Michigan Law Review

Volume 55 | Issue 1

1956

Restitution - Waiver of Tort and Suit in Assumpsit - Amount of Recovery Where There Has Been a Sale

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RESTITUTION—WAIVER OF TORT AND SUIT IN ASSUMPSIT—AMOUNT OF RECOVERY WHERE THERE HAS BEEN A SALE—In a prior action one of the defendants obtained a judgment against the plaintiff. The present action for conversion was brought because of an allegedly irregular execution sale of plaintiff's business property under that judgment. The trial court

granted defendants' motion to dismiss on the ground that the action was barred by the statute of limitations. On appeal, *held,* affirmed. The applicable statute of limitations was not tolled by fraudulent concealment[1] and plaintiff, having elected his remedy in tort, was not entitled to a trial in an action of assumpsit on the theory of a contract implied by law. The court also found that under the Judicature Act of 1915[2] any assumpsit recovery would be limited to the proceeds of the sale. One justice dissented from this view on the ground that the assumpsit action provided for in the act did not eliminate assumpsit on the common counts as a restitutionary remedy, and that recovery on such counts should not be limited to the proceeds of a sale by the wrongdoer. *Janiszewski v. Behrmann,* 345 Mich. 8, 75 N.W. (2d) 77 (1956).

The court's use of the doctrine of election of remedies in the principal case is questionable. To charge a litigant with the consequences of having elected a remedy there must be two or more remedies available to him.[3] At the time plaintiff filed his action in tort the three year statute of limitations had already barred it. It would appear that the present case involved a mistake as to the availability of a remedy rather than an election of remedies.[4] The overwhelming weight of authority is that there can be no election if one of the remedies is barred by the statute of limitations.[5] Apart from election of remedies, the principal case is notable for its discussion of the availability of assumpsit and the amount of recovery in the case of a sale of converted personal property. Although it has been almost universally recognized that an owner can waive the tort and sue in assumpsit for property tortiously taken,[6] there is no agreement about the necessity of a sale by the tort-feasor as an element of the cause of action. The modern trend and majority view is that the absence of a sale does not prohibit recovery,[7] whereas the minority view, which is followed by Michigan,[8]

1 Plaintiff argued that he did not know of his statutory exemptions and of the irregularities in the execution sale until 1954, and that the statute of limitations should begin to run at that time. Both the majority and the dissent agreed, however, that since the acts of the defendants were open and notorious, and since they were under no duty to inform the plaintiff of his legal rights, that the statute of limitations ran from the date of the sale—the alleged conversion.

2 Mich. Comp Laws (1948) §611.1.

3 Hansen v. Pere Marquette Ry. Co., 267 Mich. 224, 255 N.W. 192 (1934); Kruk v. Minneapolis, St. P. & S.S.M. Ry. Co., 249 Mich. 685, 229 N.W. 479 (1930).

4 "The law has not gone so far as to deprive parties of meritorious claims merely because of attempts to collect them by inappropriate action, upon which recovery could not be had." McLaughlin v. Austin, 104 Mich. 489 at 491, 62 N.W. 719 (1895).

5 See 28 C.J.S., Election of Remedies §12, p. 1084 (1941). There is an early case in which a plaintiff, defeated by the statute of limitations in an action of assumpsit, was held not to be able to bring an action for fraud and deceit. Black v. Miller, 75 Mich. 323, 42 N.W. 837 (1889).

6 See the cases collected in 18 AM. JUR., Election of Remedies §44, p. 163, n. 18 (1938).

7 Felder v. Reeth, (9th Cir. 1929) 34 F. (2d) 744; WOODWARD, QUASI CONTRACTS §273, pp. 440-441 (1913); 97 A.L.R. 250 at 261 (1935); RESTITUTION RESTATEMENT §151 (1937).

8 Jones v. Hoar, 22 Mass. 285 (1827); Ward v. Warner, 8 Mich. 508 (1860); Watson v. Stever, 25 Mich. 386 (1872); Tolan v. Hodgeboom, 38 Mich. 624 (1878); St. John v. Antrim Iron Co., 122 Mich. 68, 80 N.W. 998 (1899).

requires a sale in order to establish a cause of action in assumpsit.[9] The majority in the principal case said that an action of assumpsit in the case of the conversion of personal property into money was covered by the Judicature Act of 1915,[10] and that under the statute recovery was limited to the proceeds of the sale.[11] Justice Smith, dissenting, distinguished between an action for damages and an action for restitution, and stated that the Judicature Act of 1915, which permitted an action in assumpsit for damages, did not eliminate the availability of assumpsit on the common counts as a restitutionary remedy.[12] He agreed that an action under the statute would be barred by the three year statute of limitations applicable to all damage actions,[13] but he disagreed with the majority as to the amount of recovery permitted under the statute, holding recovery of all just damages sustained by the plaintiff should be allowed. He argued that the present action, however, was not brought for damages under the statute, but was a quasi-contract action covered by the six year statute of limitations applicable to promissory obligations.[14] Accepting the requirement of a sale laid down by *Watson v. Stever*,[15] Justice Smith stated that under the common law of Michigan the recovery should not be limited to the proceeds of the sale but should be the value of the property as of the time of the conversion.[16] Yet recovery limited to the proceeds is a logical consequence of accepting the requirement of a sale in order to establish a cause

[9] Where there is a contractual relationship between the parties the Michigan authorities allow assumpsit to be brought in the absence of a sale. Tuttle v. Campbell, 74 Mich. 652, 42 N.W. 384 (1889); McLaughlin v. Salley, 46 Mich. 219, 9 N.W. 256 (1881); Figuet v. Allison, 12 Mich. 328 (1864).

[10] Mich. Comp. Laws (1948) §611.1.

[11] In reaching this decision the majority was required to hold that the last sentence of this section stating, "In all such cases where assumpsit is brought, a promise shall be implied by law to pay all just damages sustained by plaintiff and may be so declared upon," was applicable only when assumpsit was brought in the case of a penalty or a forfeiture. This holding is hard to justify either on the basis of the grammatical structure of the section or in the light of its legislative history. Justice Smith's dissent points out the weakness of this position.

[12] Surely the Judicature Act of 1915 was not intended to limit the availability of assumpsit to the situations listed: trespass on land, fraud and deceit, conversion of personal property into money, and penalty and forfeiture; but there might be a real question whether in those situations assumpsit can be used to provide a quasi-contract remedy which is independent of the statute.

[13] Mich. Comp. Laws (1948) §609.13.

[14] For a criticism of applying different statutes of limitations see Corbin, "Waiver of Tort and Suit in Assumpsit," 19 YALE L.J. 221 (1910). For a criticism of Corbin's views see House, "Unjust Enrichment: The Applicable Statute of Limitations," 35 CORN. L.Q. 797 (1950).

[15] 25 Mich. 386 (1872).

[16] It is questionable that such a recovery has been permitted in Michigan. Although it appears never to have been squarely decided, there is dicta to the effect that recovery is limited to the amount of the proceeds of the sale. Lyon v. Clark, 129 Mich. 381, 88 N.W. 1046 (1902); Nelson v. Kilbride, 113 Mich. 637, 71 N.W. 1089 (1897). This is the recovery allowed in other jurisdictions which follow Jones v. Hoar, note 8 supra. See 97 A.L.R. 250 at pp. 275-276 (1935). Jurisdictions which do not require a sale permit recovery for the value of the property at the time of the conversion. Felder v. Reeth, note 7 supra. See Justice Cooley's opinion in Watson v. Stever, note 8 supra, at 387, as to why the court declined to allow recovery on the count for goods sold and delivered.

of action in assumpsit. The solution to this problem, it is urged, is to be found in overruling *Watson v. Stever*[17] as to the requirement of a sale in order to establish a cause of action in assumpsit. This would be in accord with the majority of American jurisdictions. The attention of the court should be concentrated on the original benefit obtained by the wrongdoer rather than on the fictional promise contained in an action for assumpsit.[18]

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[17] Note 8 supra.
[18] For an excellent discussion of the concept of benefits see 46 MICH. L. REV. 543 (1948).