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Replevin of the Contents of Safe Deposit Boxes

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REPLEVIN OF THE CONTENTS OF SAFE DEPOSIT BOXES

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

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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.

2. *E.g.*, Morrow v. Pryor, 125 Mo. App. 344, 102 S. W. 582 (1907); De Lore v. Smith, 67 Ore. 304, 136 Pac. 13 (1913); SHIPMAN, COMMON-LAW PLEADING §§ 46, 51 (3d ed., Ballantine, 1923); see Note, 2 A. L. R. 2d 1043 (1948).

3. *See* Richards v. Morey, 133 Cal. 437, 65 Pac. 886, 887 (1901); Note, 18 L. R. A. (N.S.) 1275 (1909).

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); Flatner v. Good, 35 Minn. 395, 29 N. W. 56 (1886) *semble. 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 Pac. 494 (1908).

7. Taylor v. Bernheim, 58 Cal. App. 404, 209 Pac. 55 (1922); Allen v. Crary, 10 Wend. 349, 25 Am. Dec. 566 (N. Y. 1833). By the majority view, however, when the sheriff is acting under valid legal process, goods so held are regarded as in the custody of the law and beyond the control of the creditor. Grace v. Mitchell, 21 Wis. 533, 11 Am. Rep. 613 (1872).

The action will also lie against a partner who refuses to allow the plaintiff to enter land owned by the partnership and remove his machinery, Nelson v. Howison, 122 Ala. 573, 25 So. 211 (1899) (detinue), and against one who conspires with another to withhold plaintiff's bonds, even though the other conspirator has custody, *see* Meixell v. Kirkpatrick, 33 Kan. 282, 6 Pac. 241 (1885).

8. "[W]here 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

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 § 275, comment *b* (1934). The courts have tended to place a premium on the right to exclusive possession of land. Chicago, I. & 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 23 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" [POLLOCK AND WRIGHT, POSSESSION IN THE COMMON LAW 1], "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 voluntarily assumed possession of the chattels,[18] it has a duty to deliver this possession to one entitled to it.[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.[20] 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.[21] Rather possession of the articles in a box, like possession of furniture in a rented office, is in the lessee of the space.[22] Should this analysis change the result?

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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. HALE, BAILMENTS AND CARRIERS 250 (1896); 14 COL. L. REV. 345 (1914); 21 CORN. L. Q. 325 (1936); 34 YALE L. J. 795 (1925).

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

19. 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 sheriff to do so. Carples v. Cumberland Coal & Iron Co., 240 N. Y. 187, 148 N. E. 185 (1925); Trainer v. Saunders, 270 Pa. 451, 113 Atl. 681 (1921), 70 U. OF PA. L. REV. 112 (1922).

20. 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. (N.S.) 143, 28 Ohio Dec. N. P. 399 (1913) (replevin action improper because bank not in possession, *semble*).

21. 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).

22. "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, 133 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. 294 (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); People *ex rel.* Glynn v. Mercantile Safe Deposit Co., 159 App. Div. 98, 143 N. Y. Supp. 849 (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. Stead, 232 U. S. 58, 67, 34 Sup. Ct. 209, 58 L. Ed. 504 (1913) (statutory duty to report 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. Engwicht, 39 Cal. App. 523, 179 Pac. 435, 439 (1919); 1 PATON'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,*[23] 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" [24] of testatrix to enter the box. Following *Wells v. Cole,*[25] 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.[26]

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,[27] defendant's interference was the sole obstacle to her possession. Thus defendant could have put plaintiff into possession, and replevin was an appropriate remedy.[28] 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.[29] 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

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ing out that a person may be a possessor as to *A* and merely a detentor as to *B*); Shartel, *Meanings of Possession,* 16 MINN. L. REV. 611 (1932). Thus a deposit company may be held not to have the "possession and control" contemplated by a local garnishment statute. Du Pont v. Moore, 86 N. H. 254, 166 Atl. 417 (1933), for example, must be read in connection with Stickney v. Balcheldер, 18 N. H. 40 (1845) (holding that *T* could not be garnisheed for shingles left in *T*'s shed by *D*); *cf.* WIS. STAT. § 304.231 (1945) ("Property in a safe deposit box . . . is not property in the possession or control of such bank or safe deposit company within the meaning of [the chapter on attachment and garnishment]"). Yet on the same facts it may have the control and intent necessary to hold it as a possessor for other purposes. *See* Lamus v. Engwicht, 39 Cal. App. 523, 179 Pac. 435, 439 (1919).

23. 33 N. W. 2d 712 (Minn. 1948) (reversing a judgment which awarded the plaintiff possession of the securities and $3,045 damages for their detention); *cf.* Rose v. Union Saving Bank and Trust Co., 14 Ohio N. P. (N.S.) 143, 28 Ohio Dec. N. P. 399 (1913).

24. The court held that plaintiff was not the "legal representative" of testatrix, and therefore that the bank was under no contractual obligation to plainiff. 33 N. W. 2d at 715.

25. 194 Minn. 275, 260 N. W. 520 (1935).

26. 33 N. W. 2d at 716.

27. This privilege is based on the implied consent of the transferor that the transferee may enter to take possession. *But cf.* 1 RESTATEMENT, TORTS § 181 *second caveat* (1934). Even without this privilege (*i.e.,* even if entering the box would have amounted to a technical trespass against testatrix's estate), however, since the estate evidenced neither a desire nor an intention to resist her entry, defendant could have put it within the power of plaintiff to remove the securities. *See* Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125, 131 (1900).

28. See *supra* p. 686. Replevin will lie against a landlord who interferes with the removal of goods from his tenant's premises. Eastern Outfitting Co. v. Myers, 39 Cal. App. 316, 180 Pac. 669 (1918); Latimer v. Wheeler, 30 Barb. 485 (N. Y. 1859).

29. 1 RESTATEMENT, TORTS § 237, comment *e* (1934).

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,[30] 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*.)