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BURDEN OF PROOF OF BAILEE'S NEGLIGENCE IN CONNECTION WITH HIS FAILURE TO REDELIVER

By ROBERT M. SWEET

If you were the trial judge, given the following facts in an action in assumpsit by a bailor against his bailee for failure to redeliver the bailed goods upon demand, how would you instruct as to who has the burden of persuasion on the issue of the bailee's negligence (or exercise of due care) in connection with the loss of the bailed property?

Evidenced adduced by the plaintiff has established that the defendant company operates a service and repair garage for trucks and that plaintiff's driver had left plaintiff's truck with the defendant company for repair. After the plaintiff's truck was repaired, it was parked on a lot owned by defendant adjacent to their service garage, which lot was also used by transient drivers stopping for food and lodging. The keys to plaintiff's truck, and other trucks similarly parked, were kept during the day in defendant's parts room and at night in a gasoline service station also operated by the defendant. When plaintiff's driver returned to claim the truck three days later, it could not be found and state and local authorities were notified that it had been stolen. The plaintiff did not allege that the loss was occasioned by the defendant's negligence, but their evidence has established that the defendant was unable to redeliver the truck because it had been stolen.

If, considering the facts just presented, you non-suited the plaintiff on the ground that since the plaintiff's evidence established that the defendant was unable to redeliver because the truck had been stolen, the burden was upon the plaintiff to introduce evidence and to persuade the triers of fact that the theft was occasioned by the defendant's negligence, and the plaintiff had failed to sustain these burdens, you are in accord with the trial judge whose ruling was the subject of appeal in the case of *Moss v. Bailey Sales and Service Inc.*[1] The Supreme Court of Pennsylvania affirmed the trial court's ruling, holding that although the plaintiff did not allege defendant's negligence in connection with the theft, the plaintiff destroyed his prima facia case by introducing evidence showing that the defendant was unable to redeliver because the truck had been stolen. In addition, the court said that had the plaintiff not introduced evidence of the cause of the loss but rather just established his prima facia case by alleging and proving delivery and failure to redeliver, it would then have been incumbent upon the defendant bailee to prove that he was unable to redeliver because the truck had been stolen, and that such a theft was not *inconsistant* with the exercise of due care on his part. The court further said, citing *American Jurisprudence*[2] and *Corpus Jurus Secundum*,[3] that no inference or pre-

[1] 385 Pa. 547, 123 A.2d 425 (1956).
[2] 6 AM. JUR., *Bailments*, § 372 (Rev. ed. 1950).
[3] 8 C.J.S., *Bailments*, § 50 (1938).

sumption of negligence arises from the fact that the bailed property is stolen while in the bailee's possession, although the Pennsylvania Supreme Court did recognize that in the more recent decisions in other jurisdictions, such a loss ordinarily does raise such an inference or presumption.

Apparently the decision in the principal case is in accord with precedents set in earlier Pennsylvania decisions,[4] and the court in the principal case stated that:

> "If a bailee for hire in Pennsylvania is to be made an insurer of the property committed to his custody" . . . (which result the court attributed to the "modern rule" that loss of the bailed property by fire or theft while in possession of the bailee raises a presumption of the bailee's negligence) . . . "it is preferable . . . that such change be made by the legislature . . . ."[5]

There is much conflict in the decisions dealing with the questions of who has the burden of persuasion on the issue of the bailee's negligence in actions by a bailor against his bailee for failure to redeliver, and what effect, if any, loss by fire or theft has upon the burden of introducing evidence.[6] The conflicting decisions can be roughly grouped into four general categories:

(1) *Cases in which the results differ, in various degrees, because of the inconsistency of the courts in interpreting and utilizing such phrases as burden of proof, prima facia case, inference and presumption of negligence.* The cases are in accord insofar as placing the burden of introducing evidence and the burden of persuasion on the bailor in establishing delivery of the chattel to the bailee and his subsequent failure to redeliver on demand.[7] Most courts say that this is prima facia evidence of the bailee's liability.[8] If the bailor's action is based on breach of the bailment contract or in the nature of trover for conversion there is general agreement that not only must the bailee introduce evidence establishing the reason for his failure to redeliver (such as loss by theft or fire) but also he must show that such loss was not inconsistent with the exercise of due care on his part.[9] If the bailor in his action alleges the negligence of the bailee in connection with the loss, the great majority of the decisions place the burden

[4] Toole v. Miller, 375 Pa. 509, 99 A.2d 897 (1953); Anderson v. Murdock Storage & Transfer Co., Inc., 371 Pa. 212, 88 A.2d 720 (1952); Yeo v. Miller North Board Storage Co., 146 Pa. Super. 408, 23 A.2d 79 (1941); Schell v. Miller North Board Storage Co., 142 Pa.Super. 293, 16 A.2d 680 (1940).

[5] 385 Pa. at....., 123 A.2d at 429.

[6] BROWN, PERSONAL PROPERTY § 87 (2d ed. 1955); 6 AM. JUR., *Bailments*, § 364 (Rev. ed. 1950); 8 C.J.S. *Bailments*, § 50 (1938); DEC. DIG., *Bailments*, § 31 (1).

[7] Threlkeld v. Breaux Ballard, Inc., 296 Ky. 344, 177 S.W.2d 157 (1944); Ullmann v. Fuerth, 269 N.Y. Supp. 25, 150 Misc. 125 (1933); Chouinard v. Berube, 124 Me. 75, 126 A. 180 (1924).

[8] Southern R. Co. v. Prescott, 240 U.S. 632 (1916); Lederer v. Railway Terminal & Warehouse Co., 346 Ill. 140, 178 N.E. 394 (1931); Traders Compress Co. v. Precure, 140 Okla. 40, 282 Pac. 165 (1929).

[9] Newton Chevrolet Co. v. Canle, 31 Tenn. App. 67, 212 S.W.2d 392 (1948); Lebens v. Wolf, 138 Minn. 435, 165 N.W. 276 (1917); Stone v. Case, 34 Okla. 5, 124 Pac. 960 (1912); Knights v. Piella, 111 Mich. 9, 69 N.W. 92 (1896).

of persuasian as to this issue on the bailor.[10] Some courts say that from the bailee's failure to redeliver, the triers of the fact are free to consider an inference of the bailee's negligence, thus making the bailee vulnerable to the risk of an adverse decision if he does not introduce evidence of his due care.[11] Other courts say that such failure to redeliver raises a presumption of the bailee's negligence, thus thrusting upon the bailee the burden of introducing countervailing evidence if he is to escape a peremptory ruling.[12] If the bailee seeks to escape liability by showing that his inability to redeliver was due to loss of the bailed chattel through fire or theft, some courts hold that such a showing thrusts upon the bailor the burden of going forward with the evidence of the bailee's negligence,[13] while others contend that an inference[14] or presumption[15] of negligence arises from the fact that failure to redeliver was so caused. If the bailor's evidence establishes that the bailed goods were lost through fire or theft, etc., many decisions have held that the bailor's prima facia case is extinguished and it then becomes incumbent on him to affirmatively establish the bailee's negligence if he is to escape a non-suit.[16] Still other cases, in what seems to be a very desirable trend in the more modern decisions, hold that by introducing evidence of loss by fire or theft, etc., the bailor does not destroy his prima facia case nor does the bailee overcome the inference or rebutt the presumption of his negligence by so attempting to explain his failure to redeliver.[17]

(2) *Cases in which the answer to the question of who has the burden of persuasion on the issue of the bailee's negligence is dictated by the form of action chosen by the bailor.* If the bailor does not allege that the bailee has been negligent, but, rather, alleges only delivery and failure to redeliver and bases his action on breach of the bailment contract, many decisions hold that not only must the bailee prove that his failure to redeliver was occasioned by the theft or destruction by fire of the bailed goods but also that he has the burden of persuading the triers of fact that he exercised due care in connection with the loss.[18] If the bailor's action is in the nature

[10] Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U.S. 104 (1941); Sanborn v. Kimball, 106 Me. 355, 76 A. 890 (1910).

[11] Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U.S. 104 (1941); Carter v. Allenhurst, 100 N.J.L. 138, 125 A. 117 (1924); Colburn v. Washington State Art Ass'n, 80 Wash. 662, 141 Pac. 1153 (1914).

[12] Lederer v. Railway Terminal & Warehouse Co., 346 Ill. 140, 178 N.E. 394 (1931); Prince v. Alabama State Fair, 106 Ala. 340, 17 So. 449 (1895).

[13] Firestone Tire & Rubber Co. v. Pacific Transfer Co., 120 Wash. 665, 208 Pac. 55 (1922); Colburn v. Washington State Art Ass'n, 80 Wash. 662, 141 Pac. 1153 (1914); Yazoo & M. Valley R. Co. v. Hughes, 94 Miss. 242, 47 So. 662 (1908).

[14] Downey v. Martin Aircraft Service, Inc., 96 Cal.App.2d 94, 214 P.2d 581 (1950); Threlkeld v. Breaux Ballard 296 Ky. 344, 177 S.W.2d 157 (1944); Gen. Exch. Ins. Corp. v. Service Parking Grounds, 254 Mich. 1, 235 N.W. 898 (1931).

[15] *Ibid.*

[16] Delaware Dredging Co. v. Graham, 43 F.2d 852 (E.D. Pa. 1930); Glover v. Spraker, 50 Idaho 16, 292 Pac. 613 (1930); Pennsylvania R. Co. v. Dennis' Estate, 231 Mich. 367, 204 N.W. 89 (1925).

[17] See 6 AM. JUR., *Bailments*, § 372 n. 12 (Rev. ed. 1950).

[18] Wilson v. Calif. Cent. R. Co., 94 Cal. 166, 29 Pac. 861 (1892); Boies v. Hartford & N.H.R. Co., 37 Conn. 272, 9 Am. Rep. 347 (1870).

of trover alleging conversion by the bailee but not putting the bailee's negligence in issue, there is authority to the effect that in order to escape liability the bailee has the burden of persuading that the property was lost, stolen or destroyed without negligence on his part.[19]

(3) *Cases where the burden of persuasion on the issue of the bailee's negligence is allocated by statute.* Here the question is what change in the common law rules is brought about by the Uniform Warehouse Receipts Act. The sections pertinent to this discussion are sections 8 and 21, which in effect provide that should a warehouseman subject to the terms of the act fail to redeliver the bailed property upon demand, *he* must establish the existence of a lawful excuse and further, he will be liable for losses occasioned by his failure to exercise that degree of care that a reasonably prudent man would exercise in caring for goods of his own of a similar nature. The decisions construing the effect of these sections, in jurisdictions where the Uniform Act is in effect, are not harmonious.[20] (a) Some jurisdictions hold that the bailor has the burden of proving the bailee's negligence but that once he has established delivery and failure to redeliver the burden of producing evidence in explanation shifts to the bailee warehouseman. If the bailee proves loss by fire or theft not inconsistent with due care on his part, the burden of producing evidence then shifts back to the bailor, requiring him to show that the negligence of the bailee contributed to the loss.[21] (b) Other decisions have made the answer to the question of who has the burden of persuasion on the issue of the bailee's negligence dependent upon the form of action and pleadings.[22] (c) In still other jurisdictions the act has been interpreted as imposing upon the bailee warehouseman the burden of persuasion as to his exercise of due care irrespective of whether the bailor alleged his negligence in connection with the loss.[23]

(4) *Cases not falling within the purview of the Uniform Warehouse Receipts Act where the burden of persuasion as to the issue of the exercise or lack of due care is placed upon the defendant bailee for reasons of policy, fairness, and accessibility to evidentiary matter concerning the circumstances of the loss.* In this area the burden would seem to be placed on the bailee regardless of which form of action the bailor utilized.[24]

The California decisions reflect the divergent viewpoints already alluded to on a national basis. In the cases falling within the scope of the

[19] Smith v. Maher, 84 Okla. 49, 202 Pac. 321 (1921); Fleischman v. Southern R. Co., 76 S.C. 237, 56 S.E. 974 (1907).

[20] See generally 13 A.L.R.2d 681 (1950).

[21] Fry v. Wagner Bros. Moving & Storage Co., 267 S.W.2d 359 (Mo. 1954); Brown v. Sloans' Moving & Storage Co., 247 S.W.2d 310 (Mo. 1954); Mims v. Hearon, 248 S.W.2d 754 (Tex. Civ. App. 1952).

[22] See note 19 *supra.*

[23] Shockley v. Tennyson Transfer & Storage, Inc., 76 Idaho 131, 278 P.2d 795 (1955); Cole v. Younger, 58 N.M. 211, 269 P.2d 1096 (1954).

[24] Agricultural Ins. Co. v. Constantine, 144 Ohio St. 275, 58 N.E.2d 658 (1944); BROWN, PERSONAL PROPERTY, § 87 (2d ed. 1955).

Uniform Warehouse Receipts Act,[25] the earlier decisions seem to hold that the burden of persuasion as to the issue of the bailee's negligence is upon the bailor,[26] although some have held that the question of who has the burden is to be decided by the form of action and the pleadings.[27] The 1949 case of *George v. Bekins Van and Storage*[28] seems to have resolved the controversy, the Supreme court holding that the burden is upon the bailee warehouseman to prove that the goods were not lost because of his negligence, irrespective of the form of action or pleadings utilized by the bailor depositor.

In those cases not controlled by the Uniform Warehouse Receipts Act, the apparently conflicting decisions seem to be reconcilable on the basis of which form of action the bailor chose to utilize and what allegations, if any, his pleadings made of the bailee's negligence.[29] The cases seem to be in accord in holding that if the bailor alleges the bailee's negligence as the cause of the loss, the burden of introducing evidence and the burden of persuasion of such negligence are on the bailor.[30] If, however, the bailor bases his action on breach of bailment contract or on conversion by the bailee, it would seem that not only has the bailee the burden of persuasion in establishing that the goods were lost by fire, theft, or otherwise, but also he must establish that such loss occurred without negligence on his part.[31] It is believed that the California courts have taken a very desirable position in holding that not only must the bailee establish the cause of loss, in causes of action based on breach of contract or conversion, but also in requiring him to prove, in cases of loss by fire or theft, etc., that such loss was not due to his failure to exercise the requisite degree of care. Although at the present time there is no decision holding *directly* that, in a suit not within the scope of the Uniform Warehouse Receipts Act in which the bailor alleges the bailee's negligence, the burden of persuasion is on the bailee to establish his exercise of due care, such would seem to be the trend. This trend seems to be heralded by Justice Traynor in the case of *Raber v. Tumin*[32] where, in a dissenting opinion he said:

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[25] The Uniform Warehouse Receipts Act was adopted in California in 1909. See CALIF. CIVIL CODE §§ 1858.17 and 1858.30.

[26] England v. Lyon Fireproof Storage Co., 94 Cal.App. 562, 271 Pac. 532 (1928); Atwood v. Southern California Ice Co., 63 Cal.App. 343, 218 Pac. 283 (1923); Runkle v. Southern Pacific Milling Co., 184 Cal. 714, 195 Pac. 398 (1921).

[27] See Wilson v. Crown Transfer & Storage Co., 201 Cal. 701, 258 Pac. 596 (1927) reviewing such cases.

[28] 33 Cal.2d 834, 205 P.2d 1037 (1949).

[29] See generally 7 CAL. JUR. 2d, *Bailments*, § 26 (1953).

[30] U Drive & Tour, Ltd. v. System Auto Parks, Ltd., 28 Cal.App.2d 782, 71 P.2d 354 (1937); Homan v. Burkhart, 108 Cal.App. 363, 291 Pac. 624 (1930); England v. Lyon Fireproof Storage Co., 94 Cal.App. 562, 271 Pac. 532 (1928); Webber v. Bank of Tracy, 66 Cal.App. 29, 225 Pac. 41 (1924).

[31] Gardner v. Jonathan Club, 35 Cal.2d 343, 217 P.2d 961 (1950); Downey v. Martin Aircraft Service, 96 Cal.App.2d 94, 214 P.2d 581 (1950); Travelers Fire Ins. Co. v. Brock & Co., 30 Cal. App.2d 112, 85 P.2d 905 (1938).

[32] 36 Cal.2d 654, 226 P.2d 574 (1951).

> "When bailed goods are lost or destroyed, it is reasonable to require the bailee to prove that the loss was not owing to his negligence."[33]

In *Downey v. Martin Aircraft Service*,[34] the court said that in view of the *George v. Bekins Van and Storage* case it might appear that the rule placing the burden on the bailee to prove that he was not negligent, irrespective of the form of action utilized by the bailor, is applicable *only* in cases arising under the Uniform Warehouse Receipts Act but that the *logic* of the rule is applicable to other bailee's who accept chattel for repair in the expectation of profit. The holding of the court was that when a bailee is unable to redeliver, not only must he show that the property was lost, stolen or destroyed, but also, in order to escape liability, he must show that there was no negligence on his part in connection with the loss. The court further said, speaking through Presiding Justice White, that:

> "It is just and fair that one who undertakes for reward to care for a chattel should have the burden of explaining its loss or destruction while in his custody . . . ."[35]

In connection with the foregoing case, it should be noted that the bailor alleged only delivery and failure to redeliver and not the the bailee had been negligent.

In the case of *Redfoot v. J. T. Jenkins Co.*,[36] the court recognized the dictum in the *Downey* case to the effect that the burden should be on the bailee to establish his freedom from negligence even though the case was not within the purview of the Uniform Warehouse Receipts Act and even though the bailor alleged such negligence, but the court did not decide the question squarely, holding that the dictum in the *Downey* case would probably apply. The latest case in point illustrating this trend is *Morgan v. G. and N. Trucking Co.*[37] Here again the dictum in the *Downey* case was alluded to but not pinned down, the court holding that even considering the burden of persuasion to be upon the bailee, there was ample evidence in this particular case from which the lower court could find that the defendant bailee had not been negligent. Considering the foregoing California cases, it would appear that a holding to the effect that the burden is on the bailee to establish his freedom from negligence even though the bailor alleged such negligence, can be expected sometime in the future. How soon no one can say but such a decision would certainly seem to be desirable.

A brief discussion of the relative merits, especially in reference to the principal case, would seem to be appropriate in conclusion. In its decision in *Moss v. Bailey Sales and Service Inc.*, the Supreme Court of Pennsylvania concluded that the application of the so called *"modern rule"* (that

[33] *Id.* at 664, 226 P.2d at 580.
[34] 96 Cal.App.2d 94, 214 P.2d 581 (1950).
[35] *Id.* at 100, 214 P.2d at 584.
[36] 138 Cal.App.2d 108, 291 P.2d 134 (1955).
[37] 139 Cal.App.2d 897, 294 P.2d 742 (1956).

loss, theft, or destruction of the bailed goods while in the possession of the bailee raises a presumption of his negligence) in effect made the bailee an insurer of the property *"committed"* to his custody. This would hardly seem to be the case, although in defense of this statement it might be said that in Pennsylvania many decisions have taken the position that the one against whom a presumption operates not only has the burden of introducing countervailing evidence but also the burden of persuasion of the non-existence of the presumed fact.[38] Even considering the burden of persuasion to be upon the bailee in establishing his exercise of due care, the result could hardly be that of making him an insurer. Since the bailor has *entrusted* (and not merely "committed") his property to the custody of the bailee and further since the bailee receives such possession in the expectation of profit, on the grounds of desirable public policy it would certainly not seem unjust to require the bailee, when he is unable to redeliver the property so entrusted to him, to establish his exercise of due care by a preponderance of the evidence. In addition to the policy considerations just mentioned, one might ask: who is in a better position to explain the loss? Certainly not the bailor. He has delivered possession to the bailee who takes control and determines the manner of keeping. In most cases it would be almost impossible for the bailor to prove the bailee's negligence. Accessability to evidence on the issue of due care would seem to be almost exclusively the bailee's. Certainly requiring the bailee to establish by a preponderance of the evidence that he has been free from culpable fault in connection with the loss, theft or destruction of the bailed article does not have the effect of making him an insurer of the goods.

It is conceded that the position, that the burden of persuasion as to the exercise of due care should be on the bailee regardless of the form of action or allegations utilized by the bailee, is one as yet adopted in only a few decisions, in the absence of statutory provisions to that effect. Still, as admitted in the principal case, the more recent decisions show a growing tendency to hold that there is an inference or presumption of negligence on the part of the bailee when the goods entrusted to him have been lost, stolen or destroyed while in his possession. It is arguable whether, in the light of human experience, it logically follows that the bailee has been negligent in such a situation but certainly it is a possibility that deserves consideration. Regardless of the question of logical deduction, in the interests of sound public policy and with the realization that access to evidence of due care is almost exclusively the bailee's, it seems just and fair that the bailee should have the burden of establishing his freedom from negligence. If such a requirement seems too harsh, then at least the bailor should have the benefit of the operation in his favor of a presumption of the bailee's negligence.

[38] McDonald v. Pennsylvania R. Co., 348 Pa. 558, 36 A.2d 492 (1944); Watkens v. Prudential Ins. Co. of America, 315 Pa. 497, 173 A. 644, (1934).