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Bailment - Bailments for Mutual Benefit - Liability for Non-Negligent Loss of Rented Chattels

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of the Iowa Assembly, the court was given little aid in the construction and application of the statute. The Certificate of Title Act states that "no person shall, acquire any right, title, claim or interest in or to any vehicle . . . from the owner thereof except by virtue of a certificate of title . . .; . . . No court in any case at law or equity shall recognize the right, title, claim or interest of any person in or to any vehicle subject to registration . . unless evidenced by a certificate of title, . . .".[14] The failure of the conditional vendor in the instant case, to have the certificate of title put in the name of the vendee brings into play the operation of the above act. In this situation, the conflict of the two acts becomes obvious. A recent Florida decision[15] held that a vendor under a conditional sales contract, who failed to comply with the State's Certificate of Title Statutes,[16] was not liable for negligent operation of the car by the vendee although he had failed to endorse and register title with the Motor Vehicle Commission. California, in a case involving identical facts and statutes,[17] has reached a contrary result.

The Iowa Court has made a reasonable reconciliation of the two conflicting acts. It must be remembered that the purpose of the Certificate of Title Act was to bring uniformity of the motor vehicle laws between the states, to prevent Iowa from becoming a dumping ground for stolen cars, and to verify and facilitate proof of ownership.[19] The Owner's Responsibility Law is principally concerned with problems of tort liabilty.

This decision demonstrates the court's judicial acumen in recognizing the importance of allocating the burden of liabilty to those directly responsible for the operation of dangerous instrumentalities, thus unchaining automobile dealers and finance institutions from the task of assuming unreasonable tort liabilities, thereby facilitating the free flow of commerce

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BAILMENT — BAILMENTS FOR MUTUAL BENEFIT — LIABILITY FOR NON-NEGLIGENT LOSS OF RENTED CHATTELS — The defendant bailee rented an earth-moving machine from Air-Mac, Inc. Four months later the machine, without fault of the defendant, was destroyed by fire. The bailor recovered $4,000, the agreed value of the machine, on its policy with plaintiff insurance company. The insurer, subrogated to the bailor's rights against the bailee, sued to recover $4,000 under the terms of the contract of bailment. The

14. See note 2, *Supra.*

15. Palmer v. R. S. Evans, Jacksonville, Inc., 81 So.2d 635 (Fla. 1955).

16. Fla. Stat. 1953, §319.22(2) "An owner who has made a bona fide sale or transfer of a motor vehicle and has delivered possession thereof to a purcahser shall not by reason of any of the provisions of this law, be deemed the owner of such vehicle so as to be subject to civil liability for the operation of such vehicle thereafter by another when such owner has fulfilled either of the following requirements: (a) When such owner has made proper endorsement and delivery of the certificate of title as provided by this law. (b) When such owner has . . . placed in the U. S. mail, addressed to the commissioner, either certificate of title properly endorsed . . ."

17. Cal. Vehicle Code §402(a) (Deering 1948) "Every owner of a motor vehicle is liable . . . for the death . . . to person or property resulting from negligence in the operation of such vehicle . . . by any person using . . . the same with the permission . . . of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages." Cal. Vehicle Code §177(b) (Deering 1948) "Every dealer upon transferring by sale . . . of a type subject to registration hereunder, shall immediately give written notice of such transfer to the department . . ."

18. Rosenthal v. Harris Motor Co., 118 Cal. App.2d 403, 257, P.2d 1034 (1953); Bunch v. Kin, 2 Cal. App.2d 81, 37 P.2d 744 (1953).

19. See 3 Drake L. Rev. 2 (1953).

contract said in part, ". . . upon termination thereof to return to the First Party (Air-Mac, Inc.) the same in good mechanical condition save and except usual wear and depreciation." It was *held,* with four justices dissenting in two opinions, and one justice concurring specially, that the words of the bailment contract imposed a duty beyond the common law duty of due care amounting to an insurer's liability. *St. Paul Fire & Marine Ins. Co. v. Chas. H. Lilly Co.,* 286 P.2d 107 (Wash. 1955).

This decision of a sharply divided court invites a closer examination of the reasons and cases supporting the several opinions. The majority in its decision relied on the ruling in a similar Washington case, *Metropolitan Park District of Tacoma v. Olympia Athletic Club,*[1] which, in holding a bailee liable as an insurer, drew an analogy between its decision and a real property rule that a covenant to return the premises at the end of a lease requires a tenant, negligent or not, to replace buildings destroyed while in his possession.[2]

Two justices, agreeing with the decision in the *Metropolitan Park* case, nevertheless distinguished it from the instant case on the theory that here the contract merely restated the common law requirement of due care. In the *Metropolitan Park* case the bailee agreed, ". . . to use every possible care," and, ". . . to return them in same condition as when received." "Every possible care," was construed to be an implied assumption of an insurer's liability by the bailee, substituting extraordinary care for the common law duty of due care.[3]

Two other justices stated that finding the defendants liable as insurers was, in either case, error. They argued that agreement to return, ". . . in the same mechanical condition in which we received," using, ". . . every possible care;" or, ". . . in good mechanical condition," is not an extension of the common law rule, but merely a restatement of it.[4]

The Chief Justice stated that the instant case was indistinguishable from the *Metropolitan Park* case which he believed was erroneous. However, support of that case by the four other justices of the majority and by two dissenting justices required his concurrence in the present result, there not being a numerical majority of the justices favoring abandonment of the *Metropolitan Park* decision. Had he dissented, liability of bailees as insurers in later cases would have depended upon subtle differences between the "return" clauses of contracts such as were involved in the instant and *Metropolitan Park* cases. An unusual situation was thus produced: five of the nine justices[5] disagreed with the court's ultimate decision.

Under the majority rule in this country, a bailee for mutual benefit, under a contract to return the bailed goods, is not an insurer of the goods.[6] He is generally held liable only for loss resulting from negligence in his care of

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1. 42 Wash.2d 179, 254 P.2d 475 (1953).

2. *Contra,* Anderson v. Ferguson, 17 Wash.2d 262, 135 P.2d 302 (1943). This decision, which appears to be the latest Washington ruling on the point, conditions lessee's liability to rebuild improvements destroyed while in his possession to cases where the lessee has covenanted to *repair* and return the leased premises. See 1 American Law of Property §§ 3.78, 3.79 (Casner ed. 1952) (to the effect that a contract to return does not extend the common law liability).

3. Sanderson v. Collins [1904] 1 K. B. 628; Dean v. Keat, 3 Camp. 4, 6, 170 Eng.Rep. 1286, 1287 (1811) (dictum); 1 Halsbury, Laws of England § 1120 (Supp. 1931).

4. Cary-Davis Tug & Barge Co. v. Fox, 22 F.2d 64 (9th Cir. 1927); Young v. Leary, 135 N.Y. 569, 32 N.E. 607, 609 (1892) (dictum).

5. Rev. Code Wash. § 02.04.070 (1951).

6. Seward v. First National Bank, 193 Miss. 656, 8 So.2d 236 (1942).

the goods.[7] Under common law, this requirement of due care arose by operation of law,[8] and where the goods were lost through the negligence of the bailee and the gist of the bailor's action was tort arising out of contract.[9] The form of the action, whether in contract or tort is generally held to be immaterial.[10] Before damages can be recovered the bailor or his subrogee must prove negligence on the part of the bailee.[11] When the lost goods are not returned a presumption of negligence arises against the bailee,[12] for only he can produce evidence to prove his non-negligence.[13]

A bailee may nonetheless by express agreement contract to extend his liability to that of an insurer of the bailed goods.[14] The question of what constitutes an express assumption of an insurer's liability is squarely presented by the instant case. The majority opinion that the covenant to return, ". . . in good mechanical condition," amounted to an assumption of absolute liability, is contrary to the weight of authority. However, where the bailee promises not only to return the goods, but also to pay for them on failure to return, it is generally held that he assumes the liability of an insurer.[15]

Most courts hold that a covenant to return in the same mechanical condition as when received, or words of similar meaning, is only a restatement of the common law requirement of due care,[16] and liability is imposed upon the bailee only if negligence in caring for the goods is established.[17] If the goods are destroyed without fault of the bailee he is not liable, for the promise to return is *dependent on the continued existence of the goods.*[18]

Whether the contract calls for a greater or lesser degree of care than ordinarily required, liability would hinge upon the bailee's failure to exercise the specified degree of care.[19] In no event, therefore, could a non-negligent bailee be held as an insurer unless words clearly declaring that intention were used in the contract. However, the Washington Court in the *Metropolitan Park* case, which controlled the finding in the instant case, held that the promise to use, ". . . every possible care," amounted to an assump-

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7. Grady v. Schweinler, 16 N.D. 452, 113 N.W. 1031 (1907); National Fire Ins. Co. v. Mogan, 186 Ore. 285, 206 P.2d 963 (1949); Hanson v. Oregon-Washington R. & Nav. Co., 97 Ore. 190, 188 Pac. 963 (1920); Sumison v. Streator-Smith Inc., 103 Utah 44, 132 P.2d 680 (1943) (which fully discusses the majority rule, citing cases in agreement from many jurisdictions). *Contra, e.g.,* Direct Nav. Co. v. Davidson, 32 Tex.Civ.App. 492, 74 S.W. 790 (1903). See Brown, Personal Property 370 (2d ed. 1955)

8. See Prosser, Torts 203 (1941).

9. Romney v. Covey, 100 Utah 167, 111 P.2d 545 (1941); Turner v. Stallibrass [1898] 1 Q.B. 56.

10. See note 9 *supra.* This so because, wherever negligence must be shown to incur in the bailee a liability to pay for the lost goods, the existence of bailee's negligence must be proved before there can recovery. See Prosser, Torts 1119 (1941) (plaintiff may not waive the tort and sue in contract alone unless the plaintiff's loss has resulted in an unjust benefit to the defendant).

11. Sumison v. Streator-Smith Inc., 103 Utah 44, 132 P.2d 680 (1943).

12. See note 11 *supra.*

13. Marshall v. Andrews, 8 N.D. 364, 79 N.W. 851 (1899); National Fire Ins. Co. v. Mogan, 186 Ore. 285, 206 P.2d 963 (1949); Romney v. Covey, 100 Utah 167, 111 P.2d 545 (1941). The principles which apply are similar to those which are involved in the doctrine of res ipsa loquitur."

14. Grady v. Schweinler, 16 N.D. 452, 113 N.W. 1031 (1907); McCoy v. Home Ins. Co., 170 Pa.Super 38, 84 A.2d 249, 252 (1951) (dictum).

15. Grady v. Schweinler, *supra* note 14.

16. Cary-Davis Tug & Barge Co. v. Fox, 22 F.2d 64 (9th Cir. 1927); Young v. Leary, 135 N.Y. 569, 32 N.E. 607, 609 (1892) (dictum).

17. Cases cited note 7 *supra.*

18. Young v. Leary, 135 N.Y. 569, 32 N.E. 607, 609 (1892) (dictum).

19. E.g., Carr v. Evans 189 Mo. App. 282, 176 S.W. 298 (1915).

tion of an insurer's liability. Under the rule laid down in the instant case the same liability can be found where the bailee promises to exercise the same duty of care as is required by common law.

Most American courts hold that in bailments for mutual benefit a contract of bailment is not to be construed to include one of insurance by the bailee. To hold otherwise is to rest liability upon incidental expressions of the common law duty of due care. Courts should not venture into uncertain grounds to find liability where none was intended when justice and certainty in contracts can so easily be had.

KIRK B. SMITH

CONTRACTS — ESTOPPEL — INFANTS — Plaintiff, 19 years of age, by representing that he was 22, induced defendant, a loan company, to finance the purchase of an automobile on conditional sale. Subsequently plaintiff abandoned the automobile to defendant, repudiated the contract on the ground of his minority, and brought this action to recover payments made. Defendant counterclaimed for the unpaid balance on the contract after repossession and resale. The trial court rendered judgment for defendant on his counterclaim and *held* that plaintiff, being of the age of discretion was estopped to rescind the voidable contract because of his fraudulent representations. *Carney v. Southland Loan Co.*, 88 S.E.2d 805 (Ga. 1955).

An infant's contract,[1] except for the reasonable value of necessaries furnished him, is voilable at his election.[2] As a prerequisite to avoiding his transaction he must return the specific consideration received, or any part of it, which remains in his possession.[3] If he has disposed of or consumed the consideration, by the weight of authority, he may nevertheless avoid the contract and recover what he has parted with.[4] This privilege was founded upon the necessity of protecting an infant from his own improvidence, and, by forcing an adult to deal with infants at his peril, of protecting minors from the designs of others.[5]

Where an infant fraudulently misrepresents his age for the purpose of inducing an adult to enter into a contract with him, the question arises whether such an infant should be allowed to avoid his obligation without responsibility either by liability in tort for his fraud or through estoppel.

Although an infant is generally liable for his torts,[6] the English Courts[7] and a few jurisdictions in the United States[8] deny such responsibility where the cause of action is based on a contract. It is reasoned that to enforce the infant's liability for the tort would be an indirect means of enforcing his

1. At common law one is an infant until the day preceding his 21st birthday. 1 Williston Contracts § 224 (rev. ed. 1936).

2. 1 Williston, Contracts §§ 223-240 (rev. ed. 1936). (As a general rule an auto is not considered a necessity.) 7 Blashfield, Cyclopedia of Automobile Law and Practice § 4438 (1950).

3. 1 Williston, contracts § 238 (rev. ed. 1936).

4. *Ibid.*

5. Burnand v. Erigoyen, 30 Cal.2d 861, 186 P.2d 417, 420 (1947) (dictum).

6. Prosser, Torts 1085, 1086 (1941).

7. *E.g.*, Bartlett v. Wells, 1 Best and S. 836, 121 Eng.Rep. 924 (1862). Johnson v. Pie, 1 Lev. 169, 83 Eng.Rep. 353 (1665).

8. *E.g.*, Monumental Building Assoc. v. Herman, 33 Md. 128 (1870); Raymond v. General Motorcycle Sales Co., 230 Mass. 54, 119 N.E. 359 (1918); Slayton v. Barry, 175 Mass. 513, 56 N.E. 574 (1900); Greensboro Morris Plan Co. v. Palmer, 185 N.C. 109, 116 S.E. 261 (1923).