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RESTITUTION—1957 TENNESSEE SURVEY

JOHN W. WADE*

MONEY PAID UNDER COMPULSION

Compulsion of Judgment: This year's most important decision in the field of Restitution is the famous case of *New York Life Ins. Co. v. Nashville Trust Co.*[1] This was the case in which one Buntin disappeared from his home in Nashville under circumstances which led the Supreme Court of Tennessee to hold that he had committed suicide and thus died while an insurance policy was still in effect.[2] As a result the plaintiff insurance company was compelled to pay the defendant trust company, as trustees for the beneficiaries of the policy (Buntin's family), an amount of $60,000. Years later, Buntin was found alive in another state, and the insurance company sued to recover the trust funds still held by the trustee. The suit was in chancery, to establish a constructive trust.

Obviously, this provides a classic illustration of unjust enrichment, as the trustees and the beneficiaries were not entitled to the insurance money unless Buntin was dead. On the other hand, the defense was res judicata—that the issues of fact had been settled by the court between these same parties and could not now be relitigated since the time for opening up the original suit had passed. The two legal principles are both strong, vigorous, important ones, and they clash here head-on. The extent of the clash in this case is indicated by the fact that the Supreme Court divided, three to two, with each of the five judges writing a separate opinion and one judge writing two opinions. The court reversed the chancellor and held that the defendant's demurrer to the complaint should have been overruled.

In this case, therefore, the policy underlying the principle of restitution[3] prevailed, and the policy of providing justice between the parties was given greater weight than the policy for laying litigation at rest and insuring stability of judgments. It happens that a similar decision was reached in *Moses v. Macferlan*,[4] Lord Mansfield's famous decision

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1. 292 S.W.2d 749 (Tenn. 1956), 10 VAND. L. REV. 868 (1957).
2. See New York Life Ins. Co. v. Nashville Trust Co., 178 Tenn. 437, 159 S.W.2d 81 (1942).
3. "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." RESTATEMENT, RESTITUTION § 1 (1937).
4. 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760). Macferlan had recovered in the Court of Conscience on the indorsement on a note because Moses was not permitted in that court to show a signed agreement by Macferlan "that Moses should not be liable to the payment of the money." Moses was permitted to recover the money back in King's Bench in an action of quasi contract for money had and received.

in 1760, which has been generally regarded as the real origin of quasi contract and thus of restitution.[5] Said Lord Mansfield in that case:

> Money may be recovered by a right and legal judgment; and yet the iniquity of keeping that money may be manifest, upon grounds which could not be used by way of defence against the judgment.
>
> .... suppose a man recovers upon a policy for a ship presumed to be lost, which afterwards comes home;—or upon the life of a man presumed to be dead, who afterwards appears;—or upon a representation of a risque deemed to be fair, which comes out afterwards to be grossly fraudulent.[6]

Since that time two changes have taken place. First, the action for restitution is now brought in equity to establish a constructive trust (as in the instant case), rather than at law in quasi contract. Second, the concept of res judicata has become stronger. When the losing party has had an opportunity for a fair trial, he is not ordinarily given equitable relief against the judgment even though it is "erroneous and inequitable."[7]

Yet there are cases where it is clearly so unjust to allow the winning party to retain the fruits of an erroneous judgment that relief must be given. A reconciliative is offered in the leading case of *United States v. Throckmorton*,[8] where a distinction is drawn between "extrinsic" and "intrinsic" fraud. Extrinsic fraud is collateral to the trial and prevents the losing party from fully presenting his case; relief is granted when it is involved. Intrinsic fraud includes false evidence, perjury or forged instruments and can be contested in the trial; the decision here is res judicata and not subject to relief.

It was on this distinction that the judges divided in the *Buntin* case. Following his "self-made surreptitious disappearance," Buntin had "concocted" evidence "very cleverly simulating the occurrence of suicide." The minority recognized this as fraud but likened it to perjured testimony and concluded that as intrinsic fraud it did not warrant equitable relief. The three judges in the majority concluded that the fraud was either extrinsic or both intrinsic and extrinsic.

It would appear that the majority opinions have somewhat obscured or rendered fuzzy the distinction between the two types of fraud and

5. The most famous quotation from this case, which is still widely quoted, reads as follows: "This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex aequo et bono*, the defendant ought to refund; . . . it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express, or implied); or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." 97 Eng. Rep. at 680.

6. 97 Eng. Rep. at 679.

7. RESTATEMENT, JUDGMENTS § 126 (1942).

8. 98 U.S. 61 (1878).

that on a strictly conceptualistic basis the fraud involved here is more properly to be regarded as the equivalent of false testimony and therefore classed as intrinsic. Yet my personal viewpoint is that the majority reached the better result. The distinction has been criticized on numerous occasions.[9] It has not been adopted in England or in Wisconsin.[10] Courts which purport to adopt it not infrequently engraft exceptions on it and sometimes themselves obscure its meaning in order to accomplish justice between the parties.[11] Obscuration may serve a useful purpose in leaving leeway to a court to reach a particular holding without setting a "dangerous precedent." The Wisconsin position of granting equitable relief from a judgment obtained by intrinsic fraud but requiring a very high degree of proof also has much to be said for it, and fifty years of experience with this rule show that it has not opened up "Pandora's Box of troubles [by destroying] stability of judgments."[12]

The unjust enrichment in the *Buntin* case was clear and undeniable, with the facts unassailable. There was not involved here the trying over of a fact issue with the chance that the court might be just as likely to be wrong the second time as it was the first time. It seems that Lord Mansfield's view of providing justice between the parties should more frequently prevail over the strictly legal technicalities of res judicata than it does now in many states. The Supreme Court showed confidence in itself and its power of restraint in rendering this decision, and there is no reason to fear its inability to control application of the principle involved when other cases arise. The *Buntin* case was almost sui generis.

Majority and minority in the case differed on one other issue—the statute of limitations. The majority held that the statute did not run while Buntin's fraud was undiscovered; the minority argued that the fraud of Buntin should not keep the statute from running in favor of the defendants in this suit.

Compulsion of State Authority: In *Roane-Anderson Co. v. Evans*[13] defendant, being required to pay certain gross receipts taxes, paid under protest and sued to recover the money paid. It succeeded in showing that the tax was not due and prevailed in its action.[14] The court declared: "Suffice it to say if Roane-Anderson Company is en-

9. See, *e.g.*, Notes, 4 VAND. L. REV. 338 (1951), 23 CALIF. L. REV. 79 (1934).
10. Note, 4 VAND. L. REV. 338, 340-41 (1951).
11. See, *e.g.*, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944), considered by both majority and minority opinions. For a collection of cases on the subject, see Annot., 126 A.L.R. 390 (1940).
12. Judge Swepston in the instant case, 292 S.W.2d at 759.
13. 292 S.W.2d 398 (Tenn. 1956).
14. Practically all of the opinion was concerned with the question of whether the taxes were properly assessed, the problem dealing with the exemption of a contractor with the Federal Government. For a discussion of this part of the case, see the article on Taxation, *infra*.

titled to recover the sums of money paid under protest, it would include not only taxes illegally assessed, but *interest* and *penalties* as well."[15]

Compulsion of Contract Obligation: Sam Finley, Inc. v. Standard Acc. Ins. Co.[16] involves an action for contribution by one insurance company against another, the plaintiff having been required to pay under its policy. The court recognized the appropriateness of the relief but found that the defendant company was not liable under its policy and so was not liable to the plaintiff.

Braswell v. Tindall[17] involved an action to recover usurious interest paid. The court recognized again the appropriateness of restitution in such a situation but was principally concerned with whether the defendant was a holder in due course and therefore able to keep the money.

RESCISSION

Fraud: In *Lowe v. Wright*[18] a real estate agent, with authority to make a contract to sell property for complainants but without authority to execute a deed, fraudulently entered into a contract to sell the land to defendant and executed a deed to him. Defendant was led by false statements to issue a cashier's check to complainants, and complainants were led by other false statements to cash this check (for $8,900), to take out certain money already owed them by Parrish and to give Parrish a cashier's check for the remainder ($6,000). Discovering the fraud and learning about the contract and deed to defendant, complainants sued to cancel the deed and remove it as a cloud on their title. The court cancelled the deed as a forgery and granted a rescission of the contract of sale on the ground of fraud. The rescission was conditioned, however, on the repayment to defendant of the $8,900. This would obviously have been required if complainants had received the money. The court recognized that both parties were defrauded and fell back on the old maxim, "where one of two persons must suffer loss by the acts or fraud of a third party, he who enabled that third party to occasion the loss, or to commit the fraud, ought to be the sufferer."[19]

Duress: Exum v. Washington Fire and Marine Ins. Co.[20] involved rescission of a release. Complainant had a fire insurance policy on his automobile, which burned. The insurance company turned the claim over to an adjustment company. Its employee accused complainant

15. 292 S.W.2d at 404.
16. 295 S.W.2d 819 (Tenn. App. M.S. 1956).
17. 294 S.W.2d 685 (Tenn. 1956).
18. 292 S.W.2d 413 (Tenn. App. M.S. 1956).
19. *Id.* at 419, quoting from GIBSON, SUITS IN CHANCERY § 61 (5th ed., Croonover 1955).
20. 297 S.W.2d 805 (Tenn. App. W.S. 1955).

of burning the car himself and arranged to have a state fire marshal get complainant from his place of work and take him to a downtown office, where he was subjected to "an implied threat of prosecution or public charge of arson"[21] and induced to sign a release in return for $132. Of this amount $1 was paid to complainant and $131 was paid directly to the bank for the balance owed it on the car. The court found that the release was not executed "as a free and voluntary act on the part of the insured but as a result of duress and hence the release should be considered void and of no effect."[22] The complainant's action on the insurance policy was therefore permitted, and it was held that he did not have to tender the $131 paid to the bank, because the insurance company would have had to pay the bank in any event. In addition, the requirement of tender was not raised until the appeal and this was held to be too late.

Breach of warranty: Henson v. Wright[23] repeats the holding of several recent cases[24] that, under the provisions of the Uniform Sales Act, rescission is one of the remedies available to a buyer for breach of warranty.

BENEFITS BESTOWED

Murray v. Grissim[25] involved an action for services rendered as manager of defendant's farm. Plaintiff, a close friend of defendant's father, had managed the father's farm without charge for six years until the father's death. He had had no dealings with the son but consented to continue managing the farm on the latter's request. After eleven years he brought this action. Though no contract was spelled out between the parties, the court held that the jury "could well find" that plaintiff reasonably expected to be paid "the reasonable value of such services," and that recovery could be had on an "implied contract to make such payment." This was probably a contract implied in fact—a true contract.[26] The court appeared ready, however, if necessary, to allow recovery on a contract implied in law—a quasi contract, or restitutionary relief for the value of the enrichment received.[27]

21. *Id.* at 809.
22. *Ibid.*
23. 296 S.W.2d 367 (Tenn. App. W.S. 1955).
24. See Wade, *Restitution—1956 Tennessee Survey,* 9 VAND. L. REV. 1112, 1114 (1956).
25. 290 S.W.2d 888 (Tenn. App. M.S. 1956).
26. "While a contract (offer and acceptance) is usually expressed in words, it may be implied from conduct. In such case the intention of the parties is a matter of inference from their conduct. Any conduct by one from which the other reasonably infers a promise in return for a requested act or promise amounts to an offer." *Id.* at 890.
27. "From the mere rendering of such services by one and their acceptance by another, the law, without regard to the other's intent, will ordinarily raise a quasi contract on his part to pay the reasonable value of such services; or the circumstances may warrant the triers of fact in finding an implied promise or contract on his part to pay such value." *Ibid.*

The court divided on the matter of the statute of limitations. The majority held that this was a continuous contract involving entire performance, so that the statute would not begin to run until the services had been completed or terminated. The dissent urged that recovery could be had only for the last six years rather than the whole eleven.

State v. O'Brien[28] involved an action by the state against the estate of a decedent paid under the old age assistance law. This was under a provision of a former statute no longer in existence.[29] The court held that the statute of limitations would not run here against the state.

28. 292 S.W.2d 733 (Tenn. 1956).
29. TENN. CODE § 4765.29 (Supp. 1950).