Michigan Law Review

Volume 40 | Issue 3

1942

DAMAGES - EFFECT OF DEFENDANT'S TENDER OF SPECIFIC RESTITUTION UPON PLAINTIFF'S ACTION TO RECOVER THE VALUE OF PROPERTY

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DAMAGES — EFFECT OF DEFENDANT'S TENDER OF SPECIFIC RESTITUTION UPON PLAINTIFF'S ACTION TO RECOVER THE VALUE OF PROPERTY — A person who has appropriated the land or chattels of another may prefer to return the subject matter rather than be held liable for its money equivalent in a law suit brought by the rightful owner. Whether the appropriator will improve his position by tendering specific restitution presents an interesting question. Because of the numerous remedies at the owner's disposal, it is impossible to formulate a single, concise answer.

1. *In Actions for Conversion of Chattels*

The tort of conversion includes a wide variety of conduct ranging from theft to a wholly innocent exercise of dominion over the chattels of another.[1] In all the cases where an action for damages for conversion

[1] BOWERS, CONVERSION, c. 5 (1917); HARPER, TORTS, § 30 (1933); 26 R. C. L. 1113 (1920).

is available, the defendant can tender the goods in question to the plaintiff. An acceptance by the plaintiff will not bar the action completely, but can be pleaded only in mitigation of damages.[2] Plaintiff's damages then are the difference between the value of the goods when taken, and the value when returned, leaving mere nominal damages if the goods have not deteriorated while in the possession of the defendant.[3]

The predicament of the defendant becomes more precarious when the plaintiff rejects the tender, preferring money reparation instead of the goods themselves. The unaccepted tender of specific restitution is no bar to an action for conversion, but the question arises as to the possibility of pleading the tender in mitigation of damages. Phrased differently, is the plaintiff entitled to an election between recovery of the goods themselves and recovery of their money equivalent, irrespective of the defendant's preference?

Where the defendant is guilty of an intentional conversion, no court has received an unaccepted tender in mitigation of damages.[4] In such a case, the plaintiff may obtain the money value of the goods regardless of the defendant's willingness to return them, and any resulting disadvantage to the defendant is disregarded. The defendant's position is more appealing when his conversion is innocent, consisting, for example, of a levy upon the wrong goods by an officer or creditor, or a refusal to return goods in the mistaken assertion of a lien upon them. The plaintiff's ability to exact the money value of the goods from the defendant in an action for conversion, despite the defendant's readiness to return the goods, enables the plaintiff to make a forced sale to the defendant.

Theoretically, the prejudice to the defendant is inconsiderable. Since the damages are the market value of the goods,[5] the defendant can recoup this amount by reselling the goods, the only disadvantage being the necessity of making the sale. Often, however, there is no active market for the goods in question. The damages then are the result of conjecture as to what the goods would bring on a hypothetical market, which may differ widely from the amount the defendant can actually realize from a resale. Where there is no market, the original cost minus depreciation may be considered in determining the value,[6] a measure having no consistent relation to resale value in absence of a

[2] HARPER, TORTS, § 32 (1933); BOWERS, CONVERSION, § 700 (1917). An acceptance may be evidence of a complete waiver of the conversion which will bar the trover action. BOWERS, id., § 570.

[3] 2 SEDGWICK, DAMAGES, 9th ed., § 494a (1912).

[4] 49 L. R. A. (N. S.) 931 (1914).

[5] 2 SEDGWICK, DAMAGES, 9th ed., § 495 (1912); BOWERS, CONVERSION, § 630 (1917).

[6] 2 SEDGWICK, DAMAGES, 9th ed., § 495 (1912).

fairly active market. The possible discrepancy is concretely illustrated by the situation in which the plaintiff possessed the goods for his own use, and the nearest market is some distance from the place of conversion. To compensate the plaintiff, the damages should be the value at the nearest market plus the cost of transportation from the market to the place of conversion.[7] In addition to paying the cost of transportation in the damages, the defendant must incur the same expense again to move the goods to market where they can be resold. The defendant's willingness to return the goods indicates that he has no use for them commensurate with a judicial valuation.

Antipathy toward making the defendant the victim of a forced sale, when he is guilty of only a technical conversion and is willing to return the goods, found judicial expression in the English case of *Fisher v. Prince.*[8] The court allowed damages in trover to be mitigated by subtracting the value of the goods when tendered to the plaintiff from the value when converted, thus leaving only nominal damages. The English view was first applied in the United States in *Rutland & Washington R. R. v. Bank of Middlebury,*[9] and has been followed by a number of well-reasoned cases.[10]

On the other hand, the weight of authority has been said to oppose admission of an unaccepted tender of specific restitution in mitigation of damages under any circumstances.[11] A survey of the cases cited for this view reveals that, exclusive of a few decisions directly in point,[12]

[7] 1 id., § 246.

[8] 3 Burr. 1363, 97 Eng. Rep. 876 (1762).

[9] 32 Vt. 639 (1860).

[10] Churchill v. Welsh, 47 Wis. 39, 1 N. W. 398 (1879); Warder v. Baldwin, 51 Wis. 450, 8 N. W. 257 (1881); Ward v. Moffett, 38 Mo. App. 395 (1889); Bigelow Co. v. Heintze, 53 N. J. L. 69, 21 A. 109 (1890); Farr v. State Bank of Phillips, 87 Wis. 223, 58 N. W. 377 (1894); Whittler v. Sharp, 43 Utah 419, 135 P. 112 (1913); Moody v. Sindlinger, 27 Colo. App. 290, 149 P. 263 (1915). Cases prior to the Bank of Middleburry case which recognize the English rule without applying it are: Yale v. Saunders, 16 Vt. 243 (1844), and Hart v. Skinner, 16 Vt. 138 (1844). Subsequent cases which recognize in dicta that there may be mitigation for an innocent conversion are: Carpenter v. American Bldg. & Loan Assn., 54 Minn. 403, 56 N. W. 95 (1893); Colby v. W. W. Kimball Co., 99 Iowa 321, 68 N. W. 786 (1896); Cernahan v. Chrisler, 107 Wis. 645, 83 N. W. 778 (1900); American Surety Co. of New York v. Hill County, (Tex. Civ. App. 1923) 254 S. W. 241; Hicks Rubber Co. v. Stacy, (Tex. Civ. App. 1939) 133 S. W. (2d) 249. See 49 L. R. A. (N. S.) 931 (1914). The tender of specific restitution may be made before suit, or there may be a tender into court after the action is begun.

[11] 2 SEDGWICK, DAMAGES, 9th ed., § 494 (1912); HARPER, TORTS, § 32 (1933); 65 C. J. 146, § 270 (1933); 26 R. C. L. 1113, § 24 (1920); 9 MINN. L. REV. 392 (1925).

[12] West Tulsa Belt Ry. v. Bell, 54 Okla. 175, 153 P. 622 (1915); Carpenter v. Dresser, 72 Me. 377 (1881); Otis v. Jones, 21 Wend. (N. Y.) 394 (1839); Hanmer v. Wilsey, 17 Wend. (N. Y.) 91 (1837).

the remarks on the question of mitigation are unduly broad, or mere dicta. In some of the cases the conversion of the defendant was intentional.[13] A number of them do not make it clear exactly how the defendant acquired the goods,[14] or do not decide that there was a conversion.[15] In others, the plaintiff had accepted a return of the goods,[16] or obtained possession of them,[17] or the immediate question before the court was whether a tender barred the action completely, not whether mitigation should be allowed.[18] A few of the cases are weak authority because the defendant did not offer to return the goods for a considerable time after the conversion,[19] or the plaintiff had acquired other goods to take the place of those converted.[20] In other words, refusal to consider an unaccepted tender in mitigation of damages has been expounded most frequently by courts not confronted with the appealing situation of an innocent converter promptly offering to return the goods.

The basic reason for refusing mitigation seems to be that the defendant in an action for conversion is a wrongdoer, and consequently should not be permitted to affect the rights of the plaintiff without the latter's consent,[21] as the defendant would be able to do if an unaccepted tender mitigated damages. This reasoning, however, does not discriminate adequately between the various classes of misconduct that are brought within the concept of conversion. Though expansion of the damage remedy into the field of innocent conversion may serve a

[13] Gorham v. Massillon Iron & Steel Co., 284 Ill. 594, 120 N. E. 467 (1918); Ketchum v. Amsterdam Apartments Co., 94 N. J. L. 7, 110 A. 590 (1920); Baltimore & O. R. R. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476 (1892); Kelly v. McDonald, 39 Ark. 387 (1882).

[14] Stephens v. Koonce, 103 N. C. 266, 9 S. E. 315 (1889); Walter v. Bolling, 108 N. C. 289, 12 S. E. 990 (1891); Fidalgo Island Shingle Co. v. Brown, 61 Wash. 516, 112 P. 629 (1911); Arneson v. Nerger, 34 S. D. 201, 147 N. W. 982 (1914).

[15] Norman v. Rogers, 29 Ark. 365 (1874); Weaver v. Ashcroft, 50 Tex. 427 (1878).

[16] Lawyers' Mortg. Investment Corp. of Boston v. Paramount Laundries, 287 Mass. 357, 191 N. E. 398 (1934). The question decided was whether the plaintiff could recover for the use of the goods during the time he was deprived of them, but the court went on to say that the plaintiff is not bound to accept a tender of the goods.

[17] Ewing v. Blount, 20 Ala. 694 (1852).

[18] Harden v. Conwell, 205 Ala. 191, 87 So. 673 (1920); Munier v. Zachary, 138 Iowa 219, 114 N. W. 525 (1908); Hofschulte v. Panhandle Hardware Co., (Tex. Civ. App. 1899) 50 S. W. 608. The last case has been repudiated by dicta of two subsequent Texas cases. See note 10, supra.

[19] Horn v. J. C. Nessen Lumber Co., 236 Ill. App. 187 (1925) (the defendant refused to return the goods for two years); Livermore v. Northrup, 44 N. Y. 107 (1870) (the defendant did not offer to lift a wrongful levy for two months).

[20] Stickney v. Allen, 10 Gray (76 Mass.) 352 (1858).

[21] Hanmer v. Wilsey, 17 Wend. (N. Y.) 91 (1837); Otis v. Jones, 21 Wend. (N. Y.) 394 (1839).

useful purpose, it does not follow that the full weight of this damage remedy must fall equally on all types of interference with chattel ownership. If some legal principle is needed to ground a doctrine which in effect requires a plaintiff to accept specific restitution, the general obligation of the plaintiff to mitigate the damages of the defendant should serve the purpose.[22] Another objection to permitting specific restitution to mitigate damages is that the plaintiff may not know whether the conversion of the defendant was innocent or not, and thus will not know whether he must accept the defendant's tender.[23] This difficulty could be overcome partially by requiring the defendant to continue his readiness to return the goods until there has been an opportunity for judicial decision of the question.

Although the position of a defendant who is guilty of an intentional conversion is not particularly appealing, it can be argued that he too should be allowed to mitigate damages by tendering specific restitution. The object of any tort remedy, unless there are elements of malice, is compensation and reparation. The usual method of making compensation is an award of money damages, not because there is something sacred about granting money damages, but because it usually is the only relief possible. Where compensation can be accorded by specific restitution, it perhaps should be required. Whether specific restitution will afford reparation depends upon whether the parties will be put in status quo. A condition of status quo would not be accomplished if the plaintiff would be prejudiced by having to accept a return of the goods, as would be the case if the plaintiff had found it necessary to acquire substitute goods.[24] A refusal of the plaintiff to accept specific restitution may be evidence that he would be prejudiced by such an acceptance, or it may indicate only his desire to take advantage of his ability to make a forced sale.

In allowing mitigation, the scienter of the converter perhaps should not be controlling. A suggested test, totally unsupported by judicial authority, is the prejudice incurred by the plaintiff in accepting specific restitution, as balanced against the hardship imposed upon the defendant if he is forced to pay the money value of the goods when he prefers to return them. A material consideration in the application of such a test would be the requirement, prescribed by cases allowing mitigation for an innocent conversion, that the goods in question must not have diminished in value between the innocent conversion and the

[22] As is suggested in Moody v. Sindlinger, 27 Colo. App. 290, 149 P. 263 (1915). The case states that where a mortgagee takes too much property under the mortgage, the mortgagor has a duty to mitigate damages by accepting a tender of the goods wrongfully taken.

[23] Carpenter v. Dresser, 72 Me. 377 (1881).

[24] As was the case in Stickney v. Allen, 10 Gray (76 Mass.) 352 (1858).

tendered return.[25] When the goods have deteriorated, it is quite likely that the plaintiff would be prejudiced if required to accept their return. Such a prerequisite, however, should be flexible, rather than iron-bound, since it may be possible to compensate the plaintiff adequately by forcing him to accept the goods, and awarding damages to make up the depreciation in value.[26]

2. *In Actions for Money Restitution*

(a) *Assumpsit for a Waived Conversion*

Instead of bringing an action for conversion, the plaintiff may waive the tort and sue in indebitatus assumpsit for the value of the goods.[27] Despite the numerous cases dealing with the effect of a tender of specific restitution in an action for conversion, and notwithstanding the fact that practically any conversion can be waived to bring assumpsit, there seems to be no case in assumpsit which presents the situation of a plaintiff seeking a money judgment for the goods while the defendant desires to return them. Nor is there any judicial indication of the answer to this problem, with the exception of the negative implications in an old English case.[28]

Ability of the defendant to mitigate damages in assumpsit by tendering specific restitution is precluded by those courts which do not allow the plaintiff to waive the conversion unless the defendant has resold the chattels.[29] Therefore, when the defendant has retained the goods, and is in a position to return them, the plaintiff cannot bring assumpsit. This restriction is based on the supposed necessity of a resale in order to imply the fictional promise of assumpsit, and does not result from an attempt to protect the defendant because assumpsit in such a case might deprive him of his ability to mitigate in an action for conversion. If the latter consideration were controlling, a consumption or destruction of the goods would render it just as impossible for the defendant to make specific restitution.[30] Also there is no correlation

[25] See Fisher v. Prince, 3 Burr. 1363, 97 Eng. Rep. 876 (1762); Hart v. Skinner, 16 Vt. 138 (1844); Whittler v. Sharp, 43 Utah 419, 135 P. 112 (1913); Bigelow Co. v. Heintze, 53 N. J. L. 69, 21 A. 109 (1890).

[26] As is done when the plaintiff accepts the tender of specific restitution. See note 3, supra.

[27] WOODWARD, QUASI CONTRACTS, § 277 (I) (1913).

[28] Bennett v. Francis, 2 Bos. & Pul. 550, 126 Eng. Rep. 1433 (1801). See JACKSON, THE HISTORY OF QUASI-CONTRACT IN ENGLISH LAW 78 (1936). As a reason for not allowing the plaintiff to waive an innocent conversion to sue in assumpsit, the court stated that in assumpsit the defendant would be deprived of his ability to mitigate damages by tendering specific restitution. The court does not explain why such mitigation could not be permitted in assumpsit as well as in an action for conversion.

[29] 97 A. L. R. 250 (1935).

[30] Id. Some courts hold that only a resale is sufficient.

between those courts which allow mitigation for an innocent conversion, and those courts which do not permit assumpsit unless there is a resale.[31]

The policy arguments for mitigation are the same as in an action for conversion; in many cases it may impose a hardship on the defendant to require him to pay cash for the goods when he prefers to return them. What the decision would be if a court were directly faced with the situation depends upon the aspect of assumpsit which is emphasized. A court allowing mitigation for an action for conversion may hold that the choice of assumpsit does not change the rights of the parties, so the determining factor is whether the waived conversion was innocent or intentional. On one extreme, the fact that the tort is "waived" may be stressed to authorize mitigation for even an intentional conversion, while on the other extreme the implied promise and contractual elements of assumpsit may be accented to disallow mitigation by specific restitution even where an innocent conversion was waived.[32]

(b) *Recovery for Property Obtained by Fraud*

In addition to the traditional function of affording reparation for a wrongful taking, the action for conversion and the action of assumpsit have other uses in which a defendant may be held liable for the value of property. The defendant may have obtained goods as vendee under a sales contract which the vendor can rescind, suing then for restitution. Since the usual justification for the vendor's rescission is the defendant's misrepresentations of his solvency,[33] the only restitution remedy that will benefit the vendor is one by which he can recover the goods themselves. If the defendant is unable financially to pay for the goods in an action on the contract, he cannot pay a money judgment in assumpsit.

There are several situations, however, in which it may be profitable for a vendor to rescind the contract in order to sue for quasi-contractual recovery of the value of property. The vendor may be able to evade a credit provision of the sales contract by rescinding and suing in as-

[31] Both Wisconsin and Vermont allow mitigation by a tender of specific restitution for an innocent conversion. Wisconsin permits a waiver of the tort without a resale while Vermont does not.

[32] If there were an express sales contract, the vendee-defendant would not be able to escape liability for the value of the goods by tendering a return to the vendor-plaintiff. The implied contract which forms the basis of the assumpsit action may be considered equivalent to an express sales contract.

[33] Bowen v. Schuler, 41 Ill. 192 (1866); Hacker v. Munroe, 176 Ill. 384, 52 N. E. 12 (1898); Brower v. Goodyer, 88 Ind. 572 (1883); Bradberry & Fosters v. Keas, 5 J. J. Marsh. (28 Ky.) 446 (1831); Pekin Plow Co. v. Wilson, 66 Neb. 115, 92 N. W. 176 (1902); Bradley v. Obear, 10 N. H. 477 (1839); Hurd v. Burch, 46 Hun. (53 N. Y. S. Ct.) 679 (1887); Oberdorfer v. Meyer, 88 Va. 384, 13 S. E. 756 (1891). Start of the action to recover the goods is sufficient act of rescission. Soper Lumber Co. v. Halsted & Harmount Co., 73 Conn. 547, 48 A. 425 (1901).

sumpsit.[34] Or a plaintiff may rescind an exchange of property and sue for the value of property transferred to the defendant because of the fraudulent misrepresentations of the defendant concerning the property transferred to the plaintiff.[35]

No case has presented the situation where a plaintiff rescinded a contract for fraud and sought a money judgment for the property transferred to the defendant, while the latter desired to return the property in mitigation of damages. Since the fraud vitiates the sale, the plaintiff can bring an action for conversion. Obtaining goods by fraud is an intentional conversion,[36] so no court would accept a tender of specific restitution in mitigation of damages. If the plaintiff waives the conversion and sues in assumpsit, there is no precedent for allowing mitigation.

Moreover, there are added reasons for not permitting a tender of specific restitution to mitigate damages. The defendant in the above predicament is not being made the victim of a forced sale, for he expressly agreed to pay for the goods. Requiring the defendant to pay the money value of the property in assumpsit merely means that he must pay in a somewhat different manner, or at a different time, than originally planned. Although the express contract in which the defendant actually promised to pay for the goods is obliterated by the rescission, the necessity of paying for the goods in one way or another was nevertheless within the defendant's contemplation during the entire transaction.

(c) *Recovery for Property Conveyed within Statute of Frauds*

Because of the statute of frauds, a plaintiff who transfers property in reliance on an oral promise may not be able to obtain specific performance, or damages for breach of the contract.[37] If the plaintiff so desires, he can obtain specific restitution for chattels, and probably for

[34] Crown Cycle Co. v. Brown, 39 Ore. 285, 64 P. 451 (1901). Contra: Jones v. Brown, 167 Pa. 395, 31 A. 647 (1895); Emerson v. Detroit Steel & Spring Co., 100 Mich. 127, 58 N. W. 659 (1894). See WOODWARD, QUASI CONTRACTS, § 278 (1913).

[35] Thayer v. Turner, 8 Metc. (49 Mass.) 550 (1844). Another situation is suggested by Atlas Shoe Co. v. Bechard, 102 Me. 197, 66 A. 390 (1906), where the original insolvent vendee made a common-law assignment for the benefit of creditors to *X*, not an innocent purchaser and solvent. The court held that the vendor could maintain trover against *X*. Would the conversion be innocent so that some courts would allow mitigation by a tender of specific restitution? Also where the vendor has accepted in full payment a note which the defendant knew to be worthless, the vendor may rescind and sue in assumpsit. Willson v. Foree, 6 Johns (N. Y.) 110 (1810). A similar case is Blalock v. Phillips, 38 Ga. 216 (1868), where the defendant fraudulently paid for the goods in confederate currency.

[36] WOODWARD, QUASI CONTRACTS, § 278 (1913).

[37] 59 A. L. R. 1305 (1929).

land.[38] Also most courts allow the plaintiff to maintain an action in assumpsit for quasi-contractual recovery of the value of either land or chattels conveyed to a defendant who refuses to perform his part of the contract.[39] Again the question arises as to whether the plaintiff can demand the money value of the property in spite of the defendant's desire to make specific restitution. To present the problem directly, the defendant probably must tender a return of the property after the plaintiff brings suit or in some other way indicates his election to rescind because of the defendant's default. If the tender is made before the plaintiff rescinds, the defendant is attempting to rescind on his own initiative with no justification.[40]

A case mistakenly cited as answering the question is *Hawley v. Moody*,[41] in which the plaintiff had delivered a gold watch to the defendant in reliance on the latter's oral promise to execute a lease. When the defendant defaulted, the plaintiff was allowed to recover the value of the watch in assumpsit after having refused a tendered return made before the plaintiff rescinded by bringing suit. The defendant was unable to tender specific restitution during suit since the watch had been taken from the defendant by an attachment at the suit of the plaintiff's own creditors. The court stated that the defendant did not have power, without the plaintiff's consent, to revest in the plaintiff title to the thing received. If the court was referring to a tender of specific restitution made during suit as well as a tender before suit, its remarks were merely dicta.

[38] If the land has not been resold, the plaintiff can obtain specific restitution in equity. Dickerson v. Mays, 60 Miss. 388 (1882).

[39] 27 C. J. 358, § 437 (1922); 20 CYC. 298-299 (1906). More recent cases are: General Paint Corp. v. Kramer, (C. C. A. 10th, 1933) 68 F. (2d) 40; Consolidated Products Co. v. Blue Valley Creamery Co., (C. C. A. 8th, 1938) 97 F. (2d) 23; Winchester v. Brown, 264 Mich. 421, 250 N. W. 277 (1933); Jelleff v. Hummel, 56 N. D. 512, 218 N. W. 227 (1928); David Taylor Co. v. Fansteel Products Co., 234 App. Div. 548, 255 N. Y. S. 270 (1932), aff'd. 261 N. Y. 514, 185 N. E. 718 (1932). If the plaintiff makes a demand for the return of the property, there probably is a conversion to support an action for conversion. In fact two old Kentucky cases hold that trover or detinue are the only remedies available. Keith v. Patton, 1 A. K. Marsh. (8 Ky.) 23 (1817); Duncan v. Baird & Co., 8 Dana. (38 Ky.) 101 (1839).

[40] Where one party is willing to perform, the other party cannot refuse to accept performance and sue for the value of the benefits of his own performance, although it may be possible where the statute of frauds says that the contract is void, rather than merely unenforceable. WOODWARD, QUASI CONTRACTS, § 100 (III) (1913). Consequently, the defendant probably cannot rescind by tendering restitution where the plaintiff is willing to perform even if the defendant does not sue for the value of anything conveyed to the plaintiff, with the noted possible exception when the statute says an oral contract is void.

[41] 24 Vt. 603 (1852). In KEENER, QUASI-CONTRACTS 285-288 (1893), the case is criticised for denying specific restitution, which criticism is referred to in WOODWARD, QUASI CONTRACTS, § 96 (1913).

Some other cases, in dicta, express the defendant's obligation as comprising a duty to pay for what he has received,[42] with two cases stating that the defendant must either return the thing received, or pay its value.[43] In no case has the defendant tendered specific restitution after the plaintiff elected to rescind because of the defendant's default. Nor does any court require a resale in order to imply a promise to support assumpsit, as do some courts where the tort conversion is waived.[44]

In regard to the interests of the defendant, no great hardship is imposed by denying him the privilege of tendering specific restitution where he has agreed to pay in money for the land or goods received. He is not the surprised victim of a forced sale. The plaintiff cannot sue on the express contract, as he can when the contract is rescindable for fraud, but the plaintiff's inability to obtain a money judgment on the oral contract is due to the statute of frauds, not because the possibility of buying the property is totally foreign to the defendant's intentions.

The situation is different when the defendant orally agreed to pay by conveying other land or chattels. He may be perfectly willing to acquire the plaintiff's land or chattels in return for other land or chattels, but may not want to keep them if he must pay in money. Of course, if the defendant deliberately defaults, relying on the statute of frauds for protection, there is no strong reason why he should not be

[42] Dix v. Marcy, 116 Mass. 416 (1875); Day v. New York Central R. R., 51 N. Y. 583 (1873). In Booker v. Wolf, 195 Ill. 365, 63 N. E. 265 (1902), the court strongly implies in dicta that the plaintiff can recover the value of the property even if the defendant should tender specific restitution. In Pletcher v. Porter, 177 Wash. 560, 33 P. (2d) 109 (1934), the court granted an alternative decree (for return of the property or payment of its value), but the plaintiff had requested such a decree so the case does not answer the question of a plaintiff desiring a money judgment while the defendant prefers to return the property.

[43] Jarboe v. Severin, 85 Ind. 496 at 499 (1882). Todd v. Bettingen, 109 Minn. 493, 124 N. W. 443 (1910), cites the statement in the Jarboe case, and KEENER, QUASI-CONTRACTS 286 (1893) to the effect that the primary obligation of the defendant is specific restitution. The question directly decided in the latter case is that the plaintiff must make specific restitution as a condition precedent to bringing suit.

[44] In Basford v. Pearson, 9 Allen (91 Mass.) 387 (1864), and Smith v. Hatch, 46 N. H. 146 (1865), there was a showing of a resale, but the courts expressly said that it would not be necessary if the plaintiff used a count in assumpsit for land sold and conveyed, rather than money had and received. Todd v. Bettingen, 109 Minn. 493, 124 N. W. 443 (1910), states that the fact of defendant's unjust enrichment is sufficient to ground assumpsit. As a concrete example, Illinois requires a resale by the defendant before the plaintiff can waive the tort of conversion to bring assumpsit. 97 A. L. R. 250 at 253 (1935). But Illinois does not require that the defendant must have resold the land before the plaintiff can bring assumpsit for property conveyed within the statute of frauds. Booker v. Wolf, 195 Ill. 365, 63 N. E. 265 (1902).

required to pay cash in spite of his desire to return the property. If his default results from an honest inability to perform, his position is more appealing.

The correct answer to the problem depends, to a large extent, upon the proper effect to be given to the statute of frauds. If it is accorded a minimum of consideration, mitigation by specific restitution need not be allowed since the defendant fares no worse when required to pay a money judgment in quasi-contract than if the oral contract were enforceable so as to render him liable for a money judgment in a suit for breach of contract. If the proper function of the statute of frauds is to return the parties to an oral agreement as nearly as possible to the position occupied before making the contract, then specific restitution should be permitted unless the plaintiff would be specially prejudiced thereby. An intermediate view might condition the allowance of specific restitution upon whether the default of the defendant was intentional or unavoidable.

(d) *Recovery for Property Transferred by Mistake*

Other illustrations of the problem may be found in the mistake field. In most of the mistake cases, however, the plaintiff is seeking a return of money, or reformation or cancellation of a contract or deed. Of the few cases where a plaintiff is suing for the value of property delivered by mistake, the most prevalent are those in which a vendor of land claims compensation for an excess in quantity mistakenly included in the conveyance. In some of the cases the decree grants the purchaser the option of paying for the excess, rescinding the whole sale[45] or reconveying the excess.[46] A judgment for the value of the excess land is contained in a few of the cases,[47] but in none did the defendant tender a reconveyance of the additional land. Since these cases usually involve a serious question as to whether the plaintiff is entitled to any recovery, or whether the alleged excess is included in the contract price already paid, a court probably would not force the purchaser to pay for land which he did not intend to buy if he offered to reconvey.

[45] Lawrence v. Staigg, 8 R. I. 256 (1866); Henn v. McGinniss, 182 Iowa 131, 165 N. W. 406 (1917), dicta; Carbajal v. Tessier, 163 La. 894, 113 So. 138 (1927), decided under provision of the Louisiana Civil Code; Ford v. Delph, 203 Mo. App. 659, 220 S. W. 719 (1920).

[46] O'Connell v. Duke, 29 Tex. 299 (1867); Miller v. Craig, 83 Ky. 623 (1886); in Korrick v. Tuller, 42 Ariz. 493, 27 P. (2d) 529 (1933), the purchaser was given an election between payment for the excess or reformation of the deed to exclude the excess.

[47] Farenholt v. Perry, 29 Tex. 316 (1867); Ladd v. Pleasants, 39 Tex. 415 (1873); Whittle v. Nottingham, 164 Ga. 155, 138 S. E. 62 (1927); Blaylock v. Hackel, 164 Ga. 257, 138 S. E. 333 (1927).

The only case in which a defendant actually tendered specific restitution involved personalty, and is inconclusive in its holding.[48] The plaintiff was granted a money judgment for the value of property transferred by mistake although he had rejected a prior tender of restitution, but the recovery allowed was nearer the amount tendered by the defendant in his answer than the amount claimed by the plaintiff.

Of all the situations discussed, mistake cases would seem to present the strongest reasons for permitting the defendant to make specific restitution, especially when the plaintiff is the mistaken party. Since no one has committed a wrong, the object should be to put the parties in status quo, and this can usually be better accomplished by allowing the defendant to return the thing mistakenly received.

3. *In Equitable Remedies*

To obtain relief from the defendant's acquisition of property in which the plaintiff has a valid claim, the latter may resort to a court of equity to cancel a deed, contract, or note because of fraud, undue influence, or mistake. After the equity court has determined that the plaintiff is entitled to the property in the possession of the defendant, will it order specific restitution of the property, or will it grant a money judgment? Will the plaintiff's request for money value prevail over the defendant's willingness to return the specific thing?

In an early federal case[49] setting aside a conveyance of land for fraud, the court held that there should be a reconveyance wherever possible, apparently even if the defendant preferred to pay money reparation, and that damages should be awarded only when a reconveyance was impossible. The court recognized that some courts followed the less rigid rule of awarding damages wherever reasonable. It probably would not be considered reasonable to order money reparation if the defendant tendered a reconveyance. A desire to protect the interests of the defendant, however, was not the reason for the decision, which is attributable to the court's doubts as to the propriety of awarding damages in equity. Granting damages was considered to be

[48] Clayton Oil & Refining Co. v. Langford, (Tex. Civ. App. 1926) 286 S. W. 268, affirmed (Tex. Comm. App. 1927) 293 S. W. 559. The plaintiff delivered oil to the defendant because of mutual mistake as to the termination of a contract under which the defendant had been buying oil from the plaintiff. Both of the parties were ignorant of the mistake for a time after the deliveries, and the court used the price of oil on the date of discovery of the mistake as the measure of recovery. Another case involving chattels is Johnson v. Saum, 123 Iowa 145, 98 N. W. 599 (1904), in which the plaintiff was awarded the money value of a horse delievered to the defendant by mistake. In Hendricks v. Goodrich, 15 Wis. 679 (1862), the plaintiff was denied recovery for a horse delivered by mistake on the ground that his action for its value, together with another action, was an attempt to affirm and disaffirm the same contract.

[49] Warner v. Daniels, (C. C. Mass. 1845) 29 F. Cas. 246.

a function of the law courts which should be undertaken by an equity court only when an equitable remedy would be ineffective.

Because of the limitations upon the jurisdiction of equity courts, a number of state decisions setting aside land conveyances find it necessary to base an award of money judgment upon a showing that the defendant has resold the land, or in some other way has made a reconveyance impossible.[50] As one case expressed it,[51] unless the defendant has reconveyed, the plaintiff is bound by his election of the rescission remedy, and cannot obtain a money judgment as he could in a court of law. Some of the cases expressly require that the plaintiff have no knowledge of the resale by the defendant before suit is brought, otherwise there is no basis for equity jurisdiction since there is no equitable remedy which the court can give. But if equity once exercises jurisdiction because equitable relief apparently was required, the court will retain jurisdiction and terminate the case by awarding money damages where a reconveyance is impossible.[52]

Today equity courts may grant money judgments more readily, but if a court has a choice between the equitable remedy of ordering a reconveyance, and awarding the money value of the property, the court probably will pick the former, especially if the defendant offers to reconvey. Where the defendant tendered a reconveyance, the Michigan court in *Bacon v. Fox*[53] held it was improper to award the money value of the land when setting aside an exchange of property because of fraud. The court said that the plaintiff's only right was to be put in status quo, which could be accomplished by a reconveyance. Thus, an equity court allowed the defendant to escape a forced sale by tendering specific restitution although he was guilty of an intentional wrong. In contrast, when the defendant in a law action for conversion or in assumpsit has committed an intentional wrong, no court permits him to mitigate damages by offering to make specific restitution.[54]

[50] Taylor v. Taylor, 259 Ill. 524, 102 N. E. 1086 (1913); Johnson v. Carter, 143 Iowa 95, 120 N. W. 320 (1909); Edwards v. Hanna, 5 J. J. Marsh. (28 Ky.) 18 (1830); Daiker v. Strelinger, 28 App. Div. 220, 50 N. Y. S. 1074 (1898); Pritchard v. Smith, 160 N. C. 79, 75 S. E. 803 (1912); Jackson v. Counts, 106 Va. 7, 54 S. E. 870 (1906); Luetzke v. Roberts, 130 Wis. 97, 109 N. W. 949 (1906); Griffiths v. Cretney, 143 Wis. 143, 126 N. W. 875 (1910).

[51] Johnson v. Carter, 143 Iowa 95, 120 N. W. 320 (1909).

[52] Warner v. Daniels, (C. C. Mass. 1845) 29 F. Cas. 246 at 254; Johnson v. Carter, 143 Iowa 95 at 100, 120 N. W. 320 (1909); Edwards v. Hanna, 5 J. J. Marsh. (28 Ky.) 18 at 27-28 (1830); Griffiths v. Cretney, 143 Wis. 143 at 150, 126 N. W. 875 (1910). This is an application of the equitable doctrine of completeness. See, 1 POMEROY, EQUITY JURISPRUDENCE, 4th ed., § 231 et seq. (1918).

[53] 267 Mich. 589, 255 N. W. 340 (1934).

[54] The situation should present an interesting problem in jurisdictions where the distinctions between law and equity have been abolished. In Pritchard v. Smith, 160 N. C. 79, 75 S. E. 803 (1912), the court cited the combination of law and equity

The discussed situation of a plaintiff suing to recover the value of property acquired by the defendant is to be distinguished from a plaintiff suing in affirmance of a contract for damages resulting from defendant's default in delivering property called for by the contract. It has been stated that once a cause of action has accrued for the breach of a contract it cannot be destroyed or minimized by a tender of performance.[55] Under the affirmance remedy, the damages for which the defendant may be liable are not necessarily the value of the property which he retained. Not allowing the defendant to mitigate damages by tendering performance does not force the defendant to purchase property of the plaintiff, but merely requires the defendant to keep his own property which he failed to deliver at the proper time. This does not mean that in all cases a tender of performance should not be accepted in mitigation of the damages claimed to result from the lack of the performance tendered. For instance, in a deceit action for the failure of a conveyance of land to contain as much area as represented, one court suggested that the defendant might be allowed to convey the deficient strip of land to the plaintiff, in view of the ease of compensating plaintiff by specific reparation compared to the hardship of requiring the defendant to pay substantial damages for a strip of land which was of little value to him.[56]

From the standpoint of preserving the interests of the defendant, mitigation by specific restitution is usually more important in the cases where a money judgment for the plaintiff imposes a forced sale of the property upon the defendant. Except in the action for conversion, however, desire to protect the defendant has not influenced the question of mitigation. The problem has been affected only incidentally by collateral matters such as the refusal of some courts to imply a promise to support assumpsit in the absence of a resale of the property, or the limitations upon the relief obtainable in equity. Because defendants have seldom presented the question squarely before the courts by tendering specific restitution, there is a paucity of judicial consideration of the subject. This may be due to the average defendant's disinclination or inability to return the property, or to his belief that the courts will not receive an unaccepted tender in mitigation of damages.

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as a reason for awarding damages in equity, but the defendant had resold the property in question. No court seems to indicate the effect of a consolidation of law and equity upon a defendant's ability to mitigate damages by specific restitution.

[55] Gould v. Banks, 8 Wend. (N. Y.) 562 (1832). In Colby v. Reed, 99 U. S. 560 (1878), the Supreme Court recognized that some courts allow mitigation by a tender of specific restitution for an innocent conversion, but held that this doctrine had no application in a damage action for breach of contract.

[56] Towle v. Lawrence, 59 N. H. 501 (1880).