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## For the Minnesota State Bar Association

Chester L. Caldwell

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## For THE MINNESOTA STATE BAR ASSOCIATION

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**BAILMENTS—INVOLUNTARY BAILEES—ABSOLUTE LIABILITY IN CONVERSION FOR MISDELIVERY.**—A person who through no act or fault of his own has been put in the actual or constructive possession of a chattel is termed by some cases an involuntary bailee.<sup>1</sup> He has various rights and liabilities. He is entitled to collect storage charges, but is not entitled to a lien on the goods,<sup>2</sup> except apparently where the owner upon notification fails to re-

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<sup>1</sup>Heugh v. London & N. W. R. Co., (1870) L. R. 5 Ex. 51, 57, 39 L. J. Ex. 48, 21 L. T. 676; Preston v. Neale, (1858) 12 Gray (Mass.) 222, 223; Cowen v. Pressprich, (1922) 192 N. Y. S. 242, 244. Walker v. Norfolk & W. R. Co., (1910) 67 W. Va. 273, 277, 67 S. E. 722, would apparently limit the use of the expression to situations wherein goods are thrown on another's land by inevitable casualty, winds, storms, etc.

<sup>2</sup>Preston v. Neale, (1858) 12 Gray (Mass.) 222.

move them.<sup>8</sup> He can be charged with a duty towards the goods only when it appears that he knows they are in his possession, actual or constructive.<sup>9</sup> And even where he has this knowledge, it was stated in a recent case<sup>10</sup> that he has not the slightest duty to care for them as long as his lack of volition towards them continues. It is submitted that this latter qualification deprives the subject of involuntary bailments of all novelty, and renders the so-called involuntary bailee liable for misdelivery according to the law of conversion.<sup>11</sup>

A person upon discovering that he is possessed of another's property may pursue one of three courses: first, he may leave the goods alone, in which event no liability can be imposed on him for his non-feasance;<sup>12</sup> secondly, he may rid himself of the possession;<sup>13</sup> or, thirdly, he may voluntarily assume to care for the chattel by the exercise of dominion not inconsistent with the rights of the owner, and having done so, he is bound to use a slight degree of care.<sup>14</sup> The policy of the law is against imposing upon a stranger the duty to care for another's property, but on the other hand, the law seeks to protect by the doctrine of conversion the owner's interest in such property. The law of conversion creates an absolute liability where by a positive act, one who has no authority so to act deprives an owner, or the person entitled to possession, of title or possession. The controlling element is the owner's loss, and not the motive of the actor. The only intent necessary is the intent which the law implies from the act.<sup>15</sup> The soundness of this unqualified doctrine was put to a severe test in the recent case of *Cow-*

<sup>8</sup>*Schneider v. Dayton*, (1897) 111 Mich. 396, 69 N. W. 829.

<sup>9</sup>*Cosentino v. Dominion Exp. Co.*, (1906) 16 Manitoba L. R. 563; see also, *Copelin v. Berlin Dye, etc., Co.*, (1914) 168 Cal. 715, 144 Pac. 961. L. R. A. 1915C 712, 12 N. C. C. A. 362, and *Cohen v. Koster*, (1909) 118 N. Y. S. 142.

<sup>10</sup>*Cowen v. Pressprich*, (1922) 192 N. Y. S. 242.

<sup>11</sup>The courts usually treat liability for misdelivery as a liability peculiar to the law of bailments; whereas in fact it is but an application of the law of conversion. Furthermore, the term "involuntary bailee" is misleading in that the word "bailee" presupposes a duty of some kind, which is contrary to the actual facts. If the term "depository" were used instead of that of "involuntary bailee," there would be less probability of the error of fixing liability for misdelivery according to the law of bailments.

<sup>12</sup>20 R. C. L. 8; *Beal, Bailments*, Canad. Ed., 66-68; but see *Schouler, Bailments and Carriers*, 3rd Ed., 5-6. As to the right of the owner to re-take his property from another's premises, see 22 Col. L. Rev. 354.

<sup>13</sup>26 R. C. L. 950.

<sup>14</sup>3 R. C. L. 83.

<sup>15</sup>*Bowers, Conversion*, 2-4; 1 Street, *Foundations of Legal Liability*,

*en v. Pressprich*.<sup>11</sup> In this case the plaintiff had agreed to sell and deliver a negotiable bond to the defendant. To effect a delivery, the plaintiff's private messenger entered a small anteroom used by such messengers, and thrust the bond with the sales memorandum attached through a slot used for that purpose, the bond falling on a clerk's desk. It was immediately noticed that the wrong bond had been delivered; so it was redelivered almost instantly to a person in the anteroom who answered when the plaintiff's name was called. It turned out that this person was an impostor; whereupon the plaintiff brought suit for the value of the bond. The court held that the defendant upon receiving the wrong bond became an involuntary bailee thereof; and that having exercised dominion over it by the attempted redelivery, he incurred absolute liability for misdelivery. The decision is apparently correct. It is submitted, however, that the foundation of the defendant's liability for his misdelivery<sup>12</sup> is based on the law of conversion, and not on any rule peculiar to the bailor-bailee relationship. This liability being a well defined one, the problem is to find if possible an escape from it.

Neither the decisions nor the texts suggest a theory of escape from liability for conversion, except that Bowers says that good intention will excuse where there is but a slight interference with the owner's interest,<sup>13</sup> as where in the owner's presence horses are put off a ferry and left on the bank with but the intent to eject them from the ferry.<sup>14</sup> This theoretical suggestion is obviously of no assistance where the act is one which deprives the owner of a substantial interest such as possession or title. Schouler's statement that misdelivery cunningly induced does not subject one to liability in conversion is not sustained by the authorities he cites.<sup>15</sup>

<sup>11</sup>(1922) 192 N. Y. S. 242. At page 252 the dissenting justice confuses intent with motive.

<sup>12</sup>The difficulty felt in 22 Col. L. Rev. 354, 357, in finding a basis for liability for misdelivery, is not apparent.

<sup>13</sup>Bowers, Conversion, 4. Another writer classifies the same cases cited by Bowers as cases wherein the defendant's act did not of itself sufficiently designate the intent essential to conversion, and that therefore resort to the actual intent of the individual was justified. 1 Street, Foundations of Legal Liability, 235.

<sup>14</sup>Fouldes v. Willoughby, (1841) 8 Mees. & W. 540, 1 Dowl. (N.S.) 86, 10 L. J. Ex. 364, 5 Jur. 534.

<sup>15</sup>Schouler, Bailments and Carriers, 3rd Ed., 72, citing Metzger v. Franklin Bank, (1889) 119 Ind. 359, 21 N. E. 973, wherein the court only found that the complaint did not state a cause of action based on fraud, negligence, or breach of contract, and Brant v. McMahon, (1885) 56

In *Hough v. London & N. W. R. Co.*,<sup>16</sup> and *Krumsky v. Loeser*,<sup>17</sup> the doctrine of conversion is evaded, for the courts in both of the cases treated the subject of misdelivery as a doctrine peculiar to bailments and foreign to the ordinary rules of conversion.<sup>18</sup>

It may be doubted that a court would hold that in a situation such as that presented by the *Cowen* case, the defendant would have an absolute right to rid himself of possession of the negotiable bond, or even further that he would have the right to leave it entirely alone and take no steps for its protection. Undoubtedly the court would take advantage of any element of invitation or custom between the parties, and it might possibly go further and recognize that "common courtesy and prudence, if not the law"<sup>19</sup> demand that the depositary take steps to enable the owner to recover the property. As a practical matter it would seem inconsistent that a depositary should have the right to rid himself of the possession of the property and yet be deprived of the right to do so by delivery to a person whom he reasonably believes to be the owner. It is submitted, however, that the rights of a depositary are ample to prevent the encumbrance of his premises with the goods of another and to prevent the imposition of any duties upon him with respect thereto, and that in the interest of the owner the doctrine of conversion should remain unimpaired.

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STAGE OF PROCEDURE AT WHICH CONSTITUTIONAL RIGHTS MUST BE ASSERTED.—The frequency with which constitutional issues are for the first time raised on appeal or in the late stages of a trial indicates a wide-spread belief that a constitutional right is so fundamental that it may be asserted at any time. But an individual may waive a constitutional provision for his benefit when no

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Mich. 489, where the court, though considering the case as one of misdelivery, misconceived the effect of a prior transaction in which by the law of sales the plaintiff did not acquire title or the right of possession as against the defendant.

<sup>16</sup>(1870) L. R. 5 Ex. 51, 39 L. J. Ex. 48, 21 L. T. 676.

<sup>17</sup>(1902) 75 N. Y. S. 1012.

<sup>18</sup>The court in the *Heugh* case, at page 57, finds authority for its holding in that *Duff v. Budd*, (1822) 3 Brod. & B. 177, 6 Moore 469, and *Stephenson v. Hart*, (1828) 4 Bing. 476, 1 Moore & P. 357, did not find a common carrier liable in conversion for misdelivery. The cases mentioned were however actions on the case for negligence; so it is difficult to understand their weight in a question of conversion not in issue under such a form of action.

<sup>19</sup>See *Cowen v. Pressprich*, (1922) 192 N. Y. S. 242, 252; 3 R. C. L.

question of public policy or morals is involved,<sup>1</sup> and a failure to make an objection questioning the validity of a statute may be deemed a waiver.<sup>2</sup> The general rule in civil cases, as stated in *Lohmeyer v. St. Louis Cordage Co.*,<sup>3</sup> is that a constitutional question should be lodged in the case at the earliest moment that good pleading and orderly procedure will permit under the circumstances of the case, otherwise it is waived. Accordingly the issue should be raised in the pleadings if due to be found there,<sup>4</sup> but where the opportunity to invoke a particular constitutional clause does not arise until the trial is under way, as in objections to the introduction of evidence or instructions to the jury, the point is timely though not presented in the pleadings.<sup>5</sup> Even where the whole right of action or defense, in a civil case, is based upon a statute alleged to be unconstitutional, the general rule is that its invalidity must be asserted at the earliest opportunity.<sup>6</sup> In Louisiana, however, a contrary result is reached under the code,<sup>7</sup> a result which Kentucky has reached without special code provision.<sup>8</sup> In a New York case,<sup>9</sup> the court said:

"It is the duty of courts to exercise some discretion in determining the time when and the manner in which questions affecting the constitutional validity of an act of the legislature should be presented."

In criminal cases, greater protection is afforded the constitutional rights of a defendant. Where the objection raised is that the act under which the defendant was indicted is unconstitutional,

<sup>1</sup>*Musco v. United Surety Co.*, (1909) 196 N. Y. 459, 464, 90 N. E. 171, 134 A. S. R. 851.

<sup>2</sup>*People v. Vaughan*, (1918) 282 Ill. 163, 118 N. E. 479.

<sup>3</sup>(1908) 214 Mo. 685, 690, 113 S. W. 1108. The object of the rule is said to be "that the trial court may be treated fairly and the question get into the case under correct safeguards and car-marked as of substance and not mere color." *Hartzler v. Metropolitan St. Ry. Co.*, (1909) 218 Mo. 562, 564, 117 S. W. 1124.

<sup>4</sup>*Miller v. Connor*, (1913) 250 Mo. 677, 681, 157 S. W. 81.

<sup>5</sup>*Wabash R. Co. v. Flannigan*, (1909) 218 Mo. 566, 570, 117 S. W. 722.

<sup>6</sup>*Lohmeyer v. St. Louis Cordage Co.*, (1908) 214 Mo. 685, 690, 113 S. W. 1108.

<sup>7</sup>*State v. Winehill & Rosenthal*, (1920) 147 La. 781, 86 So. 181.

<sup>8</sup>*McCabe's Adm'x. v. Maysville, etc., R. Co.*, (1910) 136 Ky. 674, 679, 124 S. W. 892. The court said, "When a cause of action or defense is based on a statute, it is not necessary that the validity of the statute should be attacked in a pleading setting forth specifically its invalidity. If the attention of the court is directed to the fact that the validity of the statute is drawn in question, and the determination of its validity is necessary to a correct decision of the case, it will take judicial notice of the legal question presented."

<sup>9</sup>*In re Woolsey*, (1884) 95 N. Y. 135, 144.

the tendency is to hold that the question is jurisdictional and may be raised for the first time on appeal.<sup>10</sup> Even after final conviction on appeal, it has been held that the defendant may attack the constitutionality of the statute under which he was convicted, in habeas corpus proceedings for his release from confinement,<sup>11</sup> and one convicted of a crime under an unconstitutional statute, may attack the statute, after judgment imposing a fine, by motion to quash the execution issued to collect the fine.<sup>12</sup> In a recent Georgia case,<sup>13</sup> this doctrine was extended to a quasi-criminal case where a physician's license had been revoked, and it was held, after conviction in the court of appeals, that the defendant could bring an action in equity to prevent the enforcement of the penalties imposed, on the ground that the statute under which he was convicted was unconstitutional. Where, however, the constitutional question in a criminal case affects only a matter of evidence and not the jurisdiction of the court, the question must be seasonably raised in the trial court or it is waived.<sup>14</sup>

A constitutional question cannot be raised for the first time in the Supreme Court of the United States, on an appeal from a state court. The jurisdiction of the Supreme Court is limited to points raised and passed upon in the state court.<sup>15</sup>

**MINNESOTA'S WRONGFUL DEATH STATUTES—ADVISABILITY OF REMOVING DISPARITIES—LIMITATION OF ACTION FOR WRONGFUL DEATH.**—Minnesota has two wrongful death statutes. The first is section 8175 of the General Statutes of 1913, which section has been in force for many years and up to 1915 at least has afforded the sole remedy for the death of all classes of individuals.<sup>1</sup>

<sup>10</sup>State v. Diamond, (N. M. 1921) 202 Pac. 988, 993; State v. Gibson, (Ia. 1919) 174 N. W. 34; Schwartz v. People, (1909) 46 Colo. 239, 244, 104 Pac. 92; and Commonwealth v. Hana, (1907) 195 Mass. 262, 81 N. E. 149, 11 L. R. A. (N.S.) 799, 11 Ann. Cas. 514, 122 A. S. R. 251. See contra, People v. Raport, (1920) 183 N. Y. S. 589, 592, two judges dissenting.

<sup>11</sup>Ex parte Smith, (1896) 135 Mo. 223, 229, 36 S. W. 628, 33 L. R. A. 606, 58 A. S. R. 576.

<sup>12</sup>State v. Finley, (1915) 187 Mo. App. 72, 172 S. W. 1162.

<sup>13</sup>State Board of Medical Examiners v. Lewis, (1920) 149 Ga. 716, 102 S. E. 24.

<sup>14</sup>State v. Hennessy, (1921) 114 Wash. 351, 195 Pac. 211; State v. Chavez, (1914) 19 N. M. 325, 142 Pac. 922.

<sup>15</sup>Spies v. Illinois, (1887) 123 U. S. 131, 181, 8 S. C. R. 22, 31 L. Ed. 80.

<sup>1</sup>Even death claims paid under the Workmen's Compensation Act and passing to the employer by subrogation must be brought under section 8175. Fidelity and Casualty Co. v. St. Paul Gas Light Co., (Minn. May 19, 1922). See RECENT CASES, post, p. 593. It seems, however, that the

The second, enacted in 1915<sup>1</sup> and modeled essentially after the Federal Employer's Liability Act,<sup>2</sup> provides a remedy for the wrongful death of employees on steam railroads,<sup>3</sup> and was apparently enacted for the purpose of placing railroad employees in intrastate traffic on the same footing as employees in interstate traffic.

Attention is directed to the lack of harmony existing between the provisions of the two statutes and the advisability of bringing about greater uniformity where possible. The more important differences are here set forth in parallel columns:

Section 8175	Laws of 1915, Chap. 187
1 Provides a new cause of action.	1 A survival statute.
2 Maximum recovery, \$7500.	2 Unlimited recovery.
3 Damages for pecuniary loss only.	3 Damages for the pain and suffering of the deceased, as well as for pecuniary loss.
4 Action by personal representative.	4 Action by surviving spouse or next of kin.

In the first place, since the law has been long settled in Minnesota that section 8175 creates a new cause of action<sup>4</sup> and is not a survival statute, it seems an unnecessary complication to introduce a survival statute calling for new decisions on cases whose fundamental facts are no different from those in cases under section 8175. The conflict of opinion as to the effect of instantaneous death under a survival statute is one example of the problems that

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right of the employee's dependents to recover compensation from the employer is a new and distinct right of action created by the death. *State ex rel. Carlson v. District Court*, (1915) 131 Minn. 96, 154 N. W. 661.

<sup>1</sup>Minn. Laws 1915, Chap. 187.

<sup>2</sup>See *Seamer v. G. N. Ry. Co.*, (1919) 142 Minn. 376, 380, 172 N. W. 765.

<sup>3</sup>Of course it is to the advantage of the beneficiaries of a deceased railroad employee to sue under the 1915 act because the defenses of assumption of risk, contributory negligence and the fellow-servant rule are therein abolished. The Minnesota supreme court has not yet decided whether this act furnishes the exclusive remedy for the wrongful death of railroad employees, i. e., whether section 8175 is abolished in such cases. There is no express language in the new statute compelling such a conclusion, although such an inference may perhaps be drawn from its later enactment. Whether or not the new statute is exclusive becomes important only when an action has been inadvertently brought under section 8175. In *Weireter v. G. N. Ry. Co.*, (1920) 146 Minn. 350, 178 N. W. 887, the action seems to have been brought under section 8175.

<sup>4</sup>*Anderson v. Fielding*, (1904) 92 Minn. 42, 50, 99 N. W. 357; *Clay v. Chicago, etc., Ry. Co.*, (1908) 104 Minn. 1, 14, 115 N. W. 949. In *Fidelity and Casualty Co. v. St. Paul Gas Light Co.*, (Minn. May 19, 1922) section 8175 is referred to as a "survival statute," but in view of the decisions cited this seems an inadvertence.



would be presented.<sup>6</sup> In the second place, since section 8175 fixes the maximum recovery at \$7500, there seems no reason why the beneficiaries of deceased railroad employees should be allowed greater redress, especially in view of the fact that prior to the 1915 act, \$7500 was also the maximum recovery for railroad employees. Thirdly, as to the items of damage recoverable, under section 8175 the damages are for pecuniary loss alone and do not include the pain and suffering of the deceased.<sup>7</sup> What damages are recoverable under the 1915 act does not seem to have been determined, but under the Federal Employer's Liability Act, upon which the new statute is based, a recovery is permitted under the survival feature for the pain and suffering of the deceased.<sup>8</sup> The law on the subject of damages might well be harmonized in both death actions.<sup>9</sup> A final disparity exists in the provisions as to the proper party to sue, section 8175 confining the action to the personal representative while the 1915 act provides for suit by the surviving spouse and next of kin.<sup>10</sup>

A question affecting section 8175, and also the 1915 statute if uniformity is desired, is the limitation period within which the action may be brought. Under section 8175 "The action may be commenced within two years after the act or omission." Consequently if the injured person does not die until two years after the injury, the action for wrongful death does not lie: in other words, the action of the personal representative may be barred before it ever accrues. Such a result appears illogical and, where proximate causation can be shown, unjust. It would seem that the statute of limitations should run only from the time when the action for death arises, i. e., the time of death, and not from the time of the

<sup>6</sup>Capital Trust Co. v. G. N. Ry. Co., (1914) 127 Minn. 144, 148, 149 N. W. 14.

<sup>7</sup>Guhl v. Warroad, etc., Co., (1920) 147 Minn. 44, 179 N. W. 564.

<sup>8</sup>St. Louis, etc., Ry. Co. v. Craft, (1915) 237 U. S. 648, 658, 35 S. C. R. 704, 59 L. Ed. 1160.

<sup>9</sup>This can be accomplished by eliminating the survival feature and substituting for it the new-cause-of-action theory of section 8175. Before the survival feature was introduced in the federal act, the Supreme Court of the United States confined recovery to pecuniary loss alone. St. Louis, etc., Ry. Co. v. Craft, (1915) 237 U. S. 648, 657, 35 S. C. R. 704, 59 L. Ed. 1160.

<sup>10</sup>In Molstad v. Minneapolis, etc., R. Co., (1919) 143 Minn. 260, 173 N. W. 563, and Brown v. Duluth, etc., Ry. Co., (1920) 147 Minn. 167, 179 N. W. 1003, the action seems to have been brought under the 1915 act by the administrator. It should be noted that the federal act forming the model for the 1915 act allows suit to be brought by the personal representative. U. S. Comp. Stat. 1918, sec. 8657.

injury.' 'If the limitation in section 8175 is changed so as to run from the time of death, a similar provision should be inserted in the 1915 statute.'

The statutes under discussion can be harmonized by legislation. The 1915 statute can be amended by incorporating in it the cardinal provisions of section 8175, at the same time expressly excluding from section 8175 actions against railroad companies for the death of railroad employees. Or section 8175 can be made the exclusive remedy for the wrongful death of any individual, amending the 1915 act by striking out the inconsistent parts and preserving only the advantages derived from the abolition of the common-law defenses. Which method to adopt is a matter of legislative policy.

### RECENT CASES

**ATTORNEY AND CLIENT—ETHICS—WITNESSES—ATTORNEY TESTIFYING IN CLIENT'S CAUSE.**—An attorney, in the active conduct of the trial, offered to testify generally as a witness in his client's behalf. The trial court refused to permit him so to testify unless he withdrew from the case as counsel. The attorney declined to accept this alternative and conducted the case to its conclusion. *Held*, that the decision of the trial court did not constitute reversible error in the absence of a showing that an offer of proof had been made. *Cox v. Kee*, (Neb. 1922) 186 N. W. 974.

At the early common law an attorney undoubtedly was disqualified as a witness for his client under the rule which rendered all parties primarily interested in the outcome of the action incompetent to testify, a rule of evidence which has been entirely eradicated except in so far as statutory provisions disqualified interested parties. Jones, *Evidence*, 2nd Ed., sec. 712; 28 R. C. L. 469. Under statutory provisions of that nature it is generally held that the client's attorney is not disqualified merely because of the fact that he receives a fee from the client. *Quarles v. Waldron*, (1852) 20 Ala. 217; note, 49 L. R. A. (N.S.) 426. But where

"The proviso of section 8175 for the substitution of the personal representative in an action brought by the injured person but not prosecuted to judgment before his death, provides a remedy in all cases where the deceased started suit in his lifetime. But a personal injury action may be brought in Minnesota within six years, G. S. Minn. 1913, sec. 7701, yet where the deceased defers his right to sue and then dies more than two years after the injury, the action is barred under the present statute. This limitation period was apparently taken from a survival statute in which, from the very nature of the action, the limitation began to run from the date of the injury. A further reason may be the desire of the legislature to avoid speculation concerning the proximate cause of death.

"A discrepancy also exists between the limitation period under the 1915 act and G. S. Minn. 1913, section 7701. Under the later statute a railroad employee has but two years to sue for personal injuries, whereas under section 7701 a personal injury action may be brought within six years.