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QUASI-CONTRACT AS AN ALTERNATIVE REMEDY FOR INDUCING BREACH OF TORT — In an action for money had and received, plaintiff alleged that the International Railroad Company owed plaintiff $40,000 as compensation for services rendered under an existing and valid contract of employment; that with knowledge of this fact defendant corporation, representing that it, and not plaintiff, was entitled to this sum, fraudulently conspired with International Railway Company that this sum be paid defendant instead of plaintiff, and that said amount was paid defendant, resulting in unjust enrichment under circumtances in which the law implies a promise on defendant's part to pay said sum to plaintiff. In reversing a judgment sustaining a demurrer to the complaint, the court *held* that the tort of inducing breach (non-payment) of the employment contract rendered defendant liable in quasi-contract. *Caskie v. Philadelphia Transit Co.*, 321 Pa. 157, 184 A. 17 (1936).

Maliciously inducing a third person to breach a valid, existing contract is recognized in most states as basis for a tort action [1] by the contract obligee, his interest in performance of the contract deserving, as a matter of policy, protection against all unjustified interference. Where a tort results in unjust enrichment of the wrongdoer, "waiver" of the tort and suit in the alternative remedy of quasi-contract is permitted in order to realize certain substantive and procedural advantages,[2] and this alternative is extended to cases of inducing breach of contract.[3] The fact that quasi-contract in this type of case pursues

[1] Originating with Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853), the doctrine is adopted and augmented in the United States by the cases listed in the exhaustive annotation in 84 A. L. R. 43 at 55 (1933). See also 33 MICH L. REV. 420 and 943 (1935).

[2] Listed in 33 MICH. L. REV. 420 at 421 (1935).

[3] For value of services of seduced apprentice: Lightly v. Clouston, 1 Taunt. 112, 127 Eng. Rep. 774 (1808); James v. LeRoy, 6 Johns. (N. Y.) 274 (1810).

For proceeds of re-sale of goods whose sale to defendant destroyed mortgage lien, Albertville Trading Co. v. Critcher, 216 Ala. 252, 112 So. 907 (1927).

For commissions earned by and due plaintiff, but collected by defendant: Gormley v. Dangel, 214 Mass. 5, 100 N. E. 1084 (1913); Savage, Inc. v. Wheelock, 230

money received not from plaintiff directly, but from a third party who is induced to commit the breach of contract, has caused refusal of recovery in a few cases on the ground that the fund was not taken from plaintiff's pocket [4] and that he does not have technical title [5] to it. Similarly, some courts, confusing quasi-contract with the ordinary action on express or implied-in-fact contracts, have named as reasons for refusal of relief the absence of any privity [6] between plaintiff and defendant, and the fact that plaintiff's remedy against the contract obligor for nonperformance remains unimpaired [7] by defendant's tort. But the duty to make restitution is merely an equitable complement to the primary legal obligation to refrain from unjustified interference with contract performance, a suit in quasi-contract being merely an election to seek reparation through restitution.[8] Plaintiff does not "waive," but expressly relies upon the tort as the

Mass. 111, 119 N. E. 670 (1918); Hornstein v. Podwitz, 254 N. Y. 443, 173 N. E. 674 (1930).

For amount of debt owing plaintiff but collected by defendant: rents, Smith v. Wiley, 22 Ala. 396, 58 Am. Dec. 262 (1853); checks, Bank of the Metropolis v. First Nat. Bank, (C. C. N. Y. 1884) 19 F. 301; savings account, Fowler v. Bowery Sav. Bank, 113 N. Y. 450, 21 N. E. 172 (1889); debt, Heidenheimer v. Boyd, 15 App. Div. 580, 44 N. Y. S. 687 (1897); proceeds from sale of shares, Bates-Farley Sav. Bank v. Dismukes, 107 Ga. 212, 33 S. E. 175 (1899); overpayment of ambiguous check, Rommel Bros. v. Wenks, 186 Ill. App. 369 (1914); accrued oil royalties, Peterson v. Smith, 75 W. Va. 553, 84 S. E. 250 (1915); insurance proceeds, Heywood v. Northern Assurance Co., 133 Minn. 360, 158 N. W. 632 (1916); special deposit, Bank of Oglethorpe v. Brooks, 33 Ga. App. 84, 125 S. E. 600 (1924); draft, Second Nat. Bank v. M. Samuel & Sons, (C. C. A. 2d, 1926) 12 F. (2d) 963; note, Millett v. Omaha Nat. Bank, (C. C. A. 8th, 1929) 30 F. (2d) 665; and see cases in annotation in Ann. Cas. 1918D 245.

[4] See cases discussed in 42 L. R. A. (N. S.) 1135 (1913). WOODWARD says in his LAW OF QUASI-CONTRACT 442 (1913), "it must further appear that the benefit received by him [defendant] has been *taken from the plaintiff*. As Professor Keener puts it, there must be 'not only a plus, but a minus quantity.'"

In the earlier Pennsylvania case of Tibby Bros. Glass Co. v. Farmers' & Mechanics' Bank, 220 Pa. 1, 69 A. 280 (1908), defendant bank collected the amount of a check from the drawee on an endorsement forged by the payee's bookkeeper, and recovery by the payee from the collecting bank in quasi-contract was denied on the ground that the money paid defendant was not taken from plaintiff, plaintiff had no title to the fund, no privity existed between the parties, and plaintiff's action against his original debtor remained. The principal case seems to be a direct reversal of this precedent.

[5] Relied upon by lower court in principal case. And see Tibby Bros. Glass Co. v. Farmers' & Mechanics' Bank, 220 Pa. 1, 69 A. 280 (1908); Cole v. Bates, 186 Mass. 584, 72 N. E. 333 (1904); and cases discussed in 42 L. R. A. (N. S.) 1135 (1913).

[6] Tibby Bros. Glass Co. v. Farmers' & Mechanics' Bank, 220 Pa. 1, 69 A. 280 (1908); Keene v. Collier, 1 Met. (58 Ky.) 415 (1858).

[7] Relied upon by the lower court in the principal case. And see Tibby Bros. Glass Co. v. Farmers' & Mechanics' Bank, 220 Pa. 1, 69 A. 280 (1908); and cases in 42 L. R. A. (N. S.) 1135 (1913).

[8] WOODWARD, LAW OF QUASI-CONTRACT 438 (1913).

chief circumstance rendering defendant's retention of the money unjust.[9] Recovery is had whenever in equity and good conscience defendant is not entitled to retain the fund as against plaintiff,[10] and depends in no measure upon plaintiff having title or upon direct appropriation from him.[11] Since the promise declared upon in quasi-contract is imposed by law to attain justice under the circumstances, regardless of the absence of express or implied assent of the parties, no privity of contract ever is necessary to the action,[12] and this rule seems particularly logical when, as in the principal case, the suit is based essentially upon a tort. The fact that plaintiff might have recovered from his contract obligor, who in turn would recoup from defendant, demonstrates the desirability of quasi-contract to avoid multiplicity of suits or circuity of action.[13] This single action accomplishes the result which otherwise would require two or more suits, since it reaches the tortiously gained fund in the most direct manner and permits pleading and proof of all defenses which would be available in an action on the contract.[14] Since in quasi-contract plaintiff is compensated in full for his injury, there is no need for, and little likelihood of, further suit by him in tort against defendant or in contract against his obligor. Procuring judgment in the "inconsistent" [15] alternative, quasi-contract, completely bars subsequent suit of either nature in most states; and in all jurisdictions, even were a second action permitted to proceed to judgment, full compensation of plaintiff for the injury through satisfaction of the first judgment prevents collection on the

[9] RESTATEMENT OF RESTITUTION AND UNJUST ENRICHMENT (Proposed Final Draft), p. 246 (1936).

[10] See Ann. Cas. 1918D 245; Heywood v. Northern Assurance Co., 133 Minn. 360, 158 N. W. 632 (1916); Wagener v. United States Nat. Bank, 63 Ore. 299, 127 P. 778 (1912); Indiana Truck Co. v. Standard Accident Ins. Co., (Mo. App. 1936) 89 S. W. (2d) 97.

[11] Wagener v. United States Nat. Bank, 63 Ore. 299, 127 P. 778 (1912); Allen v. M. Mendelsohn & Son, 207 Ala. 527, 93 So. 416 (1922).

[12] See Ann. Cas. 1918D 245; Heywood v. Northern Assurance Co., 133 Minn. 360, 158 N. W. 632 (1916); Allen v. Mendelsohn & Son, 207 Ala. 527, 93 So. 416 (1922); Millett v. Omaha Nat. Bank, (C. C. A. 8th, 1929) 30 F. (2d) 665.

[13] In re Gaffney's Estate, Appeal of Cauffield, 146 Pa. 49, 23 A. 163 (1892), where claim in quasi-contract by owner of savings accounts was allowed against estate to which bank paid it. See also Allen v. Mendelsohn & Son, 207 Ala. 527, 93 So. 416 (1922).

[14] Any defense showing plaintiff not entitled to performance of the contract necessarily constitutes a defense to the action for inducing breach of contract, which is based upon the policy of protecting a *right* to performance.

[15] Where there exists an election between inconsistent remedies, the party is confined to the remedy he first adopts. In Riley v. Albany Sav. Bank, 36 Hun (N. Y. S. Ct.) 513 (1885), and Fowler v. Bowery Sav. Bank, 113 N. Y. 450, 21 N. E. 172 (1889), the facts approximated those in the principal case, and election to sue in quasi-contract against the person wrongfully procuring payment of the debt was held to affirm the payment and collection, so as to preclude a subsequent contract action against the debtor, which would inconsistently disaffirm the payment.

A subsequent tort action against defendant is precluded by the accepted doctrine of "waiver" of tort by suit for restitution. Fictional elections and inconsistencies seem justifiable means for avoiding vexatious suits or double compensation.

second.[16] The advantages of this simple, direct remedy where a money judgment is sought as reparation for inducing breach of contract clearly outweigh any technical objections and account for the recent tendency of courts to apply it liberally as a law action based upon equitable principles.

E.R.G.

[16] Though judgments may be obtained against each joint tortfeasor, only one satisfaction may be had. Lovejoy v. Murray, 3 Wall. (70 U. S.) 1, 18 L. Ed. 129 (1865.)

Though a creditor may recover judgments against two parties for the same debt, he can have only one satisfaction. Van Etten v. Sphinx Holding Corp., 114 Misc. 436, 186 N. Y. S. 595 (1921); L. W. Hubbell Fertilizer Co. v. Jacobellis, 195 Ill. App. 410 (1915).