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Garnishment

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"A MORE GLORIOUS EDIFICE THAN GREECE OR ROME EVER SAW" - - -

In his matchless eulogy on General Washington in 1832, Daniel Webster closed with the words quoted below. Now, 110 years later, when we must defend our heritage against "enemies foreign and domestic," we bring them respectfully to your attention.

"Other misfortunes may be borne, or their effects overcome. If disastrous wars should sweep our commerce from the ocean, another generation may renew it; if it exhaust our treasury, future industry may replenish it; if it desolate and lay waste our fields, still, under a new cultivation, they will grown green again, and ripen to future harvests.

"It were but a trifle even if the walls of yonder Capitol were to crumble, if its lofty pillars should fall, and its gorgeous decorations be all covered by the dust of the valley. All these may be rebuilt.

"But who shall reconstruct the fabric of demolished government?

"Who shall rear again the well-proportioned columns of constitutional liberty?

"Who shall frame together the skillful architecture which unites natitonal sovereignty with State rights, individul security, and Public prosperity.

"No, if these columns fall, they will be raised not again. Like the Coliseum and the Parthenon, they will be destined to a mournful and a melancholy immortality. Bitterer tears, however, will flow over them than were ever shed over the monuments of Roman or Grecian art; for they will be the monuments of a more glorious edifice than Greece or Rome ever saw, the edifice of constitutional American liberty."

GARNISHMENT

Execution — Action by receiver of a bank in which the plaintiff brought garnishment proceedings against another bank in aid of execution on a judgment for plaintiff against defendant. From an order authorizing and directing garnishee to open a safety deposit box leased therefrom by defendant, to inspect contents thereof in the presence of the sheriff and attorneys for plaintiff and defendant, and disclose such contents for levy by the sheriff, defendant and garnishee appeal. Held, that the order of the trial court directing the garnishee to open such box and disclose the contents thereof for levy by the sheriff was primarily in direct aid of execution. Its object was to pave the way for an actual seizure of the property and not to determine the extent to

which the garnishee might be held liable. O'Conner v. McManus (First National Bank of Grand Forks, Garnishee), 299 N. W. 22 (N. D. 1941).

The court pointed out that the order of the lower court was in direct aid of execution, and strictly speaking this was not a garnishment proceeding. However, the facts of this case do raise the moot question as to whether a safety deposit box is subject to garnishment in North Dakota.

Whether a safety depositary may be charged as garnishee may usually be determined by reference to the rule concerning the character and exclusiveness of possession necessary in order to charge an agent or servant of the principal defendant.

The North Dakota law (Laws 1929, c. 188) states in substance: "Any creditor shall be entitled to proceed by garnishment in any court having jurisdiction of the subject of action against any person, including a public corporation indebted to or having property whatever, real or personal, in his or its possession or under his or its control, belonging to such creditor's debtor. . ."

The garnishee execution is a comparatively recent step in the direction of making practical remedies available to judgment creditors. Where the property sought to be reached is not in the garnishee's hands or under his control the proceeding will not lie. Wells v. Cole, 194 Minn. 225, 260 N. W. 520 (1935).

In determining whether such a depositary has sufficiently independent possession of the property to justify garnishee process against him, some stress has been laid upon the garnishee's lack of authority and ability to open the box or vault so as to make answer as to its contents, without the cooperation of defendant; but it has been held that this is not a consideration upon the validity of the garnishee process. Stehli Silks Corp. v. Diamond, 122 Misc. 666, 204 N. Y. S. 542 (1924).

The lessee of a safety deposit box places property in it and withdraws the same in privacy. Ordinarily no one knows what he has in the box, but it would seem unreasonable to presume that one would rent a box and then keep nothing in it. If the judgment debtor could sit by with valuable property in hs deposit box while the plaintiff holds a worthless judgment in his hands, it would make the garnishment statute seem but an empty gesture. Washington Loan & Trust Co. v. Susquehanna Coal Co., 26 App. D. C. 149 (1905).

Judge Hand, speaking for the court in National Safe Deposit Co. v. Stead, 250 Ill. 584, 95 N. E. 973, p. 977 (1911), said: "We think it clear that where a safety deposit company leases a deposit box or safe, and the lessee takes possession of the box and places therein his securities or other valuables, the relation of bailee and bailor is created between the parties to the transaction as to such property, and the fact that the company does not know

the character and description of the property which is deposited in such box does not change that relation any more than the relation of a bailee who should receive for safe keeping a trunk from a bailor would be changed by reason of the fact that the trunk was locked and the key retained by the bailor. . ." Contra, see Wells v. Cole, supra; and Farmers Sav. Bank v. Roth, 195 Iowa 185, 191 N. W. 987 (1923).

By the weight of authority, garnishment is a proper remedy to attach the contents of safety deposit box, although there is a conflict of opinion. In such cases it has generally been held that the court may cause the box to be opened to determine the garnishee's liability. 12 R. C. L. 805. In those jurisdictions in which it has been held that the contents of such a deposit box are not subject to garnishment, the decisions have usually been based on the ground that the relation created is not that of a bailor and bailee but is that of landlord and tenant. Dupont v. Moore, 86 N. H. 254, 166 A. 417 (1933); Wells v. Cole, supra; see also, Carples v. Cumberland Coal & Iron Co., 240 N. Y. 187, 148 N. E. 185, 39 A. L. R. 1211 (1925), where the Court of Appeals stated that the customer's control and possession of his box is not much different than would be the control and possession by a tenant of property in an office which he had rented from the owner of the building. But see, Lockwood v. Manhattan Storage & Warehouse Co., 50 N. Y. S. 974 (1898).

A few of the decisions on this subject conclude that if it develops that opportunities afforded for fraudulent concealment or the withholding by a debtor of assets from creditors through utilization of a safe deposit box are such that public policy dictates that attachable property so deposited should be rendered legally accessible, it can best be affectuated by statutory provision for a court order to that end, affording proper protection of rights of both bank and box holder, including a provision for opening the box with as little damage as possible and indemnifying the bank for its expense and damage, and adequately protecting the boxholder as to contents thereof other than property legally subject to attachment or execution. Medlyn v. Ananieff, 126 Conn. 16, 10 A. (2d) 367 (1939).

As is pointed out, most courts hold the relationship in safety deposit box cases to be that of a bailment for hire; and on that basis hold the contents of the box to be garnishable. This position is criticized on the ground that since the bank had no possession of the contents of the box, it could scarcely be said to be bailee or to have sufficient control to come within the garnishment statutes. Because of the bank's lack of possession of the contents of the box together with its high degree of control over access thereto, it is argued by some courts that the contract is inconsistent with either a bailment or a lease. The rights of the parties should be determined from their intent as evidenced by the contract. 19 Minn. L. R. 810.

If the box were not integrated into the vault, and were a separate box independent of the others, so that the box could be delivered to the officer on final judgment in the same manner as a trunk or chest, there would seem to be no difficulty in the conclusion that such a separate box, although locked, would be subject to garnishment, and that the garnishee be required to deliver the same under garnishment process and judgment. There, certainly, the box would be in the possession of the garnishee, and moreover it would be sufficiently under his control. And the box here is still a box in the possession of the garnishee, although integrated into a vault with other boxes. It has not lost its individual or separate character because of that fact. There is no determinative legal difference between such a box, merely because of a group system of convenience in construction and maintenance, as compared with one entirely separated from the vault. Wineman v. Clover Farms Dairy, 168 Miss. 583, 151 So. 749 (1934).

As said by the Utah Court in West Sugar Co. v. Hendrickson, 56 Utah 327, 190 Par. 946, p. 949 (1920), "It certainly would be a reproach to our jurisprudence and to the administration of the law if it were held that the law may successfully be defied by human agencies, and that courts cannot make their processes effective merely because valuable property may be locked and concealed in a steel safe or receptacle." Also see, State ex rel, Rabiste v. Southern, 300 Mo. 417, 254 S. W. 166 (1923).

The words "in his possession or under his control" contained in our garnishment statute should be taken to mean that the party garnished must have within his ready control or within his power to produce in court, the property or effects which are sought to be impounded by the garnishmeent. "Control" in the sense of the statute, does not necessarily mean that the garnishee has power to prevent the owner of a safety deposit box from going into it; but means such a possession and capacity to take and deal with, and produce in court, as would enable a garnishee to relieve himself of all liability by this producing of the property. Wells v. Cole, supra; 3 R. C. L. 69.

The prevailing view of the courts is that a bailor-bailee relationship is effected, and in their determination of that status they maintain that both elements of one are present, namely, possession in the bank of the contents of the box, and an assent to this possession. The law, as an incident to bailment, imposes a duty of reasonable care on the bailee, and this obligation of the bank would follow if the relation is deemed a bailment. National Safe Deposit Co. v. Stead, supra; Trainer v. Saunders, 270 Pa. 451, 113 Atl. 681 (1921). In Safe Deposit Co. of Pittsburgh v. Pollock, 85 Pa. St. 391, 27 Am. Rep. 660 (1877) the court determined the liability of the safe deposit company without reference to any question of bailment.

The general rule is that in order to constitute a transaction an actual bailment, there must be a delivery to the bailee. There must be a full transfer, either actual or constructive, of the property, to the bailee, so as to exclude the possession of the owner and all other persons, and give the bailee for the time being the sole custody and control thereof. Inasmuch as there is no bailment, it will seem difficult to support the right of a court to force the deposit company to disclose property in a safe deposit box belonging to the defendant, and later damage its own property for the purpose of taking possession of the property and delivering it up in direct opposition of the contract of the parties. Further, the exercise of such power seems unnecessary and unjustified, for if the property in the box is in the possession of the renter, it would be subject to attachment and levy as any other personal property in his possession.

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OUR SUPREME COURT HOLDS

In P. L. Keating, Pltf. and Respt., vs. F. H. Peavey & Company, Deft. and Applt., and The State of North Dakota ex rel, the Board of Railroad Commissioners of the State of North Dakota, Inter. and Respt.

That a bailment of grain to a public warehouseman is terminated by the destruction of the grain.

That defendant's answer, which alleges the destruction of the identical grain stored by plaintiff in its warehouse, states a defense to plaintiff's complaint which alleges conversion of the grain at a time subsequent to its destruction.

Syllabus by the court. Appeal from the District Court of Burleigh County, Hon. Fred Jansonius, Judge. Opinion of the Court by Burke, J. REVERSED.

In Frank A. Donaldson, Pltf. and Respt., vs. City of Bismarck, Deft. and Applt.

That the declaration in the Constitution that private property shall not be taken or damaged for public use without just compensation having been first made was intended to secure to owners, not only the possession of property, but also those rights which render possession valuable.

That where a city establishes, maintains and operates a dump near a dwelling then occupied by the owner as a home, with the result that the air in and about such dwelling becomes impregnated with ashes, and noxious and offensive odors to such an extent that the dwelling can no longer be occupied in comfort and with safety, and as a consequence the market value of the property is substantially depreciated, such property has been "damaged" within the purview of section 14 of the Constitution of North Dakota, which provides that "private property shall not be taken or damaged for public use without just compensation having been first made."