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Rights of a Plaintiff With Reference to Property Delivered to Him Under a Detinue Bond

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RIGHTS OF A PLAINTIFF WITH REFERENCE TO PROPERTY DELIVERED TO HIM UNDER A DETINUE BOND.—At the common law, the plaintiff in an action of detinue did not get possession of the property until after final judgment and the issuance of execution. Only in the action of replevin did he get possession of the property before judgment. In West Virginia, the action of replevin has been abolished by statute and the action of detinue has been expanded so as to give the plaintiff the same interlocutory relief by way of getting preliminary possession of the property which he formerly got by the action of replevin.[1] In order to get possession,

[1] W. Va. Code, c. 102; Robinson v. Woodford, 37 W. Va. 377, 16 S. E. 602 (1892); Young v. Edwards, 64 W. Va. 67, 60 S. E. 992 (1908).

the plaintiff must file "an affidavit stating the kind, quantity, and value of the property claimed by the plaintiff in such action, and that the affiant verily believes the plaintiff is entitled to recover the same therein."[2] He must also file a bond, "with condition to pay all costs and damages which may be awarded against him, or sustained by any person by reason of such suit, and to have the property so claimed forthcoming to answer any judgment or order of the court or justice respecting the same, made at any time during the pendency of the action."[3] This bond serves the same purpose as the common-law replevy bond and is frequently referred to as a replevy bond.

In a recent case,[4] the West Virginia Supreme Court of Appeals found occasion to discuss the rights and powers, pending the action, of a plaintiff who has taken possession of property under such a bond. Certain creditors, it seems, had separate judgments against a common debtor. Executions issued in pursuance of these judgments were levied by the sheriff and a constable upon an automobile then in the possession of the debtor and the sheriff and the constable took possession of the automobile. Thereupon, a third party, claimant of the property, brought an action of detinue against the judgment creditors and the officers who had levied the executions, executed a proper affidavit and bond, and took possession of the automobile. Pending the action, the automobile was placed in storage by the plaintiff and at the date of the judgment storage charges had accumulated to the amount of $146.25. The trial court rendered judgment for the plaintiff and included in the judgment, under the designation of "costs", a recovery for the amount of the storage charges. On petition of the defendants in the detinue action, the Supreme Court of Appeals issued a writ of prohibition restraining the collection of this sum. The court, it is believed, plainly demonstrates that it is an improper item of recovery, either as "costs" or damages, the statute permitting a recovery of damages by the plaintiff only for detention of the property by the defendant.[5] In undertaking to explain that the plaintiff had assumed an unnecessary burden in putting the property in storage and permitting the charges to accrue pending the action, the court, by way of dictum, makes the following statement:

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[2] W. Va. Code, c. 102, § 1.

[3] *Idem.*

[4] H. P. Dils & Sons *v.* Waugh, 129 S. E. 703 (W. Va. 1925).

[5] However, that the plaintiff's contention was not entirely illogical or unreasonable, is indicated by the fact that relief of a more or less similar nature is given by statute in some of the states. See Pa. Statutes, 1920, § 18972; Page and Adams, Ohio General Code, Vol. 5, §§ 12057, 12063.

"Here the damages claimed by the plaintiff accrued to it while the property was in its possession. It had the use of the automobile, and could have sold it, before there was any depreciation in its value, or without incurring storage charges. It was eventually answerable only for the value of the car, under its bond. *Gordon* v. *Jenny, supra.* The statute contemplates this by requiring the jury to find the value of the property in question, as well as the right to possession. In this case the plaintiff's claim did not arise by reason of defendant's actual detention of the property. By either using the automobile, or by converting it into money, plaintiff could have saved dead storage charges, and at least reduced to a minumum the depreciation claimed."

Apparently, this statement is intended to establish the conclusion that the detinue bond is an absolute substitute for the property in an action of detinue. Seemingly, it is considered that the plaintiff, after getting possession of the property by virtue of the bond, not only has the power, but has the right, to deal with the property as his own and, before the title has been finally adjudicated, to make such disposition of it as to place it forever beyond the reach of the defendant. The court, saying that "the statute contemplates this", would seem to indicate that the statute commends and encourages a use or sale of the property by the plaintiff. If such is the conclusion to be drawn, it would appear that any person, through the mechanism of an action of detinue, may be compelled to suffer a forced sale of his property, and that too without the privilege of fixing the amount of the purchase price; for if the plaintiff has the power to sell, of course he must have the power to pass title. In view of the radical results that may come from a too literal and comprehensive application of the statement, an application perhaps not intended by the court, it is deemed pertinent to inquire into the holdings of other courts where the question has actually been adjudicated.

The only case cited by the court in the principal case to sustain its conclusions is the Massachusetts case of *Gordon* v. *Jenney,*[6] which was an action of replevin. As the court indicates, owing to the effect of the local statutes already referred to, cases of replevin from other states may be accepted as authorities in point in this state. It should be noted, however, that the modern action of replevin in most cases is largely a statutory action and an interpretation of the decisions usually involves matters of local statutory construction. For this reason, the courts express a reluctance to

[6] 16 Mass. 465 (1820).

seek the aid of outside decisions for the purpose of settling controverted questions. It will be found, however, that for the purpose of determining the rights of a plaintiff under a replevy bond, the majority of the courts are largely controlled by two considerations: (1) the nature of the condition in the bond, and (2) the nature of the defendant's property rights.

Originally, the action of replevin was proper only where the plaintiff undertook to recover property that had been distrained by the defendant.[7] The ground of recovery was that the distraint had been unlawful.[8] The title to the property was not in dispute. So strictly was this true, that a mere claim of title by the defendant prevented a replevy of the property and of course caused an abatement of the proceeding.[9] Hence in these first cases, the replevy bond was always a sufficient protection for the defendant and could logically be treated as an absolute substitute for the property. In fact, it seems that the earliest replevy bonds were not conditioned for the return of the property at all.[10] In modern times, either by expansion of the common law or by virtue of statute, the field of replevin has been expanded so as to cover not only all instances of unlawful taking but likewise an unlawful detention of property, regardless of the manner in which the defendant acquired possession. Hence in most states the statutes require the bond to be conditioned for the return of the property. Where the bond is not conditioned for the return of the property, it has been held that the bond is an absolute substitute for the property.[11] Consequently, when the plaintiff gets possession of the property by virtue of such a bond, it is held that he may deal with it as his own and, of course, may sell it and pass title to a third party. In other cases, regardless of the nature of the condition of the bond, it is held that the bond may be regarded as a substitute for the property when the defendant does not claim title to the property, as where he held it for the mere purpose of securing the payment of a debt.[12] In such cases, of course, the nature of his possession or special property interest would rebut any presumption that he was interested in the intrinsic value of the specific property. But

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7 3 STREET, FOUNDATIONS OF LEGAL LIABILITY, c. XVI.
8 *Idem.*
9 *Idem,* pp. 212-213.
10 *Idem,* p. 211.
11 Smith *v.* McGregor, 10 Oh. St. 461 (1860).
12 Bruner *v.* Dyball, 42 Ill. 34 (1866), citing Speer *v.* Skinner, 35 Ill. 282 (1864); Gimble *v.* Ackley, 12 Iowa 27 (1861); Union Nat. Bank of Oshkosh *v.* Milburn & Stoddard Co., 7 N. D. 201, 73 N. W. 527 (1897). See Lockwood *v.* Perry, *infra.*

where the general ownership of the property is in dispute, and the bond is conditioned for a return of the property, the weight of authority seems to be to the effect that the bond is not a substitute for the property, and that the plaintiff, pending the action, has no right to make any disposition of the property that will impair the rights of the defendant as a possible owner depending upon the final judgment of the court.[13] During the interval between the replevy of the property and the final judgment, the property is said to be in the custody of the law.[14] The Indiana court, referring to the nature of the plaintiffs' possession, says, "they were in custody by virtue of the process of the court, and really as its agents."[15] The Montana court, answering the contention that the plaintiff has a right to make a disposition of the property pending the action, says:[16]

> "This theory would give the property to a party confessedly in the wrong, and authorize him to convert it to his own use at pleasure, while he could only be held to account for its value. The law does not give any such privilege to a wrong-doer."

This case emphasizes the fact that the plaintiff's possession is only tentative and temporary, depending upon the result of the final adjudication, the very object of the action being to make a disposition of the specific property and not to compensate in damages. Following are the views of the Illinois court:[17]

> "It is again insisted that, inasmuch as the statute requires the plaintiff, in an action of replevin, to execute a bond and security for the return of the property before it is delivered to him, the only remedy of the defendant, in case the plaintiff fails to succeed, is by a recovery on the bond. All the authorities agree, that the suing out of the writ of replevin and obtaining possession of the property under the writ in no wise changes the ownership. The plaintiff does not thereby become the owner of the property. He simply, under the law, becomes its custodian, until the right is determined by a judgment of a court on a trial of their respective claims of ownership. Before he can obtain the property, he is required to give bond with security for the return of the property if he fails to establish his right, and, if he does not establish his right, the judgment is, that he shall return it to the

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[13] Schwartz *v.* Pillow, 50 Ark. 300, 7 S. W. 167, Am. St. Rep. 98 (1888); Lockwood *v.* Perry, 50 Mass. 440 (1845); Maunausau *v.* Wallace, 87 Mich. 543, 49 N. W. 1082 (1891); Mohr *v.* Langan, 162 Mo. 474, 63 S. W. 409, 85 Am. St. Rep. 503 (1901); Hawkins *v.* Taylor & Bush, 15 Mo. App. 238 (1884); Caldwell *v.* Gans, 1 Mont. 570 (1872); Farnham *v.* Chapman, 60 Vt. 338, 14 Atl. 690 (1888). See cases cited in preceding note and *infra.*

[14] *Idem.*

[15] Pipher *v.* Fordyce, 88 Ind. 436 (1882).

[16] Caldwell *v.* Gans, n. 13 *supra.*

[17] Bruner *v* Dyball, n. 12 *supra.*

former possessor. It is then manifest, that he acquires no right by the suing out of a writ of replevin, obtaining possession of the property, and then dismissing his suit. If such were the case, any person could, at pleasure, become the owner of the property of another, against his will, only subject to the payment of such a price as should be fixed by a jury. The object of the bond required by the statute, is to give the defendant an additional remedy, in case the property is wasted or consumed, or, perhaps, when it has been sold to an innocent purchaser."

It will be noted that the court in this case hints that the plaintiff might pass title to an innocent purchaser. But there can be no implication from this language to the effect that the statute authorizes him to do so or that he has a right to do so. The fact that the purchaser must be an innocent one implies the turpitude that would attach to the unauthorized sale. Moreover, the fact that there may be even an innocent purchaser is denied by actual adjudication in other cases;[18] and it is further held that, pending the action, the property can not be taken from the plaintiff by process of law so as to jeopardize the rights of the defendant.[19]

It is pertinent to note that the purport of the broad statements in *Gordon* v. *Jenney,* the case cited to sustain the proposition in the principal case, has been considerably narrowed by a later opinion[20] expressing the views of the same court. Since *Gordon* v. *Jenney* is the only case cited to sustain the statements in the principal case, it may be excusable to quote somewhat at length from the later opinion.

"The position taken by the defendant, that the object and purpose of the writ of replevin are to transfer the possession of the article replevied to the plaintiff in replevin, is certainly well maintained, if by possession be understood a possession for the time being. The further position, that the plaintiff in replevin, after the service of the writ, has a right to sell the property thus replevied, and may give to the purchaser a good, indefeasible title, which will not be affected by a judgment in favor of the defendant in replevin, is one more difficult to be sustained. If it were limited to replevin in cases of wrongful distress of personal chattels for rent, or of cattle damage feasant, it might be more readily assented to; as in such cases the property is held by the defendant in replevin for a particular purpose, and he does not claim to be the owner of it. And where the plaintiff in replevin, who in such case is the actual owner, has

[18] N. 13 *supra.*

[19] Rhines *v.* Phelps, 8 Ill. 455 (1846); Pipher *v.* Fordyce, note 15 *supra;* McKinney *v.* Purcell, 28 Kan. 446 (1882). See cases cited in note 13 *supra.*

[20] Lockwood *v.* Perry, n. 13 *supra,* pp. 444-5.

given the requisite security, by a bond, to pay such rent, or such damages, if the property is not returned, it may be all that is requisite to do perfect justice between the parties. Whether a like principle should be applied to the case of replevin, in its extensive use now sanctioned by the laws of Massachusetts, requires more consideration.

"The proposition is, that any one who will avail himself of the forms of law in instituting his action of replevin, merely alleging property in himself, and giving bonds, may, upon the service of the writ of replevin, sell the property replevied. absolutely and by an indefeasible title, and thus divest the real owner of his property, irrespective of the judgment in the action of replevin. The language of this court, in *Gordon* v. *Jenney*, 16 Mass. 469, is strongly relied upon as sustaining such a doctrine. Taken literally, and without any restriction to its application to the facts before the court, it would sustain that view of the question. But, as it seems to us, it is to be qualified by reference to the circumstances of that case. The plaintiff was there insisting upon his right to recover damages, by reason of a deterioration of the value of the goods pending the action of replevin. In answer to his claim, the court say, he is entitled to no damages on this account: 'He may sell them. They are delivered to him upon the assertion that they are his property, and he has it in his power to deal with them as such.' But the case before the court was that of a plaintiff in replevin who was the real owner of the property replevied. That had been already settled. Such a plaintiff in replevin may, of course, deal with the goods replevied as his own. He has the possession and the right of property, and therefore all the facilities, and all the legal rights too, requisite to make a legal transfer. In ordinary cases, the purchaser buys subject to the question of the vendor's title; and we think none the less so because the vendor has acquired his possession under a writ of replevin issued upon his own representation, and which may be wholly unfounded in truth. We perceive no sufficient reason for sanctioning the broad doctrine, that by reason of the mere fact that he has acquired his possession through the instrumentality of a writ of replevin, his vendee has acquired thereby an indefeasible title as against everybody. It is doubtless true that the plaintiff in replevin has, by virtue of his writ, acquired the right of possession pending the action of replevin, and that the real owner cannot disturb that right during the pendency of the action, nor institute an action against a third person who may become possessed of the goods. And this is precisely the extent of the right exercised by force of a writ of replevin. This view of the question is fatal to the defence, as presented upon the general position, that by virtue of the writ of replevin and giving of bonds to prosecute the same, the property absolutely vested in the plaintiff in replevin."

It will be noted that under the West Virginia statute the bond is conditioned for the return of the property. The plaintiff undertakes to have it "forthcoming to answer any judgment or order of the court or justice respecting the same, made at any time during the pendency of the action." Hence under the authorities hereinbefore cited, the bond is not a substitute for the property, but merely supplies the defendant with a means of securing secondary relief in the event that the plaintiff does not live up to his legal obligation to return the property in the event of a judgment for the defendant. The common-law system of pleading prevails in West Virginia. The ordinary counts in detinue are largely fictitious. Most defenses are asserted under the broad general issue. Contrary to the situation prevailing in many of the states where the common-law procedure has been largely superseded by statutes, under the West Virginia procedure there is little in the pleadings to indicate to what extent or in what manner the title may be in dispute. Ordinarily, throughout the pendency of the action, the burden is on the plaintiff to prove title to the property and the presumption is that the defendant is the owner. Undoubtedly the reason why the law permits the plaintiff to get preliminary possession of the property, is in order that he may preserve specific property which he particularly desires to keep in lieu of claiming damages for its conversion. He does not take the property as a mere security for compensation. He is not permitted to take it because of any presumption that the defendant is insolvent or that he will in the interim do anything with his property that will interfere with the satisfaction of a money recovery. The object is solely to insure that the plaintiff will get the fruits of his final judgment for the specific property. For the same reasons, justice would require that the defendant's rights with reference to the specific property be equally protected. Consequently, the statute provides that the defendant may regain possession by giving a counter forthcoming bond.[21] This is reasonable. Since both parties can not have possession at the same time,[22] and the defendant's possession at the beginning of the action creates the presumption that he has the title, it is fair that he, on giving bond, should be favored with the final choice of possession pending the action. Nor, it is believed, can the fact that the defendant prefers to let

[21] W Va. Code, c. 102, § 4.

[22] It is interesting to note that in one state, if the property is of peculiarly intrinsic value to the defendant, the law does not permit the plaintiff to hold the property pending the action, but requires the officer to keep it. Page and Adams, Ohio General Code, Vol. 5, § 12058.

the plaintiff retain possession pending the action, rather than to give the counter bond and regain possession himself, create any presumption that the property has been finally surrendered to the plaintiff. The condition of the plaintiff's bond is that he will keep the property subject to the order of the court. The defendant has a right to trust that the plaintiff will not violate the condition of his bond. Moreover, the defendant may not be financially able to give bond with the proper security, and his poverty should not be permitted to operate against him so as to compel a forced sale of his property. The language of the statute would indicate that the primary relief which it contemplates is recovery of the specific property.[23] That this is true when judgment is rendered for the plaintiff is clearly indicated in a late decision.[24] The facts of the case were as follows: Bills sued Monroe in detinue to recover a cow. Pending the action, Monroe sold the cow to Damecki. Bills recovered judgment in the usual alternative form and execution was issued. A deputy sheriff, claiming that he was unable to find the cow, seized the alternative value and tendered it to Bills. Bills refused to accept the money value and the deputy sheriff deposited the money with the clerk of the court. Bills caused a second execution to be issued and placed in the hands of a constable, who took the cow from Damecki and delivered her to Bills. Thereupon, Damecki brought an action of detinue against Bills to recover the cow. It was contended on behalf of Damecki that the tender to Bills of the alternative value by the deputy sheriff precluded him from thereafter claiming any property in the cow. In answer to this contention, the court says:

> "In an action of detinue to recover specific property, a sheriff's return on a writ of distringas, showing execution by taking the alternative value of the property, does not preclude the plaintiff who declines to accept such alternative value from obtaining the specific property under another writ subsequently issued.
>
> "A plaintiff in detinue is entitled to insist on having the specific property, if obtainable, and is not required to accept the alternative value of the property recovered, on a tender by the sheriff, until reasonable efforts to obtain the specific property have failed."

The court, in finding that Bills, in the second action, was entitled to retain the property, decided that there could not be a valid sale

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[23] W. Va. Code, c. 102, § 6.
[24] Damecki *v.* Bills, 88 W. Va. 246, 106 S. E. 629 (1921).

of the property by Monroe pending the first action. The court says:

> "One who purchases from a party to a pending action of detinue the subject matter involved in the litigation takes it subject to the final disposition of the case, and is bound by the judgment that is entered against the party from whom he derived title."

While this was a case adjudicating the rights of the plaintiff, it should be noted that the statute places the rights of the defendant on a precisely equal basis, the form of the judgment being the same in either case.[25] If it is necessary to look beyond the terms of the statute for the purpose of defining the defendant's rights, it is believed that, independently of the statute, there are reasons why the defendant's rights to the specific property should be protected even more strictly than the rights of the plaintiff. The defendant is the party who was originally in possession and the effect of his original possession is to create a presumption, throughout the pendency of the action, that he has title to the property.

Of course, pending an action of detinue, the plaintiff may in any case undertake to make a sale or other disposition of the property. There is no physical force to prevent him, and if he finally gets judgment for the property, the sale or other disposition cannot be disturbed by the defendant. The plaintiff may conscientiously be willing to take such a risk, depending upon the circumstances of the case; or he may act with utter disregard for the defendant's rights. But when he so acts, may he not be subjecting the rights of the defendant to a risk not contemplated by the law? When he so acts, is he not acting in spite of the law, rather than in pursuance of the law? Does the law contemplate that the defendant's property rights should depend upon the plaintiff's sagacity by way of predicting what the future judgment of the court will be?

This discussion should not be concluded without suggesting that the circumstances of the principal case may be such as to bring it within a class of exceptions heretofore noted to the general rule. It will be recalled that the principal defendants were interested in the property only as execution creditors, and presumably had no interest in the specific property as such. They were interested merely in securing a monetary satisfaction of their debts.

—L. C.

[25] W. Va. Code, c. 102, § 6.