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RESTITUTION—RIGHT OF RECOVERY FOR BENEFIT CON-
FERRED ON LAND HELD UNDER FRAUDULENT CLAIM
OF TITLE

Johanna Held, owner of certain real estate located in South Dakota, died in May, 1941. Subsequent to her death, plaintiffs claimed title to this property under deeds allegedly executed and delivered to them by the decedent. In an action brought by decedent's administrator, these deeds were found to be void as obtained through fraud, and the present plaintiffs were found to be accountable for the reasonable rental value of premises during their occupancy. Plaintiffs brought the present action in equity to recover amounts paid by them for taxes, water assessments, repairs and for improvements made while in possession of the property. They contended that to deny recovery would permit the unjust enrichment of the defendants contrary to equitable principles. *Held*: Recovery denied. A plaintiff will not be granted relief in a court of equity from a situation in which his own fraudulent acts placed him, at the expense of the very person whom he tried to defraud. *Morris et. al. v. Crilly, 29 N.W. (2d) 805 (South Dakota, 1947)*.

A search of the cases has failed to disclose a decision exactly in point. The court, confronted with the problem, applied principles laid down in cases dealing with conveyances made in fraud of creditors, contending that the plaintiff was in no different or better position than a grantee who knowingly takes a conveyance to aid in a scheme to defraud the grantor's creditors. The pertinent rule as laid down in these cases is that such a grantee can not come into equity and obtain affirmative relief on account of taxes paid or expense had in connection with the property,¹ leaving the plaintiff to whatever relief he may have at law.

Tracing this matter to the earliest recognition of the problem, it is found that under the rules of the common law whoever put improvements on real estate did so at his peril. This was true even though such person acted in good faith in the sincere belief that the land was his. If at some subsequent time another party judicially established his title to land, such party had a right to all the improvements situated upon it,² unless an implied contract to the contrary could be established. This rule was founded upon the principle that the owner should not be required to pay a mere occupant for improvements which he never authorized. As a matter of public policy, the above rule was believed to discourage encroachments upon the property of others and to insure diligence in the examination of titles.

¹ Annotation, 8 A.L.R. 542 (1920).

² *Graham v. Connersville and N.C. Junction Ry. Co.*, 36 Ind. 463 (1871); *Washburn v. Sproat*, 16 Mass. 449 (1820); *Hill on Fixtures* sec. 45.

On the Continent the civil law evolved a more liberal policy. Anyone who made permanent improvements on land in his possession, under the bona fide belief that he was owner of it, was permitted to exact full compensation for the value of such improvements, less the value of the use of the land, before he could be compelled to surrender it.³

In England the courts of equity were influenced at an early date by the rule of the civil law.⁴ Where the true owner brought suit in Chancery seeking an accounting against an occupant for mesne profits after a recovery of the land at law, the court refused its aid to the complainant unless the innocent holder was compensated for his improvements upon the principle that he who seeks equity must do equity.

Eventually this rule was adopted, in part, by the common law courts, but the value of the holder's compensation for such improvements could never exceed the claim of the owner for profits,⁵ and would be completely barred unless mesne profits were claimed.⁶

The reader will note that the remedies indicated above provided negative relief only. Until recently there was no jurisdiction in England or the United States in which it was possible for the occupant to recover the value of his improvements in an affirmative action at law, nor by the prevailing rule could this be done in equity in the absence of fraud or acquiescence on the part of the landowner.⁷ Even today, except for a few isolated decisions,⁸ affirmative relief has not been granted in the absence of statute. Many states now have specific statutory provisions providing for direct affirmative proceedings against the owner. They are usually incorporated in so called "betterment acts" or "occupying claimants acts."⁹ Difficulty has arisen in the application of these statutes to particular situations. The decisions follow two lines of construction. On one hand the contention is made that such statutes are founded upon equitable principles and as such should be liberally construed so as to secure a fair adjustment of the rights of the parties. On the other hand there are those that argue since such statutes are in derogation of the common law they must be strictly construed. Under these statutes, the general rule is that an occupying claimant is not entitled to compensation for his improvements unless at the time the improvements were made he was in actual occupancy of the premises

³ *Searl v. School Dist. No. 2, Lake County (Colorado)*, 133 U.S. 553, 10 S. Ct. 374 (1889).

⁴ *Fn. 3, Supra*; Story, *Equity Jurisprudence*, Sec. 1237 (Rev. ed., 1846), Boston, C.C. Little & J. Brown.

⁵ *Green v. Biddle*, 8 Wheat, U.S. 1, 5 L. ed. 547 (1823).

⁶ 104 A.L.R. 578 (1936).

⁷ *Bigelow v. Indemnity Ins. Co.*, 206 Iowa 884, 221 N.W. 661 (1928).

⁸ 104 A.L.R. 588 (1936). Relief was confined to occupants who held land in bona fide belief that they had good title.

⁹ For typical statute, see Sec. 275.24 Wis. Stat. (1945).

under a possession which was adverse to the rights of the actual owner but maintained by the claimant in the belief that he had good title.¹⁰

It will be observed that even under these liberal statutes affirmative relief is limited to the holder who occupied the land under honest if mistaken belief of valid ownership. Obviously then even in jurisdictions having adopted these statutes¹¹ the holder with knowledge of his defective title who makes improvements will be unable to invoke the statutory remedy. However, if upon general equitable principles, one who has mistakenly improved the land of another is entitled to relief, such relief is not lost because of the existence of such a statute unless the peculiar language of the statute is such as to produce that result.¹²

This survey indicates that the plaintiff in the principal case was without any remedy at law. If relief could be had it would have to be in equity. It remains to be decided whether the South Dakota court was correct in denying equitable relief, and in applying by analogy the rule in fraudulent conveyance cases.

According to Pomeroy the principle invoked denying relief in these decisions is that one who knowingly takes a conveyance or assignment to aid and abet a scheme to defraud creditors can not be regarded as coming into court with clean hands.¹³ A distinction is made in such cases between actual and constructive fraud. If the grantee is not guilty of actual fraud¹⁴ but is chargeable with knowledge of such facts that the law holds him guilty of constructive fraud, it would seem that on the setting aside of the conveyance, he is equitably entitled to reimbursement for sums expended by him in good faith to discharge taxes or prior mortgages on the property.

Glenn maintains that no such distinction should be made. He points out that the distinction arose out of the old English Criminal Statutes designed to increase crown revenues and that the practice was adopted to protect persons guilty of only constructive fraud from the harsh forfeitures under these laws. These statutes should have no effect on civil rights. It should further be noted that the primary purpose of this branch of the law is to remove obstacles from the path of the creditor in reaching his debtor's assets. Hence equity should not overlook the claim of a grantee who has preserved an asset.¹⁵ The courts have apparently begun to relax the rule as to the absolute denial even of negative relief for those guilty of actual fraud in fraudulent conveyance cases.¹⁶

¹⁰ American Jurisprudence, Vol. 27, Improvements, sec. 8.

¹¹ South Dakota does not have such a statute.

¹² 104 A.L.R. 607 (1936).

¹³ Pomeroy's Equity Jurisprudence, Part II, Ch. I, Sec. IV, Par. 401c.

¹⁴ Glenn, Fraudulent Conveyances and Preferences, Vol. I, Sec. 250.

¹⁵ Glenn, Fraudulent Conveyances and Preferences, Vol. I, Sec. 256.

¹⁶ *Ackerman v. Merle*, 137 Calif. 169, 69 P. 983 (1902); *Smith v. Grimes*, 43 Iowa 356 (1876); 8 A.L.R. 533 (1920).

Glenn argues that the test of every such credit should be whether the payment was devoted to the interests of the property or only for the personal convenience of the grantee.¹⁷

The Restatement of the Law of Restitution seems to subscribe to Glenn's point of view. Section 158 reads:

A person is entitled to specific restitution of property from another or to the product from such property only on the condition that he compensate the other for expenditures with reference to the subject matter which have inured to his benefit, to the extent that justice between the parties requires.

It will be observed that even advanced views of Glenn and the Restatement confine the suggested remedy to a purely defensive role. As a matter of fact the writer has been unable to locate a single reported decision, or an article for that matter, supporting the contention that the occupant guilty of fraud, actual or constructive, should have the right to compensation in an affirmative action for expenses incurred in connection with property obtained through the fraud.

In conclusion then, from the arguments presented in the reported cases one may conclude that the issue will be decided through the application of two frequently antagonistic equitable principles; namely, the "clean hands" doctrine, and the principle of unjust enrichment.

In those actions in which a claim for reimbursement is pleaded defensively by the fraudulent occupant the trend is to permit the rule against unjust enrichment to control, thus entitling him to compensation. But in affirmative actions by the occupant the equitable maxim concerning clean hands continues to govern and relief is denied.

The trend now being to grant the fraudulent occupant defensive relief; the question arises, might equity be expected to yield eventually in affirmative actions as well? The slavish adherence of the courts to precedents in these cases would seem to dim the possibility of adoption of a more liberal rule. One might well ask why such a policy is followed. In effect the prevailing rule operates as a penalty, and perhaps tends to discourage fraudulent transactions of this nature. But to what extent should a court of equity undertake the punishment of misdeeds? For that matter if the denial of relief is to penalize fraud, the argument could be applied with equal force in favor of continued or renewed denial of defensive relief.

Perhaps the most acceptable argument sustaining the prevailing rule arises from the fact that the fraudulent occupant had a previous opportunity to litigate the matter. He could have sought reimbursement from the rightful owner when the owner brought the action to recover the property and for accounting. Having failed to take advantage of that opportunity he should be denied the right to vex the rightful owner with further litigation.

GORDON DAVIS

¹⁷ Fn. 15, *supra*.