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I. Mistake as to Ownership of Property

The most significant case during the Survey period is *Gulf Oil Corp. v. Forcum.*[1] The State of Tennessee condemned for highway purposes certain property including the location of a filling station. Defendant was lessee of this property and had installed its own tanks, pumps and other equipment. Plaintiff had the contract to construct the highway and was entitled under this contract to salvage condemned property. Refusing to allow defendant's agent to remove the service station equipment, plaintiff removed the equipment itself at considerable expense. When the condemnation proceeding was completed, defendant was awarded 2,000 dollars for the value of its leasehold, and 3,000 dollars for the reasonable costs of removing the equipment. It then sued plaintiff in replevin and recovered the equipment on the ground that it was personal property which had not been condemned.

The present action is to recover 3,000 dollars, as the cost of removing and storing the equipment. The lower court held for the plaintiff and awarded 1,000 dollars as the reasonable value. This was reversed by the court of appeals. First, it held that the condemnation and replevin actions were res judicata;[2] but then disregarding this holding it proceeded on to the position that the plaintiff could not recover anyhow. The lower court had stated that the defendant had been unjustly enriched. The court of appeals responded: "This may be true, but even if true, we think it is wholly immaterial; and

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1. 381 S.W.2d 521 (Tenn. App. W.S. 1964).

2. In the condemnation case, the plaintiff was not a party, but the court held that it was bound because in privity with the state. In the replevin case the court held that Gulf was entitled to the property and denied a lien on it for Forcum. The two cases clearly establish Gulf's right to the property, but it is a little difficult to see how they settled the separate problem presented in the present case, of whether Forcum should be compensated for the cost of removing the equipment.

especially so as this is a law case and not a suit in equity."[3] The reason given is that "the facts of this case do not meet the requirements of an implied contract." Most of the selections quoted deal with a contract implied in fact, which is an actual contract, and which was clearly not present here. If recovery is to be allowed, it is on the basis of quasi-contract, or "contract implied in law," an obligation imposed by the law to prevent the unjust enrichment of the defendant at the plaintiff's expense. The confusion of the two ideas here shows once again that the expression, implied contract, is very likely to be misleading and should be avoided in the interest of accurate terminology.[4] But the court in this case is also holding that an action will not lie in restitution for the unjust enrichment of the defendant.

No cases directly in point have been found. There is an analogy in the cases where one person has placed improvements on the land of another under the mistaken belief that he was the owner of the land. While the majority rule is that an action cannot be maintained to recover the value of the improvements, many courts do allow the action at common law and many states have passed so-called betterment statutes.[5] Tennessee follows the general rule in holding that a person who seeks the aid of equity to recover his property must compensate for the value of the improvements,[6] and that the value of improvements may also be set off against any rents and profits.[7] And the state has also held that when a railroad placed a depot on land it thought it owned and then had to take the land by eminent domain, the compensation paid to the owner would not include the value of the building.[8] Perhaps an even closer analogy may be drawn to the cases where one party cuts timber on land he thought he owned and takes it to market. It is held that the owner can replevy it there and need not pay for the costs of transporting it to market, but if he sues in trover and receives money, he can recover only the value of the timber where cut and not the value at the market.[9]

A composite picture is that while courts are somewhat hesitant to force a man to pay for improvements which he might not have

3. 381 S.W.2d at 527.

4. See, *e.g.*, WOODWARD, QUASI CONTRACTS § 4 (1913).

5. See RESTATEMENT, RESTITUTION § 42 (1937). The leading case allowing recovery is the opinion of Justice Story in Bright v. Boyd, 4 Fed. Cas. 127 (No. 1875) (C.C. Me. 1841). For relevant statutes in Tennessee, see TENN. CODE ANN. §§ 23-1328, -1330 (1956).

6. Howard v. Massengale, 81 Tenn. 577 (1884); Sequatchie Coal Co. v. Sunshine Coal & Coke Co., 25 Tenn. App. 604, 166 S.W.2d 402 (M.S. 1942).

7. See McKinley v. Holliday, 18 Tenn. 477 (1837).

8. Southern Ry. v. Pouder, 141 Tenn. 197, 208 S.W. 332 (1919).

9. Gaskins v. Davis, 115 N.C. 85, 20 S.E. 188 (1894).

wanted and which might prove a serious burden to him,[10] they will afford compensation if they can find a way of doing it without forcing an undesired benefit on him or if they can apportion the value of the benefit without putting a burden on him. The instant case seems to be one where that could have been done. In the first place, the defendant had to remove the fixtures in any event if he was to preserve them. This was not an unnecessary benefit. In the second place, the defendant had been paid by the state for this very purpose a sum three times the amount awarded to the plaintiff. There is no unreasonable burden placed on the defendant. The decision of the lower court seems quite reasonable, and might well have been sustained on principle, though there are no authorities directly in point.

II. Services Rendered

Two cases involve recovery in quantum meruit for services rendered. In *Slesinger v. Glatt*,[11] the defendant owned land which she had leased through the plaintiff, a real estate broker, to the DX Sunray Oil Co. for ten years, with an option to purchase for the same amount as that offered in any bona fide offer which the lessor was willing to accept. DX showing no particular interest in purchasing, defendant orally asked plaintiff to find a suitable purchaser. Plaintiff found a purchaser who offered 27,500 dollars; and defendant signed an agreement to sell, subject to the DX option. Defendant gave the requisite notice to DX and it then decided to exercise its option. Defendant refused to pay a commission to the plaintiff. In a suit for the commission the chancellor below held for the defendant on the ground that the plaintiff knew of the option and therefore did his work subject to the risk that it would be exercised.

The court of appeals reversed. It indicated first that the oral contract should probably be construed to allow recovery here;[12] but then assumed that plaintiff's performance did not come within the terms of the actual contract, and held that plaintiff might recover on an "implied contract." This is obviously quasi contract because the court declared: "In our opinion Mrs. Glatt would be unjustly enriched to be permitted to retain the benefits of the services of Mr. Slesinger without paying a reasonable compensation therefor."[13] It took judicial

10. For a strong expression of this position, see Isle Royale Mining Co. v. Hertin, 37 Mich. 332 (1877).

11. 373 S.W.2d 220 (Tenn. App. W.S. 1962).

12. This would depend first on whether the broker's undertaking was merely to find a willing purchaser or to arrange for a consummated sale, and second on whether the knowledge of the lessee's option meant that the claim for commission was subject to it too.

13. 373 S.W.2d at 225.

notice that 5 per cent (the amount of the oral contract) was a reasonable compensation; but held that there would be no recovery for a second lot which the plaintiff's purchaser had offered to buy but which was not in the option and which was not sold to anyone.

In *Kennon v. Commercial Standard Insurance Co.*,[14] the plaintiff performed services in investigation of a workman's compensation claim for defendant. Apparently there was no agreement as to the compensation, and defendant submitted a bill for 3,005.62 dollars, which defendant refused to pay. There was much testimony as to the value of the services and the court of appeals modified the chancellor's figure of 2,500 dollars and set it at 1,500 dollars, saying that when there is no agreement as to the compensation, the plaintiff recovers in quantum meruit for the reasonable value of the services. It is not clear whether the court regarded this as a contract implied in fact to pay the reasonable value, or as a quasi contract based on unjust enrichment.

III. RESCISSION

Kyker v. General Motors Corp.[15] was an action for rescission of a contract of sale for an automobile, brought against the local dealer and the manufacturer. The jury found for the dealer and against the manufacturer. The supreme court recognized that rescission is an appropriate remedy for breach of warranty, but held that it could not be available here for two reasons. First, the Sales Act, with its provisions, applied only to the buyer and seller and not to the manufacturer,[16] and second the jury verdict was inconsistent. If there was a verdict for the dealer on the ground that he did not breach the warranty, then the manufacturer could not have breached it either.

IV. LEGAL COMPULSION

Southern Coal & Coke Co. v. Beech Grove Mining Co.[17] involves a suit for indemnity. The plaintiff acted as sales agent for the defendant in submitting a bid to the Union Carbide Nuclear Co. for the supply of coal, filling a producer's statement. The contract was subject to the Walsh-Healey Act requiring the contractor to pay a minimum wage. Defendant paid more than this amount while it was

14. 376 S.W.2d 703 (Tenn. App. W.S. 1963).
15. 381 S.W.2d 884 (Tenn. 1964).
16. This action was under the Uniform Sales Act which was then in effect, and which specifically provides for rescission. The Uniform Commercial Code, now in effect, also provides for this type of relief. See TENN. CODE ANN. §§ 47-2-601, -711 (repl. vol. 1964).
17. 381 S.W.2d 299 (Tenn. App. E.S. 1963).

strip mining, but later, when it had to engage in deep mining, it paid less. The United States Government charged a violation of the act, and plaintiff, under a non-delegable duty because of its producer's statement, had to pay the statutory penalty. In this action for indemnity, the court of appeals gave credence to the plaintiff's testimony that it did not know of the defendant's violation, and held for the plaintiff. It expressly found that the factual situation came within section 76 of the *Restatement of Restitution* which provides:

> A person who in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct.

As between the two parties, it said, the defendant "should bear the brunt." It also held the clean-hands doctrine inapplicable.

In three cases a taxpayer brought action to recover taxes which it had been required to pay and which it claimed were not properly imposed.[18] The court recognized that this was an appropriate form of relief and held for the taxpayer in two of the cases.[19] Somewhat similar is another case involving a suit by members of a cooperative for a refund of excess charges for electric current.[20] The court held that restitution would not be available until they had exhausted their remedies within the cooperative.

V. Receipt of Money for Another

In re Russell's Estate[21] involved a suit by a niece against her uncle's estate on the ground that he had collected rents from her property. The court found as a fact that he had collected the rents and had not paid them over, and it granted restitution. This comes within section 124 of the *Restatement*.[22]

18. Gallagher v. Butler, 378 S.W.2d 161 (Tenn. 1964) (income tax on stock); Genesco, Inc. v. Butler, 377 S.W.2d 933 (Tenn. 1964) (excise tax); Tennessee Trailways, Inc. v. Butler, 373 S.W.2d 201 (Tenn. 1963) (privilege tax).

19. Genesco, Inc. v. Butler, *supra* note 18; Gallagher v. Butler, *supra* note 18.

20. Davis v. Appalachian Elec. Co-op., Inc., 373 S.W.2d 450 (Tenn. 1964).

21. 373 S.W.2d 226 (Tenn. App. E.S. 1961).

22. "A person who, acting or purporting to act on account of another, has received property from a third person for the other, is under a duty to account to the other for such property." Restatement, Restitution § 124 (1937).