

1940

Romney v. Covey Garage et al : Brief of Respondent

Utah Supreme Court

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Recommended Citation

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Case No. 6243

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 ASSURANCE****COMPANY, a corporation,***Interpleaded Defendant
and Respondent.*

Brief of Respondent, E. L. Romney

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH,

HON. P. C. EVANS, *Judge.*

JUDD, RAY, QUINNEY & NEBEKER,*Attorneys for Plaintiff and Re-
spondent, E. L. Romney,**Attorneys for American Equit-
able Assurance Company, a
corporation.***STEWART, STEWART & PARKINSON,
EDWIN B. CANNON****FILED**
*Attorneys for Defendant and**Appellant, Salt Lake City*

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Machine-generated O.R. may contain errors.

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In the Supreme Court of the State of Utah

E. L. ROMNEY, <i>Plaintiff and Respondent,</i>	}	Case No. 6243
vs.		
COVEY GARAGE, a corporation, <i>Defendant and Appellant,</i>		
AMERICAN EQUITABLE ASSURANCE COMPANY, a corporation, <i>Interpleaded Defendant and Respondent.</i>	}	

Brief of Respondent, E. L. Romney

STATEMENT OF THE CASE

E. L. Romney brought an action to recover damages resulting from the theft of his car from the Covey Garage. The case was tried by the court sitting without a jury and the judgment was in favor of the plaintiff for \$715 together with costs and interest from which the Covey Garage has appealed. The plaintiff alleged and the trial court found the damage resulted from defendant's negligence.

Prior to trial the defendant interpleaded the American Equitable Assurance Company and it was regularly served with an order of court ordering it to appear and set forth its claims, if any, against Covey Garage. It did not appear and the trial court in its judgment held that it had no claim against the defendant. Defendant alleged, but did not prove, that the American Equitable Assurance Company paid the plaintiff the reasonable damage to his car under an insurance policy and was subrogated to his rights against Covey Garage. Since it was made a party to the action and asserted no claim against either defendant or plaintiff its relationship, if any, with the plaintiff is in no way involved here.

On Saturday, April 30, 1938, at about 10:30 P. M., E. L. Romney of Logan, Utah, left his car for storage at the Covey Garage, which accepted the car for a consideration to be paid and delivered a claim check to Mr. Romney. The attendant was requested to fill the car with gasoline. The keys were left in the car to enable the garage employee to put in the gas and park it in the garage. It was the practice of the garage to park the cars in the garage and deliver them to the owner when called for. (Tr. 45-49)

At the time the car was left there was a dance at the dance hall, the entrance to the dance hall being about 20 yards south of the entrance to the garage. There were a lot of people milling around on the sidewalk in front of the garage.

About 11:30 P. M. the car was stolen by a man named Freeman and driven out of the garage and wrecked. Mr. Romney tendered the defendant the payment for the storage and gasoline. (Tr. 51)

When Mr. Romney's car was delivered to the garage, there were three attendants on duty — Steele Remington, Kenneth Jones and Ben Baxter. These men received, parked and delivered cars and sold gas and oil. The garage never closes. (Tr. 55) Plaintiff's Exhibit "A" (picture) shows a front view of the garage which has two main front entrances, a wash rack and a room which has a door leading into the garage. The opening just south of the two main entrances is a wash rack. There are doors which can be closed in front of the wash rack. Two of the three attendants on duty at the garage testified they did not know whether the doors to the wash rack were closed or not between ten and eleven-thirty P. M. on the night of the theft. They did not know whether or not there were any cars parked in front of the wash rack. (Tr. 58)

Whenever there is anybody going in the garage the attendants usually stop them and ask them what they want if they see them. They do not usually let anybody in the garage who doesn't have any business in there. (Tr. 59) Occasionally some one starts into the garage and the attendants stop them.

There is a rear door to the garage which is on the north side. The man who takes care of the government mail trucks closes it and locks it after 10 P. M. One of

the boys on duty usually checks this door but no particular attendant has this duty. The two attendants who testified (Baxter and Remington) do not recall checking this door on the evening of April 30, 1938. (Tr. 60)

There is an entrance that goes through the garage and comes out on 5th South Street, but the door is always padlocked. The witnesses did not know whether this door was locked or not on the evening of April 30th. (Tr. 61)

The three attendants were standing together near the door of the office on the right side of the drive when the Romney car was driven out. Two people were in the front seat. There were about 115 cars stored in the garage that evening. Unless requested otherwise the keys are left in all cars. (Tr. 63)

There was as always a line of cars parked on the service platform just south of the wash rack—(extreme south in the picture). There were about 4 cars there the evening of April 30th. They are parked with the nose pointing south. The witnesses did not know whether the wash rack door was open or closed on the night of the theft.

The opening at the extreme left of the picture is a little room with a door in the back which is always kept locked. (Tr. 68) *The man who takes care of the government mail trucks has a key to the north back door. He drives the government cars in between seven and ten P. M. and parks them on the upper floor. If the attend*

ants didn't know the people (who were going into the garage) and they were going clear to the back of the garage, we usually went with them. (Tr. 72)

The lavatory for the garage was just inside the north entrance. On dance nights a number of people use the rest rooms at the garage—a lot of people use it who have no cars parked there. The attendants usually watched them to see where they went and to see that they came back out. The attendants don't stop what they are doing but they observe as closely as they can every one coming back out. There is a ladies' rest room and a gentlemen's rest room inside the garage. (Tr. 74)

The man who parked the government cars is named Slim. He is a mechanic and worked on the cars during the evening. The garage also has a key to the north back entrance. It is kept on the register. The witnesses did not know who else has a key. (Tr. 77) The occupant of the part of the building which faces on 5th South Street has a key to the door which communicates between the garage proper and the occupant's part of the building. The witnesses did not know who had the keys to the door between the garage and the sales room on 5th South Street. It was stipulated that the witness, Kenneth Jones, would testify substantially as the witness, Steele Remington. (Tr. 78)

Mr. C. B. Squires testified that on the evening of February 26, 1938, which was Saturday, he parked his car at the defendant's garage and when he called for it the next morning it was not there, and he was told by

the attendant at the garage that his car had been driven out the previous evening. (Tr. 40) This evidence was material. It shows that the defendant knew that a car had recently been stolen from the garage. It was a circumstance to be considered by the trial court in determining whether or not the defendant exercised reasonable care in the protection of the Romney car.

ARGUMENT

The foregoing narration of the facts, together with the inferences which may reasonably be supported thereby show ample support for the findings and judgment of the trial court. They show a number of probable ways in which the thieves could have entered the garage, any one of which would support the finding of the trial court that the defendant was negligent.

The evidence supports the inference that the thieves were able to use the cars parked at the south end of the service platform as a screen to shield their entrance by means of the wash rack door from the view of the attendants. The witnesses who testified did not know whether or not the door to the wash rack was closed on the evening of the theft. It had been open during the day and there is no evidence that it was actually closed. This court can not say as a matter of law that it would not be negligent to permit that door to be left open or unlocked with cars parked so near it that persons wishing to enter the garage unobserved could go in behind the cars. On this, as well as other theories of the facts plain-

tiff made a prima facie case and made the decision a question of fact. Upon the prima facie case being made the burden of proceeding (is distinguished from the ultimate burden of proof) shifted to the defendant. This court can not say the burden thus shifted to defendant has been discharged by such clear and convincing testimony that no reasonable mind could find to the contrary.

Let us now consider the testimony regarding the rest room. It was located inside the garage doors and was used by patrons of the garage and others. The thieves may have gone to the rest room and from there to the garage. The attendants "usually" watch people who go in. No particular attendant is charged with this duty and they do not stop what they are engaged in doing at the time to be sure that such persons leave the building after using the toilet. This evidence supports an inference that the thieves may have entered the garage on the pretext of using the toilet and instead of leaving as they entered, got into the Romney car and drove away.

There is a door on the north side of the garage through which the government mail trucks are parked in the garage. The attendants who testified did not know whether or not this door was locked on the evening of the theft. The man who parked these mail trucks had a key to this door. He was not an employee of the garage. It can not be said as a matter of law that it is not negligent to permit a third party to have a key to a garage which holds itself out as a bailee for hire of many thou-

sands of dollars worth of automobiles with keys in them so they can be driven out of the open front door. Counsel for defendant suggest at page 34 of their brief that the thief may have entered by "entering while the post office mechanic was running mail trucks in the back way." It can not be said as a matter of law that the garage was not negligent in so conducting its business that the thief may have entered in that manner.

The record also shows there is an entrance to the garage or storage portion of the building through the sales room which fronts on 5th South Street. The attendants testified there was a board partition between this sales room and the storage room with a door through the partition. This door had a padlock on the storage side. The attendants did not know whether or not this door was locked on the evening of the theft. (Tr. 61) An appellate court will not hold as a matter of law that a garage has exercised due care when it has a door entering into the storage room from the business premises of a third party and the attendants on duty at the garage on the evening of the theft do not know whether or not the door is locked on the evening of the theft. The testimony of the attendants showed that no one was particularly charged with the duty of inspecting any of the four entrances aside from the two main entrances to see if they were locked. No one was particularly charged with the duty of watching to see that persons who entered the garage to use the toilet returned to the outside. No one was particularly charged with the duty of watch-

ing to see that no trespasser used the cars parked at the south end of the service platform as a shield to screen an entrance by way of the wash rack door which may have been open on the evening of the theft.

This is a law case and if there is sufficient evidence to support the findings and judgment of the trial court they will not be disturbed on appeal. In *B. T. Moran, Inc., v. First Security Corporation*, 82 U. 316, 24 Pacific 2d 384, the court said:

“This is a law action tried to the court without a jury, and for that reason this court may not weigh the evidence and itself make findings. We may merely examine the record to determine whether there is sufficient competent evidence to support the findings of the trial court, and, if such is found, then it becomes our duty to sustain the findings.”

If reasonable minds could differ as to whether or not defendant was negligent, the judgment of the trial court must be sustained.

I.

UNDER THE LAW APPLICABLE TO THIS CASE THE EVIDENCE SUPPORTS THE JUDGMENT IN FAVOR OF PLAINTIFF.

Rogers v. Murch, 149 N. E. 202, was decided by the Supreme Court of Massachusetts in 1925. It was an action in contract or tort to recover the value of an automobile stolen from defendant's garage. A window, large enough when open for a person to get through the lower half, led to the basement of the building. There was

evidence that there were locks for all the doors and windows, but

“no testimony that the windows and doors on that particular night were in fact locked other than could be inferred from evidence that it was the practice for a witness to lock them before leaving at night.”

The court said there was evidence which would warrant a finding that the basement window was not locked on the night the theft occurred. There was a verdict for plaintiff in the trial court and the Supreme Court held that the evidence was sufficient to support the verdict and said:

“The request for a ruling that ‘there is no evidence of negligence on the part of the defendant and the plaintiff cannot recover’ was refused rightly. In consideration of all the evidence and particularly of the value of the cars which were daily housed, of the ease of entering the premises, and of opening the large door, the jury could properly find that reasonable care and prudence required that the premises should have been more securely safeguarded by other or additional locks, or if such was not feasible, by a night watchman.”

The Rogers case clearly illustrates the ease with which the plaintiff in such a case establishes prima facie proof of negligence and casts upon the defendant the burden of producing evidence to rebut the prima facie case of the plaintiff. There it was shown to be the practice for some one to lock the doors and windows before

leaving at night, but the court held that the absence of evidence that the doors and windows were in fact locked on the night of the theft coupled with the entrance by the thief justified the jury in finding that the window was not locked on the night in question and that reasonable care was not exercised by defendant.

Harding v. Shapiro, 206 N. W. 168 (Minnesota Supreme Court 1925). The trial court, sitting without a jury decided in favor of plaintiff. The sliding door through which the thieves gained entrance was secured by a three-eighths inch chain fastened by a padlock. The testimony for defendant showed that after the theft, which occurred in the night time, the chain was found to have been cut, supposedly by a bolt cutter. The court said:

“Under the rule of such cases as *Hoel v. Flour City Fuel & Transfer Co.*, 144 Minn. 280, 175 N. W. 300, and *Stenson v. Flour City Fuel & Transfer Co.*, 144 Minn. 375, 175 N. W. 681, the burden was upon defendant to prove that the loss of the property bailed with him was not the result of his negligence. As stated in the *Hoel Case*, it was not for him merely to go forward with the evidence, but he had ‘the burden of proving to the jury that the loss did not come from his negligence.’

“It is a matter of common knowledge that burglars are accustomed to look over the ground of their operations in advance. Door and window fastenings as nearly burglar proof as may be are discouraging to them. On the other hand, insecure and easily broken fastenings may amount to an invitation. It

is so easy to cut a three-eighths inch chain, even though it be of steel, that it would be presumptuous for us to say as a matter of law that the use of such a chain, exposed as was this one to burglarious attack, to protect property stored with a bailee for hire, is due care as a matter of law. We consider the question one of fact. For that reason we decline to interfere with the decision for plaintiff.

“Order affirmed.”

The Harding case presented a fact situation much more favorable for the defendant in that case than the situation in the Romney case, but the court still held the question involved was one of fact and not of law. Reasonable men might believe the defendant in that case was negligent and it is obvious that reasonable men might believe the defendant was negligent in the case at bar.

Baione v. Heavey, 158 A. 181 (Superior Court of Pennsylvania 1932). The case was in trespass for negligently caring for plaintiff's automobile. Defendant conducted a parking lot on an unfenced vacant corner in Philadelphia. It was the practice to leave the keys in the car. Plaintiff had parked his car there forty or fifty times before and was familiar with the method of doing business. He parked his car at 9 P. M., and at 11 P. M., when he called for it, the car could not be found. The defendant had seven employees beside his manager at work. The trial court held the defendant was negligent. The Superior Court affirmed this decision.

“Nor have we any doubt that the evidence was sufficient to justify the trier of fact to find that defendant was negligent in the care of the car. When plaintiff presented the ticket, it was defendant’s duty to obtain the car from the place where his employee had put it, and deliver it to plaintiff; he could not deliver it, nor could he explain what had become of it consistently with the performance of the duty assumed by him in the circumstances.”

Wendt v. Sley System Garages, 188 A. 624 (Superior Court Pa. 1936). The plaintiff drove his car into an open parking lot operated by defendant. When he returned for it he found it had been stolen. The defendant testified that six attendants were employed and according to one of them four were on duty all that day until after the theft occurred. At times one or more of the attendants were driving cars to be washed and greased which required them to be taken about ten blocks. The plaintiff stated that when he called to get his car, he saw only two attendants present on the lot.

After quoting from the decision in *Baione v. Heavey*, supra, holding the question of negligence was for the trier of the facts, the court said:

“This ruling is in accordance with the text in 6 C. J. 1158, section 160, which reads as follows: ‘The rule adopted in the more modern decisions is that the proof of loss or injury establishes a sufficient prima facie case against the bailee to put him upon his defense. Where chattels are delivered to a bailee in good condition and are returned in

a damaged state, or are lost or not returned at all, the law presumes negligence to be the cause, and casts upon the bailee the burden of showing that the loss is due to other causes consistent with due care on his part.' We cited, with approval, this rule in *O'Malley v. Penn Athletic Club*, 119 Pa. Super. 584, 181 A. 370. It is also favorably commented upon by text writers. *Berry on Automobiles* (7th Ed.) pp. 744, 745, section 537, states that, if a machine is stolen while in the possession of a bailee, a presumption arises that he was negligent in caring for it, and all that is incumbent upon the bailor to make out a prima facie case is to prove the bailment and that the automobile was lost while in the bailee's possession; that 'it is then the duty of the bailee to "go forward" with proof to show that he used proper care in the bailment, in the absence of which proof the bailor is entitled to judgment.'

"The evidence offered in this case shows that the parking lot operated by defendant is on the northeast corner of Twentieth and Market streets, Philadelphia, fronting 160 feet on Market street and running back to a depth of 180 feet to Commerce street, with a capacity of 240 to 250 cars. The plaintiff parked his car, fronting Twentieth street, from which point a car could be driven across the pavement into the street. There were 30 to 50 cars parked, facing that way. The defendant testified that six attendants were employed, and, according to one of them, four were on duty all that day prior to 5:30, but at times one or more of them were driving cars to be washed or greased, which required them to be taken a distance of about ten blocks. The plaintiff stated that, when he

called to get his car, he saw only two attendants present on the lot.

“We are of the opinion that the evidence was sufficient to justify the trial judge in finding that the bailee was negligent in not exercising due care in safeguarding the bailor’s car.

“A full consideration of this evidence and argument of learned counsel convinces us that the plaintiff is entitled to his judgment.

“Judgment affirmed.”

In 1927 the Supreme Court of Illinois decided *Byalos v. Matheson*, 159 N. E. 242. The case in the appellate court is reported in 243 Ill. App. 60. Plaintiff left his car at defendant’s garage one evening and when he called for it the next morning it was not there. Plaintiff and defendant went to the police station and reported that the car had been stolen. About a week later it was recovered in Racine, Wisconsin. There was no other evidence of the negligence of defendant. The court said that “so far as the record shows (the plaintiff) could have had no knowledge of the circumstances of the theft” and held the plaintiff’s “proof made a prima facie case” and affirmed the judgment for plaintiff.

“The appellee and the appellant were the only witnesses. The material facts are that Hyman Byalos, the appellee, kept his Velie automobile at the appellant’s garage. About 7 o’clock in the evening of January 30, 1925, he left the car at the garage for the night, and when he called for it the next morning it was not there. The appellant and the appellee went together to the police station to

take out a warrant and reported that the car had been stolen.

“The appellant contends it was obligatory upon the appellee to prove the bailee was guilty of negligence, and that there was an entire failure to prove negligence. The appellee testified he left the car in the appellant’s garage at 7 o’clock in the evening of January 30. He called for it next morning and it was not there. He subsequently ascertained it had been stolen. So far as the record shows, he could have had no knowledge of the circumstances of the theft. In the early case of *Cumins v. Wood*, 44 Ill. 416, 92 Am. Dec. 189, the court held that, where the bailor shows he has stored goods in good condition with the bailee and they were returned to him damaged or not returned at all, the law presumes negligence of the bailee, unless he shows the loss did not result from his negligence. *Schaefer v. Safety Deposit Co.*, 281 Ill. 43, 117 N. E. 781, Ann. Cas. 1918C, 906; *Miles v. International Hotel Co.*, 289 Ill. 320, 124 N. E. 599. The appellee’s proof made a *prima facie* case, and no proof was offered by the appellant that he was not guilty of negligence.”

In *Medes v. Hornbach*, 6 Fed. 2d 711, the court of appeals of the District of Columbia reversed the decision of the municipal court which held the defendant garage not negligent under the evidence. The appellate court held the plaintiff had made a *prima facie* case:

“Nevertheless, when the proof establishes that a stored car, while in charge of the garage keeper, has been taken out and used by an employee of the latter, without the knowledge

or consent of the owner, and has been damaged by such use, such proof, standing alone unexplained, is sufficient to make out a prima facie case for a recovery by the plaintiff. *Knights v. Piella*, 111 Mich. 9, 60 N. W. 92, 66 Am. St. Rep. 375; *Hadley v. Orchard*, 77 Mo. App. 141; *Claflin v. Meyer*, 75 N. Y. 260, 31 Am. Rep. 467; *Staley v. Colony Co.* (Tex. Civ. App.), 163 S. W. 381; *Colburn v. Art Ass'n*, 80 Wash. 662, 141 P. 1153, L. R. A. 1915A, 594; *Travelers' Indemnity Co. v. Fawkes*, 120 Minn. 353, 139 N. W. 703, 45 L. R. A. (N. S.) 331; *Handley v. O'Gorman*, 45 R. I. 242, 121 A. 399.

"We think that, under the rules just stated, the evidence in this case made out a prima facie case for a recovery by the plaintiff, and that it was error for the lower court to render judgment upon it for the defendant."

Appellant takes the position that the ultimate burden of proof is on the plaintiff. Since the plaintiff assumed and discharged the burden of proving negligence, this question is of no importance upon appeal. The only question before this court is whether or not the judgment finds support in the testimony. If this court decides, as we respectfully submit it will decide, that reasonable minds might differ as to whether or not defendant exercised reasonable care for the protection of plaintiff's automobile, the judgment below must be affirmed.

The confusion in the cases regarding the burden of proof in actions like this one arises from the tendency of some courts to attempt to decide what is really a question of "policy and fairness based on experience in the

different situations'' (as stated by Dean Wigmore on Evidence, Vol. IV, Sec. 2486) by resort to a legal rule as a ''General solvent for all cases.'' An illustration will clarify this point. Suppose a bailor delivers 100 cattle to a bailee to be grazed upon the bailee's unfenced cattle range. The bailee's duty is to prevent the cattle from straying beyond the domain owned by him. When the cattle are returned to the bailor at the end of six months 5 head are missing. In a suit by the bailor it seems obvious that the mere fact of disappearance of the cattle while in the technical possession of the bailee would not create any presumption of negligence. And if the cattle had been stolen from a range covering thousands of acres, the situation with regard to burden of proof should be the same. The plaintiff should have the burden of showing some additional facts to create a *prima facie* case and shift to defendant bailee the burden of showing due care.

But when a bailor delivers an automobile to a large modern garage, enclosed in a building with three attendants and pays a fee to have it protected and a thief enters the building presumably while the attendants are on duty and drives the car away and wrecks it, considerations of ''fairness based on experience'' should properly hold the plaintiff has made a *prima facie* case and the burden of rebuttal then shifts to the bailee. The fact of the theft of the bailed property may or may not rebut the *prima facie* case created by the bailment and the failure to return, depending upon the facts of the bailment and the

facts of the theft. The purpose of a trial is to establish justice between the parties, and under the spirit of the code pleading reforms abolishing forms of action, it is a sacrifice of substance to mere form to answer the question of burden of proof by resort to the form of the action—whether in contract or tort.

Counsel for appellant quote at length from *Swain v. Twin City Motor Co.*, 127 S. E. 560. The court there held the defendant had the burden of the evidence—that is that the fact of the theft while in the custody of the bailee made a prima facie case for plaintiff. The defendant discharged its burden by proving the theft occurred without its negligence. The court said:

“The general principle governing liability as pronounced in this state is contained in *Beck v. Wilkins-Ricks Co.*, 179 N. C. 231, 102 S. E. 313, 9 A. L. R. 554, as follows: ‘The defendant as bailee assumed liability of ordinary care for the safekeeping and the return of the machine to the bailor in good condition. The bailee did not assume liability as insurer, and therefore did not become liable for the nonreturn of the property in good condition if he observed the ordinary care devolved upon him by reason of the bailment. If the machine had been injured or stolen or destroyed by fire while in his custody, the defendant would not be liable if such care had been observed. *On the other hand, the mere fact that the property had been destroyed by fire or stolen did not absolve him from responsibility, any more than he would have been absolved if it had been injured in his custody, unless he had shown that he had*

used the care required of him by virtue of his bailment. * * * 'The rule adopted in the more modern decisions is that the proof of loss or injury establishes a sufficient prima facie case against the bailee to put him upon his defense. Where chattels are delivered to a bailee in good condition and are returned in a damaged state, or are lost or not returned at all, the law presumes negligence to be the cause, and casts upon the bailee the burden of showing that the loss is due to other causes consistent with due care on his part.' " See *Hanes v. Shapiro*, 168 N. C. 24, 84 S. E. 33; *Hutchins v. Taylor Buick Co.*, 198 N. C. 777, 153 S. E. 397.

"Practically all courts are in accord upon the proposition that if the owner of an automobile carries it to a garage in good condition, for service furnished by such garage, and thereafter such bailee fails to return it, or returns it in a damaged condition, he makes out a prima facie case, nothing else appearing, and is therefore entitled to have the jury determine the proper issues. But, suppose it should appear from the plaintiff's evidence, or if the fact was uncontroverted, that while in such garage the car was struck by lightning or the employees of the garage were held up by an armed highwayman and the car was taken from the custody of the bailee, who was otherwise exercising ordinary care, it would hardly be supposed that under such circumstances the law required the solemn formality of submitting issues upon such admitted facts."

The Swain case cites the following North Carolina cases and in each it is held the bailee has the burden of

the evidence upon proof of the loss. None of them base this ruling upon the form of the pleading.

Beck v. Wilkins-Ricks Co., 102 S. E. 313;

Hanes v. Shapiro, 84 S. E. 33;

Hutchins v. Taylor Buick Co., 153 S. E. 397.

The court in the Beck case, *supra*, quotes the following from 6 Corpus Juris, Section 160:

“Reasons of Rule.—(1) ‘Since the bailor is generally at a disadvantage in obtaining accurate information of the cause of the loss or damage, the law considers he makes out a case for the application of the rule of *res ipsa loquitur* by proof of the bailment and the failure of the bailee to deliver the property on proper demand.’ *Corbin v. Cleaning Co.*, 181 Mo. App. 151, 155, 167 S. W. 1145. (2) ‘The rule rests upon the consideration that, where the bailee has exclusive possession, the facts attending loss or injury must be peculiarly within his own knowledge. Besides, the failure to return the property, or its return in an injured condition, constitutes the violation of a contract, and it devolves upon the bailee to excuse or justify the breach.’ *Nutt v. Davison*, 54 Colo. 586, 588, 131 Pac. 391, 44 L. R. A. (N. S.) 1170. (3) ‘The rule is founded in necessity and upon the presumption that a party who, from his situation, has peculiar, if not exclusive, knowledge of facts, if they exist, is best able to prove them. If the bailee, to whose possession, control and care of the goods are intrusted, will not account for the failure or refusal to deliver them on demand of the bailor, the presump-

tion is not violent that he has been wanting in diligence, or that he may have wrongfully converted or may wrongfully detain them; or if there be injury to or loss of them during the bailment, it is but just that he be required to show the circumstances, acquitting himself of the want of diligence it was his duty to bestow.' *Davis v. Hurt*, 114 Ala. 146, 150, 21 South. 469, 'quoted in *Hackney v. Perry*, 152 Ala. 626, 44 South. 1029, 1031."

The very recent California case of *Travelers Fire Insurance Co. v. Brock and Co.*, 85 Pac. 2d 905 (District Court of Appeal—hearing denied by Supreme Court Feb. 20, 1939), contains the following terse statement of the rule:

"The burden of proof rests with the bailee to prove, where the bailed property is not returned to the bailor, that the property was lost by theft, etc., without negligence of the bailee. *U Drive & Tour, Ltd., v. System Auto Parks, Ltd.*, Cal. Super., 71 P. 2d 354, 356."

The proof of theft of bailed property may or may not shift the burden of the evidence from the bailee back to the bailor, depending upon all the facts and circumstances. Under the facts in the case at bar the fact of the theft in view of all the other facts in evidence created a *prima facie* case for the plaintiff and shifted the burden of the evidence to the defendant. If the case had been tried before a jury, plaintiff was entitled to go to the jury. The evidence sustains the judgment which should be affirmed by the court.

As shown by the cases herein there is substantial and respectable authority for the contention that upon proof of bailment and failure to return the ultimate burden of proof shifts to the bailee. Since the evidence in the case at bar supports an inference of negligence the question of whether or not the ultimate burden of proof shifts is not here involved. All the cases, including those cited by appellant agree upon the proposition that evidence of the circumstances shown in the case at bar create a prima facie case and shift the burden of proceeding to the bailee. Or stated in another way, such evidence supports a judgment for the bailor.

Counsel for appellant cite *Galowitz v. Magner*, 203 N. Y. S. 421. The California District Court of Appeals in *Beetson v. Hollywood Athletic Club*, 293 Pac. 821, quote with approval from the *Magner* case the following:

“It seems to me obvious that plaintiff had the right to believe, from the fact that defendant maintained an inclosed space for parking cars, with an entrance and exit and attendants, that he was paying the parking fee in consideration of care and watchfulness to prevent injury or loss. Otherwise he might almost as well have parked upon the public street and saved the fee. * * *

“The proof in this case is very meager, but is in my opinion sufficient to present a question of fact for the jury. Where a space is inclosed by an 8-foot board fence, for parking cars, with an entrance and an exit, a checking system, and three attendants to look after and take care of the cars as they came in and

went out, the jury might infer that the theft of plaintiff's car could not have occurred had defendant and his employees properly performed their duty. Indeed, it seems to me that such inference is well-nigh irresistible, because some one must have taken out plaintiff's car without presenting a check or ticket therefor, and to permit this was clearly negligent."

The judgment in the *Magner* case was set aside and remanded for new trial upon the ground the complaint failed to allege negligence and because the trial court instructed the jury that the burden rested upon the defendant to show that the theft did not occur through want of due care on his part. This holding is criticized by the author of the note in 48 A. L. R. 385:

"It seems fairly open to question whether the interpretation which the court put upon the instruction in the last case is the correct one, as placing the burden of proof of due care on the defendant. Rather, the contention seems plausible that this instruction merely required the defendant to produce evidence to overcome a *prima facie* case arising from the loss of the property. It is said that the complaint alleged, and the answer admitted, by not denying, that the car was stolen. But in case of theft of property from the bailee, if the theft is admitted, it seems that the bailee ought to be required to show the care which he exercised to prevent the theft, assuming that, after he overcomes the plaintiff's *prima facie* case, the ultimate burden of proof rests on the plaintiff, the bailor, to prove negligence."

The plaintiff, in *Keenan Hotel Co. v. Funk*, 177 N. E. 364, alleged a bailment of his automobile at a public parking lot operated by defendant and that through defendant's negligence it was stolen. The court, sitting without a jury found the issues in favor of the plaintiff. The evidence showed the bailee required the bailor to leave the keys in the car and said he would watch it. There was no proof of "specific" negligence. The appellate court held the bailor had established a prima facie case and affirmed the judgment for the bailor.

"This court will not weigh the evidence where it is conflicting. If there is any evidence tending to support every essential fact necessary to sustain the judgment, it is sufficient. It is also the rule, that the court or jury trying the cause may draw any reasonable inference of fact from the evidence. It is not essential that a fact be proven by direct and positive evidence, but, where it may reasonably be inferred from the facts and circumstances which the evidence tends to establish, it will be sufficient on appeal. *Federal, etc., Co. v. Sayre* (1924), 195 Ind. 7, 142 N. E. 223. It is only when there is no evidence on some essential element to sustain the judgment, or to sustain any reasonable inferences in support thereof that this court would be justified in reversing a cause for want of evidence. *Emerson, etc., Co. v. Tooley* (1923), 81 Ind. App. 460, 141 N. E. 890."

"Where the burden of proof rests in cases of this kind is a question upon which the courts are not in harmony. The rule in Indiana however, a portion of which was quoted with approval from the case of *Miles v. Interna-*

tional Hotel Co. (1919), 289 Ill. 320, 124 N. E. 599, was very plainly set forth in this language: "The weight of modern authority holds the rule to be that, where the bailor has shown that the goods were received in good condition by the bailee and were not returned to the bailor on demand, the bailor has made out a case of prima facie negligence against the bailee, and the bailee must show that the loss or damage was caused without his fault.

* * * The effect of this rule is, not to shift the burden of proof from plaintiff to the defendant, but simply the burden of proceeding." And such prima facie case is not overcome by a showing on the part of the bailee that the goods have been burned, or otherwise destroyed or stolen. Before such prima facie case can be said to be overcome, the bailee must further produce evidence tending to prove that the loss, damage, or theft was occasioned without his fault. This rule has been applied to garage keepers who failed to return automobiles on demand.' *Employers', etc., Co. v. Consolidated, etc., Co.* (1927), 85 Ind. App. 674, 155 N. E. 535, and authorities there cited.

"From an examination of the evidence in the record, keeping in mind the above rules as a test of its sufficiency to support the judgment, we do not find that there is a total want of evidence on any essential element necessary to make appellee's case.

"Judgment affirmed."

In *Hoel v. Flour City Fuel & Transfer Co.*, 175 N. W. 300, the court said and held:

"In *Rustad v. Great N. Ry. Co.*, 122 Minn. 453, 142 N. W. 727, we had the question of the

liability of the railway company defendant as a warehouseman for the loss of property in its possession. We held that the burden of proof was upon the defendant to show that the loss did not come from its negligence; that this burden was not merely the burden of going forward with proofs, nor a shifting burden, but a burden of establishing before the jury that its negligence did not cause the loss; and we referred with approval to Dean Wigmore's statement that the question of where the burden of proof should rest is 'a question of policy and fairness based on experience in the different situations.' "

"The evidence was not such as to require a finding that it was free of negligence and that the loss did not come from its lack of care. The evidence was only this, that the defendant could give no explanation of how the car got out of the garage. The jury, taking into consideration the manner in which the garage was conducted, could find that if care commensurate with the situation had been used it would not have disappeared."

In *Federal Insurance Co. v. Lindsley*, 228 N. Y. S. 614, the court said:

"While the dismissal of the complaint seems warranted by the opinion in *Clafflin v. Meyer*, 75 N. Y. 260, 31 Am. Rep. 467, it was subsequently held in *Ouderkirk v. Central Nat. Bank of Troy*, 119 N. Y. 263, 23 N. E. 875, that the burden of showing the circumstances of the loss of the property rests upon the bailee, and unless the evidence shows the exercise of due care by him according to the nature of the bailment he will be held responsible for the

breach of his contract to return the property bailed, and in *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215, that the prima facie case made out by failure to return the property bailed on demand may be overcome, when it is made to appear that the loss was occasioned by some misfortune or accident not within the control of the bailee. See, also, *Greenberg v. Mermelstein* (Sup.), 188 N. Y. S. 250; *Hobbie v. Ryan*, 130 Misc. Rep. 221, 223 N. Y. S. 654. It follows that the mere concession that the automobile was stolen from defendant's garage did not destroy plaintiff's prima facie case, and it was error to dismiss the complaint."

In *Fisher v. Bonneville Hotel Co.*, 188 Pac. 856, 55 U. 588, where the plaintiff sued for negligently failing to care for plaintiff's baggage, and on the assumption that the plaintiff was a boarder to whom the duty of ordinary care was due, this court held the evidence sustained the finding and judgment for plaintiff. The evidence showed merely that the plaintiff handed the grip to one of the porters which was the last she ever saw of it. The hotel manager charged the porters with being careless in respect to the property.

"Certainly this court, in view of such evidence can not find that the evidence was insufficient to support the finding."

Counsel for appellant cite *Knights v. Piella*, 69 N. W. 92, decided by the Supreme Court of Michigan in 1896. In 1931 the same court decided *General Exchange Insurance Corporation v. Service Parking Grounds, Inc.*,

235 N. W. 898. In 1919 the Michigan legislature enacted the following statute:

“Section 1. Whenever any damage shall be done to any motor vehicle while in the possession or under the care, custody or control of the owner, his agent or servant, or the keeper of any public garage or other establishment where such vehicle shall have been accepted for hire or gain, proof of such damage shall be prima facie evidence that such damage was the result of the negligent act of such owner or keeper of the place where such vehicle was stored.”

The court said this statute is declaratory of the common law and held:

“The burden was on defendant not only to show that the car was stolen but also that the theft took place without any negligence on its part.”

The court cites and quotes from prior case of *Knights v. Piella* in support of its position that while the ultimate burden of proof is on the plaintiff the burden of the evidence (overcoming plaintiff's prima facie case) shifts to defendant. It is further held that the judgment for defendant below found no support in the evidence which showed negligence as a matter of law and ordered judgment for plaintiff.

Counsel for appellant cite *Stone v. Case*, 124 Pac. 960. That case is reviewed in the later Oklahoma case of *Wheeler v. Packard Oklahoma Motor Co.*, 38 Pac. 2d

943. Analysis of these cases illustrates that the rule therein announced is simply that the plaintiff has the burden of establishing a prima facie case. If this prima facie case is rebutted by uncontradicted testimony so strong that reasonable minds could not differ about it the defendant is entitled to a directed verdict. (As in the Swain case, supra, and cited by appellant.) If the rebuttal is itself only prima facie and reasonable minds may differ as to what is proved the plaintiff without further evidence is entitled to go to the jury. In the last situation the jury would be properly instructed that the ultimate burden of proof is on the plaintiff.

Carefully considered, appellant's argument regarding the burden of proof amounts to no more than an argument that if the case had been tried before a jury the defendant would have been entitled to an instruction that the burden of satisfying the jury upon the question of negligence was upon the plaintiff. Suppose the defendant admits this proposition for the purpose of the argument. The jury (the Judge in this case) was properly advised as to the law and was satisfied by the preponderance of the evidence. The only question before **this court comes back to the same proposition**: Could reasonable minds reach the conclusion reached by the trial court.

There is, however, as shown herein substantial and respectable authority for the contention that if plaintiff creates a prima facie case which is not rebutted by defendant the ultimate burden of satisfying the jury has

been shifted to the defendant. While plaintiff respectfully submits that his testimony created such a prima facie case and there was no rebuttal by defendant tending to show the exercise of ordinary care, and the plaintiff would therefore under the authority referred to have been entitled to an instruction that the burden was on defendant to prove freedom from negligence, since the trial was to the court the question involved here on appeal is properly limited to the question of whether or not the evidence supports the judgment.

In *Goodyear Tire and Rubber Co. v. Altmont Springs Hotel Co.*, 267 S. W. 555, the Court of Appeals of Kentucky held:

“We think these facts developed a prima facie case of negligence against defendant, and that the burden was upon it to show the requisite care on its part to excuse it from liability.”

The evidence showed the storage of the automobile in defendant's garage and its disappearance therefrom during the night. The keys to the garage were in the possession of defendant and it permitted its servants, as well as other boarders, lodgers and guests, to use those keys. In the case at bar the defendant permitted the man who took care of the government mail trucks to have keys to the north rear door of the garage. The above case is followed in *Blackburn v. Depoyster*, 272 S. W. 398, decided by the same court and in *Spare v. Belroy Housing Corporation*, 38 Pac. 2d 207, decided by the Supreme Court of Washington. See *Hutchins v.*

Taylor Buick Co., 153 S. E. 397; *Employers Fire Ins. Co. v. Consolidated Garage*, 155 N. E. 533; *Farrell Calhoun Co. v. Union Chevrolet Co.*, 113 S. W. 2d 419.

II.

THE TRIAL COURT PROPERLY OVERRULED DEFENDANT'S
GENERAL AND SPECIAL DEMURRERS TO PLAINTIFF'S
COMPLAINT.

Defendant's special demurrer was directed to the sound discretion of the court. Obviously the manner in which the thief entered defendant's garage was not known by the plaintiff. The plaintiff is not required to plead the evidence by which he establishes the ultimate fact of negligence.

Plaintiff's complaint alleged:

“That the defendant negligently and carelessly failed to safely and securely keep said automobile but carelessly and negligently permitted the same to be taken and stolen from said garage by Albert Freeman and Brady Wayne Poulson without the consent or authority or permission of the plaintiff or any one acting on his behalf.”

The garage and the car were in defendant's possession. Its employees on duty at the time the car was stolen testified “I haven't the slightest idea how Freeman and whoever was with him got inside the garage that night. We have all been wondering and speculating as to how he got in.” An argument that the plaintiff

must allege and prove the specific manner in which the thief got into defendant's garage when the defendant itself, in possession of the garage, asserts it does not know, defeats itself. All available facts were within the knowledge and possession of the defendant.

The trial court's ruling on the special demurrer will not be reversed on appeal where, as here, the ruling did not constitute an abuse of discretion and did not affect the substantial rights of the adverse party.

The Utah statute provides:

"104-13-1. Pleadings to be Liberally Construed. In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice between the parties."

"104-14-7. Only Prejudicial Errors and Defects To Be Regarded. The court must in every stage of an action disregard any error or defect in the pleadings or proceeding which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

"104-39-3. Prejudice Must Be Shown. No exception shall be regarded, unless the decision excepted to is material and prejudicial to the substantial rights of the party excepting."

In support of our position that the trial court did not err in overruling defendant's general demurrer we

quote from *Mangum v. Bullion, Etc., Mining Co.*, 15 U. 534:

“Under our system, the allegations of a pleading, for the purpose of determining its effect, must be liberally construed, with a view to substantial justice between the parties. Comp. Laws Utah 1888, Sec. 3238. Nor can the objection to the complaint that the allegations respecting the defective machinery and its negligent operation were in general terms avail the appellant. While these allegations do not refer specifically to the particular parts of the machinery which were defective, or specify with exactness wherein the machinery was operated carelessly, still we are of the opinion that they would have been sufficient to resist a general demurrer before trial, if one had been interposed, and hence are sufficient to resist the attack that the complaint did not state a cause of action, made after verdict and judgment. * * * Moreover, it does not appear that the plaintiff had such exact knowledge of the machinery and its operation as would enable him to state just what particular parts were defective, or just wherein its operation was negligent. The general facts he could know, but the particular facts were more likely to be within the knowledge of the defendant, because of its duty to inspect the machinery and keep it in repair. In such case less particularity in stating the specific facts, or the acts or omissions which constitute negligence, is required. The complainant may know only the immediate cause of the injury, and may be unable to state the precise acts or things which caused it. If, therefore, the facts alleged show such an occurrence as is

usually the sequence of carelessness or negligence, it is incumbent upon the opposite party to explain it, and show the exercise of proper care; and the court in such case will not say, as matter of law, that the complaint does not state a cause of action on the ground of negligence."

And in *Eddington v. Cement Co.*, 42 U. 274, 130 Pac. 243, the court said:

"Unless it is clear that the complaint fails to state some essential element necessary to a cause of action, or that some facts are stated by reason of which the plaintiff cannot recover because of some act of his own, which prevents a recovery, a general demurrer should always be overruled. Under our statute (Comp. Laws 1907, sec. 2986) doubts, if any arise, upon the allegations in the pleadings are not necessarily resolved against the pleader; but the pleading, as provided in that section, 'must be liberally construed.' No reason is perceived why appellant cannot prove a *prima facie* case under the allegations of his complaint."

In *Roster v. Inter-State Power Co.*, 237 N. W. 738, the Supreme Court of North Dakota held:

"It is the settled rule that negligence may be set forth in general terms, where the specific facts are more largely within the knowledge of the defendant. 8 R. C. L. 812; Bliss on Code Pleading Sec. 310a; *New York, C. & St. L. Ry. Co. v. Callahan*, 40 Ind. App. 223, 81 N. E. 670; *Stolle v. Anheuser-Busch*, 307 Mo. 520, 271 S. W. 497, 39 A. L. R. 1001;

Tietke v. Forrest, 64 Cal. App. 364, 221 P. 681."

In *Schaff v. Coyle*, 249 Pac. 947, the supreme Court of Oklahoma held the trial court did not abuse its discretion in overruling defendant's motion to make plaintiff's petition more definite and certain:

"For reversal, it is first insisted that the trial court erred in overruling defendant's motion to require the plaintiffs to make their petition more definite and certain. Motions to make more definite and certain are addressed to the sound discretion of the trial court, and where, as in this case, the information sought to be obtained thereby is within the knowledge of the defendant, and can be obtained from records, train sheets, switch lists, reports, and other documentary evidence, kept by the defendant, showing the movement of its various trains and engines, this court cannot say that the trial court abused its discretion in overruling such action. *City of Lawton v. Hills*, 53 Okla. 243, 153 P. 297; *Ft. Smith & Western Ry. Co. v. Ketis*, 26 Okla. 696, 110 P. 661; *Landon v. Morehead*, 34 Okla. 701, 126 P. 1027; *City of Chickasha v. Looney*, 36 Okla. 155, 129 P. 136; *Frey v. Failes*, 37 Okla. 297, 132 P. 342."

III.

THE TRIAL COURT PROPERLY HELD THAT THE AMERICAN
EQUITABLE ASSURANCE COMPANY HAD NO CLAIM
AGAINST COVEY GARAGE.

At page 44 of appellant's brief it is stated that "it was stipulated (Ab. 11) that the American Equitable As-

insurance Company paid to plaintiff under a collision coverage policy, the amount of his loss under the policy." The so-called stipulation which was little more than an argument is found at pages 35-38 of the record. Mr. Stewart stated that the amount paid by American Equitable Assurance Company to Mr. Romney "is substantially less than the amount we have stipulated should be recovered in the event there is a recovery." Plaintiff objected to the materiality of the proposed stipulation and the court never ruled on the objection, and plaintiff did not stipulate that the insurance company had paid anything to Mr. Romney.

But assuming that the insurance company had paid a portion of plaintiff's loss, there is no error in the judgment for plaintiff. It must be observed that the American Equitable Assurance Company is a party defendant in the action. It was served with an order of the court requiring it to "appear and set forth its rights and claims, if any, against defendant Covey Garage." It did not file any pleading or assert any claim. It is, therefore, idle to review the cases or discuss the question of whether or not it is a necessary party.

And when the insurance company is made a party to the action it is obviously not prejudicial to the defendant Covey Garage that it asserts no claim against that defendant.

Such is the doctrine clearly stated in *Potomac Insurance Co. v. Nickson*, 64 U. 395, 231 Pac. 445, where the court said:

“Plaintiff was liable to Wallace, and paid the loss and damage he sustained by reason of the defendant’s breach of duty, that is, by reason of his wrongful delivery of the car to Weibers. Nor is it controlling that the plaintiff was liable only in case of theft and not for misdelivery. That was the effect of the contract as between the plaintiff and Wallace. With that the defendant is not concerned except that he has a right to be protected against paying the loss to more than one claimant. As to that he is fully protected both by the proof of the assignment by Wallace to the plaintiff and also by the fact that plaintiff paid the loss to Wallace and was subrogated to his rights as against the defendant.”

With the relationship between Romney and the insurance company the Covey Garage is “not concerned” and the judgment protects it against “paying the loss to more than one claimant.”

IV.

THE TRIAL COURT PROPERLY OVERRULED DEFENDANT’S OBJECTIONS TO THE TESTIMONY OF THE WITNESS SQUIRES THAT HIS CAR HAD BEEN STOLEN FROM THE COVEY GARAGE ON FEBRUARY 26, 1938.

The testimony of Mr. Squires was admissible to show notice to defendant that on a Saturday night about two months prior to the theft of the Romney car, the Squires car had been stolen from the garage. Whether or not the prior theft had resulted from negligence was

not in issue in this case and the prior theft was notice regardless of whether or not it was negligently permitted by the bailee. *Hurd v. U. P. Ry. Co.*, 8 Utah 241, 30 Pac. 982, is cited by appellant.

This court clearly illustrates the distinction here involved when it stated:

“We think the ruling of the district court was correct, and was not in conflict with the case of *District of Columbia v. Armes*, 107 U. S. 524, 2 Sup. Ct. Rep. 840, as contended by counsel for appellant. That was a case to recover damages for injuries from a fall, caused by a defective sidewalk in the city of Washington. The sidewalk had been left in an unguarded and dangerous condition, and the court held that plaintiff might show that while it was in that condition other like accidents had occurred at the same place, for the reason that it tended to show the dangerous character of the place; and that, from the publicity necessarily given such accidents, it tended also to show that the city authorities had notice of the dangerous character of the locality. If testimony, however, had been offered that other people had fallen on other sidewalks in the city, we think the court would not have held it admissible.”

The Supreme Court of California, in *McCormick v. Great Western Power Co.*, 8 P. (2d) 145, stated the rule as follows:

“Furthermore, it is held in this state that, for the purpose of proving that one who maintains a dangerous instrumentality might

reasonably anticipate that persons engaged in lawful occupations, in places where they have a legal right to be, are likely to be injured thereby, evidence of previous accidents similar in character to the one in question, and not too remote therefrom in place or point of time, is admissible. *Long v. John Breuner Co.*, 36 Cal. App. 630, 172 P. 1132, 1136; *Gorman v. County of Sacramento*, 92 Cal. App. 656, 268 P. 1083, 1087; *Dyas v. Southern Pacific Co.*, 140 Cal. 296, 73 P. 972. In the *Long Case*, in holding that evidence of similar accidents was admissible, the court said: 'We think the evidence was admissible upon the general proposition that testimony of previous accidents similar to the one in question not only tends to show the dangerous character of the place, but, where the previous accidents have occurred under substantially the same general circumstances of the subsequent accident, tends to disclose the cause of the latter, and, furthermore, tends to bring home to the person maintaining the place where the injury occurred knowledge of the dangerous condition of such place.' And in the *Gorman Case* the following language was used: 'Appellant next contends that the court erred in permitting respondent to introduce evidence that other accidents had occurred at this bridge; that is, that at least four automobiles had fallen off of this bridge into the canal prior to the time the boy was drowned. We think the evidence was properly admitted as tending to show the dangerous character of the bridge and the cause of the boy's death, and furthermore, it tends to bring home to appellant knowledge of the dangerous condition of said bridge.' "

And in *Sargent v. Union Fuel Co.*, 37 Utah 392, 108 P. 928, the Supreme Court of Utah said:

“Over defendant’s objections, plaintiff was permitted to show that rock and earth had fallen from the roof of the tunnel at different times prior to the accident, and at places other than the place of the accident. We see no error in these rulings. Such evidence was admissible as tending to show the character of the ground, the necessity of timbering or otherwise supporting the roof, and notice to the defendant of the defective and dangerous conditions.”

Osplind v. Pearce, 221 N. W. 679 and *Manson v. Mays Department Stores Co.*, 71 S. W. (2d) 1081, announce the same rule. The question involved is answered in the cases by an appeal to common sense. Does the proof of the prior occurrence tend to show or support an inference that the defendant was negligent on the occasion in question. We believe that if the evidence showed that a car was stolen from defendant’s garage every Saturday night for two months that even the defendant would admit it was not exercising due care. The illustration differs from the facts here only in degree which goes to the weight and not the admissibility.

Under its assignment of error No. 6 appellant argues that an agent has no authority, after an event or transaction has occurred to make admissions on behalf of his principal, and that the testimony of Mr. Squires as to the prior theft was therefore hearsay and inadmissible.

Mr. Squires testified that he parked his car on Saturday night and when he called for his car and presented his check on Sunday morning the attendant did not deliver the car. The man in charge at the garage "took me all through the garage in an effort to locate my car and then he told me I couldn't claim it." The attendant and the manager told Mr. Squires the car had been driven out the night before about 11:50 and that it had not been located; that they didn't know where it was; that they had reported it to the Police Department of Salt Lake City.

When it is remembered that this testimony was offered only for the purpose of showing notice of the prior theft and not for the purpose of showing any negligence upon the prior occasion it is apparent that the statements of the attendant and manager were not hearsay. The statements were not offered for the purpose of proving the truth of their content, which was not in issue in this case. The mere fact of their statements, together with the undisputed testimony of Squires that he and the attendant went all through the garage in a fruitless effort to find his car, proves the defendant knew of the fact that the Squires car was taken out of the garage without the claim check being delivered. Perhaps the statements of the attendants add nothing to the facts observed and testified to by Squires that his car was not in the garage when he called for it and if so its admission was harmless, even if the case had been tried by a jury.

The situation is very similar to that before this court in the recent case of *Golden v. American Keene Cement & Plaster Co.*, 95 P. (2d) 755. With respect to the admissibility of certain letters not signed by or on behalf of the party against whom they were offered the court said (Mr. Justice Pratt):

“They were not hearsay as they were not offered as proof of their content, but were offered as proof of a course of conduct indicative of an intention to supervise the acts of the Cement Company.”

With respect to the statements of an agent binding the principal:

“Therefore he (the principal) is bound by the conversations of that agent within the scope of that agency. That statements are made against the interest of the principal is not ground for ruling out the answer.”

If the view is taken that the statements of the attendants were admissible only if their *content* was the only thing about them of probative value then it is submitted they are admissible as being within the apparent and implied scope of the authority of the agent. Surely the attendant on duty at the garage when a person calls for his car and presents a claim check and the car can not be found has authority to tell the owner that it had been driven out the night before and not located and reported to the police.

The headnote in *Hemminger v. Tri-State Lumber Co.* (Idaho), 68 P. (2d) 54, states:

“In libel action based on publication of list of unsatisfactory accounts compiled by secretary of organization of which defendants were members and which allegedly was responsible for publication, testimony that secretary stated to witnesses that number behind each name on list was number of businesses that turned name in and that she stated from whom she received list held admissible as primary evidence, since secretary was, for the special purpose, agent of persons who caused her to compile and publish list, and her statement stood on same footing as if made by defendants.”

In *Germann v. Huston*, 23 N. E. (2d) 371, the court held:

“While one witness was permitted to testify that he reported to defendant’s janitor sometime prior to plaintiff’s injury that children had been playing with and on the rope and had been sliding down same, the court sustained defendant’s objections to other evidence offered by plaintiff as to previous accidents to children playing on the rope as well as to complaints made to and statements of the janitor concerning children playing with said rope. This evidence was clearly admissible and competent to show that defendant knew or by the exercise of ordinary care could have known of the attractive and dangerous character of the rope and pulley apparatus. ‘It has frequently been held that evidence of other accidents by the same agency in the same con

dition is competent, not for the purpose of showing independent acts of negligence, but for the limited purpose of showing that the unsafe thing or condition causing the particular accident caused others, and that the occurrence of such other accidents tends to show notice to the owner of such dangerous agency. *Moore v. Bloomington, Decatur & Champaign Railroad Co.*, 295 Ill. 63, 128 N. E. 721; *City of Chicago v. Jarvis*, 226 Ill. 614, 80 N. E. 1079; *City of Bloomington v. Legg*, 151 Ill. 9, 37 N. E. 696, 42 Am. St. Rep. 216.' *Wolczek v. Public Service Co.*, 342 Ill. 482, 174 N. E. 577, 585."

It is respectfully submitted that the judgment of the trial court should be affirmed.

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