have an action against the condemnor to recover a second time for the same property." 367 S.W.2d at 795.

16. See note 14, *supra* and accompanying text.

to the trust. This latter sum was received . . . free of the trust . . . ."[17] Of the money he had received, *H* had used 12,000 dollars to repay a debt. "We must assume that [the loan] was paid out of that portion of the award not affected with a trust."[18]

The result in this case is clearly correct, though the state seems to have employed an unnecessarily complicated legal theory. An action against *H* for unjust enrichment through overpayment by mistake would have been entirely proper.[19] Moreover, although the court speaks in terms of a constructive trust, its later statements[20] indicate that actually an equitable lien theory was utilized.[21] Applying the analysis discussed above to the instant case, if the court had in fact applied a constructive trust theory, the interest which the state would have acquired through being subrogated to the rights of *C*, the mortgagee, would have been 14/35 of the fund paid to *H* and 14/35 of all withdrawals,[22] unless the withdrawals were paid to a bona fide purchaser. Under the equitable lien theory which was in fact applied the state had a lien of 14,000 dollars on the fund and a similar lien of up to 14,000 dollars on any withdrawals by *H* from the fund,[23] again subject to the bona fide purchaser exception.

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17. 367 S.W.2d at 795-96.

18. *Id.* at 796. The fee of *H's* attorney in the condemnation suit had also been paid from the fund; its amount was not revealed.

19. See Guild v. Baldridge, 32 Tenn. 294 (1852). See also Bridges v. Freshour, 12 Tenn. App. 188, 195 (E.S. 1930), in which *B* paid *K* on a promissory note when the money was due to *F*. (*K* had told *B* that he would turn the money over to *F*, but he did not do so.) The court held that since *B* was still liable to *F*, *B* could recover from *K* the money paid to him. It should also be noted that in the instant case *C's* rights against *H*, to which the state could be subrogated, could have been established by an action at law for money had and received. The earliest American case in point, Sergeant & Harris v. Stryker, 16 N.J.L. 464, 32 Am. Dec. 404 (1838), denied recovery on the inane ground that there was no privity between the plaintiff and the defendant, whose wrongful conduct had caused a reward to be paid to him which should have been paid to the plaintiff. The correct view is well enunciated in Heywood v. Northern Assur. Co., 133 Minn. 360, 158 N.W. 632 (1916), and is the rule in Tennessee. Dickson v. Cunningham, 8 Tenn. 203, 221 (1827).

20. See text accompanying note 18 *supra*.

21. As noted, the two remedies are often interchangeable. See note 4, *supra* and accompanying text.

22. Apparently none of the fund received by *H* was profitably invested. The question of whether *H* was a "conscious wrongdoer" so that the state could share in the profits of such investments would, therefore, not be relevant, though it seems that *H's* conduct was sufficient to meet this standard. See note 15 *supra*.

23. *E.g.*, if *H* had bought a Cadillac for 7,000 dollars with the money he received from the state, the latter would have a lien on the car for its full value; and if the car for some reason appreciated in value, the lien would correspondingly increase up to 14,000 dollars. If *H* had bought a Bentley for 20,000 dollars, the amount of the lien would be 14,000 dollars. If he had bought both, liens would attach to both, though the state's recovery would be limited to 14,000 dollars.

II. Contribution and Indemnity

In *Chamberlain v. McCleary*,[24] an automobile accident case, District Judge Wilson, applying Tennessee law, dismissed a cross-claim for contribution against the plaintiff's husband, who was driving the car in which the plaintiff was riding at the time of the accident: "[W]here one of two tortfeasors is the beneficiary of a domestic immunity as regards the plaintiff, such immunity is to be protected, if at all,[25] by denying [the other tortfeasor] the right to contribution from the immune party . . . ."[26] Judge Wilson recognized that his decision was contrary to the basis of the Tennessee Supreme Court's decision in *Graham v. Miller*,[27] where in a similar situation the plaintiff was denied relief on the ground that, had he recovered, the "non-immune" tortfeasor *could* have obtained contribution from the "immune" tortfeasor. In an excellent and thorough opinion Judge Wilson concluded that *Graham v. Miller* would not today be followed by the courts of Tennessee[28] because of the well-established rule that, unless common liability exists, there is no right to contribution.[29] Thus, if the familial immunity requires the dismissal of either the plaintiff's action for negligence or the defendant's cross-action for contribution, the choice of the latter best accommodates society's conflicting interests; denying the blameless injured person a remedy against *both* wrongdoers, merely because *one* of them is the recipient of an immunity, is unduly harsh.[30] A parity of reasoning led to the dismissal on the defendant's cross-claim for indemnity, which had been based upon the tenuous distinction between active and passive negligence. A recent decision by the Supreme Judicial Court of Maine involving the same relevant facts sustained both the plaintiff's right of action against the non-immune defendant and the latter's cross-action for contribution against the immune party.[31] It is difficult to

24. 217 F. Supp. 591 (E.D. Tenn. 1963).

25. As to the present desirability of interspousal immunity, see 27 Tenn. L. Rev. 422 (1960).

26. 217 F. Supp. at 596. The doctrine of contribution in this state is discussed in Wade, *Restitution—1962 Tennessee Survey*, 16 Vand. L. Rev. 857, 860 (1963).

27. 182 Tenn. 434, 187 S.W.2d 622 (1945).

28. "As between an innocent and injured plaintiff and the party causing the injury by culpable conduct, that rule [of *Graham v. Miller*] favored the latter by extending to him the purely personal domestic immunity of his co-tortfeasor." 217 F. Supp. at 593-94. *Graham v. Miller* is strongly criticized in 27 Tenn. L. Rev. 422, 427 (1960).

29. Citing Vaughn v. Gill, 264 S.W.2d 805 (1954) (withdrawn from official publication), and Davis v. Broad Street Garage, 191 Tenn. 320, 232 S.W.2d 355 (1950), both decided after *Graham v. Miller*.

30. However, it is clear that so long as domestic immunities are recognized a plaintiff who has been injured by the recipient of such an immunity cannot recover from a defendant whose liability would be wholly derivative.

31. Bedell v. Beagan, 192 A.2d 24 (Me. 1963). Maine, like Tennessee, has prescrved interspousal immunity.

see how this Maine decision is inconsistent with the purposes of interspousal immunity, especially when, as in Tennessee, the action for contribution cannot be tried in the same action as the original claim but must be pursued in a separate suit. Judge Wilson apparently deemed himself precluded by Tennessee decisions from reaching this result and was forced to settle for the more palatable of two insipid alternatives.

It is well settled that an injured employee of a subcontractor may recover under the Tennessee Workmen's Compensation Law from the intermediate or principal contractors,[32] even though his immediate employer is exempt from the act because he has less than five regular employees.[33] In *Tayloe Paper Co. v. Jameson Construction Co.*,[34] an employee of such an exempt subcontractor had recovered judgments against both the intermediate and general contractors and had been paid in full by the former, who then brought this suit for contribution against the general contractor. The supreme court found the workmen's compensation act inapplicable and determined the case on "equitable principles." The court denied contribution by adopting a tier theory of liability, imposing upon each subordinate contractor the duty to indemnify any superior contractor who pays the injured employee. This holding may be analogized to the order of liability on a bearer promissory note with the employee as the holder, the subcontractor as the maker, the intermediate contractor as the first endorser and the general contractor as the second endorser. A difficulty with this reasoning is that the case on which the court places exclusive reliance[35] was between a general contractor and a subcontractor who was the immediate employer of the injured workman. There it can readily be said that the liability of the latter is "primary" and that of the former is only "secondary"; in the instant case, however, the liability of both parties is "secondary," as that term is used above. The announced rule will result in no injustice so long as both parties are insured, but it may prove rather harsh if the intermediate contractor is not insured. The court in *Tayloe* also implied in dictum that the intermediate contractor was entitled to indemnity from the subcontractor, apparently overlooking the fact that the latter was specifically exempt from the act.[36] The statement must thus be regarded as dictum.

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32. TENN. CODE ANN. § 50-915 (1956).

33. Bowling v. Whitley, 208 Tenn. 657, 348 S.W.2d 310 (1961). See 1 LARSON, WORKMEN'S COMPENSATION 724 n.7 and accompanying text.

34. 211 Tenn. 232, 364 S.W.2d 882 (1963).

35. Johnson v. Mortenson, 110 Conn. 221, 147 Atl. 705 (1929).

36. TENN. CODE ANN. § 50-906(d) (1956).

Roberson v. Bitner[37] marks the second time that a federal court has determined that a cross-action for indemnity against an injured workman's employer is not barred by the Tennessee Workmen's Compensation Law. The state courts have not yet passed on the question.

III. Rescission

A. *Mistake*

In *East Tennessee Iron & Metal Co. v. United States*,[38] the government at public auction had sold to the plaintiff an item listed in the auction catalog merely as "Building w/ contents." Later, before the building was turned over to plaintiff, it was discovered that certain "black powder" stored in the building was rutile (an ore from which titanium is extracted). It was uncontroverted that at the time of making the contract neither party was aware of the nature of the "powder." The government refused to deliver the rutile and the plaintiff instituted this action for its value. Judge Taylor held that under the circumstances of the case title to the rutile passed to the plaintiff, who was therefore entitled to recovery.[39] From the opinion it appears that the government did not ask that the entire contract be rescinded on the basis of mistake. Had it done so it would undoubtedly have been met with the assertion that it had assumed the risk that the "black powder" would prove to be valuable.[40] Because of the language of the government's advertisement ("Building w/ contents"), a finding that the government did assnme this risk would be likely.

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37. 221 F. Supp. 279 (E.D. Tenn. 1963). The earlier case was General Elec. Co. v. Moretz, 270 F.2d 780 (4th Cir. 1959), discussed in Harbison, *Third-Party Liability and Adjustments Between Different Employers and Insurance Carriers in Tennessee*, 16 Vand. L. Rev. 1113, 1119 (1963).

38. 218 F. Supp. 377 (E.D. Tenn. 1963).

39. The court relied on two cases, United States v. Jones, 176 F.2d 278 (9th Cir. 1949), and Turney v. United States, 126 Ct. Cl. 202, 115 F. Supp. 457 (1953). In *Jones* the purchaser knew that included in the property were valuable goods which the government did not intend to sell. Judge Taylor rightly concluded that the present case was a stronger one for the purchaser; but he failed to note that the only reason the government lost its case in *Jones* was that the court read a statute there relevant as requiring actual fraud on the purchaser's part before the government would be entitled to rescission.

40. Restatement, Restitution § 12 (1937) (*"Unilateral Mistake in Bargains"*), illus. 4 is as follows: "A offers at auction 'a chest and contents,' believing that the chest contains only some cloth of little value, making no statements but exposing the contents. B bids $50. It is discovered that one of the pieces of cloth is worth at least $100. A is not entitled to restitution." The result in this example seems to be based on the fact that both *A* and *B* knew the contents of the chest, *A* assuming the risk that the cloth was worth more than *B* bid, and *B* assuming the risk that it was worth less. This situation is to be contrasted with the "dead horse" cases, in which an erroneous assumption by both parties is the basis of the contract. See Restatement, Contracts § 502 (1932). An example is the case where two parties contract for the

In *Warren v. Crockett*,[41] the plaintiff had been riding in her husband's car when it was struck by defendant's car. She was immediately examined by a doctor who found no injury, though he told her that " 'she had a *possible* whiplash injury and it *might* give her trouble in the future.' "[42] Shortly thereafter the defendant's insurer settled with the plaintiff and her husband, who both signed a general release covering property damage and "all known, unknown, foreseen and unforeseen, bodily and personal injuries' ";[43] but the amount paid by the insurer included nothing for personal injury to plaintiff.[44] Months later she was hospitalized for a whiplash injury; it was apparently conceded that this injury resulted from the accident. The Tennessee Supreme Court, reversing the court of appeals, held that the facts presented a jury question as to whether the release had been signed under such a mutual mistake of fact as to warrant rescission and upheld a judgment for the plaintiff. The court quoted from an earlier opinion as follows: "Mutual mistake as to the nature or extent of injuries is considered good cause for avoidance of a settlement, but the mistake must relate to a past or present fact, not an opinion as to the result of a known fact."[45] This decision is in accord with the great weight of authority on this point.[46] Most courts simply dis-

sale of goods which are, at the time of the contract, at sea. If, unknown to either of the parties, the ship had sunk before the contract was made, the buyer is entitled to rescission, unless it can be shown from the circumstances that he had assumed the risk that the ship had already been lost. In Irwin v. Burnett, 25 Tenn. 342 (1845), *B* sold *I* a slave which at the time was in *R's* hands. Both *B* and *I* assumed that *R* would return the slave on request; in fact *R* had taken him out of the country and refused to deliver him. In holding that *I* was not liable to *B* for the purchase price, the Tennessee Supreme Court said: "[O]n the subject of delivering the slave . . . [*B* and *I*] were both alike mistaken. The slave at the time, in view of the dispositions and acts of . . . [*R*], was as much lost to [*I*] as if he had been dead. If this latter state of things had existed, [*I*] could not have been held to the payment of the price, unless he had taken upon himself the risk of that event; nor will he be held to the payment of the price under the circumstances of this case, unless it could be made to appear expressly or by legitimate inference from the nature of the transaction, that [*I*] took upon himself the risk of delivery by [*R*], and contracted to be paid at all events." *Compare* Sherwood v. Walker, 66 Mich. 568, 33 N.W. 919 (1887), *with* Backus v. MacLaury, 278 App. Div. 504, 106 N.Y.S.2d 401 (1951).

It is submitted that, because of the difficulty in many cases in deciding whether a mistake in unilateral or mutual (see, *e.g.*, the discussion of *Warren v. Crockett*, at p. 1146 *infra*), the risk analysis should be employed in all cases where recission is sought on the basis of mistake.

41. 211 Tenn. 173, 364 S.W.2d 352 (1962).

42. *Id.* at 178, 364 S.W.2d at 354.

43. *Id.* at 177, 364 S.W.2d at 353.

44. Of the 326 dollars paid by the insurer, 318 dollars covered the repair bill for the car, five dollars for the loss of use of the car, and three dollars for the doctor's examination of plaintiff. *Id.* at 177, 364 S.W.2d at 353-54.

45. Metropolitan Life Ins. Co. v. Humphrey, 167 Tenn. 421, 424, 70 S.W.2d 361, 362 (1934).

46. There are extensive annotations on this point in Annot., 71 A.L.R.2d 82 (1960), and Annot., 48 A.L.R. 1462 (1927).

regard the language of the release and apparently consider it as one factor in determining whether rescission should be granted.

It should be noted that the term "mutual mistake" in the release context is a misapplied label, since in these cases it is almost always clear that the defendant made no mistake—the language of the release shows that the defendant is not concerned with the "nature and extent" of the injuries; he is interested only in settling for as little as possible and being done with the matter, irrespective of the extent of the plaintiff's injuries. The courts have dubbed this situation as one of mutual mistake, probably because they are accustomed to such statements as "there can be no rescission for a unilateral mistake," when in fact an assumption-of-risk analysis is applied to both kinds of mistakes.[47] Furthermore, the distinction between an unknown injury (for which rescission of a release will be granted) and the consequences of a known injury (for which rescission will not be granted) is at best difficult to draw[48] and has been seriously questioned.[49] The suggestion has been made that this distinction be dropped and that the question of whether to allow rescission of a release be decided by "looking at the plaintiff's conduct and words and determining whether he had in fact assumed the risk" of what later happened.[50]

In *Cofrancesco Construction Co. v. Superior Components, Inc.*,[51] defendant, a contractor,[52] had requested bids on various items of lumber,[53] including a certain amount of tongue-and-groove decking.

47. See note 40 *supra.*

48. The tenuity of this distinction was nicely pointed out by the case of Collier v. Walls, 369 S.W.2d 747 (Tenn. App. W.S. 1962), which was also reported during the survey period. There the plaintiff's neck had ached for a week after the accident and had then stopped hurting. A few days later she signed a release which was the same in all relevant particulars as in *Warren v. Crockett;* it later appeared that her neck was seriously injured. The court of appeals unanimously affirmed the chancellor's denial of rescission of the release because, the court said, the mistake concerned the consequences of a known injury. To recapitulate, in *Warren* the plaintiff was examined by a doctor shortly after the accident; though she had no pain she was told that she might have a whiplash injury. In *Collier* the plaintiff's neck hurt immediately after the accident; she was thoroughly examined by a doctor but was told nothing about her neck. A few days later the pain disappeared. Surely the factual differences in the two cases are not sufficient to call for a difference in result as to whether a question of fact is presented on the issue of rescission.

49. See, *e.g.*, Dobbs, *Conclusiveness of Personal Injury Settlements: Basic Problems,* 41 N.C.L. REV. 665, 708-13 (1963). This article gives an excellent discussion of the whole area of rescission of releases; "mutual mistake" is discussed at 702-30.

50. *Id.* at 708.

51. 371 S.W.2d 821 (Tenn. App. E.S. 1963).

52. This was a suit by the contractor to enjoin his supplier from enforcing a mechanic's lien. For the sake of clarity, it is treated as if it were an action to enforce that lien; thus the supplier is referred to as the plaintiff and the contractor as the defendant.

53. "Both suppliers were requested to rush their bids through." 371 S.W.2d at 822.

One supplier's bid included 4,015 dollars for yellow pine decking meeting the specifications. Plaintiff's bid included 1,310 dollars for Douglas fir decking, which is of higher quality than yellow pine; the bid was intended to be in the amount of 5,310 dollars, the 4,000 dollars discrepancy being due to a typographical error. Defendant accepted plaintiff's bid and plaintiff delivered the lumber. Before defendant used the lumber, and while he still had time to get other lumber without delaying his work, plaintiff discovered the error and notified defendant that plaintiff would "pick up the decking if [defendant] was not agreeable to paying the corrected price, or if [defendant] wished to purchase the material from another supplier.[54] Defendant refused to return the lumber, used it on the job, and paid plaintiff the amount of the original bid. In this action the court of appeals for the eastern section, in a thorough opinion by Judge Cooper, held that the plaintiff could recover according to the amount of the corrected bid. The court reasoned that the unilateral mistake was material—4,000 dollars out of a total bid of 9,000 dollars—and that it was palpable; that is, it was so clearly a mistake that the defendant knew or should have known that plaintiff had made an error. Alternatively, the court said that defendant, having been notified of the mistake before it had changed its position in any way, could not take advantage of such an "unconscionable bargain."[55]

The factual context of this case is unusual. In almost all cases involving mistakes in bids, the mistake is discovered before the goods are delivered or the services performed. The supplier will refuse to deliver or perform and will either bring an action for rescission on the basis of his mistake[56] or use the mistake as a defense when sued by the buyer on the contract.[57] In a few cases the supplier has delivered the goods or performed the services and sued in quasi-contract for their reasonable value.[58] In the instant case, however, the award was based, not upon the reasonable value of the goods to

54. *Id.* at 823.

55. The best discussions on the area of unilateral mistakes in bids are found in 3 CORBIN, CONTRACTS § 609 (rev. ed. 1960), and Lubell, *Unilateral Palpable and Impalpable Mistake in Construction Contracts,* 16 MINN. L. REV. 137 (1932). It should be noted that an application of the risk theory, discussed at note 40 *supra,* produces the same results; that is, the bidder assumes the risk of any mistake in submitting the bid, but the buyer will not be permitted to "snap-up" an offer which he knows or has reason to know is erroneous. However, in this area, the results produced by traditional theory in traditional terms are perfectly satisfactory; there seems to be no good reason to change analyses in the middle of the stream.

56. *E.g.,* M. F. Kemper Constr. Co. v. City of Los Angeles, 37 Cal. 2d 696, 235 P.2d 7 (1951).

57. *E.g.,* Geremia v. Boyarsky, 107 Conn. 387, 140 Atl. 749 (1928).

58. *E.g.,* Tyra v. Cheney, 129 Minn. 428, 152 N.W. 835 (1915).

the defendant, but rather on the basis of the corrected bid.[59] No previous case has been found in which this was done. The court did not discuss the point at all; apparently it simply accepted, in the absence of other evidence, the amount of the corrected bid as the reasonable value of lumber.

B. *Fraud and Duress*

The case of *Short v. Louisville & Nashville Railroad*,[60] resulted from a collision between the plaintiff, who was driving her husband's car, and the defendant's train. There was no liability insurance carried on the car, and defendant's claim agent informed plaintiff that if she sued, defendant "would get my driver's license and my husband's car tags . . . ."[61] Plaintiff needed the car in order to work. She signed a release, which she attempted to have set aside in the instant case on the ground of fraud. Defendant's motion for summary judgment was granted because no "statement . . . by the defendant's claim agent was a material misrepresentation."[62] Plaintiff might have fared better had her attempt to avoid the release been based on duress rather than fraud.[63]

59. Plaintiff had purchased the decking for 3,800 dollars; the price he quoted defendant was 5,300 dollars, and damages were awarded on this latter basis.

60. 213 F. Supp. 549 (E.D. Tenn. 1962).

61. *Id.* at 550.

62. *Id.* at 551.

63. See 5 WILLISTON, CONTRACTS §§ 1617-18 (rev. ed. 1937); Dobbs, *supra* note 49, at 697-702; RESTATEMENT, CONTRACTS § 493 (1932); *cf.* Exum v. Washington Fire & Marine Ins. Co., 41 Tenn. App. 610, 297 S.W.2d 805 (W.S. 1955), diseussed in Wade, *Restitution—1957 Tennessee Survey*, 10 VAND. L. REV. 1203, 1206 (1957).