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Article 22

Article 66--An Extraordinary Remedy

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termination, the instant statute constitutes the means of achieving this goal. But, although its purpose and its demand for a writing are akin to the Statute of Frauds, these enactments generally differ in one important respect. Here, it is not the nature of the subject matter which cloaks the statute 'round the contract; instead, it is the deliberate invocation by the parties which attaches the law's protection. Yet, in spite of this voluntary nature and its limited scope, the statute provides an important safeguard in the struggle against contract fraud.

The history of the law restricting contract modification, however, indicates that the statute has been concerned with more than the false claims of contracting parties. Although its creation was designed primarily to prevent fraud, a second, and quite important, reason motivated its adoption. The law presented the method of eliminating the anomalous lack of notice feature which characterized its predecessor, the seal. Strangely enough, judicial interpretation soon revealed that the legislative remedy itself suffered from the same ambiguity of no notice.

Now, the law has been rewritten; and its new, more definitive terminology sets forth, in a complete manner, the legal effect of a "no oral change or discharge" clause. Contracting parties may in the future safely insert such preventative clauses as they desire. And, the courts will be assured that such insertion was made with full knowledge of its effect and, as such, accurately represents the desired intention of the parties. In brief, with the difficulty of ambiguity seemingly removed, the statute stands ready to fulfill its primary purpose of protecting contracting parties from fraud.

ARTICLE 66—AN EXTRAORDINARY REMEDY

Introduction

Replevin was one of the earliest actions conceived by the law.[1] Originally it was believed that the action would lie only for the recovery of chattels illegally distrained,[2] and this limited scope was recognized by several states.[3] However, the weight of authority later

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[1] *See* Three States Lumber Co. v. Blanks, 133 Fed. 479, 481 (6th Cir. 1904); Stone v. Church, 172 Misc. 1007, 1008, 16 N. Y. S. 2d 512, 515 (County Ct. 1939).

[2] 3 BL. COMM. 147. A distrained chattel is one that is held as a pledge until the pledgor performs an obligation.

[3] Wheelock v. Cozzens, 6 How. 279 (Miss. 1842); *see* Watson v. Watson, 9 Conn. 140, 143 (1832).

permitted the action to be brought by one having an immediate right to possession to recover any chattel wrongfully taken.[4] The remedial significance of the action of replevin is apparent in that it allows the wronged party to recover the chattel *in specie*. The right to recover something more than money damages is rare in an action at law,[5] and replevin has rightfully been referred to as an extraordinary remedy.[6]

An integral part of the action of replevin is the right of the plaintiff to "replevy" the chattel. This is a process by which the plaintiff may obtain possession of the chattel before or during the pendency of the action.[7] The legislature, realizing that the plaintiff's interest lies in obtaining the chattel, allows him this additional aid, so that the party in possession cannot deprive him of the chattel by disposing of it before the final adjudication of the action.

The action to recover a chattel (replevin) and the proceedings incidental thereto are incorporated in Article 66 of the New York Civil Practice Act. Recently this article has been substantially revised by the amendment, addition and repeal of various sections, necessitating an analysis and evaluation of the altered rights and duties of the three possible parties to the action. Emphasis will be placed on the major changes in connection with the replevy of the chattel, as well as those revisions relating to the pleading, judgment and discontinuance of an action to recover a chattel.

Replevy, Incidental Proceedings and Intervention

A. *Plaintiff's Rights*

In an action to recover a chattel, the plaintiff may cause the sheriff to replevy the chattel when the summons is issued, or anytime thereafter prior to judgment.[8] In order to avail himself of this opportunity to acquire the chattel *pendente lite*, he must deliver to the sheriff, along with a written requisition to replevy, an affidavit and an undertaking.[9]

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[4] Pangburn v. Patridge, 7 Johns. 140 (N. Y. 1810); *see* Daggett v. Robins, 2 Blackf. *415, *416 (Ind. 1831); Stone v. Church, *supra* note 1.

[5] Replevin is brought to recover the possession of specific personal property. Another action at law, ejectment, lies for the recovery of real property.

[6] See 77 C. J. S. 11.

[7] See note 8 *infra*.

[8] N. Y. CIV. PRAC. ACT § 1094. Although this is the usual procedure, jurisdiction may be obtained by replevying the chattel prior to the service of the summons as provided by Section 1092. Once jurisdiction is thus obtained, the court will lose jurisdiction neither of the parties nor of the subject matter because of a subsequent failure to serve the summons. Kurzweil v. Story & Clark Piano Co., 95 Misc. 484, 159 N. Y. Supp. 231 (City Ct. 1916).

[9] N. Y. CIV. PRAC. ACT § 1095. The written requisition must be ". . . indorsed upon or annexed to the affidavit and subscribed by [plaintiff's] attorney to the effect that the sheriff is required to replevy the chattel described therein.

The affidavit to be sufficient must contain, among other necessary allegations,[10] the aggregate value of all the chattels. Formerly, this allegation was discretionary with the plaintiff.[11] The fact that this allegation is now mandatory does not necessarily imply that such omission will place at the defendant's disposal a means of avoiding immediate surrender of the chattel on jurisdictional grounds. A further amendment to the same section permits the court, in its discretion, to supply *any* omissions, defects, mistakes or other irregularities in the affidavit.[12] The importance of this latter provision can not be over-emphasized. All too often many of the errors in the affidavit were considered jurisdictional defects and hence fatal.[13] This placed the plaintiff in a dilemma. While his attorney was laboring to frame a new affidavit, the defendant, now fully apprised of the plaintiff's intent, had ample time to place the chattel beyond the sheriff's reach, thereby frustrating the very purpose of the action, that is, to recover the chattel.[14]

An undertaking must be given by the plaintiff to protect the sheriff from any actions maintainable by the defendant or any other party to the action. It must be executed by at least two sureties,[15] approved by the sheriff, who undertake to pay to the aggrieved party damages up to a specified sum of at least twice the value of the chattel,[16] should judgment be awarded against the plaintiff, or if the action abates or is discontinued prior to the return of the chattel.[17]

The requisition may be directed to the sheriff of a particular county or generally to the sheriff of any county where the chattel is found. It is deemed the mandate of the court."

[10] N. Y. Civ. Prac. Act § 1096 (effective Sept. 1, 1952). The affidavit must describe the chattel and, where the chattel is in bulk, state its quantity. It must also contain allegations that the plaintiff is the owner or has a special property interest in the chattel entitling him to possession; that the chattel is wrongfully detained by the defendant; the cause of the detention; and that the chattel has not been seized for a lawful purpose.

[11] N. Y. Civ. Prac. Act § 1096 (1920) provided: ". . . [A]nd, *at the election of the plaintiff*, it *may* state the aggregate value of . . . [the chattels] . . . ." (emphasis added).

[12] N. Y. Civ. Prac. Act § 1096 (effective Sept. 1, 1952).

[13] Failure to describe the chattel sufficiently was held to be a jurisdictional defect. Croker Fire Prevention Corp. v. Jacobs, 235 App. Div. 216, 256 N. Y. Supp. 775 (1st Dep't 1932); Schweitering v. Rothschild, 26 App. Div. 614, 50 N. Y. Supp. 206 (1st Dep't 1898); Devoe v. Selig, 25 Misc. 411, 54 N. Y. Supp. 941 (City Ct. 1895). So was failure to allege wrongful detention, *see* Metropolitan Life Insurance Co. v. Harry Gillman & Sons, Inc., 137 Misc. 18, 21, 242 N. Y. Supp. 118, 121 (Sup. Ct. 1930). as well as failure to allege the cause of detention, Northwest Engineering Co. v. Rappl, 132 Misc. 497, 230 N. Y. Supp. 177 (Sup. Ct. 1928).

[14] The chief reason for bringing replevin is that the plaintiff is interested in recovering the chattel *in specie*.

[15] An authorized surety company may be substituted for the two sureties as provided in Section 156 of the New York Civil Practice Act.

[16] The value of the chattel is stated in the plaintiff's affidavit.

[17] N. Y. Civ. Prac. Act § 1098 (effective Sept. 1, 1952).

Until recently, the sheriff was unable to replevy the chattel from a third person unless there was an agency relationship existing between the third person and the defendant,[18] as the undertaking redounded only to the defendant's benefit and did not inure to the benefit of other persons.[19] Where this relationship existed, the plaintiff was in fact depriving the defendant of possession and not the third person, as the agent's possession is constructively that of his principal.[20] However, if the sheriff erred and determined that an agency relationship existed where in fact there was none, the sheriff's interference with the third person's right to possession was unlawful.[21] Since the undertaking ran only to the defendant and not to a third person,[22] the sheriff was unprotected.[23] But such was not always the situation for in the middle of the nineteenth century,[24] a sheriff who replevied specific property from anyone other than the defendant was protected as the court believed it would impose an onerous task upon the sheriff to inquire into the title of every chattel he seized.[25] Under the present law, however, the sheriff can lawfully seize a chattel in a third person's possession. Since the undertaking of the plaintiff is now required to inure to the benefit of third-party-intervenors as well as to the defendant, the third person is adequately protected.[26]

If any difficulty is encountered in replevying the chattel, stemming from the plaintiff's lack of knowledge of the chattel's location, he may cause the testimony of any person to be taken by deposition in order to ascertain its whereabouts.[27] This may be accomplished

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[18] N. Y. CIV. PRAC. ACT § 1100 (1920), repealed Sept. 1, 1952.

[19] N. Y. CIV. PRAC. ACT § 1099 (1920).

[20] In fact, the present statute provides that the defendant has the absolute right to reclaim the chattel when it is taken from his agent's possession. N. Y. CIV. PRAC. ACT § 1105 (effective Sept. 1, 1952) reads: ". . . [T]he defendant . . . if the chattel was taken from his possession or the possession of his agent . . . [may require] a return of the chattel replevied. . . ."

[21] Otis v. Williams, 70 N. Y. 208 (1877).

[22] See note 19 *supra*.

[23] N. Y. CIV. PRAC. ACT § 1108 (1920) read: "A person not a party to the action . . . may maintain an action against the sheriff . . . to recover his damages by reason of the taking, detention or delivery of the chattel."

Although this right has been extinguished, the Judicial Council in 1951 LEG. DOC. No. 26(F), 17 REPORT, N. Y. JUDICIAL COUNCIL 249 (1951), believes that the third party claimant is not ". . . deprive[d] . . . of any substantial right" as he can now maintain an action against the plaintiff's sureties after intervening in the action.

[24] N. Y. Rev. Stat. 1846, c. 8, tit. 12, § 13, provided: "If the defendant, or any other person who may be in possession of the goods and chattels specified in the writ, shall claim property therein . . . the sheriff shall . . . forthwith summon a jury . . . to try the validity of such claim."

[25] Foster v. Pettibone, 20 Barb. 350 (N. Y. 1855).

[26] 1951 LEG. DOC. No. 26(F), 17 REPORT, N. Y. JUDICIAL COUNCIL 249 (1951).

[27] N. Y. CIV. PRAC. ACT § 1094-a (amended Sept. 1, 1952). Prior to the amendment only the testimony of an *adverse* party could be taken by deposition.

by obtaining an order, which may be granted without notice, from the court in which the action is brought or from a judge in the county court.[28] The order may be granted to accompany the summons and complaint or at anytime thereafter, and, pursuant to the amended statute,[29] even after the entry of final judgment. Furthermore, by submitting with the petition for an order of examination, an undertaking—executed by sufficient sureties and in an amount approved by the court, but in no event less than $250—the plaintiff may obtain an inclusion in the order prohibiting the adverse party from removing the chattel from the state, or from otherwise disposing of it without further order from the court.[30] The undertaking inures to the benefit of the adverse party for damages wrongfully caused by the restraint.

Ordinarily, the defendant has a right to reclaim the chattel. However, if the chattel is of such a nature that pecuniary damages would be insufficient to compensate the plaintiff if he is successful, he may deprive the defendant of this right to reclaim [31] the chattel by giving the sheriff notice and applying to the court to have the chattel impounded.[32] The application must be made while the chattel is in the sheriff's possession, that is, after he has replevied it and before he has delivered it to any party.[33] A hearing takes place on the application and if the court finds that ". . . the property is of such a nature . . . that the applicant would not be adequately compensated for its loss by the payment of its pecuniary value. . ." [34] the chattel may be impounded by the court until the final disposition of the action. Once the sheriff has received notice of the plaintiff's intention to have the replevied chattel impounded, he may not deliver it to any party to the action without further order from the court.[35]

B. *Defendant's Rights*

The defendant must act within three days after the sheriff has replevied the chattel if he wishes to reclaim it,[36] have it impounded,[37] or except to the sufficiency of the plaintiff's sureties.[38] Similarly, the sheriff who has seized the chattel must retain it for this period of

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[28] This applies to county courts of counties other than Kings, Queens, Richmond and the Bronx, which are limited in jurisdiction to criminal actions. There is no county court in New York County.

[29] See note 27 *supra.*

[30] *Ibid.*

[31] The right exists under N. Y. Civ. Prac. Act § 1097.

[32] N. Y. Civ. Prac. Act § 1103 (effective Sept. 1, 1952).

[33] *Ibid.* The plaintiff must furnish the sheriff with sufficient security to defray the cost incidental to the storing and impounding of the chattel.

[34] See note 32 *supra.*

[35] *Ibid.*

[36] N. Y. Civ. Prac. Act § 1105 (effective Sept. 1, 1952).

[37] N. Y. Civ. Prac. Act § 1103 (effective Sept. 1, 1952).

[38] N. Y. Civ. Prac. Act § 1104 (effective Sept. 1, 1952).

time, or he forfeits a specified sum,[39] and is liable for damages sustained by the aggrieved party.[40]

When the chattel is replevied from the defendant, his most advantageous right is that of reclaiming it.[41] This right, however, is not accorded to a defendant who only claims a lien on the chattel.[42] To exercise this right, the defendant must serve both the sheriff and the plaintiff with a notice requiring a return of the chattel.[43] This notice must be accompanied by an affidavit alleging that the defendant is the owner of the chattel, or that he, because of a special property interest therein, is lawfully entitled to its possession, and the supporting facts.[44] In addition to the notice and affidavit, the defendant must deliver to the sheriff and the plaintiff an undertaking executed by two sureties.[45] After giving the prescribed notice requesting a return of the chattel, the defendant must serve notice of justification of his sureties upon the plaintiff's attorney.[46] Compliance with this requirement is vital, as failure to do so will result in an immediate delivery of the chattel to the plaintiff.[47] In according the defendant a right of reclamation, the legislature gave statutory recognition to the defendant's right to the chattel as a consequence of his prior possession.[48] When the chattel is replevied from a third

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[39] N. Y. CIV. PRAC. ACT § 1108. The sum is $250.

[40] *Ibid.*

[41] Reclamation is referred to as the defendant's most advantageous right because he may reacquire possession of the chattel prior to a determination of the issues as a matter of right. See N. Y. CIV. PRAC. ACT § 1105. Under Section 1104 he may except to the plaintiff's sureties, but the chattel will only be returned to him if they fail to qualify. Under Section 1103, the defendant can only acquire possession of the chattel upon a final determination of the action if he is the successful party.

[42] N. Y. CIV. PRAC. ACT § 1105 (effective Sept. 1, 1952).

[43] *Ibid.* Service of the notice to return must be made within three days after the chattel is replevied or within three days after the sheriff has been served with a copy of an order denying a motion to impound the chattel.

[44] See note 42 *supra* at subd. (1).

[45] See note 42 *supra* at subd. (2). This subdivision states that the undertaking must be ". . . to the effect that they [the sureties] are bound in a specified sum, not less than twice the value of the chattel as stated in the affidavit of the plaintiff, for the delivery thereof to the party to whom possession is adjudged; and for payment to him of any sum which the judgment awards against such reclaiming party."

[46] *Ibid.* Such justification must be given "[w]ithin three days after serving a notice requiring a return of the chattel. . . ."

[47] N. Y. CIV. PRAC. ACT § 1107 (effective Sept. 1, 1952) reads: ". . . [I]f the person reclaiming the chattel makes default in serving justification of his sureties or in procuring the allowance of his undertaking . . . the sheriff immediately must deliver the chattel to the plaintiff." *See* O'Connell v. Kelly, 8 N. Y. Supp. 475, 476 (Com. Pl. 1890), wherein the reason given is that the sheriff is not protected against suit by the plaintiff as the defendant's undertaking is inoperative and no liability is incurred thereon until the sureties are justified.

[48] 1951 LEG. DOC. NO. 26(F), 17 REPORT, N. Y. JUDICIAL COUNCIL 253 (1951).

person, this reason no longer exists, hence the defendant is not given the right to reclaim under such circumstances.

The defendant has the right to have the chattel impounded, provided it is of such a nature that pecuniary damages would be insufficient to compensate for its loss.[49] The procedure to be followed is the same as that outlined for the plaintiff. By exercising this right, the defendant can prevent the plaintiff from acquiring the chattel.

The defendant also has the absolute right to except to the plaintiff's sureties.[50] This may be accomplished by serving a notice [51] of exception upon the sheriff and the plaintiff's attorney. After the defendant serves this notice of exception, the plaintiff must respond by serving a notice of justification of his sureties upon the sheriff and the defendant.[52] If the plaintiff defaults in serving such notice, the sheriff must deliver the chattel to the defendant.[53] By neglecting to except to the plaintiff's sureties, the defendant waives all objections to them.[54]

The defendant may also have testimony taken by deposition to ascertain the location of the chattel. This right, however, unlike the aforementioned rights, need not be exercised within three days after the chattel has been replevied, but may be resorted to even after the entry of final judgment.[55]

C. *Third Party's Rights*

Previously, a third party possessed a statutory right to assert his claim to a replevied chattel by delivering an affidavit to the sheriff while the chattel was still in the sheriff's possession.[56] This affidavit had to contain an allegation of the third party's claim to the chattel, the facts on which the claim was based, the value of the chattel, and an allegation that the third party would suffer damage if the chattel was not released to him.[57] Delivery of the affidavit, however, did not assure the claimant that he would recover the chattel *in specie.* After receiving the affidavit, the sheriff could demand that the plain-

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[49] N. Y. Civ. Prac. Act § 1103 (effective Sept. 1, 1952).
[50] N. Y. Civ. Prac. Act § 1104 (effective Sept. 1, 1952).
[51] *Ibid.* The notice must be served "[w]ithin three days after the chattel is replevied. . . . The notice of exception must be subscribed by the party serving such notice or by his agent unless the party appears by attorney, in which event it must be subscribed by his attorney. The person so subscribing the notice must add to his signature his office address as prescribed by law with respect to a notice of appearance."
[52] See note 50 *supra.* The notice of justification must be served by the plaintiff's attorney within ten days after service of notice of exception upon the plaintiff's attorney.
[53] N. Y. Civ. Prac. Act § 1107 (effective Sept. 1, 1952).
[54] N. Y. Civ. Prac. Act § 1104 (effective Sept. 1, 1952).
[55] N. Y. Civ. Prac. Act § 1094-a (effective Sept. 1, 1952).
[56] N. Y. Civ. Prac. Act § 1107 (1920).
[57] N. Y. Civ. Prac. Act § 1107 (1948).

tiff post an additional bond [58] in order that the sureties on the bond be substituted for the sheriff in a suit by the third person claimant.[59] If the plaintiff failed to post this additional bond, the sheriff had discretionary power to refuse delivery of the chattel to the plaintiff.[60] The claimant's remedy was to sue the sheriff.[61]

A third party also had a statutory right to intervene in the action.[62] However, by resorting to this method of preserving his interests in the chattel, he would lose the protection afforded by the statutory right to assert his claim against the sheriff.[63] This protection included the plaintiff's posting of an additional bond to secure his claim, and his right to sue the sheriff upon the final adjudication of the action.[64] Furthermore, if he was not in privity with the defendant, his claim was not secured by the plaintiff's undertaking as the bond ran only to the defendant.[65] Thus, under these statutory provisions, a third party could only have adequate security and an opportunity to recover the chattel by bringing a separate suit subsequent to the original action.

Under the recently amended statute a third party who claims a right to possession has a right to intervene and have his claim adjudicated in the original action.[66] In order to intervene in the action, he must serve upon all parties who have appeared in the action a notice of motion to intervene containing the grounds for the motion and a proposed pleading stating the claim upon which the intervention is based.[67]

In addition to the right of intervention, a third party has all the rights enjoyed by the defendant; namely, reclamation,[68] exception to the plaintiff's sureties,[69] impounding [70] and the right to have testimony taken by deposition to ascertain the location of the chattel.[71] The procedure used by a third party in exercising these rights is exactly the same as that used by the defendant, with one exception.

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[58] *Ibid.*

[59] N. Y. CIV. PRAC. ACT § 1109 (1948).

[60] See note 57 *supra.*

[61] N. Y. CIV. PRAC. ACT § 1108 (1920).

[62] N. Y. CIV. PRAC. ACT § 193-b (1946).

[63] See note 61 *supra* (third person's right to sue sheriff conditioned upon his not being a party to the action); *see* McLaughlin v. McLaughlin, 237 App. Div. 1, 3, 260 N. Y. Supp. 357, 360 (1st Dep't 1932).

[64] N. Y. CIV. PRAC. ACT §§ 1107, 1108 (1920).

[65] N. Y. CIV. PRAC. ACT § 1099 (1920).

[66] N. Y. CIV. PRAC. ACT § 1109 (effective Sept. 1, 1952). "A person not a party to the action who claims the right to possession of all or part of the chattels replevied . . . *must* be allowed to intervene as a party defendant. . . ." (emphasis added). 1951 LEG. DOC. No. 26(F), 17 REPORT, N. Y. JUDICIAL COUNCIL 245 (1951).

[67] N. Y. CIV. PRAC. ACT § 193-b (as provided for in Section 1109).

[68] N. Y. CIV. PRAC. ACT § 1105 (effective Sept. 1, 1952).

[69] N. Y. CIV. PRAC. ACT § 1104 (effective Sept. 1, 1952).

[70] N. Y. CIV. PRAC. ACT § 1103 (effective Sept. 1, 1952).

[71] N. Y. CIV. PRAC. ACT § 1094-a (effective Sept. 1, 1952).

The exception arises when the chattel was not replevied from the third party, and he desires to object to the plaintiff's sureties. Under such circumstances, the third party must serve an affidavit stating his claim to possession of the chattel and the facts on which this claim is predicated, along with his notice of exception on the plaintiff's attorney.[72] A third party will become a party to the action from the date he serves notice upon the plaintiff's attorney of his intention to have the chattel impounded,[73] or of his exception to the plaintiff's sureties,[74] or of his request to reclaim the chattel.[75] It is to be noted that a third party's right to intervene by motion is conditioned upon his not employing any of the above procedures which also make him a party to the action.[76]

Under the present statutory provisions, a third party who intervenes, or who has a right to intervene, has no right to sue the sheriff.[77] As indicated by the Judicial Council, precluding a third party from suing the sheriff under these circumstances is not a deprivation of a substantial right, inasmuch as the sheriff could have had the plaintiff's sureties substituted for him in such an action; and, under the new amendment, the third party's claim is secured by the plaintiff's undertaking which must be made to inure to the benefit of all parties to the action.[78]

Pleading Stage

With regard to the pleading stage of an action to recover a chattel, the recent revision of Article 66 of the Civil Practice Act contains only one amendment.[79] This amendment is concerned with the defense of title in a third person, and the need for it has been long recognized.[80] Formerly, an answer which alleged title in a third person was sufficient without connecting the defendant with the third person's title; this was so regardless of whether the action was for a chattel wrongfully detained or wrongfully taken.[81] Judicial decisions had pointed out the injustice involved in permitting one who had wrongfully acquired possession of a chattel to prevail over a prior

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[72] See note 69 *supra.*
[73] See note 70 *supra.*
[74] N. Y. Civ. Prac. Act § 1104 (effective Sept. 1, 1952).
[75] N. Y. Civ. Prac. Act § 1105 (effective Sept. 1, 1952).
[76] N. Y. Civ. Prac. Act § 1109 (effective Sept. 1, 1952).
[77] *Ibid.*
[78] 1951 Leg. Doc. No. 26(F), 17 Report, N. Y. Judicial Council 249 (1951).
[79] N. Y. Civ. Prac. Act § 1093 (effective Sept. 1, 1952).
[80] See Finkelstein, *The Plea of Property in a Stranger in Replevin,* 23 Col. L. Rev. 652 (1923).
[81] N. Y. Civ. Prac. Act § 1093 (1920). When a third person had only a special property in the chattel, this rule did not apply. Stowell v. Otis, 71 N. Y. 36 (1877).

possessor.[82] Nevertheless, when this section was added to the Civil Practice Act, the statutory requirement of defense of title in a third person made no distinction between an action to recover a chattel wrongfully detained and one wrongfully taken.[83]

The present amendment, recognizing this injustice, allows the defense of title in a third person to be interposed without requiring the defendant to connect himself with the third person's title only when the action is based on a wrongful *detention*.[84] Now, when an action is brought to recover a chattel which has been wrongfully *taken* the defense of title in a third person will be good only when the defendant alleges and proves facts which will connect him with the third person's title.[85]

The title to this section is now called "Defense of title in third person."[86] The term "Defense" is to be given broad interpretation so as to include affirmative as well as negative defenses. Therefore, the rule of pleading which allows the defendant, when the chattel is wrongfully detained, to show title in a third person under a general denial without specific allegations remains unchanged.[87]

Post Trial

Since the Revised Statutes of 1829-30, the action of replevin was intended to be a comprehensive remedy embracing the common law actions of trespass, detinue, and trover.[88] For this reason the verdict rendered in an action was required to fix the value[89] at the time of the trial.[90] This statutory requirement applied where the chattel was not replevied and the plaintiff was the successful party, and where it was replevied and the sheriff later delivered it to an unsuccessful litigant or a person not a party to the action.[91] The courts treated this provision as mandatory; a verdict which lacked these requirements was considered defective, necessitating a new trial.[92] The courts had the power to cure this defect in the verdict by sending the

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[82] *See* Stowell v. Otis, *supra* note 81 at 38; Hoyt v. Van Alstyne, 15 Barb. 568, 572 (N. Y. 1853); Rogers v. Arnold, 12 Wend. 30, 36 (N. Y. 1834).

[83] N. Y. CIV. PRAC. ACT § 1093 (1920).

[84] N. Y. CIV. PRAC. ACT § 1093 (effective Sept. 1, 1952).

[85] *Ibid.*

[86] *Ibid.*

[87] 1951 LEG. DOC. No. 26(F), 17 REPORT, N. Y. JUDICIAL COUNCIL 259 (1951).

[88] 1951 LEG. DOC. No. 26(F), 17 REPORT, N. Y. JUDICIAL COUNCIL 289 (1951).

[89] Value means the value of the successful party's interest in the chattel. King v. Clements, 243 App. Div. 853, 278 N. Y. Supp. 791 (4th Dep't 1935).

[90] N. Y. CIV. PRAC. ACT § 1120 (1920).

[91] *Ibid.*

[92] Arwin Sportswear Co. v. Salerno, 273 App. Div. 882, 77 N. Y. S. 2d 436 (1st Dep't 1948); Kram v. Manufacturers Trust Co., 238 App. Div. 680, 265 N. Y. Supp. 541 (1st Dep't 1933).

jury out again to ascertain the value of the chattel.[93] However, when the jury was discharged and the defect unnoticed, a new trial was required to fix the value.[94]

To overcome this problem, and thereby reduce unnecessary new trials, the amended section [95] now provides that a new jury may be empaneled for this purpose, upon application to the court by any party to the action during the term in which the verdict was rendered.[96]

After the plaintiff has ordered the sheriff to replevy the chattel and obtains possession of it,[97] a problem arises as to the rights of the parties, should the plaintiff decide to discontinue the action. The usual reason for such a discontinuance is that the plaintiff has already achieved his desire—possession of the chattel—through replevying it and is no longer interested in maintaining an action which, at best, will cause him to spend much time in court, and at worst, will result in the court's awarding the chattel to another party. Neither of these two possibilities appeals to the plaintiff and he is all too eager to shed the burden of proving his case, while simultaneously retaining possession of the chattel.

The statutes of some states [98] under these circumstances, award judgment to the defendant for a return of the chattel, while other states [99] require an inquiry into the property rights of the defendant in the chattel. However, in New York, prior to the amendment, there was no statutory provision for such a situation. Hence where the defendant had neglected to make a demand for the return of the chattel either in his answer or by way of notice,[100] the plaintiff was

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[93] 1951 LEG. DOC. No. 26(F), 17 REPORT, N. Y. JUDICIAL COUNCIL 263 (1951).

[94] Ellis v. Berndt, 223 App. Div. 421, 228 N. Y. Supp. 487 (1st Dep't 1928); Rosenblatt v. Niedermayr Pattern & Machine Works, 70 N. Y. S. 2d 902 (Sup. Ct. 1947).

[95] N. Y. CIV. PRAC. ACT § 1119 (effective Sept. 1, 1952).

[96] *Ibid.* 1951 LEG. DOC. No. 26(F), 17 REPORT, N. Y. JUDICIAL COUNCIL 264 (1951).

[97] The defendant, of course, may prevent the plaintiff from obtaining possession of the chattel by reclaiming the chattel or by applying to have the chattel impounded.

[98] MICH. COMP. LAWS § 627.29 (1948) provides: "If the property . . . shall have been delivered to the plaintiff, and the defendant recover[s] judgment by [plaintiff's] discontinuance . . . such judgment shall be that the defendant have return of the goods. . . ."

N. M. STAT. ANN. § 25-1512 (1941) reads: "In case the plaintiff fails to prosecute his suit with effect and without delay judgment shall be given for the defendant. . . ."

[99] "If the property has been delivered to the plaintiff, and . . . if he . . . fail to prosecute his action to final judgment, the court shall on application of the defendant . . . inquire into the right[s] . . . of the defendant." KAN. GEN. STAT. ANN. § 60-1009 (1949), *see* Higbee v. McMillan, 18 Kan. 133, 139 (1877).

[100] If the defendant did not demand a return of the chattel or the value thereof either in the answer or by way of notice, the court can, at most, dis-

allowed to discontinue the action and remain in possession of the chattel.[101] Since the plaintiff had no legal duty to return the chattel, it would seem that the sureties to the plaintiff's undertaking would likewise be under no legal obligation to the defendant. The patent result is that the defendant, who only a short while ago was in possession of the chattel, must now commence a new action for its return. The plaintiff has effectively used the law as a messenger to seize the chattel without fulfilling the requirements that the law intended to exact from him. Such a hardship should not be visited upon the defendant.

Accordingly, the legislature has amended Article 66[102] so that it now requires an inquiry into the property rights of the defendant in the chattel. Hence, despite the failure of the defendant either to demand a return of the chattel in his answer or to serve notice of such demand, he may now protect his interest in the chattel by making application to the court to take proof of his right to possession and, if the proof so warrants, receive judgment for the return of the chattel.

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miss the complaint and award judgment for the defendant without specifying that the chattel is to be returned, or that the value thereof is to be paid. See Railroad Waterproofing Corp. v. Memphis Supply, Inc., 277 App. Div. 898, 98 N. Y. S. 2d 406 (2d Dep't 1950); Hoffman v. Hoffman, 266 App. Div. 724, 40 N. Y. S. 2d 871 (1st Dep't 1943). N. Y. CIV. PRAC. ACT § 1124 (1920) provided: *"If the defendant has demanded judgment* for the return of a chattel which was replevied and afterwards delivered to the plaintiff . . . final judgment . . . *must* award to him possession thereof . . . [and] the value thereof . . . if possession is not delivered to the defendant." (emphasis added). Thus is evidenced the necessity for a demand either in the answer or by way of notice.

[101] In Powers v. De Cesare, 193 N. Y. Supp. 294 (Sup. Ct. 1922), it was said at page 296: "In a replevin action, a defendant is not entitled to *judgment for a return* of a chattel or for damages for its detention, *unless* the answer demands such affirmative relief, or defendant serves a notice demanding judgment for the return of the chattel, with damages for its detention." (emphasis added).

Since the absence of the demand is not a jurisdictional defect, it would seem that the defendant might prevent discontinuance by amending his answer to the effect that he demands the return of the chattel. See N. Y. CIV. PRAC. ACT § 105. But the court could not *on its own amendment* award the chattel to the defendant in the presence of an omission on the part of the defendant to demand a return, as Section 1124 of the Civil Practice Act, prior to amendment, stated that the judgment must award the chattel to the defendant *only* "[i]f the *defendant* has demanded judgment for the return of a chattel which was replevied. . . ." (emphasis added).

[102] N. Y. CIV. PRAC. ACT § 1124 (effective Sept. 1, 1952) provides: "If in an action to recover a chattel, it . . . has been replevied, and the action is thereafter discontinued without the consent of the defendant . . . the court, upon the application of a defendant, shall take proof concerning his right to . . . the chattel replevied, and shall award such judgment . . . as the proof shall warrant." The statute mentions no specific length of time during which this application must be made.

Conclusion

The recent amendments to Article 66 of the New York Civil Practice Act do much to streamline the ancient remedy of replevin. The court's newly-found power to correct *any* errors in the plaintiff's affidavit enhances his position—as well as it serves the ends of justice —by tightening the legal loopholes through which the party in possession was able to escape the court's jurisdiction long enough to place the chattel beyond the reach of the sheriff. However, it was hardly the intention of the legislature to thereby prejudice the other parties to the action. Mindful of their potential right to the chattel, the statute goes on to provide that any party to the action may cause the chattel to be impounded, thereby affording greater protection to all the parties.

Equally important is the statutory change which now prevents one who has wrongfully taken a chattel from setting up the defense of *jus tertii* against a prior possessor unless he can connect himself with that title. Certainly a better society is maintained by allowing a prior possessor, even without title, to maintain a successful action against a naked wrongdoer.

But the most noteworthy feature of the Article is the change which allows a third person to become a party to the action without losing valuable rights. Now the court can make a final disposition of the chattel that will affect the rights of all the parties claiming the chattel, thereby dispelling the need for several trials.