Volume 64 | Number 1 Article 8

11-1-1985

Mistaken Improvers of Real Estate

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MISTAKEN IMPROVERS OF REAL ESTATE

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When a person mistakenly improves land owned by another, difficult equitable and remedial issues arise. In such cases, the law must balance the improver's right to a remedy against the potential unfairness of requiring an owner to bear the cost of an unwanted improvement. Professor Dickinson examines the history of statutory and judicial relief granted mistaken improvers, observing that remedies for mistaken improvement continue to vary widely among jurisdictions. He then explores the principal issues raised by the mistaken improver problem through an analysis of various hypothetical cases. Professor Dickinson concludes by proposing an analytical framework for providing relief in all mistaken improver cases in a manner that will be fair to both improvers and owners.

> The concept of unjust enrichment as a restitutionary remedy has been referred to as a working hypothesis, one whose history is unclear and whose future cannot be defined. A cohesive explanation of remedies, restitutionary or otherwise, is yet to be achieved. Those who venture into the restitution thicket not infrequently become lost. It is part of our task to see that they are heard from again.[1]

Few denizens of the courthouse have evoked as much simultaneous sympathy and disdain as the serio-comic "mistaken improver"—one who, through honest error, builds a house or makes some other improvement upon land owned by another. The mistaken improver has been dismissed as an "intruder,"[2] an "intermeddler,"[3] a "volunteer,"[4] and a "mere naked trespasser"[5] by a few unsympathetic judges. Many more judges have pitied mistaken improvers, but have turned aside their pleas for relief.[6] To men and women more charitably inclined, the law's longstanding failure to find a means of relieving the mistaken improver "lies on our . . . consciences still."[7]

Mistaken improvement can occur in several ways.[8] First, an improver may acquire and improve land under a title that is mistakenly believed to be valid. Second, an improver may mistake the nature of his or her interest, believing it to

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1. Snider v. Dunn, 11 Mich. App. 39, 60, 160 N.W.2d 619, 628 (1968) (Levin, J., dissenting).
2. Parsons v. Moses, 16 Iowa 440, 444 (1864).
3. Nelson v. Allen, 9 Tenn. (1 Yerg.) 360, 366 (1830).
4. Administrators of Winthrop v. Huntington, 3 Ohio 327, 333 (1828).
5. Billings v. Hall, 7 Cal. 1, 25 (1857).
6. For a discussion of possible reasons for this seemingly callous behavior, see *infra* text accompanying notes 83-92.
7. J. DAWSON, UNJUST ENRICHMENT 51 (1951).
8. If the improver's act diminishes, rather than enhances, the land's value, the landowner may have an action in tort against the improver. RESTATEMENT (SECOND) OF TORTS §§ 162, 164 (1965).

be a fee simple when in fact it is a mere life tenancy. Third, an improver may mistake the location of his or her land. Last, an improver may have an expectancy in the land that never ripens into title.

Although concern for mistaken improvers is not uniquely American,[9] the courts and legislatures in this country have been in the forefront of common-law jurisdictions in devising remedies to relieve their plight.[10] "Betterment" or "occupying claimant" acts, affording relief to some categories of mistaken improvers, appeared almost as soon as settlement of the New World began and endure to the present day. Judicial relief emerged in the early nineteenth century and evolved more sporadically than legislative efforts. Today legislative and judicial remedies form a crazy quilt of dissimilar and sometimes contradictory solutions with only one common thread—a desire to prevent the unjust enrichment of the landowner.

This Article examines the legal plight of the mistaken improver. After briefly reviewing the history of relief granted mistaken improvers, it defines and analyzes the principal issues presented by mistaken improver cases. It then argues that the inconsistencies in the approaches taken by various states are attributable to the problem of finding an appropriate remedy and not to a lack of merit in mistaken improvers' claims. Finally, the Article suggests a framework of analysis for finding a remedy in each case that will be fair and just to both the improver and the landowner.

I. EVOLUTION OF THE LAW[11]

A. *Social and Historical Background*

Mankind's frailties and foibles are two of its most constant attributes. Thus, it is not surprising that the problem of the mistaken improver is an ancient one. The source of the problem is the doctrine of accession, which holds that materials permanently affixed to real estate lose their separate identity as person-

9. Many civil-law countries make some provision for the relief of mistaken improvers. *See, e.g.*, R. GOFF & G. JONES, THE LAW OF RESTITUTION 107 & n.8 (2d ed. 1978) (discussing French, German, Italian, South African, and Ceylonese law); Casad, *The Mistaken Improver—A Comparative Study*, 19 HASTINGS L.J. 1039, 1054-70 (1968) (comparing Argentine law to common law); Merryman, *Improving the Lot of the Trespassing Improver*, 11 STAN. L. REV. 456, 458-60 (1959) (discussing transition from Roman law to civil law). One American jurisdiction, Louisiana, owes portions of its legal system to the civil law. *See generally* Comment, *Management of the Affairs of Another*, 36 TUL. L. REV. 108, 122 (1961) (discussing application of civil-law institution of *negotiorum gestio* to mistaken improvers).

10. Aside from the limited rights discussed *infra* notes 18-20 and accompanying text, the mistaken improver in England is remediless. *See* R. GOFF & G. JONES, *supra* note 9, at 107; 2 G. PALMER, THE LAW OF RESTITUTION § 10.9, at 436 & n.6 (1978). A few common-law jurisdictions have adopted statutes which provide relief similar to that available in many American jurisdictions. *See* Property Law Amendment Act, 1963, § 3, (codified at Property Law Act, 1952, § 129A, N.Z. REPR. STAT. 2351 (1970)); Property Law Act, 1974, No. 76, §§ 195-98, Queensl. Stat. 806-07 (1974); Property Law Act, 1969, No. 32, § 123, W. Austl. Stat. 300 (1969); ONT. REV. STAT. ch. 90, § 37 (1980).

11. The history of relief for mistaken improvers of real property has been admirably and exhaustively developed by others. *See* 2 G. PALMER, *supra* note 10, § 10.9, at 436-50; Casad, *supra* note 9, at 1039-54; Merryman, *supra* note 9, at 456-80. The section offered here is but a summary of the most important facets in the evolution of the law of mistaken improvement.

alty and become a part of the land.[12] When the doctrine is applied to improvements made by mistake, however, the owner of the land may be enriched unjustly if the improver is ejected without requiring compensation from the owner.

The contradictory positions taken by American courts and legislatures in mistaken improver cases have a common root in Roman law. Roman law applied the doctrine of accession in cases of a mistaken improvement, but ameliorated its effects by permitting mistaken improvers to remove their personalty if it could be severed from the land and to recover their costs if the owner sought to regain possession.[13] The early common-law commentators drew extensively from Roman law—Bracton, Fleta, and Britton dealt with mistaken improvement of another's property in a manner similar to the Roman codifiers.[14] By the time of Britton's writing *circa* 1300, however, the rights of mistaken improvers had been reduced to removal of materials in certain limited circumstances.[15]

Despite the early, scholarly attention to the problem, there is a dearth of English cases involving mistaken improvers.[16] Nevertheless, by the end of the eighteenth century the accepted law was as follows.[17] First, in actions by landowners to recover profits from land for a period of wrongful possession by

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12. 5 AMERICAN LAW OF PROPERTY, § 19.9, at 34-36 (A. Casner ed. 1952):

> § 19.9. —Trespassers. The cases in which a person who has no interest in the land trespasses thereon and annexes fixtures are usually decided on the basis of the English maxim, *quicquid plantatur solo, solo cedit* [whatever is affixed to the soil belongs to the soil]. Thus, whatever the trespasser attaches to the land at once passes to the owner of the realty. . . .
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> . . . .
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> The difficult cases are those in which the trespasser acted in good faith, under an honest, if mistaken, claim of right. No adjustment is made for innocence in the cases. The theory apparently is that attachment by the trespasser is sufficient to transfer title to the owner of the land, regardless of motive.

See also Casad, *supra* note 9, at 1039 (The "source of the problem . . . is the ancient maxim of accession . . . ."); Merryman, *supra* note 9, at 457 ("These problems are very old [and] . . . are directly traceable to the Roman law of accession . . . ."). *But cf.* Note, *Equity—Rights of A Mistaken Improver*, 24 ARK. L. REV. 133, 137 (1970) (rights of a mistaken improver should not be resolved by classifying the improvement as real or personal).

13. Casad, *supra* note 9, at 1043 n.16. *But cf.* J. DAWSON, *supra* note 7, at 51 (mistaken improver could not recover after he surrendered possession).

14. Merryman, *supra* note 9, at 460-64 & nn.15-33. Professor Merryman describes the changes that occurred when Roman law was passed on from one author to the next as "degeneration rather than development," *id.* at 460, and as "regression," *id.* at 463.

15. A mistaken improver was entitled to remove his or her materials only if this was done before the owner obtained a Writ of Prohibition and before the materials had been permanently attached to the land. *See id.* at 463 ("Short of attachment with nails or roots the good faith improver is allowed to remove his improvements until the King's prohibition issues.").

16. *Id.* at 463 ("There is a most remarkable absence of reported litigation on the subject in England."); *see also* Green v. Biddle, 21 U.S. (8 Wheat.) 1, 81 (1823) (finding no common-law decision going beyond traditional relief); Putnam v. Ritchie, 6 Paige 390, 405 (N.Y. Ch. 1837) (finding no common-law decision going beyond traditional relief).

The only English case involving mistaken improvers appears to be Coulter's Case, 5 Co. Rep. 30a, 77 Eng. Rep. 98 (K.B. 1599), in which Coke, in dictum, stated that when ejected a "disseisor shall recoupe all in damages which he hath expended in amending of the houses . . . ." *Id.* at 30b, 77 Eng. Rep. at 98. For another report of the same case, see Ireland against Coulter, Cro. Eliz. 630, 78 Eng. Rep. 871 (K.B. 1599).

17. This curious situation, in which there was "settled law" in the absence of reported cases, may be explained by the existence of treatise writers who declared the state of the law. 2 G. PALMER, *supra* note 10, § 10.9, at 436 n.6.

others, the defendants were entitled to offset the value of any improvements made in good faith during the period of their possession.[18] If the value of the improvements exceeded the amount of the profits, however, the improver could not recover the excess. Second, if a landowner sought the aid of a court of equity, the chancellor could condition relief for the owner on the payment to the improver of the reasonable value of any improvements, under the venerable maxim, "He who seeks equity must do equity."[19] This equitable maxim did not apply if the owner recovered possession by an action at law, or if the improver voluntarily surrendered possession, obviating the need for equitable intervention. Last, courts of equity could assist the mistaken improver if the owner, knowing of the mistake, stood silent while the improvement was made.[20]

On the continent the civil law also borrowed heavily from Roman law, but to a much different end. The civil codes provided a remedy for mistaken improvers,[21] a fact well known to early American jurists and lawyers confronted by the problem of the mistaken improver.[22]

Notwithstanding the scarcity of English cases, mistaken improvement of real estate could not have been unknown in England. At the time of the settlement of British America, the English system of land titles was highly complex, and there were no recording or registration statutes to provide a means of researching titles.[23] Surveying techniques were rudimentary, and errors must

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18. This is apparently the meaning of the dictum in Coulter's Case discussed *supra* note 16. *See* Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823). In *Green* the Court stated that:

> Taking it for granted, that the rule, as laid down in *Coulter's Case*, . . . is, that meliorations of the property, (which, necessarily, mean valuable and lasting improvements,) made at the expense of the occupant of the land, shall be set off against the legal claim of the proprietor for profits which have accrued to the occupant during his possession.

Id. at 82; *see also* RESTATEMENT OF RESTITUTION § 42 reporters' note (1937) (reiterating the rule and citing authorities); 2 J. KENT, COMMENTARIES ON AMERICAN LAW 272 (1827) (no common-law cases affording restitution to improver unless owner intentionally concealed his title).

19. *See* RESTATEMENT OF RESTITUTION § 42 reporters' note (1937) (citing authorities); *see also* 2 J. POMEROY, EQUITY JURISPRUDENCE § 390, at 67 (5th ed. 1941) ("In requiring the owner to compensate the bona fide occupant for his improvements, equity thus recognizes a right that, in some jurisdictions, is not cognizable in an equitable suit for active relief."); 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1238, at 487 (1836) ("In all cases of this sort, however, the doctrine proceeds upon the ground, either that there is some fraud, or that the aid of a Court of Equity is required . . . .").

20. *See* RESTATEMENT OF RESTITUTION § 42 reporters' note (1937) (citing authorities); *see also* 2 J. POMEROY, *supra* note 19, § 390, at 67 ("Other cases, however, support the general proposition that, even in the absence of fraud, acquiescence with knowledge, or other inequitable conduct on the part of the owner of land, one who, mistakenly believing himself to be the owner, in good faith makes improvements on premises, may . . . recover therefor . . . ."); 2 J. STORY, *supra* note 19, § 1237, at 486 ("So, if the true owner stands by, and suffers improvements to be made on an estate, without notice of his title, he will not be permitted in Equity to enrich himself by the loss of another; but the improvements will constitute a lien on the estate.").

21. *See* Merryman, *supra* note 9, at 458-60 (discussing evolution of Roman law to Code Napoleon).

22. That many early American judges and commentators were well versed in the Roman and civil laws is apparent from the early mistaken improver cases. *See, e.g.*, Bright v. Boyd, 4 F. Cas. 127, 133-34 (C.C.D. Me. 1841) (No. 1,875) (discussing Roman, French, Scottish, and Spanish law); Putnam v. Ritchie, 6 Paige Ch. 390, 404 (N.Y. Ch. 1837) (discussing same authorities as *Bright*); 2 J. KENT, *supra* note 18, at 273 (discussing Roman and French law); 2 J. STORY, *supra* note 19, § 1239, at 487-88 (discussing civil law). *But cf.* Casad, *supra* note 9, at 1043 n.16 (questioning Story's characterization of Roman law in *Bright*).

23. Statutes providing for the noting of deeds in public records did exist before the 17th cen-

have been frequent. There were, however, countervailing factors that tended to limit the number of mistaken improver incidents. Land, as the principal source of wealth, must have been guarded jealously by its owner or the person with the right to its possession and use. Also, by the beginning of the seventeenth century the English countryside had been developed and substantially occupied.[24] Thus, in England, although mistaken improvers doubtless existed, their number must have been small, and the lack of a complete remedy for them was not a serious shortcoming of the legal system.

Because colonial America was different, mistaken improvement became a problem as soon as colonization began.[25] First, the land was so vast that only sporadic settlement occurred, leaving huge, uncharted areas in which a person could become disoriented easily.[26] Second, although land was still the principal

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tury. The Statute of Enrolments, 27 Hen. 8, ch. 16 (1536) so provided, but its effect was minor and short lived. *See* Haskins, *The Beginnings of the Recording System in Massachusetts*, 21 B.U.L. REV. 281, 291-93 (1941) ("In short, it is exceedingly unlikely that any English enactment affected the beginnings of recording in this country."); *see also* 4 AMERICAN LAW OF PROPERTY § 17.5, at 536 (A. Casner ed. 1952) ("[T]he few English acts which exist are for mere registry or enrollment, amounting merely to a public index of a conveyance retained by the grantee. None of them provide for recording.").

Unlike modern recording statutes, the earliest American acts did not protect subsequent purchasers who relied on the record. The earliest American act was probably a 1640 Massachusetts statute. *See* Haskins, *supra*, at 282; 4 AMERICAN LAW OF PROPERTY, *supra*, § 17.4, at 528-29. Thus, recording statutes of the modern kind evolved not sooner than, and possibly after, the betterment acts, the first of which appeared in Virginia in 1643. For references to that act, see *infra* note 25.

24. In England, like the rest of Europe, the population was ravaged by the plague during the 13th and 14th centuries. By about 1500 the population returned to pre-plague levels, and the enclosure movements changed the usage of land. "[A] growing population, inflated prices and an insatiable demand for wool reversed the social and economic cycle prevailing before 1460. They transformed the 15th century pattern of land plenty, labor shortage, and high wages into land hunger, labor surplus, and rising rents." L. SMITH, THIS REALM OF ENGLAND 1399–1688, at 67-68 (1966). For a general discussion of the conditions in England during this time, see 4 THE CAMBRIDGE ECONOMIC HISTORY OF EUROPE 29-30 (E. Rich & C. Wilson ed. 1967); J. CLAPHAM, A CONCISE ECONOMIC HISTORY OF BRITAIN 194-200 (1949); 2 E. LIPSON, THE ECONOMIC HISTORY OF ENGLAND 395-407 (4th ed. 1947). *But cf.* F. DIETZ, AN ECONOMIC HISTORY OF ENGLAND 186 (1942) (By the early 17th century "in the eastern and southern counties there were districts still almost uninhabited. The population was so sparse as yet that frontier conditions still prevailed.").

25. The first statute addressing the problem was enacted in Virginia in 1643, less than 35 years after the first settlement was founded at Jamestown. Merryman, *supra* note 9, at 466 n.53. Professor Merryman refers to Act XXXIII of the March 1642-43 session of the Virginia Grand Assembly, reproduced in 1 STATUTES AT LARGE 260 (W. Hening 2d ed. New York 1823) (1st ed. Richmond 1810). For a later version of this statute, see "Seating upon other mens dividents," Act LXX of the March 1661-62 session of the Virginia Grand Assembly, reproduced in 2 STATUTES AT LARGE 96 (W. Hening ed. Richmond 1810).

26. For example, the population of Virginia shortly before the adoption of the first "betterment" act was less than 1,250. 4 THE CAMBRIDGE ECONOMIC HISTORY OF EUROPE, *supra* note 24, at 342 (Virginia census in 1624-25 showed total population of 1,227, including servants and slaves); E. KIRKLAND, A HISTORY OF AMERICAN ECONOMIC LIFE 4 (1969) (population of Virginia in 1622 was 1,240).

The method of settlement chosen by some colonies also contributed to this dispersion. For example, "[t]he southern system was individualistic rather than cooperative. Its method of 'indiscriminate location' led to a greater confusion of boundaries and to a more scattered and dispersed settlement than that of the New England township." E. KIRKLAND, *supra*, at 10. The middle colonies, such as Pennsylvania and Maryland, were proprietary. "This system led to an individualistic type of colony quite different from the compact community settlement of New England, and not infrequently resulted in an undesirable dispersion of the population." E. BOGARD & D. KEMMERER, ECONOMIC HISTORY OF THE AMERICAN PEOPLE 49 (2d ed. 1947).

source of wealth, it was so plentiful that absentee ownership was common, removing an important check on mistaken improvement.[27] Last, the land was virgin, devoid of the customary indicia of ownership and location found in more developed parts of the world. These factors may have coalesced to increase the number of instances of mistaken improvement and to compel the colonists to relieve the plight of mistaken improvers.

Today in the United States, these circumstances have been eliminated or greatly reduced. Survey methods have been improved, and title records are maintained and known to the general public. The land is substantially occupied, leaving few open areas in which a serious mistake as to location can be made and decreasing the probability of that error going undetected. Nevertheless, cases of mistaken improvement continue to occur.

In addition to the common cases of mistaken improvement because of title or survey defects, there always have been a few comical cases that arose because the improvers had bad memories, or could not tell right from left. A society like seventeenth-century England, in which mistaken improvement was rare, could dismiss such mistaken improvers as bumblers unworthy of toleration within the legal system. In a society like contemporary America, however, which has been conditioned to respond to other instances of mistaken improvement, compassionate judges and legislators are apt to approve of restitution for even these mistaken improvers.

B. *Statutory Relief*

At present, forty-two jurisdictions have "betterment" or "occupying claimant" acts.[28] Although the statutes of seven states simply reiterate the common law,[29] most jurisdictions have expanded improvers' rights and afforded relief in

27. "The ownership and management of land became the chief magnet which attracted the attention of wealthy or influential men to the British colonies and led humbler individuals to cross the ocean and build homes in the New World." E. KIRKLAND, *supra* note 26, at 8.

28. ALA. CODE § 6-6-286 (1975); ALASKA STAT. § 09.45.640 (1983); ARIZ. REV. STAT. ANN. § 12-1256(C) (1982); ARK. STAT. ANN. §§ 34-1423 to -1424 (1962); CAL. CIV. PROC. CODE §§ 741, 871.1 to 871.7 (West 1980); CONN. GEN. STAT. ANN. § 47-30 (West Supp. 1982); D.C. CODE ANN. §§ 16-1116 to -1123 (1981); FLA. STAT. §§ 66.041 to .101 (1984); GA. CODE ANN. §§ 44-11-8 to -9 (1982); ILL. ANN. STAT. ch. 110, §§ 6-138 to -148 (Smith-Hurd 1983); IND. CODE ANN. §§ 34-1-49-1 to -12 (Burns 1973 & Supp. 1983); IOWA CODE ANN. §§ 560.1 to .7 (West 1950); KAN. STAT. ANN. § 60-1004 (1976); KY. REV. STAT. §§ 381.450 to .560 (1981); LA. CIV. CODE ANN. arts. 528-529 (West 1980); ME. REV. STAT. ANN. tit. 14, §§ 6951-6965 (1980); MASS. ANN. LAWS ch. 237, §§ 14-35 (Michie/Law. Co-op. 1974); MINN. STAT. ANN. §§ 559.08 to .15 (West 1947); MISS. CODE ANN. §§ 11-19-95 to -99 (1972); MO. REV. STAT. §§ 524.160 to .250 (1953); MONT. CODE ANN. § 70-28-110 (1983); NEB. REV. STAT. §§ 76-301 to -311 (1981); N.H. REV. STAT. ANN. §§ 524:2 to :4 (1974); N.J. STAT. ANN. § 2A:35-3 (West 1952); N.M. STAT. ANN. §§ 42-4-14 to -20 (1978); N.Y. REAL PROP. ACTS. LAW § 601 (McKinney 1979); N.C. GEN. STAT. §§ 1-340 to -351 (1983); N.D. CENT. CODE §§ 32-17-09 to -12 (1976); OHIO REV. CODE ANN. §§ 5303.07 to .17 (Page 1981); OKLA. STAT. ANN. tit. 12, §§ 1481-1487 (West 1980); OR. REV. STAT. § 105.030 (1983); S.C. CODE ANN. §§ 27-27-10 to -100 (Law. Co-op. 1977); TENN. CODE ANN. §§ 29-15-121 to -123 (1980); TEX. PROP. CODE ANN. §§ 22.021 to .045 (Vernon 1984); UTAH CODE ANN. §§ 57-6-1 to -8 (1974); VT. STAT. ANN. tit. 12, §§ 4811-4824 (1973); VA. CODE §§ 8.01-160 to -178 (1977); WASH. REV. CODE ANN. §§ 7.28.160 to .180 (1961); W. VA. CODE §§ 55-5-1 to -14 (1981); WIS. STAT. ANN. §§ 843.09, .10, .13, .14 (West 1977); WYO. STAT. §§ 1-32-206 to -216 (1977). The forty-second jurisdiction is Michigan, which has a court rule rather than a statute. *See* MICH. CT. R. 3.411 (1985).

29. ALASKA STAT. § 09.45.640 (1983); ARIZ. REV. STAT. ANN. § 12-1256(C) (1982); MONT.

situations not covered by common law, such as ejectment actions brought by owners to dispossess mistaken improvers.[30] A few jurisdictions grant relief to improvers in any equitable action without regard to whether the suit is brought by the owner or the improver.[31] Only two jurisdictions, however, allow improvers the right to initiate an independent legal action.[32] Thus, on the whole, betterment acts restrict relief to a limited number of procedural situations.

All betterment acts impose conditions on the improver's right to relief. The two most common conditions are that the improver must have acted in good faith[33] and under color of title.[34] The requirement of good faith, which prevents claims by those who know of their lack of ownership,[35] is neither new nor controversial.[36] The requirement of color of title, a concept borrowed from elsewhere in the law of property,[37] is more troublesome because it distinguishes between those who err in identifying their land and those who err concerning the quality of their title.[38] A few statutes require that the improver "believe himself to be the owner" of the land.[39] This condition serves the same purpose as a color of title requirement, but does not discriminate unreasonably against an improver whose mistake relates to the land's location. There is great variety in

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CODE ANN. § 70-28-110 (1983); N.J. STAT. ANN. § 2A:35-3 (West 1952); N.Y. REAL PROP. ACTS. LAW § 601 (McKinney 1979); OR. REV. STAT. § 105.030 (1983); TENN. CODE ANN. § 29-15-121 to -123 (1980).

30. *See, e.g.*, ARK. STAT. ANN. §§ 34-1423, to -1424 (1962); IND. CODE ANN. §§ 34-1-49-1 to -12 (Burns 1973 & Supp. 1983); MISS. CODE ANN. §§ 11-19-95 to -97 (1972); S.C. CODE ANN. §§ 27-27-10 to -100 (Law. Co-op. 1977); WYO. STAT. §§ 1-32-206 to -216 (1977).

31. *See, e.g.*, IOWA CODE ANN. §§ 560.1 to .7 (West 1950); KY. REV. STAT. §§ 381.450 to .560 (1972 & Supp. 1984); MINN. STAT. ANN. §§ 559.08 to .15 (West 1947).

32. CAL. CIV. PROC. CODE § 871.3 (West 1980); N.M. STAT. ANN. § 42-4-17 (1978).

33. *See, e.g.*, CONN. GEN. STAT. ANN. § 47-30 (West 1978); N.D. CENT. CODE § 32-17-09 (1976); UTAH CODE ANN. § 57-6-1 (1974); WASH. REV. CODE ANN. § 7.28.160 (1961); *cf.* MICH. CT. R. 3.411 (1985) (prohibiting recovery if improvements made in bad faith).

34. *See, e.g.*, ARK. STAT. ANN. § 34-1423 (1962); KAN. STAT. ANN. § 60-1004 (1976); N.C. GEN. STAT. § 1-340 (1983); WIS. STAT. ANN. § 843.09 (West 1977).

35. *See infra* notes 118-25 and accompanying text.

36. The Roman law made a clear distinction between good faith and bad faith improvers. Merryman, *supra* note 9, at 457-58. The same distinction has appeared consistently from the earliest betterment statutes. For example, the act at issue in Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823) aided "the peaceable occupant of land, who supposes it to belong to him . . . ." *Id.* at 5; *see also* Merryman, *supra* note 9, at 467 ("Almost all [betterment statutes] are restricted to aiding trespassers in good faith . . . ."). A few of the betterment acts provide limited remedies for improvers who are in adverse possession of the land. *See, e.g.*, ALA. CODE § 6-6-286 (1975). Adverse possession does not necessarily require good faith.

37. " 'As a matter of general law, color of title must be a document purporting to convey title to real estate, but which for some reason does not do it.' " Duncan v. Akers, 147 Ind. App. 511, 519, 262 N.E.2d 402, 405-06 (1970) (quoting Philbin v. Carr, 75 Ind. App. 560, 577, 129 N.E. 19, 25 (1920)); *see also* Fouser v. Paige, 101 Idaho 294, 297, 612 P.2d 137, 140 (1980) ("color of title has reference to something which has the appearance or gives the semblance of title but is not such in fact"); Whitehead v. Barker, 288 Mich. 19, 23, 284 N.W. 629, 630 (1939) (an expectancy does not constitute color of title); Rhyne v. Sheppard, 224 N.C. 734, 736, 32 S.E.2d 316, 317 (1944) ("[T]here can be no color of title without some paper writing attempting to convey title.").

38. *See infra* notes 102-13 and accompanying text; *see also* 2 G. PALMER, *supra* note 10, § 10.9, at 442 ("Apart from a recent California statute, none of the acts provides for relief in favor of a person who mistakes the location of his land.").

39. *See, e.g.*, ARK. STAT. ANN. § 34-1423 (1962); CAL. CIV. PROC. CODE § 871.1(a) (West 1980).

the terminology of the statutes.[40]

All of the betterment acts that address the issue allow improvers a remedy for improvements made both by them and by their predecessors.[41] Several statutes also require that the improvement be durable so that it will be a source of value or enrichment to the owner when he or she resumes control of the property.[42] Surprisingly few betterment acts attempt to define what is meant by enrichment of the owner. Those that provide a definition generally describe the value of the improvement as any increase in the property's fair market value that is attributable to the improvement.[43]

Betterment acts differ greatly in the remedies they provide. As noted above, the statutes of seven jurisdictions are virtual codifications of the common law. These statutes provide no remedy except as a set off in an action for mesne profits by the owner or as a condition to granting equitable relief to the owner.[44] In the remaining states, the most popular remedy is to give the owner a choice of selling his land to the improver or paying the improver the value of the improvements.[45] These statutes vary considerably as to the consequences of the owner's failure to make the election or of either party's inability to meet the requirements of the statute.[46] No current statute affords the improver a choice of reme-

40. *See, e.g.*, GA. CODE ANN. § 44-11-9 (1982) (requiring that the improver have a "bona fide possession under adverse claim of title"); KY. REV. STAT. § 381.460 (1972) (limiting relief to improvers whose claim is "founded on a public record"); MISS. CODE ANN. § 11-19-95 (1972) (improver must have acted under "some deed or contract" and made the improvement "before notice of the [owner's] intention . . . to bring an action").

41. *See, e.g.*, CAL. CIV. PROC. CODE § 871.1 (West 1980); N.C. GEN. STAT. § 1-340 (1983); S.C. CODE ANN. § 27-27-10 (Law. Co-op. 1977); W. VA. CODE § 55-5-1 (1981).

42. *See, e.g.*, ALASKA STAT. § 09.45.640 (1983) ("permanent"); D.C. CODE ANN. § 16-1116 (1981) ("valuable and permanent"); ILL. ANN. STAT. ch. 110, § 6-143 (Smith-Hurd 1983) ("lasting and valuable"); MINN. STAT. ANN. § 559.10 (West 1947) ("all kinds of buildings and fences, and ditching, draining, grubbing, clearing, breaking, and all other necessary or useful labor of permanent value to the land"); MISS. CODE ANN. § 11-19-95 (1972) ("permanent, valuable and not ornamental"); OKLA. STAT. ANN. tit. 12, § 1483 (West 1980) ("lasting, valuable and permanent").

43. *See* D.C. CODE ANN. § 16-1116 (1981); FLA. STAT. § 66.061 (1984); IND. CODE ANN. § 34-1-49-3 (Burns 1973); IOWA CODE ANN. § 560.3 (West 1950); KY. REV. STAT. § 381.500 (1981); ME. REV. STAT. ANN. tit. 14, § 6960 (1980); MINN. STAT. ANN. § 559.11 (West 1947); MISS. CODE ANN. § 11-19-97 (1972); N.M. STAT. ANN. §§ 42-4-15 to -16 (1978); S.C. CODE ANN. § 27-27-20 (Law. Co-op. 1977); *see also* CAL. CIV. PROC. CODE §§ 741, 871.1 to 871.7 (West 1980) (improver entitled to "enhancement" of land, taking into account any special value land holds for owner). For a discussion of the need to consider the special value of the land to the owner in fashioning a remedy, see *infra* notes 139-42 and accompanying text.

44. *See supra* note 29 and accompanying text.

45. The jurisdicitions providing this remedy are: Connecticut, the District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Tennessee, Texas, Vermont, Virginia, West Virginia, Wyoming, and Michigan (by court rule). For citations to the relevant statutes, see *supra* note 28.

46. In several jurisdictions (Connecticut, New Mexico, Wyoming, and Michigan) an owner who fails to make an election may be denied the relief, such as ejectment, originally sought. In other jurisdictions (Illinois, Massachusetts, Minnesota, Missouri, North Carolina, Oklahoma, Vermont, Virginia, and West Virginia) the improver may be entitled to a judgment absent an election by the owner to sell the land. In still others (District of Columbia, Florida, Georgia, Indiana, Iowa, Mississippi, Nebraska, and Texas) the improver may be given the opportunity to buy the land or even given the right to elect to take the land or to receive the value of the improvement from the owner (North Dakota). In a few jurisdictions (Indiana, Iowa, Utah, and Washington) the parties become tenants-in-common in the land to the extent of their relative interests, or the land may be sold and the

dies unless the owner fails to make an election or to execute the election. A few statutes simply authorize entry of a judgment in favor of the improver,[47] and some also give the improver an equitable lien on the land to secure the judgment.[48] The multiplicity of statutory remedies for cases of mistaken improvement speaks both of the complexity of the problem and of the depth of society's compassion for mistaken improvers. Betterment acts have been a mixed blessing for mistaken improvers, however. Although many of them create a remedy where none existed, the strictures and conditions imposed on that remedy often render the relief provided less than complete.[49] Worse, the very existence of these statutes has inhibited the development of meaningful judicial relief in many jurisdictions.[50]

C. *Judicial Relief*

Although traditional legal and equitable principles and the betterment acts adopted by the colonial legislatures provided some relief for mistaken improvers, the idea of expanding equity to provide a complete remedy in all mistaken improver cases gained currency in the early nineteenth century. Several factors militated against expanding the traditional relief: the respect for private property embodied in the constitutional provisions protecting property rights,[51] the

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proceeds divided between the owner and the improver as their interests may appear (Mississippi and South Carolina). For citations to the relevant statutes, see *supra* note 28.

47. The states that provide this remedy are Alabama, Arkansas, Kansas, Kentucky, Louisiana, Maine, Minnesota, New Hampshire, North Carolina, Oklahoma, South Carolina, Tennessee, Vermont, Virginia, West Virginia, Wyoming, and Michigan (by court rule). For citations to the relevant statutes, see *supra* note 28.

48. The states giving the improver an equitable lien on the property are Arkansas, Kentucky, Mississippi, Nebraska, New Mexico, North Carolina, South Carolina, Virginia, and West Virginia. For citations to the relevant statutes, see *supra* note 28.

49. For examples, see *infra* notes 111-13 and accompanying text; *see also* 2 G. PALMER, *supra* note 10, § 10.9, at 442-43 (discussing inadequacies of betterment acts generally and concluding that "the statutes leave untouched many instances of mistaken improvement, which remain to be worked out by reference to principles of unjust enrichment.").

50. The reporter of the RESTATEMENT OF RESTITUTION has commented:

> It seems likely that Story's view, which would permit restitution . . . would have prevailed but for the prevalence of the so-called betterment statutes. As it is, however, the non-statutory law in most jurisdictions has remained as it was originally since most of the situations calling for restitution are within the betterment statutes.

RESTATEMENT OF RESTITUTION § 42(1) reporters' notes (1937); *see also* 2 G. PALMER, *supra* note 10, § 10.9(b), at 444 (discussing possible effect of betterment acts on evolution of case law); Casad, *supra* note 9, at 1042 (betterment acts' "over-all effect has probably been to impede the development of a more rational solution"); Ferrier, *A Proposed California Statute Compensating Innocent Improvers of Realty*, 15 CALIF. L. REV. 189, 190 (1927) (general acceptance of *Bright* "not improbable" but for betterment acts). *But cf.* Duncan v. Akers, 147 Ind. App. 511, 262 N.E.2d 402 (1970) (betterment act not exclusive); Citizens & S. Nat'l Bank v. Modern Homes Constr. Co., 248 S.C. 130, 149 S.E.2d 326 (1966) (betterment act not exclusive); Somerville v. Jacobs, 153 W. Va. 613, 170 S.E.2d 805 (1969) (betterment act not exclusive).

51. The United States Constitution provides that "[n]o person shall . . . be deprived of . . . property, without due process of law . . . ." U.S. CONST. amend. V. In 1868, this prohibition was extended to the states. U.S. CONST. amend. XIV, § 1. From the inception of the Union, many state constitutions included similar protections.

Betterment acts frequently were attacked as violative of these federal and state proscriptions because the effect of the statutes was to force the owner to sell the property to the improver or to pay for the improvement. In a few cases, betterment acts were found to violate constitutional protection of property rights. *See, e.g.*, Billings v. Hall, 7 Cal. 1 (1857) (betterment act violated state constitu-

traditional English antipathy toward "officious intermeddlers,"[52] and the availability of some relief both at common law and under the betterment acts.[53] Several factors, however, favored an expansion of relief: the policy of encouraging development of the vast, uncultivated western lands,[54] the compassion and liberality shown by state legislatures in enacting betterment acts,[55] and the strong belief that no person should be enriched unjustly.[56] The issue was one about which reasonable people, including judges, disagreed.

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tion); McCoy v. Grandy, 3 Ohio St. 463 (1854) (amendatory act giving improver, rather than owner, election to buy the land held unconstitutional on state grounds). Despite some hostile rhetoric, however, most courts upheld the betterment acts. In Townsend v. Shipp's Heirs, 3 Tenn. (Cooke) 293 (1813), for example, the court stated:

> [T]he principles of the Constitution . . . secure to the honest and industrious the exclusive enjoyment of the fruits of that honesty and industry, and, in other words, the undisturbed use of their property. No man can be deprived of it but by his own consent, unless for public use, and not then without just compensation . . . . The Acts under consideration must be so interpreted as to steer clear of a violation of these constitutional principles . . . . It seems to the Court that, consistently with these principles, the remedial part of the Act can not be extended any further than the ground on which courts of equity have previous to this acted.

Id. at 300-02; *see also* Griswold v. Bragg, 48 F. 519 (C.C.D. Conn. 1880) (act did not violate federal constitution so long as it did not interfere with owner's legal title); Stump v. Hornback, 94 Mo. 26, 6 S.W. 356 (1887) (same result on state constitutional grounds); *cf.* Searl v. School Dist., 133 U.S. 553 (1890) (owner on whose land improver built a school not constitutionally entitled to compensation in eminent domain proceeding).

52. *See* Casad, *supra* note 9, at 1047 ("Instead of honoring the voluntary altruist, the common law has often upbraided him, calling him an 'officious intermeddler.' . . . This tendency apparently reflects something fundamental in the Anglo-Saxon temperament which American institutions inherited along with the common law."). For a general discussion of the subject, see Hope, *Officiousness*, 15 CORNELL L. REV. 25, 29-30 (1929) (attributing legal abhorrence of officiousness to the English temperament and character).

53. Casad, *supra* note 9, at 1047.

54. The policy of expansion is a reason often given by judges and commentators for the broadening of relief. *See, e.g.*, Townsend v. Shipp's Heirs, 3 Tenn. (Cooke) 293, 300 (1813) ("In a waste and woodland country, as this is, the Legislature must have designed to favor those who had opened land, and had contributed to clear the country of the incumbrances of forest timber."); R. GOFF & G. JONES, *supra* note 9, at 107 n.7 ("In England and the urban states of America the necessity for such legislation has not been felt. Boundaries of land are there well settled and Betterment legislation would, no doubt, merely encourage carelessness in the examination of titles.").

Comparing the traditional approach to cases of mistaken improvement to the expansionist policy of America, one commentator has noted:

> Apart from the inadequacy of this traditional approach as a means of rendering equal justice to parties in substantially similar cases, it seems particularly inappropriate as a matter of policy in a country such as America. During most of our history as a nation it has been a matter of high policy to foster and encourage land development and improvement.

Casad, *supra* note 9, at 1041.

In a similar vein, Professor Merryman has observed:

> The manner in which the law operated resulted in many hard cases and, at the same time, tended to frustrate a then widely held view of public policy. According to this view it was important that wild land be settled and improved and that the law encourage this kind of activity.

Merryman, *supra* note 9, at 466.

55. *Cf.* Casad, *supra* note 9, at 1047 ("Logically, it would seem that if [the betterment acts] are to have any effect on the nonstatutory law it should be to reflect the policy of making relief more readily available to the mistaken improver.").

56. Justice Story and many judges sympathetic to improvers based their decisions on a principle of natural justice: *Jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem* (By the law of nature, it is not just that anyone should be enriched by the detriment or injury of another.).

The possibility of judicially created relief for mistaken improvers certainly occurred to many members of the early American bar. For example, in *Administrators of Winthrop v. Huntington*[57] the original complainant, Winthrop, paid taxes on and made improvements to land he claimed under a title derived from a judicial sale. The defendant, Huntington, brought an action of ejectment and recovered possession of the land by showing that the sale had been illegal. Winthrop, the mistaken improver, was not entitled to any relief under traditional principles because Huntington had neither sued for mesne profits nor sought the aid of a court of equity. The court rejected Winthrop's case on the merits, dismissing him as a "volunteer."[58] Although Winthrop's claim with regard to taxes paid was clearer and more forceful than his claim with regard to the improvements, the court refused restitution even of this amount.[59]

Many of the courts that have declined to grant affirmative relief in mistaken improver cases have done so without reaching the merits of the improver's claim. Chancellor Walworth's opinion in *Putnam v. Ritchie*[60] is the authority usually cited for the proposition that a mistaken improver is not entitled to affirmative relief in equity. Although obviously sympathetic to the improver, the Chancellor refused to expand his jurisdiction to create a remedy that had not existed before.

> [I]f I felt myself authorized to introduce this principle of natural equity into the law . . . , I should direct a reference to a master to ascertain the present value of the lot . . . [and] of the buildings . . . ; and should give the defendants the right to elect . . . whether they would retain the legal title . . . and pay to the complainant the value of such improvements, or would release to him their legal estate in the premises upon being paid the value thereof . . . . I have not, however, been able to find any case either in this country or in England, wherein the court of chancery has assumed jurisdiction to give relief . . . . I do not, therefore, feel myself authorized to introduce a new principle into the law of this court, without the sanction of the legislature . . . .[61]

Thus, the Chancellor's refusal to grant relief arose from an abundance of judicial restraint, rather than from consideration of the merits of the improver's claim.

The principal authority for expanding equitable jurisdiction to include granting affirmative relief to mistaken improvers is Justice Story's opinion in *Bright v. Boyd*.[62] Prior to this case, Story had espoused the traditional view that a court of equity could not act to relieve a mistaken improver unless "there [was] some fraud, or . . . the aid of a Court of Equity [was] required [by the

57. 3 Ohio 327 (1828).

58. *Id.* at 333-34.

59. By paying taxes, Winthrop released the owners from their obligation to pay. Therefore, the benefit conferred upon the owners was clearer and more certain than in the case of unsolicited improvements, which may be altogether unwanted. Under modern restitutionary principles Winthrop would be entitled to relief. *See* RESTATEMENT OF RESTITUTION §§ 43(1), 54(1) (1937) (regarding mistakes of fact and law respectively).

60. 6 Paige Ch. 390 (N.Y. Ch. 1837).

61. *Id.* at 404-05.

62. 4 F. Cas. 127 (C.C.D. Me. 1841) (No. 1,875).

owner]."[63] Story was well versed in Roman and civil law, however, and knew that those systems applied a "broader principle of natural justice," sufficient to provide restitution for mistaken improvers.[64] In *Bright* the plaintiff could not avail himself of either traditional relief or the state's betterment statute because he had been ousted from possession in a legal action before he met the statutory conditions.[65] Faced with these circumstances Story easily found in equitable jurisdiction the power to order that the plaintiff be compensated.

> Upon the general principles of courts of equity, acting *ex aequo et bono* [in fairness and good], I own, that there does not seem to me any just ground to doubt, that compensation, under such circumstances, ought to be allowed to the full amount of the enhanced value [of the land]. . . . I am aware, that the doctrine has not as yet been carried to such an extent in our courts of equity . . . . But it has been supposed, that courts of equity do not, and ought not to go further, and to grant active relief in favor of such a bona fide possessor, making permanent meliorations and improvements, by sustaining a bill, brought by him therefor, against the true owner, after he has recovered the premises at law. I find, that Mr. Chancellor Walworth, in *Putnam v. Ritchie*, . . . entertained this opinion, admitting at the same time, that he could find no case in England or America, where the point had been expressed or decided either way. Now, if there be no authority against the doctrine, I confess, that I should be most reluctant to be the first judge to lead to such a decision.[66]

After Walworth and Story wrestled with the question of granting affirmative relief to mistaken improvers, many other courts have been called upon to decide the same issue. In the first hundred years, a clear majority of jurisdictions considering the question sided with Walworth and refused to grant equitable relief.[67] It seems likely that the existence of betterment statutes in so many states persuaded judges that society would be served best by leaving the matter of mistaken improvement in the hands of the legislatures.[68]

The *Restatement of Restitution* reiterated the narrow traditional rules denying equitable relief.[69] The *Restatement* acknowledged that this approach was

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63. 2 J. STORY, *supra* note 19, § 1238, at 487.

64. *Id.* § 1239, at 487-88.

65. *Bright*, 4 F. Cas. at 132.

66. *Id.* at 132-33.

There is substantial irony both in the quoted language and in the fact that Story was the judge who first opened this new area of relief for the mistaken improver. His COMMENTARIES ON EQUITY JURISPRUDENCE had been written in part because of his belief that equity was a science and because of his opposition to contemporaries who opposed equity as mere unbridled judicial discretion. Story stressed both the systematic structure of equity jurisprudence and the use of precedent as a check on the arbitrary exercise of judicial power. 1 J. STORY, *supra* note 19, §§ 18-19, at 21-22. *See generally* G. MCDOWELL, EQUITY AND THE CONSTITUTION 70-85 (1982) (discussing Story's view of equity).

67. For a listing of decisions, see RESTATEMENT OF RESTITUTION § 42 reporters' notes (1937). *See also* 2 G. PALMER, *supra* note 10, § 10.9, at 439-40 (most courts considering the issue adopted the common-law rule).

68. *See supra* note 50 and accompanying text; *see also* Note, *Improvements—The Right to Recover for Improvements to Real Property under Missouri Law*, 18 UMKC L. REV. 203 (1950) (arguing that courts of equity should provide a remedy in cases outside of the betterment act).

69. The RESTATEMENT OF RESTITUTION § 42(1) (1937) provides:

"harsh" and "not wholly consistent with the principles of restitution for mistake," but justified it on the ground that in some cases a contrary rule might "be still more harsh [on] the one receiving the benefits."[70] The *Restatement* position probably chilled the development of case law in the mistaken improver area.[71] Nevertheless, since the adoption of the *Restatement* in 1937, a number of additional jurisdictions have joined those affording some measure of judicially created relief to mistaken improvers.[72]

II. ANALYSIS

A. *The Case for Complete Relief*

The gist of the mistaken improver's claim is a simple principle of justice and fairness: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other."[73] In most mistaken improver cases,

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Except to the extent that the rule is changed by statute, a person who, in the mistaken belief that he or a third person on whose account he acts is the owner, has caused improvements to be made upon the land of another, is not thereby entitled to restitution from the owner for the value of such improvements; but if his mistake was reasonable, the owner is entitled to obtain judgment in an equitable proceeding or in an action of trespass or other action for the *mesne* profits only on condition that he makes restitution to the extent that the land has been increased in value by such improvements, or for the value of the labor and materials employed in making such improvements, whichever is least.

70. *Id.* § 42 comment a.

71. One commentator has stated:

The *Restatement of Restitution*, which contributed a certain degree of analytical coherence to the law of unjust enrichment generally, did not help in this area. In fact, it probably served to impede development in the area of relief for the mistaken improver. . . . [T]he draftsmen of the *Restatement* lent their considerable prestige to the support of those courts that are unwilling to look beyond the packaged prior precedent. They passed up the opportunity to present the problem in such a way as to stimulate development of a solution within the general framework of unjust enrichment.

Casad, *supra* note 9, at 1049.

72. *See* 2 G. PALMER, *supra* note 10, § 10.9, at 444 - 46.

73. RESTATEMENT OF RESTITUTION § 1 (1937). The comments to this section explain:

a. A person is enriched if he has received a benefit. . . . A person is unjustly enriched if the retention of the benefit would be unjust . . . .

. . . .

b. *What constitutes a benefit.* A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage.

. . . .

c. *Unjust retention of benefit.* Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it. . . . The Restatement of this Subject states the rules by which it is determined whether or not it is considered to be just to require restitution.

Id. comments a, b & c.

The RESTATEMENT (SECOND) OF RESTITUTION § 1 (Tent. Draft No. 1, 1983) states that "a person who receives a benefit by reason of an infringement of another person's interest, or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment." A comment to this section explains:

A statement of principle about "unjust enrichment" leaves the expression to be defined or explained; it cannot serve as a precise guide to decisions.

Repeated and consistent applications of the principle can, however, give support to its

the owner readily will concede that the improver built a house or made some other improvement on the owner's land. Although a few owners may argue that the improvement was of no benefit to them,[74] most owners will concede that they have been enriched. Thus, in many cases the only real issue is whether the enrichment of the owner is unjust.

Intentional interference with the property or affairs of another is officious, and any resulting enrichment of the other is not unjust.[75] Thus, one who improves land knowing it belongs to another is not entitled to restitution.[76] In cases not involving the improvement of real property, mistake often excuses what might otherwise be officious conduct and renders the resulting enrichment unjust.[77] Enrichment resulting from mistaken improvements to real property, however, arguably is not unjust because of the potential unfairness of requiring owners to make restitution for unwanted improvements.[78]

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further application in like cases. . . . Many rules of this Restatement express settled conclusions about particular situations; they are established corollaries of the general principle.

Other rules of this Restatement are not so firmly grounded. They represent considered judgments, but they concern patterns of fact on which a contrary judgment might well be made by a conscientious person considering what justice requires in the circumstances. Still other rules of this Restatement are based on a preponderance of authority about what justice requires in a given situation and not on a newly considered judgment that such a rule follows from the principle of the present section.

Id. comment d.

74. *See, e.g.*, Eagle Oil Corp. v. Cohassett Oil Corp., 263 Mich. 371, 380, 248 N.W. 840, 843 (1933) (improvements were equipment, "now a detriment" to the land, used at oil well that "came in like a lion and went out like a lamb").

75. "A person who officiously confers a benefit upon another is not entitled to restitution therefor." RESTATEMENT OF RESTITUTION § 2 (1937). The comment to this section explains:

Officiousness means interference in the affairs of others not justified by the circumstances under which the interference takes place. . . .

. . . [W]here a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be unjustly enriched. The rule denying restitution to officious persons has the effect of penalizing those who thrust benefits upon others . . . .

Id. comment a. On officiousness generally, see Dawson, *The Self-Serving Intermeddler*, 87 HARV. L. REV. 1409 (1974) (elaborating position of person who confers benefit on a stranger while acting in own interest); Hope, *supra* note 52; Wade, *Restitution for Benefits Conferred Without Request*, 19 VAND. L. REV. 1183 (1966).

76. *See, e.g.*, Mid-State Homes, Inc. v. Anderton, 291 Ala. 536, 283 So. 2d 426 (1973) (per curiam) (contractor who ignored survey stakes and warnings showing mistake denied reformation of documents and right to remove house); Miller v. Gasaway, 514 S.W.2d 90 (Tex. Civ. App. 1974) (life tenant who improved estate knowing the nature of his interest not entitled to value of improvements that vest in remaindermen on termination); Diver v. Diver, 236 Wis. 274, 295 N.W. 18 (1940) (son who knowingly improved mother's land not entitled to value of improvements).

77. The RESTATEMENT OF RESTITUTION § 2 comment a (1937) states:

Chapters 2 to 5 of the Restatement of this Subject deal with situations in which a person has conferred a benefit upon another as the result of mistake or coercion or at the other's request or in an emergency. In all of these cases the conduct of the transferor is not officious and where recovery is denied it is denied for reasons not connected with officiousness. . . . Thus, . . . the denial of restitution to a person who by mistake has improved the land of another is because of a policy which protects the owner of land against paying for improvements which he does not want or for which he may be unable to pay.

See also Hope, *supra* note 52, at 217-23 (discussing effect of mistake on otherwise officious payments and performance of services); Wade, *supra* note 75, at 1183, 1201-02 (discussing mistake as a reason for denying recipient an opportunity to decline the benefit). *See generally* RESTATEMENT OF RESTITUTION ch. 2 (1937) (concerning restitution for benefits conferred as the result of mistake).

78. Mistaken improvers of real property are denied restitution to avoid hardship on the owner. RESTATEMENT OF RESTITUTION § 42 (1937); *see also id.* § 2 comment a (mistaken improvers of

Denying relief to mistaken improvers because of the inequity of forcing owners to pay for unwanted improvements is questionable for two reasons. First, the existence and degree of injustice to the owner are factual matters that can be determined only on a case-by-case basis. Second, the perceived injustice never precluded courts of equity from granting restitution as a condition of granting the relief sought by the owner.[79] The traditional rule of equity barred relief only if the owner did not require the assistance of a chancellor. Thus, under a broad application of conventional principles, the mistaken improver has a strong argument for restitution.

In contrast, the owner's position is suspiciously technical. His legal claim to the improvement is based on the doctrine of accession, which holds that any chattels affixed to real estate become part of the land and lose their separate identity as personalty.[80] In addition, the owner may argue that since the improvement became a part of his land the instant it was affixed, requiring restitution would deprive him of property rights that are protected by fundamental precepts of Anglo-American jurisprudence and by the due process clauses of the federal and state constitutions.[81]

Few judges have been convinced of the wisdom or justice of the owner's answer. Even at common law a mistaken improver was entitled to some relief. Chancellor Walworth, the opponent of expanding equitable jurisdiction to aid mistaken improvers, freely conceded the moral claim of the improver.[82] Nevertheless, Walworth and many other judges refused restitution and tolerated the obvious enrichment of the owner at the improver's expense. Their reasons for denying relief to mistaken improvers lie in the answers to two questions that have dominated opinions concerning mistaken improvers: (1) whether restitution is consonant with the social policies of the day, and (2) whether an appropriate remedy can be framed.

Relief for mistaken improvement has always been perceived in terms of so-

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land denied restitution to protect owners against paying for improvements they do not want or cannot afford). As one commentator has noted:

> A somewhat different situation exists when plaintiff has by mistake added improvements to defendant's property. Plaintiff's situation is not materially different, since his mistake is still the reason for his failure to give defendant an opportunity to decline. But defendant's situation is quite different; now, unwanted and unneeded benefits may be forced upon him. . . . There is a clear enrichment, and the balancing process of weighing the equities of the mistaken plaintiff and the unconsenting defendant is a delicate one, whether done by court or legislature.

Wade, *supra* note 75, at 1202.

79. *See supra* note 19 and accompanying text.

80. *See supra* note 12 and accompanying text. The doctrine of accession continues to enjoy vitality in mistaken improver cases. *See, e.g.*, Producers Lumber & Supply Co. v. Olney Bldg. Co., 333 S.W.2d 619 (Tex. Civ. App. 1960) (improver who destroyed improvement after learning of error held liable for waste); Somerville v. Jacobs, 153 W. Va. 613, 170 S.E.2d 805 (1969) (warehouse mistakenly built on another's land became a part of owner's property); *cf.* Stoljar, *Mistaken Improvement of Another's Property*, 14 U.W. AUSTL. L. REV. 199, 199 (1980) (common law denies restitution to mistaken improvers "more as a matter of logical consistency than out of conviction of its basic fairness or equity").

81. *See supra* note 51.

82. *See supra* text accompanying note 61.

cial policy and public interest.[83] The common law held the mistaken improver in disdain and ignominy because of the English distaste for officious intermeddling.[84] The viewpoint and policy concerns of the American colonies, however, were different from those of the English.[85] Motivated in part by a desire to encourage development in the New World, colonial and, later, state legislatures enacted statutes providing relief for mistaken improvers.[86] Early judicial opinions show a similar concern for questions of policy.[87]

The lack of a good remedy has plagued courts continually, especially in cases brought by the improver. The common law courts and equity courts offered only defensive relief: the improver had no remedy unless the owner sought

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83. Those tempted to rely too heavily on such ephemeral bulwarks may wish to consider the following:

> Public interest is very like the ocean "without a mark without a bound;" at one time and place it is fiercely aroused, at other times and places it is quiescent, lethargic; it includes all things and is capable of swallowing everything that touches it; it is never still, but is always encroaching or receding.

Hope, *supra* note 52, at 48.

84. *Cf. id.* at 26-32 (discussing generally the English dislike of officiousness).

85. *See supra* notes 23-27 and accompanying text.

86. *See* 2 G. PALMER, *supra* note 10, § 10.9, at 443 ("The betterment acts were influenced by early uncertainties with respect to land titles, and, in addition to a legislative judgment on the question of unjust enrichment, were intended to encourage the improvement of land."); *see also supra* note 54 (citing other authorities).

The American colonies accommodated the movement toward expansion in other ways as well. For example, pressured by immigration, Pennsylvania recognized "squatters' rights." E. KIRKLAND, *supra* note 26, at 11. As suggested above, there may have been other reasons for the emergence of the betterment acts that were both less calculated and more generous. *See supra* text accompanying notes 23-27.

87. In Griswold v. Bragg, 48 F. 519 (C.C.D. Conn. 1880), the court observed:

> There is a natural equity which rebels at the idea that a *bona fide* occupant and reputed owner of land in a newly-settled country, where unimproved land is of small value, or where skill in conveying has not been attained, or where surveys have been uncertain or inaccurate, should lose the benefit of the labor and money which he had expended in the erroneous belief that his title was absolute and perfect . . . . [I]n a comparatively newly-organized state, where titles are necessarily more uncertain than they are in England, there is an instinctive conviction that justice requires that the possessor under a defective title should have recompense for the improvements . . . .

Id. at 520-21. Similar concerns were addressed in Ewing's Heirs v. Handley's Ex'rs, 14 Ky. (4 Litt.) 346 (1823):

> But the labor of the occupant in subduing the forest, fitting the land for cultivation, placing necessary buildings thereon, is not thus paid; for these he has a moral claim upon his adversary who now, by the sentence of the court, stands, in some measure, in the attitude of an employer.

Id. at 373. In setting aside a portion of the state's betterment act, the court in McCoy v. Grandy, 3 Ohio St. 467 (1854) stated:

> This encroachment upon the rights of private property, as settled by the common law, arose out of peculiar and pressing circumstances, produced by the liability to mistake, incident to the settlement of a wide extent of uncultivated land in a new country, where obscurity and uncertainty in land titles, by reason of conflicting locations, were unavoidable.

Id. at 467.

The seminal opinions by Justice Story and Chancellor Walworth concerning the availability of affirmative equitable relief for the mistaken improver differed mainly on the question of judicial activism, not on the merits of the improver's claim. *See supra* notes 60-66 and accompanying text. Nineteenth century judges often objected to expanding judicial relief or enforcing betterment statutes because of a concern that property rights protected by federal and state constitutions might be violated. *See supra* note 51 and accompanying text.

to recover mesne profits in an action at law or possession of or clear title to the land in a suit in equity. When considering the expansion of relief, courts frequently expressed the fear that any broader remedy could impose severe hardships on the owner and might result in the loss of land by the owner.[88] The latter possibility was especially abhorrent to nineteenth-century lawyers and judges to whom the right to secure and peaceable enjoyment of private property was of the greatest importance.[89] This respect for private property was reinforced by the emerging concept that each piece of land is unique.[90] Based on this principle, owners argued that in cases of mistaken improvement they were entitled not simply to the value of the land, but to the specific property that had been improved.[91]

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88. *See, e.g.*, Griswold v. Bragg, 48 F. 519, 521 (C.C.D. Conn. 1880) ("It is obvious that this statutory equity is not without occasional hardships. The true owner may be forced to sell his land against his will, and may sometimes be placed too much in the power of capital . . . ."); McCoy v. Grandy, 3 Ohio St. 463, 467 (1854) ("The improvements may be expensive, and beyond the ability of the owner to pay, without a disposition of the land; besides, he may have a strong attachment for the property, and it might have answered all his purposes without the improvements."); *see also* RESTATEMENT OF RESTITUTION § 42 comment a (1937) ("The reason for the rule [denying restitution to improvers], which is harsh to the one making the improvements by mistake, is that in many cases it would be still more harsh to require the one receiving the benefits to pay therefor."); R. GOFF & G. JONES, *supra* note 9, at 107 ("Though the owner gets a windfall at the stranger's expense, it is felt that it would be more harsh to make the owner pay for services and improvements he may not want and did not ask for."); Wade, *supra* note 75, at 1202 (owner might be forced to pay for "unwanted and unneeded" improvements). As one commentator has observed:

> The very fact that must have influenced many courts to grant restitution also argues against imposing a money judgment on the landowner without giving him some feasible alternative. . . . The fact that the enrichment often will be in an amount far in excess of the value of the land itself emphasizes the injustice of permitting the landowner to retain the structure without compensation. At the same time the entry of the usual money judgment, measured by the enhanced value of the land, and secured by a lien on the land, may result in substantial hardship to the landowner by forcing him to pay for a building he did not bargain for, may not want, and for which he cannot afford to pay.

2 G. PALMER, *supra* note 10, § 10.9, at 447.

89. *See, e.g.*, Townsend v. Shipp's Heirs, 3 Tenn. (Cooke) 293, 298 (1813) ("If the law were otherwise the idea of property in lands would be almost annihilated . . . . It would be manifestly repugnant to the first principle of property, of society, and of free government, that any person should pay for work and labor done without his consent.").

90. "A specific tract of land has long been regarded as unique and impossible of duplication by the use of any amount of money." 3 RESTATEMENT (SECOND) OF CONTRACTS § 360 comment e (1979). Although this notion is now widely accepted, its evolution was surprisingly byzantine. By the late 13th century, the action of covenant had emerged as a precursor of modern contract. It would lie for many things, although its earliest and most common use was to obtain possession of land. 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 384 (4th ed. 1936); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 570-1 (1956); 2 F. POLLACK & W. MAITLAND, THE HISTORY OF ENGLISH LAW 216-17 (2d ed. 1899 reissued 1968). Although some suits for possession of land could be redressed at law, others could be brought only in chancery because the underlying agreement of "contract" was informal or possibly oral. Since equity offered specific performance as a remedy, litigants who needed a particular piece of land came to prefer equity to law. Barbour, *The History of Contract in Early English Equity*, in 4 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY 116-22 (1914). When the long conflict between law and equity was resolved in the early 19th century, the accommodation reached was that equity would act only if the legal remedy was inadequate. One of the principal exceptions to the rule favoring damages was, and continues to be, the remedy of specific performance for breach of contract for the sale of land. E. FARNSWORTH, CONTRACTS § 12.4, at 820-21 (1982); 1 W. HOLDSWORTH, *supra*, at 457. Today the inadequacy of a legal remedy in the case of land may have two facets: the unavailability of a substitute (which is uniqueness in its pristine sense) and the difficulty of computing its value. *See infra* note 167. For a discussion of whether land is truly unique, see *infra* notes 169-71 and accompanying text.

91. These arguments have not fallen on deaf ears. For example, a dissenting justice in Somer-

In most jurisdictions mistaken improver cases have been relatively rare. If they had been more common, judges might have discerned differences between cases in which the owner's legitimate interests precluded relief of the improver and cases in which the improver's equities demanded complete, affirmative relief. In many jurisdictions failure to make such a distinction has eclipsed the improver's fundamental right to restitution.[92]

B. *Establishing the Right to Restitution*

1. The Improver's Error

The one essential element in a mistaken improver case is that the improver, or someone upon whom the improver relies,[93] makes a mistake[94] and improves land owned by another, thus enriching the true owner. The mistake requirement promotes the policy of preventing recoveries by those who knowingly improve another's land for the purpose of forcing the owner to pay for the improvements.[95] When a person improves land believing it to be his or her own, self-interest affords a safeguard against the risk of officious intermeddling.[96]

The modern betterment acts give effect to this policy by imposing conditions on the improver's right to relief; usually the improver must have "color of

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ville v. Jacobs, 153 W. Va. 613, 635, 170 S.E.2d 805, 816-17 (1969) (Caplan, J., dissenting), commented: "In my opinion for the court to permit the plaintiff to force the defendants to sell their property contrary to their wishes is unthinkable and unpardonable. This is nothing less than condemnation of private property by private parties for private use."

92. *See* Casad, *supra* note 9, at 1053 ("Because the number of cases raising the problem of the mistaken improver has not been large enough to constitute a major problem, courts have generally been content with the disorderly and inconsistent law that they have been applying, and no strong movement for reform has arisen.").

93. Taken literally, only a person who makes both the mistake and the improvement can be a mistaken improver. In many cases, however, the mistake is made by a predecessor in title and not discovered by the current occupant before making the improvement, or the mistake and the improvement are made by a predecessor whose interest is acquired for full value by the current occupant. In either case, the current occupant is treated as the mistaken improver because it is his or her interests that have been detrimentally affected by the mistake and the improvement. *See, e.g.*, Citizens & S. Nat'l Bank v. Modern Homes Constr. Co., 248 S.C. 130, 149 S.E.2d 326 (1966) (present owner permitted to remove improvement erected on wrong lot by predecessor in title). *But cf.* Rhyne v. Sheppard, 224 N.C. 734, 736, 32 S.E.2d 316, 317 (1944) (right to recover for mistaken improvement "does not run with the land upon which [the plaintiff] mistakenly thought he was building"). Most of the betterment acts expressly provide for relief to a mistaken improver's successors in interest. *See supra* note 41 and accompanying text.

94. "Mistake means a state of mind not in accord with the facts." RESTATEMENT OF RESTITUTION § 6 (1937). A mistake may be one of fact or law. "[A] 'mistake of fact' means any mistake except a mistake of law. A 'mistake of law' means a mistake as to the legal consequences of an assumed state of facts." *Id.* § 7. Although this distinction is important for some purposes, it has no practical significance in mistaken improver cases. *Compare id.* § 6 comment a ("Whether or not considered to be a fact, a rule of law is unlike other facts in that a person who does an act which otherwise would be unlawful is ordinarily not excused from liability because of a mistaken belief, however reasonable, that his act is rightful.") *with* Hope, *supra* note 52, at 217-18 (concluding that either type of mistake removes the element of "conscious purpose" from what would otherwise be an officious act).

95. This policy is a modern manifestation of the traditional English antipathy toward officious conduct or intermeddling. *See supra* note 84 and accompanying text.

96. *See* 2 G. PALMER, *supra* note 10, § 10.9, at 436; Hope, *supra* note 52, at 217 ("The essence of officiousness is the conscious purpose of interposing in another's affairs for his advantage."); Wade, *supra* note 75, at 1201-02.

title" to the land or must "believe" him or herself to be the owner in order to recover.[97] The effect of such conditions, however, is sometimes unforeseen and unjust.[98]

Troublesome issues arise if the improver knows that he or she is not the owner of the property, since the safeguard provided by the improver's self-interest no longer is present. In some cases the improver may believe mistakenly that the person with whom he or she is dealing is the owner.[99] In other cases the improver may believe mistakenly that a relationship with another[100] or a contract or other agreement with another[101] will ripen into an interest in the land.

a. Mistakes concerning the quality of the improver's title

Case 1: *X* builds a house on land bought at a judicial sale that is later held to be illegal.

This is a very common case.[102] The improver, *X*, has made a mistake of law concerning the validity of the title. Because the improver can show color of title or a reasonable belief that the title was good, the improver is entitled to relief under all of the betterment acts and virtually all of the cases providing for expanded equity jurisdiction.

Case 2: *X* builds a house on land, title to which *X* obtained from a life tenant whom *X* believed to hold a fee simple.

In this case, *X*'s mistake is one of fact instead of law. Because *X* has color

97. *See supra* notes 33-40 and accompanying text.

98. *See infra* text accompanying note 111.

99. *See, e.g.*, Shick v. Dearmore, 246 Ark. 1209, 442 S.W.2d 198 (1969) (well-driller employed by vendee of adjacent lot permitted to remove casings); Lawson v. O'Kelley, 81 Ga. App. 883, 60 S.E.2d 380 (1950) (restitution denied for roofer employed by tenants); Snider v. Dunn, 11 Mich. App. 39, 160 N.W.2d 619 (1968) (vendee under contract with daughter of life tenant who also held one-half remainder interest not entitled to restitution for repairs made to preserve property); Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966) (contractor entitled to restitution from landowner although its contract was with her mother whom contractor believed to be owner).

100. *See, e.g.*, Lee v. Menefield, 249 Ala. 407, 31 So. 2d 581 (1947) (executrix who made improvements believing she would be owner entitled to restitution); Frambach v. Dunihue, 419 So. 2d 1115 (Fla. Dist. Ct. App. 1982) (head of one of two families that shared a dwelling for nineteen years entitled to restitution for value of improvements made to communal property owned by other family); Ollig v. Eagles, 347 Mich. 49, 78 N.W.2d 553 (1956) (husband who mistakenly believed his wife held beneficial interest in land that he improved denied restitution but granted equitable lien on theory of acquiescence of true owner); Pakulski v. Ludwiczewski, 291 Mich. 502, 289 N.W. 231 (1939) (son who made improvements to parents' farm in expectation of inheriting it not entitled to restitution); Wright v. Wright, 305 N.C. 345, 289 S.E.2d 347 (1982) (husband who improved wife's land believing she would convey an interest in it to him not entitled to restitution); Diver v. Diver, 236 Wis. 274, 295 N.W. 18 (1940) (son not entitled to restitution for improvements made to mother's land).

101. *See, e.g.*, McPherson v. Redding, 323 So. 2d 687 (Fla. Dist. Ct. App. 1975), *cert. denied*, 336 So. 2d 603 (Fla. 1976) (prospective purchaser who occupied and improved land entitled to equitable lien for expenditures made before owner returned unsigned purchase contract); Pope v. Speiser, 7 Ill. 2d 231, 130 N.E.2d 507 (1955) (son-in-law who improved land in expectation that wife would receive interest on death of her father entitled to restitution).

102. This is the kind of case that probably induced early judges to seek a remedy for mistaken improvers beyond that afforded by the traditional rules or the betterment acts. *See, e.g.*, Bright v. Boyd, 4 F. Cas. 127 (C.C.D. Me. 1841) (No. 1,875) (sale by probate court set aside after eight years); Administrators of Winthrop v. Huntington, 3 Ohio 327 (1828) (sale by orphans' court set aside after nine years).

of title and an honest belief in his ownership, however, his predicament is remediable under the betterment acts and judicial decisions.[103]

Case 3: *X* builds a house on land purchased pursuant to an oral contract that is unenforceable under the Statute of Frauds.

This case presents another mistake of law, the unenforceability of the contract for the sale of the land. Although such cases generally are not remediable under the betterment statutes because the improver cannot show color of title, other means of relieving the improver's plight exist.[104]

b. Mistakes concerning the nature of the improver's interest

Case 4: *X*, a life tenant, builds a house on land that he mistakenly believes he owns in fee simple. *Z* is the remainderman.

Ordinarily when a life tenant improves the estate, he or she is presumed to know that the improvement ultimately must pass to the remainderman; thus, the remainderman is not unjustly enriched when he or she receives the improvement at the termination of the life estate.[105] However, the position of the life tenant who makes the improvement under the mistaken belief that he or she is the owner in fee is indistinguishable from the position of the mistaken improver who errs in assessing the quality of his or her title.[106] For this reason, several courts have extended relief to life tenants in such cases, although relief would be denied under most of the betterment acts.[107]

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103. *See, e.g.*, Sweeten v. King, 29 N.C. App. 672, 225 S.E.2d 598, *cert. denied*, 290 N.C. 667, 228 S.E.2d 458 (1976).

104. *See, e.g.*, Heim v. Shore, 56 N.J. Super. 62, 151 A.2d 556 (App. Div. 1959) (unenforceable contract held to show owner's knowledge of improver's mistake, justifying restitution). Such cases also may be remedied under the doctrine of promissory estoppel. *See* 1 RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981).

105. *See, e.g.*, Graves v. Bean, 200 Ark. 863, 141 S.W.2d 50 (1940) (life tenant with knowledge of estate held not entitled to value of permanent improvements); Magee v. Holmes, 220 Miss. 49, 70 So. 2d 60 (1954) (life tenant with knowledge of estate held not entitled to value of permanent improvements).

106. One court has observed that

> where the holder of the life interest has no reason to believe his interest to be so limited, and reasonably considers himself the owner of the full fee, we cannot say as a matter of law that he has made the improvements other than for the exclusive benefit of himself . . . . In the usual situation involving a life tenant who makes improvements, the enrichment of the remainderman or reversioner cannot be called unjust, for the life tenant has made the improvements voluntarily and with open eyes.

Busby v. Pierson, 272 Ala. 59, 65-66, 128 So. 2d 516, 522 (1961).

107. The life tenant who attempts to recover under a betterment act may encounter several snares. *See, e.g.*, Ingram v. Seaman, 223 Ark. 414, 419-20, 267 S.W.2d 6, 10 (1954) (purchaser at tax sale who obtained life estate only could not "believ[e] himself to be the owner" to recover under the betterment statute); Graves v. Bean, 200 Ark. 863, 141 S.W.2d 50 (1940) (life tenant with notice of lack of fee not under color of title or in good faith as required by statute); Smalley v. Isaacson, 40 Minn. 450, 42 N.W. 352 (1889) (life tenant who believed he held fee not entitled to relief under betterment act because he did not hold adversely to owner and, thus, owner would not object to improvement); Miller v. Gasaway, 514 S.W.2d 90 (Tex. Civ. App. 1974) (life tenant must show reasonable grounds for belief in his title from records). Life tenants have prevailed in some recent cases, however. *See, e.g.*, Sweeten v. King, 29 N.C. App. 672, 225 S.E.2d 598 (1976) (life tenant held to be in good faith and entitled to relief under betterment act).

Case 5: *X*, a cotenant with *Z*, builds a house on the land mistakenly believing that he alone holds a fee simple.

A cotenant who improves jointly held property is presumed to know of the other cotenant's rights and ordinarily is not entitled to any compensation from the cotenant.[108] If, however, *X* makes the improvements believing that he is the sole owner, *X* is motivated by self interest and should be entitled to restitution from *Z*, who has been enriched by *X*'s mistake.[109] Cotenants seldom are granted relief in such cases, however.[110]

c. Mistakes concerning the location of the improver's property

Case 6: *X* mistakes the location of his property and builds a house on land owned by *Z*.

In this case *X*'s mistake concerns the location of the property rather than the quality of its title. Despite the fact that *X*'s actions may have been just as reasonable and self-interested as in the case of a title mistake, *X* generally is denied relief under both the betterment acts and judicial decisions, often on the ground that he lacked color of title to the land.[111] This discrimination against improvers who make location mistakes is the most inexplicable and unfortunate feature of many betterment statutes. Such disparate treatment argues for the establishment of judicial remedies[112] or the amendment of the betterment acts to

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108. *See, e.g.*, Bras v. Bras, 463 F.2d 413 (10th Cir. 1972) (applying Oklahoma law). For a very early case denying a cotenant compensation for improvements, see Loring v. Bacon, 4 Mass. 575 (1808).

109. *See, e.g.*, Powell v. Mayo, 123 Cal. App. 3d 994, 177 Cal. Rptr. 66 (1981) (recovery from cotenant approved under betterment act).

110. Because courts deny restitution to an improver who knew of the cotenancy, the improving cotenant's principal problem is demonstrating that the improvement was made in good faith. Knowledge of the cotenancy precludes relief in most cases. *See supra* note 108 and accompanying text. In the remaining cases there may be evidence of co-ownership that must be evaluated to determine whether a reasonable person would have known he or she was a cotenant. *See, e.g.*, Michael v. Davis, 372 So. 2d 304 (Ala. 1979) (restitution denied when improver knew of adverse claims of co-owner but did not believe them); Lawrence v. Lawrence, 231 Ark. 324, 329 S.W.2d 416 (1959) (restitution denied under betterment act when joint tenant had notice of competing claims). *But see* Powell v. Mayo, 123 Cal. App. 3d 994, 177 Cal. Rptr. 66 (1981) (restitution granted under betterment act even though improver's negligence in investigating title prevented discovery of cotenancy).

111. *See, e.g.*, Wallace v. Snow, 197 Ark. 632, 124 S.W.2d 209 (1939) (under betterment act lack of color of title fatal to improver's claim); Taliaferro v. Colasso, 139 Cal. App. 2d 903, 906, 294 P.2d 774, 777 (1956) ("It would be illogical to hold that one who did not have color of title stood in better position than one who was no more than an unwitting trespasser."); *see also* Mid-State Homes, Inc. v. Martin, 465 P.2d 791 (Okla. Ct. App. 1969) (contractor who lacked color of title not entitled to remove improvement without owner's permission).

112. *See, e.g.*, Duncan v. Akers, 147 Ind. App. 511, 262 N.E.2d 402 (1970) (betterment act not exclusive remedy and color of title not necessary to restitution claim).

Location mistakes caused by faulty surveying techniques have been a continuing problem. The number of mistaken location cases, however, seems to have risen substantially with the advent of the subdivision, in which all lots are similar. *See, e.g.*, Voss v. Forgue, 84 So. 2d 563 (Fla. 1956); Duncan v. Akers, 147 Ind. App. 511, 262 N.E.2d 402 (1970); Rhyne v. Sheppard, 224 N.C. 734, 32 S.E.2d 316 (1944); Salazar v. Garcia, 232 S.W.2d 685, 688 (Tex. Civ. App. 1950) ("[The lots] are of a similar and almost identical appearance and none of the same . . . had any distinguishing landmark or characteristics which would have enabled a person of ordinary prudence . . . to have distinguished the lots from each other . . . ."). The recent liberalization of judicial relief in several jurisdictions may be attributed in part to the increase in subdivision cases, which typically cannot be remedied under most betterment statutes.

provide relief in cases of mistaken location.[113]

d. Mistakes concerning the improver's expectancy

> *Case 7*: *H* builds a house on land owned by *W*, his spouse, in the mistaken belief that *W* will convey a joint interest or full title in the future.

Although *H* knows that he is not the owner, his good faith belief that *W* will give him an interest in the land provides assurance that his conduct is not officious. The primary problem is to separate those cases in which *H* deserves restitution because he acts to benefit himself from those cases in which he acts to benefit *W*. Since *H*'s intention is difficult to divine, the question ultimately must be resolved by reference to *W*'s conduct. If the improvement was induced by *W*'s promise to convey an interest in the land, restitution clearly is appropriate.[114] If, however, *W* did not know of the improvement or was unaware of *H*'s belief that he would receive an interest in the property, the improvement is presumed to be a gift, and *H* is denied restitution.[115]

The nature of a mistaken improver's error is an appropriate criterion for determining which improvers are worthy of relief. If the improver believed that he or she was the owner, restitution should be granted to prevent the owner's unjust retention of an improvement arising from the improver's intention to benefit him or herself.[116] In other cases closer scrutiny is required to ensure that the improver's motives for making the improvement provide the same element of protection against officiousness. Objective proof that the improver acted reasonably and in self-interest is an adequate safeguard against officiousness. The improver's reasonableness and self-interest may be evidenced, for example, by a contract with the supposed owner or by the improver's erroneous expectation that he or she would receive an interest in the land, if that expectation was or should have been known to the owner.[117]

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113. California's betterment act does provide a remedy for mistaken improvers who err as to the location of their land. The statute dispenses with the requirement of color of title and permits improvers to initiate actions to recover for improvements made "in good faith and under the erroneous belief, because of a mistake of law or fact, that [the improver] is the owner of the land." CAL. CIV. PROC. CODE § 871.1 (West 1980).

114. *See, e.g.*, Coffman v. Coffman, 414 S.W.2d 308 (Mo. 1967).

115. *See, e.g.*, Wright v. Wright, 305 N.C. 345, 289 S.E.2d 347 (1982).

116. In such cases, however, relief may sometimes be withheld for educative reasons if the mistaken improver could have discovered the mistake in the exercise of due diligence. *See infra* notes 118-31 and accompanying text.

117. *See, e.g.*, Shick v. Dearmore, 246 Ark. 1209, 442 S.W.2d 198 (1969) (contract with supposed owner); Frambach v. Dunihue, 419 So. 2d 1115 (Fla. Dist. Ct. App. 1982) (improver who engaged in communal living with owners for 19 years entitled to restitution); Calacurcio v. Levson, 68 Ill. App. 2d 260, 215 N.E.2d 839 (1966) (financer of improvement held entitled to equitable lien for its value); Ollig v. Eagles, 347 Mich. 49, 78 N.W.2d 553 (1956) (acquiescence by owner in improvement by spouse of supposed owner); Roesch v. Wachter, 48 Or. App. 893, 618 P.2d 448 (1980) (acquiescence by owner in improvement by prospective purchaser); Diver v. Diver, 236 Wis. 274, 295 N.W. 18 (1940) (son denied restitution for improvements made to mother's land). *But cf.* Snider v. Dunn, 11 Mich. App. 39, 160 N.W.2d 592 (1968) (prospective purchaser denied restitution).

2. The Outer Limits

There are cases in which the improver's acts either are not the result of mistake or are so outrageous that justice requires relief be denied. Similarly, there are cases in which the owner's actions are so outrageous that justice demands relief of a sterner sort than usually granted in mistaken improver cases. These are the "outer limits" of the mistaken improver problem.

a. Improver knowledge

Mistake requires subjective good faith; the improver must have an honest belief in his or her ownership of the land even if that belief is unreasonable.[118] Intentional improvement of another's property is at best self-serving (if done as a consequence of improving one's own property)[119] or donative (if done for the purpose of benefitting another),[120] and at worst tortious or officious (if done for the purpose of extracting payment from or otherwise imposing on the owner).[121] The law has discouraged such conduct consistently by denying restitution to the improver.

Between the knowing improver and the classic mistaken improver there lies a class of improvers who either disregard information showing their mistakes or fail to use available means of discovering their errors. In these cases courts have adopted conflicting and inconsistent standards, often requiring the improver to be "ignorant of any adverse claim,"[122] without "actual notice,"[123] or without "constructive notice"[124] of adverse claims. Courts have reached similar results in construing betterment act requirements that the improver must have acted in "good faith."[125]

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118. *See* Bradley v. Cornwall, 203 Md. 28, 40, 98 A.2d 280, 286 (1953) ("*bona fide*, though mistaken, belief in his cause"); Sweeten v. King, 29 N.C. App. 672, 678, 225 S.E.2d 598, 601 (1976) ("[A]n honest belief . . . and the fact that diligence might have shown him that he had no title does not necessarily negative good faith . . . ."); Sugarman v. Olsen, 254 Or. 385, 459 P.2d 545 (1969) (when improver had record title and title insurance and there were no physical indications of another's ownership, improvement held to be in good faith despite improver's knowledge of adverse claims); Ute-Cal Land Dev. Corp. v. Sather, 645 P.2d 665, 667 (Utah 1982) ("The good faith of an occupying claimant must be premised upon a reasonable and honest belief of ownership and must be wholly free of a design to defraud the true owner."). *But cf.* Fouser v. Paige, 101 Idaho 294, 612 P.2d 137 (1980) (actual notice of another claim vitiates good faith under any circumstances); Dawson v. Grow, 29 W. Va. 333, 339, 1 S.E. 564, 568 (1887) ("[T]he question is not what the [improver] believed, nor even what she had reason to believe."). *See generally* Casad, *supra* note 9, at 1050-52 (discussing problem of borrowing standards of good faith from other areas of law, most notably from bona fide purchaser cases).

119. *See, e.g.*, Bras v. Bras, 463 F.2d 413 (10th Cir. 1972). *See generally* Dawson, *supra* note 75, at 1409 (describing rights of self-serving improvers).

120. *See, e.g.*, Wright v. Wright, 305 N.C. 345, 289 S.E.2d 347 (1982) (husband who knowingly improved wife's property held to have made a gift).

121. *See, e.g.*, Rhyne v. Sheppard, 224 N.C. 734, 737, 32 S.E.2d 316, 318 (1944). *See generally* Hope, *supra* note 52 (describing officiousness).

122. Welsh v. Welsh, 254 Md. 681, 689, 255 A.2d 368, 372 (1969) (quoting 2 H. TIFFANY, THE LAW OF REAL PROPERTY § 625, at 621-22 (B. Jones 3d ed. 1939)).

123. Combs v. Deaton, 199 Ky. 477, 486, 251 S.W. 638, 642 (1923).

124. Richmond v. Ashcraft, 137 Mo. App. 191, 198-99, 117 S.W. 689, 692 (1909).

125. *See* Fouser v. Paige, 101 Idaho 294, 298, 612 P.2d 137, 141 (1980) (actual notice of adverse claim defeats good faith); Sweeten v. King, 29 N.C. App. 672, 678, 225 S.E.2d 598, 601 (1976) ("The

The effect of these requirements is to limit relief to improvers who did not know, and in the exercise of due care could not have known, of their mistakes. Restitution is denied improvers who were negligent[126] or failed to act reasonably[127] in examining their titles or locating their land. Carried to an extreme such requirements could eliminate most claims for mistaken improvement. Location mistakes usually can be avoided by a careful survey, and title defects usually can be discovered by a title examination. Fortunately, the courts have not been too literal or rigid in their application of these principles.[128]

A related problem arises when a mistaken improver engaged in making improvements learns that someone else is asserting an interest in the land, but continues work on the improvement. An improver who learns that he or she definitely is not the owner is a knowing improver with regard to subsequent work and should be denied recovery.[129] If the improver learns merely that another is asserting a superior title to the land, however, the equities and the cases are mixed. In some states improvers are allowed to recover the value of improvements made after the improver learned of the owner's claims but before the true state of the title was established.[130] In other jurisdictions, the improver

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good faith which will entitle a claimant to compensation . . . means simply an honest belief . . . in his right or title . . . .").

126. The California betterment act expressly permits the degree of the improver's negligence to be considered in determining his or her right to restitution and the appropriate remedy. CAL. CIV. PROC. CODE § 871.3 (West 1980); *see also* Powell v. Mayo, 123 Cal. App. 3d 994, 999, 177 Cal. Rptr. 66, 68 (1981) (improver's neglect may not preclude relief under betterment act).

127. *See, e.g.*, Worley v. Ehret, 36 Ill. App. 3d 48, 59, 343 N.E.2d 237, 245 (1976) ("Not only did the defendant fail to search the record of her chain of title, but also she failed to take any steps to insure that the land which she occupied was the same as the land for which she held a deed."); Mid-State Homes, Inc. v. Martin, 465 P.2d 791, 794 (Okla. Ct. App. 1969) ("[T]here was no common boundary line between [the lot improved and the lot actually owned] and a casual inspection of the county records . . . would have revealed the ownership and location of the respective . . . lots.").

128. *See, e.g.*, Greer v. Vaughan, 96 Ark. 524, 531, 132 S.W. 456, 459 (1910) (improver entitled to restitution "believing that he was the true owner, and in ignorance of his title to this particular land being actually questioned" despite record notice); Hedges v. Lysek, 84 So. 2d 28, 31 (Fla. 1955) (failure to obtain survey not negligence); Combs v. Deaton, 199 Ky. 477, 487, 251 S.W. 638, 643 (1923) (constructive notice insufficient to deny improver relief); Sweeten v. King, 29 N.C. App. 672, 678, 225 S.E.2d 598, 601 (1976) ("[T]he fact that diligence might have shown [the improver] that he had no title does not necessarily negative good faith in his occupancy."); Comer v. Roberts, 252 Or. 189, 193, 448 P.2d 543, 545 (1968) (improver's negligence, which included not obtaining a survey, offset by negligence of owner). Under the California betterment act, the improver's negligence is relevant to both good faith and the appropriate remedy. CAL. CIV. PROC. CODE § 871.3 (West 1980); Powell v. Mayo, 123 Cal. App. 3d 994, 177 Cal. Rptr. 66 (1981). *But cf.* Magee v. Holmes, 220 Miss. 49, 70 So. 2d 60 (1954) (record notice defeats improver's good faith); Johnson v. Stull, 303 S.W.2d 110, 119 (Mo. 1957) (constructive notice negates good faith); Morris v. Ulbright, 591 S.W.2d 245 (Mo. Ct. App. 1979) (constructive notice negates good faith). *See generally* Note, *Good Faith and the Right to Compensation For Improvements on Land of Another*, 6 W. RES. L. REV. 397 (1955) (discussing effect of notice of various facts on good faith in mistaken improver cases).

129. *See, e.g.*, Mid-State Homes, Inc. v. Anderton, 291 Ala. 536, 541, 283 So. 2d 426, 431 (1973) (per curiam) (improver whose contractor was told of error by owner not entitled to remove improvement); Lawrence v. Lawrence, 231 Ark. 324, 330, 329 S.W.2d 416, 420 (1959) (under betterment act, knowledge of another's claim defeats good faith); Shealy v. South Carolina Elec. & Gas Co., 278 S.C. 132, 136-37, 293 S.E.2d 306, 309 (1982) (actual and constructive knowledge of lack of title defeats equitable claim for improvements).

130. *See, e.g.*, Harper v. Durden, 177 Ga. 216, 224, 170 S.E. 45, 49 (1933) (notice after purchase price for land paid but before improvements made will not defeat claim for improvements' value under betterment act); Bradley v. Cornwall, 203 Md. 28, 37, 98 A.2d 280, 285 (1953) (when improver and owner each had knowledge of other's claim and reason to believe in his own, improver

may be forced to choose between abandoning work or risking the loss of any improvements he or she continues to make.[131]

The nature of the mistake and the speed of its clarification should determine the reasonableness of the improver's actions in such cases. When the mistake relates to title, the determination of ownership may require litigation that could last for a period of years. Unless the improver can recover the value of work done after he or she learned of the owner's claim, the improver is presented with the Hobson's choice of continuing work and risking further loss without compensation or of suspending work and incurring the consequent loss of the use of the land. In such cases the improver should be entitled to restitution for any amount expended before it becomes probable that the owner will prevail. Only this result avoids a wasteful and harsh loss to the improver during the resolution of the dispute. In cases of mistaken location ownership can be established more quickly and easily, minimizing the possibility of further loss to the improver. In these cases there is less reason to grant restitution for improvements made after the improver learned of the owner's assertion of ownership.

b. Owner knowledge

Although mistaken improver cases generally focus on the conduct of the improver in deciding whether restitution is warranted, there are circumstances in which the conduct of the landowner should be determinative. If the improver's mistake is induced by the owner or made with the owner's knowledge, the improver is entitled to relief.[132]

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could not be said to be in bad faith); Sugarman v. Olsen, 254 Or. 385, 389-91, 459 P.2d 545, 547 (1969) (in banc) (notice of the owner's claim not sufficient to defeat improver's good faith when improver had record title and title insurance and there were no physical indications of owner's rights).

131. *See, e.g.*, Michael v. Davis, 372 So. 2d 304 (Ala. 1979) (restitution denied when improvers received actual notice of adverse interests despite continued good faith belief in their own title); Fouser v. Paige, 101 Idaho 294, 298, 612 P.2d 137, 141 (1980) (actual notice of another's interest defeats good faith despite professional advice of realtor and lender to the contrary); Welsh v. Welsh, 254 Md. 681, 695, 255 A.2d 368, 375 (1969) (institution of action of ejectment defeats improver's good faith even when improver honestly believes suit is without merit); Richmond v. Ashcraft, 137 Mo. App. 191, 198-99, 117 S.W. 689, 693 (1909) (improver's faith in title not enough for restitution).

132. *See, e.g.*, Benedict v. Little, 288 Ala. 638, 644, 264 So. 2d 491, 495 (1972); McCreary v. Lake Boulevard Sponge Exch. Co., 133 Fla. 740, 183 So. 7 (1938); Olin v. Reinecke, 336 Ill. 530, 168 N.E. 676 (1929); Ollig v. Eagles, 347 Mich. 49, 78 N.W.2d 553 (1956); Toalson v. Madison, 307 S.W.2d 32 (Mo. Ct. App. 1957); Rhyne v. Sheppard, 224 N.C. 734, 32 S.E.2d 316 (1944). There are some exceptions to the rule, however. *Compare* Union Hall Ass'n v. Morrison, 39 Md. 281, 290 (1874) (inapplicable if owner saw the improvement but was unaware of his title) *with* McKelway v. Armour, 10 N.J. Eq. 115, 117 (N.J. Ch. 1854) (relief granted despite owner's ignorance). *Compare* Fouser v. Paige, 101 Idaho 294, 298 & n.5, 612 P.2d 137, 141 & n.5 (1980) (owner not estopped from asserting claim when improver had sufficient notice to defeat good faith) *with* Kemp v. Hammock, 144 Ga. 717, 722, 87 S.E. 1030, 1032 (1916) ("The mere fact that one owning land sees another putting valuable improvements thereon, although the owner may know that the other is doing so in good faith, believing himself to have title to the land, will not estop the owner from asserting his claim.").

3. Improvements

a. The meaning of improve

Surprisingly few cases have construed the term "improvement," probably because it is a relatively uncomplicated concept widely used and understood by property lawyers. Many of the betterment acts limit compensable improvements to those that are "permanent," "lasting," or "valuable."[133] These adjectives reflect a requirement that the improvement must actually enrich the owner upon repossession.[134]

b. The question of how much

The amount of restitution due the improver is settled by precedent and specified by formula in some betterment acts. The typical formula provides for restitution of the "value" of the improvement, that is, of the difference in the fair market value of the land with and without the improvement.[135] Although this formula fully accounts for the interests of the parties in many cases, there are exceptions.

> *Case 8*: *X* spends $25,000 building a house on Lot 4 of a subdivision under the mistaken belief that it is Lot 5, which he owns. *Y* owns Lot 4, but has no particular use or plans for it. The fair market value of Lot 4 was $2,000 in its unimproved state and $27,000 after its improvement.

X's loss and *Y*'s enrichment are the same amount, $25,000. All that is necessary to accomplish substantial justice between the parties is the transfer of that sum from *Y* to *X*, either by permitting *Y* to retain the land upon payment of $25,000 to *X*, or by requiring *Y* to sell the land to *X* for its unimproved value, $2,000. In this case, the standard formula works well.

There are cases in which the formula is problematic, however. One such case is when *X*'s cost of making the improvement is more than the increase in the fair market value of the land. For example, *X* may have spent $30,000 constructing a house that increases the value of *Y*'s lot by only $25,000. In such a

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133. *See supra* note 42 and accompanying text.

134. *See* Vernon v. McEntire, 234 Ark. 995, 998, 356 S.W.2d 13, 14 (1962) (recovery denied under betterment act when improver spent $2,000 without increasing land's value); Eagle Oil Corp. v. Cohassett Oil Corp., 263 Mich. 371, 379-80, 248 N.W. 840, 843 (1933) (recovery denied but removal permitted under equitable principles when improvement was a detriment to owner); *cf.* Bradecich v. Rivard, 411 Ill. 214, 221, 103 N.E.2d 367, 371 (1952) (no recovery for improvements that are "unreasonably expensive or unsuitable, or made beyond the actual increase of value of the land").

135. *See, e.g.*, Bradley v. Cornwall, 203 Md. 28, 40, 98 A.2d 280, 286 (1953) ("the vendible increase in the value of [the] property"); Union Hall Ass'n v. Morrison, 39 Md. 281, 298 (1874) ("the actual value of the improvements, to the extent of the additional value which they have conferred upon the land"); Heim v. Shore, 56 N.J. Super. 62, 75, 151 A.2d 556, 562 (App. Div. 1959) ("the amount by which the market value of the land is increased as a result of the improvements"); Beacon Homes, Inc. v. Holt, 266 N.C. 467, 474, 146 S.E.2d 434, 439 (1966) ("the amount by which the value of [the] property has been so increased"); McKay v. Horseshoe Lake Hop Harvesters, Inc., 260 Or. 612, 617, 491 P.2d 1180, 1183 (1971) ("the market value of the improvements used for their highest and best possible use"); *see also supra* note 43 and accompanying text (computation of restitution under betterment acts).

case, courts have limited *X*'s recovery to $25,000, the amount of *Y*'s enrichment.[136] If *Y* chooses to retain the improvement, she will be required to pay only the amount of her enrichment, $25,000, and if she chooses to convey the lot to *X*, she will receive $2,000, the fair market value of the unimproved lot. Thus, the loss of $5,000 will fall on *X*, the person who would have borne the loss had the mistake not occurred.

In the contrary case, if *X* builds a house for $20,000 that increases the value of *Y*'s lot by $25,000, the results have been neither logical nor consistent. Courts generally have limited *X*'s restitution to $20,000, his cost, on the theory that although *Y* was enriched by $25,000, the last $5,000 was not unjust.[137] This result is fair to *X* because he does not suffer any loss and because there is no reason to take the windfall resulting from his mistake from *Y*. Limiting the mistaken improver's recovery to his or her costs in such a case also provides a disincentive to careless or knowing improvers by denying them the profit from their improvements.

Many betterment acts, however, do not guarantee equivalent results because of provisions that permit the owner to elect whether to sell the land to the improver or pay the improver for the improvement.[138] In the example above, if *Y* chooses to retain the improvement, she will be required to pay *X* only $20,000, the cost of the improvement. If *Y* chooses to transfer the lot to *X*, however, she will receive only $2,000, the fair market value of the unimproved lot. Thus, if *Y* retains the improvement she is enriched by $5,000, but if she sells the lot to *X* she is not enriched at all. Put in its best light, this result is more than fair to *X*, who can recover his cost in any event, but not unfair to *Y*, who can choose the remedy that benefits her most.

Special or personal values that the improvement may have for the improver or that the land may have for its owner present a more difficult and challenging problem. Special values are inherently subjective, making them both difficult to quantify and subject to suspicion. The special value of an improvement to the improver has two possible sources: the unique features of the improvement or its location. Although under some circumstances it is appropriate to consider

136. *See, e.g.*, Rzeppa v. Seymour, 230 Mich. 439, 443, 203 N.W. 62, 63 (1925) ("The cost of a building . . . does not measure the value added to the land."); McKay v. Horseshoe Lake Hop Harvesters, Inc., 260 Or. 612, 617, 491 P.2d 1180, 1183 (1971) (no reimbursement for costs, but only for enhancement in land's market value); *see also* Eagle Oil Corp. v. Cohassett Oil Corp., 263 Mich. 371, 248 N.W. 840 (1933) (no recovery when "improvement" was valueless); *cf.* Ewing's Heirs v. Handley's Ex'rs, 14 Ky. (4 Litt.) 346, 373 (1823) ("We do not here include the cost of labor expended in making improvements that are ornamental and fanciful only, or to those entirely temporary in their nature.").

137. *See, e.g.*, Madrid v. Spears, 250 F.2d 51, 54 (10th Cir. 1957) (applying New Mexico law) ("[C]ost is usually a factor in determining value, and in some cases is a limitation upon the improver's recovery . . . . [F]or the test of recovery is not how much the owner is enriched . . . but how much he is unjustly enriched."); Rzeppa v. Seymour, 230 Mich. 439, 443, 203 N.W. 62, 63 (1925) ("Neither may the value added by the building exceed the cost thereof."). *But cf.* James v. Bailey, 370 F. Supp. 469, 472 (D.V.I. 1974) (cost cap not appropriate when "it would constitute a complete windfall to the owner of the land . . . where the improvement resulted in value far in excess of its cost.").

138. The election provisions of the betterment statutes are discussed *supra* notes 45-46 and accompanying text.

the former, it is never appropriate to consider the special value of the improvement's location because that location never belonged to the improver.

Special values the owner has for the land are even more important in determining a remedy. For example, if the land was part of the owner's ancestral homestead, it may be worth more to him or her than its fair market value. In such a case the owner should be entitled to recompense for that special value, either by receiving an increased payment upon conveying the land to the improver, by reducing the amount of restitution to the improver, or even by denying the improver any restitution and requiring removal of the improvement and restoration of the land to its original state.[139]

Despite the importance of special values there is a paucity of cases dealing with them.[140] There may be several reasons for this. First, contrary to the law's assumption, there may be fewer unique pieces of land than has been supposed. Second, owners of land having special value may be particularly diligent in safeguarding it. Last, most mistaken improver cases simply arise in situations in which the land is neither unique nor possessed of special value, such as in subdivisions[141] or cases in which the mistake is mutual.[142]

C. *Finding a Remedy*

The search for an appropriate remedy, one that will do substantial justice to the owner and provide the improver with a measure of restitution, has been a difficult one.[143] There are several methods for accomplishing restitution, although none is perfect for all cases. Unfortunately, many courts and legislatures have perceived the end of the search to be a single remedy or formula that will serve in all mistaken improver cases, rather than a list of factors to be used

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139. *See infra* text accompanying note 172.

140. For two cases in which special values played a role, see Comer v. Roberts, 252 Or. 189, 448 P.2d 543 (1968) (rejecting owner's argument that forcing him to sell the land improved would render his remaining property insufficient for his intended use); Somerville v. Jacobs, 153 W. Va. 613, 635, 170 S.E.2d 805, 816 (1969) (Caplan, J., dissenting) ("It is not unusual for a property owner to have long range plans for his property . . . . He should be permitted to feel secure in his future plans . . . .").

The California betterment act expressly recognizes special values in determining the appropriate remedy. It requires that

> the court shall take into consideration any plans the owner of the land may have for the use or development of the land upon which the improvement was made and his need for the land upon which the improvement was made in connection with the use or development of other property owned by him.

CAL. CIV. PROC. CODE § 871.5 (West 1980); *see also id.* § 871.4 (same factors to be considered in determining whether substantial justice would result from removal of improvement). *Cf.* 2 J. KENT, *supra* note 18, at 273 (The owner "may have a just affection for his property, and it might have answered all his wants and means in its original state, without the improvements.").

141. *See infra* notes 166-71 and accompanying text.

142. *See infra* notes 155-63 and accompanying text.

143. *See supra* text accompanying note 1. As one commentator has observed:

> To develop a coherent approach through unjust enrichment then, would involve identifying and supplying some standard for weighing the various policy factors that would have to be considered in deciding whether the enrichment was "unjust," and formulating some criteria for determining which of various alternative forms of remedy would be most appropriate.

Casad, *supra* note 9, at 1046.

in determining which of the many available remedies is appropriate in a given case.

1. The Alternatives

a. Substitutionary remedies

Many remedies in Anglo-American jurisprudence are substitutionary; instead of the disputed item, the injured party is given a right against the offending party or the property of the offending party as a substitute for the thing that was lost or damaged. To a mistaken improver, a substitutionary remedy is either a personal judgment against the landowner or an equitable lien on the land.

Both the judgment and the equitable lien may create a hardship for an owner who does not have sufficient liquid assets to satisfy them, since foreclosure of the lien or execution on the judgment may result in the sale of the property. In the case of the judgment, the owner's other assets may be seized as well. Such hardships on the owner are unacceptable in traditional legal philosophy.[144]

There are cases in which the owner will not suffer any hardship by the entry of a judgment or the imposition of a lien. In other cases those hardships can be alleviated by the use of a conditional decree providing for installment payments or payment upon the sale or disposition of the property.[145] Although these techniques do not give immediate restitution to the improver, they ultimately do so while ameliorating the adverse effect on the owner. Even in the worst cases of hardship, adverse effect on the owner should not preclude relief for the improver but should merely deflect the search for an appropriate remedy to a new direction.

b. In kind remedies

In many cases, the problems inherent in substitutionary remedies can be avoided completely by granting specific relief, that is, by giving the improvement to the improver. This can be accomplished either by permitting or requiring the owner to sell the land to the improver for its fair market value in an unimproved state,[146] or by requiring or permitting the improver to remove the improvement

144. *See supra* note 88.

145. Although case precedent is lacking, two of the betterment acts provide for time payments by the owner. *See* FLA. STAT. ANN. § 66.091 (West 1969) (owner may elect to post "a bond with surety . . . conditioned to pay [the] balance in two equal installments, with interest"); WYO. STAT. § 1-32-213 (1979) (owner may elect to pay value of improvement "within such reasonable time as the court shall allow"). In view of the concern that relieving mistaken improvers will impose hardships on owners, it is curious that more betterment acts provide for installment payments by improvers than by owners. *See infra* note 148.

146. Permitting the owner to choose between paying for the improvement or selling his or her land to the improver has been a popular remedy in the courts and the betterment acts. *See, e.g.*, Union Hall Ass'n v. Morrison, 39 Md. 281 (1874); Hardy v. Burroughs, 251 Mich. 578, 232 N.W. 200 (1930); Rzeppa v. Seymour, 230 Mich. 439, 203 N.W. 62 (1925); McKelway v. Armour, 10 N.J. Eq. 115 (N.J. Ch. 1854); Comer v. Roberts, 252 Or. 189, 448 P.2d 543 (1968); Pearl Township v. Thorp, 17 S.D. 288, 96 N.W. 99 (1903); Somerville v. Jacobs, 153 W. Va. 613, 170 S.E.2d 805 (1969). For betterment act provisions, see *supra* note 45.

There are arguments against either remedy alone. Requiring the owner to pay for the improvement may work substantial hardship on penurious owners, especially since the value of many im-

and restore the land to its original condition.[147]

Specific remedies are not panaceas, however. They may cause hardship to an owner who is incapable of paying for the improvement by forcing him or her to part with the land. If the owner is willing to sell, the improver may not be able to pay for the land, or may need to arrange time payments. In an appropriate case, the court can fashion a decree providing for installment payments over a short, but reasonable period.[148] The interest of the owner can be secured by an equitable lien on the property or by permitting the owner to retain title until payment has been made.

Physical removal of improvements seldom has been used as a remedy, prob-

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provements greatly exceeds the value of the land. Requiring the owner to surrender title to the land may be even more repugnant, however. Indeed, some courts have thought such an action to be unconstitutional. *See, e.g.*, McCoy v. Grandy, 3 Ohio St. 463 (1854). The availability of an election is thought to avoid many of these problems, even when the practical effect is to force the sale of the property. *See* Comer v. Roberts, 252 Or. 189, 448 P.2d 543 (1968). There is precedent for forcing the sale of the land in the event the owner declines to make an election. *See* Hardy v. Burroughs, 251 Mich. 578, 232 N.W. 200 (1930); McKelway v. Armour, 10 N.J. Eq. 115 (N.J. Ch. 1854).

One unusual decision required the owner to convey his lot by ordering an exchange of the improver's vacant lot for the lot mistakenly improved. *See* Voss v. Forgue, 84 So. 2d 563 (Fla. 1956); *see also* McCreary v. Shields, 333 Mich. 290, 52 N.W.2d 853 (1952) (owner given option of receiving payment or improver's lot in exchange for her own).

147. *See generally infra* notes 172-73 and accompanying text (discussing removal of improvement as restoration for owner).

Removal may be required when the owner rejects the improvement. *See, e.g.*, Brumbaugh v. Ashton, 208 Or. 521, 302 P.2d 1018 (1956); Jensen v. Probert, 174 Or. 143, 148 P.2d 248 (1944). A few betterment acts grant the improver the right to remove the improvement. *See, e.g.*, IOWA CODE ANN. § 560.7 (West 1950); MINN. STAT. ANN. § 559.09 (West 1947).

Permission to remove has been granted in many other cases, often as a remedy supplementary to the betterment act and occasionally over the objection of the owner. *See, e.g.*, Shick v. Dearmore, 246 Ark. 1209, 442 S.W.2d 198 (1969) (over owner's objection); Pull v. Barnes, 142 Colo. 272, 350 P.2d 828 (1960); Johnson v. Dunkel, 132 Colo. 383, 288 P.2d 343 (1955) (removal of improvements permitted if feasible); Hedges v. Lysek, 84 So. 2d 28 (Fla. 1955) (location error); Bichler v. Ternes, 63 N.D. 295, 248 N.W. 185 (1933) (location error); Citizens & S. Nat'l Bank v. Modern Homes Constr. Co., 248 S.C. 130, 149 S.E.2d 326 (1966) (betterment act inapplicable); Leggio v. Bradley Land & Dev. Co., 398 S.W.2d 335 (Tex. Civ. App. 1965) (outside statute and over objections of owner); Salazar v. Garcia, 232 S.W.2d 685 (Tex. Civ. App. 1950) (outside statute and over objections of owner); *see also* Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966) (in case outside betterment act, owner objecting to removal by improver said to have elected to pay for improvement). *But cf.* Mid-State Homes, Inc. v. Martin, 465 P.2d 791 (Okla. Ct. App. 1969) (removal refused for arguably negligent improver); Producers Lumber & Supply Co. v. Olney Bldg. Co., 333 S.W.2d 619 (Tex. Civ. App. 1960) (good faith improver who destroyed improvement liable to owner for waste).

148. Few courts have decreed installment payments by the mistaken improver. The courts' reluctance to permit installment payments is more understandable when the payor is the improver rather than the owner, because in many cases the land is much less expensive than the improvement. Nevertheless, several betterment acts provide for installment payments by the mistaken improver in the event that the owner elects to sell the land. *See* FLA. STAT. § 66.101 (1984) (improver may give "a bond with surety . . . conditioned to pay [the owner] the value in two equal annual installments, with" interest); MASS. ANN. LAWS ch. 237, § 33 (Michie/Law. Co-op. 1974) (improver to pay for lot "in three equal installments on or before the expiration of one, two and three years, respectively, from the time when said election was entered . . . with interest"); N.M. STAT. ANN. § 42-4-16 (1978) (improver's "payment shall be made . . . in such reasonable terms as the court may allow"); N.C. GEN. STAT. § 1-347 (1983) (improver to pay "therefor the . . . value with interest in the manner ordered by the court"); VT. STAT. ANN. tit. 12, § 4821 (1973) (improver must pay "within four years [from the owner's election] in four equal and annual payments"); VA. CODE § 8.01-175(C) (1984) (payment "with interest, in the manner in which the court may direct"); W. VA. CODE § 55-5-11 (1981) (payment "with interest, in the manner in which the court may order it to be paid"); WYO. STAT. § 1-32-213 (1977) (payment "within such reasonable time as the court shall allow").

ably because until recently it was not technologically feasible except in the most minor cases.[149] Even though some improvements cannot be removed without costly damage or great expense, many mistaken improver cases could be resolved fairly by a decree forcing or permitting the improver to remove the improvement from the owner's land.

Despite the usefulness of removal as a remedy, its reception has been mixed. Although courts have been willing to decree removal, only three betterment acts expressly provide for it.[150] The principal drawback to removal is the complexity of determining whether it will provide meaningful restitution at an acceptable cost.[151] If removal is found to be feasible, an owner's argument that he or she has acquired rights in the improvement through the common law doctrine of accession becomes mere sophistry.

c. Combinations

The myriad variations that occur in the facts and in the interests of the parties make the use of a single remedy for all cases impossible. The solution of several state legislatures and a few courts has been to provide for an election of remedies, generally to be made by the owner since the owner is the party least

149. The statement admittedly is problematic. Removal of goods placed on the property of another always has been permitted before the goods become permanently affixed to the land. *See supra* notes 13-15 and accompanying text. The issue considered in this Article is the removability of goods after they have been affixed.

Even after attachment of personalty to the land has occurred, it often is possible to remove it by disassembling or otherwise severing it. *See* Producers Lumber & Supply Co. v. Olney Bldg. Co., 333 S.W.2d 619, 627 (Tex. Civ. App. 1960) (Barrow, J., dissenting) ("I have found no authority which holds that the house must be moved as a whole or without any damage thereto."). Although removal directly contravenes the intent and effect of the doctrine of accession, so do all the cases recognizing the rights of mistaken improvers. There are few cases according such a remedy, probably because disassembly and removal of an improvement usually is not a practical method of preserving its value for its maker.

In the 20th century removal of small structures in their entirety has become possible, and judicial reception has been good. *See* cases cited *supra* note 147.

150. CAL. CIV. PROC. CODE § 871.4 (West 1980) (limiting right to relief under the betterment act to cases in which removal under CAL. CIV. CODE § 1013.5 [relating to fixtures mistakenly attached to real estate] would not do substantial justice to parties); MINN. STAT. ANN. § 559.09 (West 1947) (authorizing removal of improvements made in good faith); WIS. STAT. ANN. § 843.14 (West 1977) (empowering court to require removal). Two other jurisdictions permit anyone who improved land taken by the state to remove improvements if someone questions the validity of the improver's title. *See* IOWA CODE ANN. § 560.7 (West 1950); UTAH CODE ANN. § 57-6-8 (1974).

Removal may be required as the most acceptable means of restitution, Jensen v. Probert, 174 Or. 143, 148 P.2d 248 (1944), or merely permitted in an appropriate action, Johnson v. Dunkel, 132 Colo. 383, 288 P.2d 343 (1955) (en banc); Brown v. Johns, 312 So. 2d 526 (Fla. Dist. Ct. App. 1975); Citizens & S. Nat'l Bank v. Modern Homes Constr. Co., 248 S.C. 130, 149 S.E.2d 326 (1966); Leggio v. Bradley Land & Dev. Co., 398 S.W.2d 335 (Tex. Civ. App. 1965). Even when the owner of the property opposes removal, that remedy still may be appropriate, Shick v. Dearmore, 246 Ark. 1209, 442 S.W.2d 198 (1969); Salazar v. Garcia, 232 S.W.2d 685 (Tex. Civ. App. 1950), or the improver may be entitled to more substantial relief, Rzeppa v. Seymour, 230 Mich. 439, 203 N.W. 62 (1925) (owner given option to pay for improvement or sell land); Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966) (owner liable for increase in value of the property in unjust enrichment action). *But see* Hughey v. Bennett, 264 Ark. 64, 568 S.W.2d 46 (1978) (removal not appropriate when neither party sought it); Mid-State Homes, Inc. v. Martin, 465 P.2d 791 (Okla. Ct. App. 1969) (removal inappropriate when owner did not know of it and improver may have been negligent).

151. *See infra* notes 172-73 and accompanying text.

responsible for the problem.[152] Typically the owner may elect to pay for the improvement or sell the land to the improver for its fair market value in an unimproved state. Although elective remedies reduce hardship on the owner, they are not flexible enough to achieve justice in all cases. For example, a penurious owner who cannot afford to pay for an improvement still may be forced to sell land he or she values highly. Conversely, an opportunistic owner may maximize his or her enrichment by paying the improver for a building that is worth much more than its cost but is easily removable.

d. Cotenancy remedies

A few state legislatures resolve mistaken improver cases by forcing the owner and the improver into a cotenancy in the ratio of their contributions to the value of the property.[153] Cotenancy generally is imposed as a result of a party's failure to make or comply with an election. Although such a remedy appears to avoid many of the pitfalls of the equitable lien and judgment, cotenancy is a remedy that serves no one well: the owner loses exclusive dominion over the land, and the improver loses the exclusive use of the improvement. In most cases cotenancy is a temporary solution that eventually leads to the partition or sale of the land in order to end an unfortunate and unwanted relationship.

Other betterment acts provide for the sale of the land with the improvement under court supervision. Proceeds from the sale are divided between the parties, either in the ratio of their interests or by paying the owner for the unimproved value of the land with the surplus, if any, paid to the improver.[154] If it is necessary to divide the property between the parties, this solution is preferable to cotenancy because it is faster and more final.

2. Remedial Issues

Acknowledging it is unjust to permit an owner to retain the enrichment attributable to an improvement, the remaining question is whether a remedy can be framed that will remove the enrichment without harming the owner. Before prescribing such a remedy, several issues must be explored.

a. Owner's complicity

If a property owner deliberately misleads the improver or acquiesces in the improver's mistake, the improver is entitled to relief.[155] The owner may, however, share a lesser degree of complicity in the improver's mistake, depending upon the reason for the owner's failure to object when the improvement was

152. *See* authorities cited *supra* notes 45 & 146.

153. *See* IND. CODE ANN. § 34-1-49-6 (Burns 1973); UTAH CODE ANN. § 57-6-3 (1974); WASH. REV. CODE ANN. § 7.28.180 (1961).

154. *See* GA. CODE ANN. § 44-11-9(c) (1982); N.C. GEN. STAT. § 1-348 (1983); S.C. CODE ANN. § 27-27-60 (Law. Co-op. 1977); VA. CODE § 8.01-176 (1984); W. VA. CODE § 55-5-12 (1981).

155. *See supra* note 132 and accompanying text.

made.[156]

Case 9: *Y* sells Lot 4 to *X* who builds a house on it. It is later discovered that the land described in the deed was Lot 5, also owned by *Y*.

X and *Y* share a mutual mistake of fact. This problem is easily remedied by reforming the deed to conform to the intention of the parties and need not involve a claim of mistaken improvement at all.[157]

Case 10: *X*, the owner of Lot 4, and *Y*, the owner of Lot 5, believe a fence to be the line between their properties. After *X* builds a house next to that fence, they discover that the true property line is on the other side of *X*'s house, placing the house entirely on *Y*'s land.

If *Y* had known the true location of the boundary, she would not have permitted *X* to build the house on her land. Thus, although *Y* is not chargeable with fraud or even neglect, her mistake was a *sine qua non* of *X*'s loss, and her equities are less than if *X* alone had been mistaken. Since *Y* was ignorant of her ownership of the land beyond the fence, money can compensate her adequately for its loss.[158] In such a case justice would be served by permitting *X* to purchase the land from *Y* for its unimproved value, or by selling the lot and dividing the proceeds in the ratio of the parties' interests.[159]

Case 11: Both *X*, the improver, and *Y*, an adult heir of the former owner of the property, erroneously believe that a decree of the probate court approving the sale of the property to *X* after the death of the former owner was valid. After *X* builds a house on the land, the parties discover that the sale was invalid.

In this case *X* and *Y* have made a mutual mistake of law. As in *Case 10*, money can compensate *Y* adequately for the lot. Justice will be served by requiring *Y* and the other heirs to deed the property to *X* in return for its fair market value in an unimproved state.[160] In both *Cases 10* and *11*, it would be inequita-

156. For an enlightening discussion of owner complicity and its effect on the improver's equities, see Stoljar, *supra* note 80, at 203-07.

157. "Where a writing . . . fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement . . . ." 1 RESTATEMENT (SECOND) OF CONTRACTS § 155 (1979).

158. *See* Stoljar, *supra* note 80, at 206 (the complicitous owner "can still be said to be relatively unaffected materially speaking, in the sense that he regards the land in question as a realisable or marketable asset as distinct from something close or personal to him as his home.").

159. *See, e.g.*, Union Hall Ass'n v. Morrison, 39 Md. 281 (1874) (buy or sell option given owner who saw improvement in progress but did not know it was on his land); Hardy v. Burroughs, 251 Mich. 578, 232 N.W. 200 (1930) (buy or sell option given owner who saw improvement in progress but did not know it was on his land); McKelway v. Armour, 10 N.J. Eq. 115, 118 (N.J. Ch. 1854) ("The fact of [the owner's] standing by, and participating in the mistake, is an important feature in the case."); Comer v. Roberts, 252 Or. 189, 193, 448 P.2d 543, 545 (1968) (buy or sell option given owner "where the equities of the owner and those of the occupier are equal"); Pearl Township v. Thorp, 17 S.D. 288, 290, 96 N.W. 99, 100 (1903) (buy or sell option given owner where "all parties interested were mistaken" as to the location of a well). Removal also has been granted in these circumstances. *See, e.g.*, Pull v. Barnes, 142 Colo. 272, 350 P.2d 828 (1960) (removal if feasible, or a lien, if not); Hedges v. Lysek, 84 So. 2d 28 (Fla. 1955) (removal ordered); McCreary v. Lake Boulevard Sponge Exch. Co., 133 Fla. 740, 183 So. 7 (1938) (removal ordered). *But cf.* Worley v. Ehret, 36 Ill. App. 3d 48, 343 N.E.2d 237 (1976) (owner's failure to discover truth offset by improver's failure to discover mistake).

160. Although many of the earliest cases involved this fact pattern, it seldom is found today. *See supra* note 102.

ble to allow the owner to resist the improver's claim for restitution on the ground that the land holds a unique value. In fact, any compensation the owner receives is a windfall, although its retention is not unjust.[161]

Other circumstances exist in which an owner may be unaware of improvements made to his or her property without sharing complicity for the improver's mistake. For example, the owner may be an absentee owner who holds title to, but not actual possession of, the property. Because the owner of property is not presumed to know what is happening to the property at all times, an absentee owner cannot be charged with constructive notice of an improver's error.[162] A comparable situation exists when the owner is physically or legally incapacitated and therefore cannot be charged with notice of events concerning the property.[163]

The interests of an owner who has no complicity in the mistake deserve greater protection than those of an owner who has participated, albeit by mistake, in his or her own unjust enrichment. This is not to suggest that owners who do not share complicity in the mistake should be absolved from liability; their enrichment is as great as if they had known of the improvement. Rather, the suggestion is that different and stronger remedies may fairly be used in the case of a complicitous owner.

> *Case 12*: *X*, while holding Blackacre under a defective title, is compelled by a municipality to install sidewalks. Later, *Y* is proven to be the true owner.

In this case *X* acted because a government regulation required the "owner" of the land make the improvement. Even though *Y* does not share complicity in *X*'s mistake, *Y* would have been compelled to make the same improvement had her interest been known. Therefore, *X* should be entitled to restitution from *Y*, not on a theory of mistaken improvement, but on a theory of subrogation.[164] Because of the absence of legal compulsion, subrogation seldom can be used in cases involving mistaken improvers, but there are a few cases.[165]

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161. One commentator has noted:

> It is not as though the improvements are made on land . . . in which [the owner] might nevertheless be presumed to have great or lasting interests. On the contrary, we now seem to be dealing with land concerning which the owner can in fact be taken to be indifferent to for the simple reason that he does not even believe that the land is his property.

Stoljar, *supra* note 80, at 205.

162. *See, e.g.*, Effinger v. Hall, 81 Va. 94 (1885) (appellees were nonresidents and could not be estopped by silence). *But cf.* Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966) (absentee owner who refused to allow removal required to pay for improvement); Jensen v. Probert, 174 Or. 143, 160, 148 P.2d 248, 255 (1944) (equities of absentee owner and improver held "perfect and equal," requiring improver to remove his improvement).

163. *See* Effinger v. Hall, 81 Va. 94, 109 (1885) ("some of [the owners] have been under the disability of coverture, and others of infancy"). *But cf.* Coffman v. Coffman, 414 S.W.2d 308 (Mo. 1967) (minor remaindermen held liable under betterment act).

164. *See* RESTATEMENT OF RESTITUTION § 40(d) comment e, illustration 10 (1937); *see also* Wade, *supra* note 75, at 1201-02 (plaintiff entitled to reimbursement because defendant not in worse position).

165. *See, e.g.*, Lee v. Menefield, 249 Ala. 407, 31 So. 2d 581 (1947) (executrix who made improvements demanded by public authority to land she believed she held as part owner entitled to lien).

b. Fungibility of the land

Part of our inheritance from England is the principle that each piece of land is unique.[166] This principle permeates the law relating to realty and distinguishes it from the law applied to personalty in several important respects. For example, the notion that land is unique is the source of the rule permitting specific performance of contracts for the sale of land.[167] In the mistaken improver context, this principle is a primary source of the deference courts and legislatures have shown to the owner's interest in his or her land.[168]

Not every piece of land is cherished by its owner for the sweetness of the fruits that grow there or for the majesty of the view from its crest; therefore, some exceptions to the principle that land is unique should be made in cases where the principle obviously does not apply.[169] If the land is a subdivision lot

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166. *See supra* note 90 and accompanying text.

167. *See* E. FARNSWORTH, *supra* note 90, § 12.6, at 829 ("Land was viewed by English courts with particular esteem and was therefore singled out for special treatment. Each parcel, however ordinary, was considered 'unique,' and its value was regarded as to some extent speculative. . . . Under this traditional view, the buyer has the right to specific performance . . . ."). Justice Story noted:

> The locality, character, vicinage, peculiar soil, or accommodations of the land generally, may give it a peculiar and special value in the eyes of the purchaser; and it cannot be replaced by other land of the same precise value, or having the same precise local conveniences or accommodations; and therefore compensation in damages would not be adequate relief. . . . And hence it is, that the jurisdiction of Courts of Equity to decree specific performance is, in cases of contracts respecting land, universally maintained; whereas, in cases respecting chattels, it is limited to special circumstances.

2 J. STORY, *supra* note 19, § 746, at 51. The RESTATEMENT (SECOND) OF CONTRACTS observes:

> Contracts for the sale of land have traditionally been accorded a special place in the law of specific performance. A specific tract of land has long been regarded as unique and impossible of duplication by the use of any amount of money. Furthermore, the value of land is to some extent speculative. Damages have therefore been regarded as inadequate to enforce a duty to transfer an interest in land . . . .

3 RESTATEMENT (SECOND) OF CONTRACTS § 360 comment e (1979); *cf.* Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495, 532 (1959) ("The adequacy test has a function . . . but as framed and usually applied it is arbitrary and irrational. It fades out completely in contracts for the sale of land, through the artificial but useful 'presumption' that it is impossible to value interests in land."). *But cf.* Barbour, *supra* note 90, at 116-17 (specific performance of contracts for interests in land emerged before courts of law enforced such contracts).

168. *See* Stump v. Hornbeck, 94 Mo. 26, 32, 6 S.W. 356, 359 (1887) (constitutional right to property requires that betterment act authorizing conveyance of land to improver be applied only with owner's consent); McCoy v. Grandy, 3 Ohio St. 463, 467 (1854) (equities of owner include "a strong attachment for the property"); *cf.* Voss v. Forgue, 84 So. 2d 563, 564-65 (Fla. 1956) (no showing that land had "any peculiar or intrinsic value," thus order requiring exchange was justified); Comer v. Roberts, 252 Or. 189, 194, 448 P.2d 543, 545 (1968) (rejecting owner's claims that remainder of his land would be harmed by conveyance of improved portion); Somerville v. Jacobs, 153 W. Va. 613, 635, 170 S.E.2d 805, 816 (1969) (Caplan, J., dissenting) (owner may have long range plans for the land).

169. *See* Suchan v. Rutherford, 90 Idaho 288, 296, 410 P.2d 434, 438 (1966) ("The land here involved is not unique. It is irrigated farm land common to the general area in which it is located. Sales of similar land are frequent and it is not difficult to establish its market value."); Centex Homes Corp. v. Boag, 128 N.J. Super. 385, 320 A.2d 194 (Ch. Div. 1974) (same result in case involving a condominium apartment); *cf.* Elliott, *Specific Performance*, 1960 U. ILL. L.F. 72, 75 (logically the inadequacy of damages in the case of contracts for land should be a rebuttable, not a conclusive, presumption). *But cf.* Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 355-62 (1978) (applying an economic analysis to contracts for unique things, including land, and concluding the concept is sound.) For a discussion of the fungibility of land, see *supra* notes 90 & 166 and accompanying text; *infra* note 171 and accompanying text.

of the same dimensions, grade, and view as other lots that are still available in the same subdivison,[170] it is perfectly fair to permit the improver to buy the lot from the owner for its unimproved value: the improver has restitution, and the owner can purchase an identical lot. Thus, the parties are placed in the same position they would have been in had the mistake not occurred. When the land is physically unique but the owner's interest in it is strictly financial, it is just to both parties to permit the improver to purchase the lot or to sell the land to a third person and divide the proceeds: the improver is compensated, and the owner receives what he or she wanted from the land—its value in money.[171]

c. Removability

In one sense every improvement is removable; any house can be taken apart board-by-board and hauled from the site in a wheelbarrow. This kind of removal may cost nearly as much as building the improvement, and the disassembled materials may be worthless to the improver. Removal in this sense is not restitution for the improver but restoration for the owner.

There are cases in which removal for the purpose of restoration is fair despite hardship on the improver.[172] If an owner who does not share complicity for the improver's mistake establishes that the land has special values that are lessened or destroyed by the presence of the improvement, the owner's equities are greater than those of the improver. In such a case the improver, rather than the owner, should be required to make restitution. Such cases have been extremely rare, probably because an owner with such a strong attachment to the land is likely to be in possession and thus able to object to the improvement as soon as it is begun.

In mistaken improver cases then, removal ordinarily must be used in its restitutionary sense, as a means of taking unjust enrichment from the owner and transferring it to the improver. Some improvements, such as swimming pools or other large unitary structures, are removable only at great cost. Other improvements, such as parking lots and large brick buildings, can be removed at a reasonable cost but are worthless after removal. In these circumstances removal is not an acceptable remedy because it either denies restitution to the improver or gives restitution only at great and economically wasteful expense.[173]

Whether it is feasible to remove an improvement is a complicated question, resolution of which requires balancing the cost of removal, the value of the im-

170. For cases in which these conditions were found, see *supra* note 112.

171. *See* Watkins v. Paul, 95 Idaho 499, 501, 511 P.2d 781, 783 (1973) (when purchaser of land wanted it purely for resale specific performance refused). *But see* Brenner, *Specific Performance of Contracts for the Sale of Land Purchased for Resale or Investment*, 24 McGILL L.J. 513 (1978) (reviewing cases from United States, Canada, England, and Australia and concluding that even when the purchaser has a financial rather than a personal interest in land, the difficulties of determining damages warrant specific performance).

172. *See* Brumbaugh v. Ashton, 208 Or. 521, 302 P.2d 1018 (1956) (per curiam); Jensen v. Probert, 174 Or. 143, 148 P.2d 248 (1944).

173. *See* Pull v. Barnes, 142 Colo. 272, 276, 350 P.2d 828, 830 (1960) (removal appropriate if "feasible," otherwise an equitable lien); Johnson v. Dunkel, 132 Colo. 383, 389, 288 P.2d 343, 346 (1955) (remand to trial court to determine "whether it would be practical and feasible" to remove).

provement after removal, and the hardship that alternative remedies would impose on the owner.

> *Case 13*: *X*, by mistake, erects a house on a subdivision lot owned by *Y*. The lot is worth $3,000 before the construction and $20,000 after. The house is movable at a cost of $3,000, and the lot is identical to 12 others that are for sale at a cost of $3,000 each.

Y has been enriched in the amount of $17,000. If the court orders *X* to remove the house, its value to *X* will be only $14,000, the difference between the increase in the lot's value attributable to the house ($17,000) and the cost of its removal ($3,000). Removal is an undesirable remedy for *X* because the amount he will recover is $3,000 less than the improvement's value *in situ*, the amount by which *Y* has been enriched. If the improvement had increased the value of the lot from $3,000 to $40,000, however, removal would be a more acceptable remedy because it would preserve most of the improvement's value for *X*.

From *Y*'s point of view, the lot is fungible with 12 others. Thus, a remedy that forces her to sell the lot to *X* will not impose any substantial hardship. Since removal will not provide significant restitution for *X* and other remedies present no discernible hardships for *Y*, a court fairly could reject removal as a remedy and order *Y* either to sell the lot to *X* or pay *X* the value of the improvement.

> *Case 14*: *X*, by mistake, erects a house on a subdivision lot owned by *Y*. The lot is worth $3,000 before the construction and $20,000 after. The house is movable at a cost of $3,000. *Y* has no special attachment to the lot, although it is the only lot left in the subdivision with a view of the woods.

Although *X*'s interests in *Case 14* are identical to his interests in *Case 13*, *Y*'s interests are changed substantially. Even if the lot holds no special value for *Y*, it is not fungible and thus is not replaceable. Although *Y* may be willing to sell the lot to *X* or buy the improvement from *X*, it is possible that *Y* wants to retain the lot but cannot afford to pay *X* the value of the improvement. If so, the court must balance this hardship on *Y* against the cost of removal to *X*. On these facts removal is a fair remedy, despite the fact that the amount of restitution for *X* will be reduced substantially by the high cost of removal.

> *Case 15*: *X*, by mistake, builds a house on a corner of *Y*'s ancestral homestead while *Y* is a patient in a mental institution. The land has a fair market value of $3,000 before construction and $20,000 after, although to *Y* it is priceless because of the memories it holds. The house is removable at a cost of $8,000, including the cost of restoring the land to its former condition. *Y* is poor and cannot afford to pay for the improvement.

Case 15 is very likely the worst case imaginable for a mistaken improver. Although *X*'s claim for restitution is as strong as in *Cases 13* and *14*, the owner's equities are stronger. *Y* shares no complicity for the error. The land is not only unique but also specially valued by *Y* for sentimental reasons. In addition, because of *Y*'s poverty, restitution by any means other than removal will impose hardship on *Y*. Only removal can restore *Y* to her former position without

hardship and still preserve at least $9,000 of value for *X*. Since the only real alternative may be to deny *X* restitution, the court would be justified in ordering removal.

3. A Remedial Proposal

All remedies, with the possible exception of removal, may impose hardship on an owner by forcing him or her to pay for the improvement or to dispose of the property. Any expansion of the improver's right to restitution depends upon the courts' finding a new, flexible approach to remedies under which relief can be tailored to the equities of the case. In devising such an approach, the starting point must be an assessment of the equities of both parties. Once the equities of the parties are clearly defined, the range of acceptable remedies is narrowed, and final selection of an appropriate remedy is a relatively simple task.

The first step must be an assessment of the owner's complicity in the improver's mistake.[174] If the mistake was mutual, the owner's equities are reduced substantially; he or she cannot claim hardship on the basis of the land's unique characteristics or special values.[175] Thus, it is not unfair to require a complicitous owner to sell his or her land to the improver or to give the owner a "sell or buy" election under circumstances that make the latter an impossibility. Removal should be used as a remedy in such cases only when it can be accomplished very cheaply and when it preserves virtually all of the improvement's value for the improver.

If the owner does not share complicity for the improver's error, the next step must be an examination of the owner's interest in the land. First, the court should determine whether the land is fungible.[176] If the land is fungible or replaceable, the owner will not be harmed if he or she is required to sell the land or to make an election which, for pecuniary reasons, amounts to the same thing. Here again, removal should be ordered only when it can be accomplished at little cost and high benefit to the improver. However, when the balance is struck, the court must assess the hardship an election to "sell or buy" would place on the owner, and the improver must be prepared to accept more inconvenience and expense than if the owner had shared complicity for the mistake.

If the land is not fungible, the court must determine whether the land has any special value for the owner.[177] If the land does have special value to the owner, the owner's equities rise accordingly, and removal should be found feasible even at great cost. In the worst case, if the land is unique and specially valued by the owner, and if the improvement is not removable except by destruction, the court may deny the improver a remedy or order that the improvement be destroyed at the improver's expense.[178]

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174. *See supra* notes 155-65 and accompanying text.

175. *See* Stoljar, *supra* note 80, at 205.

176. *See supra* notes 166-71 and accompanying text.

177. *See supra* notes 139-42 and accompanying text.

178. Perhaps the suggestion that a remedy justly may be denied a mistaken improver is an abdication of the original premise of this Article; mistaken improvement confers high equities on the

The proposal outlined in this Article is fully consistent with two secondary principles that courts have applied in mistaken improver cases. First, since the purpose of the remedy is restitution, the improver should recover only that part of the benefit conferred on the owner that constitutes unjust enrichment.[179] This principle has been applied mainly when the improvement added more to the fair market value of the land than it cost the improver. In such a case the cost of the improvement is often said to be a cap on the improver's recovery. As between the owner, who is faultless, and the improver, whose mistake caused the problem, the owner has the better claim for any surplus value created by the improvement. If any exception to this rule is warranted, it is in the case of a complicitous owner. In such a case, the equities of the improver, whose efforts resulted in the surplus gain, exceed those of the owner, who shares some responsibility for the problem, and the improver, rather than the owner, should be entitled to retain that value.

The second principle is that the owner should be held harmless so that any loss that must be borne by one of the parties will fall on the improver, whose mistake occasioned the loss. This principle can be implemented in two ways. First, the owner can be given a choice of remedies so that he or she may choose the most favorable remedy.[180] Such an election allows an owner to secure any special value in the land that is difficult or impossible to prove in court. Second, by deciding questions concerning complicity, fungibility, and special values before considering removal, courts can tip the balance in favor of removal as the potential for hardship on the owner increases.

III. CONCLUSION

As an abstract principle, a mistaken improver's claim for restitution is unassailable: conscience and equity are on his or her side. In practice, however, thorny remedial issues have caused judges and legislators to quail in the face of conscience and deny complete relief to mistaken improvers. The problem of the mistaken improver is not insoluble, however. To provide relief that is fair to the improver and the owner, courts first must weigh the equities of both, and then search for a just remedy with the same imagination, flexibility, tenacity, and vigor that typify the search for truth in other matters of conscience.

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improver in most circumstances. Despite these equities, the case posited is not an appealing one. The harm to the owner is great, tipping the parties' equities as far toward the owner's side as possible without leaving the realm of the mistaken improver for that of the knowing improver. If the traditional judicial view that the rights of owners must be protected above all is to be taken seriously, this is the case in which the rights of the owner must outweigh the claim of the improver, the case for which there is no just remedy. Fortunately for mistaken improvers, it is also a case that seldom, if ever, has arisen.

179. *See supra* notes 136-38 and accompanying text.

180. *See supra* notes 152 and accompanying text.