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PROCEDURE—CONTEMPT AS SANCTION TO ENFORCE DELIVERY IN REPLEVIN
--In a replevin action in a common pleas court the plaintiff, after filing a \$200 bond for property later valued at \$900, obtained possession of some household goods of the defendant under a fatally defective writ. On motion of the defendant

the court dismissed the action and ordered the property returned. On appeal, plaintiff's action was again dismissed and he was directed to return defendant's goods. He ignored the order and was adjudged guilty of contempt. On appeal in the nature of certiorari from this conviction, *held*, reversed without prejudice. The order was void since the court had lost jurisdiction through error. However, the plaintiff might be found in contempt if he disobeys a further order. Where there is no other adequate remedy for a defendant who is deprived of his property through a void process, the court has power to enforce by contempt the return of the replevied goods by the plaintiff. *Burton v. Wayne Court Judge*, 325 Mich. 159, 37 N.W. (2d) 899 (1949).

A majority of the states have replevin statutes which, in combining the common law actions of replevin and trover, do not afford a plaintiff in replevin any statutory means to force disclosure of its location.¹ In a minority of states three general kinds of statutes, represented by those of Massachusetts, Indiana and Arkansas, have provided for coercive disclosure. Massachusetts includes use of contempt through the enforcement of its statutory equitable replevin action provided for in "suits to compel the redelivery of goods...taken...from the owner and so secreted that they cannot be replevied."² Indiana provides for contempt by stating simply, "When it appears...that the property has been...concealed so the order cannot be executed, the court may compel attendance of the defendant, examine him under oath,...and punish a...disobedience of the orders of the court...as in cases of contempt."³ Finally, Arkansas provides, "If the property...shall have been...concealed so that the officer can not make delivery thereof, he shall...arrest the body of the defendant, and hold him...until he shall execute a bond..."⁴ (or delivers property).⁵ Although the bond merely insures defendant's appearance at the trial, the Arkansas court has held that the authority to arrest includes arrest for the purpose of compelling surrender of the property.⁶ However, under the conventional statutes the majority view is that a court has no power to enforce either a writ of replevin or a judgment

¹ Mich. Comp. Laws (1948) §627.11; Ill. Rev. Stat. (1947) c. 119, §18; 36 ILL. B. J. 484 (1948); 170 A.L.R. 122 (1947).

² Mass. Gen. Laws (Ter. ed., 1932) c. 214 §3(1). See *Clapp v. Shepherd*, 40 Mass. (23 Pick.) 228 at 230 (1839); *Bromfield v. Checkoway*, 310 Mass. 68, 38 N.E. (2d) 563 (1941).

³ Ind. Stat. Ann. (Burns, 1933) §3-2707; Kan. Gen. Stat. (1935) §60-1013. See *Batchelor v. Walburn*, 23 Kan. 517 (1880); *In re Farr*, 41 Kan. 276, 21 P. 273 (1889); Colo. Stat. Ann. (1935) c. 96, §126; Iowa Code (1946) §643.11; 35 ILL. L. REV. 988 (1941).

⁴ Ark. Stat. Ann. (1947) §34-2112. See similar statutes: Cal. Code of Civil Proc. (Deering, 1941) §479; Ga. Code Ann. (1933) §107-203; N.Y. Civ. Prac. Act (Cahill-Parsons, 1946) §826 (6).

⁵ Ark. Stat. Ann. (1947) §34-2113.

⁶ *Lane v. Alexander*, 168 Ark. 700, 271 S.W. 710 (1925). See also, *Fireman's Mut. Ben. Assn. v. Clifford*, 201 App. Div. 315, 194 N.Y.S. 295 (1922).

for the plaintiff by an order to defendant enforceable by contempt.⁷ Three reasons given for this view are: body execution was not available at common law to enforce the law action of replevin;⁸ the legislature expressly provided an alternative remedy for the value of the property when the sheriff is unable to seize it;⁹ and the statute merely commands the sheriff to take the property and does not order the defendant to deliver it.¹⁰ If plaintiff's action is dismissed, normally a judgment in the alternative is rendered either for the return of the replevied property to the defendant or for its value.¹¹ Again the conventional statutes, including Michigan's and Illinois', do not expressly provide for a contempt sanction to enforce its return.¹² Although it is generally agreed that contempt is not available where there is some other adequate remedy,¹³ lack of an adequate remedy does not make contempt available per se. Rather, a Michigan statute, similar to those of other states, provides that "disobedience of any *lawful* order, decree, or process of such court" constitutes contempt.¹⁴ Thus the court in the principal case found that it had power to order lawfully the return of the replevied property so that contempt could lie for disobedience of the order.¹⁵ Although this is apparently inconsistent with the non-use of contempt enforcement for the plaintiff, present here is the fact that the plaintiff illegally obtained the property through judicial action. Emphasizing this fact, the court said that it must have power to remedy the situation. It is believed that a desirable result was reached, for a plaintiff should not be permitted through a clear abuse of process to use the court in effect as the agency to force a credit sale of the replevied goods upon an unwilling defendant-seller. In view of the language, "Neither this sub-section nor the other sections of the above statute (being the statute defining and providing for contempt) make any distinction

⁷ *Universal Credit Co. v. Antonsen*, 374 Ill. 194, 29 N.E. (2d) 96 (1940); *Horr v. People*, 95 Ill. 169 (1880); 130 A.L.R. 632 (1941); 36 ILL. B. J. 484 (1948); 17 C.J.S., Contempt, §12 (1946).

⁸ *Fuller v. Bowker*, 11 Mich. 204 (1863); *Clements v. Tillman*, 79 Ga. 451 (1887); *Yott v. People*, 91 Ill. 11 (1878); 1 FREEMAN, EXECUTIONS, 3d ed., §8 (1900).

⁹ Mich. Comp. Laws (1948) §§627.11, 627.26; Ill. Rev. Stat. (1947) c. 119, §18; *Universal Credit Co. v. Antonsen*, supra, note 7; *Yott v. People*, supra, note 8. See also, *Hammond v. Morgan*, 101 N.Y. 129, 4 N.E. 328 (1886).

¹⁰ *Universal Credit Co. v. Antonsen*, supra, note 7; *Horr v. People*, supra, note 7.

¹¹ *Barstow v. Wolff*, 148 Neb. 14, 26 N.W. (2d) 390 (1947); *Stewart v. Hasty*, 48 S.E. (2d) 757 (1948); *Pabst v. Butchart*, 68 Minn. 303, 71 N.W. 273 (1897); 46 AM. JUR., Replevin, §128 (1943); 1 FREEMAN, EXECUTIONS, 3d ed., §4 (1900).

¹² Mich. Comp. Laws (1948) §627.29; Ill. Rev. Stat. (1947) c. 119, §22.

¹³ *Haines v. Haines*, 35 Mich. 138 (1876); *Carnahan v. Carnahan*, 143 Mich. 390, 107 N.W. 73 (1906); *Hennig v. Abrahams*, 246 App. Div. 621, 282 N.Y.S. 970 (1935), affd. 270 N.Y. 626, 1 N.E. (2d) 362 (1936). Contra: *In re Cliff's Estate*, 108 Utah 336, 159 P. (2d) 872 (1945).

¹⁴ Mich. Comp. Laws (1948) §605.1 (5). See *Robertson v. Commonwealth*, 181 Va., 520, 25 S.E. (2d) 352 (1943); 12 AM. JUR., Contempt, §24 (1938). Italics added.

¹⁵ The court relied on dicta in *Muscogee Motor Co. v. Cook*, 238 Ala. 178, 190 S. 71 (1939). In that case the facts and the statute, Ala. Code (1940) tit. 7, §920 ("... the property must be returned to the defendant"), were more favorable to a finding of contempt.

between cases on the law or equity side of the court,"¹⁶ it is not clear whether abuse of process under the particular facts was the basis of the decision, or whether the court was committing itself to the use of contempt in any replevin action.

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¹⁶ Principal case at 165.