Torts - Bailments - Presumption and Burden of Proof as to Negligence of Bailee

William C. Antoine

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But New York recently refused an annulment to a petitioner who alleged that the defendant had fraudulently promised to love and cherish him, but after the marriage had failed to do so, holding that a mere change of mind is not sufficient to justify an annulment. The petition also had alleged a fraudulent representation by the defendant that she desired a family, but that after the marriage she had taken measures to prevent the conception of more than two children. This was not a sufficient allegation of fraud, the court held, in the absence of a further allegation that the defendant had misrepresented her intent at the time of expressing her wish. _Longtin v. Longtin_, 22 N.Y.S. (2d) 827 (1940).

Annulments have been granted for fraud where a citizen of a foreign country married a citizen of the United States only for the purpose of gaining preferential entry into America under the immigration laws. _Bracksmayer v. Bracksmayer_, 22 N.Y.S. (2d) 110 (1940); _Miodownik v. Miodownik_, 259 App. Div. 851, 19 N.Y.S. (2d) 175 (1940); reargument denied, 20 N.Y.S. (2d) 670 (1940); _Lederkremer v. Lederkremer_, 173 Misc. 587, 18 N.Y.S. (2d) 725 (1940).

But an annulment will be denied where the fraud has been condoned by the plaintiff’s acts of continuing the marital relationship after he has discovered the defendant’s fraud. _Morris v. Morris_, 13 Atl. (2d) 603 (Del. 1940); _Wirth v. Wirth_, 23 N.Y.S. (2d) 289 (1941).

**Torts—Bailments—Presumption and Burden of Proof as to Negligence of Bailee.—** Plaintiff stored certain automobiles in the garage owned by defendants. While so stored and while the defendants’ employees were on duty, the automobiles were stolen. In an action to recover damages for the loss, based on negligence, it was held, that when the bailor has proved the bailment and the damage or loss, the bailee then has the burden of showing that the damage or loss was not due to his negligence, and that he stands the risk of non-persuasion on the point. _Rowney v. Covey Garage_, 9 U. S. L. Week 2626, 111 P. (2d) 545 (Utah 1941).

Most jurisdictions apply the doctrine of _res ipsa loquitur_ in situations like that of the principal case. These courts hold that when the bailor shows the fact of the bailment, and that the goods were not returned or were returned in a damaged condition, he has made out a prima facie case, and the bailee must come forward and rebut the presumption of negligence that arises. However, there is a marked difference of opinion as to how much proof is necessary to rebut this presumption.

In some jurisdictions a small amount of proof is held sufficient. Thus where the plaintiff showed that his automobile had been stolen while in the parking lot of the defendant, it was held that although a prima facie case in favor of the plaintiff arises upon proof of delivery of and failure to return the bailed property, it disappears on a showing by either the bailor or bailee that the loss was caused by fire or theft, and the plaintiff must then prove that the theft was due to the defendant’s negligence. _Edwards Hotel Co. v. Terry_, 185 Miss. 824, 187 So. 518 (1939). In a similar case, where the plaintiff’s horses were burned to death while in the exclusive possession of the defendants under a bailment contract, the court said that a presumption of negligence arises when the bailed property is destroyed while in the defendant’s exclusive possession, but that this presumption is overcome by a showing that the loss occurred through the operation of forces not within the bailee’s control, and that the plaintiff then has the
burden of disproving the asserted cause of the loss, or of showing that the bailee's negligence co-operated with the destroying cause. *Hunter v. Ricke Bros.*, 127 Iowa 108, 102 N.W. 826 (1905). So also, where plaintiff left a sum of money in defendant's hotel which could not be found upon demand, it was held that when the bailee has shown that the loss resulted from burglary, theft, fire or from some other cause which does not of itself point to negligence on the part of the bailee, the prima facie case has been met, and the bailor then has the burden of proving negligence. *Goodwin v. Georgian Hotel Co.*, 197 Wash. 173, 84 P. (2d) 681, 119 A.L.R. 788 (1938).

A majority of jurisdictions, however, require the bailee to offer a greater quantum of proof in order to meet the bailor's prima facie case. It was so held where plaintiff stored his car in defendant's garage, and while in defendant's possession it was wrecked by the negligent driving of defendant's employee, the court saying that the prima facie case is not overcome by a showing on the part of the bailee that the property was burned or stolen or otherwise destroyed, but that the bailee must further produce evidence tending to prove that the loss, damage or theft was occasioned without his fault. However, it was noted, the effect of this rule is not to shift the burden of proof from plaintiff to defendant, but simply the burden of proceeding. *Employers' Fire Ins. Co. v. Consolidated Garage and Sales Co.*, 85 Ind. App. 74, 155 N.E. 533 (1927). Wisconsin is substantially in accord with this doctrine, holding that when the plaintiff has established his prima facie case the law presumes negligence to have been the cause, and the defendant has the burden of showing that the loss did not occur through his negligence, or, if he cannot affirmatively do this, that, at least, he exercised a degree of care sufficient to rebut the presumption of negligence. *Hildebrand v. Carroll*, 106 Wis. 324, 82 N.W. 145, 80 Am. St. Rep. 29 (1900); *Milwaukee Mirror and Art Glass Works v. C. M. & St. P. Ry. Co.*, 148 Wis. 173, 134 N.W. 379, 38 L.R.A. (n.s.) 383 (1912).

Some jurisdictions require more of the bailee. *General Exchange Ins. Corp. v. Service Parking Grounds, Inc.*, 254 Mich. 1, 235 N.W. 898 (1931) illustrates this. Here plaintiff had left his car in defendant's parking lot, which was enclosed by an 8-foot fence, with only one entrance and exit, and three attendants on duty. The court directed a verdict for defendant upon a showing by him that the car had been stolen. In reversing this the upper court held that under the circumstances an inference of negligence was almost irresistible, and that defendant had the burden not only of showing that the car had been stolen, but that the theft occurred without fault on defendant's part. In a similar case, where plaintiff's car was stolen from defendant's parking lot, the court said that if defendant relied on the proposition that the property was lost by theft or fire without negligence on his part, the burden is on defendant to prove these facts, including the lack of negligence, in order to rebut the prima facie case of plaintiff. *U Drive and Tour, Ltd. v. System Auto Parks, Ltd.*, 71 (2d) 354, 138 Cal. 303 (1937). In bringing forward his evidence to rebut this prima facie case in favor of the plaintiff, defendant, it has been held, must disclose as fully as he can the manner in which the loss occurred, the facts and circumstances surrounding it, and the precautions taken to prevent it. *Stevens v. Moore*, 139 S.W. (2d) 710 (Tenn. App. 1940).

At least one court has gone as far as to declare that the entire burden of proof shifts in such a case. Thus where plaintiff sued for the value of his automobile which was stolen while stored in defendant's garage, it was held that the burden of proof is on the bailee to show that the loss did not come about through its negligence. The court pointed out that this was not merely a burden of
going forward with the proofs, nor a shifting burden, but a burden of establishing before the jury by a preponderance of the evidence that its negligence did not cause the loss. *Huel v. Flour City Fuel and Transfer Co.*, 144 Minn. 280, 175 N.W. 300 (1919).

However, it must be noted in all these cases that if the bailor himself accounts for the loss and charges it to the bailee’s negligence, he has lifted from the bailee any burden the latter may have had, and until negligence is proved the bailee need say nothing. *Glover v. Spraker*, 50 Idaho 16, 292 Pac. 613 (1930).

WILLIAM C. ANTOINE.

**Torts—Unfair Competition—Trade Marks and Trade Names—Appropriating Another’s Trade Name for a Non-Competing Product.—** S. C. Johnson & Son, Inc., a large Wisconsin corporation, which originally manufactured only floor wax, but later added floor cleaners, varnishes, fillers, brushes, enamels, lacquers, waxes for motors and the like, to its line of preparations, sold its goods nationally under the registered trade-mark “Johnson’s,” which was conspicuously marked on all of its products. The corporation had never manufactured any sort of fabric cleaner. In 1932 the defendant Johnson Products Company began selling a fabric cleaning fluid and household cleaner. Defendant’s product bore a yellow label, similar to that used on plaintiff’s goods, with the word “Johnson’s” in large red letters and below it the word “Cleaner” in letters half the size. The legend “Copyright 1933, by Johnson Products Co., Buffalo, N. Y.,” appeared at the bottom of the label in small type. The products of the two organizations, though closely related, were not competing. Plaintiff, invoking the doctrine that when a good will is established under the owner’s name, given or assumed, he may protect it not only against the competition of those who invade his market, but also against those who use the name to sell goods nearly enough alike to confuse his customers, secured an injunction prohibiting defendant from using the word “Johnson’s” in connection with its product. *Held on appeal that the owner of the registered trade-mark “Johnson’s” for floor wax and similar products was not entitled to an absolute injunction against the continued use of the word for a household cleaner manufactured by the defendant Johnson which did not compete with the trade-mark owner’s products, but was entitled to an injunction against such use except in combination with the word “Cleaner” and the legend giving the manufacturer’s name in equally conspicuous type. *S. C. Johnson & Son, Inc. v. Johnson*, 9 U.S.L. Week 2410, 116 F. (2d) 427 (C.C.A. 3rd, 1940).

It is generally held that where a personal name has become the trade-mark for particular goods, that name may not be used as the trade-mark for the same or similar goods in such a way as to confuse ordinarily prudent purchasers as to the source of the goods. *K. Taylor Distilling Co. v. Food Center of St. Louis, Inc.*, 31 F. Supp. 460 (E.D. Mo. 1940); *Pro-Phy-Lac-Tic Brush Co. v. Abraham and Strauss, Inc.*, 11 F. Supp. 660 (E.D. N.Y. 1935); *Aunt Jenima Mills Co. v. Rigney & Co.*, 247 Fed. 407 (C.C.A. 2nd 1917); certiorari denied, 245 U.S. 672, 38 S.Ct. 222. A manufacturer is not allowed to palm off his product, either directly or indirectly, as that of another. *Socony-Vacuum Oil Co., Inc. v. Rosen*, 108 F. (2d) 124 (C.C.A. 3rd, 1939). He may not trade on another person’s goodwill, nor take advantage of his advertising; nor in any way commercially use as his own, the name which has become the commercial asset of another. *Great Atlantic & Pacific Tea Co. v. A. & P. Cleaners & Dyers, Inc.*, of Washington, Pa., 104 F. Supp. 450 (W.D. Pa. 1934). A merchant’s name, when used as a trade-mark,