

## TOMBLER v. KOELLING.

Opinion delivered December 15, 1894.

*Bailment—Negligence of bailee.*

A bath house keeper who gave a check to a bather for valuables left in his custody and delivered them to another who had stolen the check, will be liable for their value, notwithstanding the bather was guilty of negligence in permitting the check to be stolen, where, if he had looked at the person who presented the check, he would have known that he was not entitled to receive them.

Appeal from Garland Circuit Court.

ALEXANDER M. DUFFIE, Judge.

STATEMENT BY THE COURT.

The appellee had been bathing at the bath house owned by appellant Tombler, in the city of Hot Springs, for about three weeks, depositing his watch, chain, a railroad ticket and money at the bath house office daily with appellant Clark, and receiving a metallic check from Clark, the superintendent or manager of the bath house; when one day, depositing these articles as usual with Clark, he received a check for them, which he put in a pocket in his clothes, entered the bath house, disrobed, hung his clothes on a hook in the bath room, took a bath, and went into a hall to cool off, and shortly afterwards returned to the bath room, got his clothing, and went to the bath room office, and presented a check

for his property left with Clark, who handed him something corresponding to the check, which he declined to receive, it not being the property he had left with Clark. Some one else had presented his check to Clark, and received the property of the appellee, and had substituted another check for appellee's while his clothing were hanging in the bath room. Clark says he told the appellee that he would have to be "very careful with his check and other matters." He admitted that he knew the appellee and his watch and chain well, and further says: "If I had looked at the party who presented the check, I would have known that he was not entitled to the package." There were two dressing rooms to each bath tub, and there was access from one to the other and from each to the bath tub. Another man was in one of these rooms when the appellee was in his, and he knew it. There was an attendant on the bath rooms, one attendant having six rooms and three bath tubs to attend to, going from one to another. It was about ten o'clock in the morning, and many bathers were at the bath house. The appellee recovered a judgment for the value of his property, from which the appeal pending here was taken.

No exceptions to the instructions given in this case were saved in appellant's motion for new trial, and they were therefore abandoned. Four were asked on the part of the appellant, which were refused. They are as follows: "(1) The court instructs the jury that if they believe from the evidence that the plaintiff, after having secured a check from the manager of the bath house, went into his bath room, and took his bath in a room that was adjoining another room, and that such adjoining room was so situated that any person bathing in said room had access to the room that plaintiff was bathing in, and that plaintiff knew this, and, after taking his bath, he left his room, and went out into the hall of

the bath house, and left the clothes in his bath room, they will find that said plaintiff in so acting was guilty of such negligence, and of such acts that the defendants cannot be held responsible for anything that occurred during the absence of the plaintiff from his bath room, and they will find for the defendants. (2.) The court instructs the jury that if they believe from the evidence that the plaintiff left his bath room in a nude condition, and went into the halls of the bath house, and left his clothes, with the check therein, in such a position that the same could be reached by persons bathing in adjoining room, and while out of his room he lost his check, they will find that the defendant cannot be held for this act of negligence on the part of the plaintiff; and they will find for the defendants. (3.) The court instructs the jury that if they believe from the evidence that plaintiff was informed, at the time he commenced bathing at the bath house, that packages would be delivered upon the return of the check given at the office, it becomes the duty of plaintiff to take care of the check, and to see that the same was not lost or stolen or mislaid; and if, after receiving the check, the plaintiff so placed the check that the same was substituted by some designing party, and the check was presented and the package delivered thereon, they will find that the defendants are not responsible for the loss and substitution of the check. (4.) The court instructs the jury that if they believe from the evidence that the plaintiff was informed by the manager, Clark, that he must be careful while in the bath room, and that all kinds of men and characters were liable to be bathing in the bath house, and that the plaintiff bathed at the bath house three weeks, and had opportunity of seeing the parties who bathed at said bath house, he was required to exercise the necessary care and control over his clothes