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Torts - Liability of Escaped Convict for Expenses of Recapture

J. G. C.

The present case is in accord with prior Louisiana jurisprudence in laying down the rule that damages is the remedy for the breach of a contract to do or not to do, with specific performance being allowed only in unusual circumstances.[19]

J. B. D.

TORTS—LIABILITY OF ESCAPED CONVICT FOR EXPENSES OF RECAPTURE—Defendant, an escaped convict, was recaptured and returned to the penitentiary at cost to the state in excess of one thousand dollars. The state thereupon sued the defendant in tort to recover the amount thus expended. *Held,* recovery denied. *State Highway and Public Works Commission v. Cobb,* 215 N.C. 556, 2 S.E. (2d) 565 (1939).

Apparently this is a case of novel impression; at least the court so considered it. The basic problem involves the inherent difference between a tort and a crime. Modern opinion agrees that a wrongful act may be both criminal and tortious, and may subject the wrongdoer to punishment by the state and to civil suit by the individual immediately harmed.[1]

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19. Art. 1142, French Civil Code, provides: "Every obligation to do or not to do resolves itself into damages, in case of non-performance on the part of the debtor." (Translation supplied.) Nevertheless, it may be proper to say with the majority of the French commentators that, as a consequence of the wide discretion assumed by the courts in specifically enforcing obligations to do or not to do with the aid of the method of *astreintes* [7 Planiol et Ripert, Traité Pratique de Droit Civil Français (1931) 84, n° 787], specific performance is the rule rather than the exception even as to such obligations. However, a judicial reluctance to compel the performance of a personal act —*fait personnel*—is still general. 1 Baudry-Lacantinerie et Barde, Traité Théorique et Pratique de Droit Civil, Des Obligations (3 ed. 1906) 469, n° 431; 24 Demolombe, Traité Des Contracts ou Des Obligations Conventionnelles en Général (1877) 486, n° 488; 7 Huc, Commentaire Théorique et Pratique du Code Civil (1894) 192, n° 135; 4 Marcadé, Explication Théorique et Pratique du Code Civil (7 ed. 1873) 437-439, nos 511-513; 2 Planiol et Ripert, Traité Elémentaire de Droit Civil (11 ed. 1937) 66-69, nos 173-175. See also Art. 1144, French Civil Code (on substituted performance).
197-199. *"Ainsi l'exécution directe de l'obligation est la règle pour toute espèce d'obligations. La règle ne reçoit d'exception que s'il y a impossibilité de poursuivre l'exécution directe."* (At 258, no 198).
Translation: "Thus specific performance of the obligation is the rule, for every kind of obligation. The rule is subject to exceptions only if it is impossible to decree specific performance."

1. Miller, Handbook of Criminal Law (1934) 21, § 4(b); Clark, Handbook of Criminal Law (3 ed. 1915) 8, § 2; Clark and Marshall, A Treatise on the Law of Crimes (3 ed. 1927) 4-5, § 2.
It is generally held in America that criminal and civil proceedings are not mutually exclusive. State v. Loyacano, 135 La. 945, 66 So. 307 (1914); State v. Vogt, 141 La. 764, 75 So. 674 (1917); State v. Walsen, 17 Colo. 170, 28

Although heretofore the courts have been silent as to the fugitive's liability for the expenses of his recapture, it is a settled rule that the defendant may be compelled to pay the costs of his prosecution.[2] In Michigan, by statutory provision, the prisoner of means is forced to reimburse the state for the per capita cost of maintenance, and the state may even secure a lien on his property for the amount of his future room and board.[3]

Liability was denied in the principal case on the theory that the escape was an offense against the state's sovereignty rather than an invasion of its proprietary rights, since the expenditure was voluntarily made by the state for the protection of its citizens. The court seemed reluctant to admit that the state could institute both civil and criminal proceedings in this type of case. However, it is clear that if the original crime is an invasion of the state's proprietary interest, such as the larceny or embezzle-

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Pac. 1119, 15 L.R.A. 456 (1892); State v. Schoonover, 135 Ind. 526, 35 N.E. 119, 21 L.R.A. 767 (1893); Newell v. Cowan, 30 Miss. 492 (1855); Knox County v. Hunolt, 110 Mo. 67, 19 S.W. 628 (1892); Austin v. Carswell, 67 Hun. 579, 22 N.Y. Supp. 478 (1893). Even if prosecution is not commenced, private suit may be instituted. Williams v. Dickinson, 28 Fla. 90, 9 So. 847 (1891); Powell v. Augusta & S. R. Co., 77 Ga. 192, 3 S.E. 757 (1887); Parker v. Lanier, 82 Ga. 216, 8 S.E. 57 (1888).

In England, according to the earlier decisions, a different rule prevailed, the tort being said to have merged in the felony. See Stone v. Marsh, 6 B. & C. 551, 564, 108 Eng. Rep. 554, 559 (1827); White v. Spittigue, 13 M. & W. 603, 608, 153 Eng. Rep. 252, 254 (1845).

But in Smith v. Selwyn [1914] 3 K.B. 98, the English doctrine was definitely settled that there was only a suspension of the civil action until the defendant was prosecuted by the sovereign in a criminal suit. In a few cases in America, the doctrine of suspension of the civil remedy until criminal prosecution has been followed. Martin's Ex'r v. Martin, 25 Ala. 201 (1854); Boody v. Keeting, 4 Greenl. 164 (Me. 1826).

2. Parker v. Robertson, 14 La. Ann. 249 (1859); State v. Hyland, 36 La. Ann. 709 (1884); State v. Chapman, 38 La. Ann. 348 (1886); Parish Board of Directors v. Hebert, 112 La. 467, 36 So. 497 (1904); State v. Belle, 92 Iowa 163, 60 N.W. 505 (1894); Doyle v. O'Dowd, 85 N.H. 402, 159 Atl. 301 (1932). In Commonwealth v. McCue's Ex'rs, 109 Va. 302, 63 S.E. 1066, 1067 (1909), the court stated that the character of the payment of costs is defined to be an exaction "simply for the purpose of reimbursing to the public treasury the precise amount which the conduct of the defendant has rendered it necessary should be expended for the vindication of the public justice of the state and its violated laws. It is money paid, laid out, and expended for the purpose of repairing the consequences of the defendant's wrong. It is demanded of him for a good and sufficient consideration, and constitutes an item of debt from him to the commonwealth. . . . The right to enforce payment of them is a mere incident to the conviction, and thereby vested in the commonwealth for the sole purpose of replacing in the treasury the amount which the defendant himself has caused to be withdrawn from it." However, the right of a court to impose costs depends entirely on statutory regulations. People v. Wallace, 245 Mich. 310, 222 N.W. 698 (1929); State v. Boog, 9 N.J. Misc. 261, 153 Atl. 374 (1931); Commonwealth v. Buccieri, 153 Pa. 570, 26 Atl. 245 (1893); Commonwealth v. Trunk, 320 Pa. 270, 182 Atl. 540 (1936).

3. Mich. Pub. Acts (1935) No. 253. It is interesting to note that in charging a prisoner for his upkeep, regard is had for claims of persons having a moral or legal right to maintenance out of the estate of the prisoner.

ment of state funds, the sovereignty may prosecute criminally and sue for redress.[4] It is difficult to understand why the state should be barred from civil remedy because the offense is a secondary one and the expenditure of state funds was made for the protection of the public. The fact that there are sufficient sanctions in the criminal law does not reimburse the state treasury; what the state in this instance sought to achieve was reparation and indemnity rather than to punish for crime. It is submitted that the courts should hesitate to adopt the sporting attitude that if a prisoner is unfortunate in his attempt to escape from prison and does not effectively evade his captors, the law should stand the expense of the chase.

J. G. C.

4. In re Leszynsky, 15 Fed. Cas. No. 8,279 (1899) (involving a statutory crime in which the United States government, although it had recovered a sum in a civil suit, was allowed to prosecute the defendant in a criminal action); State v. Walsen, 17 Colo. 170, 28 Pac. 1119, 15 L.R.A. 456 (1892); Knox County v. Hunolt, 110 Mo. 67, 19 S.W. 628 (1892). Cf. State v. Stein, 1 Rich. L. 189 (S.C. 1845), in which the court allowed the criminal action after recovery by the state in a civil suit, but held that the sovereignty would have to elect the remedy preferred due to the provisions of the particular statute which made the wrongful act criminal.