UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 22 | Number 3 Article 4

4-1-1944

Notes and Comments

North Carolina Law Review

The
North Carolina
Law Review

VOLUME 22 APRIL, 1944 NUMBER 3

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NOTES AND COMMENTS

Administrative Law†—Power of Board of Education to Abolish Fraternities*

In May, 1941, the defendant Board of Education of Durham published resolutions making known its disapproval of high school frater-

† As far as possible only cases dealing with the regulation of secret societies in public schools are used in this note.

* "The first Greek letter society in a secondary school was Alpha Phi, a literary society, which became a part of a fraternity in 1876. Subsequently secret societies, patterned after college and university fraternities, sprang into existence all over the country. . . . In time many educators came to believe that whatever good might be claimed for college fraternities was not shared by secret fraternities organized by boys and girls attending preparatory schools whose characters were not yet formed. It has been said of such societies that they tend to engender an undemocratic spirit of caste, to promote cliques, and to foster a contempt for school authority. Doubtless these organizations have many redeeming features, and, we may say, the standard of excellence of some of them is such that they are not opposed by school authorities." "Report of Commissioner of Education," *Annual Reports of the Dept. of Int.*, Vol. 1, pp. 447, 441 (1907). Cited in Bradford v. Board of Education, 18 Cal. App. 19, 121 Pac. 929 (1912).

nities, and appealed for the cooperation of both students and parents. The situation, however, became worse rather than better. After an investigation at the request of both parents and citizens, the Board adopted a further resolution in April, 1943, designed to eliminate secret fraternities and sororities from the public schools. This resolution required each student to sign a pledge indicating that he was not a member of any secret society not approved by the Board, and that he would not join one while in school. By failure to sign this pledge the student forfeited his right to take part in extra-curricular activities. The resolution was to go into effect at the beginning of the Fall Term, 1943. At the time of the adoption of the resolution, a copy was mailed to the parents residing within the school district. In September, prior to the opening of the Fall Term, the plaintiff, who was a member of the Phi Kappa Delta Fraternity and duly enrolled in the Senior High School, sought a restraining order to prevent the resolution's going into effect. Plaintiff alleged that the resolution threatened to deprive him of the right to become a member of the football team and to enjoy other extra-curricular advantages guaranteed him by the public laws of the state and the Fourteenth Amendment to the Federal Constitution. On defendant's demurrer the court dismissed the action, holding that the findings and conclusions of the local School Board fixing rules and regulations for the government of schools are conclusive unless the Board acts corruptly, in bad faith, or in clear abuse of its powers. The court will interfere only when necessary to prevent such arbitrary action. Nor does the act deprive the plaintiff of any right guaranteed by the Fourteenth Amendment to the Federal Constitution.[1]

The word "fraternities" occurring in an Indiana statute was held to include organizations of either or both sexes.[2] A California court has said: "In order that a fraternity may be secret, a promise or an agreement must be made by its members not to reveal its proceedings or secret work and as to various other matters, which undertaking is doubtless invariably in the form of a pledge, an obligation, or of a non-judicial oath. As here used the compound word 'oath-bound' is synonymous with the word 'secret.'"[3]

May a student be denied admission to a public school because of fraternity membership? The courts are divided on the question. In an early Indiana case the court held that the trustees and faculty of Purdue University could not refuse admission to a duly qualified student merely because he was a member of a secret society.[4] In a later case when the

[1] Coggins v. Board of Education, 223 N. C. 763, 28 S. E. (2d) 527 (1944).
[2] State v. Allen, 189 Ind. 369, 127 N. E. 145 (1920).
[3] Bradford v. Board of Education, 18 Cal. App. 19, 26, 121 Pac. 929, 932 (1912).
[4] Stallard v. White, 82 Ind. 278, 42 Am. St. Rep. 496 (1882).

Mississippi Legislature abolished the college fraternities, the Mississippi Court held a regulation by the trustees, making it a condition precedent that the student must sign a pledge of non-fraternity affiliation while in college, to be within the rights and duties of the trustees, and not a violation of any constitutional rights.[5]

Once a student is duly enrolled in a public or private school, he becomes subject to such rules and regulations concerning secret societies as are adopted for the government of the institution. Although he cannot be prohibited from joining a fraternity,[6] laws or regulations subjecting him to expulsion,[7] or refusing to give him credit for his work[8] or to grant him a diploma,[9] or debarring him from special privileges such as athletics, literary functions, or military affairs[10] have been held to be valid. Such rules merely make it optional for the student to determine whether he prefers membership in the secret society and forfeits such educational privileges as are granted him, or desires to forfeit membership in the society and receive those privileges.[11] Even under compulsory education it has been held that a student is not entitled to attend public schools regardless of his conduct, but he is subject to such reasonable rules for the government of schools as the trustees thereof may see fit to adopt.[12*]

Where the meetings of the society are held in the homes of parents after school hours, it must be shown clearly that the act complained of reaches within the school room and affects the conduct and discipline before any regulation of secret societies may be valid.[13*] "If the effects of acts done out of school reach within the school during school hours, and are detrimental to good order and the best interests of the

[5] Waugh v. Miss. Univ., 273 U. S. 589, 35 Sup. Ct. 720, 59 L. ed. 1131 (1913).
[6] *See* People *ex rel.* Pratt v. Wheaton College, 40 Ill. 186 (1866).
[7] Smith v. Board of Education, 182 Ill. App. 342 (1913); People *ex rel.* Pratt v. Wheaton College, 40 Ill. 186 (1866).
[8] Steele v. Sexton, 253 Mich. 32, 234 N. W. 436 (1931).
[9] Board of Trustees of Miss. Univ. v. Waugh, 105 Miss. 623, 62 So. 827 (1913), *aff'd*, 237 U. S. 589, 35 Sup. Ct. 720, 59 L. ed. 1131 (1913).
[10] Wayland v. School Directors, 43 Wash. 441, 85 Pac. 642, 7 L. R. A. (N. S.) 352 (1906).
[11] Coggins v. Board of Education, 223 N. C. 763, 28 S. E. (2d) 527 (1944).
[12*] *See* McLeod v. State, 154 Miss. 468, 122 So. 737 (1929) (A rule by a school board prohibiting married students from attending public schools was arbitrary and unreasonable, however; and therefore void.).
[13*] In Wright v. Board of Education, 295 Mo. 466, 246 S. W. 43 (1922), the court held that the domain of the teacher ceases when the child reaches its home, unless his actions, if permitted, would seriously interfere with the management and discipline of the school. No facts were shown whereby the management and conduct of the school was affected. On the other hand the court in Wayland v. Board of School Directors, 43 Wash. 441, 86 Pac. 642 (1906), held that a rule prohibiting membership in a secret society was valid, even though meetings were held in the homes of parents after school hours. Here the evidence showed that a clannish spirit of insubordination was fostered, resulting in much evil to the good order, discipline, and general welfare of the school.

pupils, it is evident that such acts may be forbidden."[14]* Such a rule by a School Board may be impliedly regarded as a disciplinary measure.[15]

At least sixteen states have prohibited fraternities in elementary and secondary public schools, but no state now excludes them in colleges and universities.[16]* In other states where the problem has arisen, there have been statutes vesting general administrative and governing power in the Board of Education or trustees sufficient for necessary regulation.[17] Such a delegation of power by the legislature does not render a statute invalid.[18] As an administrative agency a School Board has power to make rules and regulations to govern the entire school program. Findings and conclusions by the Board are conclusive unless it acts corruptly, in bad faith, or in clear abuse of its powers.[19] A court will intervene only to prevent arbitrary and unreasonable action.[20]* If the regulations are within the powers conferred upon the Board by the legislature and pertain to matters in which the Board is vested with authority, it has been held that the courts cannot review such acts.[21]*

[14]* Burdick v. Babcock, 31 Iowa 562, 567 (1871); *see* State *ex rel.* Clark v. Osborne, 24 Mo. App. 309 (1887), *aff'd*, 32 Mo. App. 536 (1888); Wayland v. Board of School Directors, 43 Wash. 441, 86 Pac. 642 (1906) (Publication of an article in "Gamma Eta Kappa," fraternity magazine, tended to destroy good order and discipline.).

[15] Wilson v. Board of Education, 223 Ill. 464, 84 N. E. 697, 15 A. L. R. (N. S.) 1136 (1938).

[16]* CAL. SCHOOL CODE (Deering, 1937) c. 134; COLO. STAT. ANN. (Michie, 1935) c. 146, §306; ILL. ANN. STAT. (Smith-Hurd, 1934) c. 122, §§699-703; IOWA CODE (Reichmann, 1939) §§4284-4287; KAN. GEN. STAT. ANN. (Corrick, 1935) §§72-5310, 72-5311; ME. REV. STAT. (1930) c. 19, §46; MICH. STAT. ANN. (Henderson, 1937) §§15-741 to 15-744; MISS. CODE ANN. (1940) §§6792-6797 (By Miss. Laws 1912, c. 177, the Legislature abolished all Greek letter societies in the public schools and colleges. However, in Miss. Laws 1926, c. 312, the Legislature permitted them to be established with the permission of the faculty in the State University. High school fraternities are still prohibited.); MONT. REV. CODES ANN. (Anderson & McFarland, 1935) §§1262.75-1262.77; NEB. COMP. LAWS (Dorsey, 1929) §79-2104; N. J. STAT. ANN. (1939) §18:14-11; OHIO GEN. CODE ANN. (Page, 1939) §§12906-12909; OKLA. STAT. ANN. (1938) tit. 70, 1121-1124; ORE. COMP. LAWS ANN. (1940) §§111-3004 through 111-3006; TEX. ANN. PEN. CODE (1938) art. 301-d; VT. PUB. LAWS (1933) §4264.

[17] See, for example, N. C. CODE ANN. (Michie, 1939) §§5410-5445.

[18] Sutton v. Board of Education, 306 Ill. 507, 138 N. E. 131 (1923); Lee v. Hoffman, 182 Iowa 1216, 166 N. W. 565, L. R. A. 1918C, 933 (1918).

[19] Finch v. Fractional School District, 225 Mich. 674, 196 N. W. 532 (1924); Tanton v. McKenney, 226 Mich. 225, 197 N. W. 510, 33 A. L. R. 1175 (1924); State *ex rel.* Dresser v. District, 135 Wisc. 619, 116 N. W. 232 (1908).

[20]* Christain v. Jones, 211 Ala. 161, 100 So. 99, 32 A. L. R. 1340 (1924); Pugsley v. Sellmeyer, 158 Ariz. 247, 250 S. W. 538, 30 A. L. R. 1212 (1923); State *ex rel.* School Dist. v. Trumper, 69 Mont. 468, 222 Pac. 1064 (1924); Cambell v. Bellvue School Dist., 328 Pa. 197, 195 Atl. 53, 113 A. L. R. 841 (1937) (In this case it was held that the court will interfere if it appears that the Board's action was based on misconception of law, or ignorance through lack of inquiry, or was the result of arbitrary will or caprice, or improper influences where in violation of the law.).

[21]* Security Nat'l Bank v. Bagley, 202 Iowa 701, 210 N. W. 947, 49 A. L. R. 705 (1926) (A School Board can authorize a corporation to install a savings system in the schools for the benefit of the students.).

Any rules and regulations by the Board which are regular on their face will be held valid in the absence of proof to the contrary.[22]

A statute or a regulation of a Board of Education governing secret societies is not unconstitutional as class legislation;[23] it does not abridge special privileges under the Fourteenth Amendment, since it is not a privilege arising out of United States Citizenship.[24] Neither do such rules deny the student equal protection of the laws,[25*] or deprive him of property without due process of law.[26*] Even statutes or School Board regulations which permit certain secret societies as exceptions to a general prohibition have been upheld.[27*]

Thus it appears that the holding in North Carolina is in accord with the principal cases dealing with secret societies in public schools.

CECIL J. HILL.

North Carolina Bastardy Statute—Support of Illegitimate Children—Statute of Limitations

A proceeding upon indictment for willful refusal and neglect to support one's illegitimate child must be brought within three years from the date of the child's birth, or within three years since the reputed father acknowledged paternity of the child by support made within the three years since its birth. This is the decision reached in the recent case of *State v. Dill,* where the court in a five to two decision held that both the criminal and the civil proceedings created by Ch. 228 of Public

[22] *See* Everts v. Rose Grove, 77 Iowa 37, 41 N. W. 478, 14 Am. St. Rep. 264 (1889).

[23] Lee v. Hoffman, 182 Iowa 1216, 166 N. W. 565, L. R. A. 1918C, 933 (1918).

[24] Bradford v. Board of Education, 18 Cal. App. 19, 121 Pac. 929 (1912).

[25*] Bryant v. Zimmerman, 278 U. S. 63, 49 Sup. Ct. 61, 73 L. ed. 184, 62 A. L. R. 785 (1928) (Such regulations do not violate the equality clause of the Fourteenth Amendment when applied to one class of oath-bound associations and not to another class, if the class so regulated has a tendency to make the secrecy of its purposes and membership a cloak for conduct inimical to the personal rights of others and to the public welfare, while the other class is free from that tendency.); *Ex parte* King, 157 Cal. 150, 154, 106 Pac. 578, 579 (1910) ("A law is general and constitutional when it applies equally to all persons, embraced in a class founded on some natural distinction. . . . The question whether the individuals affected by a law do not constitute such a class is primarily one for the legislative department of the state. . . . To warrant a court in adjudging the act void on this ground, it must clearly appear that there was no reason sufficient to warrant the legislative department in finding a difference and making the discrimination.").

[26*] Steele v. Sexton, 253 Mich. 32, 234 N. W. 436 (1931) (Neither does loss of right to school credit and a graduate's diploma, based on a willful violation of the statute, by any stretch of the imagination, constitute cruel and inhuman punishment.).

[27*] Bradford v. Board of Education, 18 Cal. App. 19, 121 Pac. 929 (1912) (Statute made it unlawful for a student to join any secret society except the orders of the Native Sons of the Golden West, Native Daughters of the Golden West, Foresters of America, and other kindred associations.).

Laws of 1933 are limited by Section 3 of the Act as amended by Section 3 of Ch. 227 of Pub. Laws of 1939.[1]

The Act, passed in 1933 and entitled "An act concerning the support of children of parents not married to each other," was intended to cover the entire subject dealing with bastardy and repealed the old act in toto.[2] Section 3 of the Act before its amendment in 1939 read: "Proceedings under this act may be instituted at any time within three years after the birth of the child and not thereafter." The question whether the proceedings referred to included both the civil one to establish the paternity of the child and the criminal one for the willful neglect and refusal to support one's illegitimate child was settled by the case of *State v. Bradshaw* in 1938. In that case the defendant was charged with the willful neglect and non-support of his illegitimate child born in 1933. During that year he had been charged with bastardy by the mother, had plead guilty, and had been fined $200 which he had paid. In 1937 this action was brought and defendant pleaded that the action was barred as brought more than three years after the birth of the child. The State contended that the three-year limitation applied only to the civil proceeding and not to the criminal one but the court held that the proceedings referred to included both.[3]

It had previously been held that Section 1 of the Act making it a misdemeanor to willfully refuse and neglect to support one's illegitimate child under the age of fourteen years created a continuing offense[4] but under the decision in the *Bradshaw* Case it was indictable only if the action was brought within three years from the birth of the child or an action had been brought within this period and the court had retained the case. The latter practice is the one that has been followed by the courts in the state with the suit to establish the paternity being brought, that issue determined and if defendant found guilty a sum being fixed by the court for maintenance and the case left open for modification in the future. However, in making the offense of willful neglect and refusal to support one's illegitimate child a misdemeanor and a continuing offense, and the purpose of the statute being to impose upon the parents the burden of its support[5] and to protect the county from the expense of maintenance,[6] it would seem that it was the legislative intent to limit the three-year limitation to the civil proceedings to establish paternity.

This assumption is strengthened by the fact that immediately following this decision the legislature amended Section 3 of the Act as

[1] State v. Dill, 224 N. C. 57, 29 S. E. (2d) 145 (1944).
[2] State v. Morris, 208 N. C. 44, 179 S. E. 19 (1935).
[3] State v. Bradshaw, 214 N. C. 5, 197 S. E. 564 (1938).
[4] State v. Johnson, 212 N. C. 566, 194 S. E. 319 (1937).
[5] State v. Roberts, 32 N. C. 350 (1849).
[6] State v. Brown, 46 N. C. 129 (1853); State v. Robeson, 24 N. C. 46 (1841).

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.[7] 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

[7] State v. Killian, 217 N. C. 339, 7 S. E. (2d) 702 (1940).

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 bailee 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

[1] Kelley v. Capital Motors, Inc., — S. C. —, 28 S. E. (2d) 836 (1944).
[2] Godfrey v. City of Flint, 284 Mich. 291, 279 N. W. 516 (1938); Hanes v. Shapiro, 168 N. C. 24, 84 S. E. 33 (1915).
[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).
[4] Travelers Fire Insurance Co. v. Brock & Co., 30 Cal. App. (2d) 115, 85 P. (2d) 904 (1938); Dennis v. Coleman's Parking and Greasing Stations, Inc., 211 Minn. 597, 2 N. W. (2d) 33 (1942); Arnold v. Kensington Plaza Garages, Inc., 179 Misc. 697, 42 N. Y. S. (2d) 118 (1943).

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).

[8] State v. Clark, 2 Terry 246, 20 A. (2d) 127 (Sup. Ct., Del. 1941); Quinn v. Miller, 34 A. (2d) 259 (Mun. Ct. of App., D. C. 1943); Carscallen v. Lakeside Highway Dist., 44 Idaho 724, 260 Pac. 162 (1927); Brenton v. Sloan's United Storage and Van Co., 315 Ill. App. 278, 42 N. E. (2d) 945 (1942); Berkowitz v. Pierce, 129 N. J. L. 299, 29 A. (2d) 552 (Sup. Ct. 1943); Castorina v. Rosen, 290 N. Y. 445, 49 N. E. (2d) 521 (1943); Beck v. Wilkins-Ricks Co., 179 N. C. 231, 232, 101 S. E. 313, 314 (1920); Hansen v. Oregon-Washington R. and Nav. Co., 92 Ore. 190, 188 Pac. 963 (1920).

[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.[10] Some states will allow the *prima facie* case on some pleadings while refusing it on others.[11*] 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.[12*] North Carolina apparently makes no issue of the distinctions in pleadings. The leading case of *Hanes v. Shapiro*[13] was brought on the breach of the bailment contract, and other cases have been pleaded on the tort basis[14] or a combination of the contract and tort.[15] South Carolina seems to follow North Carolina, since the *prima facie* case has been permitted in actions based on the contract[16] and on the tort.[17]

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;

[10] Sumsion v. Streator-Smith, 132 P. (2d) 680 (Sup. Ct., Utah 1943).

[11*] U Drive & Tour, Ltd. v. System Auto Parks, Ltd., 28 Cal. App. (2d) 782, 71 P. (2d) 354, 356 (1937) states the holding of the California courts thus: "The complaint contains sufficient allegations to state a cause of action for conversion of plaintiff's automobile by defendant, a bailee thereof. Where such a cause of action is stated, the plaintiff makes a sufficient *prima facie* showing by proof of the bailment and subsequent refusal of the defendant on demand to make delivery according to the contract, and this casts on the defendant the burden of explaining his refusal . . . if plaintiff alleges a loss by fire or theft, and charges this was due to defendant's negligence, the burden is on the plaintiff to prove such negligence. . . . So it seems that the answer to the question, on whom is the burden of proof as to the defendant's negligence, depends upon the pleadings."; Note (1940) 14 TEMP. L. Q. 261.

[12*] Lewis v. Ebersole, 12 So. (2d) 543 (Sup. Ct., Ala. 1943) where the action was brought on both the contract and negligence; Zanker v. Cedar Flying Service, 214 Minn. 242, 7 N. W. (2d) 775 (1943) in which the plaintiff pleaded the bailment contract and negligence; Wexler v. National Ben Franklin Insurance Co., 156 Misc. 755, 281 N. Y. Supp. 949 (1935) where the plaintiff pleaded both contract and tort actions; Romney v. Covey Garage, 100 Utah 167, 172, 111 P. (2d) 545, 547 (1941) in which the court stated, "This holding . . . brings the *ex-contractu* action for breach of the contract of bailment because of loss or damage, in line with the action for negligence for such loss or damage. There is no real reason why the form of action should materially change the remedy or fasten on the plaintiff a greater burden in one case than in the other."

[13] 168 N. C. 24, 84 S. E. 33 (1915).

[14] 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).

[15] Beck v. Wilkins-Ricks Co., 179 N. C. 231, 102 S. E. 313 (1920).

[16] Gilland v. Peter's Dry Cleaning Co., Inc., 195 S. C. 417, 11 S. E. (2d) 857 (1940).

[17] Albergotti v. Dixie Produce Co., Inc., 202 S. C. 357, 25 S. E. (2d) 156 (1943); Fleischman, Morris & Co. v. Southern Railway, 76 S. C. 237, 56 S. E. 974 (1907).

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-

[18] Wolf v. Pedian, 251 Ill. App. 564 (1929); Hansen v. Oregon-Washington R. and Nav. Co., 92 Ore. 190, 188 Pac. 963 (1920).

[19] Lewis v. Ebersole, 12 So. (2d) 543, 547 (Sup. Ct., Ala. 1943); Scott v. Columbia Compress Co., 157 Ark. 521, 249 S. W. 13 (1923); Carscallen v. Lakeside Highway Dist., 44 Idaho 724, 260 Pac. 162 (1927); Rochette v. Terminal R. Ass'n of St. Louis, 225 S. W. 1019 (St. Louis Ct. of App., Mo. 1920); Castorina v. Rosen, 290 N. Y. 445, 49 N. E. (2d) 521 (1943); Hansen v. Oregon-Washington R. and Nav. Co., 92 Ore. 190, 188 Pac. 963 (1920); Farrel-Calhoun Co. v. Union Chevrolet Co., 21 Tenn. App. 554, 113 S. W. (2d) 419 (1937).

[20] Keenan Hotel Co. v. Funk, 73 Ind. App. 677, 177 N. E. 364 (1931).

[21]* U Drive & Tour, Ltd. v. System Auto Parks, Ltd., 28 Cal. App. (2d) 782, 71 P. (2d) 354, 356 (1937) where the court stated, "But it now seems settled that where the plaintiff's action is strictly one of conversion, or upon the contract for failure to redeliver the property, the defendant must justify his failure, and if he relies upon the proposition that the property was lost by theft or fire without negligence on his part, the burden is on him to prove these facts, including his lack of negligence in order to rebut the *prima facie* case of the plaintiff."; State v. Clark, 2 Terry 246, 20 A. (2d) 127 (Sup. Ct., Del. 1941) was a case involving machinery stolen from a sheriff who had levied on the property. The situation was held to be like that of a bailment for hire. It was said that when there was proof of loss or damage or theft, it was the duty of the sheriff to go forward with proof to show proper care in keeping the property.; Quinn v. Miller, 34 A. (2d) 259 (Mun. Ct. of App., D. C. 1943); Brenton v. Sloan's United Storage and Van Co., 315 Ill. App. 278, 282, 42 N. E. (2d) 945, 947 (1942) where the court said: "Under the law of this state a bailor makes a *prima facie* case as against a bailee by showing that the goods which have been bailed have not been returned upon demand, and such *prima facie* case is not overcome by a mere showing to the effect that the goods have been burned or otherwise destroyed. To discharge himself from liability under such circumstances a bailee must show that

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.*,[22] followed by others,[23] 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.[24] 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.[25] 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.[26] However, in those cases which impose on the defendant not only the duty of showing failure to redeliver the goods because of force beyond

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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); English v. Traders' Compress Co., 167 Okla. 580, 31 P. (2d) 588 (1934); Huie v. Lay, 170 S. W. (2d) 823 (Ct. of Civ. App., Tex. 1943).

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 (Ct. of App., La. 1939) and in Royal Insurance Co., Ltd. v. Collard Motors, 179 So. 108 (Ct. of App., La. 1938).

[22] 179 N. C. 231, 102 S. E. 313 (1920).

[23] Falls v. Goforth, 216 N. C. 501, 5 S. E. (2d) 554 (1939); Swain v. Twin City Motor Co., 207 N. C. 755, 178 S. E. 560 (1935); Hutchins v. Taylor-Buick Co., 198 N. C. 777, 153 S. E. 397 (1930).

[24] Quinn v. Hartford Fire Ins. Co., 34 A. (2d) 259 (Mun. Ct. of App. D. C. 1943); 9 WIGMORE, EVIDENCE (3rd ed. 1940) §2494.

[25] Star Manufacturing Co. v. Atlantic Coastline R., 222 N. C. 330, 23 S. E. (2d) 32 (1942); Eller v. Church, 121 N. C. 269, 28 S. E. 364 (1897). Oklahoma agrees with North Carolina in English v. Traders' Compress Co., 167 Okla. 580, 31 P. (2d) 588 (1934).

[26] 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); 9 WIGMORE, EVIDENCE (3rd ed. 1940) §2494.

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.[27] North Carolina is in accord in allowing these cases to go to the jury.[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.[29] This type of case is predicated upon particular and unusual fact situations.[30*]

A Kentucky case[31] 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 *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

[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).

[28] Hutchins v. Taylor-Buick Co., 198 N. C. 777, 153 S. E. 397 (1930); Trustees of Elon College v. Elon Banking and Trust Co., 182 N. C. 298, 109 S. E. 6 (1921); Beck v. Wilkins-Ricks Co., 179 N. C. 231, 102 S. E. 313 (1920).

[29] Homan v. Burkhart, 108 Cal. App. 363, 291 Pac. 624 (1930); Merchants Ice and Cold Storage Co. v. United Produce Co., 279 Ky. 519, 131 S. W. (2d) 469 (1939); Dufresne v. Dick, 51 R. I. 135, 152 Atl. 692 (1930).

[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."

[31] 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,[32] 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.[33] The question of whether due care has been exercised is generally one for the jury.[34] The majority view was predicated upon the case of *Albergotti v. Dixie Produce Co.*[35] 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."[36]

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.

[32] Gilland v. Peter's Dry Cleaning Co., 195 S. C. 417, 11 S. E. (2d) 857 (1940); Fleischman, Morris & Co. v. Southern Railway, 76 S. C. 237, 56 S. E. 974 (1907).

[33] Albergotti v. Dixie Produce Co., Inc., 202 S. C. 357, 25 S. E. (2d) 156 (1943); Gilland v. Peter's Dry Cleaning Co., 195 S. C. 417, 11 S. E. (2d) 857 (1940); Fleischman, Morris & Co. v. Southern Railway, 76 S. C. 237, 56 S. E. 974 (1907).

[34] *Ibid.*

[35] 202 S. C. 357, 25 S. E. (2d) 156 (1943).

[36] Kelley v. Capital Motors, — S. C. —, 28 S. E. (2d) 836, 839 (1944).

"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."[37]

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.

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[37] GODDARD, OUTLINES OF LAW OF BAILMENTS AND CARRIERS (2d. ed. 1928) §153.