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Bailment - Liability for Contents of Closed Receptacle - Mickey v. Sears, Roebuck & Co.

BAILMENT — LIABILITY FOR CONTENTS OF CLOSED RECEPTACLE

Mickey v. Sears, Roebuck & Co.[1]

Plaintiff cashed a check for $589.71 in order to meet a payroll. He placed the money in a leather brief case and drove to Defendant's store where he made some purchases, carrying the brief case with him. Defendant delivered the purchases, which were bulky, to its loading platform so that Plaintiff might carry them to his automobile more easily; while loading his car, Plaintiff inadvertently left his brief case on the platform. When he called for the brief case the next day, Plaintiff found that it had been placed in Defendant's "property room" for safekeeping, but that the $589.71 had been removed. Plaintiff sought to recover this sum from Defendant, as bailee. Judgment on demurrer for Defendant; Plaintiff appealed. Held, affirming judgment below, that knowledge or notice is a necessary prerequisite to a bailment of the contents of a closed receptacle, and since Plaintiff failed to allege such knowledge on the part of, or notice to, Defendant as to money contained in the brief case, the demurrer was properly sustained.

It is well established that the owner of premises where personal property is mislaid by an invitee has the right to possession as against everyone except the true owner, and that Defendant became a gratuitous bailee of the brief case, once he found it and took it into his possession.[2] The degree of care owed by a gratuitous bailee is not well defined; some jurisdictions hold him liable only for "gross negligence",[3] while others, including Maryland, require him to exercise such care "as persons of ordinary prudence in his situation and business, usually bestow in the custody and keeping of like property belonging to themselves".[4]

Whether a finder of a receptacle becomes bailee of the contents of which he has no knowledge, is not settled, and in the absence of authority, for the purposes of this discussion, we must place the finder in the same position as

[1] 76 A. 2d 350 (Md. 1950).

[2] Norris v. Camp, 144 F. 2d 1 (10th Cir. 1944).

[3] Coggs v. Bernard, 2 Ld. Raym. 909, 92 Eng. Repr. 107 (1703), is the leading English case discussing the duty of care of the various classes of bailees.

[4] Schermer v. Neurath, 54 Md. 491, 497; 39 Am. Rep. 397 (1880), is a leading case on the duty of care owed by a gratuitous bailee. The case rejects the view that the standard is the care taken by a particular bailee of his own goods (which would favor negligent bailees and penalize those who are careful); instead, the standard of care is that taken by a prudent bailee in a like situation.

other bailees of a container who have no knowledge of the contents. In the *Mickey* case the Court suggested that if the nature of the contents of the brief case had been disclosed, it might be assumed that Defendant would have exercised greater care, and that, in the absence of such knowledge, Defendant was reasonable in assuming that the brief case contained papers of little or no value to persons other than the owner, intimating that liability of Defendant might depend on whether it exercised ordinary care under the circumstances, and not whether there was a bailment of the contents. But the Court rejected this view[5] and adopted what it termed the "weight of authority", that there is no bailment of the contents of which the bailee of the receptacle has no actual or constructive notice.[6]

Thus, where a bank accepted from a customer a box for safekeeping, without knowledge of its contents, it was held not liable in damages for failure to deliver a will contained in the box, upon the death of the customer;[7] and in a similar case a bank was not liable for loss of money from a box represented by the bailor to contain "papers and other valuables".[8] Where a customer of a parking garage left merchandise in his truck, unknown to the garage, it was held that he could recover only for the theft of the truck, but not for the merchandise.[9] Again, in an action against a parking lot for theft of an automobile, recovery was allowed

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[5] *Supra*, n. 1, 353.

[6] "The very essence of the relation is possession, and so it may be said, as a general rule, that there must be an acceptance of the property on the part of the bailee; for one cannot be made a bailee against his will, and must have knowledge of the fact that he is in possession of the property," VAN ZILE, BAILMENTS AND CARRIERS (1908, 2nd ed.), Sec. 18. See also EDWARDS, BAILMENT (1878, 2nd ed.), Sec. 49, that the bailee has the right to assume that a container holds only those articles reasonably expected to be found therein under the circumstances, and this "because no bailee can be drawn by artifice into a responsibility, greater than he intended to assume." See cases *infra*, ns. 7, 8, 9, 10. The court in the principal case also quoted WILLISTON, CONTRACTS (1936, rev. ed.), Sec. 1038A, that "The general rule is that the bailment of a receptacle does not entail liability for inclosed articles other than those known to the bailee or ordinarily contained therein, though, of course, the bailee is under a duty of reasonable care to protect the receptacle in the condition in which it is received." This would seem to bear out the view that non-disclosure goes to the question of liability, rather than to creation of the bailment, despite the court's holding to the contrary.

[7] Sawyer v. Old Lowell Nat. Bank, 230 Mass. 342, 119 N. E. 825, 1 A. L. R. 269 (1918).

[8] Riggs v. Bank of Camas Prairie, 34 Idaho 176, 200 P. 118, 18 A. L. R. 83 (1921).

[9] D. A. Schulte, Inc. v. North Terminal Garage Co., 291 Mass. 251, 197 N. E. 16 (1935). Since there was no bailment of the contents, the court held that the defendant owed no duty of care toward them, nor would there be liability for conversion for misdelivery to the thief. See Jones, *The Parking Lot Cases*, 27 Georgetown L. R. 162 (1938).

only for those things the defendant knew were in the automobile, he being a bailee of those things only.[10]

Maryland has applied a similar rule in the case of innkeepers. At common law, the innkeeper was a virtual insurer of all property which his guest brought to the inn. Because of this harsh burden imposed by law, the Court of Appeals in *Pettigrew v. Barnum*[11] held that the innkeeper was not responsible for articles not generally considered "baggage", such as silver knives, forks and spoons contained in a guest's trunk.

> "It is not within the implied contract of the landlord, that he will be responsible for all goods which may be brought to his house, merely because they happen to be in a trunk."[12]

Two years later, in *Giles v. Fauntleroy,*[13] the Court cited and followed the *Pettigrew* case, holding that an innkeeper was not liable for such extraordinary contents of a guest's trunk as a Colt revolver, silver teaspoons, or surgical instruments (unless the guest were a physician or medical student). Again, in *Treiber v. Burrows,*[14] an innkeeper was held not liable for $1500 in bank notes and a chest of tea, which were not reasonably considered "baggage". However, the Maryland decisions seem to be unique in so restricting the liability of innkeepers.[15] Further, there seems to be no basis in the innkeeper decisions for the rule invoked in the *Mickey* case, that knowledge or notice is a necessary prerequisite to a bailment of the contents. On the contrary, non-liability of the innkeeper seems to stem from the fact

[10] Palotto v. Hanna Parking Garage Co., 68 N. E. 2d 170, noted 45 Mich. L. R. 625 (Ohio 1946). See Jones, *The Parking Lot Cases, ibid.*

[11] 11 Md. 434, 69 Am. Dec. 212 (1857). Last cited with approval in Roueche v. Hotel Braddock, 164 Md. 620, 623; 165 Atl. 891 (1933).

[12] *Ibid,* 449. That the holding is unique, see *infra,* n. 15.

[13] 13 Md. 126, 139 (1859).

[14] 27 Md. 130 (1867).

[15] Brown, in his treatise on personal property says: "It has been intimated that the liability of the innkeeper should attach only to such goods as the guest brings with him to the inn, in the capacity of a traveler, including his ordinary luggage, clothing, and the money necessary for traveling expenses. Only in Maryland, however, does the liability of the innkeeper appear to be so restricted. The general doctrine extends the innkeeper's special liability to all property of the guest which the latter brings with him into the hotel." BROWN, A TREATISE ON THE LAW OF PERSONAL PROPERTY (1936), Sec. 105. See also Roueche v. Hotel Braddock, *supra,* n. 11, that the innkeeper is bound in law to keep his guest's goods safely, ". . . and this the majority construe to mean all the goods brought within the inn, originally adopted in this state (Towson v. Havre de Grace Bank, 6 H. & J. 47), but later modified here so as to cover only necessary money, baggage, and personal effects, a modification which 16 Am. & Eng. Enc. Law (2nd ed.) 539, says is not supported by authority, in spite of which we still hold it to be law in this state . . .".

that the innkeeper is responsible for his guest's baggage because he is compensated for that service, and that additional or unusually valuable articles, disproportionate to this compensation and not strictly for personal use, should be excluded.[16]

Also, there is the underlying principle, rejected by the Court in the instant case, that the innkeeper is not liable for unusual contents of which he had no knowledge because if he had known of the contents he would have exercised greater care and prevented the loss;[17] that is, although the innkeeper is bailee of such articles, he is only held to ordinary care under the circumstances.

It seems, therefore, that the better view is that a bailment of a receptacle constitutes a bailment of the contents.[18] The cases which hold the bailee not liable for the loss of the contents when there was no notice can nearly all be explained on the theory that there was no evidence indicating

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[16] See Treiber v. Burrows, *supra*, n. 14, 144, which says: "the ground of this responsibility is the profit which the . . . innkeeper receives for entertaining his guest, and its rigor is justified 'on the great principle of public utility, to which all private considerations ought to yield'." Although the Maryland cases have relieved the innkeeper at common law, it is interesting to note that at the time of Pettigrew v. Barnum, *supra*, n. 11, the Legislature was moved to give statutory relief in what is now Article 71, Sec. 3, of the Maryland Code (1939). This statute in effect makes an innkeeper no longer liable for loss of "money, jewelry, securities and plate" if he provides an iron safe or other secure depositary for the same. See also Dibble v. Brown, 12 Ga. 217, 225 (1852), cited in Pettigrew v. Barnum, *supra*, n. 11, where a carrier was held not responsible for unusual articles of baggage; the court, in what was admittedly *obiter dictum*, discussed generally the reasons for and against holding the carrier liable.

[17] See Orange County Bank v. Brown, 9 Wend. (N. Y.) 85 (1832), cited in Pettigrew v. Barnum, *supra*, n. 11, where a carrier was held not liable for $11,250 contained in a travelling trunk, which was considered not included under the term "baggage". The court failed to cite lack of knowledge by the carrier as precluding a bailment, but in effect approved a ruling by the lower court that "common justice required that he (carrier) should be informed of the nature of his charge, so that he might take the necessary precautions for the safety of the bills and for his own protection." Another ground cited was the injustice in holding a carrier liable for concealed contents having a value far out of proportion to the compensation for the service.

[18] See 6 Amer. Jur. Bailment, (Rev. 1950), Sec. 71, *et seq.*, to the effect that there is no settled rule whether delivery and acceptance of a closed receptacle is sufficient to create a bailment of the contents, but:

> "According to the larger number of the more recent decisions, and on principle, where one person accepts from another a sealed or locked receptacle which is delivered to him for safekeeping, carriage, or other purpose for which a bailment may be made, neither in the contemplation of the parties nor of necessity involving control by the bailee over the subject matter other than in bulk, or any use of it by him, the transaction should be regarded as a bailment of the contents as well as of the receptacle. Certainly no authority is needed to demonstrate that the purpose moving the parties in such a transaction is concerned with the contents rather than with the receptacle, and the bailment of the latter is generally only incidental." (Sec. 72).

any lack of due care on the part of the bailee.[19] This would seem to be sounder reasoning than to deny the existence of a bailment. The same criticism obtains in the principal case. Taken at face value, the decision appears to negative liability of Defendant for the value of even such contents as are reasonably to be expected in a brief case merely because it did not have knowledge or notice of the same. There seems no doubt, however, that the Court would charge a bailee in a proper case with constructive notice of certain contents of a receptacle, just as innkeepers are charged with ordinary "baggage". Applying the theory of the instant case, the Defendant would escape liability for loss of the money no matter how negligent it might have been, since if there is no bailment there is no basis for imposing liability for the loss. As there was no allegation that Defendant failed to exercise ordinary care, the Court might have based its decision on that point without laying down the more questionable doctrine that a bailment did not exist. A better rule in such cases would seem to be that there is in fact a bailment of unusual or concealed contents of a receptacle, but that a bailee need exercise only ordinary care under the circumstances; and whether this standard has been met should be determined from all the factors in the transaction, including the relationship between the bailor and bailee, the business of the bailee, the nature of the contents, the nature of the receptacle, as well as how the loss occurred.[20] Thus, whether a bailee should be held liable would in effect depend on whether he acted reasonably under the circumstances, as opposed to the inflexible rule of non-liability laid down in the principal case.

[19] That the view that no bailment is created where the bailor fails to disclose the nature of the contents to the bailee goes to the question of liability of the bailee rather than to the existence of the bailment, see 45 Mich. L. Rev. 625, 626 (1947), noting Palotto v. Hanna Parking Garage Co., *supra*, n. 10, stating that "the result reached in the principal case can be justified by placing a duty upon the defendant bailee to exercise reasonable care under the circumstances. His lack of knowledge that the items were present in the car would be enough to show that he could not take precautions to protect an unknown chattel." See also BROWN, *op. cit. supra*, n. 15, 237, Sec. 75, saying that "the result of these cases (Sawyer v. Old Lowell Nat. Bank, *supra*, n. 7; Riggs v. Bank of Camas Praire, *supra*, n. 8) seems correct for there is an inequity in requiring the bailee to be responsible for valuable articles, the existence of which he has no reason to suspect. It is difficult to understand, however, how it can be said there is no bailment. If the depositary is not in possession of the concealed goods, who else is? By possession of the receptacle the bailee must be held to have possession of the contents."

[20] See Wurmser, Inc. v. Interstate Hotel Co., 148 Neb. 660, 28 N. W. 2d 405 (1947), cited in Mickey v. Sears, Roebuck & Co., *supra*, n. 1; where failure of the bailor to notify the bailee of unusual contents of a sample case was held to be contributory negligence barring the plaintiff bailor from recovery. The sample case contained over $187,000 worth of precious stones.