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Measure of Damages for Conversion of Property of Fluctuating Value

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Court of Appeals, seems to confer upon a plaintiff, where the issue is one to be submitted to a jury, the absolute right to dismiss his action at any stage of the proceedings prior to the departure of the jurors from the court room to begin their deliberations. While the question has not arisen in precisely this form, it is submitted that the language of the Court in the *Vertrees* Case,[16] together with the steadfast adherence of the Court to that decision for more than 45 years, justifies that conclusion. Where a motion for a peremptory verdict for the defendant is sustained, the plaintiff's right to dismiss is unimpaired, at least until the direction is actually delivered to the jury, and, perhaps, if no jury foreman has been appointed, the right continues until that is done. The extreme liberality of the Kentucky rule is emphasized by the fact that this is a merely formal procedure, since the court has the power of its own accord to enter the verdict.[17]

Where the case is being tried to the court, the exact point at which "final submission" takes place is not clearly indicated. It is believed, however, that to be seasonable, the plaintiff's motion would have to be made soon after completion of counsel's arguments.[18] Where the defendant makes a motion to dismiss and the court sustains it, a motion made thereafter by the plaintiff is made too late.[19]

Apart from the practical considerations that discourage repeated and fruitless suits, there is nothing that would preclude the subjection of a defendant to recurrent litigation, prosecuted to the very threshold of submission and then dismissed by the plaintiff as a matter of right without prejudice to the bringing of another action. This liberal right of dismissal accorded the plaintiff invites waste of the court's time and encourages the bringing of ill-prepared actions. It is suggested that a modification of this Code section to provide that plaintiff might dismiss as of right at any time before commencement of the trial and thereafter only in the discretion of the court and for proper cause is a needed reform in Kentucky practice.

LEO E. OXLEY

MEASURE OF DAMAGES FOR CONVERSION OF PROPERTY OF FLUCTUATING VALUE

The standard of value normally used in assessing damages is the market value, that is, the price at which the property could probably have been sold in the ordinary course of voluntary sale by a leisurely seller to a willing buyer. However, if the property is such

[16] *Supra*, note 10.
[17] Curran v. Stein, 110 Ky 99, 60 S. W 839 (1901)
[18] Hill v Small & Bros., 7 Ky Law Rep. 376 (1885)
[19] Jarvis Ex'x. v Interstate Coal Co., 257 Ky 656, 78 S. W.(2d) 926 (1935)

that its value fluctuates on the market, we have the problem of determining the particular time at which the market should be taken in determining the standard, and inasmuch as we are searching for value from the point of view of one who is complaining of being deprived of the thing valued, it is the highest and not the lowest price on the particular day that determines the standard.

Certainly the aim of the law should be to give the owner full damages for the injury he has suffered without mulcting the converter (he may be innocent) for anything in excess thereof, and to decide the entire controversy between the two parties without unnecessarily continued litigation. In the main these objectives have been attained. However, there is a striking lack of uniformity within the various jurisdictions, as to what should be taken to be the measure of damages in cases involving the conversion of property of fluctuating value. Three distinct rules with variations within each have been put forth by various courts.

The first rule, adopted by many courts, is the old common law rule making the value of the converted property at the time of conversion the measure of damages.[1] One group of courts still maintains that, in actions for conversion, the rule not only is that one may recover the value of the property at the time it was converted, but that the fact that the property is of fluctuating character, and has risen in value gives no right to recover any higher value. Many courts, however, have felt that to award the plaintiff merely the value of the property at the time of conversion, would be inadequate relief since it denies the plaintiff damages for the frustration of his speculation, and the market may be low at the particular time.

A majority of the courts allow the plaintiff to recover the highest intermediate value reached between the time of conversion and the bringing of the action,[3] or at the time of the trial,[4] or at the

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[1] Rivinus v. Langford, 75 Fed. 959, 45 U. S. App. 79, 33 L.R.A. 250 (1896), American Soda Co. v Feutal, 73 Ark. 464, 84 S. W 505 (1905) Pribble v Kent, 10 Ind. 325, 71 Am. Dec. 327 (1858) Missouri Pac. R. Co. v Peru-Van Zandt Implement Co., 73 Kan. 265, 85 Pac. 408, 87 Pac. 80, 117 Am. St. Rep. 468, 9 Am. Cas. 790, 6 L.R.A. (N.S.) 1058 (1906) Moody v. Whitney, 38 Me. 174, 61 Am. Dec. 239 (1854) Bailey v Shaw, 24 N.H. 297, 55 Am. Dec. 241 (1851) Wallingford v Kaiser, 191 N.Y. 392, 84 N.E. 295, 15 L.R.A. (N.S.) 1126 (1907) Baltimore & Ohio R. Co. v. O'Donell, 49 Ohio St. 489, 32 N.W 476 (1892) Reynolds v. Witte, 13 S.C. 5, 36 Am. Rep. 678 (1879), Crampton v Valido Marble Co., 60 Vt. 291, 15 Atl. 153 (1888)

[2] McCORMICK, DAMAGES (1935) 189, n. 131.

[3] Ricketts v Crittenden, 2 Ky Op. 507 (1868) Arrington v Wilmington, 51 N. C. 68, 72 Am. Dec. 559 (1858), Markham v Jaudon, 41 N.Y. 235 (1869) Fish v Nethercutt, 14 Wash. 582, 45 Pac. 44, 53 Am. St. Rep. 892 (1896)

[4] Logan Co. Nat. Bank v. Townsend, 139 U.S. 67, 11 S. Ct. 496, 35 U.S. (L. ed.) 107 (1891) Terry v Birmingham Nat. Bank, 93 Ala. 599, 9 So. 299, 30 Am. St. Rep. 87 (1891) Erie R. Co. v Stunberg, 94

time of the verdict.[5] The objection to this rule seems to be that it does not require the plaintiff to take any steps toward minimizing the damages, particularly in that it allows the plaintiff to delay action, being assured of the peak price on the market. Sometimes it is provided by statute or decision that the action must be brought within a reasonable time.[6] Kentucky subscribes to the above mentioned rule of highest intermediate value reached between the time of the conversion and the bringing of the action.

New York courts, with more litigation concerning property of this nature (stocks and bonds), have adopted a third rule, namely, the highest value reached during the period from the time when the plaintiff learns of the conversion down to the expiration of a reasonable time for securing on the market other similar goods. This may be conveniently labeled the rule of highest replacement value. This rule was first laid down in the case of *Baker* v. *Drake*,[8] overruling *Markham* v. *Jaudon*,[9] a previous New York case. In applying this rule "reasonable time" seems to be a question of law[10] Thirty days has been held reasonable,[11] but undoubtedly the circumstances of the particular case should determine. This rule seems to cure some of the faults of the other two and is growing in favor, but it has serious weaknesses of its own, such as the question of a reasonable time, imposition on the plaintiff of the burden of double investment for a single advantage, and the fact that the particular item may no longer be had on the market.

Believing that the inherent danger of delay is a sufficient deterrent to prevent the plaintiff from postponing his action, the writer submits that a more equitable rule would be to allow the highest value reached from the time the plaintiff learns of the conversion down to the bringing of the action. This would have several advantages over any of the above mentioned rules. (1) It would give the plaintiff damages for the frustration of his speculation, and (2) prevents the wrongdoer from making a profit from his wrong, and (3) does not unduly penalize innocent converters.

IRA G. STEPHENSON

Ohio St. 189, 113 N.E. 814 (1916), Sproul v. Sloan, 241 Pa. 284, 88 Atl. 501. Ann Cas. 1915 B 941 (1913), Learock v Paxson, 208 Pa. 602, 57 Atl. 1097 (1904)

[5] Kid v Mitchell, 1 Nott & McCord (S.C.) 334 (1818)

[6] Rosum v Hodges, 1 S. D. 308, 47 N.W 140, 9 L.R.A. 917 (1890)

[7] Ricketts v Crittenden, 2 Ky. Op. 507 (1868)

[8] 53 N. Y. 211, 13 Am. Rep. 507 (1873)

[9] 41 N. Y. 235 (1869)

[10] Wright v Bank of The Metropolis, 110 N. Y. 237, 18 N.E. 79, 1 L.R.A. 289, 6 Am. St. Rep. 356 (1888)

[11] Colt v Owens, 90 N. Y. 368 (1882)