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Romney v. Covey Garage et al : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

L. ROMNEY,
Plaintiff and Respondent,

-vs-

OVEY GARAGE, a corporation,
Defendant and Appellant.

AMERICAN EQUITABLE ASSUR-
ANCE COMPANY, a corporation,
*Interpleaded Defendant and
Respondent*

Brief of Appellant, Covey Garage

Appeal from the Third Judicial District Court,
In and For Salt Lake County, State of Utah
Honorable P. C. Evans, Judge

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a corporation*

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In the Supreme Court of the State of Utah

E. L. ROMNEY,

Plaintiff and Respondent,

-vs-

COVEY GARAGE, a corporation,

Defendant and Appellant.

AMERICAN EQUITABLE ASSUR-
ANCE COMPANY, a corporation,

*Interpleaded Defendant and
Respondent*

Case
No. 6243

Brief of Appellant, Covey Garage

STATEMENT OF THE CASE

The plaintiff, E. L. Romney, about April 30, 1938, on a Saturday evening left his automobile at the defendant garage in Salt Lake City for storage over night. The automobile was delivered to the garage sometime between ten and eleven o'clock p. m. and plaintiff thereafter retired to the Newhouse Hotel, just north of the garage. As is customarily done, the keys were left in the automobile; the attendants in charge, at plaintiff's request, filled the automobile with gasoline and parked it in the

garage in the usual manner. Shortly thereafter, about eleven o'clock p. m., the three attendants, all at the front of the garage entrance, observed defendant's automobile coming out, being driven by a thief. Immediately one of defendant's employees of the garage got into his car, took after the refugees, chasing them for some twenty blocks, all up through the east part of town and then back down somewhere near the scene of the collision between plaintiff's automobile, then discovered to be driven by one Albert Freeman and his notorious companion, Brady Wayne Poulson, and another car, resulting in the crash causing the damage to plaintiff's car sought to be recovered in this action. How, or by what means or methods Freeman and his companion succeeded in getting into the garage is wholly unexplained and nowhere appears in the evidence, and the evidence is undisputed that the defendant's garage was maintained and operated in accordance with the usual practice and standard of similar garages and was so operated on the evening of the theft, the usual number of employees being maintained to care for the storage.

Plaintiff's complaint, (Ab. 2) sought to hold the defendant liable for negligence, alleging in addition that said automobile was stolen from the garage by said Albert Freeman and Brady Wayne Poulson. Defendant demurred (Ab. 4), both generally and specially to said complaint, primarily upon the ground (1) That in alleging the theft, plaintiff explained the loss and, there-

fore, failed to state a cause of action, and (2) That such complaint was indefinite and uncertain in that it nowhere appeared how or in what manner defendant was careless and negligent and the acts of negligence were not set forth so as to advise defendant of the nature of the negligence relied upon by plaintiff. The demurrer was overruled, (Ab. 5) and defendant was required to answer. Defendant answered (Ab. 6), admitted the bailment and the theft, but denied any negligence and further affirmatively alleged payment of the loss and damage to the plaintiff by the American Equitable Assurance Company and its right of subrogation by reason of such payment. An order was made by the court requiring the said American Equitable Assurance Company to appear and set forth its rights and claims, which order, together with a copy of defendant's answer was served on said American Equitable Assurance Company. (Ab. 10). It was stipulated at the trial, subject to plaintiff's objection of immateriality that said American Equitable Assurance Company paid Mr. Romney, the plaintiff, the amount of his loss under the policy. (Ab. 11). The case was tried to the court sitting without a jury, plaintiff's evidence was offered and received, (Ab. 10-33) at the conclusion of which defendant moved for a judgment of non-suit and dismissal, and said motion was taken under advisement on the 19th day of April, 1939, (Tr. 18) and denied on the 15th day of June, 1939, (Tr. 19A). Defendant's evidence was offered and received (Ab. 34-37): said cause was orally argued to

the court, which took the same under advisement until November 14, 1939, when a decision was entered in favor of plaintiff and against defendant. Thereafter, plaintiff made application to amend the prayer of his complaint to ask for the allowance of interest, which amendment was allowed, over defendant's objection (Ab. 38), and on the 29th day of December, 1939, over defendant's objection, plaintiff's proposed findings of fact (Ab. 41) and conclusions of law (Ab. 43) and judgment (Ab. 44) were signed by the court.

ERRORS RELIED UPON

The errors relied upon by appellant may be classified and discussed under the following groups:

1. Errors in overruling defendant's general and special demurrer and proceeding with plaintiff's evidence over the objections of defendant, based on the insufficiency of plaintiff's complaint. (Assignments of Error 1, 2, and 4)
2. Insufficiency of the evidence to create liability against the defendant. (Assignments of Error 8, 9, 10, 11, 15, 16, 17, 18 and 19)
3. Errors in rulings on the admissibility of evidence. (Assignments of Error 3, 5, 6, and 7)
4. Error in finding and concluding that the American Equitable Assurance Company had no interest in the action. (Assignments of Error 13 and 14)

5. Error in permitting plaintiff to amend his complaint after trial and decision of the court. (Assignment of Error 12)

1. PLEADINGS

The law is well settled that a garage such as defendant maintained in this action in the absence of specific agreement is not an insurer of automobiles that are left there for storage, and there is no liability for damage or loss suffered on the part of the bailor, unless such damage was proximately caused by *some act of negligence* attributable to the defendant.

Homan v. Burkhart, (Cal.) 291 Pac. 624:

“It is a well-settled principle of law in this state that a bailee for hire is not an insurer. * * * Bailee for hire is liable only when he has been guilty of some negligence. He is chargeable only with ordinary care and diligence in safeguarding his bailor’s property.”

The instant case was brought and tried upon the theory of negligence, and it is submitted that plaintiff’s complaint was insufficient in that it alleged “carelessness and negligence” generally and wholly failed to allege any specific act or failure on the part of defendant or set forth how or in what manner defendant was careless and negligent, and defendant’s special demurrer based on such grounds should have been sustained.

Under our statutes, a special demurrer for uncertainty performs the function of a motion to make a pleading more definite and certain, and Section 104-7-2, Revised Statutes of Utah 1933 like that in several western code states provides:

“The complaint must contain: * * *

“(2) A statement of the facts constituting the cause of action in ordinary and concise language.”

The purpose of this provision is that the adverse party may be entitled to know in what particular plaintiff claims the defendant is at fault and to enable him to properly prepare his defense. Plaintiff's allegation of carelessness and negligence was most certainly subject to plaintiff's special demurrer.

Clearly there is much more reason for the sustaining of defendant's special demurrer on the grounds of uncertainty in the instant case, than existed in the case of *Pennock v. Newhouse Realty Company*, (Utah) 93 Pac. (2d) 482, where uncertainty in plaintiff's complaint existed more as to how any acts of negligence alleged were the proximate cause of the accident than the failure to allege specific acts of negligence. In the instant case, although plaintiff claims negligence, no specific act of negligence is alleged. Justice Pratt at page 484 of the *Pennock* case says:

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"The defendant is entitled to know what plaintiff has in mind. A defense to an incident of carelessness of an employee may be entirely different from a defense to a failure to afford protection against a dangerous condition of the premises."

And Judge Larson on page 486 states:

"The mere characterization of an act as 'careless' or 'negligence' is not an allegation of fact, but merely the pleader's characterization or description of an act."

And in the instant case, plaintiff's complaint was insufficient in that it alleged no act of negligence on the part of defendant. 4 *Bancroft Code Pleading*, page 3543, Sec. 2041:

"It is not sufficient, at least as against a demurrer or motion, to allege merely in general terms that an injury was caused by the negligence of the defendant."

2 *Bancroft Code Pleading Practice and Remedies, Supp.*, Sec. 2041, page 961:

"The facts must be stated directly, so that the defendant may understand the specific acts of remissness with which he is charged."

Pullen v. City of Butte (Mont.) 99 Pac. 290:

"The only allegation in the complaint which seeks to charge the defendant city with negligence

is the following: 'That the said defendant * * * willfully, negligently, carelessly, and wrongfully caused the public sidewalk on the west side of Idaho street, between Galena and Mercury streets, * * * to be placed in, and willfully, carelessly, wrongfully, knowingly, and negligently permitted the same to remain in, an unsafe, dangerous, and defective condition.' At the close of plaintiff's case, the defendant moved for a nonsuit, specifying, among other grounds, that the complaint does not state facts sufficient to constitute a cause of action.

"'Our Code (1 Hill's Ann. Laws 1887) Sec. 66, requires the complaint to contain a plain and concise statement of the facts constituting the plaintiff's cause of action; and one of the great objects to be attained by this enactment was to compel the plaintiff to place upon the record the specific and particular facts which he claims entitle him to recover. The field of inquiry is thus narrowed, and the defendant is enabled to come into court advised beforehand of the particular facts he must come prepared to contest.'

"In our opinion the allegation that the city negligently placed the sidewalk in an unsafe, dangerous, and defective condition and permitted it to remain in such condition is but the statement of the bare legal conclusion of the pleader, and did not state facts sufficient to show negligence on the part of the city. The judgment and order are reversed, and the cause is remanded for a new trial."

Price v. Atchison Water Co., (Kan.) 50 Pac. 450:

"The defendant in error made its plea of contributory negligence in the following language: 'Further answering, defendant alleges that, if the plaintiffs have suffered any damage whatever, it is through and by reason of their own negligence in the premises, and that of said Melrose H. Price.' The case did not progress far enough to require evidence under this plea. Had it done so, the plaintiffs would have been uninformed as to the facts constituting the claim of negligence upon the part either of themselves or of the deceased boy. A motion by plaintiffs in error to require this answer to be made more definite and certain was made and overruled. It should have been sustained. The rule is the same in the case of an answer as it is in the case of a petition charging negligence. As to the latter it has been held: 'If a petition contains but a general allegation of negligence, it is subject to a motion requiring it to be made more definite and certain, and it is error for the court to overrule a proper motion presented for that purpose.' *Railway Co. v. O'Neill*, 49 Kan. 367, 30 Pac. 470. The case is reversed, with instructions to sustain the motion to make the answer more definite and certain, and to award a new trial. All the justices concurring."

In *Atchison, T. & S. F. R. Co. v. O'Neill*, (Kan.) 30 Pac. 470, a failure to sustain a motion to make more definite and certain was reversible error where negligence was alleged in general terms, and it did not appear which one, if any, of the servants of defendant was negligent, nor what acts or omissions constituted the negligence complained of. The court said:

"It had a right to know, not only which of its agents was chargeable with negligence, but also what acts or omissions of such servant or servants constituted the negligence complained of, so that its defense could be intelligently prepared, with respect thereto. * * * We think the petition too general, indefinite, and uncertain as to which of the company's agents or servants it imputes negligence, as to what acts or omissions constitute the negligence complained of, as well as to what proper rules for the conduct of trains the company violated in connection with the injury. The petition was therefore subject to a motion to make it more definite and certain. The motion was made at a proper time. It clearly pointed out the defects of the petition, and fully and definitely showed in what manner it should be corrected. We are of the opinion, therefore, that the refusal of the court to require the plaintiff below to correct his petition was prejudicial error."

Simons v. Pacific Gas & Electric Company, (Cal.) 220 Pac. 425:

"It should appear in what respects the defendant was negligent, and that such negligence had a causal connection with plaintiff's injury."

In *Colonial Refining Co. v. Lathrop*, (Okla.) 166 Pac. 747, it was held not error to refuse to instruct the jury on the issue of contributory negligence where defendant in attempting to plead contributory negligence, simply alleged that "such injuries claimed to have been

sustained by plaintiff were caused solely and only by negligence, carelessness and want of care of plaintiff herein," the court saying:

"Defendant should be required also to apprise the plaintiff of any special or affirmative defense he expects to make by pleading the facts constituting such defense. * * * Contributory negligence, to be available to the defendant, must be specifically pleaded."

In *King v. Oregon Short-Line Ry. Co.*, (Idaho) 55 Pac. 665, plaintiff's complaint alleged "that the defendant, by its agents and servants, not regarding its duty in that respect, so carelessly and negligently ran and managed its locomotives and cars that the same ran against, upon, and over said steer." It was held that defendant's demurrer on the grounds of 'uncertainty should have been sustained, the court saying:

"Plaintiff must show acts or omissions from which negligence will be inferred before he can recover, it certainly is no hardship on him, nor unreasonable, to require him to allege them. Subdivision 2, Sec. 4168, Rev. St., provides that the complaint must contain 'a statement of the facts constituting the cause of action in ordinary and concise language.' * * * But our Code of Civil Procedure has greatly changed the common-law rules of pleading, and requires the facts constituting the cause of action to be set forth in ordinary and concise language. And in the case at bar facts sufficient should have been set forth to inform the defendant what act or omission con-

stituted the negligence complained of. The judgment of the court below is reversed, with instructions to sustain the demurrer."

In *Osborn v. Carey*, (Ida.) 132 Pac. 967, a special demurrer to the complaint, which was based on negligent diagnosis or treatment of a patient by a doctor, should have been sustained when such complaint did not allege wherein the treatment rendered was wrong and there was nothing to show that the treatment rendered was not proper from the standpoint of the concensus of opinion and usual practice among physicians and surgeons of ordinary skill and learning in the profession in the locality wherein defendant practiced.

The same rule is applied where one relies on fraud, the pleaders in such cases being required to state the facts upon which they claim the fraud to be based, so that the party charged may know the nature of the claim and be prepared to meet it. *Muldoon v. Brown*, 21 Utah 121, 59 Pac. 720; *Wilson v. Sullivan*, 17 Utah 341, 53 Pac. 994.

2. INSUFFICIENCY OF THE EVIDENCE

Neither plaintiff's evidence, the whole evidence, nor the findings of the court discloses (1) *any particular act of negligence on the part of the defendant*, nor (2) *any particular act of negligence on the part of defendant to which can legally be attributed the proximate cause of the damage to plaintiff's car*. On the other hand, the

undisputed evidence produced on behalf of both parties is that the automobile was stolen from defendant's garage, and that before the fugitives could be overtaken the car was destroyed.

Plaintiff's Evidence

In attempting to prove negligence, plaintiff called four witnesses, C. B. Squires, plaintiff, and two attendants of the garage, Remington and Jones.

C. B. Squires simply testified that he stored his automobile with the defendant garage sometime in February, 1938; that the next morning the garage failed to deliver to him his car (Ab. 15); that he was told the car had been stolen (Ab. 17); that the car was afterwards recovered (Ab. 18). On cross examination he testified he had no personal knowledge as to how the automobile was stolen or how the thieves got into the garage or anything of that nature. (Ab. 18). We will hereafter discuss why certain objections to the testimony of Squires should have been sustained. Suffice it to say here that such testimony tended to prove nothing material and was wholly collateral to any issue in the case. There was no showing of similarity between such theft and the one in the instant case, nothing showing whether the Squires car was stolen in the daytime or at night, whether it was stolen by an employee or a stranger, did not show or disclose any negligence of defendant either in the selection of its employees or failure to afford pro-

tection against a dangerous condition of the premises, did not show a condition which the defendant might or should have remedied in any way, did not indicate any course of conduct or a neglect to remedy any condition, or any negligence of any employee which would have any bearing or relationship to a subsequent theft of an automobile.

Plaintiff testified (Ab. 19-21) to the delivery of his car to the garage between ten and eleven o'clock P.M. and about forty-five minutes after the lights of the city were off and the obtaining of the usual claim check; that the pedestrian traffic on the sidewalk in front of the garage at the time was heavy; that a number of people were parking their cars in the garage and going to the dance nearby; that as usual he left his keys in the car and one of the attendants parked it in the garage; that not long after he retired to the hotel, it was reported his car had been stolen. On cross examination, plaintiff testified he knew that garages, both in and out of this state storing automobiles required the keys to be left in the car, and that he had stored his car at the defendant garage in the same manner for a number of years.

Plaintiff then called Steel Remington and Kenneth Jones, attendants in the employ of defendant at the garage the night of the theft. These witnesses testified to the description of the garage, the manner of operation of the garage, and what took place on that particular

night. It was stipulated the testimony of Kenneth Jones would be the same as that of Steel Remington. The latter testified that they did not have "the slightest idea how Freeman and whoever was with him got inside the garage that night." They had "all been wondering and speculating as to how he got in," and the testimony of Remington showed no specific act of negligence or conduct on the part of defendant which it could be said caused plaintiff's loss. Remington testified (Ab. 22-31) to the fact that Kenneth Jones, Ben Baxter and he were all on duty the evening of the theft, and that their duties were receiving, parking, and delivering cars and servicing automobiles, including the selling of gas and oil, and also operating an automobile laundry, but that the laundry closed at six o'clock in the evening. That the garage itself was open day and night. That it was very quiet and they were not busy between 10:30 and 12:00 that evening. That there are only two doors opening from the service platform in front of the garage into the storage portion of the garage. That these two openings appear on the right hand side, looking at the picture, Plaintiff's Exhibit "A", the entrance being the opening next to the office and the exit appearing to be about one-third of the way from the left side of the picture. That to the left of the exit door, looking at the picture, is the opening to the wash rack, and the opening that appears on the extreme left hand side of the picture is just a little room that is always kept locked, and no one ever goes in it, and it is not used as an exit or an

entrance. The picture shows this door on the extreme left side of the picture as being open, but it is never used and is kept locked all the time. That whenever there was anybody going in the garage, they usually stopped them and asked what they wanted, and that they usually watched for them. That they didn't recall anybody particularly that went in between ten and eleven-thirty on this particular evening. That it was not their practice to let people go in the garage without knowing where they were going unless they knew the person, and if they did not know them, they prevented them from going in. That other than the entrances that are shown on the picture, (Plaintiff's Exhibit "A"), there is a back door on the north side of the garage about three-quarters of the way back, which is locked and closed between ten and eleven. This door is used by the government to store their trucks, and one of the government employees has a key to the door, which he uses in storing the government trucks sometime between seven and ten p. m. That one of the employees checks on this door after he has stored the trucks, and that the key is then left on the garage cash register in the office. That except as to this back door, there are no other entrances in the garage except an entrance between the inside of the garage and another business property that faces on Fifth South. That this place is always locked up with a padlock on the inside of the garage, so that if anyone had a key, they could not come through from the Fifth South entrance. That it is

their practice with all cars that are parked on the lower floor to ask the customer to leave his keys in the car. That in parking cars, it is the custom for the attendants to drive the cars in and park them, and then when the customers return for their cars, to go and get them and bring them out. That when a car would come in, they would meet it under the canopy right by the office, and it was there that they would give the customer his claim check and take possession of the car, and then when they would come back with their claim check, one of the attendants would go and get the car for them. That on dance nights it was customary for a number of people to use the rest room at the garage, but we could see where they were going, and we usually watched them to see where they went and watched them to see that they came back out. They observed in a general way as permitted by the other duties they had to do. That when Mr. Romney's car was driven out of the garage, the three employees were standing over by the little office by the front entrance on the north side of the drive. That from that office, which is glass on three sides, they have a clear view of the entire front of the garage and can see any corner of the whole garage. That he observed Mr. Romney's car coming out almost instantly and even before it got through the door. That he observed there were two people in the front seat. That he had not seen these two people or any other people while he was there that evening go into the garage. That he did not have time to do anything until they

got out in the service entrance platform. That he immediately went to his own car and went in pursuit of the Romney car. That at no time within an hour prior to the taking of this car had he observed anybody in the front of the garage at all. That with respect to letting people in the garage, they had been instructed to find out where they were going and why, and in the event they should permit them to go in and did not know them, the attendant usually went with them. "I haven't the slightest idea how Freeman and whoever was with him got inside of the garage that night. We have all been wondering and speculating as to how he got in."

Plaintiff's own witnesses having testified that they had no idea how Freeman got into the garage, and it nowhere appearing in the evidence how Freeman and his companion got into the garage, nor what act or conduct on the part of defendant was attributed to the cause of the theft, there is no negligence in this case on which to predict liability on the part of defendant. Plaintiff certainly did not show in what way this garage was operated in any different manner than any other garage, and defendant's evidence was undisputed that the garage was operated in a similar manner to other garages.

Pat Rosell, called to testify for the defendant, testified that it was the practice of all garages to have the keys left in the car. (Ab. 34-5).

It was stipulated that in the operation of garages such as the one here in question that cater particularly

to live storage and transient storage business, that ordinarily sufficient employees both day and night, are maintained to handle the ordinary run of business by meeting the cars coming in at the front entrance, taking those cars back into the garage, parking them, and coming back and meeting other cars that are arriving, and similarly when persons come for their cars to the garage, to take the claim check, if it is a claim check storage and go and get the car and bring it to the front of the garage and turn it over to the customer. (Ab. 35-36).

It was further stipulated that garage attendants of garages similarly situated during the times when they are not busy handling cars, also attend to filling up gas tanks, greasing cars that the customers want to have greased and perform those ordinary duties in such a garage, particularly garages that do servicing in the way of oiling and greasing and cleaning, and so on.

It was stipulated that on the night that plaintiff's car was stolen, at the hour of 9:19 p. m., all of the lights in the city, including inside residence and business lights, as well as street lights were out for a period of approximately five minutes, and that they first went out at 9:19 p. m., and that the car was brought to the garage perhaps one-half or three-fourths of an hour after the lights were off.

It was further stipulated that as soon as the car was driven out of the garage, that one of the three em-

ployees of the garage immediately got into his car, took after the Romney car and chased it for some twenty or so blocks all up through the east part of town and then back down town somewhere near where the car was finally apprehended, or where the collision occurred between the Romney car driven by Freeman and another car, resulting in the crash.

AUTHORITIES

All the authorities are in accord with *Homan v. Burkhart*, supra, in holding that a bailee is not liable for damages in the absence of negligence, and with the exception of two or three states, all are agreed that the ultimate burden of proving negligence rests upon the plaintiff. There has grown up in the cases, however, a procedural rule that if plaintiff simply alleges and proves the bailment and a failure to deliver on the part of the bailee, upon demand, a prima facie case of negligence has been established and the defendant then has the burden of proceeding with the evidence to rebut the presumption and explain the reason for failure to deliver. We call attention to this rule for the purpose of pointing out that such presumption has no application in the instant case for at least three reasons, namely, (1) Plaintiff based his complaint on negligence; (2) The loss was explained both in plaintiff's complaint and in plaintiff's evidence by the undisputed fact that the automobile was stolen from defendant's garage; and (3) Plaintiff proceeded at the trial, the theft being admitted, and

undertook to prove negligence on the part of defendant. We will discuss the authorities on these points.

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“ * * * It alleges that the loss was caused by fire, and that the fire was caused by defendant's negligence. In alleging a loss by fire, the defendant was relieved of the presumption of negligence, and in alleging that the fire was caused by negligence, plaintiff assumed the burden of proving such negligence. Her right of recovery is based upon defendant's negligence. She must prove this negligence in order to fix a liability on him. For, under the great weight of authority, and under the light of reason, where the loss of bailor's property is occasioned by fire, robbery, burglary, or theft, or by any means which would ordinarily and reasonably seem to be unavoidable, the bailee is relieved of the presumption of negligence in the loss, and of the consequent burden of interposing an affirmative defense. * * * Story, Bailm. Secs. 213, 278, 339, 454, and authorities, notes 3, 4. 'All bailees, with or without a special contract, are prima facie excused when they show loss or injury by act of God or of public enemies, and ordinary bailees in a variety of lesser instances, such as fire, loss by mobs, or robbery.' ”

Glover v. Spraker, (Ida.) 292 Pac. 613:

“ * * * The rule is settled in such case that, when a prima facie case is made, the burden is on the bailee to account for the loss of the article; but, when that is shown, the burden is then upon the bailor to establish negligence on the part of the bailee. *Scott v. Columbia Compress Co.*, 157 Ark. 521, 249 S. W. 13. It necessarily follows that, if the bailor himself accounts for the loss, and charges it to the bailee's negligence, he has lifted the burden from the bailee's shoulders, and, until

negligence is proven, the bailee need not open his mouth."

Homan v. Burkhart, (Cal.) 291 Pac. 624:

" * * * The weight of authority seems to be, at least in actions based on negligence, that the ultimate burden of proving negligence is ordinarily upon the bailor, where he is seeking to recover for the loss of property which it is conceded, as it is in the instant case, or which the evidence tends to show, with reasonable certainty, has been stolen while in the possession of the bailee. * * * "

And in the later California case of *U Drive & Tour, Limited v. System Auto Parks, Limited*, 71 Pac. (2d) 354, the court said:

" 'Under the rule settled in *Wilson v. Crown Tr. Co.*, if plaintiff alleges a loss by fire or theft, and charges this was due to defendant's negligence the burden is on plaintiff to prove such negligence. See, also, *Wilson v. Calif. C. R. R. Co.*, 94 Cal. 166, 172 (29 P. 861, 17 L. R. A. 685). So it seems that the answer to the question, on whom is the burden of proof as to defendant's negligence, depends on the pleadings.' "

In view of the fact that plaintiff based his complaint on negligence and also alleged the fact of the theft, and the further fact that plaintiff did not rest his case on such presumption, but proceeded with the trial on a fishing expedition and undertook to prove specific negligence on the part of defendant, there is no room

for a presumption in the instant case. Otherwise, the bailment and failure to deliver having been admitted by defendant, there would have been no occasion for plaintiff proceeding with further proof. In *Delaware Dredging Company v. Graham*, (E. D. Pa.) 43 Fed. (2d) 852, it is held that where the bailor does not rest his case upon proof of delivery and failure to return, but produces evidence to show the circumstances of loss, his case fails unless the bailee's negligence affirmatively appears from such proof. Any possible theory of plaintiff's case based on presumption is, therefore, entirely eliminated from this case.

We have heretofore reviewed the evidence in the instant case. We have failed to find any case holding like evidence sufficient to sustain a decision in favor of plaintiff based on negligence. The facts in the instant case are less favorable to plaintiff than even those in the case of *Swain v. Twin City Motor Company*, (N. Car.) 178 S. E. 560, where it was held a non-suit should have been granted. The following portion of the opinion of the Swain case discloses the evidence and the holding of the court:

“The pertinent facts disclosed by plaintiff's testimony are as follows: ‘I traded for the car with Mr. DeTamble, personally, out at his home on Tuesday night, and he told me to bring it back the next day that they would wash it, grease it and fix it up for me. * * * I took it back Saturday

morning and left it at defendant's place of business to have it washed and greased. I drove the car in their place of business and asked Mr. Hunter, the man who checks cars in and checks them out, where to put it. He told me to drive it back inside and leave the keys in it for he had to take it up on the next floor to the wash-pit. I did leave the keys in the car. * * * About eleven o'clock on the Saturday that I left the car there, Mr. Hunter called me on the phone and said somebody had stolen my car. * * * It was about eight o'clock on Saturday morning that I left my car at the Twin City Motor Company and they notified me it was stolen about eleven o'clock that morning, about three hours after I had left it there. * * * The Twin City Motor Company building has three floors, including the basement, and I left my car on the first floor, with the garage. * * * When Mr. Hunter called me to tell me my car had been stolen he said he saw a fellow standing out there looking at the cars, leaning up against the wall. * * * He said he took notice of him and then went on to doing something to another car, and saw him go out the door; that he like to hit a fellow, he went out the door so fast. * * * Mr. Hunter told me he saw a fellow with a light overcoat on, well dressed, leaning up against the wall, looking at the cars, and said when he went to turn his back to him and do something else, he saw him go out with my car.' There was further evidence that the doors of the garage were open for patrons to come in, and that no special employees or watchmen were placed at the entrance.

"Hunter, a witness for defendant, testified that when plaintiff left his car in the garage,

'we greased the car and sent it upstairs to have it washed. The boy washed it and brought it down stairs about quarter to eleven or something like that. I was busy around there waiting on people and I saw a man standing there, a little larger than I am, a nice looking fellow. I told him I would wait on him in just a few minutes and went ahead doing what I was doing, and the next thing I knew * * * I heard a noise going out the door. I looked up and the car was going out as fast as it could go. * * * There were five or six people in the department where Mr. Swain's car was stored at the time it was taken out and there were a number of other cars in there. The place was full, six or eight cars in front, and the man just had room to drive Mr. Swain's car out. Mr. Swain's car was parked about 100 feet from the door, about the center of the building. * * * There was nothing unusual about the conduct or appearance of the person whom I had seen standing in the garage and who drove Mr. Swain's car out. * * * He was nice looking, well dressed, seemed to be about twenty-eight years old. Strangers frequently come in the garage to have work done on cars. * * * I often have to let people wait while I wait on other customers. * * * There was nothing said about leaving the keys, but he had to leave the keys in the car or we couldn't move it up to the next floor to wash and grease it. * * * The car was left with the keys in it. It was between ten thirty and eleven o'clock that the man whom I have described, came in. * * * The car was backed up against the wall with the side towards the doors of the building.'

“In the case at bar, there is no dispute as to the fact of theft. It is not controverted that the car was parked within the garage, one hundred feet from the door, and that there were attendants in and about the garage at the time. Consequently, the only fact upon which negligence could be based was the leaving of the keys in the car. In this connection it must be observed that the car could not be moved without the keys, and that the leaving of the keys was not only essential to rendering the service requested, but for moving the car in case of fire and other emergency in the garage.

“Interpreting the evidence with that degree of liberality required in motions of nonsuit, no evidence of actionable negligence appears in the record, and the motion for nonsuit should have been granted.

“Reversed.”

In the instant case, there is no dispute as to the fact of the theft. It is not contradicted that the car was parked within the garage approximately one hundred feet from the door, and that there were the usual attendants in and about the garage entrance. Leaving keys in the car as in the Swain case is necessary to moving the car in case of fire and other emergency, and is the custom of all garages and this practice was well known to plaintiff. Like in the Swain case, there was no evidence of negligence, and certainly no specific act of negligence to which the court could attribute the proxi-

mate cause of the loss. The evidence is undisputed that the attendants observed the car coming out almost instantly, and even before it emerged through the entrance, and that all possible efforts were made to recover the automobile.

In *Perera v. Panama-Pacific International Exposition Co.*, (Cal.) 175 Pac. 454, it was held that before a verdict in favor of plaintiff can be sustained, there must be something in the evidence to gauge what is reasonable care and protection, and in that case a verdict was directed for the defendant where plaintiff sued to recover damages for loss of jewels left in the sole custody of defendant as an exhibit in the exposition. There were detectives placed throughout the building; the section where the theft occurred was attended in the same manner as other sections; and plaintiff was cognizant of the manner the jewelry was placed on exhibit. The jewels were stolen by prying into an exhibit case while one of defendant's attendants was on duty at the time, engaged for a moment with a customer. It further appeared in the evidence that some nine or ten evenings before this theft, a case in the same exhibit was opened and some jewelry stolen, but there was no evidence as to the circumstances under which this theft occurred. The court said:

"There is nothing in the evidence reasonably warranting a conclusion that the representative of defendant in charge of this section at the time

of the theft was guilty of any lack of ordinary care, or that the defendant was negligent in not having more than one attendant in the section."

And in answer to plaintiff's claim that there was not sufficient police protection for the exhibits in the building, the court continued:

"We find in the evidence no sufficient gauge by which it may fairly be concluded that the police protection so furnished was not reasonably adequate; that is, that it was less than a reasonable man, in view of all the circumstances, would deem essential to the proper protection of the various exhibits.

"It seems to us that any conclusion of want of ordinary care in the matter of police protection would be one based solely on mere conjecture or surmise."

And concerning the prior theft:

"The prior theft is of no practical importance in this connection, in view of the want of evidence as to the circumstances thereof. The burden was on plaintiff to affirmatively show negligence. It is true, of course, that evidence of facts and circumstances from which want of ordinary care may reasonably be inferred is sufficient to support a conclusion of negligence, in which event the question of negligence is one for the jury. But the difficulty here is that the facts and circumstances shown by the evidence furnish no sufficient basis for any such inference.

This being the condition of the proof, the trial court properly directed the jury to render a verdict for the defendant."

In *Firestone Tire & Rubber Co. v. Pacific Transfer Co.*, (Wash.) 208 Pac. 55, a judgment in favor of plaintiff was reversed and the case remanded with directions to dismiss because plaintiff had failed to prove negligence.

"All that the testimony shows in this case is that the bailee did not return the goods because they were stolen by two of its employees without its knowledge or connivance. Under ordinary circumstances, the mere fact that the goods in storage have been stolen no more shows negligence than the fact that in a personal injury case the plaintiff was injured while in the employ of the defendant shows negligence. The burden here was on the respondent to show that the theft of its goods was the result of some negligent act of the appellant. Mere proof of theft is not proof of negligence. 40 Cyc. 470; 27 R. C. L. 1002."

In *Marsh v. Penn R. Co.*, (Va.) 167 S. E. 274, failure to plead and prove specific negligence was fatal to plaintiff's case.

It cannot be determined whether the trial court concluded that liability should be imposed without negligence, or that he could speculate that negligence existed in the absence of proof. Utah is definitely committed to the uniform rule that a judgment or verdict

cannot be based upon speculation, conjecture, or surmise. There is merit in the saying that "Doors and locks are effective to keep out honest people only." It was even possible to gain entrance to the United States Mint in San Francisco. In this case, for the purpose of theft, entrance could be gained in innumerable ways, by hiding in the back of an automobile, slipping through the door while the city was in darkness, entering while the post office mechanic was running mail trucks in the back way, hiding in the garage during the day time, and certainly defendant could not be said to be negligent if a thief so entered, but in this case, there is not even proof of how entrance was gained. His method of entering is a matter of pure speculation or conjecture. The mere fact that he gained entrance is no proof of negligence. In order to sustain the judgment, it is necessary first to speculate on the method of entering, then speculate as to whether the defendant was negligent in permitting such entrance, and then speculate as to whether the loss itself was the result of such speculated negligence. The facts in this case are not similar to those in cases where a garage is left unattended, or where an insufficient lock is on a door, or where an unenclosed parking lot is left unattended, as in such cases the facts disclose that the theft was caused from a determined negligence, while in this case not only is there a lack of evidence of any negligence, but a total failure to attribute the theft to any such failure. The following authorities, while not similar in fact, support the un-

avoidable conclusion that this judgment was based upon pure speculation and conjecture.

In *Quinn v. Utah Gas and Coke Company*, 42 Utah 113, 129 Pac. 362, plaintiff was paying a bill at the cashier's window in defendant's place of business and an ink bottle having been tipped over and being undiscovered ran onto plaintiff's clothing; there was no evidence as to how the bottle was overturned. The court reversed a judgment in favor of plaintiff and directed a verdict for the defendant saying:

"In the case at bar there is not the slightest evidence with respect to who overturned the ink bottle, or how, or when it was overturned. * * * In view of the evidence, how could the appellant guard against an accident such as the overturning of an ink bottle or ink well in use by the defendant's servants?

"Counsel for respondent contend that negligence may be inferred in this case in view of the duty that the law imposes on appellant, but negligence must be deduced from facts. From what fact or facts, as they appear in this case, is it to be inferred? The doctrine is elementary that in cases where the maxim of *res ipsa loquitur* does not apply, negligence may not be presumed or inferred merely because an accident occurred. In this case all that is shown is that a bottle or well containing ink, in some way unknown, was overturned, and that the ink was spilled, and some of it dripped upon respondent's dress and damaged it. At most, therefore, the case falls

within the familiar doctrine that 'when a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to show neither.' * * * Mere conjecture, however, cannot support a finding of negligence."

In *Jenson v. S. H. Kress & Co.*, 87 Utah 434, 49 Pac. (2d) 958, a customer was injured by coming in contact with a splinter of glass projecting from a show case in defendant's store. It was not shown how or when the glass was broken. In reversing the lower court and holding a non-suit should have been granted, the court said:

"We cannot see how this case differs from the Quinn Case. In that case a bottle of ink had spilled, and plaintiff's dress was damaged by ink running upon it. In this case there was a cracked panel in the showcase and the person of plaintiff was injured. In neither case did any one know how the ink was spilled or the glass broken. In both cases the cause of the spilled ink or the broken glass may have been caused by the customer who was damaged or by another customer, or may have been caused by some representative of the company without negligence and unnoticed when it was done, or, in both cases, it may have been caused by the negligence of the company through a servant. The difficulty is that it is in the realm of speculation."

In *Fritz v. Electric Light Company*, 18 Utah 493, 56 Pac. 90, an employee of defendant was electrocuted while at service in defendant's electric plant. It was contended

that defendant was negligent by reason of the clutch or lever having been left near a live dynamo. There was no evidence as to how the deceased came in contact with the dynamo. The court said:

“Just how the decedent came in contact with the dynamo and caused the fatal current to pass through him is a matter of speculation and conjecture. * * * To entitle the plaintiffs to recover it was incumbent upon them to establish the negligence of defendant by some evidence, and that such negligence was either the cause of, or contributed to the accident. Negligence cannot be presumed, nor the question thereof left to conjecture. In the case of *Sorenson v. Monasha Paper & Pulp Co.*, 56 Wis. 338, the learned court tersely, and, we think, correctly, stated the rule as follows:

“‘When liability depends upon carelessness or fault of a person or his agents, the right of recovery depends upon the same being clearly shown by competent evidence; and it is incumbent upon such a plaintiff to furnish such evidence to show how and why the accident occurred, some fact or facts by which it can be determined by the jury, and not left entirely to conjecture, guess or random judgment, upon mere supposition, without a single fact shown.’”

In *Tremelling v. Southern Pac. Co.*, 70 Utah 72, 257 Pac. 1066, it was claimed the defendant was negligent in leaving a box car on a sidetrack so close to the main track that deceased riding on the side, came in contact

therewith and was killed. There was no positive proof that the cause of deceased's death was his coming in contact with the side car. In affirming a judgment of no suit, the court said:

"The evidence must, however, do more than merely raise a conjecture or show a probability to the cause of the injury."

See also *Dahl v. Charles A. Krause Milling Co.* (Wis.) 289 N. W. 626.

In the case before the court there is not one single fact shown which under the evidence can be said to be the basis of carelessness or negligence on the part of the defendant, nor is there any evidence by which it can possibly be determined that such fact, if its existence were supported by evidence, had even a remote connection with the real or actual cause of the theft. Appellant is wholly uninformed, even at this late date, as to what act of carelessness plaintiff claims or the trial court purports to have found to be the basis of liability; and under the authorities, plaintiff was entitled to be informed from plaintiff's complaint before it was required to answer in what particular it was claimed the defendant was negligent. If this is not a case of pure speculation, why is it that the plaintiff did not specify in his complaint wherein he claimed the defendant was negligent? And why is it that the court apparently based its decision on negligence, but failed to specify when

defendant was negligent. It cannot be determined from the pleadings, the evidence, nor the findings of the court, nor elsewhere whether negligence is claimed by reason of the manner of conducting defendant's business, a dangerous condition of the premises, or an incident of carelessness on the part of some employee, and if the latter, what employee it is claimed was negligent, much less, that the evidence supports any one of such claims. Speculation must be resorted to, first, to determine the manner of entrance of Freeman into the garage; second, whether defendant was negligent in permitting such entrance and in what particular; and, third, whether the loss was a proximate result of such speculated negligence. The evidence in this case is undisputed that garages similarly situated are all maintained and operated in a manner like the defendant's garage, and that keys are always left in the car, and this method of operation was fully known to plaintiff. It was undisputed that defendant had the usual number of attendants and employees on duty at the station the night of the theft, and that the employees saw the car being driven from the garage almost instantly and even before it had emerged from the exit and did all in their power to overtake the fugitives. There is no evidence that defendant failed in any particular to measure up to the standard of reasonable care required by law. Plaintiff neither pleaded nor proved any specific breach of duty, nor any act of carelessness proximately causing the loss, a most fundamental requirement in negligence cases.

The line must be drawn between suggestions and possible precautions not shown in the evidence to be actually connected with the loss, and evidence of actual negligence sustained by proof of actual proximate cause. Facts, not conclusions, must be determined. As stated in *Quinn v. Utah Gas*, supra, "when a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to show neither." Conjecture cannot support a finding of negligence.

3. ERRORS IN RULINGS ON THE ADMISSIBILITY OF EVIDENCE

Assignment of Error No. III

The plaintiff, E. L. Romney, simply testified to facts that were admitted in the pleadings, namely, the delivery of the car to the garage, and the theft, and his testimony in no way tended to establish liability, and the trial court should have sustained defendant's motion to strike all the testimony of that witness.

Assignments of Error Nos. V and VII

Plaintiff called the witness Squires, who attempted to testify to a previous theft from defendant's garage. Defendant objected to the reception of this testimony before the witness testified (Ab. 50-1) and also moved to strike such testimony afterward, (Ab. 54) on the grounds that such testimony was irrelevant and imma-

terial and raised a wholly collateral issue and did not show or disclose any facts as to an occurrence due to any negligence, nor show a condition which the defendant might or should have remedied in any way, nor indicate any course of conduct, nor a neglect to remedy any condition or any negligence of any employee which would have any bearing or relationship to a subsequent theft of an automobile. 1 *Jones on Evidence*, Civ. Cases, 4th Ed. Sec. 163, page 277, states the general rule as follows:

“In actions to recover damages on account of injuries caused by negligence, collateral facts are generally held to be irrelevant to the disputed issues and evidence thereof is held to be inadmissible.”

Similarly in negligence cases, it is the well-established rule that evidence of prior accidents is inadmissible for the purpose of proving actionable negligence. In *Croddy v. Chicago R. I. & P. Ry. Co.*, (Iowa) 60 N. W. 214, in an action brought to recover for the killing of a colt at a railroad crossing, plaintiff was not permitted to show that stock had previously been killed at the same crossing.

And the testimony of the witness Squires could not be admissible on the theory of proving notice to the defendant or the existence of a defective or dangerous condition because the witness could not even testify to the fact that his car was stolen except through hearsay

and for the further reason that *it was not anywhere shown that the occurrence was due to any negligence of the defendant, due to any defect or condition which the defendant might or should have remedied or any negligence of any employee which defendant could have corrected.*

In *Hurd v. Union Pacific Ry. Co.*, 8 Utah 241, 30 Pac. 982, the action was for personal injuries caused by defendant's negligence, and the only question was whether or not a locomotive engine, which had moved without human agency and caused the injury, was in good repair at the time. The court held that evidence was inadmissible to show that other engines steamed up had moved without human agency and independent of any defect discoverable by the witness, the court pointing out that such evidence would tend to introduce wholly collateral issues.

In *Perera v. Panama-Pacific International Exposition Co.*, supra, without discussing whether evidence of a prior theft was admissible in evidence, in directing judgment for the defendant, the court held that a prior theft was of no importance where there was no evidence as to the circumstances of such prior theft.

Assignment of Error No. VI

It is a well-established rule of law that an agent has no authority after an event or transaction has occurred

to make admissions on behalf of his principal and conversations with an agent or employee after the occurrence of the transaction or event as against the principal are hearsay and not admissible evidence.

Birmingham News Co. v. Browne, (Ala.) 153 So. 889:

“The declarations of an agent as to past transactions * * * are not evidence against the principal. Only when a part of the *res gestae* or in a proper case by way of impeachment of the witness, upon predicate duly laid, can such evidence be admitted. This rule has been long recognized.”

See also the following cases:

Sparks v. Maeschal (Ky.) 289 S. W. 308;
Drouillard v. Rudolph, (Iowa) 223 N. W. 100;
Prestonsburg Superior Oil Gas Co. v. Vance, (Ky.)
 284 S. W. 405;
Smith v. Emporium Merc. Co., Inc., (Minn.) 251
 N. W. 265;
Alabama Power Co. v. Smith, (Ala.) 155 So. 601;
Crock v. Magnolia Milling Co., (Wash.) 266 Pac.
 727;
Wilkinson v. Queal Lumber Co., (Iowa) 226 N.
 W. 43;
Cooley v. Killingsworth, (Iowa) 228 N. W. 880.

Nothing that any of the employees at the garage told Squires in connection with the cause of his car being missing could in any way be binding on the defendant company, and the testimony of Squires as to any con-

versation with such employees is purely hearsay and inadmissible evidence, and it was error for the court to overrule defendant's objections to such testimony.

4. ASSIGNMENTS OF ERROR XIII AND XIV

It was stipulated (Ab. 11) that the American Equitable Assurance Company paid to plaintiff under a collision coverage policy, the amount of his loss under the policy.

In *Potomac Ins. Co. v. Nickson*, 64 Utah 395, 231 Pac. 445, it is pointed out that by virtue of such payment, the insurance company becomes subrogated to the rights of the insured in the amount of such payment and such subrogation rights are equivalent to an actual assignment, and in *Session v. Hassett*, 280 N. Y. S. 148, it is said:

"The insurance company by its payment to plaintiff became the absolute owner of a proportionate interest in her claim. To this extent, the insurance company is a necessary party, the real party in interest, in whose name the action for its proportion of the claim must be brought."

It was error for the court, therefore, to find that the plaintiff was entitled to recover the full amount of the loss and further find that the American Equitable Assurance Company had no claim. There is no assignment shown from American Equitable Assurance Com-

pany to plaintiff, and in the absence of such, American Equitable Assurance Company would be the owner of its portion of the recovery.

5. ERROR IN PERMITTING AMENDMENT TO COMPLAINT

At the beginning of the trial, it was stipulated (Ab. 11) that in the event it should be decided that plaintiff is entitled to recover that the damages to be recovered are \$715.00 in addition to the usual taxable costs of court. It was most certainly error for the trial court to disregard the stipulation of the parties and permit plaintiff over defendant's objection (Ab. 38) to amend his complaint after the decision of the court, to ask for the additional amount in interest, and allow such additional amount to be included in the judgment. (Ab. 44).

CONCLUSION

We respectfully submit:

I. That defendant was entitled to be advised in the first instance how or in what manner it was claimed defendant was negligent, and the act and nature of the negligence charged, and the trial court erred in overruling defendant's general and special demurrers to plaintiff's complaint and in overruling defendant's repeated objections to the introduction of any evidence raised prior to the introduction of any evidence, dur-

ing the course of the trial, and prior to final submission of the case.

II. A. That the evidence in this case is wholly insufficient to create liability on the part of defendant in that speculation is necessarily resorted to in (1) determining the means by which Freeman succeeded in gaining entrance into the garage; (2) determining if defendant was negligent and in what particular it could be said defendant was negligent; (3) that such speculated negligence was the proximate cause of the loss.

B. That the findings of the court are insufficient to sustain the judgment for the same reason and for the further reason that there is no finding of any specific negligence on the part of defendant, which was the proximate cause of the damage to plaintiff's automobile.

III. That the court erred in:

A. Refusing to strike the testimony of the witness Romney.

B. Overruling defendant's objections to the testimony of the witness Squires on the grounds that it related wholly to a collateral issue not shown to be similar to the theft of the Romney car.

C. Overruling defendant's objections to the testimony of the witness Squires as to any conversations with defendant's employees, the same being hearsay as to the

defendant and in no way binding upon the defendant.

IV. That the court erred in finding the defendant, American Equitable Assurance Company had no interest in the action.

V. That the court erred in permitting plaintiff to amend his complaint after the decision of the court and contrary to the express stipulation of the parties relating to damages.

VI. That the judgment of the lower court should be reversed.

Respectfully submitted

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