# ULTZEN V. NICOLS [1894] 1 Q.B. 92

*Written by* ***Vedika Kejriwal***

*3rd year BA LLB student, Christ (deemed to be) University*

## FACTS

The defendant was a restaurant keeper, and the plaintiff was an old customer who went into the restaurant for the purpose of dining there. According to plaintiff's own evidence, when he entered the room a waiter took his coat, without being asked, and hung it on the hook behind him which was 2 feet above the table on which he was seated. When the plaintiff rose to leave, his coat was gone. On making a complaint to the manager the latter said that the place where the coat was hung was exactly the place from which the overcoat was taken.

## ISSUES

- Whether the restaurant keeper was the bailee of the coat?
- Whether there was on his part, any negligence, owing to a want of reasonable care?
- Whether the waiter did it in the course of his duty or merely as an act of politeness?

## ANALYSIS

The plaintiff's claim was for the value of the overcoat which was given into the care and custody of the defendants or the waiter which he undertook to return and failed due to negligence and want of proper care on the part of the defendants, i.e the restaurant keeper. Alternatively, the claim was brought against the defendant as the bailee of the coat. The defendant's claim was given that the custom established was that the coats should be placed on the chairs by the side of the customers and that they were only hung up at the customer's

request. It was also denied that anything was said by the manager as to a previous loss of an overcoat.

There was no evidence of the bailment of the coat, which was never in the exclusive custody of the defendant or the waiter. It does appear that it was any part of the waiter's duty to take charge of the coat of customers or that what he did was more than an act of courtesy towards the plaintiff. There is no suggestion that the theft was committed by any of the defendant's servants, and the defendant is under no greater liability towards his customer than a lodging-house keeper, who is not responsible to his lodger a theft committed by a stranger.

In Holder v. Soulby[1] it was held that there was ample evidence of a bailment of the coat. The waiter took the coat without being asked by the plaintiff to do so and hung it up. The Jury inferred that he offered to take the court and that he did so in the ordinary course of his duty as a servant of the defendant. The restaurant keeper was justifies in finding that he took it out of the plaintiff possession into his own care in the course of his duty to the defendant.

In the case of Richards v. London, Brighton and South Coast Ry. Co.[2] it was held that the liability of the defendants bears a strong analogy to that of that of a Railway Company for the small luggage of the Passenger when taken charge of by a porter. It was clear that it was part of the duty of the railway porter to assist the passengers with their luggage, while there was no evidence here that it was the waiter's duty to take the plaintiff's coat. The position of the waiter, who took the coat without being requested by the plaintiff, is almost precisely similar to that of the Railway porter in this Case.

As to the second issue there was ample evidence of negligent conduct on the part of waiter. Upon the evidence, it was an act of courtesy. Had it been the other way round wherein the customer commanded him to do so, it would have constituted a custody. In this case it did not become a custody but a bailment because the plaintiff was relieved of his duty of care. The waiter voluntary taking the coat and the fact that the consent was given, constitutes bailment. The customer was relieved of his care through his voluntary act and thereby the defendants assumed the position of bailee.

[1] Holder v. Soulby 8 C.B. (N.S.) 251; 29 L.J.
[2] Richards v. London, Brighton and South Coast Ry. Co. 7 C.B. 839; 18 L.J. (C.P.) 251

In the case of Kaliaperumal Pillai v. visalakshmi[3], a lady employed a Goldsmith for melting old jewellery to make some new ornaments/ Jewels. Every evening she used to receive the half made jewels from the goldsmith and put them into a box which was left in a room in the goldsmith's house of which she retained the key. One morning she found that jewellery had been stolen. She sued the goldsmith for the loss of property. Madras High Court held that the goldsmith was not liable for the loss because there was re-delivery of the jewels to the Lady and they were not in possession of the goldsmith when during one night they were stolen. They were in the mere custody of the goldsmith. Delivery is an essential element of bailment and merely leaving the box in the room of Goldsmith while she retained key did not constitute delivery within the meaning of section 149 of the Indian Contract Act 1872.

The doctrine as to the liability of restaurant keepers announced in the above case is in harmony with the idea of bailment. The rule of liability which it announces is the generally accepted one and is undoubtedly correct, but the correctness of its application to the facts is open to question. There must be a bailment and a failure to use ordinary care to make the defendant liable.

**In the case of, Lasalgaon Merchants Co-op Bank vs. Prabhudas Hathibhai[4],** Some packages of tobacco were kept in a godown of a partnership firm. The packages were pledged to the plaintiff bank. Some of the partners in the firm had failed to clear their income tax dues. Accordingly, the Income Tax Officer ordered the seizure of the goods belonging to them and the godown was locked by the officials of the Income Tax Department. The key of the godown was handed over to the police. Then came some heavy rains. The roof of the godown leaked and the tobacco packages were damaged. It was held that it was the duty of the government officials to take the steps that any prudent manager would take of the goods under him. It was held that the government did indeed stand in the position of bailee and it had to prove that reasonable care was taken and the damage was due to reasons or forces beyond their control. In this case, heavy rains were not necessarily amount to an act of God and the government was held liable.

To constitute a transaction a bailment there must be a delivery to the bailee, or his agents, and acceptance, either actual or constructive. In case of actual delivery, a full delivery of the subject

[3]Kaliaperumal Pillai v. Visalakshmi AIR 1938 Mad 32
[4] Lasalgaon Merchants co. bank v. Prabhudas Hathibai AIR 1966 Bom 134

matter must be made to the bailee as will entitle him to exclude for the time of the bailment the possession of the owner, and such as will require a redelivery of it by him to the owner or other person entitled to receive it after the term of bailment has expired. If the delivery is constructive there must be an intention to transfer the possession of the property. The existence of a bailment, determined by the control of the defendant over the article in question, and negligence on the part of the bailee have been held necessary to make the defendant liable.

The waiter had merely acted in courtesy to a customer of the restaurant. However, once the waiter took the coat in his possession, he had relieved the customer of its care. Thus, the waiter took on the responsibility of a bailee. Further, it was the waiter who selected the place where the coat was to be hung without any direction from the gentleman. Therefore, the restaurant keeper was held liable for the loss of the coat. If the customer had instructed the waiter where and how the coat should be put, the result, perhaps, would have been otherwise. To create a bailment, the bailee must *intend* to possess and in some way *physically* possess or control the bailed goods or property. In a situation where a person keeps the goods in possession of another person but in fact, continues to have control over such goods, there is no delivery for the purpose of bailment.