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Property—Personal Property—Bailments

Robert Schaus

in 1905. The testator knew of the adoption, and with other members of the family joined in keeping it secret. In 1917 he drew his will, creating a trust in favor of numerous relatives, including Mrs. Childs, and in the event that she died before the termination of the trust, then to her "lawful issue or descendants". Upjohn died that same year. Upon Mrs. Child's death in 1950, before the termination of the trust, the trustees petitioned the Surrogate Court to construe the will and determine whether or not the adopted child was the "lawful issue or decendant" of Mrs. Childs. The Surrogate held not, and the Appellate Division affirmed.[29] The Court of Appeals unanimously reversed. Judge Fuld reasoned that the words "issue" and "descendants" could not be construed in vacuo, but that their meaning must be determined in the light of the testator's intention as shown from the surrounding circumstances. Testator knew of the adoption, and treated the child with generosity and affection. He must have realized that Mrs. Childs—over 40 years of age—would not likely have any natural descendants. He was on intimate terms with the Childs family, who frequently were his guests. And he was an active partner in the pledge of secrecy. In the light of these facts, Judge Fuld concluded, the only reasonable inference to be deduced was that the testator in making his will intended that the adopted child be considered the "issue" or "decendant" of Mrs. Childs. Having determined the intention of the testator, Judge Fuld went on to meet the objection raised by reason of §115. He declared that the purpose of §115 was to prevent the perpetration of fraud on the rights of the remaindermen through an adoption for the very purpose of cutting of the remainder. He then reasoned that there was no fraud to the remaindermen if the testator intended the adopted child to limit their taking. It is submitted that approach to §115 is the proper one, and that the decision is in the best tradition of the court.

B. Personal Property

Bailments

The characterization of the relationship between a depositor and a safe deposit company has produced some difference of opinion in the courts throughout the United States. It has been stated that the legal relation is that of bailor-bailee,[30] of licensor-licensee,[31] of landlord-tenant,[32] and finally, a combination of all

29. 279 App. Div. 675, 108 N. Y. S. 2d 336 (2d Dep't 1951).

30. 6 Am. Jur. Bailments, § 407.

31. 11 Minn. L. Rev. 440 (1927).

32. Van Zile, Bailments and Carriers (2d. ed. 1908) § 196.

three.[33] Which relationship is choosen is material from the viewpoint of result, when considered in the light of the burden of proof in a suit by the depositor against the safe deposit company for the disappearance of valuables contained in the safe deposit box.

If the relation is characterized as that of landlord-tenant, or licensor-licensee, the depositor has a double burden: (1) of presenting the evidence, and (2) of persuading the jury by a preponderance of that evidence that the defendant was negligent.[34] As for the former, unless the plaintiff is aided by a presumption, thereby shifting to the defendant the duty of presenting evidence, he is unfairly handicapped.[35] The reason for this is that knowledge of what happened to the contents of the safe deposit box is ordinarily the defendant's, and any attempt by the plaintiff to uncover it would be frustrated by the reluctance of defendant's employees to testify. Consequently, unless the plaintiff can seek the aid of some presumption, he has little chance of recovery.[36] It is submitted that there are no tailor-made presumptions available to the plaintiff in the safe deposit situation. *Res ipsa loquitur* requires that exclusive control be in the defendant.[37] In the safe deposit relation, the depositor has a measure of control. Accordingly, if the relation is characterized as landlord-tenant, etc., the result is that the depositor has little chance of recovery.

But if the relationship is characterized as that of bailor-bailee, this hardship is removed, for it is a common law rule that upon failure of the bailee to account for goods in his possession, a presumption of negligence arises.[38] Appropriately enough, the reason for this rule is that the bailee is in a better position than the bailor to explain how the loss occurred.

But there is a difference of opinion as to the effect of this common law presumption. Some courts hold that it shifts to the defendant the burden of presenting the evidence *and* the burden of persuading the jury by a preponderance of the evidence of the defendant's freedom from negligence.[39] The effect of this second

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33. DOBIE, BAILMENTS AND CARRIERS § 67.

34. 9 WIGMORE, EVIDENCE (3rd. ed. 1940) §§ 2485-2487.

35. BROWN, PERSONAL PROPERTY § 87.

36. BROWN, *op. cit., supra* n. 35.

37. PROSSER, TORTS § 43.

38. DOBIE, *op. cit., supra* n. 33, § 17.

39. *McDonald v. Wm. D. Perkins and Co.*, 133 Wash. 622, 234 Pac. 456 (1925); *Security Storage and Trust Co. v. Martin*, 144 Md. 536, 125 Atl. 449 (1924); *Cussen v. So. California Savings Bank*, 133 Cal. 534, 65 Pac. 1099 (1901).

burden is to establish the defendant as negligent, and to require him to disprove it. But in order to accomplish the latter, the safe deposit company must first explain the disappearance and then show that it was through no fault of its own. In those cases in which the defendant is unable to explain the disappearance, it is never completely able to exonerate itself from negligence. Consequently, it can never be said as a matter of law that the defendant was not negligent, so as to obtain a directed verdict.[40]

Other courts hold that the effect of the presumption is merely to shift to the defendant the burden of presenting evidence, and that the burden of persuasion always remains with the plaintiff.[41] Following this view, the safe deposit company is considered to have satisfied the presumption when it introduces evidence showing that its degree of care conforms to the standard followed by similar institutions throughout the community.[42] At that point, the burden of introducing evidence shifts back to the plaintiff. If the plaintiff then rests his case, may the judge direct a verdict for the defendant?

That precise question was taken to the Court of Appeals in *Viehlman v. Manufacturers Safe Deposit Co.*[43] The plaintiff, a business woman of 69 years of age and of a very good reputation, rented one of defendant's safe deposit boxes. In her complaint she alleged that $10,000 which she had deposited had disappeared from her box. At the trial, defendant introduced evidence as to the construction of the vault, the various anti-burglar devices used by it and similar concerns, the care and management exercised in the vault's operation, and as to the trustworthy background of the vault's hand-picked custodian and his assistant. At the close of the evidence, the trial court granted defendant's motion for a directed verdict.[44] The Appellate Division unanimously affirmed.[45] The Court of Appeals reversed (4-3), Chief Judge Loughran writing for the majority, Judge Desmond for the dissent.

Chief Judge Loughran stated that the evidence showed depositors had on occasion been admitted without showing identifi-

40. *Security Storage and Trust Co. v. Martin, supra* n. 39; *McDonald v. Wm. D. Perkins & Co., supra* n. 39.

41. *Koczora v. Standard Safe Deposit Co.*, 221 Ill. App. 43 (1921); *Bohmont v. Moore*, 138 Neb. 784, 295 N. W. 414 (1940); *Schmidt v. Twin City Bank*, 151 Kan. 667, 100 P. 2d 652 (1940); *Shaefer v. Washington Safe Deposit Co.*, 281 Ill. 43, 117 N. E. 781 (1917).

42. See cases cited *supra* n. 41.

43. 303 N. Y. 526, 104 N. E. 2d 888 (1952).

44. 198 Misc. 861, 99 N. Y. S. 2d 727 (Sup. Ct. 1950).

45. 278 App. Div. 685, 103 N. Y. S. 2d 833 (1st Dep't 1951).

cation, that no record was kept of the people who came in or went out, that ordinarily only one employee was present to care for over 1900 boxes in the vault, and reasoned that from this evidence fair minded men could draw more than one inference. Consequently, the question of negligence should have been left to the jury.

Judge Desmond for the dissent stated that the relation between the safe deposit company and its depositor is not that of bailor-bailee, because the safe deposit company did not have exclusive possession over the contents of the box. Consequently, the plaintiff was not entitled to the presumption of negligence. Without the presumption, plaintiff had failed to state a cause of action, because she had failed to show any causal connection between defendant's alleged negligence and the disappearance. Hence, the defendant was entitled to a directed verdict.

It is submitted that the characterization of Judge Desmond, theoretically speaking, is true. But in the light of practical results, characterizing the relation as one of bailment achieves a just and fair solution of a unique problem. It shifts the burden of producing evidence to the defendant. Any other characterization would compel the depositor to sue on general negligence principles, and since there is no available legal device to permit the shifting of the burden to the defendant the result would ordinarily be to deny recovery.

The opinion of the majority, by declaring that the question of negligence was for the jury, has established a precedent for similar fact situations, and to that extent defined the standard of care for safe deposit companies.[46]

IX. Torts

The law of torts must effect a reasonable compromise between conflicting interests, marking out the limits of permissible invasion of one man's interests by another. The courts in the development of the common law have been guided by and have often expressly referred to, "public policy" as the final standard of justice.[1] Tort law being primarily non-statutory, its growth and development depend on the temperament of any given court. The exigency of adhering to past rules or precedents may conflict with a just disposition of the case before the court. The 1951-1952 term of the New York Court of Appeals illustrates the successful adjusting of

46. See Prosser, *supra* n. 37, § 41.

1. Pound, *Interests in Personality*, 28 Harv. L. Rev. 343 (1915).