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Specific Restitution in Equity of Converted Stocks and Bonds - Farmer v. O'Carroll

SPECIFIC RESTITUTION IN EQUITY OF CONVERTED STOCKS AND BONDS

Farmer v. O'Carroll[1]

At the time of the transaction in question the plaintiff-appellant was a widow of about 63 years with an estate of about $180,000. She delivered to defendants-appellees, the treasurer of a college and the college corporation, $135,350 worth of Liberty Bonds and signed a written agreement to the effect that the bonds were an absolute gift by her to the college corporation, but that the corporation was to pay the plaintiff the interest received from the bonds until

[1] 162 Md. 431, 160 A. 12 (1932).

her death. Later, more of such bonds ($20,000 worth) were delivered by the plaintiff to the treasurer for the corporation, presumably under the same terms, but no written agreement was made therefor. The plaintiff later brought a bill in equity against the college corporation and its treasurer alleging that she had been told by the treasurer that she could get the bonds back upon demand, that she had been induced to sign the written agreement by the fraud and misrepresentations of the treasurer, that the defendants had been her trusted and confidential advisers, that the defendants had concealed from her the true contents of the agreement by undue influence, and that the defendants had refused to return the bonds upon demand. She prayed an accounting, rescission of the written agreement, and a decree ordering the defendants to return the bonds. The defendants' demurrer to the bill was sustained, and the Court of Appeals affirmed the lower court's decision. The ground for sustaining the demurrer was misjoinder of causes of action. The two gifts of bonds were treated separately by the Court.

Concerning the first group ($135,350) of bonds, the Court held that the plaintiff stated a good cause of action in her prayer for rescission of the written agreement on grounds of fraud and undue influence, the college corporation being liable on the basis of apparent authority for the misrepresentations of its agent, the treasurer. Fraud is a matter peculiar to equity.

However, the Court put the smaller gift ($20,000) on a different footing. The facts as alleged were held to constitute a bailment by the plaintiff and a conversion by the defendants. Such a conversion gave the plaintiff a right of action at law for the tort or for breach of the contract of bailment, and equity should not take jurisdiction. Thus the Court held that the complaint joined a matter for which there was a legal remedy with a matter peculiar to equity jurisdiction and affirmed the sustaining of the defendants' demurrer.

This discussion will be limited to that portion of the case in which an equity Court refused to take jurisdiction to decree the specific return of converted bonds. Causes involving the specific return of chattels are included in that group over which courts of law and equity have concurrent jurisdiction. That is, while the primary right, estate or interest of the complaining party is one created by and cognizable by the law, equity will exercise its juris-

diction occasionally to enforce such rights; and that only when the remedy at law is inadequate.[2]

Professor Pomeroy submits that to speak of the inadequacy of the remedy at law is inaccurate.[3] It is not that the remedy itself is inadequate, for substantially the same remedy is given in equity, but it is the inability of the law courts to apply the remedy to its fullest extent in a proper case. This impotency on the part of the law courts is caused by the want of elasticity and adaptability to special circumstances of modes of legal procedure. However, whether the inadequacy be implicit in the remedy or in the application of the remedy, the courts have been uniform as to the general meaning of the formula.

To use as an example the subject now under discussion, the specific recovery of chattels, it seems to be well settled that equity will not, in general, decree the specific return of chattels.[4] The reason given is that their money value recovered as damages at law will enable the complaining party to replace his chattels from the market. The remedy at law is adequate, since it puts the plaintiff back into the position he enjoyed before being wronged by the defendant. But there may be certain chattels which by their nature can neither be specifically recovered at law, nor will damages enable the plaintiff to replace his chattels from the market. Two classes of cases may be listed here: (1) those involving articles of special value to their owners but of no general pecuniary value, and (2) those involving articles having a general pecuniary value but the actual cash value of which in a given case is incapable of accurate determination. The particular kind of chattels in which we are principally interested in this discussion, namely stocks and bonds are generally regarded as falling within the second class since by virtue of their constantly fluctuating value, damages cannot be estimated with sufficient accuracy to put the plaintiff in as good a position as he was before.

However, there is some authority for a contrary view refusing to decree the specific return of stocks and bonds,

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[2] McGrath v. C. T. Sherer Co., 291 Mass. 35, 195 N. E. 913 (1935); Mayer v. Collins, 263 Ill. App. 219 (1931); Peoples Pittsburgh Trust Co. v. Saupp, 320 Pa. 138, 182 A. 376 (1936); New York Life Ins. Co. v. Yamasaki, 159 Ore. 123, 78 Pac. (2) 570 (1938); Brex v. Smith, 104 N. J. Eq. 386, 146 A. 34 (1929).

[3] 1 Pomeroy, Equity Jurisprudence (4th ed. 1918), Sec. 173.

[4] Burr v. Bloomsburg, 101 N. J. Eq. 615, 138 A. 876 (1927); McKittrick v. Bates, 47 R. I. 240, 132 A. 610 (1926); Hughes Trust & Banking Co. v. Consolidated Title Co., 81 Fla. 568, 88 So. 266 (1921).

unless they have some special value apart from their market value or unless there are special equities.[5] In other words, these jurisdictions treat stocks and bonds like any other chattels and refuse to regard them as exceptions to the general rule.

Prior Maryland cases in this regard seemed to follow along a well marked path, but the case here being discussed gives indication of a possible trend in another direction. The first case in Maryland to discuss this problem at any great length was *Scarborough v. Scotten.*[6] The plaintiff there had indorsed some bills and notes to the defendant's testator, the latter orally agreeing to collect said bills and notes and to deliver the proceeds to the plaintiff's wife. The defendant's testator failed to make any collections during his lifetime, and, upon his death, the plaintiff demanded that the defendant return the bills and notes. Upon the defendant's refusal to do so, the plaintiff brought his bill in equity praying a specific return of the bills and notes. It was contended by the defendant on demurrer that the court should not exercise its jurisdiction because the remedy at law was adequate. The defendant's demurrer was sustained below, but the Court of Appeals reversed and held that the remedy at law was inadequate and that the lower court should have exercised its jurisdiction. The Court said: "There can be no doubt that the true ground of interference by a Court of equity, is the inadequacy of the legal remedy to give *full relief.* That is the test."[7] In determining that the remedy at law in this case was inadequate, the Court pointed out that the nature of the chattels themselves was such as to cause deficiencies in the available legal remedies. Replevin would give no relief because the defendant could file a *retorno habendo* bond rather than deliver the bills and notes to the sheriff (in which case plaintiff might be remitted to an action on the bond for damages). Nor would trover give any adequate relief, since damages in such an action are computed as of the time of the conversion (citing *Hepburn v. Sewell*[8] and *Herzberg v. Adams*[9]), and the value of the bills and notes fluctuates with the solvency of the many persons liable thereon. Thus, while the plaintiff could undoubtedly get

[5] 21 C. J. 62; Friedman v. Fraser, 157 Ala. 191, 47 So. 320 (1908); Equitable Trust Co. v. Garis et al., 190 Pa. 544, 42 A. 1022 (1899); Hill v. Rockingham Bank, 44 N. H. 567 (1863).

[6] 69 Md. 137, 14 A. 704 (1888).

[7] *Ibid,* 69 Md. 137, 140, 14 A. 704, 705.

[8] 5 H. & J. 211 (Md. 1821).

[9] 39 Md. 309 (1874).

some relief at law, the Court felt that the chattels concerned were of such a nature that the legal remedy would not be sufficient to meet the "full relief" test quoted.

The same point was raised on demurrer to the bill in *Safe Deposit & Trust Co. v. Coyle*,[10] involving converted stocks and bonds, and the Court quoted at great length from the *Scarborough* case, reiterating the arguments there presented. In *Lipson v. Evans*,[11] involving corporate stocks, the Court of Appeals decided the jurisdiction question in complete accord with the *Scarborough* case and the *Safe Deposit & Trust Co.* case, citing both these cases with approval.

In *McIntyre v. Smith*[12] the same point was again raised on demurrer to the bill. Decedent had retired from business and handed over to the defendants, his children, large amounts of Liberty Loan Bonds, Federal Land Bank bonds, and bonds of a few foreign governments to be held until his death. Upon his death, the defendants refused to return to the administrator of the estate such of the bonds as were negotiable by delivery alone, so the administrator brought a bill in equity for the specific return of the bonds. The Court granted the relief prayed. The plaintiff (the administrator) had alleged that decedent had delivered the bonds to the defendants in trust as his confidential agents and custodians, so that the Court had two possible grounds on which to base its jurisdiction: (1) The inadequacy of the plaintiff's remedy at law, and (2) the plaintiff's allegation that the property was held under a constructive trust. The Court seemed to feel that there was no doubt but that the *Scarborough* case and *Safe Deposit & Trust Co. v. Coyle* expressed the true state of Maryland law on this subject at that time. It discussed both those cases in detail, both as to facts and holdings, strongly approved of the views expressed therein, and held that they were applicable to the bonds involved. It then went on to hold that there was no trust to be enforced and thus based its decision entirely on the inadequacy of the remedy at law.

Thus it would appear that up to 1928, at least, it was well settled in Maryland that wrongfully withheld stocks and bonds could be specifically restored in equity. No special equities were needed, it being considered that the remedies available at law for their conversion fall short of giving adequate relief.

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[10] 133 Md. 343, 105 A. 308 (1918).
[11] 133 Md. 370, 105 A. 312 (1918).
[12] 154 Md. 660, 141 A. 405 (1928).

In the case now under discussion, precisely the same point seems to have been involved as in the earlier cases, namely whether a court of equity should exercise its jurisdiction to decree the specific return of converted bonds. The opinion of the Court made the flat statement that the plaintiff had a remedy at law and therefore equity would not have jurisdiction. No inquiry was made into the adequacy of the legal remedy, and the point was briefly dismissed as though the Court felt that there was little or no room for argument. The cases cited in support by the Court do not seem particularly in point.[13] They merely hold that a bailor has a cause of action *at law* against his bailee for conversion of bailed chattels. The Court did not mention at all the cases, discussed above, holding the legal remedy inadequate where the chattels converted are stocks, bonds or other evidences of indebtedness.

It is submitted that the decision in *Farmer v. O'Carroll* can be supported on two grounds. First, just a few months earlier, *Fisher v. Dinneen*[14] was decided adopting the New York rule[15] as to the measure of damages for the conversion of stocks and bonds, namely the highest value between the time of the conversion and a reasonable time thereafter. This change in the measure of damages for conversion would answer the argument on that ground as advanced in *Scarborough v. Scotten*[16] and the cases following it. However, *Fisher v. Dinneen* was not mentioned in the opinion in *Farmer v. O'Carroll.*[17]

The second ground supporting the result in *Farmer v. O'Carroll* involves disagreement with the reasoning used in the earlier Maryland cases. They relied heavily on the argument that the remedy at law was inadequate because damages would not make the plaintiff whole again, i. e. because of difficulties in computation resulting from the fluctuating solvency of those obligated on the bills and notes involved. But, stocks and bonds are frequently as readily replaceable on the open market as other chattels, there usually being no doubt as to the solvency of the obligor. It becomes a question of fact for each case as to

[13] Maury and Osbourn v. Coyle, 34 Md. 235 (1871); Third National Bank v. Boyd, 44 Md. 47 (1876); Pessagno v. Salabes, 159 Md. 476, 150 A. 866 (1930); 6 C. J. 1152-4.

[14] 161 Md. 605, 158 A. 9 (1932).

[15] Mayer et al. v. Monzo, 221 N. Y. 442, 117 N. E. 948 (1917); and see Wachtell, *The Measure of Damages on Conversion of Securities* (1934) 12 N. Y. U. L. Q. Rev. 240-245.

[16] *Supra*, notes 6, 7, 8 and 9.

[17] As indicated earlier Farmer v. O'Carroll merely stated that the legal remedy was adequate, without any explanation for this conclusion.

whether or not damages will make the plaintiff whole again. Accordingly, little justification can be seen for making stocks, bonds, and other evidences of indebtedness a separate class of chattels.

It is submitted that the Court should conform to the general rule as to the specific recovery of chattels, as was done in *Farmer v. O'Carroll,* and refuse to grant relief, unless some special circumstances are shown making the legal remedy inadequate. It is regrettable, however, that the earlier cases establishing a different rule should not have been mentioned and definitely overruled. The silence of the Court in this respect leaves the present status of these cases, as well as the applicable rule as to equitable jurisdiction, in considerable doubt.