J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 70/78

BEFORE: THE HON. PRESIDENT
THE HON. MR. JUSTICE HENRY, J.A.
THE HON. MR. JUSTICE KERR, J.A.

BETWEEN: OLIVE HART - (PLAINTIFF/APPELLANT)

A N D : LINLEY BLAIR - (DEFENDANT/RESPONDENT)

Mr. Norman Wright for Appellant.

Mr. W. Bentley Brown for Respondent.

October 20, 1978; May 10, 1979.

KERR, J.A.

This is an appeal from a judgment of the Resident Magistrate for St. Andrew in favour of the Defendant/Respondent.

The Plaintiff's claim as filed was originally against the Defendant and one Augustus Williams for $1,000 - "for damages to the Plaintiff's motor car by the negligence of the Defendants, their servants or agents and/or each of them". Augustus Williams was not served and on the matter coming up for hearing the claim was amended by adding against the Respondent alone, an alternative cause of action thus:-

> "In the alternative, the plaintiff's Claim is against the first named defendant to recover the sum of $1360 as damages for goods to wit, a motor car F.A. 248 and fully entrusted to him in the parish of St. Andrew in or about the month July 1974 to repair and which said motor car has not been so repaired nor returned to the plaintiff."

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The oral statement of defence was:-

"DEFENCE:-

(1) Negligence

1st defendant denies that 2nd defendant was at the material time a servant or agent of his, and says further that plaintiff's motor vehicle was stolen after repairs were completed and he was in no wise a party to the theft.

(2) 1st defendant admits he was entrusted with the motor vehicle by husband of plaintiff with written instructions of repairs to be effected which he completed during day 17/7/74 and securely locked away said car awaiting 21/7/74 when he should deliver the repaired car to plaintiff."

In early July 1974, the Appellant's Ford Escort Motor Car F.A. 248, was delivered to the Respondent who lived and operated a garage at No. 6 Marlowe Avenue, Duhaney Park, St. Andrew, with written instructions relayed by the Appellant's husband, Frank Hart, to effect certain repairs to the car and to keep it pending their return from a holiday abroad. Appellant and husband returned July 21, 1974, to find that the car was a wreck, damaged beyond repairs. To their enquiry, the Respondent advised that Augustus Williams a duco man who worked for him but who was not a weekly paid employee had taken and driven away the car without his knowledge or permission and so damaged it. He disclaimed liability and refused even to meet the Appellant halfway with the costs of another car. Respondent in evidence said that in accordance with the instructions he completed the repairs on July 17, and on that day at about 3 p.m., he parked the car in premises across the road as he was wont to do, and having locked it up, he placed the keys in a dish on the counter of his kitchen near a window. He didn't see Williams that day and no duco work was or was to be, done on the car. He left home apparently

about 5:45 p.m., and on his return, as a result of certain information he went to Duhaney Drive where he saw the Plaintiff's car wrecked against a tree. He denied sending Williams on any errand. He admitted in cross-examination that on leaving he did not locked his house - later he said it was not "fully locked up" - but he considered the keys were in a safe place; that although his workmen knew where car keys were kept they were not allowed to enter his kitchen.

Of the grounds of appeal filed the following formed the bases for the arguments advanced on behalf of the Appellant.

> "(i) Having regard to the Learned Resident Magistrate's findings on the facts, it is very obvious that he misdirected himself on the legal and/or equitable liability of the Defendant/Respondent to the Plaintiff/Appellant and the duty owed by him to her."
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> .....
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> "(iii) The evidence clearly establishes that the Defendant/Respondent was guilty of negligence either as a Bailee and/or otherwise, and the Learned Resident Magistrate erred in entering Judgment for the Defendant/Respondent on the evidence before him.
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> (iv) The Learned Resident Magistrate should have appreciated that it was the clear legal obligation of the Defendant/Respondent to return the car to the Plaintiff/Respondent on demand or to pay reasonable compensation which would include the value of the said vehicle."

In the course of his submissions, the Appellant's Attorney quite properly indicated that in his opinion liability in bailment was the more appropriate cause of action and he confined his arguments to that category of liability. He submitted that the Respondent was a bailee for reward and as such he was obliged to use the care and diligence of a careful and vigilant man in his own

affairs - and that the Respondent had not discharged the onus of showing that the damage was not due to his neglect or from want of the requisite care and further even if the person who drove away the car was a trespasser the Respondent was negligent in placing the keys in the place described by him. In support he referred to the following amongst other cases:-

(1) Joseph Travers & Sons, Limited v Cooper (1915) 1 K.B. p. 73.

(2) Brabant & Co. v King (1895) A.C. p. 632 p. 640.

The Learned Resident Magistrate in his reasons for judgment found the following facts:-

"(1) That Plaintiff entrusted her car on or about the 6th July 1974 to the Defendant to effect certain repairs to it and to keep it at his garage until 21st July, 1974.

(2) That on or about 17th July, 1974 one Augustus Williams - who on Defendant's recommendation does "duco work" (for which he is separately paid) on cars which Defendant is responsible for mechanical repairs - drove away Plaintiff's car and wrecked it.

(3) That at time Williams took and drove away Plaintiff's car - he was not an employee or workman of the Defendant but rather an "independent contractor".

(4) That Defendant had locked away Plaintiff's car and stored it on premises at No. 3 Marlowe Avenue., as is his custom with contract jobs.

(5) That the key for Plaintiff's car as well as other contract repairs was kept by Defendant in his home - in a dish in his kitchen.

(6) That the time the key for Plaintiff's car was taken - the Defendant's house was not fully locked up - but his home and kitchen was barred to his workers as he declared. Anyone entering therein without Defendant's Authority or consent would be a trespasser.

(7) That at the time Williams took and drove Plaintiff's car away he was not acting in the capacity of a servant or agent of the Defendant but was on a frolic of his own,"

and

"Held -

(1) That the Plaintiff's claim in negligence failed as not only was no evidence led to support this allegation but the statement made by Williams (admissible only against himself) absolved him of any liability.

(2) That Defendant as a Bailee was not liable in failing to secure Plaintiff's car as he being the operator of a garage at premises which are both his dwelling house and business place no standard of care greater that (a) locking up the car (b) putting away the keys for such cars in his private residence - entry on which is a trespass - could be expected of him."

It is clear from the Resident Magistrate's findings of fact that the Respondent was a bailee for reward - See Aitchison v Page (1936) 154 L.T. p. 128 and I accept and adopt the following passage from Halsbury Laws of England - 3rd Edition Vol. II- p. 114 paragraph 225 as a correct statement of the Law:-

> "A custodian for reward is bound to use due care and diligence in keeping and preserving the article entrusted to him on behalf of the bailor. The standard of care and diligence imposed on him is higher than that required of a gratutious depositary, and must be that care and diligence which a careful and vigilant man would exercise in the custody of his own chattels of a similar description and character in similar circumstances."

Equally acceptable is the proposition that the Plaintiff having proved the loss or damage while the goods are in the possession, custody or control of the bailee, there is an onus on the Defendant/bailee to show there was no want of care and diligence in him:-

> PARAGRAPH 227 (ibid)
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> "When a chattel entrusted to a custodian is lost, injured, or destroyed, the onus of proof is on the custodian to show that the injury did not happen in consequence of his neglect to use such care and diligence as a prudent or careful man would exercise in relation to his own property. If he succeeds in showing this, he is not bound to show how

> or when the loss or damage occurred. If a custodian declines either to produce the chattel entrusted to him, when required to do so by the owner, or to explain how it has disappeared, the refusal amounts prima facie to evidence of breach of duty on his part, and throws on him the onus of showing that he exercised due care in the custody of the chattel and in the selection of the servants employed by him in the warehousing."

However a bailee for reward is not an insurer of the goods entrusted to him. Accordingly he ..... "is not answerable for a theft by any of his servants, but only for a theft by such of them as are deputed by him to discharge some part of his duty of taking reasonable care. A theft by any servant who is not employed to do anything in relation to the goods bailed is entirely outside the scope of his employment and cannot make the master liable," per Salmon, L.J. in Morris v C.W. Martin & Sons (1956) 2 All E.R. p. 725 at 740 - and per Diplock, L.J. at p. 738 ante:-

> "Nor are we concerned with what would have been the liability of the Defendants if the fur had been stolen by another servant of theirs who was not employed by them to clean the fur or to have the care or custody of it. The mere fact that his employment by the Defendants gave him the opportunity to steal it would not suffice."

A fortiori the principle would apply to an independent contractor who was not in any way concerned with the goods in question or was not at the material time employed by the bailee to do any work in relation to them.

In the instant case there was no want of care in the locking up of the car and placing the keys in the kitchen of his house and the fact that not locking up his house made it less difficult for Williams to obtain the keys would not suffice. Williams was at the least an impertinent trespasser who apparently took advantage of