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Equitable Replevin

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EQUITABLE REPLEVIN

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Detinue and replevin, including their modern equivalents such as the code action to recover the possession of a chattel and claim and delivery proceedings, are most effective in bringing about an actual delivery or recovery of a chattel wrongfully withheld from the plaintiff when the defendant offers no resistance or when he resists only because of a dispute as to the right to possession. Difficulties arise, however, when the sheriff cannot find the article or when the defendant conceals it and refuses to surrender it to the sheriff, even after the defendant has retained possession pending trial by giving bond. Then the action or proceeding is likely to turn into one for damages in the amount of the chattel's value. Rather than run the risk that these common-law and statutory remedies may thus fail to be effective to obtain the chattel itself, a plaintiff who needs the article in specie and who fears that the defendant will frustrate the sheriff's efforts may regard equity as likely to be more successful through its *in personam* order that the defendant deliver the chattel to the plaintiff, under pain of punishment for contempt of court if he disobeys.

In what situations and on what criteria have such orders in equity, herein called equitable replevin, been awarded to compel specifically the return or delivery of chattels wrongfully withheld from the plaintiff?[1] The reported cases add up to 109 in which equitable replevin has been granted, and 41 in which resort to that remedy has been denied, including decisions on demurrer and after trial.

This article explores the relative adequacy of the equitable and other remedies in relation to each of the various types of chattels and considers the significance of some statutory changes. It does not deal, except incidentally, with the rescission or specific performance of contracts involving chattels or with injunctions to prevent the disposition of chattels. These situations involve factors beyond the present inquiry.

I

THE CHATTELS AND THE ADEQUACY TEST

A pretium affectionis. The classic subject-matter of equitable replevin has been the chattel having "a price of affection," a value to the

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[1] For other discussions, see RESTATEMENT, TORTS §§ 938, 946 (1939); McCLINTOCK, EQUITY § 45 (2d ed. 1948); 1 POMEROY, EQUITY JURISPRUDENCE § 185 (5th ed., Symons, 1941).

plaintiff resting chiefly upon emotional attachments. Notable examples were "a *horn,* which time out of mind had gone along with the plaintiff's estate, and was delivered to his ancestors in ancient time to hold their land by . . ." ;[2] an "old altar-piece made of silver, remarkable for a Greek inscription and dedication to Hercules," to which the plaintiff became entitled as treasure trove within his manor ;[3] a portrait by Gilbert Stuart of plaintiff's ancestor, Captain James Lawrence, a distinguished American naval officer in the War of 1812 ;[4] heirlooms consisting of plate, jewels, paintings and household furnishings that had come down through an old family ;[5] and a stone monument to the Confederate dead, erected through popular subscriptions.[6]

That a *pretium affectionis* as a basis for equitable replevin has not been confined to articles of antiquarian, historic or aristocratic associations is indicated by the decrees for the recovery in specie of paintings, antiques, musical instruments and household articles from a well-to-do family residence ;[7] a few antiques and pieces of ordinary furniture and jewelry, bequeathed by an aunt to her niece ;[8] silver, cutlery, bric-a-brac and china, English wedding presents to a mill-worker's wife ;[9] a diamond ring, inventoried at $250, a gift to the plaintiff from her mother ;[10] and a militia company's books and records.[11]

Compelling a pledgee to return a collection of pen and pencil sketches by contemporary European artists,[12] was based upon specific performance of contract. Trust relationships were used to justify an order to an agent to return a painting initially thought to be a "valuable original" worth £300 but which had turned out to be a Titian worth £5,000 ;[13] a decree that a bicycle club which had won the race the previous year turn over to the current winner the $60 cup that served as prize ;[14] an order that the outgoing head of a society of church officers return a silver tobacco box, enclosed in silver cases adorned with engravings and long

[2] Pusey v. Pusey, 1 Vern. 273, 23 Eng. Rep. 465 (1684). Lord Eldon thought this decision was based upon a *pretium affectionis,* apart from the land tenure significance of the horn. Nutbrown v. Thornton, 10 Ves. 160, 32 Eng. Rep. 805 (1804).

[3] Duke of Somerset v. Cookson, 3 P. Wms. 390, 24 Eng. Rep. 1114 (1735).

[4] Redmond v. New Jersey Historical Society, 129 N. J. Eq. 57, 18 A. 2d 275 (Ch. 1941), *modified in* 132 N. J. Eq. 464, 28 A. 2d 189 (Ct. Err. & App. 1942).

[5] Earl of Macclesfield v. Davis, 3 V. & B. 16, 35 Eng. Rep. 385 (1814) ; Carroll v. Lee, 3 G. & J. 504 (Md. 1832).

[6] McCullom v. Morrison, 14 Fla. 414 (1874).

[7] Barman v. Leckner, 188 Md. 321, 52 A. 2d 464 (1947) (on demurrer), 193 Md. 177, 66 A. 2d 392 (1949) (plaintiff lost at the trial on other grounds).

[8] Haydon v. Weltmer, 137 Fla. 130, 187 So. 772 (1939).

[9] Kershaw v. Merritt, 194 Mass. 113, 80 N. E. 213 (1907).

[10] Burr v. Bloomsburg, 101 N. J. Eq. 615, 138 Atl. 876 (Ch. 1927).

[11] Battalion Westerly Rifles v. Swan, 47 Atl. 1090 (R. I. 1901).

[12] Lang v. Thatcher, 48 App. Div. 313, 62 N. Y. Supp. 956 (3d Dep't 1900).

[13] Lowther v. Lowther, 13 Ves. 95, 33 Eng. Rep. 230 (1806).

[14] Wilkinson v. Stitt, 175 Mass. 581, 56 N. E. 830 (1900).

used by the society;[15] and a decree that dissident members of a Masonic lodge return the lodge's costumes, decorations, books and papers.[16] A watch, rings, gold seal and a pair of sleeve buttons, received by the plaintiff from her husband, were the subject of equitable replevin in Massachusetts under the statute authorizing that remedy where the chattel was so secreted that it could not be replevied.[17]

It was assumed in most of the cases in this group of chattels having a *pretium affectionis,* and made explicit occasionally, that a decree in equity was the only effective remedy for the recovery of the chattel in specie and that the only alternative was a jury's estimate of value in detinue, replevin or trover. This was thought to be inadequate because of the difficulty of measuring in money plaintiff's emotional interest and because of the plaintiff's need for the article itself. "A jury might not give two-pence beyond the weight."[18] Save in two cases,[19] where replevin had been tried without result and where the jewelry had been so secreted that it could not be replevied, there was no consideration of the capacity or lack of capacity of replevin to bring about a recovery or delivery of the chattel in specie. In the cases where trust principles were invoked, the relative adequacy of remedies was not a factor in the decisions.

Slaves. Prior to 1860 the Southern state courts, including that of North Carolina, frequently awarded equitable replevin for the recovery or return of slaves. It was enough for most courts that the plaintiff sought delivery of a slave in which he had a property interest,[20] unless, perhaps the slave was to be held for resale as merchandise.[21] No showing of peculiar interest or special value was required. This was presumed. Of course, proof of such a peculiar interest or special value strengthened the plaintiff's case.[22] Some courts, however, denied equitable replevin for slaves unless some such peculiar interest or special value were shown,[23] or unless the slave were concealed or in danger of

[15] Fells v. Read, 3 Ves. 70, 30 Eng. Rep. 899 (1796).
[16] Lloyd v. Loaring, 6 Ves. 773, 31 Eng. Rep. 1302 (1802).
[17] Davis v. Sullivan, 141 Mass. 76, 7 N. E. 32 (1886).
[18] Fells v. Read, *supra* note 15, at 71, 30 Eng. Rep. 899.
[19] Battalion Westerly Rifles v. Swan, 47 Atl. 1091 (R. I. 1901); Davis v. Sullivan, *supra* note 17.
[20] Hull v. Clark, 14 S. & M. 187 (Miss. 1850); Butler v. Hicks, 11 S. & M. 78 (Miss. 1848); Murphy v. Clark, 1 S. & M. 221 (Miss. 1843); Lewis v. Kemp's Executor, 38 N. C. 233 (1844); Freeman v. Perry, 17 N. C. 243 (1832); Stearns v. Ely, 16 N. C. 493 (1830); Jones v. Zollicoffer, 4 N. C. 645, 657 (1817); Mulford v. ———, 3 N. C. 244 (1803); Anon., 3 N. C. 134 (1801); Sims v. Shelton, 2 Strob. Eq. 221 (S. C. 1848); Bobo v. Grimke, 1 McMul. Eq. 304 (S. C. 1841); Young v. Burton, 1 McMul. Eq. 255 (S. C. 1841); *cf.* Snoddy v. Haskins, 12 Gratt. 363 (Va. 1855).
[21] Murphy v. Clark, *supra* note 20.
[22] McRea v. Walker, 4 How. 455 (Miss. 1840); Williams v. Howard, 7 N. C. 74 (1819); Horry v. Glover, 2 Hill Eq. 515 (S. C. 1837).
[23] Hardeman v. Sims, 3 Ala. 747 (1840); Baker v. Rowan, 2 Stew. & P. 361 (Ala. 1832); see the early Virginia cases referred to in Snoddy v. Haskins, *supra* note 20.

being lost.[24] Otherwise, it was thought that there was an adequate remedy at law.[25]

It was assumed in most of the slave cases that the only alternative to equitable replevin was an award of the value of the slave, in detinue, replevin or trover. Only the Alabama court[26] was confident that a law court could compel delivery. However, in a North Carolina case, the court remarked that juries in detinue proceedings often placed a high valuation upon the slave (in the alternative form of judgment) in order to enforce delivery.[27] In the two North Carolina decisions based on trust relationships, the adequacy test was excluded in one,[28] and included in the other.[29]

Furniture, household goods and furnishings. A wife, divorced for adultery, petitioned the divorce court to order the husband to return her household goods. The divorce court did so, but upon appeal the Massachusetts court, after ruling that the order was beyond the divorce court's jurisdiction, suggested that equitable replevin would lie.[30] In a later case, the same court upheld equitable replevin to enable the guardian of an insane woman to recover from a yardman and his relatives furniture, furnishings, and money wrongfully obtained from the insane person and taken by the others with knowledge.[31] In New Jersey, an executrix was granted a declaratory judgment by an equity court that she was entitled to the possession of household goods wrongfully withheld by a sister, so that she might carry out the distribution directed by the will.[32] In none of these cases was there any consideration of the relative adequacy of other remedies.

But an Illinois court thought that for the mere wrongful withholding of possession of the entire contents of a large apartment "there are simple and adequate legal remedies," making resort to equity unnecessary.[33]

Clothing and personal effects. In 1860, the Massachusetts court, in ruling that a sheriff could not be held liable for refusing to take in replevin a diamond pin worn on the defendant's shirt front, because it would constitute an illegal search and seizure, suggested that statutory

[24] Baker v. Rowan, *supra* note 23.

[25] In Ashley's Adm'rs v. Denton, 1 Litt. 86 (Ky. 1822) and in Ellington v. Currie, 40 N. C. 21 (1847) it was thought that equity had no jurisdiction to order delivery of a slave, unless there were a trust or a cancellation of an instrument involved.

[26] Hardeman v. Sims, *supra* note 23.

[27] Murphy v. Moore, 39 N. C. 118, 124 (1845).

[28] Freeman v. Perry, 17 N. C. 243 (1832).

[29] Williams v. Howard, 7 N. C. 74 (1819).

[30] Patterson v. Patterson, 197 Mass. 112, 83 N. E. 364 (1908).

[31] Puffer v. Hazzard, 240 Mass. 195, 133 N. E. 109 (1921); *cf.* Wood v. Rowcliffe, 3 Hare 304, 67 Eng. Rep. 397 (1844), 2 Ph. Ch. 382, 41 Eng. Rep. 990 (1847) (injunction granted to prevent sale of furniture and furnishings by a fiduciary, regardless of adequacy test).

[32] Wooten v. Harvey, 1 N. J. Super. 406, 61 A. 2d 756 (Super. Ct. 1948).

[33] Ordahl v. Johnson, 341 Ill. App. 277, 280, 93 N. E. 2d 377, 379 (1950).

equitable replevin for an article so withheld that could not be replevied "would afford ample redress in all cases where the property is so situated that it cannot be taken without interference with the person."[34] In 1909, the same court granted equitable replevin to an administrator to recover a boarder's clothing, watch, tools and $500, left with his landlady when he went to the hospital for what he feared would be (and was) a fatal illness.[35] There was no mention of the statute or of any adequacy test.

The Florida court, however, was more articulate as to the basis for relief, when in 1937 it upheld a preliminary mandatory injunction for the return of clothing and medicines and, that having failed because of evaded service, also upheld a sheriff's forceful seizure and return, under the equity court's direction, of the articles in question. A landlord, angered by the decision of the tenants, an elderly and ailing Bostonian and his daughter, to abandon the rented house in Miami because of vermin, had locked them out and denied them access to their clothing, medicine and other personal effects. The court said:

> ". . . where the remedy at law is not full, complete and adequate, or where complete relief is doubtful and a more ample and appropriate remedy may be thereby afforded, equity will take cognizance and give relief. . . . Under the facts . . . the complainants could not have full, complete and adequate relief in a court of law and . . . a more ample and appropriate remedy would be afforded by resort to equity. A sick person's medicines and a person's entire supply of wearing apparel, except that which they may have on their person at the time the other is taken from their possession, are not things that may be taken from one without authority of law and he, or she, be required to await the slow process of replevin or other law procedure, to regain possession of same. The necessity for the use of such articles is immediate and continuing. It is not a sufficient answer that such persons so deprived of the possession of such articles may go into the marts of trade and buy more and resupply themselves with the same class of articles which have been wrongfully taken from their possession. Although by doing so and awaiting process of a court of law, such person might have ultimate and complete remedy, that remedy would not be full and adequate as would be the remedy which he may have by proceeding in equity, as was done in this case."[36]

[34] Maxham v. Day, 16 Gray 213, 219 (Mass. 1860); *cf.* N. C. GEN. STAT. § 1-480 (1953): ". . . and if the property is upon the person the sheriff . . . may seize the person, and search for and take it."

[35] Nelson v. Peterson, 202 Mass. 369, 88 N. E. 916 (1909).

[36] Price v. Gordon, 129 Fla. 715, 721, 177 So. 276, 279 (1937).

Professional creations. In *McGowin v. Remington*,[37] the Pennsylvania court in 1849 awarded a surveyor equitable replevin for maps and survey notes, and an injunction against copying, destroying or secreting them. Some of the maps and notes the surveyor had made; others he had copied from private records; others could not be reproduced. The defendant, in withholding these documents had violated a confidential relation. Replevin was thought to be inadequate, for defendant's claim of property and filing a bond would defeat reclamation. Damages would be inadequate, for it would be difficult to measure plaintiff's loss of business due to the lack of these facilities. Having thus taken jurisdiction, equity also ordered the return of the furniture and other ordinary chattels.

Similarly, the New Jersey court, a century later, granted an attorney a decree compelling a building and loan association to return a title plant containing some 5,000 abstracts of title.[38] The association had seized the plant and put it in its vault. The plant was the result of years of research by the attorney. Although he had served the association as director and counsel and had used the plant in examining titles for the association, the title plant had never become the property of the association. The court held the title plant to be subject to equitable replevin because it had a peculiar, artificial value for which adequate compensation could not be had at law.

But the Florida court had thought differently in 1921.[39] There, a title plant had been sold and delivered by a title company to a bank on condition that the stockholders of the seller ratified the transaction. They did not ratify and when the seller tendered the price and sought the return of the plant, the buyer refused delivery. The seller was denied equitable replevin on the ground that replevin would effect a recovery with damages for trespass or conversion; the abstracts had been made from public records still in existence and could be reproduced; no chattel involved was thought to have any peculiar nature.

And the English court of equity, in 1862, denied an artist a decree for the recovery of his painting "The Raising of Lazarus," under these circumstances:[40] He had delivered the picture to a dealer to be engraved and exhibited for a payment of £150, with the privilege of purchase for an additional £150. The dealer sold the painting for £375. The artist had been paid nothing. The court thought that what he wanted was

[37] 12 Pa. 56 (1849).

[38] Coven v. First Savings & Loan Ass'n, 141 N. J. Eq. 1, 55 A. 2d 244 (Ch. 1947), *aff'd* 142 N. J. Eq. 722, 61 A. 2d 236 (Err. & App. 1948); Note, 21 TEMPLE L. Q. 435 (1948).

[39] Hughes Trust & Banking Co. v. Consolidated Title Co., 81 Fla. 568, 88 So. 266 (1921).

[40] Dowling v. Betzemann, 2 J. & H. 544, 70 Eng. Rep. 1175 (1862).

specific performance, and restitution only if the price were not paid, and that damages for breach of contract or in trover would suffice.

> "It was, moreover, admitted at the Bar that the payment of the £300 would dispose of the whole question in the suit. . . . Upon this, an insuperable difficulty arises in the way of the jurisdiction which this Court exercises to order the delivery of a specific chattel of a peculiar value, as in the *Pusey Horn* case. In such a case as this it appears to me that it would be an innovation on the practice of this Court, to say that a jury could not adequately estimate by damages the non-payment of a price fixed, as it is here, by the agreement of the parties."[41]

On the other hand, for other reasons former clients of an architect[42] and of an accountant,[43] respectively, were denied decrees to compel the architect and accountant to surrender their work sheets used in the production for the clients of plans and specifications and of income tax returns and asset re-evaluations: the work sheets were the properties of the professional men and not of the clients.

Letters and confidential papers. In *Dock v. Dock*,[44] decided in 1897, the Pennsylvania court granted equitable replevin for the recovery of personal letters wrongfully obtained and withheld by plaintiff's daughter-in-law. Some of the letters were written to the plaintiff by her son, the others by the plaintiff to her son. They were all taken from a bureau and a trunk in plaintiff's home for use in an alienation of affections suit against the mother. Equity's capacity to protect the plaintiff's right to prevent the communication or publication of the ideas expressed in her letters to her son was held to enable the court also to protect the plaintiff's title to the letters received from her son. Conversely, the English equity court refused to order a solicitor to deliver to a former client the client's letters to the solicitor or copies of the solicitor's letters to the client: the solicitor was entitled to keep both as his own property.[45]

In recent years, three decisions have made equitable replevin available to employers to recover from former employees various confidential papers used by the employees during the course of employment.[46] In one, the employee was using the papers to aid the employer's competitors; in all three the employee had refused to return the papers when employment ceased; in one he had initially removed the papers from company files.

[41] *Id.* at 553, 70 Eng. Rep. at 1178.
[42] Hutton v. School City of Hammond, 194 Ind. 212, 142 N. E. 427 (1924).
[43] Ipswich Mills v. Dillon, 260 Mass. 453, 157 N. E. 604 (1927).
[44] 180 Pa. St. 14, 36 Atl. 411 (1897).
[45] *In re* Wheatcraft, 6 Ch. D. 97 (1877).
[46] Union Switch & Signal Co. v. Sperry, 169 Fed. 926 (C. C. S. D. N. Y. 1909); Home Life Ins. Co. v. Morris, 7 N. J. Super. 512, 71 A. 2d 909 (Super. Ct. 1950); Industrial Electronics Corp. v. Harper, 137 N. J. Eq. 171, 43 A. 2d 883 (Ch. 1945), *aff'd* 137 N. J. Eq. 530, 45 A. 2d 671 (Err. & App. 1946).

The employees involved were a regional manager of an engineering firm, a life insurance salesman, and a branch sales manager for a manufacturer of lamps. The papers involved were blue-prints, diagrams, reports, photographs and letters; estate-planning materials relating to the situations and needs of particular prospects; and home-office statements, pay-roll sheets, and letters. The Federal court granted relief because the defendant's possession of the engineering papers was unjust and unlawful, the New Jersey court because replevin would not effectuate the return of the insurance and lamp papers and because damages would not be an adequate substitute.

But a Federal court, in 1898, although it granted a purchaser under a mortgage of a newspaper, its plant, franchises and good will an injunction against use of the newspaper's name by the mortgagor and assigns, refused to order the delivery of the books containing the names and accounts of subscribers and patrons: ". . . they are articles of which manual possession may be taken and which may therefore be recovered in an action at law. Therefore, a court of equity is without jurisdiction to assist the complainant in recovering possession of said property."[47]

Title papers. The courts have been generous in making equitable replevin available for the recovery or return in specie of deeds,[48] mortgages,[49] powers of attorney,[50] contracts,[51] letters, receipts, recorded testimony and other documents[52] relating to the title to land. Modern recording acts and land-title registration systems have perhaps reduced the need for title papers.[53] Nevertheless, when need arose, the courts have thought that the remedies other than equitable replevin were relatively ineffective to obtain possession of title papers and to prevent their transfer to innocent purchasers for value. Sometimes this was because a counter-bond from the defendant in replevin would defeat the object of that action. More often it was because damages could not be assessed or computed under the alternative judgment in detinue or replevin or in trover. Where the defendant violated a fiduciary relation to the plaintiff, equity's own jurisdiction over trusts supplemented the above listed

[47] Lawrence v. Times Printing Co., 90 Fed. 24, 26 (C. C. Wash. 1898).

[48] Tombler v. Sumpter, 97 Ark. 480, 134 S. W. 967 (1911); Williams v. Carpenter, 14 Colo. 477, 24 Pac. 558 (1890); Mills v. Gore, 20 Pick. 28 (Mass. 1838); Browne v. Cochran, 46 How. Pr. 427 (Sup. Ct. 1873); Kelly v. Lehigh Min. & Mfg. Co., 98 Va. 405, 36 S. E. 511 (1900); Danforth's Admr. v. Paxton, 1 Wash. St. 120, 23 Pac. 805 (1890).

[49] Pierce v. Lamson, 5 Allen 60 (Mass. 1862); Jackson v. Butler, 2 Atk. 306, 26 Eng. Rep. 587 (1742).

[50] Snoddy v. Finch, 9 Rich. Eq. 355 (S. C. 1857).

[51] Folsum v. McCague, 29 Nebr. 124, 45 N. W. 269 (1890).

[52] Pattison v. Skillman, 34 N. J. Eq. 344 (1881); Kelly v. Lehigh Min. & Mfg. Co., 98 Va. 405, 36 S. E. 511 (1900); Walker v. Daly, 80 Wis. 222, 49 N. W. 812 (1891). *Cf.* Pusey v. Pusey, 1 Vern. 273, 23 Eng. Rep. 465 (1684) (horn as symbol of land tenure).

[53] Kelly v. Lehigh Min. & Mfg. Co., *supra* note 52 (relief only on basis of specific performance of contract).

results of the adequacy test. And where the papers were so secreted that they could not be replevied, the Massachusetts court awarded statutory equitable replevin without more ado.

Equitable replevin for title papers has been denied in but few cases. The Georgia court thought that detinue, replevin and analogous proceedings were so adequate as to make equitable replevin unnecessary, where a holder of a deed in escrow refused delivery upon appropriate tender.[54] Before Massachusetts enlarged the equity powers of her courts, the plaintiff had not shown that the deed was so secreted that it could not be replevied so as to invoke statutory equitable replevin.[55] Of course, where the proof failed as to plaintiff's right to possession, relief was denied on the merits.[56] And a Canadian court, with two judges dissenting, refused restitution of an antimins, a consecrated lace napkin of slight monetary value used in the celebration of the mass as a badge or symbol of priesthood, though it was owned by the plaintiff national church and withheld by an excommunicated priest of a local church, because "the sole purpose of this claim, as that of the whole action, is to enforce obedience to a purely ecclesiastical sentence or decree."[57]

Funds and bank deposits. Equitable decrees for the restitution of funds and bank deposits have been granted in four cases. In one, a bank through deceit on the part of a depositor's widow, paid her the whole of the deposit. She put it in another bank, in her own name, became insolvent, and was about to withdraw the funds. The plaintiff bank owed the funds to the estate of its depositor. Garnishment was thought to be inadequate.[58] In another, in Massachusetts, money, savings bank books, and deeds had been obtained through fraud and undue influence by a nurse-housekeeper from an 83-year-old, insane widower, whom she married the next day. While a suit to annul the marriage was pending, this suit was begun to cancel the deeds and to recover the money and savings bank books. Jurisdiction was based upon equity's protection to the separate estates of the husband and wife.[59] Relying upon that decision, the same court a few years later compelled a husband to return to his wife money obtained from her through fraud and coercion and deposited in a bank in his own name.[60] The court thought in terms of

[54] Spence v. Brown, 198 Ga. 566, 32 S. E. 2d 297 (1944).

[55] Travis v. Tyler, 7 Gray 146 (Mass. 1856). For a case arising after general equity powers supplemented statutory equitable replevin, see Pierce v. Lamson, 5 Allen 60 (Mass. 1862).

[56] Mills v. Gore, 20 Pick. 28 (Mass. 1838).

[57] Ukrainian Greek Orthodox Church of Canada v. Trustees of Ukrainian Greek Orthodox Cathedral [1940], S. C. R. 586 [1940], 3 D. L. R. 670; Note, 19 CAN. BAR REV. 54 (1941).

[58] Traders' Bank of Canada v. Fraser, 162 Mich. 315, 127 N. W. 291 (1910).

[59] Lombard v. Morse, 155 Mass. 136, 29 N. E. 205 (1891).

[60] Frankel v. Frankel, 173 Mass. 214, 53 N. E. 398 (1899).

a trust and of equitable protection to a married woman's separate estate. In the fourth case,[61] a wife, about to undergo a serious operation, placed $3400 of her own money in her husband's care for safekeeping, with the understanding that it was to be returned to her if the operation were successful. It was, but the husband deserted her and deposited the funds in his name in an out-of-state bank. The Pennsylvania court found a trust. The wife could have sued at law but that remedy would not have been as effective as an equitable decree compelling the husband to return the money to her from the out-of-state bank.[62] This was the only resort in the bank deposit cases to any sort of an adequacy test, and it was applied, notwithstanding trust grounds.

Of course, these were hardly cases of equitable replevin, for, except as to the savings bank book in the case of the avaricious nurse, no chattel was to be returned in specie. However, they are closely analogous.

Insurance policies. Equitable replevin has been used to compel the delivery or return of life insurance policies in three cases. In one, suit was brought by the beneficiary against his daughter, after the death of the insured, his son, to obtain possession of the policy. Upon preliminary objection, the Pennsylvania Common Pleas Court held that replevin would not be as convenient, expeditious or efficacious as the equitable remedy.[63] In a Massachusetts case,[64] the assignee in bankruptcy of the insured (and beneficiary) of an endowment life insurance policy obtained an order in equity to compel the insurance company to deliver the policy, invalidly surrendered and discharged after the bankruptcy. The plaintiff needed the policy as evidence of his claim. He had no adequate remedy at law, and the company had so secreted the policy that it could not be replevied. The latter finding invoked statutory equitable replevin. In the third case,[65] the Massachusetts court permitted the first assignee of a life insurance policy to have a decree for the redemption of the policy from a second assignee who had taken it as security for a loan, on condition that the plaintiff pay the loan. The first assignee had not taken possession of the policy at the time of the assignment and had thus made the second assignment possible. The court treated the policy, not as a chattel, but as evidence of a non-negotiable chose in action.

Shares of stock. Equitable replevin has been freely awarded for the delivery or return of shares of corporate stock,[66] especially where there

[61] Ramsey v. Ramsey, 351 Pa. 413, 41 A. 2d 559 (1945).

[62] For cases ordering the restitution of cash, see the topics *Clothing and personal effects; Furniture, household goods and furnishings;* and *Contents of safe-deposit boxes.*

[63] Kaczmarczyk v. Walendziewicz, 39 Luz. Leg. Rep. 421, 61 York 200 (Pa. C. P. 1947).

[64] Brigham v. Home Life Ins. Co., 131 Mass. 319 (1881).

[65] Herman v. Connecticut Mutual Life Ins. Co., 218 Mass. 181, 105 N. E. 450 (1914).

[66] McGinnis v. First National Bank of Canton, 214 Ill. App. 295 (1919); Reid

was danger of transfer, or the withholding of the stock was a violation of a relationship of trust and confidence. The plaintiff's need for the particular stock in specie, a fear that replevin or damages would be circuitous and not as effective as equity in meeting that need, and the recognition of the stock as a symbol and evidence of property have combined to favor the equitable remedy. In Maine, the jurisdiction has been entertained under the statute, like that of Massachusetts, authorizing equitable replevin for chattels so secreted that they could not be replevied, as well as on general equity principles relating to the adequacy test.

But relief was denied on the merits where it would lead to unjust enrichment on the part of the plaintiff.[67] It was also denied on the merits where the plaintiff sought to recover shares of stock he had sold to the defendant as a result of the latter's misrepresentations, but it appeared that the shares were now in the hands of a bona fide purchaser, the plaintiff had not relied upon the misrepresentations, there was no fiduciary relation imposing a duty to disclose an offer to buy, the misrepresentations related to value, and the plaintiff only wanted the shares for resale.[68] And damages were awarded in lieu of restitution where the shares by mistake had been delivered to the wrong brokers and by them transferred to others so as to make relief in specie impossible.[69]

Notes, bonds and checks. Similarly, and for much the same reasons, equitable replevin has been made freely available for the delivery or return of notes,[70] bonds[71] and a check,[72] where the plaintiff needed the particular instrument itself, the withholding constituted a breach of a relation of trust and confidence, or there was a danger of transfer. The relative inadequacy of detinue, replevin or damages was vigorously asserted; only equity could meet the plaintiff's need for the instruments

v. Cromwell, 134 Me. 186, 183 Atl. 758 (1936); *cf.* Strout v. Burgess, 144 Me. 263, 68 A. 2d 241 (1949); Hill v. Rockingham Bank, 44 N. H. 567 (1863); *cf.* Currie v. Jones, 138 N. C. 189, 50 S. E. 560 (1905) (injunction against transfer); Taliaferro v. Reirdon, 186 Okla. 603, 99 P. 2d 522 (1940); Peoples-Pittsburgh Trust Co. v. Saupp, 320 Pa. 138, 182 Atl. 376 (1936); Steinmayer v. Siebert, 190 Pa. St. 471, 42 Atl. 880 (1899); Abbott's Exec. v. Reeves, 49 Pa. St. 494 (1865).

[67] Strout v. Burgess, *supra* note 66.

[68] Edelman v. Latshaw, 159 Pa. 644, 28 Atl. 475 (1894).

[69] Somerville National Bank v. Hornblower, 293 Mass. 363, 199 N. E. 918 (1936).

[70] Mayo v. Ford, 220 Ala. 426, 125 So. 684 (1930); Scarborough v. Scotten, 69 Md. 137, 14 Atl. 704 (1888); Holden v. Hoyt, 134 Mass. 181 (1883); Sears v. Carrier, 4 Allen 339 (Mass. 1862); Clapp v. Shepherd, 23 Pick. 228 (Mass. 1839); Gibbens v. Peeler, 8 Pick. 254 (Mass. 1829); Bindseil v. Smith, 61 N. J. Eq. 654, 47 Atl. 456 (Err. & App. 1900); *cf.* Yount v. Setzer, 155 N. C. 213, 71 S. E. 209 (1911) (injunction against transfer); Fairbanks' Admr. v. Keiser, 86 Vt. 210, 84 Atl. 610 (1912).

[71] McIntyre v. Smith, 154 Md. 660, 141 Atl. 405 (1928); Safe Deposit & Trust Co. v. Coyle, 133 Md. 343, 105 Atl. 308 (1918); Goodale v. Goodale, 16 Sim. 316, 60 Eng. Rep. 896 (1848).

[72] Thompson v. North, 191 Okla. 356, 129 P. 2d 1011 (1942) (attachment and garnishment inadequate).

in specie. It was thought, in addition, that the value of the instruments, as a substitute, would involve an inquiry into the financial conditions of numerous makers at the time of the conversion and forced sales to the defendants. Only equity could prevent transfers to bona fide purchasers. Where the instrument was so secreted that it could not be replevied the Massachusetts court granted statutory equitable replevin.

But the contrary has been held in six cases, five of them involving bonds,[73] the other bonds and a check.[74] Most of the courts thought, uncritically and with some vigorous dissents, that replevin or trover would be an adequate remedy, though barred in *Rawll v. Baker-Vawter* by the statute of limitations. In two cases, the court was not convinced that the plaintiff needed these particular bonds in specie. While no court seemed to be confident that replevin would actually effectuate a delivery or return of the instruments in question, most were confident that the value thereof would be a satisfactory substitute and that it could be computed in terms of the market value—it would be difficult but not impossible—even though the bonds were not listed on any exchange, there had been only sporadic sales, and the maker was practically defunct. In the Massachusetts case, it was fatal that collection of the bonds from the obligor-withholder would be sought as an incident of equitable replevin.

Contents of safe-deposit boxes.[75] The notes, bonds, checks, shares of stock, cash, jewelry, savings bank books, deeds, mortgages and other papers contained in or removed from safe-deposit boxes have frequently been the subject of equitable replevin. In three cases,[76] the plaintiff was the executor or administrator of the deceased owner, seeking to recover possession of the articles or of the key to the safe-deposit box from members of the family who withheld them, sometimes claiming as donees. In one case,[77] the plaintiff was a bank representing a lunatic wife, the defendant was her husband who had placed the securities in a safe-deposit box in another bank. In another,[78] a father sued his grown daughter to recover cash and bonds which she had removed from his box, claiming that they were hers, entrusted to him for safekeeping.

[73] Sawyer v. A. T. & S. F. Ry. Co., 129 Fed. 100 (2d Cir. 1904); Dumont v. Fry, 12 Fed. 21 (C. C. S. D. N. Y. 1882); Friedman v. Fraser, 157 Ala. 191, 47 So. 320 (1908); Lloyd v. Imperial Machine Stamping & Welding Co., 224 Mass. 574, 113 N. E. 456 (1916); Rawll v. Baker-Vawter, 187 App. Div. 330, 176 N. Y. Supp. 189 (1st Dep't 1919), criticized by Pound, *The Progress of the Law-Equity*, 33 HARV. L. REV. 420, 428 (1920).

[74] Cone v. East Haddam Bank, 39 Conn. 86 (1872).

[75] Compare Note, *Replevin* [against the bank] *of the Contents of Safe Deposit Boxes*, 2 VAND. L. REV. 686 (1949).

[76] Farnsworth v. Whiting, 104 Me. 488, 72 Atl. 314 (1908); Mitchell v. Weaver, 242 Mass. 331, 136 N. E. 166 (1922); Schraft v. Wolters, 61 N. J. Eq. 467, 48 Atl. 782 (Ch. 1901).

[77] Equitable Trust Co. v. Garis, 190 Pa. St. 544, 42 Atl. 1022 (1899).

[78] Saunders v. Saunders, 31 Del. Ch. 514, 71 A. 2d 258 (1950).

Sometimes, the property had been so secreted that it could not be replevied and that, without more, made statutory equitable replevin available in Maine and Massachusetts. When the adequacy test was invoked the plaintiff's need for the contents of the box in specie, for inventory, accounting, payment of debts and distribution, rendered replevin and trover inadequate. Duplicate keys would not prevent defendant's access to the box. An award of the value would involve an investigation into the financial condition of every debtor and would result in a transfer of title to the defendant.

In the Pennsylvania case, the plaintiff was granted a preliminary injunction against removal or transfer and to permit immediate inspection for purposes of identification and inventory. The question of ownership was postponed until final hearing. In the Delaware case, defendant's motion for a trial of the issue of title before a jury in the law court was denied; the equity court had jurisdiction of the case and its discretionary decision as to the need for a jury trial was not reviewable.

On the other hand, the Maryland court in two cases denied equitable replevin for the recovery of the contents of safe-deposit boxes. In one,[79] the alleged inter vivos donee had placed two rings, a necklace and a pin, valued by her at $1750 but inventoried in the estate of the donor's mother at $565, in a safe-deposit box in a bank for safekeeping. The administrator of the deceased donor had obtained possession of the box, broken it open and taken out the jewelry. The donee's suit for equitable replevin was dismissed because the plaintiff had an adequate remedy at law in replevin, where the parties had a right to a jury trial on the issue of gift. In the other,[80] the administrator of the deceased owner sought a declaratory judgment, discovery, an accounting and the return of a $500 ring, a $250 stickpin, a $50 watch, $7,400 in cash and $200 in Government bonds, removed from the decedent's safe-deposit box by a sister having access thereto and distributed to named members of the family. The court thought the plaintiff had adequate remedies at law in replevin, trover and money had and received. There were no allegations of a *pretium affectionis,* discovery was unnecessary as the bill set forth the exact contents of the box and their present disposition, there were no complications requiring an accounting, and the real relief sought was not declaratory but the recovery of the jewelry and money in specie. And new 1947 rules of practice relating to joinder would permit the defendants' claims to title by gift to be tried at law in one action, and, if they failed, separate judgments for the return of the jewelry and for money had and received. "In the absence of allegations in the bill we

[79] Sykes v. Hughes, 182 Md. 396, 35 A. 2d 132 (1943).
[80] Bachman v. Lembach, 192 Md. 35, 63 A. 2d 641 (1949).

cannot assume that these judgments would be inadequate or ineffective."[81]

Machinery and equipment. Equitable replevin has been granted for used machinery and machines[82] and for used oil-well casing.[83] A landlord has been restrained from interfering with the removal of a rented piano worth $265.[84] And a dairy man has been restrained from using milk bottles belonging to other dairies (he had 110 on hand).[85] Two of the cases involving machinery and machines arose under the Massachusetts statute authorizing equitable replevin for chattels so secreted that they could not be replevied. In the other cases, the court ruled that there was no adequate remedy at law. In the case of the oil-well casing, the equipment was not available on the market and the plaintiff needed it in his business, so damages would not be an effective substitute. And replevin would fail because of the plaintiff's inability to identify his pipe, now commingled with other pipe in defendant's stock pile. In the piano case, replevin would fail because the sheriff could not move the instrument in sections without destroying it or in one piece without removing and enlarging a window frame. Trover would not lie, for there had been no conversion. And in the milk-bottle case:

> "The value of the bottles is so small that the costs and expenses incident to the prosecution of numerous actions of replevin or for damages . . . would be prohibitory. The exchange tried replevin several times. In one such action . . . the value of the bottles was $6.12 and the costs and expenses amounted to $43," not including a $25 attorney's fee. ". . . In the other replevin cases the expense was five times as much as the recovery."[86]

But equitable replevin was denied for the delivery of railway track materials,[87] amusement park equipment[88] and a quantity of rifles.[89] Injunction was denied to prevent the removal of oil-well[90] and filling-station[91] equipment. Injunction was also denied to restrain the sale of

[81] *Id.* at 42, 63 A. 2d at 644.
[82] Broomfield v. Checkoway, 310 Mass. 68, 38 N. E. 2d 563 (1941); Henry Pels Co. v. Miller, 192 Mass. 13, 77 N. E. 1152 (1906); Falaenau v. Reliance Steel Fdry. Co., 74 N. J. Eq. 325, 69 Atl. 1098 (Ch. 1908).
[83] Burton v. Rex Oil & Gas Co., 324 Mich. 426, 36 N. W. 2d 731 (1949), Note, 34 MINN. L. REV. 147 (1950).
[84] Berry v. Friedman, 192 Mass. 131, 78 N. E. 305 (1906).
[85] Denver Milk Bottle, Case & Can Exchange, Inc. v. McKinzie, 87 Colo. 379, 287 Pac. 868 (1930).
[86] *Id.* at 382, 287 Pac. at 869.
[87] M., K. & T. Ry. Co. v. Sanders, 45 F. Supp. 602 (D. C. Okla. 1942).
[88] Real Estate Investment Co. v. Winn, 233 Mo. App. 26, 116 S. W. 2d 550 (1938).
[89] Sultan of the Ottoman Empire v. Providence Tool Co., 23 Fed. 572 (C. C. E. D. N. Y. 1883).
[90] Lewis v. Clark, 129 S. W. 2d 421 (Tex. Civ. App. 1939).
[91] American Oil Co. v. Moorehead, 201 Ga. 607, 40 S. E. 2d 383 (1946).

17 chickens (worth $17.00), a colt ($75.00), a threshing machine ($100.00), a manure spreader ($50.00), a saw-mill boiler ($25.00), and a saw mill ($200.00).[92] In these cases, the courts were confident that replevin or damages would be adequate and equitable relief unnecessary. In the railway track case, the lease listed the quantities and values and provided a way in which shortages should be made good. Injunction was considered to be an extraordinary remedy which the courts today discourage more than ever before. In the amusement park case, the court said: "An action in equity cannot be substituted for an action in replevin or for an action in damages for conversion or for trespass or made to serve the purpose of such actions . . . [which] are actions at law, affording adequate remedies."[93] The oil-well equipment was valued at $2750 and both parties wanted it for resale. In the cases of the railway track materials and of the filling-station equipment, the plaintiffs' need for these chattels in specie because of war-time shortages, was given little weight.

Automobiles were the subject of equitable replevin in two cases. In one,[94] a preliminary mandatory injunction for the return of a used car was awarded by the Michigan court under these circumstances: The finance company had repossessed the car from the plaintiff under the dealer's mortgage after enabling the dealer to sell the car to the plaintiff as free of liens. It was thought that neither replevin nor damages would be as adequate as injunction. In the other case,[95] the New Jersey court, after trial, ordered the return of a used car, nominally as an incident of a cancellation of a bill of sale obtained by fraud and without consideration. Actually, the court rescinded a bailment of the car by the *feme* plaintiff to the male defendant, "deceitfully procured by means of an imposition upon her enchantment."[96] And the Georgia court granted an injunction[97] against a possessory warrant proceeding for recovery of an automobile radio from plaintiff's car. The plaintiff would have had a good defense thereto, but meanwhile as sheriff he would be unable to function adequately without a radio in his car. There was no adequate remedy at law.

Horses. Equitable replevin has been used for the recovery of a $50 horse[98] and of a number of sheep,[99] where equity jurisdiction had been primarily invoked for the cancellation of a mortgage and for an account-

[92] Wiles v. Wiles, 134 W. Va. 81, 58 S. E. 2d 601 (1950).
[93] Real Estate Investment Co. v. Winn, 233 Mo. App. 26, 116 S. W. 2d 550, 555 (1938).
[94] Steggles v. National Discount Corp., 326 Mich. 44, 39 N. W. 2d 237 (1949).
[95] Tami v. Pickowitz, 138 N. J. Eq. 410, 48 A. 2d 221 (Ch. 1946).
[96] *Id.* at 414, 48 A. 2d at 224.
[97] Davis v. Logan, 206 Ga. 524, 57 S. E. 2d 568 (1950).
[98] Bates v. Crowell, 122 Ala. 611, 25 So. 217 (1899).
[99] Neeley v. Roberts, 17 S. D. 161, 95 N. W. 921 (1903).

ing, respectively. Under the Massachusetts statute, an ordinary horse[100] and a race horse,[101] so secreted that they could not be replevied, have been recovered through statutory equitable replevin. But where such jurisdictional and statutory supports for equitable relief were lacking, plaintiffs seeking to recover a mare[102] and a colt[103] or to prevent the sale of a colt[104] have been left to the remedies of detinue, replevin or trover. The horses had no peculiar value to the plaintiffs, no special need was shown, and damages would not be inadequate.

Commodities. Equitable replevin has been granted to compel the delivery or return of liquors,[105] an oil essential to the manufacture of perfumes,[106] hides,[107] motion picture films,[108] diamonds,[109] paper,[110] the stock of goods of a retail store,[111] and broom corn.[112]

The liquors were held by the police in a dry state, taken from the carrier en route to a military reservation. The remedy was not questioned. In the case of the perfume oil, it appeared that the oil was irreplaceable, and that it had a special and unascertained value to the plaintiff, who had undertaken to deliver it to a third party for blending. It was held that replevin would not ensure its return because an alternative judgment for its value would result if it could not be found. The hides were from Africa, in possession of the Collector of the Port of Boston. By federal statute, they were thus not repleviable, though subject to the orders of a federal court having jurisdiction. No common-law remedy could give the plaintiff possession. Equitable replevin for 26 films of a motion picture entitled "The Head Hunters" was awarded in an interlocutory order. The films cost only $8,000, but the potential loss through exhibition by others was incalculable. Replevin was regarded as ineffective, for if the films were not found, their value would be awarded as damages. The diamonds were held by the police, after their arrest of the thieves who had stolen them from plaintiff's jewelry store, pending criminal prosecution. Jurisdiction was based on the Massachusetts statute authorizing equity to order the return of chattels so secreted that they could not be replevied, as well as on the adequacy

[100] Strickland v. Fitzgerald, 7 Cush. 530 (Mass. 1851).
[101] Hodgkins v. Bowser, 195 Mass. 141, 80 N. E. 796 (1907).
[102] Davidson v. Floyd, 15 Fla. 667 (1876).
[103] Thompson v. Vernay, 106 Ill. App. 182 (1902).
[104] Wiles v. Wiles, 134 W. Va. 81, 58 S. E. 2d 601 (1950).
[105] Johnson v. Yellow Cab Transit Co., 321 U. S. 383 (1944).
[106] Chabert v. Robert & Co., 273 App. Div. 237, 76 N. Y. S. 2d 400 (1st Dep't 1948), Note, 14 BROOKLYN L. REV. 288 (1948).
[107] Pollard v. Reardon, 65 Fed. 848 (1st Cir. 1895).
[108] Raftery v. World Film Corp., 180 App. Div. 475, 167 N. Y. Supp. 1027 (1st Dep't 1917).
[109] Homrich v. Robinson, 221 Mass. 308, 108 N. E. 1082 (1915).
[110] Modern Dust Bag Co. v. Commercial Trust Co., 91 A. 2d 469 (Del. Ch., 1952), Note, 41 GEORGETOWN L. J. 266 (1953).
[111] Luciano v. Calderone, 255 Mass. 270, 151 N. E. 70 (1926).
[112] Missouri Broom Mfg. Co. v. Guyman, 115 Fed. 112 (8th Cir. 1902).

test. No other remedy could prevent a transfer. The order to return was made subject to a police trusteeship during the pending criminal prosecution. In the case of the paper, the manufacturer obtained a decree against the bank for the delivery of warehouse receipts for the paper. These were held by the bank on an alleged lien as security for an alleged debt. The order was conditioned upon the plaintiff depositing security to cover defendant's claim. The manufacturer needed the paper then, not later, and it was not obtainable elsewhere. Damages would not help, and replevin would be defeated by defendant's bond. The stock of goods of a retail store was held by the sheriff in an attachment suit against the mortgagor. The Massachusetts court found that it was so concealed that it could not be replevied and allowed the mortagee to recover the goods in statutory equitable replevin. In the case of the broom corn, the vendor of $3812 worth of that commodity sought to recover it in equity from the fraudulent vendee and his assigns. A part had been made into brooms and sold, and part had been mingled with other broom corn. No one was a bona fide purchaser. The court imposed a constructive trust upon the corn and its proceeds. Replevin might be available, the court thought, but it could not be as adequate as equity in this situation. The broom corn could not be identified because of mingling. Some of it had been sold and the rights of purchasers must be investigated. An accounting was necessary.

On the other hand, equitable replevin has been denied for the delivery of warehouse receipts for cotton,[113] 4896 tons of pig iron,[114] and a motion picture film.[115] Injunction was denied to prevent interference with plaintiff's self-help efforts to obtain possession of 18,000 railroad ties.[116] And injunction was denied to prevent defendants from using or interfering with plaintiff's use of 750 tons of harvested wild hay.[117]

In the cotton case, the court regarded the equity proceeding as a substitute for detinue and ruled that equity had no jurisdiction to take chattels from the possession of one party and put them in the possession of another. In the pig iron case a trustee in bankruptcy of a manufacturer sought a decree that a contract for delivery of iron to the Reconstruction Finance Corporation as security for a loan was void as fraudulent against creditors and for delivery of the iron to the plaintiff. The court said that equity will not entertain a suit for recovery of personal property

[113] Priebe v. Farmers Union Warehouse Co., 230 Ala. 73, 159 So. 694 (1935).
[114] Commonwealth Trust Co. v. Reconstruction Finance Corp., 28 F. Supp. 645 (D. C. Pa. 1938); *aff'd* because no fraud was found, in 120 F. 2d 254 (3d Cir. 1941).
[115] Sonney Amusement Enterprises v. Astor Entertainment Co., 339 Ill. App. 275, 89 N. E. 2d 746. *Cf.* Raftery v. World Film Corp., 180 App. Div. 475, 167 N. Y. Supp. 1027 (1st Dep't 1917).
[116] Jones v. McKenzie, 122 Fed. 390 (8th Cir. 1903).
[117] Smith v. Howell, 91 Ore. 279, 176 Pac. 805 (1918).

unless it is not repleviable or damages would not compensate for its loss, even though fraud is shown and there is a prayer for cancellation. In the case of the motion picture film, it was held that an allegation that the plaintiff claimed to be the owner of the film and that defendant was exhibiting it under some arrangement with a third person did not justify an interlocutory order for delivery of the film to the plaintiff, issued without notice. There was no allegation that plaintiff had no adequate remedy at law, or that plaintiff could not obtain possession of the film in replevin, or that the film had a special value. In the case of the railroad ties, which plaintiff needed to complete the construction of a railroad, but which defendant held under a replevin bond in another litigation, each claiming title, an interlocutory injunction against plaintiff's self-help efforts to get the ties was reversed because equity is without jurisdiction to try title to personal property where plaintiff was originally out of possession. Replevin and damages were regarded as adequate remedies, even though defendant could keep possession by posting a bond. And a jury trial was necessary. In the hay case, relief was denied because a suit in equity for the recovery of chattels does not lie ordinarily: the property must be unique,. *i.e.,* a personal memento or relic or heirloom that cannot be replaced. Here, hay was an ordinary, commercial article and damages for unlawful seizure would compensate for its loss.

II

North Carolina

Prior to the adoption of the Code of Civil Procedure in 1868, in the day of separate law and equity proceedings, the North Carolina equity courts frequently awarded equitable replevin. Most of the cases involved the delivery or recovery of slaves,[118] a few related to deeds[119] and shares of stock.[120]

Since 1868, however, there has been no reported case in which equitable replevin has been resorted to. Instead, for the delivery or recovery of chattels wrongfully withheld, litigants appear to have turned exclusively to the code action to recover the possession of personal property and its provisional remedy of claim and delivery proceedings. If claim and delivery is not used, the action proceeds like the old action of detinue[121] and the judgment, after trial, where the plaintiff wins

[118] Lewis v. Kemp's Exec., 38 N. C. 233 (1844); Freeman v. Perry, 17 N. C. 243 (1832); Stevens v. Ely, 16 N. C. 493 (1830); Williams v. Howard, 7 N. C. 74 (1819); Jones v. Zollicoffer, 4 N. C. 645 (1817); Mulford v. ———, 3 N. C. 244 (1803); Anon., 3 N. C. 134 (1801). *But see* Ellington v. Currie, 40 N. C. 21 (1847).

[119] Ward's Exec. v. Ward, 3 N. C. 226 (1802). *But see* Ragland v. Currin, 64 N. C. 355 (1870).

[120] Jasper v. Maxwell, 16 N. C. 357 (1830).

[121] Jarman v. Ward, 67 N. C. 32 (1872).

"may be for the possession, or for the recovery of possession, or for the value thereof in case a delivery cannot be had. . . ."[122] Where claim and delivery is used, the proceeding resembles the old action of replevin in that the sheriff, before trial, may take the chattel from the defendant and deliver it to the plaintiff. But the defendant, before this occurs, may keep the chattel pending trial, by posting bond "in double the value of the property . . . for the delivery thereof to the plaintiff . . . if delivery can be had, and if delivery cannot be had, for the payment to him of such sum as may be recovered against the defendant for the value of the property. . . ."[123]

Of course, the alternative award to the plaintiff of the value of the chattel, especially where the defendant in claim and delivery proceedings has posted bond[124] may be an effective coercion upon a defendant to return or deliver the chattel. Thus, Chief Justice Pearson, in commenting in 1869 on the replevin chapter in the Revised Code of 1855, said:

> "Sec. 2nd directs the sheriff to allow the property to remain with the defendant, provided he gives bond in double the sworn value conditioned to perform the final judgment; the penalty being in double the amount to compel the return of the property if it can be had, otherwise payment of its value. . . ."[125]

And in 1845, the court said:

> "It is not intimated in the bill, that the verdict [in an action of detinue] found the value higher than it truly was. It cannot be presumed that it did; for although juries often and properly so find in order to enforce the delivery of the slaves, yet that is not the course, where it is known that the defendant cannot discharge himself by a delivery, as if the negro be dead or is owned by another person."[126]

Suppose, however, that one entitled to the possession of a chattel wrongfully withheld by another has urgent need for its return or delivery in specie, as in many of the cases referred to in Part I of this article. Suppose, moreover, that he has reason to believe that the recalcitrant withholder will successfully frustrate[127] the sheriff's effort

[122] N. C. GEN. STAT. § 1-230 (1953). For the execution, see § 1-313 (4).
[123] N. C. GEN. STAT. § 1-478 (1953).
[124] This was the situation, as disclosed by the record, in Locke Cotton Mills v. Pate Cotton Co., 232 N. C. 186, 59 S. E. 2d 570 (1950) (warehouse receipts for cotton).
[125] Scott v. Elliott, 63 N. C. 215, 218 (1869).
[126] Murphy v. Moore, 39 N. C. 118, 124 (1845).
[127] N. C. GEN. STAT. §1-480 (1953) requires the sheriff, if the property is concealed in a building or enclosure, to cause the building or enclosure to be broken into, and take the property into his possession. Doubtless few sheriffs have been so zealous. In considering the common-law doctrine codified by this statute, the Massachusetts court, in Broomfield v. Checkoway, 310 Mass. 68, 38 N. E. 2d 563

to take the chattel from him on execution or in claim and delivery. Suppose, further, as in most of the cases above mentioned, that an award of the value of the chattel would be futile, either because the value could not be fairly computed or because funds in that amount would not be or procure an effective substitute for the chattel itself. Would equitable replevin be available in North Carolina?

It is believed that *Currie v. Jones*,[128] decided in 1905, and *Yount v. Setzer*,[129] decided in 1911, point to an affirmative answer. In each case, a code action to recover the possession of a chattel had been initiated, in *Currie* to recover shares of corporate stock, in *Yount*, a note and mortgage. In each case the plaintiff sought and obtained, in the same action, a temporary injunction against transfer. In each case the court responded to the need for equitable relief which the ordinary processes of the code action and provisional remedy could not give. In *Currie* the court said:

> "The subject of the litigation, being shares of stock in a corporation, differs, in so far as injunctive relief is concerned, from ordinary personal property. . . . In relation to such property the equitable remedy is more beneficial and complete than any the law can give."[130]

In *Yount*, the court added:

> "It is true, . . . that ordinarily the equitable jurisdiction of the court cannot be invoked to restrain the sale or other disposition of personal property when an action at law may be maintained to recover the property. . . . We do not think, however, that these principles are applicable to the facts of this case. The subject-matter of the controversy is a negotiable instrument that has not been dishonored, and it may be assigned to an innocent purchaser. If so assigned . . . the right of the plaintiffs to recover the property would be thereby defeated, . . . 'But it is the province of a court of equity, in such cases, to arrest the injury and prevent the wrong. The remedy is more beneficial and complete than the law can give.' "[131]

These, of course, were cases of negative injunctions, based upon fear of the incapacity of the statutory procedures to prevent transfer. But the principle extends as well to affirmative equitable relief, based upon

(1941), regarded such action as unlikely in view of the uncertainty and danger which would attend an attempt by an officer to break into a building and seize chattels.

[128] 138 N. C. 189, 50 S. E. 560 (1905).
[129] 155 N. C. 213, 71 S. E. 209 (1911).
[130] Currie v. Jones, 138 N. C. 189, 190, 50 S. E. 560 (1905).
[131] Yount v. Setzer, 155 N. C. 213, 217, 71 S. E. 209, 211 (1911).

fear of the incapacity of other remedies to effectuate plaintiff's recovery of a chattel which he needs in specie.

III

Statutory Changes

United States. In Part I of this article, reference was made to 11 cases where equitable replevin was sought in the Federal courts. Relief was granted in four of these, in seven it was denied. To a considerable though varying degree, these denials reflected an overliteral application of an act of 1789: "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law."[132] As a result, the willingness of Federal equity courts to appraise realistically the effectiveness of detinue, replevin and damages and to intervene when they were unlikely to produce the chattel, has been restrained. However, in 1938 this statute was rendered obsolete so far as procedure is involved by Rules 1 and 2 of the Federal Rules of Civil Procedure,[133] relating to the fusion of law and equity procedures and the one form of action. This status of the statute in question was recognized when it was omitted as obsolete from the new Title 28, U. S. Code, Judiciary and Judicial Procedure, of 1948.[134] Of course, the principles governing the propriety of equitable relief remain, but the elimination of this restrictive emphasis upon an outmoded adequacy test should liberalize the development of equitable replevin in the Federal courts.

Massachusetts led the field, in Part I of this article, with 29 cases in which equitable replevin was sought. This was nearly one-fifth of all of the cases referred to and three times as many as were found in any other state. In most of these 29 cases relief was granted, largely because of a statute, first enacted in 1823, conferring jurisdiction in equity of "Suits to compel the redelivery of goods or chattels taken or detained from the owner, and so secreted or withheld that they cannot be replevied."[135] However, in 1950 this statute was amended so as to delete the words: "and so secreted or withheld that they cannot be replevied." Now the statute reads: "Suits to compel the redelivery of goods or chattels taken or detained from the owner."[136] The amendment follows the recommendation of the Massachusetts Judicial Council, namely:

> ". . . The clause giving jurisdiction in equity above quoted [before amendment] was intended to protect the owner in special circum-

[132] Section 16 of the Judiciary Act of 1789, 1 Stat. 82, Judicial Code §267, 28 U. S. C. § 384 (omitted from the Code in 1948).
[133] Fed. R. Civ. P. 1, 2.
[134] See 2 Moore's Federal Practice 310 (2d ed. 1948), and 1954 Supp., 21-22.
[135] Mass. Ann. Laws c. 214, §3 (1) (Michie-Lawyers Coop. 1933).
[136] Mass. Ann. Laws c. 214, § 3 (1) (Michie-Lawyers Coop. Supp. 1953); Mass. Laws 1950, c. 387.

stances if he could prove the special circumstances. If a proceeding in equity is a more direct and effective method by which an owner may get back his goods from someone who has wrongfully taken or withheld them, we see no reason why he should not be allowed to proceed in equity without the preliminary obstruction of showing special circumstances based on the earlier practice of restricted equity jurisdiction which may cause delay, unnecessary waste of the time of the courts and which seems to us not adapted to modern conditions. If an owner and his counsel consider equitable replevin a more effective proceeding than an action of replevin at law, we see no reason whatever why he should not be allowed to use it."[137]

Texas. Since 1846 a Texas statute[138]—and since 1941 a rule of court[139]—has provided that:

"The court shall cause its judgments and decrees to be carried into execution; and where the judgment is for personal property, and it is shown by the pleadings and evidence and the verdict, if any, that such property has an especial value to the plaintiff, the court may award a special writ for the seizure and delivery of such property to the plaintiff; and in such case may enforce its judgment by attachment, fine and imprisonment."

The significance of this provision is indicated by *Hammond v. Decker,*[140] decided in 1907, and *Kalmans v. Baumbush,*[141] in 1916. *Hammond* was an action for the recovery of a well-boring outfit, or its value, together with damages for its detention. A writ of sequestration was sued out by plaintiff, under which the property was seized; defendant filed bond and replevied, and the jury brought in a verdict for $4,739 value and damages. On defendant's appeal, the court said:

"There is no merit in the seventeenth assignment. Appellants seem to have entirely misconceived the purpose of requiring the jury to say whether the property had a special value to appellee, which was to authorize special proceedings to enforce delivery of the property to him, instead of a satisfaction of the judgment therefor by paying its value. In this view the injury [inquiry?] was, not what was its special value, but simply if it had a special value to appellee, independent of its market value or selling or intrinsic value generally."[142]

[137] 35 MASS. L. Q. 40 (1950); 25th Report, Judicial Council of Massachusetts, p. 28 (1949); 34 MASS. L. Q. No. 5, December 1949.
[138] TEX. REV. CIV. STAT. ANN. art. 2217 (1950).
[139] VERNON'S TEXAS RULES OF CIVIL PROCEDURE, Rule 308 (1942).
[140] 102 S. W. 453 (Tex. Civ. App. 1907).
[141] 187 S. W. 697 (Tex. Civ. App. 1916).
[142] *Supra* note 140, at 455.

Kalmans was a proceeding in a justice court and later in a county court to recover a cow, of the value of $50. The plaintiff won in both courts. A writ of sequestration had been issued in the cause at its commencement, the sheriff took possession, the defendant replevied, and the county court judgment directed that a writ of possession for the cow be issued. The defendant sought to enjoin the enforcement of the writ on the ground that the "judgment for restitution of the specific property was improper and unauthorized, because the pleadings, evidence and verdict did not show that the cow had an especial value to plaintiff" and that "the judgment should have been for the value of the cow. . . ."

In sustaining the denial of injunction, the court said:

> "It may be conceded that the judgment which was entered in the cause was erroneous, in view of the provisions of the statutes quoted. But such error could be reviewed and corrected upon appeal or writ of error only. The failure to observe such provisions did not render the judgment void, nor was it sufficient ground to set the same aside in a direct proceeding such as this. Its status in this respect is not altered by the fact that the amount in controversy was so small that an appeal did not lie from the judgment of the county court."[143]

In other words, Texas has implemented the fusion of legal and equitable procedures by incorporating into its statutory substitutes for detinue and replevin the essence of equitable replevin, namely, compulsion upon the defendant to deliver the chattel in specie when it is demonstrated that the plaintiff has a special need therefor. This may have made resort to equity unnecessary.

England. There has been no reported case of equitable replevin in an English court of equity since 1888.[144] In part, this is due to rules of court which, like the rule of court in Texas, have injected the essence of equitable replevin, *i.e.,* compulsion to deliver the chattel in specie, into the modern action of detinue.[145] Unlike the Texas rule, the English rules do not require that the chattel have any special value for the plaintiff. This factor, however, may enter into the court's discretion in deciding whether to award compulsory relief or to relegate the plaintiff to damages.

These rules are chiefly operative in the Queen's Bench Division

[143] *Supra* note 141 at 697.

[144] Wyman v. Knight, 39 Ch. D. 165 (1888) (writ of assistance to enable receiver to obtain securities from absconding trustee's clerk).

[145] Order 42, rule 6, page 745; Order 43, rule 6, page 790; Order 44, rules 1 and 2, p. 797; and Order 48, rule 1, p. 845; THE ANNUAL PRACTICE (London: Sweet & Maxwell, 1954).

(though applicable in all divisions of the High Court) and in the county court. As Collins, M. R., remarked in the Court of Appeal in 1905:

> "The High Court has now, in an action of detinue, power to order the defendant to hand over the goods claimed; and if he disobeys such an order the Court has power to enforce it by attachment. The county court rule provides for the exercise of a similar power by a county court judge, and under these circumstances it is clear that the power to order attachment existed in this case."[146]

In this case, the chattel in question was the plaintiff's "running dog Floss," valued at £40. The defendant's appeal from a county court order attaching him for contempt of court for willful disobedience of an order to deliver the dog to the plaintiff, was dismissed. In *Bailey v. Gill*,[147] decided in 1919, the chattel involved was a sewing machine, valued at £6, 10*s*. The county court was upheld in ordering that a writ of delivery should issue, enforceable by distraint of defendant's lands and chattels until delivery.

Canada. Ontario has followed the English policy. By a rule of court[148] adopted in Ontario in 1913, it was provided that:

> "Where a judgment directs the recovery of specific goods, chattels, deeds, securities, documents or any property other than land or money, a writ of delivery may be issued commanding the judgment debtor specifically to deliver up forthwith the property demanded and directing that in case of refusal the judgment debtor be arrested and detained in prison until he complies with the return of the writ, and also that the goods and chattels of the judgment debtor to double the value of the property in question be taken and kept until the further order of the Court to enforce obedience to the writ."

Apparently this proved to be too drastic, for in 1917 the rule was revised so as to provide (after the introductory clauses) that:

> "... a writ of delivery may issue directing the sheriff to cause such goods or property to be delivered up in accordance with the judgment. If the goods and property are not delivered up by the judgment debtor and cannot be found and taken by the sheriff, the judgment creditor may apply for an order directing the sheriff to take goods and chattels of the judgment debtor to double the value of the property in question to be kept until the further order of the court to enforce obedience to the judgment. By leave of the

[146] Hymas v. Ogden, [1905] 1 K. B. 246, 250 (C. A.)
[147] [1919] 1 K. B. 41.
[148] Rule 544, RULES OF PRACTICE AND PROCEDURE, Supreme Court of Ontario.

Court such judgment may also be enforced by attachment, commital, or sequestration."

No cases have been reported applying or interpreting this rule.

Australia has moved in the same direction. A statute enacted in the State of Victoria in Australia in 1928 provided that a Court of Petty Sessions

". . . upon complaint made by any person claiming to be entitled to . . . any goods, may inquire into the title thereto . . . and . . . order the goods to be delivered to the owner thereof within such time as may be fixed by such order . . . and may . . . order that if any person neglects or refuses to deliver up the goods . . . he shall pay . . . the full value of such goods. . . ."

In *Wood v. Wood*,[149] decided in 1944, an action was brought under this statute in a Court of Petty Sessions to recover five tires and tubes valued at £22. The court ordered their return within seven days but did not make an alternative order for payment of their value. (The Australian Law Journal comments that war-time shortages had made plaintiffs prefer to claim their goods back, rather than seek damages.) The defendant did not return the tires and tubes and the plaintiff, under a 1937 statute relating to the enforcement of orders of justices, sought to have the defendant fined or imprisoned for his default. Upon the return of the show-cause order, the Court of Petty Sessions held the original order void for lack of the value alternative. Upon appeal, the Supreme Court held that the Court of Petty Sessions, in the light of the legislative history of the 1928 statute, had jurisdiction and discretion to order the return of the goods without the value alternative and to punish the defendant for disobedience thereof.

IV

Conclusion

Equitable replevin is being extended to a growing variety of situations. Most of the decisions manifest a wholesome response to the plaintiff's need for the chattel in specie. And the statutory changes in the United States courts and in Massachusetts will probably provide a broader base for the remedy. If the decisions denying relief on the merits (plaintiff without need or right to possession) are taken out of the reckoning, the views of the small group of courts opposed to the continued judicial development of the equitable remedy are not significant.

[149] (1944) Aust. L. R. 87, Note, 18 Aust. L. J. 48 (1944).

In contrast, the changes wrought by the rules of court in Texas, England, Canada, and Australia point to a development in a different direction. By including the essence of equitable replevin—discretionary compulsion—in the modern equivalent of detinue and replevin, they have enabled those remedies to be more completely effective and have rendered resort to equity, with the uncertainties of the adequacy test, unnecessary, save perhaps where there is danger of transfer.

North Carolina has not taken advantage of either opportunity.