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Article 7

Pledges - Conversion - Unauthorized Purchase by Pledgee

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judgment should be given effect as if no error had occurred in the original entry. *Ex parte Howland,* 3 Okla. Cr. 142, 104 Pac. 927 (1909); *United States* v. *Harrison,* 23 F. Supp. 249 (1938); *Breckenridge* v. *Lamb,* 34 Nev. 275, 118 Pac. 687 (1911). Thus, for example, where a jury assessed defendant's punishment as a fine and imprisonment, but the judgment of the court embraced only a fine and costs, it could be changed by the appellate court on motion of the State to conform to the verdict. *Gipson* v. *State,* 58 Tex. Crim. Rep. 403, 126 S.W. 267 (1910). A practical reason in addition to the above is stated in the case of *In re Bonner,* 151 U.S. 242, 14 Sup. Ct. 323, 38 L.Ed. 149 (1893) to the effect that the common law embodies in itself sufficient reason and common sense to reject the doctrine that a prisoner whose guilt is established by a regular verdict, is to escape punishment altogether, because the court committed an error in passing the sentence.

If an illegal sentence has been pronounced, the court has power to substitute a legal sentence, and its right to do this is not impaired by the circumstance that the illegal sentence has been partly executed, though that circumstance will undoubtedly be considered by the court in determining the extent of the defendant's punishment. *In re Vitali,* 153 Mich. 514, 116 N.W. 1066 (1908).

This view is further illustrated in the case of *United States* v. *Harman,* 68 Fed. 472 (1895), which held that where a sentence different from that authorized by law, has been imposed on defendant convicted of a criminal offense, and the cause remanded to the trial court, such trial court resumes jurisdiction of the cause and has authority to re-sentence the defendant and impose the penalty provided by law, notwithstanding part of the void sentence has been executed.

In Wisconsin in the case of *State ex rel Steffes* v. *Risjord,* 228 Wis. 535, 280 N.W. 680 (1938), the trial court imposed a sentence for fourth degree manslaughter after a jury found the defendant guilty of first degree manslaughter. However, the Supreme Court refused to correct this improper sentence in the absence of an appeal by the defendant. Such a sentence was not void but merely erroneous. Thus, the Supreme Court was precluded from directing the trial judge to impose a proper sentence after a conviction for first degree manslaughter.

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Pledges—Conversion—Unauthorized Purchase by Pledgee.—Defendant, pledgee of a stock certificate, claimed to have purchased the certificate, but still had possession of it. The pledgor's administratrix brought action alleging its conversion by reason of an unauthorized purchase by the pledgee. *Held*: There was no conversion since defendant still had possession of the certificate. *Erickson* v. *Midland National Bank and Trust Co. of Minneapolis* (Minn. 1939) 255 N.W. 611.

A purchase of the pledged collateral by pledgee or his agent at his own sale is prohibited. *State ex rel Shull, Bank Commissioner* v. *Liberty Nat. Bank of Kansas City,* 331 Mo. 386, 53 S.W. (2d) 899 (1932).

But if express permission to purchase it is given in the pledge contract, this prohibition is removed. *Frey* v. *Farmers and Mechanics Bank of Ann Arbor,* 273 Mich. 284, 262 N.W. 911 (1935); *Seder* v. *Gould,* 274 Mass. 223, 174 N.E. 311, 76 A.L.R. 700 (1931). Generally, in the absence of such permission, a purchase and retention of the collateral by pledgee is not held a conversion. The

transaction is voidable and thus the pledgor may either ratify or repudiate. Ratification necessarily involves an acceptance of all the terms of the sale, including the purchase price, which is then applied to the liquidation of the debt as if the sale had been legally made to a stranger in pursuance of the pledge contract. Repudiation nullifies the pledgee's title and restores the pledge agreement in its original form. *Elrae Corporation* v. *Banker's Trust Co.*, 105 N.J.Eq. 501, 148 Atl. 652 (1930); *Persons* v. *Russell*, 212 Ala. 506, 103 So. 543 (1925); *Holston Nat. Bank* v. *Wood*, 125 Tenn. 6, 140 S.W. 31 (1911).

"Conversion is any distinct act of dominion wrongfully exerted over another's property in denial of or inconsistent with his rights therein . . . "*Adams* v. *Maxcy*, 214 Wis. 240, 252 N.W. 598 (1934). The principal case follows the view of most courts that mere purchase by the pledgee of the pledged chattel is not a conversion. They reason that when a pledgee purchases and keeps the security, the property never leaves his possession and its return can be made on payment of the debt it secures. There is no act inconsistent with the owner's rights in the security until the pledgee disposes of the property. *Holston Nat. Bank* v. *Wood*, 125 Tenn. 6, 140 S.W. 31 (1911). The same doctrine applies when the pledgee, without going through the form of a sale, asserts ownership of the pledged article. *Moore* v. *Waterbury Tool Co.*, 124 Conn. 201, 199 Atl. 97 (1938); *Bardsley* v. *First Nat. Bank & Trust Co. of Montclair*, 111 N.J.L. 512, 168 Atl. 665 (1933). But it has been held that a mere unauthorized purchase by the pledgee is a conversion. *In re Thompson*, 284 Fed. 65 (C.C.A. 3d, 1922).

If the pledgee, after an unauthorized purchase of the pledged article, disposes of it, there is a conversion. But in an action for the conversion, damages recoverable are diminished by the amount of the debt. *Bardsley* v. *First Nat. Bank & Trust Co. of Montclair*, 111 N.J.L. 512, 169 Atl. 665 (1938); *Schutt* v. *Arkansas Rice Growers Agr. Credit Corp.*, 183 Ark 972, 39 S.W. (2d) 517 (1931). An analogous rule has been applied even in the action of a pledgor who sued for the conversion of security he pledged for the debt of a third party. In such a case, however, an affirmative judgment in favor of defendant in the event his debt is greater than plaintiff's damages is not permitted, since the pledgor is not the debtor. *Kegan* v. *Park Bank of St. Joseph*, 320 Mo. 623, 8 S.W. (2d) 858 (1927). If the pledgor whose collateral has been converted is sued on the debt, he may subtract his damages before paying the debt. *Ely Walker Dry Goods Co.* v. *Karnes*, 223 Mo. App. 115, 9 S.W. (2d) 245 (1928); *Ainsworth* v. *Bowen*, 9 Wis. 348 (1859).

This diminution of pledgor's damages in trover is founded on various grounds. It has been based on recoupment. *Feige* v. *Burt*, 118 Mich. 243, 77 N.W. 928, 74 Am. St. Rep. 390 (1898). But see *Farrar* v. *Paine*, 173 Mass. 58, 53 N.E. 146 (1899). Strictly, recoupment is a remedy growing out of the same transaction on which suit is brought; to permit its use, therefore, the courts treat this action for conversion as actually one for breach of contract, the pledge agreement. *Glidden* v. *Mechanic's Nat. Bank*, 53 Ohio St. 588, 42 N.E. 995, 43 L.R.A. 737 (1895). Deduction has been based on set-off. *Hornsby and Monroe* v. *Knorpp*, 207 Mo. App. 302, 232 S.W. 776 (1921). Other courts reason that the pledgor's interest is only the extent of the value of the pledged property minus the pledgee's lien for the debt, and that damages for conversion should be limited to that amount. *Farrar* v. *Paine*, 173 Mass. 53, 53 S.E. 146 (1899). Still others permit this diminution without giving a reason therefore. *Revert* v. *Hesse*, 184 Cal. 295, 193 Pac. 943 (1920). In pledgee's suit for the debt, counterclaim for conversion by pledgor has been allowed. *Ely Walker Dry Goods Co.* v. *Karnes*, 223

Mo. App. 115, 9 S.W. (2d) 245 (1928); *Ainsworth* v. *Bowen,* 9 Wis. 320 (1859). But see *Bennett* v. *Tucker & Penington,* 32 Ga. App. 288, 123 S.E. 165 (1924), in which there was recoupment allowed in a pledgor's action for conversion.

One jurisdiction formerly held that a conversion by the pledgee is such a breach of contract that when the pledgee sues on the debt, the pledgor may repudiate his obligation. *Sproul* v. *Sloan,* 241 Pa. 284, 88 Atl. 501 (1913). But this view has since been abandoned in favor of the general rule that the conversion is not such a breach of contract as will wipe out the pledgor's obligation to pay the debt. *Otis* v. *Medoff,* 311 Pa. 62, 166 Atl. 245, 87 A.L.R. 582 (1933).

AL ROZRAN.

Torts—Consent as a Defense to Trespass Upon Realty—Assault and Battery—Intent to Harm.—Two salesmen entered a shop and there demonstrated a fly spray which contained a chemical to which the shopkeeper's wife was allergic and which caused her to become ill. The shopkeeper and his wife brought action, alleging trespass to the premises and assault and battery. The trial court instructed the jury that the defendant had the burden of showing that the storekeeper had consented to the demonstration. There was a verdict for the plaintiff.

On appeal the judgment was reversed. It was *held* that the burden of proof was on the plaintiff to show a revocation of the implied license of the salesmen to enter the store and demonstrate their wares, and that an allegation of assault and battery could not be supported without showing an intent to do harm. *Brabazon* v. *Joannes Bros.,* (Wis. 1939) 286 N.W. 21.

A plaintiff alleging trespass to the person must show lack of consent as an element of the tort, and the burden is on him to establish that all of the elements are present. In other words, although consent is a defense, it is not an affirmative defense. *Wright* v. *Starr,* 42 Nev. 441, 179 Pac. 877 (1919); *Pratt* v. *Davis,* 224 Ill. 300, 79 N.E. 562 (1906); RESTATEMENT, TORTS, (1934) §§ 13, 21. But the rule is otherwise in the case of trespass to land. There consent is an affirmative defense which the defendant has the burden of establishing. *Milton* v. *Puffer,* 207 Mass. 416, 93 N.E. 634 (1911); RESTATEMENT, TORTS, (1934) § 167, comment *h.* In the principal case the defendant had sustained that burden by showing an implied license. The plaintiff then was required to establish a revocation of the license.

There is much authority, both in earlier Wisconsin cases and elsewhere, for the court's holding that an assault and battery require an intent to do harm. *Raefeldt* v. *Koenig,* 152 Wis. 459, 140 N.W. 56 (1913); *Degenhardt* v. *Heller,* 93 Wis. 662, 68 N.W. 411 (1896); *Gilmore* v. *Fuller,* 198 Ill. 130, 65 N.E. 84 (1902). Obviously, the intent element is fulfilled by an intent to harm, but something less has been held adequate in many cases. In one Wisconsin case where the jury had found that the defendant did not intend any harm a substantial verdict for an assault and battery was sustained nevertheless. An unintended injury had in fact resulted from a slight kick which the 11-year-old defendant had given a classmate in a schoolroom. *Vosburg* v. *Putney,* 80 Wis. 523, 50 N.W. 403 (1891). A mere intent to inflict an offensive rather than a harmful touching sufficed to constitute an assault and battery where the defendant shook the sleeping plaintiff to awaken him. *Richmond* v. *Fiske,* 160 Mass. 34, 35 N.E. 103 (1893). Needlessly pointing a pistol at the plaintiff while arresting him was held an assault, although there was no intent to injure and no injury