MISTAKEN IMPROVEMENT OF ANOTHER'S PROPERTY

S. J. STOLJAR*

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The case of mistaken improvement on another's land or chattels has long presented a famous difficulty, namely whether the improver should have restitution or not. In Roman law, Julian, though usually so favourable to restitutionary claims, would not allow a mistaken improver to recover anything, once the owner had regained possession of the improved thing, even if it was completely agreed that the latter was considerably enriched. This case, says Dawson, "has lain on the consciences of lawyers during the eighteen hundred years that have intervened, and it lies on our consciences still".[1]

It lies on our consciences also at common law as it, too, has steadfastly denied the improver an affirmative action of recovery. A person, to quote the Restatement, who has caused improvements to be made upon the land or chattels of another, in the mistaken belief that he is the owner, is not thereby entitled to restitution from the owner for the value of such improvements.[2] Even so, the common law has not been really content with this result. It accepts it more as a matter of logical consistency than out of conviction of its basic fairness or equity. This explains why exceptions are sometimes allowed. The Restatement, for example, immediately concedes that the improver is entitled to claim for his beneficial services where his claim is a defensive rather than affirmative one, that is, where the action is not by but against the improver for the return of the owner's property. There have also been, especially in America, Betterment Acts and other 'new' developments, as we shall later see. Still, all this does not remove, it only deepens our puzzle, for we are now even at a greater loss to understand why the classical position should be quite so strongly negative as it is. This paper will try to show that the classical legal position is commonly overstated, that it can be taken to be far more qualified and that, once it is fully qualified, this may also dissolve any lingering conflict between logic and equity. Our

* Professor of Law, Australian National University, Canberra

1 *Unjust Enrichment A Comparative Analysis*(1951) 51-52, 160.

2 *Restatement of Restitution*, S42(1) and (2). The fuller Restatement provisions are further considered below.

discussion will draw on various parts of the common law, though it is intended as but an exercise in basic principles.[3]

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Why, we may begin by asking, did our negative rule gain such a firm foothold both in civilian and common law? For Julian, it would appear, the answer was relatively simple: one could not license quasi-contractual recovery if, as there is here, no direct dealing between the parties; this, however, is a poor reason explaining little since direct dealings are already denied by the admission of a vital mistake between improver and improved. The orthodox common law has at least tried to be more informative. Its principal point has been that an owner's enrichment is far from unjust if the improver acts officiously, so that the alleged injustice of the defendant's undue enrichment is cancelled out by the plaintiff's unsolicited and meddlesome services. For these are services which the defendant cannot return and for which he would accordingly have to pay out of his own funds he may not even have.

In this latter version, the argument against recompensing unsolicited services then attacks with two horns. On the one hand, it invites us to deny a reward to those acting officiously; on the other, it warns us against restitution in respect of improvements since restitutionary relief may leave the owner not truly enriched but decidedly worse off. But, as already hinted, this argument has not quite the force it appears to have. Dealing as we now are with improvements conferred by mistake, there arise important new considerations. So an improver, acting under a mistake and, as we now suppose, under a not unreasonable mistake, cannot be accused of acting officiously, if only because a mistaken improver is not at all like a middlesome intervenor. Again, the owner, assuming he is similarly mistaken, cannot say, at least not as convincingly as elsewhere, that he has been imposed upon as though the improvement has been conferred on him against his wishes. Where, for example, the plaintiff (P) erects a building on D's (the defendant's) land which land P and D mistakenly believe belongs to P, it is by no means as obvious as it may be in other situations that P has acted officiously or that D has not been unjustly enriched so as to require restitution if this can be arranged without affecting D detrimentally.

As these considerations still need greater refinement, it will be useful to distinguish between three or four major situations, in order to identify certain features of the mistake involved: whether one or both parties were mistaken, whether the mistake is reasonable or not, how significant that mistake is, and so on. For contrary to what is often said,

it depends, in each case, on the actual nature of the mistake as to how the objection of officiousness can, or should, operate. To start with, consider two simple situations which indeed set the tone of our whole problem. Suppose first that P intervenes with improvements for D when D is absent, or is otherwise ignorant of what is being done. Thus P may falsely pretend that his improvements are definitely on his own (P's) land when in reality, as P in fact knows, they are on D's. Here, very obviously, P cannot have an action against D since the defence of officiousness must now apply, if it is to apply anywhere, in its full pristine force. This, it should be noted, would have to be so even where P is actually in possession of D's land or goods, as where he is a co-proprietor or a lessee; for here, too, P cannot be entitled to mislead D but would, on the contrary, still be expected, before undertaking his improvements, to consult with D, or to ascertain his wishes, so as to give D at least an opportunity of accepting or rejecting P's services.

The position is reversed where the boot is on the other foot. Suppose it is P, the improver, who labours under a misapprehension, while D is fully aware that P acts mistakenly. Now D would no longer have the complaint that P acted officiously; it would now be D's duty to inform P of his error. Precisely this emerges from the well-known doctrine of acquiescence, according to which it is simply dishonest for me to deliberately abstain from putting somebody right when I know him to be mistakenly building on my land, leaving him to persevere in his error; hence I cannot afterwards assert my title where the other has expended money and effort in the belief that it is his own land.[4] Thus an acquiescent owner of this sort cannot later complain of officious conduct, for being aware of P's mistake, D cannot later protest at having been imposed upon.

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Nor, to turn to another situation, can the owner properly complain of officiousness where it is clear that P's services are to be paid for, the parties having in fact so agreed but where their contract is for some reason ineffective. Two American cases illustrate this admirably. In the first, a contract for the sale of land, the purchaser had asked for certain improvements which the vendor made and for which he was allowed the reasonable value, even though the contract was not in writing.[5] The position would no doubt be different if a party made improvements for

[3] I am greatly indebted to Goff & Jones, *The Law of Restitution* (1966) 95ff; 2nd ed. (1978) 106ff; and Palmer, *The Law of Restitution* (1978) v.ii, S10; v.iii, S15.11

[4] Ramsden v. Dyson (1866) L R. 1 H.L. 129, 140-1, 168.

[5] Kearns v. Andree 107 Conn. 181 (1928); 139 A. 695, and see also Minskey's Follies v. Sennes 206 F. 2d 1 (1953).

which the other had not asked;[6] but here, the court pointed out, the plaintiff had performed services at the request of the other and in the shared expectation that he would be paid for them. Our second American example is even more telling, deriving as it does from the well-known decision in *Vickery* v. *Ritchie*.[7] An architect fraudulently induced the defendant to accept an offer for the construction of a building for $23,000 while representing to the building that he would receive nearly $34,000, a fraud that was not discovered until the building was complete. The court held that though there was no contract, the parties having never agreed on a certain price, the builder was nevertheless entitled to the reasonable price for his work, calculated at $33,000 (about a thousand dollars less than the void contract price), as against what the owner was prepared to pay, i.e. $22,000, which was the amount by which the market-value of his land had risen.

The latter decision fully reveals the strength of the legal policy protecting the right of recompense for one's labour or services. Even a contract void for mistake as to so vital a term as the price will not prevent restitution if the circumstances show that the plaintiff acted both non-gratuitously and non-officiously. Here D could not pretend that P had acted with a purely donative intent, nor could he object that P had been officious since D not only knew what was being done, but was prepared to pay for it. What the decision is less satisfactory about is what the right measure of restitution should be. Now the actual result that P should recover the reasonable value of his work has been supported on the ground that the defendant accepted the work fully knowing it was to be paid for; the right measure was therefore not so different from that in *quantum meruit*.[8]

But, surely, this hardly meets the point that the defendant was vitally mistaken about the price he might have to pay. Moreover, as others have pointed out, the court was quite wrong to suggest that it was bad judgment on the defendant's part to agree to such a building on his lot since the enhanced value of the land was much less than the value of the work done: the court was wrong precisely because the defendant's judgment was based on facts of which he was excusably ignorant, basing himself on what he thought the contract price to be; indeed, far from being wrong in this respect the enhanced value of the land was close to the figure he had agreed to.[9] Yet this solution, too, does not remove our

[6] Santoro v. Mack 108 Conn. 683 (1929); 145 A 273.

[7] 88 N.E. 835; 202 Mass. 247 (1909).

[8] See Gareth Jones 'Restitutionary Claims for Services Rendered' (1977) 93 L.Q.R. 273, 276ff.

[9] Palmer, supra n.3, iii, S15. 11.

dilemma, for it merely favours the defendant's rather than (as did the former solution) the plaintiff's mistake. Perhaps there is here no completely satisfactory answer, except one that would split the loss between the two parties, i.e. somewhere between the calculations acceptable to either side.[10] Fortunately, the exact measure of restitution is not now important; what is important is the realisation that a mistake as to price will not protect the owner from paying anything for the plaintiff's services; or, putting this in another way, that the law of restitution will not disregard the realities of our social division of labour under which a person cannot normally be expected to be able to afford to give his professional services gratuitously.

We are now in a better position to deal with our fourth and most difficult case. Our problem (to repeat) is that P improves D's property which both P and D suppose belongs to P but of which D is the true owner. Such a mutual or bilateral mistake is most likely to arise in relation to land rather than chattels. The ownership of chattels is, usually, quite precisely known, unlike land which especially in rural areas may cover stretches the boundaries of which are still unclear. Dealing first with land, the classical rule is, as already said, that the improver is not entitled to an affirmative action, whatever be his defensive claims, on the oft-repeated ground that the owner's enrichment cannot be regarded as unjust: not unjust because even if we concede that the improver does not act officiously *vis-à-vis* the owner, this does not alter the fact that the owner, were he obliged to make restitution, would still be disadvantaged since he would have to spend his money or raise new or additional funds by borrowing or selling his land merely to pay for improvements he may genuinely not want. At first sight, this ground may look unanswerable, but we shall see this impression to be a faulty one.

It is true that the negative rule we are about to criticise, as well as to reconstruct more restrictively, has long been under challenge from various exceptions. First there has been a good deal of amending legislation, such as the Betterment Acts, enacted in several American states, which purport to give the plaintiff relief, provided he has been in possession of the land for a considerable period (six years or more), and provided he can show he was in possession under 'colour of title', title he mistakenly believed to be genuine.[11] Secondly, a line of authority,

[10] Seavey, 'Embezzlement by Agent of Two Principals: Contribution?' (1951) 64 *Harv L Rev* 431.

[11] The Australian legislation is more recent. See Property Law Act, 1969 (W.A.) ss. 122, 123; Property Law Ac.t, 1974 (Q'ld) s.196. For an earlier and narrower statute see Encroachment of Buildings Act, 1922 (N. S. W.). Other Australian states however still follow the classical common law rule denying relief: see Brand v. Chris Building Co. Pty. Ltd. (1957) V. R. 625, (1958) A. L. R. 160 (Vic. Sup. Ct.).

exclusively American descending from *Bright* v. *Boyd*,[12] does allow recovery for improvements, wherethe value of the land clearly increases as a result (in *Bright* itself from $25 to $975). Thirdly, although the classical position, including the Restatement, denies the improver an affirmative action, it has not refused defensive claims. If the owner, as we have already seen, sues the improver in possession, whether in an equitable action or one in trespass or ejectment or one for mesne profits, he cannot (as the Restatement, S42, says) obtain judgment without making restitution to the extent that the land has been increased in value by such improvements, or for the value of the labour and materials employed in making such improvements, whichever is least.

However the trouble with these exceptions is that they do not really come to grips with the underlying negative rule. Legislation, needless to say, follows its own course. But how is *Bright* v. *Boyd* to be justified, given what is still the American majority view according to which relief has to be denied. Even more curiously, why should there be a difference between an affirmative action and a defensive claim? Why, more generally, should a basic rule deny relief, if we then rush in to make both legislative and case-law exceptions to it? One let-out might be to say that where we do allow restitution we are encouraged by a superior equity that is more hospitable to restitutionary claims. But the point is why this should be so in this particular case when almost everywhere else the common law has shown itself by no means inferior in enabling restitutionary relief. Not even to mention the fact that the common law does not reject defensive claims even where the events that distinguish a claim as either affirmative or defensive can be entirely fortuitous, depending entirely on whether or not the improver gives up possession of the land before starting his suit.

It follows that the negative rule in general, and the affirmative-defensive distinction in particular, must be read very differently from the way they usually are. That is to say, they must be read not as a clash between common law and equity, but rather as rather imperfect formulations of quite another distinction previously adverted to, that between officious and non-officious services. Thus an affirmative claimant might now be seen as an officious improver, the person who intervenes from outside, with little or no connection with the owner's property, while the defensive claimant can now be presumed to be in possession with the owner's approval, while being thus in possession the improvements he makes can be taken to be with the owner's at least tacit consent, whether the latter acquiesces in P's actions, or mistakenly believes P is doing

[12] 4 F. Cas. 127 (1841), 4 F. Cas. 134 (1843);.Palmer, supra n.3, S10. 9.

what he is anyhow entitled to do, the result being, in either case, however, that P can no longer be accused of officiousness. In other words, the fact that D lets P into possession raises a presumption that D also knows of what P is about; indeed inevitably knows the longer or the more extensive the improvements that P undertakes. But there is now a special point. Can D not argue that in the case of mutual mistake of title any allegation of officiousness has to be looked at from two sides, not only from that of P but also from that of D. For it is not always enough to say that P was not officious because he was mistaken, because even if not officious in intention, he (P) may nevertheless still render himself officious in effect, since what P did for him is something he (D) did not remotely want so that restitution does alter his position disadvantageously. Yet how strong is this objection from D? It does not seem to have been realised that D's mistake now has more far-reaching implications. As we now assume that D was not merely ignorant of what P was doing, but was mistaken about the title of the land precisely as P was so mistaken, this implies that, given such a mistake, D cannot really complain that the land on which the improvements take place matter to him significantly. It is not as though the improvements are made on land the owner of which happens to be temporarily absent, but land in which he might nevertheless be presumed to have great or lasting interests. On the contrary, we now seem to be dealing with land concerning which the owner can in fact be taken to be indifferent to for the simple reason that he (D) does not even believe that the land is his property. If so, D cannot later turn round and say that he has been disadvantaged by what P did or that P's improvements are something completely unwanted; for D now finds himself, contrary to his earlier knowledge or belief, to be the proprietor of land with new improvements. It is true that D's mistake does not alter his title, but it does undermine his defense that P's officiousness affects him detrimentally or diminishes his economic prospects or autonomy quâ proprietor.

On this basis, the one remaining problem is only to work out the best method by which a restitution is technically achievable, whether by a monetary recompense to P, or by a sale of the land, or its exchange, or lease, or the granting of an easement—the method to be chosen always depending not only on the satisfaction given to P but also on the least possible discomfort to D.[13]

[13] Some recent American decisions now give the landowner a choice eitner of paying the improver, or of seeling him the land at a price fixed by the court, or of accepting an exchange of land if there are adjoining lots of approximately equal value: see Palmer, supra n.3, S10. 9(c). The Australian legislation also contemplates other forms of relief than monetary reimbursements.

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If the above analysis thus substantially restricts the negative rule in relation to a mutual mistake of title, what happens if D is merely ignorant of what P does? Suppose P mistakenly improves D's land which D does know is his but is otherwise ignorant of P's activities. This case differs not inconsiderably from that of the mutual mistake earlier considered. The reason is that the mutuality of the mistake guarantees, so to speak, each party's good faith *vis-à-vis* the other, whereas in our present case (where D is merely ignorant of what is happening) the parties' mutual good faith is far from assured. Thus the improver (P) may feign a mistake to avoid any allegation of officiousness, while the owner (D) may pretend to be ignorant lest he be charged with acquiescence.

Of course, P may well be found to have been reasonably mistaken and D be found to be genuinely ignorant: what is the position then? The short answer is that D should again be liable to make restitution to P, although the reason now is somewhat different. For D cannot now be said to be completely indifferent as to his property, not being now mistaken as to his ownership; rather, the reason is that he (D) can still be said to be relatively unaffected materially speaking, in the sense that he regards the land in question as a realisable or marketable asset as distinct from something as close or personal to him as his home. The point of this is that though ignorance of some event is unlike a mistake as to title, it may still have a similar effect, in that the owner's ignorance also provides persuasive evidence that it would be no hardship to D to part with the land: to be (for example) ordered to sell the land or that part of it on which the improvements occurred, either to P directly or to some third party so as to make the proceeds available to reimburse P. Ignorance, in other words, thus does give rise to restitution, but only if a particular condition is fulfilled. Obviously it is one thing for P to improve D's open or empty spaces, concerning the title of which P may well make a reasonable mistake; it is quite another thing for P to improve D's personal home which P anyhow ought to know cannot belong to him. In the former case, D's land can well be treated as a marketable or at any rate an adjustable asset, whereas in the second case this would seem out of place since D's home cannot easily be treated as a realisable asset, for to dispose of this might well leave D distinctly worse off; no longer would D be unjustly enriched. It follows that P's mistake is likely to be a reasonable or plausible one only in relation to marketable as well as ignorable assets, not in relation to more personal things.

These may be the considerations that can reconcile our negative rule

with a decision as in *Bright* v. *Boyd*[14] since this and similar later cases need no longer be seen as exceptions or as so-called 'new' developments. In any case, the above ideas also apply to chattels, these being almost always marketable rather than purely personal commodities. Examples are somewhat hard to come by, except in circumstances such as arose in *Greenwood* v. *Bennett*[15]. Here A gave his car for repairs to B. B badly damaged it and wrongfully sold it to C for £75. C repaired the car at a cost of £225 and then sold it for £450. The Court of Appeal held that C was entitled to recoup from A the value of his improvement (£225). The owner, said Lord Denning M.R., should not enrich himself at the expense of the innocent purchaser who has increased the value of the chattel.[16]

The true principle thus emerging is then far less inhospitable to restitution than has been generally taken for granted. Nevertheless the plaintiff will not have recovery unless he can show that his improvements were not officious but rest on his mistake as to title. Nor will the defendant's own mistake or ignorance help the latter, unless the improvements are on things that suggest that P knew, or ought to have known, that what he was improving was not his but was another's property. Subtle as these distinctions may be, they do trace a pattern that supports not only the demands of unjust enrichment but the principle against officiousness as well.

14 See above.

15 (1973) 1 Q.B. 195.

16 Only Lord Denning relied on unjust enrichment. Cairns L.J. thought there was no basis for affirmative restitution, while Phillimore L.J. did not commit himself on this issue. The Torts (Interference with Goods) Act 1977 now recognises that the mistaken improver should be given an allowance to the extent to which the increased value of the goods is attributable to the improvement.