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Bailments -- Proof of Loss and Presumption of Negligence -- Stipulations Against Negligence

J. A. Williams

Rate Case[7] being the landmark in this field. These decisions involving railroad transportation and the liberal attitude taken in the principal case indicate that the courts will not be exacting in their requirements.[8] There seems to be good cause for Mr. W. R. McCracken's assertion[9] that ". . . the regulation of aerial navigation will ultimately be either largely or exclusively vested in the federal government. . . ."[10]

The Uniform State Law for Aeronautics, as adopted by twenty states, including North Carolina,[11] does not fix a definite minimum altitude for flight, but makes it unlawful to fly so low that existing use of the land will be interfered with. In a state court, under this statute, the present plaintiff could probably recover.

H. L. LOBDELL.

Bailments—Proof of Loss and Presumption of Negligence—Stipulations Against Negligence

The United States Lines issued specifications and requested bids for the repair of the steamship *America*. The bids received were too high. The specifications were changed and the defendant shipyard received the contract on the second bidding. Under the first set of specifications the contractor was required to carry insurance on the ship for $2,000,000, owner's benefit, and premium $5,000. By the contract agreed upon, under the second set of specifications, it was provided, ". . . The United States Lines will continue the present hull, machinery, and equipment insurance upon the vessel during the period the vessel is at the contractor's yard. . . ." While in the possession of the defendant, the ship was damaged seriously by fire.

[7] 234 U. S. 342, 34 Sup. Ct. 833, 58 L. ed. 1341 (1913). This case was characterized by Senator Glass of Virginia as the case "which practically extirpated every remaining right any state had over intrastate commerce." Associated Press dispatch of Feb. 10, 1930.

[8] Nor have the courts been exacting in determining what constitutes interstate commerce itself. The Daniel Ball, 10 Wall. 557, 19 L. ed. 999 (1871) (holding that a steamboat plying between two points in same state, but carrying goods destined for points outside the state, was engaged in interstate commerce). Philadelphia, B. & W. R. Co. v. Smith, 250 U. S. 101, 39 Sup. Ct. 396, 63 L. ed. 869 (1919) (holding that a cook for a crew repairing a railroad bridge was engaged in interstate commerce).

[9] McCracken, *Air Law* (1923) 57 AM. L. REV. 97.

[10] Dean Bogert of Cornell looks askance upon this possibility, and declares the principle of allowing federal interference with intrastate commerce "is one which should be sparingly applied." Bogert, *Problems in Aviation Law* (1921) 6 CORN. L. Q. 271.

[11] P. L. 1929, c. 190, §4; N. C. CODE (Michie, 1929 Supp.) §191 (M).

In admiralty, the District Court found the defendant negligent in handling the ship, and held that the contract did not relieve the defendant of liability for loss caused by the defendant's negligence. The Circuit Court of Appeals reversed the decision, holding that the contract exempted the defendant of liability for loss caused by defendant's negligence up to the agreed amount of $2,000,000.[1]

This case raises the following questions:

(1) Does evidence of loss or damage to goods while in possession of the bailee justify, or if unrebutted require, a finding of negligence? In the absence of special contract, a bailment for mutual benefit requires the bailee to use diligence commensurate with the degree of skill he professes to the public to possess.[2] If the bailor proves a bailment, and the failure of the bailee to return the bailed property, the bailee offering no evidence, the bailor makes out a *prima facie* case.[3] This position, under the North Carolina rule, would permit him to go to the jury;[4] under the Federal rule, would entitle him to recover.[5] Does the bailee, by offering evidence that the property was lost or damaged through causes consistent with due care on his part, rebut the presumption raised by the bailor in the above situation? The older and more prevalent rule holds that he does, and the duty of going forward with the evidence shifts to the bailor to prove the negligence of the bailee.[6] The Federal courts, as in the principal case, North Carolina, and the minority of state courts, hold that the bailor's presumption is not rebutted unless the bailee assumes the duty of going forward with the proof of due care.[7]

(2) May the bailee stipulate against liability for loss caused by his own negligence? There is no unanimity of opinion among the courts in answer to this question. Some courts have held definitely

[1] Newport News Shipbuilding & Dry Dock Co. v. United States, 34 F. (2d) 100 (C. C. A. 4th, 1929).

[2] GODDARD, OUTLINE OF BAILMENTS AND CARRIERS (Cullen's ed. 1928) 119.

[3] Hanes v. Shapiro, 168 N. C. 24, 84 S. E. 33 (1915).

[4] MCINTOSH, N. C. P. & P. IN CIV. CASES (1929) 609; White v. Hines, 182 N. C. 275, 109 S. E. 31 (1921).

[5] Int. M. M. S. S. Co. v. W. & A. Fletcher Co., 296 Fed. 855, 860 (C. C. A. 2d, 1924).

[6] Note (1923) 23 COL. L. REV. 398; Firestone Tire & Rubber Co. v. Pac. Trans. Co., 120 Wash. 665, 208 Pac. 55 (1922).

[7] McCormick, *Charges on Presumptions and Burden of Proof* (1927) 5 N. C. L. REV. 291; Note (1925) 3 TEX. L. REV. 290; Fleishman v. So. Ry. Co., 76 S. C. 237, 56 S. E. 974 (1906); Nutt v. Davison, 54 Colo. 586, 588, 131 Pac. 390 (1913); Smith v. Economical Garage, 176 N. Y. Supp. 479, 107 N. Y. Misc. 430 (1919); Beck v. Wilkins-Ricks Co., 179 N. C. 231, 102 S. E. 313 (1920).

that a bailee may not contract against liability for loss caused by his own negligence.[8] Others have adopted the view that the bailee may contract against liability for his own negligence, provided the bailee acts in good faith, and, unless it amounts to "gross" negligence, by which they seem to mean misconduct approaching bad faith.[9] The Federal courts permit the private bailee to limit his liability for negligence, but do not extend this privilege to public bailees, as it is considered that such an extension would be contrary to public policy.[10]

(3) The ability of the bailee in the principal case to contract against liability for his own negligence was admitted by both opinions. The main point in controversy was, "Did the bailee, by express contract, excuse himself from such liability?" Article X, section 2, of the contract, after stating conditions demanding the highest degree of care, contained the clause, "Provided, however, that the United States Lines will continue the present hull, machinery, and equipment insurance during the period the vessel is at the contractor's yard. . . ." The majority opinion construes the above provision to relieve the bailee of liability for his own negligence, and to give the bailee the benefit of the bailor's insurance. A private bailment for mutual benefit does not make the bailee liable as an insurer. The bailee, by express contract, may limit or increase his liability, but such a variation must be clearly expressed as the intention of both parties.[11] The evidence showed that an express contract making the bailee insurer was customary in similar bailments. In view of the reduced bid under the second specifications, this provision was not included, except as to material removed from the ship and placed in storage by the bailee.[12] It appears that this reveals an intention by

[8] Lancaster County Natl. Bank v. Smith, 62 Pa. St. 47 (1869); Pilson v. Tip Top Auto Co., 67 Ore. 528, 136 Pac. 642 (1913).

[9] Marks v. New Orleans Cold Storage Co., 107 La. 172, 31 So. 671 (1902); Grady v. Schweinler, 16 N. D. 452, 15 Ann. Cas. 161 (1907); Hanes v. Shapiro, *supra* note 3, at 29.

[10] McCormick v. Shippy, 124 Fed. 48 (C. C. A. 2nd, 1903); Int. M. M. S. S. Co. v. W. & A. Fletcher Co., *supra* note 5; The Oceanica, 170 Fed. 893 (C. C. A. 2nd, 1909). In Santa Fe, Prescott, and Phoenix Ry. Co. v. Grant Bros. Const. Co., 228 U. S. 177, 33 Sup. Ct. 474, 57 L. ed. 787 (1913), a common carrier acting in a private capacity was permitted to stipulate against liability for its own negligence.

[11] HALE, BAILMENTS (1896) 28; McCormick v. Shippy, *supra* note 10, at 51; Int. M. M. S. S. Co. v. W. & A. Fletcher Co., *supra* note 5, at 860; Marks v. New Orleans Cold Storage Co., 107 La. 172, 31 So. 671 (1902).

[12] Newport News Dry Dock & Shipbuilding Co. v. United States, *supra* note 1, at 102.

the bailor to assume risks of loss that might occur by means other than the negligence of the bailee. The bailee is placed by the contract in the identical position as regards loss or damage due to his negligence that he would occupy in the absence of an express contract. The tenor of Article X, as a whole, does not excuse the bailee of any liability for negligence. Consequently, the dissenting opinion seems to reflect the sounder view.

J. A. WILLIAMS.

Constitutional Law—Due Process—Fixing Liability of Stockholders in Insolvent State Banks

The procedure by which the statutory liability of stockholders in insolvent banking corporations could best be enforced has been a problem in North Carolina. Prior to 1927 no assessment could be made against such stockholders until the value of the banks' assets in proportion to its debts had been ascertained.[1] This requirement often resulted in long and expensive litigation, and made it difficult in many cases for the receiver to enforce liability. To remedy this situation the legislature enacted section 13, chapter 113, Public Laws of 1927.[2]

This statute first came before the North Carolina Court in *Corporation Commission v. Murphey*.[3] The defendant in the case was a stockholder in an insolvent bank, and had failed to pay the "levy" docketed in clerk's office of the Superior Court by the Corporation

[1] Corporation Commission v. Merchants Bank & Trust Co., 193 N. C. 113, 136 S. E. 362 (1927); Corporation Commission v. Farmers & Merchants Bank, 192 N. C. 366, 135 S. E. 48 (1926); N. C. Cons. Stat. Ann. (1919) §239.

[2] "After the expiration of thirty days from the date of the filing of the notice of the taking of possession of any bank, in the office of the clerk of the Superior Court, the Corporation Commission may levy an assessment equal to the stock liability of each stockholder in the bank, and shall file a copy of such levy in the office of the clerk of the Superior Court, which shall be recorded and indexed as judgments, and shall have the force and effect of a judgment of the Superior Courts of this state; and the same shall become due and payable immediately, and if not paid execution may at the instance of the Corporation Commission issue against the stockholder delinquent, and actions on said assessments may be instituted against any non-resident stockholders in the same manner as other actions against non-residents of the state. Any stockholder may appeal to the Superior Court from the levy of assessment; the issue raised by the appeal may be determined as other actions in the Superior Court. At any time before the determination of said appeal such stockholder may petition the resident or presiding judge to relieve his property of the lien, pending the determination of the question raised by said appeal; and such relief may be granted in the discretion of the judge hearing the petition and upon such terms as he may fix." N. C. Code (Michie 1927) §218c (13).

[3] 197 N. C. 42, 147 S. E. 667 (1929); affirmed 50 Sup. Ct. 161 (1930).