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LIMITATION BY BAILEES AND BY LANDLORDS OF LIABILITY FOR NEGLIGENT ACTS

by

Charles C. Arensberg*

Louise Wright signed a lease for an apartment and garage space in the apartment. The lease was a form lease and referred to rules and regulations which were made a part of it. The rules and regulations specified that the landlord would not be responsible for loss or damage to the automobile stored from any cause whatsoever.

One evening Miss Wright left the car in the garage with the attendants. The next morning the car was gone. No explanation could be made of its disappearance. In a suit brought against the defendant landlord, the court, relying on the well known doctrine of Pennsylvania that a landlord may stipulate against liability for his own negligence, held for the defendant.¹ The covenant in the lease against negligence, the court said, was a "contract between persons conducting a strictly private business" and relating "entirely to their personal and private affairs," which could not be said to be opposed to public policy.²

Phoebe Downs' son drove her car to a parking lot. He delivered it with the key in the ignition to an employee in attendance and paid the thirty-five cent fee. He received a check which stated on its face, "Not responsible for fire or theft." When the boy returned about 8:30 P.M., the car was gone. It had been stolen. Phoebe Downs brought suit for the value of the car and recovered judgment against the defendants.³

Why is there a difference between the case of Louise Wright and that of Phoebe Downs? Louise and Phoebe both paid consideration for storing their automobiles in a certain space. They both relinquished complete control of the automobile to an agent of the landlord or of the parking lot owner. Furthermore, in Louise's case, she had not "leased" a particular spot or alcove in the garage for her own and no one else's use. She was not required or even permitted to park the car herself.

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¹Wright vs. Sterling Land Company, 157 Pa. 625; 43 A 2nd 614 (1945).

²Cannon vs. Bresch, 307 Pa. 31 (1932), Drew J.; Siegel vs. Philadelphia Record Company, 348 Pa. 245 (1944).

³Downs vs. Sley System Garages, 129 Pa. 68 (1937).

The courts of Pennsylvania have held repeatedly that while a bailee cannot limit his liability for negligence,⁴ a landlord can, since his contract with the tenant is a strictly private business and according to the Supreme Court in *Cannon vs. Bresch*, 307 Pa. 31, (1932) is "of no interest to the public or the state."

But surely the public or the state has as much interest in protecting tenants as it does in protecting owners of automobiles who park their vehicles temporarily for a nominal sum in a vacant lot. Indeed, in these days of severe housing shortages on the one hand and ample vacant space for storing automobiles on the other, the tenants' interests might be deemed to demand more attention. Such was not the case, it may be granted, in the overbuilt cities of 1932 when *Cannon vs. Bresch*, supra, was decided and the lease contract was a matter of no interest to the public or the state.

Would it not be better public policy to refuse to permit anyone to stipulate against his own negligence where the stipulation is not of the essence of the contract? Of course, if Louise had said to the landlord, "My car is old and I don't want to pay for insurance on it. I'll pay you \$5.00 a month less than everyone else here if you'll let me keep it in the garage, and then you need not be responsible for loss or theft.", that would be all right. The parties in that case would have bargained for the inclusion of the clause. The stipulation against negligence would really have been part and parcel of the contract and should in that case be enforced.

The converse situation seems equally sensible. Let us assume Louise knows the law and allows the landlord to stipulate against his own liability for negligence. She says, therefore, "My car is new and must be handled with care. So, I'll pay you \$5.00 a month more than everyone else in the apartment and you will be responsible for your own negligence in storing and watching the car." Here Louise has bargained for the exclusion of the clause. It is of the gist of the contract that she pay more for more protection.⁵

Generally speaking, however, the two situations described above are anomalous. Louise rarely bargains about each specific point of the long printed lease. She is interested in obtaining space and in the price she has to pay for it. If there is anything in the lease which is not "legal" in the lay sense of the word, she feels that the law will protect her ordinary rights.

⁴Except, of course, under public carriers' limitations of liability according to declared value under the Interstate Commerce Act and the Carmack Amendment (Act of June 27, 1906, 34 Stat. 584), and the Pennsylvania Act, for Intrastate shipments (Act of May 28, 1937, P.L. 1053, 66 Purdon S. Section 1177). See article in 18 Temple L.Q. 199 (1944): "Rights and Duties of Bailor and Bailee under the Law of Pennsylvania" and article "The Right of Bailees to Contract against Liability for Negligence" in 20 Harvard Law Review 297 (1907). A bailee successfully modified its liability in *Allam vs. Pa. R.R. Co.* 183 Pa. 174 (1897).

⁵*Shay vs. Sherwood* 66 Pa. 463 (1917) is an example of a definite agreement as to limitation of liability between tenant and landlord; the supplying of water without extra charge in return for a release of liability except for gross negligence was obviously part of the bargain between the parties and was enforced.

Where nothing is said, therefore, where the minds of the parties do not really meet on the question of what will happen if Louise comes one morning to the apartment garage and finds her car gone, although she gave it to the attendants' exclusive control the night before, where this happens, should not the courts declare that in the absence of proof of special agreement, public policy requires that the rules of bailment apply likewise to a lease?

Fine print is fine print just as much on a lease as on the back of a parking ticket. Is the placing of one's car in a parking lot any less one's "strictly private business" than entering into the lease of a garage space in an apartment? Does not the placing of one's automobile in a parking lot relate "entirely to one's personal and private affairs" to the same extent, no more and no less, than entering into the lease of garage space in an apartment?

The leading case in Pennsylvania on the subject of a landlord's limitation of liability for his own negligence is *Cannon vs. Bresch*, supra, (1932). There the statement of claim alleged that the lessee operated a hat shop in premises belonging to the defendant. The defendant was in possession and control of the rooms directly above plaintiff's showroom. The heating system was controlled and maintained by the defendant. During the night, water in the radiators on the floor above that occupied by plaintiffs, flowed from the air vents of the radiators and ran through the ceiling between the first and second floors onto the goods of the plaintiff. The valve through which water flowed into the boiler of the furnace was out of repair on that date, and had been out of repair for four or five months previous thereto, and the defendant had knowledge of this defect and had failed to repair it. It was because the valve was out of repair, and because the janitor in the employ of the defendant turned the water into the boiler and neglected to turn it off, that the boiler became flooded, and water forced through the pipes into the radiators created a pressure that opened the vents on the radiators, causing the flow of water therefrom which passed through the ceiling and into the demised premises, resulting in damage and loss to the plaintiff.

The defendant filed an Affidavit of Defense by way of a demurrer, raising the legal question that, by reason of a covenant contained in the lease exempting the landlord from negligence, the plaintiff had no cause of action. The court below sustained the affidavit of defense and entered judgment for the defendant which on appeal was affirmed. The court said:

"All that the law insists on in the case of the tenant's waiver of his landlord's responsibility is that it shall be plainly expressed. It was not unreasonable to assume that the covenant resulted in a lower rental value than would otherwise have been demanded. The parties had a right to bargain freely and agree upon their own terms."

But actually tenants in most cases do not bargain freely with landlords or agree upon or discuss the terms of the leases that they sign. They never see their landlord, but only an agent or representative with a printed lease which he has no

authority to vary. It is a typical "take it or leave it" situation. The terms, except for the rent, the space to be occupied and the length of the lease are never mentioned or considered by either party. This is not to intimate or propose that no term in a contract, if not the subject of special bargaining or agreement, should be binding, but simply to state that in the absence of special agreement as to particular terms, the law should scrutinize the fine print terms thoroughly to determine whether they are valid under public policy.⁶

It is interesting to note that the rule itself as applied to landlords is of rather recent promulgation, and stems from mere dicta of Mr. Justice Mestrezat in the case of *Perry vs. Payne*, 217 Pa. 252, (1907).⁷ The language from *Cannon vs. Bresch* to the effect that such contracts are a "strictly private business" relating entirely to personal and private affairs and therefore not a matter of interest to the public or the state, comes, however, from the case of *Woodbury vs. Post*, 158 Mass. 140, cited in *Perry vs. Payne*, supra.

In *Perry vs. Payne*, 217 Pa. 252, (1907) the owner of a building permitted two workmen employed by a contractor to use the top of the elevator as a stage for painting the upper part of the shaft of the elevator. The painters thereafter went to the bottom of the shaft and while at work there the elevator boy employed by the owner drove the elevator down the shaft and killed one of the men. The contractors had given the owner a bond conditioned that they should "protect and keep harmless the owner of and from all loss, costs and . . . damages . . . arising from accidents to persons employed in the construction of or passing near the said work, or for damages done to adjacent properties by reason of the construction of said work, or by depositing material in such a manner as to damage either the city or the individual."

In a suit in assumpsit on the bond the court nonsuited the plaintiff on the ground that the bond could not be construed to apply to acts of negligence of the owner himself. The whole atmosphere of the decision was a warning *against* such contracts, a wariness that to allow such construction there must be no doubt whatsoever of the intention of the parties. *Woodbury vs. Post*⁸ is cited as the only case which the plaintiff used for his unsuccessful contention. The latter case is distinguished on the ground that the release there expressly stipulated against the negligence of the employees. Yet the rule of the Pennsylvania cases is founded on the dictum of *Perry vs. Payne*, supra, that the owner is not to be indemnified

⁶To the same effect and on substantially the same facts are *Lerner vs. Heicklen* 89 Pa. 234 (1926) and *Siegel vs. Philadelphia Record Co.* 348 Pa. 245 (1944).

⁷*Perry vs. Payne* seems to have been first followed in *Rose vs. Finance Company of Pennsylvania* 21 Dist. 490 (1912).

⁸158 Mass. 140 (1893). The case involved an indemnity agreement. *Fera vs. Child* 115 Mass. 132 (1874), cited also in *Cannon vs. Bresch* 307 Pa. 31 (1932) involved a lease and was the real ancestor of the Pennsylvania doctrine.

from the consequences of his own negligence unless it is expressly and unequivocally stipulated in the contract. This dictum at page 262 is as follows:

"We think it clear, on reason and authority, that a contract of indemnity against personal injuries should not be construed to indemnify against the negligence of the indemnitee, unless it is so expressed in unequivocal terms. The liability on such indemnity is so hazardous, and the character of the indemnity so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation. No inference from words of general import can establish it. The manifest purpose, in such cases, to indemnify against the injury which, under the circumstances, could reasonably be apprehended only from the action of the indemnitor or his servant, is a weighty consideration in construing indemnity contracts. The circumstances surrounding the parties, the one, the owner for whom the building is to be erected, and the other, the contractor who is to construct the building and hence from whose acts injury to persons and property may be anticipated, would seem to make the conclusion irresistible, that unless expressly stipulated in the contract the owner is not to be indemnified against his own negligence."

In the late case of *Manius et vir. vs Housing Authority of the City of Pittsburgh*, 350 Pa. 512, (1945) the question is again broached. The tenant's gas stove exploded and injured the tenant. The lease contained a release for injury to the tenant "for any cause whatsoever." Appellants ingeniously urged that the covenant in the lease could no longer be called as it was in *Cannon vs. Bresch*, supra, a contract between "private persons relating strictly to their private affairs." The United States government itself was a party to the contract. Again the tenants cited by analogy the well established doctrine prohibiting the common carrier from relieving itself of responsibility from negligence.⁹

The court, however, refused to extend the doctrine even where it could no longer be said that the contract was a strictly private affair. The court said, "The analogy is not a proper one. Consideration of public policy would seem to be a weighty factor in *permitting* (italics ours) the Authority to contract for non-liability. When the purpose for which the Authority was created and the probable effect a rule of law similar to that applied to common carriers would have upon it are considered, it is readily apparent that this court will not, by judicial fiat, impose a restriction upon the contracting power of appellee."

But, the Authority was created for the purpose of relieving slum conditions, of providing decent places to live, of furnishing a greater measure of care and safety for those who previously were forced to live in substandard homes. Why does the court fear "the probable effect" of applying the carrier rule as to exculpation to public housing? Is not the court unduly apprehensive when it envisages the

⁹Stoneboro and C. I. Co. vs. L. S. Railway Company, 238 Pa. 289, 294 (1913).

possible collapse or diminution of the benefits of public housing because it is required to provide safe stoves? The common carrier has been forced to exercise a high degree of care and yet it has not failed to prosper under the restrictions. If the courts are in favor of public housing as we do not doubt they are, surely it would enhance their acceptance in the public's mind to subject the Authority at least to the same degree of care in the static journey of the home life as exists in the journey over rails.

Indeed, the lessee in *Cannon vs. Bresch*, supra, is no more capable of protecting his premises from water overflowing from a heating plant in the lessor's exclusive possession than the passenger on a fast express is in saving himself from the drunkenness of the conductor or the negligence of the engineer.

The case of *Hoyt vs. Clinton Hotel Company*, 35 Pa. 297, (1908) is interesting when compared with *Wright vs. Sterling Land Company*, supra. The plaintiff entered into a lease of a hotel room. One clause of the lease provided that the plaintiff agreed to conform "to any and all rules and regulations now governing said apartment house." Another provision held that "each tenant may store two trunks in the storeroom without charge at the owner's risk." The plaintiff delivered his trunk to the storeroom for storage. When he returned for it later it could not be found. The plaintiff sued in trespass for the value of the trunk. The defendant presented two points to the jury based on the exemption of liability contained in the lease. They were:

- 1) The plaintiff by his lease agreed to conform to any and all rules and regulations governing the defendant's apartment house, and the rules and regulations which were part of the lease provided that each tenant might store his trunks in the storeroom at the owner's risk. The plaintiff has waived his right to recover against the defendant for the loss of the trunk; therefore, the verdict must be for the defendant.

- 2) Although at common law the defendant would be liable for the loss of his trunk, the plaintiff by his lease relieved the defendant of his liability by agreeing that the trunk should be stored at his own risk.

The two points were refused by the Superior Court in 1908. Unlike the same court in *Wright vs. Sterling Land Company* in 1945, they preferred to treat the storage of the trunk as separate from the lease and instead regarded it as a mere bailment. Since they had named the transaction, and we submit properly so, a bailment instead of a lease, there were ample early authorities in 1907 much more venerable than *Perry vs. Payne* to make such a stipulation against negligence unlawful.¹⁰ Judgment for the plaintiff was affirmed.

¹⁰*Beckman vs. Shouse* 5 Rawle 179 (1835); *Goldey vs. Pa. Railroad Co.*, 30 Pa. 242 (1858); *American Express Company vs. Sands*, 55 Pa. 140 (1867). There is an interesting discussion of semantics and the law in Stuart Chase "The Tyranny of Word" (1945). See also Korzybski, "Science and Sanity."

What can be said as to the cases in which the surface of the land is conveyed and the grantors, for example, reserve the right to mine the sub-surface without liability for damages done or to be done? The courts of Pennsylvania have generally upheld such exculpatory clauses.¹¹

The balanced economic interests of such a great mining state as Pennsylvania have always been cited as one compelling justification.¹²

The right to deal with one's own land at one's own pleasure, the *jus disponendi*, is another justification. In other words the right of support is one of the bundle of faggots of title which is simply not conveyed to the grantee when the owner is carving out the surface and retaining the subjacent rights.

But here again one can "go too far." If the situation is created by the failure to grant right of support contemplates exemption for loss of life or physical injury to the *person*, as opposed to mere damage to *property*, the courts may look twice and hold the clause void as against public policy. Such indeed was the intimation in *Atherton vs. Clearview Coal Company*, 267 Pa. 425, (1920).

Williston recognizes this limitation. He states that although an attempted exemption from liability for a future intentional tort or for a future willful act or one of gross negligence is void, nevertheless, future action which would otherwise be tortious may often be licensed, if the only effect is upon property interests of the licensor, or if the action is otherwise not intrinsically opposed to a distinct public policy such as may arise because of a relation between the parties. Williston cites the *Atherton* case¹³ in support of this exception.¹⁴

Williston states further that it is clear that apart from statute a landlord may at common law exempt himself from liability for negligence.¹⁵ However, statutes limiting and regulating the relationship of landlord and tenant and in particular exemptions from liability from negligence have been held constitutional.¹⁶

Indeed, in New York State the Legislature has given expression to the growing modern feeling in its amendment of 1937 to The Real Property Law.¹⁷ The Law, known as the Multiple Dwelling Law, provides as follows:

"Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants, or em-

¹¹*Maden vs. Lehigh Valley Coal Company*, 212 Pa. 63 (1905).

¹²*Justice Holmes in Penna. Coal Company vs. Mehan*, 260 US, 393 (1922).

¹³267 Pa. 425 (1920).

¹⁴Williston on Contracts, Rev. Ed., Section 1751B.

¹⁵*Idem*, Section 1751C.

¹⁶The emergency rent laws of the great depression were held constitutional in *Block vs. Hirsh*, 256 US 135 (1921), and *Brown Holding Company vs. Feldman*, 256 US 170 (1921), both cases noted in 9 Cal. L. Rev. 337, 7 Cornell L.Q. 47, 34 Harv. L. Rev. 426. The OPA rent controls during World War II were validated in *Bowles, Price Admr. vs. Willingham*, 321 US 503 (1944).

¹⁷N. Y. Real Property Law, Section 234.

ployees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable."

The initial response to this Act was, of course, fierce and unyielding. It was attacked as an arbitrary and capricious invasion of a lessor's liberty of contract and was therefore repugnant to the "due process" and "equal protection" clauses of the Federal and State Constitutions. The objections were all dismissed and the section was held constitutional in *Billie Knitwear vs. N.Y. Life Insurance Co.*, 22 NYS 2d 324, (1940), affirmed by the New York Court of Appeals in a *Per Curiam* decision in 288 N.Y. 682, 43 NE 2d 80, (1942).¹⁸

The Act was earlier held not retroactive¹⁹ and, of course, the courts restricted the tenant's right to complain to cases purely and simply of negligence proven on the part of the landlord.²⁰

It is submitted the Act nevertheless represents a definite step forward in a new conception of the State's interest in what before was so often dismissed as a matter of purely private concern.

The English Landlord and Tenant Act of 1927 stipulates certain rights incident to the relation of landlord and tenant and limits the power of the parties by contract to avoid the effect of the statutory provisions.²¹ What the English refer to as "contracting out" of the Act is permitted, but only if the tenant is to receive adequate consideration for the relinquishment by him of his rights under the Act.²²

Does not this modern legislation indicate a realization of the disadvantages of unequal bargaining power and a desire somehow to balance the scales so that tenants shall no longer be at the mercy of an inflexible printed form of lease?²³

Can a bailment be a bailment at 11 o'clock and a lease at 12:00? Must there be courts where ideas are "modern" and courts where the same ideas are "new-fangled"? Does the law depend on name tags, or can it be made to hinge, not on the definition, but on the teleological concept?

¹⁸See also *Excellent Holding Corp. vs. Richman*, 279 NYS 587 (1935); *Villa Victoria vs. Fanning* 283 NYS 145 (1935); *W. & B. Hosiery Corp. vs. Kaplow*, 286 NYS 764, (1936).

¹⁹*Hanfeld vs. A. Broido, Inc.*, 3 NYS 2d 463 (1938).

²⁰Thus in *Hanfeld vs. A. Broido, Inc.* 3 NYS 2d 463 (1938 the tenant would have no cause of action in tort against the landlord for damages resulting from the landlord's failure to repair a leaking radiator, where the lease provided that the tenant should make repairs at his own expense, and there was no proof of negligence in the landlord.

²¹*Williston on Contracts*, Section 1751C. And see Notes 178 L.T. 270 (1934), 72 Sol. J. 655 (1928), 74 Id. 455 (1930), 77 Id. 479, and 598 (1933), 78 Id. 893 (1934).

²²"Contracting Out of the Landlord and Tenant Act of 1927" 178 L.T. 270.

²³See note in 37 Col. L. Rev. 248 (1937) "The Significance of Comparative Bargaining Power in the Law of Exculpation"; Llewellyn "What Price Contract—An Essay in Perspective" 40 Yale L.J. 704, 716, et seq. (1931). Cf. *Santa Fe P&P Ry. vs. Grant Bros. Contraction Co.* 228 U.S. 177 (1913); Cohen, "Basis of Contract," 46 H.L.R. 553, (1933); Pound, "Introduction to Legal Philosophy" (1922) p. 87 et seq.