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TENDER: A REQUIREMENT FOR EQUITABLE JURISDICTION AND RELIEF. A 16th CENTURY CONCEPT IN A 20th CENTURY COURT

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INTRODUCTION

Today, the doctrine and requirement of tender is ill defined, overly strict, generally confusing and largely outmoded. Tender developed first in the law courts as a method to insure justice to the parties within the strict procedural and power limitations of that court. In chancery, tender had little value and consequently small influence. The chancellor, without resort to elaborate fictions, could easily protect all the parties through his flexible *in personam* conditional decree-granting power. The confusion necessarily engendered by the strict demands of tender were thus largely isolated in the law courts. However, with the modern merger of law and equity into a single court the line between equitable and legal actions was no longer clearly apparent. The merger of the courts destroyed the established law of neither; it merely required one judicial officer to exercise both legal and equitable jurisdiction. The court would have to decide if the facts and prayers warranted equitable relief or legal relief and then apply the principles of the court that would have heard the case prior to the merger. Keeping the legal demands of tender isolated in purely legal actions requires a degree of sophistication. The judicial officer must recognize that an action falls within legal or equitable jurisdiction and apply the relevant tender requirement.[1]

Most courts have done this well. They have recognized the historical spawning ground of tender and have largely limited its application to legal actions.[2] The courts of Georgia, however, have either failed to appreciate the historical significance of tender or have failed to

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1. Of course the argument has been made that since tender developed from a procedural inability of the law courts to condition decrees or specific action, and since that lack of power no longer exists, the requirement of tender should be largely overturned and a single rule adopted for all actions.

2. As will be pointed out, in actions for specific performance when time is of the essence, it may be inequitable to enforce a contract on behalf of a plaintiff who did not offer to perform within the time limitations imposed by the contract. However, such situations can and should be handled according to established equitable principles and need not rely on the legal doctrines of tender.

recognize the historical distinction between legal and equitable actions. As a result Georgia stands virtually alone in the demands of tender it makes upon petitioners seeking equitable relief. Examination of the cases in various areas of equitable relief provides an ideal example of the confusion that can result by zealous enforcement of prior tender requirements. It is a case in point for abandonment of the principle of tender.

HISTORICAL BACKGROUND

The legal requirement of tender was apparently spawned by an inability of the law courts to compel specific action or issue conditional decrees.[3] Without this power the law courts needed a device to insure justice to both parties when the facts of the particular case demanded an exchange or a return to the status quo. Tender was such a device. To illustrate: If an action on the contract could have been brought without a prior tender, the defendant would have been compelled to perform in order to avoid liability for damages. However, as the court considered itself unable to order the plaintiff to render a return performance, defendant would have been forced to perform without any opportunity or ability to secure the agreed exchange. Of course defendant could have refused to perform, but his position would be unimproved. Again, as the court would not issue an award conditioned upon plaintiff's performance unless a rule of law required the consideration be made continuously available, the defendant would have to satisfy the judgment without any assurance of securing the agreed return performance.[4]

The practical demand of tender was soon an element in the semi-mystical "cause of action." The defendant was said to have no duty to perform until tender was made by the plaintiff. Only if the defendant refused to perform after the tender would this "cause of action" arise in favor of the plaintiff.[5]

Although there was a marked distinction in theory, the right of

3. *See* Brown v. Norman, 65 Miss. 369, 4 So. 293 (1888); Coffee v. Newsome, 2 Ga. 442, 461 (1847). It has been suggested that the law courts actually possessed the power to enter conditional decrees. As they rarely, if ever, used this power, it was effectively nonexistent. *See* 31 COLUM. L. REV. 124 (1931).

4. *See* Rutherford v. Haven & Co., 11 Iowa 587 (1861); 5 A. CORBIN, CONTRACTS 298 (1964). However, in making tender the plaintiff ran the risk that defendant would seize the tender. The tables would be turned. Defendant would have the performance. Plaintiff would have a law suit.

5. Zehring v. Driskel, 184 Kan. 644, 339 P.2d 57 (1959), and cases cited therein. POMEROY, SPECIAL PERFORMANCE OF CONTRACTS 767 (3d ed. 1926).

rescission, particularly the rescission of contracts, was recognized at law as well as in equity.[6] However, unlike equity, rescission at law demanded a prior tender. The underlying reason for such a demand was again the inability of the law court to protect a defendant by ordering specific action or conditioning its decree.[7] With this supposed inability of the law courts, the fear was once again that if there was no continuing tender to insure defendant a return of his exchange, the plaintiff could avoid the contract, recover his consideration and still keep the proceeds of the contract. The defendant would have to resort to a second action, and the vagaries inherent therein, before he could recover his consideration.

This underlying justification for tender at law resulted in an elaborate theory. The law relied heavily upon the legal fictions of "title" and "completed" as distinguished from "uncompleted" rescission. The law court had no power to order a rescission. However, the plaintiff could "complete" the rescission, and on the basis of the completed rescission the court would honor the action for trover, replevin or indebitatus assumpsit. This was the analysis: A transaction based upon defendant's fraud or tortious conduct is "voidable."[8] The plaintiff could avoid the transaction by manifesting his intent to do so and tendering a return of the consideration. Until plaintiff did this, rescission was not "complete" and plaintiff had no "cause of action."[9] However, after the tender "title" to the tendered consideration reverted to the defendant. "Title" to the money or objects in the defendant's hands reverted to the plaintiff. Thereafter, plaintiff could file the appropriate common law action to recover "his" property.[10]

6. The law's jurisdiction was exercised primarily on sales contracts. Equity acted only when the remedy provided at law was inadequate, as where the instrument needed to be cancelled, a lien set aside or a unique object immediately recovered. Hogg v. Maxwell, 218 F. 356 (2d Cir. 1914); Davidson v. Brown, 215 Ala. 205, 110 So. 384 (1926). Glenn, *Rescission for Fraud in Sale or Purchase of Goods, Quasi Contractual Remedies as Related to Trover and Replevin*, 22 VA. L. REV. 859, 862 (1936).

7. *See* Brown v. Norman, 65 Miss. 369, 4 So. 293 (1888); 5 A. CORBIN, CONTRACTS 626-627 (1964).

8. Henderson v. Gibbs, 39 Kan. 679, 18 P. 926 (1888); RESTATEMENT, CONTRACTS § 476 (1932). However, there was considerable early authority that title did not pass when a sale was induced by fraud. Farley v. Lincoln, 51 N. H. 577 (1872); Hall v. Gilmore, 40 Me. 578 (1855); Thurston v. Blanchard, 22 Pick. (Mass.) 18 (1839); Van Cleer v. Fleet, 15 Johns. (N.Y.) 147 (1818). However, this approach presented conceptual problems. How could the bona fide purchaser be protected? If the tortfeasor got no title, could not the plaintiff file for replevin immediately without tender? This older authority was ultimately abandoned.

9. E.T.C. Corp. v. Title Guar. & Trust Co., 271 N.Y. 124, 2 N.E.2d 284 (1936); Thayer v. Turner, 49 Mass. 550 (1834).

10. Thomas v. Beals, 154 Mass. 51, 27 N.E. 1004 (1891); Brown v. Norman, 65 Miss. 369, 4 So. 293 (1888); DEFUNIAK, HANDBOOK OF MODERN EQUITY 234 (2d. ed. 1956); Annot., 142

These elaborate fictions seemed little more than a facade which allowed a court of law to recognize a rescission when it felt conceptually unable to order a return of the consideration or destruction of the contract and thus kept for itself a large area of litigation that it would have surely lost to the chancery.

Equity having the ready power to condition decrees and make specific in personam orders usually required no prior tender as a condition for rescission.[11] The justification often given for the distinction between law and equity is that equity used its power to void existing transactions, whereas the law acted only upon the completed rescission.[12] This superficial explanation only begs the question. The real distinction was that the law could not protect the defendants in a rescission action without requiring the plaintiff to make available for acceptance the return of the consideration. Thus, tender was demanded.[13]

The power limitations in the law court that begat elaborate legal fictions to protect the litigants did not exist in equity. No less than the judge, the chancellor desired to see all the parties secure the proper consideration. However, unlike the judge, the chancellor had at his disposal the power to protect the parties. Thus, both in the enforcement contracts and cancellation of instruments the reason underlying the law's rigid tender requirements had no true application in the chancery. As a transplant on foreign ground with no root of necessity, tender never flourished.

The requirement of tender in an action at law was perhaps, at one time, justifiable. However, with the amalgamation of the courts and with a modern judge possessing the power to condition all of his decrees and to specifically order action of his litigants, the underlying reason for tender is largely destroyed. Improvement and modernization of the judicial machinery have removed the necessity of tender. It is today a rule without reason, an historical relic, an accident of an ancient time; though serving well at one time, it has long outlived its

A.L.R. 582, 583 (1943); 95 A.L.R. 1000 (1935). This analysis is open to the conceptual criticism in that if defendant indeed acted tortiously in obtaining the goods, a conversion was then and there committed. See, COOLEY, LAW OF TORTS 235 (Throck ed. 1930). This conversion would be grounds for a trover or replevin action without any further activity by the plaintiff. Glenn, *Rescission for Fraud in Sale or Purchase of Goods, Quasi Contractual Remedies as related to Trover and Replevin*, 22 VA. L. REV. 859, 864 (1936).

11. Masters v. Van Wart, 125 Me. 402, 134 A. 539 (1926); Thomas v. Beals, 154 Mass. 51, 27 N.E. 1004 (1891).

12. MCCLINTOCK, PRINCIPLES OF EQUITY 231 (2d 1948); 36 CAL. L. REV. 606 (1948).

13. 5 A CORBIN, CONTRACTS 626-627 (1964).

modern usefulness. Continued recognition of the wholly fictional distinction between rescission at law and rescission in equity is no longer necessary. Demanding prior tender in one instance while excusing it in another is hard to justify. Continued demand of tender when it serves no purpose is blind obedience to a ghost.[14]

CURRENT STATUS OF TENDER REQUIREMENTS IN EQUITABLE ACTIONS

When the petition is for specific performance, the strictness of the prior tender requirement seems to vary. When time is of the essence, a prior tender is usually required, and rightfully so. To compel a return performance would be inequitable when the plaintiff has not performed or offered to perform within the time stated in the contract.[15] In reality this requirement is based primarily upon the doctrine of "doing equity" rather than being a transplantation of the legal doctrine of tender. Even when time is not of the essence, however, there are some courts that demand some form of prior tender.[16] Even in these courts the technicalities of the tender are generally not so rigidly enforced as they would be in a legal action.[17] Often "offer" of tender prior to suit, as distinguished from an actual physical tender, is sufficient.[18]

This requirement of tender prior to bringing the specific performance action can perhaps be rationalized on the grounds that when the provisions of the contract are mutual and dependent, the defendant is under no legal duty to perform until plaintiff tenders his performance. Until the tender and consequent refusal to perform, there has been no legal breach of the contract. As "equity follows the law" the chancellor may rightfully hesitate, on conceptual grounds, to enforce a contract to which there has been no legal violation, no "cause of action".[19]

The equitable demand of a prior tender has been severely criticized as ignoring the historical justification of tender at law and the absence of such a justification in equity.[20] Recognizing this argument, numerous

14. In re Meiselmann, 105 F.2d 995, 999 (2d Cir. 1939); 26 VA. L. REV. 222 (1939).

15. Kelsey v. Crowther, 162 U.S. 404 (1896); Thompson v. Robinson, 65 W.Va. 506, 64 S.E. 718 (1909); RESTATEMENT OF CONTRACTS § 276 (1932); 6 S. WILLISTON, TREATISE ON THE LAW OF CONTRACTS 109 (3d ed. 1962).

16. Redden v. Bausch, 110 Kan. 625, 204 P. 752 (1922); Morton v. Varnado, 127 Miss. 332, 90 So. 77 (1921); Bateman v. Hopkins, 157 N.C. 369, 73 S.E. 133 (1911). POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS 767-768 (3d ed. 1926).

17. 4 POMEROY, EQUITY JURISPRUDENCE 1051 (5th ed. 1941).

18. Harris v. Greenleaf, 117 Ky. 817, 79 S.W. 267 (1904).

19. *See* Scott v. Smith, 58 Ore. 591, 115 P. 969, 974 (1911); Baird v. Barton, 163 Cal. App.2d 502, 329 P.2d 492 (1958); 4 POMEROY, EQUITY JURISDPRUDENCE 1052 (5th ed. 1941).

20. 5 A. CORBIN, CONTRACTS 299-301 (1964).

authorities hold that although tender may have some effect on costs,[21] tender is not a necessary ritual that must precede the bringing of the bill.[22] Alleging a willingness and ability to perform in the bill is all that is required.[23] Equity can condition its decree to provide the defendant with the protection necessary. Thus, if the plaintiff is unable or unwilling to perform the defendant is required to do nothing.

The split of authority that exists regarding the necessity of tender as a condition precedent to an equitable action seeking specific performance is not so apparent when the action is for equitable rescission. Recognizing the age old distinction between rescission at law and rescission in equity, the vast majority of the cases require no tender for equitable rescission.[24] Unlike the law that was operating under supposed limitations on its power, the chancellor had flexible in personam powers to insure justice. Tender was thus not necessary in equitable actions for the protection of the parties and so was generally not required. In equitable rescission, tender demands are seldom more than a general pleading requirement that petitioner be willing, able and ready to perform.[25]

THE LAW OF GEORGIA

I. Introduction:

In Georgia the problems of tender have presented themselves in three basic types of equitable actions: specific performance, rescission, and

21. Wood v. Howland, 127 Iowa 394, 101 N.W. 756 (1904); Boston v. Nichols, 47 Ill. 353 (1868); RESTATEMENT OF CONTRACTS § 359 (1932).

22. Sims v. Birmingham, 254 Ala. 598, 49 So. 302 (1950); Welsh v. Jakstas, 401 Ill. 288, 82 N.E.2d 53 (1948); McMillan v. Smith, 363 S.W.2d 437 (Tex. 1963); MCCLINTOCK, PRINCIPLES OF EQUITY 207 (2d ed. 1948); 6 S. WILLISTON, TREATISE ON THE LAW OF CONTRACTS 113 (3d ed. 1962).

23. Glave v. Brandlin, 196 So.2d 780 (Fla. 1967); Beverage v. Canton Placer Mining Co., 43 Cal.2d 769, 278 P.2d 694 (1955); Priest v. Oehler, 328 Mo. 590, 41 S.W.2d 783 (1931).

24. Gooden v. Hunter, 56 Wash.2d 617, 355 P.2d 20 (1960); Lacey v. Edmunds Motor Co. 216 Ala. 479, 113 So.2d 507 (1959); Thomas v. Beals, 154 Mass. 51, 27 N.E. 1004 (1891); 5 A. CORBIN, CONTRACTS 626 (1964); 5 S. WILLISTON, TREATISE ON THE LAW OF CONTRACTS § 1529 (Rev. ed. 1937); MCCLINTOCK, PRINCIPLES OF EQUITY 231-233 (2d ed. 1948); RESTATEMENT OF CONTRACTS § 481 comment (a) (1932); RESTATEMENT OF RESTITUTION § 65 comment (d) (1937); *Contra*, Smith v. Smith, 261 N.C. 278, 134 S.E.2d 331 (1964); Kam Chin Chun Ming v. Kam Hee Ho, 45 Hawaii 521, 371 P.2d 379 (1962).

25. Gooden v. Hunter, 56 Wash.2d 617, 355 P.2d 20 (1960); 5 S. WILLISTON, TREATISE ON THE LAW OF CONTRACTS § 1529 (Rev. ed. 1937). Again it should be emphasized that with the powers of our combined courts, the need to retain any distinction between equitable and legal rescission is doubtful. Regardless of the historical base for the distinction, the modern court has the power to protect all of the parties with its decree. Thus, strict tender requirements in a modern court, regardless of the historical theory, smack of the unreasonable. In re Meiselman, 105 F.2d 995, 999 (2d Cir. 1939).

injunctions. Injunctions against the collection of taxes have presented unique problems that have provoked an unusual quantity of litigation. In each of these areas Georgia courts have demanded tender as a condition precedent to suit with a vigor that is unknown in most other jurisdictions. Occasionally, as in rescission, the requirement of tender is justified by reference to specific provisions of the code.[26] More often, however, the requirement of a tender prior to suit is distilled from the general maxim found codified in GA. CODE ANN. Section 37-104 (Rev. 1962), "He who seeks equity must do equity". In Georgia the notion of a plaintiff "doing equity" is tendering prior to suit, any consideration in his possession that rightfully will have to be returned or delivered to the defendant. For at least two reasons Georgia's demands of a prior tender in equitable actions seems ill advised. Firstly, it ignores the historical *raison d' etre* requirement at law, and the power of a court of equity, or any modern court, to protect the defendant without imposing the technical maze of tender. Secondly, the heavy reliance upon the maxim, "He who seeks equity," is misplaced. In Georgia the court seems to view anyone who fails to make a proper tender disparagingly and not entitled to equitable aid. Such is seldom the case, and when it is, it can be governed by the maxim, "He who comes into equity must do so with clean hands". This is the maxim usually relied upon by courts in denying relief because of prior inequitable conduct.[27] The maxim of "He who seeks equity must do equity" has not, in other jurisdictions, been applied to doing justice *before* suit is filed, but is invoked by the decree itself requiring plaintiff to do certain acts before the defendant is obligated under the decree to respond.[28]

In enforcing the requirement of tender the Georgia courts approach the absolute limit of strictness—the plain language of the code, common practice and common sense to the contrary notwithstanding.

26. *See* GA. CODE ANN. § 20-906 (Rev. 1965).

27. *See* Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488 (1942); Carman v. Fox Film Corp., 269 F. 928 (2d Cir. 1920; Hall v. Wright, 125 F. Supp. 269, 273 (S.D. Cal. 1954).

28. In Tramonte v. Colarusso, 256 Mass. 299, 152 N.E. 90 (1926) and McNanamy v. Firestone Tire and Rubber Co., 114 Pa. Super. 282, 173 A. 491 (1934) a decree requiring defendant to remove an encroaching structure was conditioned upon plaintiff consenting to a temporary trespass for the purpose of removal. "He who seeks equity must do equity" was the justification for such a decree. Similarly, a specific performance decree that would leave a defendant without security may be conditioned upon a plaintiff executing security instruments for defendant's protection. Van Scoten v. Albright, 5 N.J.Eq. 467 (1846). Relying on the maxim, rescission decrees commonly include a requirement that plaintiff return the received consideration. Masters v. Van Wart, 125 Me. 402, 134 A. 539 (1926). *See also,* Walker v. Galt, 171 F.2d 613 (5th Cir. 1948), *cert. denied* 336 U.S. 925 (1949); Griggs v. Miller, 374 S.W.2d 119 (Mo. 1964).

In its zealous crusade to protect the sanctity of tender, the court will not only fail to recognize established authority from other jurisdictions and ambiguous code provisions that would seem to justify the common approach, but it will also ignore code provisions that seem to demand liberalism. The court's tender demands not only fail to reflect the real life activities of the society, but often result in a shocking lack of justice to the plaintiff who fails to meet the strict demands. A reading of the cases leaves one mystified. What is the court trying to accomplish by such strictness? What goal is the court attempting to reach by making such strict tender requirements? The question goes unanswered.

II. Specific Performance

Form of the Tender From a very early time the Georgia courts have held that tender of the amount due is a condition that must be satisfied by a purchaser before he is entitled to bring an action in equity specifically enforcing the contract to sell.[29] Unlike numerous jurisdictions which, although demanding some form of prior tender, do not require the strictness demanded in legal actions on the contract, Georgia applies the same standard of tender to both legal and equitable actions.[30] Therefore, although the action is equitable, all the formalities of tender at law are demanded. A mere "offer to tender" must be distinguished from the actual bona fide presentation of the agreed consideration.[31] Tender will be considered complete only when the party making the presentation need do no further act.[32] It is quite clear that the mere allegation of a readiness and ability to perform without this prior presentation of the consideration is insufficient.[33]

A few early cases, however, seem to view the situation somewhat differently if the vendor rather than purchaser is the party seeking to enforce performance. First, if the covenant to perform is independent of the defendant's duty to pay, there is no duty of tender or offer of tender.[34]

29. Cummings v. Johnson, 218 Ga. 559, 129 S.E.2d 762 (1963); Morgan v. Mitchell, 209 Ga. 348, 72 S.E.2d 310 (1952); Terry v. Keim, 122 Ga. 43, 49 S.E. 736 (1905); DeGraffenreid v. Menard, 103 Ga. 651, 30 S.E. 560 (1898); Askew v. Carr, 81 Ga. 685, 8 S.E. 74 (1888); Cothran v. Scanlan, 34 Ga. 555 (1866); McGehee v. Jones, 10 Ga. 127 (1851).

30. Cothran v. Scanlan, 34 Ga. 555 (1866); McGehee v. Jones, 10 Ga. 127 (1851).

31. Jolly v. Jones, 201 Ga. 532, 40 S.E.2d 558 (1946); Angier v. Equitable Bldg. & Loan Ass'n., 109 Ga. 625, 35 S.E. 64 (1900).

32. Carnation v. Pridgen, 84 Ga. App. 768, 67 S.E.2d 485 (1951).

33. Cummings v. Johnson, 218 Ga. 559, 129 S.E.2d 762 (1963); Jolly v. Jones, 201 Ga. 532, 30 S.E.2d 558 (1946); Askew v. Carr, 81 Ga. 685, 8 S.E. 74 (1888).

34. Chastain v. Platt, 166 Ga. 307, 143 S.E. 378 (1928).

Furthermore, it has been stated that even if the covenants are concurrent, mutual and dependent, if the party has something to do other than the payment of money, an *offer* to perform prior to suit is sufficient.[35]

The question is, would these early cases be applied today? Is actual tender only demanded when the plaintiff has a money payment to make? This is a difficult question to answer with assurance. These early cases could be rationalized on the basis of a waiver of tender. Even though the language of the court indicated that actual tender was not demanded, it was apparent that the defendant, in fact, refused to perform. This refusal by the defendant could be considered as a justification for plaintiff's failure to make an actual tender.[36] Later cases have cited *Booth* v. *Saffold,* but the later courts use the terms "offer to convey" and "tender" together and interchangeably.[37] Therefore, it is not clear whether actual tender would be excused if plaintiff is obligated to do something other than paying money. Of course, if the obligation is the performance of a service, bona fide offer to perform the service should be sufficient to satisfy any tender demand. However, it would not be safe to assume that if plaintiff was obligated to deliver an object, chattel or chose, other than money, his actual tender of the obligation would be excused. When viewed in the context of the strictness of Georgia's tender requirements, the early authority that seemed to allow a mere offer to perform to serve as a substitute for an actual legal tender could not be relied upon with safety.

The amount tendered, if a money debt, must be in legal tender, not a check.[38] However, objection to the form of the tender must be made by the recipient at the time of the tender.[39] Tender must be according to the terms of the contract.[40] This means that the defendant cannot be asked to accept risks for which he has not contracted, and any tender that attempts to do so is invalid.[41]

35. McLeod v. Hendry, 126 Ga. 167, 54 S.E. 949 (1906); Booth v. Saffold, 46 Ga. 278 (1872).

36. Banks v. Harden, 221 Ga. 505, 145 S.E.2d 563 (1965); Fraser v. Jarrett, 153 Ga. 441, 112 S.E. 487 (1922).

37. *See* Chastain v. Platt, 155 Ga. 307, 143 S.E. 378 (1928); Mealor v. McNabb, 83 Ga. App. 432, 63 S.E.2d 702 (1951); Archibald Hardware Co. v. Gifford, 44 Ga. App. 837, 163 S.E. 254 (1932); Reliance Realty Co. v. Mitchell, 41 Ga. App. 124, 152 S.E.295 (1930).

38. Askew v. Carr, 81 Ga. 685, 8 S.E. 74 (1888); Holland v. Mutual Fertilizer Co., 8 Ga. App. 714, 70 S.E. 151 (1911).

39. McEachern v. Indus. Life & Health Ins. Co., 51 Ga. App. 422, 180 S.E. 625 (1935); GA. CODE ANN. § 20-1105 (Rev. 1965).

40. Blake v. Williams, 208 Ga. 353, 66 S.E.2d 899 (1951); Marsh v. Baird, 203 Ga. 819, 48 S.E.2d 529 (1948).

41. Franklin v. Jordan, 224 Ga. 727, 164 S.E.2d 718 (1968).

Of course, tender is generally made to the contracting party or anyone authorized to act for him. However, in the event the contracting party has conveyed out the subject matter to one against whom performance can be demanded, the tender shall be made to the third party purchaser.[42]

Tender that is made must be unconditional. The code provides that tender must be ". . . unconditional except for a receipt in full or delivery of the obligation".[43] The court has repeatedly held that any attempt to add other conditions including the condition of return performance as contracted makes the tender invalid.[44] Thus, if the plaintiff tenders the agreed cash in exchange for the contracted deed, this is considered conditional and is fatal to his securing equitable relief to compel delivery of the deed.[45] As pointed out in *Marsh* v. *Baird*,[46] "Tender of the amount due for land sold under bond for title, with a condition that the obligor make a deed in accordance with the bond is not a good unconditional tender". Only when ". . . plaintiff called upon the defendant and offered his cash money the balance . . . and defendant declined to receive it . . ." had a valid tender been made. The construction placed upon the code section, reaching such an absurd result, does not seem to be as unavoidable as the court apparently believes. The code permits a plaintiff to condition tender upon a "delivery of the obligation". "Delivery of the obligation" need not, and probably should not be limited, as the court has done, to *evidence* of the obligation. Rather it should be extended to include delivery of defendant's *actual* obligation under the contract. Thus, a tender conditioned upon return performance as obligated under the contract would be permitted.

Certainly common sense and common practice would favor this view. It would seem only natural that when a person tenders his performance he would expect, even demand, a simultaneous performance of the other party. Only the foolhardy would be expected to surrender their performance and get nothing in return. The defendant could accept the tender, refuse to perform as promised, and the plaintiff would be left with the uncertainty and insecurity of a law

42. Finney v. Blalock, 206 Ga. 655, 58 S.E.2d 429 (1950).

43. GA. CODE ANN. § 20-1105 (Rev. 1965).

44. Heath v. Miller, 205 Ga. 699, 54 S.E.2d 432 (1949).

45. Smith v. Bank of Acworth, 218 Ga. 643, 129 S.E.2d 857 (1963); Morgan v. Mitchell, 209 Ga. 348, 72 S.E.2d 310 (1952); Irvin v. Locke, 200 Ga. 675, 38 S.E.2d 289 (1946); DeGraffenreid v. Menard, 103 Ga. 651, 30 S.E. 560 (1898); Cothran v. Scanlan, 34 Ga. 555 (1866); McGehee v. Jones, 10 Ga. 127 (1851).

46. 203 Ga. 819, 48 S.E.2d 529 (1948).

suit. It is indeed ironic that because of overly strict tender demands a plaintiff in Georgia is unprotected to the same extent that a defendant would have been at common law had no tender requirement developed for his protection. As one would therefore expect, a tender that is conditioned only upon the delivery of the promised performance is generally, in other jurisdictions, considered proper.[47]

Amount of the Tender. In the case of a money payment, tender must be made according to the terms of the contract. This normally means payment of the agreed purchase price. A payment of less than this amount is not a valid tender.[48]

However, if the plaintiff is entitled to deduct part of the purchase price as when the subject matter of the contract is damaged or destroyed before final conveyance,[49] then he should be allowed to tender the lesser amount.

Given this and other reasons, accuracy of tender may be difficult to ascertain in advance of litigation. To demand absolute accuracy under penalty of dismissal can result in considerable hardship.[50] Therefore, it could be argued that tender should be excused when the amount is in dispute or difficult to ascertain with any accuracy,[51] but reference to other areas lends little support. In rescission cases it appears that tender will be excused when there are a series of complex mutual accounts and the plaintiff asking for an accounting offers to pay any small amount owing.[52] However, in tax injunction cases the mere difficulty or even impossibility of determining the amount of tax due does not excuse tender of a "fair" amount. It would seem in contract enforcement cases, a mere difficulty of determination does not entirely excuse tender. However, a good faith tender of the amount admitted to be due under the contract with an allegation in the complaint of a

47. 6 S. WILLISTON, TREATISE ON THE LAW OF CONTRACTS 105 (3d ed. 1962).

48. GA. CODE ANN. § 20-1105 (Rev. 1965).

49. Ingram v. Methodist Church, 210 Ga. 100, 131 S.E.2d 848 (1963); Phinzy v. Guernsey, 111 Ga. 346, 36 S.E. 796 (1900). Georgia apparently does not follow the doctrine of equitable conversion that shifts the risk of loss to the purchaser after a specifically enforceable contract has been entered into. *See* Paine v. Meller, 6 Vassy (Chancery) 389 (1801); Briz-Ler Corp. v. Weiner, 39 Del. Ch. 478, 171 A.2d 54 (1961); Annot., 27 A.L.R.2d 444 (1953). There is a large split of authority as to where the risk of loss should fall while the contract is still executory. *See* 4 POMEROY, EQUITY JURISPRUDENCE § 1161 (a) (5th ed. 1941); 4 S. WILLISTON, TREATISE ON THE LAW OF CONTRACTS § 935 *et seq.* (Rev. ed. 1937); CLARK, EQUITY § 118, 119 (1954).

50. *See* Smith v. Pilcher, 130 Ga. 350, 60 S.E. 1000 (1908).

51. For dicta to this effect, *see* Kerr v. Hammond, 97 Ga. 567, 25 S.E. 337 (1895).

52. Wynne v. Fisher, 156 Ga. 656, 119 S.E. 605 (1923); Mayer v. Waterman, 150 Ga. 613, 104 S.E. 497 (1920). However, in tax injunction cases the mere difficulty or even impossibility of determining the amount of tax due does not excuse tender of a "fair" amount. Walker v. Burns, 220 Ga. 467, 139 S.E.2d 389 (1964).

readiness to pay any additional amount the court might find due will satisfy the tender demands.[53] Even this seemingly liberal rule has its dangers. The general rule clearly demands a tender of payment in full. In any instance in which the plaintiff tenders an amount less than due he must be able to prove his "good faith". This proof of good faith will be quite difficult unless there is in fact a complex situation of mutual accounts or an amount truly in dispute. Furthermore, if plaintiff tenders an unduly small amount, an amount less than what the court considers "fair", the tender might be struck down. The unfairness of the tender would indicate lack of the required good faith.[54]

Time for the Tender. Since Georgia makes the same tender demands upon equitable actions for the enforcement of contracts as it does upon actions at law, logic would dictate that tender must precede the filing of the suit. However, the code provision defining and explaining tender in contract actions states that the tender "may be made at any time before final trial".[55] Ostensibly this would allow tender at any time prior to the trial of the case, perhaps even to the time of judgment. It clearly does not demand tender before institution of the action. Nonetheless, the courts have not applied this code language and have consistently demanded tender as a condition precedent that must be satisfied before suit is filed.[56]

When a complaint is dismissed for failure to make a proper tender, the first question that would come to mind is, can the plaintiff now make a proper tender and refile his action? In all justice it would seem that he should be able to do so. It would be shocking to hold that a technical flaw in instituting the action would forever bar a plaintiff from enforcing a valid contract, and allow a defendant to escape his solemn obligations solely because the plaintiff bungled a formal prerequisite. In an age where procedural technicalities are not supposed to interfere with substantive justice, such a result would be indefensible. Nonetheless, in the absence of a case on point, the question is not subject to any easy solution.

In the early cases there was an expressed uncertainty about the

53. Henderson v. Willis, 160 Ga. 638, 128 S.E. 807 (1925); Smith v. Kelly, 48 Ga. App. 679, 173 S.E. 229 (1934).

54. *See* Freeman v. Keaton, 223 Ga. 505, 156 S.E.2d 347 (1967); Walker v. Burns, 220 Ga. 467, 139 S.E.2d 389 (1964); Roberts v. Mayer, 191 Ga. 588, 13 S.E.2d 382 (1941).

55. GA. CODE ANN. § 20-1105 (Rev. 1965).

56. Coleman v. Hunsucker, 214 Ga. 351, 104 S.E.2d 910 (1958); McKown v. Heery, 200 Ga. 819, 38 S.E.2d 425 (1946); Roberts v. Mayer, 191 Ga. 588, 13 S.E.2d 382 (1941); Terry v. Keim, 122 Ga. 43, 49 S.E. 736 (1905).

ability of a plaintiff to cure a faulty tender.[57] However, in at least two recent cases dealing with rescission, not contract enforcement, the courts have tacitly allowed a tender following the first filing of the suit and a timely amendment in the pleadings that reflected that late tender.[58] Hopefully, this liberality would be followed and applied in specific enforcement cases.

Nonetheless, the Georgia courts have consistently used the maxims of "doing equity" and "unclean hands" almost interchangeably. The view seems to be that any plaintiff who would file a suit without making proper tender is acting inequitably.[59] If this is accepted, the character of his inequitable conduct has not been cured by a later tender and the filing of a second suit. Thus any further attempts to enforce the contract would arguably be futile. Particularly would this seem arguable if time was of the essence, and at the time of the second tender the time for performance had passed.[60]

The rules relating to amending and supplemental pleading now governed by the Civil Practice Act, § 15[61] are very liberal, but do not in themselves provide the final answer to the problem of curing the untimely or faulty tender.

If tender was actually made but improperly pleaded, it would seem that the proper procedure would be to amend the complaint to reflect this fact. Under subsection (a)[62] a party may amend his pleadings, as a matter of course, at any time without leave of court.[63] The amendment to reflect an already completed tender would seem to be wholly proper.

If the tender was not properly made at the time the complaint was filed it would seem that the proper procedural step would be to make the tender and then file a supplemental complaint that reflects that fact.

57. Dotterer v. Freeman, 88 Ga. 479, 14 S.E. 863 (1891); Cothran v. Scanlan, 34 Ga. 555, 558 (1866).

58. Brooks v. Southern Clays, Inc. 220 Ga. 152, 137 S.E.2d 630 (1964); Smith v. Merck, 206 Ga. 361, 57 S.E.2d 326 (1950).

59. Georgia Bapitst Orphans Home Inc. v. Moon, 192 Ga. 81, 14 S.E. 2d 590 (1941).

60. Though hypertechnical, this is the approach taken by the court against plaintiffs who seek to enjoin the collection of their taxes. An inadequate tender prior to the first filing is fatal to any later suit based upon the same complaint. Maddox v. Hill, 225 Ga. 147, 166 S.E.2d 354 (1969); Kiker v. Hefner, 224 Ga. 511, 162 S.E.2d 731 (1968); Clisby v. City of Macon, 191 Ga. 749, 13 S.E. 2d 772 (1941).

61. GA. CODE ANN. § 81A-115 (Rev. 1967).

62. GA. CODE ANN. § 81A-115 (a) (Rev. 1967).

63. This is very liberal. The Federal Rules of Civil Procedure, Rule 15, only allows amendment as a matter of course before the responsive pleading. Although a motion is not considered a responsive pleading under the Federal Rules, any amending that takes place after the defendant has answered the complaint must be done under leave of the court.

The governing of supplemental pleadings is in sub-section (d).[64] This section provides:

> Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief. . . .

Thus, it is within the discretion of the court to allow supplemental pleadings. It does not absolutely grant a plaintiff the right to make a tender and file a second pleading. This right will rest, of course, with the trial court's discretion, and is based largely upon substantive rather than procedural considerations. If the second tender results in a measurable hardship to the defendant, not just a technical harm, then certainly the right to tender late should be denied. If the court believes that the plaintiff's conduct is basically inconsistent with equitable principles it could justifiably deny the right to amend. The right to tender after the first suit should be determined by a balancing of interests. The harm to the defendant from the delay should be balanced against the harm to plaintiff should the right to amend be denied, discounted to the degree that plaintiff has acted inequitably. The fact standing alone that plaintiff did not tender prior to filing the first suit, absent a showing of harm to the defendant or inequitable motive by the plaintiff, should not be enough to deny plaintiff the right to amend or supplement his pleadings.

Waiver of Tender, the Practical Application. Though the requirement of tender is strict, and the danger to the plaintiff in making the required "unconditional tender" is substantial, and the right to remedy the faulty tender is uncertain, the situation, though far from ideal, is not as black as it might seem. As a practical matter, the skillful plaintiff may be able to short circuit the confusion and be allowed to bring his action without ever subjecting himself to the rigors of the tender.

As pointed out earlier, if the plaintiff has to perform some act other than the payment of money, the "offer to perform" might be sufficient. This is particularly true if the performance is a personal service. Even if a tender is absolutely required, the defendant may waive the requirement. He may make this waiver by word or deed. If he, in fact, waives his right to a formal tender, the plaintiff is excused from performing the "useless formality". As stated in a series of cases:

> . . . [T]ender by the vendee before suit is excused, if the vendor by

conduct or declaration, proclaims that if a tender should be made, acceptance would be refused.[65]

Thus, if the defendant has made it impossible to perform by conveying the property to a third person, there is no need to go through the formality of tender. Plaintiff is thus spared the danger of tendering his performance unconditionally and having it accepted by a defendant presently incapable of performance.[66] Likewise statements by the defendant that indicate directly or by inference that he considers the contract at an end or unenforceable and that he does not intend to perform will allow the plaintiff to omit the prior formality of tender.[67]

Therefore, a plaintiff could probably succeed in obtaining such a "waiver" by making a bona fide offer to tender, as distinguished from the actual tender. If the defendant is balking, in all likelihood he will express himself in such a way that actual tender will be waived by him. However, as the burden will be upon plaintiff to plead and prove either a tender or excuse for tender, evidence of the waiver should be carefully preserved.

This will save the plaintiff of the danger of making a tender and having it "snatched up" by a dishonest defendant. In situations where the amount is uncertain, it will save the plaintiff from making an exact calculation and risking the danger of a dismissal for lack of sufficient tender. It will guard against the almost certain tendency to make the tender improperly conditioned upon return performance. But if there is any substantial doubt as to whether defendant has waived tender, the only safe way to insure against dismissal, perhaps permanently, is to go through the motions of the proper legal tender before filing the complaint.

III. Rescission

Introduction Regardless of whether the action is in law or equity, or whether the instrument is "void" or "voidable", the Georgia courts demand a prior tender of all benefits from the transaction. Though there is considerable similarity between contract enforcement and rescission in their requirements, rescission presents some unique problems and solutions.

65. Banks v. Harden, 221 Ga. 505, 145 S.E.2d 563 (1965); Fraser v. Jarrett, 153 Ga. 441, 112 S.E. 487 (1922); Miller v. Watson, 139 Ga. 29, 76 S.E. 585 (1912).

66. Banks v. Harden, 221 Ga. 505, 145 S.E.2d 563 (1965); Turman v. Smarr, 145 Ga. 312, 89 S.E. 214 (1916); Cooley v. Moss, 123 Ga. 707, 51 S.E. 625 (1905). *See also* Dee v. Collins, 235 Iowa 22, 15 N.W.2d 883 (1944); Annot., 70 A.L.R. 1241 (1931).

67. McLoon v. McLoon, 220 Ga. 18, 136 S.E.2d 740 (1964); Higdon v. Dixon, 203 Ga. 67, 45 S.E.2d 423 (1947); Foster v. Leeper & Menafee, 29 Ga. 294 (1859).

In a petition for rescission the Georgia courts will probably rely upon one or two code sections in demanding a prior tender as a condition precedent to filing the action. If the instrument sought to be cancelled is a contract, the court will likely rely upon GA. CODE ANN. Section 20-906 (Rev. 1965), which provides:

> A contract may be rescinded at the instance of the party defrauded, but in order to rescind he must promptly, upon discovery of the fraud, restore or offer to restore to the other whatever he has received by virtue of the contract, if it be of any value.[68]

In applying this section the court has currently failed to recognize the distinction between rescission at law and rescission in equity. A large number of rescission actions were at law, particularly in the area of sales contracts. In these actions at law, it was said that the court of law having no power to decree rescission could only act upon a rescission completed by the plaintiff.[69] The rescission was completed by exercising the right of avoidance and returning or rendering all of the consideration received under the contract. However, when the remedy at law was inadequate, as was the case when instruments needed to be cancelled, equity was called upon to act. Not suffering from the power limitations of the law court, the chancellor did not have to wait until the parties had completed a rescission, but could act on the petition alone. As such, a prior tender was not required, although the defendant could be equally assured of a return of the consideration by a conditional decree.[70] Not recognizing this distinction that would easily have been read into the statute, the Georgia court has demanded tender regardless of the historical theory of action.

Furthermore, even assuming that the court feels completely bound by the code provision, the court still has strictly construed the phrase in the code, "offer to restore". "Offer to restore" is an ambiguous term that could mean either a bare offer to return, or an actual tender in fact. "Tender" is a word of art. If the codifier had intended to use this restrictive word of art, it should be assumed he would have done so. The "offer to restore" means something less than tender and thus should have been taken at face value. Nonetheless the court has adopted the strict view and demands the formal tender.[71] "Tender" and "offer to restore" have been interpreted to have the same meaning.

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68. GA. CODE ANN. § 20-906 (Rev. 1965).
69. *Supra*, notes 5 and 10.
70. *Supra*, notes 10 and 11.
71. Crockett v. Oliver, 218 Ga. 620, 129 S.E.2d 806 (1963).

If the instrument sought to be cancelled is not a contract the court will probably rely on the old maxim codified by GA. CODE ANN. Section 37-104 (Rev. 1962):

> He who would have equity must do equity, and give effect to all equitable rights in the other party respecting the subject-matter of the suit.[72]

In applying this maxim, the court has ignored the fact that the maxim has not been generally applied so as to superimpose a tender requirement on equitable actions. Rather it is a maxim that justifies conditional decrees requiring plaintiff, before he actually received relief, to be willing and able to see that equity is done to the other party.

Early Georgia courts seemed to recognize the distinctions between legal and equitable actions and the proper application of the maxim of "doing equity". As early as 1848, two cases spoke in terms of conditional decrees that insured equity to the defendant by requiring in the decree that plaintiffs do equity.[73] No prior tender was demanded. In *Peacock v. Terry*[74] the court indicated that an allegation of willingness to pay the balance due would be sufficient. Justice Lumpkin in *Ziegler v. Scott*[75] pointed out the equitable nature of cancellation and how it was the relief which concerned the court, not payment prior to filing the action. However, by 1875 ambiguity began to appear in the opinions. In *Bazemore v. Davis*[76] the court demanded that before a beneficiary could successfully set aside a sale, the benefit would have to be restored. The court did not say whether it had to come before suit was filed, or only before relief was granted.

In 1878, *Campbell v. Murray*[77] seemed to hold that to "do equity" one must tender any amount due before filing of the action. However, the decision was unclear. A year later, however, the court spoke in terms of "offer to return" prior to suit.[78] Even as late as 1895[79] there was an indication from the court that prior tender was not an absolute requirement to equitable actions. Offer of restoration in the petition might be sufficient.

In 1889, the court in *East Tenn., Va. & Ga. Ry. v. Hayes*[80] was called

72. GA. CODE ANN. § 37-104 (Rev. 1962).
73. Miller v. Cotton, 5 Ga. 341 (1848); Nisbet v. Walker, 4 Ga. 221 (1848).
74. 9 Ga. 137 (1850).
75. 10 Ga. 389 (1851).
76. 55 Ga. 504 (1875).
77. 62 Ga. 88 (1878).
78. Summerall v. Graham, 62 Ga. 730 (1879).
79. Bowden v. Achor, 95 Ga. 243, 22 S.E. 254 (1895).
80. 83 Ga. 558, 10 S.E. 350 (1889).

upon to disregard a settlement contract and release. Plaintiff had sued for damages at law and defendant railroad set up the release as a defense. Plaintiff sought to avoid the release, but the court held that it could not because plaintiff had not tendered his consideration under the settlement. The court did not cite any Georgia authority, but rather relied heavily upon the case of *Thayer v. Turner*[81] which was a landmark case for rescission at law. The court, though not clearly articulating it, apparently recognized this as a legal action and demanded according to the established case of *Thayer v. Turner*[82] prior restoration by the complaining party.

However, a few years later, any distinction between legal action and equitable relief that might have developed was completely destroyed. The fifty year old recognition that equitable rescission need not be preceded by a tender was ignored in the case of *Dotterer v. Freeman.*[83] There the plaintiff was seeking the cancellation of a note and security deed. Thus, the action was equitable in nature. Nonetheless, the court required that before plaintiff could seek equitable relief he must tender to the remote purchaser the amount of the indebtedness. Specifically, the court held that a mere offer to do equity in the petition was not sufficient. This case seems to be the forefather of Georgia's present demands.

A few early cases also attempted to distinguish between so-called void and voidable transactions, holding that a void transaction required no tender.[84] However, the Georgia court has often used the terms of void and voidable interchangeably to the point where it is difficult to distinguish between the concepts.[85] In some situations where the instrument is strictly void, such as forgery, the plaintiff will not have received any consideration that need be returned. For this reason tender would be excused.[86] However, even though considered void, if plaintiff received any consideration that will in good conscience have to be eventually returned, it would seem well established that tender will be demanded.

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81. 49 Mass. 550 (1834).

82. *Id.*

83. 88 Ga. 479, 14 S.E. 863 (1891).

84. Burt v. Burt, 145 Ga. 865, 90 S.E. 73 (1916); Benedict v. Gannon Theological Seminary, 122 Ga. 412, 50 S.E. 162 (1905); Forbes v. Hall, 102 Ga. 47, 28 S.E. 915 (1897); *See also* McCracken v. San Francisco, 16 Cal. 591 (1860); Coffee v. Newsome, 2 Ga. 442 (1847).

85. *See* Tate v. Potter, 216 Ga. 750, 119 S.E.2d 547 (1961); Georgia Baptist Orphans Home Inc. v. Moon, 192 Ga. 81, 14 S.E.2d 590 (1941).

86. Tate v. Potter, 216 Ga. 750, 119 S.E.2d 547 (1961); Burt v. Burt, 145 Ga. 865, 90 S.E. 73 (1916).

Form of the Tender. Rescission has many tender requirements that are similar to the demands in a contract enforcement action. In addition, it is quite common for a petitioner to seek not only rescission but also injunctive relief ancillary to the rescission. Therefore, it is often difficult to ascertain in this area of overlap if the tender demands that are being made are made pursuant to the requested injunctive relief, or whether the demands of tender are inherent in the prayer for rescission. There has been no noticeable attempt by the Georgia courts to distinguish between the demands of tender in the two types of relief.

As the law has evolved in Georgia it would appear that there must be actual tender prior to the action for rescission. The law, however, is far from clear on this seemingly simple point. A large number of courts, without discussion, have assumed that a formal tender is demanded and so express this in the decision.[88] However, when there is no underlying debt, it is not clear whether an actual tender is demanded. If one of the parties is seeking to cancel a contract to which there has been a mutual exchange, it seems that the courts often rely on the language of the code provision and emphasize the words "offer to restore", to the exclusion of "tender".[89]

There is, of course, a distinct difference between an offer to restore and an actual tender.[90] Attempting to distinguish between instances when the court used and seemed to demand an actual tender from those instances when the court merely quoted the provision of the code requiring only an "offer to restore" is no doubt attributing to the court a sophistication that the court never intended and certainly has never articulated. An example of this confusion is found concerning a contract cancellation.[91] If there is any validity in the distinction that when there is an underlying debt the plaintiff must actually tender, whereas, if it is merely a contract rescission an "offer to restore" would be sufficient, then it would seem in this contract cancellation

87. Tate v. Potter, 216 Ga. 750, 119 S.E.2d 547 (1961); Georgia Bapitst Orphans Home Inc. v. Moon, 192 Ga. 81, 14 S.E.2d 590 (1941); Echols v. Green, 140 Ga. 678, 79 S.E. 557 (1913).

88. Dimmick v. Pullen, 224 Ga. 452, 162 S.E.2d 427 (1968); Crockett v. Oliver, 218 Ga. 620, 120 S.E.2d 806 (1963); Dumas v. Burleigh, Inc. v. Moon, 192 Ga. 81, 14 S.E.2d 590 (1941); Manning v. Wills, 193 Ga. 82, 17 S.E.2d 261 (1951); Georgia Baptist Orphans Home Inc. v. Moon, 192 Ga. 81, 14 S.E.2d 590 (1941); Darnell v. Tate, 177 Ga. 279, 170 S.E. 63 (1933).

89. Griggs v. Dodson, 223 Ga. 164, 154 S.E.2d 252 (1967); Cardin v. Riegel Textile Corp., 217 Ga. 797, 125 S.E.2d 62 (1962); Wheeler v. Pioneer Inv. Inc. 217 Ga. 367, 122 S.E.2d 518 (1961); Williams v. Fouche, 157 Ga. 227, 121 S.E. 217 (1924).

90. Angier v. Equitable Bldg. & Loan Ass'n., 109 Ga. 625, 35 S.E. 64 (1900).

91. Dimmick v. Pullen, 224 Ga. 452, 162 S.E.2d 427 (1968).

case that "offer to restore" would have met the requirement. The court, however, used "tender" and "offer to restore" interchangeably. Thus, the court apparently has had no rationale in mind when it used these particular words. An actual tender seemed to be the demand.

In one area, however, it does appear that "offer to restore" might indeed be sufficient without the formalities of an actual tender. This area is found when a plaintiff has possession of land, the value of which is fraudulently misrepresented. The plaintiff desires to recover his consideration in return for the land that he now possesses. It would seem that an offer to return the land would suffice. The early case of *Coffee v. Newsome*,[92] held that no tender or offer of any sort was necessary. This rationale was apparently based, however, on the obsolete notion that a transaction tainted by fraud was "void" as distinguished from "voidable". However, in at least three more modern cases, the indication is that a plaintiff in possession seeking to rescind and recover his consideration need not make a formal tender of either the land or the documents of title. An offer to return the land would be sufficient.[93] This would seem to be in accord with the weight of authority.[94] A recent case allowed a plaintiff in possession[95] to rescind on the basis of fraud in the inducement without mentioning the fact that apparently not only did the plaintiff not tender or offer to return the property prior to suit, but sought an ancillary injunction against the defendant to prohibit his interference with the property and the rents and profits therefrom.

It is said that tender preceding a rescission action must be unconditional. What is meant by "unconditional" may be difficult to ascertain. The code discusses and defines tender.[97] In so doing it states that tender must be ". . . unconditional except for a receipt in full or delivery of the obligation." It has been repeatedly pointed out in contract enforcement cases that any condition that is placed on the presentation and delivery of the consideration, except for the stated conditions of receipt or delivery of the obligation, will make the tender

92. 2 Ga. 442 (1847).

93. Puckett v. Reese, 203 Ga. 715, 48 S.E.2d 297 (1948); Manget v. Cunningham, 166 Ga. 71, 142 S.E. 543 (1928); Garner v. Butler, 144 Ga. 441, 87 S.E. 271 (1915); McLeod v. Hendry, 126 Ga. 167, 54 S.E. 949 (1906) which allowed a plaintiff in possession to enforce a contract to sell without an actual tender.

94. Annot. 142 A.L.R. 582, 588, 595-598 (1943).

95. Gaines v. Watts, 224 Ga. 321, 161 S.E.2d 830 (1968).

96. Straughan v. Brown, 223 Ga. 592, 157 S.E.2d 256 (1967); Darnell v. Tate, 177 Ga. 279, 170 S.E. 63 (1933).

97. GA. CODE ANN. § 20-1105 (Rev. 1965).

invalid. Thus a demand of the agreed return performance is improper.[98] Although this code provision relating to the tender requirements is found under the heading of contracts, it has been applied with similar strictness when the petitioner is seeking to enjoin the collection of his taxes.[99] As the requirements for tender have been interchanged in the past, it is possible that the strictness demanded in specific enforcement and injunction actions would be demanded in a complaint for rescission. Thus, if the plaintiff makes a tender, but demands return of his consideration, the court might interpret the tender as having been made upon the condition of a return. As the condition of a return was not authorized by the code, the tender could be held as an unauthorized unconditional tender.[100]

Such a result is difficult to justify and hopefully the Georgia court would not reach it. In the first place the theory of rescission at law is that the party with the power of avoidance will make a demand for a return of the status quo.[101] Thus the demand for a return is in reality a part of the requirement for an effective rescission. As pointed out by Black,[102] "[T]he idea of rescission involves the additional and distinguishing element of a restoration of the status quo, that is, an offer by the moving party to restore all that he has received under it, *with a demand for the similar restoration* to him of all that he has paid or given under it. . ." (emphasis added). Common sense would seem to demand that when a plaintiff has been the victim of some inequitable conduct, in exercising his power of rescission, he would not release what consideration he had to the perpetrator of the transaction without demanding a simultaneous return of his consideration.

> An offer to restore pursuant to a rescission of a contract is, therefore, quite reasonably, and perhaps impliedly, conditioned upon mutual restoration. The conditional offer, whether in equity or out of equity is an offer to do what is equitably and necessarily required by a true rescission. There is something absurd in saying that in electing to rescind the vendee must immediately abandon possession . . . where manifestly the effect of an immediate and unconditional surrender of

98. Smith v. Bank of Acworth, 218 Ga. 643, 129 S.E.2d 857 (1963); Marsha v. Baird, 203 Ga. 819, 48 S.E.2d 529 (1948); Irvin v. Locke, 200 Ga. 675, 38 S.E.2d 289 (1946).

99. Adcock v. Sutton, 224 Ga. 505, 162 S.E.2d 632 (1968); Kent v. Mayor of Alamo, 193 Ga. 445, 18 S.E.2d 289 (1942).

100. Some early cases in other jurisdictions indicate that tender must indeed be unconditional. Whitworth v. Stuckey, 18 S.C. Eq. (1 Rich.) 404 (1843); Grundy v. Jackson, 1 Litt. (Ky.) 11 (1822).

101. Manning v. Wills, 193 Ga. 82, 17 S.E.2d 261 (1941).

102. 1. Black, RESCISSION AND CANCELLATION 4 (1916).

> possession must be to give to the vendor, the party at fault both the land and the money. And such a doctrine places on the vendee the burden of all the uncertainties as to the vendor's solvency, present and future.[103]

As stated in RESTATEMENT OF RESTITUTION § 65 comment (*d*):

> The offer need not be unconditional; it may be conditioned upon restitution by the other party since it is only by mutual restoration that the transaction is effectively rescinded.

A majority of the cases in other jurisdictions seem to recognize this position and do not demand that a rescinding plaintiff offer up the consideration under his control without being allowed to demand a simultaneous return of his property.[104]

Secondly, the Georgia court should not feel bound by GA. CODE ANN. Section 20-1105 (Rev. 1965). The provision, not only by its position in the code, but by its wording, was obviously intended to be applicable to contract actions and not to actions for rescission. The section talks in terms of tender being "equivalent to performance" and that tender must be "in full of the specific debt", obviously the language of contract enforcement.

Furthermore, even if applied to rescission action the interpretation relating to the conditions placed on the statute in specific performance litigation is unduly restrictive. The code permits a condition to be based upon "delivery of the obligation". As pointed out, the courts have interpreted this to mean only evidence of the obligation. Return performance cannot be demanded.[105] However, such a holding is subject to severe criticism. It does not give effect to the plain wording of the statute. It is inconsistent with common sense and common practice, and should be reconsidered to allow conditions of return performance.

Time for the Tender. Regardless of whether an actual tender is required or an "offer to restore" would be sufficient, it is very clear that this step must be taken. It is a condition precedent that cannot be satisfied by an offer to restore in the complaint.[106] However, it would appear

103. Annot., 142 A.L.R. 582, 583 (1943).

104. Oregon Mortgage Co. v. Renner, 96 F.2d 429 (9th Cir. 1938); Kent v. Clark, 20 Cal.2d 779, 128 P.2d 868 (1942); Young v. Harris, 2 Ala. 108 (1841).

105. Smith v. Bank of Acworth, 218 Ga. 643, 129 S.E.2d 857 (1963); Heath v. Miller, 205 Ga. 699, 54 S.E.2d 432 (1949).

106. Dimmick v. Pullen, 224 Ga. 452, 162 S.E. 2d 427 (1968); Darnell v. Tate, 177 Ga. 279, 170 S.E. 63 (1933); Williams v. Fouche, 157 Ga. 227, 121 S.E. 217 (1924); Cabniss v. Dallas Land Co., 144 Ga. 511, 87 S.E. 653 (1916); Dotterer v. Freeman, 88 Ga. 479, 14 S.E. 863 (1891).

that a tender could be made after action is filed,[107] after a motion to dismiss is made,[108] or even after the motion is sustained for failure to allege tender.[109] The liberal amendment and supplemental pleading allowance of Section 15 of the Civil Practice Act,[110] would permit the pleadings to reflect this act.[111] Thus, tender for rescission, if faultily made, can be remedied by a later proper tender.

Amount of the Tender. Generally, tender must be of the amount received under the contract. Tender of an amount less than the value actually received is invalid.[112]

The party seeking rescission may deduct from his tender, however, any damages to the property beyond ordinary wear and tear and the value of the fair rental for the period of time occupied by the defendant.[113] As the duty of plaintiff to tender is based upon quasicontractual principles of enrichment, the amount of the tender should be increased to the extent that defendant has made good faith improvements. The amount of tender is measured by the increased value of the land, not the cost to the defendant of the improvements.[114]

Most courts resolve these issues of mutual debts and credits after hearing, and enforce them by use of the conditional decree. However, as Georgia has relied heavily on the prior tender, and demands a degree of accuracy in its tender requirements, these rules should not be totally ignored when ascertaining the correct amount of the tender. If the situation is complex, the plaintiff could probably, in good faith, tender an amount admitted to be due that was fairly accurate, offering in his complaint to account for any slight differences.[115]

The mere difficulty in ascertaining the exact amount due would seem to be no excuse for tendering nothing. There is a duty to tender at least a "fair" amount. A recent example of the strictness of this requirement can be found in *Smith v. Brown*.[116] In this case a father was seeking

107. Auld v. Cobb Exch. Bank, 204 Ga. 729, 51 S.E.2d 635 (1949); Lee v. O'Quinn, 184 Ga. 44, 190 S.E. 564 (1937).

108. Smith v. Merck, 206 Ga. 361, 57 S.E.2d 326 (1950).

109. Brooks v. Southern Clays, Inc. 220 Ga. 152, 137 S.E.2d 630 (1964).

110. GA. CODE ANN. § 81A-115 (Rev. 1967).

111. See discussion of this problem under specific performance.

112. Cardin v. Riegel Textile Corp., 217 Ga. 797, 125 S.E.2d 62 (1962); Toberts v. Mayer, 191 Ga. 588, 13 S.E.2d 382 (1941); Bank of LaFayette v. Giles, 208 Ga. 679, 69 S.E.2d 78 (1952).

113. Lyle v. Scottish Am. Mortgage Co., 122 Ga. 458, 50 S.E. 402 (1905). *See also* RESTATEMENT OF RESTITUTION § 158(d) (1937); Walker v. Gault, 171 F.2d 613 (5th Cir. 1948); *cert. denied* 336 U.S. 925 (1949).

114. Lang v. Giraudo, 311 Mass. 132, 40 N.E.2d 707 (1942); Kimmel v. Peach, 240 Mich. 697, 216 N.W. 374 (1927); RESTATEMENT OF RESTITUTION § 158 (d) (1937).

115. *See* Smith v. Merck, 206 Ga. 361, 57 S.E.2d 326 (1950); Dumas v. Dumas, 206 Ga. 767, 58 S.E.2d 830 (1950); Henderson v. Willis, 160 Ga. 638, 128 S.E. 807 (1925).

the cancellation of a warranty deed for his farm home given to his daughter. Consideration for the deed was the promise from the daughter and her husband that they would move to the farm and care for the father for the balance of his life. The daughter refused to move to the farm and the father was forced to move into his daughter's home in the city. The father remained there about nine months and then sought cancellation of the deed for failure of consideration. His bill was dismissed because he failed to tender the fair value of the room and board given to him in his daughter's home. For a number of reasons such a result is incredible. The "fair amount" when none could be ascertained itself is open to criticism. But demanding a tender of the value of care given by a daughter to her elderly father is indefensible. Even if one were to overlook the presumption of gift between close relatives,[117] the care provided for the father was collateral to the conveyance agreement and should not be the subject of tender.[118] The care given the father was not given pursuant to the agreement, but rendered solely because the agreement was never honored by the grantee. The court had to stretch tender demands to the limit in justifying dismissal in this case.

Even when there is a complex set of mutual accounts one cannot rest assured that tender will be excused. When the defendant is in possession of real property and the plaintiff has received partial payment, the fact that the fair rental value for which defendant must account is approximately equal to the consideration which he has paid, will excuse plaintiff from making a tender prior to suit. A prayer for accounting and an offer to pay any slight difference that may result will excuse any tender requirement.[119]

However, this exception has been limited to its facts and severely restricted by later cases. When plaintiff sought to cancel a lease of mineral rights given to the defendant and did not tender payments he had received under the lease the complaint was dismissed even though plaintiff alleged that defendant owed him certain damages.[120] Perhaps plaintiff could not validly claim damages, as rescission and damages are inconsistent remedies. Normally, if a plaintiff expects to rescind a transaction, he may not at the same time recognize the efficacy of the

116. 220 Ga. 845, 142 S.E.2d 262 (1965).

117. *See* RESTATEMENT OF RESTITUTION § 57 Comment (b) and § 107 (2) comment (c).

118. Butter v. Richmond and Danville R.R., 88 Ga. 594, 15 S.E. 668 (1891).

119. Dumas v. Dumas, 206 Ga. 767, 58 S.E.2d 830 (1950); Wellborn v. Johnson, 204 Ga. 389, 50 S.E.2d 16 (1948).

120. Brooks v. Southern Clays, Inc. 220 Ga. 152, 137 S.E.2d 630 (1964).

transaction and seek damages for its breach.[121] However, the court did not seem to rely on this doctrine of election of remedies, and assumed, perhaps correctly so, that the "damages" were injuries to the subject matter for which defendant would have to account.

In *Wilson v. McAteer*[122] the plaintiff had made certain notes that had been paid by an indorser. The indorser also had stock which had been pledged to secure the notes. In addition apparently plaintiff was a past employee who had been promised a share of the indorser's profits. Plaintiff wanted to cancel the notes and sought an accounting for the difference, if any, between the debt satisfied by the indorser and the value of the pledged stock plus the alleged share of profits. The courts said that this was not enough to excuse tender. This result would seem to all but emasculate any excuse for tender based upon complex mutual accounts. The capstone to this doctrine was added when the court in an admittedly complex real estate transaction stated:

> An offer to restore whatever an accounting might show to be due is not an unconditional tender as the law requires.[123]

Thus it would seem that the burden is upon the plaintiff, even in a complex situation of mutual accounts, to ascertain an amount fairly due and tender this amount. Since in rescission actions tender need not be made prior to filing suit,[124] dismissal on appeal for improper tender would seem to serve little purpose. Particularly is this true when the trial court has reached the merits of the case. It is difficult to see how the cause of justice is served by a dismissal, the making of a proper tender, a retrial, and finally a second appeal. When the legal issues are capable of present adjudication, the supreme court could well order the trial court to enter the appropriate decree conditioned upon a proper tender by the plaintiff. In this way the time and expense of unnecessary relitigation could be avoided.

Tender to Whom. Generally tender must be made to the party against whom the equitable action is sought. However, there is some indication that it would be permissible to make payment into court.[125]

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121. Deas v. Jackson, 204 Ga. 134, 48 S.E.2d 878 (1948); Wolff v. Southern, 130 Ga. 251, 60 S.E. 569 (1908); Board of Ed. v. Day, 128 Ga. 156, 57 S.E. 359 (1907); Bacon & Co. v. Moody, 117 Ga. 207, 43 S.E. 482 (1903); Bankers Fidelity Life Ins. Co. v. Harrison, 104 Ga. App. 899, 123 S.E.2d 438 (1961); *cf.* Gaines v. Watts, 224 Ga. 321, 161 S.E.2d 830 (1968); Schneider v. Smith, 189 Ga. 704, 7 S.E.2d 76 (1940).

122. 206 Ga. 835, 59 S.E.2d 252 (1950).

123. Straughan v. Brown, 223 Ga. 592, 157 S.E.2d 256 (1967). *See also* Holcomb v. Approved Bancredit Corp., 225 Ga. 271, 167 S.E.2d 655 (1969); Darnell v. Tate, 177 Ga. 279, 170 S.E. 63 (1933).

124. See *Supra* notes 107-109.

125. Auld v. Cobb Exch. Bank, 204 Ga. 729, 51 S.E.2d 635 (1949).

Securing restitution to an injured party when instruments are in the hands of remote purchasers presents something of a unique tender problem. Such a situation can arise when a fraud is perpetrated on a seller. The fraudulent purchaser then transfers to third parties who have notice.[126] The grantor is obviously entitled to a rescission of the first conveyance. However, he also desires that the remote conveyances be cancelled as clouds on his title. The law demands a tender of the consideration that he has received. The problem is, to whom should the tender be made, his purchaser or the remote third party?

A similar problem is presented when a person holding an option to purchase lands finds that the record title holder has subsequently given a deed to a third party who had notice of the option.[127] The problem then combines specific performance and rescission. The plaintiff desires to enforce the option contract, and at the same time wants to see the deed to the third party cancelled. The problem again, to whom should the tender be made? In both situations plaintiff should not be subjected to double loss. Yet, if tender is made to and accepted by the wrong party, this could be the result. To get relief he will be forced to make a second tender to the correct party. In spite of this danger the decisions in Georgia give no clear direction.

The early case of *Dotterer v. Freeman*,[128] in fact the first case in Georgia that clearly held that in all instances of rescission an actual tender must be made, dealt with the cancellation of a note and a conveyance in the hands of a remote purchaser. Though tender was apparently made to the first grantee, the court specifically held that tender must be made to the remote grantee. The failure to tender to the remote grantee was fatal to the action. Given Georgia's strict tender demand, this requirement is quite logical. After all, it is the remote purchaser who holds the evidence of plaintiff's debt, and has paid value for the evidence.[129] Some years later the court was faced with a similar problem. However, without citing *Dotterer* the court said that the grantor, "may pay or tender the amount of the debt to the first grantee and maintain an equitable action against the first grantee and the remote grantee for cancellation of both deeds. . . ."[130] The court continued that if the first grantee was not available for tender, the defrauded grantor could make the payment of the amount due into court and maintain his action.

126. *See* Berry v. Williams, 141 Ga. 642, 81 S.E. 881 (1914).
127. *See* Banks v. Harden, 221 Ga. 505, 145 S.E.2d 563 (1965).
128. 88 Ga. 479, 14 S.E. 863 (1891).
129. *See* Crockett v. Oliver, 218 Ga. 620, 129 S.E.2d 806 (1963).
130. Berry v. Williams, 141 Ga. 642, 81 S.E. 881 (1914).

The relatively recent case of *Tate v. Potter*[131] involved alleged insanity and forgery in the execution of a deed. The grantee had executed a security deed to a third party. The court recognized a duty to tender to the immediate grantee any value received from the transaction but seemed to disclaim any duty on the part of the alleged grantor to tender anything to the remote purchaser.[132]

This limited authority permitting tender to the first purchaser is unfortunate. It would allow rescission against the party who has the most to lose from this transaction, the remote purchaser, without providing that party with any assurance that he will be restored to the status quo. The purpose behind the tender of protecting the defendant is thus wholly ignored. The first purchaser could accept the tender that is made to him from the grantor, and with a double recovery in his pocket the full risk of loss would fall upon the remote purchaser. The remote purchaser has made his payment to the first grantee. He has suffered cancellation of his interest. Yet he has no assurance, except for the honesty and solvency of the first grantee, that he will receive any of his rightful consideration. This is hardly an ideal result.

With the recent case of *Banks v. Harden*[133] the emphasis seems to have changed. In this case the plaintiff was the grantee of an option. Notwithstanding the outstanding option, the title holder transferred the property to a third party who took with notice of the option. Although the court held that tender would normally be required to specifically enforce the option contract, tender was made unnecessary by the title holder's conveyance to a third party. Though indicating that a tender to the third party purchaser might be acceptable, the court stated, "The petitioner was not required to make an unconditional tender to the subsequent purchaser against whom cancellation of the deed was sought since he tendered into the registry of the court the amount due under his option."[134]

Wisely, the court has shifted its emphasis from actual tender to a party to payment into court. Much like an interpleader action, this protects all of the parties to the action. The plaintiff is protected against the possibility of double loss in the event he should pay the amount to the wrong party, and the remote purchaser is protected

131. 216 Ga. 750, 119 S.E.2d 547 (1961).

132. The court was actually discussing the duty to tender the amount paid by the remote purchaser to the immediate grantee. The court specifically held that there was no duty to tender the amount of the debt existing between these two grantees.

133. 221 Ga. 505, 145 S.E.2d 563 (1965).

134. *Id.* at 507, 145 S.E.2d at 565.

against the absconding immediate purchaser. This is a sound approach which hopefully, the court will continue to follow in similar situations. However, one might still ask, could not this same result be reached more simply by relying on the simple expedient of the conditional decree?

Excuses for Tender. Tender can be excused for a number of reasons. If nothing is due the defendant, tender is not demanded. Nothing will be due if all the value received by the plaintiff was intended as a gift,[135] or when the lessor seeking cancellation of a lease has received rent, but the lessee has been occupying the premises,[136] or when an heir is fraudulently induced to sell a share of the estate for less than was actually due,[137] or when the plaintiff is seeking cancellation of a release under an insurance claim, but seeking at the same time full recovery under the policy.[138] In each of these situations, and there are many more, the plaintiff was allegedly entitled to keep any consideration he had already received. To require him to tender this amount would be purposeless.

If the subject matter is worthless, the formalities of tender are likewise dispensed with.[139]

There is some authority that poverty of the plaintiff might be an excuse for tender. In *Stodder v. Southern Granite Co.*,[140] the plaintiff was seeking rescission of a contract on the ground of incompetency and fraud. Tender by plaintiff was said to be excused because plaintiff placed the money he received from the transaction out of his reach before the fraud or incompetency was discovered by him.

This exception, if it be one, is subject to the criticism that rescission requires a restoration of the status quo. The Georgia Court has stated this firmly.[141]

"Restitution before absolution is as sound in law as in theology; and that doctrine prevents an ex parte rescission by the plaintiff without restoring the defendant to this original situation."[142] This rule is generally true even if the property is lost or destroyed through no fault

135. Williford v. Swint, 181 Ga. 44, 181 S.E. 227 (1935).

136. Cowart v. Gay, 223 Ga. 635, 157 S.E.2d 466 (1967).

137. Farnell v. Brady, 159 Ga. 209, 125 S.E. 57 (1924).

138. Bankers Health & Life Ins. Co. v. Griffeth, 59 Ga. App. 740, 1 S.E.2d 771 (1939). *See also,* Annot., 134 A.L.R. 6 (1941). *Accord,* Immel, *The Requirement of Restoration in the Avoidance of Releases of Tort Claims,* 31 NOTRE DAME LAWYER 629 (1956).

139. Kerr Glass Mfg. Co. v. Americus Grocery Co., 13 Ga. App. 512, 79 S.E. 381 (1913); RESTATEMENT OF RESTITUTION § 65 (d) (1937).

140. 94 Ga. 626, 19 S.E. 1022 (1894).

141. Lane v. Latimer, 41 Ga. 171 (1870); Miller v. Cotton, 5 Ga. 341 (1848).

142. Summerall v. Graham, 62 Ga. 730, 731 (1879).

of the plaintiff.[143] Although one has sympathy for the impecunious victim of fraud or other inequitable conduct it would not be just for him to spend the consideration received from the defendant and then be allowed to recover his property. In all justice the plaintiff should be required to restore the consideration or appropriate substitute before he can recover his consideration. The requirement should be absolute. If the plaintiff cannot comply the loss should not fall on the defendant. Plaintiff, of course, always would have a tort action for damages, which would require no tender.

The most frequently encountered excuse for tender is waiver by the defendant. When the defendant indicates by declaration or conduct that he will not accept a rescission or return the consideration in his hands, such action relieves the plaintiff of his normal duty to tender.[144] This provides a handy and practical "escape hatch" through which most plaintiffs can avoid the rigors and dangers of the formal tender. As pointed out in the specific performance problems, a plaintiff may make an offer of tender as distinguished from an actual tender. If the defendant indicates with clarity that he will not accept the tender or that the contract is to be enforced, the requirement of future formalities are eliminated. The plaintiff need not go through a meaningless ritual. He may proceed immediately with his action.

One exception that is closely akin to the waiver is defendant's inability to perform. In rescission this exception is generally found when the plaintiff is seeking the return of money and the defendant appears financially unable to respond. The plaintiff is not required to tender his consideration. Rather he may keep his consideration as security for payment.[145]

If an exception can be found, a plaintiff can sidestep innumerable obstacles in the tender demand, but plaintiff should be able to plead and prove this excuse. Otherwise, at best, he will have to start again.

IV. Injunctions

Introduction. In most of the situations where a petitioner would seek purely injunctive relief, prior tender would present no problem. Usually

143. American Exch. Bank v. Smith, 173 Wash. 441, 23 P.2d 414 (1933); Louisville Point Lumber Co. v. Thompson, 202 Ky. 263, 259 S.W. 345 (1924); RESTATEMENT OF RESTITUTION § 66 (1937); 32 MICH. L. REV. 550 (1934); *contra*, Wilks v. McGovern-Place Oil Co., 189 Wis. 420, 207 N.W. 692 (1926).

144. Hefner v. Hall, 223 Ga. 148, 154 S.E.2d 197 (1967); Nixon v. Brown, 223 Ga. 579, 157 S.E.2d 20 (1967); B-X Corp. v. Jeter, 210 Ga. 250, 78 S.E.2d 790 (1954).

145. Apple v. Edwards, 92 Mont. 524, 16 P.2d 700 (1932); Sorensen v. Larue, 43 Idaho 292, 252 P. 494 (1926); Duncan v. Jeter, 5 Ala. 604 (1843). 142 A.L.R. 582, 586 (1943). *See* UNIFORM COMMERCIAL CODE § 2-721.

the petitioner is seeking to protect himself against tortious or illegal activity and has nothing in his possession which should be given to the defendant. However, occasionally a petitioner has something within the subject matter of the litigation that equitably needs to be delivered to the defendant prior to receiving injunctive relief. In such cases the rules requiring a prior tender are applied with all their strength. Furthermore, the injunction is often a remedy that is used in conjunction with other forms of equitable relief. For example, in praying for specific performance, the plaintiff may want to insure that the subject matter does not get into the hands of a bona fide purchaser. He may thus seek in conjunction with his specific performance action an injunction against conveyances to third parties. Similarly, the plaintiff with a power of rescission may want to protect his equitable right. Injunction against conveying is the ideal remedy. In these situations the injunctions are ancillary to the primary relief sought. Problems of prior tender are presented, but they have been considered in conjunction with the primary relief sought.[146] Considered now will be the problems of the "pure" injunction.

Enjoining Sales and Conveyances One primary example of a situation that requires prior tender is where the debtor or a person with a right of rescission attempts to enjoin or set aside a sale.[147] The court has stated on numerous such occasions that "He who seeks equity must do equity," and denied injunctive relief to the debtor-grantor for failure to tender before suit, the amount admitted to be due on the underlying debt.[148] Although tender of a collateral obligation not yet due is not demanded,[149] the plaintiffs must tender what is currently due on the debt even though they themselves did not receive the consideration for the debt. In *Georgia Baptist Orphans Home, Inc. v. Moon*,[150] the attack was being made on the foreclosure sale. The security deed in question was made by the deceased testator. The attack was being made by the heirs who received none of the consideration for the

146. *See* Morris v. Continental Ins. Co., 116 Ga. 53, 42 S.E. 474 (1902).

147. Crockett v. Oliver, 218 Ga. 620, 129 S.E.2d 806 (1963).

148. O'Kelley v. Evans, 224 Ga. 49, 159 S.E.2d 418 (1968); Budreau v. Crawford, 222 Ga. 716, 152 S.E.2d 398 (1966); Bower v. Certain-Teed Prod. Corp., 216 Ga. 646, 119 S.E.2d 5 (1961); Auld v. Cobb Exch. Bank, 204 Ga. 729, 51 S.E.2d 635 (1949); Harton v. Fed. Land Bank of Columbia, 187 Ga. 700, 2 S.E.2d 62 (1939); Liles v. Bank of Camden County, 151 Ga. 483, 107 S.E. 490 (1921).

149. Pass v. Pass, 195 Ga. 155, 23 S.E.2d 697 (1943). However, if this collateral obligation is related to the transaction and is in default, and the plaintiff without justification refuses to make payment, relief might be denied on the basis of "unclean hands" as well as a failure to "do equity."

150. 192 Ga. 81, 14 S.E.2d 590 (1941).

execution of the security deed. Yet to sue for purpose of setting aside the sale they were required to tender the amount received by their ancestor.

The fact that the amount due under the note is in dispute,[151] or impossible of exact calculation is no excuse. An attempt to enjoin a sale under a security deed given to secure past and future attorney fees was denied because the debtor failed to tender the amount of money due for past attorney fees.[152] From the point of view of the debtor, this would be a difficult, and probably disputed calculation. A plaintiff who failed to tender something when the agreement called for "gold coin" was held not entitled to equitable action, even though at the time of payment "gold coin" was not legal tender.[153]

In these situations the court did not specify what or how much was supposed to be tendered. Perhaps the plaintiff should have tendered a "fair" amount. However, what is "fair" will ultimately be determined by the court, and if the tender was not a fair approximation of what the court in retrospect thinks was "fair", the tender may be held bad.[154] However, in the event there is a complex system of mutual debts, there is authority that a prayer for accounting would excuse an immediate tender.[155] This exception, however, has been strictly viewed, and a bare prayer for accounting without a showing of complex mutual debts does not excuse tender.[156] An allegation of willingness and ability to pay an amount the court determines to be due cannot substitute for an actual tender.[157] Furthermore, if the plaintiff admits that some amount is due he must tender that amount. This admitted indebtedness can be implied from the facts. The court can view the situation and determine for itself that some amount is actually owing.[158] The plaintiff is then forced to anticipate if he actually owes the defendant something. Even if he doesn't realize the actual indebtedness or the amount is impossible or difficult to ascertain, the plaintiff, at his peril, must hazard a tender of some amount.

The extent of the formality perhaps reached its apex in the case of

151. Oliver v. Slack, 192 Ga. 7, 14 S.E.2d 593 (1941).

152. O'Kelley v. Evans, 224 Ga. 49, 159 S.E.2d 418 (1968).

153. Stephens v. National Life Ins. Co., 179 Ga. 619, 176 S.E. 772 (1934).

154. See discussion of taxes accompanying footnotes 196-202.

155. Wynne v. Fisher, 156 Ga. 656, 119 S.E. 605 (1923); Mayer v. Waterman, 150 Ga. 613, 104 S.E. 497 (1920); Coates v. Jones, 142 Ga. 237, 82 S.E. 649 (1914).

156. Straughan v. Brown, 223 Ga. 592, 157 S.E.2d 256 (1967); Harton v. Federal Land Bank of Columbia, 187 Ga. 700, 2 S.E.2d. 62 (1939).

157. Oliver v. Slack, 192 Ga. 7, 14 S.E.2d 593 (1941).

158. Latimer v. Lyon, 177 Ga. 888, 171 S.E. 562 (1933).

Washington & Lee University v. Suburban Development Co.[159] Here, on a complex set of mutual accounts the court apparently accepted in lieu of tender the allegation of willingness to pay any amount owing. However, the court still dismissed the bill because of an absence of an *allegation of willingness* to pay an amount due on default in the event the court *might find* that plaintiff had defaulted.

This formalistic approach to allegation of tender wholly ignores the powers of the equity court. Why deny equitable relief to a petitioner solely because of a technical requirement? The plaintiff's failure to tender or properly allege it has not always harmed the defendant. If it has not, relief can be granted with the injunction being conditioned upon the petitioner paying to defendant or into court the amount equitably due. All parties are effectively and efficiently granted the proper consideration.

In many injunction cases, the demand of a tender results in confusion, delay and perhaps circuituous litigation, but the harm is usually within limits.

However, there is at least one situation where any demand of payment, either prior to suit or as a condition of relief, would seem improper. This is when the attack is not on the debt, but on the validity of sale itself. The impecunious plaintiff may not be financially able to tender, yet this plaintiff obviously and rightfully desires to see the foreclosure sale properly conducted.[160] However, even though conducted in gross violation of the law, perhaps even with fraudulent intent, the Georgia court has held that unless plaintiff tendered the total amount due, the illegal sale would not be stopped or set aside.[161] The problem of attacking the validity of the sale differs markedly from litigation concerning the underlying debt as where the amount of the debt is in dispute,[162] where the plaintiff is contesting the legality of the interest,[163] or where the plaintiff is seeking a reformation of the instrument.[164]

At an early point the court seemed to recognize this difficulty of

159. 183 Ga. 130, 187 S.E. 647 (1936).

160. In rescission actions it has been held that intervening poverty will excuse tender. Stodder v. Southern Granite Co. 94 Ga. 626 19 S.E. 1022 (1894). However, it has likewise been said that inability to pay the debt will not excuse the requirement of tender when plaintiff seeks to enjoin a foreclosure sale. Woodward v. LaPorte, 181 Ga. 731, 184 S.E. 280 (1936); Kontz v. C&S Nat. Bank, 181 Ga. 70, 181 S.E. 764 (1935).

161. Georgia Baptist Orphans Home Inc. v. Moon, 192 Ga. 81, 14 S.E.2d 590 (1941); Bigger v. Home Bldg. & Loan Ass'n., 179 Ga. 429, 176 S.E. 38 (1934).

162. Oliver v. Slack, 192 Ga. 7, 14 S.E.2d 593 (1941).

163. Wardlaw v. Woodruff, 178 Ga. 240, 173 S.E. 98 (1934); Liles v. Bank of Camden County, 151 Ga. 483, 107 S.E. 490 (1921).

164. Auld v. Cobb Exch. Bank, 204 Ga. 729, 51 S.E.2d 635 (1949).

demanding tender in all situations and attempted to recognize distinctions and to frame exceptions to the tender requirement when the sale was viewed as "void" as distinguished from "voidable". It was said that a grossly inadequate price indicated the voidness of the sale and excused tender.[165] In another case the grantee under a security deed obtained a judgment on the debt and levied execution pursuant to the judgment without a prior reconveyance. The grantor was allowed to enjoin the proceedings without a prior tender because of the "voidness" of the transactions.[166] However, the above exception based upon "voidness" were especially limited to their facts.[167]

Admittedly, applying a rule based upon void as distinguished from voidable transactions is fraught with difficulties. However, to demand a prior tender when the thrust of the attack is against the sale and not the underlying debt is indefensible. The result might well be that because of his poverty the plaintiff would be unable to secure judicial protection of his rights. Such a result may indeed violate his constitutional right to equal protection of the law.[168] Certainly it violates the spirit of equitable justice. The reason the sale is being conducted is probably because plaintiff is unable, or perhaps for good reason unwilling, to satisfy the debt. To demand that plaintiff must tender a satisfaction of the debt before he is entitled to equitable protection from an illegally conducted or fraudulent sale is ludicrous. Even more ludicrous is the holding that such a demand is being made to insure "equity". It is the sale that is being contested, not the debt. There is a distinction and this distinction should be recognized. When the debt is in dispute the court can properly condition its injunction to insure that the defendant gets the proper consideration. Even demanding a prior tender of amounts admitted due, though a lot of potentially expensive "mumbo jumbo", is not seriously injurious if the initial failure can be remedied by a later tender and the filing of an amended or supplemental pleading.[169] However, when it is the sale or the mechanics of the sale which are under attack, the amount of the debt is irrelevant. Plaintiff should be able to contest the validity of this sale without paying the debt.

165. Forbes v. Hall, 102 Ga. 47, 28 S.E. 915 (1897).

166. Benedict v. Gannon Theological Seminary, 122 Ga. 412, 50 S.E. 162 (1905).

167. Georgia Baptist Home v. Moon, 192 Ga. 81, 14 S.E.2d 590 (1941).

168. *See* Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

169. It appears that such a "late" tender would be permitted. In Lee v. O'Quinn, 184 Ga. 44, 190 S.E. 564 (1937) tender was made after the sale was commenced and the action to enjoin the sale was filed. In Auld v. Cobb, 204 Ga. 729, 51 S.E.2d 635, the trial court with approval of the supreme court gave permission to tender after suit but before ruling on demurrer.

Enjoining the Contract Violations. A second example of tender being required as a prerequisite to injunctive relief comes when a plaintiff seeks to enjoin activities that are being conducted in violation of a contract. If the plaintiff has in his possession any of the proceeds from the contract, it has been held that he must tender these proceeds before he can seek injunctive relief.[170]

It is hard to say how far this doctrine will be extended or where it will be applied. It, of course, suffers from the criticism universal in this paper: it erects artificial procedural barriers that, because of the power to grant conditional decrees, results in no particular protection to the defendant. Nonetheless, if extended to apply in some situations without serious thought being given to the possible results, it could result in even more serious consequences, as has happened by extending tender requirements to encompass injunctive attack on foreclosure sales. For instance, in the noted case of *Snell v. Spaulding Foundry Co.*,[171] pursuant to a contract, defendant had in his possession certain assets of the plaintiff. Merely because plaintiff failed or lacked ability to make the required payments under a contract, this should not license the defendant to harm plaintiff at will. The defendant should not be allowed to appropriate plaintiff's assets or use and profit from these assets in any manner the defendant sees fit. The court of equity must and should retain the flexibility necessary to step-in and protect the rights of the plaintiff. Expanding a rigid tender requirement without recognizing this potential might deny the court that needed flexibility, and leave the plaintiff virtually helpless against defendant's tortious activity.

Enjoining Taxes. Perhaps the most confusing example of a tender requirement in seeking injunctive relief comes when a taxpayer seeks to enjoin the collection of his taxes.

In demanding tender as a prerequisite to injunctive relief against the tax collector the Georgia courts once again rely on the maxim, "He who seeks equity must do equity."[172] This is a requirement commonly found in other jurisdictions.[173] However, unlike Georgia there seems to be very little current litigation on the subject. The Supreme Court's idea of a taxpayer doing equity is to unconditionally tender the amount

170. Snell v. Spalding Foundry Co., 180 Ga. 582, 180 S.E. 218 (1935).

171. *Id.*

172. Freeman v. Keaton, 223 Ga. 505, 156 S.E.2d 347 (1967); Walker v. Burns, 220 Ga. 467, 139 S.E.2d 389 (1964).

173. 2 J. POMEROY, EQUITY JURISPRUDENCE 77 (5th ed. 1941); Annot., 47 A.L.R. 248 (1927).

of taxes actually *due* prior to the filing of the bill. As stated and repeated many times:

> One seeking relief from excessive tax levies, but admitting either expressly or by necessary implication that he owes part of the tax covered by such executions, must pay or offer to pay the amount of the taxes admitted to be due in order to obtain the relief sought.[174]

At one time there appeared to be at least two major but related exceptions to the requirement of a prior tender. They both dealt with the immediateness of the liability. First, if the suit was filed before any assessment was made, there was theoretically no immediate liability for the taxes due. As nothing was *yet* due, no tender was demanded.[175]

Secondly, "[T]ender is not necessary in cases where the entire assessment is void, as distinguished from one that is merely excessive."[176] When the taxpayer alleged that the levy was wholly void, that he owed no taxes, he was said to be excused from making a prior tender.[177]

Developing simultaneously with this immunity was the concept that admission of "some tax due" and consequently a duty to tender could be implied from the facts of the case. Even if the taxpayer refused to admit any liability, the facts of the particular situation could be examined to determine if it was apparent that he, in fact, did owe something.[178] Admission of some tax liability might be implicit from the taxpayer's petition, as when he is contesting the amount, not the

174. Derrick v. Campbell, 219 Ga. 795, 136 S.E.2d 381 (1964); Candler v. Gilbert, 180 Ga. 679, 180 S.E. 723 (1935); Peoples Credit Clothing Co. v. Atlanta, 173 Ga. 653, 160 S.E. 873 (1931); Hardwick v. Dalton, 140 Ga. 633, 79 S.E. 553 (1913).

175. The following cases ruled upon the merits without being concerned about tender: Colvard v. Ridley, 218 Ga. 490, 128 S.E.2d 732 (1962); Barrett v. Slagle, 214 Ga. 650, 106 S.E.2d 908 (1959); Hutchins v. Howard, 212 Ga. 309, 92 S.E.2d 133 (1956); Green v. Calhoun, 204 Ga. 550, 50 S.E.2d 209 (1948). The court in Derrick v. Campbell, 219 Ga. 795, 136 S.E.2d 381 (1964) (demanded a tender distinguishing the above cases on the grounds of no present liability. The court pointed out that in each of the cases the suit had preceded the establishment of tax liability for that year. Thus, it would seem that, if the taxpayer acts before he has any tax outstanding for the year he will be rewarded for his fleetness by being excused from the tender. The court did not say whether tender would be demanded after filing the bill when the assessment actually became due.

176. 2 J. POMEROY, EQUITY JURISPRUDENCE 77 (5th ed. 1941); Annot., 47 A.L.R. 248, 250 (1927).

177. Williams v. Hutchens, 212 Ga. 594, 94 S.E.2d 412 (1956); Pullman Co. v. Suttles, 187 Ga. 217, 199 S.E. 821 (1938); National Linen Service Corp. v. Milledgeville, 51 Ga. App. 167, 179 S.E. 837 (1935). *See also* Norwood v. Baker, 172 U.S. 269, 293 (1898); Jones v. Holzapfel, 11 Okl. 405, 68 P. 511 (1902); 1 HIGH, LAW OF INJUNCTIONS 388 (3rd ed. 1890).

178. Wood v. Rome, 24 Ga. App. 115, 110 S.E. 74 (1919); Burns v. Atlanta, 22 Ga. App. 381, 96 S.E. 11 (1918).

legality, of a levy. Admission of tax liability could be implied from the filing of a return,[179] or in an affidavit of illegality filed in response to an execution.[180]

In *Hobbs v. Nichols*,[181] the apparent conflict between the two concepts was brought into focus. On one hand there was immunity from tender granted when *no tax was due*. On the other hand there was a concept that facts of a situation could be examined to determine if there was some implication of tax liability. If it was determined that some tax is *due*, then it was thought to follow that there must be a tender. However, the term "tax due" is ambiguous. Because of the court's failure to recognize and resolve the ambiguity of this term, the exception to tender based upon no immediate liability was largely destroyed.

In *Hobbs* the taxpayer alleged that the entire levy of *ad valorem* taxes was based upon an illegal tax digest and was thus void. Asserting that he owed no tax, taxpayer made no tender. Nonetheless, the court looked beyond taxpayer's allegations and concluded that taxpayer *must* admit that he owes some taxes for the year in question. Owing some taxes, he must make a tender.

In reaching such a conclusion, the court failed to correctly resolve the inherent ambiguity of "no tax due" by not distinguishing between immediate tax liability and ultimate tax responsibility. Often the taxpayer is contesting only the *amount* of the assessment, alleging excessiveness, but admitting a certain immediate indebtedness. Requiring tender of the amount presently due and thus not in issue would seem entirely proper.[182] In other situations the taxpayer will be contesting not merely the amount due, but the validity of the *assessment* itself. The taxpayer perhaps impliedly admits that he has some ultimate, underlying tax responsibility that will eventually have to be satisfied, and in that sense that there is "some tax due". Even so the taxpayer is asserting that there is no immediate tax liability. As nothing is *immediately due* from him, it would seem that nothing need be immediately tendered by him.[183] Then there is a third, rare situation

179. Trust Inv. & Dev. Co. v. Marietta, 216 Ga. 788, 119 S.E.2d 568 (1961); Candler v. Gilbert, 180 Ga. 679, 180 S.E. 723 (1935); Federal Law would not find such an admission. 1968-2 CUM. BUL. 198.

180. Hardwick v. Dalton, 140 Ga. 633, 79 S.E. 533 (1913).

181. 233 Ga. 639, 157 S.E.2d 294 (1967).

182. Even demanding immediate tender of taxes admitted to be due in the *near future* would not be unreasonable. To allow admitted taxes to go unpaid merely because taxpayer files suit shortly before they are due is of doubtful logic. Perhaps tender could be waived if they are not due at the time suit is filed, but demand tender once the admitted taxes become payable.

183. *See supra* notes 172 and 173.

when a taxpayer will be able to allege that he has no immediate tax liability and in the area of dispute, no ultimate tax responsibility. It is this later situation that *Hobbs* seems to demand before it will excuse a prior tender.[184] Any ultimate tax responsibility seems to demand a tender, even if nothing is immediately due. An allegation of no immediate liability was held not to excuse a tender.[185]

The holding in *Hobbs* obliterating the "no tax due" exception to tender explains the rather strained analysis given by the court in the recent case of *Dobson v. Brown*.[186] Here, the taxpayers were attacking as unconstitutional the statutory basis for the combined Augusta, Richmond County collection system. Taxpayers neglected to tender any taxes. For the preceding five years, the taxpayers had paid their taxes to the authority now being challenged, and only when they believed their taxes had become excessive were they "spurred" to action. Thus, the taxpayers could not be contending that there was no underlying responsibility for their county and state taxes for the year in question. They were asserting only that there was no immediate liability to this particular taxing authority. In excusing tender it would have been convenient for the court to have been able to rely on the general rule that requires no tender when the legality of the assessment is in question and the taxpayer is asserting that no tax is immediately due.[187] However, the court was logically blocked from following this path by the decision in *Hobbs*. To follow the *Hobbs* case, requiring a tender even though the entire levy was attacked as void, would call for a dismissal of the present action for a failure to tender. Finding themselves bound by a case that would demand tender the court blazed a new trail. The court excused tender on the grounds that petitioners were not seeking to enjoin the collection of a tax, but were seeking a declaration of the constitutional authority of a public official and an injunction against the exercise of that authority. This analysis is superficial in that, as the court itself later recognized when discussing the issues of *laches*, the only goal of the taxpayers was to stop the

184. *See* Derrick v. Campbell, 219 Ga. 795, 136 S.E.2d 381 (1964); Pierce Trading Co. v. Blackshear, 182 Ga. 649, 186 S.E. 721 (1935). Perhaps *Hobbs* relates only to the assertion of voidness, and the exception based upon timeliness still has application. Within the holding, if the tax is not *yet* payable, conceivably, nothing need be tendered. Still it would be unsafe to continue to rely on this exception.

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186. 225 Ga. 73, 166 S.E.2d 22 (1969).

187. *See* 2 J. POMEROY, EQUITY JURISPRUDENCE 77 (5th ed. 1941); Williams v. Hutchins, 212 Ga. 594, 94 S.E.2d 412 (1956); Pullman Co. v. Suttles, 187 Ga. 217, 199 S.E. 821 (1938).

collection of the tax they believed to be excessive. If this rationale for excusing tender were applied to future cases, tender would likely be eliminated as a condition precedent to tax injunction suits. Any attack on the legality or excessiveness of a tax could be viewed as an attack on the taxing authority's right to levy that tax. An injunction against the tax is an injunction against the collecting official's use of his taxing authority. With *Dobson* as authority, tender could be sidestepped by clever pleading. However, given its strong predilection to rigid tender requirements, in this and other fields, it would be foolhardy to assume that the court intended to travel this far. It is much more likely the court wishes to handle this particular case on the merits, but found itself logically boxed into inaction by their earlier decision in *Hobbs*. Therefore, the court hastily designed an ad hoc rationalization that would allow them to rule on this statute's constitutionality.

After these two cases, nothing remains but confusion. It was thought to be an axiomatic excuse for tender when nothing was presently alleged to be due at time of suit. This exception was all but destroyed by the holding in *Hobbs*. *Dobson* reached a result that is consistent with the old exception that excuses tender when the entire levy is being attacked as void. To that extent the holding in *Hobbs* is thrown into doubt. However, rather than re-establishing the old, accepted exception to tender, the court attempted to fashion a new exception, which if applied could destroy entirely the tender requirement in tax cases. The only safe advice to the taxpayer, unless perhaps he denies all tax liability, immediate and ultimate[188] would be to tender.

Recognizing that a tender usually is the only safe route to follow is not the end to the taxpayer's problems. It may only be the beginning. Tender must take the proper form. It must be timely, unconditional, "fair" and "fairly accurate".

Tender must be timely not only in the sense that a taxpayer must act with reasonable diligence in making his attack,[189] but the tender must come prior to the first filing of an action. Tender must precede the suit, and the defect of filing the suit without having first tendered cannot be cured. The subsequent tender and the filing of a new or amended action would be to no avail.[190] This result is not demanded

188. This complete denial of all tax liability was alleged in Pharr Rd. Inv. Co. v. Atlanta, 224 Ga. 403, 163 S.E.2d 333 (1968) and Richmond County Business Ass'n. v. Richmond County, 224 Ga. 854, 165 S.E.2d 293 (1968). Tender, sub silento, was excused.

189. Dobson v. Brown, 225 Ga. 73, 166 S.E.2d 22 (1969); Kirker v. Morley, 223 Ga. 736, 157 S.E.2d 745 (1967).

190. Maddox v. Hill, 225 Ga. 147, 166 S.E.2d 354 (1969); Kiker v. Hefner, 225 Ga. 511, 162 S.E.2d 731 (1968); Clisby v. City of Macon, 191 Ga. 749, 13 S.E.2d 772 (1941).

by GA. CODE ANN. Section 20-1105 (Rev. 1965)[191] which allows tender to be made "at any time before final trial." This rule of non-curability of a faulty tender is not found in sister jurisdictions.[192] Nor is it a rule recognized in Georgia in other areas of equitable relief.[193] A rule that prohibits the timely curing of technical defects can have little justification other than providing a technical trip wire over which numerous good faith litigants will stumble. The acceptance and continued application of such a technical rule ignores the essence of equitable jurisprudence. The history of equity is a testament to flexibility, to the ability to supply justice when the formalistic rules of law would deny that justice. It is not, nor has it ever been, the purpose of the chancellor to erect, or even apply, hypertechnical barriers to the securing of just relief. "Equity will not suffer a wrong to be without a remedy," "Equity abhors a forfeiture," "Equity delights in doing justice . . . ," are atl monuments to this spirit of liberality. Yet, in Georgia particularly in tax injunction suits this spirit seems to have become smothered in the court's seemingly eager adherence to, even expansion of, outmoded technicalities. Certainly the court should take a new look, at the confused state of the tender requirement, and particularly examine the concept that failure to tender taxes prior to suit may not, in proper instances, be cured.

Not only must the tender be made and made prior to suit, it must take the proper form. That is to say, the tender must be an actual tender, a present bona fide offer to pay, not merely a willingness to pay.[194] A mere offer to tender, or an allegation in the complaint that the petitioner is willing and able to tender the amount due is not satisfactory.[195]

Furthermore, the tender must not be what the court classifies as "conditional." Borrowing liberally from the code provision relating to contracts,[196] the court had held that the ". . . tender must be certain and unconditional except for a receipt in full of the obligation." Any

191. GA. CODE ANN. § 20-1105 (Rev. 1965) sets forth numerous requisites of tender applicable to contract actions. However, in other areas including the enjoining of tax collections, the court has relied heavily upon its provisions.

192. Collins Inv. Co. v. Metropolitan Dade County, 164 So.2d 806 (Fla. 1964); O'Brien v. Johnson, 202 P.2d 248 (Wash. 1955). In the latter, tender was required before final relief was ordered.

193. *See* Brooks v. Southern Clays, Inc. 220 Ga. 152, 137 S.E.2d 630 (1964).

194. *See* Jolly v. Jones, 201 Ga. 532, 40 S.E.2d 558 (1946).

195. Holloway v. DeVane, 212 Ga. 182, 91 S.E.2d 350 (1956); Clisby v. City of Macon, 191 Ga. 749, 13 S.E.2d 772, (1941).

196. GA. CODE ANN. § 20-1105 (Rev. 1965).

tender that attaches any condition other than the demand for a receipt would thus seem to be acceptable.[197]

An example of this strictness is found in *Adcock v. Sutton*.[198] Here, the taxpayers tendered their check[199] for the amount admitted to be due, but less than the amount assessed against them. However, taxpayers made a fatal, though understandable, mistake. They noted on their checks, "Paid in full." This delivery, the court held, was necessarily conditioned upon the defendant accepting the checks as full payment of plaintiffs' tax liability. Being based upon the condition of full satisfaction, it was unacceptable as a tender.

The frustration engendered by this case is not the court's analysis of what constitutes "conditional", nor necessarily the demand of unconditional tender in tax injunction cases. It is often justifiable to demand unconditional tender. Though being exceedingly strict in its construction, the court is no doubt technically correct in interpreting this particular notation as a condition. What is frustrating is that this is a notation commonly made on payment checks. It is thus a mistake easily made by a good faith taxpayer in offering to pay his taxes. The frustration is compounded by the fact that if the taxpayer does not discover his error prior to the filing of his injunction suit, his oversight will likely be fatal to his cause. As there was no acceptable tender prior to suit, it would seem from prior discussion that taxpayer's mistake could not now be corrected. Tender of a second unconditional check and the filing of an amended complaint would be highly desirable, but likely unacceptable. A minor oversight has thwarted the taxpayer in a quest for judicial review of his taxes.

The question of how much needs to be tendered can also present problems. Generally, of course, the taxpayer must tender the amount "admitted to be due." Thus, if the taxpayer makes a return and pays the tax on the value as assessed by him the tender requirement will probably be satisfied.[200] However, the taxpayer must be fairly accurate in his calculations. In *Kent v. Mayor of Alamo*[201] the taxpayer took

197. Adcock v. Sutton, 224 Ga. 505, 162 S.E.2d 632 (1968). *See also*, Heath v. Miller, 205 Ga. 699, 54 S.E. 2d 432 (1949).

198. *Id.*

199. Objection to tender could have been made on this ground. *See* Sadler v. May Bros., 185 So. 81 (La. App. 1938); Holland v. Mt. Fertlizer Co., 8 Ga. App. 714, 70 S.E. 151 (1911). However, unless specified as the ground for objecting to the tender, it may not later be raised. McEachern v. Indus. Life & Health Ins. Co., 51 Ga. App. 422, 180 S.E. 625 (1935); GA. CODE ANN. §20-1105 (Rev. 1965).

200. Linder v. Watson, 151 Ga. 455, 107 S.E. 62 (1921).

201. 193 Ga. 445, 18 S.E.2d 769 (1942).

an unwarranted deduction from the tax he admitted owing. The court held his tender to be improper. Therefore, except for the value placed by him on property assessed, if the taxpayer makes inaccurate calculations and offers an amount less than due, his tender may be considered ineffectual.[202] Of course, the court may want to distinguish between mistakes resulting from factual oversights or mathematical calculations and mistakes resulting from a misinterpretation of the law. However, giving the court's strictness thus far one should not rely on any such leniency.

This is not the end to the problem of how much need be tendered. One necessary element for the correct determination of a tax is obviously the tax rate. Therefore, if the rate has not been set at a time necessary for taxpayer to make his tender, any payment by him would have to be based upon guesswork. Because of this, when the amount due is difficult or impossible to ascertain, the general rule would excuse tender.[203] Not in Georgia however. Tender must be made. But how much? The court has stated that a taxpayer is not doing the required "equity" unless he tenders a "fair" amount. Impossibility of determining the exact amount does not excuse tender.[204] Now who is going to determine when a tender of an unascertainable amount is "fair"? The answer is obvious. The court, not the taxpayer determines "fairness". The allegation of fairness has been held as nothing more than a conclusion. The taxpayer must show to the court's satisfaction that the amount tendered was "fair". Mere tendering of the amount paid the previous year is not sufficient.[205] Thus, not only must the tender be "fair" in the eyes of the taxpayer, it must be fairly accurate according to the court's calculations. If the taxpayer tenders an amount less than that considered "fair" by the court, his tender will likely be held invalid. Such a result leaves the taxpayer, in an untenable position. He is unable to ascertain in advance how much should be tendered, yet he is required to tender something. He must then guess what the court will consider "fair". If he guesses too low, his entire suit may be lost.

This whole problem of accurate tender of an "unknown" amount is compounded when the taxpayer denies all immediate liability. It is

202. *See* Roberts v. Mayer, 191 Ga. 588, 13 S.E.2d 382 (1941).

203. Norwood v. Baker, 172 U.S. 269, 293 (1898); Wilt v. Bueter, 186 Ind. 98, 115 N.E. 49 (1917); Hughson v. Crane, 115 Cal. 404, 47 P. 120 (1896); 2 J. POMEROY, EQUITY JURISPRUDENCE 77 (5th ed. 1941).

204. Walker v. Burns, 220 Ga. 467, 139 S.E.2d 389 (1964).

205. Freeman v. Keaton, 223 Ga. 505, 156 S.E.2d 347 (1967).

almost a contradiction of terms to say that the taxpayer asserts that he owes nothing, yet he must tender something. Yet, as has been pointed out, this seems to be the requirement. If the taxpayer asserts that the whole levy is void, but admits some ultimate tax liability, *Hobbs v. Nichols*[206] would require a tender. The question of, "how much?" is answered by "a fair amount." Therefore, even asserting that he owes nothing, the taxpayer must tender an amount considered by the court to be "fair". Conceptually, this is quite bazaar.

Tender prior to seeking equitable relief from taxes presents a picture of confusion and treacherousness. Even if the taxpayer is able to sucessfully navigate the technical demands of this prerequisite, he must carefully see that other demands of the chancellor are met. He must exhaust his administrative and legal remedies,[207] or show that such remedies provide inadequate relief.[208] He must show circumstances that justify avoiding the general rule that prohibits equitable interference with the collection of taxes.[209] The taxpayer indeed has a difficult path.

CONCLUSION AND A PLEA FOR REFORM

Like a paleozoic lizard living in a modern world, tender in Georgia has survived the evolutionary progress of law that in all rights should have made it long extinct. Tender has outlived the now obscure forces that brought it to life and shaped its character. Not only has it survived, in the fertile isolation of the Georgia courts, it has spread from its original source in the law courts and now flourishes in all areas of equitable relief. It has survived the amalgamation of the courts of law and equity, and the flexible powers of these combined courts that makes its modern presence largely unnecessary. In short, tender has outlived its usefulness. Nonetheless, in Georgia its stringent demands must be satisfied. Tender must be actual. Tender must be accurate. Tender must be to the proper person. Tender must be unconditional, and unconditional in the strictness sense. Tender must be timely. But tender may be unnecessary when waived by a defendant reacting in a prescribed manner. Finely weaved distinctions, delicate differences, shaded subtilities; a narrow and often difficult path to follow with numerous tripwires for the unwary litigant. Failure to observe the

206. *Supra* note 77.

207. Hawes v. Conner, 224 Ga. 567, 163 S.E.2d 724 (1968).

208. Whiddon v. State Revenue Comm., 184 Ga. 453, 191 S.E. 438 (1937).

209. *See* Dows v. Chicago, 79 U.S. (11 Wall.) 108 (1870); Derrick v. Campbell, 219 Ga. 795, 136 S.E.2d 381 (1964); GA. CODE ANN. § 92-7901 (Rev. 1961); W. WALSH, EQUITY 558-559 (1930).

demands prior to the filing of suit could be fatal. At best, the hapless plaintiff must start over again with hopefully a proper tender and the filing of an amended or supplemental pleadings. The precious time of the litigants and the courts is needlessly sacrificed to satisfy the ritual demands of this obsolete doctrine. The entire legal system from trial to Supreme Court is encumbered by arguments as to whether tender was properly made. It reminds one of the medieval scholastics debating the number of angels on the head of a pin. The court seems to accept as a necessity tender and the maze of technicalities in its train. It is unquestionably accepted not only as though it were inevitable; but important to the administration of justice. Both assumptions are essentially false. The purpose of tender should be explored. If that purpose is no longer necessary or can be served by a more efficient alternative process, tender should be gracefully put to a not untimely death.

Unlike the law courts of old, the modern court, as has been stated, has no need for a prior tender as a protection to the rights of the litigants. The courts today, be they granting legal or equitable relief, can condition their decrees to protect all of the interests of all the parties. It has been many years since the defendant was in danger of being deprived of his rightful consideration by a court with only one arm of power. The basic reason for tender at law has died. But tender has survived.

All would no doubt agree with a statement in *Williams v. Fouche*,[210] that it is unfair to a defendant to subject him to a suit without the plaintiff first making a demand for performance. But does this reach the problem, or justify the giant superstructure of tender? Hardly! The cure is certainly worse than the disease. The problem of the eager plaintiff can easily be cured without the stringent ritual of a prior tender.

If a plaintiff filed an action for contract enforcement, rescission, or for injunctive relief without first making a demand, the court without insisting on tender, could easily adjust the rights of the parties through the assessment of costs. The filing of the suit against defendant is a practical and obvious demand for performance. Therefore, if defendant performs as required within a reasonable time, the suit would be dismissed as moot with the costs being assessed against the plaintiff. As it was the plaintiff who filed without first giving the defendant notice and opportunity to perform, it should be plaintiff who bears the expense of his eagerness.[211] Other than burdening the courts and the

210. 157 G.227, 121 S.E. 217 (1924).

211. GA. CODE ANN. § 81A-154(d)(1967) seems to grant the court power to direct costs

parties, what more could be served by dismissing the suit and demanding a complete tender before refiling? If defendant refused to perform, is it not reasonable to assume that tender would have been and, if required, will be, rejected? To demand it is to demand a useless and meaningless ritual. Defendant can be compelled to perform conditioned upon any performance by plaintiff. Costs will be assessed against defendant, as it was defendant's refusal after a reasonable time, that necessitated the expenses.

If the plaintiff makes a prior demand for performance the defendant should be allowed to insist on a simultaneous performance by both parties. If the plaintiff does not offer his performance along these lines, but fites suit instead, the court could adjust the rights between the parties with the conditional decree. However, as plaintiff filed suit without being willing to equitably exchange performances the plaintiff should bear the costs of the suit relevant to this failure. Again, nothing positive would be served by dismissal for plaintiff's failure to actually tender that could not better be served by simply continuing with the litigation and adjusting the costs according to who prompted the unnecessary litigation.

With this prior tender as a prerequisite to suit and ultimate relief would be removed. The failure to offer performances when it is equitably required would be remedied not by the broad sweep of the dismissal, but by a manipulation of the costs. Tender would be taken from its medieval context and placed in time and in tune with the realities of a modern judicial system. Certainly a need for such a change is at hand.