

Mistakes

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, Huling 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.)

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 if I was negligent or even grossly negligent⁴—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. 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 result seem to be a matter of desert, as perhaps it is. But what of the economic sense 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—or rather the gain—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—the social cost of it—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 and might well 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 the cost of the return 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 busi-

ness and handle by contract the possibility of mistaken payments. The solution that keeps their joint costs the lowest is to simply have such payments returned whenever they are made, less any quantifiable loss the party at fault has imposed on the other side.

And in the background, besides, is the built-in incentive anyone has to avoid these sorts of tangles. A mistake creates a risk to its maker 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. (Even apart from those possibilities, the simple risk of having to litigate to get the money back is enough to make anyone strongly prefer not to send it to the wrong place.) 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 the built-in incentives to be careful are, if not optimal, adequate to prevent mistaken payments from being a chronic source of trouble to anyone.

As was just mentioned, someone who receives a mistaken payment may resist giving it back on the ground that he changed position in reliance on it. "Change of position" is one of the most important defenses to a restitution claim. It is discussed more fully in the last chapter of this book, but a brief account of the idea here will be useful. In the simplest cases of the defense, you receive money from me without realizing it is a mistake, and then spend it on something that you wouldn't have bought otherwise and that you can't return. Imagine for simplicity's sake that you bought a bottle of wine and drank it. You now have a good defense against repayment of the money I accidentally sent. You may have been unjustly enriched by it, but there is no way to undo the enrichment without risk of making you worse off than you were before it happened. Even if the wine was worth every penny you spent on it, you can still object that you would not have chosen to buy it, or to pay what it was worth, if you hadn't received the mistaken payment.

Consider it this way: after a mere mistaken payment, there is no loss that necessarily has to be allocated; in other words, it is not necessary that anyone be left worse off than he was before the mishap. The defendant can simply return the money and thus restore the status quo. But your consumption of the wine changes the case in that very important respect. Now there *is* a loss to allocate between us. You will end up a little worse off than you were before the mistake was made, or I will. Since the mis-

take was mine, it is better that I should suffer. So your obligation to pay me back is reduced by the price of the wine, perhaps to zero.

The details of the change-of-position defense can wait until later, but seeing the idea now should help clarify the logic of recovery for mistakes in the first place. The theory of liability and the defense to it give effect to similar values and in some ways are mirror images of one another. The party who makes a mistaken payment can ordinarily claim back the money. He didn't mean to pay it, so requiring that it be returned shows respect for his autonomy and is efficient besides, as we saw earlier. But if the defendant who received the money has innocently changed position in reliance on it, now *his* autonomy is at stake as well. Making him return the money forces a kind of transaction on him that he did not want (in effect he will have bought wine with his own money that he wouldn't have bought at all if the mistake hadn't been made). Since the mistake wasn't his, the concern for the autonomy of the recipient prevails over the concern for the autonomy of the party who made the mistake. And the change-of-position defense promotes efficiency as well. It provides a measure of stability and certainty in financial affairs. If you receive money without notice that the payment is a mistake, you can go ahead and spend it without providing against the nagging worry that someone is going to claim the money back later and leave you in a bad spot. The flavor of this reasoning is familiar from elsewhere in law. We might say that once there is a loss to be allocated rather than a mere transfer to be undone, principles resembling those from tort law will assign the loss to the party whose negligence caused it.

Allocating the Risk of Mistake

Defenses to one side for now, there is one great and general limit on the initial 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. Say 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. We might even have *said* this.⁸ But whether the allocation was explicit or merely 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 when making 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 mak-

ing 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 so offered to let her choose a replacement 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 his assessment of other such uncertainties. 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 plaintiff had been unjustly enriched by the earlier payment. So the plaintiff would refuse the offer. The result would be litigation that neither side wanted.

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 Lockheed a contract 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 those charges, claiming that the payments were based on a mistake: the government had thought that it owed the money 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 govern-

ment 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 familiar enough pattern in which 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: in effect the bidder had gotten its 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. 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. Bidders get no relief if they make mistakenly high price quotes that prevent them from winning contracts, or if they make other mistakes that cause their performance to be costlier than they had estimated. Buyers likewise get no relief if they agree to prices that they later learn were higher than they could have been. Parties that want different allocations of risks are free to offer (or demand) prices that are explicitly subject to reduction if it turns out that the estimates or calculations behind them 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.

Now a final type of mistake. I sell you a horse because you seem to be an upright sort of person. Later I discover that you are a scoundrel—a felon, even—and I want to unwind the transaction, regarding it as a great error; I would not have made the sale if I had known your true charac-

ter. 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 scoundrel was 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. 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 depend on testimony given in hindsight that will tend to be self-serving. If one prefers a forward-looking explanation, 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.

The line between mistakes of fact and of judgment cannot be made entirely precise, and it is pliable in the face of other 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 regards as "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 a better explanation of the result is that the son was innocent and the court was loath to upset his expectations.

Benefits Other Than Money Generally

The next series of problems is best pursued through a stylized example that can illustrate them all. Instead of mistakenly sending money, suppose you send me an order and payment for ten thousand bricks. I mistakenly send twelve thousand. Without counting them, you use all the bricks to build a wall. Then I discover my mistake and demand payment for the extra two thousand 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; 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—let's assume they made the wall stronger—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.

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.

The first is that recovery in restitution is measured by the defendant's provable gain (the benefit he received 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 a mistaken improvement is made 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. The principle just shown is reversed when the defendant is a wrongdoer, as we will see in the chapter on takings.)

This “whichever is less” principle didn't make a difference in the ear-

lier 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 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 autonomy of the innocent defendant and ensures that the mistaken party does not benefit by forcing a transaction on the other.

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 should not have a forced exchange imposed on him; in other words, he shouldn't be made 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 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 further and disgorge other 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 of a mistaken transfer, 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. It would be different, too, if you asked for the bricks or the plowing job but we never settled the price. The law will then typically assume that you were prepared to pay market value for what you received—the measure known as “quantum meruit.” But that assumption doesn't make sense, and so this theory is generally off-limits, when the defendant received an unrequested benefit.

(This discussion just made reference to “quantum meruit”—literally, “as much as he deserved.” That is a slippery phrase in law. It can refer to either of two things: [a] A party's recovery on an implied contract; the court assumes the recipient meant to pay the market value of whatever he had asked for. [b] A party's recovery in restitution when there is no enforceable contract between the two sides but one has conferred benefits on the other. The performing party, again, sometimes may collect the market value of those benefits. In a case of an innocent defendant who received unrequested benefits, however, recovery in quantum meruit is not available in either sense.)

So forget the market value of the bricks. What about the market value of the wall? Suppose the wall were appraised and its value were found to be \$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 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 outlined 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 par-

ticular 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. A related approach is to show that the benefit supplied by the plaintiff was something 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 ten thousand bricks from me, you offered to buy another two thousand 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 two thousand additional bricks is evidence that you value them at least that much and is a good basis for requiring you to pay me \$100 now.

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 it valued the coal at its market price when delivered (indeed, there was evidence that it did not). 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 may be less helpful as examples than a case 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 (so long as it cost me at least \$5,000 to put on the roof).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 eats it.

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 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 reluctant 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. Let us turn to them.

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. A 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 the builder from trespassing. The builder brings a restitution claim against the owner. What is the result?

Under the principles seen so far, the outlook for the 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. What if he only likes living in the house because it is free? Of course the builder is likely to be allowed whatever specific restitution he can get without violating our second principle shown earlier (that the defendant should not be made any worse off by the plaintiff's error): if the house can be removed without damaging the owner's land, the builder will probably 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 the builder will be able to salvage only a bit of his work. So he seems likely to receive nothing or close to it. If the builder is entitled to demolish and remove the house, the result might 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.

This analysis 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—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 based on all the facts, constrained only by the idea that the remedy must not impose undue prejudice on the recipient³⁰—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 the builder or selling the underlying land to him, in either case at a market rate.³¹ Or the court can give the builder an equitable lien on the house, possibly 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 sale of it.³² Or the court can order a simple payment of the value of the house or other improvements to the 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 entirely³⁵ (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 come 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 The general idea from an economic standpoint 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 the property at stake. If an innocent owner lives on the land that was mistakenly improved, the costs of a forced sale are at their highest. No court will oust him. At the other end of the spectrum, where unoccupied land 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. Forge*.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 different design of his own in mind). And the solution still leaves the mistaken builder with an ample 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 examining 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. 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. Those statutes are still the starting place for analysis of any such case now. They tend to be limited in scope and to coexist with the state’s common law, but they still have their effect.³⁹ And in any event the courts have gradually followed suit on their own.

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 may then be 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 transgression was innocent. 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 there is 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 may be 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.

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 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 was owed by another. Such cases usually produce restitution claims that really are no different from the other cases of mistaken payment discussed 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 Since our concern is with unjust enrichment, the amount that I mistakenly paid on your behalf is not the important point. 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 fact reduces the net benefit to you, and it consequently reduces the amount that you owe to me.⁴⁵ Or I paid the full bill for whatever it was, but you would have been able to get a discount because you are a regular customer. The lesser amount that you avoided paying is all that I can collect from you.

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 nonreturnable benefits that I provide to others but 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 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 at least roughly the outcome the parties would have reached by contract if they had seen the risk of such a 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 whatever amount he was saved, but not a penny more. In effect he had the transaction foisted on him by the party who performed his obligation by mistake. That party should not be able to do any better by his error than he might have done if he had proceeded (as we would generally like him to have done) by an open negotiation in which he offered to pay the bill or do the work 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. What fun!

Temporal Mistakes: Expectations of Ownership

The mistakes examined 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 look at 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 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 may 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. (You may well have a claim of your own 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. Maybe 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 estoppel 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 viewed as a calculated risk similar to an insurance company's decision to pay a claim that it knows is questionable. There is no restitution for the company or for me when our gambles turn out badly.

Temporal Mistakes: Unmarried Cohabitants

The cases just discussed 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 couples who lived as though they were married without ever tying the knot,⁵⁷ or same-sex partners who lived together in a state that would not recognize their marriage and then separated.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 a 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 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 seemed 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. If the state has not gone that route, courts hearing restitution claims still are reluctant 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 exchange benefits informally all the time; thus claims based on restitution for cooking and other such domestic services usually do not succeed, because they are viewed as the sorts of benefits that cohabitants routinely provide to each other as in-kind compensation.⁶² In cases where courts find that restitution law does apply, the facts and equities vary widely. Courts exercise much flexibility in meeting them, and this makes it hard to generalize much about the results one can expect.

The most 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 a claimant pays \$100,000 in tuition bills so that the defendant can go to medical school while they are living together. They expect that the defendant will go on to a lucrative career as a doctor and support them both in high style. And the 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 the claimant's 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 amount spent on tuition.⁶³ 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.⁶⁴ The defendant who went to medical school and then broke off the relationship is regarded as the beneficiary of a noncontractual transfer, and perhaps the beneficiary of a mistake, but not as a wrongdoer (at least not without more facts).⁶⁵ 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 is considered in the chapter on monetary remedies.