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THE MISTAKEN IMPROVER—A COMPARATIVE STUDY

By ROBERT C. CASAD*

I. The American Approach

The case of the mistaken improver of another’s real estate “has lain on the consciences of lawyers” for at least the 1800 years since the Roman jurist Julian declared the improver had no right of action against the owner.1

The source of the problem, of course, is the ancient maxim of accession, quicquid plantatur solo, solo cedit, the notion that whatever is attached to the soil automatically becomes a part of the real property interest of the owner of the soil. American courts, under the rubric of the law of fixtures, have developed a host of special rules and exceptions to avoid the effect of this maxim in cases where its application would produce harsh results or would tend to subvert some important policy objective.2 But in the absence of such special rule or exception or some agreement or statute, when material that becomes attached to land has been supplied by someone other than the landowner, the one supplying it loses his personal property rights in that material, and according to the conventional common law view he cannot remove it and he usually does not gain any compensating rights in the real estate nor any personal claim against the owner.3

If the improver knew that everything he added to the land would become a part of the landowner’s property interest, and nevertheless went ahead and made the improvement without any understanding as to payment, the owner’s retention of the improvement without payment does not seem grossly unjust.4 But if the improver mistakenly thought he, or some third party he intended to benefit, owned the

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1 J. DAWSON, UNJUST ENRICHMENT 51 (1951).
4 I.e. it does not seem grossly unjust to one whose orientation is in Anglo-American law. In some other countries one who improved another’s land under the circumstances suggested could recover under the doctrine of negotiorum gestio if what he did conformed to the “interest” of the owner and to his “actual or presumable will.” Dawson, Negotiorum Gestio: The Altruistic Intermeddler, 74 HARV. L. Rev. 817, 824 (1961).
land, he might well have cause to complain of injustice if the law affords him no remedy. The operation of the principle of accession disappoints his expectations as to the enjoyment of the benefit of the improvement and his disappointment is compounded if the law allows him no recovery for his expenditures. Since the economic value of land improvement usually is substantial, this can impose a severe forfeiture on one who has done a socially desirable act, i.e. improving land, in all good faith. Moreover, his disappointed expectations and out-of-pocket loss are reflected rather directly in the unexpected gain which the landowner experiences without doing anything to deserve it. It is true that the landowner has suffered a violation of his right of exclusive use and an alteration in the condition of the land for which he ought to have compensation, but there is no such necessary relation between his injury and the value of the improvement to justify imposing the forfeiture on the improver as a remedy for the inadvertent trespass. A mature legal system ought to provide some rational means of accommodating the interests of both.

In most states the improver has no common law or equitable right of action to recover either the improvement itself or its value to the owner, except where the owner was guilty of misleading the improver or at least was aware of his mistake and did nothing to warn him. The states which follow this majority view do allow the improver a limited form of relief that can be asserted defensively. If the owner should find it necessary to bring some sort of equitable action against the improver, the latter is permitted to counterclaim for restitution of the benefit accruing to the owner by reason of the improvement, and the owner's equitable relief will be conditioned upon his making restitution in such form as the court shall decree. If the owner initiates an ordinary legal action for

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5 See Merryman, supra note 3; Annot., 57 A.L.R.2d 263 (1958).

6 RESTATEMENT OF RESTITUTION § 40 (a), (c) (1937): “A person who . . . has affixed chattels to the land or chattels of another is entitled to restitution therefor if . . . the chattels were affixed:

(a) because of the fraud or material misrepresentation of the other, or

(c) in the mistaken belief, or which the other knew or had reason to know, that the services would inure to the benefit of the one giving them or of a third person, or that the other promised to pay for them . . . .”

7 Id. § 42 (1):

“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 of the labor and materials employed in making such improvements, whichever is least.”
trespass or ejectment against the improver and seeks recovery of mesne profits, the improver is allowed to set off against his liability the value of the improvements, although he is not permitted a positive recovery in the event the value of the improvement exceeds the rents and profits.\(^8\)

The inconsistency in this majority approach is immediately apparent. It recognizes the injustice of permitting the owner to claim the benefit of the improvement without any compensation, and in some circumstances allows the improver complete restitution. But in some cases it allows only partial relief by way of reduction of liability, and in other cases no relief at all. Whether the improver can recover all, some, or none of the value of the improvement depends upon factors that have no rational relation to the "equities" of the parties. Everything depends upon whether the owner seeks some sort of judicial relief against the improver, and if so whether it is of an equitable or a legal nature. An improver who, either through ignorance or a conciliatory nature, accedes to the owner's demands without suit gets nothing.

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. Of course, we have not sought to encourage the un-permitted improvement of the land of another, but in most of our vast territory land titles have not always been so clear as to warrant a rule that one who seeks to improve land must act at his peril.\(^9\) In view of this,\(^10\) all but a handful of the states that entered the union after the adoption of the Constitution have enacted statutes modifying the basic common law rule.\(^11\) These are the so-called "occupying

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\(^8\) Id.

\(^9\) Cf. G. Palmer, Mistake and Unjust Enrichment 4 (1962): "[T]he conventional view at the common law denied restitution to the mistaken improver. This must have had the undesirable effect of discouraging land improvements during a period when that was a social goal of high importance...."

\(^10\) See the statement of Henry Clay arguing in support of the validity of the Kentucky occupying claimants statute in Green v. Biddle, 21 U.S. (8 Wheat.) 1, 54 (1823): "The ground on which the laws repose is not that of any inherent taint or defect in the title. It is one of policy, founded upon the peculiar condition of the country; the multitude of dormant claims to the same land; the non-assertion of their titles by adverse claimants; and the necessity of encouraging improvement."

\(^11\) The exceptions are Arizona, possibly Alaska, Hawaii, Idaho, Montana, Nevada, Oregon and Colorado. California adopted such a law in 1856, but it was held unconstitutional the following year. Billings v. Hall, 7 Cal. 1 (1857); see Merryman, supra note 3, at 468. Several of the states that enacted no such law borrowed extensively from California, and so their failure to adopt
claimants” or “betterments” acts. The specific provisions of these statutes vary considerably, but they have certain features in common.

Basically it can be said that the statutes make what is generally supposed to be the old equity rule—allowing the improver a positive judgment by way of counterclaim—available even in actions at law. Most of them still do not allow an independent action: the rights they give still depend on the improver being sued first. But they remove the limitation previously imposed by the common law that allowed him only an offset against liability for rents and profits. Another characteristic feature of these statutes is the provision for an election by the owner either to take the land, paying the improver the value of the improvement, or to require the improver to buy the land at its unimproved value. For the most part their provisions may be invoked only by improvers who acted in “good faith” and under “color of title,” although the meaning ascribed to these terms by judicial interpretation varies.1

Although relieving some of the inadequacies of the traditional nonstatutory law, the statutes, since most apply only where the improver is first sued, still permit drastic differences in result in cases that are essentially similar. Moreover, their over-all effect has probably been to impede the development of a more rational solution, since it seems likely that if there had been no such statutes the “minority” approach of Justice Story in *Bright v. Boyd*,13 would by now be universally accepted.14

In *Bright v. Boyd*, Story was faced with the question of whether the traditional restrictive approach should prevail in America, and concluded that it should not. In that case a suit in equity was brought

such a law may reflect the California ruling on unconstitutionality. It should be noted, however, that today at least three and probably four of those states have abandoned the common law rule by judicial decision and permit an independent action for restitution by a mistaken improver. See Full v. Barnes, 142 Colo. 1272, 350 P.2d 828 (1960); Smith v. Long, 76 Idaho 265, 281 P.2d 483 (1955); Hatcher v. Briggs, 6 Ore. 31 (1876); cf. Cross v. Cross, 94 Ariz. 28, 381 P.2d 573 (1963). ALASKA STAT. § 09.45.640 (1962) allows a defendant in an action for the recovery of real property a right of set-off. There are no cases construing this section, but it amended a former provision, ALASKA COMP. LAWS ANN. § 56-1-6 (1949), which had expressly limited set-off to such of the value of improvement as did not exceed the damages for wrongful detention. By deleting this limitation Alaska may not permit a positive judgment to the improver.

12 See Merryman, supra note 3, at 467; Annot., 137 A.L.R. 1078 (1942); text accompanying notes 33-39 infra.

13 4 F. Cas. 127 (No. 1875) (C.C.D. Me. 1841).

14 "It seems likely that Story's view, which would permit restitution . . . would have prevailed but for the prevalence of the so-called betterment statutes." W. Seavey & A. Scott, NOTES TO THE RESTATEMENT OF RESTITUTION 29 (1937).
by one who claimed title to the land through a sale made by an administrator. He and his predecessors had occupied the land and made improvements. Later one of the heirs of the decedent was able to prove a technical defect in the administrator’s sale and established his title to a share of the land. The disappointed purchaser then brought an independent action in equity to get an allowance for the enhancement in the value of the land attributable to the improvements. Story recognized the traditional view that an improver could not bring an action as plaintiff even in equity unless the owner had been guilty of some unfair conduct. However, he doubted both its soundness and its validity. The fact equity courts invoke the maxim “he who seeks equity must do equity” as the excuse for going beyond the common law rule and allowing full recovery to improvers sued in equity does not necessarily mean they should not also grant full recovery in a case where that maxim could not apply, i.e. in a case initiated by the improver. Before he could reach the conclusion that a good faith improver must be given such different treatment when suing than when sued, Story would have to find some direct authority. He said:

I find that Mr. Chancellor Walworth, in Putnam v. Ritchie, 6 Paige, 390, 403-405, entertained this [traditional] 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 [that an improver should be able to sue for the full amount of the enhanced value under the maxim “no one ought to be enriched at another’s expense”], I confess, that I should be most reluctant to be the first judge to lead to such a decision. It appears to me, speaking with all deference to other opinions, that the denial of all compensation to such a bona fide purchaser, in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity.15

Finding no direct authorities in Anglo-American law—only obiter opinions—for denying recovery to the improver as plaintiff, Story turned to other legal systems. He found support in the Roman law for allowing the improver full compensation, not just offset against rents and profits, although he neglected to mention that the Latin phrases he quoted and Digest references he cited did not support the proposition that the improver should have an independent action for compensation.16

15 4 F. Cas. at 133.
16 The Roman law may have permitted an independent action by a good faith improver to recover the materials if they were ever severed, and it permitted defensive recovery (by exceptio) of compensation for the value of improvements when the improver was sued for possession by the owner. See Merryman, supra note 3, at 457-58. But insofar as an independent action for compensation is concerned the Roman law apparently supported the traditional view which Story was attacking. Because of this, Dawson has said
He also found that the French code, the laws of Scotland, and the laws of Spain, supported his position, as well as several noted civil law writers. Tentatively deciding that the action would lie, he withheld a final decision "until all the equities between the parties"—particularly the valuation figures—were before the court in a master's report.

When that report was rendered Story's views were "strengthened and confirmed." He said:

I wish, in coming to this conclusion, to be distinctly understood as affirming and maintaining the broad doctrine, as a doctrine of equity, that, so far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, has, by his improvements and meliorations, added to the permanent value of the estate, he is entitled to a full remuneration, and that such increase of value is a lien and charge on the estate, which the absolute owner is bound to discharge, before he is to be restored to his original rights in the land. This . . . has the most persuasive equity, and, I may add, common sense and common justice, for its foundation. The "Betterment Acts" (as they are commonly called) of the states of Massachusetts and Maine, and of some other states, are founded upon the like equity, and were manifestly intended to support it, even in suits at law for the recovery of the estate.\(^1\)

Thus Justice Story, who doubtless had studied this matter longer and more deeply than anyone before him,\(^1\) announced the rule as one supported by every consideration of sense and justice, and opposed by nothing except unreasonable opinions. The equity of the improver's position being established on the maxim that no one ought to be enriched at another's expense, logic requires that his position be no worse if he sues than if he is sued.

Story's decision in *Bright v. Boyd* was that the mistaken improver

that "Story misstated the results in Roman law in the improver's case." J. Dawson, *Unjust Enrichment* 188-89 n.20 (1951). However, Story did not actually say that the Roman law allowed the improver a direct action for compensation. He did say in the second opinion that the Roman law considered the improver entitled to "full remuneration" for the increase in value, and that this was a lien and charge which the owner had to discharge before being restored to his original rights. *Bright v. Boyd*, 4 F. Cas. 134, 135 (No. 1876) (C.C.D. Me. 1841). He did not comment on the procedural means (exceptio) by which the improver could avail himself of this. He was apparently treating the substantive equity in the improver's position.

\(^{17}\) 4 F. Cas. at 135.

\(^{18}\) Story had written the first opinion in *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823), a case that produced violent reactions and "set Kentucky aflame with resentment." 2 C. Warren, *The Supreme Court in the United States History* 97 (1923). The reargument in that case lasted a full week, and the Supreme Court did not hand down its decision until a year later. 4 A. Beveridge, *The Life of John Marshall* 380 (1919). Story concurred only reluctantly, in the final decision upholding his first one. See his letter to Justice Todd, quoted in 2 C. Warren, *supra*, at 100. Story could never forget *Green v. Biddle*, and so he probably was not thinking only of *Bright v. Boyd* when he wrote in that case: "These considerations . . . greatly weigh in my own mind, after repeated deliberations on the subject." 4 F. Cas. at 134.
should be entitled to "full remuneration" for the increase in the value of the land attributable to the improvement, and to an equitable lien to secure payment. It would, however, be wrong to assume that he meant that every mistaken improver should always be entitled to that remedy. He stressed the fact that the plaintiff was an innocent purchaser for value, and the defendant was not the original owner but an heir who, accordingly, paid no value for his interest. He specifically withheld decision until all the equities of the parties were presented, so it is reasonable to assume that if the circumstances of the case had been different he might have found a different remedy more equitable.  

Moreover, although Story referred specifically to the right of an "innocent purchaser for a valuable consideration, without notice of any infirmity in his title," there is nothing in his opinion to suggest that the maxim that he based his decision on—"that no one ought to be enriched at another's expense"—would not also support relief in some form to an improver who might not meet all the requirements for status as a bona fide purchaser. The substantive basis of the right of action he recognized in Bright v. Boyd is the unjust enrichment of the landowner occasioned by the combination of the improver's mistake and the law of accession, not the status of the improver as a purchaser.

The Story view seems to offer the basis for a rational approach to the problem of the mistaken improver. The unintended, unearned and unexpected benefit which the law of accession casts upon the landowner must generally be regarded as unjust unless some special circumstances are present, or unless extending relief to the improver would have some undesirable policy consequences. The exact dimensions of the improver's right of action would have to be worked out case by case, where the significance of countervailing policy factors could be weighed, as in other common law areas. In this area, however, the problem of providing an appropriate remedy is somewhat more difficult than in most. Because the value of land improvement often is quite large, imposing a positive obligation to pay over such a sum can work hardship on the owner in some cases, although in others it may be a wholly satisfactory remedy. Removal of the im-

19 He surely would approve such sensible alternative remedies as removal, where that can be done without great damage, as, e.g., in Jensen v. Probert, 174 Ore. 143, 148 P.2d 248 (1944); Citizens & S. Nat'l Bank v. Modern Homes Constr. Co., 248 S.C. 130, 149 S.E.2d 326 (1966); Salazar v. Garcia, 232 S.W.2d 685 (Tex. Civ. App. 1950); or exchange of deeds between the owner and an improver who built on the wrong lot, where the lots were essentially identical, as, e.g., in Voss v. Forgue, 84 So. 2d 563 (Fla. 1956); McCreary v. Shields, 333 Mich. 290, 52 N.W.2d 853 (1952).

provement may be a sufficient remedy in some cases, but in others the structure may be such that removal would be so destructive of economic values that it should not be countenanced. The equitable lien, the "buy or sell" alternative provided by most statutes, and even a declaration of cotenancy might be appropriate in some cases. 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 the most appropriate. It may be suggested that this approach is so lacking in clear-cut directives as to be improper for a judicial tribunal—that the process it calls for is more like arbitration than judging. However, the substantive principle of unjust enrichment is not entirely unfamiliar to courts, and flexibility in molding the remedy to suit the needs of the case has traditionally been a feature of equity jurisdiction.

It is curious that more states have not openly adopted the Story view. Apart from its inherent reasonableness, it can make a strong claim to authority: stronger perhaps than the traditional English view in most states, except where contrary decisions have already been rendered. If Story was correct that there were no direct authorities denying an independent right of action except Putnam v. Ritchie,21 then what was the "non-statutory" law in America (outside of New York) after Bright v. Boyd? What was the "non-statutory" law, especially in all those states formed as territories under federal law after 1841? Were they bound to follow the supposed common law and equity rules of England in spite of the absence of a clear decision? Or were they bound to follow the carefully deliberated ruling of a truly great judge (who only shortly thereafter wrote the main opinion in Swift v. Tyson)22 sitting in the federal circuit court declaring a "broad doctrine of equity?" Were the courts of those states and territories free to choose to follow either? If they were free to follow either, which should they follow in view of the express recognition by their legislatures in the occupying claimants acts of the inadequacy of the common law rule? It is hard to see how a judge could do other than follow the Story view. Even if they were not bound, as federal territories, to follow Bright v. Boyd as a matter of stare decisis, neither were they bound to follow the

21 6 Paige 390 (N.Y. Ch. 1837). See quotation accompanying note 15 supra. Professor Merryman's researches failed to turn up any direct English authorities, and he concluded that the source of the American law on this subject was probably an isolated dictum in Coulter's Case, 77 Eng. Rep. 98 (K.B. 1599). Merryman, supra note 3, at 465.
English rule (if it was a rule) in view of the conditions in America that seemed to make it inappropriate.

How, then, are we to account for the persistence of the traditional rule in America, in the face of almost universal disapproval of it by writers and judges, who even while applying it often expressly deplore it. Probably a number of factors have contributed. One, suggested above, is the existence of statutes that ameliorate some of the inadequacies of the traditional approach. It might be thought that the effect of the statutes would be exactly the opposite. Their existence indicates express legislative recognition that the traditional common law approach is unsatisfactory for America. Logically, it would seem that if they 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. This was the significance Story attributed to the Maine and Massachusetts statutes, and some states have followed this view. In other states, however, the statutes have been construed quite strictly on the theory that they are in "derogation" of the common law, and some courts have even read into their statutes the seemingly unwarranted implication that in enacting a law that slightly changed the traditional law, the legislature intended that the law should be changed no further. There is very little to support this negative implication, and the fact that courts have drawn it in the face of authority like Bright v. Boyd and in spite of the generally accepted notion that the traditional rule is unduly harsh on the improver shows that some very deeply rooted principles must be operative here.

One such principle must surely be the common law's traditional hostility to persons who confer unsolicited benefits on others. Instead of honoring the voluntary altruist, the common law has often upbraided him, calling him an "officious intermeddler." Even when he acted with the intention of charging the recipient for his beneficial works or services, his chances of recovery are severely limited by the common law rule. The idea of imposing an obligation on one who did nothing to incur it was repugnant to common law judges. This tendency apparently reflects something fundamental in the Anglo-Saxon temperament which American institutions inherited along with the common law. It is an aspect of the spirit of individualism that dominated American attitudes during the formative years of our society. This attitude of opposition to the intermeddler is so firmly imbedded that it is rarely questioned, in spite of the fact

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23 Text accompanying note 14 supra.
that most other legal systems take a completely different view of
the voluntary benefactor. But even if the common law's attitude is
accepted, it does not follow that one who was motivated by mistake
should be treated the same as one who voluntarily conferred a ben-
fit. He certainly does not normally deserve to be called "officious."

But so strong is the notion in our law that one should not be sub-
jected to an obligation that he did not voluntarily undertake that
courts have often ignored the fact that in the mistaken improver's
case the owner's obligation would be merely to restore something
which would not even be his if the law, through the principle of
accession, did not take it away from the improver and give it to the
owner.

This basic bias in our law might not of itself be such a barrier to
a solution to the problem if it were not for the concurrent existence
of some other inhibiting factors. One of these is the heritage of the
forms of action which still, to some extent, "rule us from their
graves." At common law one who interferes with another's right
of possession is a trespasser even if he honestly thought he owned
the land. A trespasser is a wrongdoer, and it is hard to consider one
as having a right arising from his own wrong. Moreover, the forms
of action left us with a tendency to think of legal rights and remedies
as being bound up together in packages. Unless it can be shown
that an already packaged remedy exists for an asserted right, many
courts will refuse to treat the case. The general reluctance of courts
to act without some established prior precedent is aggravated in this
situation by the fact that if the basic, standard common law and
equitable remedies were to be employed to help the improver it
often could lead to an injustice nearly as great as the situation they
are supposed to rectify. The common law depends almost entirely on
the remedy of money damages, and courts usually think first in these
terms. It is not hard to visualize situations in which an owner
would be unable to pay a money judgment for the value added by
the improvement. The effect of the judgment in such a case could
well be that the owner would lose his land, since it would probably
have to be sold to satisfy the judgment. Even if the sale netted the

26 "It is well known that in the treatment they accord to altruists there
is a major difference between the Anglo-American common law and most
legal systems of western Europe." Dawson, supra note 4, at 817.
27 Although that term was applied to one who mistakenly built houses
on some lands he had dedicated to the township for school purposes in Town-
28 Cf. 2 J. KENT, COMMENTARIES *338: "There is no moral obligation
which should compel a man to pay for improvements upon his own land,
which he never authorized, and which originated in a tort."
30 Note 28 supra.
full combined value of the land and the improvement, the owner would be forced to accept money in lieu of land which conceivably might have value to him beyond its merely economic worth. Substituting an equitable lien for the money judgment, or giving the owner the choice of paying for the improvement or requiring the improver to pay for the land at its unimproved value does not change this problem very much. Failing to see a clear-cut, pre-packaged remedy that could be applied justly to all cases, courts have refused to allow any remedy at all, even in cases where a money judgment would not have the effect of "improving the owner out of his land" or otherwise act harshly on him. No doubt they have feared the possibility that any decision recognizing a right of action in the improver might be viewed as itself a prepared package remedy by later courts and applied to cases where injustice might result.

This fear itself would not be so significant if the courts could rely on established substantive law doctrine to keep the effects of their decisions within predictable limits. In Anglo-American law, however, unjust enrichment doctrine is still in a rather primitive state of development. Instead of a general unifying principle with its logical extensions and elaborations, our law of unjust enrichment remains largely an enumeration of the kinds of cases in which courts will fictitiously imply "quasi-contracts" or construct "constructive trusts." 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. The draftsmen of the Restatement simply reproduced the traditional view, without noting its questionable authority in America, and in spite of its admitted harshness and its inconsistency with the law of mistake generally.31 The Story view was acknowledged, but not in the blackletter text. By this treatment of the problem, the 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.

Another factor tending to prevent acceptance of the Story view

31 In the comment on section 42 the draftsmen acknowledge the harshness of the rule to the improver, but give as the reason for it that "in many cases it would be still more harsh to require the one receiving the benefits to pay therefor." Restatement of Restitution § 42, comment a at 168 (1937). No reason is suggested to explain why no relief is allowed in the other cases where it would not be "still more harsh" to require the owner to pay, or why some remedy other than payment of money should not be allowed. They do go on to admit that the rule is "not wholly consistent with the principles of restitution for mistake . . . ." Id.
is the fear, often expressed as justifying the traditional approach, that
to allow an independent right of action to a mistaken improver
would encourage carelessness in the examination of titles and in locat-
ing the land on which to build. It is no doubt true that some of
the incentive to carefulness would be removed if the law were to be
changed to generally permit anyone who improves on another's land
to recover from the owner. But that argument goes no farther than
to say that recovery should be denied if the mistake could have been
avoided by the exercise of care. Such a limitation on recovery could
be accommodated within the general framework of an unjust enrich-
ment approach. In any event, that argument does not justify denying
relief in the many cases where no reasonable precautions could have
precluded the mistake.

All these factors, and perhaps others, have contributed to the
failure of American courts to develop a consistent approach to the
problem by building upon the basic principle of unjust enrichment, as
Story invited them to do by his decision in Bright v. Boyd.

One further general observation needs to be made concerning the
American approach. Under whatever theory relief is sought, the im-
prover must show that he meets certain requisites. The most per-
vasive of these is the requirement of "good faith." Whether the law
under which relief is sought be the traditional common law, the tradi-
tional equity rule, the "minority" equity (Story) rule, or most better-
ments statutes, the improver generally must show that he acted in
"good faith." There are, however, widely variant views as to what
"good faith" is in this context. Definitions adopted in construing the
betterments statutes have been regarded as applicable in nonstatutory
cases, and vice versa. Moreover, courts have displayed a trouble-
some tendency to take definitions from other contexts and apply
them without modification to the case of the mistaken improver. Thus
the United States Supreme Court in Searl v. School District, in
considering the status of an improver under the traditional equity
rule, took its definition of "good faith" from two Illinois adverse pos-

See 2 J. Kent, Commentaries §33-38: "[I]n the ordinary state of things, and in a cultivated country, such indulgences are unnecessary and pernicious, and invite to careless intrusions upon the property of others. There are but very few cases in which a person may not, with reasonable diligence and cautious inquiry, discover whether a title be clear or clouded . . . ." Cf. R. Goff & G. Jones, Restitution 96 n.4 (1966): "In England and the urban states of America the necessity for such (betterments) 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." The authors no doubt were thinking of New York and perhaps California when they spoke of the "urban states of America," since nearly every other state either has such a statute or has adopted the Story view by judicial decision.

133 U.S. 553 (1890).
session cases that arose under a statute that vested title in one who occupied land in good faith under color of title for 7 years. The result was a rather liberal definition of good faith:

"Good faith is doubtless used here in its popular sense, as the actual, existing state of the mind; whether so from ignorance, scepticism, sophistry, delusion, fanaticism or imbecility, and without regard to what it should be from given legal standards of law or reason." . . . "The good faith required by the statute, in the creation or acquisition of color of title, is a freedom from a design to defraud the person having the better title;" and "the knowledge of an adverse claim to, or lien upon property, does not, of itself, indicate bad faith in a purchaser, and is not even evidence of it, unless accompanied by some improper means to defeat such claim or lien." 

The Searl definition has been followed by a number of courts in mistaken improver cases. Probably more, however, have adopted definitions ultimately traceable to bona fide purchaser cases. Such definitions tend to emphasize the improver's good faith belief in his own title and the absence of any suspicion that another may be challenging his claim. This yields a very narrow definition which seriously restricts the availability of relief to the improver, even in some states that have adopted the Story view. Thus in Bryan v. Councilman, the Maryland court, which had previously accepted the Story view, held that the common statutory requirements of "good faith," "color of title" and "adverse possession" applied to equitable actions as well. Its authority for this was a quotation from the American and English Encyclopedia of Law. From the same source the court got a definition of "good faith" which depended upon the improver's honest belief in the validity of his own title and the absence of any notice that another might be claiming a better right in the land. The plaintiff there had expended her own money in improving lands occupied by herself and her husband, both mistakenly believing that the husband had full title in fee simple. Since she knew she lacked title herself, she was allowed no recovery for extensive construction and improvements made on the land: she could not show the requisite "good faith." The application of this test for good faith effectively precludes recovery by one who acted under a well-founded expectancy of getting title which fails not because of some contingency but because his assumptions were mistaken, or one who intended to benefit a third party he mistakenly believed

34 Woodward v. Blanchard, 16 Ill. 424 (1855); McCagg v. Heacock, 34 Ill. 476 (1864).
35 133 U.S. at 563-64.
38 106 Md. 380, 67 A. 279 (1907).
owned the land, and many cases have so held.39 This seems inconsistent with an unjust enrichment analysis of the situation and suggests that in those courts that follow the restrictive definition of good faith, the policy primarily served by allowing the improver relief is not that of preventing unjust enrichment, but of protecting direct reliance upon the system of land transfer. In such courts, the policy against allowing one person to profit from another's inadvertent mistake seems to be more than offset by the policy of discouraging unpermitted activity on another's land, and the general social desirability of encouraging land improvement is not enough to tip the balance in favor of the improver. But when the integrity of an apparently valid title is at stake, one who relied is entitled to protection. His situation is comparable to that of a bona fide purchaser.

The predominance of this policy element is further emphasized by the quite widespread insistence even in nonstatutory cases that the improver not only believe in his title, but have some instrument constituting "color of title" to reinforce it.40 Some courts have construed the "color of title" requirement so restrictively as to preclude recovery to one who mistook not the quality of his interest but the location of the land to which his interest related. Thus one who had a perfectly good title to one lot but mistakenly improved another has sometimes been denied recovery on the ground that he lacked "color of title" to the lot improved.41 Here, again, if unjust enrichment were the basis of allowing relief, it would seem that recovery should sometimes be allowed. No such inherent difference appears between one whose mistake related to the location of his lot and one whose mistake related to the validity, quality or duration of his title as would justify allowing some sort of recovery in the latter case but none at all in the former. It may be that in some cases the true facts are so easily verifiable that it might be thought to encourage carelessness if recovery based on mistake should be allowed. But such cases can arise either where the mistake relates to quality of title or to location of land. No justification appears, and none is ever


41 Cf. Neiman v. Davis, 170 Kan. 208, 225 P.2d 124 (1950), raising the question under the Kansas Occupying Claimants Act, KAN. STAT. ANN. § 60-1901 (1963), which uses the term "plain and connected title" rather than the customary "color of title."
given, for a rule which, by way of construing "color of title," prevents all hope of recovery where the mistake relates to location.

Perhaps cases where the improver relied on a belief of ownership in himself, bolstered by "color of title," do present a somewhat stronger claim for relief than other cases. Certainly courts have struggled to find ways of neutralizing the effects of uncertain title records and land surveys in America. It does not follow, however, that a mistaken improver should not also be entitled to recovery in some other cases. The emphasis many American courts have placed on the improver's own title claim has undoubtedly tended to blind them to other significant factors in mistaken improver cases.

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. There does, however, seem to be a trend observable in recent cases toward adoption of the Story view, and this trend eventually may overcome the inhibiting factors we have noted here.

In some states there are no direct decisions preventing affirmative relief to a mistaken improver. When the issue arises those states should adopt the Story view rather than blindly following the traditional common law and equity doctrine, in spite of the Restatement's weak endorsement of the latter. If case precedent is regarded as important, Bright v. Boyd, as a part of the federal equity law when the states were organized as federal territories, would seem to be a closer precedent in some of these jurisdictions than the decisions of the courts of other states. There is neither reason nor precedent to compel a court to follow the traditional rule in such cases. And even those states that have expressly adopted the traditional majority view could overrule those prior cases and accept the Story approach without ill effect. Since the rule is one designed primarily to guide judges in resolving cases, not to influence primary private behavior, the change in approach would not prejudice anyone who planned action in reliance on the assumption that courts would adhere to their prior decisions.

With wider acceptance of the one basic approach, a sufficient number of case decisions could be expected to be forthcoming to permit the refinement of the doctrine at a rather rapid pace. In this process the courts may seek insights from other legal systems that treat the mistaken improver more sympathetically than America traditionally has done, and that have a more highly developed body of unjust enrichment law. Story did not hesitate to resort to European authorities to aid his deliberations in Bright v. Boyd, and his example
could well be followed by present-day courts as they build upon the ground he broke. The following account and analysis of the Argentine approach to the problem of the mistaken improver is offered in the hope that it may be of some value in this process.

II. The Argentine Approach*

The problem of the mistaken improver has perplexed all legal systems. In not all, however, has the problem been presented, as it has in America, in combination with a strong public policy favoring improvement of undeveloped land, especially where frontier conditions existed, with consequent confusion of land titles. This is mainly a new world problem, and it is perhaps best to look to Latin America for comparisons. Argentina, which has the best developed—or at least most accessible—body of case decisions is especially appropriate for this purpose.

The basic civil law of Argentina is embodied in a national code, adopted in 1871, which, in keeping with the theory of codification, purports to declare all of the law. It was drawn up by a highly respected Argentine jurist, Dalmacio Vélez Sársfield, who fashioned it out of provisions taken from various foreign codes, from leading French and German treatises, and, most extensively, from a draft or sketch (esbogo) of a proposed Brazilian code formulated by the Brazilian jurist Teixeira de Freitas. The prestige of the Argentine codifier was so great that his code was adopted with virtually no critical debate. The combination of this eclectic process of formation and the absence of debate yielded a code whose provisions did not always fit neatly together, sometimes overlapping and sometimes revealing inconsistencies. The code contains some broad provisions relevant to our problem, and also some rather specific ones, which obviously rest on the concept of unjust enrichment. In addition to the code provisions, the Argentine courts have recognized the existence of a general uncodified principle which they can invoke where needed to remedy unjust enrichment, or "enrichment without cause."

The concept of enrichment without cause is bound up in a reme-

* The excerpts from the cases, articles and treatises are the author's translation.

42 "One Argentine writer (Dr. Lisandro Segovia: Introducción a la Exposición y Crítica del Código Civil) has taken the trouble to compute Dr. Vélez Sársfield's indebtedness to the various authors and codes and proclaims the result to be: Zachariae, 78 articles; Aubry y Rau, 700; Goyena, 300; Chilian Civil Code, 170; French Civil Code, 1100; Troplong, 50; Demolombe, 52; Louisiana Code, 52; Acevedo's Uruguay Code, 27; Chabot, 18; Maynz, 13; Molitor, 13; Savigny, 4—a total of 2556 articles. The remaining 1494 articles, says Dr. Machado (Exposición y Comentarios del Código Civil Argentino, vol. 1), were taken from Freitas' Project of Civil Code for Brazil." Eder, Introduction to ARGEN. CIV. CODE at xxx-vi (Johannini transl. 1917).
dial action deriving from the Roman law called the action of *in rem verso*, whereby one person could recover a benefit he conferred on another.\(^{43}\) Whenever the elements of this action are present, the action lies. In some instances, as will be seen, specific code provisions allow for the recovery of enrichment, and these are thought of as particular instances of the action of *in rem verso*. The elements of the action, as declared by Argentine writers and judges, are:

1. enrichment of the defendant,
2. impoverishment of the plaintiff,
3. causal relation between the enrichment and the impoverishment,
4. absence of any juridical cause for the situation, and
5. the lack of any other avenue of relief.\(^{44}\)

This last requirement means that the uncodified principle will not be invoked if a provision of the code applies, and that the more general code provisions, such as those relating to the recovery of beneficial expenditures (article 2306) or unowed payment (article 784) will not be applied where a more specific one will serve. This effectively precludes the use of the general noncode action as a remedy for a mistaken improver since the Argentine code contains several (probably too many) provisions that apply directly to his case. Moreover, some of the general code provisions permitting recovery of enrichment are themselves broad enough to include almost every conceivable case of mistaken improvement not covered by some more specific provision. This is true of the provisions relating to the recovery of beneficial expenditures (*empleo útil*).

A. **Empleo Útil (Recovery of Beneficial Expenditures)**

The provisions which are the basis of the *empleo útil* concept are articles 2302, 2306, 2309, and 2310. These articles are derived from Freitas’ *Esboço*, although the concept they embody can be traced to article 262 at the Prussian General Land Law of 1794 and to article 1041 of the Austrian Civil Code of 1811.\(^{45}\) Vélez, however, confusingly placed them under a general title which he took mainly from the French Civil Code. They appear under the general title of “Management of Another’s Affairs” (the Roman *negotiorum gestio* or, in

\(^{43}\) For an account of the development of the action of *in rem verso* into a generalized remedy for unjust enrichment, see J. Dawson, *Unjust Enrichment* 35-90 (1951).


Spanish, gestión de negocios). Negotiorum gestio is regarded as an extension of agency law to cover persons who, although not actually agents, intentionally undertake to act for another. Articles 2288 through 2305 (with the exception of 2302) deal with the rights and duties of the "manager" (gestor) and the "owner." The gestor is entitled to an action to recover from the owner the expenditures made by the gestor in managing the owner's affairs. One, for instance, who without actual authority knowingly undertook to improve another's real estate, intending thereby to further the interests of the owner, would have a right to recover his expenditures under these provisions. If the gestor believed he was managing his own business, as would be true in the case of one who mistakenly thought he owned the land, article 2302 would apply, which allows recovery, not of expenditures, but of the "amount of the benefit." This provision is borrowed from the French code, and the French courts regarded it as an "abnormal" application of the negotiorum gestio concept, since the actor lacked the intent to obligate the owner. The Argentines, however, regard article 2302 as a more or less superfluous special instance of the empleo útil concept, which, as noted, the Argentine code borrowed from other sources. The text of the general empleo útil articles are set out in the footnote.

Article 2306 grants to any person making expenditures which redound to the benefit of another "an action to recover them against the person to whose benefit they have accrued." No intent to obligate is required: the obligation on the part of the benefited one to pay arises simply from the fact of his receiving an undeserved benefit at the expense of the actor. The language of this article does not literally limit recovery of the actor's expenditures to the amount of the other party's enrichment, but it seems never to have been

46 ARG. CIV. CODE art. 2298.
47 At least up to the extent of the enhancement in the value of the land. Cf. ARG. CIV. CODE art. 2301.
48 E. TORINO, ENRIQUECIMIENTO SIN CAUSA 124 (1929).
49 Article 2306: "When a person, without being the manager of the business [gestor de negocios] or a mandatary, makes expenditures for the benefit of another person, he may bring an action to recover them against the person to whose benefit they have accrued."
Article 2309: "Any expenditures of money which have increased the value of something belonging to another, or from which some benefit has accrued to him, or an improvement to his property, shall be considered beneficial even though the benefit has subsequently ceased."
Article 2310: "If the property improved by the advantageous employment of money is owned by a third person, to whom it had been transferred under an onerous title, the owner of the money used shall not have a right of action against the grantee of the property, but if the transfer had been made under a gratuitous title, he may bring an action for its recovery against the person who holds the property to the extent of its value at the time of the acquisition thereof."
suggested that it could have any other meaning. It is clear, from the
codifier's notes, that in this provision Vélez was trying to distill the
essence of several sections of Freitas' Esboço, where empleo útil
was treated in a separate chapter, distinctly separated from gestión de
negocios (negotiorum gestio). There is general agreement that the
action authorized by article 2306 is the action of in rem verso for
the recovery of enrichment, not the action negotiorum gestorum for
the recovery of expenses.  

The code refers to the recovery of "expenditures," but it is ac-
cepted that this term contemplates any performance capable of pecu-
niary valuation, including personal services.  

The code appears to extend the right of recovery to anyone who
makes expenditures beneficial to another, as long as he is not a
gestor nor an agent, but the provision has not been construed so
broadly as the words might indicate. If the beneficial expenditure
was made by one bound to do so by contract with the party benefited,
any right he may have to payment must be predicated upon the
contract. The contract supplies the "cause" for the enrichment of the
other party, and accordingly the action of in rem verso for the
beneficial expenditures will not lie. But where the expenditures are
made under contract with someone other than the benefited defendant,
and were made with no thought of benefiting the defendant, recovery
under the empleo útil provision may be possible.  

Because article 2306 is considered as embodying the action of in
rem verso, the basic action for the recovery of enrichment without
cause, the courts and writers have read into article 2306 all of the
traditional requirements of that action, even though the code does
not mention them. Theoretically, then, the empleo útil provisions,
like the noncode action of in rem verso for enrichment without
cause, are not to be invoked when another, more specific, code pro-
vision allows relief. This rule limits the potential application of
empleo útil, even in land improvement cases, which are specifically
referred to in articles 2309 and 2310, since the Argentine code contains
a great number of provisions specifically on that subject. But the

50 See L. Rezzonico, Estudio de las Obligaciones 1563 (1961).
51 See id. See also Fernandez Sanchez v. Gobierno Nacional, [1957-I]
52 See Moccia v. Saavedra Hnos., 79 Gaceta del Foro (G.F.) 313 (Sup.
Trib. de San Luis 1926). A contractor built on land of the defendant under
contract with a land contract purchaser he thought was the owner. The same
element of subjective, if not excusable, error was present in Cabos, Yearson
53 See text accompanying note 44 supra.
empleo útil provisions serve as a sort of backstop, to allow recovery where other sections of the code would not permit it. In virtually every case, then, a "good faith" mistaken improver will be able at least to recover the benefit his improvement cast upon the owner, although one who acted under a mistake of law, as we shall see, may be classed as a "bad faith" improver and thus allowed only limited relief.

B. Construction of New Buildings

The "Accessions" chapter, under the subheading "Building and Planting," contains the Argentine code's basic provision for dealing with the plight of mistaken improvers.

Article 2588: When building, sowing or planting is done in good faith with one's own seeds or material on the land of another, the owner of the land shall have the right to retain the work, sowing or planting upon paying the corresponding indemnity to the builder, sower or planter in good faith, and the latter shall not have the right to demolish what he has built, sowed or planted, if the owner of the land does not consent thereto.

Article 2589: If any building, sowing or planting has been done in bad faith on the land of another, the owner of the land may demand the demolition of the work and the restoration of things to their original condition at the cost of the builder, sower or planter. But if he desires to retain what has been done, he must reimburse the cost of material and labor.

Article 2590: When there has been bad faith not only on the part of the person who builds, sows or plants on the land of another, but also on the part of the owner, the rights of both shall be adjusted according to the provisions relating to builders in good faith. There is understood to be bad faith on the part of the owner whenever the building, sowing or planting has been done in his sight and with his knowledge, without any objection on his part.

These articles basically incorporate the French code's solution to the problem, as reflected in articles 554 and 555 of the Code Napoleon, although there are some significant changes in wording and organization. In terms these articles appear to extend a right of indemnity to anyone who builds, sows or plants on the land of another if the owner wants to keep the improvement. A distinction is made, however, between those who have acted in "good faith" and those who have acted in "bad faith." If in good faith, article 2588 applies; if in bad faith, either article 2589 or 2590.

A basic limitation on the application of articles 2588 and 2589 is the rule that in the case of building, the work must be a new building—not repairs or improvements on existing buildings or things.54 We tend to think of building as a form of improvement. In Argentine law, however, a definite distinction is made between building (edificación) and improvement (mejoramiento), and articles

54 See E. Torino, ENRIQUECIMIENTO SIN CAUSA 165 (1929).
2588 and 2589 apply to building only. The provisions relating to "improvements" are discussed in the next section. This difference is illustrated in the opinion of the court of second instance in the interesting case, Canton v. Gobierno Nacional, where the claim for recovery under articles 2588 and 2589 were rejected. The works put on the land consisted of a well, dams, clearing trees, and similar works preparatory to colonizing the wilderness land. The plaintiff had no title whatever, and had occupied the government land for many years. Referring to articles 2588 and 2589, the court said:

The articles cited, as Salvat teaches, are applicable to cases of building [edificación], that is to say to the new constructions made on the land of another or new constructions that are added to those already existing, in which cases by the very creation of a new thing there is basis for the application of the theory of accession as a mode of acquisition of property: but they are not applicable to cases of simple improvements [mejoras] which do not give rise to the formation of a new thing to which the theory of accession could be applied: in "improvements" the thing that is the object of them remains the same, although its value can have increased and as a consequence it is just to take it into account in regulating the rights of the parties. The situation of improvement—says Salvat—is ruled by dispositions that the civil code embodies in different places. In the case before us, it is clear that the works for which the government had been directed to indemnify the plaintiff, clearing the land of stumps, wells for water, dams, do not constitute building, [edificación] but improvements [mejoras] properly speaking.

Under article 2588, the owner of the land must pay "the corresponding indemnity" to the one who in good faith builds, plants or sows on his land. The text makes it appear that the landowner has an option to keep the improvement or to demand its removal, for it says he "shall have the right to retain the work;" etc. However, this is not true. The Argentine authorities generally have rejected this construction summarily. He becomes the owner of the building by the law of accession, and an obligation to pay devolves upon him for that reason. He does not have the right to avoid this obligation by insisting upon the removal of the work where the builder, sower or planter has acted in good faith. He simply has to pay the "corresponding indemnity."

55 [1946-III] J.A. 72 (Cam. Fed. Cap.). The case was later reversed by the Supreme Court of the Nation, the court finding that the national government was obligated for unjust enrichment to the extent of the increase in the value of the land attributable to the plaintiff's expenditures in improvements.

56 Id. at 80.

57 See Spota, Edificación en Suelo Ajeno, 50 J.A. 817, 823 (1935): "With the general doctrina of our authors [citing Salvat and Lafaille] he [the owner] does not possess this right: he cannot require the demolition of the work. To allow it would be to carry our code, in this respect, back to the period before the law of Justinian."

58 Sup. Cte. Le Bs. As. 12-11-1913 (Ac. y Sent. 7-IX-322).
In fixing the amount of the "corresponding indemnity" owed by the owner to the one who built, sowed or planted in good faith, the Argentine doctrina has departed from the view the French jurisprudence developed in connection with article 555 of the Code Civile. The French accord the land owner an election: He may pay either the costs of the material and labor involved in the work or an amount equal to the increased value of the property at the time of restitution. The Argentines, however, are inclined to say that since action under article 2588 is based on a supposed unjust enrichment, the measure of recovery is the increased value of the thing—the land. It is clear that what is actually meant is that the measure is the lower of the two: cost or increased value. The Argentine writers seem always to think primarily of the enrichment being less than the cost. But if the reverse were true, it is perfectly clear that the recovery would be limited to the cost: there would be no formality of giving the owner an election to pay the lesser or greater amount.

In the case of planting or sowing, for instance, the recovery normally is the costs—seeds or plants plus labor—since the yield is commonly greater than the costs.

If the building, sowing or planting has been done in bad faith, on the other hand, the owner of the land does have an election to keep the improvement or to demand its removal. By article 2589 he is given the choice of demanding the demolition of the work and restoration of the land to its original condition, or of retaining the work. If he elects to retain it, he is to "reimburse the cost of the material and labor," not "pay the corresponding indemnity." This presents an anomaly. The "corresponding indemnity" that is referred to in article 2588, as we have seen, is understood to be the increase in value of the land but no more than the cost to the plaintiff. The amount recoverable by the bad faith builder, planter or sower, however, is expressly stated as "reimbursement of the value of the material and labor." It would appear, if any significance is to be attributed to the choice of a different term to describe the amount recoverable by a party acting in bad faith, that the situation of the bad faith (unless the owner wants the work removed), for the good

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61 See Gaitan v. Alarcon, [1949-IV] J.A. 679 (Sup. Trib. de Entre Ríos), where this recovery against the owner was granted. The owner had sold the land to a third party who harvested a growing crop of wheat and flax sowed by the plaintiff (who appeared to be simply occupying the land at the sufferance of the owner's lessee) before he was ejected. The court found that the owner was benefited by the growing crop through an increased sale price for the land, but awarded the plaintiff recovery for the cost of the seeds and labor as the lesser of the two alternatives.
faith builder, sower or planter can recover costs only up to the amount of increase in the value of the land. There is no explanation for this anomaly: for some undisclosed reason Vélez chose in this section to borrow directly the text of the French code (article 555) rather than the modified wording of Teixeira de Freitas, who avoided this difficulty. The anomaly had already begun to plague the French at the time the code was drafted,\(^6\) and of this Vélez was clearly aware. The Argentine codifier did, however, provide a key to resolving the anomaly in his note to article 2589:

The code has wanted, says Marcadé, and has been able to be just. It has said that no one ought ever to be enriched at the cost of another, although that other be a man of bad faith. It declares that if the constructions are made on our land, he who made them knowing that the land did not belong to him, we are able to cause them to be removed, or else reimburse him for all he has expended. The owner of the land, having the right to force the destruction of the work, . . . can offer [it for] much less than what it cost. [Citing Zachariae, section 297].

Thus the matter is resolved by a bargaining process, apparently, which is supposed to reach a figure somewhat less than the cost to the bad faith builder, planter or sower. This seems an unnecessary, and unjustifiable, complication, however. Vélez should have made it clear in the text of the code that the recovery of the bad faith builder is to be limited to at least the same extent as that of the good faith builder, or else he should have used some term less abstract than “corresponding indemnity” to describe the recovery of the good faith actor.\(^6\)\(^3\)

But even though the measure of recovery were the same, a distinction between those who build, sow or plant in good faith and those in bad faith would still be necessary because of the landowner’s right to require the restoration of the premises to their previous state in the latter case. The distinction is not so easy to draw as it might appear. Although the code does not declare it, the right of action under these articles sometimes has been said to extend only to “possessors,” since those provisions derive from article 555 of the French code which specifically refers to “possession of good faith.” The possession referred to here—and generally in the Argentine code—is not the same conception as possession in Anglo-American law. We recognize possession in, for instance, a lessee or a tenant at will. Such occupants, however, would not be considered “possessors” in the Argentine system. That term is used to refer to

\(^6\) See Planiol’s account of this anomaly. 1 M. PLANIOL, TREATISE ON THE CIVIL LAW (pt. 2), at 612 (La. St. Law Inst. Transl. 1959).

\(^6\) Cf. E. TORINO, ENRIQUECIMIENTO SIN CAUSA 167 (1929), which refers to some French authors and the argument that the owner can elect to consider a bad faith builder as being in good faith if the value of the improvement is less than the cost.
persons whose only connection with the owner is the fact of occupying his land: persons not bound by any contractual tie to the owner. This would exclude, then, lessees, easement holders, contract purchasers, and others with contractual rights. Only one who occupies with *animus domini* is a "possessor" in this strict code sense: one who mistakenly believes he is working on his own land, or one who claims it as an adverse possessor. So long as the application of these provisions relating to building, sowing and planting was thus limited to those who occupied *animus domini* it could be said that good and bad faith, as those terms are used in articles 2588 and 2589, referred to the character of the "possession" of the builder, sower or planters, which could be determined in accordance with the general code provisions relating to possession. Article 2356 provides as follows:

Possession may be in good faith or in bad faith. Possession is in good faith when the possessor, through ignorance or error of fact, is convinced of its legality.

Under that test, then, the only person who could claim the protection of article 2588 was one who under mistake or ignorance of fact believed that land to be his. Article 2589, accordingly, applied to all others who claimed *animus domini*: persons acting under mistake of law, adverse possessors, and others similarly situated. But another view is sometimes seen in the Argentine cases, a more liberal view which would allow application of these articles in any case except where the work was done under some contractual or other obligation to the owner. A number of cases have followed this view, allowing recovery under 2588 to such as lessees, purchasers, and construction contractors who built on the land under contract with purchasers. When under this more liberal view such "nonpossessors" come within the scope of these articles, the "possession" test of good faith and bad faith becomes inapplicable.

In a leading case in the process of developing a new conception

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64 See id. at 165.
66 See Acuña, La Obligación de Indemnizar las Mejoras Utiles Autorizados en Materia de Locación, 74 J.A. 151 (1941).
of "good faith" to be applied with the expanded, liberal view of the article's scope, an action was brought by a lessee under article 2588 to recover for some vegetables and fruit trees planted and left on the land. It was argued that a lessee could not be a "possessor" at all, since he knew he was not the owner and therefore had no status either under 2588 or 2589. In holding that the lessee was within the scope of article 2588, the court said:

And I consider the plaintiff to be of good faith, because in my view, although generally one who plants or sows on the land of another is of bad faith, he is so because he does it against the express or presumed will of the owner, thus committing an abuse, since he usurps a right inherent in the title holder; but it is not possible to place in this category one who proceeds to sow or plant with the consent or authorization of the owner.⁶⁹

Many cases could be cited reflecting various views of this subject. The judge and scholar Salvat has consistently urged, at least since 1930,⁷⁰ that article 2588 applies, not just to possessors animo domini, but also to occupants who are mere holders. In the latter case, "good faith" refers to the "persuasion on the part of the builder of being lawfully invested with the right to build . . . ."⁷¹ Others have argued that article 2588 applies to anyone who builds, including a construction contractor who acts under contract with a tenant.⁷² Spota, for instance, holds that 2588 can apply to anyone: contractors, bailees, depositaries, gestors, and others. In such a case, his test of good faith looks to whether the builder, planter or sower has a well-founded conviction that some juridical relation authorized him to do the work.⁷³

It may seem curious that the Argentine courts have taken such an expansive view of the concept of "good faith," rejecting the possession test which had been applied by the French in construing their virtually identical provisions. The "backstop" provisions for the recovery of beneficial expenditures (empleo útil) and the general action for enrichment without cause, it may be thought, would protect the improver anyway, even if he could not come within the scope of articles 2588 and 2589. The probable explanation, however, is that one who acted under some kind of consensual arrangement with respect to his position relative to the land could not show the

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⁶⁹ 75 G.F. 314 (Cam. Civ. Cap. 1928), quoted in Lara, El Regimen de la Indemnizaci¢n de las Mejoras en la Locaci¢n, 3 REVISTA CRITICA DE JURISPRUDENCIA 378, 382 (1934). Volume 75 of Gaceta del Foro, which contains the text of the opinion quoted, could not be found in the Harvard Law Library.
requisite “absence of juridical cause” to make the action of *in rem verso* available. Thus his only hope of recovery might be under article 2589. The policy of encouraging land development is so strong in Argentina that the expansive interpretation is felt justified.\(^{74}\)

In cases where both parties are in “bad faith,” article 2590 says the situation is to have the same effect as in the case of good faith, and knowingly permitting the planting, sowing, or building to proceed without objection is expressly declared to amount to bad faith on the part of the land owner.

C. Improvements Other Than New Constructions

It was noted above that Argentine law distinguished “buildings” and “improvements.” Articles 2588 and 2589 apply only to the former. Provisions covering “improvements” and other expenditures appear in other parts of the code: in the section covering “possession” (articles 2427, 2428, 2430, 2440, and 2441) and in the sections dealing with “obligations to give” (articles 589 and 591). These articles are set out in the footnote.\(^{75}\)

\(^{74}\) See text accompanying note 84 *infra.*

\(^{75}\) Article 589: “If there are any improvements or increase which the debtor who possessed the thing in good faith has added thereto with his money or labor, or the labor of others for him, he is entitled to indemnity in the just value of the necessary or beneficial improvements, according to the evaluation thereof to be made at the time of restitution, provided he had been forbidden to make improvements. If the improvements are voluntary the debtor, even though a possessor in good faith, is not entitled to any indemnity whatsoever. If the debtor be a possessor in bad faith, he shall be entitled to the indemnity for the necessary improvements.” Article 591: “Necessary improvements are those without which the thing could not be preserved. Beneficial improvements are not only those indispensable for the preservation of the thing, but also those which are of manifest benefit to any possessor thereof. Voluntary improvements are those which constitute mere luxuries or are for purposes of recreation, or benefit exclusively the person who made them.” Article 2427: “The necessary or beneficial expenditures shall be paid the possessor in good faith. The special taxes levied on the immovable, the mortgages which encumbered it at the time he entered upon the possession, the money or materials used in necessary or beneficial improvements existing at the time of the return of the thing, constitute necessary or beneficial expenditures.” Article 2428: “A possessor in good faith may retain the thing until the necessary or beneficial expenditures have been repaid him; and even though he does not make use of this right and delivers this thing, these expenses are due him.” Article 2436: “If the possession is vicious, he shall pay for the destruction or deterioration of the thing, even though the owner could not have prevented it had it been in his possession. Nor shall he have the right to retain the thing on account of the necessary expenses in connection therewith.” Article 2440: “A possessor in bad faith is entitled to indemnity for the necessary expenses incurred in connection with the thing, and he may retain it until he has been reimbursed. A person who has stolen the thing does not enjoy this benefit.” Article 2441: “A possessor in bad faith may recover the cost of the beneficial improvements which have increased the value of the thing up to the amount of the higher existing
It will be seen that these provisions require a distinction between improvements that are "necessary," "beneficial" and "voluntary." The definitions of these contained in article 591 are applicable to those terms when they appear in other sections of the code, including article 2427.

It must first be noted that these provisions, unlike those concerning "building, planting or sowing," can apply to either real or personal property, but we will discuss them here in the real property context.

The parties covered by all of these sections are described in terms of "possession" in good or bad faith. The recovery prescribed in the different sections, however, appears to be different. In article 589 it is "the just value of the necessary or beneficial improvements (mejoras)" in the case of one possessing in good faith, and apparently the same measure of "indemnity" for "necessary improvements" by the one in bad faith. Article 2427, on the other hand, allows recovery for the "necessary and beneficial expenditures (gastos)" to the possessor in good faith; and articles 2440 and 2441 allow the possessor in bad faith recovery for (1) necessary expenditures (gastos) and (2) the cost of beneficial improvements (mejoras) up to the increased value of the thing, to be recovered out of the "fruits" of the land (for which he otherwise would have to account to the owner). "Voluntary improvements" can be removed if that can be done without damage.

These provisions appear to direct different measures of recovery in some cases that seem to be the same, and this has been the cause of much thought on the part of the commentators on the Argentine code. They have been extremely reluctant to conclude that the passages are contradictory. Of the theories proposed to reconcile them, the one with the strongest support currently is that adopted by the Supreme...
Court of Buenos Aires in *Brilla (suc.) v. Hermida*. In that case the plaintiff sued to recover land the defendant had occupied as a good faith possessor and on which, while in possession, she had made improvements. There was no issue as to the plaintiff's right to the land nor of the defendant's good faith. The only question was how much the plaintiff would have to pay for value at the time of restitution in an amount greater than the cost of the improvements. If article 589 governed the case, the measure defendant was to receive was the increase in value at the time of restitution. If article 2427 applied, it was "the money and materials used in improvements existing at the time of the restitution." Without considering whether these two tests really would produce different quantities, the court held that 2427 applied.

Article 589 foresees the situation in which the cause for the devolution of the land is an obligation resting upon pre-existing judicial relations: article 2427 foresees the situation in which the restitution of that paid arises from possessor relations that end as a result of a successful reivindicación [action to recover the property itself from the possessor].

What this means is that article 589 is applicable only where the "obligation to give" is an obligation consciously undertaken or contracted by the possessor; e.g. the obligation of one who holds as a depositario (one who holds the property—normally personality—under an agreement by which he undertakes to conserve it and keep it in his power until the owner shall ask for it) or comodatorio (one who receives property under an agreement allowing him the use of it, he being obligated to conserve it and return it at the time agreed). A lessee might also be within the terms of this article, but since expenditures by lessees are specifically covered by other code provisions, it is never applied to them. Article 2427 is applicable whenever the "obligation to restore" arises not from a contractual undertaking to that effect, but from the judicial declaration in an action for reivindicación, which may be brought for a great variety of reasons, e.g. to eject one tortiously occupying, or to get back property which was transferred under a sale or lease that has been nullified. Thus, under this view each section has its proper scope. Articles 589 and 2427 are not contradictory provisions covering the same thing. Of the two, only article 2427 would apply to the case of the mistaken improver.

In the provisions of articles 2427, 2428, 2440 and 2441 the term "possessor" is used in its strict sense. They purport to give a right of recovery for necessary expenditures both to the good faith and bad faith possessor. There is no apparent limitation

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80 Id. at 358 (opinion of Acuña Anzorena, J.).
to the amount of the other party's enrichment in the case of necessary expenditures, although by definition it could be said that the owner is enriched to the full extent of such expenditures, since they were necessary to preserve the thing and the owner has been saved that expense. The possessor in good faith can also recover his beneficial expenditures, apparently without limit. But the bad faith possessor, who, as noted above\textsuperscript{81} may be one who acted under mistake of law, can obtain reimbursement for beneficial improvements only up to the amount of the increase in value of the thing, and even for this he cannot get a judgment against the other party: he must get such reimbursement as he can from the fruits of the land by way of set-off against his liability to the owner for the fruits collected during the period of his possession. In this the Argentine law treats the bad faith possessor who has made beneficial improvements the way the common law (according to the traditional view) treats good faith improvers. It is to be noted that article 2441 refers to beneficial "improvements" (\textit{mejoras}) rather than "expenditures" (\textit{gastos}). The term "expenditures" as used in articles 2427, 2428 and 2440 is broad enough to include "improvements" (in fact this is expressly stated in article 2427). But it is not clear that "improvements" is broad enough to include all expenditures. Sometimes the two terms are used synonymously,\textsuperscript{82} but this is not always true, and the writers have debated the meaning of the terms in this context. In some situations the use of different terms probably was not intended to convey distinct meanings. Vélez simply used the word employed by the source from which he got the provision and within the same section of the code he may have drawn from various sources. If there is a difference, and "improvements" is a term of narrower scope than "expenditures," then a bad faith possessor may be denied even the limited recovery of 2441 for beneficial expenditures that are not also improvements.

A right of retention to secure repayment of what he is entitled to is granted to the good faith possessor for necessary and beneficial expenditures by 2428, and to the bad faith possessor for necessary expenditures by article 2440.

In summarizing the Argentine approach to the problem of the mistaken improver, the following points can be made:

1. One who acted under a mistake of fact, believing the land improved to be his, can recover the cost of any new constructions put on the land of another, up to the amount by which the value of the land was increased.

2. Even if his mistake was one of law, or if he realized he did not

\textsuperscript{81} Text preceding note 66 supra.

\textsuperscript{82} See discussion of "\textit{mejoras}" in 19 ENCICLOPEDIA JURIDICA OMEBA 526, 532-33 (1964).
own the land, but nevertheless had an honest and reasonable belief that he had a right to build, he can, under the liberal view of modern cases, recover for new constructions up to the increased value of the land.

3. One who, whether or not mistaken as to the ownership, made expenditures which were necessary to preserve the land and its pre-existing improvements, can recover them from the owner, and has a right to retain the possession of the land to secure payment.

4. One who possessed the land in the belief, based on a mistake of fact, that he owned it, and who made expenditures which were beneficial to the owner, although not necessary for the preservation of the land, can recover his expenditures, and has a right to retain the land to secure payment. One whose belief was based upon a mistake of law, however, can get credit for such beneficial expenditures up to the extent that the value of the land has been increased, to be set off against his liability for the fruits of his possession, but he cannot get a positive judgment in case the value of the beneficial improvements exceeds the fruits.

5. In any situation not covered by a specific code provision where one has conferred a benefit upon another by beneficial expenditures upon the other's land, recovery of the amount by which the value of the land was increased is possible under the general empleo útil provisions.

The dramatically different treatment of one who improves another's land in these two Western Hemisphere countries is in part explainable by the fundamentally different view civil law countries have generally taken with respect to the receipt of unsolicited benefits. In Argentina, as in France, Germany, and most other countries, there is no such reluctance to impose an obligation on one who did not voluntarily solicit a work or service as English and American courts have demonstrated. Through the negotiorum gestio concept civil law systems generally allow recovery of expenditures made by one who, although lacking actual authority, undertook to serve another's interests with intent to obligate the other therefor. A legal system that tolerates and even encourages intentional intervention into the affairs of another logically should be fairly sympathetic to one who was actuated by mistaken assumptions.

But the Argentine code and court decisions go even farther than most others to protect a land improver. This is demonstrated by the willingness to expand the concept of "good faith" as used in article 2588 to include persons other than "possessors" animo domini who built under mistake of fact. In this the Argentine judges and writers consciously departed from the interpretation given by French authorities which seemed too narrow to fit the special needs of Argentina.

83 See note 4 supra.
84 See text accompanying notes 68-72 supra.
In contrast to Europe, Argentina had vast land areas that needed to be developed and used. Public policy demanded the elimination of rules that could have a discouraging effect on that objective. The strength of this policy of encouraging building on the land is also reflected in certain provisions of the code that have not been treated here, most notably article 1535, which imposes on lessors a general obligation to pay for buildings and necessary and beneficial improvements put on by their lessees. The relative strength of this policy, as compared to that of protecting the exclusive prerogatives of land ownership, reveals another important difference in the premises underlying the Argentine and American approaches.

In view of these fundamental differences, the Argentine approach could not be copied in America (although Louisiana does take a somewhat similar approach, based upon provisions taken from the French code). But there are some things we can learn from it. One thing, which should be obvious but which American courts seem sometimes not to comprehend, is that the rule of accession, which says the owner of the land gets all improvements placed on it, does not say that he should get the improvements without paying anything. The Argentine code, like most others, clearly separates the question of title and the question of the obligation to pay. Some American courts have confused these issues and have denied recovery to a mistaken improver because to allow it would be to make the owner pay for something he already owns.

The Argentine code's distinction between new constructions and improvements added to existing structures has not been regarded as significant by American courts. The distinction is probably of less importance in countries that do not place such strong emphasis on

85 Article 1535: "When the lease is of lands in cities or rural communities, it is understood that the lease has been made with authorization to the lessee to build thereon, the necessary and beneficial improvements running to the account of the lessor." Commenting on this, the jurist Machado, writing in 1922 said: "There still are in our country great zones of undeveloped lands, and they will exist for many years to come, and the Argentinian legislature has had to regulate the leasing of them, enacting laws that are completely different from those that are in force in European nations, overburdened with population, where one cannot find an inch of ground that has not been subjected to the work of man." 4 MACHADO, COMENTARIO DEL CODIGO CIVIL ARGENTINA 296 (1922).

86 See, e.g., opinion of Murray, C.J., in Billings v. Hall, 7 Cal. 1 (1857), ruling unconstitutional the California betterments act. "That which, before, was mine, is by this act taken from me, either in whole or in part, for if I refuse to pay for the improvements which were put upon my land by a mere trespasser, and which were mine by the law, before the passage of the statute, I lose not only the improvements, but the land itself . . . ." Id. at 9. See generally Merryman, Improving the Lot of the Trespassing Improver, 11 STAN. L. REV. 466, 468-80 (1959), for a detailed discussion of this case and the unique California approach to the improver problem.
the development of vacant land as does Argentina. Likewise the Argentine distinction between mistake of fact and of law seems of doubtful value to us. Some courts have denied recovery for improvements where the improver's mistake was one of law instead of fact, but this seems utterly without logic, especially in view of the fact that the strongest policy element underlying recovery for improvers in America is to protect reliance on apparently valid titles. Title defects are as likely to raise questions of law as questions of fact.

The classification of improvements into the three categories of "necessary," "beneficial" and "voluntary" might have some usefulness in elaborating an unjust enrichment approach to the problem of the mistaken improver. The classification would be significant primarily in the matter of determining the proper remedy. The enrichment produced by "necessary" expenditures, i.e. those necessary to preserve the land, could be measured by the expenses saved the owner rather than merely the increased value of the land. "Voluntary" improvements, as those which would not necessarily be regarded as beneficial by any possessor of the land, should probably be regarded as removable but not compensable, i.e. the improver should be given an opportunity to remove them if he wishes, but the owner should not have to pay anything for them if the improver does not or cannot remove them.

The struggle of the Argentine courts with the "good faith" concept in cases involving new constructions also has some meaning for American courts. The Argentine courts carry the concept far beyond the mistaken improver, of course, but in doing so they have abandoned the notion that the improver must believe in his own title to the land and have concentrated instead on his belief in his right to build. Some American courts have in effect followed this kind of test, but more, as noted above, continue to require a belief in one's own title.

87 See, e.g., Holmes v. McGee, 64 Miss. 129, 8 So. 169 (1886).