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Evidence—Proof of Damage to Bailed Goods

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Heyser[89] a police officer followed defendant at a distance of 100 yards for more than one-quarter of a mile. In *Marsellus*[90] the officer followed defendant for two miles.

In considering the present case, the court found the opportunity for observation afforded the two police officers to be comparable to that found in the cases just described. It is submitted that the facts of these four cases demonstrate that there may be considerable latitude in defining the meaning of "adequate opportunity for observation."

In a concurring opinion,[91] Judge Van Voorhis deplored the majority's departure from "the almost universal custom of Police and Justices' Courts,"[92] which requires that speeding violations be established by speedometer or radar readings rather than by observations of eyewitnesses "no matter how expert they may be."[93] He pointed out that the need for supporting evidence would be eliminated if the police were to make and keep records of regular tests of measuring devices. Despite the appeal of this viewpoint to traffic courts and motorists, it now appears to be well settled that readings of untested radar equipment, if corroborated by testimony of policemen who have had an adequate opportunity for observation, will be sufficient as a matter of law to sustain a speeding conviction.

PROOF OF DAMAGE TO BAILED GOODS

Where a mutually beneficial bailment exists the bailee's duty is to exercise reasonable workmanship upon the bailed goods.[94] Upon completion of the work the goods must be returned to the bailor reasonably fit for the known use intended.[95] If the goods are returned damaged and the bailor shows they were not so damaged when bailed, a *prima facie* case is made out against the bailee,[96] whereupon the bailee, if he is to escape liability, must show reasonable care was used by him.[97]

In *Aronette Mfg. Co. v. Capital Piece Dye Works, Inc.*[98] defendant undertook to waterproof plaintiff's textiles after receiving them from a third party which had subjected the textiles to a crease resisting process. Defendant first sent three samples, which he had waterproofed, to the plaintiff for inspection. He also informed plaintiff that a few of the pieces when originally received by defendant had an odor. Upon plaintiff's approval of the samples, defendant waterproofed the rest of the textiles. When received by plaintiff, the goods contained an odor. Upon assurance by defendant that the odor

89. People v. Heyser, *supra* note 86.
90. People v. Marsellus, *supra* note 87.
91. *Supra* note 84 at 128, 181 N.Y.S.2d 496.
92. *Ibid.* at 130, 181 N.Y.S.2d 497.
93. *Id.*
94. Foster v. Pettibone, 7 N.Y. 433 (1852).
95. Douglas v. Hart, 103 Conn. 685, 131 A.2d 401 (1925).
96. Wintringham v. Hayes, 144 N.Y. 1, 38 N.E. 999 (1894).
97. Gerdau Co. v. Bowne Morton Stores Inc., 1 A.D.2d 581, 151 N.Y.S.2d 831, *aff'd* 2 N.Y.2d 905, 161 N.Y.S.2d 153 (1956).
98. 6 N.Y.2d 465, 190 N.Y.S.2d 361 (1959).

would disappear, plaintiff manufactured raincoats from the textiles. The odor did not disappear and the goods were a total loss to plaintiff. Plaintiff thereupon brought suit against defendant.

Defendant contended that the evidence 1) was insufficient to show that the goods were undamaged at the time he received them and, therefore, no inference of his guilt could be raised which would necessitate his coming forward with evidence, and 2) did not show that the odor was traceable to his waterproofing process.

The Court of Appeals held that defendant's statement, that a few of the goods had an odor when received by him, manifested the implication that the remaining goods were odor free. This implication was substantiated by the fact that the sample pieces sent to plaintiff did not contain any odor. These findings sufficed to show that the goods were in good condition when defendant received them, and to raise the inference that the damage occurred during his period of exclusive control. Therefore, his silence at the trial justified the jury's finding that damage resulted from an improper discharge of his bailment obligation.

In many cases, where there is injury to the plaintiff, the only reasonable inference is that the damage was the result of fault. Yet, because one party has had exclusive control over the goods, any clue as to the possibility that damage occurred during this period of control lies with the defendant alone. It is virtually impossible for an aggrieved plaintiff in such case to prove the injury. Therefore, it does not seem inequitable to expect the party who has had exclusive control to explain his conduct during such period, and if he chooses to remain silent, to construe that silence against him.

MALPRACTICE: BASIS FOR EXPERT TESTIMONY

Before a controversy may be submitted to the jury the complaining party must establish a *prima facie case.* Failure to do so requires the court to dismiss the complaint as a matter of law.

In a recent New York malpractice action the plaintiff alleged she had suffered a partial loss of sensation and taste in her tongue following an extraction of one of her teeth by the defendant dentist, and that such loss was the result of the defendant's negligence in severing two nerves during the extraction.[99] The defendant not only denied having severed the nerves but further testified he had done no work on the side of the tooth wherein the nerves lay.

At the trial the Supreme Court disregarded the testimony of an expert witness for the plaintiff who had testified that, in his opinion, the lost senses in the tongue were caused by the severance of the nerves during the extraction performed by the defendant, and dismissed the complaint at the close of the plaintiff's case. The Appellate Division affirmed the dismissal of the complaint

99. Cassano v. Hagstrom, 5 N.Y.2d 643, 187 N.Y.S.2d 1 (1959).