RESTITUTION, TORT, AND CONTRACT.

Restitution, tort, and contract are related bodies of law that each address cases where people's entitlements have gotten out of alignment—cases where one person has caused losses to another, or has gained at another's expense, and so is obliged to make things right. Lawyers are trained early to spot such situations by looking for the first pattern just mentioned: someone has suffered losses for which compensation is due from whoever caused them. The losses might result in a tort claim if they involve damage to the victim's person or property, or in a contract claim if they arise from a broken promise. This book views the whole spectrum of obligations through the other, last-mentioned lens, which more often is overlooked: the rights that arise not when one person has caused an unjustifiable loss to another, but when the defendant has unjustifiably *gained* at the plaintiff's expense. Those cases are matters for the law of restitution. Sometimes searching out wrongful gains will catch the same cases found by looking for actionable losses, because a gain to one person is a loss to another (they are just two ways of looking at the same event—say, a theft); but the search for gains also turns up a great many distinctive problems and solutions of its own, which form much of our subject here.

Let us begin this look at restitution by asking how it is that one person ever does gain at another's expense. We can divide all such situations into four rough families according to the consent or intent of the parties involved; the book will be organized mostly around these groupings. Each of them gives rise to its own claims for restitution with their own difficulties, and in each case we can consider how restitution compares to other kinds of lawsuits as a source of relief.

1. *Mistakes*. Neither party might have intended the transfer. This typically results in a case of mistake, as when someone pays money they don't owe. The law of restitution is the exclusive source of recovery in all such cases, and has a well-developed apparatus for dealing with the complications that can arise—mistakes that are only partial, or a party who makes a payment while assuming the risk that it is mistaken, and so forth.

2. *Conferrings*. The giver might have intended the transfer, but the recipient did not, or in any event didn't intend to pay for it—as when one person confers benefits on another in an emergency where there is no chance to negotiate. Another sort of conferring occurs when one person does something necessary for himself and can't help benefiting another in the process. Perhaps the plaintiff, to protect himself, paid a tax bill that could have been collected from either him or the defendant. In that sort of case the benefit might not seem to be conferred on the defendant "intentionally"; it would be more precise, however, to just say that the plaintiff was not *motivated* by a desire to benefit the defendant. The plaintiff's act in paying the bill was deliberate, and the benefits that accrued to the defendant were neither wished-for nor accidental. They were side-effects of actions the

plaintiff took for other reasons. Again the law of restitution is the only source of help in such cases, and provides doctrines for separating the good cases for recovery from the bad (typically asking whether the giver's failure to seek consent to the conferral of the benefits was excusable or was a foisting that the law should not reward).

3. *Takings*. The recipient might have intended the transfer while the giver did not. In other words, one person takes benefits from the other. In these cases restitution tends not to be the only body of law that addresses the problem. The victim of a fraud, for example, can choose whether to seek return of the benefits that the defrauder obtained (by way of a restitution claim) or damages for his losses (by way of a tort suit). Sometimes the choice may not matter, but in other cases one of those measures will be larger than the other. And even when the victim does bring a claim for restitution, tort law—and for that matter criminal law—will often remain relevant. A taking only entitles the victim to recover in restitution if the taking was in some way wrongful; and much of the time the law of restitution defers to tort and criminal law for the answer to that question. But sometimes restitution does go farther than tort or criminal law in recognizing misconduct that requires gains to be returned. (Thefts might seem to be an even better example of a taking, but restitution law isn't the usual vehicle for addressing those cases. The reason is a matter of historical accident, and is discussed in the chapter on equitable remedies.)

4. *Failed trades*. Both parties might have intended the transfer, but it nevertheless resulted in unjust enrichment because the intentions of either side, or both, were frustrated. It was a defective trade or gift. (Using "trades" as shorthand for this category is rough because a gift may be a transfer intended by both sides—and so fit into this category—and yet not be a trade.) Perhaps one side or the other was not competent to execute the transfer or was forced into it by duress. Or maybe the intended enrichment of one side was conditioned on an intended enrichment of the other that did not occur. The parties had a contract and one side breached. The right to restitution may then depend on familiar points of contract law, just as it may depend on points of tort or criminal law in a case that involves a taking. But here, as there, restitution has plenty of its own work to do, for in many cases that arise from efforts at trade the point is that there *is* no contract between the parties. Whatever agreement they made is invalid. So contract law is no help, yet one side has been enriched unjustly. The result is a claim for restitution—not as a remedy for breach of contract, but as a freestanding claim of its own.

These categories are informal, and some situations might be sorted into more than one of them. Transfers made under duress could be viewed as extractions made by a wrongdoer without consent—in other words, as a taking—or as cases where both sides intended the transfer but the consent of one of them shouldn't count: a failed trade. A payment based on a mistaken belief of fact likewise could be viewed as an intentional conferring, or as a trade gone wrong, or as a case where there wasn't any intent by either side to make the transfer that actually occurred. Straightening out these problems would require precise definitions of "intent," but we don't need to bother about that because in the law of restitution nothing depends on the organization set out here. The actual doctrines used to decide restitution cases are fashioned at a lower level of abstraction than the divisions just shown. In all the cases just mentioned as ambiguous from the standpoint of intent, for example, there are clear and distinctive rules for decision. The categories above merely are convenient for purposes of this book because they organize all gains by one person at the expense of another into typical patterns that are easy to grasp and that tend to be treated according to similar principles.

In addition to clarifying the different sorts of restitution claims that can arise, this four-part apparatus can serve as a helpful starting point in comparing the scope of restitution on the one hand and the more familiar scope of tort and contract law on the other. The rest of this chapter will be spent examining some of those points of comparison, as they will provide a sense of orientation for what follows and some general themes that will recur later.

a. Notice that we could have asked how *losses* of wealth ever happen, and then made a sorting that looks much like the one shown above: (a) losses can occur that nobody intends, as by accident. These usually are cases of negligently inflicted injury, but self-inflicted losses, such as property mislaid by the owner and found by someone else, also would go here. Or a loss may occur (b) by giving away wealth deliberately or otherwise conferring a benefit on someone else. This doesn't give rise to a legal claim when viewed as a loss. In other words, it is not a source of tort liability, though it may create a good claim for restitution, as noted a moment ago. Or a loss may occur (c) when one party intentionally takes wealth away from another. These usually amount to intentional torts, so the victim can choose between recovering his losses (in tort) or demanding return of the other side's gains (in restitution). This category also can include extractions by the government that may or may not turn out to be wrongful. Or, last, a loss can occur because (d) a party makes an intentional trade that goes awry in some way. If the attempted trade had ripened into a contract, the loss that results is remedied by a suit for breach of that contract, with recovery usually measured in terms of the victim's damages. When the attempted trade didn't ripen into a contract, the loss can only be remedied by a restitution claim, with recovery measured in terms of the defendant's gains.

As that review shows, most transactions can be viewed as occasions for either gain or loss; it just depends on how you look at them. But notice that restitution law gives a more complete account of gains than tort and contract law give of losses. If I defraud you out of $500, you can bring a tort claim or a restitution claim as you prefer. But if you mistakenly send me $500 that you meant to send to your plumber, there is both a loss to you and a gain to me, but tort law has no comment to make, while the law of restitution is just as interested as ever. The reason for the asymmetry is that restitution is the remedy for unjust enrichment, which is a very broad category, whereas tort is not quite a remedy for unjust losses. It is the remedy for *wrongs* one person commits against another, which is a smaller set of events. Contract law likewise is not about all unjust losses, or even all losses that can arise from voluntary exchanges that go awry. It is only concerned with losses that arise from properly formed contracts, which again is a smaller category. Contract and tort law can afford to be narrow precisely because the law of restitution picks up the slack in all the cases of misallocation that they don't cover.

But it would be a mistake to infer from this that restitution just exists to give plaintiffs some recourse in cases that tort and contract law miss. It would be closer to the truth to think of tort and contract law as exceptional. Recovery is available for every unjust gain that one party makes at another's expense, whether by a mistake, a conferring, a taking, or a trade. The law of restitution speaks in detail to all of those situations, and provides a remarkable array of tools to rectify them. Then come tort and contract law, which provide some special and additional rules that also allow plaintiffs to recover more simply for their *losses* even without reference to whether anyone else has gained—but only in a fairly narrow set of cases when particular requirements are satisfied, and then usually by a simple remedy. The plaintiff just presents the defendant with a bill.

It would be tempting and tidy to say that restitution law has the potential to speak to every case covered by tort and contract law (if the cases from those areas are viewed from the standpoint of gains rather than losses) and then many others as well. But it would be a little misleading. In theory, any instance of unjust enrichment can indeed be addressed with a restitution claim. In practice, though, there are a couple of types of unjust enrichment that never result in restitution claims because our legal traditions have committed the resolution of them to a different rigmarole. After a breach of contract, the plaintiff might, in principle, be able to sue the tortfeasor in restitution, claiming that he was unjustly enriched by the breach. This never happens in practice, though, because the law is used to handling those problems as "contract cases"—within which, however, "restitution" is one possible remedy that operates much like (though not exactly like!) a restitution suit would. And if I steal your goods and you want them back, this too might in principle seem to call for a restitution claim. I certainly have been unjustly enriched. But it just happens that these facts traditionally have been addressed by a suit for replevin rather than restitution. Restitution does become relevant if I have sold your goods and you want the money I obtained for them. This distinction, too, is a matter of historical accident. It will be discussed in the chapter on equitable remedies. These wrinkles might make the scope of restitution sound confusing, but the general result they produce can be stated simply enough. Almost any case of unjust enrichment can be—and is—addressed with a restitution claim. There are just a few kinds of unjust enrichment that are addressed in some other way, and we just noted the most important of them.

While the scope of restitution law is wider than the scope of tort or contract law, tort and contract undeniably have a more constant practical importance. First, in the cases that tort and contract law cover, plaintiffs usually prefer claims under those headings to restitution claims because their losses are greater than the defendant's gains. In a car accident, for example, the gains to the defendant from skipping whatever precautions he should have taken are minimal, while the losses to the plaintiff are large. The same goes for a punch in the nose. So those incidents invariably result in tort rather than restitution claims. Nobody even thinks of restitution as a plausible line of recovery for them.

The other and larger reason for the greater importance of tort and contract law involves the natural incentives of potential defendants. Skipping a precaution or not keeping a promise—the stuff that tort and contract claims are made of—usually is easier and cheaper than taking the victim's interests to heart. Classic restitution cases are less likely to involve temptations like that. If I mistakenly pay you money that I owe to someone else, I have blundered at my own expense, not yours; so I have a built-in reason to be careful not to do it. Likewise, a breach of contract is a more common thing than an invalid contract, because a breach is tempting for one side to commit but an invalid contract is not usually tempting for either side to make. If a contract ends up invalid and useless, it is usually in spite of the original intentions of both parties. Tort and contract law get used more, despite covering less ground than restitution, because opportunism is a more powerful force than the altruism, self-injuring carelessness, and other forces that give rise *only* to claims of unjust enrichment.

So restitution shows up behind tort and contract law in practical importance, but not too far behind, for its reach is vast and covers a lot of situations that come up often. People make mistakes, reasonable or unreasonable, about who or how much to pay. They perform disputed obligations that turn out not to exist. They confer benefits on others in emergencies. They do things for themselves that incidentally make others better off, too. They steal and then resell property or commit other wrongs and greatly enrich themselves in the process. Those are all cases for the law of restitution, and the patterns they involve can arise not only on their own but in the thick of other cases that may appear at first glance to be just matters of tort and contract. The seasoned expert on restitution sees occasions for it that are easily overlooked by the lawyer overly habituated to look for losses, who asks when confronted with any misallocation whether it somehow can be crammed into the law of tort or contract.

b. The word "restitution" is confusing because it can refer to either of two things. It is, as we have been treating it, the name of a certain kind of *claim* a plaintiff can bring: a claim that the defendant has been unjustly enriched at the plaintiff's expense. Restitution also is the name of a certain kind of *remedy* a plaintiff can seek in other kinds of cases—mostly involving contract law, but sometimes also involving other areas, such as those governed by statutes that may entitle a plaintiff to "restitution" in a specially defined sense. This is simply an annoyance in studying the subject that the lawyer has to master early.

Some of this confusion could be avoided by changing our use of the word "restitution," so that it never describes a type of legal claim and only is used to describe a remedy—the remedy of disgorgement, whether in response to a claim sounding in unjust enrichment or a claim sounding in contract or elsewhere. On this view "unjust enrichment" might refer not to every situation that gives rise to restitution, but just to a subset of claims with its own set of elements. We thus would have tort claims, for which restitution is a possible remedy, contract claims, for which restitution is a possible remedy, and unjust enrichment claims, for which restitution is a possible (or perhaps inevitable) remedy. This would indeed make life a little less confusing in some ways, but it would create a series of fresh problems. The claim of "unjust enrichment" would have to be defined to capture a lot of cases that are quite dissimilar—cases involving, say, both mistakes and conferrings. Some claims will fall outside any definition one makes (restitution law currently covers a lot of very miscellaneous fact patterns); they will be left in search of a name, and in a strange legal posture. Meanwhile it doesn't appear that reworking the verbal and intellectual framework in this way would cause any cases to come out differently. So with all due regret that the terminology for these cases wasn't chosen better seventy years ago, the case for a fundamental change in it seems unpersuasive. Lawyers understand that the word "negligence" is ambiguous, as it can refer either to the tort claim one brings in a typical accident case or to one element of that claim—a failure to use due care. They also understand, or can quickly enough grasp, that "restitution" is subject to its own ambiguity, as it can name either a remedy or a freestanding type of legal claim based on unjust enrichment.

c. It is hard to sketch the economic rationale of a large field in a short space, but much of restitution law can be explained by the interaction of a few principles. First, sometimes it is useful to look at tort and restitution as complementary. Tort law determines when people are responsible for injuries, or costs, that they impose on others. Restitution determines when people are liable for gains they have made at others' expense. The parallel is useful because both tort and restitution can be viewed as substitutes for contracts. People go around creating costs and benefits for each other; that is the usual business of life. If they transfer those costs and benefits voluntarily on both sides, we say it is done by contract and the results are governed by their agreement and by contracts law. But sometimes transfers aren't voluntary for one reason or another—not intentional on one side or both sides, or intentional but not amount to contracts—and for those cases we need other legal tools to adjust the results: tort and restitution law. Often these adjustments amount to asking what arrangements the parties might have made if a contract had existed between them, to the extent such a thought experiment is workable.

This assumes that neither side can be blamed for *not* making a contract or discussing the possibility in advance. Giving the parties what they would have agreed upon in a hypothetical discussion beforehand sometimes is less important giving them an incentive to engage in actual discussions next time. A central focus of much of restitution law, as we shall see, involves deciding when the plaintiff is justified in, or at least excused for, conferring benefits on the defendant without a contract. It isn't quite as simple as saying that plaintiffs lose if they could have made contracts but didn't; for sometimes they win anyway, as when they make innocently mistaken payments. The law's concern more often is to prevent people from consciously skipping voluntary negotiations or other uses of markets.

Second, the nature of losses at issue in restitution cases differ in interesting ways from the losses at issue in many tort cases. Usually an accident that leads to a tort suit isn't just a loss to the victim, it's a real loss of resources. An accident has occurred and now a bunch of costs exist that weren't there before—medical expenses, repairs, and so forth. Those costs can be considered a waste, and are counted as social losses as well as personal losses, because resources that might have been spent in some better way will now have to be spent fixing new problems. This makes it economically important to avoid accidents, or more precisely to spend resources preventing them until precautions become more expensive than whatever gains in safety they would produce.

Cases of unjust enrichment usually don't involve social losses of that kind, at least directly. If I pay money to you that I don't owe, or I pay you money on a contract that turns out to be invalid, I'm poorer but the world isn't, at least not significantly. Rather, I'm poorer and you are richer, perhaps to an identical extent. In this case resources haven't been wasted. They just have been moved from one person to another. It is easy to understand why liability should be imposed on someone who fails to prevent a waste of resources, but it is not as obvious why there is a public interest of any economic kind in a case where one person's wealth merely has been shifted to another.

There are several answers to that question, and some of them resemble the economic account of why we have liability for intentional torts that merely transfer wealth from one person to another—such as conversion, or theft. First, some acts that call for restitution *are* intentional torts. They result in restitution suits just because the gain for the tortfeasor happened to be larger than the loss to the victim (perhaps the tortfeasor embezzled money and then profitably invested it). Taking away the tortfeasor's gains will make his act valueless to him, and so deters it better than just making him pay for the damage done. He thus ends up with an appropriate incentive to respect the rights of others and seek what he wants by their consent. An important economic reason for inducing those consensual transactions is that restitution cases, like intentional tort cases, often raise nasty problems of valuation. We don't know whether the converter of goods values them more than the victim of the conversion, because they did not bargain. There is a similar difficulty in the reverse situation where the plaintiff in a restitution case confers benefits on a defendant who did not ask for them. We don't know how much the defendant valued them, because the parties did not bargain. So we deter the intentional tortfeasor from proceeding in that way by making him pay damages, and we deter the officious supplier of benefits from proceeding in that way—at least sometimes—by denying him any recovery for them.

In addition, bad transfers—even those that create no loss in themselves—create side costs if they go uncorrected. The familiar point from torts is that if the law provides no remedy when you take my things, I have to spend lots of my own money on protection of them, and everyone else has to do the same. To apply the point to problems of unjust enrichment: if you aren't legally obliged to return overpayments I make to you, then perhaps we will have to waste time making our own agreements about how to handle that problem if it ever comes up (contracting around the legal rule, so to speak), or taking exaggerated precautions to make sure such an overpayment never happens. And if you aren't legally obliged to pay me if I rescue you, perhaps I don't bother with the rescue—which is too bad, because if we had foreseen the emergency we would (let us imagine) have made a contract to provide for the rescue at a price satisfactory to us both. So restitution law may not prevent costly accidents, but it sometimes provides a substitute for precautions that the people involved should not be put to the bother of taking in advance.

d. Despite the fact that accidents—the stuff of tort suits—involve immediate social losses while cases of unjust enrichment frequently do not, the law often is quicker to provide remedies in restitution than in tort. Holmes observed that the law of torts presumptively allows losses to lie where they fall. If I run you over with my car the result is a serious social loss, but you have no right to recover anything from me unless you can show some fault on my part (so if I collapsed behind the wheel from a heart attack, you probably lose). Compare a case where I negligently overpay you. There is no immediate social loss, yet the law of restitution generally allows me to recover the overpayment despite the absence of fault on your side and the presence of it on mine. *Gains*, in other words, do not presumptively lie where they fall.

This at least is the practical result of restitution law. There is a theoretical debate among restitution scholars about whether, in general, gains at another's expense have to be turned over unless they are shown to be justified, or whether the burden is on the plaintiff to show that they *aren't* justified because that there is an "unjust factor" at work. The latter view would be much like saying that gains presumptively do lie where they fall. But even if that were the outcome of the theoretical debate about restitution, the practice wouldn't resemble the pattern found in the law of torts. The broad scope of restitution law, and the large number of "unjust factors" that everyone agrees can support a claim of unjust enrichment, mean that gains at another's expense routinely have to be paid back—again, even when the plaintiff is at fault and the defendant isn't.

e. Considerations of fairness—that is, matters of justice separate from arguments about economics and incentives—also operate somewhat differently in tort and restitution. In tort cases it often is hard to isolate a specific role for worries about fairness independent of worries about efficiency, because they usually point the same way. Take as a simple example the standard rule in tort cases that someone who negligently causes an accident has to pay all the costs incurred by the victim. This serves the cause of efficiency by forcing the defendant to feel, or "internalize," the entire cost of his carelessness, thus giving him and others an incentive to avoid more of the same. It also might be thought to serve the cause of fairness by restoring the plaintiff to the rightful position he occupied before the accident. But the disgorgement of gains in a restitution case doesn't work that way. The amount the plaintiff recovers may bear no relationship to anything the defendant did or needs to internalize. The defendant may have done nothing wrong at all. The large recovery comes just because the plaintiff has a better claim to the money than the defendant does. Sometimes this practice can be explained using the sort of hypothetical contract fantasy employed a moment ago, but in other cases that rationale is strained. And there are other ideas in the law of restitution that seem to be based mostly or entirely on fairness, such as the rule that liability in restitution cannot be permitted make the innocent recipient of a gain any worse off than he was before the gain arrived, or that no one should be allowed to profit from his own wrong. Tort law has no comparable rules.

The notions of fairness found in restitution law sometimes have old roots. Restitution historically was available from both law and equity courts, and the influence of equity principles still can show up at every stage of a restitution case now. Contract and tort law, by contrast, were strictly matters for law courts, and this is reflected both in the simplicity of the remedies usually available for such claims—i.e., money damages—and in the more clear-cut rules of entitlement and defense that govern them. Equitable remedies play a relatively small role in tort and contract litigation, whereas they are at the fore in a large share of restitution cases. And restitution also offers a set of defenses that account for the equities on both sides of the case both in deciding liability and in fashioning remedies.

On other occasions the law of restitution can seem a good deal less sensitive to notions of fairness, because some of its principles are grounded in basic ideas about property—ideas that don't lend themselves to the balancing and inquiries into blame that we often find in tort cases. Suppose that after defrauding Smithers and Jones out of $500 each, you put their money into separate pockets. You spend Jones's money, and then you are caught. All you have left is the $500 from Smithers. Both parties bring restitution claims against you. Should Smithers get the entire $500 back, or should he and Jones get $250 apiece? The latter solution might seem more fair, since the two plaintiffs were (let us assume) equally victimized by you and equally free of any culpability of their own. But traditional rules of restitution would probably entitle Smithers to all of his money and Jones to nothing, because Smithers can make a property claim. The money is *his*. He can point to it in your pocket, say that you never obtained title to it, and insist that it therefore has to be returned directly without any talk about what is fair to Jones. Some courts might insist on a clearer separation of the funds than just putting it into separate pockets, but the principles would still be the same. Then again, a few modern courts have abandoned this logic in favor of *pro rata* distribution to victims of fraud when the defrauder has spent the money of some of them but not others. We will return to that issue, too, later in the book. For now we can take it just as an example of a general theme: the recurrent tension in restitution law between old-fashioned rules founded in property and more modern tendencies to apportion liability based on fault.

MISTAKES.

1. *Mistaken payments of money.*

Herbert W. Smith and Huling W. Smith both have rights in the Amoco oil company. Amoco lists them both in its records as "H. W. Smith," and the identical names cause the company to make a mistake: for several years it sends Huling's money to Herbert. When the error is discovered, Amoco wants Herbert to return the money. This is a real case, and an easy one.[1] Herbert has to give the money back. It is the same if Amoco mistakenly sends him more than it owes by mistyping the amount on the check or if Amoco mistakenly pays him twice for the same thing.[2] In all of these cases the recipient is unjustly enriched to the extent of the mistake, and is legally obliged to pay back the overage. Or if a claim is brought against Herbert by the person who was supposed to receive the money—say, Hulett Smith—then Herbert has to pay it over to *him*.[3] Either party—the one who made the mistaken payment, or the one who should have received it—has a better claim to the money than Herbert does, and either can bring a claim for restitution. (If Herbert makes a payment to either of them, his obligations to both are at an end.) Herbert may have defenses, as would be the case if he has innocently spent the money in some irrevocable way. But those are complications for later.

In effect the liability of someone who receives a mistaken payment is strict. If I inadvertently send you money that I do not owe, it does not matter if you were free from blame, or indeed if I was negligent or even grossly negligent[4]—as I probably was, for that is how mistakes typically happen.[5] You have to repay the money the tenth time I overpay it, just as you did the first time. The usual judicial account of the rule is that it is a matter of equity or ethics. The recipient of the money has done nothing to deserve it; if he is in a position to give it back, that is obviously the right thing for him to do, or for the law to make him do.[6] He is said to be "unjustly enriched"—a phrase that makes the rule seem to be a matter of intuitions about deserts. But what about the economic basis of the rule? At first it might seem puzzling. Mistaken payments in themselves don't cost society anything. They are painful for the maker of the mistake, but presumably are just about as pleasurable for the recipient. *Returning* the money does cost a little something. So why not let the loss lie where it falls? Or we can state the puzzle this way: the legal response to mistaken payments doesn't do much to deter them. If we try to infer how much care the law wants the mistaken party to take, the answer seems to be none. Wouldn't mistaken payments be better discouraged by letting the recipient keep the money?

No doubt they would; but they probably would be *overly* discouraged. The problem is that the actual cost to the world of a mistaken payment may bear no relationship to how large a payment it was. Suppose I send you checks routinely. One day I mean to send you $10,000 but put the decimal in the wrong place and send $100,000, which you deposit without noticing (you receive hundreds of checks each day). The error annoys me; it might annoy you, too, if you feel obliged to correct it. But letting you keep the $90,000 excess as compensation for the annoyance is overkill, because the actual costs imposed on you are unrelated to that figure. They are just the costs of finding the money and cutting a check in the other direction, which (let us imagine) might amount to $100 in trouble. To turn the point around, the threat of a $90,000 penalty for such mistakes would cause me to invest heavily in efforts to make sure the mistakes never happen. Those heavy investments in care would probably cost me a lot more than the $100 that my occasional mistakes would cost you if you are required to give the money back.

So the cheaper way to handle mistakes (if we are looking just at total costs to everyone, and not worrying about who pays them) is to have you put up with the relatively small bother of returning the money, or, if the bother can be quantified, to deduct it from what you pay back to me. The right to deduct those incidental damages is implied in the Restatement's assurance that "[t]he liability in restitution of an innocent recipient of unrequested benefits may not leave the recipient worse off (apart from the costs of litigation) than if the transaction giving rise to the liability had not occurred."[7] This creates a reason to be appropriately but not excessively careful about mistaken payments: makers of mistakes have to pay for any costs they create by them. This probably resembles the solution that we would expect parties to reach who do a lot of business and handle the possibility of mistaken payments by contract. The solution that keeps their joint costs the lowest is to simply have such payments returned whenever they are made, less any quantifiable loss they have cost the other side.

And in the background, besides, is the built-in incentive anyone has to avoid these sorts of mistakes. Mistakes create a risk to their makers that the money will not be recoverable because the recipient will have changed position in reliance on it, or will have some other defense, or will abscond. The real case we started with is an example. Herbert W. Smith had to pay back some of the money to Amoco, but not all of it; by the time the company noticed its mistake, its right to take back the earliest payments it made had been extinguished by the statute of limitations. So there are natural pressures to avoid mistakes, and they help explain why the law goes so easy on those who commit them. The built-in incentives to be careful are, if not optimal, adequate to prevent mistaken payments from being a chronic source of annoyance to anyone.

2. *Allocating the risk of mistake.*

There is one great and general limit on the principle of restitution for mistaken payments. The defendant's enrichment is not considered unjust, and thus the plaintiff can have no recovery, if the plaintiff assumed the risk of the mistake. We sign a contract in which I agree to pay you $10,000 and you agree to dismiss your lawsuit against me, which had sought $100,000 on the theory that my ox gored you. I don't think that I owe you anything, but I would rather pay the $10,000 than continue the litigation. You are sure that I owe you $100,000, but would rather take $10,000 than go to trial and risk ending up with nothing. A few weeks later I find evidence that would have won the case for me decisively—the ox had an alibi—and now claim that you have been unjustly enriched by my mistaken payment to you of $10,000. The argument fails, of course, because our contract implicitly addressed the risk that other evidence might later appear and make my case stronger. In effect our agreement allocated that risk to me, the mistaken party; to settle the case was precisely to take that chance in return for an end to hostilities. The contract might even have *said* this.[8] But whether the allocation was explicit or just the fair implication of our contract, the result is the same so far as the law of restitution is concerned. These really are not cases of mistake at all. They are cases of judgments about risk that one party comes to regret.

Sometimes the allocation of risk made by a contested payment is not so clear. Some prominent close cases of this type involve decisions by insurance companies to pay uncertain claims. Thus in *Pilot Life Ins. Co. v. Cudd*,[9] the plaintiff's husband, Cudd, was a cook on a ship that went missing during World War II. The Navy told the plaintiff that Cudd was thought to have been lost at sea. The company that insured his life was sent a "Certificate of Presumptive Death," and it paid Cudd's wife the policy benefits. Then Cudd reappeared as a prisoner of war in Japan. The insurance company wanted its money back and got it, the court concluding that "acceptance of the death of the insured as a fact was a mutual mistake of fact equally concurred in by both parties."[10] To this case compare *New York Life Ins. v. Chittenden & Eastmen*.[11] The insurance company issued a policy on the life of a man named Jarvis. Jarvis vanished. The insurance company said it would pay the policy benefits only if the beneficiaries signed a bond that would cause the money to be paid back if Jarvis reappeared. The beneficiaries refused. The insurer decided to pay them the benefits anyway. Then Jarvis did reappear. The company was not able to recover its payment:

> Counsel for appellant insist that this payment was one made under a mutual mistake of fact, and that in accordance with the well-recognized equitable principle money thus paid may be recovered back. The rule thus invoked is not applicable, however, where under an assumption of fact known to both parties to be doubtful there has been a voluntary payment in extinguishment of a claim.[12]

These two insurance cases reflect the alternative ways of interpreting a payment that its maker would not have made if better informed: it can be viewed as a mistake or as a calculated risk. Deciding which pattern a case follows can be difficult in practice. If the assumptions behind a payment are not made explicit, the court has to consider whether the party making it stood in conscious ignorance of some feature of the facts. A more recent application of the principle is furnished by *Tarrant v. Monson*.[13] A jeweler lost a customer's ring, and offered the customer a replacement of her choice from his collection. Later the jeweler found the original ring; the customer preferred to keep the replacement, which was more valuable; the jeweler sued and lost. His replacement of the ring was viewed not as a mistake but as the settlement of what otherwise would have been a dispute: "Since respondent at time of agreement knew that the ring might later be found, respondent bargained with conscious uncertainty and not under a mistaken belief."[14]

Whatever its difficulties in practice, the theory of this "voluntary payment" rule is easy to understand. If the parties are aware that the premise behind a payment may be wrong, the size of the payment will reflect the payor's judgment about that possibility, his willingness to risk litigation by holding out until the unknowns are cleared up, and so forth. He is consenting to a particular allocation of risks, and presumably knows better than anyone else how he values them. If a court were to undo that allocation later by awarding restitution, payors in the same position would not be able to credibly commit themselves in the future. A defendant would offer a plaintiff a certain sum to settle a case; the plaintiff would be distrustful, worrying that if facts were to later turn out the defendant's way, the defendant could claim the defendant had been unjustly enriched by the earlier payment. So the plaintiff would refuse the offer. The result would be litigation that neither side wanted.

Where arguments of policy call for it, the risk of a mistake also can be allocated to a claimant in subtler ways that don't involve the consciousness of risk we saw in the cases just described. In *United States v. Systron-Donner Corp.*,[15] the federal government gave a contract to Lockheed to build missiles. Lockheed's price was based partly on the bid of a subcontractor, Systron-Donner. That bid turned out to include mistaken double charges. The government sought to recover its payments for the double charges, claiming that the payments were based on a mistake: the government had thought that it owed those monies but it "really" didn't. But it really did; the claim was rejected. There had been a mistake in a sense, but not (the court thought) in the sense relevant to restitution; even if the risk of this error had not been the subject of any conscious awareness on either side, it was assigned to the government anyway—"as a matter of law," as the Restatement puts it,[16] which essentially means that the allocation serves the interests of public policy.

The result in *Systron-Donner* might seem questionable. The government had agreed to pay twice for the same thing, and would not have consented to the contract if it had understood that. But the mistake made by the bidder can be viewed as just an extreme example of a common enough pattern: the price a seller proposes turns out later to be higher than it would have been if he had shown more care or foresight in calculating it. More commonly this will be true because performance simply ends up being cheaper than the bidder had expected. In *Systron-Donner* it was true for a different reason: the bidder had gotten the math wrong. It was like a case where you see a used car advertised for $10,000, and agree to pay that price without discussion; you then discover (somehow—perhaps the seller imprudently admits it) that the seller's calculations of the car's value had mistakenly counted the radio twice. This does not entitle you to have some of your money back. Your agreement to pay $10,000 was an assumption of the risk that the seller came to that price by mistake, or by throwing darts, or in any other way, so long as he made no misrepresentations—an important qualification. In short, these are not cases where one side pays the other an amount that everyone can agree was not owed.

The point of the rule is that contracting parties seem best served when the prices they agree to pay and accept for things are treated as final and opaque unless stated otherwise. A bidder gets no relief if he makes a mistakenly high price quote that prevents him from winning a contract, or if he makes other mistakes that cause his performance to be costlier than he had estimated. The buyer likewise gets no relief if he agrees to a price that he later learns was higher than it could have been. A party that wants a different allocation of risks is free to offer (or demand) a price that is explicitly subject to reduction if it turns out that the estimates or calculations behind it were higher than necessary. Such contract provisions evidently are unusual. Part of the reason probably is that bidders and sellers already have enough incentive to avoid these sorts of mistakes; after all, they are trying to win a bidding contest, or to sell a car. But more generally it would create uncertainty in commercial life if an agreed-upon price could be attacked later by showing that although neither side said anything false, one of them made a mistake in figuring out how much it should offer to the seller or vice versa.

Now a final type of mistake. I sell you a horse because you seem to me to be an upright sort of person. Later I discover that you are a rascal—a felon, even—and I want to unwind the transaction, regarding it as a great mistake. I would not have made the sale if I had known your true character. More likely variations involve gifts made to friends or relatives who turn out to be unworthy—and this is a more interesting version of the problem, too, because one cannot just say the risk of the recipient being a rascal is impounded in the contract. There was no contract. It was a gift. But I still can't recover it or demand payment.[17] There is always a risk that the recipient of a gift, or the partner in any transaction, will turn out to have bad character or make the other side sorry for some other such reason. But once those qualities have been revealed, it is too hard for a court to figure out how important they really are, or were, to the unhappy party, how much investigation of them would have been worthwhile beforehand, and so forth. The answers to those questions will vary a lot from person to person, and will depend on testimony given in hindsight that will tend to be self-serving. Not letting the giver reverse the gift gives him a good incentive to check out the recipient's character in advance if he cares about it, rather than trying to undo the deal at a later point that causes more disruption and doubt. A restitution plaintiff can get relief from mistakes that, like duress or fraud, impair his efforts to *make* a judgment, not mistakes that involve the erroneous assessment of accurate facts.

The line between mistakes of fact and of judgment cannot be made entirely precise, and it is pliable in the face of other policy considerations besides the ones just mentioned. It makes a great difference if the recipient hid things from the donor or otherwise engaged in conduct the court considers "inequitable." So to the disappointed gift-giver discussed a moment ago, compare *Hutson v. Hutson*.[18] The plaintiff married a woman and made a gift of property to her before discovering to his surprise that she was still married to someone else. The gift was held to be recoverable in restitution. The misapprehension was a matter of fact that the plaintiff had no reason to doubt and that anyone would regard as important; it wasn't a judgment that might have idiosyncratic importance to him and that he should have understood himself to be making at his own risk when he entered into the marriage. Yet in *Mott v. Iossa*,[19] a plaintiff likewise was duped into marrying a woman, one Filomena, who was already married to someone else, but he was not allowed to recover gifts he made as a result—because the gifts were made not to Filomena but to her son. The court defended the result by saying that "the cause of the gift was his affection for the boy himself and not his belief that Filomena was his lawful wife." This reasoning seems wrong; there were many "causes" of the gift, and it seems highly doubtful that it would have been made if the plaintiff had known the truth about his wife. Probably the better explanation of the result is that the son was innocent and the court was loath to upset his expectations.

3. *Benefits other than money generally*.

The next series of problems will best be pursued through a stylized example that can illustrate them all. Instead of mistakenly sending money, suppose you send me an order and payment for 10,000 bricks. I mistakenly send 12,000. Without counting them, you use all the bricks to build a wall. The extra bricks make the wall a little stronger. Then I discover my mistake and demand payment for the extra 2,000 bricks. Notice first that if the mistake had become apparent before you built the wall, it really wouldn't be a problem. You would simply be obliged to return the extra bricks. A mistakenly delivered thing, like a mistaken payment of money, unjustly enriches whoever receives it, and if the thing can be returned, the plaintiff is entitled to that remedy—a case of "specific restitution."[20] The brick wall is a harder case because it isn't feasible to return the goods. The bricks are *in* the wall. They could be removed, but only at considerable cost to you. So you undoubtedly have been enriched by the extra bricks, and I have suffered a loss, but there is no way to rectify the situation cleanly. And let us assume that whatever contract we had did not speak to this possibility.

Here as with mistaken payments, the law of restitution does not generally ask whether my mistake in sending the extra bricks was negligent.

(If it did, again, most claims would fail. Negligence is the usual reason why mistakes like this ever happen.) The basic problem would be similar if, instead of sending you extra bricks, I were to mistakenly plow your field, thinking it belongs to someone else who had hired me. In either case the benefit cannot feasibly be returned, and in either case it will probably be hard to say what you should pay for it. The law deals with problems of this kind by applying two fundamental principles.

a. The first is that recovery in restitution is measured by the defendant's provable gain (the benefit he got from the extra bricks) and not by the plaintiff's loss (probably the cost of the bricks).[21] Notice that the plaintiff's loss usually will be greater than the defendant's gain; after all, the defendant didn't want, or at least did not ask for, whatever the plaintiff sent. If the plaintiff's loss is *smaller*—as in the rare case where he makes a mistaken improvement that is worth a great deal to the recipient of it—then the defendant can just pay those costs. In other words, the measure of recovery is the *lesser* of the costs to the plaintiff or the gain to the defendant.[22] (We are speaking now of the rules when the defendant is innocent. When the defendant is a wrongdoer, the principle just shown is reversed, as we shall see in the chapter on takings.)

This "whichever is less" principle didn't make a difference in the earlier cases where one side paid too much to the other. If you mistakenly send me a hundred dollars, my gain and your loss are the same, so it doesn't matter which way we look at it. But the difference in perspective can matter a lot when anything other than money is involved and it can't be returned. We are then likely to find a discrepancy between the value the two sides put on whatever changed hands. The "whichever is less" approach protects the innocent defendant and ensures that the plaintiff does not benefit by mistakenly forcing a transaction on him.

b. The second major principle relates to that final point: if the defendant—that is, the recipient of the benefit—has done nothing wrong, a restitution claim cannot be used to make him any worse off than he was before the mistake.[23] He cannot be made poorer, and cannot be forced to buy things that we are not sure he otherwise would have bought—not even if making him a little worse off in these ways would make the plaintiff much better off, or be simpler for the courts, or create rough justice. This principle has great practical importance because it often rules out solutions to a case that might otherwise seem tempting. (Some of those solutions are so tempting that the rule gets relaxed slightly. We will see an example soon.)

Though the law is very protective of the innocent defendant, it takes a quite different attitude toward the defendant who bears some blame for the mistake, either because he caused it or because he knew it was happening but said nothing.[24] In that case he will have to bear a share of the loss that reflects his share of fault for it. "Loss" here means any losses the plaintiff still may have after collecting whatever gains that he can prove the defendant had from the mistake. For example, if I mistakenly provide you with $1,000 worth of bricks (or a plowed field at a cost of $1,000, etc.) and the provable benefit to you is $600, you can be made to pay me the $600. That still leaves a loss of $400 that must be apportioned somehow. It will be allocated to me (the maker of the mistake) if you are innocent; I simply won't collect it. But you will share liability for the $400, or pay all of it, if responsibility for the mistake was partly or wholly yours, as in a case where you overlooked obvious early hints that it was happening, or did worse. Depending on the extent of a defendant's blameworthiness, he may be required to go farther and disgorge all gains from the transaction; but this point can wait until the chapter on monetary remedies.

Let us move from those first two principles to the problem of valuation. We just spoke of the "provable" benefit to the defendant. Provable benefit is the limit of the plaintiff's recovery, and if the size of the benefit to the defendant cannot be proven, the plaintiff generally cannot recover anything at all.[25] But how is that proof to be made? Presumably the bricks were worth *something*. You used them, and the wall was stronger as a result. But since you had not asked for them, we can't assume that they were worth their market price to you. The obvious inference is that they weren't; if they had been worth their market value to you (or a little more), you likely would have asked to buy them, which you didn't. Indeed, suppose you did ask for the bricks or the plowing job but we never settled the price and various other details. We might have no enforceable contract, but you would have a good restitution claim because at least we know that I wanted what I got. The law will assume I was prepared to pay market value for it—the measure known as *quantum meruit* ("as much as he deserved)". But that assumption doesn't make sense, and so this theory is generally off-limits, when the defendant received an unrequested benefit.

But forget the market value of the bricks. What about the market value of the wall? Suppose the wall were appraised, and its value were $100 greater because of the added strength provided by those extra bricks. Couldn't you then be required to pay me $100? No, because that appraisal only shows how much the market values the stronger wall. It doesn't show how much *you* value it, or whether you value it at all. True, the appraisal might show that if you ever sell the wall, it will fetch $100 more than it otherwise would have. But notice that there are problems here, not only of valuation, but also of liquidity. The money value of the thing cannot be realized without selling it, and a forced sale is not generally an option allowed by the second principle above: ordering you to pay $100 would force a transaction on you—the purchase of the bricks—that we have no reason to think you wanted to make.

With market value unavailable for use, there remain a few other ways to show that the recipient valued an unrequested benefit at some particular amount. First, sometimes it can be shown that the plaintiff's mistake saved the defendant an expense he otherwise would have incurred. That approach seems unlikely to help in the case of the bricks, but it works if my mistaken plowing of your field allows you to cancel similar work you had ordered by someone else. But it could be charged, and was charged, the price that it had agreed to pay for the coal that it would have used if the mistaken shipment had not arrived. A related approach is to show that the benefit supplied by the plaintiff was the defendant had offered to pay for on this or on other occasions, thus revealing his valuation of it. So suppose it were shown that after you originally ordered the 10,000 bricks from me, you offered to buy another 2,000 for $100. I refused, saying that I would accept no less than $200—but then I mistakenly sent them anyway. Your offer to pay $100 for those 2,000 additional bricks is solid evidence that you value them at least that much, and a good basis for requiring you to pay me $100 now. Or I might have offered to have you or someone else plow my property on another occasion, etc.

These principles are illustrated well by *Mich. Cent. R. Co. v. State*.[26] A railroad mistakenly delivered to a prison a carload of coal that had been meant for another buyer. The prison, accustomed to receiving the same sort of coal on cars from the same railroad, accepted the shipment and burned it before the mistake was discovered. The railroad sought recovery in restitution in the amount of $6.85 per ton, which was the market value of the coal. That was not allowed; for while it was clear that the prison needed coal, there was no proof that the it valued the coal at its market price when delivered. But the prison did have its own long-term contract to receive the same type of coal at $3.40 per ton, and this provided a basis for recovery on either of the principles put forward a moment ago. The contract showed how much the prison valued coal, and it showed what expense the prison had been spared by the railroad's mistake. So the railroad collected $3.40 per ton, a sum that plainly did not cover its losses but that did reflect the maximum provable value of the benefit to the prison.

Sometimes the benefit to the defendant will later be reduced to cash because he will choose to sell whatever the plaintiff gave him (or he will sell some larger thing in which the plaintiff's benefit was mixed). The defendant can then be made to give the plaintiff a share of the money, which serves as a solvent of their difficulties. The brick wall and mistaken plowing are not as helpful here as examples of mistaken improvements that result in a long-lasting benefit to the property, such as a re-roofing job that I was supposed to perform for someone down the street but mistakenly did for you instead. If you were then to *voluntarily* sell the house, and an appraisal showed that the sale price was $5,000 greater because of my mistaken contribution, I would have a good claim to that amount.[27]

Suppose, finally, that you never offered to pay me anything for the extra bricks, and that you never sell the wall—what then? You probably owe me nothing. My claim against you fails because there is no way to prove how much you valued the extra bricks, or that you valued them at all. And requiring you to give them back would make you worse off than you were before the mistake was made, since you would have to build the wall twice. Sometimes that is the result in a case of mistake. The plaintiff simply eats it. In this case you might have been enriched, and unjustly so, but recovery depends on proof of the amount of the enrichment, and there isn't any. The rule creates a stern incentive for potential plaintiffs not to make the sorts of mistakes that give rise to these valuation problems.

The logic just pursued represents an orthodox view of restitution law and follows the Restatement, but courts do not always adhere to it rigorously. When the stakes of a case are modest, it is easy to say that a plaintiff who mistakenly confers a benefit on the defendant should collect nothing for it if the value of the benefit cannot be specifically proven. But as the stakes increase, the equities of a case can put pressure on the orthodox logic. If it becomes evident that the benefit conferred on the defendant was large, courts are loath to turn away the plaintiff with no recovery even if the size of the benefit is hard to pin down. This tendency emerges most clearly when the unrequested benefit consists not of simple goods or services but of improvements to real property, which can quickly become large in scale. Let us turn to consideration of them.

4. *Mistaken improvements to property.*

As just noted, large-scale improvements are of particular theoretical interest because the equities of them put pressure on the usual principles of restitution and sometimes cause them to buckle a bit. We again can start with stylized facts. Builder mistakenly erects a house on someone else's vacant lot. He was confused about which lot he owned, or he bought the lot from someone he mistakenly thought had authority to sell but didn't, or he had a deed but the deed was defective. The owner of the lot discovers this, moves into the new house, and posts a guard dog outside to prevent Builder from trespassing. Builder brings a restitution claim against the owner. What result?

Under the principles seen so far, the outlook for Builder seems grim. Assume the owner hadn't previously planned to build a house on his property, but has no plans to sell the house now that it exists. On those facts it will likely be impossible to prove how much the owner values the house. The fact that he chooses to live there is interesting, and might suggest that he should at least pay some sort of amount for the pleasure—maybe something like its rental value each month. But this would force a transaction on him that he might not have wanted. Maybe he only likes living in the house because it is free. Of course Builder is likely to be allowed whatever specific restitution he can get without violating our second principle: if the house can be removed without damaging the owner's land, Builder will likely be allowed to come take it away.[28] (Sneaking onto the property to destroy the improvement is a very different thing, and may result in an award of damages against the destroyer.)[29] But often it will not be movable, and Builder will be able to salvage only a bit of his work. So he seems likely to receive nothing or close to it. If Builder is entitled to demolish and remove the house, perhaps the result will be a negotiation in which he agrees not to do that in return for some small amount—anything more than what the builder would net from the wreckage after he carts it away.

The analysis just shown is, again, what would follow from the simple principles introduced earlier. The result—a blundering builder puts up a house, perhaps at enormous cost, and receives nothing in return for it—is very harsh, and intolerably harsh in the view of most courts today. Not that the courts set rules about when the harshness becomes too much to bear; they just look at each case and try to come up with solutions that seem reasonable on all the facts, constrained only by the idea that the remedy must not impose undue prejudice on the recipient[30]—a standard that provides much flexibility and a long menu of solutions to consider. Those possible solutions include forcing an owner to choose between buying the house from Builder or selling the underlying land to him, in either case at a market rate.[31] Or it can give Builder an equitable lien on the house, perhaps in a conditional form that allows the value of the improvement to be collected from rental payments produced by the property or by a later rather than immediate sale of it.[32] Or the court can order a simple payment of the value of the house or other improvements to Builder.[33] Or it can always follow the older rules and just let the builder remove whatever parts of the house he can carry away, with nothing more.[34]

All these options are available in principle. Whether a court is willing to use them in practice will depend on the equities of the situation. First, of course, there is the simple question of good faith. The builder who knew he was outside his rights—an unusual character, but not unheard of—will be out of luck entirely;[35] he probably does not belong in this chapter, since strictly speaking he did not commit a mistake. Likewise, the owner who knew of the builder's mistake but kept silent will not be heard to complain later when the builder is granted liberal relief.[36] Then comes related matters of negligence. We saw earlier that a claimant's negligence usually is not relevant to whether a defendant is found to have been unjustly enriched; it becomes very relevant, however, at the remedial stage of a case. A builder who was negligent about where to build will be entitled to less solicitude than one who did all that could be asked but was the victim of a bad surveyor.[37] From an economic standpoint, the general idea is to preserve good incentives by denying some benefits to anyone who had a chance to avoid the fiasco but didn't.

Finally, a court choosing a remedy will be interested in the relationships between the parties and their properties. If an innocent owner lives on the land that was mistakenly improved, the costs of a forced sale are at their highest; no court is going to oust him. At the other end of the spectrum, where unoccupied property is held just for the sake of investment, a court is more likely to be creative in fashioning relief. The old example was wooded property on the frontier. A more modern version is *Voss v. Forgue*.[38]

The parties owned different plots in a subdivision that was under construction. One of them mistakenly put up a house on the square of land owned by the other. After finding that the two squares of property had the same value and no intrinsic advantages relative to one another, the court simply ordered the parties to trade lots. The remedy didn't really cost anybody anything, and it probably increased the overall value in the situation because the house the builder had created was no doubt more valuable to him than it was to the owner of the underlying land (who presumably had a slightly different design of his own in mind). And the solution still leaves the mistaken builder with plenty of incentive to be careful, since he can't count on being so lucky next time: the law's usual presumption is that every parcel of land is unique, meaning the owner attaches special value to whichever one he has; so a forced trade of the kind used in *Voss* is rarely going to be an attractive remedy.

The shift just described, from clear rules (don't force a transaction on the owner) to standards that are less protective of the innocent recipient (just don't inflict undue prejudice on him), also reflects a shift in time. Common law courts in the nineteenth century usually stuck to simple rules; in the settings we are considering here, those simple rules generally left mistaken builders without much recourse. That pattern was reversed by legislatures in almost every state, which passed various sorts of "betterment acts" that give broader rights to mistaken builders who have acted in good faith, often including the right to force a sale on the landowner or collect the market value of the improvements. Those statutes are still the starting place for analysis of any such case today. They tend to be limited in scope and to coexist with the state's common law, but they still have their effect.[39] In any event, the courts gradually followed suit on their own. The new rules reflected sensitivity to the position of builders on the frontier, who were adding a lot of value to empty land, and for whom exact information about land boundaries was not as easy to come by as it is today.

The result in this area bears some resemblance to the tort rules governing liability for encroachment. If I mistakenly build a house that extends a foot onto your property, there is no possible claim that I have enriched you, unjustly or otherwise. Instead you have a tort claim against me for trespass, and can ask a court to order the house removed. That request typically will be granted; removal is the usual rule in a case of encroachment.[40] But most courts are willing to make exceptions when the builder acted in good faith and the equities are very lopsided, as when a whole house would have to be torn down because it encroaches just a little. The mistaken builder is then allowed to just make a payment to the neighbor for the value of the property—a forced transaction.[41] The resemblance to restitution law in cases of mistaken improvement is evident. In both cases a formal rule works best most of the time, and in both cases the formal rule is relaxed when its application would work great hardship and the courts are satisfied that the mistake was made in good faith. It is the same fault line that extends into the law of contract, where courts are prepared to relieve parties from unilateral mistakes on a showing of good faith and serious hardship. In most of these cases the courts may just find the equities unbearable; it bothers them to see a massive punishment befall a party as the result of a relatively minor act of negligence. But that reluctance also has the economic basis mentioned earlier. It relieves parties of an incentive to overspend on precautions to prevent small invasions of the rights of others.

Mistaken improvements can be made to chattels as well as to land. The largest set of cases in this branch of the law involves automobiles. A thief steals your car and resells it to an innocent buyer. The buyer rebuilds the engine and replaces the tires—and then you appear and demand the return of the car. Your claim to the car cannot be questioned. It is yours; the thief acquired no title to it, and so could pass none to the buyer. But the buyer still might assert a restitution claim against you, for again he is as much a mistaken improver as the builder who puts a house on the wrong lot. Here as there, the buyer will be allowed specific restitution to the extent it can be easily made. In this case that means he can take back the new tires he added, since they can be removed simply enough (but he also has to put back the old ones).[42] As for rebuilding the engine, his only hope for compensation is probably a finding that you had already commissioned similar work when the car was stolen, for then we have evidence that you valued it, and by how much. Otherwise the buyer (or, more typically, the repair shop) is just another plaintiff who, by rebuilding the engine, made a mistaken but irreversible transfer of unknown value to the defendant—in which case the improver ordinarily loses.

So far this is just like the case of the brick wall, the plowed field, or any other mistakenly conferred benefit. When does it become parallel to the mistaken construction of a house—in other words, a case where the equities require some flexibility in the application of basic principles? The answer is illustrated by *Ochoa v. Rogers*.[43] Ochoa's car was stolen and sold at an auction to one Rogers, by which time it was a wreck with no top, no tires, an engine that had been removed, and so forth; as the court put it, what Rogers bought "was no longer an automobile, but a pile of broken and dismantled parts of what was once Ochoa's car." Rogers used the parts to build a delivery truck. A year later, Ochoa saw the truck Rogers had built and recognized the hood and radiator cover as his own. He demanded the truck. Rogers resisted on the ground that he had contributed most of its value. Notice the analogy to the case where a developer builds a house on a vacant lot, and thus is responsible for most of the lot's value in the end. Courts often balk at throwing the developer out of court on those facts, and the court balked in the case of the rebuilt car as well. Rogers was held entitled to it by the doctrine of accession—but he still had to pay the plaintiff the scrap value that the car had when he first bought it. That is what the remains would have been worth to Ochoa if he had come upon the wreck himself before Rogers went to work. It is analogous to letting the builder of the mistakenly-placed house force the owner of the underlying land to sell it to him.

5. *Mistaken payment of another's debt or performance of another's obligation*.

Suppose I mistakenly pay a debt that you owe. Maybe it is a tax bill that I thought was mine but actually is yours; the town wrongfully added some of your property to my assessment. Or suppose an insurance company pays someone for damage done by its insured, but then discovers that the insured's policy did not cover the incident. Those situations are structurally the same. One person has paid money that really was owed by another. Such cases usually produce restitution claims that really are no different from the other cases of mistaken payment considered already. You have been unjustly enriched to the extent that I paid off your obligations and saved you what would have been a necessary expense. This usually means that you now owe the money to me instead of to the original creditor. I become *subrogated* to the creditor's rights (that term has no important practical implications here, but it will later).[44] The amount that I mistakenly paid on your behalf is not important. What matters is the amount that you avoided paying because of what I did. These might be different amounts. Imagine, for example, that since I paid your tax bill, you are now unable to deduct your payment of it (because you made no such payment) from your federal income taxes. That is a loss to you, and it reduces the amount that you owe to me.[45]

The same sort of restitution claim arises if I mistakenly pay off a lien on your property. You sell me property encumbered by a mortgage; I pay off the mortgage; and then it turns out that your sale of the property to me was invalid. I have a claim against you for the enrichment you received when I paid off the lien, and your defenses are the same as they would be if you were confronted by the original lienholder.[46] Other complications may arise, as usual, when we stop talking about mistaken payments of money and start considering non-returnable benefits I provide to others that should have been provided by you. If I perform a job that you were obliged to do (by contract or law), you owe me, of course—not the amount I spent, but the amount you saved by not having to do the job yourself, which again may be something less.

So suppose that, as in *Sykeston Township v. Wells County*,[47] a township and county both think the township is responsible for putting gravel on a road. The township does so. Then the parties discover that the law is otherwise: putting down the gravel was the county's job. The township is entitled to restitution. But since the case did not quite involve a mistaken payment of money, the measure of recovery would have to account for the difference between what the benefit cost the plaintiff and what it was worth to the defendant. Suppose the county could have done the paving job more cheaply than the township. If so, that fact will reduce the township's recovery. It is entitled to collect the amount it spent laying down the gravel, or the amount the county would have needed to get it done—whichever is less.[48]

The policy behind all of these applications is generally the same. Letting the mistaken performer of another's obligation recover "whichever is less" (what he paid, or the amount he saved the party who should have done it) gently deters these mistakes, since the maker of them risks being undercompensated for his costs. And it probably resembles the outcome the parties would have reached by contract if they had seen the situation coming. To be more precise, if one imagines the range of terms that the parties might have agreed to, the law chooses the set of terms most favorable to the party who was supposed to pay the obligation: he pays to the plaintiff whatever amounts he was saved, but not a penny more. This is appropriate, because in effect he had the transaction foisted on him by the party who performed his obligation by mistake; and that performing party should not be able to do any better by his error than he might have done if he proceeded (as we would generally like him to proceed) by an open negotiation in which he offered to pay the bill for the other side and the parties finally consented to terms that we know made them both better off.

The mistaken payment of an obligation owed by someone else can raise a special difficulty. I mistakenly pay X the money that you owed him—or that you seemed to owe him; but actually you *deny* owing him the money. And maybe you have a good argument. Perhaps I inadvertently paid your tax bill, and now you tell me that you thought the bill was erroneous and that you had planned to contest it. Do you owe me the full amount that I paid? Not necessarily. You are free to argue that the tax bill was wrong.[49] I, in turn, will argue that the bill was valid. It might seem odd that I end up arguing the government's position in the lawsuit between us, but that is what can happen when one party pays an obligation owed by another. To state the point more generally, the beneficiary of a mistaken payment to a creditor has all the same defenses against the plaintiff that he would have had against the creditor who was mistakenly paid. And now suppose those defenses succeed, so you don't have to repay me. Do *I* now have a claim against the town for reimbursement? So it might seem. After all, I paid money to the town that a court has said was not due. But the town fairly can claim that it hasn't had its own day in court yet. It can't be bound by the finding in my lawsuit against you, because it did not participate—a necessary condition of collateral estoppel.[50] So I will have to bring a fresh lawsuit against the town, arguing that the tax bill it sent you was wrong—after I just finished, in my suit against you, arguing that the bill was right.

6. *Temporal mistakes: expectations of ownership.*

The mistakes considered so far have been of a straightforward variety. Someone made a payment or improvement that he would not have made if he had understood the facts. We now consider a couple of other situations that also can be classified as mistakes in a less conventional sense: benefits conferred by people who had mistaken expectations about what was to come next.

We have talked about gradations of good faith and negligence that may bear on the remedy in a restitution case. On occasion those considerations are powerful enough to affect the basic finding of liability. An important category of case like this involves a frustrated expectation of ownership.[51] The claimant buys a deed to a piece of land, makes improvements on it, and then the original sale of the land to him is unexpectedly rescinded or the claimant is otherwise ousted from the property. Courts are quite sensitive in these cases to the reasonableness of each side's behavior. The outcome depends on just *why* the sale was reversed. Suppose I bought the piece of land from you and you later sued to rescind because you lacked capacity to make the deal;[52] or it turned out that the land did not match the deed description you gave me, and so I was the one who sued to rescind;[53] or we shared a misunderstanding about the property's suitability for the purpose I had in mind—a misunderstanding so fundamental that a court declares our contract void on account of mutual mistake.[54] In any of these situations the contract might be rescinded. And in any of them I have a solid argument for recovery of the value that I added to the property that is now being returned to you. (In the usual case, you may well have a claim that partly offsets mine—say, for the rental value of the property during the time I enjoyed it.) But my claim fails if I made the improvements to the property while at the same time failing to make the required payments on it—for in that case any expectation of future ownership I had was not reasonable. The allocation of the loss follows the parties' fault, and thus their capacities (or the capacities of others situated the same way) to prevent similar losses next time.

The argument for recovery is particularly easy to make when I went forward with improvements to the property on the basis of a promise you made. Perhaps you assured me that the sale would go through or that I would be allowed to stay. In that case a claim for restitution and a claim based on the doctrine of promissory estoppel, familiar from the law of contracts, may well produce the same result.[55] I have no claim if my expectation was not so reasonable, as when I buy property at a judicial sale and begin to improve it despite knowing that the original owner of the land may be able to redeem it—that is, get it back—upon payment of his taxes.[56] If he does, then my decision to improve the property will be considered a calculated risk similar to an insurance company's decision to pay a claim that it knows is questionable. There is no restitution for them or for me when our gambles turn out badly.

7. *Temporal mistakes: unmarried cohabitants.*

The cases just sketched involved "mistakes" about what the future would hold. A similar logic is one way to understand restitution claims between unmarried former cohabitants: couples who were engaged but then called off the marriage, for example, or who lived as though they were married without ever tying the knot;[57] or gay partners who lived together in a state that would not recognize their marriage.[58] Sometimes one party to such an arrangement will sue the other to recover for benefits conferred while they were together. Perhaps one of them always paid the rent during the relationship, or one paid the other's tuition expenses, or one spent money to improve the house where they lived,[59] which increased its resale value later on. Or in an extreme case one of them might simply have deeded property to the other.[60] In any of these cases the parties might separate, with a claim for restitution then made by the party who paid against the party who did not.

These cases are an awkward fit to usual principles of restitution law because at the time the payments are made they typically are meant to be gratuitous. Neither side expected them to ever create any legal obligations. In most other settings, as when similar arrangements occur between family members or friends, this would spoil any possible restitution claim made later. The payments would just be considered either gifts or subjects of implied contracts. There would be no room between those options to squeeze in a restitution claim, because there would be nothing to excuse the claimant's failure to make a contract if he wanted legal obligations to arise from his payments. But the law of restitution handles unmarried cohabitants a little differently. It often lets the claimant collect if the benefits can be clearly proven and quantified.[61]

The reason the law sometimes honors these claims can be viewed as analogous to its reasons for allowing recovery in cases where party improves property with the reasonable expectation that he owns it, or soon will, but turns out to be mistaken. The unmarried cohabitants in a restitution case likewise had an expectation that their lives would continue in a certain way. In some of these cases one might question how reasonable that expectation really was; but in this age of unconventional relationships, let that point pass. The parties committed a temporal mistake. Nobody is likely to blame them for failing to make a contract for the benefits involved, because it was reasonable for them to suppose that no contract was needed. Enrichment that was just at the time it occurred thus comes to seem unjust in retrospect.

Principles of restitution law will not apply to cases like this if the state has chosen to handle such disputes altogether differently, as by adopting the American Law Institute's *Principles of the Law of Family Dissolution*. That framework provides its own set of rules for claims between people who lived together without being married. And even in cases where restitution law might apply, the facts and equities will vary widely. Courts exercise much flexibility in meeting them, and this makes it hard to generalize much about the results one can expect. So we will not discuss here the many details that can affect the outcomes in particular circumstances, and will just note a couple of important general principles.

First, courts hearing restitution claims do not want to turn themselves into family courts by conducting a full accounting of all the ways in which one party benefited the other during a relationship. People who live together informally exchange benefits all the time; thus claims based on restitution for cooking and other such domestic services usually do not succeed, because they will be viewed as the sort of benefits that cohabitants routinely provide for various types of in-kind compensation.[62] Exceptions are always possible in the extreme case. If two unmarried parties have been living as though they were married for twenty years, with one providing all the domestic labor and the other all the income, a court might order the same sort of division of assets one would expect after a divorce, and might partly rely on principles of restitution to explain that outcome.[63]

The more common case of successful recovery for unjust enrichment involves a clear trade of benefits that never gets completed or is lopsided in some other obvious way. Suppose claimant pays $100,000 in tuition bills so that defendant can go to medical school while they are living together. They expect that defendant will go on to a lucrative career as a doctor and support them both in high style. And defendant does begin a lucrative career, but then the parties end their relationship. Now what? Assuming liability for restitution is established, the claimant might seek a share of the income that the medical degree will entitle his former partner to earn. After all, both parties had expected those earnings to be enjoyed by both of them. Wouldn't allowing the graduate to keep all the earnings now amount to unjust enrichment? Probably not; the Restatement would limit recovery, in cases of this type that succeed, to the actual amounts spent on tuition.[64] The larger amount the claimant seeks—not just compensation for the services rendered, but a piece of their "traceable product"—is commonly awarded only against defendants who are guilty of wrongdoing.[65] The defendant who went to medical school and then broke off the relationship is considered the beneficiary of a non-contractual transfer, and perhaps the beneficiary of a mistake, but not a wrongdoer (at least not without more facts).[66] The wrongdoer—especially the conscious wrongdoer—needs a stronger deterrent, and gets it in the form of a more generous measure of his enrichment. The difference between these two types of recovery comes up a lot in restitution law, and will be considered in the chapter on monetary remedies.

ENDNOTES:

[1] Amoco Prod. Co. v. Smith, 946 S.W.2d 162 (Tex. App. 1997).
[2] See, e.g., Bank of Alex Brown v. Goldberg, 158 B.R. 188 (E.D. Cal. 1993) (defendant received two refund checks when one was due); In re Berry, 147 F. 208 (2d Cir.1906) (bookkeeper's error caused defendant to be credited twice for amount due once).
[3] See R3RUE sec. 48.

[4] See Amoco Prod. Co. v. Smith, supra note XX, at 164 (the action "is not premised on wrongdoing, but looks only to the justice of the case and inquires whether the defendant has received money which rightfully belongs to another"); United States v. Nw. Nat'l Bank & Trust Co., 35 F. Supp. 484, 486 (D. Minn. 1940) ("if a benefit is bestowed through mistake, no matter how careless or inexcusable the act of the bestower may have been, the recipient of the benefit in equity must make restoration, the theory being that the restitution results in no loss to the recipient. He merely received something for nothing."); Sentry Ins. v. ClaimsCo Int'l., Inc., 608 N.W. 2d 519, 524 (Mich. App. 2000); R3RUE sec. 5, comment f.

[5] See Ex parte AmSouth Mortg. Co., 679 So.2d 251, 255 (Ala. 1996) ("If all persons who negligently confer an economic benefit upon another are disqualified from equitable relief because of their negligence, then the law of restitution, which was conceived in order to prevent unjust enrichment, would be of little or no value").

[6] See, e.g., In re Berry, supra note XX, at 210 ("Stripped of all complications and entanglements we have this naked fact that Raborg & Manice by mistake paid Berry & Co. $1,500, which they did not owe and which Berry & Co. could not have retained without losing the respect of every honorable business man"); W.B. Hibbs & Co. v. First Nat. Bank of Alexandria, 112 S.E. 669, 673 (1922) (W.D. Va. 1990) (mistaken payments must be returned "ex aequo et bono"—i.e., according to equity and good conscience).

[7] R3RUE 50(3).

[8] As in Sears v. Grand Lodge A.O.U.W., 57 N.E. 618 (N.Y. 1900). The plaintiff's husband had been missing for many years and was presumed dead. The defendant promised to pay the plaintiff $666 "not to be returned in any event," with an additional amount held in escrow for later payment if the husband still hadn't appeared some years later. After the parties made this agreement but before defendant paid anything, the husband reappeared. Defendant resisted payment of the $666; held for the plaintiff, that the contract was explicit on the defendant's obligations and on its assumption of the risk of a reappearance.

[9] 36 S.E.2d 860 (S.C. 1945).

[10] Id. at 864.

[11] 112 N.W. 96 (Iowa 1907).

[12] Id. at 99.

[13] 619 P.2d 1210 (Nev. 1980); see R3RUE sec. 5(2)(b).

[14] 619 P.2d at 1211.

[15] 486 F.2d 249 (9th Cir. 1973).

[16] R3RUE sec. 5(3)(a), comment b(1).

[17] See Silano v. Carosella, 172 N.E. 216, 218 (Mass. 1930) ("Subsequent conditions which cast an appearance of injustice over the transaction as a gift do not afford ground for legal liability. A gift flowing from unalloyed good will commonly promotes friendship and stimulates thankfulness, but ingratitude cannot transmute a gift into an obligation enforceable at law"); Horn v. Owens, 171 S.W.2d 585 (Mo. 1943); R3RUE sec. 5, comment c.

[18] 177 A. 177 (Md. 1935).

[19] 181 A. 689 (N.J. Eq. 1935).

[20] E.g., Bank of America v. J. & S. Auto Repairs, 694 P.2d 246 (Ariz. 1985); or see R3RUE sec. 9, Illus. 1.

[21] Dept. of Human Services ex rel. Palmer v. Unisys Corp., 637 N.W.2d 142 (Iowa 2001).

[22] For acknowledgment of the "whichever is less" principle in various contexts, see Madrid v. Spears, 250 F.2d 51, 54 (10th Cir. 1957); Washington v. Claassen, 545 P.2d 387, 391 (Kan. 1976); Beavers v. Weatherly, 299 S.E.2d 730 (Ga. 1983); R3RUE sec. 10, comment h.

[23] R3RUE sec. 50(3).

[24] Olin v. Reinecke, 168 N.E. 676 (Ill. 1929); Blowers v. S. Ry., 54 S.E. 368 (S.C. 1906); R3RUE sec. 9, comment c.

[25] See TVL Associates v. A & M Const. Corp., 474 A.2d 156 (D.C. 1984); Golob v. George S. May Intern. Co., 468 P.2d 707, 712-13 (Wash. App. 1970).

[26] 155 N.E. 50 (Ind. App. 1927); R3RUE sec. 9(c)-(d) & illus. 6.

[27] See, e.g., United States v. Pegg, 782 F.2d 1498, 1500 (9th Cir. 1986) (government mistakenly conveyed to defendant a lot with a house on it rather than a vacant lot; defendant

was required to remit the additional value received when he later resold the property); R3RUE sec. 9(b). Cf. Lawson v. O'Kelley, 60 S.E.2d 380 (Ga. App. 1950) (no claim for unjust enrichment where subsequent buyer of building did not pay more on account of the mistaken improvement the plaintiff had made to it; the new buyer intended to raze the building). The Restatement suggests that a court might even give the improver a lien on the house—in other words, a partial property interest in it—until such time as it ever is sold. See R3RUE sec. 9, comment d & illus. 5.

[28] See Shick v. Dearmore, 442 S.W. 2d 198 (Ark. 1969); Pull v. Barnes, 350 P.2d 828, 830 (Colo. 1960); Atchison, T. & S. F. R. Co. v. Morgan, 21 P. 809 (Kan. 1889).

[29] Producers Lumber & Supply Co., supra, 333 S.W.2d 619 (Tex. App. 1960).

[30] R3RUE sec. 10.

[31] See Soma v. Zurawski, 772 N.W.2d 724 (Wis. App. 2009); Somerville v. Jacobs, 170 S.E.2d 805 (W.Va. 1969); Hardy v. Burroughs, 232 N.W. 200 (Mich. 1930).

[32] For discussion, see R3RUE sec. 10, ill. 19 & reporter's note.

[33] See Fitzpatrick v. Allied Contracting Co., 182 N.E.2d 183 (Ill. 1962); Mulholland v. Jolly, 17 S.W.2d 1109 (Tex. App. 1929).

[34] Bank of Am., 694 P.2d at 248; R3RUE sec. 10, comment g.

[35]See, e.g., Doyle v. West Temple Terrace Co., 152 P. 1180 (Utah 1915).

[36] See Ollig v. Eagles, 78 N.W.2d 553 (Mich. 1956); Olin v. Reinecke, 168 N.E. 676, 678 (Ill. 1929)..

[37] See Brown v. Davis, 493 So.2d 523 (Fla. App. 1986), where the defendant, acting in reliance on a mistaken survey, built a house on the plaintiff's land; when plaintiff sought to eject defendant, court ordered parties to exchange their lots, which were identical. For examples of courts shutting the door on claims brought by plaintiffs who made improvements without a plausible basis for believing the property was theirs, see O'Marr v. McLean, 238 N.Y.S. 443 (App. Div. 1930); Schaffner v. Schilling, 6 Mo. App. 42 (1878).

[38] 84 So.2d 563 (Fla. 1956).

[39] See, e.g., Alaska Stat. § 09.45.640 (2009); N.J. Stat. § 2A:35-3 (2009); N.Y. Real Prop. Acts. Laws § 601 (2009); Annot., 137 A.L.R. 1078 (1942 & Supp.); R3RUE sec. 10, comment b.

[40] See Goulding v. Cook, 661 N.E.2d 1322 (Mass. 1996); Winthers v. Bertrand, 396 P.2d 570, 571 (Or. 1964).

[41] See Goulding v. Cook, supra note XX.

[42] Bank of Am. v. J. & S. Auto Repairs, 694 P.2d 246 (1985); R3RUE sec. 9, illus. 3.

[43] 234 S.W. 693 (Tex. Civ. App. 1921).

[44] See, e.g., State Farm Mut. Auto. Ins. Co. v. Northwestern Nat. Ins. Co., 912 P.2d 983 (Utah 1996); R3RUE sec. 7. comment b.

[45] Partipilo v. Hallman, 510 N.E.2d 8, 12 (Ill. App. 1987).

[46] See Taylor v. Roniger, 147 Mich. 99, 110 N.W. 503 (1907); Detroit & N. Mich. Bldg. & Loan Ass'n v. Oram, 200 Mich. 485, 167 N.W. 50 (1918); Brookfield v. Rock Island Improvement Co., 205 Ark. 573, 169 S.W.2d 662 (1943); R3RUE sec. 8, illus. 3.

[47] 356 N.W.2d 136.

[48] See R3RUE sec. 7, illus. 9.

[49] See R3RUE sec. 7, illus. 2; cf. Buckett v. Jante, 767 N.W.2d 376 (Wis. App. 2009).

[50] See Restatement (Second) of Judgments § 27.

[51] See R3RUE sec. 27.

[52] As in Beavers v. Weatherley, 299 S.E.2d 730 (Ga. 1983); see also Farnum v. Silvano, 540 N.E.2d 202 (Mass. App. 1989).

[53] R3RUE sec. 27, illus. 2.

[54] E.g., Renner v. Kehl, 722 P.2d 262 (Ariz. 1986).

[55]Cf. Burton Imaging Group v. Toys "R" Us, Inc., 502 F. Supp. 2d 434, 440 (E.D. Pa. 2007) (both promissory estoppel and unjust enrichment claims failed when other party's statements were too vague to make reliance on them was reasonable); R3RUE sec. 28, comment b.

[56] See McCloud v. AmSouth Bank, 540 So. 2d 75 (Ala. App. 1989).

[57] See Dixon v. Smith, 695 N.E.2d 284 (Ohio App. 1997); Evans v. Wall, 542 So. 2d 1055 (Fla. Dist. Ct. App. 3d Dist. 1989).

[58] See, e.g., Doe v. Burkland, 808 A.2d 1090, 1095 (R.I. 2002).
[59] As in Evans v. Wall, supra..
[60] As in Salzman v. Bachrach, 996 P.2d 1263 (Colo. 2000); Bramlett v. Selman, 597 S.W.2d 80 (Ark. 1980).
[61] R3RUE sec. 29.
[62] Johnston v. Estate of Phillips, 706 S.W.2d 554 (Mo. App. 1986); Tapley v. Tapley, 449 A.2d 1218 (N.H. 1982) (same); R3RUE sec. 29, comment d.
[63] As in Sullivan v. Rooney, 533 N.E.2d 1372, 1374 (Mass. 1989); see R3RUE sec. 29, comment c.
[64] R3RUE sec. 28, illus. 8. Cf. Meyer v. Meyer, 620 N.W.2d 382 (Wis. 2000); Pyeatte v. Pyeatte, 661 P.2d 196 (Ariz. App. 1982).
[65][Discussion in chapter on money remedies.]
[66] Compare R3RUE sec. 28, comment e, illus. 13.