

1940

# Romney v. Covey Garage et al : Reply Brief of Appellant, Covey Garage

Utah Supreme Court

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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*

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REPLY BRIEF OF APPELLANT, COVEY GARAGE

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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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# In the Supreme Court of the State of Utah

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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

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## REPLY BRIEF OF APPELLANT, COVEY GARAGE

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Plaintiff's counsel have filed a well and cleverly prepared brief, which on first examination might appear to justify the desired conclusion. A more careful examination makes perfectly apparent that the real and determinative factors have been begged.

Respondent not only assumes that the evidence discloses negligence, but adds to that assumption, an additional assumption that the thief, Freeman, gained entrance as a result of such negligence, or in other words, that such negligence was the proximate cause of the theft and resulting accident. In other words, respondent

endeavors to recover on one assumption based upon another assumption, or one conjecture predicated upon another conjecture. This court has recognized and adhered to the rule that a judgment cannot be based upon conjectures upon conjectures or inferences upon inferences. In *Chapman v. Troy Laundry Co.*, 87 Utah 15, 47 Pac. (2d) 1054, it was said:

“The only things to rebut their testimony are the inferences heretofore discussed that counsel would have us draw.”

Again the court says:

“It is inference based on inference, in series and in reverse.”

Exactly the same argument is applicable to respondent's argument. He argues that although plaintiff's evidence does not definitely show negligence, yet by reading between the lines, an inference of negligence can be found. Certainly there is no more than such a possible inference. He next argues that while there is no evidence that Freeman gained entrance to the garage as a result of such inferred negligence, yet an inference may be drawn that he did so gain entrance. In other words, it is necessary in order to sustain the judgment to first infer negligence, and then on that inference, base another inference that the proximate cause or actual entrance resulted from the first inference of negligence.

It is a clear case of inference upon inference, with a total absence of positive evidence.

Respondent completely ignores fundamental rules. He admits that there is no affirmative evidence of negligence, and likewise admits that he has only shown possible or probable ways by which Freeman could have gained entrance. He says he has shown "a number of PROBABLE ways in which the thieves could have entered." He then says, "On this, as well as other THEORIES of the facts, plaintiff made a prima facie case." In other words, his position is one merely of "probability" or "theories" or "inferences." He entirely overlooks the necessity that the "inferences" or "probabilities" must all lead in one direction and exclude other hypotheses. He overlooks the necessity for the evidence to do more than raise a conjecture or probability. This court in *Tremelling v. Southern Pacific*, 70 Utah 72, 257 Pac. 1066, said:

"The evidence must, however, do more than merely raise a conjecture or show a probability as to the cause of the injury, and no recovery can be had if the evidence leaves it to conjecture which of two causes resulted in the injury, where defendant was liable for only one of them."

Certainly, as hereafter pointed out, the evidence does not exclude reasonable hypotheses under which no liability would attach. Not only is there a total failure in such respect, but rather does the evidence show affirm-

actively an exercise of reasonable and ordinary care by the defendant, and a gaining of entrance by an experienced thief through some trick or device which ordinary care would not guard against.

At page nine of his brief, respondent concludes that "if reasonable minds could differ as to whether defendant was negligent, the judgment of the trial court must be sustained." This statement would be true if, as we have pointed out, there was first, affirmative evidence of negligence, and, second, evidence that such negligence was the proximate cause of Freeman's entrance and the resulting loss. Respondent again overlooks the basic rules of liability at page seventeen, in saying: "If this court decides \* \* \* 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." This argument, and in fact all arguments advanced in respondent's brief, consistently and cleverly assume as established the very facts, the absence of which sustain a successful defense against liability. The fundamental essentials of a cause of action, to-wit: evidence of negligence and evidence of proximate cause, are ignored.

Counsel endeavor to show from the evidence how the burglars in this case *may* have found entrance to the building. The most that can be said of his *possible* theory is that they *might* have gained entrance by such method, but it is equally as possible or probable that

entrance was not gained by any means suggested, but rather while all the lights of the city were out, or by hiding in the back of an automobile taken into the garage. There is absolutely no evidence as to the actual means of entry. How then, could it be said defendant's negligence caused the loss? Even if it be assumed (without proof) that defendant was negligent in not making certain the door to the wash rack was closed, how could it be said that such was the proximate cause of the loss, if Freeman entered when the lights of the city were out, and no one could see, or if he road in in the back of a car.

A case based on negligence and proximate cause necessarily fails when all that is shown is a mere possibility.

#### NO PROOF OF NEGLIGENCE

The only doors to the garage other than the front entrance were the two doors, one on the north side of the garage, and the other on the south side between the garage proper and another place of business. The latter was always kept locked with a padlock on the garage side, and a partition separated the places of business. No one could get in this door without first getting into the garage. (Tr. 27-28, 45) As to the door on the north side, respondent's counsel asked the witness Remington, "Do you know whether or not that door was closed on the evening of April 30, 1938, between ten and eleven-thirty.



"A. It was closed between ten and eleven, or after ten it was closed and locked." He did not recall that he had personally checked it that particular evening. (Tr. 27).

As to the doors in the front of the garage, the opening at the extreme left, looking at plaintiff's Exhibit "A," is a little sort of room that has a door in the back, but it is always kept locked and that is not used as an exit or entrance. (Tr. 68). The opening shown in the picture next to this room is the laundry or wash rack. The laundry closes at six o'clock. (Tr. 24). There are doors that close in front of the wash rack. (Tr. 25). The wash rack door is usually closed. (Tr. 32). He did not know definitely whether or not the doors were closed between ten and eleven-thirty on the evening of April 30, 1938. The other two entrances seen on the picture on either side of the gas pumps are used for driving cars in and out of the garage. The entire front of the garage is plainly visible from the office. THERE IS NO EVIDENCE ANY DOORS WERE UNLOCKED OR THAT ANY EMPLOYEE FAILED IN HIS DUTY.

Respondent's brief, page six, suggests "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." Simply another possibility. Plaintiff's witness testified that the laundry closed at six o'clock p. m., and the wash rack is usually closed. It is pure speculation that the wash

rack door was not closed. It is pure speculation that the thieves entered through the wash rack. It is pure speculation that even if they did enter through the wash rack, that the defendant was negligent, and certainly it is purely a guess that if defendant failed to exercise reasonable and ordinary care in any particular respect that the loss proximately resulted from such failure. The most that could be said for plaintiff's evidence is that Freeman might or possibly could have gained entrance through the wash rack. Negligence and proximate cause cannot be proved by merely showing what might have happened—mere possibilities.

In our original brief, we cited general authority and many cases holding that the presumption arising in favor of plaintiff, based on proof of bailment and failure to return on demand, is completely overcome upon undisputed proof produced by either party that the bailed article was stolen or destroyed by fire. These cases are based upon the well-founded theory that the presumption is merely a rule of orderly procedure requiring the bailee to go forward with the evidence in explanation of the loss, as distinguished from the burden of proof, which remains with plaintiff throughout. Respondent does not disagree with this rule and acknowledges his obligation to prove liability. This presumption is based purely on proof of the bailment and failure to return upon demand, and as neither the bailment, nor failure to return are in and of themselves actual evidence of negligence, or any evidence as to whether or not the loss

actually occurred with or without the fault of the bailee, such presumption entirely disappears in the face of actual evidence. This represents the weight of authority and is the view taken by this court as last announced in *Saltas v. Affleck*, (Utah) 102 Pac. (2d) 493:

“And the settled rule in this jurisdiction is that as soon as evidence is offered on the question, the presumption ceases and does not longer exist. In *Re Newell's Estate*, 78 Utah 468, 5 Pac. (2d) 230, *State v. Green*, 78 Utah 580, 6 Pac. (2d) 177, *Fox v. Lavender*, 89 Utah 115, 56 Pac. (2d) 1049, 109 A. L. R. 105.”

The fact that North Carolina goes a step further than the general rule and requires the bailee to rebut the presumption by more than proof of the bare fact of theft, makes all the more significant, the decision of *Swain v. Twin City Motor Company*, 178 S. E. 560 (Appellant's brief pp. 27-30, Respondent's brief pp. 19-21). In the instant case, there was the additional proof that the defendant's garage was operated in accordance with the same standards and customs of similar garages throughout the country, which method of operation was well-known to the plaintiff.

Minnesota and Pennsylvania are alone in holding that the ultimate burden of proof is on the defendant or bailee to establish that it exercised due care. In *Harding v. Shapiro* (Minn.), 206 N. W. 168 (Respondent's brief p. 11), it is said:

"The burden was upon defendant to prove that the loss of the property bailed with him was not the result of his negligence. \* \* \* 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."

And in *Wendt v. Sley System Garages*, 188 Atl. 624 (Respondent's brief p. 13), the Pennsylvania court says:

"If a bailee fails to give a satisfactory explanation for its disappearance, he has the burden of proving that the loss was not due to his negligence."

These two states are obviously against the decided weight of authority. Respondent himself does not claim the burden of proof is on the defendant, but states at page seventeen:

"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."

We can agree with counsel in his statement that the question on this appeal should be decided upon "whether or not the judgment finds support in the testimony," that is in the evidence. That being the case,

the fact that the ultimate burden of proof of establishing negligence is upon the plaintiff is of no importance on this appeal, except that if there is not sufficient actual evidence to sustain a finding of both specific negligence and proximate cause, plaintiff's case must fail; whereas, if the ultimate burden of proof were on the defendant to prove he was not negligent, then a finding in favor of plaintiff in a case of this kind might be perfectly proper, even though there was no evidence of negligence, just the same as a defendant, who being sued for damages arising out of an automobile accident would be entitled to a judgment in his favor if the plaintiff, who in that case had the ultimate burden of proof, failed to prove negligence and proximate cause.

True, it is not the province of the appellate court to determine where the weight of the evidence is, but it is the province of such court to determine if there is any actual substantial evidence sufficient to sustain a finding of negligence and proximate cause. We maintain on this appeal that the evidence is insufficient to sustain a finding that defendant was negligent, and also insufficient to sustain a finding of proximate cause. On the contrary it is established that defendant exercised that reasonable care usually exercised by all garages. The evidence must do more than show that the defendant might have been negligent, or if negligent, that the loss might have been caused by such negligence. As stated in *Fritz v. Electric Light Company*, 18 Utah 493, 56 Pac. 90 (Appellants brief pp. 36-37), "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."

This is particularly true when a case is based on circumstantial evidence. *Jones on Evidence*, Civ. Cases, 4th Ed. Vol. 5. Sec. 899, p. 1681, says:

"A theory cannot be said to be established by circumstantial evidence, either in a civil action or in a criminal prosecution unless the disclosed facts and circumstances shown are consistent therewith and inconsistent with any other rational theory."

*Cornwell v. O'Connor* (Kan.), 5 Pac. (2d) 861:

"The appellee relies upon circumstances to prove negligence. To accomplish this the facts and conditions must be of such significance and relation one to the other that a reasonable conclusion of negligence can be founded thereon. To establish a theory by circumstances the facts relied on must be of such a nature and so related one to the other that the only reasonable conclusion to be drawn therefrom is the theory sought to be established."

*Simpson v. Hillman* (Ore.), 97 Pac. (2d) 527:

"It is well established that the causal connection between defendant's act or omission and the injury must not be left to surmise or con-

jecture. The evidence must be something more substantial than merely indicating a possibility that the alleged negligence of the defendant was the proximate cause of the injury. When the evidence shows two or more equally probable causes of injury, for not all of which the defendant is responsible, no action for negligence can be maintained. In other words, negligence can not be based on conjecture or speculation."

In *Potter v. Dr. W. H. Groves L. D. S. Hospital* (Utah), 103 Pac. (2d) 280, wherein this court held that plaintiff had failed to prove that the hospital was negligent in not placing sideboards on a bed, it was said:

"There is nothing to show that in not attaching sideboards to Mrs. Potter's bed, appellant was not exercising due care prior to and at the time of her injury. Some negligent act or failure to act by the hospital or its servants must be alleged and proved. Plaintiffs (respondents) did not establish that a standard of due care required the hospital to place sideboards on the bed of patients in the condition of Mrs. Potter on Monday night. Therefore, its failure to place sideboards on Mrs. Potter's bed that night was not negligence."

In that case, the accident might not have happened had they had sideboards on the bed. In the instant case in what respect it could be said defendant was negligent, much less appears than in the Potter case, because absolutely nothing is shown which defendant should have been required to do in the exercise of ordinary care that

would have prevented the theft. Even an armed guard or a special watchman, which in the Swain case, *supra*, was not required, would not have prevented Freeman and his companion from slipping in while the city was in darkness or by hiding in the back of an automobile. As the California court said in *Perera v. Panama-Pacific International Exposition Co.*, 175 Pac. 454 (Appellant's brief pp. 31-32):

“We find in the evidence no sufficient gauge by which it may fairly be concluded that the \* \* \* 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 \* \* \* proper protection.”

#### RESPONDENT'S CASES

To support his argument, counsel cites cases from Minnesota and Pennsylvania where, as we have pointed out, contrary to the great weight of authority, the ultimate burden is on defendant to prove he was not negligent. These cases have no application, because in those states, even if there was no evidence of negligence, a finding of negligence would be justified. “Since the plaintiff” in the instant case “*assumed*” and claimed to have “discharged the burden of proving negligence” (Respondent's brief p. 17), these cases are of no importance on this appeal. Many of the cases cited by respondent had to do with garages closed and supposedly locked for the night, rather than a garage open for business. Others have to do with vacant lots, which were used for



parking cars. None of the cases, we submit, are in point, because they either come from a state where the ultimate burden of proof rests on defendant, or are based solely on the so-called presumption rule, or are cases where specific negligence was found in the evidence.

*Rogers v. Murch*, 149 N. E. 202 (Respondent's brief p. 9), had to do with a garage left unattended for the night. There was no watchman, and plaintiff alleged and proved that the entrance to the building was effected through a window in the basement.

In *Harding v. Shapiro* (Minn.), 206 N. W. 168 (Respondent's brief p. 11), the means of entry was established, and the garage had been closed, with no attendants or watchmen on duty. Furthermore, the case coming from Minnesota, rests upon the rule there that defendant had the burden of proving he was not negligent.

The *Baione v. Heavey* decision (Pa.), 158 Atl. 181 (Respondent's brief p. 12), likewise comes from a jurisdiction where the burden of proof is on defendant. In the opinion it is not stated what the evidence was, but it does appear that there was an outside parking lot which was unfenced, and that the cars in leaving were not required to go out any particular exit and might cross the sidewalk at any place along two streets.

*Wendt v. Sley System Garages*, 188 Atl. 624 (Respondent's brief p. 13), likewise comes from Pennsyl-

vania. There were only two attendants, when customarily at least four were provided. The quotation from 6 C. J. 1158, Section 160, quoted from the Wendt case, and also appearing at page 21 of respondent's brief, is incomplete. We quote further from this citation at page 1160:

"But by the weight of authority the rule does not go so far as to require the bailee *positively* to acquit himself of negligence. The burden of proof of showing negligence is on the bailor and remains on him throughout the trial. The presumption arising from injury to the goods or failure to redeliver is sufficient to satisfy this burden and make out a *prima facie* case against the bailee; but the bailee may overcome this presumption by showing that the loss occurred through some cause consistent with due care on his part, in which case he is *entitled to the verdict* unless the bailor affirmatively proves to the satisfaction of the jury that the loss would not have occurred but for the negligence of the bailee. *Thus if he proves that the loss was occasioned by burglary or theft, by fire, by the falling of the warehouse in which the goods were stored, or by any inevitable accident, the burden is again shifted to the bailor to prove defendant's negligence.*"

In the instant case, there never was a presumption, because it affirmatively appeared without dispute and from plaintiff's complaint that the car had been stolen. Plaintiff based his action upon negligence and not upon any contract of bailment, introduced evidence and *assumed* the obligation and claimed to have discharged

the burden of proving negligence. In face of the pleadings and evidence, no presumption existed.

*Byalos v. Matheson*, 159 N. E. 242 (Respondent's brief p. 15), rests entirely on the presumption. Plaintiff's action in that case was not based on negligence, nor did the plaintiff undertake to prove negligence, and "no proof was offered by the appellant (defendant) that he was not guilty of negligence."

In *Medes v. Hornbach*, 6 Fed. (2d) 711 (Respondent's brief p. 16), the automobile was taken out by one of the employees of defendant *without the consent of the owner*.

We cannot see how the case of *Travelers Fire Insurance Co. v. Brock and Co.*, 85 Pac. (2d) 904 (Respondent's brief p. 22), has any application, when in that state "the answer to the question on whom is the burden of proof as to defendant's negligence, depends on the pleadings." *U Drive & Tour, Ltd., v. System Auto Parks, Ltd.*, (Cal. Super.) 71 Pac. (2d) 354, 356. In the *Travelers* case, the action was "based on contract." In the instant case, plaintiff not only based his complaint on negligence but at the trial "assumed \* \* \* the burden of proving negligence."

In *Beetson v. Hollywood Athletic Club*, 293 Pac. 821 (Respondent's brief p. 23), "the defendant's attendant

left its parking place without taking the slightest precaution to protect plaintiff's car against theft."

*Keenan Hotel Co. v. Funk*, 177 N. E. 364 (Respondent's brief p. 25), is a case apparently based on the presumption, but the fact also appears that the bailor's wife asked that she be permitted to lock the car and take the keys with her. This request was refused.

*Hoel v. Flour City Fuel & Transfer Co.*, 175 N. W. 300 (Respondent's brief p. 26), is another Minnesota case. *Federal Insurance Co. v. Lindsley*, 228 N. Y. S. 614, was an action apparently based on contract.

In *Fisher v. Bonneville Hotel Co.*, 55 Utah 588, 188 Pac. 856, there was substantial evidence that "the manager informed the porters that they had been careless, and promised plaintiff's husband that the matter would be fixed up if the grip could not be found." The finding of negligence was justified by the admission.

In *General Exchange Insurance Corporation v. Service Parking Grounds, Inc.*, 235 N. W. 898 (Respondent's brief pp. 28-29) there was specific negligence:

"Not only was the car taken without the surrender of the tickets, but it was further shown that there were no lights on the lot at night time; that the lot was enclosed by barriers, but it had two exits and entrances which were not guarded."

The cases cited (Respondent's brief pp. 31-32), were cases where there were no attendants both day and night

and boarders, lodgers, guests, and all were permitted free access to the garage. One of those cases, *Employers Fire Ins. Co. v. Consolidated Garage*, 155 N. E. 533, had to do with a theft by one of defendant's employees.

Respondent limits the question on this appeal to "whether or not the evidence supports the judgment." (Respondent's brief p. 31.) Negligence and proximate cause cannot, we submit, be sustained *by the evidence*. There can be no presumption in the instant case, because plaintiff did not base his complaint upon contract or upon the presumption, but both undertook to allege and prove negligence and "assumed and" claimed to have "discharged the burden of proving negligence." The bailment and failure to return upon demand, the facts upon which any so-called presumption rests, are not in and of themselves any evidence of negligence, and when actual evidence was introduced, any possible presumption wholly disappeared. The actual evidence at most shows nothing but possible ways of gaining entrance to the garage. The evidence is undisputed that the garage was being operated in accordance with the same standards and practices as other garages throughout the country, and this was known to plaintiff. There was no evidence that an established standard of due care was not maintained by the garage and its employees. The manner of entrance of the burglars is wholly unknown. It is just as probable they entered while the city was in darkness or by hiding in the back of an automobile, or

by some other means. There is no fact shown which under the evidence can be said to be the basis of 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. Even if it should be assumed that defendant was negligent in any manner which respondent suggests, it cannot be said that such negligence was the proximate cause of the theft, if the thieves entered by some other means.

The findings of fact and conclusions of law of the court are insufficient to sustain the judgment for the same reasons. The court did not find the defendant negligent in any particular.

#### DEFENDANT'S DEMURRER

*Mangum v. Bullion, Etc., Mining Co.*, 15 Utah 534, 50 Pac. 834, and *Eddington v. Cement Co.*, 42 Utah 274, 130 Pac. 243 (Respondent's brief 34-35), had to do with a general demurrer or an objection to the complaint on appeal not made in the trial court. In the *Mangum* case, it was said:

"If the facts were not stated with certainty and definiteness which good pleading requires, the appellant's remedy was by special demurrer or motion to make more definite and certain."

In the instant case, defendant's general demurrer was based upon the fact that the cause of the loss affirma-

tively appeared, namely, the theft. The purpose of the motion in *Schaff v. Coyle* (Okla.), 249 Pac. 947 (Respondent's brief p. 36), is not disclosed in the opinion. Respondent claims that all facts were within the knowledge and possession of the defendant, yet it appears that the employees of the garage themselves did not know how the thieves got in the garage. If respondent claims defendant was negligent in parking the automobile south of the wash rack, certainly he could have alleged the same in his complaint. We submit that defendant's demurrer should have been sustained when actual negligence rather than a presumption is relied on.

#### CLAIM OF AMERICAN EQUITABLE ASSURANCE COMPANY

It was our understanding (Tr.35) that respondent stipulated that the American Equitable Assurance Company paid to Mr. Romney, the plaintiff, under a collision coverage policy, the amount of his loss under the policy, subject to counsel's objection that it was immaterial; otherwise, defendant would have produced actual evidence to that effect. True, the court did not pass on the materiality of the matter, but, nevertheless, it was the duty of the court to make its findings in accordance with the evidence. In the Potomac case, the plaintiff was protected because the insurance company had paid the entire loss and there had been an assignment, at least by subrogation of the entire loss. In the instant case, there was subrogation of a part of the loss, and defendant is entitled to be protected against the insurance company

as to the portion paid by it. To properly do this, the court should have divided the recovery, if any, between Mr. Romney and the insurance company, proportionate to the loss sustained by each.

#### TESTIMONY OF WITNESS SQUIRES

In the cases cited by respondent, notice to the defendant of a prior accident or event was held to be material in putting the defendant on notice of *some defective condition* of the sidewalk or premises of the defendant, which after such notice could have been remedied. In *Hurd v. U. P. Ry. Co.*, 8 Utah 241, 30 Pac. 982 (Respondent's brief p 39) the sidewalk had been left in an unguarded and dangerous condition.

In *McCormick v. Great Western Power Co.*, 8 Pac. (2d) 145 (Respondent's brief p. 39), it is pointed out that electricity is a "dangerous instrumentality" and one who maintains it must exercise a high degree of care, and has a definite duty to keep the wires properly insulated or placed beyond the point of danger. Prior accidents in question with the electric wires were notice that at a certain place, the wires were not properly maintained.

In *Sargent v. Union Fuel Co.*, 37 Utah 392, 108 Pac. 928 (Respondent's brief p. 41), there was a dangerous condition in defendant's mine, because of failure to timber or in some manner provide against the dangerous condition thereof.



In *Osplind v. Pearce*, 221 N. W. 679 (Respondent's brief p. 41), the evidence admitted was to show previous accidents caused by the same defect on a roller coaster, and in *Manson v. Mays Department Stores Co.*, 71 S. W. (2) 1081 (Respondent's brief p. 41), the falling of plaster was notice to the defendant that the plaster on the ceiling was loose and in a dangerous condition.

The testimony of Squires, besides being objectionable as hearsay, did not show any defect or condition which defendant might or should have remedied, or show any negligence of any employee which defendant might have corrected. Respondent would not seriously contend that if the defendant was being sued for the negligent operation of an automobile that the fact defendant had had a prior accident in the same automobile would be admissible or have any probative value in proving defendant was negligent in the second accident. The situation would be different, however, in the accident case, if the defendant had an accident because of a defect in the steering gear, but continued to drive the same automobile without having such defect corrected, and thereafter had another accident caused by the same defective gear. If a bank were robbed by a burglar getting through a basement window, the hinges of which were worn out, such would be notice to a bank to fix such defective window. On the other hand, if the only fact known was the fact that the bank was robbed, there would be no proof that the bank was negligent if it

happened to be robbed again at a later date. As well stated in *Perera v. Panama-Pacific International Exposition Co.*, 175 Pac. 454, the "prior theft is of no practical importance in this connection, in view of the want of evidence as to the circumstances thereof."

We submit, first, that the evidence of the prior theft in the instant case was inadmissible as being based on hearsay and because related to a wholly irrelevant and collateral matter, there being nothing shown as to the circumstances thereof, and nothing showing a defect or condition that defendant might or should have remedied, and, second, that at any rate, the matter was of no practical importance in the case, except to prejudice the trial court.

#### DAMAGES

Respondent has no answer to appellant's assignment of error No. 12 (Ab. 56). The court erred in permitting plaintiff to amend his complaint to increase the amount of damages claimed, in view of the specific stipulation limiting the damages if plaintiff should recover, to \$715.00 in addition to the usual taxable costs.

We respectfully submit that the judgment in this case should be reversed.

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