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ACCESSION OF LABOR—WHEN TITLE PASSES—OWNER OF LAND CANNOT RECOVER IN ASSUMPSIT FROM PURCHASER.—*St. John* v. *Antrim Iron Company*, 80 Northwestern (Mich.), 998 (1899). In this case B., claiming title under a tax deed for the taxes of 1892, entered upon certain land, in 1897, and cut and removed therefrom 538 cords of wood, which he sold and delivered to the defendant, who burned it into charcoal and used the charcoal in the manufacture of pig iron. The tax deed was subsequently vacated by a certificate of error and the plaintiff, who was the owner of the original title to the track of woodland, brought suit in assumpsit in the Circuit Court and recovered the value of the wood at the place of delivery. Upon appeal to the Supreme Court it was said by Montgomery, J.: "It is perhaps to be regretted that this case must be determined by a ruling

not going to the merits of the controversy, but under the facts there can be no recovery in assumpsit. There are two cases where the plaintiff has the election under the common law of suing in either tort or assumpsit: first, where defendant has converted property of the plaintiff into money or money's worth, the plaintiff may waive the tort and sue in assumpsit, treating the sale as made on his behalf; second, where defendant holds possession of property by virtue of contract relations with plaintiff, and converts such property, the plaintiff may, at his election, proceed in assumpsit."

Assumpsit will not lie for the value of personal property against a trespasser who has wrongfully taken, and still retains, the same in his possession. But when the trespasser has sold or disposed of the property, and received money or money's worth for it, the owner may waive the tort, affirm the sale as made on his behalf, and recover the proceeds in an action of assumpsit. *Watson* v. *Stever*, 25 Mich. 387 (1872); *Tuttle* v. *Campbell*, 74 Mich. 652 (1889); *Jones* v. *Hoor*, 5 Pickering, 285 (1827); *Pike* v. *Bright*, 29 Ala. 336 (1856); *Emerson* v. *McNamara*, 41 Me. 565 (1856); *O'Reer* v. *Strong*, 13 Ill. 688 (1852); *Newman* v. *Olney*, 118 Mich. 545 (1898); *Lightly* v. *Clouston*, 1 Taunt. 112 (1808).

If one has wrongfully taken another's property and has exchanged it for other property, and has not sold or otherwise disposed of the property obtained in the exchange, assumpsit will not lie. *Fuller* v. *Duren*, 36 Ala. 73 (1860).

But if the property has been sold it makes no difference whether the price is received in money or in a chattel at an estimated price for money, the plaintiff may still bring assumpsit. *Arms* v. *Ashley*, 4 Pick. 71 (1826); *Mason* v. *Waite*, 17 Mass. 560 (1822); *Stewart* v. *Conner*, 9 Ala. 813 (1846); *Cameron* v. *Clarke*, 11 Ala. 259 (1847).

There is a material distinction between a sale and an exchange, and when one chattel is exchanged for another, no price being attached, it is not a sale, and assumpsit will not lie. *Gunter* v. *Leckey*, 30 Ala. 596 (1857); *Williamson* v. *Berry*, 8 Howard (U. S.) 544 (1850).

The owner of goods which have been intrusted to an agent for a special purpose, and which have been sold by him wrongfully, cannot maintain an action of contract against the purchaser for goods sold and delivered. *Gloss Co.* v. *Wolcott*, 2 Allen, 227 (1861); *Stearns* v. *Dillingham*, 22 Vt. 627 (1850); *Smith* v. *Smith*, 43 N. H. 536 (1862).

An action of assumpsit for money had and received will not lie against a trespasser, although he has consumed the property. *Barlow* v. *Stalworth*, 27 Ga. 517 (1859).

Defendant held as a deposit a note against himself in favor of plaintiff, which he refused to deliver upon demand. The court held the plaintiff could not recover in assumpsit, as the consideration for the note was not known, and it might have been given in settlement of a tort. *Tucker* v. *Jewett*, 32 Conn. 563 (1865).

Where a sale of land has been induced by the fraudulent representations of the vendor, the vendee may waive his action of tort for

deceit, and sue in assumpsit for the money which he paid on the contract. But where part of the consideration was land and claims against other persons a recovery of them cannot be had in assumpsit, except so far as defendant may have converted them into money. *Pearsoll* v. *Chapin*, 44 Pa. 9 (1862).

Where money is paid into court upon a declaration in contract it is an admission of the existence of a contract by assent of the parties, even though no contract were really in existence. *Bennett* v. *Francis*, 2 B. and P. 550 (1801); *Jones* v. *Hoor*, 5 Pickering, 285 (1827).

Some of the earlier cases allowed assumpsit, but they are contrary to the rule at the present day. Thus *Hill* v. *Davis*, 3 N. H. 384 (1826), decided that where one took the goods of another and converted them to his own use the tort might be waived and assumpsit brought for the price, although there was no contract. *Lee* v. *Shore*, 1 B. and C. 94 (1822); *Hill* v. *Perrott*, 3 Taunt. 274 (1810). Plaintiff's land was used by the defendant for pasturing cows, and he was allowed to sue in assumpsit, although defendant was a trespasser. *Welch* v. *Bogg*, 12 Mich. 41 (1863); *Bennett* v. *Francis*, 4 Esp. 30 (1801).

In an action of trover the plaintiff may recover the full value of the goods, though the sale may not actually have produced more than half their worth, but in assumpsit he can recover only what the party really received, or what the goods actually produced. *King* v. *Leith*, 2 T. R. 144 (1787); *Elliott* v. *Jackson*, 3 Wis. 649 (1854); *Nelson* v. *Killbride*, 113 Mich. 637 (1897). Plaintiff may also recover for the use of the property, if defendant has received anything therefor. *Chauncey* v. *Yeaton*, 1 N. H. 151 (1824).

Where one enters another's land by mistake, believing it to be his own, and cuts and carries away cord-wood, he is not entitled to compensation for labor performed in cutting the wood. *Mining Co.* v. *Hertin*, 37 Mich. 332 (1877).

Railway Co. v. *Hutchins*, 32 Ohio, 571 (1877), holds that when timber is cut from the land of another by a trespasser its value enhanced threefold by labor performed upon it, and sold to an innocent purchaser, the owner of the land cannot recover from the innocent purchaser the increased value of the timber. This case, however, seems against the weight of authority.

In an action for timber cut and carried away the United States Supreme Court held: (1) Where defendant is a willful trespasser, the measure of damages is the full value of the property at the time and place of demand, with no deduction for his labor and expense; (2) where he is an unintentional or mistaken trespasser, or an innocent vendee from such trespasser, the value at the time of conversion, less the amount which he and his vendor have added to its value; (3) where he is a purchaser without notice of wrong from a willful trespasser, the value at the time of such purchase. *Woodenware Co.* v. *U. S.*, 106 U. S. 432 (1882).

It seems that the proper action for the plaintiff to have brought in the case of *St. John* v. *Iron Co.* would have been trover for the con-

version of the goods. He could not have brought either trespass or assumpsit against them, because they had not trespassed on plaintiff's land or made any promise to him.

Had the plaintiff desired to bring action against B., who cut and sold the wood to the iron company, it seems that he could have sued in trespass for the taking, or in trover for the conversion, or, waiving the tort, he could have sued in assumpsit for the value of the wood.

M. L. V.

TRUSTS—NOTICE—BONA-FIDE PURCHASER.—*Rua* v. *Watson et al.* Supreme Court of South Dakota. August 29, 1900. In this case a mining deed conveyed a mining property to one "William A. Watson, trustee, and to his heirs and assigns forever," for the nominal consideration of one dollar. About a year after the delivery of this deed to Watson, he sold the property, described in the deed, to Sol. Rosenthal, for $450, paid by him at the time in cash. This action was brought to obtain a decree, adjudging the defendant, Rosenthal, to be an involuntary trustee of the property. The Circuit Court of Lawrence County found for the plaintiff, whereupon Rosenthal appealed to the Supreme Court, which reversed the judgment of the lower court.

The Supreme Court says, "The mere employment of the word trustee, after the name of Watson, is insufficient to create a trust or operate as notice of any kind to appellant."

Undoubtedly this case was properly decided on its own peculiar facts. The deed from Rua to Watson, trustee, conveyed the property to him absolutely, and by its own terms gave him an unquestionable right to sell. In addition to this, Rua testified, in the trial, that there was a verbal agreement between Watson and himself that Watson should sell, if he could, and give the money to Rua. The force of this testimony was to weaken the plaintiff's case.

The syllabus of the case, in the 83d N.W. 572, is headed "Trusts —*Construction of Deed*—Bona-fide Purchaser." This is certainly a proper representation of the decision; for this particular decision rests on the *construction* of the deed in question.

It does not necessarily decide that "The mere employment of the word trustee, after the name of Watson, is insufficient to create a trust or operate as notice of any kind to appellant." However, the court refers to a number of cases, three of which may throw some light on the unqualified statement last quoted.

In the case of *Brewster* v. *Sime*, 42 Cal. 139, certain mining stocks had been placed, by the owner, in the name of another as trustee, without more words to indicate any limitation of his authority over them. He hypothecated stocks, and they were finally sold. It was held the purchaser took them free of the trust. The court says, "All that is intended to be decided is that the mere addition of the word 'trustee,' after the name in the certificate, is not, in this state, of itself, nothing more appearing, to be deemed constructive notice of the equities of a *secret* owner of the stock."

In the case of *Dyett* v. *Trust Co.* (N. Y. App., 35 N. E. 341), express authority was given, by the trust deed, to sell. It therefore does not decide the question suggested.

In the case of *Hart et al.* v. *Seymour et al.*, 35 N. E. 246, a deed conveyed land to three grantees, "trustees of the Norwood Land and Building Association," and "to their heirs and assigns forever."

The question, here under discussion, was fairly raised, and the Supreme Court of Illinois said, "In the first place, if the question of title is to be determined solely from what appears on the face of the deeds, it is not sufficiently shown that any trust whatever is declared, and much less one that the statute of uses will execute. The deeds both run to Tyler, Field and Eberhardt, trustees of the Norwood Land and Building Association, and to their heirs and assigns forever. This was of itself no declaration of trust, but prima facie conveyed an absolute title to the grantees."

In other cases the addition of the word trustee, with or without qualifying words, as in the last case above, is called a mere "descriptio personarum."

As far as the cases examined are concerned, it may be safely laid down that the mere employment of the word "trustee," after the name of the grantee, will not be sufficient constructive notice to a bona-fide purchaser of any secret trust existing between the grantee and any other person or persons.

J. B. W.

CONTRACT: AGREEMENT NOT TO CONDUCT BUSINESS.—In *Tuscaloosa Ice Mfg. Co.* v. *Williams*, Sup. Ct. Ala., 28 Southern, 669 (1900), the facts were somewhat unusual. Williams and the defendant each owned an ice plant in a city of 7,000 inhabitants and the former, in consideration of defendant's paying him $175 annually, agreed not to run his ice plant nor suffer it to be run for five years; further, in case some unknown party should erect or operate an ice machine in the vicinity of the city before $500 had been paid to Williams, the defendant should pay the difference between the total payments made and $500. A rival corporation began the manufacture of ice after the first payment of $175 had been made and Williams brought suit, alleging defendant had failed to pay $325 according to contract, in the event of the erection of an opposition ice plant. Judgment for the plaintiff was reversed on appeal.

The law relative to contracts in restraint of trade has changed considerably from the early idea enunciated in *Colgate* v. *Bacheler*, Co. Eliz. 872 (1596), that any contract in restraint of trade was "against the benefit of the Commonwealth," this being in course of time modified, (*Rogers* v. *Parry*, 2 Bulstrode 136,–1613) and the distinction between contracts in general and those in partial restraint of trade being recognized and given effect to in the famous judgment of Lord Macclesfield in *Mitchell* v. *Reynolds*, 1 P. Wms., 181, 1711, until we finally come to the modern American rule which con-

siders primarily if the tendency of the contract in question is to affect adversely the interests of the public. See *Nester* v. *Continental Brewing Co.*, 161 Pa. 473 (1894); *Stanton* v. *Allen*, 5 Denio (N. Y.) 434 (1848); *Oregon Steam Nav. Co.* v. *Winsor*, 87 U. S. 64 (1873), and the interesting case of *Perkins* v. *Lyman*, 9 Mass. 522 (1813), where a contract by an adventurer to retire seven years from the skin trade on the northwest coast of America was considered valid "as the volume of that trade is limited, and such contract is rather for the benefit of the community as preventing the trade from being overdone."

After stating that the argument in support of the contract was largely based on the considerations that the restraint it imposed was limited both as to time and to territory, the Court said: "Here the covenantee does not *purchase* the business, practice, trade or plant of the covenantor . . . . . His business is not transferred merely; it is destroyed: his plant is not continued by the covenantee in useful production, but is left to rust and canker in disuse. The purpose and effect of the contract is not to protect the covenantee in the legitimate use of something he has acquired from the covenantor, but to secure to him the use, in an illegitimate way, of that *which he already has*, in respect of which there is no reason or occasion for the covenantor to assume any obligation of protection." See *Field Cordage Co.* v. *National Cordage Co.*, 6 Ohio. Cir. Ct. R. 615 (1892); *Western Wooden Ware Association* v. *Starkey*, 84 Mich. 76 (1890); *Oliver* v. *Gilmore* (C. C.) 52 Fed. 562 (1892).

It is difficult to lay down a hard and fast rule, but both reason and authority seem to commend the decision given; and in all cases of this nature the statement of Mr. Chief Justice Fuller in *Gibbs* v. *Gas Co.*, 130 U. S. 396 (1888), repeated in *Fowle* v. *Park*, 131 U. S. 88 (1888), should be considered:—"The question is, whether under the particular circumstances of the case, and the nature of the particular contract involved in it, the contract is, or is not, unreasonable."

H. J. S.