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QUASI-CONTRACTS-ASSUMPSIT FOR USE AND OCCUPATION OF LAND

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QUASI-CONTRACTS—ASSUMPSIT FOR USE AND OCCUPATION OF LAND—Defendant had a right of way over plaintiff's land limited to the transportation of coal mined on that land. Plaintiff seeks to recover for use and occupation of his land by defendant when he exceeded his right by transporting coal mined on adjacent property. *Held,* the plaintiff is entitled to quasi-contractual recovery of the value of the benefit to defendant based on the prevailing rate of purchase of right of way for transportation of coal over another's land. *Raven Red Ash Coal Co., Inc. v. Ball,* (Va. 1946) 39 S.E. (2d) 231.

Except as qualified by some jurisdictions that require a subsequent sale or exchange,[1] generally when property has been taken, and the tort-feasor has received a benefit therefrom, the owner is allowed to waive the tort and recover

[1] Jones v. Hoar, 22 Mass. (5 Pick.) 285 (1827); WOODWARD, QUASI CONTRACTS, § 273 (1913). Although eleven states still follow the rule of Jones v. Hoar, the limitation has been rejected in a growing number of states; see cases collected in 97 A.L.R. 259 (1935). The RESTITUTION RESTATEMENT, § 128 (1937) rejects the distinction. See also Am. Smelting & Ref. Co. v. Swisshelm Gold Silver Co., (Ariz. 1945) 160 P. (2d) 757, and Woodruff v. Zaban & Son, 133 Ga. 24, 65 S.E. 123 (1909).

on an implied promise.[2] Although the majority of courts permit the owner to recover for the value of the use of chattels where he has regained them,[3] the traditional view denies the quasi-contract remedy for the tortious use and occupation of land,[4] except where the elements of an implied in fact contract are present [5] or the tort-feasor has severed and converted something from the soil.[6] Denial of the remedy is laid in part to historical and procedural [7] reasons; but the concept of benefit is the primary factor, for although the policy is to prevent unjust enrichment, the courts tend to require a tangible gain [8] with a corresponding deprivation suffered by the owner [9] when dealing with the use of land, disregarding the fact that the remedy is available for the use of chattels.[10] If the trespasser has simply used the premises of another to save himself inconvenience or even expenditure of money, the owner cannot maintain an action of debt or assumpsit.[11] Where the trespasser's occupation has been to the ex-

[2] RESTITUTION RESTATEMENT, § 128 (1937); WOODWARD, QUASI CONTRACTS, c. 20 (1913); 19 YALE L. J. 221 (1910).

[3] Fanson v. Linsley, 20 Kan. 235 (1878); Jansen v. Dolan, 157 Mo. App. 32, 137 S.W. 27 (1911); and cases cited in RESTITUTION RESTATEMENT, Reporters' notes, § 128, comment i (1937).

[4] Ames, "Assumpsit for Use and Occupation," 2 HARV. L. REV. 377 (1889); WOODWARD, QUASI CONTRACTS, § 284 (1913); Phillips v. Homfray, 24 Ch. Div. 439 (1883); 30 MICH. L. REV. 1087 (1932). See cases collected in RESTITUTION RESTATEMENT, Reporters' notes, § 129 (1937).

[5] Historically assumpsit was not available for the collection of rent, and even with a statute [11 Geo. 2, c. 19, § 14 (1738)] permitting the remedy against a tenant upon a parol demise, the courts restricted its use to cases where elements of implied in fact contracts (virtually that of landlord-tenant relationship) were present. See WOODWARD, QUASI CONTRACTS, § 284 (1913), specially the collection of cases p. 456, note 4; Judge Cooley's article in 3 ALBANY L. J. 141 (1871); 30 MICH L. REV. 1087 (1932); Adsit v. Kaufman, (C.C.A. 9th, 1903) 121 F. 355; Hayes v. Moore, 127 Minn. 404, 149 N.W. 659 (1914); Cavanaugh v. Cook, 38 R. I. 25, 94 A. 663 (1915).

[6] The current authorities disclose no further developments in cases where there has been a tortious removal of coal, ore, stone, or timber or the appropriation of forage by trespassing cattle, than as indicated in the collections of cases in 30 MICH. L. REV. 1087 at 1091 (1932); WOODWARD, QUASI CONTRACTS, § 283 (1913); Downs v. Finnegan, 58 Minn. 112, 59 N.W. 981 (1894).

[7] It is argued that assumpsit for use and occupation, being a personal, transitory action, is not suited for the trial of title; but that should not deprive an owner's use of the remedy where title is not disputed. For example, see Parks v. Morris, Layfield & Co., 63 W. Va. 51, 59 S.E. 753 (1907); Quinn v. Smith, 49 Cal. 163 (1874); King v. Mason, 42 Ill. 223 (1866); Downs v. Finnegan, 58 Minn. 112, 59 N.W. 981 (1894).

[8] Phillips v. Homfray, 24 Ch. Div. 439 (1883).

[9] ". . . the facts must show, not only a plus, but a minus quantity," KEENER, QUASI CONTRACTS 163 (1893); 22 VA. L. REV. 683 (1936).

[10] See cases cited supra, note 3.

[11] Downs v. Finnegan, 58 Minn. 112, 59 N.W. 981 (1894); Chafin v. Gay Coal & Coke Co., 113 W. Va. 823, 169 S.E. 485 (1933); cases cited in 30 MICH.

clusion of the owner, damages in a tort action are measured by the reasonable value of the use and occupation of the land;[12] but if the use is not exclusive, as in the case of an unauthorized use of an easement, recovery is limited to nominal damages in the absence of a showing of special injury.[13] Thus in addition to the other reasons for waiver of tort and resort to quasi-contract,[14] there is this inadequacy of recovery. Where the only objection lies in the concept of benefit, two remedial avenues seem to be open to the courts: to consider the value of the use as a marketable item and determine the benefit on that basis [15] or to recognize the unjust enrichment of the trespasser as a sufficient basis for recovery.[16] The dissent in *Phillips v. Homfray* [17] and the approval of the decision in *Edwards v. Lee's Administrator* [18] expressed by the reporter of the *Restatment of Restitution* [19] can well serve as an impetus for a swing away from the general rule toward allowing quasi-contractual recovery for the use and occupation of land.[20]

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L. REV. 1087 (1932) and RESTITUTION RESTATEMENT, Reporters' notes § 129 (1937).

[12] Cutter v. Waddingham, 33 Mo. 269 (1862); WOODWARD, QUASI CONTRACTS 457 (1913).

[13] Appleton v. Fullerton, 67 Mass. (1 Gray) 186 (1854); 28 C. J. S., Easements, § 103; 14 Cyc. 1215 (1904).

[14] The purpose behind choosing the quasi-contract remedy is sometimes an influencing factor in determining the availability of the remedy. Some of the reasons are: privilege of counterclaim and set-off [Fanson v. Linsley, 20 Kan. 235 (1878)]; attachment; survival of actions [Kramer v. Eysenbach, 186 Olka. 234, 96 P. (2d) 1049 (1939)]; longer statute of limitations [Bicknell v. Garrett, 1 Wash. (2d) 564, 96 P. (2d) 592 (1939)]; actions against government; proof of claims in bankruptcy [37 A.L.R. 1442 (1925)]; jurisdiction of inferior courts [15 MICH. L. REV. 332 (1917)].

[15] See De Camp v. Bullard, 159 N. Y. 450, 54 N.E. 26 (1899); but cf. Carson River Lumbering Co. v. Bassett, 2 Nev. 249 (1866).

[16] See Edwards v. Lee's Admr., 265 Ky. 418, 96 S.W. (2d) 1028 (1936), discussed in 37 COL. L. REV. 503 (1937); 31 ILL. L. REV. 680 (1937); 35 MICH. L. REV. 1190 (1937). See 48 HARV. L. REV. 485 (1935), for a note on an exploratory trespass case.

[17] 24 Ch. Div. 439 (1883). The considered dissent of Lord Justice Baggallay asks why recovery should depend on the diminution of the value of the owner's property when the gist of the action is to prevent the unjust enrichment of a wrongdoer who has benefited whether there has been a diminution or not.

[18] Supra, note 17.

[19] RESTITUTION RESTATEMENT, Reporters' notes § 129 (1937), "The decision [in Edwards v. Lee's Admr.] is a welcomed departure from the result in Phillips v. Homfray. . . ."

[20] For a list of cases wherein such recovery was allowed, see RESTITUTION RESTATEMENT, Reporters' notes, § 129 (1937) and 30 MICH. L. REV. 1087 (1932).