Dufour, Julius v. Mepham Michael et al

472/7

617/3

Dufour. Resp (P)

V

Michael Mepham App.

William Mepham (D)

Sanders & Holloway R

Frances Mann Ap

Dufour sold Mepham 140 in whisky - to store

- would not return 640

- Bank up to 500

Barber what

Warlow

- St. Common pleas

March 1862

Sept 1862

Judgement for plaintiff is affirmed

Judge Bate

Bay & Dryden

RG 600
Supreme Court of Missouri
Case Files

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Julius Dufour Plaintiff & Respondent
vs
Michael S. Mepham and William G. Mepham Defendants & Appellants

IN SUPREME COURT,
October TERM, 1859
No. 276

AND now come the said appellants and say, that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said appellants assign the following, to wit:

1. That said Court admitted improper and illegal testimony offered by
2. That said Court rejected proper and legal testimony offered by Defendants, appellants.
3. That the Court gave to the Jury improper and illegal instructions.
4. That the Court refused to give to the Jury proper and legal instructions offered by appellants, Defendants
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the Plaintiff, Respondent when it should have been rendered for the Defendants, appellants.
10. That said Court overruled the motion for a new trial, made by the Appellants
11. That the Court, having overruled the Plaintiff's Motion to strike out those parts of the answer, which specially set up their Defense, ought to have permitted the Defendants to have introduced evidence in support thereof.

Wherefore the said appellants pray that said Judgment be reversed. Francis Minor
Attorney for Appellants.

And now come the Respondent and for joinder in error says that there is no error in the record and proceedings of said Court below in said cause, as assigned by said appellant

Sanders & Holliday
Attys for Respt

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Julius Dufour Plaintiff
& Respondent.

vs

Michael S. Mepham &
William G. Mepham
Defendants &
Appellants

Assignment of Errors
by appellants.
Francis Minor
Atty for appellants

Filed 19 Oct. 1859.
W S Glanville Clk

Supreme Court March Term 1865

Julius Dufour Respondent - vs Michael S. Mephram & William G. Mephram Appellants	Appeal from St Louis Court of Com: Pleas

Appellants' Brief.

This is a case of Bailment - the suit being brought by the Respondent against the appellants, to recover the value of forty Barrels of whiskey, for which he held a warehouse receipt.

The defense set up was, that the bailment was originally made with one Benjamin, who subsequently transferred the whiskey to Plaintiff (Respondent) to secure him in a debt of five hundred Dollars due from Benjamin to Plaintiff -

That Plaintiff's only interest in said whiskey was to secure said indebtedness -

That Plaintiff was in the employment of Benjamin as an agent or Salesman -

That Defendants, having transferred their place of business to another location, left the whiskey (and other goods of their own) in the old Store in charge of a proper person - and while in this situation Benjamin, the original Bailor came

removed or took away the same, without the knowledge or consent of defendants and against their wish or authority -
By reason of which, said goods were lost, and could not be obtained upon demand of Plaintiff - The defendants further pleaded that during this time Plaintiff was in the employment of said Benjamin, and privy to the fact of said removal -
To this defense there was no replication, but the Plaintiff moved the Court to strike it out as frivolous & irrelevant -
This, the Court refused to do -
At the trial the defendants offered evidence to support their allegations that in the care & custody of the whisky they had taken & testowed all proper & reasonable care & diligence - That they had taken the same care of it that they had of their own goods, also stored in the same place - and that not = = withstanding such care & diligence said whisky was lost through no fault or negligence of the defendants.
On motion of the Plaintiff, the Court excluded said evidence, to which defendants duly excepted,

and the case being submitted to the jury, they found for the Plaintiff -

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The Appellants make the following points

1. The Court erred in excluding said evidence not only because it had already decided said point in favor of Defendants, by overruling the Plaintiff's motion to strike out that part of the answer; but because the same set up a valid and substantial defense to the Plaintiff's action -

11. The Court clearly erred in refusing the instructions asked by Defendants -
Those instructions contain the law as declared by repeated adjudications from the time of Lord Kenyon down, and many of them are in the exact language of the Decisions -

See the following authorities -

Finncane	vs Small.	1 Espinasse N.P. Rep	315.
Califf	vs Danvers -	Peake N.P. Rep	~~[illegible]~~ 155
Garside	vs Trent Nav: Comp:	4 T. Rep	581.
Foot	" Storrs	2d Barbour Sup Ct Rep	329.
Schmidt	" Blood	9 Wendell	271.
Owens	" Geiger	2d Mo: Rep:	35.

Douglass vs Stephens 18 Mo: Rep. 367
Ray " Toney 24 " " 602
Roß " Clark 27 " " 549.

Jones on Bailments p. 97 note p. 1.
Story on Bailments § 402 to § 409.

Francis Minor
Attorney for Appellants.

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Julius Dufour Respondt.

vs

M. S. Mepham et al

appellants.

Appellants' Brief

Minor

for appellants

Filed 4 April 1860.

Wm L Glanville

Cl.

Supreme Court of Missouri,
St. Louis, March Term 1861.

Julius Dufour, Respondent,
vs.
Michael S. Mepham & Wm G. Mepham, Defendants.
} Appeal from St. Louis Court of Common Pleas

Statement.

Bailment. Myron F. Benjamin & Co. deposited forty barrels of whisky, with the defendants, warehousemen, at St. Louis, about the 1st of February 1858, and took their warehouse receipt therefor.

About the 10th of the same month said Benjamin & Co. transferred said whisky to the respondent, plaintiff below, and surrendered their warehouse receipt to the appellants, defendants below. The defendants, at the same time gave the plaintiff a new warehouse receipt for the whisky.

The whisky was held by the plaintiff below, respondent here, as collateral security for the sum of five hundred dollars.

The appellants, defendants below, removed from the warehouse in which they were doing business when the whisky was stored with them, and they left the whisky in the warehouse without giving any directions whatever to their successors, and without taking any receipt for the same, or leaving it in charge of any one. The whisky was afterwards taken by Benjamin & Co., (see defendants' answer,) without any order from any one, and without the knowledge or authority of the respondent, and in violation of his rights. The whisky was worth six hundred and forty dollars. Plaintiff, before

the commencement of this suit, demanded the whisky of defendants which they refused to deliver.

Respondents Brief.

II. The defendants' answer admits the whole of plaintiff's case, — negligence is clearly admitted. No defense is set up in the answer. Fraud on the part of the plaintiff is insinuated but not charged, — there was neither truth in the insinuation nor any evidence offered to support it.

III. Because the court erred in overruling plaintiff's motion to strike out parts of defendants' answer, was no reason why it should repeat the error at the trial, — there is a locus penitentiae even for courts.

IIII. The court very properly refused to give defendants' instructions:

1. The 1st instruction refused, declared the law to be, that defendants would not be liable, if they exercised the same care and attention over the whisky that they bestowed upon their own goods, or that any prudent party would have done in regard to his own property. This is put in the disjunctive, and discharges the defendants from liability if they were as negligent with their own goods, as with the plaintiff's.

2. The 2nd instruction was erroneous. All that a plaintiff has to prove, is the bailment, the value of the property, the demand, and the refusal to deliver, — that is all: if the defendants necessarily show their own negligence in delivering to an improper party, in endeavoring to account for their non-delivery to plaintiff, on demand,

that is not a loss in the meaning of the law, nor does it leave anything for the plaintiff to prove. Edwards on Bailment, p. 288, states the whole law, on this point, very clearly, as follows; "As the rule is now well settled, the total failure of the bailee to deliver on demand is prima facie sufficient to charge him with a liability for the goods bailed, but that presumption is removed by such evidence as shows them to have been lost; after which, the owner must show affirmatively that the loss was through the negligence of the bailee," citing 9 Wend. 268; 2 Barb. 326; 2 Denio 643. - if the defendant must necessarily show his own negligence in accounting for the loss, what is left for the pl'ff to prove? See note a. at bottom of this brief.

3. The 3rd instruction is defective because defendants claim a judgment against plaintiff for storage when no such claim is made in their answer.

4. The 4th instruction is erroneous: the court declared the law more favorably for the defendants on this point, than the law warranted. The law on this point is, that, "if the plaintiff claims the property converted, merely by a lien to secure a debt, he recovers only the amount of the debt, because that is a measure of his interest, if the defendant have any title or interest at all." Parsons on Contracts 2 vol. p. 476. Citing 1 Sandf. 248; 7 Cowen 670; 8 Wend. 445; 12 S. & M. 223; 6 Ala. 245; 2 C. & R. 264. But, if the defendant be a mere stran

ger, the plaintiff has a title to the whole, against him, and recovers the whole value. Parsons on Contracts 2nd Vol. 477, citing 15 Conn. 302; 5 Binney 457; 6 Geo. 530.

Plaintiff sought to recover for the whole whisky, and asked an instruction to that effect, which the Court refused to give, changing the same to the instruction which was given by the Court.

5. The 5th instruction, concerning master and servant has nothing to do with the case.

6. The 6th instruction was erroneous for the same reason that the second was. Plaintiff did not have to prove negligence, till defendant proved a loss. - no loss was proven, or, even if it be deemed a loss, gross negligence was the cause thereof. The mere fact of delivering to a wrong party, under the circumstances, as stated in defendants' answer, will be declared by the Court to amount to want of ordinary care.

The defendants' instructions were not applicable to the testimony in the case, and to the admissions in defendants' answer. Their offer to produce evidence was rightly overruled by the Court, because, when condensed it amounted to nothing more than the proposition that, if the defendants left their own goods in the condition in which

they left the whisky, they were not liable — their offer was nothing more than that; and defendants' counsel seemed to be laboring under that idea during the whole trial — that seemed to be his only defense — Respondent asks ten per cent damages. Sanders & Holliday,
Attys for Respondent.

a. Where a warehouseman delivers property deposited with him for storage, to some person other than the true owner, through either mistake or negligence, he is answerable to the owner for a conversion Edwds on Bail. 286-7; Willard v. Bridge, 4 Barb. R 361;

The evidence of a refusal to deliver on demand casts the onus upon the bailee to show that the property has been lost without fault or neglect on his part. Edwds on Bail. 287; Lockwood v. Bull, 1 Cowen 322; 7 id. 500; 11 Wend. R. 26; West v. Wentworth 3 Cowen 82; 7 id 295; 9 Wend 271.

Sanders & Holliday
attys pr respt.

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Julius Dufour,
Respondent.

vs.

Michael S. Mepham and
Wm. S. Mepham, Appellants.

Respondent's Brief

Filed 26 March 1861.
Wm. F. Glanville,
Cl.

Sanders & Holliday
Attys. for Resp't.

Dufour
v
Mepham

Goods were deposited by Benjamin & Co with Mepham to be kept for them. Subsequently Benjamin & Co transferred the goods to Dufour and surrendered to Mepham their warehouse receipt, who then issued another receipt to Dufour for the same goods. - Mepham removed from the warehouse in which these goods were stored to another but left these goods (and some of their own) in the old warehouse, and the person who succeeded them in the possession of the warehouse delivered the goods to Benjamin & Co.
Dufour having demanded the goods sued Mepham for their non-delivery, who set up the facts as above stated as an excuse. -

This is not a case of the negligence of the warehouseman but of a delivery to the wrong person.

Either Mepham voluntarily abandoned the possession and ~~custody~~ care of the goods, leaving them to be taken by whoever might choose to do so, or ~~the~~ the person who succeeded Mepham in the possession of the warehouse must be considered as the Agent of Mepham and his wrongful act in delivering the goods to Benjamin as Mepham's act. - Judgment having been given for the plaintiff is affirmed. Barton Bates

Judges Bay & Dryden concur.

Dufour
vs
Mepham

affirmed

Opinion
Bates

Filed April 24 1862
A.O. Mead
Clk

Dufour v. M. S. & W. G. Mepham

This is not a case of loss of goods by fire or theft, whilst in the custody of the warehouse man - but of a delivery of them by the warehousemen or his agents to the wrong person. It is true, that there was an offer to prove on the trial, that the defendants had taken the same care of the property that they did of their own & that notwithstanding such care, it was stolen & carried away by some third person - but this offer seemed to be a mere argumentative commentary upon the facts already in proof. It appeared that the defendants left the whiskey in their warehouse, after they removed to another store, in the custody of third persons, along with some property of their own & that the whiskey was delivered to Benjamin Ho - the original owner of it, but who had transferred it to the plaintiff to secure a debt of four hundred dollars. As the plaintiff took the receipt from the defendants in his own name, they were of course not at liberty to deliver it to any one else, unless upon his order. The persons in whose care the old warehouse was left, when the defendants moved to their new house, must be regarded as agents for them, & their delivery of the whiskey to Benjamin Ho was equivalent to a delivery by the defendants, who stood under an obligation to keep it, although ~~they may have~~ latter may have been entirely ignorant of the occurrence.

The instructions therefore concerning negligence

applicability

were properly refused, because they had ~~nothing~~ to the facts of ~~do with~~ the case. The goods were taken from the custody of the defendants by their permission or without their dissent & their want of knowledge of it is surely no exoneration. It is not pretended that they were clandestinely removed. Or that their removal ~~[illegible]~~ was attended with any circumstances which could raise a question as to ~~their~~ the diligence of the custodians, either ordinary or extraordinary.

Judt. affirmed

W. B. Napton

Judge Emery concurs

Judge Scott absent

Dufour
v.
M S & W G Mephane

Opinion of
the Court

Napton