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Vice Presidential Succession: A Brief Rebuttal

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NOTES

CLAIM AND DELIVERY IN SOUTH CAROLINA

An owner of personal property who has been deprived of it by another has two courses of action available to him. He may by way of a suit in claim and delivery seek recovery of the chattel in specie; or by means of a suit in conversion, he may seek to recover the value of the converted article.[1] Because in South Carolina an owner of property may by way of one suit in claim and delivery obtain the value of his property in the event his chattel cannot be found,[2] both courses of action will be involved in the following discussion.

I. Nature And Scope

A. Definition and Common Law Background

Claim and delivery is a statutory action which is brought to determine who has the superior right to the possession of a specific chattel.[3] In such an action two issues are involved: (1) does the plaintiff have the right to possession of the property and (2) did the defendant unlawfully take or detain the property.[4] A decision of these issues in the plaintiff's favor would entitle him to demand both delivery of the property and an award of damages for the taking and detention.[5]

Claim and delivery is actually a combination of the old common law actions of replevin, detinue, and trover.[6] As these old forms of action seem to "rule us from the grave"[7] an understanding of them is essential to an understanding of the scope of claim and delivery.

1. Brown, Personal Property § 22 (1955).

2. Moore v. Sanders, 114 S.C. 350, 103 S.E. 589 (1920); Casto v. Murray, 470 Ore. 57, 81 Pac. 883 (1905).

3. See United Fabrics Corp. v. Delaney, 241 S.C. 268, 128 S.E.2d 111 (1962); Lummus Cotton Gin Co. v. Townsend, 36 F.2d 364 (E.D.S.C. 1929); 77 C.J.S. *Replevin* § 1 (1952).

4. 77 C.J.S. *Replevin* § 4 (1952).

5. In the event the property cannot be located, the plaintiff may have to settle for a money award. However, because the first object of an action in claim and delivery is to allow the plaintiff to obtain possession of the property in specie, he should have every opportunity to locate the property before requiring him to accept the alternative money verdict. Charlotte Barber Supply Co. v. Branham, 184 S.C. 184, 189, 191 S.E. 891, 893 (1937).

6. Actually trover corresponds more closely with conversion as both are means of collecting damages equal to the value of the converted property. Claim and delivery is applicable in such a sense only if the property sought has been destroyed or lost.

7. Prince, Our Common Law Heritage 9 (1959).

1. Replevin. Replevin originally was used only against one who had unlawfully "distrained"[8] chattels of the plaintiff. Under this action the plaintiff upon giving security, thereby insuring that he would contest the distrainor's rights, was entitled to a return of the goods. Thereafter, this action was extended to apply to all cases of wrongful taking, regardless of whether "distraint" was involved.[9] Possession of the chattel was the primary concern of replevin; therefore, the action did not lie when the plaintiff sought damages or money in lieu of the property. Furthermore, it did not lie for possession except when the defendant had acquired possession *unlawfully*.[10]

2. Detinue. Originally, detinue was the action brought to recover bailed property. It subsequently lay in cases other than bailments, as where a seller refused to deliver purchased goods to the buyer or where the finder of lost property refused to surrender it to the original owner.[11] Finally, detinue became the proper action to bring in any case where the defendant "had come by his possession lawfully, as, for instance, where the owner of the property . . . demanded its return by one to whom he had loaned it, and the defendant . . . unlawfully refused to redeliver it."[12]

3. Trover. Actually, trover is the forerunner of an action for "conversion," rather than claim and delivery. The remedy afforded by both trover and conversion is a judgement for *damages*, not possession. However, since one may seek a money judgement via claim and delivery if the property sought is not available, claim and delivery necessarily encompasses some of the characteristics of trover.[13]

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8. To "distrain" refers to the taking of the property of another as security for the performance of some obligation. Byers v. Ferguson, 41 Ore. 77, 68 Pac. 5 (1902).

9. See SCOTT & SIMPSON, CASES ON CIVIL PROCEDURE 87 (1951).

10. For a short discussion of replevin, see PRINCE, OUR COMMON LAW HERITAGE 10 (1959).

11. See SCOTT & SIMPSON, CASES ON CIVIL PROCEDURE 91 (1951).

12. See PRINCE, *op. cit. supra* note 7, at 10.

13. In discussing the inclusion of trover and replevin within claim and delivery, the court said:

> Replevin was an action to recover the possession of specific chattels, together with damages for their unlawful detention. Trover was an action for damages arising out of the unlawful conversion of personal property. In so far as the plaintiff's action sought to recover the possession of the chattels it partook of the nature of replevin, but in so far as it claimed the value of the property and damages it resembled the action of trover.

Reynolds v. Philips, 72 S.C. 32, 34, 51 S.E. 523, 524 (1905).

An action in trover was based on an offense to the owner's title, as when the defendant had exercised unlawful dominion over, or "converted" the property of another.[14] Trover was available even when there was no showing of bad faith. For example, when one purchased goods in good faith from a thief, the rightful owner could still recover in trover from the purchaser.[15]

B. Property Subject to Claim and Delivery

In order to be recoverable by claim and delivery, the chattel must meet several requirements. First, though it may be animate or inanimate,[16] the property must be personal rather than real estate.[17] Secondly, it must be moveable and capable of identification and delivery. "Where the property cannot be identified or separated so as to be seized in kind, replevin usually will not lie."[18] Thirdly, the property must not be incorporeal, such as "shares" of stock as compared to stock certificates.[19] Finally, claim and delivery will not lie for property that has been destroyed or is otherwise not in existence at the time of the suit.[20]

Quite naturally, many different items of property have met the above requirements and have become subjects of claim and delivery actions. The following examples depict the scope of property recoverable by means of claim and delivery.

1. Growing Crops and Timber. In *Norwood v. Carter*,[21] a sharecropper's growing crops and ginned cotton were seized for delivery to his landlord. The farmer sought by way of claim and delivery to get his goods back, but the court held that the unsevered crops were "realty" and, therefore, were not subject to an action in claim and delivery.[22] However, severed trees and timber are personalty and may be the subjects of claim and delivery actions.[23]

14. See PRINCE, *op. cit. supra* note 7, at 12.

15. In addition to being able to recover from a good faith purchaser, the rightful owner could ask the jury to return a money judgment equal to the highest value of the converted property between the time of the taking and the time of the trial. See PRINCE, *op. cit. supra* note 7, at 12-13.

16. See C.J.S. *Replevin* § 9 (1952).

17. Therefore, to obtain possession of land or fixtures attached thereto or to enforce delivery of a deed, claim and delivery is not the proper remedy.

18. See C.J.S. *Replevin* § 9 (1952).

19. *Ibid.*

20. *Ibid.*

21. 176 S.C. 472, 180 S.E. 453 (1935).

22. However, that growing crops cannot be replevied by way of claim and delivery does not seem to be the general rule. Timothy v. Hicks, 237 Mo. App. 126, 164 S.W.2d 99 (1942); 77 C.J.S. *Replevin* § 22 (1952).

23. Cloquet Lumber Co. v. Burns, 207 Fed. 40 (8th Cir. 1913).

2. Buildings. Generally, buildings may be replevied only if they have been severed from the realty.[24] In the case of *Vausse v. Russel*,[25] the plaintiff held a leased lot on which he had built a house. He neglected to pay his rent and the landlord, using the power of distraint, required the sheriff to seize the plaintiff's chattels. The officer found no chattels and returned the warrant as levied on the house. The court held that neither a freehold nor things affixed to it can be subjects of claim and delivery actions.[26]

3. Documents. Generally, claim and delivery is available for the recovery of records and other writings such as a corporation's books,[27] insurance policies,[28] architectural plans[29] and stock certificates.[30] The applicability of claim and delivery to writings also extends to negotiable instruments.[31] A draft,[32] promissory note[33] and check[34] have all been replevied.

4. Money. Because money cannot be readily identified as a specific article, claim and delivery will not lie for its return.[35] It therefore follows that claim and delivery is not the proper remedy for the collection of a debt,[36] or to recover money due on account.[37]

II. Factors Precedent to Bringing Suit

Even though the chattel sought is within the scope of repleviable property, other factors must be considered before a suit in claim and delivery can successfully be maintained.

24. Cutter v. Wait, 131 Mich. 508, 91 N.W. 753 (1902); Vausse v. Russel, 2 McCord 329 (S.C. 1823).
25. 2 McCord 329 (S.C. 1823).
26. *Ibid.*
27. See 77 C.J.S. *Replevin* § 10 (1952).
28. Wiessman v. Weissman, 11 N.Y.S.2d 1008 (Sup. Ct. 1939).
29. Parry v. Dener, 117 Colo. 455, 189 P.2d 713 (1948).
30. Somerville Nat'l Bank v. Hornblower, 293 Mass. 363, 199 N.E. 918 (1936).
31. Walter v. Earnhardt, 171 N.C. 731, 88 S.E. 753 (1916); Merrell v. Springer, 123 Ind. 485, 24 N.E. 258 (1890); Smith v. Eals, 81 Iowa 235, 46 N.W. 1110 (1890); 40 Am. Jur. *Replevin* § 19 (1943).
32. Smith v. Eals, 81 Iowa 235, 46 N.W. 1110 (1890).
33. First Trust Co. v. Matheson, 187 Minn. 468, 246 N.W. 1 (1932).
34. Whitman v. Kovacs, 89 N.Y.S.2d 21 (Sup. Ct. 1949).
35. Eaton v. Blood, 201 Iowa 834, 208 N.W. 508 (1926).
36. Spear v. Arkansas Nat'l Bank, 111 Ark. 29, 163 S.W. 508 (1914).
37. Hewett v. Wester, 72 Fla. 26, 72 So. 462 (1915).

A. Possession and Demand

In the 1817 case of *Byrd v. O'Hanlin*[38] the indispensable requisite of claim and delivery was stated to be a "clear and unequivocal possession in the plaintiff."[39] This in numerous later cases[40] was found to mean that in order to bring an action in claim and delivery, the plaintiff at the time of the commencement of the action must be entitled to the immediate possession of the property in question. Furthermore, the plaintiff cannot recover on the grounds that his adversary lacks the possession requirement; he must, instead, recover on the strength of his own title or right to possession.[41]

As a second requisite to maintaining an action in claim and delivery, the plaintiff must make a demand for the return of the property on the person who is in possession.[42] The demand requirement is based on the theory that one who rightfully comes into possession of a particular chattel will surrender it to the genuine owner upon demand, and should, therefore, be allowed to do so before being subjected to a law suit.[43] It should be noted that the theory refers to one who "rightfully" comes into possession; therefore, when the taking by or possession of the defendant is proven to have been wrongful, as when the defendant converts the plaintiff's goods,[44] demand is not necessary. Demand is similarly unnecessary when the circumstances are such that a demand, if made, would be futile. A showing of futility may stem from the defendant's acts or statements concerning the property before the suit is begun, or from his position at the trial. Exemplary of the latter would be where, instead of defending on grounds of lack of demand, the defendant alleges fraud, sets up title in himself, and proceeds to litigate the merits of the case.[45]

38. 1 Mill Const. 401 (S.C. 1817).

39. *Id.* at 402.

40. E.g., Clerks' Benevolent Union v. Knights of Columbus, 70 S.C. 543, 50 S.E. 206 (1905); Holliday v. Poston, 60 S.C. 103, 38 S.E. 449 (1901); Kirven v. Pinckey, 47 S.C. 229, 25 S.E. 202 (1896).

41. Peeples v. Warren, 51 S.C. 560, 29 S.E. 659 (1898). Thus, if the plaintiff depends for recovery on the fact that the defendant also does not have the right to possess the chattel, his suit will be lost.

42. Nixon & Wright v. Robinson, 104 S.C. 376, 89 S.E. 320 (1916); Harby & Co. v. Byers Lumber Co., 95 S.C. 33, 78 S.E. 522 (1913); Burkhalter v. Mitchell, 27 S.C. 240, 3 S.E. 225 (1887); Jones v. Dugan, 1 McCord 428 (S.C. 1821).

43. See 77 C.J.S. *Replevin* § 64 (1952).

44. 89 S.C. 535, 72 S.E. 464 (1911).

45. Nixon & Wright v. Robinson, 104 S.C. 376, 89 S.E. 320 (1916).

B. Jurisdiction and Venue

Because claim and delivery is an action in rem,[46] jurisdiction depends on the location of the property sought, rather than on the residence of the defendant. Therefore, in order to maintain a claim and delivery action in South Carolina, the goods over which the litigation is concerned must be situated somewhere within the state.[47]

Also of importance in successfully maintaining a claim and delivery action, is the selection of the proper venue. In South Carolina according to code section 10-301,[48] the particular county in which the chattel is located is the correct place to bring a claim and delivery action.[49] Furthermore, if the wrong county is chosen at first, the venue should be changed, by way of a motion for an order to change the place of trial, to the proper county wherein the chattel is kept.[50]

"Jurisdiction" also involves the necessity of acquiring jurisdiction over the person of the defendant by either serving a summons on him or by obtaining his voluntary appearance in court.[51] This need for jurisdiction over the person of the defendant would seem to produce a problem when considered with the dual need of bringing the action in the county where the property is situated. What if the defendant and the chattel were in different counties? This problem is solved by a consideration of two factors. On the one hand if the defendant appears in court to contest any part of the suit, the court can assume jurisdiction over him. On the other hand, if he refuses to appear at the trial, on

46. Lummus Cotton Gin Co. v. Towsend, 36 F.2d 364 (E.D.S.C. 1929).

47. Peeple's Nat'l Bank v. Jones, 249 Ky. 468, 61 S.W.2d 17 (1933); 77 C.J.S. *Replevin* § 84 (1952).

48. Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial in certain cases . . . (4) for the recovery of personal property distrained for any cause.
S.C. CODE ANN. § 10-301 (1962).

It could be noted that actions for "conversion" are not governed by this section but by S.C. CODE ANN. § 10-303 (1962), which states that actions for conversion may be brought in any county where the defendant resides regardless of where the property is located. Williams v. Rollins, 107 S.C. 440, 93 S.E. 1 (1917).

49. Smith v. Thomas, 184 S.C. 498, 193 S.E. 51 (1937); Williams v. Rollins, 107 S.C. 440, 93 S.E. 1 (1917); Ail v. Williams, 87 S.C. 101, 68 S.E. 1041 (1910).

50. Smith v. Thomas, 184 S.C. 498, 193 S.E. 51 (1937).

51. Florence Trading Corp. v. Rosenberg, 123 F.2d 557 (2d Cir. 1942); Devonia Discount Corp v. Bianchi, 271 N.Y.S. 413 (Sup. Ct. 1934); 77 C.J.S. *Replevin* § 85 (1952).

the authority of *Ex parte Townes*,[52] the defendant waives his right to contest jurisdiction. "A magistrate is not presumed to know the county where a defendant resides . . . . If the magistrate has made a mistake, the defendant knows and must appear and state the facts; his failure so to appear . . . warrants the magistrate to conclude . . . either that the defendant has been sued in the county of his residence, or that the defendant assents to the suit in the county named as the venue."[53]

III. Procedure for Claim and Delivery Actions

An action in claim and delivery is begun, as is any civil suit, with the service of a complaint. Because the statutory sections[54] concerning claim and delivery do not specifically command the service of a complaint, numerous plaintiffs have neglected this necessary step and thus have lost their right to sue.[55] Actually the code sections which have caused the confusion lay down the procedure, not for carrying out the suit, but for obtaining immediate possession of the property *prior* to bringing the court action.[56] Accordingly, if the plaintiff in a claim and delivery suit is interested in obtaining his goods immediately, he must follow strictly the procedure prescribed by sections 10-2501 through 10-2516.[57] If he does not desire immediate delivery he merely serves a summons and complaint and proceeds as he would for any civil suit.

A. Procedure for Obtaining Immediate Possession

1. Summons. Code section 10-2501 states that "the plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property, as provided in this chapter."[58] According to the court's interpretation of this section, a proceeding to obtain immediate possession of the prop-

52. 97 S.C. 56, 81 S.E. 278 (1914).

53. *Id.* at 59, 81 S.E. at 279.

54. S.C. Code Ann. §§ 10-2501 to -2516 (1962), sets forth the mandatory procedures for claiming immediate delivery of the goods sought in an action of claim and delivery.

55. *E.g.*, Plowden v. Mack, 217 S.C. 226, 60 S.E.2d 311 (1950); Middleton v. Brown, 202 S.C. 418, 25 S.E.2d 474 (1943); Adeimy v. Dleykan, 116 S.C. 159, 107 S.E. 35 (1921).

56. Middleton v. Robinson, 202 S.C. 418, 25 S.E.2d 474 (1943).

57. S.C. Code Ann. §§ 10-2501 to -2516 (1962).

58. S.C. Code Ann. § 10-2501 (1962).

erty may not be begun until the summons has been issued.[59] Therefore, if the summons is served several days after the seizure of the property, a mandatory provision of the statute has not been complied with and the action will fail.[60]

2. Affidavit. The second step of the procedure is the drawing of an "affidavit."[61] This document, first of all, must describe the property that is sought and tell why the plaintiff is entitled to possess it.[62] Secondly, it must state that the defendant wrongfully detains the property, and why he so detains it. Next, the affidavit must show that the property has not been taken for tax payments or pursuant to other legal processes and, finally, it must give the actual value of the property.[63]

The affidavit, even though it contains much information that a complaint would contain, does *not* take the place of a complaint and is *not* the basis of the plaintiff's cause of action. Several plaintiffs, as has previously been stated, by confusing the two documents have failed to file complaints and have, therefore, forfeited their suits.[64]

As a final step in regards to the affidavit, the plaintiff may by an endorsement in writing upon the affidavit, require the sheriff of the county in which the property claimed may be

59. Plowden v. Mack, 217 S.C. 226, 60 S.E.2d 311 (1950); Pelham v. Edwards, 45 Kan. 547, 26 Pac. 41 (1891).

60. Plowden v. Mack, 217 S.C. 226, 60 S.E.2d 311 (1950).

61. When a delivery is claimed an affidavit must be made by the plaintiff or by someone on his behalf showing:

> (1) That the plaintiff is the owner of the property claimed, particularly describing it, or is lawfully entitled to the possession thereof by virtue of a special property therein, the facts in respect to which shall be set forth.
>
> (2) That the property is wrongfully detained by the defendant.
>
> (3) The alleged cause of the detention thereof, according to the affiant's best knowledge, information and belief;
>
> (4) That the property has not been taken for a tax, assessment or fine pursuant to a statute or seized under an execution or attachment against the property of the plaintiff or, if so seized, that it is by statute exempt from such seizure; and
>
> (5) The actual value of the property.

S.C. CODE ANN. § 10-2503 (1962).

62. Such description enables the officer to identify the property which he is to seize and to take to the plaintiff. See 77 C.J.S. *Replevin* § 100 (1952).

63. This statement of value is necessary to aid the court in setting bond and to determine jurisdiction of the court, if the court's jurisdiction is limited by the amount involved.

64. Plowden v. Mack, 217 S.C. 226, 60 S.E.2d 311 (1950); Middleton v. Robinson, 202 S.C. 418, 25 S.E.2d 474 (1943); Adeimy v. Dleyken, 116 S.C. 159, 107 S.E. 35 (1921).

located, to take the property from the defendant and to deliver it to the plaintiff.[65]

3. Bond. The next major step in a claim and delivery action is the securing of a "written undertaking" or bond by one or more sheriff-approved sureties.[66] Such sureties, being bound for double the value of the property, assure the defendant that, if he prevails, the property will be returned to him together with such damages as he may be entitled to collect.[67] Obtaining bond is a mandatory prerequisite to gaining immediate possession of the property, and without it, the sheriff must leave the chattels in the possession of the party who holds them.[68]

4. Seizing the Property. Upon receiving from the plaintiff the affidavit and bond, the sheriff serves a copy of these papers on the person in possession of the property.[69] He may then take the property into his possession. If the chattel is concealed, the sheriff must carefully follow the rules for seizure laid down by the code.[70] He should first publicly demand that the chattel be handed over to him; if the defendant refuses to do so, the sheriff may break open the enclosure and take the property into his possession.[71]

65. "The plaintiff may thereupon, by endorsement in writing upon the affidavit, require the sheriff of the county in which the property claimed may be to take the property from the defendant and deliver it to the plaintiff." S.C. CODE ANN. § 10-2504 (1962).

66. Upon receipt of the affidavit and notice, with a written undertaking executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit, for the prosecution of the action, for the return of the property to the defendant, if the return thereof be adjudged, and for payment to him of such sum as may, for any cause, be recovered against the plaintiff . . . the sheriff shall forthwith take the property described in the affidavit.

S.C. CODE ANN. § 10-2505 (1962).

67. See 77 C.J.S. *Replevin* § 103 (1952).

68. South Carolina Nat'l Bank v. Florence Sporting Goods, 241 S.C. 110, 127 S.E.2d 199 (1962).

69. The sheriff shall without delay serve on the defendant a copy of the affidavit, notice and undertaking, by delivering to him personally, if he can be found, or to his agent, from whose possession the property is taken, or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion.

S.C. CODE ANN. § 10-2507 (1962).

70. If the property or any part thereof be concealed in a building or enclosure the sheriff shall publicly demand its delivery. If it be not delivered he shall cause the building or enclosure to be broken open and take the property into his possession, and, if necessary, he may call to his aid the power of his county.

S.C. CODE ANN. § 10-2513 (1962).

71. S.C. CODE ANN. § 10-2513 (1962).

The sheriff next files the affidavit and notice of his proceedings with the proper clerk of court.[72] At this point, the defendant is given three days during which he may give notice to the sheriff that he does not accept the sureties offered. If he waits longer, he will be deemed to have waived his objections.[73] As a final step the sheriff keeps the property in a secure place until he delivers it to the party entitled to possession.[74]

B. Results of Claim and Delivery Actions

1. Judgments of the Court. The type of judgment a court may hand down in a claim and delivery action is determined by the South Carolina Code of Laws:

> In an action to recover the possession of personal property judgment for the plaintiff may be for the possession, for the recovery of possession or for the value thereof in case a delivery cannot be had and for damages, both punitive and actual, for the detention.[75]

Accordingly, a plaintiff may receive either possession of the property in specie or the value in money of the property if the chattel cannot be located. Seemingly if the defendant would rather keep the property, he could intentionally misplace it, and pay over to the plaintiff the value assessed by the jury.[76] This theory has been completely dispelled by *Charlotte Barber Supply Co. v. Branham.*[77] The court here ruled that "the prevailing party should have the right and opportunity to first exhaust every available and appropriate remedy known to the law in an effort to locate and gain possession of the property in dispute before

72. "The sheriff shall file the notice and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending within twenty days after taking the property mentioned therein." S.C. CODE ANN. § 10-2508 (1962). However, no penalty is imposed for failure to comply with the provisions of this section. Alexander v. Jamison, 56 S.C. 409, 34 S.E. 695 (1900).

73. "[D]efendant may within three days after service of a copy of the affidavit and undertaking give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he shall be deemed to have waived all objections to them." S.C. CODE ANN. § 10-2509 (1962).

74. When the sheriff shall have taken property, as this chapter provides, he shall keep it in a secure place and deliver it to the party entitled thereto upon receiving his lawful fees for taking and his necessary expenses for keeping the property.
S.C. CODE ANN. § 10-2514 (1962).

75. S.C. CODE ANN. § 10-2516 (1962).

76. Charlotte Barber Supply Co. v. Branham, 184 S.C. 184, 191 S.E. 891 (1937).

77. *Ibid.*

he should be required to accept the alternative verdict, the value assessed by the jury."[78] By means of this ruling, the court seeks to preserve the first objective of a claim and delivery action: the right of a true owner to regain possession of his property in specie.[79]

2. Accession and Confusion. The results of a claim and delivery action become more difficult for the court to determine when either "accession" or "confusion" is involved. In accession, an innocent party's goods either are irreparably attached to the property of another, or are used by another to make an entirely new product.[80] In both cases many jurisdictions have held that the resulting chattel becomes the property of the owner of the "principal" goods.[81] For example, if a wrongdoer steals the cloth of another and makes from it a coat, using his own possessions as accessories, the owner of the principal property, the cloth, becomes the owner of the coat. However, if a wrongdoer steals the paint of another and uses it to paint his house, the wrongdoer as owner of the house would also become the owner of the paint. The innocent party in such a case could avoid this result by bringing in a suit in "conversion" for the value of his converted property, rather than by bringing a suit in claim and delivery for possession of his goods. By following the conversion procedure, he would entreat the court to decide, not who has superior right to the possession of the goods, but to decide what damages he should receive because his property was converted.[82] The injured party could thereby receive in South Carolina, a judgment equal to the highest value of the converted property between the time of the taking and the time of the trial.[83]

"Confusion" involves the intermingling of the goods of two or more owners. Each person's goods retain the original shape and characteristics, but, due to the intermingling, the goods can no longer be identified, separated or returned to the original owner.[84] Examples of confused goods are grain, oil and mineral ores which have been stored in a common bin or warehouse.[85] The

78. *Id.* at 189, 191 S.E. at 893.

79. Finley v. Cudd, 42 S.C. 121, 20 S.E. 32 (1894).

80. See BROWN, PERSONAL PROPERTY § 30 (1955).

81. Kemp-Booth Co. v. Calvin, 84 F.2d 377 (9th Cir. 1936); Hope Shoe Co. v. Advance Wood Heel Co., 89 N.H. 178, 195 Atl. 669 (1937); Mack v. Snell, 140 N.Y. 193, 35 N.E. 493 (1893).

82. See BROWN, *op. cit. supra* note 80, § 27.

83. See PRINCE, OUR COMMON LAW HERITAGE 12-13 (1959).

84. See BROWN, *op. cit. supra* note 80, § 30.

85. *Ibid.*

owner of such intermingled goods depends on the circumstances involved. First of all, if the goods are of the same kind and quality, and the amount contributed by each owner is known, then all owners are entitled to receive portions equal to the amounts contributed.[86] However, if the goods are of differing quality, kind and contributed amounts, the court may solve the ownership problem by considering who caused the intermingling. If the confusion occurred with the consent of the owners or because of an act of nature, all owners become tenants in common with equal rights and obligations.[87] If the confusion was caused by a deliberate or negligent act of one of the parties, many courts have ruled that, unless the intentional wrongdoer can identify his goods, he forfeits all right to the confused goods, and the innocent party becomes the sole owner.[88] Other courts view this as a "burden of proof" problem, saying that the aim of the court is not to punish the wrongdoer, but to obtain redelivery of the innocent party's goods. However, the difficult task of proving which goods belong to the innocent party should not fall on his shoulders, but on those of the wrongdoer. Therefore, if the wrongdoer cannot prove which amount of the goods belongs to whom, all of the goods become the property of the innocent party.[89]

3. Damages. Provided he demanded such in his pleading,[90] the successful party to a claim and delivery action may obtain a judgment for both punitive and actual damages.[91] Actual damages are allowed in order to repay the prevailing party for the losses he suffered by being deprived of his property.[92] More specifically, such damages are allowed to compensate for the wrongful taking of his property,[93] for the detention or holding of the property,[94] and, of course, for the value of the chattel in

86. See BROWN, *op. cit. supra* note 80, § 31.
87. Low v. Martin, 18 Ill. 286 (1857); Nowlen v. Colt, 6 Hill 461 (N.Y. 1884).
88. *E.g.*, Union Naval Stores Co. v. United States, 240 U.S. 284 (1916); Brainard v. Cohn, 8 F.2d 13 (9th Cir. 1925); Claflin v. Continental Jersey Works, 85 Ga. 27, 11 S.E. 721 (1890); Hall v. Shaffer, 131 Kan. 109, 289 Pac. 442 (1930); Levyeau v. Clements, 175 Mass. 376, 56 N.E. 735 (1900).
89. See BROWN, *op. cit. supra* note 80, § 33.
90. See 77 C.J.S. *Replevin* § 262 (1952).
91. S.C. CODE ANN. § 10-2516 (1962).
92. Hunt v. Cohen, 740 Okla. 248, 179 Pac. 1 (1918); McMillan Hardware Co. v. Ross. 24 Okla. 696, 104 Pac. 343 (1909).
93. Ainsworth v. Smith, 157 Miss. 202, 127 So. 771 (1930); Jackson v. McDonald, 115 Mont. 269, 143 P.2d 898 (1943).
94. Sherman v. Williman, 321 Mich. 345, 32 N.W.2d 476 (1948); Cook v. Waldrop, 160 Miss. 862, 133 So. 894 (1931); Smith v. Berlinberg, 302 Pa. 202, 153 Atl. 343 (1931).

the event it cannot be found.[95] The amount of all damages to be received by the successful party is assessed by the jury, who conceivably may consider the value of the property at the time of the conversion,[96] depreciation of the property since the time of the conversion[97] and enhancement of the value of the property since the time of the conversion.[98]

Greenwood Mfg. Co. v. Worley[99] depicts a claim and delivery situation wherein the jury may award actual damages. The defendant, Worley, by way of a counterclaim, sought recovery of goods which the plaintiff had wrongfully taken from the defendant's store. The plaintiff had encouraged the defendant to open the store and had furnished him with the goods to offer for sale. After the defendant had spent much time, effort and money in remodeling and stocking the store for business, the plaintiff repudiated the agreement and took away his goods. The court held such taking was wrongful and allowed the defendant to recover for all losses involved including the time and money that he spent preparing the store for business.[100]

Punitive damages are allowed in a claim and delivery action only if there has been a willful taking or willful holding of the property in question.[101] *South Carolina Nat'l Bank v. Florence Sporting Goods*[102] states that such a "willful action" must give rise to a "reasonable inference of fraud, willfulness, reckless or conscious disregard"[103] of the plaintiff's rights before a verdict for punitive damages can be given.

IV. Conclusion

Claim and delivery affords South Carolina citizens and their ever-increasing amounts of "belongings" a valuable source of protection. Without this action there would be no legal means whereby one could recover a wrongfully or mistakenly taken chattel. True, most people carry insurance to assure the return of

95. Steel Motor Service v. Zalke, 212 F.2d 856 (6th Cir. 1954); Coulbourn v. Armstrong, 243 N.C. 663, 91 S.E.2d 912 (1956); Moore v. Sanders, 114 S.C. 350, 103 S.E. 589 (1920); Myers v. Walker, 173 Wash. 592, 24 P.2d 97 (1933).

96. See 77 C.J.S. *Replevin* § 270 (1952).

97. See 77 C.J.S. *Replevin* § 271 (1952).

98. See 77 C.J.S. *Replevin* § 273 (1952).

99. 222 S.C. 156, 71 S.E.2d 889 (1952).

100. *Ibid.*

101. Manley v. Bailey, 151 S.C. 366, 149 S.E. 119 (1929).

102. 241 S.C. 110, 127 S.E.2d 199 (1962).

103. *Id.* at 115, 127 S.E.2d at 201.

the monetary value of a converted article, but only by way of an action in claim and delivery may one regain the possession of the chattel in specie.

It is obvious that a claim and delivery action is superior to its common law forebears. No longer must a plaintiff decide before bringing suit whether the taking was wrongful or whether a return of the property itself or a payment of its value in money would best meet his needs. Now he must only show that the property was taken from him and that he is entitled to possession of it, and then by way of one suit in claim and delivery seek the remedy he feels will make him whole.

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