Maryland Law Review

Volume 7 | Issue 1 Article 5

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Liability of Lessors of Safe Deposit Boxes - Takoma Park Bank v. Abbott, 7 Md. L. Rev. 76 (1942)
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Comments and Casenotes

LIABILITY OF LESSORS OF SAFE DEPOSIT BOXES

Takoma Park Bank v. Abbott[1]

In a jury trial in the Circuit Court for Carroll County the plaintiff-appellee obtained a judgment for loss of property placed in a safe deposit box which he had leased from the defendant bank. The judgment was affirmed by the Court of Appeals.[2]

The box was leased and fifty $1,000 gold certificates, together with other property, were placed therein several years after the issuance of a Federal Executive Order which prohibited the retention of gold certificates except under license.[3] The plaintiff alleged that he was not aware of the Executive Order and, therefore, did not know that the certificates should have been turned into the Treasury in exchange for other money. He testified that he last saw the safe deposit box on November 30, 1937, at which time he removed $200 therefrom and checked to make certain that the envelope containing the gold certificates was still there. On December 13, 1937, the plaintiff visited the Morris Plan Bank and inquired concerning the possibility

[1] 19 A. (2d) 169 (Md., 1941).

[2] The bank filed in the Supreme Court of the United States a petition for certiorari to review the action of the Maryland Court. This petition was denied. The plaintiff executed on his judgment and it was returned nulla bona, as the bank was insolvent. Plaintiff then instituted, on the judgment, an attachment suit in the Circuit Court for Montgomery County against Aetna Casualty and Surety Co., as garnishee. The Insurance Company removed the case to the Federal District Court for Maryland. This company had issued a safe depository liability policy to the bank and the plaintiff contended that, as beneficiary of this policy, he had a right to recover the amount of his judgment. His claim was based both on the express terms of the policy and on Md. Code (1939) Art. 48A, Sec. 68, which provides that if an execution upon any final judgment against the assured, under a liability insurance policy issued in the State of Maryland, is returned unsatisfied an action may be brought by or on behalf of the injured person against the insurance company. Plaintiff's motion for judgment was granted, Abbott v. Aetna Casualty and Surety Co., 42 Fed. Supp. 793 (D. C. Md., 1942). This was affirmed by the United States Circuit Court of Appeals, Aetna Casualty and Surety Co. v. Abbott, 130 Fed. Rep. (2d) 40 (C. C. A. 5th, 1942).

[3] "After 30 days from the date of this order no person shall hold in his possession or retain any interest, legal or equitable, in any gold coin, gold bullion, or gold certificates situated in the United States and owned by any person subject to the jurisdiction of the United States, except under license therefor issued pursuant to this Executive order . . ."—Executive Order 6260, Sec. 5, August 28, 1933, 12 U. S. C. A. Sec. 95 (5).

of disposing of a $1,000 gold certificate; upon relating that he had fifty of them, the plaintiff was advised to engage counsel. The attorney whom he selected suggested that he go to the bank the next day to obtain the gold certificates and promised to take them to the Treasury for him. The following morning while the plaintiff was signing the register in the safe deposit box room of the defendant bank, the attendant to whom he had just handed his key exclaimed: "There is no box there, you must have left it outside in one of the booths." Neither the box nor its contents were ever accounted for in any way.

The plaintiff contended that the loss resulted from the negligence and default of defendant in not using reasonable care and diligence in guarding and safekeeping the safe deposit box. In addition to the general issue plea, the defendant filed a special plea which stated that the plaintiff had no interest, legal or equitable, in the fifty gold certificates because he held them in violation of an Act of Congress and of an Executive Order,[4] and therefore was not entitled to maintain his action to recover the alleged loss. The plaintiff's demurrer to the latter plea was sustained.

The Court of Appeals clearly pointed out several defects in the defendant's special plea. The only point of substantive law involved was that a bailee cannot dispute a bailor's title; this is in accord with the great weight of authority.[5] Also, in discussing the plaintiff's claim to the gold certificates, the Court implied that the certificates likely could have been exchanged at the Treasury and, therefore, that plaintiff had a very real interest in them. This was based on the decision of a Federal District Court which had held that the Government could not confiscate gold money without proving intent on the part of the holder to violate the act under which the Executive Order calling in gold and gold certificates was issued.[6]

In passing on the lower court's ruling on the prayers, the appellate court cited *Security Storage and Trust Co. v.*

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[4] Federal Reserve Act, Section 11 (n), as added in 1933, 12 U. S. C. A. 248 (n); Trading with the Enemy Act, Section 5(b), as amended in 1933, 50 U. S. C. A. Appendix, Section 5.

[5] Barker v. Lewis Storage and Transfer Co., 79 Conn. 342, 65 A. 143 (1906); Viers v. Webb, 76 Mont. 38, 245 P. 257 (1926); Ford's Adm'x. v. Bank of Hartford, 250 Ky. 793, 63 S. W. (2d) 967 (1933); Kramer v. Grand Natl. Bank of St. Louis, 336 Mo. 1022, 81 S. W. (2d) 961 (1935); The "Idaho", 93 U. S. 575 (1876).

[6] United States v. 98 $20 United States Gold Coins, et al., 20 Fed. Supp. 354 (D. C. E. D. Pa., 1937).

Martin,[7] which embraced facts similar to those in the instant case, and reiterated the holding therein to be the law of Maryland. In that case the Court held that the relationship of the parties to a safe deposit box lease was that of bailor and bailee, and that failure to deliver and account for the property placed in the box should be treated as prima facie evidence of negligence on the part of the bailee in not exercising ordinary or reasonable care and diligence in its safe keeping. The Maryland Code, in its provisions relative to the lessor's right to limit its liability by contract (which will be discussed in a subsequent paragraph) refers to the party leasing a safe deposit box as "such lessor or bailee".[8]

The Maryland view in calling the transaction a bailment is in accord with the views of a majority of the courts.[9] Many of the text writers, on the other hand, state that the rental of a safe deposit box is in the nature of a lease of space, creating a landlord-tenant relationship.[10] They point out that possession is one of the fundamental elements of a bailment and contend that the lessor of the box does not have sufficient custody and control of its contents to constitute possession, the property remaining in the possession of the lessee who, alone, has access to it. The analogy used by some of the writers taking this position compares the rental of a safe deposit box with the leasing of office space in a large office building. Property placed in the office is not in possession of the owner of the

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[7] 144 Md. 536, 125 A. 449 (1924).

[8] Md. Code (1939) Art. 23, Sec. 293.

[9] Security Storage and Trust Co. v. Martin, 144 Md. 536, 125 A. 449 (1924); National Safe Deposit Co. v. Stead, 250 Ill. 584, 95 N. E. 973 (1911), affirmed 232 U. S. 58 (1914); Young v. First National Bank of Oneida, 150 Tenn. 451, 265 S. W. 681 (1924); Roberts v. Stuyvesant Safe-Deposit Co., 123 N. Y. 57, 9 L. R. A. 438, 25 N. E. 294 (1890); Reading Trust Co. v. Thompson, 254 Pa. 333, 98 A. 953 (1916); West Cache Sugar Co. v. Hendrickson, 56 Utah 327, 11 A. L. R. 216, 190 P. 946 (1920); Guaranty Trust Co. v. Diltz, 42 Tex. Civ. App. 26, 91 S. W. 596 (1906); Trainer v. Saunders, 270 Pa. 451, 113 A. 681 (1921); Cummins, *A Review of the Law of Safe-Deposit Companies* (1895) 9 Harv. L. Rev. 131.

[10] ELLIOTT, BAILMENTS (2d ed., 1929) Sec. 105; 2 STREET, FOUNDATIONS OF LEGAL LIABILITY, Ch. 28, 291; VAN ZILE, BAILMENTS (2d ed.) Secs. 195, 196; HALE, BAILMENTS, 248, 249; GODDARD, BAILMENTS, Sec. 158.

One law review writer expressed the view that the relationship is that of licensor and licensee; he states that it cannot be a landlord-tenant relationship because the tenant does not have free and unencumbered access to the property which he has rented. Note, *Bailment—Landlord and Tenant—Licenses—Warehousemen—Relation Between Renter of Safe-Deposit Box and the Safe-Deposit Company* (1927) 11 Minn. L. Rev. 440. This view is criticized in Note, *Property: The relation of a safety deposit box company and its patrons* (1936) 21 Corn. L. Q. 325, which points out that a licensor-licensee relationship would impose no duty of care on the lessor.

building; it remains in the custody and control of the tenant even though he may have access to it only during reasonable business hours. Another writer adds that since possession has remained in the lessee of a safe deposit box, there has been no delivery and without such there can be no bailment.[11]

While disagreeing with the courts as to terminology, some of the writers take the view that from the standpoint of the lessor's liability for failure to safeguard and to return property placed in the box, the technical legal relationship is merely an academic question. In the absence of a statute, the lessor has the same duties and responsibilities to its customers by means of their contracts, express or implied, as those imposed upon a bailee for hire.[12]

The question whether the transaction is a bailment takes on more practical aspects when the rights of third parties become involved. A majority of the courts have held that a creditor of the lessee may reach the property in the safe deposit box by garnishment proceedings.[13] This is consistent with their contention that the transaction between the lessor and lessee is a bailment, which requires that possession be in the former. The Court of Appeals of Maryland has not ruled on this point, however, and any expression of opinion as to which course the Court will follow if the question is ever presented would be mere conjecture. One of the most recent cases in point, in another jurisdiction, adopted the minority view.[14] Since no third party creditors are involved in the instant case, this note will be confined to the rights of the immediate parties to the lease.

In most jurisdictions, including Maryland, the lessor of safe deposit boxes is required to use ordinary care, or such care as a prudent man would take of his own goods.[15] The duty arises from the nature of the business as well as from the legal responsibilities of a bailee for hire.[16] Maryland

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[11] DOBIE, BAILMENTS AND CARRIERS (1914) 167.

[12] ELLIOTT, BAILMENTS (2d ed., 1929) Sec. 106; HALE, BAILMENTS, 250.

[13] West Cache Sugar Co. v. Hendrickson, *supra*, n. 9; Washington Loan and Trust Co. v. Susquehanna Coal Co., 26 App. D. C. 149 (1905); Tillinghast v. Johnson, 34 R. I. 136, 82 A. 788, 41 L. R. A. N. S. 764 (1912); Trowbridge v. Spinning, 23 Wash. 48, 62 P. 125, 54 L. R. A. 204 (1900); Trainer v. Saunders, *supra*, n. 9.

[14] Wells v. Cole, 194 Minn. 275, 260 N. W. 520 (1935).

[15] Cussen v. Southern Cal. Savings Bank, 133 Cal. 534, 65 P. 1099 (1901); Mayer v. Brensinger, 180 Ill. 110, 54 N. E. 159 (1899); Security Storage and Trust Co. v. Martin, *supra*, n. 7; Young v. First National Bank of Oneida, *supra*, n. 9.

[16] ELLIOTT, BAILMENTS (1929) Sec. 105; HALE, BAILMENTS, 250.

differs from the weight of authority, however, with respect to the burden that is placed upon the defendant to prove that he has exercised such care. A majority of the courts hold that although the defendant must overcome the prima facie case of negligence which results from the property not being returned to the plaintiff box holder, once the defendant has met that burden by offering evidence of care, the plaintiff must prove his allegations of negligence if he is to recover.[17] Maryland, on the other hand, requires the defendant to show, by a fair preponderance of the evidence, that it has exercised the required care.[18] Thus, in our state, the plaintiff need only prove that the property which he placed in the safe deposit box was not extracted by him or by anyone acting under his authority, has not been returned to him, and is no longer in the box in the lessor's safe deposit vault. The burden then shifts to the defendant, whose success or failure to show that he has exercised the required degree of care virtually determines the verdict.

In the instant case the defendant bank did not explain in any way the disappearance of the box nor or its contents; it merely offered evidence to show the practices in its safe deposit box room and this testimony did little to help its case.[19] Thus, it hardly met the burden of proof placed upon it by the prima facie evidence of negligence and it

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[17] Schaefer v. Washington Safety Deposit Co., 281 Ill. 43, 117 N. E. 781 (1917); Firestone Tire and Rubber Co. v. Pacific Transfer Co., 120 Wash. 665, 208 P. 55 (1922); Corbin v. Gentry and Forsythe Cleaning and Dyeing Co., 181 Mo. App. 151, 167 S. W. 1144 (1914); Herbert v. Patrick, 27 Colo. App. 204, 146 P. 190 (1915).

[18] Security Storage and Trust Co. v. Martin, *supra*, n. 7.

[19] The Clerk who testified for the defendant bank was engaged in other phases of the bank's work primarily, but helped the regular attendant in the safe deposit box room when the latter was especially busy and during the lunch hour. She explained that no one could obtain access to a safe deposit box which had been leased except by use of both a guard key and the boxholder's key and that the former was retained by the employee in charge, in her cage, back of the grille. (It is the usual situation that both the guard key and the boxholder's key are required to open a safe deposit box.) The witness stated, however, that the key to the box which contained the unused keys was available to any employee of the bank. While this might appear, on first glance, to be a harmless practice, it has serious possibilities in that an employee with evil intent might have the keys to some of the boxes duplicated before the boxes are leased and later, by obtaining the guard key, have access to the boxes.

The witness testified that on the last date on which the plaintiff claims to have seen the lost property she assisted him in obtaining his box and then returned to her work in another part of the bank and was not at the door as the plaintiff left the safe deposit box room. Although the plaintiff testified that there was an attendant at the door of the safe deposit box room to let him out, the bank presented no evidence of this, nor of its general practice in this regard.

likely would have been held liable for the loss in any state in which the situation may have arisen.

In a case like the one at bar, where the entire box is missing, without any signs of a burglary having occurred, the loss tends to speak for itself. It is most unusual for such a situation to arise, and the Maryland rule, which places a more severe burden upon the defendant, would not appear to be unreasonable in such circumstances. There is certainly little that the plaintiff can prove relative to the disappearance of the box; any facts available on this point are more likely to be known to the defendant.

Several months after the Court of Appeals rendered its decision in *Security Storage and Trust Co. v. Martin,* which announced the rule that the defendant-lessor must overcome a prima facie case of negligence in showing by a fair preponderance of the evidence that it has exercised the required degree of care, the Legislature came to the aid of the banks and other depositories which lease safe deposit boxes. A statute was passed making it possible for the lessor to limit its liability by contract.[20] The statute provides that loss due to negligence may be limited to any amount not less than five hundred times the annual rental[21]; that the lessor may name money, jewelry, or any other specified articles for which it will assume no liability; also, the contract may stipulate that evidence tending to prove loss of property from the box shall not be sufficient to raise a presumption that it was lost by any negligence of the lessor, nor to place the burden of proof on the lessor. Evidently the defendant bank in the case at bar did not avail itself of the provisions of the statute in leasing the box to the plaintiff.

Thus, while the decision in *Security Storage and Trust Co. v. Martin* placed a hardship upon the depositories, which likely gave them some concern, this situation was short lived. The statute which relieved them of their burden appears to be as liberal as could be justified, considering the nature of the business. The leasing of a safe deposit box implies that the property to be placed therein is small in bulk but of relatively high value; this makes it necessary that a high degree of care be exercised by the lessor. Possibly, under the statute, the pendulum has

[20] Md. Code (1939) Art. 23, Sec. 293.

[21] Since a large majority of the boxes rent for $5.00 per year or less, the lessor could limit its liability for negligence to $2,500 in most of its contracts. Many companies which offer this service, however, have large boxes, a few of which may rent for $100 per year or more.

swung too far, the banks being allowed to contract away so great a portion of their liability. Should cases arise in which the statute works a hardship on the lessees, it is likely that there will be a demand for its revision. However, at present, it would seem that a bank, or other depository, would avail itself of the liberal provisions of the statute by inserting appropriate wording in its contracts.