ALI HUSSAIN

v.

PURAN

[SUPREME COURT, 1965 (Mills-Owens C.J.), 24th September, 5th November]

Appellate Jurisdiction

Sale of goods—non-delivery—property passing—vendor in position of bailee for reward—loss of goods—onus of proof on question of negligence—Sale of Goods Ordinance (Cap. 198) ss.22,41(2),51,52—Indemnity, Guarantee and Bailment Ordinance (Cap. 199) ss.30,31.

Bailment—loss of goods—bailment for reward—onus on bailee to show absence of negligence—Indemnity, Guarantee and Bailment Ordinance (Cap. 199) ss.30,31.

The appellant purchased a cow from the respondent and paid for it on the same day. The cow was not delivered to the appellant and the magistrate held that it was left in the custody of the respondent. He held further that the onus of proving that the failure to deliver the cow on demand was attributable to the negligence of the respondent, was upon the appellant, and that he had not discharged it.

Held: 1. By virtue of section 30 of the Indemnity, Guarantee and Bailment Ordinance the respondent as bailee was bound to take as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances take of his own goods.

2. The respondent's failure to comply with the appellant's demand for the animal placed him under a duty to prove that he had taken due care of it.

Cases referred to: *Dublin City Distillery Ltd. v. Doherty* [1914] A.C.823; 111 L.T.81: *Wiehe v. Dennis Bros* (1913) 29 T.L.R.250: *Martineau v. Kitching* (1872) L.R.7 Q.B.436; 26 L.T.836: *The Parchim* [1918] A.C.157; 117 L.T.738: *Phipps v. New Claridges Hotel* (1905) 22 T.L.R.49: *Travers v. Cooper* [1915] 1 K.B.73; 111 L.T.1088: *Coldman v. Hill* [1919] 1 K.B.443; 120 L.T.412: *Hunt and Winterbotham v. B.R.S. (Parcels) Ltd* [1962] 1 All E.R.111; 105 Sol. Jo. 1124: *Bullen v. Swan Electric Engraving Co.* (1907) 23 T.L.R.258.

Appeal from a judgment of the Magistrate's Court.

R. I. Kapadia for the appellant.

H. B. Gibson for the respondent.

The facts sufficiently appear from the judgment.

MILLS-OWENS C.J.: [5th November, 1965]—

In this case the parties entered into two transactions of sale of cattle by the respondent to the appellant. One sale was of three cattle which were within the respondent's fenced enclosure. The

other sale, made two or three days later, was of a cow which at the time of the agreement was outside the enclosure but which was pointed out and identified at the time. No dispute arose concerning the sale of the three cattle; the respondent was paid the price therefor and duly made delivery of these animals to the appellant's son when he went to collect them. In the case of the cow however although the appellant paid the respondent for it on the day of the sale, as is admitted, he has never obtained physical possession of the animal. The appellant's case was that it was agreed that he should come or send for all four animals in a fortnight's time; that his son went to collect them and was given only the three, and was told the cow was missing. The respondent's case, as outlined orally by his counsel at the commencement of the hearing and as given in evidence by the respondent, was that the appellant himself had taken delivery of the cow. He agreed it was a tame animal.

The learned Magistrate accepted the case for the appellant but gave judgment for the respondent. He considered that the claim might have been laid either in tort as an action of detinue or in contract as an action for damages for non-delivery; here the claim was framed in detinue. He went on to say —

> "The fact of the contract appears to me important: it alters the onus of proof.
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> Maxim is *res perit domino:* there was nothing to show that, as in ordinary case, the property did not pass at the time of making the contract i.e. on 26/8/65. If so, the risk is on the purchaser, when he can show in tort that there was negligence on part of seller: or that the passing of the property in the cow was delayed. The Defendant gave evidence that he did not possess the cow, nor did he know what had happened to it; this was not contradicted.
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> According to *Halsbury V. 38* (3rd Edn) page 774: "Detinue is the form of action which lies when one person wrongfully detains the goods of another. It also lies against a person who has had possession of goods but has improperly parted with possession." No evidence given that Defendant had improperly parted with possession — "or against a bailee who has lost goods unless he shows that the loss was without default on his part. The gist of the action is the unlawful failure to deliver up the goods when demanded".
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> Here the bailee was a vendor with possession. I think this alters the onus of proof: the purchaser has to show negligence on the part of the seller.
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> This was not shown.
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> The doctrine of frustration does not apply, I think, to the sale of a specific article like this, in which the property has passed: accordingly I do not think the money can be returned to Plaintiff, under the modern doctrine.
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> I am sorry for Plaintiff, particularly in view of contradictory evidence of Defendant: but it would seem that he has not shown Defendant's negligence: accordingly I must dismiss the complaint."

On the appeal it was argued that the only issue at trial was whether the cow had been delivered to the appellant, as the respondent alleged; no issue of negligence had been raised; the learned Magistrate had held against the respondent on the facts and should therefore have given judgment for the appellant; the respondent had succeeded on an inconsistent case; even on the basis on which the judgment was given the decision should have been in the appellant's favour, counsel contended, as the onus was on the respondent, not the appellant (see 2 *Halsbury* (3rd Edn) at pp.102-3). Counsel for the respondent contended that the appellant remained in the same dilemma as in the Court below. The appellant had alleged that he left the cow with the respondent "for safe custody". He had not shown that the respondent still had the animal and would not give it up. There was no evidence as to what the arrangement was; was the respondent to guard the cow, to feed and water it, to bring it into the fenced enclosure?

The case illustrates the advantages of written pleadings or, at least, a clear settlement of the issues. The appellant pleaded a bailment and failure to deliver the cow on demand being made. The respondent (orally) denied the bailment. In the circumstances there was no occasion for the appellant to reply alleging negligence; if the respondent had filed a formal defence simply denying the bailment by alleging delivery no issue of negligence would have arisen. He was, in effect, given the advantage of a case which he had never pleaded. It cannot, in my view, be said that it was an entirely inconsistent case which prevailed; it was open to the Magistrate, as a matter of law, to believe the appellant when he said that the cow was not delivered to him but left with the respondent for safe custody, and at the same time to accept that the respondent was no longer in possession of the cow because it had disappeared; that could well have been the truth of the matter. As it appears to me the appellant's case was properly pleaded in detinue, on the facts as found. In a case of non-delivery on a sale of goods the plaintiff may have one or more of four remedies: (1) an action for damages for non-delivery (section 51 of the Sale of Goods Ordinance (Cap. 198); (2) if the price has been pre-paid, an action for recovery thereof as money paid for a consideration which has failed; (3) if the goods are specific or ascertained he may sue for specific performance (section 52 of the Ordinance), but this remedy is discretionary; (4) if the property in the goods has passed, and he is entitled to immediate possession, he has the ordinary remedies of an owner deprived of his goods, namely conversion or detinue as the case may be. In the present case, on the facts, it is unlikely that a claim under (1), (2) or (3) would have succeeded. In effect, at the time of the sale, there was a delivery to the appellant as purchaser, and a bailment back by him to the respondent as the seller. Section 41(2) of the Ordinance contemplates such an eventuality; it provides that an unpaid seller may exercise his lien for the price notwithstanding that he is in possession of the goods as agent or bailee for the buyer; see also section 22. Here the respondent remained in physical possession of the cow and, in effect, attorned to the appellant thereby becoming a bailee (see *Dublin City Distillery Co. v. Doherty* [1914] A.C. 823 at pp.843 and 852; and *Wiehe v. Dennis Bros.* (1913) 29 T.L.R. 250).

No doubt the rule is *res perit domino* in appropriate circumstances — "when you can show the property passed, the risk of the loss is *prima facie* in the person in whom the property is" (per Blackburn J. in *Martineau v. Kitching* (1872) L.R.7 Q.B. 436 at 454, 456 approved in *The Parchim* [1918] A.C. 157 at 168 P.C.). But that does not solve the problem here. The position of the seller as a bailee is discussed in *Benjamin on Sale* (8th Edn.) at pp.400-1 and in *Chalmers' Sale of Goods* (14th Edn.) at pp. 82-3. At common law the seller in such circumstances is a bailee for reward and therefore under a duty to use ordinary diligence in taking care of the thing sold; he is liable for ordinary negligence; that is to say until the time for delivery arrives. In Fiji the matter of the bailee's duties and liabilities are dealt with by the Indemnity, Guarantee and Bailment Ordinance (Cap. 199) — see particularly sections 30 and 31. Section 30 reads as follows —

> "30. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed."

As the learned Magistrate said in his judgment the matter depended on the onus of proof; but I am obliged to differ from him in the result. The respondent gave no evidence of safe keeping and there was no evidence as to what had happened to the cow or that the respondent took any steps to recover it. May a bailee for reward escape liability simply by saying that the thing bailed has disappeared, without adducing some evidence negativing negligence on his part? Clearly not, as appears from numerous cases (see, for example, *Phipps v. New Claridges Hotel* (1905) 22 T.L.R. 49; *Travers v. Smith* [1915] 1 K.B. 73; *Coldman v. Hill* [1919] 1 K.B. 443; *Hunt and Winterbotham v. B.R.S. (Parcels] Ltd* [1962) 1 All E.R. 111). This is not however to say that he must prove the precise cause of the loss *(Bullen v. Swan Electric Engraving Co.* (1907) 23 T.L.R. 258; 2 *Halsbury* at pp. 97 and 117). This is not a case governed by the maxim *res perit domino;* the respondent's failure to comply with the appellant's demand for the animal placed him under a duty to prove that he had taken due care of it. Only if he discharged that duty might the maxim apply. In the absence of such proof he is liable in detinue.

Accordingly the appeal is allowed with costs here and in the Court below.

Appeal allowed.