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QUASI-CONTRACTS -- PROFITS AS MEASURE OF RECOVERY FOR APPROPRIATION OF BUSINESS IDEA

QUASI-CONTRACTS — PROFITS AS MEASURE OF RECOVERY FOR APPROPRIATION OF BUSINESS IDEA — Plaintiff advertising firm submitted advertising plans at the invitation of defendant brewing company, in the hope of getting a contract to handle its advertising. Defendant awarded the contract to another, but appropriated and used extensively a slogan, "The Beer of the Century," from the material submitted by plaintiff, who sued to recover the value thereof. *Held*, that plaintiff was entitled to recover, on an implied contract to pay for the services, the value to defendant of the fruits of the services. *How. J. Ryan & Associates, Inc. v. Century Brewing Assn.*, 185 Wash. 600, 55 P. (2d) 1053 (1936).

Although the court found the elements of an implied-in-fact contract, and probably was justified in doing so to reach a desired result, it could be argued that actual intent was lacking, since defendant expressly refused to contract with plaintiff. It is further questionable whether this is in essence a suit for services. Where intellectual efforts furnish the means of livelihood, the courts have afforded protection on a service theory, and have recognized that the value of the services depends in part upon the results obtained.[1] The normal service of the advertising agency is analogous, and where its services have been rendered and accepted, similar rules should be, and have been, applied.[2] But where, as here, the services of the agency have been refused, and an idea in certain form has been appropriated, it would be somewhat preferable to treat the suit as based upon property in the phrase.[3] The concept of literary property is

[1] Lawyers: Coco-Cola Co. v. Moore, (C. C. A. 8th, 1919) 256 F. 640; physicians: Eddy v. Healy, 209 Ill. App. 270 (1918); architects: Davis v. School District, 84 Neb. 858, 122 N. W. 38 (1909); managers: Kubey v. Coast Athletic Club, 172 Wash. 305, 20 P. (2d) 21 (1933).

[2] Simpson Advertising Service Co. v. Manufacturers & Merchants Assn., 330 Mo. 1049, 51 S. W. (2d) 1019 (1932); Haynes Chemical Corp. v. Staples & Staples, 133 Va. 82, 112 S. E. 802 (1922).

[3] Indeed, the court found its chief support in Liggett & Myer Tobacco Co. v. Meyer, (Ind. App. 1935) 194 N. E. 206, arising from a similar fact situation, but based on the theory of an implied contract to pay for an appropriated property right. The court in the principal case remarked that the cases were essentially the same, and indicated that the same result would have been reached had the suit been brought on a literary property theory.

beset by limitations and difficulties of proof,[4] but given a proper case, especially one in which there is no possibility of finding an actual contract, should quasi-contractual relief be given? Equitable relief and damages are afforded if the appropriation constitutes unfair competition,[5] infringement of trademark,[6] or violation of confidence,[7] and the giving of damages for invasion of literary property rights as such is no innovation, either in equity [8] or at law.[9] The existence of the tort at common law does not seem to have been questioned in these cases, and it has been said that literary property has the benefit of all remedies accorded other types of property, so far as they are applicable.[10] Inflexible application of property concepts to the type of business idea involved in the principal case, in order to protect its originator, might unduly expose business institutions to spurious plagiarism suits; [11] but where, as in the principal case, there has been a wilful appropriation of plaintiff's property, resulting in a substantial benefit to defendant, probably he should be required to make restitution. Such restitutionary relief is not dependent upon appropriation of tangible property,[12] and especially in recent decisions it is deemed sufficient if defendant has received through interference with some right of plaintiff a benefit which it would be inequitable for him to retain.[13] A difficulty arises in connection with

[4] For a good discussion, see 47 HARV. L. REV. 1419 (1934); also 44 YALE L. J. 1269 (1935).

[5] Downes v. Culbertson, 153 Misc. 14, 275 N. Y. S. 233 (1934); Lynn Shoe Co. v. Auburn-Lynn Shoe Co., 100 Me. 461, 62 A. 499 (1905).

[6] Holley Milling Co. v. Salt Lake & Jordan Mill & Elevator Co., 58 Utah 149, 197 P. 731 (1921).

[7] Booth v. Stutz Motor Car Co., (C. C. A. 7th, 1932) 56 F. (2d) 962, where unpatentable chassis design was appropriated by defendant after plaintiff had disclosed it for sole purpose of offer to sell.

[8] Banker v. Caldwell, 3 Minn. 94 (1859) (damages with injunction); Kortlander v. Bradford, 116 Misc. 664, 190 N. Y. S. 311 (1921) (damages and accounting with injunction); Fendler v. Morosco, 253 N. Y. 281, 171 N. E. 56 (1930) (accounting); French v. Kreling, (C. C. Cal., 1894) 63 F. 621 (accounting); Mansell v. Valley Printing Co., [1908] 2 Ch. 441 (damages with injunction).

[9] BOWKER, COPYRIGHT 46 (1912); Press Publishing Co. v. Monroe, (C. C. A. 2d, 1896) 73 F. 196; Maxwell v. Goodwin, (C. C. Ill. 1899) 93 F. 665; American Law Book Co. v. Chamberlayne, (C. C. A. 2d, 1908) 165 F. 313; Victor Talking Machine Co. v. George, (C. C. A. 3d, 1934) 69 F. (2d) 871; Tams v. Witmark, 48 App. Div. 632, 63 N. Y. S. 1117 (1900); Roberts v. Petrova, 126 Misc. 86, 213 N. Y. S. 434 (1925); Jenkins v. News Syndicate Co., 128 Misc. 284, 219 N. Y. S. 196 (1926); Clay County Abstract Co. v. McKay, 226 Ala. 394, 147 So. 407 (1933); Mansell v. Valley Printing Co., [1908] 2 Ch. 441.

[10] Kortlander v. Bradford, 116 Misc. 664, 190 N. Y. S. 311 (1921).

[11] Juries are easily convinced of wrongful appropriation by evidence of receipt of plaintiff's letter, plus some similarity between plaintiff's idea and defendant's advertisement. See Liggett & Meyer Tobacco Co. v. Meyer, (Ind. App. 1935) 194 N. E. 206; also 44 YALE L. J. 1269 (1935). Some firms refuse even to open mail which may contain such suggestions or ideas. 209 SAT. EVE. POST. 10 (Aug. 1, 1936).

[12] WOODWARD, LAW OF QUASI-CONTRACT, § 275 (1913).

[13] Second Nat. Bank v. M. Samuel & Sons, (C. C. A. 2d, 1926) 12 F. (2d) 963; Caskie v. Philadelphia Rapid Transit Co., 321 Pa. 157, 184 A. 17 (1936); Federal Sugar Refining Co. v. United States Sugar Equalization Board, (D. C. N. Y. 1920) 268 F. 575; Roberts v. Ely, 113 N. Y. 128, 20 N. E. 606 (1889).

restitution, for courts tend to refuse relief when a market is lacking as a standard for measuring defendant's "benefit," though they place the refusal on other grounds. In this situation, no matter what sort of damage action is given, the measure will have to be primarily the value to the defendant, since there is no organized market, and the value of the time consumed is grossly disproportionate to the value of the thing produced. There is authority for allowing quasi-contractual recovery of benefits received without regard to what plaintiff has been deprived of.[14] That there is an admonitory function in damages is recognized,[15] and arguments for and against recovery tending to be punitive must be based on its utility or inutility as a social instrument. Since quasi-contractual principles could readily be applied to this situation and since courts apparently desire to give some sort of "implied contract" relief, it would seem better to explain the result in terms of quasi-contract, rather than to strain the facts in an effort to find an actual contract for services.[16]

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[14] Federal Sugar Refining Co. v. United States Sugar Equalization Board, (D. C. N. Y. 1920) 268 F. 575; Head v. Porter, (C. C. Mass. 1895) 70 F. 498; Steam Stone Cutter Co. v. Sheldons, (C. C. Vt. 1883) 15 F. 608.

A perplexing problem of proof accompanies any attempt to apportion between plaintiff and defendant profits realized from sales of defendant's product during use of plaintiff's advertising scheme. In the related field of patent and trademark infringements, plaintiff recovers defendant's gain over normal profits; but to place on either party the burden of proving precisely this indeterminable gain would result in forfeiture, so courts permit use of expert testimony and a guess by the jury or referee. 41 HARV. L. REV. 906 (1928); 30 COL. L. REV. 242 (1930). Non-existence of a scientific method of apportioning profits and the resulting injustices probably should not defeat a meritorious suit against a *wilful* appropriator, but should prevent wholesale permission of quasi-contract without regard to the animus of the appropriation.

[15] See Morris, "Punitive Damages in Tort Cases," 44 HARV. L. REV. 1173 at 1205 (1931); also 37 L. R. A. (N. S.) 533 at 534 (1912).

[16] However, in jurisdictions where disclosure of the plan to defendant is held to destroy the property in the idea, adequate relief could be afforded only on some theory involving services.