

1983

The Legal Relationship Between the Bank and its Safe Deposit Customer

Richard A. Lord
Campbell University School of Law

Follow this and additional works at: <http://scholarship.law.campbell.edu/clr>

 Part of the [Banking and Finance Law Commons](#)

Recommended Citation

Richard A. Lord, *The Legal Relationship Between the Bank and its Safe Deposit Customer*, 5 Campbell L. Rev. 263 (1983).

This Article is brought to you for free and open access by Scholarly Repository @ Campbell University School of Law. It has been accepted for inclusion in Campbell Law Review by an authorized administrator of Scholarly Repository @ Campbell University School of Law.

Campbell Law Review

Volume 5

Spring, 1983

Number 2

THE LEGAL RELATIONSHIP BETWEEN THE BANK AND ITS SAFE DEPOSIT CUSTOMER

RICHARD A. LORD*

I. INTRODUCTION

Today in the United States, virtually every commercial bank makes safe deposit services available for a small fee, either through a department of the bank or through a subsidiary or affiliated safe deposit company. Never before has the demand for safe deposit services been so great. More than ever before, Americans are turning to safe deposit companies and bank safe deposit vaults for the storage of their assets.

This increased demand has caused increased concern among legislators and bankers about whether to regulate further the day-to-day affairs of the safe deposit business. Increased use of safe deposit vaults and boxes will predictably lead to more litigation concerning the rights and responsibilities of banks and their customers. It is therefore important to examine the legal status of the relationship of the bank to its safe deposit customer. This Article will explore the nature of the relationship, the ways in which courts have viewed the relationship and the problems that may arise as a result of the legal relationship of the bank to its safe deposit customer.

* Professor, Campbell University School of Law. The author gratefully acknowledges the able research assistance of Ben Sirmons of the Class of 1983 and Craig Young who is a third year student.

II. THE NATURE OF THE RELATIONSHIP

A. *Freedom of Contract as a Base*

As a general principle, it may be said that the relationship between the bank and its safe deposit customer is contractual in nature. During the nineteenth century, before safe deposit activities became institutionalized and the contracts governing the relationship became standardized, it was often said that the relationship arose as a result of an implied-in-fact contract.¹ Today, with standard-form contracts creating and defining the relationship, it is clear that the parties are governed by their express contract.

Ordinarily, the contract between the bank and its customer is denominated a lease, with the bank variously referred to as "bank," "lessor" or "landlord," and its customer as "renter," "lessee" or "tenant." In recognition of the treatment by the courts, some safe deposit contracts refer to the bank and its customer as bailee and bailor respectively. Regardless of how the contract between the parties is captioned, in essence the bank is renting the customer a receptacle in which he may place his valuables. The customer is entitled to access during specified banking hours, and possesses a key which, in conjunction with a master key kept by the bank, permits access to the box.

Safe deposit contracts are invariably standard form documents drafted by the bank, and as such contain terms most favorable to the bank. It is common for such contracts to define the relationship other than in terms of bailment. This is because a bailee is subject to a requirement of ordinary care, and will be liable for failure to exercise such care if a loss results from that failure.² This follows from the fact that a bailee has lawful possession of another's property, and in essence agrees to treat it with reasonable

1. See, e.g., *Mayer v. Brensinger*, 180 Ill. 110, 54 N.E. 159 (1899); *Robert v. Stuyvesant Safe Deposit Co.*, 123 N.Y. 57, 25 N.E. 159 (1890).

2. *Preston v. Prather*, 137 U.S. 604 (1891). The Court held that, in a bailment for the mutual benefit of both parties, the bailee is required "to give such care as a prudent owner would extend to his own property of a similar kind" *Accord*, *Fireman's Fund Ins. Co. v. Schreiber*, 150 Wis. 42, 135 N.W. 507 (1912). "A bailee for hire . . . should exercise that care which men of common prudence generally bestow upon their own property similarly situated and is only liable in case of failure to perform this duty." See also 3 PATON'S DIGEST at 3323 (1944), and cases cited; *Security Storage and Trust Co. v. Martin*, 144 Md. 536, 125 A. 449 (1924); *Buena Vista Loan and Sav. Bank v. Bickerstaff*, 121 Ga. App. 470, 174 S.E. 2d 219 (1970).

care for the owner.³

Generally, the bank will prefer to be viewed as a landlord, lessor, licensor, or mere custodian. The required standard of care may be less if one of these relationships, rather than a bailment, is shown to exist. For example, a landlord, unlike a bailee, is not in possession of another's property, but merely permits another a place in which to store property.⁴ It thus may be argued that while a landlord must use ordinary care to protect the premises, he is under no particular obligation to safeguard the tenant's property. Finally, if the relationship is seen as a license, the bank in effect is merely permitting the customer entry onto bank premises, and owes the customer no particular duty of care.⁵ Thus, establishment of a licensor-licensee relationship is of greatest advantage to the bank, and the bank may wish to adapt its contract to provide for that relationship.

B. *Cutting Across Freedom of Contract*

Unfortunately for the bank, a number of factors may prevent the pure freedom of contract model from operating. First is the rule that the bank, as drafter of the contract, should not be permitted to exculpate itself from liability caused by its own negligence.⁶ To the extent that the parties' relationship controls the re-

3. *Zetterstrom v. Thomas*, 92 Conn. 702, 104 A. 237 (1918). See also *Union Marine & General Ins. Co. v. American Export Lines*, 274 F. Supp. 123 (S.D.N.Y. 1966) (guards hired to watch cargo held not liable on bailment theory; insufficient possession and control). See also *Kramer v. Grand Nat'l Bank of St. Louis*, 336 Mo. 1022, 81 S.W.2d 961 (1935).

4. *People ex. rel. Glynn v. Mercantile Safe Deposit Co.*, 159 A.D. 98, 143 N.Y.S. 849 (1913); *Morgan v. Citizens' Bank of Spring Hope*, 190 N.C. 209, 129 S.E. 585 (1925); *Blair v. Riles*, 37 Ohio App. 513, 175 N.E. 210 (1930).

5. This rule has been in the process of change in the real estate area for several years, but, at least in the safe deposit context, probably remains true even today. Note, *Property: The Relation of a Safety Deposit Box Company And Its Patrons*, 21 CORNELL L.Q. 325, 326 (1927). The author based this conclusion on the "well established" rule that "the only duty that a licensor owes to a licensee is to abstain from positive wrongful acts which might harm that licensee."

6. See, e.g., *Goldbaum v. Bank Leumi Trust Co.*, 543 F. Supp. 434, 436 (S.D.N.Y. 1982). "Liability exclusions in bailment agreements, where ambiguous, are to be interpreted against the bailee, especially where it drafted the agreement." See *Fitzgerald & Spaulding, Ability of Banks to Limit Liability by Contract*, 69 BANKING L.J. 308, 313-15 (1952). See also *Cussen v. Southern Calif. Sav. Bank*, 133 Cal. 534, 65 P. 1099 (1901); *McDonald v. William D. Perkins & Co.*, 133 Wash. 622, 234 P. 456 (1925); *Sporsem v. First Nat'l Bank of Poulsbo*, 133 Wash. 199, 233 P. 641 (1925); but see *Kolt v. Cleveland Trust Co.*, 89 Ohio App. 349, 93

quired standard of care, a contractual change of the relationship may be seen as an attempt at exculpation. Second, in a number of jurisdictions the relationship is established by statute, thereby potentially pre-empting contractual freedom. Third, the majority of jurisdictions hold that the relationship is a bailment, seemingly irrespective of the parties' contract.⁷ While a bailment is often said to exist in the absence of an agreement to the contrary,⁸ that language probably means that the bank is free to impose upon itself a higher standard of care, but cannot lessen the required standard of care. This conclusion, while not certain, seems likely, based as it is on historical precedents.

C. *The Treatment of Safe Deposit Contracts in the Courts*

In the late nineteenth century, when it became commonplace for banks to engage in the safe deposit business, some of them did so casually, without much in the way of documentation. Where nothing was said, orally or in writing, about the relationship of the parties, and a loss occurred, the courts almost invariably held that the relationship was one of a bailment, either gratuitous or for hire, created by an implied-in-fact contract.⁹ That contract required that the bank, having taken the chattels of the customer, had an obligation to return them. The exact scope of the obligation depended upon whether payment was received by the bank and whether any representations had been made by the bank, among other things. It was thus said that the relationship was contractually akin to a bailment.¹⁰

N.E.2d 788 (1950). Also, a general exculpatory clause may not be effective if it conflicts with a specific contractual duty. *See Sniffen v. Century Nat'l Bank of Broward*, 375 So. 2d 892 (Fla. App. 1979).

7. *See, e.g.,* ME. REV. STAT. ANN. tit. 9-B, § 443 (1980), MINN. STAT. ANN. § 55.13 (West 1970), MO. ANN. STAT. § 362.485 (Vernon, Cum. Supp. 1983), MONT. CODE ANN. § 70-6-101 *et. seq.* (1983), VT. STAT. ANN. tit. 8, § 1452 (1971). *See also* note 56 and accompanying text *supra*.

8. *See, e.g.,* Mayer v. Brensinger, 180 Ill. 110, 54 N.E. 159 (1899); *Sagendorph v. First Nat'l Bank of Philmont*, 218 A.D. 285, 218 N.Y.S. 191 (1926); *Cussen v. Southern Calif. Sav. Bank*, 133 Cal. 534, 65 P. 1099 (1901); *Sprosem v. First Nat'l Bank of Poulsba*, 133 Wash. 199, 233 P. 641 (1925).

9. *See* note 56 and accompanying text *supra*. *See also* Cummins, *A Review of the Law of Safe Deposit Companies*, 9 HARV. L. REV. 131 (1895).

10. *Roberts v. Stuyvesant Safe Deposit Co.*, 123 N.Y. 57, 25 N.E. 294 (1890); *Mayer v. Brensinger*, 180 Ill. 110, 54 N.E. 159 (1899). *See also* Note, *Bailment-Landlord and Tenant-Licenses-Warehousemen-Relation Between Renter of Safe-Deposit Box and the Safe-Deposit Co.*, 11 MINN. L. REV. 440, 446 (1927).

Even those banks that established formal written contracts, specifically designed for their safe deposit departments, rarely undertook to define the relationship between themselves and their customers. Nor did they undertake to establish the required standard of care. Rather, the contracts normally provided the specific rules and regulations that would govern the parties' contractual affairs. Such rules included the need for references upon leasing a box, requirements that the renter replace lost keys and pay rent in advance, the hours during which access would be permitted, and that the bank could terminate the relationship at will.¹¹ In addition, and central to this article, was often found this statement, or its equivalent: "[n]o person other than the renter, or registered Deputy, or legal representative (in case of the death, insolvency, or other disability of the renter), shall have access to the safe, excepting as hereinafter expressly stipulated."¹²

The above language was included in the contract to absolve the bank from responsibility if it denied access. That is, its intent was to permit the refusal of access to other than authorized persons. However, when the customer alleged that a loss had occurred, and that the bank was responsible, the language took on the appearance of a promise by the bank to restrict access to only authorized persons. Thus, in the earliest judicial decisions dealing with whether a bank or safe deposit company should be liable for a loss,¹³ this contractual language lent support to the courts' conclu-

"The inherent nature of the business and the primary purpose for which safe-deposit boxes are rented impose upon the deposit company, as a contractual obligation, those duties which would have been imposed by law if it were a bailment." See also 3 PATON'S DIGEST at 3330 *et seq.* (1944); And see Huggins, *The Safe Deposit Business: Its Bailment Law*, 72 BANKING L.J. 734 (1955); Cummins, *supra* note 9; Note, *Law of Safety Deposit Boxes*, 57 W. VA. L. REV. 74 (1955).

11. Note, *Bailment-Landlord and Tenant-Licenses-Warehousemen-Relation Between Renter of Safe-Deposit Box and the Safe-Deposit Co.*, 11 MINN. L. REV. 440, 441 (1927). See notes 47-51 and accompanying text *supra*; See, e.g., forms contained in 2 PATON'S DIGEST 2253 (1926); see also language to similar effect in *Cussen v. Southern Calif. Sav. Bank*, 133 Cal. 534, 65 P. 1099 (1901); *McDonald v. William D. Perkins & Co.*, 133 Wash. 622, 234 P. 456 (1925); *Roberts v. Stuyvesant Safe Deposit Co.*, 123 N.Y. 57, 25 N.E. 159 (1890).

12. See notes 47-51 and accompanying text *supra*. A typical contract can be found at *Sadler v. Nat'l Bank of Bloomington*, 403 Ill. 218, 85 N.E.2d 733, 735-36 (1949). See 2 PATON'S DIGEST 2253 *et seq.* (1926). See also cases cited at note 11, *supra*.

13. See, e.g., *Safe Deposit Co. v. Pollock*, 85 Pa. St. 391, 27 Am. Rep. 660 (1878); *Roberts v. Stuyvesant Safe Deposit Co.*, 123 N.Y. 57, 25 N.E. 159 (1890); *Cussen v. Southern Calif. Sav. Bank*, 133 Cal. 534, 65 P. 1099 (1901).

sions that the relationship was that of a bailment for hire. However, the language the parties employed was not necessarily determinative.

Thus, one of the earliest and most frequently cited decisions, *Roberts v. Stuyvesant Safe-Deposit Co.*,¹⁴ dealing with whether the lessor would be responsible for the removal of the lessee's property by officers acting pursuant to a warrant, begins as follows:

The legal relation which the defendant held to the plaintiff, and out of which this controversy has arisen, was that of a bailee or depositary for hire. The fundamental question . . . is whether the defendant . . . discharged those duties and obligations . . . which the law imposed upon it in regard to the care and custody of her property.¹⁵

The case clearly indicates that the court viewed the relationship as a bailment for hire even in the absence of a clause in the contract that specifically established that or any other relationship. The contract in that case provided that the responsibility of the lessors was "limited to the diligent and faithful performance of their duty,"¹⁶ and further provided that access would be permitted only to authorized persons, and then only to one person at a time unless they were known to the bankers.¹⁷ When officers armed with a warrant demanded access the lessor relented without questioning their authority or demanding to see the warrant, permitting multiple persons access and permitting removal of items not covered by the warrant. Based on these and other actions, the court concluded:

We think that the defendant's officers neglected to exercise, in the care and keeping of the property which the plaintiff had confided to their charge, *that degree of diligence and fidelity to which they were bound by the terms of the contract under which the property was deposited in the defendant's vaults, as well as by the legal relations which they then assumed to the plaintiff.*¹⁸

In other words, though the contract purported to *limit* the lessor's responsibility, it was read (or ignored) to broaden it. A similar result was reached in the early case of *Mayer v. Brensinger*,¹⁹ ex-

14. 123 N.Y. 57, 25 N.E. 294 (1890).

15. 25 N.E. at 294.

16. *Id.*

17. *Id.*

18. *Id.* at 295 (Emphasis added).

19. 180 Ill. 110, 54 N.E. 159 (1899).

cept that apparently no written contract existed, or it offered no palpable argument in the lessor's favor. Again, without considering whether the relationship might be better characterized in some other way, the court concluded:

The relation . . . was that of a bailee or depositary for hire. As such bailee or depositary for hire, appellant was bound to exercise ordinary care and diligence in the preservation of the property *Although one who hires a box in the vaults of a safety deposit company may keep the key himself, yet the company, without any special contract to that effect, will be held to at least ordinary care in keeping the deposit. The duty of exercising such care arises from the nature of the business which the safety-deposit company carries on. The obligation to discharge such duty is implied from the relation between the parties.*²⁰

Thus, even in the absence of a contractual provision, the very nature of a safe deposit business requires that, when the lessee pays for the service, a bailment for hire exists. That bailment for hire imposes at a minimum a duty to exercise ordinary care.

The earliest courts considering safe deposit concerns recognized the essentially contractual nature of the relationship. This led defendants to attempt by their contracts to relieve themselves of liability. The earliest such attempt that fostered litigation appears to be *Cussen v. Southern California Savings Bank*,²¹ where the defendant urged that the following language in the contract absolved it from responsibility: "The lessor shall use diligence that no unauthorized person shall be admitted to any rented safe, and beyond this the lessor shall not be responsible for the contents of any safe rented from it."²² The bank's contention was that the foregoing language required it not to "admit" (that is, affirmatively allow entry to) unauthorized persons, and beyond this it had no obligation.²³ Because the money at issue had been removed by one other than an unauthorized person (an employee had taken the money), the bank argued that it was not liable.

Rejecting this argument, the court characterized the relationship as a bailment for hire, and indicated that the bank had to

20. 54 N.E. at 160 (Emphasis added).

21. 133 Cal. 534, 65 P. 1099 (1901).

22. 65 P. at 1099.

23. *Id.* "Admitted," the bank argued, referred only to such persons as might be admitted to the safe deposit vaults in the usual course of business. The "diligence" to be exercised was simply to guard against false impersonation and forgery by a person claiming to be a renter or deputy.

exercise even more than ordinary care "unless by some special agreement" that requirement had been waived.²⁴ The contract, according to the court, did not waive the requirement as a matter of law.²⁵

Following the *Cussen* case, a number of courts considered the effect of the contract upon the relationship of the parties. In *Sagendorph v. First National Bank of Philmont*,²⁶ the New York Supreme Court indicated that "[w]here there is an express contract between a bailor and bailee, the terms thereof control as to the liability of the bailee. Either party may impose on the other such terms as they may agree upon. Such express agreement will prevail against the general principles of law applicable. . . ."²⁷ In that case it was held that the following clause limited the bank's liability and did not impose on the bank the requirement to insure the lessee's property: "The . . . Bank . . . will give the property left for safe-keeping the same care it does its own property, but beyond that does not assume responsibility."²⁸

In response to the argument that this amounted to an agreement to insure the property, the court held that it was not a sufficient "special contract" to require the bank to do so.²⁹ Nevertheless, the court's suggestion is clear: The relationship of the parties is contractual, so they may freely define that relationship by contract.

That same general notion appears in *Schaefer v. Washington Safety Deposit Co.*,³⁰ where the court stated as a general proposition that "the relation being contractual, the plaintiff and defendant might by contract define their respective duties or limit the liability of the defendant, provided the contract was not in viola-

24. *Id.*

25. *Id.* at 1100.

26. 218 A.D. 285, 218 N.Y.S. 191 (1926).

27. 218 N.Y.S. at 192.

28. *Id.*

29. See also, *Wilson v. Citizens Central Bank of Nationville*, 56 Ohio App. 478, 11 N.E.2d 118 (1936); compare *United Farmers Bank v. Brent*, 505 S.W.2d 760 (Ky. Ct. App. 1974) (contract provided that bank would exercise same diligence in protecting customer's property as its own; bank placed customer's property in one vault, its own in another; burglars broke into the vault where the customer's property was; held bank was liable because it afforded greater protection to its property than to the customer's). See notes 41-44 and accompanying text *supra*.

30. 281 Ill. 43, 117 N.E. 781 (1917).

tion of law or public policy. . . ."³¹

As recently as 1982, in *Goldbaum v. Bank Leumi Trust Co. of New York*³² the court reiterated the rule that the relationship between the bank and its customer is essentially contractual. In that case the question was whether a clause purporting to limit liability would be given effect. The court made clear its belief that it would be, provided the clause was not violative of public policy.³³

The ultimate question is therefore whether the bank, in seeking to define the relationship, is in reality attempting to do something which violates public policy. If the bank's purpose in defining the relationship as other than bailor-bailee is to avoid liability for its own negligence, it may well violate public policy. However, if it does so for some legitimate purpose, the courts should give effect to the contractual establishment of the relationship.

Lest it appear that the contractual expression of the relationship can only inure to the benefit of the bank, it should be kept in mind that some cases indicate that the bank may by its contract convert itself from, for example, a landlord to a bailee, or a bailee to an insurer. In those jurisdictions which statutorily set the relationship as landlord-tenant, it is generally possible to convert the relationship into a bailment. Moreover, as *Sagendorph* points out,³⁴ a bailor may by special contract become an insurer. This same view appears in *Roberts v. Minier*,³⁵ where it is stated that a bailee "may enlarge his legal responsibility by contract, express or implied,"³⁶ and "by special contract . . . assume the liability of an insurer."³⁷ However, both of these cases point out that such a change in the relationship must be accomplished by explicit language.

Unfortunately, language not directly bearing on the parties' relationship may have the effect of changing it, usually from landlord-tenant to bailor-bailee or from bailor-bailee to insurer. This occurred in the very early decision of *Safe Deposit Co. v. Pollock*.³⁸ The contract indicated that the safe deposit company would keep

31. 117 N.E. at 784.

32. 543 F. Supp. 434 (S.D.N.Y. 1982).

33. 543 F. Supp. at 436.

34. 218 N.Y.S. at 193.

35. 240 Ill. App. 518 (1926).

36. 240 Ill. App. at 523.

37. See also *Morgan v. Citizens' Bank of Spring Hope*, 190 N.C. 209, 129 S.E. 585 (1925).

38. 85 Pa. 391, 27 Am. Rep. 660 (1878).

“a constant and adequate guard and watch over and upon the burglar-proof safe.”³⁹ In affirming a decision in favor of the customer who alleged the loss of bonds, the court indicated that the loss itself suggested that the company had not lived up to its agreement to keep “a constant and adequate guard.”⁴⁰

A much more recent, and to banks, more disturbing case, is *United Farmers Banks v. Brent*,⁴¹ where the contract provided that the bank agreed “to exercise the same diligence in the protection of the said box and its contents against loss by fire and burglary that it uses in the protection of its own property, but assumes no liability whatever for any loss or damage that may occur.”⁴²

The bank built an addition to its vault which was made of reinforced concrete. The original vault was made of unreinforced brick, as was the wall that separated the original wall from the addition. The safe deposit boxes were contained in the original portion of the vault, and burglars broke through the brick wall to gain entry to the vault and boxes. The bulk of the bank’s property, on the other hand, was contained in the addition. Although noting that the burglars could have broken into the addition (because the internal wall was constructed of unreinforced brick), the court nonetheless held that the bank offered greater protection to its own property, since burglars would have had to undergo greater risks to break into the inner vault addition.⁴³ As a result, the court permitted the customer to recover on the basis of breach of contract, in effect converting the bank into something more than a bailee.

The *Brent* court sought to distinguish *Sagendorph*,⁴⁴ although the cases are not readily distinguishable. It thus appears that in at least some jurisdictions, language in the contract which appears to obligate the bank to do more than exercise ordinary or reasonable care will effectively modify the relationship from that of bailor-

39. 27 Am. Rep. at 660.

40. *Id.* at 661.

41. 505 S.W. 2d 760 (Ky. Ct. App. 1974).

42. *Id.* at 761.

43. *Id.*

44. *Id.* at 761-62. According to the court, the holding in *Sagendorph* merely struck from the complaint the allegations of negligence, but did not deny recovery for breach of a contractual obligation to exercise the same diligence in protecting the contents of a safe deposit box as a bank exercised in protecting its own property.

bailee to something close to insurer-insured.

Such a result is highly inappropriate for several reasons. First, the bank by its contract is normally intending to limit, rather than increase, the responsibility owed its customers. Second, given the lack of clarity surrounding the relationship in the absence of express contractual provision, absent explicit language the relationship should be at its strictest bailor-bailee. In other words, despite the rule that these contracts should be strictly construed against the drafter (the bank), construction that perverts language should not be favored, and the bailment relationship, already to some extent "anti-bank," is more appropriate than any more stringent standard. Finally, some courts view language which promises that the bank will care for the customer's property as it does for its own as no more than the contractual embodiment of a bailee's responsibility. Thus, while a bailee is required to use "due," "ordinary," or "reasonable" care in relation to the stored property, some courts have stated that the bank, as a bailee, must take care of the property as if it were its own.⁴⁵ Therefore, when the bank includes such a phrase in its contracts, it is promising to do no more than that required if the relationship were established in the absence of an express contract.

It is usually stated as a general rule that the express contract of the parties will control. However, often the courts pay only lip service to this rule. As has been seen,⁴⁶ often the courts will take language intended to limit responsibility and hold that it broadens responsibility or changes the relationship. Moreover, the courts occasionally disregard or ignore entirely the parties' language, particularly if the parties do so themselves. A good example of this occurred in *Sadler v. National Bank of Bloomington*.⁴⁷ In that case, the plaintiff allegedly deposited valuables in a box pursuant to a contract that named him as the lessee and his sister as deputy. The contract specified that the rental had been received from plaintiff and his wife. About ten months later, the bank permitted the wife to sign as co-lessee and permitted her access. She removed valuables from the box during the plaintiff's absence. After the

45. See *Schaefer v. Washington Safety Deposit Co.*, 281 Ill. 43, 117 N.E. 781 (1917); *Wilson v. Citizens Central Bank of Nelsonville*, 56 Ohio App. 478, 11 N.E.2d 118 (1936). See also 1 SCHLICHTING, RISE & COOPER, BANKING LAW 10-8 (1982).

46. *Cussen v. Southern Calif. Sav. Bank*, 133 Cal. 534, 65 P. 1099 (1901). See notes 21-25 and accompanying text *supra*.

47. 403 Ill. 218, 85 N.E.2d 733 (1949).

plaintiff and his wife were divorced, he sued the bank for permitting her access.

The court paid careful attention to the contract except in one respect. The contract provided that it was the bank's duty to permit access only to the "lessee or authorized deputy."⁴⁸ Because the contract did not specify that the wife was either lessee or deputy, the contract was breached. However, the contract also provided:

Lessor shall under no circumstances . . . be considered as bailee or otherwise howsoever in control or possession of the contents of the leased box, the relation of the lessor and lessee, under this agreement, being that solely of landlord and tenant.⁴⁹

Ignoring this language, the court bolstered its decision by reference to the law of bailments. It indicated that the parties agreed a bailment existed, and that therefore the bailee must either deliver the property to one entitled to it or be presumed negligent.⁵⁰ Given that, the bank bore the burden of demonstrating due care. According to the court, the bank failed to introduce "proper evidence to overcome this presumption."⁵¹

Although dictum, this statement demonstrates the reasoning of the court. Moreover, it suggests that the presumption might not arise if some relationship other than a bailment was shown to exist. Thus the clause in the contract, declaring that the bank was a lessor and not a bailee, had it been given effect, might have changed the outcome of the case. Certainly, it would have required different reasoning by the court.

Despite clear and unequivocal language seeking to establish a landlord-tenant relationship, the court ignored the parties' (or at least the bank's) intent and applied the law of bailments. That this type of result might occasionally occur should not, however, discourage banks from seeking to define their relationship with safe deposit customers as other than that of bailor-bailee.

III. THE DIFFERENT RELATIONSHIPS AVAILABLE

Although in theory the parties to the safe deposit contract are free to adopt for themselves any of several relationships, as a practical matter, the choice narrows to one of two: landlord-tenant or

48. 85 N.E.2d at 736; see provision 8.

49. *Id.* at 740; see provision 3.

50. *Id.* at 740.

51. *Id.*

bailor-bailee. However, at least three other possibilities have been advanced, and courts will probably uphold the creation of an alternative relationship if it is advanced, not to avoid liability for the bank's negligence, but for some legitimate reason. Therefore, these other relationships should at least be mentioned. What follows is a brief description of the most common ways in which the safe deposit relationship has been viewed.

A. *Bailor-Bailee*

A bailment exists when one is in physical possession of the property of another.⁵² As a general principle a bailment requires that there be physical possession over such property.⁵³ In addition, the physical possession will typically be accompanied by an intent to exercise actual control over the property.⁵⁴ In the typical bailment setting outside the area of safe deposit boxes, the bailee usually comes into clear physical possession of another's property through the delivery of the property by the owner. What causes difficulty with the bailment theory in the safe deposit context is that the bailee bank does not have full, unrestricted possession of the bailor customer's property. The customer retains the key that enables access. Beyond this, neither the bank nor its customer intends that the bank should be able to obtain possession of the contents of the box, absent extraordinary circumstances. It may thus be argued that no bailment exists.⁵⁵

On the other hand, the bank does have physical custody of the box, at least in the sense that the customer cannot obtain his property without the assistance of the bank. Moreover, the bank's possession is absolute as against all parties but the safe deposit customer. These factors support the idea that the bank has absolute control over the box and its contents, or such control over access to them as to amount to the same thing. Coupled with the fact that

52. See note 3 and cases cited therein *supra*.

53. R. BROWN, *BROWN ON PERSONAL PROPERTY* § 10.2 (3rd ed. 1975).

54. *Id.* § 10.3. See *Bunnell v. Stern*, 122 N.Y. 539, 25 N.E. 910 (1890).

55. Cummins, *A Review of the Law of Safe-Deposit Companies*, 9 HARV. L. REV. 131 (1856); Huggins, *The Safe Deposit Business: Its Bailment Law*, 72 BANKING L.J. 774 (1955); Note, *Law of Safe-Deposit Boxes*, 57 W. VA. L. REV. 74 (1955). Leading cases considering the question are *Nat'l Safe Deposit Co. v. Stead*, 250 Ill. 584, 95 N.E. 973 (1911); and, *Morgan v. Citizens' Bank of Spring Hope*, 190 N.C. 209, 129 S.E. 585 (1925). See also Note, *Bailment-Landlord and Tenant-Licenses-Warehousemen-Relation Between Renter of Safe-Deposit Box and the Safe-Deposit Customer*, 11 MINN. L. REV. 440, 442-43 (1927).

the bank and the customer intend that the bank be in a position of control, insofar as safety is concerned, and the fact that no other relationship seems to fit the situation better, most jurisdictions adopt the view that a bank's relationship with its safe deposit customer is that of bailor-bailee.⁵⁶

B. *Landlord-Tenant or Lessor-Lessee*

A landlord-tenant (lessor-lessee) relationship exists when the owner of property (the landlord/lessor) makes it available to another (the tenant/lessee) for that other's exclusive use, possession and control for the lease period.⁵⁷ In terms of the safe deposit relationship, the bank acts as a landlord/lessor of the safe deposit box or a portion of its vault, and makes the exclusive use, possession and control of the box or portion available to the tenant/lessee.

In the typical landlord-tenant or lessor-lessee setting outside the safe deposit context, the tenant/lessee enjoys various rights, which may vary depending upon whether the lease is one of personal or real property. Where the lease is of real property, the tenant enjoys the exclusive use, possession and control of the real estate.⁵⁸ He may use and possess the property to the exclusion of the owner of the real estate.⁵⁹ The landlord does not have possession of the personal property contained within the leased premises any more than he has possession of the leased premises themselves. Where the lease is of personalty, though "title" to the personal property remains in the lessor, the lessee does have an interest in the personal property, and has exclusive use, possession and con-

56. *Cussen v. Southern Calif. Sav. Bank*, 133 Cal. 534, 65 P. 1099 (1901); *Mayer v. Brensinger*, 180 Ill. 110, 54 N.E. 159 (1899); *Security Storage & Trust Co. v. Martin*, 144 Md. 536, 25 A. 449 (1924); *Roberts v. Stuyvesant Safe Deposit Co.*, 123 N.Y. 57, 25 N.E. 159 (1890); *Morgan v. Citizens' Bank of Spring Hope*, 190 N.C. 209, 129 S.E. 585 (1925); *Moon v. First Nat'l Bank of Benson*, 135 A. 114 (Pa. 1926); *Young v. First Nat'l Bank of Hendrickson*, 56 Utah 327, 190 P. 946 (1920); *McDonald v. Oneida*, 150 Tenn. 451, 265 S.W. 681 (1924); *West Cache Sugar Co. v. Hendrickson*, 56 Utah 327, 190 P. 946 (1920); *McDonald v. Perkins & Co.*, 133 Wash. 622, 234 P. 456 (1925). At least one jurisdiction, Tennessee, has since shifted its position from bailor-bailee to landlord-tenant; see TENN. CODE ANN. § 45-2-902 (1980); see also Comment, *Liability and the Safety Deposit Box*, 2 S. TEX. L.J. 249 (1956) (discussing the Texas statutory change).

57. *Adams v. Hambrick*, 161 Ky. 797, 171 S.W. 398 (1914).

58. *Morgan v. Citizens' Bank of Spring Hope*, 190 N.C. 209, 212, 129 S.E. 585, 587 (1925).

59. *Id.*

trol of the personalty during the lease term.⁶⁰ The lessor has no rights with respect to the leased personal property except the right to receive rent, and to the return of the property at the termination of the lease.⁶¹

In the context of safe deposit activities, the suggestion has been made that the bank is akin to a landlord of real estate,⁶² leasing property (the safe deposit box or a portion of its vault) to the tenant, and merely controlling access in much the same way as a landlord in other contexts controls hallways or other common areas. Or the bank might be considered the lessor solely of the box itself, rather than as a landlord in the real property sense, making the customer a lessee of the box.⁶³ It follows from either theory that the bank cannot have possession of the contents of the box any more than the owner of a building or apartment has possession of the furniture or other personalty of the tenant. Rather, the bank merely has the power to control other unrented real estate areas, or other unrented personal property.

The problem with the foregoing is that, almost by definition, the tenant/lessee is not the exclusive possessor or controller of the box. The bank in actuality has physical custody, possession and control over the box. Although it does not have the right to use the box, it has the right at various times to prevent its use by the customer. Moreover, while the bank does not have any right whatsoever to the contents of the box, or any right to know what, if any-

60. *Undercoffer v. Whiteway Neon Ad., Inc.*, 114 Ga. App. 644, 152 S.E.2d 616, 618 (1966).

61. *Id.*

62. *Carples v. Cumberland Coal & Iron Co.*, 240 N.Y. 187, 192, 148 N.E. 185, 186 (1926). "While the status of the Safe Deposit Co., is . . . in some respects that of a bailee, 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." See also *Morgan v. Citizens' Bank of Spring Hope*, 190 N.C. 209, 212, 129 S.E. 585, 587 (1925) where the court stated:

The interesting suggestion is made by counsel for [the bank] . . . that the relationship between a lessor bank and a lessee customer . . . is that of landlord and tenant, and that the bank's possession of the contents of the box is analogous to the possession which a landlord has of the contents of the house which he has rented to his tenant.

63. For an interesting discussion, see *Veihelmann v. Manufacturers Safe Deposit Co.* as it wandered through the courts of New York. See 198 Misc. 861, 99 N.Y.S.2d 727 (Sup. Ct. 1950); *aff'd* 278 A.D. 685, 103 N.Y.S.2d 833 (1951); *rev'd with directions*, 303 N.Y. 526, 104 N.E.2d 888 (1952); at trial, plaintiff recovered and this was affirmed at 282 A.D. 653, 122 N.Y.S.2d 127 (1953).

thing, the box contains, it fully controls access to the box, and its negligence could lead to the loss of the box's contents. Thus, only a minority of jurisdictions, albeit a substantial one, has accepted the notion that, absent express contractual provision, the relationship is one of landlord-tenant or lessor-lessee.⁶⁴

Furthermore, some authorities hold that even if the bank is characterized as a lessor and the customer as a lessee, a bailment may arise, the thought being that the two relationships are not mutually exclusive.⁶⁵

C. Licensor-Licensee

A license merely permits the licensee to come onto the licensor's property without being a trespasser.⁶⁶ The relationship of licensor-licensee involves a grant of permission by the landowner to enter property for a limited purpose.⁶⁷ No interest in the property arises, and any personalty the licensee brings along remains fully his own and in his possession. In the safe deposit context the licensor-licensee relationship has been likened to that existing between a lodger in a hotel or rooming house and the owner.⁶⁸ The cus-

64. See *Dupont v. Moore*, 166 A. 417 (N.H. 1933); *Tow v. Evans*, 194 Ga. 160, 20 S.E.2d 922 (1942); *But see Buena Vista Loan & Sav. Bank v. Bickerstaff*, 121 Ga. App. 470, 174 S.E.2d 219 (1970) (questioning whether mere labeling in *Tow v. Evans* precludes bailment analysis). The New York decisions question whether the relationship is one of bailment or one of landlord-tenant; see, e.g., *People v. Mercantile Safe Deposit Co.*, 159 A.D. 98, 143 N.Y.S. 849 (1913); *Cohen v. Manufacturers Safe Deposit Co.*, 297 N.Y. 266, 78 N.E.2d 604 (1948); *Veihelmann v. Manufacturers Safe Deposit Co.*, 198 Misc. 861, 99 N.Y.S.2d 727 (Sup. Ct. 1950); *Veihelmann v. Manufacturers Safe Deposit Co.*, 282 A.D. 653, 122 N.Y.S.2d 127 (1953) (Dore, J., dissenting); *Veihelmann v. Manufacturers Safe Deposit Co.*, 303 N.Y. 526, 104 N.E.2d 888 (1952) (Desmond, J., dissenting).

65. See, e.g., *Buena Vista Loan & Sav. Bank v. Bickerstaff*, 121 Ga. App. 470, 174 S.E.2d 219, 222 (1970) where the court stated:

We do not regard the mere labeling of the relationship . . . as that of lessor and lessee . . . as a holding which is dispositive of the relationship between the bank and a box holder . . . Both lease and bailment are indicative of a contractual relationship, and the terms are not necessarily mutually exclusive. A lease may refer to a contract involving realty or personalty, or both, whereas a bailment involves the custody of personalty.

66. *Meers v. Munsch-Protzmann Co.*, 217 A.D. 541, 217 N.Y.S. 256, 259 (1926); *Barnett v. Lincoln*, 162 Wash. 613, 299 P. 392, 394 (1931).

67. *Timmons v. Cropper*, 40 Del. Ch. 29, 172 A.2d 757, 759 (1961); *Isaacson v. Ken Drug Corp.*, 195 Misc. 246, 85 N.Y.S.2d 253, 256 (1948).

68. See *Nat'l Safe Deposit Co. v. Stead*, 232 U.S. 58, 68 (1914); *Shakespeare*,

customer-licensee is given permission by the bank-licensor to enter the bank vault premises for the limited purpose of gaining access to the safe deposit box. The bank continues to own and possess its premises and the box, but the customer-licensee owns and at least constructively possesses the contents of the box.

The chief drawback of the license theory is that ordinarily a licensor is under no duty to exercise reasonable care toward the licensee.⁶⁹ Such a rule defeats the purpose of the safe deposit contract, because by definition the customer is seeking a safe place to deposit his belongings. If the bank does not have to exercise reasonable care over its premises for the protection of the depositor, the likelihood that customers would use safe deposit facilities would diminish significantly.

The licensor-licensee approach has its base in dictum contained in the United States Supreme Court's affirmance of *National Safe Deposit Co. v. Stead*.⁷⁰ There the Court declared that the Illinois Supreme Court's holding that the relationship was a bailment was binding upon the Court, but also indicated that this choice was not inevitable, and that the relationship might also have been seen as that of landlord-tenant or licensor-licensee.⁷¹ An older Pennsylvania case⁷² also suggests that a license might exist in the safekeeping relationship, but beyond these decisions little but academic support for the position can be found.⁷³

D. Other Theories

Two other possibilities have been raised as to the "true" nature of the relationship between the bank and its safe deposit customer, the "custodian" and "sui generis" theories. The custodian theory maintains that the bank is a mere custodian of the box and

Adm'r v. Fidelity Trust & Safe Deposit Co., 97 Pa. 173 (1881); Comment, *Law of Safety Deposit Boxes*, 57 W. VA. L. REV. 74 (1955); Note, *Bailment-Landlord and Tenant-Licenses-Warehousemen-Relation Between Renter of Safe-Deposit Box and the Safe-Deposit Co.*, 11 MINN. L. REV. 440, 446 n. 23 (1927).

69. See note 5 and accompanying text *supra*.

70. 250 Ill. 584, 95 N.E. 973 (1911), *aff'd*, 232 U.S. 58 (1913).

71. 232 U.S. at 68.

72. Shakespeare, *Adm'r v. Fidelity Trust & Safe Deposit Co.*, 97 Pa. 173 (1881).

73. Note, *Bailment-Landlord and Tenant-Licenses-Warehousemen-Relation Between Renter of Safe-Deposit Box and the Safe-Deposit Co.*, 11 MINN. L. REV. 440, 445 (1927); Comment, *Law of Safety Deposit Boxes*, 57 W. VA. L. REV. 74 (1955).

hence the property contained in it, but does not have possession of or the right to control the customer's property. As a mere custodian of the property, the bank would not be subject to the same rigors of a bailee in terms of demonstrating its freedom from negligence in the event of a loss, and would not be subject to garnishment. However, it would still owe the customer a duty of reasonable care. A custodian has physical possession of another's personal property, but absent is any intent on the part of the owner to give up the right to control the property.⁷⁴ Put in the context of the safe deposit business, the bank would have physical possession of the customer's property but the customer would be deemed to control it. Although the custodian theory of safe deposit activities seems plausible, it has so far attracted only academic interest.⁷⁵

Finally, the "sui generis" theory suggests that an entirely new area of law should be established with respect to the safe deposit relationship. It has been suggested that safe deposit activities involve aspects similar to a range of other relationships, and therefore a new category should be carved out for them alone.⁷⁶ This suggestion has been made by courts⁷⁷ and commentators alike,⁷⁸

74. *State v. Smyrski*, 4 Conn. Cir. Ct. 550, 236 A.2d 714, 716 (1967); *State v. Nichols*, 130 S.W.2d 485, 487 (Mo. 1939) (Possession by bailee is in legal contemplation "possession" of bailor, though "custody" of goods is in bailee).

75. See Note, *Property: The Relation of a Safety Deposit Box Company and its Patrons*, 21 CORN. L.Q. 325, 329 (1936) (supports the bailment theory, but explains in part that conclusion as follows:

Generally, the depositor has only one of the two keys necessary to open the box . . . He appoints another as custodian, expects control by the safety deposit company and therefore does not intend to control the box or contents himself, except at intervals . . . Then, the first requirement of possession in the bank is fulfilled with respect both to the box and its contents.)

76. DOBIE, *HANDBOOK ON THE LAW OF BAILMENTS AND CARRIERS*, 166 (1914). "It seems that the relation . . . is not that of bailor and bailee, nor that of landlord and tenant, nor yet that of master and servant, but is rather an anomalous combination of the three." See also, Huggins, *The Safe Deposit Business: Its Bailment Law*, 72 BANKING L.J. 774 (1955); Taylor, *Legal Considerations Affecting Safe Deposit Practices*, 74 BANKING L.J. 751 (1957); Note, *Right of Access to Safety Deposit Boxes*, 17 IOWA L. REV. 505 (1932); Comment, *Liability and the Safety Deposit Box*, 2 S. TEX. L.J. 249 (1956).

77. *Id.* See also, *Veihelmann v. Manufacturers Safe Deposit Co.*, 198 Misc. 861, 99 N.Y.S.2d 727 (Sup. Ct. 1950), *rev'd on other grounds*, 303 N.Y. 526, 104 N.E.2d 888 (1952) ("Thus, have the courts evolved a concept of a composite relationship . . ." 198 Misc. at —, 99 N.Y.S.2d at 734.)

78. See note 76 *supra*.

most of whom then assert that the label itself is less important than the rights that attach to that label. Then they analyze, on the basis of the degree of control, the precise question presented, and other factors, and end up labeling a particular fact situation as a bailment or landlord-tenant relationship.⁷⁹ Ultimately this may be the most sound approach, but it has not been undertaken generally.

IV. BAILOR-BAILEE: THE RELATIONSHIP ABSENT EXPRESS CONTRACT

Almost every major article or book concerning the relationship of the bank and its safe deposit customer begins with a statement like: “[t]he overwhelming weight of authority in the United States is that the relationship between the bank and its safe deposit customer is that of bailee-bailor.”⁸⁰ Indeed, it is true that the majority of jurisdictions adopt the bailment analysis, though it is by no means as overwhelming as some have asserted. Moreover, the relationship may be changed by contract, and other relationships are possible and have some support. Finally, this majority view is articulated primarily when it is alleged that the contents of the box have disappeared. When the dispute is not solely between the bank and its customer, as when garnishment, attachment, or the rights

79. See, e.g., *National Safe Deposit Co. v. Stead*, 232 U.S. 58, 68 (1914): [t]he federal question presented . . . does not call for a decision as to the exact relation between the parties . . . whether there was a strict bailment; whether the renter was in possession of the box . . . whether the property was in the custody of the Company with the renter having a license . . . or whether . . . the relation was that which exists between tenants and landlords

See also, *Blair v. Riley*, 37 Ohio App. 513, 175 N.E. 210, 212 (1930), where the court said: “We do not hold that the law of this case would apply in all instances The relation between the boxholder and the bank would, in all probability, not be paralleled in an institution of sufficient size to maintain a separate safety box department.” And see *Veihelmann v. Manufacturers Safe Deposit Co.*, 198 Misc. 861, 99 N.Y.S.2d 727 (Sup. Ct. 1950), *rev'd on other grounds*, 303 N.Y. 526, 104 N.E.2d 888 (1952); and cases in note 64 *supra*.

80. See, e.g., 1 SCHLICHTING, RICE & COOPER, *BANKING LAW* at 10-11 (1982); Note, *Law of Safe Deposit Boxes*, 57 W. VA. L. REV. 74, 75 (1955); Note, *Property: The Relation of a Safety Deposit Company and Its Patrons*, 21 CORN. L.Q. 325, 327 (1936); Note, *Bailment-Landlord and Tenant-Licenses-Warehousemen-Relation Between Renter and Safe-Deposit Box and the Safe-Deposit Co.*, 11 MINN. L. REV. 440, 441 (1927); Taylor, *Legal Considerations Affecting Safe Deposit Practices*, 74 BANKING L.J. 751, 752 (1957).

of third parties are at issue, the relationship may well not be characterized as a bailment at all.⁸¹

Many of the earliest cases dealing with the safe deposit relationship declared that a bailment was created without considering that some other relationship might be present. In the early case of *Roberts v. Stuyvesant Safe Deposit Co.*,⁸² the court stated: "[t]he legal relation which the defendant held to the plaintiff, and out of which this controversy has arisen, was that of a bailee or depositary for hire."⁸³ Similarly, the California Supreme Court, citing *Roberts* and another New York decision,⁸⁴ declared in *Cussen v. Southern California Savings Bank*,⁸⁵ without considering other possibilities, that "[t]he relation between the parties was that of bailor and bailee. The defendant was a depositary for hire."⁸⁶ To like effect was the Illinois Supreme Court's decision in *Mayer v. Brensinger*,⁸⁷ where the court stated that the relationship of the appellant to the appellee "was that of a bailee or depositary for hire,"⁸⁸ and that this relationship arose "from the nature of the business which the safe deposit company carries on."⁸⁹

By the turn of the century, it was thus fairly well established that the relationship, absent a contract provision to the contrary, was that of a bailment.

In fact, this seemed so obvious to the lower New York court in *Lockwood v. Manhattan Storage & Warehouse Co.*,⁹⁰ decided after *Roberts*, that it expressed incredulity at the suggestion that the relationship could be anything other than a pure bailment:

It is urged upon the part of the defendant that it was not the bailee, because it was not in possession of the plaintiff's property. If it was not, it is difficult to know who was. Certainly the plaintiff was not, because she could not obtain access to the property

81. See cases in notes 64 and 79 *supra*. See also, *People v. Mercantile Safe Deposit Co.*, 159 A.D. 98, 143 N.Y.S. 849 (1913); *Moller v. Lincoln Safe Deposit Co.*, 174 A.D. 458, 161 N.Y.S. 171 (1916); *Medlyn v. Ananieff*, 126 Conn. 169, 10 A.2d 367 (1939); and see, WIS. STAT. ANN. § 812.19 (West 1977).

82. 123 N.Y. 57, 25 N.E. 294 (1890).

83. 25 N.E. at 294.

84. *Lockwood v. Manhattan Storage & Warehouse Co.*, 28 A.D. 68, 50 N.Y.S. 974 (1898).

85. 133 Cal. 534, 65 P. 1099 (1901).

86. 65 P. at 1099.

87. 180 Ill. 110, 54 N.E. 159 (1899).

88. 54 N.E. at 160.

89. *Id.*

90. 28 A.D. 68, 50 N.Y.S. 974 (1898).

without the consent and active participation of the defendant. . . . The vault was the defendant's, and was in its custody, and its contents were under the same conditions. . . . It is perfectly clear that under the ordinary principles governing bailments the relation of the defendant to the plaintiff was that of a depositary for hire. . . .⁹¹

The same clarity attended Professor Cummins of the Harvard Law School, who declared without fear of contradiction in 1896 that the relationship was that of bailor-bailee.⁹²

In the early cases, it may not have been necessary to determine the nature of the parties' relationship, except insofar as the relationship governed the duty of care owed by the bank to its customer. Thus in *Safe Deposit Co. v. Pollack*,⁹³ the court was able to affirm the jury verdict in favor of the plaintiff without expressing the view that a bailment had arisen. Nevertheless, the courts that considered cases arising out of the safe deposit relationship for the most part determined that the relationship was a bailment.

In 1911, the Supreme Court of Illinois, in *National Safe Deposit Co. v. Stead*,⁹⁴ was called upon to decide whether the bank was a bailee of the contents of a safe deposit box so that it could be seen as "in possession or under control" of a decedent's property for purposes of an inheritance tax law. The court first stated that the parties' relationship would determine the outcome of the case, and next decided that the relationship between the bank and its customer was that of bailor-bailee.⁹⁵ Therefore, the bank, although it did not know what the box contained and had no right of access to the box, was nonetheless in possession of it, and thus subject to the inheritance tax statute.⁹⁶

The United States Supreme Court affirmed the decision,⁹⁷ but specifically noted that it was unnecessary to determine the nature of the relationship in view of the Illinois Supreme Court's holding "that the relation created by the Deposit Company's contract was that of bailor and bailee. That construction of the statute is controlling, unless . . . it makes the statute violate the Fourteenth

91. 50 N.Y.S. at 976.

92. Cummins, *A Review of the Law of Safe-Deposit Companies*, 9 HARV. L. REV. 131, 132 (1896).

93. 85 Pa. 391, 27 Am. Rep. 660 (1878).

94. 250 Ill. 584, 95 N.E. 973 (1911).

95. 95 N.E. at 977.

96. *Id.* at 978.

97. *Nat'l Safe Deposit Co. v. Stead*, 232 U.S. 58 (1913).

Amendment.”⁹⁸ Accordingly, the Court had to determine whether the bank or the customer had possession, if only in the sense of “control.”⁹⁹ Viewed in that light, two things were clear to the Court. First, the customer did not have actual possession of the contents. Second, whether or not the bank had possession:

[I]n law and by contract it had such control as to make it liable for allowing unauthorized persons to take possession. Both by the nature of its business and the terms of its contract it had assumed the obligation cast upon those having possession of property claimed by different persons.¹⁰⁰

Thus, whether the bank was viewed as a bailee, landlord, or licensor, it had sufficient *control* over the property to become responsible for not delivering it until the inheritance laws had been complied with.

The Court noted that a New York court considering a similar statute had intimated that the safe deposit company was more like a landlord than a bailee.¹⁰¹ Indeed, in that case, *People v. Mercantile Safe Deposit Co.*,¹⁰² the court held that the defendant could not be liable for the penalty assessed against safe deposit companies for failure to comply with the inheritance tax statute because the defendant had neither “possession” nor “control” over the decedent’s property.¹⁰³ Although the defendant in some respects resembled a bailee, the court believed that the true relationship was that of a custodian, likening the defendant to a landlord who, although he maintains the building, does not possess or control the contents of the premises.¹⁰⁴ The case was thus distinguishable from that of a clear bailment.

Despite occasional cries in the judicial wilderness, the courts throughout the early part of this century adhered to the bailment theory, and most, blindly following the early precedents, failed even to consider that some other relationship might exist. Then during the 1920’s what had been a trend theretofore became

98. 232 U.S. at 68. According to the Court, the state court’s construction of the contract would violate the fourteenth amendment if it amounted to an “arbitrary attempt to create liabilities arising out of possession, where there was no possession in fact.”

99. *Id.* at 68-70.

100. *Id.* at 70.

101. *Id.* at 68.

102. 159 A.D. 98, 143 N.Y.S. 949 (1913).

103. 143 N.Y.S. at 951.

104. *Id.*

clearly established as the majority position. In rapid succession North Carolina,¹⁰⁵ Washington,¹⁰⁶ Tennessee,¹⁰⁷ Maryland¹⁰⁸ and Idaho¹⁰⁹ joined those states that had previously declared the relationship to be a bailment. Thereafter, even more states joined the bailment fold during the 1930's.¹¹⁰ However, about this time the courts for the first time began to acknowledge that, depending on the facts giving rise to the controversy, another relationship might exist.¹¹¹ As important was the realization that defining the relationship was less important than the obligations attending it.

V. LEGAL PROCESS PROBLEMS

By definition, a bailee has possession of chattels belonging to the bailor.¹¹² In a majority of jurisdictions, one in possession of another's property is subject to legal process by which he can be compelled to turn over the property to a sheriff or other third party. This process is known by various names, but is most commonly called garnishment or attachment.

It follows from the foregoing that if a bank is considered to have possession of the contents of a safe deposit box, it may be the subject of legal process in the form of garnishment. On the other hand, if the bank is not deemed in possession, it may only be subject to other types of attachment, or none at all. Thus, a number of courts have been called upon to determine whether the bank is a bailee and, therefore, has possession of the box for purposes of attachment, garnishment, and other legal process. On the whole, the probable majority of jurisdictions, though mostly based on older cases, have held that a bailment exists, and hence possession is in

105. *Morgan v. Citizens' Bank of Spring Hope*, 190 N.C. 209, 129 S.E. 585 (1925).

106. *Sporsen v. First Nat'l Bank of Poulsbo*, 133 Wash. 199, 233 P. 641 (1925).

107. *Young v. First Nat'l Bank of Oneida*, 150 Tenn. 451, 265 S.W. 681 (1924). *But see* TENN. CODE ANN. § 45-2-902 (1980).

108. *Security Storage & Trust Co. v. Martin*, 114 Md. 536, 125 A. 449 (1926).

109. *Rosendahl v. Lemhi Valley Bank*, 43 Idaho 273, 251 P. 293 (1927).

110. *See, e.g., Bedford v. Colo. Nat'l Bank of Denver*, 104 Colo. 311, 91 P.2d 469 (1939); *Klamer v. Grand Nat'l Bank of St. Louis*, 336 Mo. 1022, 81 S.W.2d 961 (1935); *Bank of Calif. v. City of Portland*, 157 Or. 203, 69 P.2d 273 (1937), *cert. denied*, *City of Portland v. Bank of Calif.*, 302 U.S. 765 (1938); *Mitchell v. First Nat'l Bank*, 136 Pa. Super. 467, 7 A.2d 513 (1939).

111. *E.g., Wells v. Cole*, 194 Minn. 275, 260 N.W. 520 (1935).

112. *See* note 3 and accompanying text *supra*.

the bank.¹¹³ The better view is that attachment should be permitted, but absent a contractual provision or specific statutory authorization, garnishment should not be allowed.

By definition, attachment and garnishment are different kinds of legal process, sufficiently distinct to justify different treatment when applied to safe deposit contents. Attachment is the physical seizure of a person's property, usually accomplished pending or following litigation.¹¹⁴ It is uniformly held that the contents of a safe deposit box should be subject to attachment, the theory being that the defendant (customer) should not be able to frustrate creditors by placing wealth in a safe deposit box.¹¹⁵ Regardless of who has "possession" of the box's contents, if they are clearly the property of the defendant, they should be subject to attachment. The only obstacle would be the state statutory scheme controlling the process, since it may make certain property unreachable by attachment.

In contrast, garnishment consists of determining what assets, if any, a third party owes the defendant, or holds on behalf of the defendant, and thereafter compelling the turnover of those assets.¹¹⁶ The discovery aspect of garnishment ordinarily requires the bank to disclose whether it has in its possession or control any of the defendant's property. If the bank is considered to be in possession of the contents of the safe deposit box, it would owe a duty to respond affirmatively. After it is determined that the bank is in possession of such property, an order issues compelling the garnishee bank to pay that property over to the garnishing creditor.

The statutes governing garnishment and attachment must be closely examined by bank counsel, since often the determination of whether garnishment or attachment of a safe deposit box is permitted depends not only upon the relationship of the bank to its customer, but upon the precise statutory language as well. In addition, a few states have very specific statutes dealing with questions

113. See note 56 and accompanying text *supra*.

114. *Union Bank & Trust Co. v. Edwards*, 281 Ky. 693, 137 S.W.2d 344, 348 (1940).

115. See also, *Carples v. Cumberland Coal & Iron Co.*, 240 N.Y. 187, 148 N.E. 185 (1925); Note, *Bailment-Landlord and Tenant-License-Warehousemen-Relation Between Renter of Safe-Deposit Box and the Safe-Deposit Co.*, 11 MINN. L. REV. 440 (1927); Annot., 11 A.L.R. 225 (1921); Annot., 19 A.L.R. 863 (1922); Annot., 39 A.L.R. 1215 (1925).

116. *Posselius v. First Nat'l Bank*, 264 Mich. 687, 251 N.W. 429, 430 (1933), *cert. denied*, 292 U.S. 627 (1933).

concerning process and safe deposit boxes,¹¹⁷ such as whether the bank will be liable for refusing access to the customer following service of process, or entitled to reimbursement for damages caused by forced entry, and even whether the box is subject to certain types of process.

Beyond this, specific provisions should appear in the contract dealing with legal process, permitting the bank to deny access if process is served, and exonerating the bank from the duty to determine the validity of the process. In this manner, the bank may be able to protect itself by contract from assertions by its customers of impropriety.

Unfortunately, these contractual provisions may or may not be given effect, depending upon whether the courts perceive them as an attempt to avoid liability for negligence. To the extent that the bank has the responsibility to exercise due care with respect to the safe deposit box and its contents, its admission of one, under legal process that is either improper or insufficient to permit access, would be lack of ordinary care. Under these circumstances, the bank would be potentially liable to its customer, absent a state statute exonerating the bank. It therefore remains important to consider the court-made rules governing service of process.

The earliest cases suggested rather strongly that, because the box's contents were not in the bank's possession, garnishment was inappropriate.¹¹⁸ However, subsequent cases were not always quick to distinguish between garnishment and attachment, focusing instead on whether the property was the debtor's¹¹⁹ and the policy that should preclude the debtor from hiding behind the safe deposit arrangement. In the early part of this century, a number of cases permitted garnishment, attachment, or both.¹²⁰ Many failed to discuss explicitly what relationship existed between the bank and its customer, instead taking the position that, regardless of where possession lay, the contents were reachable by some form of

117. See CAL. CIV. PROC. CODE § 682a (West 1980), MINN. STAT. ANN. §55.10 (West 1970), NEB. REV. STAT. § 8-501 (1977), OKLA. STAT. ANN. tit. 6 § 1312 (West 1966), TENN. CODE ANN. § 45-2-906 (1980), TEX. REV. CIV. STAT. ANN. art. 342-906 (Vernon 1973), VA. CODE § 6.1-333 (1983), WIS. STAT. ANN. § 812.19 (West 1977).

118. See, e.g., *Gregg v. Hilson*, 8 Phila. (Pa.) 91 (1871).

119. See, e.g., *Washington Loan & Trust Co. v. Susquehanna Coal Co.*, 26 App. D.C. 149 (1905); *Trowbridge v. Spinning*, 23 Wash. 48, 62 P. 125 (1900); *Trainer v. Saunders*, 270 Pa. 451, 114 A. 681 (1921); *Carples v. Cumberland Coal & Iron Co.*, 240 N.Y. 187, 148 N.E. 185 (1925).

120. See note 119 and accompanying text *supra*.

process. If possession lay in the bank, garnishment would be appropriate; if in the customer, some other form of attachment could be used.

Such an analysis misses the point, however. It disregards the burden that garnishment places on the bank,¹²¹ and the fact that garnishment may cause the bank some loss of good will whereas attachment in some other form does not. Furthermore, to the extent that garnishment is not a remedy known at common law,¹²² it is appropriate to require strict construction of the garnishment statutes.

Beginning in the 1930's¹²³ some courts took a closer view of the circumstances, and while they presumably would permit attachment, refused to read their garnishment statutes to permit invasion of the safe deposit box. Thus Connecticut,¹²⁴ New Hampshire,¹²⁵ Minnesota¹²⁶ and Georgia¹²⁷ held that, under their garnishment statutes, assets contained in safe deposit boxes were not reachable. Other jurisdictions have followed suit with legislation.¹²⁸

Whether legal process may reach box contents depending upon the parties' relationship answers only part of the inquiry. Other questions include whether the bank may be liable for permitting access pursuant to improper process; whether the bank must bear the expense of a forcible opening pursuant to the process; whether the bank that complies with proper process is nonetheless liable to its customer; whether process can affect joint te-

121. Typically, when a bank is served with garnishee process, it must take at least the following action: 1) spend time answering whether it has property belonging to the debtor (a none-to-easy task); 2) specify what property it has (an impossible task, since it will not know what the box contains); and, 3) freeze the customer's access (or that of a deputy or co-tenant) to the box. Not only does the bank suffer inconvenience as a result, but there is also the potential loss of good-will involved, and the not insufficient costs associated with the process, both in terms of time and money.

122. *Loewe v. Sav. Bank of Danbury*, 236 F. 444, 447 (2d Cir. 1916), *aff'd*, 242 U.S. 357 (1917).

123. The process may have begun earlier; see *Stehli Silks Corp. v. Diamond*, 122 Misc. 666, 204 N.Y.S. 542 (1924).

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

125. *Dupont v. Moore*, 86 N.H. 254, 166 A. 417 (1933).

126. *Wells v. Cole*, 194 Minn. 275, 260 N.W. 520 (1935).

127. *Tow v. Evans*, 194 Ga. 160, 20 S.E.2d 922 (1942); *but cf.* *Buena Vista Loan & Sav. Bank v. Bickerstaff*, 121 Ga. App. 470, 174 S.E.2d 219 (1974).

128. See, e.g., Wis. STAT. ANN. § 812.19 (West 1977).

nants; and whether process in the form of a search warrant or Internal Revenue Service inquiry or warrant must be obeyed.

These questions are to some extent governed by the relationship of the parties. Unfortunately these issues, while important, have not been as thoroughly litigated as others concerning the safe deposit relationship, so less clearcut answers must be given. Nevertheless, the local statutes and decided cases offer some guidance.

A. *Liability for Improperly Permitting Access*

It appears that the bank does run the risk of liability for permitting access improperly or pursuant to improper process. The bank owes a duty of due care to the customer, and therefore must examine process to ensure that it is proper, and take all reasonable steps to prevent access or removal of contents by persons unauthorized by the process.

In some jurisdictions,¹²⁹ statutes provide that the bank will not be liable for complying with process, though the problem remains of what steps the bank must take to ensure that the process is valid. Typically, the contract provides that the bank need not inquire into the validity of the process. However, it is questionable whether such a clause will be upheld.

The leading case in this area is *Roberts v. Stuyvesant Safe Deposit Co.*,¹³⁰ decided nearly a century ago by the New York Court of Appeals. The case concerned a search warrant served on the defendant which authorized the search of a safe deposit box located in defendant's vaults and rented by plaintiffs. The police had obtained information by subpoena from the defendant that the plaintiff had a safe. Thereafter a warrant was served and the contents were removed, though the defendant and the police inventoried them. The defendant did not examine the warrant, which contained no authorization to remove. Nor did the defendant attempt to prevent the removal of items not described in the warrant.

When the plaintiff sued, the defendant sought to defend on grounds that it was complying with process and could not be liable. Rejecting this argument, the court held that the process, since it did not authorize the action taken, and the defendant had failed to resist, could not afford an excuse.¹³¹ The safe deposit company

129. See, e.g., MINN. STAT. ANN. § 55.10 (West 1970).

130. 123 N.Y. 57, 25 N.E. 294 (1890).

131. 25 N.E. at 295.

should have assured that the process was valid, resisted its execution if invalid, or sought to reclaim the property after it was improperly taken.¹³² Having failed to do so, the company was liable to its customer.

A subsequent New York decision, *Moller v. Lincoln Safe Deposit Co.*,¹³³ suggests that the *Roberts* rule is to be extended to any court order, and that failure to ascertain the validity of any process could subject the bank to liability.¹³⁴

The foregoing rules are a direct outgrowth of the bailment relationship, requiring the bailee to use due care to ascertain the validity of process, to resist an improper taking, to notify the bailor of the seizure, and to pursue legal remedies of reclamation. However, it may be that regardless of the relationship, similar duties would be placed on the bank.

B. *Liability for the Expense of Forcible Opening*

Here again state statutes should be consulted, because some states have enacted legislation that places the expense of forcible entry on the party seeking access.¹³⁵ Because the rights of third parties are involved, a contractual provision alone is unlikely to be effective.

It is the practice in a number of states for orders of garnishment or attachment of safe deposit contents to include a clause allocating costs to the person seeking access. Moreover, as a practical matter, most creditors seeking debtor assets are willing to pay the costs associated with forcible entry.

The majority of states have statutes governing will searches; such statutes typically place the cost on the party seeking access, or provide for a claim against the decedent's estate. By analogy to such statutes, the bank should not be forced to bear the expense of forcible opening. It is the creditor who seeks access and causes the opening; it is the debtor whose assets are sought. Either party is in a better position than the bank to bear responsibility for the expense.

However, judicial authority exists for the proposition that the bank can be forced to bear the expense of the opening, at least initially. In the leading case, *West Cache Sugar Co. v. Hendrick-*

132. *Id.*

133. 174 A.D. 458, 161 N.Y.S. 171 (1916).

134. 161 N.Y.S. at 173.

135. *Tillingshast v. Johnson*, 34 R.I. 136, 82 A. 788 (1912).

son,¹³⁶ the Utah Supreme Court, in reversing an order of garnishment, nevertheless indicated that the fact that the bank had to bear the expense of the opening was not a bar to garnishment of the box's contents. That ruling was based upon a number of factors. The cost of the procedure was but \$2.50. The box could be drilled and the hole plugged so that the box was "just as good as it was originally."¹³⁷ Finally, the expenses associated with the opening would be "chargeable as costs, and will be allowed by the court."¹³⁸ In other words, the ultimate cost would not, under the *Hendrickson* scheme, be borne by the bank. The court indicated that the key was whether the box could be entered without permanent injury.¹³⁹

On the other hand, the New York Court of Appeals in *Carples v. Cumberland Coal & Iron Co.*,¹⁴⁰ sidestepped the issue, holding that because the safe deposit company had not appealed the lower court ruling, the issue of whether the order violated some right of the company would not be reached.¹⁴¹ In this connection, it should be noted that a lower New York court, in *Stehli Silks Corp. v. Diamond*,¹⁴² ruled the year before *Carples*, that the courts were powerless to order the destruction of the bank's property.¹⁴³

Perhaps a majority of jurisdictions would follow the lead of *Hendrickson*, although the problem is largely avoided in practice by the assessment of costs against the plaintiff creditor.

C. Whether Complying with Proper Process Provides Excuse for Failure to Deliver

In this area, the relationship of bailor-bailee is to the bank's advantage, although it is probably true that, even if the relationship were defined differently, the bank would be exempt from liability. The general rule is that the bailee who permits the removal of bailed property pursuant to court order is not liable for having

136. 56 Utah 327, 190 P. 946 (1920).

137. 190 P. at 949.

138. *Id.*

139. *Id.* "If . . . there is any method or device available by means of which such boxes can be opened without destroying them and their contents, the courts have ample power to direct those who have possession and control of such boxes to open them by any available method. . . ."

140. 240 N.Y. 187, 148 N.E. 185 (1925).

141. 148 N.E. at 186.

142. 122 Misc. 666, 204 N.Y.S. 542 (1924).

143. 204 N.Y.S. at 542-43.

done so.¹⁴⁴ Ordinarily under these circumstances the bailee may excuse its failure to deliver to the true owner on that basis.¹⁴⁵ This rule appears to have been adopted with respect to safe deposit boxes, although some courts seem to require the notification of the true owner to establish the excuse.¹⁴⁶ Thus in *Carples v. Cumberland Coal & Iron Co.*,¹⁴⁷ the court, in determining that the exact nature of the relationship did not have controlling effect with respect to whether garnishment could occur, said:

[I]f . . . we regard the Safe Deposit Company as in some respects a bailee and having possession of the box, it was still proper for the court to make the order which it did, and which, with the levy of the sheriff thereunder, will be ample protection to the company as against the defendant.¹⁴⁸

It should be noted that, in some jurisdictions, the duty to act with reasonable care requires that notice of service of process be provided by the bank to the customer.¹⁴⁹ Furthermore, as indicated previously, the duty of due care requires the bank to insure that the process is valid, and this may require the bank to appeal the matter, if decided adversely to it, rather than resting on a lower court decision.

As a practical matter, the safe deposit contract should contain

144. See, in the safe deposit area, *Carples v. Cumberland Coal & Iron Co.*, 240 N.Y. 187, 148 N.E. 185 (1925):

And if, on the other hand, we regard the Safe Deposit Company as in some respects a bailee and having possession of the box, it was still proper for the court to make the order, which it did, and which . . . will be ample protection to the company as against the defendant.

148 N.E. at 186-87. Compare *Roberts v. Stuyvesant Safe Deposit Co.*, 123 N.Y. 57, 25 N.E. 294 (1890).

It is no doubt true that a bailee . . . may excuse himself for a failure to deliver the property to the bailor . . . by showing that the property was taken out of his custody under the authority of valid legal process, and that within a reasonable time he gave notice of that fact to the owner. But where the process is invalid or the bailee does not inquire into its validity, it is not shown that the property was taken . . . by legal process, so as to excuse its loss.

25 N.E. at 295-96.

145. *Id.*

146. New York is apparently such a jurisdiction. See *Roberts v. Stuyvesant Safe Deposit Co.*, 123 N.Y. 57, 25 N.E. 294, 295 (1890).

147. 240 N.Y. 187, 148 N.E. 185 (1925).

148. 148 N.E. at 186-87.

149. See note 146 *supra*.

a provision to the effect that the bank need not inquire into the validity of process. If that provision is invoked by the bank to insulate it from the liability to its customer when the process is facially valid, and the bank has otherwise acted reasonably to protect its customer's interests, the clause should be given effect. The bank, however, should not be permitted to rely on such a clause when it is apparent that the bank has not acted reasonably.

On a related issue, at least one case has held that the bank can be found liable for denying the customer access to the box.¹⁵⁰ However, when process is served, it is advisable to seal the box and refuse further access, regardless of whether the process served requires it. To protect the bank in this situation, the contract should provide that, on the service of any legal process upon the bank, it may refuse the customer access, without liability, and without regard to the precise nature of the process. However, again the bank must not seek to use this clause to excuse lack of due care. Thus, the bank should seal the box and refuse access on the basis of other than court process, regardless of how "official" the demand for access appears.

Where the process is valid, the bank is protected. If there is any question, the bank should, if possible, seek indemnification from the entity seeking access, or seeking to bar the access of others.

D. Process as it Affects Joint Tenants

Whether legal process can adversely affect joint box holders is a difficult question, and can be appropriately answered either way. Any process served on the bank relative to a safe deposit box will force the box to be sealed, or require the opening and potential removal of its contents. To this extent at least, the joint tenant or co-lessee is precluded from entry or has his privacy invaded. However, it is well settled that the scope of legal process goes only to that property covered by it,¹⁵¹ so at least in theory, property not belonging to the defendant cannot be taken. Moreover, some courts have gone so far as to hold that unless the joint box holder is named as a defendant, no garnishment (or presumably other

150. See *Stevenson v. Economy Bank of Ambridge*, 413 Pa. 442, 197 A.2d 721 (1964). See also Annot., 4 A.L.R.3d 1642 (1965), discussing other cases that indicate a rule requiring unrestricted access to authorized persons.

151. See *Roberts v. Stuyvesant Safe Deposit Co.*, 123 N.Y. 57, 25 N.E. 294 (1890). See also notes 155-161 *supra*.

process) is appropriate.¹⁵² In addition, some jurisdictions specifically cover the situation by statute, either requiring the creditor to post bond,¹⁵³ or compelling or permitting the denial of access.¹⁵⁴

The issue of joint tenants being affected by legal process has seldom been fully explored. The Utah Supreme Court, in *West Cache Sugar Co. v. Hendrickson*,¹⁵⁵ indicated it would permit the garnishment of a box to which joint access was available. However, the court noted that in framing the order permitting garnishment (and presumably other legal process), courts must be sensitive to the fact that multiple persons might have access to the property and the box.

[T]he order should be so framed as to permit the garnishee to be present by its agent or attorneys and to make a complete and accurate inventory of the articles that are found in the box when it is opened. In view of the garnishee's liability, it should be given the right, not only to make such an inventory, but in case the articles bear no earmarks respecting ownership, and the garnishee claims an interest or right to any article found in the box, then the garnishee should be permitted to go before the court and assert its rights to such articles, or, in case it has reason to believe, and does believe, that some article or articles belong to a person or persons other than the judgment debtor or lessee of the box, the garnishee should be permitted to suggest that fact to the court, to the end that the alleged owner or owners may be notified to come before the court and make known their rights or interest in or to the articles.¹⁵⁶

To the contrary, the Michigan Supreme Court in *First National Bank in Mount Clemens v. Croman*,¹⁵⁷ held that garnishment of a jointly held box was improper when the non-debtor was not named as a party defendant.¹⁵⁸ In *Croman*, the defendant in a garnishment action was the husband of a safe deposit box lessee. He was also named as a deputy, and therefore was entitled to access to the box. The bank, when served with garnishment papers, answered that the husband had no box, but volunteered that the

152. See, e.g., *First Nat'l Bank in Mount Clemens v. Croman*, 288 Mich. 370, 284 N.W. 912 (1939).

153. See, e.g., CAL. CIV. PROC. CODE § 682a (West 1980).

154. *Id.*

155. 56 Utah 327, 190 P. 946 (1920).

156. 190 P. at 950-51.

157. 288 Mich. 370, 284 N.W. 912 (1939).

158. 284 N.W. at 914-15.

wife did. The plaintiff sought to join the wife as a party defendant, but she was dismissed on her motion, and the plaintiff did not appeal. Subsequently, the plaintiff sought garnishment of the box, naming only the husband. The trial court denied the right of garnishment, ruling that the wife was a necessary party.¹⁵⁹ The plaintiff appealed, and the Michigan Supreme Court held that although a safe deposit box leased by one person might be reached by garnishment, where multiple parties had access rights, the box's contents could not be reached.¹⁶⁰ Otherwise, "dire results" could follow, and even the safeguards suggested by *Hendrickson* might not be sufficient.

True it is that upon the opening of the box [the other tenant] might be summoned as a witness and his claim to the contents, if any, developed. But we think it would be highly improper for the court to adjudicate the ownership of the contents of the box in a proceedings [sic] to which one of the parties having the contract right to use it was not a party and upon whom, therefore, the court's adjudication would not be binding. Under such circumstances, even the garnishee defendant would not be protected by the judgment rendered against a subsequent claim of the one who was not a party to the proceedings. . . . Opening the box in a proceedings [sic] to which [the other tenant] was not a party . . . would have been in violation of her rights. It is to be presumed that a lessee of such a box has property therein and that it has been placed there for the owner's own protection. The right to have this status preserved should not be violated by a court in a proceedings [sic] to which such lessee is not a party.¹⁶¹

The rule established by the Michigan court seems the more sound one, unless the bank is to be fully protected for having complied with legal process. As a practical matter, the problem may be solved by contract, with the inclusion of a clause providing that, where multiple parties have access (either as co-lessees, joint tenants or deputies), service of process on one permits the bank to

159. *Id.* at 914.

160. *Id.*

161. *Id.* at 914-15 (citations omitted). It should be noted that the presumption indulged in by the court, that the property in the box is the box renter's, has been used to place the burden of showing multiple rights of access on the bank. Thus, when a creditor seeks access to the box, and the box is in the name of only one lessee, the bank, in order to defeat the claimed right of access, would have to show that the property might belong to others. See *United States v. New England Merchant's Nat'l Bank*, 465 F. Supp. 83, 88 (D. Mass. 1979).

grant access, regardless of the fact that the property may belong to another.

Because of the split of authority in this area, and the bank's duty to use reasonable care to prevent improper access, it is advisable to resist an order affecting a joint box unless the order makes explicit reference to, and provision for, all parties.

E. Compliance with Search Warrants and Internal Revenue Service Process

In addition to legal process served with the purpose of seeking to restrain access or seize a box's contents for the benefit of private persons, perhaps the most common processes served are search warrants and Internal Revenue Service warrants or levies. Here again the rule appears to be that the bank must take every reasonable effort to protect the customer's privacy and safe deposit contents.¹⁶² If it does, and access is ordered and permitted pursuant to final legal process, the bank should be protected. And again, if it does not exercise such care it is likely to be held liable to the customer.

When a search warrant is served on the bank, it must ascertain that the warrant is proper. If any defect is obvious, the bank should refuse access. If the warrant appears proper, an officer of the bank should accompany the police officer, and take an inventory of the contents. Additionally, the bank should refuse to permit removal of any contents not set forth in the warrant. As a practical matter, this will mean that bank counsel will have a decision to make on the spot. If there is any doubt, access or removal should be refused.

Where the process is from the Internal Revenue Service, much depends on what type of process is served. The two most common types of I.R.S. process are the third party summons, seeking record-keeping information, and the I.R.S. levy. The third party summons is authorized by 26 U.S.C. § 760.¹⁶³ Basically, that sec-

162. By analogy to *Roberts v. Stuyvesant Safe Deposit Co.*, 123 N.Y. 57, 25 N.E. 294 (1890). See notes 130-32 and accompanying text *supra*.

163. Section 7602 authorizes the Secretary (1) to examine any books, papers, records, or other data which may be relevant in determining the liability of any person for any internal revenue tax; and (2) to summon "any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax . . . to appear before the Secretary . . . and to produce such books, papers, records, or other data. . . ."

tion enables the I.R.S. to serve a summons on a bank to require the production of records held by the bank, so that the I.R.S. may determine what property the bank holds on behalf of a taxpayer. This, in turn, enables the I.R.S. to investigate and determine the taxpayer's tax liability, if any. Ordinarily the summons will seek all records relative to a particular taxpayer, including safe deposit records.

The I.R.S. must notify the person whose records are sought within three days after issuing the summons.¹⁶⁴ If that person notifies the bank within 20 days that it is not to comply with the summons, the bank must abide by his wishes.¹⁶⁵ The bank then needs to await a federal court order to produce the records.¹⁶⁶ The bank is thus permitted by statute to avoid having to decide whether to comply with the summons, at least until the customer fails to object, or until a court order is issued.

The second type of I.R.S. process presents more problems. The I.R.S. levy served upon a bank seeks access to, or the sealing of the box, and may even seek the removal of the box's contents. Strong authority supports the proposition that the bank *must* comply with the levy,¹⁶⁷ although, from a practical standpoint, compliance should not occur until the bank is convinced beyond doubt of the legitimacy of the levy.

The I.R.S. basically uses two types of levies, the deficiency levy and the jeopardy levy. Both, have similar effect with respect to safe deposit boxes. Ordinarily the I.R.S. will notify the taxpayer of a deficiency, and the taxpayer is entitled to exhaust his administrative remedies in objecting to the deficiency.¹⁶⁸ If the assessment

164. 26 U.S.C. § 7609 (1976).

165. *Id.* The period was lengthened from 14 to 20 days in 1982.

166. 26 U.S.C. § 7604(a) (1976) provides that "[i]f any person is summoned under the Internal Revenue laws to appear, to testify, or to produce records, or other data, the United States district court . . . shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data." 26 U.S.C. § 7609 (1976).

167. *See United States v. First Nat'l City Bank*, 568 F.2d 853 (2d Cir. 1977); *United States v. New England Merchant's Nat'l Bank*, 465 F. Supp. 83 (D. Mass. 1979). *See also* 26 U.S.C. § 6332(c).

168. After administrative remedies are exhausted, the taxpayer is sent a statutory notice of deficiency, after which the taxpayer has 90 days to file a petition with the Tax Court. If no petition is filed, the I.R.S. will assess the tax and proceed to collect it. The taxpayer's remedy at that point is to pay the tax, and file a claim for refund with the I.R.S. If the claim for refund is denied, or no action is taken within six months, the taxpayer can bring suit in federal district court or

is upheld, the I.R.S. will demand payment from the taxpayer. Upon the taxpayer's failure or refusal to pay, the I.R.S. may levy on the taxpayer's property, including assets contained in a safe deposit box.

Occasionally, however, the I.R.S. will conclude that payment will be in jeopardy if the taxpayer is notified and given opportunity to pursue his remedy administratively, as where the taxpayer is about to leave the country owing taxes, or is about to liquidate and dispose of assets. In such events, a procedure known as jeopardy assessment¹⁶⁹ is used. The I.R.S. levy is then made immediately to prevent removal of assets by the taxpayer.

The effect of both types of levies is essentially the same with respect to the bank, although not to the taxpayer. In all events, the I.R.S. seeks through use of these levies to prevent access by the taxpayer. Additionally, it usually seeks access to the box and the right to remove the box's contents. The question becomes how the bank should react to these levies. The rule laid down by the courts appears to be that access should be given, and that removal must be allowed, at least where levy is followed by an administrative subpoena.¹⁷⁰ However, the bank should refuse access long enough to enable it to determine the propriety of the demand for access. This may well mean that access must be refused until the courts, as opposed to the I.R.S., order it.

The problem is that if the bank permits access or removal and the taxpayer later objects and prevails in his objection, the bank may have no excuse for permitting access or removal. It presumably would be liable to its customer for failure to exercise due care. On the other hand, refusal of access or removal casts the bank into the role of an obstructionist, and refusal to seal the box could render the bank liable to the government. Regrettably, there is little alternative but to advise the bank to seal the box upon service of any I.R.S. process, refusing access to the customer until the validity of the process is settled. The contract should contain a clause permitting I.R.S. agents access to the box. If for one reason or another this cannot be accomplished, the bank *must* take an inventory of the box's contents, and should never permit removal

the Court of Claims.

169. So called because the prospect of payment is in jeopardy. Jeopardy assessment is authorized by 26 U.S.C. § 6851 (1976).

170. See *United States v. First Nat'l City Bank*, 568 F.2d 853 (2d Cir. 1977); *United States v. First Nat'l City Bank*, 388 F. Supp. 1044 (S.D.N.Y. 1974) (same cases).

of any contents. This will force the I.R.S. to obtain a court order compelling the bank to permit access or removal.

As a practical matter, the court will almost certainly issue the order, and this procedure will be costly and unproductive for the bank. However, in view of its potential liability for acting otherwise, in the absence of statutory provision clearly protecting the bank, the bank has no alternative.

The leading cases involving I.R.S. process are *United States v. First National City Bank*,¹⁷¹ and *United States v. New England Merchants National Bank*.¹⁷² In *City Bank*, the federal district court ordered both City Bank and Chemical Bank to permit forcible entry of safe deposit boxes leased to a taxpayer, relying on New York law.¹⁷³ The government had made a jeopardy assessment. Although the banks had sealed the boxes, they refused access and removal by the I.R.S. The taxpayer was held not to be a necessary party to the proceeding.¹⁷⁴ The court, in ordering that access be permitted, ruled that New York law applied and that the property was therefore subject to seizure.¹⁷⁵ The court further held that "[t]o permit a taxpayer to avoid levy and seizure of property . . . by placing it in a safe deposit box would frustrate the enforcement provisions of the Internal Revenue Code. We cannot permit the taxpayer to shield selected assets from the tax laws simply by placing them in a safe deposit box."¹⁷⁶

On appeal by City Bank and the taxpayer, the district court was upheld by the Court of Appeals.¹⁷⁷ Of particular interest on appeal was whether the taxpayer should be allowed to intervene. The court did not permit intervention, rejecting the taxpayer's argument that otherwise his constitutional rights were being violated.¹⁷⁸

171. 388 F. Supp. 1044 (S.D.N.Y. 1974), *aff'd*, 568 F.2d 853 (2d Cir. 1977).

172. 465 F. Supp. 83 (D. Mass. 1979).

173. *City Bank*, 388 F. Supp. at 1046.

174. *Id.* at 1045.

175. *Id.* at 1045-46.

176. *Id.* at 1046.

177. 568 F.2d 853 (2d Cir. 1977). The other defendant, Chemical Bank, chose to permit access and removal based on the district court order. Citibank, on the other hand, had permitted access but still refused to allow removal.

178. *Id.* at 858. The court stressed that the issue was *not* whether the taxpayer had a right to a hearing *after* his property was seized, but rather whether he was entitled to litigate his claims *before* the government obtained possession of the contents of the box. The taxpayer's remedy, according to the court, was a post-seizure hearing of the sort described in *Commissioner v. Shapiro*, 424 U.S.

The intervention issue is important from the bank's standpoint. If the taxpayer is not a party, it is possible that he subsequently will be able to object to the bank's actions, because the court's decision would not necessarily bind him. Certainly this would be true unless the court specifically held that the taxpayer did not have to be joined. Thus, it is advisable for the bank, whenever process is served upon it, to ensure that the customer is named as a party, notified of service of process, and given an opportunity to intervene. Otherwise, the bank must refuse access and litigate the question itself. This is what occurred in *United States v. New England Merchants National Bank*.¹⁷⁹

Merchants National is a district court case that was not appealed, thereby perhaps diminishing its import. However, it remains important for several reasons. First, it suggests that federal, rather than state law, should govern with respect to I.R.S. process and safe deposit boxes. Second, it supports the proposition that the taxpayer need not be joined. Finally, it addresses the bank's very real concern that the property in the box might not be the taxpayer's.

In *Merchants National*, the lessee of a safe deposit box in the defendant bank was determined by the I.R.S. to owe some \$47,000 on unpaid marijuana transfer taxes. The taxes were delinquent, a jeopardy assessment was made, and notices of levy and seizure were served on the bank. The government had the key to the box, but the bank refused to cooperate in its opening. The government then sued the bank, seeking an order compelling its cooperation. The government moved for summary judgment, which motion was granted.

The government had proceeded pursuant to 26 U.S.C. § 6632, which permits the I.R.S. to demand property of the taxpayer that is subject to levy and in the possession of someone other than the taxpayer.¹⁸⁰ The bank first contended that the taxpayer had pos-

614 (1976).

179. 465 F. Supp. 83 (D. Mass. 1979).

180. Section 6632(a) provides as follows:

Except as otherwise provided in subsection (b), any person *in possession of* (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

session, not the bank, and that therefore Section 6632 did not apply. The bank supported this contention by pointing to state law, and arguing that Massachusetts law did not consider the bank in possession.

The district court disagreed that state law should resolve the issue, holding that:

federal law should govern the determination of whether property subject to levy is in the "possession" of a third party, for any other result would permit states to frustrate the collection of federal taxes. Even if "possession" were in general a question of state law, state law should give way to federal law . . . where following the state's rule would frustrate the purpose, terms and uniformity of the controlling statutory scheme.¹⁸¹

The court then concluded that although Massachusetts law was unclear:

the bank would appear to have sufficient control over the safe deposit box and the surrounding area to give it "possession" of the contents of the box for purposes of applying 26 U.S.C. § 6332 (a). . . . Otherwise a taxpayer could insulate his property from levy simply by placing it in a safe deposit box prior to its seizure.¹⁸²

On the question of joinder of the boxholder as a necessary party, the court agreed with the "weight of authority" that the boxholder was not a necessary party.¹⁸³

The bank's third argument, that the contents of the box might not be owned by the taxpayer and therefore might not be subject to levy, was not disposed of as easily. Presumably, the bank's concern was that if it permitted seizure of someone else's property, it could be held liable to that other person. If a co-tenant or joint boxholder had property in the box, the bank thus bore a substantial risk. Similarly, it was possible that some related, though unnamed, person was using the box with permission of the taxpayer. These considerations had led other courts to refuse enforcement of other types of process, suggesting that the persons should be joined.¹⁸⁴ *Merchants Bank* took a different approach, perhaps be-

(Emphasis added).

181. 465 F. Supp. at 86-87 (Citations omitted).

182. *Id.* at 87.

183. *Id.* In *United States v. Mellon Bank*, 521 F.2d 708, 711 (3d Cir. 1978), the court held that joinder was discretionary with the trial court.

184. *See, e.g., First Nat'l Bank in Mount Clemens v. Croman*, 288 Mich. 370,

cause the bank failed to make clear the reason for its concern. The court noted that under Massachusetts law, rental of a safe deposit box raised a rebuttable presumption of ownership of its contents.¹⁸⁵ Accordingly, when the government proved rental of the box, the bank bore the burden of rebutting the presumption that the contents, if any, were owned by the lessee. The bank failed to produce any evidence that someone else owned the contents or might be the owner. Therefore, the presumption sufficiently established that the taxpayer owned the property.¹⁸⁶

This approach makes sense, provided that the bank can rebut the presumption merely by showing that one other than the taxpayer had access to the box, and (perhaps) exercised that right of access. Beyond this, it might be legitimate to require some sort of affidavit of ownership presented by the co-tenant or other deputy. The problem is that if such an affidavit is not available, the failure to produce it could operate to render the bank liable in a subsequent action. As a result, the better rule would be either to immunize the bank from liability, or at a minimum place the burden on the government once the bank shows the possibilities of multiple access. As the bank apparently did not show any such possibilities in *Merchants Bank*, the court's ruling was appropriate.

The problems banks face in dealing with I.R.S. legal process are compounded by public policy considerations. Taxpayers themselves often raise claims related to their fourth amendment right of freedom from unreasonable searches and seizures, and their fifth amendment right to avoid self-incrimination. These concerns, and the public policies they embody, may well cause banks to hesitate more than they might if only private interests were at stake. Moreover, it can be argued that the banks should take it upon themselves to raise these concerns, despite their almost certain rebuff, to avoid potential civil liability on the basis of failure to exercise due care. The mere prospect of such liability, or even the expense attendant upon defending lawsuits based upon such assertions, justifies extraordinary caution on the part of banks when process of any type is served. Furthermore, this potential liability more than justifies legislative guidelines, or in their absence, the creation of judicial immunity.

284 N.W. 912 (1939). See notes 157-61 and accompanying text *supra*.

185. 465 F. Supp. at 88.

186. *Id.*

VI. CONCLUSION

This Article has explored the relationship of the bank to its safe deposit customer. As has been seen, the relationship is essentially a matter of contract, except that, to the extent that public policy concerns affect the relationship, the bank may not be free to avoid responsibility for matters at the heart of the relationship. Moreover, in the absence of contractual provisions making clear the nature of the relationship, the courts have not been at all reluctant, to impose judicial strictures on the relationship. The judicial pronouncements have been sound for the most part, though the courts have shown a marked tendency to categorize, to pigeon-hole, and to squeeze the safe deposit relationship into more traditional legal relationships. The effect has been to create some serious problems, many of which have not been fully considered by the courts that created them.

In some jurisdictions at least, the legislatures have considered the question of the legal relationship of sufficient importance to address certain aspects of it. While the legislative enactments have generally been better considered than the judicial responses, even they have failed to address many significant problems which cause banks daily concern. Despite the existence of far too many regulatory statutes already, it is probable that only new statutes can resolve these problems in an effective and uniform fashion.

The starting point is to recognize that what the relationship is called, by what legal terminology it is known, is significantly less important than the rights and responsibilities that attach to it. Some of the rules that derive from the law of bailments may well have their place in the safe deposit context, as may many of the rules that result from denominating the relationship as one of landlord and tenant. However, the time has come to discard the mere labels and to provide solutions to very real problems that banks and their customers face on a daily basis.

This Article has attempted to point out some of those problems and to suggest possible ways of dealing with them. It is to be hoped that, before the problems become insurmountable, the courts, and particularly the legislatures, will take a close look at the relationship of the bank to its safe deposit customer and develop solutions that both parties can live with. Until that time, banks in the 1980's will be faced with solutions that were developed when the safe deposit box was unique, and its use was restricted to the very wealthy.