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Bailments—Misdelivery—Conversion; Chattel Mortgage—Assignment—Recording Statute; Corporations—Creditors—Statutory Liability of Directors; Evidence—Waiver—Dead Man Statute; Malpractice—Expert Testimony—Function of Jury

W. J. D.

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RECENT CASES

BAILMENTS—MISDELIVERY—CONVERSION. Plaintiff left a sum of money in an envelope with defendant for gratuitous safekeeping. Later, plaintiff was committed to the state hospital for the insane and while so confined signed an order authorizing her son to receive the envelope. Without knowing of the plaintiff's condition, but after checking the signature on the order with those on the bailed envelope, defendant delivered the envelope to the son. The bailor later sued for misdelivery of the property. *Held:* The bailee, not being guilty of gross negligence in delivering the bailed property to a third person, is not liable, notwithstanding the bailor's actual mental condition at the time of signing the order. *Maitlen v. Hazen*, 109 Wash. Dec. 172, 113 P. (2d) 1008 (1941).

According to the majority view, there are two aspects to the obligation imposed by the bailment contract. The bailee, besides owing the duty of using varying degrees of care in safeguarding the subject of the bailment from damage, depending upon the class of bailment, also owes to the bailor the duty of redelivering the property to him upon demand when the purposes of the bailment have been fulfilled. The degree of diligence that is exacted of each of the several classes of bailees in respect to the care of the thing bailed ordinarily has no application to the liability of the bailee in respect to its return. *Harlan State Bank v. Banner Creek Coal Corp.*, 202 Ky. 639, 261 S. W. 16 (1924). Misdelivery is conversion without regard to the care and diligence exercised by the bailee, *Jenkins v. Bacon*, 111 Mass. 373 (1873); *Hall v. Boston & Worcester R. R.*, 14 Allen 439 (1867); Notes (1921) 15 A. L. R. 687, (1926) 42 A. L. R. 138, (1928) 54 A. L. R. 1330, or his utmost good faith, *Baer v. Slater*, 261 Mass. 153, 158 N. E. 328 (1927); *Byer v. Canadian Bank of Commerce*, 8 Cal. (2d) 297, 65 P. (2d) 67 (1937). And the fact that the bailment is gratuitous does not relieve the bailee from the absolute liability for delivery to the wrong person. *Serry v. Knepper*, 101 Iowa 372, 70 N. W. 601 (1897); *Marlow v. Conway Iron Works*, 130 S. C. 256, 125 S. E. 569 (1924).

In the *Maitlen* case the court seems to hold the gratuitous bailee for only slight care in redelivery, confusing the prevailing rule as to the duty to care for the property with the duty to redeliver it. The result may be correct in the instant case, since the court also decided that there was sufficient evidence to support the finding that plaintiff was lucid when she signed the order authorizing delivery to her son. Moreover, it may well be desirable to reject the rule which makes the bailee a strict insurer for redelivery of the bailed property. But the *Maitlen* decision was reached without any conscious election to establish a minority rule. For this reason, and because an early Washington case imposed strict accountability upon the bailee by the application of orthodox principles of conversion, *Kahaley v. Haley*, 15 Wash. 678, 47 Pac. 23 (1896), the *Maitlen* case cannot be considered a definitive rejection of the majority doctrine.

W. J. D.

CHATTEL MORTGAGE—ASSIGNMENT—RECORDING STATUTE. *A* mortgaged an automobile to *B*, who recorded the mortgage. *B* assigned the mortgage to *C*, who did not record the assignment. Thereafter, *B* repossessed the automobile and sold it to *D*, taking *D's* mortgage and recording it. *B* then assigned *D's* mortgage to *E*, giving him a satisfaction of *A's* mortgage. *E*

recorded his assignment. *B* repossessed the automobile and delivered it *E*, who sold it. *C*, upon learning of the subsequent transactions, brought suit against *E* for conversion. *Held:* Under Washington statute, the assignee of a chattel mortgage must record his assignment in order to protect his title as against an innocent third party who, by fraudulent act of the assignor, paid value to said assignor for an assignment of a subsequent mortgage on the same property. *General Credit Corp. v. Lee James, Inc.*, 8 Wn. (2d) 185, 111 P. (2d) 762 (1941).

The applicable statute, and the only one relating to recording of assignments of chattel mortgages, is REM. REV. STAT. § 10616, providing that "any person to whom any . . . mortgage has been . . . assigned, may, after the assignment has been recorded in the office of the county auditor of the county wherein such mortgage is of record, acknowledge satisfaction of the mortgage, and discharge the same of record."

While the language of this statute is not mandatory, the interpretation placed thereon by our Supreme Court, insofar as third persons are concerned, gives the statute mandatory effect, the court holding that an unrecorded assignment of a mortgage is invalid as against subsequent bona fide purchasers. *Erickson v. Kendall*, 112 Wash. 26, 191 Pac. 842 (1920); *Seattle National Bank v. Ally*, 66 Wash. 610, 120 Pac. 94 (1912); *Summy v. Ramsey*, 53 Wash. 93, 101 Pac. 506 (1909); *Gottstein v. Harrington*, 25 Wash. 508, 65 Pac. 753 (1901). However, in these cases the mortgagee gave the subsequent purchaser a release, albeit unauthorized, of the mortgage; in the *Lee James* case the mortgagee gave the assignee of the subsequent mortgage a satisfaction of the prior mortgage, but no such satisfaction was given to the subsequent purchaser-mortgagor.

Notice of the first mortgage by its record makes it a duty of the subsequent purchaser in the exercise of proper diligence to inquire whether his vendor, the mortgagee, is still owner of the mortgage, and his omission to make that inquiry deprives him of the protection due a bona fide purchaser. *Oregon Trust Co. v. Shaw*, 5 Saw. 336 (C. C. D. Ore. 1878); *Burhans v. Hutcheson*, 25 Kan. 435, 37 Am. Rep. 274 (1881).

The failure to record the assignment does not invalidate the record of the mortgage itself. *Enos v. Cook*, 65 Cal. 175, 3 Pac. 632 (1884); *Burt v. Moore*, 62 Kan. 536, 64 Pac. 57 (1901), and, accordingly, several cases hold that a subsequent purchaser cannot avoid a prior mortgage on the ground that an assignment of such mortgage was not recorded, unless the vendor enters a satisfaction of the mortgage of record. *Middlekauff v. Bell*, 111 Kan. 206, 207 Pac. 184 (1922); *Peoples Trust Co. v. Tonkonogy*, 144 App. Div. 333, 128 N. Y. S. 1055 (1911).

Where the mortgagee assigned the mortgage, which assignment was not recorded, and then executed a fraudulent release to a subsequent purchaser, the latter could rely upon the release and be protected as against the unrecorded assignment. *Frank v. Snow*, 6 Wyo. 42, 42 Pac. 484 (1895). This is the rule applied in the previous Washington cases. The assignment statute is construed to protect a subsequent purchaser of the mortgaged property, giving him greater rights than his vendor had, where the assignment is not recorded. *A priori*, the same protection would be extended to subsequent assignees of the mortgage.

But it is going much further to hold, as the *Lee James* case does, that the protection of the assignment statute extends similarly to an assignee of a different and later mortgage which was clearly a junior mortgage

at the time of its execution. The theoretical dubiousness of this holding would produce more obvious practical difficulties in the form of redemption questions if a similar rule were announced for real property cases. Sound principles of statutory construction would seem to condemn such a construction of a statute so devoid of any indication that the legislature intended that result.

M. D. C.

CORPORATIONS—CREDITORS—STATUTORY LIABILITY OF DIRECTORS. A corporation was organized under the laws of Washington, and an affidavit was filed to the effect that the stated amount of capital with which it was to begin business had in fact been paid in. Actually, none of that stated amount had been paid. The corporation nevertheless transacted business, in violation of REM. REV. STAT. (Supp. 1939) § 3803-8 (1), and incurred the debt on which this action is based. Suit is by an individual creditor at law against a director of the corporation to enforce the defendant's statutory liability imposed by REM. REV. STAT. (Supp. 1939) § 3803-8 (2) for all debts resulting from such unlawful transaction of business. *Held:* This suit is equitable in character and is to enforce only a limited liability imposed by the statute, so all directors and creditors must be joined before such suit can be maintained. *Royer v. Maib*, 6 Wn. (2d) 286, 107 P. (2d) 335 (1940), *aff'd on rehearing*, 6 Wn. (2d) 294, 111 P. (2d) 593 (1941).

No prior case has been found in Washington in which this provision of our Business Corporations Act has been construed. The holding seems to be based on the court's conclusion that the liability imposed on directors participating in or not dissenting from the violation of this statute for "debts or liabilities of the corporation arising therefrom" is a limited one. In support of the holding, several cases are cited in which a creditor of the corporation was not permitted to sue directors in an individual action. *Horner v. Henning*, 93 U. S. 228 (1876); *Platner v. Hughes*, 200 Iowa 1363, 206 N. W. 268 (1925); *Webb v. Cash*, 35 Wyo. 398, 250 Pac. 1 (1926). However, each of those cases dealt with statutes of a different type from the one here involved; in each of them, a creditor was suing to enforce a statutory liability imposed on directors for permitting the corporation to incur debts in excess of the statutory limit, in which situation the statute allowed creditors to sue *for such excess*. In that situation the rule seems to be well established that only a representative suit for the benefit of all creditors covered by the statute is permissible, the underlying theory being that in that situation a common limited fund for the benefit of all eligible creditors is created, out of which fund no single creditor may obtain more than his proportionate share.

Under REM. REV. STAT. (Supp. 1939) § 3803-8, however, liability is imposed on directors for permitting or failing to dissent from the transaction of business by the corporation before the stated paid-in capital has been actually paid, and the liability is for "the debts or liabilities of the corporation arising therefrom." Here, the purpose of the statute seems to be to entitle each creditor whose claim is a result of such unlawful transaction of business to sue not only the corporation, but the defaulting officers and directors as well, *for the full amount of the debt*. It is submitted, therefore, that in fact there is no real limit to the liability imposed; that it extends to the full amount of all debts incurred by the transaction of business in violation of the statute. There is no element of a

common fund of limited scope such as there is when the liability is only for the excess of the debts over the statutory limit. The limit is not on the liability of the director, but merely on the number of corporate debts which are included within the statute.

This case, therefore, seems to fall within the rule stated in 13 AM. JURIS. 1012: "Where the liability of a defaulting officer is absolute and unlimited, except by the amount of the corporate debts which fall within the terms of the statute, and the amount which one creditor may collect will not reduce that which another may recover, . . . an action may be maintained by a single creditor to enforce such liability." And *Patterson v. Minnesota Mfg. Co.*, 41 Minn. 84, 42 N. W. 926 (1889), relied on by the plaintiff in the instant case, seems to be in point as support for his position.

M. O.

EVIDENCE—WAIVER—DEAD MAN STATUTE. REM. REV. STAT. § 1211 (the so-called "dead man" statute), while removing the common law interest-disqualification from witnesses, adds the proviso that an interested person suing or defending against the administrator, etc., of one deceased shall not be admitted to testify in his own behalf as to transactions had by him or statements made to him or in his presence by the deceased. In an action by deceased's widow to set aside a conveyance by him to defendant corporation, two of its officers and shareholders (deemed interested persons under the statute) were permitted to testify, over objection, to transactions between themselves and deceased. *Held:* the evidence was admissible, because, by herself testifying to the transactions, at which she too was present, plaintiff waived the protection of the statute. *Johnston v. Medina Improvement Club*, 110 Wash. Dec. 77, 116 P. (2d) 272 (1941).

The same question has arisen before. *O'Connor v. Slatter*, 48 Wash. 493, 93 Pac. 1078 (1908) (opinion by Judge Rudkin), held that such testimony on behalf of the estate did not waive the statute. "The prohibition of the statute . . . admits of no qualification or exception . . . ." In deciding the *Johnston* case the court took no notice of the *O'Connor* case, but relied upon a subsequent series of cases finding waiver of § 1211 in various circumstances—*Robertson v. O'Neill*, 67 Wash. 121, 120 Pac. 884 (1912) (after objectionable testimony, administrator sought by cross-examination to establish the estate's counterclaim); *Levy v. Simon*, 119 Wash. 179, 185, 205 Pac. 426 (1922) (administrator introduced parts of adverse party's testimony in a previous proceeding, whereupon adverse party introduced the remainder); *Johnston v. Clark*, 120 Wash. 25, 206 Pac. 914 (1922) (testimony elicited by administrator himself, on cross-examination); *Floe v. Anderson*, 124 Wash. 438, 214 Pac. 827 (1923) (administrator called adverse party as witness; adverse party's attorney cross-examined); *Gregory v. Peabody*, 157 Wash. 674, 290 Pac. 232 (1930) (one answer, probably not open to objection, followed by extended cross-examination of adverse party as to transactions and statements inferentially referred to). These cases seem easily distinguishable from the situation in the *Johnston* and *O'Connor* cases.

Nevertheless, considerable can be said for the result of the *Johnston* case. For one thing, there seems little reason for restricting the adverse party when an equally interested person testifies on behalf of the estate to transactions with deceased; one is as apt to lie as the other, and if one testifies, the other's version should be admitted. For another, the restric-

ion upon evidence imposed by the statute may not be wise. *See* Note (1936) 11 WASH. L. REV. 270; McCormick, *Tomorrow's Law of Evidence* (1938) 24 A. B. A. J. at 511 ("['Where one man's lips are closed by death, the other's must be closed by law'] has a specious equity which conceals a baneful potency for injustice. It is a sin against the light, when in the name of solicitude for the dead, the law permits one set of living folks to set off another's claim without a fair hearing."); *Report of Committee on Improvements in the Law of Evidence of the American Bar Association* (1938) 63 A. B. A. REP. 581 (permitting survivor to testify has aided in ascertaining truth, and it is recommended that statutes such as § 1211 be discarded); 2 WIGMORE, EVIDENCE (3d ed. 1940) §§ 578, 578a ("as a matter of policy, this survival of a part of the now discarded interest-disqualification is deplorable in every respect; for it is based on a fallacious and exploded principle. . . ."). Washington decisions have not, however, reflected any persistent adverse view of the policy of the statute. For example, there has been no consistent disposition to narrow construction; *cf. Sackman v. Thomas*, 24 Wash. 660, 673, 64 Pac. 819, 823 (1901) (strict construction), with *Nicholson v. Kilbury*, 80 Wash. 500, 141 Pac. 1043 (1914) (restrictive policy of the statute should be carried out). However, the court is finding increasing exceptions in the form of implied waivers; *see* the instant case, and those cited in support of it.

On the other hand, the "plain language of the statute", read whole, does not seem to permit of the result of the *Johnston* case. Hutcheson, *The Admissibility of Testimony Concerning Transactions With Decedents* (1925) 1 WASH. L. REV. 21. With due deference it is suggested that the question of the *Johnston* case cannot be finally settled until the court considers the prior contrary holding in *O'Connor v. Slatter*. M. B. C.

MALPRACTICE—EXPERT TESTIMONY—FUNCTION OF JURY. In a malpractice action against a physician for pain and suffering and permanent loss of eyesight resulting from the alleged failure to diagnose and treat properly an injury resulting when the plaintiff was struck in the eyes by liquid and fumes from an exploding refrigerator which he had been trying to repair, the expert witnesses called by each side sharply disagreed as to whether the physician should have applied water to the plaintiff's eyes. In holding that there was no case for the jury, the Washington court said: "Where physicians and surgeons of equal skill and learning, being in no way impeached and discredited, disagree in their opinions as to what the proper treatment of a patient should be, the jury in a malpractice action will not be allowed to accept one theory to the exclusion of another, and hence there is nothing on which a verdict by a jury can be based." *Peddicord v. Leiser*, 5 Wn. (2d) 190, 105 P. (2d) 5 (1940).

Ordinarily, of course, the fact that one expert is contradicted by another does not preclude the jury from accepting the testimony of the former. The Washington court apparently has restricted its exception to this universally accepted rule to disputes as to proper medical treatment, holding that the exception has no application to disputed questions of fact, in which case it is within the jury's province to reconcile any conflict in the expert testimony. *Gross v. Partlow*, 190 Wash. 489, 68 P. (2d) 1034 (1937). See also *Howat v. Cartwright*, 128 Wash. 343, 222 Pac. 496 (1924).

While but few courts have had an occasion to decide the narrow question thus presented, the Washington court stands alone in holding that there is no case for the jury in such a situation. In an Iowa case, in an

action against physicians for the negligent treatment of a patient where the testimony of experts as to whether the method of treatment adopted by the defendants was proper was conflicting, the court followed the normal rule and held the determination of the question was for the jury, commenting that "the value of expert opinion cannot be determined by counting noses, and, even though six physicians took one view and but one the other, the issue was for the jury to decide." *Tomer v. Aiken*, 126 Iowa 114, 101 N. W. 769 (1904). In *Bennison v. Walbank*, 38 Minn. 313, 37 N. W. 447 (1888), where the expert witnesses differed as to the conditions under which amputation should be resorted to under the particular circumstances, the Minnesota court held that it was for the jury to determine; and, in comparing and weighing the opinions of such witnesses upon a given state of facts, the jury must necessarily consider the relative value of the testimony of the different witnesses, having reference to their knowledge and experience, their freedom from bias, and the reasons they are able to give for their conclusions. The Nebraska court has followed a similar rule, recognizing that the jury is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Stohlman v. Davis*, 117 Neb. 178, 220 N. W. 247, 60 A. L. R. 658 (1928); *Hewitt v. Eisenbart*, 36 Neb. 794, 55 N. W. 252 (1893). The Colorado court has indicated that such a dispute should be decided by the jury. *Tadlock v. Lloyd*, 65 Colo. 40, 173 Pac. 200 (1918).

The Washington rule was first enunciated in *Dahl v. Wagner*, 87 Wash. 492, 151 Pac. 1079 (1915) where the court said that the rule has been "the uniform holding of this court". But the decision of the *Dahl* case was based on the logic of *Brydges v. Cunningham*, 69 Wash. 8, 124 Pac. 131 (1912), and as all the experts *agreed* in the *Brydges* case that certain treatment would not have been proper when they were questioned in light of all the facts, the *Dahl* case appears to have been unsupported by apt precedent.

It is true that it is enough to absolve the physician if the treatment employed has the approval of at least a respectable minority of the medical profession who recognize it as a proper method of treatment. *Lorenz v. Booth*, 84 Wash. 550, 147 Pac. 31 (1915). It is also true that a judgment against a physician should not be based upon mere speculation and conjecture. *Dishman v. Northern Pacific Benefit Assn.*, 96 Wash. 182, 164 Pac. 943 (1917). But a holding that a mere conflict in the expert *testimony* entitles the physician to judgment as a matter of law is anomalous and at variance with settled law and practice in comparable situations.

It is suggested in a well-considered note to the *Peddicord* case in 13 ROCKY MOUNTAIN LAW REVIEW 169 that as a practical matter it becomes nearly impossible to recover from a physician for improper treatment under the Washington rule because of the requirement of unanimity of testimonial opinion. Should a physician be given such an immunity?

It is submitted that no sound reason exists for making an exception in this situation to the general rule and that in the case of a conflict in expert testimony as to the propriety of medical treatment, the jury is entitled to resolve the conflict, taking into account the education, training and experience of the witnesses, their apparent objectivity or lack of it, their possible bias, the reasons given for their conclusions, their demeanor and such other considerations as are usually relevant to a witness' credibility. J. G.