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RIGHTS OF BAILOR AGAINST A THIRD PARTY FOR AN INJURY WHEN BAILEE HAD CHATTEL IN POSSESSION AND CONTRIBUTED TO THE INJURY.

The recent case of *Gilson v. Bessemer & L. E. R. Co.*, 75 Atl. Rep. 195, is a very interesting case on the question of what rights the bailor of a chattel has against a third party when his bailee by negligence contributes to the negligent injury of the

third party. There are two views on this question, one imputing the negligence of a bailee to his bailor and the other allowing the bailor to recover. The latter view was adhered to by the court in this case. The view taken by the court was that "Where the owner of a livery stable lets out a horse and buggy and the horse is killed at a grade crossing by the joint negligence of the bailee and the railroad company, the negligence of the bailee is not to be imputed to the owner of the horse, so as to prevent him from recovering from the railroad company."

The court then shows what a bailment is and that the relation between a livery stable keeper and hirer of horse and buggy is that of bailor and bailee. In arriving at the conclusion that the negligence of the bailee is not to be imputed to the bailor, the court seems to rely largely on recent text books as *Edwards on Bailments, Van Zile on Bailments* and *Thompson on Negligence,* also citing the case of *Bard v. Yohn,* 26 Pa. 486. These text books argue that the bailee is not a servant or under control of the bailor and because he does not stand in the place of the bailor his negligence cannot be imputed to the bailor. The bailor and bailee are independent parties and hence the doctrine of respondant superior cannot be involved.

There are not many cases on the subject and a review of them shows that the courts have taken both sides on this question. The court in *Hirlihy v. Smith,* 116 Mass. 265, in deciding the right of a third party against a bailor because of bailee's fault laid it down as law that "The owner of a horse and carriage is not liable for an injury caused by the negligent driving of a borrower, to a third person if they were not being used at the time in the owner's business." By applying this principle the bailor could not sue the third party because the bailee was not his agent.

A remarkably strong case supporting this doctrine is that of *New Jersey Electric Ry. Co. v. New York L. E. & W. Ry. Co.,* 61 N. J. L. 287; 43 L. R. A. 849. The court made a very exhaustive review of the cases in point and held in conclusion that "The negligence of the bailee or his servants or agents is not imputable to the bailor, and will not prevent recovery."

In this case the plaintiff let out to another railroad company a locomotive and cars. The defendant was a street railway com-

pany whose tracks crossed those of the second railway company. The jury by a special verdict found that negligence on the part of both parties had contributed to a collision at the crossing point of the roads. In this collision the rented locomotive and cars were injured. After showing that where there was no negligence on part of the bailee the bailor could recover against a third party the court went on to say: "The general property remains in the bailor and the bailee only has a special interest for the express or implied objects of the bailment. Under these general rules now well established as governing the contract of bailment, it would be entirely too artificial to say that no right of action existed by the bailor against a third party as a wrongdoer for injury by negligence or otherwise, to the chattel which was the subject of bailment. . . . It would seem, upon reason. that there could exist no objection to the joint liability of the wrongdoer and the bailee when the joint negligent act of both caused the injury."

The distinction between the relation of bailor and bailee and that of master and servant was then pointed out. No agency existed in this case to bring it under the agency doctrine of imputable negligence.

Analagous cases were then taken by the court. Cases were cited showing that negligence of one passenger is not imputable to the railway company, which is a common carrier of all passengers. The court said here, "There must exist concurring negligence in some respect in the railway company." The Court also laid stress on the fact that the owner of a reversionary interest of chattel has the same right of action in respect to injury thereto as in the case of real property. *Halsey v. Lehigh Valley Ry. Co.*, 45 N. J. L. 26; *Potts v. Clarke*, 20 N. J. L. 536. Continuing, the court distinguishes between the bailment of a common carrier which is an insurer of goods entering into a particular contract of bailment, and the bailment of chattels per line.

In conclusion the court said, "The bailee was bound to use reasonable care and diligence in the preservation of the property from injury. The defendant in the operation of the electric car was bound to exercise reasonable care in avoiding injury to the property of which the plaintiff was the owner. It would seem that the intervention of the negligence of the bailee could not shield the defendant from injury caused by its own negligence.

Both might have been selected as joint tort feasors, or the action could be maintained against either. . . . Each is liable upon its own negligence and the negligence of the bailee is not imputable to the plaintiff as a shield to the defendant against recovery. The case of *Bard v. Yohn*, 26 Pa. 486, cited in the case under comment accords with this view.

An interesting analogous case is that of *Boehm v. Bethlehem*, 4 Pa. Supr. Ct. 385. It was held that the owner of a building was not prevented from recovering from a borough for damages from an overflow caused by the negligent obstruction of a sewer because his tenants had thrown some of the obstructions into the sewer.

The opposing view is very strongly supported. In the case of *Svealnss Co. v. Vicksburg L. & P. Ry. Co.*, 153 Fed. Rep. 774, it was held that contributory negligence of a compress company which had possession of the cotton as bailee at the time it was destroyed is imputable to the owner and contributed a defense. Here the insurance company was subrogated to the rights of the owners of the cotton and because of the negligence being imputed to owner could not recover. The bailor in this case had no knowledge of the negligence of the compressing company which left cotton on a platform where sparks from passing engines could set it on fire. Hence acquiescence could be no reason for imputing negligence to the bailor. Somewhat analogous is the imputing of the negligence of a consignor to his consignee. *McCarthy v. Louisville Ry. Co.*, 102 Ala. 193.

Another case of cotton being injured in the hands of a bailee is that of *Ry. Co. v. Tankersley*, 63 Tex. 57. Here the court in speaking of the rights of the plaintiff said: "For if the cotton was stored with C. C. Wilson & Co. then they were the bailors of the plaintiff. And if it was in an exposed and dangerous place and this was known to Wilson & Co., or might have been known by 'slight care and attention' on their part and that cotton was destroyed by reason of being so exposed, then the negligence in this regard would be imputable to appellee and would constitute a defense to his action against appellant."

A similar line of reasoning is followed in the case of gratuitous bailee. The case of *Ry. Co. v. Sims*, 77 Miss. 325, is an example of this. There the court was speaking of the rights of bailee

and bailor against third parties, and said: "Whatever entitles to a recovery entitles either bailor or bailee to such recovery. *E converso* whatever forbids a recovery to the bailee will also defeat the bailor's action.

Another case of gratuitous bailee is that of *Welty v. Indianapolis & Vincennes Ry. Co.*, 105 Ind. 55. It was decided by this case that "Where the borrower of a horse while intoxicated, rides the animal along a highway to a railroad crossing, and, there being no fence or cattle guard as required by statute, the horse turns and proceeds upon the track until killed by an approaching train the railway company is not liable to the owner in an action based upon the statute requiring such companies to keep their tracks securely fenced." The case of *Forbes Township v. King*, 84 Pa. St. 230, follows this view, holding that "The owner of a horse lent without line is responsible for the negligence of the borrower, and if the negligence of the latter contributed to an accident whereby the horse was killed, the owner cannot recover.

Thus it will be seen that there is strong authority on both sides. Those cases supporting the case under comment hold that there is no relation of master and servant and because the bailee is not an agent his negligence cannot be imputed to bailor or doctrine of respondent superior invoked.

The other side argues that the bailor gives up for a certain time and under certain conditions his right to a chattel. The bailee takes the chattel not as an agent, but as an independent party acting for himself. The bailor after a time acquires the right to possession of his chattel. He finds that it is injured and wishes to recover against a third party who committed the injury. But the courts hold his substitute has by his negligence contributed to the accident and is prevented from recovering. Hence the bailor cannot get any better rights than the party he clothed with rights of possession.

The supporting cases appear to assume that the only way negligence can be imputed is by the master and servant doctrine. But it seems as if there were a distinction between an agent and a substitute and that the doctrine of agent and principal need not be used to uphold the view of the courts opposed to the view of the case under comment.

As stated before, recent text books favor the doctrine of the case under comment. Otherwise opinion seems evenly divided. The bailor at one time had no rights against third parties. However, the right of bringing trover, replevin and trespass against third parties for injury to his chattel in the hands of bailee have been gradually acquired and this case seems to be in line with the increasing rights of the bailee to sue.

UNREASONABLE DISCRIMINATION IN THE EXERCISE OF THE POLICE POWER.

It has generally been agreed by all the courts that it is much easier to perceive and realize the existence and the sources of the police power than to mark its limitations or prescribe limits to its exercise. *Commonwealth v. Alger,* 7 Cush. (Mass.) 85. It is always easier, says Chief Justice Waite, to determine whether a particular case comes within the general scope of the power than to give an abstract definition of the general scope of the power itself which will be in all respects accurate. *Stone v. Mississippi,* 101 U. S. 814.

But in the recent case of *People ex. rel. Duryea v. Wilber,* 90 N. E. 1140, the New York Court of Appeals did not find it easy to determine whether that particular case came within the scope of the police power, since the decision was only reached by the close vote of four to three justices that an amendment to the Greater New York Charter, requiring that all public dancing academies and schools where a charge is made for teaching dancing shall procure a license authorizing the business to be conducted at the place named, was unconstitutional. This case was one of considerable public interest as the statute in question had been framed and passed through the urgent efforts of the Committee on Amusement and Vacation Resources of Working Girls as a measure to mitigate the evils of the cheap dance hall. In addition to the requirement of a license at a cost of $50 per year, the law laid down various other rules governing the conduct of such dancing academies, but only the resorts where dancing was taught for a consideration had to secure the license.

This classification the majority of the justices held was wholly an arbitrary and unjust discrimination, since it was based on a

ground that was without reason, "for there is nothing in the fact of teaching as distinguished from dancing without a teacher that has any injurious effect upon or relation to the morals, health, or good order of the community." Nor was the act intended as a revenue measure as the fees were all to go for the payment of the inspectors' salaries. The three dissenting justices felt that the wisdom of such legislation was no concern of the courts, and since the law only required a discrimination based on the police power to rest on a plausible reason, and there were reasons advanced which would at least support an argument in this case, they held it a constitutional exercise of the police power as promoting the public safety, health, and decency.

As a general rule, laws to be valid as police regulations must be necessary to the health, morals, order or safety of the community and no law prohibiting that which is harmless in itself or commanding that to be done which does not tend to promote the health, safety, or welfare of society, will be sustained, since it would be an unauthorized exercise of the power. *Ex parte Whitewell,* 98 Cal. 73. While the police power confided to the legislature is very extensive and in its exercise a very wide discretion as to what is needful or proper for that purpose is necessarily given to it, so that any business, occupation, rights, franchises or privileges becoming obnoxious can be regulated for the public welfare even to suppression, still this power is not above the Constitution, but rather begins only where the Constitution ends. *New Orleans Water Works Co. v. St. Tammany Water Works Co.,* 14 Fed. 194; *Wright v. Hart,* 182 N. Y. 330.

As a general proposition it may be stated that it is in the province of the law making power to determine whether the exigencies exist calling into exercise the power, and the exercise of its discretion in this respect is not the subject of judicial review. What are the subjects of its exercise and reasonable regulations is clearly established to be a judicial question. *T. W. & W. R. W. Co. v. City of Jacksonville,* 67 Ill. 37. The determination of the legislature as to what is a proper exercise of the power is not final or conclusive, but is subject to the scrutiny of the courts and a statute to be upheld must have some relation to the ends sought by the police power and the liberties of the people and the rights of property must not be unnecessarily invaded. If it violates no express commands of the Constitution and tends in a

degree that is perceptible and clear towards the preservation of the lives, the health, the morals, or the welfare of the community, and is not passed ostensibly in favor of the promotion of some distinct and totally different purpose, it comes within the jurisdiction of the legislature and the courts will sustain it. *People v. Gillson,* 109 N. Y. 389; *Wright v. Hart, supra; Chicago B. & Q. R. Co. v. State,* 47 Neb. 549.

But the most frequent source of unconstitutionality is not in the subject sought to be regulated, but in the existence of arbitrary distinctions as in the principal case. The rule requiring equality of treatment and protection is that such acts shall operate in their requirements with substantial equality to all. It is not sufficient that a classification has been enacted under the police legislation of the State, but it must appear that it is based upon some reasonable ground which has a proper relation to the attempted classification and is not a mere arbitrary selection. *Russel on Police Power,* p. 74. But such equality is not denied where the law operates alike upon all persons and property similarly situated. *Wallston v. Nervin,* 128 U. S. 578. Accordingly the Supreme Court has held that a municipal ordinance prohibiting washing and ironing in public laundries and washhouses within defined territorial limits, from ten o'clock at night till six in the morning, was a proper police regulation. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which is carrying out a public purpose and is limited in its application, if within the sphere of its operations it affects alike all persons similarly situated, is not unconstitutional. *Barbier v. Connolly,* 113 U. S. 27.

In the case of *People ex rel Farrington v. Mensching,* 187 N. Y. 8, decided in 1907, the Court held a statute unconstitutional which imposed a tax of two cents on each share of corporate stock of one hundred dollars of face value or fraction thereof. The tax was thus measured by the number of shares regardless of their actual value. All corporate shares were placed in one class, but all members of the class were not treated alike, the statute bearing heavily on some and lightly on others. The 1899 anti-department store law of Missouri was an interesting example of the application of the rule of the principal case. In that case a statute of Missouri provided that in cities of fifty thousand population, certain enumerated kinds of goods should

not be sold in the same building under a unit of management without paying a tax of from $300 to $800 fixed by the Board of Commissioners for each city and which was to be uniform only in the same city. This was held to create a purely arbitrary distinction and to be void. *State ex rel Wyatt v. Ashbrook,* 154 Mo. 375.

Statutes regulating the right to practice medicine or other professions but allowing the right to all who have the qualifications prescribed, do not deny equal protection. *People v. Phippen,* 70 Mich. 6; *State v. Green,* 112 Ind. 462. But if such a statute discriminates between persons engaged in the same profession or against citizens of other States, then equal protection is denied, as in *State v. Pennoyer,* 65 N. H. 113, where a statute was held unconstitutional which required one of two classes of physicians differing only in respect to the residence to be subject to the expense of obtaining a license from which the other party was exempt.

Where the act requiring any plumber before engaging in the business to take an examination and obtain a license, but permitted all members of a firm to pursue the business where one only had procured such a license and all the members of a corporation to pursue it where the manager only had procured such license, it was held that the act did not operate equally upon all of a class pursuing the calling under like circumstances and was invalid. *State v. Gardiner,* 58 Ohio St. 599. If a law is impartial on its face, yet is applied and is so administered as to operate a denial of equal justice, it may be declared unconstitutional. *Yick Wo. v. Hopkins,* 118 U. S. 373. But the possibility of maladministration is not sufficient ground. *Williams v. Mississippi.* 170 U. S. 213.

From the principles laid down and the illustrations given of their application, it would appear, however, that the New York Court of Appeals has properly applied the law in the principal case.

MALICIOUS INTERFERENCE WITH BUSINESS.

Although the Courts, both in England and in America, have very generally held the rule, since *Stevenson v. Newham* (1853), 13 C. B. 285, that bad motive by itself is no tort, and that an act

lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action, still the contrary opinion persists in presenting itself before the Courts.

The recent case of *Arnold v. Moffitt,* 75 Atl. (R. I.) 502, has applied this doctrine, settled so clearly in the famous case of *Allen v. Flood* (1898), App. Cas. 1, to an interesting and somewhat novel set of circumstances. It will be found upon examination that practically all the cases regarding malicious interference with business are those where the elements of conspiracy or breach of contract enter. In this case neither is present. The plaintiff, a contractor for electrical work, alleged ten instances where he claimed to have been delayed, hindered or discriminated against by the defendant, an inspector for the Providence Insurance Association. The defendant was charged with refusing and neglecting to make inspections within reasonable times, and at other times with maliciously requiring the plaintiff to make changes which were not required of other contractors. None of the counts were held to give a legal cause of action. Nevertheless, the plaintiff appeared to proceed on the theory that although the defendant may not have done any illegal act yet he was liable to the plaintiff by reason of the malicious character of his acts. But the Court held that as there was no proof of any illegal act on the part of the defendant, it was of no consequence that it might be made to appear that the defendant was actuated by malicious motives in what he did as inspector, and so gave judgment for the defendant.

The question whether malice is an essential element of the cause of action in cases of interference with business, and in fact what malice means in this connection, has been the subject of very lengthy discussion in the cases which have arisen in England and this country since the modern labor problem has become so acute. In this respect, the principal case is in an entirely different field, and yet the principles governing it are not different in any way from those laid down in the labor cases.

There were certain expressions used by the judges in the English cases of *Lumley v. Gye,* 2 El. & Bl. 216; *Bowen v. Hall* (1881), L. R. & 6 Q. B. Div. 333; and *Temperton v. Russell* (1893), 1 Q. B. 715, which might readily be taken as supporting the view that malice is the gist of the action, and Lord Coleridge (after-

wards Lord Chief Justice of England) based his dissent to the first two of the above cited cases on this point. However, in all of these cases the defendant had been guilty of an unlawful act in procuring the breach of a contract so that there was a tangible expression of malicious motive in a definite illegal act committed by the defendant in all three cases.

But in *Allen v. Flood, supra,* the judges expressly denied these implications, and in *Quinn v. Leathem* (1901), App. Cas. 495, a still more recent case, Lord Mac Naghten, in speaking of *Lumley v. Gye, supra,* said: "I have no hesitation in saying that I think that decision was right—*not on the ground of malicious intention* —that was not, I think, the gist of the action, but on the ground that the violation of a legal right committed knowingly is a cause of action, and that it is a cause of action to interfere with contractual relations recognized by law, if there is no sufficient justification for the interference."

It is a settled rule in England now, as laid down by Lord Watson in *Allen v. Flood, supra,* that, "Although the rule may be otherwise with regard to crimes, the law of England does not take into account motive as constituting an element of civil wrong. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent. But the existence of a bad motive in the case of an act not in itself illegal will not convert the act into a civil wrong for which reparation is due." The same case quotes the definition of malice of Judge Bayley in *Bromage v. Prosser,* 4 B. & C. 247. "Malice in common acceptance of the term means ill will against a person. But in the legal sense it means a wrongful act done intentionally without just cause or excuse." This has often been approved, although it eliminates motive and includes only "wrongful" acts intentionally done.

In this country the same general doctrine has been followed. "Malicious motives make a bad act worse, but they cannot make that wrong which in its own essence is lawful. As long as a man keeps himself within the law by doing no act which violates it, we must leave his motive to Him who searches the heart." *Jenkins v. Fowler,* 24 Pa. St. 308.

Malice has been said to exist when defendant's acts were done without right or justifiable cause with the unlawful purpose to cause damage or loss to the plaintiff. *Walker v. Cronin,* 107 Mass. 562.

In view, however, of the many unsettled points regarding the rights of trade and labor, the Massachusetts Courts have felt it wise to leave a possible qualification to the general doctrine, that bad motive by itself can never be a tort. "It is said also that where one has the lawful right to do a thing, the motive by which he is actuated is immaterial. If the meaning of this and similar expressions is that where a person has the lawful right to do a thing, irrespective of his motive, this motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person, if actuated by one kind of motive, has a lawful right to do a thing, the act is lawful when done under any conceivable motive, or that an act lawful under one set of circumstances, is therefore lawful under every conceivable set of circumstances, the first proposition does not commend itself to us as either legally or logically sound. In many cases the lawfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause, and this justification may be found sometimes in the motive alone and sometimes in the circumstances and motive combined." *Plant v. Woods,* 176 Mass. 492.

In the United States, malicious interference with business, when it takes the form of interference with a contract between two parties, has called forth a variety of diverse opinion. The weight of opinion, including the United States Supreme Court, holds with *Lumley v. Gye,* and *Bowen v. Hall, supra,* that if one maliciously interferes between two parties and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer. *Angle v. Chicago, etc. R. Co.,* 151 U. S. 1.

Some Courts go so far as to hold that the action lies even though the contract would not have been enforceable against the party who was induced to break it. *Perkins v. Pendleton,* 90 Me. 166. And it has been held actionable even to wrongfully deter others from entering into contracts or business dealings with a party. *May v. Wood,* 172 Mass. 11. *Contra, Guethler v. Altman,* 26 Ind. App. 587.

On the other hand, some decisions disagree with *Lumley v. Gye, supra,* and hold that an action commonly lies only for enticing a servant away from a master, or for procuring by fraud, threats or violence, the breach of a contract by a party thereto, to the damage of the other party. *Boulier v. Macauley,* 91 Ky. 135; *Chambers v. Baldwin,* 91 Ky. 121; *Boyson v. Thorn,* 98 Cal. 578.