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Appellant suited for retirement benefits under the respondent corporation's pension plan which provided that, "No pension or gratuity

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of the third party beneficiary doctrine. (1) The agency theory makes the promisee the agent of the beneficiary, but this is fictional since the beneficiary does not make the promisee his agent. Gardner v. Denison, 217 Mass. 492, 105 N.E. 359, 51 L.R.A. (N.S.) 1108 (1914); Williston, Contracts (1920), §352; Anson, Contracts (1930), §277, 283. (2) Another theory finds a trust in a third party beneficiary contract; but this is weak, since there is no holding of legal title by a trustee. Seaver v. Ransom et al., 224 N.Y. 233, 120 N.E. 639 (1918); O'Hara et al. v. Dudley et al., 95 N.Y. 403 (1884); Anson, Contracts (1930), §277, 283a, 285. (3) Another theory allows the third party to recover on the basis of quasi-contract, but this theory breaks down because there is no unjust enrichment. Anson, Contracts (1930), 295. (4) The equitable asset theory holds that the promisee is the debtor of the beneficiary and hence makes a contract for his benefit, and this becomes an equitable asset of the beneficiary; however, this could apply only in the case of a third party creditor beneficiary and not in the case of a donee beneficiary. National Bank v. Grand Lodge, 98 U.S. 123 (1878); Hall v. Marston, 17 Mass. 575 (1822); Anson Contracts, §286. (5) One theory speaks of the third party's recovery as an equitable remedy, but this does not explain antecedent rights and duties. Smith et al. v. Thompson et al., 250 Mich. 302, 230 N.W. 156, 73 A.L.R. 1389, 1395 (1930). The theory of the instant case is immune from all of the above-mentioned objections.

5. Hageman v. Holmes, 179 Ill. 275, 53 N.E. 739 (1899).
6. Kinnan v. Hurst Co., 317 Ill. 251, 148 N.E. 12 (1925).
7. Vial v. Norwich Union Fire Ins. Society, 257 Ill. 355, 100 N.E. 929, 44 L.R.A. (N.S.) 317 (1913).
8. Searles v. City of Flora, 225 Ill. 167, 80 N.E. 98 (1906).
9. 27 Am. Jur., Indemnity, sec 20.
10. La Mourea v. Rhude, 209 Minn. 53, 259 N.W. 304, 306 (1940).
11. Carson Pirie Scott & Company v. W. J. Parrett et al., 346 Ill. 252 178 N.E. 498, 81 A.L.R. 1262, 1271 (1931).

shall be paid except out of the profits of the company and no pension or gratuity or claim thereto shall be a charge upon or against or payable out of any of the capital assets of the company." The defense was: first, that there were no profits, as depreciation on operating facilities was properly chargeable as an expense before profits were realized; second, that an item on the respondent's books, "Reserve for Pensions and Benefits" was only an estimate of contingent liability and not a segregation of assets constituting a trust fund. Held, the court found the meaning of the word "profits" in the contract to be plain and unambiguous, interpreting it to be net income less items of expense; including an allowance for depreciation of assets as an expense. There was no evidence to sustain the appellant's contention that the "Reserve for Pensions and Benefits" was a segregation of assets representing a trust fund. *Gearns v. Commercial Cable Co.*, 293 N.Y. 105, 56 N.E. (2d) 67 (1944), affirming 266 App. Div. 315, 42 N.Y.S. (2d) 81 (1943); motion for reargument denied, 293 N.Y. 755, 56 N.E. (2d) 749 (1944).

If the meaning of the contract is clear, the effect will not be controlled by an erroneous construction given to it by the parties.[1] Profits are defined by the courts in a general manner to be the excess of receipts over expenditures.[2] Where statutes provide for taxes on the profits of municipal utilities, the term "profits" has usually been construed to include an allowance for depreciation as an expense.[3] In contracts between master and servant providing for salary and sharing of profits, the courts have interpreted profits to include depreciation as an expense so that payments will not be made out of the capital assets of the company.[4] Dividends, of course, can only be paid out of the profits of a corporation, and the stockholders are liable to creditors in the event dividend payments are made without first allowing for depreciation to

1. Gardner v. Caylor, 24 Ind. App. 521, 56 N.E. 134 (1900).
2. Providence Rubber Company v. Goodyear, 9 Wall. 788, 804 (U.S. 1869); see Bates v. Porter, 74 Cal. 224, 15 Pac. 732 (1887); Curry v. Charles Warner Company, 2 Marv. 98 (Del.), 42 Atl. 425 (1895).
3. City of Norfolk v. Board of Supervisors of Nansemond County, 168 Va. 606, 192 S.E. 588 (1937); People ex Rel Binghamton Light, Heat, and Power Company v. Stevens, 204 N.Y. 22, 23, 25, 96 N.E. 114, 118, 119 (1911); People ex Rel Jaimaica Water Supply Company v. Board of Tax Commissioners, 196 N.Y. 39, 57, 58, 89 N.E. 581, 586, 587 (1909). But cf. Mr. Justice Spratley, dissenting in City of Norfolk v. Board of Supervisors of Nansemond County, supra at 636, 192 S.E. at 601, ". . . in determining profits. . . If, in addition to current repairs and maintenance, an allowance is made for the replacement of original parts, and the plant kept in its original condition of usefulness, it is apparent no additional sum should be allowed for general depreciation."
4. Swaney v. Derragon, 281 Mich. 142, 143, 274 N.W. 741 (1937), "Profits are defined as the net gain made from an investment or from the prosecution of some business after payment of all expense incurred, and the term is not to be confused with earnings or receipts which deal only with income and not with operating costs, fixed charges, overhead, depreciation, or expenses." Indiana Veneer and Lumber Company v. Hageman, 57 Ind. App. 668, 105 N.E. 253 (1915); Arthur Jordan Company v. Caylor, 36 Ind. App. 640, 76 N.E. 419 (1905); E. B. Hartwell v. E. A. Becker, 181 Mo. App. 408, 168 S.W. 837 (1914); Cf. W. E. Jones v. W. F. Davidson, 2 Sneed 448 (Tenn. 1854).

replace capital assets.[5] In businesses, such as temporary exhibitions, where the initial investment is not intended to be replaced, obviously, depreciation is not allowable as an expense to ascertain the profits.[6]

The courts have followed a logically consistent pattern in defining the word "profits" to include the expense of depreciation, since profits are produced by capital and if no allowance was made for the replacement of capital then profits could no longer be accumulated. In the instant case, the contract itself is an obligation and therefore an expense, but the word "profit" is used to make the pension expense one of *contingent* liability; a type of unsecured claim.

CRIMINAL LAW

THE PROBLEM OF SIMILAR OFFENSES

L., a sales department manager, feloniously took goods from his own and other departments and removed them, during and after store hours, from the establishment where he was employed. He had no authority to remove goods from the premises without procuring a requisition. L. delivered the goods to G., who knew that they had not been legally obtained. G. subsequently sold them, sharing proceeds with L. Charged with grand larceny, L. pleaded guilty. G. was later tried and convicted for receiving stolen goods. Motion for new trial on grounds that verdict was contrary to law and not sustained by sufficient evidence overruled. Ruling assigned as error. *Conviction*, reversed: Statute[1] defines distinct offenses of feloniously receiving stolen goods and feloniously receiving embezzled goods. Where affidavit charged receipt of stolen goods and evidence showed receipt of embezzled goods, the variance requires reversal. *Gentry v. State*, —— Ind.——, 61 N.E. (2d) 641 (1945).

This case presents the anomalous situation of a defendant charged with and convicted of receiving stolen goods from a person who plead

5. Bank of Morgan v. Reid, 27 Ga. App. 123, 107 S.E. 555 (1921); Fricke v. Angemeier, 53 Ind. App. 140, 101 N.E. 329 (1913); Burk v. Ottawa Gas and Elec., Company, 87 Kan. 6, 123 Pac. 857 (1912). But see Guaranty Trust Co. of N.Y. v. Grand Rapids G. H. and M. Ry Co., 7 F. Supp. 511, 520 (W.D. Mich. 1931).

6. Eyster v. Centennial Board of Finance, 94 U.S. 500 (1876).

1. Ind. Stat. Anno. (Burns' 1933) § 10-3097: "Receiving Stolen Goods. Whoever buys, receives, conceals, or aids in the concealing of, anything of value, which has been stolen, taken by robbers, embezzled, or obtained by false pretenses, knowing the same to have been stolen, taken by robbers, embezzled, or obtained by false pretenses, shall, . . . "

The problem presented in the principal case would not arise in any of the states cited in the Burns' list of comparative legislation. Under a similar statute, the Ohio court has held averment of the character of the offense by which the property was originally wrongfully obtained unnecessary. Whiting v. State, 48. O.S. 220 (1891). The other legislation is not strictly parallel: Idaho has a separate statute defining receipt of embezzled goods; Illinois and Oregon classify embezzlement as larceny and goods obtained by embezzlement are "stolen"; California and New York have theft legislation and the property would be "stolen" regardless of the species of theft involved.