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Law of Safety Deposit Boxes

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cedures contemplating only *sua sponte* inception of an in banc sitting. The former left it to each court to elect whether the judges should all vote on in banc petitions or whether this should be delegated to the division; the latter felt that only the first course would serve the purposes of section 46 (c).

There is the utmost variety in the extent to which the circuits, since the *Western Pacific* decision, exhibit conformity with the views there expressed. The range extends from the third circuit's elaborate procedure to the seventh circuit's utter absence of procedure for a complete nonuse of the in banc power. The second, sixth, and seventh circuits, since they have no established procedures, of course, have none than can be "clearly explained" to litigants. While these circuits do not prohibit such hearings, it may be that they are curtailing the in banc power "indiscriminately." The eighth and ninth circuits, in providing for having petitions of litigants for rehearing in banc ruled on by the division, have chosen an option permissible under the majority but condemned by the concurring opinion. The third, tenth, and District of Columbia circuits' established procedures seem fully to conform to the *Western Pacific* opinion and afford to other circuits useful though not identical patterns of how conformity may be achieved.

The feasibility of formulating criteria for application to all cases coming before the court to determine whether there should be an in banc sitting is doubtful.⁶⁹ The classes of cases in which the District of Columbia circuit has used its in banc power is, however, suggestive of those appropriate for consideration by full court.

C. R. M.

LAW OF SAFETY DEPOSIT BOXES.—The growth of safety deposit business to its present commercial importance had its origin as an incident of banking from its very beginning when the goldsmiths of London received money, bullion and plate from depositors merely for safe-keeping.¹ Though a body of law, separate from the general law of banking, has developed concerning safe-deposit boxes, the business of leasing depositories for the safe-keeping of valuables is nearly always conducted by a bank or trust company

⁶⁹ See Laskin, *The Supreme Court of Canada*, 29 CAN. B. REV. 1038, 1043 (1951). The Supreme Court of Canada though it sits in division and in banc has no established criteria to be applied to all cases to determine if a particular one is proper for a full court hearing.

¹ 1 ZOLLMAN, BANKS & BANKING 34 (Perm. ed. 1936).

either directly or through affiliated or subsidiary corporations. This affiliation is a natural one and probably derives from the older accommodation of keeping customer's valuables in the bank vaults—a rather unsatisfactory arrangement to both bank and customer.²

Although the law concerning safe-deposit boxes has been developed by case law for the most part, as will appear in later discussion, several states have undertaken to establish the rights and liabilities of the parties by statute.

The mechanics of customer access to a safety-deposit box, once rented, is very nearly the same throughout the country. The deposit company has a master key, which, when used together with the depositor's key, will open the box. The bank has no independent access to the safety box, and the door to the box must be forced and a new lock drilled if the depositor's key is lost. The fact that neither party has an independent right or means to possession is most troubling to courts when defining the relationship existing between the deposit company and the customer.

Relationship of the Parties. When a bank, holding itself out as having special facilities for the safe-keeping of valuables, accepts property for safe-keeping, the great weight of authority maintains that a bailor-bailee relationship is created.³ This position, however, has not escaped criticism. Some courts have held the relationship to be one of landlord and tenant,⁴ and others have suggested that the true relationship created is that of a licensee-licensor.⁵ Another and less categorical view maintains that it is neither a bailment, a tenancy, a license, but a hybrid, and that possibly the true classification will depend upon the specific problem with which the court is confronted.⁶

By the majority rule, previously referred to, it is immaterial that the bank does not know the nature and value of the contents of the box.⁷ Critics of this view argue that a bailee must have exclusive possession of the property, and since, in these transactions, the usual practice is for the opening of the box to require two keys, one in the bank's, the other in the lessee's possession, the

² For the various problems raised in such a situation, see generally *Phares v. Hood*, 118 W. Va. 208, 189 S.E. 707 (1937).

³ *Cussen v. Southern California Savings Bank*, 133 Cal. 534, 5 Pac. 1099 (1901). For a collection of cases, see 6 AM. JUR. 490.

⁴ *E.g.*, *Carples v. Cumberland Coal & Iron Co.*, 240 N.Y. 187, 148 N.E. 185 (1925).

⁵ *E.g.*, *National Safety Deposit Co. v. Stead*, 232 U.S. 58 (1914).

⁶ Note, 17 IOWA L. REV. 505 (1925).

⁷ See note 3 *supra*.

bank does not have sufficient possession to satisfy this requisite of a bailment.⁸ Another ground of criticism is that the bank does not have the necessary intent to control the contents of the box, since the duty of the bank is not that of controlling the box, but rather the negative duty of excluding unauthorized persons from access thereto.⁹

The tenancy theory has enjoyed only a meager following, primarily because the lessee or tenant is not given free, unencumbered access to the property rented as is an ordinary incident of a tenancy.¹⁰ The license theory has found little, if any, judicial support although it has been forcefully advocated on the analogy of a person renting a room in a house, the possession or control of which remains in the owner of the house while the renter has access to and the use of the room. It was urged that the contents of a safe-deposit box do not come into possession of the bank any more than the personal belongings of the renter of a room come into the possession of the owner of the house.¹¹

Despite plausible arguments for and against each proposed relationship, most courts in the language of typical opinions "... think it unnecessary to define the precise relationship between the parties,"¹² and regard arguments for the tenancy theory as "interesting but not persuasive."¹³ The West Virginia court, without mentioning the other possibilities, accepted the view that a bank is a bailee.¹⁴

Among jurisdictions which adhere to the bailment theory, there is a conflict of opinion as to what type of bailment is created. One view is that when a bank receives direct compensation for the safe-keeping of valuables, it is a bailment for hire, but when there is no direct compensation, a gratuitous bailment is created.¹⁵ The West Virginia court, however, has held in a case where there was no direct compensation, that "Banking institutions receiving articles of unusual value, and holding themselves out as having special facilities for their safe-keeping, are not accommodation bailees; the compensation being indirect benefits."¹⁶

⁸ Note, 11 MINN. L. REV. 440 (1926).

⁹ *Sawyer v. Lowell National Bank*, 230 Mass. 342, 119 N.E. 825 (1918).

¹⁰ *Morgan v. Citizens Bank*, 190 N.C. 209, 129 S.E. 585 (1925).

¹¹ See note 8 *supra*.

¹² *McDonald v. William Perkins & Co.*, 133 Wash. 622, 632, 234 Pac. 456, 459 (1925).

¹³ *Morgan v. Citizens Bank*, 190 N.C. 209, 213, 129 S.E. 585, 587 (1925).

¹⁴ *Hill v. Ansted National Bank*, 95 W. Va. 649, 123 S.E. 417 (1924).

¹⁵ *Merchants National Bank v. Guilmartin*, 88 Ga. 797, 15 S.E. 831 (1892).

¹⁶ *Hill v. Ansted National Bank*, 95 W. Va. 649, 657, 123 S.E. 417, 418 (1924)

Liabilities of the parties. Since the relationship between the bank and a renter of a safe-deposit box is that of a bailment for hire, ". . . the rules and principles of the rights and duties of a bailee for hire are generally applicable thereto."¹⁷ In the general law of bailments, in the absence of express provisions to the contrary, a bailee for hire is required to use that degree of care which would be exercised by a person of ordinary prudence and care in the protection of his own property.¹⁸ The orthodox rule, accepted in West Virginia,¹⁹ fixes the same duty of care on the bank as on any bailee for hire;²⁰ but there is some authority that a bank, in such circumstances, is under a duty to exercise the highest degree of care and is liable for loss resulting from slight negligence.²¹

Even though a bailment depends upon a contract, the bailor-renter, in suing the bailee-bank, is not limited to an action sounding in contract but may sue the bailee in tort for his negligence in the safe-keeping of the contents of the box.²² In such an action, the contributory negligence of the bailor-renter may afford a defense to the bank.²³

The relationship between the bank and the lessee of a safe-deposit box depends upon a contract express or implied. Today the contracts are almost universally express, taking the form of standard printed contracts. They contain various provisions which attempt to adjust the relationship between, and the rights, duties, and liabilities of, the parties. There is much uncertainty and conflict as to the validity of these provisions. Generally, their legality will depend upon the type and degree of departure from the usual incidents of bailment which they attempt.

As with any other bailment, the parties may by special provision define their rights and liabilities, where the provisions are explicit and unambiguous, and do not contravene public policy.²⁴ Thus a bank may, by special contract, and in the absence of a prohibitive statute, assume the liability of an insurer.²⁵ There is more doubt concerning a contract which attempts to restrict the liability of the bank. Such provisions vary widely, the most com-

¹⁷ Wilson v. Citizens Central Bank, 56 Ohio App. 478, 480, 11 N.E.2d 118, 119 (1936).

¹⁸ BROWN, LAW OF PERSONAL PROPERTY 284 (1936).

¹⁹ See note 14 *supra*.

²⁰ See note 3 *supra*.

²¹ Underhill v. United States Trust Co., 195 Ky. 149, 241 S.W. 812 (1922).

²² See note 17 *supra*.

²³ Saddler v. National Bank, 335 Ill. App. 18, 80 N.E.2d 387 (1948).

²⁴ Schaefer v. Washington Safety Deposit Co., 281 Ill. 43, 117 N.E. 781 (1917).

²⁵ Roberts v. Minier, 240 Ill. App. 518 (1926).

mon one and definitely the most troublesome one taking the form of an attempt to exempt the bank from liability for its negligence.

At one time many courts permitted the bank to contract itself out of liability for negligence, regardless of degree,²⁶ and most courts would permit contractual exemptions from liability for all but gross negligence.²⁷ However, the modern tendency is to invalidate such sweeping exculpatory clauses, when used by those whose contracts for bailment are entered into in the course of the bailee's general dealings with the public.²⁸ A bank or safe-deposit company might be deemed such a bailee, and a number of more recent decisions reach this conclusion. The part of a provision that "The lessor shall use due diligence that no unauthorized person shall be admitted to any rented safe, and beyond this the lessor shall not be responsible for the contents of any safe rented from it", has been said to be intended to fix only ". . . the degree of care required to be exercised by the defendant, not in guarding the property placed in its charge, but in the identification of parties claiming to be customers. It follows that the defendant was called upon by law to use that degree of care . . . which is demanded from a bailee for hire . . ." ²⁹ Another variation of the same type of provision is seen in a West Virginia case, where an acknowledgment of the receipt of valuables provided, ". . . same to have the same protection as we give our own bonds, securities, cash, etc. But further than this we do not assume responsibility, that is to say, should burglars blow open the safe and steal the bonds, we will not be responsible." The court, without discussing the validity or effect of the writing, said that the bailee's exercise of the same degree of care as it exercised over its own property of similar character was merely prima facie evidence of diligence rebuttable by proof that the bank was negligent in the care of its own property and concluded that the jury was warranted in finding that the bank had not exercised reasonable care.³¹ This was a receipt and not a term in a written bailment contract, but it is submitted that, had it been the latter, the result would have been no different. A provision substantially similar, incorporated in a written bailment contract, has been dismissed if intended as limiting the bank's

²⁶ Willis, *Right of Bailees to Contract against Liability for Negligence*, 20 HARV. L. REV. 297 (1906).

²⁷ *Ibid.*

²⁸ Note, 175 A.L.R. 111 (1948).

²⁹ McDonald v. Perkins & Co., 133 Wash. 622, 637, 234 Pac. 456, 461 (1925).

³⁰ See note 14 *supra*.

³¹ *Ibid.*

liability for negligence, since the law fixes such liability.³² However, other jurisdictions do give effect to such provisions,³³ although subject even there to being strictly construed against the bank.³⁴

Two restrictive provisions used by some banks in West Virginia invite attention. One is that the bank under no circumstances should be considered as a bailee, nor otherwise in control or possession of the contents of a leased box, the relation being solely one of landlord and tenant. This is of doubtful practical significance because ". . . regardless of how the relationship is regarded, . . . whether it is that of bailor and bailee or of landlord and tenant, the rule governing the liabilities of the parties is the same."³⁵ The other is that an unauthorized opening shall not be presumed or inferred from proof of partial or total loss of contents. Again this would seem of negligible importance since a prima facie case of liability is established by a showing of delivery of the property to the bank, under the contract, and failure of the bank to return upon demand.³⁶

It is submitted that such exculpatory provisions should not be valid, since to adopt any other course would permit the bank to escape liability for breach of a duty which the ordinary renter, without any knowledge of the law involved, would naturally assume the bank to bear.

Rights of third parties. With the construction of larger and stronger vaults and the employment of better means in general to safeguard the holdings of banks, chances are rapidly diminishing that a deposit company will incur liability for a theft or loss of property caused by its negligence. The greater problem for the deposit company arises when it is called upon to grant access to a deposit box to a third person who is acting under legal process or color of same.

When the contents of a deposit box are sought under color of legal process, the character of the duty imposed upon deposit companies is subject to little dispute. One court has aptly said, "When property in the custody of a bailee for hire is demanded by third persons, under color of process, it becomes his duty to ascertain whether the process is such as requires him to surrender the property, and if it is not, then it is his right and duty to refuse,

³² *Sporsem v. First National Bank*, 133 Wash. 199, 233 Pac. 641 (1925).

³³ *Sagendorph v. First National Bank of Philmont*, 218 N.Y. Supp. 191, 218 App. Div. 285 (1926); *Sturm v. Boker*, 150 U.S. 312 (1893).

³⁴ *Langford v. Nevin*, 117 Tex. 130, 298 S.W. 536 (1927).

³⁵ *Wilson v. Citizens Central Bank*, 56 Ohio App. 478, 480, 11 N.E.2d 118, 119 (1936).

³⁶ See note 10 *supra*.

and to offer such resistance to the taking, and adopt such measures for reclaiming it if taken, as a prudent and intelligent man would if it had been demanded and taken under a claim of right to the property by another without legal process."³⁷ The property there involved was taken from the deposit box by officers acting under a search warrant whose property description materially varied from that of the property in the safety box. The deposit company was held liable, having registered only a formal complaint against the officers' entrance into the vault.

The result represents an application of the orthodox general principle that a delivery of bailed property by the bailee to one, not the true owner and not authorized by the bailor to receive it, is of itself a conversion.³⁸ Moreover, when the deposit is founded upon express contract, as is normal today, it is common for the deposit company expressly to contract to restrain unauthorized entrance by third persons except under legal process, and liability is present on purely contractual principles when loss occurs by entrance under irregular process.

If the process is regular and of the type which lawfully can be directed against safety deposit boxes, the deposit company is exempt from responsibility for subsequent acts of officers seizing the property. The problem is to determine the types of process which may be directed against a safe-deposit box. There is complete disagreement over whether a deposit box may be reached by garnishment. On the theory that the deposit-company has no possession of the property in the deposit-box, some courts have refused to allow a garnishment writ to be directed against the property therein,³⁹ while other courts approve its use.⁴⁰ Several states have resolved the issue by statute.⁴¹ An attachment proceeding, it is agreed, may reach safe-deposit property.⁴² When the contents of the deposit box are attached or garnished, the deposit company is not liable for property of third persons taken from the debtor's box because such property is confused with the debtor's.⁴³ The remedy of the third person would be appropriate action against the levying officers.

³⁷ *Roberts v. Sturvesant Safe-Deposit Co.*, 123 N.Y. 57, 66, 25 N.E. 294, 296 (1890).

³⁸ *Baer v. Slater*, 261 Mass. 153, 158 N.E. 328 (1927).

³⁹ *Medlyn v. Ananieff*, 126 Conn. 169, 10 A.2d 367 (1939).

⁴⁰ *Blanks v. Radford*, 172 Ky. 75, 188 S.W.2d 879 (1945); *Morris v. Beatty*, 323 Ill. App. 390, 55 N.E.2d 830 (1944).

⁴¹ 1 VA. CODE tit. 6, § 264.1 (*Michie*, 1950); WIS. STATS. § 267.025 (1951) provide for the garnishment of safe-deposit box contents.

⁴² *Carples v. Cumberland Coal & Iron Co.*, 240 N.Y. 187, 148 N.E. 185 (1925).

⁴³ *Wilson v. Lane*, 33 N.H. 466 (1856).

Joint tenants. Special problems have arisen where plural renters contract for a single safe-deposit box. Breach by the deposit company of a provision that the bank will give access to the renters only jointly and not individually may render the company liable for the contents removed from the box.⁴⁴

Whether the renters are joint tenants with rights of survivorship in the contents has been answered in line with the current disfavor of joint survivorship, by refusing to find a joint tenancy in the absence of a clear intention disclosed by the terms of the instrument.⁴⁵

C. B. F.
W. T. S.

LIABILITIES UNDER PROMOTER'S CONTRACTS.—It is often necessary in the organization of a corporation for those persons promoting the organization to make contracts with outsiders on behalf of the proposed corporation before its organization is completed. The necessity for such contracts raises many problems with regard to the liabilities of the promoters, the corporation, or both. Before an understanding of these problems is possible, it is necessary to ascertain just exactly what a promoter is. "A promoter is a person who brings about the incorporation and organization of a corporation, and who brings together the persons who become interested in the enterprise, and who aids in procuring subscriptions and sets in motion the machinery which leads to the formation of the corporation."¹ A promoter is not the agent of the corporation and cannot contract for it.² This is because the organization of the corporation has not been completed and thus there is no principal in existence. Several West Virginia cases have spoken of the promoters as agents although it seems that the court did not actually treat them as such.³

It has been held throughout the United States that a corporation is not liable upon contracts made on its behalf by its promoters before incorporation unless after incorporation it expressly

⁴⁴ *First National Bank v. Fite*, 131 Tex. 523, 115 S.W.2d 1105 (1938).

⁴⁵ *In re Jirovec*, 285 Ill. App. 499, 507, 2 N.E.2d 354, 357 (1936).

¹ *Cox v. National Coal & Oil Investment Co.*, 61 W. Va. 291, 56 S.E. 494 (1907).

² *Clifton v. Tomb*, 21 F.2d 893 (4th Cir. 1927); BALLANTINE, *MANUAL OF CORPORATION LAW & PRACTICE* 155 (1930).

³ *Wallace v. Eclipse Pocahontas Coal Co.*, 83 W. Va. 321, 98 S.E. 293 (1919); *McCullough v. Clark*, 81 W. Va. 743, 95 S.E. 787 (1918).