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Article 8

Torts - Consent as a Defense to Trespass Upon Realty - Assault and Battery - Intent to Harm

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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

in fact was inflicted. *Burge* v. *Forbes,* 23 Ala. 67, 120 So. 577 (1929). The intent element may be supplied by intending to cause (a) a harmful contact, (b) an offensive contact, or (c) intending to put in fear of either a harmful or offensive contact. RESTATEMENT, TORTS, (1934) §§ 13, 21.

In the principal case none of the required intents appeared to be present. Had they been, the required offensive or harmful contact undoubtedly could have been effected by means of fly spray. It has been held that a battery may be committed by bringing smoke into offensive contact with another. Thus, where a tenant failed to vacate the premises when the lease expired the landlord was held guilty of a battery because he tried to smoke out the wife of the tenant by removing the lid of the stove on the premises and pouring water on the fire. *Wood* v. *Young,* 20 Ky. Law Rep. 1931, 50 S.W. 541 (1899).

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Torts—Contributory Negligence of Infant Plaintiff.—The plaintiff, an eight year-old-boy, pursued into the street a handmade parachute which he had tossed into the air. His chase took him into the path of defendant's oncoming car. He had seen the car when it was still a block away, but misjudged the time it would require to retrieve the parachute, and was struck by the fender of the car. Defendant admittedly was traveling at a speed in excess of the legal limit, and estimated by witnesses at 35 to 40 miles an hour.

Defendant requested the trial court to direct a verdict in its favor because of the plaintiff's contributory negligence. From a denial of this request, the defendant appealed.

The trial court's instruction to the jury: that in determining whether plaintiff was contributorily negligent consideration must be given to his previous training, his mentality; that not the same degree of care and caution is required of an infant as of an adult, but his duty to exercise care must be measured by his age and capacity; that it was for the jury to determine from the evidence and the foregoing considerations whether or not there was contributory negligence.

Held, the charge to the jury was fully and fairly submitted; judgment affirmed. *Clemens* v. *City of Saulte Ste. Marie,* (Mich. 1939) 286 N.W. 232.

Infant plaintiffs were at one time held to that degree of care demanded of adult plaintiffs, as a condition to recovery from a negligent defendant. The first instance of the rule, in Wisconsin, was in 1875, where the court held it applicable to a child of seven. *Ewen* v. *C. & N. W. R. R. Co.,* 38 Wis. 613 (1875). In the same year, it was held that a child of seven, in view of his age and circumstances could not reasonably be expected to exercise that degree of care which an adult would be required to observe. *Miebus* v. *Dodge,* 38 Wis. 300 (1875). In 1881, the court, in submitting the question of contributory negligence, instructed the jury as to the degree of care required of an adult, but added that the fact the plaintiff (a child of seven) was a person of tender age should be considered in its determination. *Townley v. C. M. & St. P. Ry. Co.,* 53 Wis. 626, 11 N.W. 55 (1881). At present in Wisconsin, a child is required to exercise only that degree of care which the great mass of children of the same age ordinarily exercise under the same circumstances, taking into account the experience, capacity, and understanding of the child. *Briese* v. *Maechtle,* 146 Wis. 89, 130 N.W. 893 (1911); *De Groot* v. *Van Akkeren,* 225 Wis.