Bailments -- Negligence -- Burden of Proof in Case of Loss or Damage

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follows: "Proceedings under this Act to establish the paternity of such child may be instituted at any time within three years next after the birth of the child, and not thereafter: Provided, however, that where the reputed father has acknowledged the paternity of the child by payments for the support of such child within three years from the date of birth thereof, and not later, then, in such case, prosecution may be brought under the provisions of said sections within three years from the date of such acknowledgment of the paternity of such child by the reputed father thereof." In the first case calling for a construction of the amendment the defendant was charged with willful neglect and refusal to support his illegitimate child who had been born in 1930. Although the defendant had supported his child until one year before the action, no proceedings had ever been instituted to establish the paternity of the child. It was held that the action was barred as not brought within three years from the date of birth of the child or within three years since the reputed father had acknowledged the paternity of the child by support given within the three-year period. However, in referring to the amended section the court made this statement: "This Section, however, was definitely changed by Section 3 of Ch. 217, Pub. Laws of 1939, which limited the application thereof to proceedings 'to establish the paternity of such child' and added the proviso thereto." From this statement it would appear that as a result of the amendment, only the civil proceedings were thought by the court to be under the three-year limitation, and that the criminal action could now be brought at any time until the child was fourteen years old if proceedings to establish the paternity of the child had been instituted within the periods provided in this section of the Act.

The decision in State v. Dill dispelled this idea so the only effect of the amendment was to add an extra three years on to the time permissible for bringing the action, and only then if paternity was acknowledged at the end of three years next after birth of the child.

JOHN F. SHUFORD.

Bailments—Negligence—Burden of Proof in Case of Loss or Damage

The plaintiff's car was destroyed by fire while in the possession of the defendant bailee for repairs. The fire originated in a bowling alley on the floor above the defendant's garage and spread to the defendant's premises despite the efforts of the city fire department. The plaintiff brought this suit for damages based on the defendant's failure to return the automobile. The record showed that the defendant had not employed a night watchman, and the court assumed that the defendant

had neither a sprinkler system nor fire extinguishers since the record was silent as to these facts. The defendant contended that the loss was due to a force beyond his control. At the close of the testimony in the trial court the defendant moved for a directed verdict on the ground that the only reasonable inference to be drawn from the evidence was that the defendant was not guilty of any negligence having a causal connection with the destruction of the plaintiff’s property. The trial judge overruled the motion and sent the case to the jury who returned a verdict for the plaintiff. The Supreme Court of South Carolina, one judge dissenting, reversed the trial court and directed a verdict for the defendant on the theory that the record of the case did not warrant a reasonable inference of negligence on the part of the defendant. The dissenting judge argued that the case should have gone to the jury for its determination of the defendant’s negligence on all the facts of the case.¹

Bailments are now generally classified under three types: (1) Those for the sole benefit of the bailor; (2) those for the sole benefit of the bailee; and (3) those for the benefit of both parties. The latter type arises where one person gives to another the temporary use and possession of his property, other than money, for reward, the latter person agreeing to return the property at a future time. A bailment for mutual benefit connotes lucrative benefit for both parties.² Generally the degrees of negligence have been done away with by most courts, and the degree of care required of any bailee is that care which would be exercised by a person of ordinary prudence under the same circumstances in regard to his own property.³ A baillee for mutual benefit is held not to be an insurer.⁴

The instant case is one involving a bailment for mutual benefit. The particular problem presented is that of the quantum of evidence required of the bailor to establish his case against the bailee for his failure to return the bailed goods, and the quantum required of the bailee to maintain an adequate defense to the bailor’s suit. The question of the burden of proof, and the allied problem of the burden of going forward with the evidence, has caused the courts much concern. It is generally held in such cases that proof by the bailor of the delivery of the goods to the bailee and the latter’s failure to return the bailed goods on demand

³ Livaudais v. Lee She Tung, 197 La. 844, 2 So. (2d) 232 (1941); Peet v. Roth Hotel Co., 191 Minn. 151, 253 N. W. 546 (1934); Trustees of Elon College v. Elon Banking and Trust Co., 182 N. C. 298, 109 S. E. 6 (1921).
free from damage is *prima facie* evidence that the loss or damage was due to the negligence of the bailee.\(^5\) Allowing the plaintiff a *prima facie* case prevents the imposition of an undue hardship on him who otherwise would be forced at the outset of the trial to prove facts of which he had no knowledge—facts in the exclusive possession of the bailee.

Some courts, following the English rule,\(^6\) have held that the burden of proof at all times lies on the plaintiff, not only to show loss and injury but also negligence directly attributable to the defendant.\(^7\) However, "the rule adopted in the more modern decisions is that the proof of loss or injury establishes a sufficient *prima facie* case against the bailee to put him upon his defense. Where chattels are delivered to a bailee in good condition and are returned in a damaged state, or lost or not returned at all, the law presumes negligence to be the cause, and casts upon the bailee the burden of showing that the loss is due to other causes consistent with due care on his part."\(^8\) North Carolina follows the modern rule in allowing the plaintiff thus to establish a *prima facie* case of negligence.\(^9\)

Some states have made distinctions in the *prima facie* theory on the basis of the pleadings. The bailor has his choice of actions against the

\(^5\) See notes 8 and 9 post.

\(^6\) Story, *Commentaries on the Law of Bailments* (5th ed. 1851) §454 states this rule as follows: "In respect to depositories for hire, there seem to be some discrepancies in the authorities, whether the *onus probandi* of negligence lies on the plaintiff, or the exculpation of negligence lies on the defendant, in a suit brought for the loss. In England the former rule is maintained. In America, an inclination of opinion has sometimes been expressed the other way; yet perhaps the weight of authority coincides with the English rule. . . . By the French law, where a loss or injury happens to the thing deposited for hire, the burden of proof is in like manner thrown on the hirer to repel the presumption."

\(^7\) Poydras Fruit Co. v. Weinberger Banana Co., 189 La. 940, 181 So. 452 (1938); Sandler v. Commonwealth Station Co., 307 Mass. 470, 473, 30 N. E. (2d) 389, 391 (1940) where the court said, "The burden of proving negligence of the defendant was on the plaintiff and there was no presumption that the defendant as a bailee did not use due care in safeguarding the plaintiff's automobile."; Yeo v. Miller North Broad Storage Co., 146 Pa. Super. 408, 23 A. (2d) 79 (1941); Schell v. Miller North Broad Storage Co., Inc., 142 Pa. Super. 293, 16 A. (2d) 680 (1940); Farrell-Calhoun Co. v. Union Chevrolet Co., 21 Tenn. App. 554, 113 S. W. (2d) 419 (1937); Magoon v. Motors Acceptance Corp., 238 Wisc. 1, 298 N. W. 191 (1941).


\(^9\) The leading case on this point is Hanes v. Shapiro, 168 N. C. 24, 84 S. E. 33 (1915), where the plaintiff sent a sideboard to the vendor of the article for repairs and the bailed goods were destroyed by fire; Beck v. Wilkins-Ricks Co., 179 N. C. 231, 102 S. E. 313 (1920); Falls v. Goforth, 216 N. C. 501, 5 S. E. (2d) 554 (1939); Swain v. Twin City Motor Co., Inc., 207 N. C. 755, 178 S. E. 560 (1935); Hutchins v. Taylor-Buick Co., 198 N. C. 777, 153 S. E. 397 (1930).
bailee: (1) he may allege trover for failure of the bailee to return the bailed goods in which case he has to prove conversion; (2) he may bring a tort action for negligence; or (3) he may bring an action on the contract and the breach thereof. Some states will allow the *prima facie* case on some pleadings while refusing it on others. However, there are states that concede the different types of actions and yet allow the plaintiff a *prima facie* case whether he alleges one of the types or combines them. North Carolina apparently makes no issue of the distinctions in pleadings. The leading case of *Hanes v. Shapiro* was brought on the breach of the bailment contract, and other cases have been pleaded on the tort basis or a combination of the contract and tort. South Carolina seems to follow North Carolina, since the *prima facie* case has been permitted in actions based on the contract and on the tort.

The plaintiff having presented a *prima facie* case, the burden then devolves on the defendant to prove ordinary care on his part sufficient to rebut the *prima facie* case, and when this is adequately done, the burden once more is cast upon the plaintiff to prove his case or fail. Despite the confused terminology used by the courts, the burden cast is that of going forward with the evidence to prove a given proposition;
for the burden of proof in the accurate sense never shifts but remains on the plaintiff throughout the proceeding.¹⁸

Just what it takes to refute the plaintiff's prima facie case or the presumption of negligence has led to much divergence of opinion in the courts. One line of authority holds that "defendant's duty is prima facie discharged in this respect when the loss is shown to have occurred as the result of fire or theft, thereby requiring plaintiff to prove that the fire or theft was the result of the defendant's negligence."¹⁹ But there is a growing body of sentiment to the effect that the burden still remains on the defendant to show further that his actions were consistent with due care. The prima facie case of the bailor is not overcome by a showing on the part of the bailee that the goods have been burned or otherwise destroyed. Before such a prima facie case can be said to be overcome, the bailee must further prove that the loss, damage or theft was occasioned without his fault. This rule has been applied to garage 'keepers who failed to return automobiles on demand.²⁰ The reasoning behind this viewpoint is that thus the defendant is prevented from merely offering, as a defense, force beyond his control with no further explanation, leaving the plaintiff with the hardihood of presenting his claim. The defendant, having possession of the bailed goods and knowledge of the facts surrounding the bailment, is in a superior position to explain the loss. This latter view is the more modern one and is finding support in many states,²¹ but whether it is yet the weight of author-

ity is questionable. North Carolina in the *Hanes* Case said that the showing of loss by fire was sufficient to rebut the *prima facie* case of the plaintiff. However, in the case of *Beck v. Wilkins-Ricks Co.*, followed by others, the court decreed that the defendant must come forth with an affirmative showing of his due care in addition to proving force beyond his control.

The probative force of the evidence in the various stages of the proceedings presents a complex problem. If the plaintiff establishes his *prima facie* case, and the defendant fails to meet this at all, the verdict may then be directed for the plaintiff. North Carolina is contra to this general holding in that the verdict can never be directed for the plaintiff who has the burden of proof, but the question must be sent to the jury. In other jurisdictions if the defendant comes forward with evidence showing the cause of the loss or damage to have been beyond his control, the burden then is thrust back upon the plaintiff to prove specific negligence or the verdict will be directed for the defendant. However, in those cases which impose on the defendant not only the duty of showing failure to redeliver the goods because of force beyond the loss occurred without his fault and whether he has met this burden is a question of fact for the jury to decide.

- Zanker v. Cedar Flying Service, 214 Minn. 242, 7 N. W. (2d) 775 (1943);
- Evans v. Coleman's Parking and Greasing Stations, 211 Minn. 597, 2 N. W. (2d) 33 (1942);
- Berkowitz v. Pierce, 129 N. J. L. 299, 29 A. (2d) 552 (Sup. Ct. 1943);
- Wexler v. National Ben Franklin Insurance Co., 156 Misc. 755, 281 N. Y. Supp. 949 (1935) in which the court says that certain statements in other New York cases might lead to the conclusion that mere proof of a fire or theft would destroy the bailor's *prima facie* case and place on him the burden of proving negligence, but that an examination of those cases would show that in each the surrounding circumstances were proved and some explanation of the loss given;
- *Federal Insurance Co. v. Lindsley*, 132 Misc. 54, 228 N. Y. Supp. 614 (1928);

The Louisiana court has not gone as far as many courts in placing on the defendant the burden of proving due care after he has proved destruction or loss of the bailed goods by force beyond his control. Instead they have placed this burden on the defendant only in those cases where the fire originated on the premises of the defendant and consumed only the bailed goods of the plaintiff as in *Gulf Insurance Co. v. Temple*, 187 So. 814 (Cr. of App., La. 1939) and in *Royal Insurance Co., Ltd. v. Collard Motors*, 179 So. 108 (Cr. of App., La. 1938).


- Carscallen v. Lakeside Highway Dist., 44 Idaho 724, 260 Pac. 162 (1927);
- Beatrice Creamery Co. v. Fisher, 291 Ill. App. 495, 10 N. E. (2d) 220 (1937);
his control but also the duty of affirmatively establishing due care, whether or not he has met this burden is a question for the jury.\textsuperscript{27} North Carolina is in accord in allowing these cases to go to the jury.\textsuperscript{28}

There is one exception to this rule. That is, when the defendant has come forward and shown that the damage resulted from forces beyond his control and has affirmatively established due care, and there remains but one inference that can be reasonably drawn from the facts, the question of due care belongs to the court and not to the jury.\textsuperscript{29} This type of case is predicated upon particular and unusual fact situations.\textsuperscript{30}

A Kentucky case\textsuperscript{21} presents a clear example of the applicability of the "one inference" situation. The plaintiff's potatoes were destroyed by flood waters infiltrating a cold storage warehouse. The defendant had been warned of the approaching flood and started taking precautions by removing the goods stored in the basement. On the authority of the United States Weather Bureau that the water would not rise to such a height as would cause flooding of the basement, and on the basis of previous yearly records of the flood rise, the defendant ceased removal of the goods. The court held that the defendant would not overcome the \textit{prima facie} case of the plaintiff merely by showing that the property was destroyed by an act of God, but that he must show reasonable precautions to forestall it. The precautionary removal of the goods and the later reliance on the Weather Bureau information was held to justify the only reasonable inference that the defendant has acted as an ordinary intelligent man would have acted under the same

\textsuperscript{27} Brenton v. Sloan's United Storage and Van Co., 315 Ill. App. 278, 42 N. E. (2d) 945 (1942); Zanker v. Cedar Flying Service, 214 Minn. 242, 7 N. W. (2d) 775 (1943); Evans v. Coleman's Parking and Greasing Stations, 211 Minn. 597, 2 N. W. (2d) 33 (1942); Romney v. Covey Garage, 100 Utah 167, 111 P. (2d) 545 (1941).


\textsuperscript{30} North Carolina has one case where the "one inference" rule was applied. In Swain v. Twin City Motor Co., 207 N. C. 755, 758, 178 S. E. 560, 561 (1935) the plaintiff's car was stolen while in a garage. The defendant proved the theft, the car being parked within the garage while many attendants were about; that leaving keys in the car was customary and incidental to the service; and that patrons frequently came into the garage and the presence of the thief had thus excited no suspicion among the employees. The court said, "But suppose, it should appear from the plaintiff's evidence, or if the fact was uncontroverted, that while in such garage, the car was struck by lightning or the employees of the garage were held up by an armed highwayman and the car was taken from the custody of the bailee, who was otherwise exercising ordinary care, it would hardly be supposed that under such circumstances the law requires the solemn formality of submitting issues upon such admitted facts."

\textsuperscript{21} Merchants Ice and Cold Storage Co. v. United Produce Co., 279 Ky. 519, 131 S. W. (2d) 469 (1939).
circumstances, and the question of the defendant's ordinary care was decided as one of law.

The majority held the instant case to be of this exceptional "one inference" type. South Carolina follows the *prima facie* theory, and imposes on the bailee the duty of showing not only the loss due to force beyond his control, but also due care to prevent loss or injury. The question of whether due care has been exercised is generally one for the jury. The majority view was predicated upon the case of *Albergotti v. Dixie Produce Co.* which stated the "one inference" rule but was not itself an example of such a case since the court there left the question of due care to the jury.

Was the instant case capable of only one interpretation from the facts—the interpretation that the defendant had exercised due care and done all that a reasonable man in like circumstances could be expected to do?

The majority of the court seemed to think that from the defendant's evidence only one inference could be drawn. The plaintiff insisted that failure to provide a night watchman, sprinkler system or fire extinguishers showed a lack of due care on the part of the defendant. But the majority dismissed this contention by saying that if the defendant was held by law to the highest degree of care, these precautions would be necessary, whereas in a bailment for mutual benefit only ordinary care is required. The court stated: "We hesitate to hold that every person who operates an automobile sales room and repair garage must either employ a night watchman or else be guilty of negligence—or must either install a sprinkler system or fire extinguishing apparatus or else be held to be negligent—or must either have all three—night watchman, sprinkler system and fire extinguishing apparatus—or else be held to be negligent."

It is admitted that a bailee for mutual benefit should not be required to exercise more than ordinary care. Nor should he be responsible for losses arising from fire or theft which occur without any fault on his part. However, the bailee undertakes that the place of bailment should be reasonably safe, fit for its various purposes, and free from any defects which could have been discovered by the use of ordinary care.

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34 Ibid.
“It should be equipped with modern appliances and improvements in general use by this class of custodians for the protection of goods against injury by theft, fire, rats, heat and other destroying agents.”

The majority opinion ruled as a matter of law that these precautionary measures were not incidental to due care, thus disregarding the requirements of the times with reference to the usages and customs of the particular bailee's trade, and also the nature and value of the bailed goods and its liability to damage. These factors should have been left to the discretion of the jury for determination of the defendant's exercise of due care, and in ruling on this as a matter of law, the South Carolina Supreme Court seems to be in error.

Idrienne E. Levy.