

NOTES

ACTIONS TO RECOVER CHATTELS IN MISSOURI

THE STATUTORY PROVISIONS

The purpose of this note is to state the general rules applicable in Missouri in litigation concerning the right to possession of specific chattels. The problem involves the investigation of the modern statutory counterpart of the common law actions of replevin and detinue. It will be remembered that whenever a question arose at common law over the right to recover a specific chattel, the action in which the litigation would proceed would be either replevin or detinue.¹ For this reason, it may be worthwhile to refresh the reader's mind with the capabilities and limitations of those two common law actions. A review of the two actions will conduce to a better understanding of Missouri law regarding the claim and delivery of personal property, because Missouri's statutes dealing with the recovery of such property include the substantive law of replevin and detinue, stripped of their arbitrary rules concerning pleading and procedure. Indeed—today's more liberal procedure aside—not much more can be done under Missouri's statutes dealing with this subject than was possible under the combined actions at common law.

The three most common situations in which a person might have the right to possession of a specific chattel are (1) where defendant takes the property from the plaintiff wrongfully; (2) where defendant wrongfully detains the property, though he somehow came into possession thereof rightfully;² (3) where plaintiff contracts to purchase the property from the defendant. In the first situation—wrongful or trespassory taking—replevin

1. An occasional exception arose when equity intervened in unusual cases in order to assure the plaintiff absolutely of securing the chattel he sought—cases wherein the chattel had a unique, intrinsic value to the plaintiff, which value was not susceptible of an objective valuation. In such cases, both replevin and detinue were inadequate, for in detinue the defendant always had the option to pay the value rather than to return the property, while replevin, though theoretically giving to the plaintiff the sole option of recovering the chattel in specie, actually gave no such absolute choice since there was nothing to prevent the defendant from hiding or otherwise disposing of the chattel and, upon losing the litigation, paying the value.

2. Of course, the recovery of a trust res would fall within this category. The law of trusts, however, includes principles peculiar to that subject and to the equity courts, and, though the rules of trusts often cut across the law of recovery of personal property, the author has omitted from this paper any discussion of the law concerning the recovery of a trust res.

was the proper remedy, for as finally developed at common law, replevin lay only for the recovery of goods wrongfully taken from the plaintiff's possession. Early Missouri cases followed this "trespassory taking" rule in replevin actions.³ Replevin was thus delictual in nature and origin. Born of the landlord's right of distraint over his tenant's chattels, replevin soon developed into an action in which the plaintiff posted bond to indemnify the sheriff and the defendant and immediately secured possession of the property in controversy, the right to possession being litigated thereafter in the suit.⁴

For the latter two situations, where the original taking was rightful but the defendant refused on demand to return the property, and where the plaintiff contracted to purchase the chattel, detinue was the proper remedy. Detinue, unlike replevin, was contractual in origin and nature, being an offspring of the action of debt. At a very early date, it was held that detinue would lie for a chattel which had never been in the possession of the plaintiff, he having contracted merely to purchase the same from defendant.⁵ Detinue, of course, differed from replevin in two major ways. In detinue, the property remained in possession of the defendant until after the litigation decided the right thereto in plaintiff, while in replevin the plaintiff might have the property at the beginning of the suit by filing bond. Again, in detinue the defendant had the option of returning the chattel or paying the value thereof, while in replevin, theoretically at least, the plaintiff might demand the chattel in specie.⁶

Replevin and detinue made their exit in Missouri along with other common law forms of action in 1849⁷ and the substantive law covering these two actions was combined into what is com-

3. *Chevalier v. Little*, 1 Mo. 345 (1823).

4. No bond was required at first but by 2 GEO. 1, c. 19, § 23, a bond was required with two sureties in the amount of double the value of the property about to be replevied, conditioned to prosecute the suit with effect and without delay and for a return of the property if it be so adjudged. For a historical discussion of the bond requirement, see WELLS, A TREATISE ON THE LAW OF REPLEVIN (1880) 385. The Missouri statute regarding this bond requirement has departed little from the above ancient provisions. MO. REV. STAT. ANN. § 1798 (1939).

5. In 1442, Fortescue, C.J., laid down the law "that if I buy a horse of you, now the property in the horse is in me; and for that you shall have a writ in debt for the price, and I shall have detinue for the horse upon the bargain. Y.B. 20 Henry VI (1442). See KEIGWIN, CASES IN COMMON LAW PLEADING § 40 (2d ed. 1934).

6. For an excellent comparison of detinue and replevin at common law, see *Dame v. Dame*, 43 N.H. 37 (1861).

7. MO. LAWS 1849, p. 73.

monly referred to as the statutory "claim and delivery" of personal property.⁸ The statutes united the capabilities of each action and, in some instances, adopted the limitations existing in them at common law. Except for a few modifications and additions which will be referred to as the discussion proceeds, the statutes covering the subject today are substantially the same as those enacted over a hundred years ago. The statutes are to the greatest extent like replevin. They are similar to replevin in that the plaintiff can, upon furnishing bond, secure possession of the property at the beginning of the suit. Also, the judgment is, in the first instance, that the property be returned in specie, or if that cannot be done, that the defendant pay the value thereof at the election of the plaintiff. But they are like detinue in that recovery may be had under them even where the original taking by the defendant was rightful, the detention alone being wrongful. For the most part, the statutes appear to be merely a codification of common law replevin with the principle borrowed from detinue that recovery can be had where the original taking is rightful. Indeed, the courts still speak of actions to recover personal property as "replevin," while very few cases have mentioned detinue since the form was abolished in 1849.⁹ Even the statutes today refer in the alternative to "replevin," and the titles of the chapters in which the statutes are found are *Replevin in Courts of Record* or *Replevin in Justice Courts*. The same privilege will be availed of here, and henceforward reference to the statutory actions will be made as "replevin."

The Missouri statutes dealing with replevin consist of approximately fifty sections. Revised Statutes Missouri 1939, sections 1788 to 1811 deal with replevin in courts of record, while sections 2934 through 2958 cover the action instituted in justice courts. Except for rules of procedure, the two different categories are substantially the same. Only one surety on the bond is required for the action in justice courts while two are required in courts of record. Of course, the jurisdiction of the justice courts over replevin is fixed by the value of the property and the size of the city in which the action is instituted.¹⁰ Since, in substance, the

8. The first statutes covering claim and delivery of personal property after the abolition of the old forms of action were sections 1 through 9, Mo. Laws 1849, art. 1, p. 82.

9. *Moore v. Chamberlain*, 15 Mo. 238 (1849).

10. Before the justice courts can exercise jurisdiction in replevin actions,

rules are the same, no distinction between the two groups of statutes will hereinafter be made unless specifically necessary. Where it has been necessary to refer to the statutes for illustrative purposes, those statutes dealing with replevin in courts of record have been used.

Under the replevin statutes, the plaintiff must bring his suit in the county in which the property is situated.¹¹ He may proceed in either of two ways. He may allow the defendant to remain in possession of the property during the suit, or he may procure the sheriff to deliver the property to him at the institution of the suit and the right to possession will then be decided in the subsequent litigation. If the latter course is pursued, the plaintiff must file an affidavit with his petition stating that he is either the owner of the property in controversy or is lawfully entitled to the possession thereof;¹² that the defendant wrongfully detains the property; the actual value thereof;¹³ that the property has not been seized under any process, execution or attachment against the plaintiff, and that the plaintiff will be in danger of losing the property unless it be taken from the defendant immediately.¹⁴ After filing the affidavit, the plaintiff must then file a bond with two sureties stating that they are bound to the defendant in double the value of the property as stated in the affidavit, for the prosecution of the suit with effect and without

the value stated in the affidavit plus the damages claimed must be less than \$350.00 in counties or cities of over 50,000 population; in counties or cities having less than 50,000 population, such value and damages must be less than \$250.00. MO. REV. STAT. ANN. § 2934 (1939).

11. MO. REV. STAT. ANN. § 1811 (1939).

12. Just how a party becomes lawfully entitled to the possession of the property is often hard to determine. The problem involves the question of the quantum of title required, for instance, and also the question whether an executory contract entitles the vendee to "lawful possession." These problems are discussed in a subsequent part.

13. But the plaintiff is not bound by the value stated in his affidavit since the only purpose is for fixing the amount of the bond and not for the subsequent assessment of the actual value by the jury. *Ferguson v. Comfort*, 184 S.W. 1192 (Mo. App. 1916).

14. MO. REV. STAT. ANN. § 1811 (1939): "If the plaintiff claim in his petition the possession of specific personal property, he may, at the time of filing his petition, or at any other time afterward, before the rendition of judgment in the cause, file his affidavit, or the affidavit of some other person in his behalf, showing: first, that the plaintiff is the owner of the property claimed, sufficiently describing it, or is lawfully entitled to the possession thereof; second, that it is wrongfully detained by the defendant; third, the actual value thereof; fourth, that the same has not been seized under any process, execution or attachment against the property of the plaintiff; and, fifth, that the plaintiff will be in danger of losing his said property, unless it be taken out of the possession of the defendant, or otherwise secured."

delay, for the return of the property to the defendant if such be adjudged and for the payment of the assessed value, damages for the taking and detention, and the costs of the suit.¹⁵ Having taken these steps, the plaintiff is then entitled to the possession of the property and the sheriff will take it from the defendant, deliver it to the plaintiff and the litigation then proceeds. The right of the plaintiff to take the property at the beginning of the suit is absolute if the defendant took the property from plaintiff's possession wrongfully.¹⁶ If, however, the original acquisition of the property by the defendant was not wrongful, he may retain the property during the suit by filing a bond similar to that required of the plaintiff wherein he binds himself and his sureties to the plaintiff for double the value of the property and the damages assessed in case he loses the litigation which follows.¹⁷ The litigation then proceeds to find the party entitled to the possession of the property and judgment is rendered for that party to retain or recover the possession of the property, together with any damages he has suffered from the taking and detention, or the detention alone where the original taking was rightful.

While the parties are thus in possession of the property under the delivery bonds, the property is said to be in *custodia legis* and the parties are not supposed to dispose of it until final judgment is rendered.¹⁸ Practically, however, there is nothing to

15. MO. REV. STAT. ANN. § 1790 (1939): "The sheriff shall not receive such property until the plaintiff shall deliver to him a bond, executed by two or more sufficient sureties, approved by the sheriff, to the effect that they are bound to the defendant in double the value of the property stated in the affidavit, for the prosecution of the suit with effect and without delay, for the return of the property to the defendant, if return thereof be adjudged, and, in default of such delivery, for the payment of the assessed value of such property, and for the payment of all damages for the taking and detention thereof, and for all costs which may accrue in the action."

16. MO. REV. STAT. ANN. § 1790 (1939): "If the plaintiff shall state in the affidavit made by him, as provided by section 1788, that the property was wrongfully taken, and that his right of action accrued within one year, the defendant shall not be entitled to retain such property by giving bond, as provided by section 1791, but the same shall be delivered to the plaintiff upon his giving bond required."

17. The bonds filed under the statute do not authorize the recovery of double damages. The amount is fixed at the double value to secure the winning party for any additional damages over and above the value of the property. To fix the bond at the mere value would not secure the party for the added damages. *Collins v. Hough*, 26 Mo. 149 (1858). As previously noted, no bond is necessary in the replevin suit at all since the plaintiff may proceed without first securing possession of the property. *Hamilton v. Clark*, 25 Mo. App. 428 (1887).

18. *Mohr v. Langan*, 162 Mo. 474, 63 S.W. 409 (1901).

prevent either party from disposing of the property pending the outcome of the suit since he has absolute control over it, and since his only penalty will be that, in the event he loses in the subsequent litigation, he will be adjudged liable for the value of the property. The statute in this connection says that the judgment shall be for a return of the property or the payment of the value assessed *at the election of the prevailing party*.¹⁹ But, if the losing party has already sold or otherwise disposed of the property, the "election" given to the prevailing party becomes meaningless and he must be satisfied with the assessed value of the property instead of the chattel itself. It is often said that a party who disposes of the property pending the suit is guilty of a conversion and is liable on that basis.²⁰ As will be pointed out in a subsequent part of this paper, where the property which the losing party has disposed of has a use value, to hold that he will be liable for a conversion of the property would really reward the party for disposing of the property since it is usually possible to recover more in a replevin action involving property with a use value than in an action of trover involving the same type of property. The possibility of a greater measure of damages results from the rule that damages for the loss of use of the property are not awarded in trover. The courts seem to realize this possibility, however, and even those giving lip-service to the rule nevertheless go ahead and award use damages for the property if such damages are proper. Where the party who disposes of the property pending suit goes ahead and wins in the litigation, no such question arises, of course. In such case, the fact that he has already disposed of the property does not prevent him from collecting the proper damages from the losing party for the taking and the detention of the property.²¹

It has been suggested that the statutory bond requirement, in furnishing security to the party out of possession of the property, silently acquiesces in the disposal of the property as the party in possession may see fit.²² This conclusion appears logical when we consider that the only penalty imposed is that the party makes himself liable for the value of the property. The argument in favor of the proposition becomes more logical when it is re-

19. MO. REV. STAT. ANN. §§ 1799, 1801.

20. *Ely v. Sutton*, 177 Mo. App. 546 (1913).

21. *Donohue v. McAleer*, 37 Mo. App. 312 (1866).

22. WELLS, A TREATISE ON THE LAW OF REPLEVIN § 480 (1880).

membered that certain types of property could not be retained until the outcome of the litigation. For instance, if the property involved is of a perishable nature, it would be unreasonable to require the party in possession to hold it, taking the chance that it might spoil. In such a case, he would not be relieved from liability for the value of the property. A similar situation might arise in the case of property which fluctuates in market value. In such cases the party in possession ought to be able to take advantage of a substantial rise in value and dispose of the property, especially since he might be held liable for a substantial fall in market value.²³

At any rate, the alternative judgment will be framed just as though the property had not been disposed of.²⁴ It will be that the prevailing party, if he is not in possession of the property at time of the judgment, recover the property, or the assessed value thereof at his election, together with all damages suffered as a result of the taking and/or detention by the other party.²⁵ Missouri thus uses an alternative judgment which is contrary to the general rule in the United States that the losing party may insist on a return of the property instead of paying the value thereof. The argument for the general rule is that a person should not be compelled against his will to purchase property he does not desire. However, the very suit in which he is engaged attests that he has asserted ownership of the goods, and when it is found that such assertion was without foundation, his possession is obviously wrongful. There should, therefore, be no hesitation in requiring him to pay the value of the property if plaintiff so elects.

The question is settled in Missouri, however, by the statute which gives to the prevailing party the sole choice as to whether he will take the property or its value. And he need not make this election until the property is delivered over to the sheriff for the purpose of returning it to him. The winner may go to the sheriff's office, look over the property and decide at that time whether he wants it or its value.²⁶ The alternative judgment is

23. *Rosenblatt v. Winstanley*, 186 S.W. 542 (Mo. App. 1916).

24. *Western Storage & Warehouse Co. v. Glasner*, 169 Mo. 38, 68 S.W. 917 (1902). MO. REV. STAT. ANN. § 1801 (1939).

25. MO. REV. STAT. ANN. § 1799 (1939).

26. *Hanlon v. O'Keefe*, 55 Mo. App. 528 (1893); MO. REV. STAT. ANN. § 1802 (1939).

rendered either as a result of a trial of the issues by the court or jury, or as the result of a summary judgment against the plaintiff for failing, after having taken the property under the bond, to prosecute the suit "with effect and without delay." In other words, the plaintiff in replevin who has taken possession of the property under the statutory bond may not take a voluntary non-suit. If he does, it will be treated as a default and the same judgment for a return of the property or its value, together with damages, may be rendered against him as if the suit had been contested in court and a verdict rendered against him.²⁷ Under the statutes, as at common law, the successful party may recover that part of the property sued for which can be found and the value of that which cannot be found.²⁸

In order to maintain replevin in Missouri, the defendant must have been in possession of the property at the time the suit was commenced.²⁹ There really seems to be no compelling reason for this rule in view of the statutory alternative judgment which allows the plaintiff to elect the value of the goods rather than the property itself. Further, there is little or no distinction between a disposition of the property after filing the petition in replevin and a disposition of it prior to commencement of the suit, yet in the former instance, the action of replevin proceeds and the prevailing party is awarded judgment much as if the property were before the court. Many jurisdictions have no such requirement. In New Jersey, for instance, it is not necessary that the defendant be in possession of the property at the time the suit is commenced.³⁰ Even at common law, it appears that from the very beginning, there was no requirement that the defendant be in possession at the time suit is commenced, the action being maintainable for damages or value alone.³¹ In Missouri, the courts apparently reason that when the defendant has disposed of the property prior to the institution of the suit, an action in the nature of trover for a conversion of the property is the proper procedure. But, as already noted, where the property is valuable

27. *Smith v. Winston*, 10 Mo. 299 (1847).

28. *Swafford Bros. Dry Goods Co. v. Jacobs*, 66 Mo. App. 362 (1896).

29. *Gulath v. Waldstein*, 7 Mo. App. 66 (1879); *Penn v. Brashear*, 65 Mo. App. 24 (1895); *Myers v. Lingenfelter*, 81 Mo. App. 251 (1899); *Dewolf v. Morino*, 187 S.W. 620 (Mo. 1916).

30. *Preziaso v. Union City Cleaning Co.*, 6 N.J. Misc. R. 171, 140 Atl. 394 (1928).

31. KEIGWIN, *CASES IN COMMON LAW PLEADING* § 56, n. 2 (2d ed. 1934).

for its use, the defendant, by disposing of its prior to the suit compels the plaintiff to proceed in trover and forces upon him a remedy which permits smaller damages than replevin does. This is true because damages for loss of use of property are not awarded in trover. For the above reasons Missouri might well do away with the requirement that the defendant be in possession at the time an action in replevin is commenced, thus giving the plaintiff the choice of whether he will proceed in replevin or trover.

The statutes prescribe the proper course of litigation without equivocation, and as a consequence the courts have not had much trouble with the procedural problems. For many substantive questions, however, the statutes are either silent or open to construction, and these have given the courts much trouble. The cases indicate that opinions differ widely as to just how the following questions should be answered. What property is subject to an action of replevin? What title is required in plaintiff to support replevin? How do the courts fix the "value" of the property and the damages for the "taking and detention"? Can the plaintiff ever be assured of obtaining the chattel itself in replevin? No statute can answer all these questions, for the facts of the cases in which they are discussed are as varied as the cases themselves. No rules can be stated which are satisfactory for all cases. Rather, it is hoped that from a review of the cases in Missouri covering the subject, broad general rules will emerge which will allow a reasonably accurate prediction as to what course the courts will follow when called upon to decide the numerous issues arising in any replevin suit.

PROPERTY SUBJECT TO REPLEVIN

The general rule is that any personal property, not attached to the realty, which is susceptible of identification for purposes of description required in the affidavit, and which has not been attached in any legal process against the plaintiff,³² may be the subject matter of a replevin suit.³³ As with all general rules, however, this one breaks down in certain specific applications. For instance, the question often arises when property is suffi-

32. Note that this requirement would prohibit successive replevin suits involving the same property.

33. *Gray v. Parker*, 38 Mo. 160 (1866).

ciently identifiable. In this connection, where mixed goods of the same nature may be separated so that a division of equal value can be made, such as with fungible goods, it is not necessary that each unit be identified. Replevin will lie for a part of a mass of fungible goods.³⁴ Such instances often furnish an exception to the general rule that replevin will not lie in favor of one tenant in common against another.³⁵ The property must be susceptible of seizure by the sheriff,³⁶ and under this rule it has been held, for instance, that replevin will not lie for a coffin containing a body which has already been interred.³⁷

Missouri follows the universal rule that money may not be the subject matter of replevin unless it can be set aside and marked in some manner so as to render it identifiable.³⁸ But the action will lie to recover possession of a check, a promissory note or other choses in action.³⁹ Trees severed from the realty may be recovered by the owner or possessor of the land in an action of replevin.⁴⁰ Growing crops, whether or not they have been severed from the realty, and whether or not they have ceased to take nutriment from the soil, are personalty and hence may be replevied.⁴¹

Interesting questions often arise concerning the right to possession of after-acquired property under a mortgage. When the property is the increase of mortgaged animals, the mortgage of a domestic female animal covers the increase of such animal, and, on default by the mortgagor, the mortgagee may recover the young animal along with its mother in an action of replevin.⁴² The reason assigned for the rule is that the increase of a female animal belongs to the legal owner rather than to the possessor.⁴³ But it has been held that the rule does not apply unless the mortgage was made during the period of gestation.⁴⁴ All the cases dealing with this problem, however, are old decisions, and the

34. *Kaufman v. Schilling*, 58 Mo. 218 (1874); *Schnabel v. Thomas*, 98 Mo. App. 197, 71 S.W. 1076 (1903).

35. *Hopson v. Pregree*, 206 Mo. App. 28, 228 S.W. 859 (1920).

36. *Jones v. Dodge*, 61 Mo. 368 (1875).

37. *Guthrie v. Weaver*, 1 Mo. App. 136 (1876).

38. *Hamilton v. Clark*, 25 Mo. App. 428 (1887); *Pilkington v. Trigg*, 28 Mo. 95 (1859).

39. *Steinbaum v. Wallace*, 237 Mo. App. 841, 176 S.W.2d 683 (1944).

40. *Lead Company v. White*, 106 Mo. App. 222, 80 S.W. 356 (1904).

41. *Garth v. Caldwell*, 72 Mo. 622 (1880).

42. *Rogers v. Gage*, 59 Mo. App. 107 (1894).

43. *White v. Storms*, 21 Mo. App. 288 (1886).

44. *Edmonton v. Wilson*, 49 Mo. App. 491 (1892).

problem doubtless would not arise today since the right to the increase of mortgaged animals would probably be provided for in the mortgage.

When the after-acquired property is something other than animals, the courts seem to say that such property cannot be recovered in an action of replevin,⁴⁵ but they have nevertheless proceeded to adjust all the rights to the property in the replevin action anyway. In *St. Louis Drug Company v. Robinson*⁴⁶ the defendant mortgaged store goods to the plaintiff with the understanding that the defendant was to remain in possession for the purpose of selling them, but with the further stipulation that the defendant would keep the stock at such a level as not to endanger the security and that if he allowed the stock to decrease, the plaintiff should have the right to possession. The defendant allowed the goods to decrease and the court held that the plaintiff could recover the remaining goods in replevin even though some of the stock was not in the defendant's possession when the mortgage was made. A similar situation arose in *Gregory v. Tavernner*,⁴⁷ in which the defendant gave the plaintiff a lien on his stock of merchandise or any additions thereto, to secure a running indebtedness. Plaintiff seized the goods under a replevin bond from the defendant's assignee in bankruptcy. The trial court ruled that replevin would not lie for such goods and held that the defendant's assignee should recover the property or its value. On appeal, however, the trial court was reversed, and the court, *though agreeing that replevin would not lie*, ruled that since the plaintiff did have an equitable lien on the goods, and since law and equity in Missouri were fused, the equities of the parties should be adjusted in the replevin suit. The appellate court accordingly ruled that the defendant could recover the property only by paying the plaintiff's lien or, if he elected to take money instead of the property, only the amount by which the value of the seized property exceeded the plaintiff's lien. This procedure is identical with that followed in the case of ordinary property in a replevin action when the defendant has a special

45. The reason most often assigned for the rule is that there has been no prior possession of such property. *Scudder v. Bailey*, 66 Mo. App. 40 (1896). But such a rule would prevent any mortgagee from recovering mortgaged property in replevin.

46. 81 Mo. 18 (1883).

47. 38 Mo. App. 627 (1890).

property in the goods, such as a possessory lien. Thus, for all practical purposes, it appears that replevin will lie for after-acquired property in favor of a mortgagee.⁴⁸ The principle seems to arise from the recognition, that in Missouri, law and equity are fused, and since it is well established that the mortgagee of after-acquired property does acquire a valid equitable lien thereon, the court might well adjust the rights of the parties when the property has been seized by the plaintiff under the replevin statutes.⁴⁹

SUFFICIENCY OF PLAINTIFF'S TITLE TO SUPPORT REPLEVIN

Replevin based on a prior naked possession.

It has been seen that the general owner of a chattel may obtain the property in replevin without having prior possession of the property. Thus, the mortgagee of a chattel has been allowed to obtain possession of the property on default by the mortgagor.⁵⁰ Similarly, the vendee under a contract executed on his own side may recover the property although he has never had possession thereof.⁵¹ Conversely, when one has only a special interest in the property, he must have had prior possession in order to maintain replevin. In the great majority of instances when a party has a special property in a chattel it will be a possessory lien. It would therefore be tautological to say that one having only a special property in the goods must have had prior possession, since a possessory lien presupposes prior possession.

The next question is whether a person with only a possessory interest in a chattel can maintain replevin. By "possessory interest" is meant that interest which a prior possession alone gives to the possessor. The definition excludes both general and the special property in the chattel. The answer will depend on the

48. *Accord*, Keating v. Hannenkamp, 100 Mo. 161, 13 S.W. 89 (1889); Scott v. Soda Water Company, 134 Mo. App. 302 (1908). *But cf.* Scudder v. Bailey, 66 Mo. App. 40 (1896) where the court said that a mortgagee cannot maintain replevin for after-acquired property because he has never been in possession thereof.

49. It is interesting to note the extent to which such reasoning departs from the theory of the case, for even some of the more liberal code states would look askance at giving the plaintiff equitable relief when the theory under which he filed his suit was strictly legal. See, for instance, Jackson v. Strong, 222 N. Y. 149, 118 N.E. 512 (1917), where the plaintiff asked for equitable relief and, upon finding that he was not entitled to such relief, was refused legal relief even though he was shown to be entitled to it.

50. Abington v. Steinberg, 86 Mo. App. 639 (1900).

51. Boutell v. Warne, 62 Mo. 350 (1876).

question: "against whom is such person to prevail?" Naturally, he could not maintain replevin against the general or special owner of the property. There are two other classes of persons, generally speaking, who might be involved—some person who claims the property under the owner thereof, such as a finder, a gratuitous bailee and the like, or someone who is, himself, another bare possessor of the chattel. It is obvious that one having a bare possession, and nothing more, could not prevail against a party claiming under the true owner of the chattel. The field is thus narrowed down so that the defendant must be either a trespasser who himself has no interest in the property, or a person who, though having no interest in the property, somehow came by his possession rightfully, though the plaintiff was in possession at a time prior to him. In Missouri, the plaintiff who claims under a naked, prior possession will prevail in replevin against the former—that is, the trespasser—but not the latter—the party who somehow came by his possession from the plaintiff rightfully.

It is said, however, by various authorities that Missouri is among about one-half of the jurisdictions in the United States which hold that "bare possession alone is not sufficient to support an action of replevin."⁵² Under this rule the defendant, even though he be a wrongdoer, wins in the replevin suit by showing that some third party has the general or special interest in the property. In other words, it is said that the defendant in such cases may set up the defense of *jus tertii*. Though, indeed, there are Missouri cases which appear to stand for the bald proposition that a peaceful possessor of a chattel may not recover the property in replevin from a wrongdoer who takes the chattel away from him, a close scrutiny of these cases reveals that there was usually more involved than the rule under review. In *Fowles v. Bebee*,⁵³ the defendant took a cow from plaintiff's possession. Plaintiff sued in replevin for recovery of the animal. The defendant answered, *claiming title in himself, but failing to prove it*. The court nevertheless found for the defendant, holding that when the defendant put plaintiff's title in issue *by claiming title in himself*, it became necessary for the plaintiff to show more

52. *Gray v. Parker*, 38 Mo. 160 (1866); *Gartside v. Nixon*, 43 Mo. 138 (1868). And see, 150 A.L.R. 192 *et seq.* for classifications of jurisdictions adopting the rule.

53. 59 Mo. App. 401 (1894).

than mere prior possession; that it became incumbent on the plaintiff to show a right to the property as against the defendant. Possession is mere prima facie evidence of title, the court said, and when the defendant claimed title in himself, plaintiff's prima facie case disappeared. Stated in another way, the rule is that the plaintiff must win on the strength of his own case rather than on the weakness of defendant's. It is apparent that in this case the court became entangled in rules of presumption and begged the very issue involved—that is, whether plaintiff's prior possession would support replevin against the trespassing defendant. The court, after admitting that plaintiff could prevail by showing a right to the property as against the defendant, proceeded to hold that he had not done this by showing a peaceful possession and a wrongful taking by the defendant, and then gave as a reason for its decision that the defendant had claimed title in himself!

There are other cases which on a cursory reading appear to stand for the proposition that bare possession is not sufficient to support an action in replevin. For instance, in *Rosenstreter v. Brady*,⁵⁴ the court held that the bailee of a sheriff who had seized property from the owner under a writ of attachment did not have sufficient interest in the property to maintain replevin against the former owner who had retaken the property, because he (the plaintiff) ought to have had either a special or general interest in the chattel, possession alone not being enough. This case does not stand for the proposition that a wrongdoer who interrupts the plaintiff's possession may defend successfully in replevin. Here, there might have been some question as to the validity of the attachment, and the court might have felt that the owner should keep possession until the question could be determined in litigation with the sheriff. The bailee of the sheriff was certainly not a proper party to litigate this question.

*Jackson v. City of Columbia*⁵⁵ is another case which is often cited for the proposition that bare possession is not enough to support an action of replevin. In this case, the city seized a carload of whiskey from Jackson, a bailee of the owner. In replevin by Jackson against the city for return of the whiskey, the city was allowed to defend by showing the title to the whiskey to be

54. 63 Mo. App. 398 (1895).

55. 217 S.W. 869 (Mo. 1920).

in one Miller. Here again, the case cannot be cited for the proposition under review. Jackson was in illegal possession of the whiskey in the city of Columbia and the courts are not apt to aid a person in violating the law. It is even doubtful whether the true owner, Miller, could have recovered the property after proof that it was contraband. This case could just as easily be cited for the absurd proposition that the bailee of the true owner may not prevail in replevin against one who seizes the property.

The problem is bound up with the "possession-gives-title" doctrine and, while Missouri may not be overly eager to allow replevin based on a prior, bare possession, when the question narrows down to a contest between two mere possessors, one of whom is a defendant-trespasser, Missouri will follow what is supposed to be the converse of *jus tertii*. This converse rule is that, as against a trespasser, possession is title. Stated in other words, the rule is that a wrongdoer will not be permitted to question the plaintiff's title which the plaintiff proves prima facie by showing himself to have been in possession under a claim of ownership. The classic example of this view is *Anderson v. Gouldberg*.⁵⁶ The view was adopted by Missouri in the case of *Campbell v. Brown*.⁵⁷ In this case, the plaintiff occupied a newly formed island in the Mississippi River between Missouri and Tennessee, cultivated it and built several buildings. The island had not be included in any federal or state survey. The plaintiff was selling sand from the island and had previously made sales to the defendant. The defendant then tortiously removed a barge-load of sand from the island, whereupon the plaintiff sued in replevin for its return or value. The court commanded the defendant to return the sand or pay its value, and based its decision on the plaintiff's prior, bare possession of the island. The language of the court sounds so logical that it will bear quoting:

A close examination of the cases pro and con regarding naked possession will disclose that there is no real conflict, but that what was said in each case was correct as applied to the facts of that particular case. The correct rule to be deduced from all the cases is that prior possession is sufficient proof of title upon which to maintain the action of replevin against a wrongdoer. That is, against one who may

56. 51 Minn. 294, 53 N.W. 638 (1892).

57. 146 Mo. App. 319 (1910), *rehearing* 160 Mo. App. 532 (1911).

have dispossessed him or who may have tortiously interfered with his possessory right; but if the defendant has come into possession of the property without having, in any way, trespassed upon the plaintiff's right of possession, then defendant's possession is as strong evidence of his title as is plaintiff's prior possession, and as the burden of proof is on the plaintiff, he must fail, but if defendant has tortiously taken possession from the plaintiff he cannot profit by his own wrong, and, in that case, will not be permitted to assert a possession thus wrongfully acquired as a defense to the plaintiff's claim.⁵⁸

It might be argued that the case is distinguishable because it involved land, or that, since it was not surveyed, it belonged to no one in whom the defendant might have set up the *jus tertii*. The fact remains that the plaintiff was allowed to recover the sand or its value on the strength of a mere prior possession. Adverse possession of a chattel, as of land, will ripen into an indefeasible title and even sooner in most cases. The court made no distinction on this basis. Nor would the court have been impressed by any showing of ownership in some third party. The language of the opinion is unequivocal.

In the case of *Rankin v. Wyatt*,⁵⁹ the court held that one rightfully in possession of an automobile, but without title because of failure to obtain an assignment of the title certificate as required by statute, could maintain replevin against a trespasser taking possession without right. The court, without citing the *Campbell* case, reaffirmed the principle outlined in that decision, stating that:

The fact that a third person may have some interest in the property will not preclude replevin by one having the right to possession as against the party sued. As the right of a defendant to retain the property descends the scale of relative rights of possession to the vanishing point of a wrongful detention by a trespasser, the interest sufficient to sustain plaintiff's action in replevin diminishes.⁶⁰

Even present Missouri statutes appear to state negatively that a person who has neither the general or special interest in property can maintain replevin. Early statutes provided that before plaintiff could maintain replevin he had to be entitled to posses-

58. *Id.* at 323.

59. 335 Mo. 628, 73 S.W.2d 764 (1934). *Accord*, *Pearl v. Interstate Securities Co.*, 357 Mo. 160, 206 S.W.2d 975 (1947).

60. 335 Mo. 628, 634, 73 S.W.2d 764, 767 (1934).

sion "by virtue of a special property therein."⁶¹ This phrase was subsequently omitted from the statutes and the present wording states merely that he must be "lawfully entitled to possession."⁶²

There is, however, force in the argument that even as against a trespasser, the plaintiff who claims nothing more than a bare possession should not be awarded the value of the property in the alternative. In such a case, the true owner might later take the property from the defendant, or require him to pay for it again. In most cases, even a trespasser has not committed such a wrong as to justify requiring him to pay double the value of the property. When, however, the defendant has disposed of the property, he should be required to pay the plaintiff for it. But, if the property is in possession of the defendant at the time of the trial, an alternative judgment for money should not be rendered.

Right of a defrauded Vendor to recover the Property in Replevin.

The right of a vendor of personal property to sue in replevin against a fraudulent vendee often arises. The general rule is that a breach of contract cannot be litigated in a replevin suit,⁶³ but an exception provides that a vendor may replevin goods from a vendee who secured the transfer of the goods by fraud. The exception rests on the theory that when a vendor is induced by fraud to part with the possession of his goods, the property never passes and the vendor may therefore recover possession from the vendee.⁶⁴ The vendor may also maintain replevin against the execution creditor of the fraudulent vendee,⁶⁵ or a purchaser or mortgagee with notice of the fraud,⁶⁶ or a sheriff who has seized on execution for creditors,⁶⁷ or a taker from the vendee in payment of an antecedent debt.⁶⁸ But once the goods pass into the hands of an innocent purchaser for present value, the purchaser acquires an indefeasible title and the vendor may not recover the goods in replevin.⁶⁹

61. MO. LAWS 1849, art. 8, § 1.

62. MO. REV. STAT. ANN. § 1788 (1939).

63. *International Fire Door Equipment Co. v. St. Louis Fire Door Co.*, 13 S.W.2d 582 (Mo. 1929).

64. *Dry Goods Company v. Jacobs*, 66 Mo. App. 362 (1896).

65. *Stein, Block & Co. v. Hill*, 100 Mo. App. 38, 71 S.W. 1107 (1903).

66. *Spitz, Londauer & Co. v. Kerfoot*, 42 Mo. App. 77 (1890).

67. *Goebel v. Troll*, 71 Mo. App. 123 (1897).

68. *Dry Goods Co. v. Jacobs*, 66 Mo. App. 362 (1896).

69. *Bidault v. Wales & Son*, 20 Mo. 547 (1855).

No trouble is met in applying the rules once the fraud has been established, but it is often far from easy to establish the fraud. The task is relatively simple in those cases when the vendor parts with his property for some worthless return, such as a bad check, counterfeit money, and the like. It will be remembered that there must be some misrepresentation of a material fact on the part of the vendee, together with certain other elements, before fraud can be established. Accordingly, when the sale is made in reliance upon representations by the vendee that he is solvent, the sale is avoided on the vendor's showing that the vendee was, in fact, insolvent, if the other elements of fraud are present.⁷⁰ The representation of solvency must come from the vendee himself. Accordingly, it has been held that a Dun-Bradstreet commercial agency report which falsely represented the vendee to be better off than he was, which the vendee knew to be false and which the vendor relied on, was not enough if the vendee did not contribute to the false report.⁷¹

Mere insolvency of the vendee alone at the time of the sale is not fraud, in the absence of some misrepresentation of that fact, and this is true even if the buyer knew at the time of the sale that he was insolvent, but did not tell the vendor.⁷² The vendor on finding that he has sold his property on credit to a person in dire financial straits is often only too eager to charge that a fraud has been perpetrated against him. But the insolvency of the vendee can be so hopeless that silence on his part may be tantamount to the misrepresentation of a material fact. When the vendee purchases goods and accepts the possession thereof, there is either an express or implied promise to pay for them. Hence, by implication, the vendee states that he intends to pay for the goods. Therefore, if it can be shown that he really never had any intention of paying, a material fact has been misrepresented and the sale may be avoided and the goods recovered in replevin. Accordingly, it has been held that when the insolvency is so hopeless as to afford no other inference than that the vendee could not have intended to pay for the goods, it is tantamount to an intention never to pay.⁷³ The rule in-

70. *Moore & Bier v. Hinsdale*, 77 Mo. App. 217 (1898); *Beebe v. Hatfield*, 67 Mo. App. 609 (1896).

71. *Stein, Block & Co. v. Hill*, 100 Mo. App. 38, 71 S.W. 1107 (1903).

72. *Bidault v. Wales*, 19 Mo. 36 (1853); *Fox v. Webster*, 46 Mo. 181 (1870).

73. *Manufacturing Company v. Troll*, 77 Mo. App. 339 (1898).

volves the delicate problem of attributing to a person a certain state of mind and the courts have proceeded cautiously in applying it. It is recognized that an insolvent vendee may have a bona fide intent to pay for the goods at the time the sale is made, and it is therefore not sufficient to show that at the time of the sale the vendee had no reasonable expectation of doing so.⁷⁴ It appears that before the rule can be applied, the extrinsic facts must show that the vendee could have had no expectation of paying for the goods at all.

Replevin based on an executory Contract of Sale.

It is interesting to note that, even though many common law jurisdictions allowed detinue against the vendor of an executory contract to sell a specific chattel,⁷⁵ there is some doubt whether this can be done under Missouri's "claim and delivery" statutes which have supposedly incorporated the substantive law of detinue. In *Boutell v. Warne*,⁷⁶ the court said that when there is only an agreement to sell and the sale is not executed on the buyer's side an action for possession cannot be maintained. The court went on to say that the proper remedy in such cases would be an action for damages for breach of contract. The same rule was restated as late as 1948.⁷⁷ In that case, a wife brought replevin based on a written agreement between herself and her husband whereby she was to have certain property when they were divorced. The court, citing the *Boutell* case as authority, ruled that before the right of possession would accrue, the wife must show that she had performed all her obligations under the agreement regardless of whether or not such obligations were conditions precedent. In other words, the court held that before replevin can be based on a contract, such contract must be fully executed on the part of one who would enforce it in a replevin action. In both of the above cases, however, there are facts which would justify the courts withholding possession from the vendee. But the language of the cases is broad enough to preclude replevin based on any executory contract of sale. Such a rule seems hardly justifiable under the present statutes which require merely that the plaintiff be "lawfully entitled to pos-

74. *Manheimer v. Harrington*, 20 Mo. App. 297 (1886).

75. See note 5 *supra*.

76. 62 Mo. 350 (1876).

77. *Mohr v. Prinster*, 213 S.W.2d 267 (Mo. App. 1948).

session." In this connection it might be noted that Missouri has not adopted the *Uniform Sales Act* under which the property in specified goods passes to the buyer when the contract is made, so that he can then recover possession in replevin or detinue.⁷⁸

FIXING THE VALUE OF THE PROPERTY AND DAMAGES FOR ITS DETENTION

General.

The statute says that the prevailing party⁷⁹ in replevin shall have a return of the property or be paid the value assessed at the election of the successful party, together with the damages sustained for the taking and detention, or the detention alone when the original taking was rightful.⁸⁰ This requirement of the statute has caused the courts much trouble and, though in the main the cases have arrived at a just result, the methods used have often been rather haphazard. Any attempt at making a pattern of the court holdings regarding specific problems is difficult, from whatever angle the approach be made, and this is especially true of the damages problem. A better understanding will result if the reader bears in mind throughout the discussion which is to follow that, when the statute says that the value and damages shall be assessed, it aims at compensation of a party whose property has been taken from him and detained by another. Punitive damages rarely enter into consideration in replevin actions. Indeed, no Missouri cases were found in which such damages were awarded, although the courts would not hesitate to award this type of damages where the conduct of the party is regarded as malicious.⁸¹

The first problem is whether the losing party in the replevin suit is ever excused from accounting for the value of the property. A minority of the jurisdictions in the United States hold that an act of God which destroys the property will excuse the

78. Section 19 (1) of the Uniform Sales Act provides that "where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed."

79. It should be noted that the "prevailing party" may be either the plaintiff or defendant and that he may or may not have possession of the property at the time of the trial, the other party having recovered or retained possession under the statutory bond privilege.

80. MO. REV. STAT. ANN. §§ 1799, 1801 (1939).

81. Laughlin v. Barnes, 76 Mo. App. 258 (1898).

losing party. Missouri has adopted this view, but with some curious exceptions. In *Pope v. Jenkins*,⁸² for example, the defendant had retained possession of slaves pending a replevin suit for their possession by plaintiff. Through no fault of the defendant, the slaves died before the litigation was completed. The court held that the defendant was excused from paying their value. A similar view was adopted in *Jennings v. Sparkman*⁸³ involving live stock. But in *Bradley v. Campbell*⁸⁴ the property involved was furniture and, while in possession of the defendant under a delivery bond, the furniture was destroyed by fire through no fault of the defendant. The court ruled that the defendant must nevertheless account for the value of the property. The reason assigned by the court was that the defendant, in refusing to return the property and contesting the replevin suit, was asserting ownership therein. Therefore, when he failed in his claim by losing the replevin suit, his possession was revealed as wrongful from the first. Whether the losing party should be held absolutely liable for the value of the property should not turn on any such subtle distinction; nor should the question turn on whether the property involved be animals as distinguished from ordinary personal property. The character of the possession alone should be considered. If the losing party in the suit be the defendant, he could be a wrongful taker, a defaulting mortgagor, a lien holder, a pledgee, or the like. The plaintiff's possession, on the other hand, will always be under a redelivery bond by which he asserts a right to the possession of the property. When the defendant is in possession of the property by virtue of a wrongful taking, there should be no difficulty in holding him absolutely liable for the value of the property. Conversely, in absence of an agreement to the contrary, there seems to be no reason why a defaulting mortgagor, a lien holder, a pledgee or the like, whose possession was originally rightful, should be held accountable for the value of the property in case of its destruction by an act of God. Whether or not the plaintiff should be held absolutely liable for the value of the property when he loses in the replevin suit ought to depend on the *bona fides* of his claim under the redelivery bond. Or, since he has

82. 30 Mo. 528 (1843).

83. 48 Mo. App. 246 (1892).

84. 132 Mo. App. 78, 111 S.W. 514 (1908).

asserted a claim of ownership or right to possession of the property by seizure under the bond, it might be held that his possession becomes wrongful when judgment goes for the defendant. If this view is correct, he should then be absolutely liable for the value of the property in the event of its destruction by an act of God.

Except for those few instances when the courts relieve the losing party from liability for the property, the losing party in the replevin suit must account for the property or its value at the election of the prevailing party. This "election" given to the winning party thus makes it necessary to fix the value of the property in every replevin suit. The alternative judgment for the return of the property or its value serves two purposes: (1) even if the property be in possession of one of the litigants at the time of the trial, the prevailing party may elect whether he will take the value rather than the property itself; (2) if the party who had the possession has disposed of the property, or if it has been destroyed pending suit, the prevailing party may collect the value. The question is what point of time will be used to fix the value of the property for purposes of the alternative judgment—the time of the taking, the time of the trial, or some intermediate point? It is necessary to consider these possibilities because the time at which the value of the property is fixed necessarily controls the measure of damages for the taking and detention of the property. In this connection, it should be borne in mind that "value" as used in the statute, and the damages for the "taking and detention" are two distinct concepts and must be determined separately, even though they are so interrelated that the "value" must control the measure of damages for the taking and detention.⁸⁵ This "value" then, plus the damages for the "taking and detention," contemplates full compensation for the wronged party as of the exact moment he parted with the possession of his property.

It will be remembered that in trover the procedure for compensating the plaintiff is relatively simple. The value of the

85. As long ago as 1883 the court in *Chapman v. Kerr* 80 Mo. 158 (1883), warned against confounding the value of the property to be found and the damages to be assessed, insisting that they must necessarily be determined separately. See also *Young v. Griesbauer*, 183 S.W.2d 917 (Mo. App. 1944), where the court said that the value of the property is not a part of statutory "damages."

property is fixed at a specific time and this value alone wholly compensates the plaintiff for his loss, legal interest on the value being the only damages necessary. The value in trover is normally fixed as of the time of taking. This eliminates the need to calculate damages for injury or deterioration because these items become immaterial when the plaintiff gets back the exact value of the property as of the moment he parted with it. In case of appreciation in value happening subsequent to the taking, however, merely to fix the value as of the time of taking might not fully compensate the wronged party. In such cases, some intermediate point is used—often that point where the property reached its highest value between the time of taking and the time of trial. But here again, only one calculation is made and with this the prevailing party is fully compensated, no items of damages except legal interest being necessary. Damages for the value of the use are not proper in trover because the theory of action is that the losing party by his conversion, has “bought something” and his “purchase” relates back to the time of the taking. Under this theory he was the owner of the property from the time he took it, might use it as he saw fit, and is therefore entitled to the use value of the property.⁸⁶

Fixing Value and Damages when the losing Party still has Possession of the Property at Time of the Trial.

In addition to the fact that use damages are awarded in replevin, there is another reason why the problem of compensating the wronged party is more complicated in replevin than in trover. In Missouri, when one of the litigants still has possession of the property at the time of the trial, the prevailing party is given a choice of a return of the property or its value;⁸⁷ hence, it is necessary to fix the value of the property as of the time of the trial. Because the property is to be returned, if at all, at the time of the trial, an equality of the property and “value” as spoken of in the statutes is contemplated. In other words, since

86. In Missouri, the rule which allows damages for loss or use in replevin and not in trover, can work to the disadvantage of the plaintiff. When the defendant has disposed of the property before plaintiff can commence the replevin suit, plaintiff's only recourse is trover (see note 29, *supra*); hence, no use damages. This may be one reason why some jurisdictions (New Jersey, for instance, note 30 *supra*) allow replevin even when the defendant has disposed of the property before suit is commenced. In such jurisdictions the plaintiff always has an election between trover and replevin.

the property is to be returned at the time of the trial, it follows that the value must be fixed as of that time also.⁸⁸ Another reason for the rule may be owing to the fact that it is much easier for a jury to assess the value of property which it has before it. At any rate, Missouri's cases are uniform in holding that when one of the litigants still has possession of the property at the time of the trial, the value must be fixed as of that time.⁸⁹

It is obvious that in many cases the property may have a different value at the time of the trial than it had when taken from the prevailing party. The property may have either increased or decreased in value. If the value has increased so that it is higher at the time of the trial than at the time of taking, the prevailing party is not over-compensated because the court has decided that the property belonged to him and the owner of property naturally takes any increase in value. However, property involved in replevin actions is more likely to decrease in value between the time of taking and time of trial. The prevailing party must therefore be compensated for this deficiency in the form of various items of damages, and this is true whether he elects the property or its value. What are these elements of damages which must be added to the value of the property as found at the time of the trial? The nature of such damages will vary according to whether the property involved has or has not a use value to the owner.

Personal property having no use value will normally have decreased in value to some extent between the time it was taken from the owner and the time of the trial. For instance, when the property has been injured by the losing party, the amount of this damage must be calculated and awarded the prevailing party so as fully to compensate him for his loss.⁹⁰ It appears that if the property has decreased in value for any reason, even due to natural attrition, the amount of such deterioration must be calculated and awarded the prevailing party.⁹¹ Some cases

87. Mo. REV. STAT. ANN. §§ 1799, 1801 (1939).

88. *Willison v. Smith*, 60 Mo. App. 469 (1891).

89. *Pope v. Jenkins*, 30 Mo. 528 (1843); *Mix v. Kepner*, 81 Mo. 93 (1883); *Ascher v. Schaefer*, 25 Mo. App. 3 (1886); *Baldrige v. Dawson*, 39 Mo. App. 527 (1890); *Hinchey v. Koch*, 42 Mo. App. 230 (1890); *Payne v. King*, 141 Mo. App. 246 (1910); *Muzenich v. McLain*, 220 Mo. App. 502 (1925).

90. *Kreibohn v. Yancey*, 154 Mo. 67 (1899).

91. *Mix v. Kepner*, 81 Mo. 93 (1883); *Baldrige v. Dawson*, 30 Mo. App. 527 (1890); *Hinchey v. Koch*, 42 Mo. App. 230 (1890); *Jennings v. Spark-*

have held that the deterioration must have been caused by the intentional injury or negligence of the losing party before he is liable.⁹² The property may be worth less at the time of the trial because of a fall in market value. If so, the losing party must pay the difference.⁹³ For some peculiar reason, no interest is awarded in any case where the value of the property is fixed as of the time of trial. The possible reasons for this rule are discussed below.⁹⁴ Where no damages at all are shown, the prevailing party is entitled at least to nominal damages.⁹⁵ The courts are generally agreed that items such as counsel fees and expenses in prosecution of the suit are not proper elements of damages in replevin actions.⁹⁶

When the property involved has a use value to the owner, different considerations with respect to damages arise. Missouri follows the universal rule that the value of the use of property taken and detained is a proper element of damages in replevin.⁹⁷ Before such damages can be awarded, the property must be such as is primarily valuable for its use, such as a sawmill,⁹⁸ a truck,⁹⁹ laundry equipment,¹⁰⁰ mules,¹⁰¹ or slaves,¹⁰² as distinguished from ordinary articles of property which are possessed primarily for purposes of consumption or sale.¹⁰³ When the prevailing party could not lawfully have used the property even though entitled to possession, damages for the value of the use cannot be

man, 48 Mo. App. 246 (1891); *Trinkle v. Mercantile Co.*, 56 Mo. App. 633 (1894); *Kreiboln v. Yancey*, 154 Mo. 67, 55 S.W. 260 (1899); *Muzenich v. McLain*, 20 Mo. App. 502, 274 S.W. 888 (1925).

92. *Chemical Company v. Nickells*, 66 Mo. App. 678 (1896).

93. *Rosenblatt v. Winstanley*, 186 S.W. 542 (Mo. 1916) (fall in market value due to change in style during the detention).

94. See note 116 *infra*.

95. *American Alliance Insurance Co. v. Mead*, 242 S.W. 1005 (Mo. 1922).

96. *Mix v. Kepner*, 81 Mo. 93 (1883); *Trinkle v. Mercantile Co.*, 56 Mo. App. 683 (1894); *Wright v. Broome*, 67 Mo. App. 32 (1896); *Howard v. Haas*, 139 Mo. App. 591, 123 S.W. 1048 (1909); *Hodkinson v. McNeal Machine Co.*, 161 Mo. App. 87, 142 S.W. 457 (1911).

97. *Shenuit v. Brueggestratt*, 8 Mo. App. 46 (1879); *Anchor Milling Co. v. Walsh*, 24 Mo. App. 97 (1887); *Jennings v. Sparkman*, 48 Mo. App. 246 (1891); *Reno v. Kingsbury*, 39 Mo. App. 240 (1889); *Trinkle v. Mercantile Co.*, 56 Mo. App. 683 (1894); *Baldrige v. Dawson*, 39 Mo. App. 527 (1890); *Laughlin v. Barnes*, 76 Mo. App. 258 (1898); *Kreiboln v. Yancey*, 154 Mo. 67, 55 S.W. 260 (1899); *Robertson v. Snider*, 86 S.W.2d 966 (Mo. 1935).

98. *Stockham v. Leach*, 210 Mo. App. 407, 238 S.W. 853 (1922).

99. *Robertson v. Snider*, 86 S.W.2d 966 (Mo. 1935).

100. *Kreiboln v. Yancey*, 154 Mo. 67, 55 S.W. 260 (1899).

101. *Jennings v. Sparkman*, 48 Mo. App. 246 (1891).

102. *Pope v. Jenkins*, 30 Mo. 528 (1843).

103. *Chemical Co. v. Nickells*, 66 Mo. App. 678 (1896); *Shenuit v. Brueggestratt*, 8 Mo. App. 46 (1879).

awarded.¹⁰⁴ When damages for the value of the use are awarded, any deterioration brought about by use of the property by the losing party are not awarded the prevailing party.¹⁰⁵ This rule is just because the party who gets the value of the use should stand the deterioration loss caused by such use. For the same reason the court will deduct from the value of the use any maintenance costs which were borne by the losing party.¹⁰⁶ Furthermore, because interest itself is a sort of use premium, interest is not a proper element of damages in any case where the prevailing party is awarded damages for the loss of use of his property.¹⁰⁷ For any other type of value decrease, however, such as that caused by injury to the property, fall in market value or deterioration from causes other than use, the prevailing party is awarded damages just as for property having no use value. The aim is always to compensate the wronged party and this is accomplished by fixing the value as of the time of the trial and adding thereto any elements of damages to which the prevailing party is entitled, including damages for the loss of use. It should be noted that when the value of the property is fixed as of the time of trial, and when the losing party used the property, any deterioration brought about by such use is thus automatically calculated by this fixing of value as of the time of trial. When the losing party did not actually use the property though he possessed same, this deterioration would not be reflected at time of the trial. The court would then have to guess at the amount the chattel would have depreciated had it been used and subtract this amount from any use damages awarded to the prevailing party.

Value and Damages when the Losing Party has disposed of Property prior to the Trial.

It often happens that the party having possession of the property will dispose of it between the time suit was commenced and the trial. The prevailing party out of possession is then deprived of his right of election between the property or its value and must be satisfied with the value. At the same time, the fact that the winner may not elect between the property or its value at the time of the trial eliminates the requirement discussed above

104. *Robertson v. Snider*, 86 S.W. 966 (Mo. 1935).

105. *Kreibolm v. Yancey*, 154 Mo. 67, 55 S.W. 260 (1899).

106. *Ibid.*

107. *Reno v. Kingsbury*, 39 Mo. App. 240 (1889).

that the value of the property must be fixed as of the time of the trial. Having in mind the relatively more simple method of compensating the plaintiff in trover—the method whereby the value is fixed at such a time so as to effect full compensation, thus eliminating elements of damages—the Missouri courts have ruled that in those cases where the losing party has disposed of the property pending trial, the value of the property is to be fixed as of the time of taking, or the refusal to return when the original taking was rightful.¹⁰⁸ It is obvious that for personal property having no use value the courts are greatly simplifying the calculations necessary to compensate the wronged party in reverting to the time-of-taking rule when the losing party has disposed of the property prior to the trial. When the value of the property is fixed as of the time of taking and there has been a decrease in value, items of damages such as that caused by injury to the property, fall in market value, or other deterioration, become immaterial.¹⁰⁹ When there has been a rise in market value of property disposed of prior to the trial, merely to fix the value as of the time of taking would not fully compensate the prevailing party. In case the market value of the property is higher at the time of trial than at the time of taking, the courts usually abandon the time-of-taking rule and fix the value as of the time of trial so that the prevailing party would not lose the substantial rise in market value.¹¹⁰ Further, even though the property does not reflect an increase in value at the time of the trial, there might be other instances when the wronged party might not be fully compensated merely by fixing the value as of the time of taking. Such instances often occur in the case of property which fluctuates in value so that it reaches its highest value at some point between the taking and the trial. In such cases, it may become necessary to peg the value at some intermediate points in order fully to compensate the wronged party. Problems dealing with property which fluctuates in value are discussed below.

108. *Willison v. Smith*, 60 Mo. App. 469 (1891); *Chemical Co. v. Nickells*, 66 Mo. App. 678 (1896); *Jones v. Jones*, 188 Mo. App. 220, 175 S.W. 227 (1915).

109. Of course, when the original acquisition of the property by the losing party was rightful and his possession became wrongful only by his refusal to return at the proper time, any injury occurring prior to the refusal should be awarded the prevailing party.

110. *Schnabel v. Thomas*, 98 Mo. App. 197 (1903).

In those cases when the value of the property having no use value is fixed as of the time of taking because the losing party has disposed of it at the time of the trial, interest is a proper measure of damages. The full measure of compensation is then the value of the property at the time of taking plus the legal rate of interest on the value from the time of taking to the trial.¹¹¹ It will be remembered that when the value is fixed as of the time of the trial, the courts refuse to award interest as damages in replevin. The possible reasons for awarding interest in the former case and refusing it in the latter are discussed below.

We have seen that when the losing party disposes of property having no use value prior to the trial, the calculation of sundry items of damages becomes unnecessary because the value is fixed at the time of the taking, thus simplifying the replevin procedure greatly. Would this same simplification apply if the property involved has a use value to the owner? Unfortunately, no. This is true because regardless of the time at which the value of the property is fixed deterioration brought about by use must be calculated in order to prevent the prevailing party from getting the use value without paying for the deterioration caused by use. When the value is fixed as of the time of the trial, this deterioration is automatically reflected in the value at that time. When, however, the value must be fixed as of the time of taking, and the prevailing party is to be awarded use value, deterioration caused by use must be subtracted from the amount awarded as use damages.¹¹² Thus, it appears that the only situation in which the "time-of-taking" procedure could profitably be used in Missouri to fix the value of the property would be for chattels having no use value and which have been disposed of prior to the trial by the losing litigant.

Interest as Damages in Replevin.

When the property in replevin has a use value, the prevailing party is compensated for loss of use directly and, of course, may not have interest on the value of the property.¹¹³ To award interest in such cases would, in effect, cause double use damages. By

111. *Chemical Co. v. Nickells*, 66 Mo. App. 678 (1896).

112. For an example of how complicated the procedure becomes when the value of property having a use value is fixed as of the time of taking, see *Kreiboln v. Yancey*, 154 Mo. 67, 55 S.W. 260 (1899).

113. *Reno v. Kingsbury*, 39 Mo. App. 240 (1889).

the same reasoning it would appear logical to award interest in any case where the property does not have a use value. This is not the case in Missouri. Missouri allows interest on the value from time of taking to them of trial if, and only if, the losing party has disposed of the property having no use value pending the litigation so that the value is fixed as of the time of taking.¹¹⁴ In *Chemical Co. v. Nickells*,¹¹⁵ for example, the court held that where defendants were deprived of their statutory right of election in consequence of the disposal by plaintiff of property having no use value, the damages would be the value of the property at the time of the taking with six per cent interest from that time until the time of trial.

When, however, the value of property having no use value must be fixed as of the time of trial because the losing litigant is still in possession, it has been held that interest is not a proper element of damages.¹¹⁶ It is suggested that the latter rule is based on a misconstruction of an early supreme court case. Early cases had been ruling that the value of property in replevin suits should be fixed as of the time of taking regardless of whether the losing party still had possession at time of trial. In *Woodburn v. Cogdall*,¹¹⁷ the court said that

the true measure of damages in such cases is the value of the property at the time of the seizure with interest at the rate of six per cent per annum until the time of trial.¹¹⁸

A similar ruling was made in *Miller v. Whitson*.¹¹⁹

It is well established by decisions of this court that the measure of damages in such cases when the finding is for the defendant is the value of the property when taken with legal interest thereon to time of the trial.¹²⁰

It will be noted that the holding in both cited cases includes two propositions: (1) that the time at which the value of the property is to be fixed in replevin actions is the time of taking and

114. *Woodburn v. Cogdal*, 39 Mo. App. 222 (1866); *Miller v. Whitson*, 40 Mo. 97 (1867); *Chemical Co. v. Nickells*, 66 Mo. App. 678 (1896); *Cummings v. Lumber Co.*, 130 Mo. App. 557, 109 S.W. 68 (1908); *Zahner Mfg. Co. v. Harnish*, 227 Mo. App. 287, 51 S.W.2d 145 (1932).

115. 66 Mo. App. 678 (1896).

116. *Andrews v. Costigan*, 30 Mo. App. 29 (1888). And see 96 A.L.R. 142, where Missouri is listed among those jurisdictions which generally do not consider interest a proper element of damages in replevin.

117. 39 Mo. 222 (1866).

118. *Id.* at 229.

119. 40 Mo. 97 (1867).

120. *Id.* at 101.

(2) that interest in such cases is a proper measure of damages. Later in the case of *Chapman v. Kerr*¹²¹ the supreme court had before it a case in which the lower courts had agreed with the *Whitson* and *Cogdal* cases as to proposition number one—that the value of property in replevin actions is to be fixed as of the time of taking regardless of whether the losing party has possession at time of trial. The supreme court saying nothing whatever regarding proposition number two—that interest is a proper measure of damages in replevin actions—reversed the lower courts and overruled both the *Whitson* and *Cogdal* cases in their holding that the value of property still in possession of the losing party at the time of the trial should be fixed as of the time of taking, citing a much earlier supreme court decision as authority.¹²² Five years later the case of *Andrews v. Costigan*,¹²³ involving logs which the plaintiff had taken from the defendant under a redelivery bond, came before a Missouri appellate court. Judgment was entered for the defendant and he elected to take the money value instead of the logs. Value of the logs was fixed as of the time of the trial in accordance with the ruling in the *Chapman* case that for property in possession of the losing party at the time of the trial the value should be fixed as of that time. The defendant further claimed that he should have interest on the money value of the logs. The court held that “interest was not warranted” and cited as authority the *Chapman* case, which, the court said, overruled the holding of the *Cogdal* case that the “true measure of damages in such cases is the value of the property at the time of the seizure with interest at the rate of six per cent per annum until the time of the trial.” In other words, the *Costigan* case construed the *Chapman* case as overruling the *Cogdal* and *Whitson* cases as to both propositions: that the time of fixing the value is the time of taking and (2) that interest is a proper measure of damages when actually, as seen above, the *Chapman* case said nothing whatever regarding the propriety of awarding interest as damages in those cases where the value is fixed as of the time of the trial.

Since the *Costigan* case the courts have been noticeably silent regarding interest as a measure of damages in those cases where

121. 80 Mo. 158 (1883).

122. *Pope v. Jenkins*, 30 Mo. 528 (1843).

123. 30 Mo. App. 29 (1888).

the value of the property is fixed as of the time of the trial. If the failure of the courts to allow interest in such cases is not based on a misconstruction of *Chapman v. Kerr*, as suggested, is there any valid reason why interest should not be given? It is sometimes said that interest is not allowable as damages in absence of a statute,¹²⁴ or that interest is not allowed in tort actions prior to judgment.¹²⁵ The following statute would seem to nullify both of these rules:

The jury on the trial of any issue [in tort actions] or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure.¹²⁶

Thus there seems to be nothing legally wrong in awarding interest in any case where use value is not given. Although the courts have not expressed any reason for not giving interest in such cases (thus strengthening the misconstruction theory suggested above), a possible explanation might be something like the following: the fact that the value is to be fixed as of the time of trial means that the losing party still has possession at that time so that, under the statutes, the prevailing party may elect whether he will take the property or its value. Since he may elect the return of the property itself, interest is not warranted because interest is not ordinarily payable on the use of property, a fee for hire or rental being more appropriate. But by hypothesis the property had no use value and if it did it is unquestioned that interest would not be warranted. Besides, such reasoning would at most justify refusal of interest only in those cases where the prevailing party elected the property rather than the value and, as noted above, *Andrews v. Costigan* refused to allow interest even when the prevailing party had elected the money value of the property. There appears to be no justification for the rule. Even in those instances when the prevailing party elects to take the property, interest might justly be awarded on the theory that the owner might have chosen to sell the property but for its detention by the losing party. In this way he would have money on which he could have earned interest. The only reasonable basis on which to decide whether or not to award in-

124. *Simmons Hdwe. Co. v. St. Louis*, 192 S.W. 394 (Mo. 1917).

125. *Stack v. St. Louis I. M. and S. Ry. Co.*, 187 S.W. 275 (Mo. App. 1916).

126. MO. REV. STAT. ANN. § 3657 (1939).

terest in replevin actions is whether or not the property involved has a use value. If it does, the Missouri courts rightly refuse interest. The fact that in certain cases the value of property having no use value must be fixed as of the time of trial should have no bearing at all on whether or not to award interest. The courts allow interest as damages when the value is fixed as of the time of taking. It is apparently an arbitrary rule which refuses interest when the value is to be fixed as of the time of trial, even though identical property be involved.

PROPERTY WHICH FLUCTUATES IN VALUE

We have seen that when there has been a straight rise or fall in the value of property between the time of taking and the time of trial, Missouri's rules fixing the value at either the time of taking or time of trial are flexible enough to prevent the losing party's juggling to the detriment of the prevailing party. For instance, when the losing party is still in possession at time of trial so that the value must be fixed as of that time and there has been a fall in market value from the time of taking to the time of trial, the losing party must pay damages for the fall in market value.¹²⁷ Thus, the losing party, by holding onto property which is falling in value cannot profit by the rule that the value of property still in his possession at the time of the trial must be fixed as of that time. Conversely, we have seen that when the losing party disposes of property which rises in value from time of taking to time of trial he cannot profit under the rule which would normally fix the value of property disposed of prior to suit as of the time of taking, because, in such cases, the courts will not adhere to the time-of-taking rule, but will fix the value as of the time of trial so that the increased value is reflected.¹²⁸

Suppose that the property involved is of a nature which fluctuates in value so that at some point between the time of taking and the time of trial it reached its highest value. It is obvious that, in such cases, to fix the value at either the time of taking or time of trial would not compensate the prevailing party for what he might have realized from his property except for the detention by the losing party. Would the Missouri courts com-

127. *Rosenblatt v. Winstanley*, 186 S.W. 542 (Mo. 1916).

128. *Schnabel v. Thomas*, 98 Mo. App. 197, 71 S.W. 1076 (1903).

pensate the prevailing party for this increased value either by fixing the value of property which has been disposed of prior to the trial as of some intermediate point between time of taking and time of trial, or, in those cases where the value must be fixed as of the time of trial, by awarding damages based on the higher intervening value? No Missouri replevin actions involving property of this nature were found, hence it is not known just what procedure the courts would use. In trover it appears that the courts ignore any fluctuations in value and adhere strictly to the time-of-taking rule in fixing the value of the property.¹²⁹ Traditionally, however, the courts are more liberal in awarding damages in replevin than in trover and we have seen that Missouri will so arrange its replevin rules so as fully to compensate the prevailing party where there has been a straight rise or fall in the market value of property. The courts might, therefore, take into consideration a fluctuation in value between the time of taking and the time of trial in replevin actions. How could they best do this?

When property which fluctuates in value is involved in trover actions, the jurisdictions of the United States use three different times at which to fix the value of the property. Some jurisdictions (including Missouri) fix the value as of the time of taking, ignoring the fluctuation. Others give the plaintiff the highest value reached by the property between the time of taking and the time of trial. This procedure is often unjust because it permits the plaintiff to relax and play the market without fear of losing anything. A compromise was reached between the two foregoing rules by the New York courts which ruled that the plaintiff should have the highest value reached by the property between the time he knew of the conversion and a reasonable time thereafter, during a period that he could have replaced the property on the open market. This rule is based on the theory that it is always plaintiff's duty to mitigate the defendant's damages where possible.¹³⁰ Working within the above rules and the framework of Missouri law regarding the time at which the value is to be fixed in replevin actions, consider the possibilities when there has been a fluctuation in value.

129. *Darling v. Potts*, 118 Mo. 506, 24 S.W. 461 (1893); *Walker v. Boland*, 21 Mo. 289 (1855); *Ross v. Fidelity Bank and Trust Co.*, 115 S.W.2d 148 (Mo. App. 1938).

130. For a discussion of relative merits of the three rules and jurisdictions using each, see MCCORMICK, DAMAGES § 48 (1935).

Where losing Party has Possession at Time of Trial.

The type of property under review is most likely to be goods held for the purpose of consumption or sale, for which reason it is highly unlikely that the losing party would still have possession at the time of the trial. Assuming that he did, however, the value must be fixed as of that time.¹³¹ In such a case the prevailing party would get the property or its value at the time of trial plus damages representing the difference between the value as found at the time of trial and either the highest value reached between the taking and the trial, or the highest value reached after the prevailing party learned of the conversion and a reasonable time thereafter, depending on whether or not the New York rule discussed above were used. For obvious reasons, other types of damages such as for deterioration, injury, or fall in market value, could not be awarded. Except for Missouri's refusal to award interest anytime the value is fixed as of the time of trial, interest could be awarded on the value of the property—but perhaps not on the damages since such damages are really based on a loss of profits and it has been held that when this is true interest cannot be given.¹³²

As noted, property which fluctuates in value is most likely to be the type held for consumption or sale, and not for use, hence damages for loss of use would rarely enter into consideration in the type of case under review. Theoretically the property could have a use value, in which case the prevailing party would be awarded damages for the loss of use. However, since damages awarded for the difference in value as of the time of trial and at some intervening point between the taking and the trial are based on a presumed sale of the property at that point but for the detention by the other party, damages for the loss of use should be given only from the time of taking up to the time of the presumed sale. When the prevailing party receives use damages of course, interest is not warranted.

Where the Losing Party has Disposed of the Property prior to Trial

When the losing party has disposed of property prior to the time of trial, the Missouri courts fix the value as of the time of

131. See note 89 *supra*.

132. *Wiggins Ferry Co. v. Chicago & A. R. Co.*, 128 Mo. 224, 27 S.W. 568 (1895).

taking.¹³³ Hence, if the Missouri courts wanted to compensate the winner for an increased intervening value owing to fluctuation in value, the time at which to fix the value of the property could be moved up to one of the intervening points already discussed. Interest could be awarded on the value of the property as of the time of taking though perhaps not on the higher intervening value for the reason mentioned above.¹³⁴ If the property had a use value, which is unlikely, he could be awarded damages for loss of use from the time of taking up to the time of the presumed sale, deducting both deterioration caused by the use and any maintenance cost borne by the losing party.

DIVIDED OWNERSHIP IN THE PROPERTY

Where it is found in a replevin suit that both parties have an interest in the property—one having the general property and the other a special property—wholly different considerations arise than those heretofore discussed. For instance, suppose that the plaintiff in a replevin suit is found to own the property, but it turns out that the defendant has a possessory lien. Replevin being a possessory action, it is obvious that the defendant will prevail in the suit as far as the possession of the property is concerned. Suppose in such a case that the defendant has retained the possession of the property either because the plaintiff did not file the required redelivery bond, or because the defendant has filed a delivery bond. The defendant will be adjudged to keep possession of the property. Should the court go further? One Missouri court had just such a case before it in which it was held that where the defendant still has possession and it turns out that he has a lien on the property, the disputed amount of the lien may be determined by the jury and judgment rendered for the return of the property to the plaintiff on his paying the lien.¹³⁵ The court said that it would retain the case and adjust all the equities of the parties in the property. Such procedure appears all right since the disputed lien amount would probably have to be determined by court action anyway, and the finding of the amount of the lien as incidental to the replevin action *ipso facto* found that the plaintiff could not regain possession of his property until he discharged the lien.

133. See note 108 *supra*.

134. See note 132 *supra*.

135. *Sanders v. Brooks*, 239 Mo. App. 578 (1946).

The problem becomes more complicated when the plaintiff in such cases has taken the property under the redelivery bond. Suppose, in such case, it turns out that the defendant has a lien on the property. The replevin statute says that when the plaintiff fails in his suit and has the property in his possession, the value of the property will be assessed and judgment entered that the defendant have a return of the property or its value *at his election* together with damages for the taking and detention of the property.¹³⁶ Here the replevin statutes would be inapplicable, for, upon judgment being rendered for the defendant, if the statutes be followed, the judgment would be for the *full* value of the property to defendant or its return at his election. Manifestly, neither element of such a judgment should be made in such cases, for the defendant is entitled to the value of his lien only, and he is not entitled to elect whether he will have a return of the property since the plaintiff as general owner, may say whether he will keep the property by paying the lien. In such situations it has been held that:

the forms prescribed in the statute for judgment in replevin suits apply where one party recovers, and as a result the other is adjudged to have no interest at all in the property. Where, however, both parties have an interest in the property, the judgment must be made to conform to the rights of the parties, and these rights may be adjusted in the replevin suit.¹³⁷

The court then held in the noted case that the judgment must be for the value of the lien only, or for a return of the property to the defendant until such lien be paid.¹³⁸ If it is found that the plaintiff is a stranger to the title, judgment may be rendered for the defendant for the full value and he is then liable over to the true owner for the value above his lien.¹³⁹

In this connection it is interesting to note that the statutes on replevin in justice courts cover the situation where one of the parties is found to have a special property in the chattel in dispute, while the statutes dealing with replevin in courts of record are lacking in this respect. Revised Statutes, Missouri, sections

136. Mo. Rev. Stat. Ann. § 1798 (1939).

137. National Theater Supply Co. v. Scovill, 223 Mo. App. 968, 977, 22 S.W. 2d 68, 71 (1929).

138. *Accord*, Smith v. Tucker, 200 S.W. 707 (Mo. App. 1918); McWherter v. Randall, 207 Mo. App. 465, 232 S.W. 1070 (1921).

139. Dilworth v. McKelvey, 30 Mo. 149 (1860); Frei v. Vogel, 40 Mo. 150 (1867).

2955 and 2966 both contemplate a special interest in the property by the defendant. Those sections provide that the jury will find whether the defendant had (1) the right of property, or (2) the right of possession, and, after determining this, will find the value of the property or the value of the possession and award judgment accordingly.

SUFFICIENCY OF REPLEVIN TO RECOVER THE CHATTEL IN SPECIE.

Since the parties to a replevin suit may, and often do, dispose of the property pending the outcome of the litigation with relative immunity, how can a party ever be assured of recovering the chattel he seeks *in specie*? Suppose the chattel has some peculiar value to the plaintiff for which reason he desires the return of the property itself, in which case the alternative judgment for money which the defendant has the power, and apparently the right, to force upon plaintiff would be unsatisfactory. There is nothing in the replevin statutes which prohibits disposition of the property pending suit. The only penalty, if such it can be termed, is that the defendant is liable for a conversion of the chattel. It is true that damages over and above the market value may be awarded for property having a sentimental value to the plaintiff.¹⁴⁰ Often, however, no amount of money could adequately compensate the plaintiff for the loss of such property. What he wanted was the chattel itself.

Whether the Missouri courts have the power in replevin actions to act on the person of the defendant in order to assure return of the chattel in specie is not clear. As noted, there is nothing in the statutes giving them such power. In *In Matter of Irwin and Bushman*,¹⁴¹ the lower court had ordered defendants in the replevin action to deliver up a diamond ring *to the court*, pending outcome of the litigation. The defendants refused to surrender the ring, whereupon they were jailed for contempt. On hearing for a writ of habeas corpus, the supreme court ruled that the lower court was without power to issue that particular order in a replevin suit, adding that the only action within its power in such case was an order to deliver the property over to the sheriff on plaintiff's filing bond for further delivery over to the plaintiff. The latter order is satisfactory if it can be made

140. *Kalinoski v. M. A. Newhouse and Son*, 53 S.W.2d 1094 (Mo. App. 1932).

141. 320 Mo. 20, 6 S.W.2d 597 (1928).

before defendant has disposed of the property. On issuing such an order, the court has the defendant in its power for contempt citation and he would then dispose of the chattel at great risk. Thus it appears that plaintiff would be secure if he filed with his petition an affidavit showing sufficient facts to warrant such an order from the court. However, the *Irwin and Bushman* case is really no precedent for courts in replevin actions to issue such orders as a matter of course. It will be observed that the order issued by the court in that case was ruled improper and the supreme court merely stated that the order for delivery over to the sheriff would be proper. No case was found in which the latter order was actually made. Further, in the *Irwin and Bushman* hearing there had been evasive conduct on part of defendants which had antagonized the court. It is submitted that the replevin statutes might well give the courts express power to act in exceptional cases to prevent the party in possession from disposing of the property, and to deliver it over to the plaintiff. Other jurisdictions often have such provisions in their replevin statutes. For example, Colorado's replevin statutes provide that:

Whenever it shall be made to appear to the satisfaction of the court by the affidavit of the plaintiff or otherwise, that the defendant or any other person knowingly conceals the property sought to be recovered, or having control thereof refuses to deliver the same to the officer, the justice may commit such defendant or other person until he or they disclose where such property is, or delivers the same to the officers.¹⁴²

Of course, if the plaintiff could make out a proper case, the equity courts could intervene to assure him a return of the chattel. Though no cases were reviewed where a court of equity ordered the defendant to deliver up a unique chattel to the plaintiff, Missouri's equity courts would probably follow the general rule that, where the chattel which the plaintiff seeks has a peculiar value to him, such as an object of art, equity will decree that the defendant return the chattel in specie. In such cases equity will exercise whatever power is necessary over the person of the defendant to assure return of the chattel to the plaintiff.¹⁴³ There

142. COL. STAT. ANN. c. 96, § 126 (1935). Other states have given similar power to the law courts. See, for instance, New York Civil Practice Act (1939) §§ 826 and 1094a, which impose restraints on the defendant pending litigation over personal property.

143. *Lang v. Thacher*, 48 App. Div. 313, 62 N.Y. Supp. 956 (1900) (drawings); *Evans v. Van Hall*, 1 Clarke Ch. 22 (N.Y. 1839) (personal letters).

is no shortage of cases in which equity has decreed the specific performance of a contract to purchase a chattel having a unique value to the vendee. It is generally held that where the chattel which the plaintiff has agreed to purchase is desired for a particular purpose, and cannot be duplicated anywhere else, and if his reason for desiring it is such that money would not compensate him, Missouri's equity courts will decree specific performance of the contract. For instance, in *Dennison v. Keasby*¹⁴⁴ it was held that where shares of stock which the plaintiff had contracted to purchase were unavailable in the open market, the remedy at law was inadequate and equity would decree that those specific shares be conveyed to the plaintiff. And in *Whiting v. Land and Sheep Co.*¹⁴⁵ the court held that the buyer had a right to specific performance of a contract to deliver shares of corporate stock when the reason assigned by the plaintiff for desiring those particular shares was that he would thereby gain a measure of control over the corporation issuing the stock.

Specific performance of personalty contracts has been decreed for chattels other than shares of stock. In *Boeving v. Vandover*¹⁴⁶ the plaintiff placed an order with the defendant automobile dealer for a new Buick automobile in 1946 when new cars were scarce and could normally be obtained only on the black market by paying exorbitant prices. After a long wait the defendant told the plaintiff he had an automobile for him. When plaintiff offered to pay for the automobile, he was informed by defendant that a trade-in of plaintiff's old car as part payment on the new one would be necessary. Plaintiff refused to do this, whereupon defendant refused to deliver the new car. Plaintiff filed suit for specific performance of the contract based on the order he had placed with the defendant. Final decision was handed down by the supreme court in 1949 and the decree was that the defendant convey to the plaintiff a new, 1949 model Buick automobile for the price stipulated in the original order for a 1946 model Buick.

144. 200 Mo. 408, 98 S.W. 546 (1906); *accord*, *Wood v. Telephone Co.*, 223 Mo. 537, 123 S.W. 6 (1909).

145. 265 Mo. 374, 177 S.W. 589 (1915); *accord*, *O'Neil v. Webb*, 78 Mo. App. 1 (1898).

146. 218 S.W. 2d 175 (Mo. 1949).

CONCLUSION.

The preceding discussion shows that the Missouri replevin law needs at least a careful amendment in some particulars. Neither the legislature nor the courts have been interested in securing the actual recovery of a chattel in specie. Yet it would be easy to provide that the court, upon application of the other party, should order the party in possession not to dispose of the chattel pending the litigation, and, upon conclusion of the case should order the losing party to deliver possession to the winner. All such orders could easily be enforced through contempt process. The only objection to them would be that they constitute a use of equity proceedings in a law case, and this could hardly be seriously maintained in a state which has attempted so completely to abolish the traditional distinctions between law and equity. This change seems the more necessary because the scarcity of equity cases involving chattels suggests that that remedy is being overlooked.

Secondly, the doubt whether replevin will lie for a chattel the title to which has passed to the plaintiff under a contract,¹⁴⁷ should be removed. It seems hardly arguable that the purchaser in such situations is entitled to the remedy unless the contract expressly or impliedly postpones his possessory rights.

The other objections to the present state of the law all have to do with the assessment of damages.¹⁴⁸ In general, a far more precise description of the rules of damages to be applied in the action would be both feasible and beneficial. No standard whatever is given to the courts by the legislative provision merely that damages will be assessed for "the taking and detention" of the property. This explains, for example, the curious inconsistencies of the rules governing interest which were pointed out above.¹⁴⁹ This can be corrected only by the adoption of more exact statutory directions based upon the experience revealed in the cases. Again, limiting the value in trover to the time of taking even though the chattel fluctuates thereafter,¹⁵⁰ while in

147. 62 Mo. 350 (1876).

148. Of course, as pointed out above, the courts are still in confusion and disagreement as to the propriety of permitting an action of replevin based on naked possession. This problem, however, is not peculiar to replevin but runs through any possessory action involving either chattels or realty.

149. See note 116 *supra*.

150. *Darling v. Potts*, 118 Mo. 506, 24 S.W. 461 (1893); *Walker v.*

replevin the value at the time of the trial is given in the same situation,¹⁵¹ makes it the defendant's interest to dispose of the chattel, if he can, before he is sued thereby decreasing the amount of damages which can be levied against him. The most obvious correction of this condition is to adopt a statute giving the plaintiff in trover the highest value between notice and a reasonable time thereafter.¹⁵² Though a strong case could be made for a general re-working of the law all through, these fundamental changes could be made quite easily and would correct the more objectionable features of the present practice.

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Boland, 21 Mo. 289 (1855); Ross. v. Fidelity Bank and Trust Co., 115 S.W.2d 148 (Mo. App. 1938).

151. Schnabel v. Thomas, 98 Mo. App. 197, 71 S.W. 1076 (1903).

152. See note 130 *supra*.