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Personal Property

James A. Knox

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terminated, the lessee was allowed recovery of damages from Western Union measured by the loss attributable to the delay in the delivery of the money order telegram.

Richard S. Woods.

PERSONAL PROPERTY

DAMAGES—NON-WILFUL CONVERSION OF TIMBER

Arkansas. The case of *Burbridge v. Bradley Lumber Company*¹ was an action for damages for conversion of timber. Defendant lumber company, under an honest but mistaken belief of ownership, entered land belonging to plaintiff and removed and converted to lumber some 500,000 board feet of timber. The market value of the stumpage, *i.e.*, the timber standing in the tree, was \$4.50 per thousand board feet, and the cost of converting the timber into lumber was \$11.61 per thousand. The finished product, lumber, had a market value of \$25 per thousand. Both parties claimed they were entitled to the net profit of \$8.89 per thousand.

The court discussed two conflicting rules of damages that had been applied in Arkansas in such cases. The two rules had caused considerable confusion and were identified as the *Eaton* rule and the United States rule.

The *Eaton* rule was followed in this case. The rule, as established by the case of *Eaton v. Langley*,² provides that the measure of damages is the value of the wood in its manufactured state, less the cost of the converter's labor and expenditures, provided that such expenses do not exceed the increase in value, in which event the plaintiff would be entitled to the value of the property as lumber less the increase in value.

The effect of this rule is to give the original owner whatever

¹ _____ Ark. _____, 239 S. W. 2d 285 (1951).

² 65 Ark. 448, 47 S. W. 123, 126 (1898).

increase in value there may have been over and above the actual cost of manufacture. The principal reason given by the court for its decision was that the *Eaton* case stated the "wisest and most just" rule. Several cases were cited as supporting the *Eaton* rule.³

The United States rule, which seems to be the more generally accepted rule, is to assess as damages the value of the goods as of the time and place of the conversion. This rule, of course, assumes the conversion to be innocent. Applied in this case, the rule would give the original owner only the stumpage value of the timber, allowing the converter whatever profit has resulted from his conversion. Several Arkansas cases are cited in the principal decision as supporting this rule.⁴

The *Eaton* rule appears to be the more just because if the United States rule is followed, the injury inflicted by the trespasser is borne in part by the innocent owner. The latter is deprived of the opportunity to make a profit on the thing converted. "Such a doctrine, as said by Chief Justice Cooley, 'offers a premium to heedlessness and blunders, and a temptation by false evidence to give an intentional trespasser the appearance of an innocent mistake.'"⁵

An exception to the *Eaton* rule will probably be made where the cost of conversion and the value added are "out of all proportion to the value of the original article."⁶ A leading authority cites the *Eaton* case and indicates that an increase of more than six hundred per cent may be sufficient increment in value to permit acquisition of a new title by the converter. "The idea seems to be

³ *Bailey v. Hammonds*, 193 Ark. 633, 101 S. W. 2d 785, 786 (1937); *Brown and Hackney v. Daubs*, 139 Ark. 53, 213 S. W. 4 (1919); *Bradley Lumber Co. v. Hamilton*, 117 Ark. 127, 173 S. W. 848 (1915); *Randleman v. Taylor*, 94 Ark. 511, 127 S. W. 723 (1910); *Central Coal & Coke Co. v. John Henry Shoe Co.*, 69 Ark. 302, 63 S. W. 49 (1901).

⁴ *Jones v. Vaughan*, 184 Ark. 174, 41 S. W. 2d 986 (1931); *Augusta Cooperage Co. v. Black*, 153 Ark. 133, 239 S. W. 760 (1922); *Bunch v. Pittman*, 123 Ark. 127, 184 S. W. 850 (1916); *Foreman v. G. D. Holloway & Son*, 122 Ark. 341, 183 S. W. 763 (1916); *United States v. Flint Lumber Co.*, 87 Ark. 80, 112 S. W. 217 (1908).

⁵ 239 S. W. 2d at 288.

⁶ *Ibid.*

that it must be sufficiently great to make an award of title to the owner of the materials 'gross injustice at the first blush.'⁷

CONDITIONAL SALES

Louisiana. The case of *Roy O. Martin Lumber Company v. Sinclair*⁸ involved two conditional sales of movable property. The property in question, which plaintiff vendor had sequestered, was a caterpillar tractor, three motors, two mules, two horses and two trailers. Plaintiff alleged it was the owner of the property and attached the two conditional sales contracts to its petition. As set out by the agreements, the fixed selling price of the tractor was \$4,375.57, while the price of the other movables was \$3,783.14. The contract for purchase of the tractor was, in substance, that the vendor agreed to sell and the vendee agreed to buy, for the fixed selling price (\$4,375.57) to be paid by the vendee at \$1.50 per thousand board feet for all logs delivered to the vendor's plant. It provided for weekly settlements, and the amount due the vendee for the hauling was to be credited on the purchase price. A similar arrangement was made for purchase of the other movables. A \$624 balance had not been paid at the time the property was sequestered.

The court affirmed the dissolution of the sequestration and allowed the defendant \$1,200 damages, which amount was not regarded as excessive considering the loss of the use of the property for several days, attorneys' fees, and the cost of obtaining a surety. The reason for the decision was that Louisiana will not enforce a conditional sale, *i.e.*, a sale where the vendee is unconditionally bound for the purchase price and the vendor is to remain the owner of the property until the price is paid. The court cited several decisions to this effect.⁹ A leading case states very clearly

⁷ BROWN, *PERSONAL PROPERTY* (1936) § 24.

⁸ 220 La. 226, 56 S. W. 2d 240 (1951).

⁹ *Thomas v. Philip Werlein, Ltd.*, 181 La. 104, 158 So. 635 (1935); *Byrd v. Cooper*, 166 La. 402, 117 So. 441 (1928); *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*, 121 La. 152, 46 So. 193 (1908).

Louisiana's view toward conditional sales. "A so-called conditional sale, or sale by which the vendee is to become at once unconditionally bound for the price and the vendor is to continue to be the owner of the property until the price is paid, is not possible under the laws of this state. A petition wherein the vendor under such a contract claims the ownership of the property sold shows no cause of action."¹⁰ Under the Louisiana Civil Code a sale cannot be accomplished unless title passes. The manifest intention of the parties in these agreements is that there should be a sale, and the stipulation of continued ownership is held inconsistent with that intention. The seller's remedy in Louisiana is to enforce his vendor's lien or to sue for dissolution of the sale.¹¹

It was held that the method by which, or the time when, the purchase price was to be paid should not be controlling in the principal case. An absolute agreement to purchase and sell for a fixed purchase price was imposed on the parties. Plaintiff was not allowed to assert that the sequestration should be upheld on the basis of his vendor's lien because he had made the inconsistent claim of ownership in his petition.

LIMITATION ON LIABILITY—BAILEE FOR HIRE

*Oklahoma. Fisk v. Bullard*¹² is a case which held a transportation company liable as a bailee for hire for loss of a bag which had been checked after plaintiff had completed his trip. Plaintiff boarded a bus operated by defendant transportation company in Oklahoma City and upon arrival in Holdenville checked his bag by delivering it to defendant Fisk. He was given a check which recited that the storage charge was ten cents per day and that "liability of this check [was] not to exceed \$25.00." Next day plaintiff returned to the bus station and found that the portion of the tag issued to him which had been retained by defendant Fisk

¹⁰ Barber Asphalt Paving Co. v. St. Louis Cypress Co., 121 La. 152, 46 So. 193 (1908). The statement is found in the syllabus prepared by the court.

¹¹ LA. CIV. CODE (Dart, 1945) Arts. 2561, 2564, 3227.

¹²Okla....., 239 P. 2d 424 (1951).

was placed upon the wrong bag. At the suggestion of Fisk, who made out a claim for him, plaintiff negotiated with the claim agent of defendant transportation company. All this was to no avail, and plaintiff brought suit. Among the defenses of the transportation company was the contention that the limitation of liability on the checkroom tag was valid.

The court stated that it had held that a warehouseman or bailee for hire could not limit its liability for the loss of property held by it.¹³ The opinion does not touch upon whether or not a sufficient, actual notice of limitation of liability would be effective. Ordinarily a bailee and bailor can agree to limit liability if there is a conscious meeting of the minds on the point. In the absence of conscious agreement it seems fair that the bailee should be liable for the full value of the thing bailed if it is of the class of article he holds himself out as accepting for bailment.

LIABILITY OF BAILEE—PRESUMPTIONS

Texas. The case of *Trammell v. Whitlock*¹⁴ was a bailor-bailee controversy over damage to a cargo trailer. Plaintiff bailor made an express oral agreement with defendant bailee for the loan of a trailer for ten days, and defendant agreed to return it in as good order as when received, except for usual wear and tear. The agreement was for the mutual benefit of the parties. Delivery to the bailee was established inasmuch as the court found that the trailer was left parked in front of defendant's place of business and under one of defendant's trucks. Plaintiff was later told the trailer was damaged in a wreck and that defendant would repair it, but no repairs were made and plaintiff repossessed it off a trailer lot. Actually, the bailee had loaned the trailer to an employee whose brother wrecked it in Arkansas. No proof as to how the wreck occurred was offered. Only a single issue of liability was submitted based on the contract.

¹³ Citing *Oklahoma City Hotel v. Levine*, 189 Okla. 331, 116 P. 2d 997 (1941).

¹⁴*Tex.*....., 242 S. W. 2d 157 (1951).

The court stated that it would be erroneous to say that under such agreement the bailee was an insurer of the trailer. Liability must rest on a failure to exercise reasonable care for the bailed article, as in the usual case of a bailment for mutual benefit. If, assuming the fact of bailment, evidence presented a fact question of negligence, then the mere finding of bailment would not support a judgment for the plaintiff; but if, on the same assumption, the record compelled the conclusion of negligence, judgment should have been rendered for the plaintiff. Here the record compelled the conclusion of negligence because the bailee's explanation, consisting of the mere fact of the wreck of the trailer in the hands of someone else associated with him (though not an employee) was no more of an explanation than if the bailee simply said he did not know how the trailer came to be damaged. The inference was that the bailee wrongfully let the trailer out of his possession, and this strengthened rather than destroyed the existing presumption of negligence.

As to the burden of proof, the whole case rests on the bailor, but when goods have been lost or returned in a damaged condition, and the bailee's liability depends on his negligence, the fact of negligence may be presumed, and the bailee will have to show other cause for the loss. The bailee is in a better position to explain the loss. These principles are supported by the weight of authority.¹⁵

But it is well to note that the presumption spoken of is not a true presumption. As pointed out by Judge Learned Hand in *Alpine Forwarding Company v. Pennsylvania Railroad Company*,¹⁶ "The presumption on which the bailor may rely is a mere rule for the conduct of the trial. It puts upon the bailee the risk of a directed verdict if he does not meet it, but does no more; once he has done so, it disappears from the case. Thus, it can

¹⁵ See cases collected in 8 C. J. S., *Bailments*, § 50, n. 87; 6 AM. JUR., *Bailments*, § 371, n. 17. And see *Rhodes v. McDonald*, 41 Tex. 478, 172 S. W. 2d 972 (1943); *Rhodes v. Turner*, 171 S. W. 2d 208 (Tex. Civ. App. 1943); *Callihan v. Montrief*, 71 S. W. 2d 564 (Tex. Civ. App. 1934).

¹⁶ 60 F. 2d 734, 736 (2d Cir. 1932).