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RESTITUTION AS AN ALTERNATIVE REMEDY FOR A TORT

Ludwig Teller

RESTITUTION AS AN ALTERNATIVE REMEDY FOR A TORT

LUDWIG TELLER

RESTITUTION is a term now widely used to define the remedy which older practitioners customarily describe by the words quasi-contracts. The remedy of restitution is designed to prevent unjust enrichment; the measure of recovery is not the plaintiff's damage but the benefit secured or reaped by the defendant at the expense of the plaintiff.

The preference for restitution as the descriptive word comes from three main purposes: first, to indicate the inclusion of equitable remedies of a quasi-contractual nature, like subrogation, the equitable lien, the constructive trust; second, to get away from many of the historical abstractions attached to the common counts in general assumpsit which often limit the availability of the restitutionary remedy; third, to point up the broad purview of the remedy, and the extent to which it is a distinct subject which cuts across all branches of the law. It is a vehicle for effectuating justice in numerous situations where accustomed remedial categories may prove inadequate.[1]

A significant contribution to the subject of restitution was recently made in New York by the Appellate Division, First Department, in *Dentists Supply Co. of New York* v. *Cornelius*,[2] whose decision was affirmed by the Court of Appeals without opinion. The present article is devoted to the ramifications of the decision in this case, in relation to the action for restitution as an alternative remedy.

LUDWIG TELLER, of the New York Bar, is a Professor of Law at New York Law School, a member of the New York State Legislature, and the author of the treatise THE LAW GOVERNING LABOR DISPUTES AND COLLECTIVE BARGAINING and other books and articles. The present article is in substance part of a forthcoming treatise on Restitution.

[1] Keener's work on quasi-contracts published in 1893, which was followed by Woodward's book in 1913, marked out some of the boundaries of the quasi-contractual remedy. Then this important remedy was allowed to become an unclassified appendage of other subjects until the publication in 1937 of the monumental Restatement of Restitution by the American Law Institute. "Restitution is a term unknown to legal treatises, encyclopedias and digests, yet it represents one of a trinity of principles which actuate the proceedings for remedial justice. The law of contracts enforces promises. The rules of tort provide compensation for harm. Restitution is the equitable principle by which one who has been enriched at the expense of another, whether by mistake or otherwise, is under a duty to return what has been received or its value to the other." Seavey, *Problems in Restitution*, 7 OKLA. L. REV. 257 (1954).

[2] 281 App. Div. 306, 119 N. Y. S. 2d 570 (1st Dep't. 1953), *aff'd. on certified questions*, 306 N. Y. 624, 116 N. E. 2d 238 (1953).

It appeared in the *Cornelius* case that the plaintiff's goods were transferred by his agent without authority to the defendant. This, of course, made the defendant liable for the tort of conversion, governed by a three years' statute of limitations. Apparently that statute had run, so the plaintiff sought to take advantage of the six years' statute applicable to contract actions by suing for restitution, to recover the value of the goods. Special Term held he could not do so, and dismissed the complaint. The Appellate Division reversed, and by a divided court held that the longer contract statute could be invoked. The Court of Appeals affirmed without opinion. This, it is submitted, was a desirable holding.

Perhaps, as interesting as the decision itself was the fairly short opinion of the Appellate Division. Nowhere was the word "restitution" used. No reference was made to the Restatement of Restitution, which appears to support the court's holding.[3] "Plaintiff," said the court, "apparently has waived the tort of conversion and is suing in quasi-contract on the theory that he has ratified the transfer as if it were a sale," citing *Terry* v. *Munger*,[4] about which much has been written (mostly critical) in law review articles and in the opinions of courts of other states, and which has been repudiated by statute in New York.

It is well settled that a person aggrieved by a tort committed upon him may at his election sue in the alternative action for restitution where the tortfeasor has been enriched by the tort.[5] It is not sufficient that a tort has been committed; it must further appear that the tortfeasor has been enriched as a result.[6] The mere "duty to pay damages for a tort does not imply a promise to pay them."[7] Restitution will not lie for an assault and battery, since while the plaintiff is injured, the defendant is not enriched.[8] Similarly, restitution will

[3] RESTATEMENT, RESTITUTION § 524 (1937).

[4] 121 N. Y. 161, 24 N. E. 272 (1890).

[5] RESTATEMENT, RESTITUTION § 3 (1937); Corbin, *Waiver of Tort and Suit in Assumpsit*, 19 YALE L. J. 221 (1910). Normally the action is for money, but jurisdiction resides in equity to grant a restitutionary remedy by way of specific relief to repair the defendant's tort, as where he tortiously withholds a unique chattel. See Taliaferre v. Reirdon, 186 Okla. 603, 99 P. 2d 522 (1940); McGowin v. Renington, 12 Pa. 56, 51 Am. Dec. 584 (1849). For other cases see 1 POMEROY, EQUITY JURISPRUDENCE, § 185 (5th ed., San Francisco and Rochester, 1942).

[6] Reynolds Bros. v. Padgett, 94 Ga. 347, 21 S. E. 570 (1894); Greer v. Newland, 70 Kan. 315, 78 Pac. 835 (1904); Kyle v. Chester, 42 Mont. 552, 113 Pac. 749 (1911); RESTATEMENT, RESTITUTION § 523 (1937).

[7] Cooper v. Cooper, 147 Mass. 370, 17 N. E. 892 (1888).

[8] Bigby v. United States, 188 U. S. 400, 23 S. Ct. 468, 47 L. Ed. 519 (1903).

not lie against a wrongdoer where a third party, not the wrongdoer himself, received the benefit.[9]

I. "WAIVER" VERSUS ELECTION OF REMEDIES

THE court in the *Cornelius* case stated that the plaintiff "waived the tort of conversion" when he sued for restitution. This is a common statement in judicial opinions. But it is clear that a party who selects the alternative restitutionary remedy does not "waive" the tort; the tort is the basis of the restitutionary remedy, and proof of the commission of the tort is as necessary when such remedy is invoked as when action is brought in tort for damages.[10] Thus, an infant, though not accountable for breach of contract, may be sued for restitution for a tort.[11] When by statute a body execution is authorized in actions "founded upon tort," it has been held that the statute may be invoked in an alternative action for restitution for a tort.[12]

The view that the tort is "waived" has led to unfortunate decisions in a variety of connections. It has been held, for example, that when property is sold on credit, an action for restitution brought to remedy the defendant's fraud in securing the sale may not be brought until the credit period has expired; the election to sue for restitution instead of for the tort is said to "waive" the fraud and to "affirm" the sale and the period of credit attached to the sale.[13]

"Waiver" is one of the most confusing terms in our law, and

See also N. Y. Central R. Co. v. State, 242 App. Div. 421, 287 N. Y. S. 850 (3d Dep't. 1936) (negligent damage to property).

[9] Taylor v. Currey, 216 Ill. App. 19 (1919); Scherger v. Union National Bank, 138 Kan. 239, 25 Pac. 588 (1933); Ward v. Guthrie, 193 Ky. 76, 234 S. W. 955 (1921); Howard v. Swift, 356 Ill. 80, 190 N. E. 102 (1934); National Trust Co. v. Gleason, 77 N. Y. 400 (1879). See also Schall v. Gamors, 251 U. S. 239, 40 S. Ct. 135, 64 L. Ed. 247 (1919).

[10] See RESTATEMENT, RESTITUTION, Ch. 7, at 525 (1937); Albee v. Schmied, 250 Mich. 270, 230 N. W. 146 (1930). Elwell v. Martin, 32 Vt. 217 (1859).

[11] Bristow v. Eastman, 1 Esp. 172 (1794).

[12] Wheeler v. Wilkin, 98 Colo. 568, 58 P. 2d 1223 (1936).

[13] Kellogg v. Turpie, 93 Ill. 265 (1879); Prest v. Farmington, 117 Me. 348, 104 Atl. 521 (1918). But see American Woolen Co. v. Samuelson, 226 N. Y. 61, 123 N. E. 154 (1919); Stocksdale v. Schuyler, 55 Hun. 610, 8 N. Y. Supp. 813 (1890), *aff'd.* 130 N. Y. 674, 29 N. E. 1034 (1891). The same faulty approach arises when it said that a party to an executory bilateral contract containing mutually dependent promises may, where the contract is repudiated or materially breached, "waive" the breach (or, what is a variant of the same underlying notion, "rescind" the contract) and sue instead for restitution. When restitution is invoked in such circumstances, the breach is as much the basis for the action as it is when the prayer is for damages. See Richard v. Credit Suisse, 242 N. Y. 346, 152 N. E. 110, 45 A. L. R. 1041 (1926).

might well be discarded in favor of more specific terms which actually describe the basis of decisions in various circumstances. Williston has pointed out that in the law of contracts, the term "waiver" means nine different things,[14] and the Restatement of Contracts restricts its use to cases of promissory estoppel, i.e., situations in which one party changes his position in justified reliance on the acts or statements of the other.[15] As applied to election between alternative courses of action, "waiver" is defined in the Restatement of Contracts as the process "whereby a party who has a choice of several rights or remedies, adopts one and thereby destroys all right to the others."[16]

A. *Excessive Analogy to Contracts.*—The erroneous approach to restitution as an alternative remedy in tort cases derives not simply from the view that the tort is "waived" but also from the belief that the remedy is truly contractual in character or creates a contractual relation between the parties. As stated by the court in the *Cornelius* case, "Plaintiff, therefore, apparently has waived the tort of conversion and is suing in quasi contract *on the theory that he has ratified the transfer as though it were a sale*" (italics supplied). Now we all know that the goods were not sold. They were converted. Why should we, then, persist in this approach simply because the language in the common counts of assumpsit in pre-Code days were framed to take advantage of one procedural category of liability instead of another?

The quasi-contractual remedy was originally assimilated to the action of assumpsit so as to permit use of the simple methods of pleading available in assumpsit, and to afford the widest possible latitude for development of the action.[17] But the customarily repeated statement that the aggrieved party "may waive the tort and sue in assumpsit" should not be taken to mean that the restitutionary remedy is contractual in character. The action of assumpsit was in its origin based on tort,[18] and some scholars contend that the requirement of consideration in the law of contracts at common law as a detriment (i.e., injury) exchanged for a promise is traceable at least partly to the tort origin of our law of contracts. At all events, if for historical reasons the language of sale and delivery must be

[14] WILLISTON, CONTRACTS 679 (Rev. ed. 1936).
[15] RESTATEMENT, CONTRACTS § 88 (1932).
[16] *Id.* at § 297.
[17] Moses v. Macferlan, 2 Burr. 1005, 1 W. Bl. 219 (1760).
[18] Ames, *History of Assumpsit,* 2 HARV. L. REV. 1, 53 (1887).

used in a complaint supporting an action for restitution based on a tort, it ought to be kept in mind that such language is a remedial fiction.[19] It should not be countenanced as a substantive fact.

A great deal of mischief has been worked by regarding the action as contractual for all purposes. When the owner of land seeks to resort to assumpsit against a trespasser it is said that he thereby elects to regard the defendant as a tenant, which has the effect of foreclosing the assumpsit remedy because of the lack of an express agreement establishing a landlord-tenant relationship.[20] When the alternative remedy of restitution is resorted to for conversion where property is stolen, it has been reasoned that the effect is to pass title to the converter, hence no recovery may be had against a bona fide purchaser from the thief.[21] So it is also held that an election to sue in assumpsit for a tort works a ratification of the transaction (and effects a sale of the chattel for example, in cases of conversion) so as to preclude withdrawal of the suit and the bringing of an action based on the tort.[22] Because this fictitious sale is treated as though it were really a fact, it is held that the statute of limitations, when restitution is sought as an alternative remedy for fraud in the purchase of goods, runs not from the time the tort action accrues (i.e., when the fraud was or should reasonably have been discovered) but from the time when the goods were delivered and accepted.[23]

The holding in *Terry* v. *Munger*,[24] cited by the court in the *Cornelius* case, is a good example of a wrong result caused by excessive acceptance of the contract-identification. The defendants in that case were joint-tortfeasors; they had detached and carried away from a mill certain machinery belonging to the plaintiffs, who sued one of them for restitution, i.e., he "waived the tort and sued in assumpsit" for the value of the machinery. Apparently the plaintiffs recovered

[19] At a later point in its opinion the Appellate Division in the Cornelius case recognized that the language of sale in an action for restitution is fictitious.

[20] See Preston v. Hawley, 101 N. Y. 586, 5 N. E. 770 (1886); Lamb v. Lamb, 146 N. Y. 317, 41 N. E. 26 (1895). This is the genesis of the doubtful decision in City of New York v. Bee Line, Inc., 246 App. Div. 28, 284 N. Y. Supp. 452 (1st Dep't. 1935), *aff'd.* 271 N. Y. 595, 3 N. E. 2d 202 (1936), where the plaintiff was denied the right to sue for restitution to recover the reasonable value of the defendant's use of city streets, the defendant having wrongfully operated its buses without a franchise.

[21] Jameson v. Beeler & Campbell Supply Co., 118 Kan. 760, 236 Pac. 247 (1925).

[22] See State Bank of Kingman v. Braly's Estate, 139 Kan. 788, 33 P. 2d 141 (1934); Bolton Mines Co. v. Stokes, 82 Md. 50, 33 Atl. 491 (1895).

[23] See American Woolen Co. v. Samuelson, 226 N. Y. 61, 123 N. E. 154 (1919).

[24] 121 N. Y. 161, 24 N. E. 272 (1890).

a judgment which was not satisfied. Thereafter they sued the other defendant in tort for conversion. The defendant urged that the plaintiffs had ratified the tort and had in effect treated the transaction as a sale in the first action by suing in quasi, and could not now sue the defendant in tort for conversion. The court agreed, stating:

"We have then the fact that the defendants in that action were sued by the plaintiffs herein, upon an implied contract to pay the value of the property taken by them, as upon a sale thereof by plaintiffs to them. The plaintiffs having treated the title to the property as having passed to the defendants in that suit by such sale, can the plaintiffs now maintain an action against another person, who was not a party to that action, to recover damages from him for his alleged conversion of the same property, which conversion is founded upon his participation in the same acts which plaintiffs in the old suit have already treated as constituting a sale of the property? We think not."[25]

The same view was reinforced by the court in the following language:

"The plaintiffs having by their former action, in effect, sold this very property, it must follow that at the time of the commencement of this one they had no cause of action for a conversion in existence against the defendant herein. The transfer of the title did not depend upon the plaintiffs recovering satisfaction in such action for the purchase-price. It was their election to treat the transaction as a sale which accomplished that result, and that election was proved by the complaint already referred to."[26]

In other jurisdictions the rule in the same circumstances at common law is different; it is correctly perceived that the contract identification is designed to broaden, not to restrict, the availability of the alternative restitutionary remedy; that to sue for restitution in a tort case is to choose one of two or more available remedies for a wrong, not to "waive" any rights.[27]

In 1939 New York abolished the rule in *Terry* v. *Munger* by enacting Section 112-c of the Civil Practice Act which provides as follows:

"Actions in conversion and on contract; no election of remedies. Where rights of action exist against several persons for the conversion of property and upon an express or implied contract, the institution or maintenance of an action against one of these persons, or the re-

[25] *Id.* at 161, 24 N. E. at 272.

[26] *Id.* at 168, 24 N. E. at 273.

[27] See, for example, Huffman v. Hughlett, 11 Lea 549 (Tenn. 1883). For criticisms of the decision in Terry v. Munger, *supra,* and cases in other states holding to the same effect see 28 YALE L. J. 409; 14 MINN. L. REV. 562.

covery against one of them of a judgment which is unsatisfied, for the conversion or upon the contract, shall not be deemed an election of remedies which bars a subsequent action against the others either for conversion or upon the contract."[28]

What has been said up to this point may seem inconsistent, for the holding in the *Cornelius* case is approved yet the contractual character of the alternative restitutionary remedy in tort cases is denied. It is not, however, the identification with contract which is sought to be denied, but the identification with contract in all situations and for all purposes, even when the result is to deny a remedy when the purpose in creating the quasi-contractual remedy was to expand the field of available remedies to aggrieved persons.

The identification of quasi-contract with the remedy of assumpsit was made to get away from the limiting rules governing traditional forms of action which circumscribed the ability of the common law to effectuate justice. In tort cases, for example, the remedy of restitution was available to repair unjust enrichment where because of the common law rules governing abatement of tort actions by the death of either party no action *ex delicto* could be brought.[29]

The purpose was not to emancipate the restitutionary remedy from one area of restrictions so it could be trapped in another. Enlarging the measure of justice was the grand design. The test, therefore, ought to be this: When resorted to as an alternative remedy for a tort, the action for restitution should be identified with contract only to the extent necessary to broaden the availability of the restitutionary remedy, otherwise the tort basis of the remedy should be applied.[30]

[28] Section 112-c is in some respects a special instance of a general result accomplished by § 112-a of the Civil Practice Act, also enacted in 1939, which provides as follows: "Where rights of action exist against several persons, the institution or maintenance of an action against one, or the recovery against one of a judgment which is unsatisfied, shall not be deemed an election of remedies which bars an action against the others." See N. Y. Law Revision Commission Report, Leg. Doc. No. 65(F) (1939), indicating that the purpose of § 112-c was to repudiate the view, expressed in Fowler v. Bowery Sav. Bank, 113 N. Y. 450, 21 N. E. 172 (1889), that an action against one party for wrongdoing based on so-called ratification does not bar a later action against another wrongdoer based on so-called disaffirmance.

[29] Patton v. Brady, 184 U. S. 608, 22 S. Ct. 493, 46 L. Ed. 740 (1902); Ferrill v. Mooney, 33 Tex. 219 (1870). Resort to the restitutionary remedy for this purpose is unnecessary in New York today, since §§ 118 and 119 of its Decedent Estate Law have abolished the common law rule which abated actions because of the death of the person aggrieved or the person liable.

[30] See Pink v. Title Guarantee & Trust Co., 274 N. Y. 167, 8 N. E. 2d 321 (1937); Miller v. City of Oneida, 153 Misc. 438, 275 N. Y. Supp. 157 (Sup. Ct. 4th Dep't. 1934). Cf. Kittredge v. Grannis, 244 N. Y. 182, 155 N. E. 93 (1926).

Restitution is a separate branch of the law. Its distinguishing feature, one which sets it apart from other categories of legal liability, lies in its measure of recovery. The purpose is not to enforce contracts nor to award damages but to prevent unjust enrichment. It looks not to the plaintiff's damages but to the benefit which the defendant obtained or retains and to which he is not entitled. For a tort or material breach of contract by which the defendant is unjustly enriched, restitution is an alternative remedy. In numberless situations, (e.g., mistake, duress, innocent misrepresentation, many cases of illegal transactions, contracts discharged by impossibility) restitution is commonly the sole available remedy.[31]

The contractual character of the restitutionary remedy in tort cases has properly been applied to permit the assignability of claims, in jurisdictions where tort claims are nonassignable,[32] to allow the revival of a barred claim by a new promise,[33] to authorize proof of a claim in bankruptcy,[34] to enable a party to secure a warrant of attachment,[35] to broaden the availability of counterclaims.[36]

Where, however, greater justice would thereby be achieved the alternative restitutionary remedy in tort cases is held to be non-contractual in character. The question arises, for example, when a reward is paid to one who wrongfully induces payment, when in fact another is entitled to the reward. May the party entitled to the reward sue the wrongful recipient for restitution, or is it a defense that no "privity" exists to support the action? Older cases deny a

31 Examination of law texts for their coverage of restitution often yields interesting results. For example, treatises on torts (including the Restatement of the law of torts) commonly contain only cursory reference to the alternative remedy of restitution for torts. By contrast, contract texts fully cover restitution as an alternative remedy for material breach of contract. See, for example, 5 CORBIN, CONTRACTS, §§ 1102-1121 (St. Paul, 1951). Tort claims, except those to recover damages for personal injury, are assignable in New York, by virtue of N. Y. PERSONAL PROPERTY LAW, § 41.

32 Mayer v. Rankin, 91 Utah 193, 63 P. 2d 611 (1936).

33 Belcher v. Tacoma Eastern R. Co., 99 Wash. 34, 168 Pac. 782 (1917). Apparently a barred tort claim which is not amenable to the alternative restitutionary remedy may not be revived by a new promise in New York. See Reilly v. Sabater, 26 Civ. Proc. R. 34, 43 N. Y. Supp. 383 (1896). The Restatement of Contracts (§ 86) does not appear to permit revival of tort obligations unless quasi-contractual remedies are available.

34 Davis v. Aetna Acceptance Co., 293 U. S. 328, 55 S. Ct. 151, 79 L. Ed. 393 (1934); Reynolds v. New York Trust Co., 188 Fed. 611 (1st Cir. 1911).

35 McCall v. Superior Court, 1 Cal. 2d 527, 36 P. 2d 642 (1934).

36 See Manhattan Egg Co., Inc. v. Seaboard Terminal & Refrigeration Co., 137 Misc. 14, 242 N. Y. Supp. 189 (Sup. Ct. 1st Dep't. 1929) (prior to 1936 amendment of Civil Practice Act § 266, which now freely allows counterclaims).

right of action by the party entitled to the reward against the recipient,[37] but the greater number of more recent decisions are to the contrary.[38] The same principle applies when restitution is allowed by the rightful owner against a party who collects negotiable paper on a forged indorsement.[39]

The inapplicability of contract provisions or principles to the alternative action for restitution for torts is further brought out in cases where payment is made by an insurance company on a fraudulent overstatement of loss under a policy which provides that all rights under the policy shall be forfeited for such fraudulent overstatement. The insurance company might defend a suit by the insured to recover the actual loss upon proof of the fraudulent overstatement, but after the company has paid the overstated amount it may not sue to recover any more than the excess, since the "action for money had and received to the plaintiff's use is in no way founded upon the contract of insurance, but upon the fact that false and fraudulent representations were made by the defendants in order to induce the plaintiff to pay the same."[40]

II. TYPES OF TORTS WHERE RESTITUTION IS AVAILABLE

THE alternative remedy of restitution for a tort performs an important function because, as we have seen, it may be invoked in situations where the tort action is unavailable[41] or has been barred, as in the *Cornelius* case. In a variety of situations, moreover, the restitutionary remedy allows a measure of recovery which may be more beneficial to the aggrieved party. Proof of damages in tort may often be difficult; at times they cannot be proved at all. Yet, through the remedy of restitution, the wrongdoer is compelled to yield up his unjust enrichment to the plaintiff. That the common law is thereby able to broaden the ethical reach of its process may be indicated by some of the types of tort situations where restitution has been allowed.

[37] Sergeant & Harris v. Stryker, 16 N. J. L. 464 (1838).

[38] See Claxton v. Kay, 101 Ark. 350, 142 S. W. 517 (1912); Caskie v. Philadelphia Rapid Transit Co., 321 Pa. 157, 184 Atl. 17 (1936); Bosworth v. Wolfe, 146 Wash. 615, 264 Pac. 413 (1928).

[39] Cf. Allen v. M. Mendelsohn & Son, 207 Ala. 527, 93 So. 416 (1922).

[40] Western Assurance Co. v. Towle, 65 Wis. 247, 260, 26 N. W. 104, 110 (1886). See also Schank v. Schuchman, 212 N. Y. 353, 100 N. E. 127 (1914).

[41] See notes 32-36, *supra*.

A. *Appropriation of Another's Rights or Property.*—One who appropriates the property rights of another, such as trade names, trade secrets, protected business ideas, trademarks, patents, profits a prendre, or franchises, commits a tort in doing so, and the aggrieved party may in the alternative compel the wrongdoer to yield up his profits in an action for restitution.[42] The remedy of restitution is effective in such cases to repair unjust enrichment; the tort remedy is often ineffective because little actual damage is done to the plaintiff's property or property rights.[43]

Some doubt has been expressed whether an action at law for restitution may be had for wrongful use of a patent, upon the ground that the statutory remedies of an action for damages and a suit for injunction are exclusive,[44] but it would seem more logical to hold that the statute supplements rather than supplants the existing field of general common law remedies.[45] There is no reason why the general rule permitting actions for restitution in cases of tortious interference with business advantages should not apply to patent infringements,[46] and this appears to be the view adopted by the Restatement of Restitution.[47] At all events the equivalent of restitution may be secured in an injunction suit where the patent is still alive, since the infringer's profits are recoverable in such suit.[48]

One who wrongfully acquires property from another to which a third person is entitled may be sued for restitution by the party entitled to it.[49] This proposition is applied in a variety of situations, including cases in which, while the acquisition is wrongful, it does not necessarily constitute an actionable tort.[50] If, for example, Jones knows that Smith is indebted to Black, not Jones, but secures payment of the debt to himself, he may be compelled to make restitution

[42] RESTATEMENT, RESTITUTION § 136 (1937); Ryan & Associates v. Century Brewing Assn., 185 Wash. 600, 55 P. 2d 1053 (1936).

[43] See RESTATEMENT, RESTITUTION § 136, Comment a (1937).

[44] In re Paramount Public Corp., 8 F. Supp. 644 (S. D. N. Y. 1934).

[45] See Schiff v. Hammond Clock Co., 69 F. 2d 742 (7th Cir. 1934).

[46] See KEENER, QUASI CONTRACTS 165 (New York, 1893); WOODWARD, QUASI CONTRACTS § 288 (Boston, 1913).

[47] RESTATEMENT, RESTITUTION § 136, Comment a (1937). See Eckert v. Braun, 155 F. 2d 517 (7th Cir. 1946).

[48] See Leman v. Krentler-Arnold Hinge Last Co., 284 U. S. 448, 52 S. Ct. 238, 76 L. Ed. 389 (1932).

[49] RESTATEMENT, RESTITUTION § 133 (1937).

[50] See Heywood v. Northern Assurance Co., 133 Minn. 360, 158 N. W. 632 (1916); cf. Armstrong v. Blackwood, 227 Ala. 545, 151 So. 602 (1933).

to Smith.[51] Similarly, if Jones, knowing that Smith is entitled to a reward by fraud or other wrongful conduct secures payment of the reward to himself, Smith may sue Jones in restitution to recover the reward.[52]

The foregoing instances express the general principle that a party who makes a profit at the expense of another may be compelled to surrender it in an action for restitution.[53] It is not too clear, however, that the present state of the law goes so far. When the breach of a contract is tortiously induced, for example, there is hesitation at times to allow recovery of the wrongdoer's profit. The aggrieved party is limited to a tort action for damages. Where a servant is tortiously enticed to leave his master, an early English case indicates that an action for restitution will lie,[54] though it has been contended that a tort action is the sole remedy unless force is used to accomplish the enticement.[55] There seems no logical reason to deny the restitutionary remedy when the breach of a contract is induced, even when the tort lies solely in the inducement and is not accompanied by other wrongdoing such as fraud or duress.[56] The alternative remedy of restitution has been allowed in many cases.[57]

To the extent that the disinclination to allow restitution is based on a view that interference with contract rights has an inferior status to comparable interference with rights in property,[58] the denial of restitution seems plainly to be unjustified. Certainly the remedy of restitution should not be denied simply because it is not the kind

[51] See Heywood v. Northern Assurance Co., 133 Minn. 360, 158 N. W. 632 (1916); Caskie v. Philadelphia Rapid Transit Co., 321 Pa. 157, 184 Atl. 17 (1936).

[52] See Seastrand v. Foley & Co., 144 Minn. 239, 175 N. W. 117 (1919).

[53] See Connecticut General Life Ins. Co. v. Smith, 226 Ala. 142, 145 So. 651 (1932); McArthur v. Murphy, 74 Minn. 53, 76 N. W. 955 (1928).

[54] Lightly v. Clouston, 1 Taunt 112 (1808).

[55] WOODWARD, QUASI CONTRACTS § 285 (Boston, 1913). Doubt regarding the correctness of the *Lightly* and *Foster* cases is also expressed in JACKSON, HISTORY OF QUASI CONTRACT IN ENGLISH LAW 80 (Cambridge, 1936); WINFIELD, THE PROVINCE OF THE LAW OF TORT 174-175 (Cambridge, 1931) (reason for doubt itself doubtful, since based on the view that alternative remedy of restitution in tort cases has been, and therefore presumably should be, limited to count for money had and received).

[56] Cf. Caskie v. Philadelphia Rapid Transit Co., 321 Pa. 157, 184 Atl. 17 (1936) (breach of contract induced by fraud).

[57] Second National Bank v. M. Samuel & Sons, Inc., 12 F. 2d 963 (1926), *cert. den.* 273 U. S. 720, 47 S. Ct. 110, 71 L. Ed. 857 (1927). The measure of recovery is not the profit which the plaintiff would have made had he performed the contract but the profit which the defendant reaped by inducing its breach, even though this be greater than the plaintiff's profit. See Federal Sugar Ref. Co. v. U. S. Sugar Equalization Board, 268 Fed. 575 (S. D. N. Y. 1920).

[58] Cf. Ryan & Associates v. Century Brewing Assn., 185 Wash. 600, 55 P. 2d 1053 (1936).

of case in which the remedy has customarily been granted in the past—"The whole trend of the law points to the aspiration of the courts to find an adequate and orderly remedy for wrongs as to which redress was elusive until this theory of quasi contracts was developed."[59] Possibly, however, the hesitation to extend the remedy of restitution to cases involving inducements to breach contracts derives from the view that the wrongdoer's profit is normally attributable in part to his own efforts. The Restatement of Restitution declines to take a position as to the availability of restitution in such cases.[60]

B. *Wrongful Securing or Appropriation of Services.*—Restitution may be had where, through tortious action (such as false imprisonment, duress or fraud), services of another are secured.[61] If the jailer or the applicable division of government receives money from the contractor for the services of a person unlawfully imprisoned, restitution may be had for the amount received.[62] Thus, one may be compelled to make restitution for services tortiously secured from a wife, or from an unemancipated child without the parent's consent.[63] It is not a defense, nor a ground for mitigating liability, that wages were paid to the child,[64] but the value of necessaries furnished the child may be deducted.[65]

C. *Breach of Fiduciary Duty.*—A fiduciary who by breach of duty acquires a benefit, commits a tort and the beneficiary may in the alternative sue the fiduciary for restitution.[66] Thus, if an agent through disloyalty or breach of his fiduciary duties makes a profit, he may be compelled to yield it up to the principal in an action for restitution.[67]

[59] Federal Sugar Ref. Co. v. U. S. Equalization Board, 268 Fed. 575 (S. D. N. Y. 1920).

[60] RESTATEMENT, RESTITUTION § 133, Comment c (1937).

[61] RESTATEMENT, RESTITUTION § 134 (1937). See, for example, Patterson v. Crawford, 12 Ind. 241 (1859), where a contractor of prison labor who used compulsion upon those entrusted to his care was compelled to make restitution to one wrongfully imprisoned.

[62] See RESTATEMENT, RESTITUTION § 134(2) (1937).

[63] RESTATEMENT, RESTITUTION § 135 (1937); Smith v. Gilbert, 80 Ark. 525, 98 S. W. 115 (1906); Smith v. Smith, 30 Conn. 111 (1860); Culbertson v. Alabama Const. Co., 127 Ga. 599, 56 S. E. 765 (1907).

[64] See White v. Henry, 24 Me. 531 (1845); Dunn v. Altman, 50 Mo. App. 231 (1892).

[65] See Culbertson v. Alabama Construction Co., 127 Ga. 591, 56 S. E. 765 (1907).

[66] RESTATEMENT, RESTITUTION § 138(1) (1937).

[67] Schmidt v. Wallinger, 125 Va. 361, 99 S. E. 680 (1919). See Wechsler v. Bowman, 285 N. Y. 284, 34 N. E. 2d 322 (1941); Seavey, *Problems in Restitution,* 7 OKLA. L. REV. 257, 259 (1954).

If a third person tortiously colludes with the disloyal fiduciary and thereby obtains a benefit, the beneficiary may alternatively sue the third person for restitution.[68] Thus, if the third person bribes the agent to secure the principal's business and adds the amount of the bribe to the charge made to the principal, he may recover the overcharge in an action for restitution.[69]

D. *Wrongful Creating of Liability Against Another.*—It often happens that a party is empowered, by virtue of his relation to another, to impose liability upon him toward a third person even though the party imposing such liability has no right to do so. The law of agency abounds with such situations. Thus a general agent may bind his principal to a contract with a third person in violation of special instructions. An agent may exercise an apparent authority with the same effect, though his actual authority may give him no right to do the act or make the contract in question. A servant acting outside the scope of his authority may obligate his master to a third party in tort by application of the doctrine of vicarious liability.

In these and comparable situations the act of the party imposing liability, though done in the exercise of a power flowing from the relationship, is tortious and may also constitute a breach of contract if the matter was contractually covered by the parties to the relationship.[70] Whether or not it is also a breach of contract, the principal or other person may resort to the alternative remedy of restitution against the agent or other person who tortiously created the liability to the third party.[71]

E. *Wrongful Destruction of Property Interests.*—The wrongful exercise of a power which exists by virtue of a relationship may give rise not only to the creation of a liability against another, as discussed above, but also to the destruction of property interests. An example as to chattels is the case of an agent to pledge who sells the chattels instead, under circumstances where because of the agent's ostensible authority title passes to the vendee. The relationship need not be fiduciary in character. A second assignee of a claim who has knowledge of the first assignment, for example, who nevertheless collects the claim from an innocent debtor thereby extinguishing it is

[68] RESTATEMENT, RESTITUTION § 138(2) (1937).
[69] Schank v. Schuchman, 212 N. Y. 352, 106 N. E. 127 (1914).
[70] See RESTATEMENT, AGENCY §§ 400-401 (1933).
[71] RESTATEMENT, RESTITUTION § 132 (1937).

an illustration. In all such cases the party whose property interest has been tortiously destroyed may in the alternative secure restitution from the wrongdoer.[72]

A subsequent assignee of rents who collects them has been compelled to make restitution, under the principle stated in this section, to a mortgagee of the realty who, by the mortgage agreement, was entitled to the rents after the mortgagor's default.[73]

F. *Fraud and Deceit.*—One of the most common situations in which the remedy of restitution is invoked is where property or a property right is secured by fraud or duress. Since the prevailing view does not as yet seem to regard duress as an independent tort,[74] restitution is the sole remedy to recover the value of property obtained by duress. As regards misrepresentation, restitution may be the sole remedy or an alternative remedy depending on the circumstances.

One who is induced by misrepresentation to enter into a contract may, while the contract is wholly executory, have a complete defense to the other party's action to enforce it. In addition, in jurisdictions (such as New York) providing such a remedy, he may sue for a declaratory judgment that the contract is a nullity.[75]

If there was mistake by the person to whom the misrepresentation was made, and as a result the agreement fails to express what both parties intended, reformation may be had.[76] The mere fact of misrepresentation, however, is not sufficient, since the purpose of reformation is to establish the agreement which the parties in fact made but imperfectly expressed, not to establish an agreement which the parties should have or would supposedly have made if they were aware of all the facts. When reformation is not possible, nullification (rescission) is the sole remedy.[77]

Neither where reformation nor rescission is sought, is it necessary that the misrepresentation be willful, i.e., that it be sufficient to

[72] RESTATEMENT, RESTITUTION § 131 (1937); McArthur v. Murphy, 74 Minn. 53, 76 N. W. 955 (1928).

[73] Connecticut General Life Ins. Co. v. Smith, 226 Ala. 142, 145 So. 651 (1932).

[74] Cf. PROSSER, TORTS 85-86 (2d ed. St. Paul, 1955). Dissatisfaction with the view that duress is not a tort is evidenced in RESTATEMENT, TORTS § 871 (1939), which takes the view that a tort action lies for duress where property interests are interfered with.

[75] WILLISTON, CONTRACTS § 525 (Rev. ed. New York, 1936).

[76] RESTATEMENT, CONTRACTS §§ 491, 505 (1934).

[77] Russel v. Shell Petroleum Corp., 66 F. 2d 864 (10th Cir. 1933).

predicate an action in tort for fraud and deceit. Innocent misrepresentation, provided it is material, is sufficient.[78]

The innocent party may, if the contract is wholly executory and he has done nothing in performance of it, sue the other party for damages. If the misrepresentation was willful, his action could be in tort for fraud and deceit, if innocent the action would have to be for breach of warranty where the transaction is of a kind that raises a warranty (such as a sale of goods). In either event the measure of damages would be the difference between the value of the imperfect performance and the promised performance.[79]

In a number of jurisdictions, however, including New York, a less favorable measure of damages is provided for tort actions in fraud and deceit; the innocent party is given not the benefit of the bargain but the right simply to be restored to his original position. In other words, if X sells a watch to Y fraudulently representing that it is made of gold when in fact it is made of silver, Y would not have a cause of action under the view to recover damages in tort if the watch were worth what Y paid for it despite the misrepresentation. If the contract is wholly executory this would mean that no damages would be recoverable.[80] In such jurisdictions the tort measure of damages is similar to that applied to actions for restitution. If, therefore, an action for breach of contract or warranty also exists in the particular case, it may be advantageous to sue upon this theory, as damages would be measured by the lost advantage contemplated by the contract. Notwithstanding that damages may not be recovered, however, rescission may be secured.[81]

If the innocent party has parted with something of value, he may sue at law to recover its value, or he may petition equity to secure it back if land or a unique chattel is involved.[82] In the case, then, where a party is induced to make a contract which is not performed according to its terms by reason of the defendant's tortious fraud and

[78] Dale v. Roosevelt, 5 Johns. Ch. 174 (N. Y. 1821); RESTATEMENT, CONTRACTS § 470(1) (1934); RESTATEMENT, RESTITUTION § 28 (1937).

[79] Seimer v. Dickinson Farm Mtge. Co., 299 Fed. 651 (E. D. Ill. 1924), aff'd. 12 F. 2d 772 (7th Cir. 1926), *cert. den.* 273 U. S. 700, 49 S. Ct. 95, 71 L. Ed. 847 (1926).

[80] Smith v. Bolles, 132 U. S. 125, 10 S. Ct. 39, 33 L. Ed. 279 (1889); Reno v. Bull, 226 N. Y. 546, 124 N. E. 144 (1919).

[81] Brett v. Cooney, 75 Conn. 338, 53 Atl. 729 (1902); RESTATEMENT, CONTRACTS § 476 (1934).

[82] Heilbronn v. Herzog, 165 N. Y. 98, 58 N. E. 759 (1900); RESTATEMENT, RESTITUTION § 130, Comment a (1937).

deceit, the plaintiff has at least three alternative remedies: (1) a tort action; (2) an action for damages for breach of contract; (3) an action for restitution, based on rescission, to recover benefits conferred on the defendant in performance of the contract.[83] The common law also affords a defrauded buyer the right to recover the price he paid for the goods and permits recovery of the property through an action of trover (conversion) or replevin. In addition, the defrauded or innocent party may, after rescinding the transaction and restoring whatever benefits he received under it from the other party, sue him in tort for conversion.[84]

The innocent party may, however, elect to disaffirm the transaction and to sue in restitution for return of the benefit conferred on the guilty party. In other words, he may "waive" the torts of fraud and deceit or conversion, or the contract right to sue for damages for breach of warranty, and sue for restitution to secure not the price of the goods sold (or other benefit conferred) but its value to the guilty party.[85]

Suit for restitution as an alternative to a tort action is permitted in cases of fraud or misrepresentation not only where contracts are involved, but in other cases. In general, if X makes a fraudulent representation to Y as a result of which Y confers a benefit upon X, Y may sue the other in tort for fraud and deceit or for restitution to recover the value of benefit. Where, however, X's misrepresentation is innocently made, Y's sole remedy would be for restitution.[86]

G. *Conversion.*—An action for restitution as an alternative for the tort of conversion both of chattels and money and irrespective of the innocence of the converter is universally recognized;[87] though a number of limitations exist as to the circumstances in which the alternative remedy of restitution may be invoked.

Unless title is in dispute, conversion of property held by tenants in common, as where one of the tenants sells trees grown on the land

[83] See Bijard v. Holmes, 33 N. J. L. 119 (1857).

[84] RESTATEMENT, TORTS § 128 (1932).

[85] Casserly v. Orrick (Mo. App.) 536; Crown Cycle Co. v. Brown, 39 Ore. 285, 64 Pac. 451 (1901); RESTATEMENT, RESTITUTION § 28, 134 (1937). The New York statute allowing damages in an action for rescission (Civil Practice Act, § 112e) does not, it seems, contemplate the situation described in this paragraph of the text, but has to do with cases such as those in which a party desires to return goods which he has a right to reject, and sue for damages for failure to deliver the right kind of goods. See 1941 Report of the Law Revision Commission 285.

[86] See RESTATEMENT, RESTITUTION § 28 (1937).

[87] *Id.* at § 128.

without the consent of the other tenant, is held to give rise to an action for restitution by the aggrieved tenant.[88] An alternative action for restitution may be brought for conversion not only against the original wrongdoer, but against one who acquires from him by purchase of the converted property.[89] If a thief transfers money or negotiable instruments to a third party other than a bona fide purchaser, the owner may secure restitution against the third party.[90]

The alternative remedy of restitution is available where money or property is obtained by fraudulent means.[91] If the defendant was entitled to something but by fraud secured more, only the excess may be recovered.[92]

In cases of conversion as in the law of restitution generally, when the restitutionary remedy is invoked the measure of recovery is not the plaintiff's loss but the benefit received by the defendant.[93] What may perhaps be regarded as a deviation from this principle, though explainable on logical grounds, are the cases which hold that one who innocently buys a chattel from a thief (and thereby becomes liable for conversion) may be held in restitution for its value, without deduction of the purchase price paid to the thief.[94]

The tort of conversion is committed where (1) property is wrongfully damaged or destroyed; (2) property is wrongfully taken, retained or used. In the first type of case restitution is not available unless the destruction takes place while the converter is in possession of the property.[95] The aggrieved party is limited to a tort action be-

[88] Lufkin v. Daves, 220 Ala. 443, 125 So. 811 (1930).

[89] See Dentists Supply Co. of New York v. Cornelius, 281 App. Div. 306, 119 N. Y. S. 2d 570 (1st Dep't. 1953), *aff'd.* 306 N. Y. 624, 116 N. E. 2d 238 (1953).

[90] Arkansas Nat. Bank v. Martin, 110 Ark. 578, 163 S. W. 795 (1914); Armstrong v. Kubo & Co., 88 Cal. App. 331, 263 Pac. 365 (1928).

[91] RESTATEMENT, RESTITUTION § 128, Comment d (1937); Maxherman Co. v. Alger, 210 App. Div. 389, 206 N. Y. Supp. 233 (1st Dep't. 1924).

[92] See Schank v. Schuchman, 212 N. Y. 352, 106 N. Y. 127 (1914).

[93] See Catts v. Morris, 2 How 376, 11 L. Ed. 306 (1884); Corey v. Struve, 170 Cal. 170, 14 Pac. 48 (1915); RESTATEMENT, RESTITUTION § 128, Comment f (1937).

[94] RESTATEMENT, RESTITUTION § 128, Comments f, k (1937); McGoldrick v. Willits, 52 N. Y. 612 (1873); Sage v. Shepard & Morse Lumber Co., 4 App. Div. 290, 39 N. Y. Supp. 449 (3d Dep't. 1896), *aff'd.* 158 N. Y. 672, 52 N. E. 1126 (1899); Manhattan Egg Co. v. Seaboard T. & R. Co., 137 Misc. 14, 242 N. Y. Supp. 189 (Sup. Ct. 1st Dep't. 1929). The contrary holding in Soderlin v. Marquette National Bank of Minneapolis, 214 Minn. 408, 8 N. W. 2d 331 (1943), which is opposed to the prevailing view, is criticized in Note, 27 MINN. L. REV. 583 (1943), but in Thurston, *Recent Developments in Restitution: 1940-1947,* 45 MICH. L. REV. 935 (1947), it is stated (at p. 946): "As an original question there is much to be said for this conclusion . . .".

[95] RESTATEMENT, RESTITUTION § 154, Comment a (1937).

cause, while the plaintiff has been damaged, the defendant has not been enriched.[96] Restitution will not lie for negligent damage or destruction of property.[97]

The second type of case, i.e., where the property is wrongfully taken, retained or used, is in turn capable of a two-fold division: (a) where the wrongdoer retains the property, i.e., does not sell it; (b) where he sells the converted property. A number of decisions hold that restitution is inappropriate to the first of these cases, reasoning that "waiver of tort" in conversion cases may be resorted to only under the count of money had and received.[98] The greater number of jurisdictions, however, including New York and approved by the Restatement of Restitution,[99] hold that restitution may be had in both types of cases.[100] Thus it is held that one who (though innocently) purchases property from a thief or from one who had no legal or equitable right to property, may be held liable not only in tort for its conversion but in restitution for its value.[101] The same rule applies where property is purchased from an unauthorized agent.[102]

Where the action for money had and received is based on the wrongful sale of converted property, a further refinement is made in some cases to the effect that it must be shown the defendant has received money in exchange for his property; the mere sale by way of exchange is insufficient,[103] unless the exchanged goods are received

[96] Ward v. Guthrie, 193 Ky. 76, 234 S. W. 955 (1921); Reynolds v. Padgett, 94 Ga. 347, 21 S. E. 570 (1874); RESTATEMENT, RESTITUTION § 128, Comments c, e (1937).

[97] Reynolds Bros. v. Padgett, 94 Ga. 347, 21 S. E. 570 (1894). See *supra*, notes 6-9.

[98] See Ford & Co. v. Atlantic Compress Co., 138 Ga. 496, 75 S. E. 609 (1912). As a means of circumventing the rule allowing the alternative remedy of assumpsit only under the count of money had and received, it was held in early English cases that if the defendant was unable to produce the property he presumably sold it for value, thereby permitting the plaintiff to recover. See Longchamp v. Kenny, 1 Doug. 329 (1779); Hunter v. Walsh, 1 Stark 224 (1816).

[99] § 128, Comment h (1937).

[100] Heinze v. McKinnon, 205 Fed. 366 (1913); Roberts v. Evans, 43 Cal. 380 (1872); Abbott v. Blossom, 66 Barb. 353 (N. Y. 1873) (where wrongdoer has changed condition and character of property); Harman v. Loscalzo, 125 N. Y. S. 517 (App. Term 1st Dep't. 1910); Manhattan Egg Co. v. Seaboard Terminal Etc. Co., 137 Misc. 14, 242 N. Y. Supp. 189 (Sup. Ct. 1st Dep't. 1929).

[101] RESTATEMENT, RESTITUTION § 128, Comment f (1937); Manhattan Egg Co., Inc. v. Seaboard Terminal & Refrigeration Co., 137 Misc. 14, 242 N. Y. Supp. 189 (Sup. Ct. 1st Dep't. 1929); Crown Cycle Co. v. Brown, 39 Ore. 285, 64 Pac. 451 (1901); Huffman v. Hughlett, 11 Lea 549 (1883).

[102] Sage v. Shepard & Morse Lumber Co., 4 App. Div. 290, 39 N. Y. Supp. 444 (3d Dep't. 1896), *aff'd.* 158 N. Y. 672, 52 N. E. 1126 (1899).

[103] Fuller v. Duren, 36 Ala. 73 (1860); Jones v. Hoar, 5 Pick. 285 (Mass. 1827); Kidney v. Person, 41 Vt. 386 (1868).

as money's worth.[104] The prevailing rule and the law in New York, however, is to the contrary.[105] Still a further refinement is made where the converted property is rightfully acquired, as where it is secured by virtue of a contract. In such cases (e.g., wrongful sale of property by a pledgee) even those courts which insist upon evidence of a sale of the property hold that restitution will lie for the conversion though the property has not been sold.[106]

The prevailing view is that an action for restitution will lie for the wrongful use of personal property.[107] The contrary is held in some cases, in large part influenced by the view that assumpsit does not lie for conversion unless the converter has sold the property or exchanged it for property of fixed value.[108] The measure of recovery when restitution for use is permitted is the actual value of the use, but not less than the reasonable rental value whether or not the chattel was actually used.[109]

Conversion is a species of absolute liability; innocence of the defendant, whether through mistake or otherwise, does not prevent operation of the forced-sale characteristic of the tort, by virtue of which he is deemed to have bought the property, hence liable for its full value to the plaintiff.[110] The Restatement of Torts,[111] in disagreement with the prevailing rule, adopts the view that one who innocently becomes liable for conversion, as where he unknowingly purchases goods from a thief, should have a right to return the goods in mitigation of damages. New York is one of a few states which go so far as to hold in such cases that the plaintiff's cause of action does not accrue without prior demand for return of the goods; the defendant, in other words, has the right to return the goods and be

104 Burton Lumber Co. v. Wilder, 108 Ala. 669, 18 So. 552 (1895); Whitewell v. Vincent, 4 Pick. 449 (Mass. 1827).

105 Terry v. Munger, 121 N. Y. 161, 24 N. E. 272 (1890); RESTATEMENT, RESTITUTION § 128, Comment k (1937).

106 Bell v. Bank of California, 153 Cal. 234, 94 Pac. 889 (1908); Tennessee Chemical Co. v. George, 161 Ga. 563, 131 S. E. 493 (1925).

107 McSorley v. Faulkner, 18 N. Y. Supp. 460 (Com. Pls. N. Y. Co. 1892); Philadelphia Co. v. Pork Brothers, 138 Pa. St. Rep. 346 (restitution for profits derived from use of converted machine). RESTATEMENT, RESTITUTION (§ 128, Comment i) is in accord.

108 See Carson Riv. Lumbering Co. v. Bassett, 2 Nev. 249 (1866). See also Lloyd v. Fox, 1 E. D. Smith 101 (N. Y. 1850).

109 RESTATEMENT, RESTITUTION § 128, Comment k (1937).

110 BURDICK, TORTS 425 (Albany, 1926); PROSSER, TORTS 77-78 (2d ed. St. Paul, 1955).

111 § 247 (1932).

free of liability for their conversion.[112] In all cases, of course, the plaintiff would have a right to sue in restitution for the reasonable value of the use of the goods.[113]

The measure of restitution for conversion is at least the value of the converted property[114] as of the time of the conversion.[115] Accordingly, if the conversion involves a wrongful taking, the time of taking measures the recoverable value, while if the taking was lawful but the conversion lies in tortious detention, the time of detention controls in measuring the value.[116]

If the conversion was willful and the property is of fluctuating value, the aggrieved party is entitled to the highest value which the property (e.g., stock) would have been worth when he probably would have sold it.[117] In the case of property secured by fraud, this time is calculated as of a reasonable period after the property is transferred.[118] Where conversion is by unauthorized taking or detention, as where a pledgee sells or repledges a pawn, the aggrieved party is entitled to recover the highest intermediate value between the date upon which he gained notice of the conversion and a reasonable time thereafter.[119] Enhancement of recovery in the case of property having fluctuating value is denied where the conversion was innocent.[120]

It has been held in some cases that where the converter sells the

[112] Gillet v. Roberts, 57 N. Y. 28 (1874). This does not detract from the absolute character of tort liability for conversion, since demand is not necessary and the plaintiff may sue immediately where the defendant loses or sells the goods or they are damaged or destroyed. See Pease v. Smith, 61 N. Y. 477 (1875).

[113] See RESTATEMENT, RESTITUTION § 128, Comment g (1937).

[114] Davidson Grocery Co. v. Johnston, 24 Ida. 336, 133 Pac. 929 (1913); Bowen v. Detroit United Ry., 212 Mich. 432, 180 N. W. 495 (1920). Notwithstanding that the defendant is innocent, he may not secure a reduction in the recovery because he could obtain the material at a lower price under a contract with a third party. Galvin v. Mac M. & M. Co., 14 Mont. 508, 37 Pac. 366 (1894). "The fact that the property converted was of little or no benefit to the converter, or that it was destroyed without benefit to him is immaterial." RESTATEMENT, RESTITUTION § 128, Comment a (1937).

[115] Felder v. Reeth, 34 F. 2d 744 (9th Cir. 1929); Moore v. Richardson, 68 N. J. L. 305, 53 Atl. 1032 (1903); Baker v. Drake, 53 N. Y. 211 (1873); First Nat. Bk. v. Bailey, 97 W. Va. 19, 125 S. E. 357 (1924).

[116] RESTATEMENT, RESTITUTION § 151, Comment e (1937).

[117] *Id.* at § 151, Comment c.

[118] *Id.* at § 151, Illustration 3.

[119] Baker v. Drake, 53 N. Y. 211 (1873); Hall v. Bache, 235 App. Div. 256, 256 N. Y. Supp. 693 (1st Dep't. 1932); 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); Newton v. Wade, 264 N. Y. 632, 191 N. E. 600 (1934).

[120] RESTATEMENT, RESTITUTION § 154, Comment a (1937); Jamison v. Moon, 43 Miss. 598 (1870).

property he may be held liable in an action for restitution only for the proceeds of the sale.[121] These cases derive in part from the older view that the alternative assumpsit remedy for torts may be brought only under the count for money had and received, partly also from the error of treating the converter as the agent of the owner, i.e., from the mistaken view that the tort is "waived", the transaction is ratified and the converted goods sold.[122] In principle such decisions are indefensible and the Restatement of Restitution has adopted what is believed to be the prevailing rule today.

If the converted goods or chattels have been incorporated into property owned by the converter or were exchanged for other property the owner may have an equitable lien on the property into which they were incorporated or for which they were exchanged, and at least where the conversion was willful or at all events not innocent the owner may enforce a constructive trust against the property received in exchange.[123]

III. STATUTE OF LIMITATIONS

STATUTES of limitations governing torts are commonly shorter than those governing contracts. If the contract statute is held to govern the alternative action of restitution for a tort, the advantage of a longer statute of limitations may accrue to the plaintiff. Keener assumed without much discussion that the assumpsit (i.e., contract) statute controls, not the shorter tort statute.[124] Woodward took the opposite view, reasoning that the obligation to make restitution is not a "primary" one, as where money or property is conferred by mistake, but "a secondary one, arising, like the obligation to pay damages, upon the breach of the primary obligation not to commit the tort . . . ."[125] Under this view the statute of limitations in tort cases would be that governing torts, and the contract statute where restitution is invoked as an alternative remedy for material breach of contract.[126] In the other branches of the law of restitution, e.g., where

[121] Heinze v. McKinnon, 205 Fed. 367 (2d Cir. 1913); In re Baker, 35 Del. 198, 162 Atl. 356 (1932); Seavey v. Dana, 61 N. H. 339 (1881).

[122] Cf. Felder v. Reeth, 34 F. 2d 744 (9th Cir. 1929).

[123] See RESTATEMENT, RESTITUTION § 128, Comment L (1937); Newton v. Porter, 69 N. Y. 133 (1877); American S. R. Co. v. Fancher, 145 N. Y. 552, 40 N. E. 206 (1895); Lightfoot v. Davis, 198 N. E. 261, 91 N. E. 582 (1910); Edwards v. Culbertson, 111 N. C. 342, 16 S. E. 233 (1892); Peoples Nat. Bk. v. Waggoner, 185 N. C. 297, 117 S. E. 6 (1923); Preston v. Moore, 133 Tenn. 247, 180 S. W. 320 (1915).

[124] KEENER, QUASI CONTRACTS 175 (New York, 1893).

[125] WOODWARD, QUASI CONTRACTS § 294 (Boston, 1913).

[126] *Id.* at § 267.

benefits are conferred by mistake, Woodward seems to concede that the contractual statute would apply.[127]

The Woodward view is justified on the surface by the fact that in tort cases the alternative remedy of restitution, like the action for damages, is predicated not on "waiver" of the tort but upon its commission; the tort must be proved when either remedy is invoked. But does this view survive scrutiny? It is believed not, since it ignores the fundamental character of the action for restitution, whose purpose is to repair an unjust enrichment. The defendant is asked not to pay damage but to yield up a benefit inequitably secured or retained. Historically the action to effectuate this purpose has been regarded as contractual in nature, and whatever the source of the action, whether arising out of a mistake or fraud or the commission of a tort, the contract statute of limitations should be held to apply. This is the view adopted by the Restatement of Restitution,[128] and seems to be the prevailing rule.[129]

In the absence of evidence of a contrary legislative intent, it is submitted that a statute of limitations for a tort should be construed as applying to an action for damages, not an action for restitution. The very creation of the alternative remedy of restitution in tort cases was intended to get away from the rules of law governing actions for damages for tort (e.g., abatement of action upon death of the wrongdoer), and this historical background should be given recognition because it is consonant with the requirements of justice; tort statutes of limitations are made shorter than those governing contract actions for a variety of reasons, of course, but one of them has to do with a desire to dispose of damage actions more expeditiously than other actions. This reason does not necessarily apply to cases in which a remedy is sought for unjust enrichment.

While it seems fair, therefore, to invoke the contract statute to actions for restitution based on a tort, some doubt may be had with the manner in which the contract statute is applied in some cases.

[127] *Id.* at § 33.

[128] See RESTATEMENT, RESTITUTION § 5; Introductory Note to Chapter 7 (1937).

[129] See Lipman, Wolfe & Co. v. Phoenix Assurance Co., 258 Fed. 544 (9th Cir. 1919); Liles v. Barnhart, 152 La. 419, 93 So. 490 (1922); Miller v. Miller, 7 Pick. 133 (Mass. 1828); Liberty Nat. Bank v. Lewis, 172 Okla. 103, 44 P. 2d 127 (1935). "Ordinarily the statutory period for a quasi-contractual cause of action is the same as for a cause of action based upon an oral contract." RESTATEMENT, RESTITUTION § 148, Comment f (1937).

Woodward did not like these applications, and apparently was led as a result to question the basic propriety of the tort statute in all cases.[130] Suppose a chattel is converted on one date, and later sold, which date determines the tolling of the statute? It has been held that the count of *quantum valebat* starts to run upon the conversion date, whereas the count for money had and received does not begin to run until the later date when the chattel is sold.[131] If, however, the chattel is not sold until after the tort statute of limitations for the conversion has run, no action for money had and received accrues because of the sale.[132]

Keener thought the *Miller* case was correctly decided and anticipated with approval the holding in the *Currier* case.[133] There is ground for urging that the *Miller* decision is of doubtful utility, but that if the *Miller* case is right the *Currier* decision is wrong. As to the *Miller* case, it would seem fair to urge that the common counts should be regarded as merely descriptive of a single cause of action in assumpsit, not a vehicle for creating new causes of action. The tort was committed when the chattel was converted, and what was done thereafter should not be held to create a new cause of action. A partial clue to the rationale of the *Miller* case may perhaps be found in the unwillingness of the courts, particularly in the early cases, to extend the alternative remedy of restitution beyond the count of money had and received. *Quantum valebat* was not recognized in such cases. An unjustifiable restriction on the availability of the restitutionary remedy became at least partly the ground for an equally unjustified enlargement of the statute of limitations.

But if the *Miller* case was correctly decided, the *Currier* decision is questionable. The *Currier* case was decided on the ground that by the running of the tort statute for the conversion the defendant got title to the property and therefore sold his own goods, not those of the plaintiff. But this can also be said where the defendant does not sell the converted chattel, and in *Kirkman* v. *Phillips' Heirs*,[134] it was properly disposed of as follows: "It is true, as argued, that a wrongdoer may obtain a title to the property by three years adverse possession, and yet be liable for three years after his title is perfected to

130 WOODWARD, QUASI CONTRACTS § 294 (Boston, 1913).
131 See Miller v. Miller, 7 Pick. 133 (Mass. 1828).
132 Currier v. Studley, 159 Mass. 17, 33 N. E. 709 (1893).
133 KEENER, QUASI CONTRACTS 175-178 (New York, 1893).
134 7 Heisk (54 Tenn.) 222 (1872).

pay the original owner the value thereof. This is a necessary consequence of the right which the original owner has to elect whether he will sue for property or its value. During six years his right to sue for the value is as perfect as his right to sue for the property within three years."

The court in the *Cornelius* case properly held, as stated earlier, that the longer contract statute of limitations applies when restitution is invoked as an alternative remedy for the tort of conversion. "The statute of limitations," said the Appellate Division, "pertains to the remedy rather than the substantive right. The contractual limitation should be applied where the cause of action has been fitted to the contractual remedy."[135] Three main cases were cited by the court in support of its decision. Two of these cases[136] held that an action for restitution (i.e., for money had and received) governed by the six years' statute could be brought by or on behalf of a corporation for corporate waste by the defendants from which they secured a benefit.

The third case, *Henderson* v. *Lincoln Rochester Trust Co.*,[137] showed how the alternative remedy of restitution for conversion may be of value in the law of negotiable instruments. This case is both a clear holding (though not plainly stated as such in the opinion of the court) that the alternative remedy is governed by the six years' contract statute, not the three years' statute which controls an action for conversion, and at the same time represents a refusal to apply this holding in all situations.

X, indebted to the plaintiff, drew its check on the defendant drawee bank for part of the indebtedness, payable to the plaintiff, and gave the check to *Y* for delivery to the plaintiff. *Y* forged the plaintiff's signature and presented it at the defendant bank, which

[135] Cf. Cohen v. City of New York, 283 N. Y. 112, 27 N. E. 2d 803 (1940), an action for money had and received to recover money which the defendant obtained by fraud. Concededly the statute of limitations would have run from the time of discovery of the fraud by the plaintiff if he had sued in tort, but the court appeared to hold that since the action was for money had and received, the statute began to run from the time the money was obtained. See, for a contrary holding, Adams v. Harrison, 34 Cal. App. 2d 288, 93 P. 2d 237 (1939). The California decision is clearly preferable, since it does not subject the alternative action for restitution in tort cases to a disability greater than that applicable to the tort action itself. See Thurston, *Recent Developments in Restitution: 1940-1947*, 45 MICH. L. REV. 935, 949 (1947). See also *supra*, at note 23.

[136] Gottfried v. Gottfried, 269 App. Div. 413, 56 N. Y. S. 2d 50 (1st Dep't. 1945); Myer v. Myer, 271 App. Div. 465, 66 N. Y. S. 2d 83 (1st Dep't. 1946), *aff'd.* 296 N. Y. 979, 73 N. E. 2d 562 (1947).

[137] 303 N. Y. 27, 100 N. E. 2d 117 (1952).

either cashed it or credited it to *Y*'s account. A second check issued by *X* to the plaintiff's order was drawn on the Security Trust Company, as drawee, and similarly given to *Y* for delivery to plaintiff. *Y* forged the plaintiff's endorsement on this check too, and presented it to the defendant bank, which accepted it and thereafter either paid or credited *Y* with the proceeds of the check. The defendant, in other words, was the drawee bank as to the first check and the collecting bank as to the second check.

The plaintiff did not discover that the checks had been issued until about three years later, and brought action after the expiration of three years from the date of the forgeries. The first cause of action in the complaint had to do with the first check, the second with the second check. As to both, plaintiff sought recovery on a contractual theory.

Holding that the first cause of action was one for conversion governed by a three years' statute, the court decided that it was outlawed. There was no privity between the plaintiff and the defendant drawee, the court said, to support an action based on a contractual theory. "The drawee becomes liable in contract to the drawer and the indorsers become liable to the drawee. The privity is apparent. As between the drawee and the payee, however, there is no contractual relation."[138]

The second cause of action, however, in which the defendant bank acted as the collecting agent, was upheld as having been properly brought on a contractual theory. The court reasoned that "a collecting bank is merely an agent for the purpose of collecting from the drawee bank the proceeds of the check delivered to it. When it takes the check for collection it assents to the agency and becomes bound by the terms of the instrument received. Those terms include an obligation to pay the proceeds collected to the true payee owner in the absence of a valid endorsement. The moment the collecting bank receives the proceeds it holds money belonging to the owner of the check and becomes a debtor of such owner and of no one else in the absence of a valid endorsement."[139]

It is submitted that the relationship between the payee whose signature has been forged and the collecting bank is no more contractual than the relationship between such a payee and the drawee bank.

[138] *Id.* at 31, 100 N. E. 2d at 119.
[139] *Id.* at 32, 100 N. E. 2d at 120.

The collecting bank is a wrongdoer when it turns over the proceeds of the check to the forger, not an agent for anybody, and the so-called contractual action which the aggrieved payee is allowed to bring against the collecting bank is our old friend—the alternative remedy of restitution for the tort of conversion. The so-called agency of the collecting bank for the aggrieved payee results from a fictitious "ratification" which is supposed to be accomplished by "waiver" of the tort and suit in assumpsit. This is clearly stated in the New York decisions cited in the *Henderson* case.[140] This also appears from the language of a Maryland decision[141] quoted in the *Henderson* case. To say, therefore, that there is "privity" in one situation but not in another is to give undeserved reality to the fictitious contractual analogy of the alternative restitutionary remedy in tort cases. The court in the *Henderson* case failed to indicate why, if for the conversion in the second cause of action the alternative remedy of restitution could be invoked, the same remedy should not be allowed as to the conversion alleged in the first cause of action.

In a recent case[142] where the plaintiff sought through an alternative action of restitution to recover the proceeds received by the defendant from the publication and sale of a book which allegedly libelled the plaintiff, the court held that the one year statute applicable to libel controlled the case. The plaintiff's action, which was commenced a little less than six years after the publication, was held to be outlawed. Argument may be had with much in the opinion of the court at Special Term. It was implied, for example, that the alternative restitutionary remedy is limited to torts which involve injury to property, not to those having to do with personal injury.

The court found a legislative intention, when the statute for libel was cut down from two years to one year in 1936, to limit the action to one year whatever the theory. It is doubtful whether any such intention, or any particular intention in the matter, may be attributed

[140] See Moon v. Security Bank of New York, 176 App. Div. 842, 163 N. Y. Supp. 277 (1st Dep't. 1917), *aff'd.* 225 N. Y. 723, 122 N. E. 879 (1919) (contains a good discussion of the reality that so-called "waiver" of tort is an election of alternative remedies); Comstock v. Hier, 73 N. Y. 269 (1878) (for the collecting bank's conversion the plaintiff may in the alternative sue for money had and received).

[141] National Union Bank of Maryland v. Miller Rubber Co., 148 Md. 455, 129 Atl. 690 (1925). See BRITTON, HANDBOOK OF THE LAW OF BILLS AND NOTES 683, 689 (St. Paul, 1943).

[142] Hart v. E. P. Dutton & Co., 197 Misc. 274, 93 N. Y. S. 2d 871 (1949), *aff'd.* 277 App. Div. 939, 98 N. Y. S. 2d 773 (4th Dep't. 1950), *leave to appeal den.*, 99 N. Y. S. 2d 1014 (1950).

to the legislature. Libels do not customarily result in unjust enrichment, and it is just as possible to urge that the statute, whether before or after 1936, contemplated solely actions for damages, not the remedy of restitution.

The decision can, however, be explained on the ground that the remedy of restitution is not suitable to a case where, as in the case under consideration, the plaintiff was one of many libelled in the publication. Allocation of unjust enrichment reaped at the expense of the plaintiff might well be impossible. The case is interesting, at all events, in pointing up some of the fields of inquiry which are opened by the alternative remedy of restitution.