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Of the Right to Waive a Tort and Sue in Assumpsit

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excludes all questions as to exemplary damages. The general rule is, that in an action against an executor or administrator for the torts of his decedent, exemplary damages are not recoverable (a). In Massachusetts they are expressly disallowed by statute in such an action (b).

Of the defendant: The act of the defendant, and the wrongful elements incident thereto, furnish the reason for awarding exemplary damages. The fact that the defendant bears malice toward a third person will not entitle the plaintiff to receive exemplary damages at his hands; nor will they be given where the injury is a mere mistake of judgment; they are incident to compensation.

Such is the doctrine of the law regarding vindictive damages in actions for tort; they are not awarded under any claim of right by the party, but for reasons of an enlarged public policy.

OF THE RIGHT TO WAIVE A TORT AND SUE IN ASSUMPSIT.

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 an individual, and to be redressed at his instance, while a crime is a wrong done to the commonwealth, and to be punished by means of a public prosecution.

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 counted 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

(a) 51 Pa. St. 315. (b) Mass. G. S. 1866, ch. 128, sec. 2.

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 damnified 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 *wave 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" (a).

This, however, is stating the rule much too broadly, for in most cases the tortfeasor 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 vs. Dorrell* (b), where assumpsit was brought by an administrator to

(a) Per Tindall Ch. J. in *Young vs. Marshall*, 8 Bing. 43. (b) Ld. Raym. 1216.

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 in 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 indentures. Powell J. said: "It is clear the plaintiff might have maintained detinue or trover for the indentures, 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 vs. Kenney* (a) 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 vs. Trott* (b) the same eminent jurist considers the matter farther. 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

(a) Doug. 137. (b) Cowp. 375.

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 (a) which sets this matter in a clear light. 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 lifetime, to keep the same for the use of him the plaintiff, which cow the said Richard afterwards sold, and did convert and dispose of the money to his own use ; and that neither the said Richard in his lifetime 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 *moritur cum 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 *feri facias*, and cited Cro. Car. 539, 9 Co. 50 a, where this very difference was agreed ; for non-feasance 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 offence 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

(a) Bailey vs. Birtles, Sir T. Raym. 71.

the expense of the sufferer, as beating or imprisoning a man, etc., there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But, where, besides the crime, property has been acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by the testator in cutting down another man's trees, but for the benefit arising to the testator for the value or sale of the trees, he shall."

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 or 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 afterwards 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 afterwards treat it as a wrong." (a) Of the correctness of the doctrine as thus stated there is no dispute, and it is well supported by judicial decisions (b).

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

(a) Addison on torts, p. 33 citing *Brewer v. Sparrow*, 7 B. & C. 310, and *Lvthgoe v. Vernon*, 5 H. & N. 180; 29 Law J. Exch. 164.

(b) See *Hitchin v. Campbell*, 2 W. Bl. 827; *Annotts v. Barry*, 2 B. & B. 369; *Powell v. Rees*, 7 A. & E. 426; *Borie v. Taylor*, 5 Hill, 577; *Miller v. Miller*, 9 Pick. 84; *Gimre v. Wilber*, 12 Pick. 120; *Appleton v. Bancroft*, 10 Met. 231; *Monson v. Rogers*, 2 Scam. 317; *Staat v. Evans*, 35 Ill., 455; *Leighton v. Preston*, 9 Gill, 201; *Gray v. Griffith*, 10 Watts, 431; *Goodsnow v. Luyder*, 3 Greene Iowa, 599; *White v. Brooks*, 43 N. H. 402. "The principle is" says Pollock C. B. "that the owner of property wrongfully taken has a right to follow it and adopt any act done to it, and treat the proceeds as money had and received to his use." *Neat v. Harding* 20 Law J. Rep. (N. S.) Exch. 250; S. C. 4 Eng. L. & Eq. 464. "Subject" he adds, "to certain exceptions," which, however, he does not point out.

which were payable to another; (a) or a trespasser upon lands demands and receives wharfage dues; (b) or the defendant by deceit and fraud obtains money from the plaintiff; (c) 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; (d) or the apprentice or slave of another is knowingly employed without the master's permission; (e) or one turns his cattle upon the land of another, and pastures them there without the owner's consent; (f) or by the instrumentality of the defendant in an execution, the property of another is sold to satisfy the judgment (g). And it has also been held that where property has been wrongfully taken and used, assumpsit may be brought for the use after its return (h).

And in some cases a strong disposition has been manifested to sustain an action of assumpsit wherever an unlawful conversion appears, whether the defendant has been benefited thereby or not.

In *Walker v. Davis* it is said: "Ordinarily 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 estopped to say there was no promise, and that he took the property wrongfully, or to set up his own fraud or wrong in defence of the suit (i)." 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

(a) *Hasser v. Wallis*, 1 Salk. 28. (b) *O'Conlev v. Natches*, 1 S. & M. 31. (c) *Pearsoll v. Chapin*, 44 Penn. St. 9. (d) *Miller v. Miller*, 7 Pick. 133; *Strickland v. Bemis*, 14 Ala. 511; See *Huton v. Wetherald*, 5 Harr. 38; *Budd v. Hiler*, 3 Dutch. 43; *Phelps v. Conant*, 30 Vt. 283. (e) *Curtis v. Bridges*, Comb. 450; *Fower v. Stewart*, 3 M. & S. 191; *Lightly v. Clouston*, 1 Taunt. 112; *Munsey v. Goodwin*, 3 N. H. 272; *Stockitt v. Watkins's Adm.* 2 G. & J. 324. (f) *Welch v. Bagg*, 12 Mich. 42, compare *Stearns v. Dillingham*, 22 Vt. 624. (g) *Hackley v. Swigert*, 5 B. Mour. 86. (h) *Stockitt v. Watkins*, 2 G. & J. 326; *Alsbrook v. Hathaway*, 3 Sneed, 454. (i) *Walker v. Davis*, 1 Gray, 509, per Thomas J. See *Badger v. Poinney*, 15 Mass. 359.

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 (*a*). 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 at 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 (*b*). In New Hampshire the Courts have finally settled down upon the same rule, overruling the earlier decisions in the same State (*c*). In Illinois and Wisconsin the same rule is adopted (*d*). 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 (*e*). 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 (*f*). We must consequently expect that upon

(*a*) *Hill v. Davis*, 3 N. H. 384; *Floyd v. Wiley*, 1 Mo. 430; *Ford v. Caldwell*, 3 Hill (S. C.) 248; *Baker v. Corey*, 15 Ohio 9; *Fiquet v. Allison*, 12 Mich. 328; *Webster v. Drinkwater*, 5 Greenl. 323, per Mellen Ch. J.; *Jones v. Buzzard*, 1 Hemp. 240; *Johnson v. Reed*, 3 Eng. 202; *Laheaume v. Hill*, 1 Mo. 643. See also note to *Putnam v. Wise*, 1 Hill 240; note to 2 Greenl. Ev. § 108. In *Schweizer v. Weiber*, 6 Rich. 159, 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*, 16 Cal. 574; *Cooper v. Berry*, 21 Geo. 526.

(*b*) *Jones v. Hoar*, 5 Pick. 285. This appears to be a leading case on this subject. And see *Glass Co. v. Walcott*, 2 Allen, 227.

(*c*) *Mann v. Locke*, 11 N. H. 248; *Smith v. Smith*, 43 N. H. 536.

(*d*) *Morrison v. Rogers*, 2 Scam. 317; *O'Reer v. Strong*, 13 Ill. 688; *Kelty v. Owens*, 4 Chand. 166; *Elliott v. Jackson*, 3 Wis. 649.

(*e*) *Searas v. Dillingham*, 23 Vt. 627, per Bennett J. And he adds: "The rule is the same where the trespass consisted in breaking the plaintiff's freehold, and cutting and carrying away the trees standing thereon. The trees must have been sold by the defendant."

(*f*) See *Willett v. Willett*, 3 Watts, 277; *Pearson v. Chapin*, 44 Penn. St. 9; *Guthrie v. Wickliffe*, 1 A. K. Marsh. 83; *Fuller v. Dusen*, 36 Ala. 73; *Tucker v. Jewett*, 32 Conn. 563; *Saunders v. Hamilton*, 3 Dana, 552; *Barlow v. Stalworth*, 27 Geo. 517; *Pike v. Bright*, 39 Ala. 332; *Emerson v. McNamara*, 41 Me. 565. Compare *Bennett v. Francis*, 2 B. & P. 554; *Read v. Hutchinson*, 3 Camp. 351.

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 (*a*). A mere naked trespass cannot therefore be made the basis of an implied assumpsit (*b*). 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 beneficial (*c*). The action of trespass is the proper action for the trial of the adverse claim in these cases.

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 afterwards if he has paid over the money in pursuance of his process before notice of the plaintiff's claim (*d*). 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 (*e*).

(*a*) *Osborn v. Bell*, 5 Denio, 377, per Beardsley J. quoting and adopting the language of Mellen Ch. J. in *Webster v. Drinkwater* 5 Greenl. 323.

(*b*) *Jones v. Hoar*, 5 Pick. 285; *Stearns v. Dillingham*, 27 Vt. 624. But where the defendant has received money by means of the trespass, it may be recovered, as we have before seen, in this action. See *O'Conley v. Natches*, 1 S. & M. 31.

(*c*) *Carson River & Co. v. Bassett*, 2 Nev. 249. As where the defendant has used a private artificial canal, under a claim that it is a public highway. *Ward v. Warner*, 8 Mich. 508. In this case Manning J. intimates an opinion that the tort cannot be waived in the case of personal property appropriated under an adverse claim. He says: "In a case of pure trespass, by which I mean one committed without color of right to the property taken, the Court may well say to the defendant, 'you shall not be permitted to defeat the action by showing you took the goods without intending to pay for them, or with an intention to do a wrong with which the plaintiff, by putting a more charitable construction on your conduct, has not thought proper to charge you.' This, I think is all that is meant by waiving the trespass and suing for goods sold and delivered. There is no objection to such a course, when the trespass is wholly separate from the right of property; but when it is mixed up with the right of property, and the question of trespass or no trespass depends on that right, and must stand or fall with it, the trespass cannot be waived, because none is admitted; and the law will not imply a promise to pay, as defendant took the goods in his own right." But this doctrine, though receiving some support from *Wynne v. Lathan*, 6 Jones L. 329, is opposed to that of several of the cases hereinbefore cited, including that of *Fiquet v. Allison*, in the same Court. 12 Mich. 328.

(*d*) *Osborn v. Bell*, 5 Denio, 370. (*e*) *Patterson v. Prior*, 18 Ind. 441.

Where an express promise exists, the law will not imply a different one; and therefore if one purchases goods upon a condition which he afterwards fails to perform, but keeps and converts the goods to his own use, the vendor must sue upon the conditional contract, or in trover. He cannot waive the tort, and sue upon an implied contract for goods sold (*a*).

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 afterwards 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 afterwards defeated an action on the contract of purchase on the ground of infancy, are illustrations of this rule (*b*).

(*a*) *Strutt v. Smith*, 1 C. M. & R. 315; *Allen v. Ford*, 19 Pick. 217.

(*b*) See *Badger v. Phinney*, 15 Mass. 359; *Walker v. Davis*, 1 Gray 509.