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Contracts--Bailments--Effect of Provisions Limiting Liability Printed on Parking Lot Identification Receipt

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in view of the diminishing proportional importance of the general property tax. In refusing to accept the reasoning followed by these other courts, the Kentucky court has refused to accept a judicial device, the extended special fund theory, which has enabled these other courts to lend approval to legislative schemes designed to circumvent similar constitutional limitations. There can be little doubt that the court has construed the constitutional debt prohibitions substantially as the original framers of these provisions in 1849 intended them to be understood.[25] The hardship which this decision works on the highway program of the Commonwealth is not the result of an erroneous construction placed upon the Constitution by the Court of Appeals, but is rather attributable to the lack of foresight exercised by the framers of our fundamental law.[26] The decision properly leaves to the people of the state the task of revising the Constitution to meet the needs of the Commonwealth as they themselves feel those needs exist.

GIBSON DOWNING

CONTRACTS—BAILMENTS—EFFECT OF PROVISIONS LIMITING LIABILITY PRINTED ON PARKING LOT IDENTIFICATION RECEIPT—Plaintiff parked his car overnight in the Parkrite Auto Park in Lexington, Kentucky. He was handed what was apparently a receipt or identification stub upon the back of which was the following limitation of the bailee's liability:

[25] See generally REPORT OF DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF KENTUCKY (1949). Sec. 49 of the present Constitution was adopted in toto from the Kentucky Constitution of 1849.

[26] Even in 1849 some Kentuckians realized that restrictions such as those found in Sections 49 and 50 would become obnoxious to the Commonwealth. In arguing against the adoption of Sec. 35 of Article Second of the Kentucky Constitution of 1849, which eventually became Sec. 49 of the present Constitution, William Preston, Constitutional Convention Delegate from the City of Louisville said: ". . . There are a hundred reasons why this margin [the $500,000. limit] should be left with the legislature; and I hope that no personal differences of opinion, no little spirit of parsimony will prevail on this floor, on such a subject as this. I hope by our vote on this question we will at least say that the people of the [C]ommonwealth of Kentucky can afford to repose discretion in their legislature, to redeem the honor of their state, as its emergencies might require. Impose this restriction, and you will find that in five or six years an impulse will have sprung up under the influence of wealth and growing prosperity that will call for another constitution.

". . . A constitution, sir, is a thing that should be made for ages, if made as it ought to be. It is the embodiment of the great principles lying at the foundation of society, which should be disturbed as seldom as possible. . . . I merely ask gentlemen to use some discretion; I ask them not to stigmatize the state by saying that they have no power in all time to come; I ask them not to deprive the state of that self-control which belongs to all truly and well organized bodies." REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF KENTUCKY, 1849 at 782-783.

> In consideration of the low rates charged for parking, customer agrees that parking operator will not be responsible for loss by fire, misdelivery or theft except such loss be occasioned by negligence of operator, and then only up to a maximum value of $100.
>
> Proportionally greater rates must be paid in advance if customer sets larger limits of liability.
>
> Articles left in car at owner's risk.[1]

According to the plaintiff's uncontradicted testimony his attention was not called to the limitation of liability and he had no notice of it. During the night the car was stolen through the defendant's negligence and upon suit in the Fayette Circuit Court the plaintiff recovered $792.95. On appeal the defendant insisted that the entire contract of bailment was printed upon the receipt and its liability was thus limited to $100.00. Held: Judgment affirmed. *Parkrite Auto Park* v. *Badgett,* 242 S.W. 2d 630, (Ky. 1951).

Cases in the United States passing upon the question presented in the principal case fall into three distinct categories. In at least one state it has been held that printed stipulations on a parking stub given by a parking lot operator which limit the operator's liability will effectively absolve him from liability, such stipulation being part of the bailment contract and binding upon the bailor.[2] In so holding, the appellate court of California drew an analogy to cases where bills of lading and receipts given by warehouses contain terms and conditions which are considered binding regardless of the ignorance of the acceptor as to their contents.[3] The court said:

> . . . . Defendant admits that nothing was said or done, beyond the mere fact of handing him the piece of cardboard, to direct Lejeune's attention to such printed matter or any portion thereof . . .
>
> . . . . Upon the above-mentioned evidence we cannot say as a matter of law that the trial court was unjustified in its implied finding that by the contract of bailment it was agreed (impliedly) that defendant's responsibility as bailee should cease upon the closing of its park at 12 midnight.[4]

The above holding has been criticized by one legal scholar as "impracticable and conducive to fraud."[5]

Another view adopted by courts when considering provisions of the sort encountered in the principal case is that which is exemplified by Ohio decisions. In *Pallotto* v. *Hanna Parking Garage Co.,*[6] the court

[1] Parkrite Auto Park v. Badgett, 242 S.W. 2d 630, 632 (Ky. 1951).
[2] U Drive & Tour v. System Auto Parks, 28 Cal. App. 2d 782, 71 Pac. 2d 354 (1937).
[3] WILLISTON, CONTRACTS, sec. 90A (1938).
[4] *Supra,* note 2, 71 Pac. 2d 354, 357.
[5] Jones, *The Parking Lot Cases,* 27 GEORGETOWN L.J. 162, 179 (1938-39).
[6] 46 Ohio L. Abs. 18, 68 N.E. 2d 170 (1946).

said that contracts limiting liability for negligence in bailments for hire, in the course of dealing with the public, have generally been regarded as against public policy.[7] From a purely theoretical and historical approach this holding seems to be valid. However, when reflection is made on the fact that a bailee, in the usual parking lot situation, is undertaking to care for an object valued at from two thousand to six thousand dollars for a consideration of twenty-five cents to one dollar, the above holding loses some of its appeal. There seems to be no reason why a parking lot operator should not be able to limit his liability in proportion to the rates he charges on the condition that the customer-bailor has actual knowledge of the limitation.

For this reason it is the opinion of this writer that the rule adopted by the majority of jurisdictions is correct. This rule is stated as follows:

> Similiarly, although there is authority apparently to the contrary, the trend of the more recent authorities is toward the view that receipt from a garage keeper of the numbered identification slip for an automobile left at a garage or parking station does not bind the bailor as to provisions, purportedly limiting the bailee's liability, which are printed thereon, where his attention is not called to them and he has no actual knowledge at the time of the bailment that they are supposed to become part of the contract.[8]

This view is supported by many cases in the United States.[9] In *Kravitz* v. *Parking Service Co.*,[10] the court said that provisions on the parking stub disclaiming liability for loss or damage did not bind the bailor unless they were brought to his attention or known to him,

[7] Malone v. Santora, 135 Conn. 286, 64 A. 2d 51, 54 (1949); Lee Tire & Rubber Co. of the State of N.Y. v. Dormer, 108 A. 2d 168, 172 (Del. 1954) *Dictum*; Jersey Ins. Co. of N.Y. v. Syndicate Parking 78 N.E. 2d 692, 693 (Ohio 1948); Agricultural Insurance Co. v. Constantine, 58 N.E. 2d 658 (Ohio App. 1944); Atkins v. Racquet Garage Corp., 177 Pa. Super. 94, 110 A. 2d 767, 768 (1955).

[8] 24 AM. JUR. 496.

[9] Kravitz v. Parking Service Co., 199 So. 727, 729 (Ala. 1940); Manning v. Lamb, 89 A. 2d 882, 884 (D. C. Mun. App. 1952); Lucas v. Auto City Parking Co., 62 A. 2d 557, 560 (D. C. Mun. App. 1948); Parkrite Auto Park v. Badgett, *supra* note 1; Munson v. Blaise, 12 So. 2d 623, 624 (La. 1943); Rappaport v. Storfer Bros. 138 N.Y.S. 2d 584, 588 (1955) (Fur coat); Howard v. Handler Bros. & Winell, 103 N.Y.S. 2d 786, 789-791 (1951) (Fur coat); Marrone v. McGraw-Hill Bldg. Corp., 70 N.Y.S. 2d 16 (1947) *per curiam*. It is interesting to note that the law relating to the liability of bailees and provisions limiting their liability *seems* to historically follow a definite pattern of development in any given particular situation. For instance, in carrier cases concerning bills of lading the early cases held that provisions limiting liability were against public policy. The next series of cases held the provisions binding with notice to the bailor. When it became uniform practice to limit liability and thus became well-known to the public, the cases hold the provisions binding without notice. The parking lot cases, being comparatively modern, may be evolving in the same manner, thus explaining the three way split of authority as to the effect of these provisions. 9 AM. JUR. 879; Howard v. Handler Bros. & Winell Inc., *supra* this note.

[10] *Supra* note 9.

thereby making such provisions a part of the terms of the bailment contract. However, in cases where the facts have established that the bailor had notice of the provisions limiting the liability of the bailee the courts have had little difficulty in finding that the provisions became part of the bailment contract.[11]

In the principal case the Kentucky Court of Appeals undoubtedly reached the right result. However, as a basis for reaching this result they gave two apparently conflicting reasons. Early in the opinion the court quoted the above excerpt from American Jurisprudence, and said, in effect, that the provisions on the parking receipt *would* have been binding upon the plaintiff *if* his attention had been called to them. However, according to the plaintiff's "uncontradicted testimony" his attention had *not* been called to them at the time of the bailment. Thus the contract between bailor and bailee limiting the bailee's liability was never completed because the provision was never assented to, either impliedly or otherwise. If the court had rested with this ground for its result there would have been no difficulty created by the decision.

In an attempt, however, to bolster its decision by providing another basis the court then considered *Denver Union Terminal Railway Co.* v. *Cullinan*,[12] a case involving a bailment of baggage. The Kentucky court said:

> It was pointed out in the Cullinan opinion that in bailments for hire in the course of a bailee's general dealing with the public, contracts limiting liability for negligence are generally considered against public policy.[13]

Thus it is seen that the Kentucky court apparently bases its decision on conflicting grounds, grounds which confront an analyzer of the case with a difficult task of reconciliation. If provisions in contracts of bailment which limit liability for negligence are against public policy and unenforceable, a discussion of whether or not there was an acceptance of such a contract would seem to be immaterial to the result; whereas if there may be such a contract when impliedly assented to by the bailor's having knowledge or notice of the provisions and making no objection thereto, the court would seem to have no reason to declare such contractual provisions against public policy. In other words, such provisions may not be capable of enforcement if accepted on the one hand, and unenforceable because against public policy on the other hand.

[11] Marrone v. McGraw-Hill Bldg. Corp., *supra* note 9.
[12] 73 Colo. 248, 210 Pac. 602, 27 A.L.R. 154 (1922).
[13] *Supra* note 1, 242 S.W. 2d 630, 632.

It is the belief of this writer that the real holding of the *Parkrite* case is that there was no contract because it was not accepted, but that it would have been enforceable if assented to. First, the facts of the case show that the bailor-plaintiff did not assent to the contractual condition. Thus the court *had no contract to declare against public policy.* Second, the statement concerning public policy follows the statement relating to contractual assent. This would seem to indicate that the court merely added the statement of public policy as an afterthought—as an additional supporting leg. Third, the court makes particular note of the exact statement in American Jurisprudence,[14] that the trend of more recent decisions is to hold these provisions binding if assented to, thus implying that the intention of the court is to follow the majority rule and enforce these provisions if acceptance is proven. It is the belief of this writer that it is also the better rule. It is a compromise between the position of the bailor-customer and the bailee-proprietor, allowing the bailee to limit his liability in proportion to his rates and insuring to the bailor an opportunity to know of and assent to or reject the contractual provision limiting the bailor's liability. This position is sound in both reason and justice to both parties.

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CRIMINAL LAW—ARREST—PROBABLE CAUSE FOR ARREST WITHOUT A WARRANT—Defendant was arrested for burglary by officers acting without a warrant on information obtained by interrogating a witness whom they had picked up in response to a "tip" from a secret informer. A search of the defendant's automobile revealed burglary tools which were introduced in evidence over defendant's objection that his arrest, and hence the search of his car, was illegal, since not based upon a reasonable belief that he was guilty of a felony. Defendant contended that since the witness, whose identity had been given to the police by the informer, had not definitely accused him of any crime, the officers had not acted reasonably in inferring that the defendant had committed a felony even though the witness's statements were almost tantamount to an accusation. Defendant also asked the court to require the arresting officer to divulge on the witness stand the name of the informer who furnished the tip leading to the arrest and questioning of the witness. The trial court ruled against defendant on both points and defendant appealed. *Held,* judgment affirmed. *Brewster* v. *Comm.,* 278 S.W. 2d 63 (Ky. 1955).

[14] *Supra* p. 2-3.