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IS A CABLEGRAM REPUDIATING A CONTRACT EFFECTIVE AS AN  
ANTICIPATORY BREACH WHEN DELIVERED TO THE  
TELEGRAPH COMPANY.

In the case of *Wester v. Cassein Co. of America*, recently before the Court of Appeals of New York (100 N. E., 488), the Court has placed itself on record with a rather unique interpretation of the doctrine of anticipatory breach of contract, holding that notice of refusal to carry out the terms of a contract to be performed in the future was effective as a breach when delivered to the telegraph company, and that the fact that the telegraph company had been selected by the other party as a medium for correspondence, justifies the conclusion that the telegraph company was its agent and, therefore, a delivery to it was a delivery to the person for whom it was intended. It is submitted that the decision upon this point is wrong. As the Court points out, an acceptance of an offer by mail or telegraph takes effect at the time and place of sending. *Adams v. Lindsell*, 1 B. & Ald., 681; *Household Fire Ins. Co. v. Grant*, 4 Exch. Div., 216; *Anson on Contracts*, 2nd. Am. Ed., p. 33. But there is no analogy between an acceptance of an offer to contract and the repudiation of a contract already in existence. A repudiation

is of a totally different character from an acceptance. It is more of the nature of an offer, and indeed, in the principal case that is exactly what it was. A and B enter into articles of agreement to perform a contract at X. Later B telegraphs to A that he will not perform at X but that he will perform at Y. Is this anything more or less than an offer of a contract at Y, and would it not be the height of absurdity to say that A should know of this offer even though it is never communicated to him?

The cases cited by the Court in the principal case, although excellent authorities for the rule as to acceptance, give no license to the court to take liberties with a fundamental and well established rule of contracts, than an anticipatory repudiation, to be effective to put an end to a contract, must be communicated to the person to whom it was addressed, and furthermore, must be accepted and acted upon by him as a breach. *Zuck and Henry v. McClure & Co.*, 98 Penn. State, 541. To say that a delivery to the cablegram company was a delivery to the sendee is a mere fiction.

While we cannot agree with the court in the line of reasoning that it adopts, we are inclined to think that the case was correctly decided, but on grounds that the Court has failed to employ in reaching its result. Briefly the facts are as follows: The plaintiffs were residents of Argentina; the defendants were a New Jersey corporation doing business in New York. An agreement was entered into by which the plaintiffs were to sell and the defendants to buy all of the plaintiffs' output of cassein for three years; delivery and inspection to be at Buenos Aires. Before any shipments should be made the defendants were to establish a satisfactory line of credit, presumably in New York, although this is not clearly brought out in the statement of facts. Should the defendants allow more than a stipulated amount of cassein to accumulate at Buenos Aires, the plaintiffs were to have the privilege of shipping it to Liverpool, drawing on the defendants at New York for the price of the shipment. The New York Code of Civil Procedure provides that a non-resident, in order to maintain an action against a foreign corporation before the Courts of that State, must establish a cause of action which arose within the State. *New York Code of Civil Procedure*, Sec. 1780. So in the principal case, in order to bring the case within the jurisdiction of the New York Courts it was necessary to show a breach, in New York.

The defendant totally failed to establish credit as he had agreed to do. He allowed the cassein to accumulate at Buenos Aires. He notified the plaintiffs by the cablegram in question that he repudiated the contract. Now it is submitted that this cablegram may have been treated by the plaintiffs as an anticipatory breach had they chosen to regard it as such, inasmuch as the doctrine of *Hockster v. Delatour* has received such universal recognition, in spite of the faulty reasoning upon which it rests. But the plaintiffs did not choose to regard it as such, as is shown by their cablegram in reply, saying that they would hold the defendants to the performance of their contract, and would ship to Liverpool and draw on the defendants for the price of the shipments.

Up to this stage of the proceedings there had been no breach, the attempted anticipatory breach by the defendant being ineffective for the reasons stated above. When the goods arrived in Liverpool the plaintiffs, still following strictly the terms of the contract, presented the drafts on the defendant at New York for his acceptance. Acceptance was refused. This, we maintain, was the first and only breach of the contract, for by the articles of agreement the defendants were to accept drafts on them at New York for the cargo shipped to Liverpool. This was a breach in New York, and under the code provision the plaintiff was entitled to maintain his action in the Courts of that State.

The principal case is peculiar in that the lower Court in deciding for the defendant, committed an error of fact in holding that the plaintiff had accepted the defendant's cablegram as a breach, while the upper Court in reversing that decision, also committed error, but this time the error was one of law. While we agree with the lower Court in its contention that the cablegram was ineffective as a breach when delivered in New York, we disagree with it as to its effect when delivered to the plaintiffs at Buenos Aires. In neither place was there a breach created by the cablegram, for as stated above, an anticipatory repudiation cannot be a breach until accepted and treated as such by the other party. It was this principle that both the lower and the upper Court overlooked.

It may be possible to justify the decision on one other ground than that which we have mentioned. It is not made clear in the opinion where credit was to have been established, but it was presumably to have been in New York. Failure to do this was a present, positive breach of an important part of the contract.

Occurring in New York, it was sufficient to supply jurisdiction to the local Courts, but this also seems to have been omitted from the consideration of the Court.

We commend the dissenting opinion of Justice Ingraham of the lower Court, and believe it to be a true exposition of the law as it should have been applied to the facts of the principal case.

LIABILITY OF RESTAURANT KEEPERS FOR THE LOSS OF GUEST'S  
PERSONAL PROPERTY.

The plaintiff entered defendant's restaurant, removed his overcoat, hung it on a hook about two feet from a table at which he had seated himself, and while eating his meal the coat was removed. *Held*, that the coat was laid off at the defendant's invitation, was actually delivered to the temporary custody and exclusive possession of the defendant, and that the defendant was therefore liable to the plaintiff for its loss. *Wentworth v. Riggs*, 139 N. Y. S., 1082.

At common law and in the majority of American jurisdictions an innkeeper is an insurer of the property of his guests committed to his care except where loss was due to the act of God, public enemies, or negligence of the guest or his servant. *Robins v. Gray*, 2 Q. B., 501; *Norcross v. Norcross*, 53 Me., 163. In some jurisdictions this rule has been relaxed and the innkeeper is held to be merely *prima facie* liable. *Hulbert v. Hartman*, 79 Ill. App., 289; *Laird v. Eichold*, 10 Ind., 212; *Howe Mach. Co. v. Pease*, 49 Vt., 477. Keepers of restaurants are not innkeepers and are not subject to the same liabilities. *Ulzen v. Nichols*, (1894) 1 Q. B., 92; *Sheffer v. Willoughby*, 61 Ill. App., 263; *Carpenter v. Taylor*, (N. Y.) 1 Hilton, 193.

To make a restaurant keeper liable for the loss of an overcoat of a customer while such customer takes a meal or refreshments, it must appear that the coat was placed in the physical custody of the keeper of the restaurant or his servants, in which case there is an actual bailment, or that the overcoat was necessarily laid aside under circumstances showing at least notice of the fact and of such necessity to the keeper of the restaurant or his servants, in which case there is an implied bailment or constructive bailment, or that the loss occurred by reason of the insufficiency of the supervision exercised by the keeper of the restaurant for the pro-

tection of the property of customers temporarily laid aside. *Montgomery v. Ladjing*, (N. Y.) 39 Misc. Rep., 92. In *Ulzen v. Nichols*, *supra*, a case where an overcoat was lost by a customer in a restaurant, the Court says, "This appeal raises two questions, first, whether the defendant was a bailee of the coat; secondly, whether there was on his part any negligence, owing to a want of reasonable care." The doctrine as to the liability of restaurant keepers announced in the above cases is in harmony with the idea of bailment upon which the decision in the principal case purports to rest. The rule of liability which it announces is the generally accepted one and is undoubtedly correct, but the correctness of its application to the facts is open to question. There must be a bailment and a failure to use ordinary care to make the defendant liable.

To constitute a transaction a bailment there must be a delivery to the bailee, or his agents, and acceptance, either actual or constructive. *Houghton v. Lynch*, 13 Minn., 85; *Trunick v. Smith*, 63 Pa. St., 18; *Samuels v. McDonald*, 33 N. Y. Super. Ct. In case of actual delivery, such a full delivery of the subject matter must be made to the bailee as will entitle him to exclude for the time of the bailment the possession of the owner, and such as will require a redelivery of it by him to the owner or other person entitled to receive it after the term of bailment has expired. *Fletcher v. Ingram*, 46 Wis., 191; *Samuels v. McDonald*, *supra*. If the delivery is constructive there must be an intention to transfer the possession of the property. *Sherman v. Commercial Printing Co.*, 29 Mo. App., 31; *Trunick v. Smith*, *supra*.

In all the adjudicated cases where the facts were similar to those of the principal case, the existence of a bailment, determined by the control of the defendant over the article in question, and negligence on the part of the bailee have been held necessary to make the defendant liable.

In *Pattison v. Hammerstein*, (N. Y.) 17 Misc. Rep., 375, the owner of a theater was not liable where a coat was taken from a hook in the box occupied by the plaintiff, though the hook was placed there for the articles of the occupants of the box and it was necessary for the convenience of the patrons of the box that it be so used. The Court said there could be no liability on the part of the defendant because there was no bailment, which implies a delivery.

Where clothing was taken from a room in a Turkish bathing establishment which had been assigned to the plaintiff the owner

was held liable for its loss. *Bird v. Everhard*, (N. Y.) 4 Misc. Rep., 104. But the defendant was not liable where money and jewelry were taken from the plaintiff's clothes left on a bench in a five-cent bathing establishment. *Schneps v. Sturm*, (N. Y.) Misc. Rep., 168. In the first case the plaintiff left his clothes in a place designated by the defendant, and, in so doing, placed them under the exclusive control for the time being of the defendant. In the other case the defendant did not profess to care for articles, further than to provide a general supervision over them. The Court well says: "The measure of the defendant's obligation to his patrons was the careful observance of that which the facts show he assumed to perform."

Similar questions have arisen where articles have been left by customers in stores and the Courts have applied the same rules. In *Woodruff v. Painter*, 150 Pa. St., 91, the plaintiff was preparing to buy a suit of clothes and, by the direction of the shopkeeper's salesman, placed his watch in a drawer. The watch disappeared and the defendant was held to be chargeable as a bailee. Here the delivery was evident and there was a bailment. In *Bunnell v. Stern*, 122 N. Y., 539, the plaintiff's cloak was taken while trying on another, she having laid it aside in the presence of a saleslady but not at her request, and the defendants were held liable. The Court, *per* Vann. J., says, "They (defendants) invited each lady who came there to buy a cloak, to remove the one she had on and try on the one they wished her to purchase. . . . The obligation of the defendants would not have been greater or different if one of their number had met the plaintiff on the street and had not only expressly invited her to come to the store and buy a cloak, but had also requested her to take off her wrap and try on the one that he offered to sell her." On the other hand, in *Wamser v. Browning, King & Co.*, 187 N. Y., 87, the defendants were not liable where the plaintiff, at the request of a clerk, had gone into a part of the store alone, and, while trying on garments, his vest and contents were taken. The Court says: "Had the clerk been present attending upon him (plaintiff) and the clothing had been laid aside by his invitation before his eyes so that he had an opportunity to watch and care for it, a different question would have been presented."

Following the foregoing cases, the rule was laid down in *Simpson v. Rourke*, (N. Y.) 13 Misc. Rep., 230, that a restaurant keeper is not an insurer, but is only required to use the ordi-

nary care called for under all the circumstances of the case. In another case where the defendant maintained a checking system and gave notice by his bill of fare and signs on the wall that he was not responsible for lost property unless checked, he was not liable for the loss of a customer's coat hung on a hook on the wall. *Duckworth v. Codrington Co.*, 136 N. Y. S., 68. In this case the existence of a bailment was not even discussed. The same conclusion was reached in *Harris v. Childs' Unique Dairy Co.*, 136 N. Y. S., 160, where a coat was taken from a nail on the wall when the defendant maintained a checking system, gave notice that he was not responsible for lost property unless checked, and had a manager in attendance to protect the property of guests.

In view of the adjudicated cases reviewed it seems that the Court erred in holding the defendant liable in the principal case, when its decision purports to rest solely on the ground of bailment, it being extremely doubtful whether there was a delivery. The Court seems to consider the defendant liable if a bailment existed but did not mention negligence as a reason for defendant's liability as a bailee. Granting that there was a bailment, the defendant would not be liable if he used ordinary care. *Ulsen v. Nichols, supra*; *Simpson v. Rourke, supra*. The facts disclose no such degree of negligence as would render the defendant liable if he was in fact a bailee.