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Replevin of the Contents of Safe Deposit Boxes

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It is often stated that a plaintiff cannot recover in replevin\(^1\) or detinue unless the defendant is in possession of the disputed goods at the commencement of the action.\(^2\) This requirement is fundamentally one of practicality. Since possession of the chattel is the primary object of an action for specific recovery, replevin is inappropriate unless the defendant is in a position to restore this possession to the plaintiff.\(^3\) But one may sometimes be able to put another in possession and have a duty to do so without himself having that combination of physical control and intent which the law calls possession.\(^4\) In such cases the practical reason for the requirement is satisfied, and replevin has been held to be a proper remedy. Replevin will lie, for example, against a servant (who has only custody of his master's goods),\(^5\) against a bailor at whose order goods are held by another,\(^6\) and against an attaching creditor who may at will release to the owner goods in the possession of the sheriff.\(^7\) Thus, insofar as the character of the remedy is concerned, the requirement that a defendant in replevin have "possession" means merely that he must be able, without personally invading the rights of any person not a party to the litigation, to put the plaintiff in physical custody of the goods.\(^8\)

The defendant's position with respect to the chattel may be significant for another reason, however. For the duty enforced in replevin is the duty not to withhold possession from one entitled to it; and, while this obligation

1. "Replevin," as used in this Note, includes replevin in the detinet, detinue, claim and delivery, bail-trover, and other similar actions for the recovery of specific personal property.
3. See Richards v. Morey, 133 Cal. 437, 66 P. 886, 887 (1901); Note, 18 L. R. A (n.s.) 1275 (1899).
4. "[A] person who is in 'possession of a chattel' is one who (a) has physical control of a chattel with the intent to exercise such control on his own behalf, or, otherwise than as servant, on behalf of another...." 1 Restatement, Torts § 216 (1934).
5. Eveleth v. Blossom, 20 Me. 447 (1867); Plater v. Good, 35 Minn. 395, 29 N. W. 56 (1886); see e.g., Contra: McDougall v. Travis, 24 Hun 590 (N. Y. 1881).
6. Bradley v. Gamelle, 7 Minn. 331 (1862); Jones v. Green, 20 N. C. 488 (1839); Krebs Hop Co. v. Taylor, 52 Ore. 627, 98 P. 494 (1908).
8. "Where defendant has such control over the property that he may deliver the possession of it if he so desires, replevin may be maintained against him, though he has not actual manual possession." Burkee v. Great Northern Ry., 133 Minn. 200, 158 N. W. 41, 42 (1916); see Note, 18 L. R. A. (n.s.) 1275 (1909).
may be voluntarily assumed,9 it is imposed by law whenever the defendant's physical control or proprietary rights become obstacles to the plaintiff's possession.10 For example, when A's goods, through his own fault and without the knowledge or consent of B, are placed on B's land,11 an assertion of B's right to exclude others from his premises actually operates to deprive A of possession, and, unless privileged,12 it violates this duty.13 But here again legal possession would seem not to be the test;14 the duty not to resist a trespass arises, not because the defendant has possession, but because by such action he would be withholding possession from the plaintiff.

Does a safe deposit company have such control over articles within its vaults that it is in a position to deliver possession of them to their rightful owner? And if so, does it have a non-contractual duty either to deliver them or to permit one entitled to possession to enter its premises for the purpose of taking possession?

Most courts have classified the relationship between a safe deposit company and its customers with respect to property placed in the rented compartments as that of bailor and bailee for hire,15 finding that the general control and supervision over the premises exercised by the company, coupled with its intent to exclude all persons not entitled to access,16 give the company both actual and legal possession of property within its vaults.17 A fortiori, the

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9. As by a contract of bailment, which imposes a duty to deliver according to its terms.
10. See 3 STREET, FOUNDATIONS OF LEGAL LIABILITY 155 (1906).
11. In such a situation A has no privilege to enter. McGill v. Holman, 28 Ala. 9, 93 So. 848 (1922); PROSSER, TORTS § 24 (1941); 1 RESTATEMENT, TORTS § 200 (1934).
12. An intentional invasion of plaintiff's right to possession should be privileged only if defendant's interest in preventing unauthorized entry on his land is much more important than plaintiff's interest in the enjoyment of his chattels. See PROSSER, TORTS § 16 (1941); 1 RESTATEMENT, TORTS § 273, comment b (1934). The courts have tended to place a premium on the right to exclusive possession of land. Chicago, L. & L. Ry. v. Pope, 99 Ind. App. 132, 188 N. E. 594 (1934), criticized, 9 IND. L. J. 461. But in any case defendant cannot "exercise dominion" over the goods (i.e., sell them or use them for his own benefit); and where no serious damage or inconvenience is threatened and the value of the chattel is relatively great, the law should make it possible for the only person who can make use of the chattel to regain its possession.
13. There is no logical inconsistency in the proposition that B may recover in trespass for A's entry and yet himself be liable in trover if he takes affirmative steps to prevent it; each duty is separate and distinct. See 21 Col. L. Rev. 312 (1923).
14. Thus, although no cases have been found, it would seem immaterial that the chattel is on C's land, rather than B's, if A cannot recover it except by crossing B's land. If C can defend against A, of course, then B's refusal would not in fact operate to deprive A of the chattel and would violate no right of A.
15. E.g., National Safe Deposit Co. v. Stead, 250 Ill. 584, 95 N. E. 973 (1911), aff'd, 232 U. S. 58, 34 Sup. Ct. 209, 58 L. Ed. 504 (1913); Lockwood v. Manhattan Storage and Warehouse Co., 28 App. Div. 68, 50 N. Y. Supp. 974 (1st Dep't 1898); Young v. First National Bank, 150 Tenn. 451, 265 S. W. 681 (1924); BROWN, PERSONAL PROPERTY § 74 (1936); GODDARD, BAILMENTS AND CARRIERS § 158 (2d ed. 1928); 3 PATON'S DIGEST 3300 (1944).
16. While "[p]ossession in law . . . has coupled with this concept [physical control] the idea of a legal claim and right to exercise it in one's own name against the world at large" [POLOOCK AND WRIGHT, POSSESSION IN THE COMMON LAW I], "world at large" is not inclusive of persons having a better legal right to possess. HOLMES, THE COMMON LAW 221 (1881).
17. See note 15 supra. By this analysis the depositor's key, like the key to a locked
company is in a position to put the owner in possession; and, having volun-
tarily assumed possession of the chattels,\footnote{18} it has a duty to deliver this pos-
session to one entitled to it.\footnote{19} A few courts, however, have ruled that a safe
deposit company merely leases space to its customers, collaterally contracting
to protect that space from unauthorized
invasion. These courts reason that
neither in fact nor within the contemplation of the parties is there a delivery
of possession when property is placed in a compartment.\footnote{20} Rather possession
of the articles in a box, like possession of furniture in a rented office, is in the
lessee of the space.\footnote{22} Should this analysis change the result?

suitcase, is only an additional safeguard; its retention does not prevent a constructive
delivery of possession when articles are placed in a box. Cf. Hooper v. Day, 19 Me. 56,
36 Am. Dec. 734 (1841). This “bailment” classification has been criticized on the grounds
that it is inconsistent with the contract between the parties, actual control of the property,
and ordinary business understanding. Dobie, Bailments and Carriers § 67 (1914); 2
Street, Foundations of Legal Liability 291 (1906); Van Zile, Bailments and Carriers § 195
(2d ed. 1908); Note, 11 Minn. L. Rev. 440 (1927). The legal consequences
of the relationship seem more nearly those of a bailment than of any other standard
classification, however. Half, Bailments and Carriers 250 (1896); 14 Col. L. Rev.
345 (1914); 21 Corn. L. Q. 525 (1936) ; 34 Yale L. J. 795 (1925).

By the nature of its business it consents in advance to the transfer of possession.

The company must at least deliver such control as it exercises itself. Some courts,
have forced the company to break into the box at its own expense. West Cache Sugar
Co. v. Hendrickson, 56 Utah 327, 190 Pac. 946 (1920). But see Tillinghast v. Johnson,
34 R. I. 136; 82 Atl. 788, 792 (1912). In any case it must allow the plaintiff or the
112 (1922).

Wells v. Cole, 194 Minn. 275, 260 N. W. 520 (1935), 3 U. of Chi. L. Rev. 147
(garnishment improper because bank not in possession); Du Pont v. Moore, 86 N. H.
254, 166 Atl. 417 (1933) (trustee process; same); Rose v. Union Savings Bank and
Trust Co., 14 Ohio N. P. (w.s.) 143, 28 Ohio Dec. N. P. 399 (1913) (replevin action
improper because bank not in possession, semble).

The depositor’s key gives him control of the space as against the bank, and the
bank’s key serves to protect the renter’s possession. Du Pont v. Moore, 86 N. H.
254, 166 Atl. 417 (1933).

“The relationship assumed is the same as that which exists where one person
rents from another an apartment in a big apartment building. . . . In all such cases
the lessor retains control of the avenues of access. . . . [Y]et no one questions that the
renter . . . is in possession of the contents of the [apartment]. Control of the avenues
of access does not give one possession.” Wells v. Cole, 194 Minn. 275, 260 N. W. 520,
521 (1935) ; see 3 U. of Chi. L. Rev. 147 (1935).

A better approach would be to treat the relationship as sui generis, as the courts,
have treated field warehousing and other similar fact situations. See Notes, 13 A. L. R.
209 (1941); 170 A. L. R. 1113 (1947) (department store leasing arrangements). In
practical effect this is the result reached by the New York decisions, which call the
relationship a bailment for some purposes [Roberts v. Stuyvesant Safe Deposit Co., 123
N. Y. 57, 25 N. E. 284 (1890) (liability for loss)], and a lease for others. See Carples
v. Cumberland Coal & Iron Co., 240 N. Y. 187, 148 N. E. 185 (1925) (attachment);
249 (1st Dep’t 1913) (duty to report assets of a decedent to taxing authorities). And
some courts have expressly declined to classify the transaction, holding classification
unnecessary to the solution of the particular case. See National Safe Deposit Co. v.
box to taxing authorities held not a violation of due process); McDonald v. Wm. D.
Perkins & Co., 133 Wash. 622, 234 Pac. 456 (1925) (liability for negligent loss of
contents); Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125 (1900) (garnishment).

As an abstract matter, probably the bank and the renter are in joint possession. See
Lamus v. Emwicht, 39 Cal. App. 523, 179 Pac. 435, 439 (1919); 1 Patton’s Digest 159
(1940); 3 U. of Chi. L. Rev. 147 (1935). But the nature of the proceeding must be
considered before it can be determined whether the bank is in “possession” as against
third parties. See Kocourek, Two Problems in Possession, 17 Calif. L. Rev. 372 (1929) (point-
This problem was raised in Kohlsaat v. First National Bank of St. Paul, a recent Minnesota decision. In this case testatrix died leaving trust property in a safe deposit box in defendant bank. By her will plaintiff was appointed successor trustee. Plaintiff presented the key and informed defendant of her right to the contents of the box; but the bank, standing on the terms of its rental contract, refused to allow anyone but the "legal representative" of testatrix to enter the box. Following Wells v. Cole, the court found that the relationship between the bank and testatrix was that of lessor and lessee and that possession of the rented space remained in testatrix and passed to her estate. It then reasoned that securities placed within the box were not in the bank's possession, and therefore that no action for their specific recovery could be directed against the bank.

This conclusion seems unsound. Plaintiff could and would have taken possession of the contents of the box had defendant granted her access to it. Since she had testatrix's key and a privilege to invade the possession of testatrix's estate, defendant's interference was the sole obstacle to her possession. Thus defendant could have put plaintiff into possession, and replevin was an appropriate remedy. Defendant's unqualified refusal either to deliver the bonds or to allow plaintiff access to the box, unless privileged, violated its duty not to withhold possession from one entitled to it. Thus the real question in the case is not whether defendant was in possession, but whether it was privileged to deprive plaintiff of possession. And where, as here, the...
bank's interest in protecting its premises from this type of trespass is relatively far less important than the social interest in protecting the enjoyment of property by those entitled to its possession, it would seem that no privilege should be found.

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30. The bank had a right to demand satisfactory proof of title, time to investigate, reimbursement for damages occasioned by the entry, and indemnity against possible liability; and it was entitled to interplead the renter. In view of the nature of its business, this would seem fully to protect the bank's interests. The Kohlsaat case, on the other hand, illustrates the inconvenience which may result from releasing the bank from all non-contractual liability; for plaintiff must now proceed to sue testatrix's estate (for which no administrator had been appointed), which has no real interest in or concern with the controversy, in the meanwhile being deprived of the enjoyment of his property. (The plaintiff had already suffered over $3,000 damages from the decline in value of the securities in the box. See note 23 supra.)