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ELECTION OF REMEDIES - AS BETWEEN CONVERSION AND REPLEVIN - MEASURE OF RECOVERY

ELECTION OF REMEDIES — AS BETWEEN CONVERSION AND REPLEVIN — MEASURE OF RECOVERY — Through fraud, defendant received from plaintiff certain shares of stock together with other securities to secure a loan of $300,000 to the plaintiff. Defendant wrongfully hypothecated this stock. Plaintiff, after learning of the conversion, sued for the specific stock in replevin. During the course of the action he changed his demand to one in damages for conversion. The court *held* that plaintiff may not change the theory of his cause of action from replevin to conversion. *Satterwhite v. Harriman Nat. Bank & Trust Co.*, (D. C. N. Y. 1935) 13 F. Supp. 493.

Generally the rule as to election of remedies is applied as between two co-existing and inconsistent remedies.[1] It has been held that a suit for conversion treats the unlawful acts of appropriation as having divested plaintiff of his title and he cannot thereafter bring replevin.[2] The better view is that in an action for conversion plaintiff claims that title was obtained by defendant wrongfully, and that this is not such a disaffirmance of title as to render the action inconsistent with a replevin suit.[3] However, the court in the principal case found no inconsistency between the two remedies. Under the present law of New York (where the case arose), a plaintiff by a replevin action may recover the specific property or its value at the time of trial if the property has been disposed of,[4] and this is the general rule.[5] By the New York rule in an action for conversion the measure of damages is the market price at the time of actual conversion or the highest price within a reasonable time after notice has been received of the conversion.[6] The rule in *Markham v. Jaudon* [7] which allowed the highest market value between the time of conversion and the time of trial was discarded because it threw the risk of all market fluctuations on the defendant.[8] The court in the principal case rested its decision on

[1] Stafford v. McDougal, 171 Okla. 106, 42 P. (2d) 520 (1935); Gray v. Gurney Seed & Nursery Co., 62 S. D. 97, 252 N. W. 3 (1933); Green v. Phoenix Ins. Co., 218 Iowa 1131, 253 N. W. 36 (1934).

[2] National Surety Co. v. Odle, (Tex. Civ. App. 1931) 40 S. W. (2d) 876; Equitable Trust Co. v. Connecticut Brass and Mfg. Corp., (C. C. A. 2d, 1923) 290 F. 712, reversed on retrial, (C. C. A. 2d, 1926) 10 F. (2d) 913; Crockett v. Miller, (C. C. A. 8th, 1901) 112 F. 729 at 736 (dictum); Ireland v. Waymire, 107 Kan. 384, 191 P. 304 (1920); Morse v. La Crosse Milling, Grain & Ice Co., 116 Kan. 697, 229 P. 366 (1924); Presson v. Worthen, 66 Ill. App. 457 (1896).

[3] Equitable Trust Co. v. Connecticut Brass & Mfg. Corp., (C. C. A. 2d, 1926) 10 F. (2d) 913; Miller v. Hyde, 161 Mass. 472 (1894); Cowan v. Young, 282 Mo. 36, 220 S. W. 869 (1920); Moss v. Marks, 70 Neb. 701, 97 N. W. 1031 (1904); Deinard and Deinard, "Election of Remedies," 6 MINN. L. REV. 341 at 361 (1922).

[4] New York Guaranty & Indemnity Co. v. Flynn, 55 N. Y. 653 (1873); Gilroy v. Everson-Hickok Co., 103 App. Div. 574, 93 N. Y. S. 132 (1905); Allen v. Fox, 51 N. Y. 562 (1873).

[5] Morris v. Coburn, 71 Tex. 406 (1888); 2 SEDGEWICK, DAMAGES, 9th ed., p. 1039, § 533 (1912).

[6] In re Salmon Weed & Co., (C. C. A. 2d, 1931) 53 F. (2d) 335; Baker v. Drake, 53 N. Y. 211 (1873); Gruman v. Smith, 81 N. Y. 25 (1880); Colt v. Owens, 90 N. Y. 368 (1882); Wright v. Bank of the Metropolis, 110 N. Y. 237, 18 N. E. 79 (1888).

[7] 41 N. Y. 235 (1869).

[8] In re Salmon Weed & Co., (C. C. A. 2d, 1931) 53 F. (2d) 335.

the ground that to allow plaintiff to change his action from replevin to conversion would amount to allowing him to reinstate substantially the discarded rule of the *Markham* case. This is true only to a limited extent, for a plaintiff would have a choice between two values, value at the time of trial or value within a reasonable time after notice of the conversion, not the highest value between the time of conversion and the time of trial. But if a plaintiff sues in replevin he will recover the highest market price if that happens to be the value at the time of trial, and since he had his choice between the two remedies to begin with, the hardship to the defendant is inherent in the situation. One way out would seem to be to change the measure of damages in replevin suits to the measure used in suits for conversion. Such a measure of damages is sometimes used where by statute the plaintiff may sue in replevin and then elect to take either the goods or their value and he elects to take their value.[9] But where the plaintiff has no choice, and must take money value because the goods cannot be found, such a rule would not assure him a true substitute for his goods, and would consequently be unfair.[10] Therefore it would seem that the value at the time of trial is at least under some circumstances a fair standard for valuation in replevin and that the plaintiff in the principal case had, prior to the start of suit, a choice between two distinct measures of recovery. The mere start of suit on one or the other theory should not be enough to deprive the plaintiff of his election if it later proves that a change to another theory would increase his recovery.

J. J. DeL.

[9] Schnitzer v. Russell, 81 N. J. L. 146, 80 A. 938 (1911); Hanselman v. Kegel, 60 Mich. 540, 27 N. W. 678 (1886); Just v. Porter, 64 Mich. 565, 31 N. W. 444 (1887); Theatre Equipment Acceptance Corp. v. Betman, 266 Mich. 22, 253 N. W. 201 (1934).

[10] Morris v. Coburn, 71 Tex. 406 (1888).