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BAILMENTS—LIABILITY OF BAILOR FOR PERSONAL INJURIES TO BAILEE RESULTING FROM VICIOUS PROPENSITIES OF THE BAILED ANIMAL.—In April, 1931, the defendant company rented a team of mules and a mare to plaintiff's decedent and his nephew. The animals were used in defendant's business and were stabled and cared for in decedent's barn. Decedent's nephew worked the mare and paid defendant for her use while decedent worked the mules. On August 11, 1931, the defendant suggested that the mare be worked with one of the mules and the parties agreed upon the exchange. Thereafter, but before the mare had been used in the team, she kicked the decedent causing injuries which resulted in his death. It is agreed that the relation between the decedent and defendant is that of bailee and bailor. The complaint "is predicated upon the alleged negligent conduct of the defendant in knowingly

⁹ *Wiggins v. Keizer* (1855), 6 Ind. 452; *Wilson v. Ray* (1859), 13 Ind. 1, *Hill v. Jamieson* (1861), 16 Ind. 125, 79 Am. Dec. 414, *Indiana & I. C. R. Co. v. Searce* (1864), 23 Ind. 223, *Bell v. Hewitt* (1865), 24 Ind. 280; *Frost v. Tarr* (1876), 53 Ind. 290; *Parker v. Siple* (1881), 76 Ind. 345, *Hinkle v. Fisher* (1885), 104 Ind. 84, 3 N. E. 524, *Piper v. Fosher* (1889), 121 Ind. 407, 23 N. E. 269; *Durham v. Hiatt* (1890), 127 Ind. 514, 26 N. E. 401, *Decatur v. McKean* (1906), 167 Ind. 249, 78 N. E. 982; *Freas v. Custer* (1928), 201 Ind. 159, 166 N. E. 434, *Pennsylvania Co. v. Dolan* (1892), 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. 289; *American Quarries Co. v. Lay* (1905), 37 Ind. App. 386, 75 N. E. 608, *Timmonds v. Taylor* (1911), 48 Ind. App. 531, 96 N. E. 331.

¹⁰ *Willis*, *Statute of Frauds—A Legal Anachronism* (1928), 3 Ind. Law Journal 427, at page 539.

¹¹ *Ward v. Hasbrouck* (1902), 169 N. Y. 407, 62 N. E. 434.

¹² *Tiffany*, *Landlord and Tenant*, vol. 2, page 1518.

¹³ *Schmitz v. Laoferty* (1868), 29 Ind. 400. Had the lease in the principal case been for three years to start some time in the future, the lease would have been within the statute regardless of the question raised by the fact that it could have been performed in three years.

hiring a vicious and ugly mare to decedent without warning him of such characteristics." Verdict for plaintiff and defendant appeals. Held, that since decedent had notice of the vicious characteristics of the mare from conversation with his nephew, the defendant, assuming it possessed this knowledge, was relieved from imparting the same to the decedent; that conversation with defendant's officer amounted only to a suggestion, not an order, by defendant that the change be made, and, therefore, decedent was at liberty to make change or not as he saw fit; that since the injury occurred before decedent actually worked the mare, there was no causal connection between the exchange and the injury.¹

There are two classes of cases having a direct bearing on the problem involved in this case, namely: (1) the master and servant cases, where the servant is injured by an animal furnished by the master, and (2) the bailment for hire cases, chiefly those concerning injuries caused by horses rented from a livery stable. The cases cited in the opinion include both classes.

In considering the first class, the master's duty to warn is based upon his duty to furnish reasonably safe working conditions or to warn the servant of risks which he may not discover by the exercise of due care.² The law seems well settled that a master owes his servant the duty to furnish him with a safe animal, or to impart to the servant any knowledge which he has or by the exercise of proper diligence ought to have which would enable the servant to protect himself better; and if he fails to do so, he must respond in damages, provided the servant did not know or was under no obligation to know of the animal's viciousness.³ However, the master is not liable if he has no actual or constructive knowledge of the animal's vicious character and is under no obligation to know them.⁴ Neither is he liable if the servant knows or has reason to know of the animal's dangerous characteristics.⁵ This is variously referred to as contributory negligence and assumption of risk. The latter

¹ *Artificial Ice & Cold Storage Co. v. Martin* (1935), — Ind. App. —, 198 N. E. 446.

² *Hammond Co. v. Johnson* (1893), 38 Nebr. 244, 56 N. W. 967, *Restatement of Agency*, Sec. 471 and 492; *Mechem*, *Outlines of Agency* (3rd Ed. 1923), Sec. 427, *Leigh v. Omaha St. R. Co.* (1893), 36 Nebr. 131, 54 N. W. 134.

³ *Hammond Co. v. Johnson* (1893), 38 Nebr. 244, 56 N. W. 967, *Wilson v. Sioux Mining Co.* (1898), 16 Utah 392, 52 Pac. 626, *Knickerbocker Ice Co. v. Finn* (1897), 80 Fed. 483, 51 U. S. 256, 25 C. C. A. 579; *Miller v. Kelly Coal Co.* (1909), 239 Ill. 626, 88 N. E. 196, *East Jellico Coal Co. v. Stewart* (1902), 24 Ky. Law Rep. 420, 68 S. W. 624, *Farmer v. Cumberland Tel. & Tel. Co.* (1905), 86 Miss. 55, 38 So. 775, *Leigh v. Omaha St. R. Co.* (1893), 36 Nebr. 131, 54 N. W. 134, *McCready v. Stapp* (1903), 104 Mo. App. 340, 78 S. W. 671, *Helwke v. Stetler* (1893), 69 Hun 107, 23 N. Y. S. 392; *Gray v. Floersheim* (1894), 164 Pa. St. 508, 30 Atl. 397, *Morgan v. Hendrick* (1907), 80 Vt. 284, 67 Atl. 702. See also note in 19 Ann. Cases 863 and note in 3 L. R. A. (N. S.) 209.

⁴ *Hosmer v. Carney* (1920), 228 N. Y. 73, 126 N. E. 650; *Arkansas Smokeless Coal Co. v. Pippins* (1909), 92 Ark. 138, 122 S. W. 113; *Benoit v. Troy & L. R. Co.* (1897), 154 N. Y. 223, 48 N. E. 524; *Cooper v. Cashman* (1906), 190 Mass. 75, 76 N. E. 461.

⁵ *Douglas v. Scandial Coal Co.* (1913), 161 Iowa 180, 141 N. W. 960; *Bowles v. Ind. Ry. Co.* (1901), 27 Ind. App. 672, 62 N. E. 94; *Bessemer Land & Improvement Co. v. Dubose* (1900), 125 Ala. 442, 28 So. 380; *Green & C. Street Pass. R. Co. v. Bresmer* (1881), 97 Pa. St. 103; *Manufacturer's Fuel Co. v. White* (1905), 122 Ill. App. 527.

logically appears to be the better term.⁶ Whether the master knew of the animal's vicious propensities or not is a question for the jury to determine.⁷ The same is true concerning the question of whether the animal was in fact dangerous either to persons or property.⁸ Likewise, it is for the jury to determine whether or not the servant knew or should have known of the vicious tendencies of the animal.⁹

In the second group of cases—those where a horse is hired from the keeper of a livery stable—it is generally held that the bailor must furnish a horse which is reasonably safe for the purpose contemplated.¹⁰ This applies equally to carriages, harness, and other equipment furnished by the liveryman.¹¹ If the horse or equipment were not safe and the bailor either knew, or by the exercise of reasonable care, ought to have known they were not safe, then he is liable to the bailee for resulting injuries, unless the bailor, at the time of the hiring, warned the bailee by imparting to him such information as the bailor possessed.¹² This, of course, does not mean that he is liable for hidden defects of which he did not know or could not have ascertained by a careful inspection.¹³

While there are some English cases holding that a hirer of horses and carriages warrants that they are reasonably safe and suitable for the purpose,¹⁴ the American cases generally treat the liability as the negligent failure to perform a duty imposed by law.¹⁵ It seems the law requires a high degree of care in the performance of this duty, however.¹⁶

⁶ See A. L. I. analysis of contributory negligence, Restatement of Torts, Sec. 466.

⁷ *Benoit v. Troy L. R. Co.* (1897), 154 N. Y. 223, 48 N. E. 524, *Hammond Co. v. Johnson* (1893), 38 Nebr. 244, 56 N. W. 967, *Farmer v. Cumberland Tel. & Tel. Co.* (1905), 86 Miss. 55, 38 So. 775.

⁸ *East Jellico Coal Co. v. Stewart* (1902), 24 Ky. Law Rep. 420, 68 S. W. 624, *Farmer v. Cumberland Tel. & Tel. Co.* (1905), 86 Miss. 55, 38 So. 775.

⁹ *Manufacturer's Fuel Co. v. White* (1905), 122 Ill. App. 527, *Wilson v. Sioux Consol. Min. Co.* (1898), 16 Utah 392, 52 Pac. 626, *Farmer v. Cumberland Tel. & Tel. Co.* (1905), 86 Miss. 55, 38 So. 775.

¹⁰ *Horne v. Meakin* (1874), 115 Mass. 326, *Windle v. Jordan* (1883), 75 Maine 149; *Lynch v. Richardson* (1895), 163 Mass. 160, 39 N. E. 801, *Nisbet v. Wells* (1903), 25 Ky. 511, 76 S. W. 120; see also note in 25 L. R. A. (N. S.) 372.

¹¹ *Kissam v. Jones* (1890), 56 Hun. 432, 10 N. Y. S. 94, *Hadley v. Cross* (1861), 34 Vt. 586, 80 Am. Dec. 699; *Denver Omnibus & Cab Co. v. Madigan* (1912), 21 Colo. App. 131, 120 Pac. 1044.

¹² *Nisbet v. Wells* (1912), 25 Ky. 511, 76 S. W. 120; *Kissam v. Jones* (1890), 56 Hun. 432, 10 N. Y. S. 94, *Windle v. Jordan* (1883), 75 Maine 149; *Hadley v. Cross* (1861), 34 Vt. 586, 80 Am. Dec. 699; *Horne v. Meakin* (1874), 115 Mass. 326, see also note in 18 Ann. Cas. 814.

¹³ *Hadley v. Cross* (1861), 34 Vt. 586, 80 Am. Dec. 699; *Denver Omnibus & Cab Co. v. Madigan* (1912), 21 Colo. App. 131, 120 Pac. 1044.

¹⁴ *Jones v. Page* (1867), 15 L. T. N. S. 619; *Hyman v. Nye* (1881), 6 Q. B. Div. 685, 44 L. T. N. S. 919; *Chew v. Jones* (1847), 10 L. T. Journ. 231, see also note 19 L. R. A. 283.

¹⁵ *Dickie & Goelzer v. Henderson* (1912), 95 Ark. 78, 128 S. W. 561, *Denver Omnibus & Cab Co. v. Madigan* (1912), 21 Colo. App. 131, 120 Pac. 1044.

¹⁶ See *Hadley v. Cross* (1861), 34 Vt. 586, 80 Am. Dec. 699, where the court said, "Due care and reasonable diligence are nothing less than the most watchful care and active diligence in any business involving the personal safety and care of others."

In determining the bailor's liability, it is generally held that livery stable keepers, whose business is to care for the horses and carriages of others and to let their own horses and carriages either with or without drivers, are not common carriers of passengers within the legal meaning of that term.¹⁷

It is a question for the jury whether the bailor knew of the horse's viciousness,¹⁸ or whether he was negligent either in failing to discover the vice or lack of training of the animal or in hiring to the bailee a horse which was not suitable for the use contemplated.¹⁹ Whether the bailor gave the bailee sufficient warning to relieve himself from liability is also a question for the jury.²⁰

While there seems to be no previous Indiana cases which are conclusive upon the point in issue, the court in the instant case follows the generally accepted principles of law on the subject.

H. S. C.

¹⁷ Stanley v. Steele (1905), 77 Conn. 688, 60 Atl. 640, 69 A. L. R. 561; Payne v. Halstead (1891), 44 Ill. App. 97, Seigrist v. Arnot (1885), 86 Mo. 200, 56 Am. Rep. 424, Erickson v. Barber Bros. (1891), 83 Iowa 367, 49 N. W. 838; Copeland v. Draper (1893), 157 Mass. 558, 32 N. E. 944; McGregor v. Gill (1905), 114 Tenn. 521, 86 S. W. 318, 108 Am. St. Rep. 919.

¹⁸ Lynch v. Richardson (1895), 163 Mass. 160, 39 N. E. 108.

¹⁹ Dickie & Goelzer v. Henderson (1910), 95 Ark. 78, 128 S. W. 561; Denver Omnibus & Cab Co. v. Madigan (1912), 21 Colo. App. 131, 120 Pac. 1044.

²⁰ Windle v. Jordan (1884), 75 Me. 149.