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Liability of Parking Lot Operators for Car Thefts

LIABILITY OF PARKING LOT OPERATORS FOR CAR THEFTS

When a car is stolen from a commercially operated parking lot, the parking lot operator's liability usually depends on two issues: First, is the particular transaction a bailment or a lease? Secondly, assuming the transaction is found to be a bailment, is the ever-present sign or provision printed in the parking ticket which disclaims all liability for loss or theft of the parked car effective?

The recent case of *Nargi v. Parking Associates Corp.*[1] follows the usual pattern. The plaintiff's car was stolen from a parking lot operated by the defendant at New York's La Guardia Airport. The plaintiff had paid a nominal parking fee to leave his car in any available place on the defendant's lot. He locked the car and took the keys with him. The lot itself was fenced on two sides and bounded by a gulley at the rear. The front of the lot was unfenced and alongside a main highway, which enabled a thief to drive a car from the lot over a small curb and mingle with the traffic on the highway.

The defendant refuted liability for the theft on two grounds. He claimed the transaction amounted to a mere leasing of space, involving no duty of due care on his part; and that the parking ticket itself, which the plaintiff admittedly read, disclaimed all liability arising from loss or theft.

The court, in a non-jury trial, held for the plaintiff. It found, as a matter of fact, that sufficient possession and control of the car had passed to the defendant to constitute a bailment; that the duty of due care, implicit in a bailment, was violated by the defendant's improper fencing of the lot; and that the ensuing liability could not be diminished by the disclaimer of liability in the parking ticket.[2]

In drawing the distinction between a lease and a bailment, an overwhelming majority of the courts have held contrary to the principal case. Where the customer simply pays a fee, drives his car to any available place in the lot, locks the car and takes the key with him, most courts hold that possession and control of the car, necessary to constitute a bailment, does not pass to the parking lot operator.[3]

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[1]36 Misc. 2d 836, 234 N.Y.S.2d 42 (N.Y. City Civ. Ct. 1962).

[2]Ibid.

[3]Thompson v. Mobile Light & R.R., 211 Ala. 525, 101 So. 177 (1924); Suits v. Electric Park Amusement Co., 213 Mo. App. 275, 249 S.W. 656 (1923); Freeman v. Myers Auto. Service Co., 226 N.C. 736, 40 S.E.2d 365 (1946); Burcham v. Coney Island, 87 Ohio App. 352, 94 N.E.2d 280 (1949); Giles v. Myers, 62 Ohio L. Abs. 558, 107 N.E.2d 777 (C.P. 1952); Wright v. Sterling Land Co., 157 Pa. Super. 625, 43 A.2d

In the case of *Lord v. Oklahoma State Fair Ass'n*,[4] a parking lot operator was found not liable for the theft of the plaintiff's car where the plaintiff paid a small fee to gain entrance into the defendant's enclosure, parked his car in a spot selected by himself, and locked the car, taking the key with him. The court held this to be a lease and not a bailment on a finding that possession and control of the car were never turned over to the defendant, but were retained solely by the car owner. However, where such possession and control are delivered to the parking lot operator, the courts have consistently found a bailment.[5] In *Samdler v. Commonwealth Station Co.*,[6] a proprietor of a parking lot was held liable for the theft of the plaintiff's car where the plaintiff received a claim check and at the defendant's request left the keys in his car.[7]

The facts of the principal case are strikingly similar to those of the *Lord* case, while the result is quite opposite. Clearly, the latter case is representative of the majority approach,[8] but support for the holding in the principal case can be found in *Dunham v. City of New York*.[9] Dealing with a factual situation very similar to the *Lord* case and to the principal case, the *Dunham* case found that control and possession of the car, sufficient to constitute a bailment, had passed to the parking lot operator. The court reasoned that such a determination rested on the entire evidential picture rather than on any single fact, and that the jury, concerned with such a factual consideration, could reasonably find either way.[10]

Once a bailment is established, as in the principal case, there re-

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614 (1945); Feay v. Miller, 72 S.D. 185, 31 N.W.2d 328 (1948); Panhandle So. Plains Fair Ass'n v. Chappel, 142 S.W.2d 934 (Tex. Civ. App. 1940).

[4]95 Okla. 294, 219 Pac. 713 (1923).

[5]U. Drive & Tour Ltd. v. System Auto Parks, Ltd., 28 Cal. App. 2d 782, 71 P.2d 354 (Super. Ct. 1937); Malone v. Santora, 135 Conn. 286, 64 A.2d 51 (1949); Lee Tire & Rubber Co. v. Dormer, 48 Del. 578, 108 A.2d 168 (1954); Goodyear Clearwater Mills v. Wheeler, 77 Ga. App. 570, 49 S.E.2d 184 (1948); Marine Ins. Co. v. Rehm, 177 So. 79 (La. App. 1937); Auto Ins. Co. v. Syndicate Parking Co., 58 Ohio App. 148, 16 N.E.2d 239 (1937).

[6]307 Mass. 470, 30 N.E.2d 389 (1940).

[7]The distinction between a bailment and a lease has often turned on the following factors: leaving the keys in the car at lot attendant's request. Passero v. Diana Parking Station, 123 N.Y.S.2d 652 (Rochester City Ct. 1953); acceptance of a parking receipt and leaving the car unlocked: Schwartz v. Felman, 50 Ohio L. Abs. 222, 79 N.E.2d 355 (Ohio Ct. App. 1947).

[8]See note 4 supra.

[9]264 App. Div. 732, 34 N.Y.S.2d 289 (1942).

[10]It is apparently well settled that the question of whether or not a bailment was established is one for the fact finding body. Osborn v. Cline, 263 N.Y. 434, 189 N.E. 483 (1934).

mains the question of whether the bailee may contractually lessen or completely avoid the ensuing duty of due care imposed upon him.[11] The court in the principal case had little difficulty in disposing of this question, for the contractual provision in issue was in direct conflict with a statute, which provided in part:

> "No person who conducts or maintains for hire . . . [a] parking lot . . . may exempt himself from liability for damages for injury to . . . property resulting from the negligence of such person, his agents or employees, in the . . . maintenance of such . . . parking lot . . . and any agreement so exempting such person shall be void."[12]

Even in the absence of a comparable statute, the courts generally have found that attempts by a bailee to contract against his own or his employees' negligence violate public policy and are void.[13] While recognizing that the right to contract is a fundamental right as well as a constitutional guarantee,[14] the courts have, nevertheless, held that such a right may not and cannot infringe upon the public interest.[15] This doctrine has often been applied to bailees whose business is affected with a public interest,[16] and it is clear that the operation of a parking lot is affected with a public interest.[17]

However, where a particular contract provision is not found violative of public policy, it will be allowed.[18] The two provisions that are most often upheld by the courts are those which stipulate the value of the article to be bailed[19] and those which define or limit the

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[11]Soutier v. Kaplow, 330 Mass. 448, 115 N.E.2d 149 (1953); Fuelberth v. Splittgerber, 150 Neb. 309, 34 N.W.2d 380 (1948); Diamond v. Foote, 109 N.Y.S.2d 831 (Niagara Falls City Ct. 1952); Starita v. Campbell, 72 R.I. 405, 52 A.2d 303 (1947).

[12]N.Y. Gen. Bus. Law § 89-b.

[13]Jersey Ins. Co. v. Syndicate Parking Inc., 50 Ohio L. Abs. 329, 78 N.E.2d 692 (Ct. App. 1948); Atkins v. Racquet Garage Corp., 177 Pa. Super. 94, 110 A.2d 767 (1955); Baione v. Heavey, 103 Pa. Super. 529, 158 Atl. 181 (1932). See 6 Am. Jur. 270 (1959).

[14]U.S. Const. Art. I § 10.

[15]See note 13 supra.

[16]Denver Union Terminal Ry. v. Cullinan, 72 Colo. 248, 210 Pac. 602 (1922); Silvestri v. South Orange Storage Corp., 14 N.J. Super. 205, 81 A.2d 502 (1951); Miller's Mut. Fire Ins. Ass'n v. Parker, 234 N.C. 20, 65 S.E.2d 341 (1951).

[17]Philippine Air Lines, Inc. v. Texas Engineering & Mfg. Co., 181 F.2d 923 (5th Cir. 1950).

[18]Revenue Aero Club, Inc. v. Alexandria Airport, Inc., 192 Va. 231, 64 S.E.2d 671 (1951); Kravitz v. Parking Serv. Co., 6 Ala. App. 487, 199 So. 727 (1940).

[19]In Schoen v. Wallace, 334 Ill. App. 294, 78 N.E.2d 801 (1948), the plaintiff sent her mink coat, allegedly valued at $3,500, to a furrier for summer storage. The plaintiff and the defendant furrier stipulated by contract that the value of the coat was $100. Because the plaintiff, who had already insured the coat against any type of loss, wanted to pay only the minimum rate for storage, the storage

time during which the bailment is to remain in effect.[20] Even these provisions, however, are subject to certain limitations.

The first limitation is that a bailee cannot bind a bailor by any contractual provision unless the bailor had notice of such provision.[21] The mere retention of a parking receipt does not constitute notice of the terms written on the receipt.[22] The bailor considers a receipt to be only for purposes of identification, and cannot, therefore, be presumed to have agreed to anything further.[23]

The second limitation is that a provision printed in a parking ticket or on a sign posted in the lot will not be construed more strongly against the bailee.[24] A sign stating that the parking lot will close at 6 p.m. does not, in itself, relieve the bailee of his duty to care for a car remaining in the lot after such hour, even where the sign is called to the car owner's attention.[25] The courts have held that such a sign can reasonably be interpreted by the owner of a car to mean that no automobiles will be accepted after 6 p.m. and not that the bailee is, at that hour, relieved of his normal duties.[26]

Since it seems well established that a bailee cannot contractually eliminate either the entire or even a substantial portion of that duty implicit in a bailment,[27] his liability will most probably turn on whether the transaction was a bailment or a lease. This determination, unlike the extent to which a bailee may contract against his own negligence, interestingly enough lies in the jury's province.[28] It is for the fact finding body to decide whether sufficient possession and control passed to the parking lot operator. Given this treatment, the issue is, as it should be, highly flexible and susceptible to determination either way, depending on the particular facts.

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rate increasing proportionately with the stipulated value of the coat. The coat disappeared in storage, persumably due to the negligence of the furrier. The court, without discussing the effect of the stipulation on an insurer's right of subrogation, limited the plaintiff's recovery to $100, holding that it is more against public policy to allow this plaintiff to recover twice for the same coat than it is to allow the defendant to establish a liquidated limit on his possible damages. Accord, Blinder v. United States Fire Ins. Co., 103 F. Supp. 902 (E.D. Ill. 1952).

[20]Lee Tire & Rubber Co. v. Dormer, 48 Del. 578, 108 A.2d 168 (1954).

[21]Manning v. Lamb, 89 A.2d 862 (D.C. Munic. Ct. App. 1952); Lucas v. Auto City Parking Co., 62 A.2d 557 (D.C. Munic. Ct. App. 1948).

[22]Allen v. Southern Pac. Co., 117 Utah 171, 213 P.2d 667 (1950).

[23]Rappaport v. Storfer Bros. Inc., 207 Misc. 391, 138 N.Y.S.2d 584 (N.Y. City Ct. 1955); McAshan v. Cavitt, 149 Tex. 147, 229 S.W.2d 1016 (Tex. 1950).

[24]Langford v. Nevin, 117 Tex. 130, 298 S.W. 536 (Tex. Comm'n App. 1927).

[25]McAshan v. Cavitt, 149 Tex. 147, 229 S.W.2d 1016 (Tex. 1950).

[26]Ibid.

[27]See note 13 supra.

[28]See note 10 supra.