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purpose and motive of Congress in passing the enactment is too obvious to be denied.²⁵

Conceding that the suppression of professional gambling would be of great moral benefit to our society it is still difficult to regard an attempt at such accomplishment under the guise of a revenue measure to be in the best interests of public policy.²⁶ An enactment which in return for the payment of an occupational tax purports to grant to the taxpayer the privilege of performing certain acts but which actually and designedly subjects him to punishment for their performance cannot be viewed as a rational or good-faith use of the federal taxing power. And yet in view of the fact that all taxation inevitably results in economic and social regulation to some extent and that extreme deference is due Congressional use of its delegated power to tax it is submitted that the United States Supreme Court has adopted the better policy in upholding the Wagering Tax Act. The real solution lies in the hope that in the future Congress will make a more reasonable use of its delegated powers and that the states will make a more effective use of their police powers.

THOMAS W. STEED, JR.

Damages—Fraud and Deceit—Recovery of Punitive Damages for Fraud and Deceit

One segment of the law of damages not frequently discussed is the question of assessing punitive damages in an action of fraud and deceit. North Carolina has recently considered this question in a case of first impression.¹

There the plaintiffs, aged Negroes without education, were induced to buy a tract of land from the defendant as a result of false and

under State law." Justice Black, also dissenting, calls the act "a squeezing device contrived to put a man in federal prison if he refuses to confess himself into a state prison as a violator of state gambling laws." *United States v. Kahriger, supra*.²⁶ There are many instances in the Congressional debates prior to the passage of the tax where the suppression of gambling was discussed. For instance see 97 CONG. REC. 6892 (1951):

"Mr. Hoffman of Michigan. Then I will renew my observation that it might if properly construed be considered an additional penalty on the illegal activities."

"Mr. Cooper. Certainly, and we might indulge the hope that the imposition of this type of tax would eliminate that kind of activity."

²⁶ Although concurring in the majority opinion upholding the wagering taxes Justice Jackson said: "But here is a purported tax law which requires no reports and lays no tax except from specified gamblers whose calling in most states is illegal. It requires this group to step forward and identify themselves, not because they like others have income, but because of its source. . . . It will be a sad day for the revenues if the good will of the people toward their taxing system is frittered away in efforts to accomplish by taxation moral reform that cannot be accomplished by direct legislation." *United States v. Kahriger, 73 Sup. Ct. 510 (1953)*.

¹ *Swinton v. Savoy Realty Co., 236 N. C. 723, 73 S. E. 2d 785 (1953)*.

fraudulent representations by defendant's agent that the lot was 268 feet wide and 160 yards deep and worth \$2,000, when in fact it was only 80 by 150 feet and worth no more than \$500. After having paid the purchase price, the plaintiffs learned the truth, and sought in this action to recover \$1,500 actual damages, and an additional amount as punitive damages. The jury awarded the actual damages prayed for and also \$1,500 punitive damages. The Supreme Court affirmed the judgment as to actual damages but reversed that portion which allowed punitive damages. It held that before punitive damages could be awarded "there must be an element of aggravation accompanying the tortious conduct which causes the injury."² After finding that facts were not sufficient to warrant the allowance of punitive damages, the Court further stated that "there was no evidence of insult, indignity, malice, oppression or bad motive other than the same false representations for which they have received the amount demanded. Here fraud is not an accompanying element of an independent tort but the particular tort alleged."³

The North Carolina Court has previously adopted this "element of aggravation" criterion for the assessment of punitive damages in virtually all classes of tort actions without discrimination.⁴ And in many cases the word "fraud" has been used as one of these elements upon which punitive damages may be predicated.⁵ The Court in the principal

² *Id.* at 725, 73 S. E. 2d at 787.

³ *Id.* at 727, 73 S. E. 2d at 788.

⁴ *Binder v. General Motors Acceptance Corporation*, 222 N. C. 512, 23 S. E. 2d 894 (1943) (wrongful conversion of automobile); *Lay v. Gazette Publishing Co.*, 209 N. C. 134, 183 S. E. 416 (1936) (libel); *Baker v. Winslow*, 184 N. C. 1, 113 S. E. 570 (1922) (slander); *Ford v. McAnally*, 182 N. C. 419, 109 S. E. 91 (1921) (malicious prosecution); *Hodges v. Hall*, 172 N. C. 29, 89 S. E. 802 (1916) (assault and battery); *Carmichael v. Southern Bell Tel. and Tel. Co.*, 157 N. C. 21, 72 S. E. 619 (1911) (wrongfully removing the telephone from plaintiff's premises); *Arthur v. Henry*, 157 N. C. 393, 73 S. E. 206 (1911) (blasting); *Williams v. Carolina & Northwestern Railroad Company*, 144 N. C. 498, 57 S. E. 216 (1907) (negligence); *Ammons v. Railroad*, 140 N. C. 196, 52 S. E. 731 (1905) (wrongfully ejecting plaintiff from defendant's train).

These cases all state in effect the general rule applicable in actions of tort as announced in *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101, 107, 13 S. Ct. 261, 263, 37 L. Ed. 97, 101 (1893) where the court said that punitive damages are recoverable in tort actions, ". . . if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations; but such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages." It should be noted that this general rule is the one applied by the court in the principal case. *Cf. Smith v. Morganton Ice Co.*, 159 N. C. 151, 156, 74 S. E. 961, 964 (1912).

⁵ Typical of the language used is, "Punitive damages are never awarded, except in cases 'when there is an element either of fraud, malice, . . . or other causes of aggravation in the act or omission causing the injury,'" *Holmes v. Central Carolina Railroad Co.*, 94 N. C. 318, 323 (1886). The following cases use either the same or substantially the same language quoted: *Hairston v. Atlantic Greyhound Corporation*, 220 N. C. 642, 645, 18 S. E. 2d 166, 168 (1942); *Harris v. Queen City Coach Co.*, 220 N. C. 67, 69, 16 S. E. 2d 464, 465 (1941); *Robinson v. McAlhaney*, 214 N. C. 180, 184, 198 S. E. 647, 650 (1938); *Tripp v. American Tobacco Co.*, 193 N. C. 614, 616, 137 S. E. 871, 872 (1927).

case relies upon only two North Carolina decisions as the bases of its holding regarding punitive damages,⁶ and both of these cases were decided on the issue of slander. Since punitive damages are assessed for the purpose of punishing the defendant for his "outrageous conduct,"⁷ *i.e.*, willful and wanton, etc., the requirement of some aggravation seems to be well founded where the action is grounded upon libel and slander.⁸ However, where the action is brought on the theory of fraud and deceit, some doubt arises as to the soundness of requiring this element of aggravation in addition to establishing the cause of action. Before a plaintiff can prevail in an action of fraud and deceit, he must have shown that the defendant, or his agent, has made an untrue statement, knowing it to be untrue, and intending that the plaintiff shall act upon it.⁹ That the ill-will, malice, or bad motive necessary to subject a defendant to an assessment of punitive damages may appear either by direct evidence or from the inherent character of the tort itself, would seem to follow without dispute.¹⁰ Is not then fraud and deceit such a tort that by its very nature should expose the perpetrator to the possibility¹¹ of having to pay punitive damages?

Other jurisdictions are not in harmony on this question. In the absence of a controlling statute, it appears that a majority of the courts

⁶ Baker v. Winslow, 184 N. C. 1, 113 S. E. 570 (1922); and Cotton v. Fisheries Products Co., 181 N. C. 151, 106 S. E. 487 (1921).

⁷ Swinton v. Savoy Realty Co., 236 N. C. 723, 726, 73 S. E. 2d 785, 787 (1953). See McCormick, *Some Phases of the Doctrine of Exemplary Damages*, 8 N. C. L. REV. 129 (1930). Cf. Binder v. General Motors Acceptance Corporation, 222 N. C. 512, 23 S. E. 2d 894 (1943); Cotton v. Fisheries Products Co., 181 N. C. 151, 106 S. E. 487 (1921).

It would appear from the two cases last cited, that the injury caused the plaintiff by way of humiliation, etc., furnishes some motivation for the court to allow punitive damages.

⁸ It is quite clear that one may act in complete good faith, and still be liable in such an action for actual damages. See Lay v. Gazette Publishing Company, 209 N. C. 134, 183 S. E. 416 (1936).

⁹ The elements necessary for a right of action in fraud and deceit are well established. There must be a statement made by the defendant; that statement must be untrue in fact; the defendant must either know that it is untrue, or be culpably ignorant (that is, recklessly and consciously ignorant) of whether it is true or not; it must be made with the intent that plaintiff shall act upon it; and the plaintiff must act in reliance on the statement in the manner contemplated and thereby suffer damage. Small v. Dorsett, 223 N. C. 754, 28 S. E. 2d 514 (1944) and cases cited therein.

Thus it is apparent that the action of fraud and deceit is inherently different from that of libel and slander. The former requiring a conscious and intentional wrongdoing.

¹⁰ "It must be shown either that the defendant was actuated by ill-will, malice, or evil motive (which may appear by direct evidence of such motive, or from the inherent character of the tort itself, or from the defendant's oppressive or insolent demeanor, sometimes called 'circumstances of aggravation'). . . ." McCormick, *Some Phases of the Doctrine of Exemplary Damages*, 8 N. C. L. REV. 129, 134 (1930).

¹¹ Punitive damages are not awarded as a matter of right. This determination rests exclusively within the sound discretion of the jury. Tripp v. American Tobacco Co., 193 N. C. 614, 618, 137 S. E. 871, 873 (1927) and cases cited therein.

deciding the point have applied the same general rule as that adopted by the North Carolina Court in the principal case.¹² However, a minority of the jurisdictions allow the jury to assess punitive damages without requiring the additional element of aggravation.¹³ California, Colorado, Montana, North Dakota, Oklahoma, and Texas have seen fit to modify the general rule applied in torts cases regarding punitive damages, and have, by statute and judicial interpretation, authorized their assessment upon a showing of actionable fraud.¹⁴

¹² *Hollins v. Nalls*, 58 So. 2d 112 (Ala. 1952); *Lutfy v. R. D. Roper and Sons Motor Co.*, 57 Ariz. 495, 115 P. 2d 161 (1941); *Laughlin v. Hopkinson*, 292 Ill. 80, 126 N. E. 591 (1920); *Kluge v. Ries*, 66 Ind. App. 610, 117 N. E. 262 (1917); *Russell v. Stoops*, 106 Md. 138, 66 Atl. 698 (1907); *Sovereign Camp, W.O.W. v. Boykin*, 182 Miss. 605, 181 So. 741 (1938); *Oehlhof v. Solomon*, 73 App. Div. 329, 76 N. Y. Supp. 716 (1st Dep't 1902); *Long v. McAllister*, 275 Pa. 34, 118 Atl. 506 (1922); *Nye v. Merriam*, 35 Vt. 438 (1862).

It should be noted that a number of the courts adhering to this "majority view" have stated that *gross fraud* is an aggravating circumstance upon which punitive damages may be predicated. *Hollins v. Nalls*, *supra*; *Laughlin v. Hopkinson*, *supra*; *Russell v. Stoops*, *supra*; *Sovereign Camp, W.O.W. v. Boykin*, *supra*. This term has been defined as, "representations made with a knowledge of their falseness (or so recklessly made as to amount to the same thing), and with the purpose of injuring the plaintiff." *Southern Building & Loan Ass'n v. Dinsmore*, 225 Ala. 550, 552, 144 So. 21, 23 (1932). Thus it would appear that a jury would be justified in finding that gross fraud was present, where the plaintiff has done no more than establish mere actionable fraud.

¹³ *Bower v. Perkins*, 135 Conn. 675, 68 A. 2d 146 (1949); *District Motor Co. v. Rodill*, 88 A. 2d 489 (D. C. Munic. Ct. App. 1952); *Jones v. West Side Buick Auto Co.*, 231 Mo. App. 187, 93 S. W. 2d 1083 (1936); *Saberton v. Greenwald*, 146 Ohio St. 414, 66 N. E. 2d 224 (1946).

¹⁴ *California*: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." CAL. CIV. CODE § 3294 (1949), *Thompson v. Modern School of Business and Correspondence*, 183 Cal. 112, 190 Pac. 451 (1920).

Colorado: "In all civil actions in which damages shall be assessed by a jury for a wrong done to the person, or to personal or real property, and the injury complained of shall have been attended by circumstances of fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings, such jury may, in addition to the actual damages sustained by such party, award him reasonable exemplary damages." COLO. STAT. ANN. c. 50 § 6 (1935). While the Colorado Court has yet to decide the direct issue, it has held that implied malice is sufficient to allow punitive damages under this statute. *McAllister v. McAllister*, 72 Colo. 28, 209 Pac. 788 (1922) (suit for alienation of affections). Thus it appears that when the issue presents itself, the Colorado Court will reach the same result as those states following the "minority rule."

Montana: The language of the statute here is substantially that of the California statute set out above. MONT. REV. CODES ANN. § 17-208 (1947). The exact issue has likewise failed to present itself to the Montana Court. However, from the wording of the statute and the decision in *Moelleur v. Moelleur*, 55 Mont. 30, 173 Pac. 419 (1918), it is likely that this court too will authorize punitive damages where actionable fraud is shown.

North Dakota and Oklahoma: The statutes in both these states employ essentially the same wording as does the California statute, *supra*. N. D. REV. CODE § 32-0307 (1943); OKLA. STAT. ANN. tit. 23, § 9 (1937). *Wuest v. Richmond*, 48 N. D. 1081, 188 N. W. 573 (1922); *Garrett v. Myers*, 190 Okla. 273, 123 P. 2d 965 (1942).

Texas: After defining actionable fraud, and stating the measure of damages, the statute continues ". . . all persons wilfully making such false representations or promises or knowingly taking the advantage of said fraud shall be liable in ex-

As to the measure of damages in actions for fraud and deceit, there are two rules that the courts have basically followed: (1) the "benefit of bargain" rule, and (2) the "out of pocket" rule.¹⁵

Under the "benefit of bargain" rule, the plaintiff is entitled to recover the difference in the value of what he received and the value which it would have had had the representations been true.¹⁶ Therefore, in those jurisdictions following this doctrine, as well as the proposition that punitive damages are not allowable except under circumstances of aggravation, where the plaintiff prevails in his cause of action the defendant will be required to pay the plaintiff more than his actual loss in situations where the price paid is less than the falsely represented value, even though no punitive damages are assessed.¹⁷ However, where the price paid is the same as the falsely represented value, the plaintiff recovers only the amount he paid above the true value, and the defendant goes unpunished. Consequently, when this measure of damages is combined with the principle that punitive damages are allowed by simply showing actionable fraud, it becomes obvious that the defendant in the former situation will be punished twice for one wrongful act.

Conversely, in those jurisdictions where the "out of pocket" rule is accepted (by which the plaintiff is entitled to the difference between the amount paid and the actual value of that which he received)¹⁸ along with the theory of requiring additional aggravation for the allowance of punitive damages, an equally undesirable consequence will result in many situations. Thus where the court finds that the element of aggravation is wanting, the plaintiff is not made entirely whole; for he must

emplary damages to the person defrauded in such amount as shall be assessed by the jury, not to exceed double the amount of the actual damages suffered." TEX. REV. CIV. STAT. ANN. art. 4004 (1925), *J. S. Curtiss & Co. v. White*, 90 S. W. 2d 1095 (Tex. 1935).

¹⁵ The first rule is applied by the following courts: *Lutfy v. R. D. Roper & Sons Motor Co.*, 57 Ariz. 495, 115 P. 2d 161 (1941); *Morrell v. Wiley*, 119 Conn. 578, 178 Atl. 121 (1935); *Menke v. Rovin*, 352 Mo. 826, 108 S. W. 2d 24 (1944); *Kennedy v. High Point Savings & Trust Co.*, 213 N. C. 620, 197 S. E. 130 (1938).

The second rule has been adopted in California by statute. CAL. CIV. CODE § 3343 (1949) (see note 21, *infra*). And by the courts in the following jurisdictions: *Horning v. Ferguson*, 52 A. 2d 116 (D. C. Munic. Ct. App. 1947); *Peters v. Stroudsburg Trust Co.*, 348 Pa. 451, 35 A. 2d 341 (1944).

For a collection of cases as to both rules, see 37 C. J. S., *Fraud* §143b.

¹⁶ *Kennedy v. High Point Savings & Trust Co.*, 213 N. C. 620, 623, 197 S. E. 130, 131 (1938).

¹⁷ This inevitable result is undoubtedly the reason for the Arizona Court holding that while legal malice, *i.e.* the intentional doing of a wrongful act without justification or excuse—is a sufficient basis for the awarding of punitive damages,—such damages should not be allowed where the "benefit of bargain" rule applies, in the absence of the defendant acting wantonly and recklessly, etc. the court apparently feeling that the result in this situation would make the plaintiff whole, and at the same time punish the defendant. *Lutfy v. R. D. Roper & Sons Motor Co.*, 57 Ariz. 495, 504, 115 P. 2d 161, 165 (1941).

¹⁸ *Horning v. Ferguson*, 52 A. 2d 116, 119 (D. C. Munic. Ct. App. 1947).

pay the expenses of litigation in order to recover that amount fraudulently taken from him, while a cheat is permitted to go unpunished.

In view of the purpose for which punitive damages are assessed, and the fact that the plaintiff has a right to be made whole, it appears that the courts of California and the District of Columbia have adopted the best view, which more nearly meets the purposes of damages in tort actions. These jurisdictions apply the "out of pocket" rule for the measure of damages,¹⁹ and authorize the submission of the issue of punitive damages to the jury where the plaintiff's evidence tends to show actionable fraud.²⁰ By applying this rule the sum wrongfully obtained will be returned to the plaintiff, and the jury may, in its discretion, punish the defendant to the degree that the facts of each case warrant. And by virtue of this punishment, the plaintiff may receive the expenses he incurred in litigation.

From the propositions discussed above, it is concluded that where the "out of pocket" rule is not applied and punitive damages are not allowable upon showing actionable fraud, the perpetrator in too many cases has nothing to lose by his fraud. He stands the chance of making a dishonest profit if his scheme is successful, but in no event can he lose by his misconduct. The unfairness of such a result is vividly illustrated by the principal case. Would it not, then, be advisable for every state to adopt statutes similar to those in California?²¹

DURWARD S. JONES

Deeds—Adverse Possession—Tacking—Strip of Land not Included in Deed

For twenty years or more the successive occupants of two adjoining tracts of land have been satisfied that the correct boundary between their lands is a certain ditch, line, fence or hedgerow. Then deeds are consulted, a physical survey is run, and one landowner realizes that he is in possession of a strip of land not included in his deed, nor in the deeds of his predecessors. Convinced that the land is rightfully his, he claims title by adverse possession, only to be told that he has not held

¹⁹ CAL. CIV. CODE § 3343 (1949), *Jacobs v. Levin*, 58 Cal. App. 2d 913, 137 P. 2d 500 (1943); *Horning v. Ferguson*, 52 A. 2d 116 (D. C. Munic. Ct. App. 1947).

²⁰ CAL. CIV. CODE § 3294 (1949), *Thompson v. Modern School of Business & Correspondence*, 183 Cal. 112, 190 Pac. 451 (1920); *District Motor Co. v. Rodill*, 88 A. 2d 489 (D. C. Munic. Ct. App. 1952).

²¹ The California Statute providing for the use of the "out of pocket" rule states, "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction." CAL. CIV. CODE § 3343 (1949). The California Statute authorizing the assessment of punitive damages is set out in note 14 *supra*. CAL. CIV. CODE § 3294 (1949).