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

Judge T. M. Cooley, of the supreme court of Michigan, contributes the following article to the January number of the Bench and Bar:

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 therefore differs from an action for a tort, in that, in the former, the contract itself is set 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 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 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 suzd in contract, because that form of action lets in a set-off, and enables him to pay money into court."

This, however, is stating the rule much too broadly, for in most cases the tort-feasor 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, 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 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 might have brought detinue or trover for the indentedures, 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, the 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 deliver 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. Trott, 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, which sets this matter in a clear light.

1 Per Tindall, Ch. J., in Young v. Marshall, 8 Bing. 43.
2 Liv., Raym. 1216.
3 Doug. 137.
4 Lambie v. Trott.
5 Longchamp v. Kenney.
6 Hambly v. Trott, Sir T. Raym. 71.
that he was possessed of a cow which he delivered to the testator, Richard Bailey, in his life-time, to keep 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 owner may either disaffirm his act and treat him as an agent, he cannot afterward 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 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 correeess of the ddoc-

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; or a trespasser upon lands demands and receives wages due; or the defendant by deceit and fraud obtains money from the plaintiff; and the like.

1 See Hitchin v. Campbell, 2 W. B. 627; Abbott v. Barry, 2 B. and C. 561; Powell v. Bess, 7 A. and E. 428; Hurley v. Taylor, 5 Hill, 277; Miller v. Miller, 9 Pick., 34; Gilmore v. Wilber, 12 Id., 120; Ajiplon v. Bancroft, 19 Met., 251; Monson v. Rogers, 2 Scam., 317; Stann v. Evans, 35 Ill., 405; Loughton v. Preston, 9 Hill, 39; Gray v. Griffin, 16 Vols., 411; Goodnow v. Layder, 3 Grum., Iowa, 596; White v. Brooks, 45 N. H., 422. "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." 2 Next v. Harding, 30 Law J. Rep., N. S., 299; S. C., 4 Eng. L. and Eq. 461. "Subject," he adds, "to certain exceptions," which, however, he does not point out.

It seems that an officer who takes goods by color of lawful authority is not liable to the owner in assumpsit before he has 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. 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.

Where an express promise exists, the law will not impose 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. He cannot waive the tort, and sue upon an implied contract for goods sold.

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.

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 to which it relates. In some instances the court may well say to the defendant, ‘you shall not be permitted to defeat the action by showing the goods without intending to pay for sold, 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 is all that is meant by waiving the trespass and suing for goods sold. 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 impose a promise to pay, as defendant took the goods in his own right.” But this doctrine, though receiving some support from Wynn v. Latham, is Jones, L. 329, is opposed to that of several of the cases heretofore cited, including that of Pluquet v. Allison, in the same court, 12 Mich., 556.

1 Osborn v. Bell, 5 Denio, 370.
2 Patterson v. Prior, 18 Ind. 411.
4 See Badger v. Phinney, 15 Mass. 336; Walker v. Davis, 1 Gray, 593.
5 Prepared for Daniel Ketchum as a note to Osborn v. Cobbett 2 Sandl. Ch. 396.