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Of the Right to Waive a Tort and Sue in Assumpsit

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A tort is a wrong or injury done by one party to another, for which the law gives a remedy in damages. It differs from a crime, in that it is a wrong done to another, for which the law gives a remedy in damages.

Every breach of contract is, in a certain qualified sense, a wrong; but an action to recover damages therefor differs from an action for a tort, in that, in the former, the contract itself is conned upon, while in the latter the suit is for some wrongful act or omission of duty, which, though it sometimes springs from or is connected with a disregard of contract relations, is nevertheless something more than a mere failure to perform an agreement.

The distinctions between an action for a tort and one upon contract are such that where the one will lie the other generally will not; but there are nevertheless some cases in which either may be brought at the election of the party injured. Thus, it is sometimes the case, that, in a business relation, the law makes it the duty of a party to observe a certain course of conduct with regard to the rights of others, where by contract he has also undertaken for the same thing; and in such a case a breach of duty is coincident with a breach of the contract, and the party damnsified has his election to sue either for the tort or upon the contract.

There are also cases of breach of contract where a wrong has been done not strictly coincident, but where, nevertheless, the damages recoverable are the same as those following a breach of the contract, so that a recovery for the tort gives complete compensation. In these cases, also, the party may elect the form of action, and a recovery in one will be a bar to a recovery in the other.

In still other cases, although the act done is purely one of tort, the law suffers the party injured to charge the other in contract, and to recover upon the basis of agreement, though in fact no agreement existed. In these cases, the law implies a promise on the part of the wrong-doer to do what he ought to do, and will not suffer him to dispute the implication. And where this is permitted, the party injured is said to have a right to waive the tort, and sue as upon promises.

It is said by an eminent judge in one case, that "no party is bound to sue in tort, where, by converting the action into an action on contract, he does not prejudice the defendant; and, generally speaking, it is more favorable to the defendant that he should be sued in contract, because that form of action lets in a set-off, and enables him to pay money into court."1

This, however, is stating the rule much too broadly, for in most cases the tort feaver could not be prejudiced by converting the action into one on contract if the law would suffer it; but well settled rules forbid.

The right to waive a tort and sue in assumpsit, seems to have been first distinctly recognized in Lamine v. Dorrell,2 where assumpsit was brought by an administrator to recover the moneys received by the defendant on a sale made by him, without authority, of debentures belonging to the estate. It was objected that the action would not lie, because the defendant sold the debentures under a claim of administration himself, and therefore could not be said to receive that money to the use of the plaintiff, which, indeed, he had received to his own use; but the plaintiff ought to have brought trover or detinue for the debentures. Powell, J., said: "It is clear the plaintiff might have maintained detinue or trover for the debentures, but the plaintiff may dispense with the wrong, and suppose the sale made by his consent, and bring an action for the money that they were sold for as money received to his use." And Holt, Ch. J., said: "Suppose a person pretends to be guardian in socage, and enters into the land of the infant, and takes the profits; though he is not rightful guardian, yet an action of account will lie against him. So the defendant in this case, pretending to receive the moneys the debentures were sold for in the right of the intestate, why should he not be answerable for it to the intestate's administrator?"

In Longchamp v. Kenney,3 this doctrine was applied to the case of one who, being in possession of a masquerade ticket belonging to another, which was issued for the purposes of sale, refused either to redeliver it or to account for its value. In an action for money had and received, Lord Mansfield said: "If the defendant sold the ticket and received the value of it, it was for the plaintiff's use, because the ticket was his. Now, as the defendant has not produced the ticket, it is a fair presumption that he has sold it." And the plaintiff had judgment.

In Hambly v. Trot,4 the same eminent jurist considers the matter further. The question there was, what actions survive and what do not? "In most, if not all, the cases," he says, "where trover lies against the testator, another action might be brought against the executor, which would answer the purpose. An action on the custom of the realm against a common carrier, is for a tort and supposed crime; the plea is not guilty; therefore it will not lie against an executor. But assumpsit, which is another action for the same cause, will lie. So if a man take a horse from another and bring him back again, an action of trespass will not lie against his executor, though it would lie against him; but an action for the use and hire of the horse will lie against the executor."

"There is a case," he proceeds, "in Sir Thomas Raymond,5 which sets this matter in a clear light.

1 Per Tindall, Ch. J., in Young v. Marshall, 8 Bing. 43.
2 Li., Raym. 1261.
3 Doug. 137.
4 Cowp. 379.
there, in an action on the case the plaintiff declared that he was possessed of a cow which he delivered to the testator, Richard Bailey, in his life-time, to keep the same for the use of him the plaintiff, which cow the said Richard afterward sold, and did convert and dispose of the money to his own use; and that neither the said Richard in his life-time nor the defendant after his death, ever paid the said money. Upon this state of the case no one can doubt but the executor was liable for the value. But the special injury required him to plead that the testator was not guilty. The jury found him guilty. It was moved in arrest of judgment, because this was a tort for which the executor was not liable to answer, but mortitur caus a persona. For the plaintiff it was insisted that though an executor is not chargeable for a misfeasance, yet for a nonfeasance he is; as for non-payment of money levied upon a fieri facias, and cited Cro. Car. 596, 6 Co. 60, a, where this very difference was agreed; for nonfeasance shall never be vi et armis nor contra pacem. But notwithstanding this the court held it was a tort, and that the executor ought not to be chargeable. Sir Thomas Raymond adds, "vide Saville, 40, a difference taken." That was the case of Sir Henry Sherrington, who had cut down trees upon the queen's land, and converted them to his own use in his life-time. Upon an information against his widow after his decease, Manwood, J., said: 'In every case where any price or value is set upon the thing in which the offense is committed, if the defendant dies his executor shall be chargeable; but where the action is for damages only in satisfaction for the injury done, there his executor shall not be liable.' These are the words Sir Thomas Raymond refers to. Here, therefore, is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, etc., there the person injured has only a reparation for the damage, and receives wharfage dues or the defendant's cattle upon the land of another, and pastures them there the person injured has only a reparation for the damage, and receives wharfage dues or the defendant's cattle upon the land of another, and pastures them there where this very difference was agreed; for non-

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Mr. Addison, in his treatise on the law of torts, dismisses this subject after very brief consideration. "If a man," he says, "has taken possession of property, and sold or disposed of it without lawful authority, the owner may either disaffirm his act and treat him as a wrong-doer, and sue him for a trespass for a conversion of the property; or he may affirm his acts and treat him as his agent, and claim the benefit of the transaction; and if he has once affirmed his acts and treated him as an agent, he cannot afterward treat him as a wrong-doer, nor can he affirm his acts in part and avoid them as to the rest. If, therefore, goods have been sold by a wrong-doer, and the owner thinks fit to receive the price, or part thereof, he ratifies and adopts the transaction, and cannot afterward treat it as a wrong." 1 Of the correctness of the doctrine as thus stated there is no dispute, and it is well supported by judicial decisions. 1

The right to waive the tort is not, however, confined to cases of sales of property, but is applicable to all other cases when the defendant has by wrongful act become possessed of money which in equity and good conscience belongs to the plaintiff. As where one without authority collects moneys which were payable to another; 2 or a trespasser upon lands demands and receives wharfage dues; 3 or the defendant by deceit and fraud obtains money from the plaintiff; 4 and the like.

But when we go beyond the cases in which money has actually come to the hands of the defendant, all is not so clear upon the authorities. There are many cases which hold, that if the defendant, by means of a tort, has obtained money's-worth, assumpsit may be brought; as where property is wrongfully sold, and other property received in payment; 2 or the apprentice or slave of another is knowingly employed without the master's permission; 4 or the defendant has been benefited thereby or not.

In Walker v. Davis it is said: "Ordinarilv in the case of torts it is at the election of the Owner of property wrongfully taken, to bring his action for the tort, or, waiving that, to bring assumpsit; and when he brings the latter, the defendant is stopped to say there was no promise, and that he took the property wrongfully, or to set up his own fraud or wrong in defense of the suit." 10 If the doctrine of the right to waive the tort and sue in assumpsit rested solely upon the early English decisions, there could be little doubt, we think, that a statement of the general principle as broad as here given would be supported by them; and there are many cases which hold that assumpsit may be brought for property wrongfully
converted by the defendant, whether sold or not.1 But however reasonable these cases may appear, and harmonious as they seem to be with the general rules governing the action of assumpsit, they do not appear to have received universal approval, and this time, probably the majority of judicial decisions upon the point under discussion is opposed to them.

In Massachusetts the rule is very clear, that to authorize the plaintiff to waive the tort and sue in assumpsit, a sale of the property by the defendant must be shown.2 In New Hampshire the courts have finally settled down upon the same rule, overruling the earlier decisions in the same state.3 In Illinois and Wisconsin the same rule is adopted.4 In Vermont it is said "the law is too well settled to admit of discussion, that to enable the owner of goods to waive the tort and sue in assumpsit, where they have been wrongfully taken from him, the goods must have been converted into money.5 And there are like rulings in other states, some of which appear to have been made on such full consideration of the subject, that they are not likely to be disturbed hereafter in the same states.6 We must consequently expect that, upon this particular branch of our subject, the authorities in the different states will continue to exhibit hereafter the same want of harmony which is now apparent.

In general, a promise will not be implied unless it appear, either that the defendant intended it should be, or that natural justice requires it, in consequence of some benefit received by him.7 A mere naked trespass cannot, therefore, be made the basis of an implied assumpsit.8 And where the defendant has entered upon real estate under a claim of right adverse to the plaintiff, the law will not imply a promise, notwithstanding he has made his tortious possession to the plaintiff, the law will not imply a promise, notwithstanding he has made his tortious possession beneficial.9 The action of trespass is the proper action for the trial of the adverse claim in these cases.

1 Hill v. Davis, 3 N. H. 381; Floyd v. Willey, 1 Mo. 431; Ford v. Caldwell, 3 Hill (N. C.) 248; Baker v. Locke, 2 Ohio 9; Fiquet v. Allison, 12 Mich. 232; Webster v. Drinkwater, 5 Greenl. 340; Jones v. Melone, 19 Vt. 369; Johnson v. Reed, 9 Eng. 375; Labeaume v. Hill, 1 Mich. 415; see also note to Putnam v. Wise, 1 Hill, 236; note 1, 2 Greenl. Ev. 62. In Schweitzer v. Welber, 6 Mich. 150, this doctrine was held applicable to the case of one who had wrongfully taken property, and in whose hands it had been accidentally destroyed. See also Halleck v. Mixer, 10 Cal. 574; Cooper v. Berry, 21 Ga. 528.

2 Jones v. Honr, 5 Pick. 283. This appears to be a leading case on this subject, and see Glass Co. v. Walcott, 3 Allen, 227.

3 Mann v. Locke, 11 N. H. 282; Smith v. Smith, 43 id. 535.

4 Morrison v. Rogers, 2 Barn., 26; Bothwell v. Strong, 11 Ill. 698; Kelly v. Owens, 4 Chand. 186; Elliott v. Jackson, 3 Wis. 669.

5 Stearns v. Dillingham, 22 Vt. 627, per Bennett, J. And he adds: "The rule is the same where the trespass consisted in breaking the plaintiff's freehold, and carrying away the trees standing thereon. The tree must have been sold by the defendant." See Willett v. Willett, 3 Watts, 277; Pearl v. Chaplin, 44 Penn. St.; Gilchrist v. Wickliffe, 1 A. R. Marsh. 22; Fuller v. Dunen, 30 Ala. 73; Tucker v. Jewett, 32 Conn. 581; Snider v. Hamilton, 21 Ind. 202; Thompson v. Hall, 27 Geo. 357; Peake v. Bright, 38 Ala. 338; Emerson v. McNama, 41 Mo. 563; Compare Bennett v. Francis, 2 B. and P. 554; Reid v. Hutchinson, 3 Camp. 360.

6 Osborn v. Bell, 3 Den. 357; per Beardsley, J., quoting and adopting the language of Melone, Ch. J., in Webster v. Drinkwater, 5 Greenl. 322.

7 Jones v. Jones, 12 Ohio 77; Stearns v. Dillingham, 22 Vt. 627. But where the defendant has received money by means of an error of description, the cases have been before seen, in this action. See O'Connor v. Natches, 1 S. and P. 357.

8 Carson River, etc., Co. v. Bassett, 2 Nev. 242. As where the defendant has used a private artificial canal, under a claim that it is a public highway. Ward v. Warner, 8 Mich. 568. In this case, Manning, J., intimates an opinion

9 It seems that an officer who takes goods by color of lawful authority is not liable to the owner in assumpsit before he had sold them and received the price, nor afterward, if he has paid over the money in pursuance of his process before notice of the plaintiff's claim.1 But an officer who has kept a person in confinement at hard labor, under a void sentence, and received personally the benefit of his labor, is liable for the value thereof in an action for work and labor.2 Where an express promise exists, the law will not imply a different one; and therefore if one purchases goods upon a condition which he afterward fails to perform, but keeps and converts the goods to his own use, the vendor must sue upon the conditional contract, or in trover.3 He cannot waive the tort, and sue upon an implied contract for goods sold.4 These references will perhaps sufficiently illustrate the general current of decision on the subject of election of remedies in the case of torts. They will perhaps also show that the right to waive a tort, and pursue a remedy as upon contract, is not so general as is sometimes supposed. It may be added, however, that if, in case of a tort, the party wronged elects to sue on contract, and fails to establish a valid promise, express or implied, he is not bound by that election, but may afterward sue for the tort. The cases in which infants have obtained property by purchase, on the false statement that they were of full age, and afterward defeated an action on the contract of purchase on the ground of infancy, are illustrations of this rule.5

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THE LAW OF TRADE-MARKS.

It is well settled that a manufacturer may, by priority of adoption, or by inventing a new word, secure a right of property in certain letters, marks, or symbols, so as to be entitled to the exclusive use of the same to designate the particular property, mark, or symbol, which it is affixed. Amoskeag Company v. Spear, 2 Sandif. 590; Clark v. Clark, 25 Barb. 76; Barrows v. Knight, 6 R. I. 434; Stokes v. Landgraff, 17 Utah, 568; v. Johnson, 2 Bow. 1; Wolf v. Goulard, 18 How. Pr. 64; Cassell v. Davis, 35 id. 70; Burnett v. Phalon, 9 Bow. 192.

1 Prepared by Daniel Ketchum as a note to Holbrook, 2 Sandif. Ch. 588.