Lee Brobst's

EYE OF THE EAGLE

THY WILL BE DONE IN ASSOCIATION

NEWSLETTER

Volume I No. 9 January 1990

THE PUBLIC TRUST OF 1933

Almost everyone has at one time in his experience known of a case in which property was placed in the hands of a person called a trustee, to be held by him, not for his own use, but for that of other persons, very often children or married women. The person for whom property is so held was called, by lawyers, cestui que trust, or more briefly, the cestui. In modern times the term cestui que has became known as the beneficiary of the trust although in some jurisdictions the term cestui que is still used. As might perhaps be expected, the practice of creating trusts is a very ancient one in our legal system. Indeed, it is not possible to determine at what time people in England first began to do so. When trusts first appeared in English law they were known as uses, from the fact that the person in whose hands the property was placed held the same for the use of others and not for himself. The first legal records we have of these shows them to be a result of established and well known usage. For a long time, however, the courts refused to recognize that the beneficiary, or cestui que use, had any rights enforceable in court. In what follows, we shall trace briefly the history of these uses and their development into the modern trusts.

The reasons which led to the attempts to separate the legal ownership of property from its beneficial use were more than one. Chief among them, probably, was the desire of the ecclesiastical corporations to escape from the results of the statutes of mortmain which forbade the transfer of real estate to corporations as distinguished from natural persons. To evade this, the devise was adopted of having a donor, who wished to give the ecclesiastical corporation the benefit of lands, transfer the property to another natural person, the conditions of the transfer being that the transferee should hold the same so

mortmain was put an end to by the statute of 15 Richard II (1391), c. 5, but other reasons led to a continuance of the practice of conveying land to the uses of others than the transferee.

For a considerable time, as already noted, the beneficiary use had no redress in any court, if the transferee to uses failed to perform his agreement by permitting the beneficiary to have the use of the land. It seems that for a time, probably until forbidden by statute, the ecclesiastical courts undertook to enforce the conscientious obligation under which the feoffee (pronounced fee-e; to whom a fee or service or duty is conveyed) to uses stood. The term feoffee is no longer used as it has been replaced by the term trustee. After a time, however, the chancellor, the growth of whose jurisdiction as a court of equity to compel people to do what was fair and equitable and just, began to recognize the duty of the feoffee to uses to do as he had agreed. It is very probable that the recognition of the rights of the beneficiary use was aided by the fact that the early chancellors were, as we have already seen, ecclesiastics and so more or less acquainted with the Roman or civil law. In that legal system there existed certain legal relationships somewhat similar to the one the chancellor was here asked to recognize. In any event, it is known that as early as the reign of Edward III (1326-77) the practice of conveying land to uses was in very general use.

The recognition by equity of the rights of the beneficiary did not in any way effect the legal ownership of the feoffee to uses: "The feoffee to uses is alone recognized by the common law as entitled to the land. It is from him that every alliance who is to take a legal interest must receive his title; he, and he only, is the lord; his reason alone is the cause of forfeiture; for his debts alone can land be taken in execution. The laws knows nothing of any third person who is free from the burdens while he reaps the profits of the tenancy. Supposing however, that the feoffee attempts to exercise his legal right by alienating or charging the lands, he would, at the time we are now speaking of, be restrained from doing so, by the extra-legal, or, if the expression be allowed, supra-legal power of the chancellor- a power as been seen, stronger than the law. Further, the chancellor having power not only to restrain wrong doing, but to command the performance of acts, would order the feoffee to do any lawful acts of disposition which the beneficiary use may require of him. He would be constrained to convey his legal interest to beneficiary use or his heir, or to a purchaser from him; to convey to the person named in the beneficiary use's will; to make the provision required by him for his family; to made a portion for his wife, or for payment of his debts; and to prosecute all actions necessary for the protection of beneficiary's interest".

In other words, the rights of the beneficiary use were not an estate in the lands themselves, but only a personal right against the feoffee that he should do his duty by keeping his agreement. This duty the chancellor compelled the feoffee to perform, by ordering him, in the name of the king, to do so, and punishing him for contempt if he failed to obey.

At first the chancellor did not see how anyone except the original feoffee, i. e., the one who promised to do so, could be compelled to allow the beneficiary to have the benefit of the lands, and so the heir of the feoffee, or a transferee by conveyance from him, held the land free from the use. Further consideration, however, led later chancellors to see that it was inequitable for an heir of a feoffee to uses, who had paid nothing for his legal title to the land, to keep it for his own use, and so they imposed upon him a similar personal duty to permit the beneficiary to have the benefit of it. Naturally the same result had to be reached in the case of a donee, to

whom the feoffee to uses had made gift of the land. The same considerations led to the same results on the case of a purchaser for a value of the legal interest who took the conveyance of the same from the feoffee with knowledge of the equitable rights of the cestui. In the case however, of one who, without notice of the equitable rights of the beneficiary use, purchased for value the legal interest from feoffee to uses, the chancellor saw nothing inequitable in permitting him to enjoy the legal rights of ownership thus innocently acquired, and so refused to impose upon him any duty to hold the property for the former beneficiary use. The latter's only remedy in such a case was against the feoffee personally.

We have already described one of the simplest modes of creating a use, viz., A, legal owner in fee simple, makes a feoffee (conveyance) to B and his heirs (i.e., in fee simple), to the use of C and his heirs. In other cases, uses arose which were based upon a presumed intention of the parties to a transfer of land. If A without consideration transferred his land to B and his heirs, the chancellor at this period of our legal history presumed, since that was usually the case at this time, that the intention was that the use should remain, or result, to A. This presumption was one of fact, and could be rebutted by evidence showing an intention that the use should go to B along with the legal title. The payment of a consideration, or the fact that B was a near blood relative of A, served to rebut the resumption. At this time, in all the cases supposed, the transfer of the legal title to B required the delivery of the possession of the property to the transferee, i. e., "feoffee " with the "livery of seisin." Uses could, however, be created without this transfer of possession. If A covenanted to stand seised to the use of B, and B were a sufficiently near blood relative, or a consideration in the shape of money was given for the covenant, the chancellor would compel A to keep his covenant; in other words B became the beneficiary use. If there were a valuable consideration (money), a promise to stand seised, through not by deed (not under seal), was sufficient to raise a use in favor of the promisee. This form usually appeared as a "bargain and sale," i.e., A, the legal owner, agreed with B, the purchaser, for the sale to the latter of the land. In such a case, the seller by virtue of the bargain and sale was held by the chancellor to be seized to the use of the bargainee.

In determining the duration and devolution of the interest of beneficiary use, the chancellor followed the analogy furnished by legal estates in land. For example, if land were transferred to B and his heirs, to the use of C and his heirs, C would have an "equitable estate in fee simple," just as B had a legal estate in fee simple. Similarly, on the death of beneficiary use, the beneficial interest would go to his heirs, if a legal estate of similar duration would, for example in the case of the fee simple given above. On the other hand, if the feoffee were to hold to the use of C for ten years, the rights of C, if he died before the expiration of ten years, would pass to his executor or administrator, just as would a legal estate for years. We should note, however, that equity denied dower, dower was a old common law term whereby the law made provisions for a widow to receive lands and tenements of her late husband for the support of her children and herself; and curtesy to the husband of beneficiary use. Curtesy being where the husband was entitled to his late wife's lands and tenements.

It is said that at the time of the Wars of the Roses (1455) the greater part of the land in England was held on feoffee to uses. As already pointed out, one of the early purposes which the creators of uses had in mind was the evasion of the statutes of mortmain, put an end to by the statute of 1391 previously cited. Other purposes were the defrauding of creditors, who could levy on the legal interest only, and

not on the use. This was ended by a statute of 50 Edward III c, (1376). Still another purpose was to enable one who had wrongfully disseised another of land to prevent the rightful owner from recovering it. This was accomplished by transferring the land to some great feudal lord whom it would be difficult to oust, and who would consent to hold it for the disseisor. This also was later prevented by statute 1 Rich. II c. 9 (1377). Finally, the feoffee to uses aided the tenants of lands to escape many of the results of the feudal system of tenures, such as forfeiture of lands for treason, etc. If the one guilty of treason held only the use, no forfeiture was incurred, as the loyalty was due only from the legal owner, even through the one having the use was in possession and actually enjoying the land.

Owing to the recognition and enforcement of uses by the chancellor, the one for whose use land was held came to enjoy nearly all the benefits of ownership without the corresponding burdens. This being so, beneficiary use was not inaptly described as the "beneficial owner" as distinguished from the feoffee to uses, the legal owner. In the later part of the fifteenth century two statutes made attempts to remedy some of the evils resulting from this separation of legal from beneficial ownership 1 Rich. III c. 1 (1483) ; and 4 Hen VII, c. 17 (1488), but they had little effect as compared with the great statute of uses of 1536-27 Hen VIII, c. 10 passed in 1535 and effective in 1536 which had for its object the reunion of the beneficial with the legal ownership. The statute provided that when ever a person stood seised of any interest in lands for the use of other persons, the ones having the use or beneficial interest "shall from henceforth stand and be seised, deemed, and adjudged in lawful seisin, estate, and possession of and in the same," so that legal estate previously vested in the persons seised to uses should vest in the one who were entitled to the use.

Had the statute had its intended effect, the distinction between the legal ownership and the beneficial ownership would have been annihilated. Unfortunately, as is so often the case, the statute not only failed to carry out its purpose, but produced a large number of unforeseen and very important results. In fact, what may be called the "modern law of real property and the highly technical and intricate system of conveyance which still prevails (in England) dates from the legislation of Henry VIII."

As intimated on the preceding subsection, the statute of uses did not have the desired effect. In the first place, it did not apply to personal property. In the second, it applied only where one person stood seised for another's use. As the common law did not ascribe seisin to one who held a term of years, it follows that if A, seised in fee of Blackacre, raised a term of years, however long, vesting the same in B, to the case, i. e., did not "execute the use" and vest the legal interest in the term of years in C and the others, as would have been the case had A conveyed a freehold interest (a life estate or fee simple, for example) to B. In the third place, by a rather curious bit of scholastic reasoning, it was held that the statute exhausted itself in executing one use, and that if there were a "use upon a use," the second was not covered by the statute. Concretely: conveyance to A to the use of B to the use of C, after the statute, resulted in the legal interest passing to B, and in the use vesting in C. In the fourth place, whenever the one in whom the legal estate was vested had any active duties to perform, such as managing the property, collecting the tents and profits, and paying them over to the ones for whose benefit he held the land, the statute again did not apply. Just when the grantee of the legal interest has active duties, and so the title remains in him, it is not always easy to determine. If it be found to be such, however, the distinction remains between the legal title and the beneficial or equitable interest, and this

brings us to the modern trust.

The modern trust is in reality nothing but a development of the old use. The cases in which active duties were imposed upon the grantee to uses were not covered by the statute, and the grantee to uses were not covered by the statute, and the rights of the one for whose use the property was conveyed were still enforceable only in equity by the chancellor's decree bidding the grantee to perform the conscientious obligation which he had undertaken. The active uses came to be called trusts, and it is with them that we have to deal. Many, indeed most, of the old rules as to uses still applied, but to some extent departures were made, due to the attempts of equity more and more to treat the "equitable" or beneficial ownership" as much like real ownership as possible. For example, it was held, though not without a struggle, that the husband of the beneficiary trust was entitled to an estate by the curtesy in the equitable interest; but, illogically, dower was refused to the wife of the beneficiary trust. With these matters of detail, however we shall deal later. Strictly and in essence, the modern trust is the lineal descendant of the old use, and partakes of the same fundamental characteristics. The trustee owns the property, both at law and in equity, in spite of loose language used at times by the courts which seems to indicate the contrary; and the right of the beneficiary is, in essence, to have the chancellor, by acting in personam, compel the trustee to perform this conscientious obligation. That this is true will come out more clearly as we proceed with the discussion of the rights of the beneficiary with reference to the property, as against both trustee and third persons.

Now that you have a brief outline of the origin of trusts; let the reader bare in mind that of the year of 1933, the people as a nation have joined in a private trust in order to create public debt. This trust although private has become public because 51% of the people voluntarily consented to conditions that created this public trust. Although the term beneficiary is used and is probably a loose term, it has many other names but, let us proceed to see if we can put the illusive puzzle together.

DEFINITION OF FUNDAMENTIAL TERMS IN A PUBLIC TRUST

Editors Note: Due to the rather lengthly and complex nature of the subject of Trusts, Contracts, Quasi-Contracts, and Equity; the next series of newsletters will deal almost entirely upon these subjects. Following these subjects will be the most important subject of all and that will be the substance of mother earth herself, the LAND. After which we will go into review of the various subjects we have been discussing in the past and try to gain a more absolute grip upon our UNDERSTANDING. It is hoped the reader will gain a in depth UNDERSTANDING of how the law operates so that he or she will be able to propell themselves light years ahead in order to cope with any given situation.

A trust is a fiduciary relationship in which one person (14th amendment citizen) is the holder of the title to property (real or personal) subject to an equitable obligation to keep or use the property for the benefit of another called beneficiary.[1]

---

[1] "A trust is an obligation imposed, either expressly or by implication of law, whereby the obligor is bound to deal with property over which he has control for the benefit of certain persons, of whom he may himself be one, and any one of whom may enforce the obligation." Hart, What is a Trust? 15 Law Quartley Rev., 301.
"A trust may be defined as a property right held by one party for the use of another." Keplinger v. Keplinger, 185 Ind. 81, 113 N. E. 292, 293.

The settlor of a trust is the 'person or 'persons' who intentionally causes the trust to come into exhistence.

The trustee, 14th amendment 'person', who holds title for the benefit of another.

The trust property is the property interest which the trustee holds subject to the rights of another. The trust property being the res which will be dealt with later in the article.

The beneficiary is the 14th amendment 'persons' for whose benefit the trust property is to be held or used by the trustee. In other words, everything is held in a communal pool whereby all 'persons' subject to either withdraw or deposit from this pool to be administered by the board of elders called the congress or the state legislatures and enforced by their administrative courts of executive equity which are 14th amendment citizens also.

The trust instrument is the sealed instrument called a birth certificate which is a unilaterial offer to you to become a beneficiary of the public debt and all that is needed is the documentary evidence that you create to make you a 'person' (trustee) subject to the 14th amendment whereby; property interests are vested in a beneficiary.

Some definitions of the trust seem concerned rather with the duty or obligation of the trustee, or the right of the cestui, than with the trust. The trust in its modern sense is conceived to be the relationship or status in which are concerned certain property and persons, and incidental to which are certain rights and duties. The whole bundle of property, persons, rights, and duties makes up the trust. It is often said that a trustee holds the trust property "subject to a trust," but it would seem to be more accurate to state that he holds it subject to the duties of a trustee. See Restatement, Trusts, Second, @2.

The trusts treated herein should not be confused with the business monopolies or combinations called "trusts," or with the offices which are loosley called "positions of trust." The monopolistic trusts were orginally so called because of the stock of the combining corporations was transferred to technical trustees to accomplish a centralization of control. But !, and I use the word but very loosely, as we will learn, the Republic of the United States of America has been replaced to become a business trust to be called EXON U.S.A. and the President is the chairman of the board.

The relation between trustee and beneficiary is particularly intimate. The beneficiary is obliged to place great confidence in the trustee. The trustee has a high degree of control over the affairs of the beneficary. The relation is not an ordinary business one. The court of equity calls it "fiduciary", and places on the trustee the duty to act with strict honesty and condor and solely in the interest of the beneficiary. There are many other fiduciary relations, for example, guardianship and executorship.

It should first be noticed that a specific thing or things and specific property interests therein are always involved in the trust. In some relations men only, or men and property, may be involved, for example, in agency, where A may be the agent of B for the performance of personal services, which have no connection with any property, or no connection with any particular property. But the trust presupposes identified things, tangible or intangible, and ascertained interests therein, to be held by the trustee. The trust property is sometimes called the trust res, the corpus, or the trust principal or subject-matter of the trust.

It is sometimes said that the legal title to the trust property is always in the trustee. His title may be a legal or an equitable one, dependent on the nature of the title which

the settlor has seen fit to give him. Thus if the settlor has a fee simple estate in certain lands, and conveys his interest to A to hold in trust for B, A, the trustee, will be seized of the legal estate; yet if the settlor has contracted in writing to buy land which he has paid the purchase price, but a deed of which he has not yet received and the settlor transfors his interest in the land to A in trust for B, A, the trustee will hold merely the equitable title of the contract vendee of the land. It is because of this possibility of legal or equitable ownership that the definition given above merely states that the trustee is a title-holder, without regard to the court on which his title will be recognized. In a great majority of trusts, the trustee has the legal title to the trust property.

It is customary to think of three persons or classes of persons as connected with every trust, namely, the settlor, the trustee or trustees, and the beneficiary or beneficiaries. But if the settlor declares himself a trustee, settlor and trustee are one and the same person, and a trust may exist with only two parties. Because a man cannot be under an obligation to himself, the same individual cannot be settlor, trustee, and beneficiary, and the persons involved in the trust can never be less than two. But a sole trustee may be one of a number of benficiaries, and one of several joint trustees may be the sole beneficiary.

In some trusts there is no settlor. These are the implied trusts created by the law for the purpose of accomplishing justice and are called "constructive trusts". In these constructive trusts no individual intentionally brings a trust into being. The court gives life to the trust. The acts of one or more persons are not settlors. Their acts merely afford the reasons which the courts give for declaring the existence of the trust. Hence, in the definition of the word "settlor" given above the word "intentionally" is used, so that the doers of acts which unintentionally result in the declaration of a trust by a court may not be included within the class of settlors.[2] The settlor is also sometimes called the creator of the trust, the donor, or the trustor. The beneficiary of a trust is the person for whose benefit the trust is created and who is equitably entitled to its advantages. Under older terminologly he was called the cestui trust or the cestui, and this language is still used by some courts, but corporate fiduciaries and other professional trust men employ the word beneficiary almost exclusively.

Although in some cases trusts may be, and are, created orally, they are generally based on a written document which describes the trust property, conveys interests in it, names the trustee, names or describes the beneficiaries and fixes their interests. This document generally is called the "trust instrument", and the details as to powers, rights and duties of the trust parties are called the "trust terms".

The trustee holds the property "for the benefit of" the beneficiary. It is unnecessary now to consider how the beneficiary may obtain that benefit. The methods vary greatly, according to the terms of the particular trust. In one case the trustee may have no duty, except to hold the property, and the beneficiary may have no duty, except to hold the property, and the beneficiary may take the profits directly. In another instance the trustee may be charged with the obligation of detailed management, and the beneficiary may receive the benefits indirectly.

The duties of the trustee may be enforced by the beneficiary. This quality distinguishes the trust in some jurisdictions from certain possible contracts. Thus, if A promises for B, for a consideration running from B to A, that he (A) will deliver over certain property to

---

2 The reader is urged to make a mental note of this type of print. It has importance in putting the puzzle together as it relates to future articles. on trusts.

C, C in some jurisdictions might be unable to enforce the performance of A's promise because C is a stranger to the contract. But if A declares himself a trustee of property for C, C everywhere may enforce the trust against A, regardless of privity or of knowledge of consent by C. This quality of enforceability by the beneficiary, notwithstanding a lack of privity, is a characteristic of the trust.

The trustee's obligation is said to be "equitable". Originally it was recognized only by the English court of chancery, which alone administered the rules and applied the principles of equity. Many writers defining the trust make enforceability in a court of chancery or equity a part of their definition. But in the present state of the law it is deemed preferable to define the trustee's obligation as equitable, and to omit any reference to the court in which this obligation may be enforced. In most American states the separate court of chancery has been abolished and both legal and equitable obligations are enforced in the same court, but in a few states the separate court of equity is maintained. The trustee's obligation is based on equitable principles, whether enforced by a court having both legal and equitable jurisdiction, or by a court of law enforces the obligation of the trustee to the beneficiary. It seems wiser to omit all reference to the forum of enforcement.

Next month, Express Trusts.

QUASI-CONTRACTS

continued from December

The action then in this class of cases is brought upon the theory that the money received by the defendant if received in exchange for the plaintiff's property and in equity should be paid to the plaintiff. It follows from this that the right to bring an action for money had and received does not accrue to the plaintiff until the defendant has sold the property and received the money for it, the wrongful act for which the action of assumpsit is brought in this case being the failure of defendant to pay to the plaintiff the money thus received. This fact has an important bearing upon the running of the statute of limitations. For example, if we suppose that the sale by the defendant and the receipt of the money does not take place until two or three years after the original conversion, the action for money had and received does not accrue until the receipt of the money. According to the general principals covering the applications of the statute of limitations, the time for the running of the statute is computed from the date upon which the plaintiff's right of action accrued, which in the case supposed, is two or three years after the conversion. The result is that very frequently the action on tort for the conversion will be barred by the statute of limitations, while the action for money had and received, not having accrued until much later, will not be barred for a much longer period.

Suppose now that the defendant B appropriated the property of A, the plaintiff, and retained the same for so long a period that A, because of the running of the statute of limitations, lost all right to recover the property from the defendant in an action of replevin or some similar action. Suppose further that after this the defendant sells the property in question and receives money for the same. Could A maintain an action for money had and received under those circumstances? The answer to this depends on whether A, the plaintiff, after the statute had barred his action of replevin, still retained any title to the property; because if the effect of the running of the statute and the consequent barring of the replevin action is to vest the title to the property in the defendant, it would follow that when the defendant later sold the property he was selling his own property, and the money received

would be the price, not of the plaintiff's property, but of the defendant's property, and so no action for money had and received would lie. This is the view which the courts have taken of this question. They hold that the effect of the statute of limitations when it bars all actions for the recovery of specific property, is to vest the title to that property in the defendant, and that therefore a sale later is simply a sale by the defendant of his own property, and gives rise to no quasi-contractual obligation.

If the defendant appropriates the plaintiff's property and exchanges the same for their property, clearly the defendant has not received money for the use of the plaintiff, and so a count for money had and received will not be supported. As there never was developed any form of declaration in assumpsit to cover the receipt of anything to the use of the plaintiff except money, if follows that no quasi-contractual action can be maintained in such a case, although of course there is an unjust enrichment at the expense of the plaintiff, as much as in the case where money is received instead of property. The reader, however, is referred upon this point to the article upon trusts in this newsletter in which he or she will learn that in such a case the plaintiff could by a bill in equity hold the defendant as a constructive trustee of the new property in exchange for the old, and would therefore be entitled to a decree from the court of equity, directing the defendant to transfer to the plaintiff this new property; a result reached by the court of equity upon exactly the same principles as those upon which the court of law has proceeded in the case which we have been discussing. It should be noted also that if the defendant was entitled to receive money in exchange for the plaintiff's property, and in place of that, accepted property, the property so received is held to be the equivalent of money, and the plaintiff is accordingly entitled to bring an action for money had and received. For example the defendant bought certain wood belonging to the plaintiff and sold the same under a contract entitling him to receive money, but finally took in part payment for the same some real estate which he still held. It was decided that an action for money had and received for the whole promised price would lie, on the ground that he had received the equivalent of money. Had, however, the transaction been that the defendant exchanged the wood directly for real estate, never being entitled to money, a count for money had and received could not have been sustained.

Returning now to the case in which B appropriated A's horse, let us modify the case by supposing that B instead of selling the horse kept him for his own use. This is of course is equally a conversion. May A, the owner of the horse, in a case of this kind, waive the tort and sue in assumpsit, or is his sole remedy the tort action for damages? Before we can answer this question, we must examine the forms of declaration in general assumpsit, and see if there be any form which could cover the case. On doing so, we find only one that could by any possibility apply, namely, the count for "goods sold and delivered." In this form of the declaration the allegations would be that the defendant was indebted to plaintiff for one horse theretofore sold and delivered by plaintiff to the defendant, and being so indebted the defendant promised to pay the said sum to the plaintiff on request, and that he had not done so. Remembering now that the declaration in general assumpsit is not to be taken at its face value, but that the promise alleged in any event is a fiction, does this form of declaration mean that an actual sale was made? Let us go back a moment to the case of the action for money had and received, if B had sold the horse. The declaration

there says that there was money had and received by the defendant to the use of the plaintiff. Now the evidence would show that the defendant received the money actually for his own use. That is, that was his intention, and the assertion that it was to the use of the plaintiff is the result of a rule that the law makes it his duty to pay it to the plaintiff. May not the law say, in the case where he keeps a horse instead of selling it, that the owner may treat it as a fictitious sale and compel him by an action of assumpsit for one horse sold and delivered to pay the value of the horse, as though there has been a sale? Or, putting it shortly, may he not be sued on a constructive or fictitious sale?

If a stranger takes my goods no doubt a contract may be implied and I may bring an action, either of trover for them, or of assumpsit. This is a declaration framed on a contract implied by law. Where a man gets hold of goods without any actual contract, the law allows the owner to bring assumpsit. In the early Massachusetts law the whole extent of the doctrine, as gathered from the books, seems to be that one whose goods have been taken from him or detained unlawfully, whereby, he has a right to an action of trespass or trover, may if the wrong doer sell the goods and receive the money, waive the tort, affirm the sale, and have an action for money had and received for the proceeds. In a early Michigan case Mr, Justice Cooley said "If one has taken possession of property and sold or disposed or it, and received money or money's worth therefor, the owner is not compellable to treat him as a wrong doer, but may affirm the sale, as made on his behalf, and demand in this form of action the benefits of the transaction. But we cannot safety say the law will go very much further than this in implying a promise, where the circumstances repel all implications of a promise in fact.

It is apparent that in both of these cases the court misconceived the basis of the action for money had and received where the defendant has sold the converted goods. Apparently it is thought that in some way a promise in fact be found; that by choosing to waive the tort and sue in assumpsit the plaintiff has in some mysterious way affirmed the sale so that it was in fact made with his consent form the beginning as though the defendant had been his agent. It is however well recognized today that such is not the case, but, as we have seen, that the principle involved is that the money received is an unjust enrichment of the defendant at the expense of the plaintiff. In both the cases where the property is sold for money, and in the case where it is retained by the tort-feasor, the circumstances repel all implications of a promise in fact and in both cases it is true that the defendant has unjustly enriched himself at the expense of the plaintiff. In many, and perhaps a majority, of the American states which have passed upon the question, the action for goods sold and delivered in the cases with which we are dealing, is allowed. For example, plaintiff alleged a sale and delivery by the plaintiff to the defendant of 250,000 feet of lumber, and that the defendants had not paid for the same. At the trial, all the plaintiff proved was that the defendants had wrongfully appropriated logs belonging to the plaintiff. The court held that the plaintiff had proved the allegations of his compliant, and that under the circumstances of the case the plaintiff had the right to waive the tort and sue in assumpsit on the "contract implied in law," if he so wished.

In the cases thus far considered of the appropriation of property, we have assumed that the defendant

appropriated the entire property. Suppose now that instead of doing this the defendant simply appropriated the use of the property for a certain limited period. For example a defendant had, without the permission of the plaintiff, taken a threshing machine owned by the plaintiff and used the same for a period of three days. In doing so he had damaged the machine so that the plaintiff expended $100 in having it repaired. In addition the plaintiff expended $50 in bringing the machine back to the plaintiff's farm, the defendant not having returned the same when he was through with it. It was found that the reasonable value of the use of the machine was $100 per day or $300 for the three days. The question in the case was, for which, if any, of these three items could a quasi-contractual action be maintained. The court, following a dictum of Lord Mansfield in a earlier case, held that the value of the use of the machine could be recovered in the basis of quasi-contractual obligation, but not the other two items. The reason for this is obvious. The damage to the machine, although it caused a loss to the plaintiff, did not result in an enrichment of the defendant. So also the expenditure by the plaintiff of the sum for having the machine returned to his farm was a loss to the plaintiff, but again not an enrichment to the defendant. The only enrichment was for the use of the machine for the three days, and this therefore was the limit of the plaintiff's recovery in that form of action.

In another case the plaintiff sold his business to the defendant and vacated the office in which he had been carrying on the same, the defendant taking possession of the office and carrying on the business. The telephone which the plaintiff had agreed with the telephone company to pay for one year was left in the office. Nothing was said between the plaintiff and the defendant when the business was sold about the telephone, and the court found that it was not the fair understanding of the parties that the use of the telephone was transferred by the plaintiff to the defendant Without the permission of the plaintiff the defendant used the telephone regularly and continuously for a certain period. Upon discovering this the plaintiff, who had to pay the telephone company the agreed rental of the telephone, brought an action to recover from the defendant the reasonable value of the use of the telephone during the period in question. It was held that the plaintiff could recover, and that the reasonable value was the amount which the plaintiff had had to pay the telephone company for the period in question. Upon the same principle it is held that, where a person without agreeing to pay for the same, succeeds in getting his goods carried from one place to another by a common carrier without paying for the same, he is under a quasi-contractual duty to pay for the carriage. Similarly, one who infringes a patent and manufactures and sells the patented article must, where it is possible to estimate them, account to the owner for the profits of the infringement.

In the case of real property where the defendant has used and occupied another person's land wrongfully and without permission, no quasi-contractual action can be maintained, for reasons connected with the historical development of this action of general assumpsit. The court in general assumpsit for the use and occupation of real estate, in other words, can be sustained only in a case where the defendant has occupied the lands under an actual agreement, express or implied in fact, to pay for the same. Interesting questions arise, however, where the defendant has not been in the occupation of real property but has

used it to a certain extent without taking possession of it. For example, defendants without owners knowledge used certain roads and passages under the plaintiff's farm for the convenience of their stone and iron. By doing this, it was admitted that they saved a considerable expense to themselves. The question before the court was whether the defendants were under a quasi-contractual duty to pay the plaintiff for the use of the roads and passages. As the action is not one for the use and occupation of real estate, the difficulty referred to above does not prevent a recovery, but the English court held, one of the judges dissenting, that no quasi-contractual action would lie, on the ground that "although the defendant saved his estate expense, he did not bring into it any additional property or value belonging to another person." and that the principle of unjust enrichment demanded the existence of both a loss to the plaintiff and an enrichment of the defendant. It is difficult to see, however, either that the defendant received nothing or that the plaintiff lost nothing. As already stated, one of the judges dissented from the conclusion reached, and it would seem that he had the better reasoning upon his side. The defendant had certainly used the plaintiff's property; he took, so to speak, a right of way under the plaintiff's land, and therefore had been enriched to that extent at the expense of the plaintiff. In certain American courts it has been held without any difficulty that the defendant who pastures his cattle upon land belonging to and in the possession of the plaintiff, is subject to a quasi-contractual duty to pay the owner of the land the reasonable value of the pasturage.

It has been suggested that in these cases of the wrongful use of property the amount which the plaintiff can recover is limited to the reasonable value of the use and does not cover the value of the use to the defendant. In other words, it is said that the plaintiff is not entitled to recover the profit which the defendant derived from the use of the plaintiff's property, but simply the reasonable value or the market value of the use. Let us suppose in the case of the threashing machine previously discussed, that the defendant, instead of using the machine, had succeeded in renting it at an unusually high rate for three days to another person. For example, suppose the reasonable or ordinary rental; would be $100 per day, but that the defendant had found some one who had urgent need of the machine and had obtained $125 per day for the machine. Would not the $25 that the defendant received for the sale of the use of the plaintiff's property be money had and received by the defendant to the use of the plaintiff? If we are to be consistant with the decisions in cases where the defendant sells the whole of the property for more than it is worth, it would seem that here also the plaintiff is entitled to recover all the defendant has received for the sale of the use of the plaintiff's property. Next months subject will begin with usury in relation to Quasi-Contracts.

PLEASE NOTE THE CHANGE OF ADDRESS.

Yearly subscription rate is $35.00 per volume year and runs from May thru April.of each year. CASH or U.S. POSTAL MONEY ORDERS ONLY.

Return address is Lee Brobst
P.O. Box 22
Flinton, PA. 16640 (814) 674 8469.