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Quasi-Contracts -- Filling Stations -- Recovery by Lessee for Defects in Equipment

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whether such property was included in the rate base inventory of the owner or in that of the lessee, since the ultimate result upon both the utilities and the public would be the same. An Act of Congress giving the Commission similar authority over all leases of lines and equipment as it now possesses over extensions and withdrawals¹⁵ and over security issues¹⁶ would perhaps produce the end desired.

HERMAN S. MERRELL.

Quasi-Contracts—Filling Stations—Recovery by Lessee for Defects in Equipment.

Plaintiff orally contracted to purchase gasoline and oil daily from defendant at one cent per gallon above tank wagon prices, the one cent being paid as rent for the premises and tanks and gasoline pumps. Within sixty days plaintiff found he was losing money and a series of complaints to the defendant suggesting that there was a leak in the tanks elicited as many assurances from the defendant that there could be no leaks. Finally defendant dug up the tanks and found a leak therein. Plaintiff alleged defendant was under a duty to inspect the tanks and to keep them in repair, and sued for loss sustained by the leakage. Defendant's demurrer to the complaint was overruled and this was sustained on appeal.¹

The possibility that suit upon the facts above might be successfully based on landlord and tenant law does not present itself. It is settled law that in the absence of a covenant to the contrary, there is no duty on the lessor to keep the premises in repair.² And it is generally held that the lessor does not impliedly covenant that the premises are suitable for the use which the lessee intends to put them to.³

The North Carolina court based its decision on the implied contract growing out of the assurances by the defendant and the reliance thereon by the plaintiff. The opinion emphasized the generality with which a cause of action for money received may be

¹⁵ 41 STAT. 477, 49 U. S. C. A. §1 (18) (1920).

¹⁶ 41 STAT. 494, 49 U. S. C. A. §20a (1920).

¹ *Andrews v. National Oil Co.*, 204 N. C. 268, 168 S. E. 228 (1933).

² *I TIFFANY, LANDLORD AND TENANT* 87; *Richmond v. Standard Elkhorn Coal Co.*, 222 Ky. 150, 300 S. W. 359 (1927), 58 A. L. R. 1423 (1929); *Smithfield Improvement Co. v. Coley-Bardin*, 156 N. C. 255, 72 S. E. 312 (1911), 36 L. R. A. (N. S.) 907.

³ *Duffy v. Hartsfield*, 180 N. C. 151, 104 S. E. 139 (1920); *Federal Metal Bed Co. v. Alpha Sign Co.*, 289 Pa. 175, 137 Atl. 189 (1927); *Plaza Amusement Co. v. Rothenberg*, 159 Miss. 800, 131 So. 350 (1930); *Smithfield Improvement Co. v. Coley-Bardin*, *supra* note 2.

alleged,⁴ unfortunately without extensive reference to North Carolina authorities dealing with the action.⁵

Only one case similar on its facts to the principal case has been found.⁶ The Mississippi court specifically recognized the usual situation wherein the lessor, unless he covenants to the contrary, is under no duty to repair the premises and did not question the soundness of this doctrine. However, it pointed out that the leasing of a filling station under terms whereby the lessee was to sell only the products of the lessor and use the premises only for this purpose made the relationship more than a mere landlord and tenant relation. The court concluded that the enterprise was a joint business in which both parties were interested and allowed a recovery, holding that the lessor impliedly warranted the fitness of the equipment. Stress was laid upon the fact that the lessor had once previously attempted to repair the pumps as showing that the parties recognized the existence of an implied warranty. Thus by rather unusual reasoning the Mississippi court reached what seems to be a desirable result.

The usual standard form contract used by distributors leasing filling stations contains no clause wherein the lessor assumes the responsibility for repairing the equipment.⁷ The actual practice in this respect, however, is that the distributor will, upon complaint by the lessee, make reasonable efforts to remedy the defect; but this assumption of duty seems to rest upon a desire to promote efficiency and expedite sales rather than upon any contractual basis.⁸ In view

⁴ "When defendant is proved to have in his hands the money of the plaintiff which *ex equo et bono*, he ought to refund, the law conclusively presumes that he has promised to do so. . . . The defendant insists that fraud is not sufficiently pleaded, but the facts warrant a recovery for money had and received, and the complaint by liberal construction, is broad enough to support such a theory."

⁵ Money paid voluntarily with a knowledge of the facts cannot be recovered back. *Commissioners of Macon Co. v. Commissioners of Jackson Co.* 75 N. C. 240 (1876); *Brummitt v. McGuire*, 107 N. C. 351, 12 S. E. 191 (1890); *Bank v. Taylor*, 122 N. C. 569, 29 S. E. 831 (1898). But a payment under a mistake of fact may be recovered. *Pool v. Allen*, 29 N. C. 120 (1846); *Worth v. Stewart*, 122 N. C. 258, 29 S. E. 579 (1898); *Simms v. Vick*, 151 N. C. 79, 65 S. E. 621 (1909), 24 L. R. A. (N. S.) 517, 18 Ann. Cas. 669; *Sanders v. Ragan*, 172 N. C. 612, 90 S. E. 777 (1916). Money paid under a contract, continuance of which was induced by defendant's false representations may be recovered. *Whitehurst v. Insurance Co.* 149 N. C. 273, 62 S. E. 1067 (1908); *Jones v. Insurance Co.* 151 N. C. 56, 65 S. E. 611 (1909).

⁶ *Louisiana Oil Corp. v. Rayner*, 159 Miss. 783, 132 So. 739 (1931), 83 A. L. R. 1426 (1933).

⁷ Information given writer by various filling station operators.

⁸ *Ibid.*

of the rapid growth of this relatively new business and the frequency with which the lessee finds himself in the position of the plaintiffs in the two cases noted, the decisions in these cases allowing recovery and the bases upon which the cause of action was worked out are highly significant.

J. C. EAGLES, JR.

Receivers—Enjoining Other Suits—Judgments in Other Suits as Liens.

An action in the nature of a creditors' bill was brought by a simple contract creditor against a debtor alleged to be solvent. The debtor joined in plaintiff's request for the appointment of a receiver. A receiver was appointed, and the court enjoined further prosecution of pending suits brought by other creditors. On motion, the restraining order was vacated and the court ordered that those creditors who had brought their actions prior to the receivership proceedings be permitted to proceed to judgment and that their judgments be claims in the receivership prior to the claims of the general creditors. *Held*: The order allowing the priority was correct.¹

Generally, an equity court appointing a receiver has inherent power to protect his possession of the debtor's property. Interference with that possession may be enjoined at the time of the appointment² or later upon petition by the receiver in the receivership proceedings.³ One interfering with his possession is subject to punishment for contempt, and this is true even where there is no injunctive order.⁴ The property is not subject to attachment,⁵ garnishment,⁶ or execution⁷ without the consent of the court, but execu-

¹ *Dillard v. Walker*, 204 N. C. 67, 167 S. E. 632 (1933).

² *Cherry v. Insull Utility Investments*, 58 F. (2d) 1022 (N. D. Ill. 1932).

³ *Virginia, T. & C. Steel & Iron Co. v. Bristol Land Co.*, 88 Fed. 134 (C. C. W. D. Va. 1898); *Lake Shore & M. S. Ry. Co. v. Felton*, 103 Fed. 227 (C. C. A. 6th, 1900); *Westinghouse Electric & Mfg. Co. v. Richmond Light & R. Co.*, 267 Fed. 493 (E. D. N. Y. 1920).

⁴ *In re Marcus*, 21 F. (2d) 480 (W. D. Pa. 1924); *Coker v. Norman*, 162 Ga. 351, 133 S. E. 740 (1926).

⁵ *Central Trust Co. v. Wheeling & L. E. R. Co.*, 189 Fed. 82 (C. C. N. D. Ohio 1911); *Carroll v. Cash Mills*, 125 S. C. 332, 118 S. E. 290 (1923); see *Ewing v. Ewing Planing Mill*, 183 Iowa 711, 167 N. W. 607 (1918).

⁶ *Fleegee v. Swift*, 122 Kan. 6, 251 Pac. 187 (1926).

⁷ *Mercantile Trust Co. v. Baltimore & O. R. Co.*, 79 Fed. 389 (C. C. E. D. Pa. 1897); *Pelletier v. Greenville Lumber Co.*, 123 N. C. 596, 31 S. E. 855, 68 Am. St. Rep. 837 (1898); see *Shapiro v. Wilgus*, 55 F. (2d) 234, 235 (C. C. A. 3d, 1931); cf. *Meyers v. Washington Heights Land Co.*, 107 W. Va. 632, 149 S. E. 819 (1929).