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Exemplary Damages In Equity

EXEMPLARY DAMAGES IN EQUITY

The doctrine of exemplary damages[1] has been a subject of much controversy in this country.[2] It has been settled that they are awarded only when it is found that the defendant acted with malice, ill will, or conscious disregard of consequences to others,[3] and that they cannot be recovered in actions based solely upon breach of contract.[4] Whether they may be awarded in a court of equity, however, has not been so conclusively settled.

The recent Indiana case of *Hedworth v. Chapman*[5] has answered the question whether a court of equity may grant exemplary damages in the affirmative. Hedworth filed a complaint in ejectment charging the Chapmans with wrongful possession of land. The Chapmans filed a cross-complaint charging Hedworth with misrepresentation concerning the boundaries of the land and the condition of the premises, and praying for reformation of the real estate contract and for damages, including exemplary damages. The trial court entered judgment against Hedworth on his complaint and in favor of the Chapmans on their cross-complaint; in addition to reforming the real estate contract, actual and exemplary damages, and costs were granted. On appeal by Hedworth, the Appellate Court held that the trial court did not err in awarding exemplary damages and said: "It is our opinion that a court of equity may grant exemplary damages in a proper case and in

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[1]Exemplary damages, known also as punitive damages and sometimes as "smart money," has been defined as the "amount allowed over and above actual or compensatory damages." Dr. P. Phillips & Sons v. Kilgore, 152 Fla. 578, 12 So. 2d 465, 467 (1943). The doctrine originated in the English common-law courts as a means of justifying excessive awards of damages. E.g., Huckle v. Money, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (1763); see generally, 1 Sedgewick, Measure of Damages §§ 348-50 (9th ed. 1912). The primary purpose of exemplary damages today is to punish the defendant and deter him and others from further offenses. E.g., Motor Equip. Co. v. McLaughlin, 156 Kan. 258, 133 P.2d 149, 159 (1943).

[2]For criticisms of the doctrine see, e.g., Fay v. Parker, 53 N.H. 342 (1872); Willis, Measure of Damages When Property Is Wrongfully Taken by a Private Individual, 22 Harv L. Rev. 419 (1909). For defenses of the doctrine see, e.g., Day v. Woodworth, 54 U.S. (13 How.) 363 (1851); I Sedgewick, Measures of Damages § 354 (9th ed. 1912). Yet, in only four states has the doctrine been definitely rejected altogether. Vincent v. Morgan's La. & Tex. H.R. and S.S. Co., 140 La. 1027, 74 So. 541 (1917); Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N.E. 1, 5 (1891); Boyer v. Varr, 8 Neb. 68 (1878); Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 25 Pac. 1072 (1891).

[3]McCormick, Damages § 79 (1935).

[4]E.g., Cochran v. Hall, 8 F.2d 984 (5th Cir. 1925); American Ry. Exp. Co. v. Bailey, 142 Miss. 622, 107 So. 761 (1926); see generally, McCormick, Damages § 81 (1935).

[5]192 N.E.2d 649 (Ind. App. 1963).

doing so it is merely affording complete relief after it once has acquired jurisdiction."[6]

Although some of the cases which take the view that exemplary damages may not be recovered in a court of equity are not based on any particular theory,[7] most of them are grounded on one or a combination of the following three theories: (1) a court of equity lacks the power to award exemplary damages;[8] (2) by seeking equitable relief, a litigant waives all claim to exemplary damages;[9] or (3) the awarding of exemplary damages is incompatible with the principles and practice of equity.[10] According to these cases, exemplary damages should not be awarded in a court of equity even it the facts would justify an award by a jury at law.[11]

Following the first theory, some courts have refused to award exemplary damages in equity simply on the basis that a court of equity, in the absence of an express statutory provision, has no authority to assess them.[12] This is only begging the question, for by merely saying that a court lacks the power to do something does not explain why it does.[13] *Orkin Exterminating Co. v. Truly Nolen, Inc.*[14] said the chancellor lacks the authority because "the right to assess a punitive fine for civil wrongs is best left to the jury."[15] It would seem, however, that if this were a serious objection, the court could simply send the issue of damages to a law court to be tried by a jury as has been done by equity courts for years.[16]

An early authority in the United States for the second theory,

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[6]Id. at 651.

[7]E.g., United States v. Hart, 86 F. Supp. 787 (E.D. Va. 1949); Moore v. Carr, 224 Ala. 275, 139 So. 269 (1931); see Annot., 48 A.L.R.2d 947, 950 (1956).

[8]E.g., United States v. Bernard, 202 Fed. 728 (9th Cir. 1913); Orkin Exterminating Co. v. Truly Nolen, Inc., 117 So. 2d 419 (Fla. Dist. Ct. App. 1960); See Annot., 48 A.L.R.2d 947, 951 (1956).

[9]E.g., Superior Constr. Co. v. Elmo, 204 Md. 1, 104 A.2d 581 (1954); Bird v. Wilmington & M.R. Co., 29 S.C. Eq. (8 Rich.) 46 (1855); see Annot., 48 A.L.R.2d 947, 954 (1956).

[10]E.g., Livingston v. Woodworth, 56 U.S. (15 How.) 546 (1853); Superior Constr. Co. v. Elmo, 204 Md. 1, 104 A.2d 581 (1954); see Annot., 48 A.L.R.2d 947, 953 (1956).

[11]E.g., Superior Constr. Co. v. Elmo, 204 Md. 1, 104 A.2d 581 (1954).

[12]See note 8 supra.

[13]See I.H.P. Corp. v. 210 Central Parks So. Corp., 16 App. Div. 2d 461 228 N.Y.S.2d 883 (Sup. Ct. 1962), in which the court gives another reason for why this theory is not good, at least as far as jurisdictions where law and equity have been merged are concerned.

[14]117 So. 2d 419 (Fla. Dist. Ct. App. 1960).

[15]Id. at 423.

[16]See 2 Story, Equity Jurisprudence § 795 (13th ed. 1886).

that a litigant by seeking equitable relief waives all claim to exemplary damages, is *Bird v. Wilmington & M.R. Co.*[17] Although the case has been cited often as an authority for the theory, it not only fails to cite any authority for the theory, but also fails to discuss any reasons for it. In *Superior Constr. Co. v. Elmo,*[18] a suit in equity to enjoin further trespassing upon realty and for damages, the court adopted this theory and thought it was especially applicable for two reasons: (1) the complainants not only failed to ask for punitive damages in the bill, but also failed to include a prayer for general relief; and (2) the complainants had a full and adequate alternative to relief in equity, since a statute[19] authorized incidental relief by an injunction in an action at law. In the absence of such additional circumstances, the waiver theory is another example of circular reasoning, for it in effect states a result and fails to supply the reason for that result.[20]

Perhaps the strongest theory for not allowing exemplary damages in equity is that the awarding of them is incompatible with the principles and practice of equity, namely that a court of equity is a court of conscience which will not enforce penalties of forfeitures, or go beyond compensation.[21] An early authority that has often been cited for this third theory is *Livingston v. Woodworth.*[22] Actually, however, the court's indication that it would not have allowed exemplary damages in this particular case even if they were permissible in equity makes the case a weak authority for this theory. In the *Superior Construction* case[23] the court adopted the third theory, as well as the second one. It admitted that there is the rule that equity will, as incidental relief, award compensatory damages and in so doing sit as a court of law; but it further said that this rule is a permissive one of convenience, not a mandatory rule and that it will be followed only

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[17]29 S.C. Eq. (8 Rich.) 46 (1855). It is to be noted that the theory had been expressed in England previously in Colburn v. Simms, 2 Hare 543, 67 Eng. Rep. 224 (1843). The theory, moreover, has been consistently reaffirmed by the South Carolina courts. E.g., Standard Warehouse Co. v. Atlantic Coast Line R.R., 222 S.C. 93, 71 S.E.2d 893 (1952).

[18]204 Md. 1, 104 A.2d 581 (1954).

[19]Md. Ann. Code art. 75, §§ 135-147 (1951). The court in Karns v. Allen, 135 Wis. 48, 115 N.W. 357 (1908) referred to a similar statute.

[20]"[I]t merely begs the question to hold that a waiver has resulted from a mere asking for equitable relief." I.H.P. Corp. v. 210 Central Park So. Corp., 16 App. Div. 2d 461, 228 N.Y.S.2d 883, 888 (Sup. Ct. 1962).

[21]See note 10 supra.

[22]56 U.S. (15 How.) 546 (1853).

[23]Note 18 supra at 585.

as long as it is consistent with the underlying and fundamental principles of equity. Finally, the third theory was also adopted in *Bush v. Gaffney*.[24] The appellate court, notwithstanding the finding of the jury for exemplary damages, upheld the refusal of the trial court to award such damages in decreeing a rescission of a conveyance of land, awarding a money judgment, and establishing a constructive trust because "a court of equity is a court of conscience, but not a forum of vengeance."[25] It admitted that its holding was contrary to earlier cases in the state wherein exemplary damages had been allowed,[26] but pointed out that in none of them was the propriety of a court of equity awarding exemplary damages considered.

There are at least two problems with the third theory. The first problem is suggested by the following statement: "In emphasizing the punitive aspect of punitive damages it is easy to overlook the punitive aspect of 'compensatory' damages, particularly since the term 'compensatory damages' emphasizes the reparative function."[27] Yet, according to the overwhelming weight of authority, a court of equity may grant compensatory damages as incidental to equitable relief.[28] The second and even more significant problem arises when one attempts to reconcile this theory with the principle of equity that a court of equity having taken cognizance of a cause for any purpose, will award relief which is complete and finally disposes of the litigation.[29] Indeed, it is difficult to reconcile the view that exemplary damages may not be recovered in equity with this principle.[30]

The cases that hold that exemplary damages may be recovered in a court of equity generally fall into two categories: (1) Those that

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[24]84 S.W.2d 759 (Tex. Civ. App. 1935).

[25]Id. at 764. It is to be noted that the court in refusing exemplary damages relied, in addition, to some extent on the rule that exemplary damages are not recoverable in an action for breach of contract. See text at note 4 supra.

[26]Oliver v. Chapman, 15 Tex. 400 (1855); Western Cottage Piano & Organ Co. v. Anderson, 97 Tex. 432, 79 S.W. 516 (1904); Western Cottage Piano & Organ Co. v. Anderson, 45 Tex. Civ. App. 513, 101 S.W. 1061 (1907); and Mossop v. Zapp, 189 S.W. 979 (Tex. Civ. App. 1916).

[27]Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1188 (1931). See also, Morris, Rough Justice and Some Utopian Ideas, 24 Ill. L. Rev. 730 (1930); Note, 70 Harv. L. Rev. 517 (1957).

[28]E.g., Osage Oil & Ref. Co. v. Chandler, 287 Fed. 848 (2d Cir. 1923).

[29]E.g., Dennis v. Omaha Nat'l Bank, 153 Neb. 865, 46 N.W.2d 606 (1951). See I.H.P. Corp. v. 210 Central Park So. Corp., 16 App. Div. 2d 461, 228 N.Y.S.2d 883 (Sup. Ct. 1962) in which the Court said in regard to the theory that "Such inflexibility has never been characteristic of equity jurisprudence." Id. at 887.

[30]This is the main reason why the principal case adopted the opposite view.

rely on the doctrine of the merger of law and equity;[31] and (2) those that award them as a matter of principle.[32]

First, there are two jurisdictions that have relied on the doctrine of merger. The court in the California case of *Union Oil Co. v. Reconstruction Oil Co.*[33] conceded that as a general rule equity does not award damages by way of punishment, but emphasized that in California there is but one form of action under the Code. In the New York case of *I.H.P. Corp. v. 210 Central Park So. Corp.*[34] the court attacked each of the three theories advanced in favor of denying exemplary damages in equity[35] and decided that the rule against the awarding of punitive damages is based on the historic, but now obsolete, procedural separation between law and equity.[36]

There are other cases which have not relied on the doctrine of merger. In Tennessee where the courts of law and equity are separate, the court in *Lichter v. Fulcher*[37] said: "The allowance of punitive damages in a proper case is a matter largely within the discretion of the trial court, and will not be disturbed on appeal except in case of abuse of the discretion."[38] Other Tennessee cases have held that a court of equity may award punitive damages against a complain-

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[31]E.g., Union Oil Co v. Reconstruction Oil Co., 20 Cal. App. 2d 170, 66 P.2d 1215 (1937). See 55 Mich. L. Rev. 1059, 1111 (1957) for a list of the states which have merged systems.

[32]E.g., Lichter v. Fulcher, 22 Tenn. App. 670, 125 S.W.2d 501 (1938).

[33]20 Cal App. 2d 170, 66 P.2d 1215 (1937). In regard to this case, the court in the Superior Construction case pointed out that the damages awarded were actually enlarged compensatory damages for wilful trespass rather than true punitive damages. It is submitted, however, that the court was dealing with them as if they were true punitive damages. Cf. Rivero v. Thomas, 86 Cal. App. 2d 225, 194 P.2d 533 (1948).

[34]16 App. Div.2d 461, 228 N.Y.S.2d 883 (Sup. Ct. 1962). This case expressly overrules Dunkel v. McDonald, 272 App. Div. 267, 70 N.Y.S.2d 653 (Sup. Ct. 1947).

[35]See notes 14, 21, and 29 supra.

[36]"It is thus apparent that the rule which forbids combination of equitable relief with an award of punitive damages is founded upon an [obsolete] procedural division with no rational basis, apart from history, in modern substantive law or equity. If the facts warrant, it may be entirely appropriate to grant an injunction or another form of equitable relief and also exact punitive damages as a deterrent against flagrantly unlawful conduct, whether embraced within an injunction or not. Such freedom to grant whatever judicial relief the facts call for is entirely consonant with substantive legal and equitable principles and with present-day concepts of procedural efficiency." 16 App. Div. 2d 461, 228 N.Y.S.2d 883, 886 (Sup. Ct. 1962).

[37]22 Tenn. App. 670, 125 S.W.2d 501 (1938). As pointed out in the Superior Construction case, it was simply assumed in this case that punitive damages could be allowed in equity. The Supreme Court of Tennessee, however, later ended any doubts by expressly ruling that the Chancery Court in Tennessee has authority to allow punitive damages. Bryson v. Bramlett, 204 Tenn. 347, 321 S.W.2d 555 (1958).

[38]22 Tenn. App. 670, 125 S.W.2d 501, 506 (1938).

ant who maliciously or recklessly invokes the injunctive power of the court.[39]

Prior to the principal case, the issue of awarding exemplary damages in equity was essentially an open question in Indiana. In *Waddell v. Hapner*,[40] a suit in equity to enjoin the continuance of an alleged nuisance and to recover damages, the court in holding that the complainant was entitled to recover compensatory damages based its decision on the particular facts before it and did not discuss whether a court of equity can or ever will award punitive damages. The principal case cites the *Lichter* case, but in holding that exemplary damages may be recovered in a court of equity, the court was actually relying on the principle of complete relief in the equity court: "[E]xemplary damages may be recovered in a court of equity in our opinion more fully carries out the theory of broad powers of the equity court."[41] This case is particularly significant in view of the fact that as to the awarding of exemplary damages Indiana has taken a stricter view than most of the other states, for there, such damages may never be awarded if the defendant would be subject to criminal prosecution for the same offense.[42]

Finally, as a result of a recent decision of the Supreme Court of Texas,[43] the issue as to awarding exemplary damages in equity may no longer be considered unsettled in that state either. The court said:

> "There should be a deterrent to conduct which equity condemns and for which it will grant relief. The limits beyond which equity should not go in its exactions are discoverable in the facts of each case which give rise to equitable relief."[44]

It is submitted that there is lacking a substantial reason for the rule that a court of equity may not grant exemplary damages. The same is not true in regard to the rule that an equity court may grant them in the proper case, for this rule more fully carries out the principle of complete relief in equity.[45] Of course, this does not mean that they should be allowed in every case in equity, but only when the facts in a particular case justify an award.[46]

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[39]E.g., South Penn Oil Co. v. Stone, 57 S.W. 374 (Tenn. Ch. App. 1900).

[40]124 Ind. 315, 316, 25 N.E. 368 (1890).

[41]Note 5 supra at 651.

[42]Taber v. Hutson, 5 Ind. 322 (1954). See Aldridge, The Indiana Doctrine of Exemplary Damages and Double Jeopardy, 20 Ind. L.J. 123 (1945).

[43]International Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567 (Tex. 1963).

[44]Id. at 584.

[45]See note 29 supra.

[46]For indications of what would be a proper case, see text at notes 3-4 supra.