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PARKING LOT - BAILMENT - THEFT BY EMPLOYEE***Goldberg v. Kunz***¹

The defendant operated a garage and parking lot where the plaintiff stored his car for ten days. The keys to the car were left with the defendant who promised to let no one have them. The following Sunday an employee, about whom the defendant knew very little, was left in full charge of the lot and garage. The employee took the car from the garage and went on a frolic of his own which resulted in damage to the automobile. The defendant's

¹ 185 Md. 492, 45 A. 2d 279 (1946).

motion for a directed verdict was refused, and the jury found the defendant negligent in hiring the employee and rendered a verdict for the plaintiff. The Court of Appeals held the transaction was a bailment and that it was the duty of the defendant to use ordinary care in hiring a trustworthy servant. It was further held that the bailor has made out a *prima facie* case when he has established the bailment and an unauthorized use or misdelivery by the bailee. However, the decision in favor of the plaintiff was based solely on the negligence of the defendant in hiring the servant and in entrusting him with the care of the premises. The Court expressly negated the idea that it in any way dealt with the possibly broader basis of liability grounded on a breach of the defendant's undertaking, and pointed out that other jurisdictions are in conflict regarding such liability.

In the instant case the automobile was probably kept in the garage of the bailee instead of on his parking lot, but the only distinction between a garage and a parking lot for the purpose of determining the existence of a bailment is in the possible differences in the manner of conducting the business.²

Where the automobile owner surrenders his key to the lot attendant, or leaves it in his car at the express or implied request of the lot attendant, there is sufficient delivery of possession and a bailment exists.³ Or if the key is left in the car with the lot attendant's knowledge and acquiescence, a bailment may be created.⁴ Nor does the fact that the car owner has a definite place in which he parks every night preclude the relationship from being a bailment if the key is left at the attendant's request.⁵ The relationship may start as a bailment and end as a mere license, *e.g.*, the bailor delivered his car and the keys to the defendant bailee and both agreed at the time that since the bailee was in the habit of leaving the lot at five-thirty each afternoon, if the bailor had not returned by that time then the bailee would place the keys above the sun-visor of the automobile and leave; the Court held there was a constructive re-delivery of possession and control to the

² Jones, *The Parking Lot Cases* (1938) 27 Geo. L. J. 162; See Annot. (1930) 65 A. L. R. 431 and (1940) 131 A. L. R. 1175.

³ Doherty v. Ernst, 284 Mass. 341, 187 N. E. 620 (1933); *Beetson v. Hollywood Athletic Club*, 109 Cal. App. 715, 293 P. 821 (1930); *Westchester Development Corporation v. Burkett*, 38 A. 2d 628 (D. C. 1944); see also, Note, *Liability of Parking Lot Owner for Stolen Car* (1939) 37 Mich. L. Rev. 468.

⁴ Doherty v. Ernst, *supra*, n. 3.

⁵ *Westchester Development Corp. v. Burkett*, *supra*, n. 3.

bailor at five-thirty and the defendant was not liable for the theft of the car which occurred after that time.⁶

When it is understood that the automobile owner must surrender a claim check or ticket, or must in some other manner identify himself before he can reclaim his automobile, a bailment usually is found to exist, even when the key is retained by the owner who locks his car or not as he sees fit.⁷ However, receipt of a check or ticket from the lot attendant in itself is not conclusive of a bailment, when the keys are retained by the car owner, if circumstances warrant a finding that it is not intended to be a claim check, but is meant to be a receipt for the payment of a fee for the license to park.⁸ When it appears that nearly all of the cars parking on the lot will be arriving and leaving at the same time, and the number of employees in relationship to the number of cars makes delivery to the lot attendant and re-delivery to the automobile owner impracticable, it may be considered apparent that the ticket is not meant as a claim check but is intended as a receipt for the payment of the parking fee.⁹ However, even where such circumstances exist, it may be possible to find some duty owed by the lot owner to the automobile owner during the period when no cars are entering or leaving based on a contract to guard the cars. In order to establish such a duty there would have to exist an express contract to guard, or an implied contract based upon the manner of conducting the business and the circumstances of the case, taking into consideration the degree of enclosure, the manner in which it is guarded, and the disclosed practice of prohibiting any one from leaving with an automobile during this guarded period without proper identification and proof of the right to remove the car. On the other hand, it is possible to argue that a bailment exists by constructive delivery at the time the lot keeper begins to exercise such control and that there is a constructive re-delivery of such control when the guarded period ends and the people are allowed to remove their cars *en masse* without consulting the lot keeper. However, the contract

⁶ Continental Insurance Company v. Himbert, 37 So. 2d 605 (La. 1948).

⁷ General Exchange Ins. Corp. v. Service Parking Grounds, 254 Mich. 1, 235 N. W. 898 (1931); Galowitz v. Magner, 208 App. Div. 6, 203 N. Y. S. 421 (1924); U Drive & Tour v. System Auto Parks, 28 Cal. App. Supp. 2d 782, 71 P. 2d 354 (1937).

⁸ Ex Parte Mobile Light and R. Company, 211 Ala. 525, 101 So. 177 (1924); Porter v. Los Angeles Turf Club, 40 Cal. App. Supp. 2d 840, 105 P. 2d 956 (1940).

⁹ Ex Parte Mobile Light and R. Co., *supra*, n. 8, a parking lot catering to the patrons of a nearby baseball park.

theory seems to be the sounder theory for imposing liability in such a case. In *Goodyear Clearwater Mills v. Wheeler*¹⁰ the Court split on the question with the majority calling the transaction a bailment while the dissent held that a contract to guard was the only basis upon which liability could be imposed. In that case the defendant was the manager of a large plant which maintained a fully enclosed parking lot with one gate at which a guard was stationed; the cars were allowed to enter and exit freely during the changes of the working shifts of employees, but during the *interim* period between shift changes, the lot was closed and guarded.

Where the lot owner exercises no control over the automobile, letting the car owner take the keys and permitting him to lock the car or not as he desires, and where the parties contemplate that the car owner may enter the lot and remove the car at will without consulting the attendant first, generally no bailment is found to exist.¹¹ A license to park appears to indicate more accurately the nature of this relationship than does a lease of space.¹² The lease theory is more plausible where one habitually parks his car in the same space every day or night.¹³ Under these circumstances if attendants are present, it is usually only for the purpose of collecting fees and directing traffic.¹⁴ But even here the courts might uphold the express contract, actually made between the lot attendant and the car owner, to guard the car against theft.¹⁵

¹⁰ 49 S. E. 2d 184 (Ga. 1948).

¹¹ *Suits v. Electric Park Amusement Co.*, 213 Mo. App. 275, 249 S. W. 656 (1923); *Lord v. Oklahoma State Fair Ass'n.*, 95 Okla. 294, 219 P. 713 (1923); *Ex Parte Mobile Light and R. Co.*, *supra*, n. 8.

¹² Note, *Liability of Parking Lot Operators for Theft of Automobiles* (1934) 18 Minn. L. Rev. 352.

¹³ *Jones*, *supra*, n. 2.

¹⁴ *Ex Parte Mobile Light and R. Co.*, *supra*, n. 2.

¹⁵ *Pennroyal Fair Ass'n. v. Hite*, 195 Ky. 732, 243 S. W. 1046 (1922); this case also discusses the authority of an attendant to make such a contract. It is not within the scope of this casenote to deal with the problem of liability for the theft of chattels left in the car. However, the case of *Hesse v. Auto City Parking Company*, Superior Court of Baltimore City (O'Dunne, J.) D. R., Nov. 30, 1944, is worthy of note. Plaintiff parked his car containing valuable electrical tools in the trunk and a radio on the back seat and informed the attendant of the presence of these articles. He left his car keys with the attendant at the latter's request. The car and the tools and radio were stolen and the defendant lot owner admitted liability for the car but not for the tools and radio. The Court held that to impose liability on the lot owner for chattels left in the car, he must have actual or constructive notice of the presence of such items. Thus where the chattels are visible, or the car owner informs the attendant of their presence the lot owner assumes liability for them. See also, *Lucas v. Auto City Parking Co.*, 62 A. 2d 557 (D. C. 1948), and note, *Unknown Chattels Contained in Object Bailed* (1947) 45 Mich. L. Rev. 625.

Thus it becomes apparent that the nature of the relationship existing between the owner of the parking lot and the owner of the automobile who parks his car thereon is determined by the manner in which the parking lot business is conducted.¹⁶

Where a bailment exists the lot owner may attempt to avoid responsibility by a limitation of liability posted on the lot or printed on the check given to the car owner. However, it is frequently held that a bailee cannot exempt himself from liability for his own negligence.¹⁷ Furthermore, the parking lot owner or garage keeper cannot limit the nature of his liability by posting a sign to that effect or by printing such a stipulation on the ticket or check given to the bailor unless such limitations are specifically called to the attention of the bailor.¹⁸

By establishing the existence of a bailment and the failure of the bailee to return the car, or its delivery in a damaged condition, the plaintiff has established a *prima facie* case against the defendant and a presumption that the injury or loss was caused by the bailee's negligence is raised. Most cases do not allow the bailee to overcome this presumption by merely showing that the car was stolen, but impose the burden on the bailee of proving that the theft occurred without any fault on his part.¹⁹ Thus the bailee must prove that he was not negligent in guarding the car against theft. The protection afforded the car must be commensurate with the danger of theft to which the car is exposed by virtue of the location of the parking lot, the degree to which it is enclosed, and other relevant circumstances including the furnishing of sufficient employees to supervise adequately the cars on the lot.²⁰ This rule, placing the burden on the defendant to

¹⁶ Oshorn v. Cline, 263 N. Y. 434, 189 N. E. 483 (1934).

¹⁷ Malone v. Santora, 64 A. 2d 51 (Conn., 1949; *but see*, RESTATEMENT, CONTRACTS (1932) Sec. 574, 575.

¹⁸ Hesse v. Auto City Parking Company, *supra*, n. 15; note, *Effect of Attempt to Contract Away Liability for Negligence* (1948) 17 Cinn. L. Rev. 305. Notice on the ticket that there would be no attendant on duty after 6 P. M. does not relieve defendant of liability for theft after 6 P. M. If defendant expressly informed plaintiff, or if plaintiff actually knew, it would be evidence to consider in defendant's favor, Sandler v. Commonwealth Station Co., 30 N. E. 2d 389 (Mass. 1940).

¹⁹ Jones, *supra*, n. 2. *Contra*, Castorina v. Rosen, 290 N. Y. 445, 49 N. E. 2d 521 (1943).

²⁰ Rhodes v. Turner, 171 S. W. 2d 208 (Tex., 1943). In Kaiser v. Poche, 194 So. 464 (La., 1940), the Court held that if the keys are left in the car, a greater degree of care must be exercised than when the key is left in the possession of the attendant. In Fire Ass'n of Philadelphia v. Fabian, 170 Misc. 665, 9 N. Y. S. 2d 1018 (1938), where the key was left with the car but plaintiff knew the cars were left unguarded most of the time, held a bailment but that the plaintiff assented by implication to the limited

prove that he used due care, has been described as a rule of necessity since the car owner hardly can be expected to know what happened to his automobile while it was in the charge of the bailee. The bailee, on the other hand, should be expected to account for such loss or damage and to come forward with evidence to establish due care on his part or to show that the loss or damage occurred despite such due care.²¹

When the theft is by an employee of the bailee, all courts agree that the bailee is liable if he was negligent in employing or entrusting the servant, or in retaining him after having reason to be distrustful of him.²² Again, the courts place the burden on the bailee to prove that he was free from negligence and allow the bailor to make out a *prima facie* case by showing that the theft or unauthorized use which caused the damage was by a servant of the bailee.²³

Although there is much authority for the position that the bailee is not liable for the theft or unauthorized use of the subject of the bailment by his employee without the bailee's connivance or negligence,²⁴ many cases are *contra*.²⁵ The cases holding the employer where the damage to the stored vehicle is caused by an act of the employee not in

supervision. In this case, the car owner was not required to consult the lot owner before removing his car. In *Loeb v. Whitten*, 49 S. E. 2d 785 (Ga. 1948), the Court said safety measures to protect the car must be taken in advance to prevent the possibility of theft by providing sufficient enclosure if only a few employees are to be kept. The bailee's persistent but futile attempts to stop a thief as he was leaving with the car was not enough, the Court stating, "the defendant here did too little and did that too late."

²¹ *Quinn v. Milner*, 34 A. 2d 259 (D. C. 1943). In *Galowitz v. Magner*, *supra*, n. 7, the Court said that the fact that the thief got past the attendant without presenting a claim check infers negligence on the part of the bailee. For a contrary view, see *Davis v. Harsdorff*, 207 S. W. 2d 424 (Tex. 1948), which held that when the loss resulted from fire or theft, the burden is on the bailor to prove the bailee negligent.

²² *Holmes v. First National Bank*, 101 N. J. L. 401, 128 A. 150 (N. J., 1925).

²³ *Medes v. Hornbach*, 56 D. C. App. 13, 6 F. 2d 711, 712 (1925). The mere fact that an employee came well recommended is generally not enough to relieve defendant unless the defendant made an ample investigation of the servant before hiring him, *Castorina v. Rosen*, 38 N. Y. S. 2d 753 (1942). The fact that the employee was once in jail for intoxication is not evidence of negligence in hiring, *Argonne Apartment Home v. Garrison*, 59 D. C. App. 370, 42 F. 2d 605 (1930). *Quacra*, if the servant actually had a good record, could the bailee by proving the previous good record show that his lack of due care in hiring was not the proximate cause of the loss or injury?

²⁴ *Medes v. Hornbach*, *supra*, n. 23; *Barclay, Inc. v. Maxfield*, 48 A. 2d 768 (D. C. 1946); *Holmes v. First National Bank*, *supra*, n. 22; *Castorina v. Rosen*, *supra*, n. 19.

²⁵ *Maynard v. James*, 109 Conn. 365, 146 A. 614 (Conn., 1929); *Grenada Bank v. Moore*, 131 Miss. 339, 95 So. 449 (1923); *Muehlebach v. Paso Robles Springs Hotel Company*, 65 Cal. App. 634, 225 P. 19 (1924); *Corbett v. Smeraldo*, 91 N. J. L. 29, 102 A. 889 (1918).

the scope of his employment, and where the bailee has adequately proven himself free from negligence do so on the theory that this is a breach of a positive duty to protect the car, a duty which the bailee has undertaken to perform through his servant. This duty of safe return is one imposed by the bailee's contract, from which he cannot by his own conduct, much less by shifting the responsibility to his servant, release himself, and the liability in such a case grows out of the fact that the bailee has failed to do the thing he agreed to do.²⁶ The bailee is in a position to supervise and select his employees and should do so with the degree of particularity commensurate with the great value of the automobile which the employees are to control, and with an eye to the enticing nature of the automobile and the facility with which a servant can remove it from the garage or lot. The bailee should be forced to choose between minimizing the risk by paying larger salaries to induce better employees to work for him or to bear the greater risk of a contrary course of conduct. It seems more proper that the risk should be placed upon the bailee who selects the servant and has a chance to supervise his actions than upon the bailor who has no control whatsoever over the methods of management used. The risk should properly be a risk of the business and not of the bailor.

The courts adopting the contrary view contend that those who hold the bailee responsible are injecting an unusual term into the contract of bailment inconsistent with the liability usually incident to the bailment relationship.²⁷ They point out that a master is liable only for the servant's tortious acts done within the scope of his employment and that a bailee is not an insurer.²⁸ The instant Maryland case bases the defendant's liability on negligence and expressly leaves open the question of holding the defendant liable on any broader basis.

²⁶ *Bowles v. Payne*, 251 S. W. 101 (Mo. 1923); *Castorina v. Rosen*, *supra*, n. 23, reversed by the Court of Appeals, *supra*, n. 19.

²⁷ *Firemen's Fund Ins. Co. v. Schreiber*, 150 Wis. 42, 135 N. W. 507 (1912).

²⁸ Note, *Liability of Garage Keeper for Wrongful Act of Servant Outside Scope of Employment* (1943) 29 *Corn. L. Q.* 94, noting *Castorina v. Rosen*, *supra*, n. 19.